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EMPANEL. See **IMPANEL.**

EMPLOY — EMPLOYEE — EMPLOYMENT. (See also the titles **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 3, p. 80; **EMBEZZLEMENT**, vol. 10, p. 976; **FELLOW SERVANTS**; **GARNISHMENT**; **INSOLVENCY AND BANKRUPTCY**; **MASTER AND SERVANT**; **MECHANICS' LIENS**; **PUBLIC OFFICERS**; **WAGES**; and see **BUSINESS**, vol. 5, p. 71; **PROFESSION**; **TRADE**. As to worldly employment, see the title **SUNDAY**; as to common employment, see the title **FELLOW SERVANTS**.) — **Employ.** — To employ means to engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs.¹ When used passively, it

1. *State v. Foster*, 37 Iowa 407; *McCluskey v. Cromwell*, 11 N. Y. 593. The word, "when used in respect to a servant or hired laborer, is equivalent to hiring, which implies a request and a contract for a compensation, and has but this one meaning when used in the ordinary affairs and business of life." Laborers *employed* by a sub-contractor were held in this case not to be laborers *employed* by the chief contractor himself, within the meaning of a bond to pay the compensation of such laborers.

In *Brugier v. Moussier*, 5 La. 93, the court said: "The word *employed* may mean either busy, or occupied at work, or it may mean commissioned or intrusted with the management of an affair. If taken in the latter sense, it might perhaps justify the conclusion it was used in the petition to express two distinct commissions or engagements, but it is clear the plaintiff himself did not so intend to use it. For he alleges that on the first of October and the following days he was *employed* to erect buildings, which clearly means that he was occupied and at work on the plantation during these times; unless he intended to say that he made a new agreement each day, which is not contended for."

Assignments. — A statute provided for the recording of assignments in the town where the assignor resided, or, if a nonresident, in the town where he was *employed*. It was held that an assignment of moneys to become due by a building contract was not within the statute. The court said: "The word *employed* indicates that the assignments contemplated by the statute were assignments of wages earned under a contract of hiring by one *employed*, and not assignments of contracts like the present." *Abbott v. Davidson*, 18 R. I. 91.

Regulation of Contract in Another State. — In *Nashville, etc., R. Co. v. State*, 83 Ala. 71, it

was held that although the legislature of *Alabama* could not regulate or prescribe the conditions of contracts made in another state, yet it might regulate the *employment* of persons in Alabama under contracts made elsewhere. The court said: "An argument has been made before us, based on the word *employ* (*employing*) as used in the statute. The contract under which the services of the conductor were obtained in this case was made in the state of Tennessee — the state in which the corporation has its domicile and principal office. The argument is that the legislature of this state cannot prescribe rules for making contracts in another state. The conclusion is just, if the premises justify it. But they do not. The provision has no reference to the mere contract under which the services were obtained. It relates to and regulates the services procured to be performed for the corporation. Its meaning in this statute is to make use of, to intrust with some agency or duty; making use of, intrusting with some agency or duty. (*Worcester's Dictionary*.) There is nothing in this argument."

Absence. — Where an act required a clerk to have been *employed* in the business of an attorney for five years before he could be admitted as an attorney, an absence of eleven months on a sea voyage for his health could not be estimated as a part of the time of his clerkship. *Ex p. Moses*, L. R. 9 Q. B. 1.

Ship Being Repaired. — But a ship is in the *employ* of her freighter where she is hauled off for repairs during the voyage, within the meaning of a charter party wherein the freighter agreed to pay so much for six months and in proportion for any longer time she might be employed by him, and the owner agreed to keep her in repair. *Ripley v. Seaife*, 5 B. & C. 167, 11 E. C. L. 188.

Engage Services — Actual Service. — In *Em-*

sometimes has a reflexive meaning, signifying only to be engaged in.¹ To

mens v. Elderton, 4 H. L. Cas. 624, Crompton, J., said: "The words 'retain and employ,' as used in the present case, are a mere amplification of the preceding contract of hiring and service. These words are used in the precedents continually as meaning a hiring, engaging, and keeping a person in a service, and do not necessarily imply that the master is bound to supply the servant with any particular work whilst the relation subsists." In this case a contract between a corporation and an attorney by which he was to accept a salary in lieu of rendering an annual bill of costs, and advise and act for the company on all occasions in all matters connected therewith, was held sufficient to support an allegation that the corporation had promised to retain and employ him as attorney.

In the Exchequer Chamber Parke, B., said: "Does it also imply a promise to employ?" * * * It depends on the meaning of this term *employ*. If it means that the company shall be bound to supply him with business as an attorney and solicitor, at all events, or to require his advice or use his services as attorney or solicitor whenever they have occasion for the advice or services of an attorney or solicitor, we think it clear that there is no such promise on their part. To hold that there was a promise to the former effect would be to hold that the company must be bound to incur litigation as well as create occasions for legal advice. * * * But if the word *employ* means only 'to engage in his service'—one of the meanings of that term—then there appears to us to be a promise to that effect. Many cases of *employment* may be suggested, in different capacities, where the use of the actual service is optional or conditional, and yet the *employment* may be properly said to take place or continue." *Elderton v. Emmons*, 6 C. B. 160, 60 E. C. L. 160.

Factory Act.—*Employed* was defined in an act to prevent the employing of children, to mean "occupied in any handicraft, whether for wages or not, under a master or under a parent." Where a child was sent to a man to learn to read and to make straw plait, and worked under his superintendence, making from straw furnished by its mother the plait, which it took home to her, and for its tuition the mother paid, the child was held to be *employed* under the act. *Beadon v. Parrott*, L. R. 6 Q. B. 718.

Time of Employment—Slave Trade.—A vessel intended for the slave trade, on its outward voyage, before any slaves are taken on board, is "*employed* or made use of in the transportation or carrying of slaves from one foreign country or place to another," within the meaning of an act prohibiting the same. The court said: "To be *employed* in anything means not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it." *U. S. v. Morris*, 14 Pet. (U. S.) 464, quoted in *U. S. v. Schooner Catharine*, 2 Paine (U. S.) 721. The vessel is *employed* in the trade from the time it is fitted out for it. *The Brig Alexander*, 3 Mason (U. S.) 175.

Same—Buildings.—Buildings in course of erection for the custody of arms are *employed*

for public service, within the meaning of a building act, although not completed. *Reg. v. Jay*, 8 El. & Bl. 469, 92 E. C. L. 469.

Same—Teacher.—A more restricted meaning was put upon the word in *School Dist. No. 2 v. Dilman*, 22 Ohio St. 194, where, under an act providing that no one should be *employed* as a teacher unless he had first obtained the certificate required by law, it was held that the *employment* began, not at the time of the contract, but at the time of entering upon the performance of the duties of the position. If the certificate was obtained in the interval, the contract was valid.

Employing One's Self.—A general order in bankruptcy allowing the assignee fees for an attorney at law, where "necessarily *employed* by the assignee," does not authorize such fees where the assignee is himself an attorney. *Matter of Muldaur*, 8 Ben. (U. S.) 65.

Employed In or About the Works.—By the Coal Mines Regulation Act, 1872, § 52, power is given to frame special rules for the conduct and guidance of the persons acting in the management of a coal mine or *employed* in or about the same. By a special rule in force in the H. mine no person *employed* in or about the works was to ascend the pit contrary to the direction of the hooker-on. In the H. mine the workmen had power to dismiss themselves at a moment's notice. The respondents were workmen *employed* in the H. mine, and being dissatisfied with their working place discharged themselves. They asked the hooker-on to allow them to ascend the pit, but he refused to do so until the ordinary time came for workmen to quit the mine; the respondents, however, ascended contrary to his direction. It was held that the respondents had been guilty of a breach of the special rule above mentioned. Lindley, J., said: "When did their character of persons *employed* in the mine cease? The majority of the justices have taken the view that at the moment when the respondents terminated their contract of service, they ceased to be 'persons *employed* in or about the works,' within the meaning of No. 25 of the special rules. I think that a mistake. No doubt the contract of service was at an end when the respondents gave notice to terminate it, and I am disposed to think that if a reasonable time had elapsed for going out of the mine, regard being had to its extent, and if permission to quit it had then been refused to the respondents, they would no longer be in the position of persons *employed* in the mine; but upon the facts stated in the case before us, I think that their character of persons *employed* in the mine continued when they quitted it contrary to the direction of the hooker-on, for a reasonable time had not then elapsed." *Higham v. Wright*, 2 C. P. Div. 397.

1. "Person or persons who are *employed* or about to engage in the cultivation of the soil," in an act providing for the creation of agricultural liens by such, has reference only to the cultivator of the soil on his own account; *i. e.*, the proprietor, either as landowner or tenant, and as such owner of the crop to be made. The phrase does not include a mere laborer for wages, engaged as a

select; to designate.¹

farm hand in cultivating the soil. *Carpenter v. Strickland*, 20 S. Car. 1.

Proprietor.—An ordinance provided a penalty for disorderly women who should be found *employed* carrying beer in saloons or dance halls. It was held that the ordinance applied to women carrying beer, whether they acted as proprietors or servants. The court said: "It is sufficient, however, to say that the etymological meaning of the word *employ* will as well consist with the interpretation here given as the one ascribed to it in the Criminal Court. Such being the fact, and the intention being clear, the remedy must be had in view and advanced, and the mischief suppressed. The law levels its power against any one of the class of persons designated 'found *employed*' in saloons carrying beer, whether they act as proprietors or servants." *State v. Canton*, 43 Mo. 48.

Embezzlement. (See also the title EMBEZZLEMENT, vol. 10, p. 976.)—In *People v. McKinney*, 10 Mich. 83, it was held that a statute providing for the punishment of any officer, clerk, or other person *employed* in the treasury of the state, who should commit any fraud or embezzlement therein, included within its terms the state treasurer. The court said: "We do not think the term *employed*, as used in our statute, can be restricted to the narrow sense contended for by defendant's counsel. It is true, such is the sense in which it has been quite generally used in reference to embezzlement; but this, we think, has so happened mainly because this crime always presupposes the offender to have come rightfully into the possession of the money or property, by reason of some position of trust and confidence, which is the principal feature distinguishing this offense from that of larceny. And the crime has been more frequently and generally provided for as to clerks, agents, and servants, than as to public officers; and, as the former are so much more numerous, the offense has been more frequently committed by them. But the state treasurer also occupies a position of trust and confidence, the only difference in this respect being that one is intrusted, confided in, and *employed* by a private person, or some officer or officers—the other by the public, by election or appointment. The primary signification of the word *employ* is not that for which the defendant's counsel contends; the primary meaning, as given by Webster, is 'to occupy the time, attention, and labor of; to keep busy or at work,' etc., the sense which would here include the treasurer. The sense claimed by defendant's counsel is the fourth given by Webster, 'to engage one's services.'

In *State v. Foster*, 37 Iowa 407, it was said: "The words indicating the relation that must exist between the accused and another, which is a necessary ingredient of the offense, are *employer*, 'master,' *employment*. We will, without notice of the word 'master,' consider the terms *employer* and *employment*. They are not of the technical language of the law or of any science or pursuit, and must, therefore, be construed according to the context and the approved usage of the language. *Rev. Stat.*,

§ 29, p. 2. The words are defined as follows: '*Employment*—1. The act of employing or using. 2. Occupation; business. 3. Agency or service for another or for the public. *Employer*—one who *employs*; one who engages or keeps in service.' The verb *employ* is defined as follows, when used with a human being either as its subject or object: 'To engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs.' (Webster.) It will be seen from the definition of these words that the statute contemplates the relation of agency, a contract for services, whereby the accused is bound to do or perform something in connection with the property embezzled, and that by virtue of such relation he acquired possession thereof. It by no means appears that the idea of bailment or bailee is excluded from these definitions."

Eight-hour Law.—A *United States* statute provided that letter carriers *employed* more than eight hours per day should be paid extra therefor. It was held that the carrier was not entitled to recover for extra time when not actually *employed* in work, and not required to remain in or about the post office. The court said: "It is admitted by both counsel for plaintiff and defendant that the proper determination of the issues in the case depends upon the interpretation of the word *employed* as used in the act. On behalf of the defendant in error it is contended that he is *employed* when he is in uniform and voluntarily remains in or about the post office, though not actively *employed*, or required by any express order of the postmaster to do so; and on the part of the plaintiff in error it is insisted that he is not so *employed* during such intervals, unless he is actively engaged at work as a letter carrier. This does not appear to be a new question, but has been settled by the Supreme Court of the United States in *U. S. v. Post*, 148 U. S. 124. In that case the right of a letter carrier to recover, under Act May 24, 1888, for extra service, was considered, and the term *employed* defined by Justice Blatchford, speaking for the court, as follows: 'This extra pay is given to him by the statute distinctly for his being *employed* a greater number of hours per day than eight. The statute does not say how he must be *employed*, or of what such *employment* is to consist. It is necessary only that he should be a letter carrier, and be *employed* in work that is not inconsistent with his general business under his *employment* as a letter carrier.' This would seem to dispose of the contention of the defendant in error by holding that he was only *employed*, according to the language of the act, when he was lawfully *employed* in work not inconsistent with his general business as a letter carrier." *U. S. v. Langston*, 85 Fed. Rep. 613. See generally the title EIGHT-HOUR LAWS, vol. 10, p. 462.

Employed on Water.—A stipulation in a contract of hiring a slave that he is not to be *employed* on water is not broken by sending him to water horses, with instructions not to ride into deep water. *Madre v. Saunders*, 3 Jones L. (48 N. Car.) 1.

1. *Matter of Astor*, 50 N. Y. 363. Used of Volume XI.

Employment. — The term "employment" signifies an occupation; a business; an object of industry; an engagement; a vocation, calling, or profession;¹

selection of newspapers for advertising by municipalities.

Employ in the Sense of Invest. — The Constitution of *Louisiana* (see also the title EXEMPTION FROM TAXATION) provided that the capital, machinery, and other property employed in the manufacture of machinery should be exempt for twenty years from taxation. It was held under this provision that property leased for manufacturing purposes was not exempt, the court holding that where employed was used in the provision it meant invested. *State v. Assessors*, 46 La. Ann. 859.

1. *State v. Canton*, 43 Mo. 48.

A Cadetship is an "office, commission, place, or employment," within the meaning of an act making it a misdemeanor to receive money in exchange for such. *Reg. v. Charretie*, 13 Q. B. 447, 66 E. C. L. 447. See generally the title PUBLIC OFFICERS.

Keeping Swine. — A board of health of a town made a regulation which provided that no swine should be kept in any place in the town without a permit being first obtained from the board. On a complaint against a person for violation of this regulation it appeared that the defendant kept about a hundred and fifty swine, and had been engaged for years in the business of feeding offal to swine. It was held that such a keeping of swine was an employment, and that the authority of the board to regulate it was under the *Massachusetts* Gen. Stat., c. 26, § 52, and not under section 5; that the defendant was entitled to notice under section 55; and that a publication under section 6 was not sufficient. *Com. v. Young*, 135 Mass. 526.

Single Transaction. — In order to constitute the sale of liquor one's business or employment within the meaning of a license act, it is necessary that more than one sale should be made; employment being that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit. *Moore v. State*, 16 Ala. 411; *Harris v. State*, 50 Ala. 127; *Lawson v. State*, 55 Ala. 118; *U. S. v. Jackson*, 1 Hughes (U. S.) 531. See also BUSINESS, vol. 5, p. 71.

In *Louisville, etc., R. Co. v. Wilson*, 138 U. S. 505, it was said: "The terms 'officers' and employees both alike refer to those in regular and continual service. Within the ordinary acceptance of the terms, one who is engaged to render service in a particular transaction is neither an officer nor an employee. They imply continuity of service, and exclude those employed for a special and single transaction."

In *Wilson v. Gray*, 127 Mass. 98, it is said: "The word employed, although answered by any present occupation, is more commonly used as signifying continuous occupation, and although a single act of trading answers the phrase 'employed in trade,' yet this phrase also ordinarily imports continuous business."

Business Used as a Synonym of Employment. — See *Martin v. State*, 59 Ala. 36; *Sterne v. State*, 20 Ala. 43; *Moore v. State*, 16 Ala. 411; *Weil v. State*, 52 Ala. 21; *Lyons-Thomas*

Hardware Co. v. Perry Stove Mfg. Co., 86 Tex. 153. And see BUSINESS, vol. 5, p. 71.

Professional Employment can only relate to some of those occupations universally classed as professions, the general duties and character of which courts must be expected to understand judicially." A real-estate agent is not engaged in professional employment. *Pennock v. Fuller*, 41 Mich. 153.

Employment Distinguished from Office. — "Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act or perform a service, without becoming an officer; but if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer." *U. S. v. Maurice*, 2 Brock. (U. S.) 103, 26 Fed. Cas. No. 15,747. And that an office is to be distinguished from an employment, see *Bunn v. People*, 45 Ill. 403; *Throop v. Langdon*, 40 Mich. 673; *Guthrie Daily Leader v. Cameron*, 3 Okla. 677.

In *Opinion of Justices*, 3 Me. 481, it is said: "There is a manifest difference between an office and an employment under the government. We apprehend that the term 'office' implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still, it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment, merely, has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law. And if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the execution of any standing laws, which are considered as the rules of action and the guardians of rights." See also *Guthrie Daily Leader v. Cameron*, 3 Okla. 677.

Railroad. — A city charter granted authority to impose a license tax upon persons engaged in certain enumerated callings, and upon any other person or employment which it might deem proper. It was held that this did not empower the city to impose a tax upon a railroad corporation, such corporation being neither a person nor an employment within

also, the service of another.¹

Employee.—An employee is one who is employed.² The term means one who works for an employer; a person working for a salary or wages; applied to any one so working, but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a government or corporation or to domestic servants.³

the ordinary acceptance of these words. *Lynchburg v. Norfolk, etc., R. Co.*, 80 Va. 237.

Employment—Clergymen.—The provisions of the constitution and discipline of the Methodist Protestant church, enacting that "it shall be the duty of the president of an annual conference, * * * in the recess of conference, * * * to employ such ministers and preachers as are duly recommended, and to make such changes of preachers as may be necessary, provided the consent of said preachers and their charges be first obtained," authorize the president of an annual conference, during a recess of the conference, to station a minister in a vacant church without the consent of such church. The court said: "The president has the right during recess to employ and station ministers or to fill a vacancy without the consent of the church. This seems to be necessary in order to enable the president to fill a vacant pulpit, and is evident from the use of the word *employment* in the article and the similar use of the word in the other articles of the constitution." *Robinson v. Cocheu*, 18 N. Y. App. Div. 325.

1. In this sense, to which *employ*, when used as a noun, is confined, the word involves the relationship of master and servant. A contractor who is his own master, and employs men who are under his direction and control, is not "in the *employ*" of his contractee. *State v. Emerson*, 72 Me. 455. See *infra*, the note *Employee and Contractor Distinguished*.

Employment is defined as not only the act of *employing* but also the state of being *employed*. *Ritchie v. People*, 155 Ill. 98.

2. Webster's Dict., adopted in *Ritter v. State*, 111 Ind. 324, and *Stone's Case*, 3 Ct. of Cl. 260.

3. Century Dict., quoted in *Palmer v. Van Santvoord*, 153 N. Y. 612; *People v. Buffalo*, 57 Hun (N. Y.) 579.

Employee and Laborer Not Synonymous.—See *Conlee Lumber Co. v. Ripon Lumber, etc., Co.*, 66 Wis. 481; *Pendergast v. Yandes*, 124 Ind. 159.

Employee and Servant.—As to whether the terms *employee* and "servant" are synonymous, see *Hand v. Cole*, 88 Tenn. 405.

An Act of Congress Increasing the Salaries of "civil officers and temporary and all other clerks and *employees* * * * in the office of the commissioner of public buildings," includes in its terms a member of the capitol police, *Mallory's Case*, 3 Ct. of Cl. 257; and a laborer on public grounds, *Stone's Case*, 3 Ct. of Cl. 260. In the latter case Peck, J., said: "Webster, in his dictionary, says an *employee* 'is one who is employed,' which is the only definition given by him. Worcester says an *employee* 'is one who is employed; an official, a clerk, a servant.' Johnson's dictionary does not define the word. It seems to be a word recently adopted into our language from the French, and applies equally to a person within

or without the office, whether he be a servant or clerk. * * * A person who is engaged in the performance of the proper duties of an office is an '*employee* in the office,' whether his particular duties are carried on within or without the walls of the building in which the chief officer usually transacts his business. * * * The word *employee* * * * signifies any one in place, or having charge, or using a function, as well as one in office."

Attorney.—An attorney at law *employed*, but not exclusively, by a corporation, at a salary of fifty dollars per week, and not having his office in any building nor upon any property belonging to the corporation, cannot maintain an action, under the provisions of the *New York Stock Corporation Law* (Laws of 1892, c. 688, § 54) making the stockholders of every stock corporation "personally liable for all debts due and owing to any of its laborers, servants, or *employees* other than contractors, for services performed by them for such corporation," as he is neither a laborer, servant, nor an *employee*, within the meaning of the statute, while the word "contractors," as used in the statute, refers merely to persons who perform work and furnish materials. *Bristow v. Kretz*, 22 Misc. Rep. (N. Y. Supreme Ct.) 55.

In *People v. Remington*, 45 Hun (N. Y.) 329, affirmed 109 N. Y. 631, it was held that under a statute giving preference to *employees*, operatives, and laborers of a corporation, an attorney employed to render professional services for the corporation was not an *employee*.

And in *Louisville, etc., R. Co. v. Wilson*, 138 U. S. 505, an attorney was held not to be an *employee*.

But in *Gurney v. Atlantic, etc., R. Co.*, 58 N. Y. 358, the question decided was whether the language of an order appointing a receiver, and directing him to pay debts owing to the laborers and *employees* of the corporation, was intended to include a claim for professional services. Evidence was given that the order was the result of negotiation and compromise, and that the word *employee* was used by the party drafting the order with a distinct view of embracing the claim for professional services of the company's attorney. It was there said: "It is manifest that literally and lexically the claimant was an *employee* of the company; that is, he was employed by, and rendered important services for, them. * * * This is a word of more comprehensive signification than 'laborers' and 'operatives.' * * * The term *employee* is the correlative of *employer*, and neither term has either technically or in general use a restricted meaning by which any particular *employment* or service is indicated. The terms are as applicable to attorney and client, physician and patient, as to master and servant, a farmer and day laborer, or a master mechanic and his workman. To *employ* is to engage or use another as an agent or substi-

Relationship of Master and Servant. — Although the terms “employ” and

tute in transacting business or the performance of some service; it may be skilled labor or the service of the scientist or professional man as well as servile or unskilled manual labor.”

Officers of Corporation. — Where an act regulating the foreclosure of railroads provided that the purchaser should pay “all sums due and owing * * * to any servant or *employee*,” these terms were held not to include the secretary of the company, but to include only “operatives of the grade of servants, ‘who have not a different, proper, and distinctive appellation, such as officers and agents of the company.’” The court said: “The officers of the company are its representatives, and, it may be said, are the official masters who direct and control the servants and *employees*. The former are appointed and elected, and are trustees; * * * the latter are hired, and are the subordinates of the former.” *Wells v. Southern Minnesota R. Co.*, 1 McCrary (U. S.) 18, 1 Fed. Rep. 270.

Same — President. — The president of a railroad is not an *employee* within the meaning of a statutory provision excepting wages from garnishment. *South, etc., Alabama R. Co. v. Falkner*, 49 Ala. 115.

Same — Confined to Manual Labor. — Under the provisions of chapter 388 of the *New York Laws of 1890*, entitled “An Act to provide for the weekly payment of wages by corporations,” the word *employee*, when read in connection with the word “wages” used in that statute, is limited in its scope to laborers and workmen engaged in manual labor. The compensation of a clerk in the mayor’s office or a secretary or treasurer of a park commission, or a member of the fire department, or a school teacher, or a patrolman on the police force of a municipal corporation, is not in either case required by the said act to be paid weekly. *People v. Buffalo*, 57 Hun (N. Y.) 577. See also *People v. Board of Police*, 75 N. Y. 41.

Officers of an Unincorporated Association. — In *Murray v. Walker*, 83 Iowa 208, it was sought to render the officers of an unincorporated association liable for the acts of the corporation. The lower court instructed the jury as follows: “But his acts at said fair, if any, as a mere *employee*, if he was such, would not of themselves impose any liability upon him if he was not a member of such association.” The appellate court said: “It is further urged that the instruction is faulty, misleading, in that it speaks of the acts of the defendant at the fair as an *employee*. There is no evidence of his being an *employee* in the sense of ‘working for hire,’ but the term *employ* has a different meaning at times, as, ‘to use,’ ‘to occupy,’ ‘to intrust;’ and under the evidence there could not well have been any misunderstanding by the jury as to what was meant by the term *employee*.”

Clerks and Officers. — Within a statute requiring weekly payment of wages, it has been held that the clerks and officers of municipal and private corporations were not *employees*. *People v. Myers*, 42 Alb. L. J. 332.

Medical Health Officer. — In *Macfie v. Hutch-*

inson, 12 Ont. Pr. Rep. 167, the medical health officer of a city was held to be an *employee* within an exemption from taxation. O’Connor, J., said: “The word *employé*, or *employee* as the statute has it, is not a legal term, nor is it an English word, but a word imported with its native pronunciation from the French language, which is frequently used by English-speaking people as a convenient commonplace term to designate the relation or situation of a class of persons who are not precisely menial servants, but whose whole time and services are *employed* and paid for by another person or persons, or by a corporation, or by the government. Our best pronouncing lexicographers treat it as a foreign word, and try to import and preserve its native pronunciation by the use of such combinations of letters as they consider most likely to convey to English ears the nearest approximation to the native sounds of its several syllables. But the result coming from English tongues is generally ludicrous to French ears. In *Spiers and Surenne’s French pronouncing dictionary* (1881) the word *employé* is defined: ‘(1) a person *employed*, person in any one’s *employ* — *quelqu’un*; (2) (in public administration) a clerk.’ It seems to me too clear for mistake that the term *employé* cannot in its ordinary acceptance be applied to members of any of the learned professions. As a fact, I think it is never in common usage applied by either the learned or the unlearned to a practicing physician, a lawyer, a clergyman, a surveyor, or a civil engineer, practicing his professional avocation or what pertains thereto.”

Officer and Employee Distinguished. — See *Throop v. Langdon*, 40 Mich. 673, 8 Cent. L. J. 507.

Employee and Contractor Distinguished. — In *Vane v. Newcombe*, 132 U. S. 220, the plaintiff, having contracted with the company to put up certain telegraph wires on the company’s poles, and furnished the labor of himself and others in doing the work, claimed a priority of lien under a statute of *Indiana* which gave a lien to *employees* of corporations. The court said: “It seems clear to us that Vane was a contractor with the company, and not an *employee* within the meaning of the statute. We think the distinction pointed out by the Circuit Court is a sound one, namely, that to be an *employee* within the meaning of the statute, Vane ‘must have been a servant, bound in some degree at least to the duties of a servant, and not,’ as he was, ‘a mere contractor, bound only to produce or cause to be produced a certain result — a result of labor, to be sure — but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party.’” The lien was accordingly denied.

And in *Louisville, etc., R. Co. v. Wilson*, 138 U. S. 501, it was said that the word *employee* implies continuity of service and excludes those employed for a special or single transaction. See also *Rosser v. Kentucky Union R. Co.*, 6 U. S. App. 196.

In connection with railroads the term *employee* applies to conductors, agents, superintendents, and others engaged in operating the

"employment" usually import the relationship of master and servant,¹ yet

road and the like, and not to contractors and persons engaged in constructing the roadbed and in laying down the ties and rails. *Ney v. Dubuque, etc., R. Co.*, 20 Iowa 347.

A statute provided that no action should be brought against any officer, *employee*, or servant of the department of railways and canals, for anything done by virtue of his office. It was held that a contractor of a department for the construction of a branch railroad was not an *employee*. *Kearney v. Oakes*, 18 Can. Sup. Ct. Rep. 148, *overruling* 20 Nova Scotia 30.

A person who furnishes the labor or services of others, under a contract to do the whole business of a corporation, or a particular branch of it, is not an *employee*, but a contractor. *Lehigh Coal, etc., Co. v. Central R. Co.*, 29 N. J. Eq. 252.

A person who operates a shingle machine to manufacture shingles by the thousand for the owners or lessees of a mill is a contractor, and not an *employee* or servant for whose acts the owners or lessees are liable under the *Maine* special statute of 1868, c. 448. *State v. Emerson*, 72 Me. 455.

And that a contractor is not an *employee*, see *Rogers v. Florence R. Co.*, 31 S. Car. 378, 39 Am. & Eng. R. Cas. 348.

But when, by a written contract, Q. agreed, "for the consideration of five per cent. on the entire amount of cost of said building, to erect, superintend, and otherwise direct the erection of" a certain warehouse, for the other parties to the contract, it was held that Q. was an *employee*, and the five per cent. compensation, mentioned in this contract, was "wages or hire," within the meaning of the *Maryland* Act of 1854, c. 23, which exempts from attachment "the wages or hire of a laborer or other *employee*, in the hands of the employers," not actually due at the date of the attachment. *Moore v. Heaney*, 14 Md. 558.

Solicitor and Machines.—Within a statute providing that *employees'* wages shall be preferred, it was held that the word *employee* included one employed by a manufacturing company to set up machines and take them down, and to fix or repair them, going from place to place for this purpose, and also selling and soliciting sales of the machines. *Palmer v. Van Santvoord*, 153 N. Y. 612.

Newsboy.—A newsboy engaged in selling newspapers, and permitted to pass in and out of traction cars for that purpose, but not engaged or in any way employed by the company, is not an *employee* on or about the road of the company within the meaning of the *Pennsylvania* statute giving a right of action to *employees*. *Philadelphia Traction Co. v. Orbann*, 119 Pa. St. 37, 34 Am. & Eng. R. Cas. 432.

Corporation.—In *Dukes v. Love*, 97 Ind. 341, it was held that a corporation aggregate could not be an *employee* of another corporation within the meaning of the word *employee* as used in a statute providing for an individual liability of stockholders for the wages of *employees*.

Draymen.—In *Watson v. Watson Mfg. Co.*, 30 N. J. Eq. 588, a drayman who was in the

regular *employ* of a corporation, whose services were of a kind and class which a corporation must have had in order to continue its business, was held entitled to the priority given to wages, under the *New Jersey* statute. The court said: "The word *employee* properly describes any one who renders labor or service to another."

Bookkeeper.—In *Brown v. A. B. C. Fence Co.*, 52 Hun (N. Y.) 151, it was held that one employed to assist the general manager of a corporation in keeping its books, and to clean the office, and ship goods, was within the statute preferring wages of *employees*.

And a bookkeeper has been held entitled to a preference. *Consolidated Coal Co. v. Keystone Chemical Co.*, 54 N. J. Eq. 309. *People v. Beveridge Brewing Co.*, 91 Hun (N. Y.) 313, *disapproving* *Matter of Stryker*, 73 Hun (N. Y.) 327.

Insurance Adjuster.—In *American Casualty Ins. Co.'s Case*, 82 Md. 535, it was held that the adjuster of an insurance company was not an *employee* within a statute preferring the wages of *employees*.

1. Master and Servant.—*State v. Emerson*, 72 Me. 455; *Emmens v. Elderton*, 4 H. L. Cas. 624.

A statute imposed an income tax upon any individual in the *employment* of a company, copartnership, or individual. It was held that this did not apply to the salary of a minister of the gospel. The court said: "*Employment* is used in connection with all the terms, in the same sentence; and with 'individual or individuals,' ought to be construed as *ejusdem generis* with the other subjects of taxation and persons, in the same connection. Again, was the pastor of the First Presbyterian Church in the *employment* of A, B, C, and D, of his congregation? *Employment* means 'business.' Was he acting in the 'business' of the individuals of his congregation? It seems to me a departure from every ordinary use of the terms. We are not wont to speak of a minister of the gospel as in the 'business' or *employment* of the 'individuals' of his church; nor in the 'business' or *employment* of his congregation. He is not their servant, at least in any secular sense. He is the servant only of the Master in whose name he ministers. He does his own work, not that of the congregation." *Plumer v. Com.*, 3 Gratt. (Va.) 615.

By the English Coal Mines Regulation Act, persons employed in a mine had a right to appoint a check weigher, but such check weigher must be one of the persons employed in the mine. The plaintiff was appointed a check weigher, and afterwards received a fortnight's notice to quit his *employment* from the men employed in the mine. Before the notice expired, the men held a fresh election, at which the plaintiff was again appointed. It was held that the plaintiff ceased to have any *employment* in the mine when he was first appointed check weigher, and therefore his second appointment was invalid, as the statute limited the choice to persons employed in the mine by the mine owner. *Hopkinson v. Caunt*, 14 Q. B. Div. 592.

this is not always so.¹

EMPLOYER.—"Employer" means a person who has another in his employ to do certain things in a regular and successive way.²

EMPLOYERS' LIABILITY ACTS.—See the titles FELLOW SERVANTS; MASTER AND SERVANT.

1. *State v. Canton*, 43 Mo. 48. See also *Carpenter v. Strickland*, 20 S. Car. 5.

Relation of Master and Servant Not Implied.—A statute exempted from military services ministers regularly *employed* in the discharge of their ministerial duties. In construing this provision the court in *King v. Daniel*, 11 Fla. 98, said: "The word *employed*, as found in the act, is calculated to raise a doubt as to the sense in which it was designed to be used. In its restricted sense, and when applied to persons, it may very naturally be taken to presuppose the existence of the relation of *employer* and *employee* and thus involve the idea of contract. Such, however, in our estimation, is not the meaning that was intended to be affixed to the word. It was doubtless used in its more common acceptation, as being synonymous with the words 'engaged' or 'exercised,' and therefore designated to embrace within its scope the idea of voluntary ministration, as well as that which is performed under and by virtue of contract."

The word does not necessarily mean "a case in which a man is set to work for money by another person. A man may so *employ* himself in order to earn money as to be said to carry on an *employment*." The occupation of a bookmaker, who attends horse races, and bets upon them, is a vocation or *employment* within the meaning of an income tax act. *Partridge v. Mallandaine*, 56 L. J. Q. B. 251, 56 L. T. N. S. 204.

Gratuitous Assistance.—Within § 26, 7 Wm. IV. and 1 Vict., c. 36, it was held that the words "person *employed* under the post office" included a person who, at the postmaster's request, gratuitously assisted him in sorting letters. Parke, B., said: "The term *employed*, in this statute, means engaged or occupied." *Reg. v. Reason*, 23 L. J. M. C. 13. So in *Reg. v. Foulkes*, L. R. 2 C. C. 150, it was held that a person who lived with his father, who was clerk to a local board, and gratuitously assisted him in his office, and in the business of the board, was an *employee* within the statute against embezzlement.

Pollock, B., said: "If it had been necessary to say absolutely that the prisoner was a clerk or servant, I should have hesitated. But I think the words '*employed* as a clerk or servant' are wider, and that there is evidence to bring the case within them."

Hiring. (See also HIRE.)—In section 4500 of the *Georgia Code*, which prohibits the *employment* of a servant of another under written contract, attested by one or more witnesses, the term *employment* is not synonymous with hiring, but means to use a servant for a special or general purpose, inconsistent with his duty to his *employer*, with a mutual benefit. The court said: "It is contended that the term *employment*, in its legal sense, means 'hiring,' and that as by the code, § 2085, hiring is a contract by which one person grants to another the use of the labor and industry either of himself or his servant, during a certain time, for a stipulated compensation, that the court erred in charging the jury, if they believed from the evidence that the defendant specially permitted the prosecutor's servant to serve him in any capacity which was beneficial to him, during the term that the defendant knew the servant was employed in the manner prescribed by law by another, then they would be authorized to find him guilty; that 'to use a servant for a special or general purpose, inconsistent with his duty to his *employer*, with a mutual benefit, is a sufficient *employment* under this statute.' This charge, it seems to us, accurately defines the term *employment*, as used in the statute. The idea of 'hiring' may be involved in *employment*, but its application is not restricted to any particular mode of use, as hiring. Use is synonymous with *employment*, and both include many other things besides hiring. One may use a thing, that is, may *employ* it in his service or business, without any contract for any stipulated time or price whatever. Webster's Dictionary, *verbis employment* and 'use.' " *Hightower v. State*, 72 Ga. 482. But see *McCluskey v. Cromwell*, 11 N. Y. 599.

2. *State v. Foster*, (Del. 1898) 40 Atl. Rep. 940.

EMPLOYERS' LIABILITY INSURANCE.

BY CHARLES SUMNER LOBINGIER, M.A., LL.M.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: ACCIDENT INSURANCE, vol. 1, p. 284; FOREIGN CORPORATIONS; INDEMNITY CONTRACTS; LIFE INSURANCE.

I. INTRODUCTORY — 1. Definition and Nature. — Employers' liability insurance is a recent and important extension of the insurance principle so as to cover and protect against the legal liability which one assumes in becoming the employer of others.¹ It is not a mere contract of indemnity against dam-

1. Definition — *England*. — Henry Rifle Barrel Co. v. Employers' Liability Co., Q. B. D., March, 1884.

Scotland. — Morrison v. Scot. Employers', etc., Liability Co., 16 Ct. Sess. Cas. (4th ser.) 212; Wright v. Howard, 21 Ct. of Sess. (4th ser.) 29.

Australia. — Victorian Stevedoring, etc., Co. v. Australian Acc. Ins., etc., Co., 19 Victorian (Australia) 139.

United States. — American Steam Boiler Ins. Co. v. Chicago Sugar Refining Co., 57 Fed. Rep. 294; Chicago Sugar Refining Co. v. American Steam Boiler Co., 48 Fed. Rep. 198.

Arkansas. — American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 569; Fidelity, etc., Co. v. Fordyce, 64 Ark. 174.

Georgia. — Hawkins v. McCalla, 95 Ga. 192.

Maryland. — American Casualty Ins. Co.'s Case, 82 Md. 535.

Massachusetts. — People's Ice Co. v. Employers' Liability Assur. Corp., 161 Mass. 122; Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404.

Michigan. — Grand Rapids Electric Light, etc., Co. v. Fidelity, etc., Co., 111 Mich. 148; Employers' Liability Assur. Co. v. Insurance Com'r, 64 Mich. 614.

Minnesota. — Anoka Lumber Co. v. Fidelity, etc., Co., 63 Minn. 286.

New Jersey. — Ross v. American Employers' Liability Ins. Co., 56 N. J. Eq. 41.

New York. — People v. American Steam Boiler Ins. Co., 89 Hun (N. Y.) 456; New Jersey, etc., Concentrating Works v. Ackermann, 15 Misc. Rep. (N. Y. Supreme Ct.) 605.

age, like other forms of insurance,¹ but a contract to discharge liability for damage.² This form of insurance differs also from ordinary accident insurance both in respect to the status of the insured and the character of the risk.³ As these policies are not yet in common use, and as their provisions are often valuable for reference, certain cases, the reports of which set out the policies sued upon, are cited in the notes.⁴ The proceeds of such a policy are to be paid to the insured, and do not constitute an asset of the deceased employee's estate, notwithstanding the payment was made as the result of the accrual of the policy by reason of such employee's death.⁵ But the employee on account of whose injuries a right of action has accrued to the employer as against the insurer may intervene in the action against the latter and garnish the amount of the judgment though the employer has meanwhile made an assignment in insolvency.⁶

2. Validity. — Contracts of insurance of this class have been assailed as being contrary to public policy in virtually lessening the penalties which follow negligence on the part of the insured toward those to whom he owes a legal duty, but this view has not received judicial sanction.⁷ Neither are such contracts objectionable for want of insurable interest on the part of those protected by the policy.⁸

3. History. — This form of insurance is one of the most recent yet devised. It probably does not date back of the last decade, as the earliest decision involving it by a court of last resort, and cited in the following pages, was in 1884.⁹ But the exigencies which have called into being this novel development of the insurance idea are entirely conditions of modern life. While the early common law nominally fixed a liability upon the employer, it was not regarded as a serious or probable cause of loss.¹⁰ It is only in our own time

6 N. Y. App. Div. 540; *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.*, 11 N. Y. App. Div. 411; *People v. American Steam Boiler Ins. Co.*, 10 N. Y. App. Div. 9; *Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co.*, 24 Abb. N. Cas. (N. Y. Supreme Ct.) 368, 61 Hun (N. Y.) 552.

Pennsylvania. — *Phillipsburg Horse Car Co. v. Fidelity, etc., Co.*, 160 Pa. St. 350.

Wisconsin. — *Hoven v. Employers' Liability Assur. Corp.*, 93 Wis. 201.

1. Insurance Usually a Contract of Indemnity Against Damage. — See the title *INSURANCE*.

An exception is made in the case of life insurance, which is held not to be a contract of indemnity. *Dalby v. India, etc., L. Assur. Co.*, 15 C. B. 365, 80 E. C. L. 365, *overruling* *Godsall v. Boldero*, 9 East 72. See the title *LIFE INSURANCE*.

2. Nature of Employers' Liability Insurance. — *Hoven v. Employers' Liability Assur. Corp.*, 93 Wis. 201; *Anoka Lumber Co. v. Fidelity, etc., Co.*, 63 Minn. 286.

"This is not simply a contract of indemnity. It is more. It is also a contract to pay liabilities." *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, the opinion containing a review of the authorities which distinguish between these two forms of contract.

3. Employers' Liability and Life Insurance Distinguished. — "In one sense there can be no doubt that an employers' liability policy is accident insurance. Such policies cover accidents to others than the assured, but the assured must stand in such a relation to the person accidentally injured or killed as to be legally liable for the result of the accident, and

it is only an accident causing bodily injury or death which creates a right to the insurance." *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404. See the title *LIFE INSURANCE*.

4. Forms of Policies. — *Morrison v. Scot. Employers', etc., Liability Co.*, 16 Ct. Sess. Cas. (4th ser.) 212; *Victorian Stevedoring, etc., Co. v. Australian Acc. Ins., etc., Co.*, 19 Victorian (Australia) 139; *Phillipsburg Horse Car Co. v. Fidelity, etc., Co.*, 160 Pa. St. 350.

The report of the case of *American Steam Boiler Ins. Co. v. Chicago Sugar Refining Co.*, 57 Fed. Rep. 294, sets out a so-called boiler insurance policy, but which really covered employers' liability.

5. *Hawkins v. McCalla*, 95 Ga. 192.

6. Right of Injured Employee to Collect Insurance. — *Anoka Lumber Co. v. Fidelity, etc., Co.*, 63 Minn. 286.

7. Employers' Liability Insurance Not Contrary to Public Policy. — *American Casualty Ins. Co.'s Case*, 82 Md. 535.

8. Employers' Liability Insurance Not Invalid for Want of Insurable Interest. — *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404; *Porter on Insurance* (2d ed.) 464.

9. Recent Origin of Employers' Liability Insurance. — *Henry Rifle Barrel Co. v. Employers' Liability Co.*, Q. B. D., March, 1884; also decided in the Court of Appeal, July, 1884.

10. *Pollock on Torts* (Webb's Am. ed.) 89, where the author, speaking of the master's liability rule, says: "No reason for the rule, at any rate no satisfying one, is commonly given in our books. Its importance belongs altogether to the modern law, and it does not seem to be illustrated by any early authority." *Citing* *Joseph Brown, Q. C.*, in evidence before

that this form of liability has reached proportions which render it, when unprovided for, a menace to success in many commercial lines,¹ and hence it is that nearly all the reported cases concerning this branch of insurance have been decided during the present decade.

II. THE RISK — 1. The Master's Liability — In General. — In order to understand the contract of employers' liability insurance, it is necessary at the outset to consider the legal obligations which the master assumes towards his employee or servant, for it was these which gave rise to this peculiar form of insurance.

To Third Persons. — A master is liable, first of all, to third parties for injuries by his servant in the course of his employment.²

To Servants. — And he is also liable to the servant for injuries incurred by the latter in the course of service and as a result of the master's want of proper care.³ To the last-named species of liability insurance there is the important qualification that the servant assumes the hazards which are incidental to his employment,⁴ among which are the servant's contributory negligence⁵ and the negligence of fellow servants.⁶

Fellow Servants Rule. — The latter is a qualification of recent origin, for until more than a third of the present century had passed it seems never to have been intimated that the master was relieved from liability for a servant's injuries merely because they were caused by another servant. The doctrine nevertheless soon became generally established throughout those jurisdictions where the English law prevails. But in many instances legislation has been employed to curtail the effects of this latest exception to the master's liability. Thus in Great Britain an act was passed in 1880, the effect of which was to place an employee who came within its terms "as against his employer in approximately the same position as an outsider as regards the safe and fit condition of the material instruments" and other servants employed by the master. Statutes of somewhat similar import, though less radical in effect, have been enacted in certain American jurisdictions and also in other countries,⁷ and the effect of these statutes is to render the master's liability more rigorous and to restore it to something like its condition prior to 1837. Hence it was that in such jurisdictions employers' liability insurance first came into vogue.⁸

2. Scope of Contract — In General. — Such is the legal responsibility of an employer whose losses from this cause it is the purpose of this new form of insurance to lessen. But the right of recovery upon such a contract does not pertain to all liability which a master may incur. The injury from the consequences of which he is thus protected must not only be one for which he is legally chargeable, but must also be covered by the provisions of the policy.⁹ In

Select Committee on Employers' Liability, 1876, p. 38; Brett, L. J., 1877, p. 114.

1. "The invention of accident insurance preceded the recent flood of actions of tort for personal injuries, and the only risk from accidents to the person then commonly thought of as a factor in ordinary life was the risk of injury to one's own person. Such insurance grew popular, was afterwards seen to be too costly for general use, and was abandoned by most of the companies which engaged in the business. But when it came to be understood that every man engaged in business and every owner or lessee of business property was exposed to heavy losses from accidents to the persons of others, the chance of which no prudent man could afford to ignore, a new demand for accident insurance against personal injuries arose, which it was the legitimate function of accident insurance companies to meet." *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404.

2. **Liability of Master to Third Persons.** — See the title MASTER AND SERVANT.

3. **Liability of Master to Servants.** — See the titles FELLOW SERVANTS and MASTER AND SERVANT.

4. **Incidental Risks Assumed by Servant.** — See the title MASTER AND SERVANT.

5. **Restrictions on Liability of Master to Servant.** — See the titles CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368; MASTER AND SERVANT.

6. See the title FELLOW SERVANTS.

7. See the title FELLOW SERVANTS.

8. Thus the earliest cases cited in this article which construe the employers' liability policy arose in Great Britain, where the common-law rule was first modified by statute. And in this country probably the earliest case is *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404.

9. **Insurance Limited to Legal Liability of the Insured.** — Porter on Insurance (2d Am. ed.) 464.

regard to the hazards insured against, the policies issued by different insurers, as well as various forms written by the same insurer, show a strange diversity.

Insurance Covers Liability for Injuries to What Persons. — Some of these cover liability for injuries to employees only,¹ others insure against liability for injuries to all persons except employees,² while still others purport to protect the insured against liability for injuries to any person.³

Insurance Covers Liability for What Injuries. — Then, too, policies of this kind are often so restricted as not to cover liability for every injury, irrespective of how it occurred.⁴

1. Injuries to Employees Covered. — *People's Ice Co. v. Employers' Liability Assur. Corp.*, 161 Mass. 122; *Morrison v. Scot. Employers', etc., Liability Co.*, 16 Ct. Sess. Cas. (4th ser.) 212; *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.*, 11 N. Y. App. Div. 411; *Hoven v. Employers' Liability Assur. Corp.*, 93 Wis. 201; *Anoka Lumber Co. v. Fidelity, etc., Co.*, 63 Minn. 286; *Grand Rapids Electric Light, etc., Co. v. Fidelity, etc., Co.*, 111 Mich. 148; *New Jersey, etc., Concentrating Works v. Ackermann*, 15 Misc. Rep. (N. Y. Supreme Ct.) 605.

2. Injuries to Persons Not Employees Insured Against. — *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404; *Phillipsburg Horse Car Co. v. Fidelity, etc., Co.*, 160 Pa. St. 350; *Victorian Stevedoring, etc., Co. v. Australian Acc. Ins., etc., Co.*, 19 Victorian (Australia) 139.

3. Omnibus Policies. — *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562; *Fidelity, etc., Co. v. Fordyce*, 64 Ark. 174; *Ross v. American Employers' Liability Ins. Co.*, 56 N. J. Eq. 41 (also construing a policy restricted to employees' injuries only); *American Casualty Ins. Co.'s Case*, 82 Md. 535. Compare *American Steam Boiler Ins. Co. v. Chicago Sugar Refining Co.*, 57 Fed. Rep. 294.

Instance of Policy Held to Cover Liability for Injuries to Third Persons. — A policy insuring a lumber company against "common-law or statutory liability" for accidents has been held to cover injuries to commercial travelers received while riding on the locomotive of the insured on returning from its store, although the application stated that the railroad upon which the accident occurred was used by the insured for its "own lumbering purposes" only. *Travellers' Ins. Co. v. Wild River Lumber Co.*, 83 Fed. Rep. 977. In the opinion delivered in this case it was said: "We are of the opinion that the transportation upon the company's private railroad of two commercial travelers, who had come to the premises of the lumber company to transact business with the company, and to make sales, and to take orders for supplying the shop of the lumber company, was a use of the railroad within the scope of the company's 'own lumbering purposes.' The fact that the travelers paid a sum of money for a special conveyance is immaterial, since the railroad was used by them and by the lumber company in direct connection with the business of the company. Nor can we say that the undertaking of the company or its servants to carry the two travelers upon a locomotive was such a fraud upon the insurer as to preclude the insured from recovering. The defendant in error is a lumbering company, with a railroad for lumbering purposes, and its equipment and mode of running its road nat-

urally differ from those of a common carrier. As the circumstances are peculiar, this court cannot apply to this case common knowledge as to ordinary train service on ordinary railroads; and the record discloses no such finding of facts, bearing upon this question, as to justify us in finding error in the rulings thereon by the Circuit Court. Upon the record before us it appears that the method of conveyance was assented to by the passengers and by the company. There is no evidence of bad faith or of wanton and wilful disregard of the safety of the travelers. The lumber company, for the improper performance of its undertaking, became subject to a common-law liability to the injured men, and is entitled to indemnity from its insurer by the contract of insurance, even if this contract contains the limitation for which the plaintiff in error contends."

4. Injuries by Explosives. — Where an employee in a gun factory was injured while cleaning a shell which had been used in action and was believed to be spent, the employer, who was obliged to pay him damages, was permitted to recover upon an employees' liability policy, even though it contained no warranty against explosives, and covered only injuries incurred while engaged in the ordinary work of the employer. *Henry Rife Barrel Co. v. Employers' Liability Co.*, Q. B. D., March, 1884.

A steam boiler insurance company, not authorized to insure against fire, cannot be held liable on a policy covering explosives, if they are mere incidents of the fire. *American Steam Boiler Ins. Co. v. Chicago Sugar Refining Co.*, 57 Fed. Rep. 294, reversing *Chicago Sugar Refining Co. v. American Steam Boiler Co.*, 48 Fed. Rep. 198.

Restriction of Insurance to Liability for Injuries Caused by Appliances. — A policy insuring a street-railway company against liability on account of injuries caused by appliances used in its business has been held not to cover an injury sustained in consequence of the overturning of a sleigh which was used by the company when its tracks were obstructed by snow. *Phillipsburg Horse Car Co. v. Fidelity, etc., Co.*, 160 Pa. St. 350.

Insurance of Ice Dealers — Injuries Caused by Fall of New Icehouse While in Process of Construction. — Under a policy insuring ice dealers, the insurers were held not liable for injuries to employees caused by the fall of an icehouse. *People's Ice Co. v. Employers' Liability Assur. Corp.*, 161 Mass. 122. In delivering the opinion of the court, Allen, J., said: "Taking the policy and the application together, the risk assumed was for injuries received in connection with the carrying on of

Waiver. — But the objection that a liability is not within the terms of the policy may of course be waived, and where the insurer undertakes the defense of the action by the injured party against the insured, with full information as to the character of the injury, it will be deemed to have waived the point that such injury was not one which would have entitled the insured to recovery.¹ But a letter by the insurer's manager merely stating that he will bring the claim to the attention of the proper officers is not a waiver of a condition reserving to such insurer the right to settle the claim.²

the business. No doubt the words used should be construed with reasonable liberality, but they are not broad enough to cover the work of erecting a new and large building which is to be used for storing ice. The erection of new icehouses or stables for the enlargement or better accommodation of the business is not an operation connected with the business, within the meaning of the policy and application when construed together. There is a difference between ordinary day-by-day repairs, which are incident to the carrying on of the business, and the erection of large new buildings which, when completed, are to be used in the business. Such buildings might be built wholly by independent contractors. Whether they are so or not, the agreement between these parties does not refer to or include an operation of that character. Looking at all of the provisions above recited, we are unable to put so broad a construction upon the risk assumed as would be necessary in order to sustain the plaintiff's case. Since the contract of the defendant did not include such a risk, it is immaterial whether it was customary for people in the ice business to erect their own icehouses. The case depends upon the construction of the contract, and the custom, if proved, would not enlarge the defendant's liability. See *Benson v. Gray*, 154 Mass. 391, and cases there cited; *Davis v. Galloupe*, 111 Mass. 121; *Potter v. Smith*, 103 Mass. 68."

Insurance Covering Operations Connected with Business of Iron and Steel Works. — Where a policy covered operations connected with the business of iron and steel works, an injury received by an employee by reason of, but not while engaged in, the construction of a building for the employer was held not to be within its terms. *Hoven v. Employers' Liability Assur. Corp.*, 93 Wis. 201.

Insurance Covering Liability under a Specified Statute. — Where a policy covered a liability which the employer might infer by virtue of a certain statute, which provided for the particular form of action, the insurer was held not liable for damages recovered from the insured by an employee in an action at common law and not under the statute. *Morrison v. Scot. Employers', etc., Liability Co.*, 16 Ct. Sess. Cas. (4th ser.) 212.

1. Waiver of Objection that Liability Is Not Within Terms of Policy. — *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.*, 11 N. Y. App. Div. 411, where the court said in the opinion: "Assuming that the unguarded set screw was a breach of warranty, which went both to the inception and the continuance of the contract, then the cases are to the effect that the policy is not void, but voidable only, at the option of the insurer; that the insurer

may waive the forfeiture and take the benefit of the policy, but that in order to charge him with such waiver, from his acts acknowledging the validity of the policy, it must be shown that he, at the time of the waiver, had knowledge of the facts constituting the forfeiture. *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389; *Roby v. American Cent. Ins. Co.*, 120 N. Y. 510; *Tripp v. Provident Fund Soc.*, 140 N. Y. 23; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410. We think the evidence justified the finding that the insurance company knew all the material facts respecting the set screw when it served the answer for this plaintiff in the *Jasmin* action, and, although a nonresident of the state, was chargeable with knowledge of the law requiring set screws to be guarded."

2. Victorian Stevedoring, etc., Co. v. Australian Acc. Ins., etc., Co., 19 Victorian (Australia) 139, 157, where it was observed: "Then it appears on the face of the case that a letter was written by the manager of the defendant company to the plaintiff company in answer to the first intimation sent as to the accident or the claim. The letter is addressed to the manager of the plaintiff company, and is as follows: 'In answer to your letter of the 21st inst., with copies of letters, I have placed the matter before the company's solicitors. They point out that the first condition of the policy has not been complied with, and therefore no claim can be entertained. I write this immediately because from appearances the writ served upon you must be attended to, and as my directors only meet next Thursday, something will have to be done in the meantime so far as the writ is concerned. I will bring the matter before the board on Thursday next.' It is argued that that amounted to a waiver of the second condition, and that it justifies the plaintiffs in taking the matter into their own hands and endeavoring to settle the claim as cheaply as they could, but we think that no such inference can be drawn. It is a letter in friendly terms, indicating nothing definite, that the defendants have made some inquiry, but that they are considering the matter in the meantime. It amounts to a statement by the manager that he is getting the earliest meeting of his directors to consider it, and meanwhile that it is well that something should be done to avoid defeat as to the writ. That did not leave the plaintiffs at large pending their decision to settle the case at once. There is nothing to constitute a waiver of the second condition. It is a suspense letter to provide for an emergency. Therefore, I think it certainly does not amount to sufficient to warrant the court drawing that inference from it. The appeal is allowed with costs. Judgment to be entered for the defendants with cost to be taxed."

3. Amount of Liability. — A limitation of liability to a certain sum "in respect of any one accident" permits recovery up to that amount for each injury suffered by each of a large number of persons injured at the same time, though the aggregate claims far exceed the sum fixed.¹

4. Duration of Liability. — Where the policy insured against liability for accidents "for twelve calendar months from" a certain date, it was held to cover an injury incurred exactly one year after the date of its issue.²

III. PARTIES — **1. The Insurer** — *a. WHO MAY INSURE.* — Employers' liability insurance is generally written by corporations organized for that purpose, though it is sometimes effected by other organizations known as "Lloyds."³ Under certain circumstances the employer himself may become the insurer.⁴

b. FOREIGN INSURANCE COMPANIES — *Necessity of a License.* — Under the

1. Limitation of Insurer's Liability to Specified Amount. — *South Staffordshire Tramways Co. v. Sickness, etc., Assur. Assoc., [1891] 1 Q. B. 402.*

Accident — Term Defined. — In the above cited case of *South Staffordshire Tramways Co. v. Sickness, etc., Assur. Assoc., (1891) 1 Q. B. 402*, Bowen, L. J., said: "The word 'accident' may be used in either of two ways. An accident may be spoken of as occurring to a person, or as occurring to a train or vehicle or bridge. In the latter case, though several persons were injured who were in the train or vehicle, or on the bridge, it would be an accident to the train or vehicle or bridge. There might, however, be said to be several accidents to the several persons injured. To ascertain in which way the word 'accident' is used, we must really look to the terms of the document. The policy recites a proposal made by the plaintiffs. The proposal is 'for indemnity against all such claims as hereinafter mentioned for compensation for personal injuries and damage to property caused by vehicles in their possession.' When we look to the policy, it limits the words of the proposal by adding the words 'in respect of accidents.' The question is, What is the meaning of those words? Is it meant by them to treat as one accident what happens to several persons? I should not think any one would suppose, having regard to the proposal, otherwise than that the word 'accident' was there used in the sense of injury accidentally caused to the person. Then the question arises, What is the meaning of the term 'one accident,' further on in the policy? It seems to me that, if in the previous part of the policy the word 'accident' is used as meaning accident to the person, it must receive the same construction in the phrase limiting the liability of the defendants. I think that Lawrance, J., was right in thinking that 'accident' meant in the policy the mischief suffered by a person injured to his person or property." Fry, L. J., adds: "I am of the same opinion, and will add very few words. The operative part of the policy is an agreement by the defendants to insure 'so far as regards claims for personal injury and damage to property made against the assured in respect of accidents caused by vehicles.' It seems to me plain that 'accidents caused by vehicles' there means 'injuries accidentally caused by vehicles to person or property.' I should come to that conclusion without refer-

ence to the terms of the proposal recited; but when that proposal is looked at the matter is still plainer. Then the policy proceeds to say that 'the association shall pay to the assured the sum of two hundred and fifty pounds in respect of any one accident.' I think that the word 'accident' is there used in the same sense as in the earlier part of the policy, and that the meaning is 'in respect of any single injury to person or property accidentally caused.'"

2. Limitation of Insurer's Liability to a Specified Period. — "The first question raised is whether or not November 24, 1888, the day on which this event occurred, is included in the period covered by the policy. The insurance being 'for twelve calendar months from November 24, 1887,' obviously either November 24, 1887, or November 24, 1888, must be excluded, for otherwise the period covered would exceed twelve calendar months by one day. I decide without hesitation that the former date is excluded and the latter included. If space were in question, and a mile had to be measured 'from' a given place, it is obvious that no part of the place could be included in the mile. And, similarly, I cannot but think that, as regards time, 'from' is akin to 'after,' and excludes the date fixed for the commencement of the computation. As was said in argument, had the words been 'for one day from November 24, 1887,' it could not have been contended that November 24, 1887, was itself included. The defendants are, therefore, in my opinion, liable." Day, J., in *South Staffordshire Tramways Co. v. Sickness, etc., Assur. Assoc., (1891) 1 Q. B. 402*.

3. Insurance by Companies. — See *New Jersey, etc., Concentrating Works v. Ackerman*, 6 N. Y. App. Div. 540, 15 Misc. Rep. (N. Y.) 605.

4. Insurance by Employer. — Where it was shown that the employer had posted notices at various places about his works, to the effect that certain sums would be deducted from the weekly wages of the employees to secure insurance benefits in case of accident, and that any workman accepting such benefits would be held to have discharged all claims against the employer, which notice was well known to the employees generally, it was held that an employee who had taken advantage of this form of insurance was not entitled to any further recovery against the employer. *Wright v. Howard*, 21 Scotch Ct. Sess. Cas. (4th ser.) 25.

statutes existing in most of the states it is necessary that a foreign insurance company obtain a license to do business therein;¹ and accordingly an employers' liability insurance company which attempted to do business in one state without license, by delivering insurance policies which were issued in a different state, was at the instance of a rival company enjoined from continuing the business, though evidence of injury to the plaintiff was slight.²

Necessity of Depositing Security. — And under a statute requiring as a condition precedent to admission into a state the deposit of security to a certain amount with an officer of the state where the applicant was organized, it was held insufficient for a British company to make such deposit either in another state where it was merely licensed or in Great Britain, and this notwithstanding the insurance commissioner had admitted other companies on such grounds.³

Powers of Corporation Authorized to Issue "Accident" and "Employers' Liability" Policies. — But a corporation authorized to transact accident and employers' liability insurance may issue policies of insurance to owners of vehicles, buildings, etc., against liability for injury to others than employees.⁴

Right to Exclusive Use of Phrase "Employers' Liability." — A company organized to write this kind of insurance cannot appropriate the phrase "employers' liability" so as to entitle it to an injunction against the continuance in business of another company which uses these words as a part of its corporate name.⁵

c. INSOLVENCY. — In case of the insolvency of an employers' liability insurance company, the liabilities for losses incurred by the insured are valid claims against the receiver if the casualty occurred before the date of the insolvency, although the amount recoverable from the assured remained unascertained and unpaid until after that date,⁶ and so is a reasonable charge for attorneys' fees for defending actions for injuries which might result in liability to the company.⁷

1. Right of Foreign Corporation to Insure. — See the title FOREIGN CORPORATIONS.

2. Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co., 61 Hun (N. Y.) 552.

3. Deposit of Surety — Construction of Statute Requiring. — *Employers' Liability Assur. Co. v. Insurance Com'r*, 64 Mich. 614, wherein the court said: "The object of providing the deposit is to secure a fund to which our citizens may have convenient access for indemnity for their unpaid losses. A deposit abroad would be of no practical use to them in most cases, because not readily accessible. If we give the word 'state' a sense which will include a foreign nation, the language of the statute would require the deposit to be made in the foreign state to which the company belonged. That would not help this relator, because the deposit is in New York and not in Great Britain. It is therefore claimed that what the statute means is that the deposit should be made in another American state, but that the word 'organized' may mean licensed to do business. This is not a natural meaning. A British company may be licensed to do business in every state of the Union. Under the interpretation claimed it might have a single deposit in any of the states. So a New York company might be licensed in every state. This same construction would allow the deposit of that company to be made anywhere else as well as in New York. But if the statute said nothing about foreign companies no one would imagine that an American company could be treated as organized anywhere but in its home state. Language which is so plain and definite when so applied cannot be made

to mean something else, and applied to objects which in no way fulfil its conditions."

4. Authority to Write "Accident" and "Employers' Liability" Insurance Includes What Insurance. — *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404.

5. Exclusive Right to Phrase "Employers' Liability" Denied. — The superintendent of the insurance department in *New York* is required to refuse permission to a foreign company to do business in the state under a name which in his judgment is so nearly similar to one already in use as to lead to confusion or uncertainty on the part of the public. The "*Employers' Liability Assurance Corporation, Limited*," of Great Britain, doing business in New York, sought to enjoin the "*Employers' Liability Insurance Company of the United States*" from doing business in the same state, on account of the similarity in name. But it was held that the complainant could have no exclusive right to the use of the words "employers' liability," and the injunction was refused. *Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co.*, 61 Hun (N. Y.) 552, affirming 24 Abb. N. Cas. (N. Y.) 368.

6. Claim for Loss Sustained Before Insolvency Provable Against Receiver. — *American Casualty Ins. Co.'s Case*, 82 Md. 535; *Ross v. American Employers' Liability Ins. Co.*, 56 N. J. Eq. 41.

7. Attorney's Fees Provable Against Receiver. — *Ross v. American Employers' Liability Ins. Co.*, 56 N. J. Eq. 41, where the point is thus elaborated by Vice Chancellor Pitney: "Most of the claims of lawyers audited and adjusted by the receiver were for services rendered

2. The Insured. — Prior to the appearance of this phase of the insurance contract there was authority for the view that a master had an insurable interest in the life of his servant.¹ And upon the principle that an employer has a direct pecuniary interest in the safety of his employees, he is generally entitled to take out and recover upon policies insuring him against the occurrences of injuries to them.² In *Great Britain* the opinion has been advanced that the master's insurable interest depends upon whether or not the servant belongs to the class protected by the Employers' Liability Act.³ And since in Scotland a tramway conductor has been included within this class,⁴ while in England an omnibus conductor has been excluded,⁵ the question of insurable interest with reference to these has been answered by the same authority accordingly.⁶

IV. WHO MAY ENFORCE LIABILITY — Insurance Payable to the Employer. — The contract of employers' liability insurance being for the indemnification of the employer against loss by reason of his liability to employees, the insurance money is payable to the employer.⁷

under the retainer of the insolvent corporation before it went into the hands of the receiver, in defending such actions. The receiver, in adjusting those claims, has made abatements in several instances by reason of the fact that the damages recovered were much beyond the insurance, and hence the defense was as much for the benefit of the insured as for the benefit of the insurer. A small portion of the claims, as I understand, is for services rendered in other matters beside the mere defense of actions of the kind above referred to. I think that the circumstance that the lawyers in such cases acted upon the retainer of the insolvent company and looked to it primarily for pay does not vary the case, so far as the insolvent company is concerned, but that their claims should be allowed precisely as if they had been paid by the insured, and that they should be put on the same basis as the policy holders. The services were all rendered in defense of the general fund, and were for the benefit of the policy holders. The presumption is — and the learned receiver, from a very careful and elaborate examination of all their claims, is of the opinion — that they are all meritorious in that respect. At the argument the idea was enforced with great vigor that they are strictly within the limits of the terms of the trust upon which the securities — which constitute the bulk of the assets of the company — were deposited with the commissioner of banking and insurance of this state. The trust was that the securities were deposited 'for the protection and benefit of all the policy holders.' And it was argued that defending the fund against claims the allowance of which would deplete it was strictly within the terms of that trust. And I am not sure that the position is not well taken. Under the policies it was not only the contractual duty of the corporation to defend those claims in all cases where there was reasonable ground for such defense, but it was also their duty independent of that contract to so defend; and I am inclined to think that the counsel fees, within reasonable limits, must be considered as a sort of salvage necessarily expended for the benefit of the fund."

1. View that Master Has Insurable Interest in Life of Servant. — *Hebdon v. West*, 3 B. & S.

579, 113 E. C. L. 579; *Summers v. U. S. Insurance Co.*, 13 La. Ann. 504; *Miller v. Eagle L., etc., Ins. Co.*, 2 E. D. Smith (N. Y.) 292. See *Woodfin v. Asheville Mut. Ins. Co.*, 6 Jones L. (51 N. Car.) 558, where an action was brought on a policy insuring the life of a slave belonging to the plaintiff.

2. Master's Insurable Interest in Safety of Employee. — *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404, where the court said: "It is plain that each of these policies is a contract of insurance, and that in each the assured has an insurable interest in the safety of those whose accidental personal injury is made the foundation of his claim to indemnity. The happening of such an accident will be of disadvantage to the assured and will subject him to direct pecuniary loss, for which such policies afford him a useful and desirable means of indemnity. Although but recently devised, they are evidently consistent with the general policy of our insurance legislation, and ought not to be held unauthorized unless such appears to be the clear intent of the legislature."

3. Porter on Insurance (2d Am. ed.) 464, where it is observed: "The liability, to be enforceable against the insurers, must be not only one which falls on the employer within the statute (otherwise the employer would have insurable interest), but also within the policy."

4. Wilson v. Glasgow Tramway Co., 5 C. S. C. (5th ser.) 981.

5. Morgan v. London Gen. Omnibus Co., 12 Q. B. Div. 201.

6. Porter on Insurance (2d Am. ed.) 464.

7. Insurance Money Not Assets of Injured Servant. — *Hawkins v. McCalla*, 95 Ga. 192. It was held in this case that the proceeds of an employers' liability insurance policy, which had been paid to the insured, did not constitute an asset of the deceased employee's estate, although the payment was made as the result of the accrual of the policy in consequence of such employee's death. *Simmons, C. J.*, in delivering the opinion of the court, said: "The contract of the insurance companies, as appears from the petition, was a contract to indemnify the paper mills company against loss by reason of its liability to employees, and was not a contract with or for the

Garnishment of Proceeds of Policy by Employee. — It has been held that an employee who has recovered a judgment against the insured for injuries sustained while in his employment may reach the insurance money by garnishment.¹

V. ACCRUAL OF LIABILITY. — As has already been shown, an employers' liability insurance policy is not a mere contract of indemnity against damage, but is a contract to pay liability for it.² The distinction between these two forms of contract rests on principles which were well established before employers' liability insurance arose. A contract of indemnity against damage gives no right of action until the damage itself has fully accrued,³ but a contract to discharge liability affords a right of action as soon as the liability attaches.⁴

Insured Need Not Have Discharged Liability. — An employers' liability insurance policy being a contract of the latter class, it is not necessary that the insured should have discharged the liability from which the contract protects him in order that he may recover thereon.⁵

Liability of Insured Must Be Determined. — But an action is not maintainable by the insured upon a policy of this kind until his liability has been determined. And so long as an appeal is pending from a judgment against the insured for the liability protected by the policy, there can be no recovery against the insurer.⁶

VI. NOTICE OF INJURY — **Effect of Failure to Give Required Notice.** — Notice of the injury which gives a right of action on the policy is generally required to be forwarded within a fixed period, and failure to comply with this requirement is fatal to recovery,⁷ even though the policy contains

benefit of the employees themselves; and if the paper mills company was liable for the homicide of this employee, his widow was entitled to recover (Code, § 2971; Acts 1887, p. 43); and the statute which gives her this right expressly provides that no recovery had under its provisions 'shall be subject to any debt or liability of any character of the deceased husband.' Any sum, therefore, which may have been paid by the insurance companies to the paper mills company to cover its liability in this case was in no sense assets of the estate of the deceased employee."

1. Garnishment of Insurance Money. — *Anoka Lumber Co. v. Fidelity, etc., Co.*, 63 Minn. 286. See the title GARNISHMENT.

2. American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562; *Hoven v. Employers' Liability Assur. Corp.*, 93 Wis. 201; *Anoka Lumber Co. v. Fidelity, etc., Co.*, 63 Minn. 286; *Porter on Insurance* (2d ed.) 464.

3. Rule in Case of Indemnity Contracts. — *Wicker v. Hoppock*, 6 Wall. (U. S.) 94; *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562; *Solary v. Webster*, 35 Fla. 363; *Carson Opera House Assoc. v. Miller*, 16 Nev. 327; *Churchill v. Hunt*, 3 Den. (N. Y.) 321; *Maloney v. Nelson*, 144 N. Y. 182; *Thompson v. Taylor*, 30 Wis. 68. Compare *Fidelity, etc., Co. v. Fordyce*, 64 Ark. 174. See the title INDEMNITY CONTRACTS.

4. American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Jones v. Childs*, 8 Nev. 121; *Trinity Church v. Higgins*, 48 N. Y. 532; *Smith v. Chicago, etc., R. Co.*, 18 Wis. 17. See the title INDEMNITY CONTRACTS.

5. Right of Insured to Recover Without Discharging Liability — *Arkansas*. — *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562; *Fidelity, etc., Co. v. Fordyce*, 64 Ark. 174.

Maryland. — *American Casualty Ins. Co.'s Case*, 82 Md. 535.

Minnesota. — *Anoka Lumber Co. v. Fidelity, etc., Co.*, 63 Minn. 286.

New Jersey. — *Ross v. American Employers' Liability Ins. Co.*, 56 N. J. Eq. 41.

Wisconsin. — *Hoven v. Employers' Liability Assur. Corp.*, 93 Wis. 201.

6. Action Not Maintainable on Policy until Master's Liability Is Finally Determined. — *Fidelity, etc., Co. v. Fordyce*, 64 Ark. 174.

7. Failure to Give Required Notice Bars Recovery. — *Patton v. Employers' Liability Co.*, 20 L. R. Ir. 93; *Victorian Stevedoring, etc., Co. v. Australian Acc. Ins., etc., Co.*, 19 Victorian (Australia) 139. In the last cited case the Supreme Court reversed the judgment of the court below, *Madden, C. J.*, saying: "It was contended that the first part of the condition — that notice of any injury must be given to the insurance company within seven days of its occurrence — could not be regarded as a condition precedent because it was unreasonable to so read it. It was said that a man might be injured and might not give notice in time, and the insured might not be made aware of it for months after, and so could not give notice to the insurance company, and it would be a monstrous thing to hold that the policy was void because the insured had failed to give notice of something which he did not know. But it must be borne in mind that accident insurance policies contain many harsh conditions, which the insurers regard no doubt as indispensable, and those who accept such contracts on the basis of the conditions must accept the hardship as a part of the contracts. Although the circumstances might render it very hard or even absolutely impossible to give the notice required, still the insured entered into the contract and placed himself

no forfeiture clause.¹

Time of Notice. — Where an employers' liability policy requires that the insured shall give immediate notice of the accident or claim, it nevertheless need not be given until the person injured has presented his claim for damages.² But a notice given six months after the occurrence is not a compliance with the policy,³ and where notices are required "upon the occurrence of an accident and also upon receipt of notice of any claim," both are conditions precedent, and the failure to notify the insurer until a claim for damages is presented, nine months after the injury, is fatal.⁴

VII. EXPIRATION OF LIABILITY. — Provisions in the policy requiring the insured to take steps towards the enforcement of its rights within a certain

under that obligation, and must abide by it. Apart from such conditions the authorities show that this view is the one which the courts have adopted." *Citing Worsley v. Wood*, 6 T. R. 710; *Cassel v. Lancashire, etc., Co.*, 1 Times L. R. 495.

1. *Underwood Veneer Co. v. London Guarantee, etc., Co.*, (Wis. 1898) 75 N. W. Rep. 996.

2. **Policy Requiring Immediate Notice of Accident or Claim.** — *Grand Rapids Electric Light, etc., Co. v. Fidelity, etc., Co.*, 111 Mich. 148; *Anoka Lumber Co. v. Fidelity, etc., Co.*, 63 Minn. 286. In the last cited case the court said: "We are not unmindful of the force of the appellant's contention that it would be of great benefit to have immediate notice of any accident, as well as of any claim, for the purpose of getting at the truth of the alleged accident, of finding witnesses who know the facts, and making preparation for the defense of any anticipated claim for damages. Other reasons might be readily suggested, but the insurance company must abide by its own terms, which it has deliberately expressed, and by the whole contract of which these terms are a part. Upon the other hand, it may be said that it might frequently be difficult for the employer to give immediate notice. Take, for instance, our lumbermen, where the employees are in the pine woods, a long distance from the employer's place of business or residence, and where it would, perhaps, upon account of deep snows or want of rapid communication in traveling or by telegraph, be an impossibility to know of the accident for a long time, perhaps weeks or months after its occurrence. Under such a condition of things a policy requiring immediate notice of the accident to the employee to be given to the insurance company by the employer would render the policy entirely useless. We might very well say that the provision under consideration does not need either construction or interpretation, but that the usual and ordinary meaning of it from a grammatical point of view is that which we have indicated and decided."

3. **Notice Six Months After Occurrence Insufficient.** — *Grand Rapids Electric Light, etc., Co. v. Fidelity, etc., Co.*, 111 Mich. 148. *Compare Whitehurst v. North Carolina Mut. Ins. Co.*, 7 Jones L. (52 N. Car.) 433; *Edwards v. Lycoming County Mut. Ins. Co.*, 75 Pa. St. 378; *Patton v. Employers' Liability Co.*, 20 L. R. Ir. 93.

4. **Two Notices Required.** — *Underwood Veneer Co. v. London Guarantee, etc., Co.*, (Wis. 1898) 75 N. W. Rep. 996, the court say-

ing: "After careful consideration, we are constrained to hold that the conditions indorsed upon the policy and quoted above were conditions precedent. The policy expressly states that it was 'subject to the agreements and conditions indorsed' thereon. Such conditions expressly required the plaintiff, 'upon the occurrence of an accident,' to 'give immediate notice in writing of such accident,' etc. The reason for requiring such notice is obvious. It was to enable the defendant to investigate the facts and circumstances of the accident while they were fresh in mind, with the view of settling the loss, in case it should be so advised, and, in case of a contest, to be prepared to defend the same as stipulated in the policy. Accordingly the plaintiff was thereby expressly precluded from settling any claim or incurring any expense without the consent of the defendant, except in case of absolute necessity. These things made it important for the defendant to be notified, immediately, not only of the occurrence of the accident, but also that a claim for damages had been made by the injured person on account of the accident. The words 'and also,' in the conditions quoted, pretty clearly indicate that such notice of 'the occurrence of the accident' was to be followed by a further or additional notice of any claim made for damages, and each such notice was to be given immediately as therein required. In the two cases relied upon by counsel for the plaintiff the condition did not contain the word 'also,' and in that respect the cases are *distinguished* from the one at bar. *Anoka Lumber Co. v. Fidelity, etc., Co.*, 63 Minn. 286; *Grand Rapids Electric Light, etc., Co. v. Fidelity, etc., Co.*, 111 Mich. 148. Certainly we cannot hold, under the conditions in this policy, that the notice of the claim for damages, made for the first time nine months after the accident, satisfied the requirement that immediate notice should be given of 'the occurrence of the accident;' nor can we hold that such requirement was not a condition precedent; nor can we hold that such notice of the accident, given for the first time nine months after the occurrence of the accident, was an 'immediate notice,' within the condition quoted, as those words have been repeatedly construed by this court. *Kentzler v. American Mut. Acc. Assoc.*, 88 Wis. 589, 43 Am. St. Rep. 934. True, there is no forfeiture clause in the contract. Nevertheless, the plaintiff, in order to maintain this action, was bound to perform such condition precedent."

period are valid, and noncompliance therewith will relieve the insurer. Thus where it was required that the claim be prosecuted within a period of six months from the termination of the suit against the insured by the party injured, it was held that the limitation began to run from the time of the affirmance of the judgment against the insured by the court of last resort, and not from the time of the payment of the judgment.¹ But where the policy was issued by several underwriters, and provided that no suit should be brought against more than one of these at the same time, unless within three years from the occurrence of the injury, it was held sufficient that any one of the underwriters was served within the time limited.²

VIII. DEFENSE AND SETTLEMENT. — Sometimes the policy stipulates that the insurer may undertake the defense or settlement of the action against the insured;³ and where an insurer thus reserves the right to settle a claim, the insured forfeits his right to recovery by effecting a settlement on his own account.⁴ Reasonable charges by attorneys for defending the actions which have thus been undertaken by the insurer are valid claims against a receiver into whose hands the company has passed.⁵ But the right to recover for expenses incurred by the insured in defending the action is barred by the same limitation which governs an action on the policy as a whole.⁶

EMPOWER. (See also the title *PRECATORY TRUSTS*.) — See note 7.

EMPRESARIO. — See note 8.

EMPTY. — See note 9.

1. Provisions Requiring Suit to Be Brought Within a Time Specified. — *People v. American Steam Boiler Ins. Co.*, 89 Hun (N. Y.) 456, *affirming* *People v. American Steam Boiler Ins. Co.*, 10 N. Y. App. Div. 9. In the former case it was observed: "The claim is that the assured had no cause of action until after it had paid the judgment; could not present a claim until then, and therefore had six months from the time its cause of action accrued within which to prosecute it. If this position be well taken, then the limitation provided for by the contract was dependent upon the time of payment of the judgment instead of upon the termination of the suit. And as payment could be postponed by the assured for so long a period as it could arrange with its judgment creditor, the right to determine when the six months' period should begin to run would rest with the assured. But the language of the provision does not admit of such a construction. It provides that the period of six months shall date from the termination of the suit, not from the date of payment. It was within the power of the assured, through a prompt payment of the judgment, to make both dates the same, and thus to secure, if desired, six months after the cause of action accrued within which to present its claim. But it had not the right to postpone the period by refusing to pay the judgment."

2. Time of Bringing Suit on Policy Issued by Several Underwriters. — *New Jersey, etc., Concentrating Works v. Ackermann*, 6 N. Y. App. Div. 540, *affirming* 15 Misc. Rep. (N. Y.) 605.

3. Stipulation that Insurer May Settle or Defend Action Against Insured. — *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.*, 11 N. Y. App. Div. 411.

4. Victorian Stevedoring, etc., Co. v. Australian Acc. Ins., etc., Co., 19 Victorian (Australia) 139.

5. Ross v. American Employers' Liability Ins. Co., 56 N. J. Eq. 41.

6. People v. American Steam Boiler Ins. Co., 10 N. Y. App. Div. 9.

7. Mandatory or Directory. (See also the title *STATUTES*.) — An act providing for relief against illegal taxation, by the terms of which boards of supervisors are "authorized and empowered," upon application of any aggrieved party, to hear and determine claims for taxes improperly collected, is mandatory, and does not make it discretionary with the board whether it will hear a claim. *People v. Herkimer County*, 56 Barb. (N. Y.) 452. But in *Picquet, Appellant*, 5 Pick. (Mass.) 65, an act empowering a judge of probate to take an administration bond in a special case in a mode different from that prescribed by the general law was held not to be imperative. And see *Binney v. Chesapeake, etc., Canal Co.*, 8 Pet. (U. S.) 201, 212. See also *MAY*.

Authorize and Empower. — The words "authorize and empower" import discretion. *Welsh v. Erie, etc., Valley R. Co.*, 181 Pa. St. 461.

"License and Empower" was held to import a grant in a deed creating a right to construct and use fifty patented machines. *Washburn v. Gould*, 3 Story (U. S.) 162.

8. Empresario. — In *Rose v. Governor*, 24 Tex. 503, it was said: "Bearing these facts in mind, it may also be worth while to remark, in this connection, that the proviso of the statute which has been quoted does not have exclusive reference to empresarios themselves, because the assignees of whom the proviso speaks could not be empresarios. An empresario, as the term is used in our land laws, was one who contracted directly with the government."

9. "Empty Boat or Vessel" in an act granting and regulating tolls means without cargo, not

EN DECLARATION DE SIMULATION. — The action *en declaration de simulation* is, in the law of *Louisiana*, an action to have a contract declared judicially a simulation and a nullity, to remove a cloud from the title, and to bring back, for any legal purpose, the thing sold to the estate of the true owner. It is essentially one in revendication, and never of condition.¹

EN VENTRE SA MERE. — See the titles ABORTION, vol. 1, p. 186; HOMICIDE; LEGACIES AND DEVICES; NEGLIGENCE; WILLS; and see DE VENTRE INSPICIENDO, vol. 8, p. 832; PREGNANCY.

ENABLING STATUTES. — Enabling acts are those that confer power upon persons or corporations to do things that were before unlawful, such as the Statute of Wills, Married Women's Acts, etc.

ENACT. (See also the title STATUTES.) — To enact means to establish by law; to perform or effect; to decree.²

ENAGENACION. — *Enagenacion*, in Mexican and Spanish law, is equivalent to the English term "alienation."³

ENCLOSURE. — See INCLOSURE.

ENCOURAGE. (See also the titles ACCESSORY, vol. 1, p. 257; ACCOMPLICES, vol. 1, p. 389; AIDER AND ABETTOR, vol. 2, p. 29; SOLICITATION.) — To intimate; to incite to anything; to give courage to; to inspirit; to embolden; to raise confidence; to make confident.⁴

ENCROACH — ENCROACHMENT. (See also the titles ABUTTING OWNERS, vol. 1, p. 224; HIGHWAYS; NAVIGABLE WATERS; STREETS AND SIDEWALKS; and see OBSTRUCTION.) — To encroach is to intrude; to gain unlawfully the lands, property, or authority of another.⁵

without passengers. *Perrine v. Chesapeake, etc., Canal Co.*, 9 How. (U. S.) 189.

1. *Edwards v. Ballard*, 20 La. Ann. 170. It is to be distinguished from the revocatory action, the object of which is to avoid serious but fraudulent contracts, while that *en declaration de simulation* aims at declaring simulated acts which are contrary to truth. *Erwin v. Kentucky Bank*, 5 La. Ann. 1.

2. **Resolution.** — *Bouv. Law Dict., followed in Re Senate File 31*, 25 Neb. 876. The court further said: "The formula 'be it enacted,' therefore, includes the formula 'be it resolved.' In other words, the phrase 'be it enacted,' while ordinarily applied to the passage of bills, may be used in passing a mere resolution or proposal."

Adopt and Enact Distinguished. — In *Williams v. Michigan Bank*, 7 Wend. (N. Y.) 557, it is said: "Much was said in argument about the meaning of the terms 'adopt' and *enact*, and there is no doubt a difference. To *enact* implies the creating anew a law which did not exist before; but 'adopt' no doubt implies the making that their own which was created by another, as the *adoption* of our statute laws of Great Britain, as they stood, by the colonial government."

3. In *Mulford v. Le Franc*, 26 Cal. 88, it was said: "According to *Escriche*, * * * *enagenacion* means 'the act by which the property in a thing, by lucrative title, is transferred, as a donation; or by onerous title, as by sale or barter. This word, taken in a more extended sense, comprises also the *enfiteusis* (lease), the pledge, the mortgage, and even the creation of a *servidumbre* (servitude) on an estate.' * * * Now, what is the plain sense of this definition of the word *enagenacion*? Obviously, that in its ordinary use it means a transfer of the title, the fee; but taken in a

more comprehensive and enlarged sense, it may mean something more than is usually understood by it, and include the six other contracts mentioned. The word, as used in the instrument under consideration, has been rendered in all the translations in the record by the English word 'alienation;' and it is manifest from the definition given by *Escriche*, in its most comprehensive sense, that the meanings of the two words *enagenacion* and 'alienation' are as nearly identical as the significations of any two words in different languages are ordinarily found to be." When no limiting term is used, the use of the term indicates an intention to convey the fee.

4. *Huddleston, B.*, in *Reg. v. Most*, 7 Q. B. Div. 258. And see *Rex v. Royce*, 4 Burr. 2073.

5. **Distinguished from Obstruction.** — Between *Rev. Stat. Wisconsin*, § 1326, relating to obstructions in a highway, and section 1330 *et seq.*, relating to *encroachments*, there is a clear distinction; and when one is notified by the supervisors to remove his fence as being an *encroachment* on the highway, and he denies the *encroachment*, the supervisors should proceed according to the statute to determine whether an *encroachment* has been made; and an action to recover the penalty for obstructing the highway, under section 1326, does not lie. *State v. Pomeroy*, 73 Wis. 664.

Stream. — The city charter gave the common council power to require the removal of *encroachments* in a certain stream. In construing this provision the court said: "If the plaintiff's action was not to remove *encroachments*, it follows that plaintiff could not lawfully remove any of the existing banks of the stream. For if such banks were in any respect an interference with the flow of the stream, then they must be *encroachments* thereon, and could not be deposits or obstruc-

ENCUMBRANCE — ENCUMBER. — See INCUMBRANCE.**END.** — See note 1.**ENDEAVOR.** — See note 2.

tions in the stream. A bank is not a deposit in the stream, nor is it an obstruction, as distinct from an *encroachment*. It appears from the evidence that there were trees along the banks where the stream passed through defendant's land, which trees the plaintiff cut down and the roots of which plaintiff dug out. This fact shows that these trees, and the banks on which they stood, could not have been deposits or obstructions in the stream. If these banks and these trees were nearer to the centre of the stream than the original banks were, then they might be *encroachments*. If they were claimed to be *encroachments*, then the plaintiff could not act in respect to them except under the sections above cited, giving a jury trial, etc. But no such proceedings were taken. Very plainly the plaintiff cannot, by calling an *encroachment* a deposit, deprive the defendant of his right to a jury trial. And the words 'deposits' and 'obstructions' plainly designate different things from the word *encroachments*." *Schenectady v. Furman*, 61 Hun (N. Y.) 175, *affirmed* 133 N. Y. 695.

Distinguished from Dedication. — A statute authorized the city council to permit and sanction *encroachments* for a fair and reasonable compensation paid in money into the city treasury. It was held that under such authority the mayor and council did not have the power to make a donation of ten acres of land of the city commons to a railroad corporation, and afterwards grant to such corporation large *encroachments* upon a street of the city, the consideration therefor being the return of the ten acres of land to the city. The court said: "We do not think that the legislature, when it passed that act, contemplated that the mayor and council would have the right or authority, or would ever claim the right, to grant to a railroad company a block of land eighty feet wide and four hundred and eighty feet long in one of the busiest streets of the city. Our idea is that the meaning of the Act of 1857 is to allow them to grant small *encroachments* to property holders, along the whole length of the street and on both sides thereof, in order to narrow the streets. It was never contemplated that they should have power to grant an *encroachment* which would jut out eighty feet into the street and be an obstruction thereon. Such a grant as this was not an *encroachment*, but a dedication of the major part of the street for purposes entirely foreign to the object for which the street was laid out." *Daly v. Georgia Southern, etc., R. Co.*, 80 Ga. 796.

1. Ended. — An entry by the plaintiff of "ended, debt and costs paid," in the docket of a suit, is equivalent to an entry of satisfaction, and may be pleaded in bar of a new suit for the same cause of action. *Phillips v. Israel*, 10 S. & R. (Pa.) 391.

The term *ended* means final, definitely complete, conclusive. *Bonsack Mach. Co. v. Woodrum*, 88 Va. 515.

End of Voyage. (See also VOYAGE.) — Where

A shipped on board B's fishing vessel, under an agreement that he should have a certain proportion of the fish taken, and drew an order on B requesting him to pay C a certain sum at the *end* of the voyage, if he should make enough, which was accepted by B, the *end* of the voyage meant, not the arrival of the vessel at port, but a point of time after the sale of the fish. *Bradford v. Drew*, 5 Met. (Mass.) 188.

End On. (See also the title NAVIGATION.) — Under a regulation that if two sailing ships are meeting *end on*, or nearly *end on*, so as to involve risk of collision, the helms of both shall be put to port, "sailing ships are meeting *end on* when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision on account of their proximity, and when the vessels have advanced so near to each other that the necessity for precaution to prevent such a disaster begins;" and "nearly *end on*" includes "cases where two sailing ships are approaching from nearly opposite directions, or on lines of approach substantially parallel, and so near to each other as to involve risk of collision." *The Nichols*, 7 Wall. (U. S.) 656; *The Dexter*, 23 Wall. (U. S.) 75.

Signing — End of the Will. (See also the title WILLS.) — In *Matter of Dayger*, 47 Hun (N. Y.) 127, it was said: "An instrument is signed at the *end* thereof when nothing intervenes between the instrument and the subscription."

A subscription by a testator after the attestation clause has been held to be at the *end* of the will. *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156. It was claimed in that case that the attestation clause was not part of the will, and therefore the signature should have preceded it in order to be at the *end* of the will.

End of the Year. (See generally the title TIME, COMPUTATION OF.) — An *English* statute provided that a person charged with an income tax might under certain circumstances claim repayment "at the *end* of the year." It was held that the expression "at the *end* of the year" did not mean at any time after the *end* of the year, or, on the other hand, within any limit of time generally applicable, but as soon after the *end* of the year as, having regard to the circumstances of the particular case, was practicable by the use of due exertions. *Reg. v. Income Tax Com'rs*, 21 Q. B. Div. 313.

2. Endeavor to Make a Revolt. (See also the title SEAMEN.) — In *U. S. v. Kelly*, 11 Wheat. (U. S.) 417, which came before the court on a certificate of division on the question whether it is competent for the court to give a judicial definition of an *endeavor* to make a revolt, the court decided the point in the affirmative and said: "We think that the offense consists in the *endeavor* of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her

ENDORSE. — See the titles **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 65; **CHECKS**, vol. 5, p. 1028; and see **INDORSE**.

ENDOW — ENDOWMENT. (See also the titles **CHARITIES AND TRUSTS FOR CHARITABLE USES**, vol. 5, p. 893; **DOWER**, vol. 10, p. 122; **ENDOWMENT INSURANCE**, *post.*) — “To endow” means to give; to bestow; to furnish with a portion of goods or estate; to settle on, as a permanent possession; to furnish with a permanent fund or property.¹ “Endowment” is defined as property or pecuniary means bestowed as a permanent fund; as, the endowment of a college, a hospital, or a library.²

or by transferring their obedience from the lawful commander to some other person.” Justice Washington delivered the opinion of the court, and was one of the judges before whom the case was originally tried. 4 Wash. (U. S.) 528. But in *U. S. v. Haines*, 5 Mason (U. S.) 272, Mr. Justice Story, who, as one of the justices of the Supreme Court, concurred in the above definition, in reply to the argument of the defendant’s counsel used this language: “In truth, I consider the definition given by the Supreme Court not to have been designed to have more than an affirmative operation; that is, to declare that such acts would amount to the offense, and not negatively, that none others would.” See also *U. S. v. Huff*, 13 Fed. Rep. 635.

1. Endow. — *Gupton v. Gupton*, 3 Head (Tenn.) 489, in which case it was held, where a statute provided that the widow might within a year dissent from the provision made for her in her husband’s will and be **endowed** as if her husband had died intestate, that the use of the term **endowed** did not limit the estate to be taken by the widow to one-third of the land, but embraced the personal estate, the court saying that the term **endowed** could not be confined to the act of assigning dower.

In *Liggett v. Ladd*, 17 Oregon 104, the court said: “To **endow** means to make provision for the support of a corporation or institution by appropriating lands or funds as a source of regular and reliable income. By the word **endow**, as used in that article, it would seem to have been intended to endue the college with all the functions and capacities which such word imports, and that is, usually, to take and receive property or funds in all the various forms in which it may be donated for educational purposes.”

“The word **endow** means giving a benefit to some existing thing: it supposes something to exist, either at the time when the gift is made or when the **endowment** is to take place.” *Edwards v. Hall*, 6 De G. M. & G. 83.

2. Exemption from Taxation — Real Property. (See also the title **EXEMPTION FROM TAXATION**.) — *Wagner Free Institute’s Appeal*, 116 Pa. St. 564, in which case it was held that where the gifts, bequests, or **endowments** of a charity were exempt from taxation, a conveyance of real property for the use of charity was not an **endowment**. The court said: “A gratuitous conveyance of the title to a piece of real estate is in a very large sense a gift, but it is not so designated in the popular or in the legal thought or expression, and we would not feel at liberty to depart from the ordinary meaning of the word in construing a statute exempting property from taxation. Nor is the word **en-**

dowment any more apt to describe such property as this. **Endowment** is defined by Worcester as ‘property or pecuniary means bestowed as a permanent fund; as, the **endowments** of a college, a hospital, or a library.’ It is certainly understood in common acceptation as a fund yielding income for the support of an institution.”

A taxation act, after exempting certain lands and chattels, among others buildings erected and used for religious worship, and the furniture thereof, and personal property used therein, exempted the “**endowment** or fund” of any religious society. In construing this the court said: “These words, ‘**endowment** or fund,’ are *ejusdem generis*, and intended to comprehend a class of property different from the other two, not real estate or chattels. The only difference between the words is that ‘the fund’ is a general term including the **endowment**; while the **endowment** is that particular fund, or part of the fund, of the institution bestowed for its more permanent uses, and usually kept sacred for the purposes intended.” **Endowment** does not include real estate, and consequently a parsonage was held not exempt from taxation. *State v. Lyon*, 32 N. J. L. 360.

Nor are lots, part of the church property, situated apart from the church edifice, a part of the “**endowment** or fund.” *State v. Krollman*, 38 N. J. L. 323.

Same — Endowment and Donation. — A statute exempted from its operation any institution, establishment, or society for religious or other charitable purposes, wholly maintained by voluntary contributions, and provided that where any charity was maintained partly by voluntary subscriptions and partly by income arising from any **endowment**, the powers and provisions of the act should, with respect to such charity, “extend and apply to the income from **endowment** only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income, in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this act.” In construing this provision the master of the rolls said: “It is clear, also, that the word **endowment** would extend to and include any sum given for a specific and peculiar trust or object in connection with the particular charity. But the difficulty is this: at what point and under what

condition does a donation become an *endowment* within the meaning of this section? The word *endowment* is not used here in its ordinary and popular sense; so used it is impossible to distinguish between a donation and an *endowment*. In ordinary parlance, a man who granted an annuity of one hundred pounds out of his landed estate to the corporation of the sons of the clergy would be said to *endow* it. In like manner, a man who gave two thousand pounds at once to the corporation would be said to have *endowed* it. The section speaks of the 'income arising from *endowment*.' If the word *endowment* has reference to the production of an annual income only, the fact that the corporation invested its contributions in any permanent investment would alter the character of the money bestowed and convert it from a contribution into an *endowment*; but it is impossible that the legislature can have meant to make the control of the charity commissioners dependent upon the circumstance whether or not the affluence or providence of the society had enabled or induced it to secure a portion of its funds by an investment in a permanent security. It is suggested in argument that the cessation of voluntary contributions would at once, as a matter of course, put the whole of the property of the institution under the control of the charity commissioners; but I dissent from that argument. It is impossible that such could have been the meaning of the legislature. Occasional or accidental unpopularity might deprive an institution of the receipt of contributions for a series of two or three or more years, which might afterwards be renewed. I think it impossible to hold that such a circumstance would alter the character of the institution within the meaning of this section, so as to bring it within the scope of the act, and to exclude it from the exception contained in this section, during the period of its cessation from receiving voluntary contributions, and then give it the benefit of the exception again, and take it away from the control of the charity

commissioners on the return of the subscriptions. But if the argument be well founded, the authority of the charity commissioners must attach after the contributions have ceased for a reasonable time, without a prospect of any returning contributions, which nevertheless, from altered circumstances, might be shortly afterwards received.

"The cessation in the receipt of voluntary contributions cannot alter the character of the funds already received by the institution; and, assuming them to have been originally voluntary contributions, they continue to retain that character as long as they remain in possession of the corporation, although invested in some permanent security, provided always that they are not by some competent authority set apart for or impressed with any particular trust. My opinion is founded upon the words of the sixty-second section, 'where any charity is maintained,' etc. It is clear, from this language, that a donation or bequest would be an *endowment*; but if invested, the income arising from it would be exempted from the control of the board; unless, to use the words of the act, there was a 'special application or appropriation,' that is to say, an appropriation to some specific, as distinct from the general, purpose and object of the association. My opinion, therefore, founded on the consideration of this section, taken by itself alone, is that the word *endowment* has reference to an *endowment* made for some specific or particular purpose or trust. I use the words 'specific or particular purpose or trust' advisedly, because a gift of a sum of money to the corporation *simpliciter*, or a gift in trust for the furtherance of the objects and purpose for which the corporation was established, would be various ways of accomplishing the same end, namely, making a donation to the corporation itself." *Governors for Relief of Poor Widows, etc. v. Sutton*, 27 Beav. 651. See also *Royal Soc. of London v. Thompson*, 17 Ch. Div. 407.

ENDOWMENT INSURANCE.

BY CHARLES SUMNER LOBINGIER, M.A., LL.M.

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I. DEFINITION AND NATURE — 1. In General. — Endowment Insurance is a contract evidenced by an instrument styled a policy, by which one party, for a consideration called the premium, promises to pay a specific sum of money at a time stated, or at the payee's death if it occurs earlier than the date fixed for payment.¹ In its broadest sense it includes tontine insurance, as all tontine policies are written on the endowment plan combined with the survivorship feature.²

2. Is It Life Insurance? — There is an apparent conflict in the authorities as to whether this contract is properly classed as life insurance at all. On the one hand it has been denied that character³ and is declared to be rather a loan

1. Endowment Insurance Defined. — 1 Biddle on Insurance, § 5; Cooke on Life Insurance, § 107; Briggs v. McCullough, 36 Cal. 542.

"The very essence of any definition of insurance is indemnity for loss in respect of a specified subject. The contract of life insurance, or of insurance upon a life, in the ordinary form, is a contract to pay a certain sum of money on the death of the insured. Another form, known as 'endowment insurance,' is a contract to pay a certain sum to the insured if he lives a certain length of time, or, if he dies before that time, to some other person indicated. In either of these forms the contract is, strictly speaking, an insurance on the life of the party, although the latter is generally denominated 'endowment' insurance." State v. Federal Invest. Co., 48 Minn. 110.

"An endowment policy is an insurance into which enters the element of life. In one aspect it is a contract payable in the event of

a continuance of life; in the other, in the event of death before the period specified." Brummer v. Cohn, 86 N. Y. 11, 40 Am. Rep. 503.

"The most common, and the original, form consists in the simple life policy, which is an agreement to pay a certain sum upon satisfactory proof of the death of the insured, or within a certain time thereafter. The second form is like the first, except that it is called an endowment policy, and provides that at a certain time, or on the happening of a certain event, the whole amount of the policy shall, if the applicant be living, be paid to him, but if he die during the meantime that it will be paid to his representatives." Alexander on Life Insurance 3.

2. See the title *TONTINE INSURANCE*.

3. Whether Endowment Insurance Constitutes Life Insurance. — Cooke on Life Insurance, § 107, where the author says: "Sometimes

or investment,¹ but, on the other hand, it has been frequently treated as a form of life insurance.²

Exemption of Insurance Money. — In *California* an endowment policy was held to be within the provisions of a statute which exempted from execution the proceeds of any "insurance on the life of the debtor."³ But it has, in the absence of such a statute, been held that the avails of an endowment policy taken out by an insolvent husband in favor of his wife are subject to the claims of creditors.⁴ It has been held, however, that the rule is different where the

the contract to pay on the death of the insured is conjoined with a contract to pay on the expiration of a fixed period, should he live so long. Such a contract is called a contract of endowment insurance, though, so far as concerns the contract to pay on the expiration of a fixed period, it is not, strictly speaking, a contract of life insurance at all."

1. *Talcott v. Field*, 34 Neb. 611, 33 Am. St. Rep. 662, where the court said: "A policy of life insurance is a contract in consideration of certain payments to the insurer, for which it undertakes to pay a certain sum upon the death of the person whose life is insured. 3 Kent's Com. 366. Under the endowment plan, however, the insurer undertakes, upon the payment of a certain amount, to pay the insured, or such person as he may designate, a certain specified sum in a given number of years. It is more like an investment than insurance, the latter being a mere incident and not the main purpose of the transaction." But compare *Studebaker Bros. Mfg. Co. v. Welch*, 51 Neb. 228, and *Tompkins v. Levy*, 87 Ala. 263, 13 Am. St. Rep. 31.

2. **The Endowment Contract Treated as Life Insurance.** — *Alexander on Life Insurance* 3.

California. — *Briggs v. McCullough*, 36 Cal. 542.

Illinois. — *Rockhold v. Canton Masonic Mut. Benev. Soc.*, 129 Ill. 440.

Kansas. — *Endowment, etc., Assoc. v. State*, 35 Kan. 253. Compare *State v. National Assoc., etc.*, 35 Kan. 51.

Minnesota. — *State v. Federal Invest. Co.*, 48 Minn. 110; *Tennes v. Northwestern Mut. L. Ins. Co.*, 26 Minn. 271.

Nebraska. — *State v. Farmers', etc., Mut. Benev. Assoc.*, 18 Neb. 276.

Pennsylvania. — *Hendel v. Reverting Fund Assur. Assoc.*, 2 Pa. Dist. Rep. 116.

Canada. — *Ontario Insurance Corporations Act*, 1892, § 12 (*d*).

Compare *State v. Merchant's Exch. Mut. Benev. Soc.*, 72 Mo. 146.

3. **Exemption of Endowment Insurance Money — Under Statutes Exempting Life Insurance.** — "It must appear that it is an 'insurance on the life of the debtor,' and it is urged that the policy in this case is not an insurance on the life of McCullough in the sense of the statute, but is simply a covenant by the company that in consideration of a certain sum deposited by McCullough the company will pay him at the expiration of ten years, or sooner if he dies, a certain other stipulated sum, together with such dividends as his deposit shall in the meantime have earned. The term 'life insurance' is not alone applicable to an insurance for the full term of one's life. On the contrary, it may be for a term of years, or until the assured shall arrive at a certain age. It is

simply an undertaking on the part of the insurer that either at the death of the assured, whenever that event may occur, or on his death, if it shall happen within a specified term, or before attaining a certain age, as the case may be, there shall be paid a stipulated sum. In either form it is, strictly speaking, an insurance on the life of the party. In this case the policy was to become payable on the death of McCullough, provided he died within ten years, and it is to that extent certainly an insurance on his life. It is an undertaking to pay the stipulated sum if he shall die within a specified term, which is of the very essence of life insurance. The fact that the company is to pay the agreed sum at the expiration of ten years, even though McCullough shall not have died in the meantime, does not divest it of its character of life insurance. It is only a new and additional element in the contract, not inconsistent with its other, which is its chief constituent part, to wit, the undertaking to pay on the death of the assured within the specified term. We think, therefore, that this was an insurance on the life of McCullough." *Briggs v. McCullough*, 36 Cal. 542.

4. **Same — In the Absence of Statute.** — *Tompkins v. Levy*, 87 Ala. 263, 13 Am. St. Rep. 31; *Talcott v. Field*, 34 Neb. 611, 33 Am. St. Rep. 662, where it was observed: "It may be conceded that where a reasonable amount of insurance is effected upon the life of a husband, the sole object being to provide a fund for the support of a beneficiary in case of the death of the insured, that such fund will not ordinarily be liable for his debts. Where, however, the money, or a considerable portion of it, is to be repaid in his lifetime, the transaction partakes more of the character of a loan. On principle the insured might deposit the premiums in a bank on time certificates drawing interest and at the end of fifteen years draw the same with accrued interest. Such funds remain the property of the debtor. So in case of an endowment policy. The transaction is simply one of contract in which the insurer promises after a certain date to repay the insured the amount agreed upon. Now suppose the money so invested belongs to the debtor, and which should be applied to the payment of his debts, the mere act of filtering it through the insurance company will not transmute it so that it becomes the property of the beneficiary free from the claims of creditors. If so it would afford an easy mode of evading the law, and no stronger illustration is required than the case under consideration. If a debtor's property may be given to his wife in the way proposed, free from the claims of creditors, then our attachment and other laws for the collection of debts are wholly deficient and ineffectual to protect the rights of credit-

husband is solvent when he pays the premium.¹

Endowment Insurance Companies Subject to Statutes Relating to Life-insurance Companies. — It has been held that a contract in the endowment form is life insurance, and requires compliance on the part of the maker with the laws relating to life-insurance companies.²

II. PARTIES — 1. The Insurer — Statutory Limitations on Right to Issue Endowment Insurance. — The right to issue the contract of endowment insurance is often subject to statutory limitations.³

Right of Corporation to Issue Endowment Insurance Dependent on Charter. — The right of a corporation to issue this form of insurance is, of course, dependent on the terms of its charter.⁴

Compliance with Insurance Laws Necessary. — Compliance with the insurance laws is, as a rule, imperatively required on the part of those assuming to issue the endowment contract,⁵ and a concern attempting to transact business without

ors. But the laws spoken of are not defective, nor is the property in question free from their claims. It is very clear that the money derived from the insurance company, with which the live stock in question was purchased, was the property of the husband and not of the wife, and is liable for his debts."

This is also the doctrine contended for by Mr. Lucius Weinschenk in his pamphlet on "Endowment Life Insurance Policies Carried by Insolvent Debtors" (Denver, 1897). See especially pp. 3, 23.

1. *Studebaker Bros. Mfg. Co. v. Welch*, 51 Neb. 228, *distinguishing* *Talcott v. Field*, 34 Neb. 611, 33 Am. St. Rep. 662, and *following* *Dayton Spice-Mills Co. v. Sloan*, 49 Neb. 622. See the title LIFE INSURANCE.

2. **Statutes Relating to Life Insurance Companies Applicable to Endowment Insurance Companies.** — *Endowment, etc., Assoc. v. State*, 35 Kan. 253.

3. **Statutory Prohibition of Endowment Insurance.** — In *Iowa* it has been held that a mutual association which has never issued endowment policies cannot bind itself by assuming the payment of policies of this class issued by another association prior to the enactment of a statute which prohibited such issue. "After the Act of 1886 took effect the defendant could not have issued to new members certificates providing for endowments like those in question; nor could it then assume or create a liability for such endowments on the part of any of its members whose contracts of insurance did not in some manner provide for it. The agreement of 1889, so far as it relates to the endowments in question, can only be performed on the part of defendant through the medium of assessments. It has no other source from which to obtain the necessary funds. If valid as to its own members it creates a liability on their part for a kind of insurance in which they have no interest, which they cannot obtain, and for which their contracts do not provide. The Act of 1886 authorized the performance of valid contracts for endowments already made, but prohibited the making of new ones similar to those in suit. After it took effect the defendant could not have entered into contracts giving to its own members the advantages of endowment insurance like that in question; and there is less reason for holding that it could impose upon them burdens of such insurance for the

sole benefit of others. The practical operation of the contract, if it were to have the effect contended for by the plaintiff, would be to give to members of the aid society who hold endowment certificates (said to be not more than eighteen in number) all the advantages which accrue from both death and endowment benefits, and the right to have assessed for them the six hundred members of the defendant who do not hold such certificates, while the members last named have the right to assessments on the holders of the endowment certificates for death benefits only. To give the contract that effect would be not only unauthorized, but would perpetrate a gross injustice." *Dishong v. Iowa L., etc., Assoc.*, 92 Iowa 163.

4. **Power of Corporation to Issue Endowment Insurance.** — See the title CORPORATIONS, vol. 7, p. 620.

Thus, it was held in *Illinois* that a benevolent society organized for the purpose of giving "financial aid and benefit to the widows, orphans, and heirs or devisees of deceased members," cannot issue a certificate payable to a member after a certain number of years. *Rockhold v. Canton Masonic Mut. Benev. Soc.*, 129 Ill. 440.

And it has been held that an association organized under an act authorizing a certain number of persons to incorporate "for the purpose of securing to the families or heirs of any member, upon his death, a certain sum of money to be paid by such corporation either out of its fund or by assessment made upon the members of such corporation, * * * or for the purpose of securing in the same manner a certain sum of money, weekly or monthly, to any member disabled from attending to his ordinary duties by sickness or other disability," is not authorized to conduct an endowment insurance business. *Walker v. Giddings*, 103 Mich. 344.

5. **Necessity of Compliance with Insurance Laws** — *Kansas*. — *Endowment, etc., Assoc. v. State*, 35 Kan. 253; *State v. National Assoc., etc.*, 35 Kan. 51.

Minnesota. — *State v. Educational Endowment Assoc.*, 49 Minn. 159.

Missouri. — *State v. Merchant's Exch. Mut. Benev. Soc.*, 72 Mo. 146.

Nebraska. — *State v. Farmers', etc., Mut. Benev. Assoc.*, 18 Neb. 276.

A mutual association which, as part of its

such compliance may usually be proceeded against by the attorney-general.¹

2. The Insured — *a. STATUS.* — Since, under the prevailing view, the endowment contract is treated as a species of insurance, the party to whom the proceeds are payable may be termed the insured; but he is not to be regarded as a member or stockholder in the company which issues the policy.²

b. RIGHT OF RECOVERY — (1) *In General.* — The right of recovery of the insured depends upon much the same principles as those which apply to policies of ordinary life insurance. A valid contract is, of course, essential to recovery; and where the certificate sued on had been issued by a mutual association prior to the enactment of a statute prohibiting the transaction of endowment business by it, but the payment thereof had been assumed by another association after such enactment, it was held that the plaintiff could not recover.³ So, if the insured commits a plain breach of the contract, such as making voyages to a foreign country without asking a permit from the insurer, it will be fatal to recovery.⁴

(2) *Forfeiture.* — Endowment contracts usually provide that they shall be forfeited for the nonpayment of premiums, but the courts have been slow to give effect to such provisions. Thus where the contract provided that paid-up insurance should be issued within a certain time after the cessation and surrender of the old policy for nonpayment of premiums, one who had paid only a part of the ten annual premiums was held entitled to the paid-up insurance, though he had not surrendered the old policy within the required time⁵ and

business, promised to pay "personal benefits" to members after ten years' membership, was ousted from transacting business for non-compliance with the insurance laws. *State v. Farmers', etc., Mut. Benev. Assoc.*, 18 Neb. 276. But a corporation which, after meeting its current expenses, created what was termed a "maturity fund" which it paid in sums of one hundred dollars to the member holding the oldest outstanding certificate, was held not to be transacting endowment insurance, and not subject to the insurance laws of *Minnesota*. *State v. Federal Invest. Co.*, 48 Minn. 110.

1. *Endowment, etc., Assoc. v. State*, 35 Kan. 253; *State v. National Assoc., etc.*, 35 Kan. 51; *State v. Farmers', etc., Mut. Benev. Assoc.*, 18 Neb. 276. *Compare State v. Merchant's Exch. Mut. Benev. Soc.*, 72 Mo. 146.

In *Minnesota* two methods of procedure in such cases are provided, one summary, and the other available only after an examination and report of the insurance commissioner, supplemented by the opinion and formal application of the attorney-general; but these methods are held to be cumulative. *State v. Educational Endowment Assoc.*, 49 Minn. 158.

2. *Term "Insured" Applied to Party to Whom Proceeds Payable.* — *People v. Security L. Ins., etc., Co.*, 78 N. Y. 114, 34 Am. Rep. 522. *Compare Mayer v. Atty.-Gen.*, 32 N. J. Eq. 815.

3. *Invalid Contract of Endowment Insurance.* — *Dishong v. Iowa L., etc., Assoc.*, 92 Iowa 163, where the court said: "It is said the defendant has had the benefits of the contract and is now estopped to deny its validity. The benefits received by the members of the aid society appear to be as great as those they have conferred. They have paid assessments made on account of the death of members of the defendant, and the latter have paid assessments made on account of the death of members of the aid society. Members of that

society have been required to pay more assessments for death benefits than they would have paid had the consolidation of the two corporations not been made, but the beneficiaries of their certificates are entitled to assessments from more members than they could have assessed if the consolidation had not been effected. The defendant has never recognized any liability to make the assessments demanded by the plaintiff, and its members have never paid such assessments, nor in any manner admitted liability for them. The plaintiff and his wife were chargeable with knowledge of the want of power in the defendant to make the assessments in question when they paid those which have been made upon them. We conclude that the defendant is not estopped to make the defense pleaded. Our attention has not been called to any case which is in all respects like this, although it is somewhat similar to that of *Twiss v. Guaranty L. Assoc.*, 87 Iowa 733, 43 Am. St. Rep. 418. See also *Rockhold v. Canton Masonic Mut. Benev. Soc.*, 129 Ill. 440; *Kennan v. Rundle*, 81 Wis. 212. So far as the agreement in question seeks to place upon the defendant liability for the payment of the endowments provided for by the certificates in suit, it is unauthorized and void."

4. *Violating the Foreign Travel Clause.* — *Douglas v. Knickerbocker L. Ins. Co.*, 83 N. Y. 492. *Citing Hathaway v. Trenton Mut. L., etc., Ins. Co.*, 11 Cush. (Mass.) 448; *Nightingale v. State Mut. L. Ins. Co.*, 5 R. I. 38; *Rainsford v. Royal Ins. Co.*, 33 N. Y. Super. Ct. 454, *affirmed* 52 N. Y. 626; *Evans v. U. S. Life Ins. Co.*, 64 N. Y. 304.

5. *Forfeiture for Nonpayment of Premiums.* — *Montgomery v. Phoenix Mut. L. Ins. Co.*, 14 Bush (Ky.) 51; *Southern Mut. L. Ins. Co. v. Montague*, 84 Ky. 653, 4 Am. St. Rep. 218. *Compare Lockwood v. Michigan Mut. L. Ins. Co.*, 108 Mich. 334.

though the original policy had been forfeited by the nonpayment of premiums.¹

c. **RIGHT OF RESCISSION — On Account of Representations as to Profits of Insurer.** — It has been held that the insured in an endowment policy, with the right to share all profits, could not rescind the contract merely on account of misrepresentations of the insurer's agent as to future profits.² Nor is a clause in the prospectus of the insurer to the effect that it requires the payment of interest in advance on one loan which it will make to the insured, but "all other interest paid by dividends," equivalent to a guaranty that the dividends will meet all other interest, so as to entitle the insured to rescind if they fail to do so.³

On Account of Misrepresentations as to Provisions of Policy. — But where the policy issued to the insured is materially different in its provisions and benefits from that which was represented by the insurer's agent the former may rescind and recover back the premium paid.⁴ So where an assessment company transacting business on the endowment plan subsequently abandons it for ordinary insurance and induces members to surrender their old certificates, thus diminishing the endowment fund, this is a sufficient ground for a member to rescind his contract and sue to recover back his assessments.⁵

d. **RIGHT OF ASSIGNMENT AND TRANSFER.** — In ordinary life insurance the beneficiary acquires a vested right at its inception, and no divestiture of this right is usually permitted.⁶ In case of endowment policies where the proceeds are payable to the insured himself or his estate, he has an absolute right of disposition.⁷ And even where the endowment policy is made payable to another than the insured, authority is not wanting for the rule that the payee or beneficiary acquires no vested right, as in ordinary life insurance policies,⁸ and that the assured may assign or transfer the same at pleasure.⁹

1. *Winchell v. John Hancock Mut. L. Ins. Co.*, 30 Fed. Cas. No. 17,866, 8 Ins. L. J. 651, 8 Rep. 549.

In *Massachusetts* the nonforfeiture law operates to prevent the full enforcement of the clause, and one who has survived the endowment period and paid all but the last premium may recover the proceeds of the policy less the amount due, with interest, notwithstanding the contract provides that the policy shall be forfeited if the premium is not paid on the day when it becomes due. *Carter v. John Hancock Mut. L. Ins. Co.*, 127 Mass. 153.

But in *Rhode Island*, without a nonforfeiture law, an endowment contract was held to be forfeited where, after notes had been given for two of the fifteen annual premiums, the insured had taken out paid-up insurance subject to the terms of the original contract, but made no payment on the notes. *McQuitty v. Continental L. Ins. Co.*, 15 R. I. 573, 16 Ins. L. J. 950.

And in *Wisconsin*, under an endowment policy providing for the payment to the insured of a sum proportionate to the premiums paid by him in cash when due, no recovery was permitted for a portion of the premiums for which the insured had merely given his notes. *Ewald v. Northwestern Mut. L. Ins. Co.*, 60 Wis. 431.

2. **Representations as to Future Profits.** — *Hale v. Continental L. Ins. Co.*, 12 Fed. Rep. 359.

3. *MacIntyre v. Cotton States L. Ins. Co.*, 82 Ga. 478.

4. **Misrepresentations as to Provisions of Policy.** — *U. S. Life Ins. Co. v. Wright*, 33 Ohio St.

533. But compare *Gougower v. Equitable Mut. L., etc., Assoc.*, (Iowa 1895) 63 N. W. Rep. 192.

5. *People's Mut. Ins. Fund v. Bricken*, 92 Ky. 297, 22 Ins. L. J. 554.

6. See the title **BENEFICIARIES (IN INSURANCE)**, vol. 3, pp. 980-984.

7. **Insured's Power of Disposition.** — *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591; *White v. Smith*, 2 Tex. App. Civ. Cas., § 401, the court saying: "The certificate in this case is a very different instrument from an ordinary life-insurance policy. It was primarily intended for the benefit of the assured himself. It is payable to him or his order. He was himself the beneficiary in it. No one else had any interest in it. He could have disposed of it by assignment without restriction, and his power of disposition being absolute, of course he could dispose of it by will. It was a part of his estate, and upon his death passed, not to his heirs, but to his executor, to be administered in accordance with the testator's will."

8. *Tennes v. Northwestern Mut. L. Ins. Co.*, 26 Minn. 271; *Miller v. Campbell*, 2 Misc. Rep. (N. Y. Super. Ct.) 518; *Tompkins v. Levy*, 87 Ala. 263, 13 Am. St. Rep. 31.

9. **Assignment Permitted.** — *Bursinger v. Watertown Bank*, 67 Wis. 75, 58 Am. Rep. 848, the court saying: "Whatever objection there might be to allowing the assignment of a life policy, upon which the future premiums are to be paid, during the life of the assured, no such objection can be fairly raised against the assignment of a policy upon which all the premiums have been paid, and the payment of the

Limitation on Right of Insured to Surrender Policy. — Other decisions, however, seem to place a limitation upon the right of the insured in an endowment policy to surrender it as against the beneficiary.¹ Especially where the endowment policy has been exchanged for paid-up insurance it has been held that the beneficiary acquires a vested interest in the latter.² And where an endowment policy is made payable to the insured's mother, if living, and otherwise to his brothers and sisters, and provides for a cash surrender value upon a receipt by the insured and beneficiaries, it is necessary that all of the latter join in such receipt.³

amount due is alone dependent on the death of the assured, nor to the assignment of an endowment policy where nearly all the payments have been made."

In *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151, it was said: "By the policy, if Alanson K. Josselyn 'shall survive until the eighth day of November, 1877, then the said amount insured shall be paid to him, deducting therefrom the amount of all unpaid notes given for premiums or loans by them on this policy, and all deferred premiums, if any, then existing.' This interest in the policy Alanson K. Josselyn could assign, and did assign to the plaintiff, as collateral security for the payment of two promissory notes given by him. That his wife joined with him in the assignment does not detract from the effect of his assignment; and it is not necessary to consider what would have been the effect of her assignment if her husband had died before November 8, 1877."

But compare with the case last cited *Pingrey v. National L. Ins. Co.*, 144 Mass. 374.

1. Limitations upon Right of Surrender. — *Pingrey v. National L. Ins. Co.*, 144 Mass. 374, in which case the court said: "In this case the assured reserved to himself no power of revocation or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the premiums; but the omission to do this did not have the effect to give to him an implied power of revocation. His mother might herself continue the payment of the premiums. Moreover, by the terms of the policy, after payment of two full annual premiums it would not lapse, and certain valuable rights would still exist under it. Under these circumstances the assured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority. *Chapin v. Fellowes*, 36 Conn. 132, 4 Am. Rep. 49; *Lemon v. Phoenix Mut. L. Ins. Co.*, 38 Conn. 294; *National L. Ins. Co. v. Haley*, 78 Me. 268, 57 Am. Rep. 807; *Barry v. Brune*, 71 N. Y. 261; *Landrum v. Knowles*, 22 N. J. Eq. 594; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156, 58 Am. Rep. 806; *Ricker v. Charter Oak L. Ins. Co.*, 27 Minn. 193, 38 Am. Rep. 289; *Wilburn v. Wilburn*, 83 Ind. 55; *Weston v. Richardson*, 47 L. T. N. S. 514. It is urged, in behalf of the widow of the assured, that the above rule should not be applied to the case of an endowment policy, like the present, where the whole sum covered by the policy was to be paid to the assured himself as soon as the premiums and other payments should amount to that sum. But the assured died be-

fore the premiums amounted to that sum, and no other payments were made upon the policy, and therefore the amount of the policy did not become payable to him, but by its terms was payable to his mother. The fact that it might have become payable to him in a certain contingency, which did not happen, is immaterial."

2. *Brockhaus v. Kemna*, 10 Biss. (U. S.) 338, 7 Fed. Rep. 609, the court saying: "Whatever principle of law might be regarded as applicable and controlling if the right of Mrs. Kemna to the first policy in which she was named as beneficiary, or its proceeds, was involved, an important fact in the case is that the complainant surrendered that policy and received from the company a paid-up policy, payable to Mrs. Kemna in 1878. The same was done with reference to the other policies in which his other daughters are named as beneficiaries. This new policy, payable to Mrs. Kemna, was an absolute promise on the part of the company, in consideration of the past payments of premiums, to pay her \$1,690. It was not a policy liable to lapse, but it constituted an absolute, fixed liability, and the question is whether, as between the father and daughter, it was not an executed gift from him which he could not revoke. I can have no doubt that it was, unless the circumstances under which the act was done can have the effect to create other rights between the parties."

3. "The interests of all the beneficiaries in the present case depend upon contingencies. The contingency of the death of the insured within twenty years applies to both beneficiaries. The interest of the brothers and sisters depends upon one other contingency, viz., the death of the mother before the assured. The contract is specific and clear in requiring the receipt of all the beneficiaries before the obligation of payment is fastened upon the defendant. It might have provided for its surrender upon his receipt alone, or upon those of himself and mother, in which event the beneficiaries could not complain; but it did not. Both the plaintiff and the defendant agreed that the beneficiaries should be consulted about the termination of the contract, and that their receipt should be produced in order to terminate it. If plaintiff should refuse or neglect to pay the annual premiums, it would be doubtful if the policy would be forfeited without notice to the beneficiaries and the opportunity afforded them to keep the policy alive by payment. It follows that plaintiff had not complied with the plain terms of his contract, and was therefore not in position to maintain this suit." *Lockwood v. Michigan Mut. L. Ins. Co.*, 108 Mich. 334.

e. **RIGHTS OF INSURED UPON INSOLVENCY OR DISSOLUTION OF INSURER.** — The holder of an endowment policy is a creditor of the insurance company by which it is issued.¹

Computation of Value of Policy Holder's Interest. — In case the company becomes insolvent, the interest of such holder is to be determined according to the tables in common use by actuaries,² and the employment of the Northampton Tables for this purpose is proper.³

Priority as Between Policy Holders. — Where the insurer is a stock corporation, it has been decided that the holders of policies founded upon death losses accruing prior to dissolution are not entitled to priority over claims founded upon policies running at that time.⁴ But in winding up a mutual company it was determined that the holders of policies which had matured either by death or by the expiration of the endowment period were preferred creditors, and could not be called upon to share subsequent losses, while the holders of unmatured policies were not such creditors though they might have paid their premiums.⁵ Upon the revocation of a mutual company's license, holders of policies which have matured prior thereto are entitled to payment from the endowment fund, and those maturing after that date take their distributive share.⁶

f. **MISCELLANEOUS RIGHTS.** — Sometimes the company which issues the endowment contract becomes a lender to, as well as a borrower from, the insured.⁷

1. Policy Constitutes the Holder a Creditor. — *People v. Security L. Ins., etc., Co.*, 78 N. Y. 114, 34 Am. Rep. 522; *Carr v. Hamilton*, 129 U. S. 252.

2. Mode of Determining Policy Holder's Interest. — *Carr v. Hamilton*, 129 U. S. 252.

3. People v. Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522.

4. Priority as Between Policy Holders. — *Relfe v. Columbia L. Ins. Co.*, 76 Mo. 594. Compare *Wilson's Case*, L. R. 9 Eq. 720; *People v. Security L. Ins., etc., Co.*, 78 N. Y. 114, 34 Am. Rep. 522.

5. Mayer v. Atty.-Gen., 32 N. J. Eq. 815, reversing *Vanatta v. New Jersey Mut. L. Ins. Co.*, 31 N. J. Eq. 15; *Gray v. Merriman*, (Minn. 1894) 57 N. W. Rep. 463, 23 Ins. L. J. 765.

6. Stamm v. Northwestern Mut. Ben. Assoc., 65 Mich. 317.

7. Loans by Insurer to the Insured. — *Carr v. Hamilton*, 129 U. S. 252; *MacIntyre v. Cotton States L. Ins. Co.*, 82 Ga. 478.

Interest on Loans to Insured. — In the above-cited case of *MacIntyre v. Cotton States L. Ins. Co.*, 82 Ga. 478, it was said: "The consideration of the contract was 'an annual premium of \$736.60 to be paid on the 24th of January in each and every year for fifteen years next succeeding the date of this policy or during its continuance; which annual premium is to be paid in the manner following: An annual loan of \$368, and a cash annual premium of \$368.60, to be paid on the 24th day of January.' From the sum insured were to be deducted 'the balance of the year's premium on this policy, if any, and also all the notes or credits for premiums thereon, and other indebtedness of the insured to this company.' Amongst the conditions set out in the instrument was one declaring that 'if the premiums due on this policy shall not be paid at the time above mentioned, and the interest on one note or credit for premiums on this policy paid annually in advance to this company or its authorized agents, * * * this policy shall terminate

and become void and of no effect.' " The court, in construing the above, said: "We have quoted from the document the sole expression touching interest which it contained; and were that expression the only clue to the meaning of the policy there might be some difficulty in arriving at the conclusion that more interest accrued than was required to be paid in advance. But as the policy made the whole premium for each year due in January, the whole would have been payable then in cash had it not been stipulated that nearly half of each should be payable in a loan. No time was expressed for the loan to become due; but as it was a substitute for cash it seems to us that it ought to be considered due for the purpose of bearing interest at the time it was made. No doubt it was intended to run on without payment until the policy matured, but to make it the equivalent of cash it would have to be treated as an investment of that much money producing an income, which income, as no other measure was adopted, could be measured only by the lawful rate of interest, seven per cent per annum. The contract, on this question as well as on every other, ought to be construed with reference to the nature of the business in which the insurance company was engaged. Its business was to accumulate money not only for the benefit of its stockholders, but for the redemption of its policies. There can be no presumption that it, or those who dealt with it, contemplated the lending of its assets gratuitously, or for merely friendly accommodation without interest. How could such an institution afford to leave half of its premiums in the hands of its patrons unemployed and unproductive? Or how could it afford to accept a single year's interest paid in advance as compensation for the use of loans spreading over various periods from fifteen years to one year respectively? It seems to us that such a system of business cannot rationally be supposed to have been adopted or to have been in the contemplation of either of the

Right of Set-off by Insured. — And in an action by the insurer to recover the amount of such loan it is held by the federal Supreme Court that the insured may set off the amount due on the endowment policy; ¹ but the contrary rule prevails in *New York*.²

Policy on "Reserve Dividend Plan." — Where an endowment policy was issued on the "reserve dividend plan" the meaning of these words was determined by recourse to contemporaneous insurance literature.³

3. Beneficiaries — To Whom Proceeds Are Payable. — In the endowment contract the beneficiary or payee of the proceeds may be the insured himself.⁴ Even where other parties are named the proceeds may really belong to the insured's estate, as where they are made payable on his death to his "heirs or representatives."⁵

Payee Dying Before Insured. — So where the money is made payable to the insured at the end of the endowment period, but is to go to another in case of the former's earlier death, the latter acquires no rights if the insured survives.⁶

parties to this contract. All writings are to receive a reasonable construction, with reference to the nature of the business or subject-matter to which they relate. It would be unreasonable even to the verge of absurdity to hold that a business corporation, such as a bank or an insurance company, intended to loan its funds for years upon years in the regular course of its business transactions without interest or income as compensation to it for the use of them by the borrower. Moreover, under the charter of this company (Acts of 1868, p. 47), each of the insured was entitled to participate in the profits by sharing in dividends. The chief if not the only capital employed in producing dividends, in behalf of the policy holders, we may assume, was money taken in as premiums from the insured on their respective policies. If some of the insured paid the whole of their premiums in cash, and some paid only half, themselves borrowing from the company the other half, there would be great inequality in allowing dividends to both these classes on equal terms; and the charter contains nothing warranting unequal terms, either with reference to furnishing money with which to produce profits or in the distribution of dividends. We cannot escape the conviction that as the whole annual premium upon the policy now in question became due in January of each year, the contract really meant that the company was to have for it, as a whole, either the cash, so as to use the same itself, or the equivalent of cash, if the insured retained the money for his own use under the name of loans.⁷

1. Set-off by Insured of Amount Due on Policy Against Amount of Loan. — *Carr v. Hamilton*, 129 U. S. 252. See the title SET-OFF, RECOVERY, AND COUNTERCLAIM.

2. Newcomb v. Almy, 96 N. Y. 308. This case was expressly disapproved in *Carr v. Hamilton*, 129 U. S. 252.

3. "Reserve Dividend Plan" Policy — Liability upon Determined in Accordance with Contemporaneous Literature. — Where, at the time of issuing a "reserve dividend plan" policy by the defendant corporation, there had been published and copyrighted a volume entitled "Key to Reserve Dividend Plan," and the only "reserve dividend plan" known at the time was the one explained in this work, it

was held that the company's liability upon a policy should be determined in accordance with the principles explained in the said "key." *Fuller v. Metropolitan L. Ins. Co.*, 37 Fed. Rep. 163.

4. Proceeds Payable to the Insured. — *White v. Smith*, 2 Tex. App. Civ. Cas., § 399.

5. Wason v. Colburn, 99 Mass. 342.

6. Right of Payee in Case of Death of Insured where the Latter Survives. — *Bancroft v. Russell*, 157 Mass. 47; *Tennes v. Northwestern Mut. L. Ins. Co.*, 26 Minn. 271. Compare *Levy v. Van Hagen*, 69 Ala. 17; *Miller v. Campbell*, 140 N. Y. 457, 23 Ins. L. J. 458, affirming 2 Misc. Rep. (N. Y. Super. Ct.) 518.

In *Brigham v. Home L. Ins. Co.*, 131 Mass. 319, it was held that the insured's interest passed to his assignee in bankruptcy, though the policy was made payable to his children in case he died before the end of the endowment period, since the children's interest was contingent on the insured's death.

In *Lamberton v. Bogart*, 46 Minn. 409, the policy was made payable to the insured's "executors, administrators, or assigns, in ninety days after satisfactory proof of the death of said George H. Elmer, if death occurs prior to his attaining the age of fifty-five years. In case of the death of said George H. Elmer before attaining the age of fifty-five years, this policy shall be payable to Anna Elmer, wife of said George H. Elmer." The part of the foregoing which is italicised was inserted in writing, while the remainder was in the printed provisions of the policy. The court, in construing this language, said: "It seems to us that what the insured had in mind, and what he intended by the written portion of this policy, was to provide protection for his wife in case she survived him, and nothing more. Thus construed, the meaning of the policy would be that, in case of the death of the insured before its maturity, the money should be paid to his personal representatives or assigns, provided, however, if his wife was then living, it should be paid to her. This construction would give effect to both the printed and the written portions of the policy, for it would make the latter in the nature of an exception to the former, leaving the printed provision in force, except in case of the happening of the contingency constituting the exception."

Wife Suing for Divorce. — Where a policy was taken out insuring the life of the applicant's wife and payable in four years to her if living, otherwise to the applicant himself, the wife was held to be entitled to the proceeds at the end of the endowment period, though she had filed a petition for a divorce, and though the husband had paid the premiums, retained the policy, and received the dividends thereon.¹

Assignment of Policy by Wife as Beneficiary. — Under a former *New York* statute the wife as beneficiary was not competent to assign an insurance policy, and this limitation was held applicable to endowment contracts.²

ENEMY. (See also the titles ALIENS, vol. 2, p. 86; TREASON. As to "public enemies," see the titles CARRIERS OF GOODS, vol. 5, pp. 235, 236, 258; COMMON CARRIERS, vol. 6, p. 263; CONTRACTS OF AFFREIGHTMENT AND CHARTER PARTIES, vol. 7, pp. 203, 208; MARINE INSURANCE.) — See note 3.

ENFANS. (See also the title CHILD — CHILDREN, vol. 5, p. 1082.) — *Enfans* comprehends grandchildren down to the latest generation.⁴

1. Effect of Suit for Divorce. — *Ætna L. Ins. Co. v. Mason*, 14 R. I. 583, 14 Ins. L. J. 572. The court, in commenting on the *Rhode Island* statute which makes insurance money taken out for the wife inure to her separate use and benefit, observed: "We think it is quite clear that under this provision, in the absence of any fraud or mistake, the policy must be taken to have inured to the benefit of the said Annie, according to its terms, notwithstanding that it was never delivered to her, but was retained by her husband and was payable to him in case of her death before the time for payment. Hers was the primary right, he having no right if she survived the time for payment. Having survived, her right has become absolute. Indeed, the cases go far to show that this would have been the effect without the statute. *Landrum v. Knowles*, 22 N. J. Eq. 594; *Ricker v. Charter Oak L. Ins. Co.*, 27 Minn. 193, 38 Am. Rep. 289; *Fowler v. Buttery*, 78 N. Y. 68, 34 Am. Rep. 507; *Pilcher v. New York L. Ins. Co.*, 33 La. Ann. 322. But even if, without the statute, it would be possible for said Volney, he having paid for the policy, to prove a resulting trust in his favor against its terms by oral testimony, we think it would not be permissible under the statute, the statute being so positive and explicit. Any other construction would make the statute a cover for fraud."

2. Statute Against Assignment of Policy by Wife as Beneficiary. — *Brick v. Campbell*, 122 N. Y. 337; *Brunner v. Cohn*, 86 N. Y. 11, 40 Am. Rep. 503; *Fowler v. Buttery*, 53 How. Pr. (N. Y. Super. Ct.) 471; *De Jonge v. Goldsmith*, 46 N. Y. Super. Ct. 131. *Contra*, *Living v. Domett*, 26 Hun (N. Y.) 150.

3. Indians at peace with the United States are in no received sense of the word *enemies*, and cannot be judicially considered as embraced within the term. *Thomas's Claim*, 4 Opp. Atty.-Gen. 81.

An Enemy under the Rule of Law that Permits the Seizure of an Enemy's Property. — If a citizen during the late civil war resided within the lines of the Confederate army, he might have, *prima facie*, been considered an *enemy* to the United States, and his property *enemy's* prop-

erty, and liable to seizure; and likewise, if he resided within what were only the temporary lines of the Union army. *Taylor v. Jenkins*, 24 Ark. 337. See also the title WAR.

An Enemy under the Act of Congress of March 2, 1799. — By this act it is declared "that for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, if retaken from the *enemy*" within a certain time, the owners are to allow a certain part for salvage. In March, 1799, Congress had raised an army, stopped all intercourse with France, dissolved the treaty, built and equipped ships of war, and commissioned private armed ships, enjoining the former and authorizing the latter to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prizes, and to recapture armed vessels found in their possession. It was held that this constituted a public qualified war between France and the United States, and that the French were an *enemy* within the act. *Chase, J.*, said: "As there may be a public general war and a public qualified war, so there may upon correspondent principles be a general *enemy* and a partial *enemy*. The designation of *enemy* extends to a case of perfect war; but as a general designation, it surely includes the less, as well as the greater, species of warfare. If Congress had chosen to declare a general war, France would have been a general *enemy*; having chosen to wage a partial war, France was, at the time of the capture, only a partial *enemy*, but still she was an *enemy*." *Bas v. Tingy*, 4 Dall. (U. S.) 37.

4. Issue. — *Poydras v. Poydras*, 1 La. 160. But in that case the term was limited by the whole context to immediate descendants.

In *Duhamel v. Ardovin*, 2 Ves. 163, *Hardwicke, L. C.*, said: "I cannot put the construction that *enfants* meant issue, especially to make it too remote and the will void; and there has been a case on a French will wherein I determined otherwise, viz., that it meant children; and beside there is something in the subsequent parts of this will which confines it to children."

ENFEOFF. (See also FEOFFMENT.)—To make a gift of any corporeal hereditaments to another.¹

ENFORCE.—See note 2.

ENGAGE. (See also the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES.)—I. The verb “to engage” means to embark; to take a part; to devote attention and effort.³ II. “To engage” also means to bind by

1. Bouv. L. Dict.

Enfeoff was the technical and proper operative word of a feoffment, so long as a feoffment was in use. 1 Davidson's Conv. 68; Perry v. Price, 1 Mo. 553.

2. A Statute of Illinois made it the duty of state's attorneys of the several judicial districts to **enforce** the collection of all fines, etc., imposed or incurred in the courts of record in their several counties. It was held that the power thus conferred necessarily included the right to receive all fines, etc., and give receipts therefor that should operate as full discharges to the parties paying the same, as well as the right to receive the amount of any judgment that might have been rendered for any such fine, etc., and to execute an acquittance therefor. People v. Christerson, 59 Ill. 157.

Enforced.—A statute provided that no civil process should issue or be **enforced** for a certain time against any person in the service of the state or of the United States. It was contended that by “process” was meant only original process. The court said: “We do not think so. ‘No civil process shall issue or be **enforced**,’ are words comprehensive enough to include all forms of execution as well as original and mesne process. The word **enforced** implies execution process, and would scarcely apply to any other.” Breitenbach v. Bush, 44 Pa. St. 320. See generally the titles EXEMPTION FROM EXECUTION; MILITARY LAW.

A Rule requiring a court to **enforce** obedience to its provisions does not justify a committal without a previous order requiring obedience. In re Royle, 50 L. J. Q. B. 656.

3. The Alexander, 60 Fed. Rep. 917; Roberts v. State, 26 Fla. 362.

Engage in Business in Other States.—See the title FOREIGN CORPORATIONS.

Single Act—To Engage in Shooting.—Under an act which imposed a fine upon any person “who **engages** in shooting” on Sunday, it was held that “to **engage** in shooting does not imply that the shooting should be repeated. One act is enough.” Smith v. State, 50 Ala. 159.

Same—Engaged in the Sense of Occupied.—But in Guiltinan v. Metropolitan L. Ins. Co., 69 Vt. 469, it was held that a servant in a hotel who occasionally served guests with liquor was not **engaged** in the sale of spirituous liquors within the meaning of a question asked of him when applying for insurance. The court said: “The word **engaged**, as used in the application, means occupied, and does not relate to an occasional act outside of a regular employment, and the obvious purpose of the question was that the defendant might be informed whether or not this was the applicant's occupation. The defendant could have no interest to ascertain whether the applicant, as a servant of the hotel, was occasionally called upon to furnish liquor to a guest.” See generally the title LIFE INSURANCE.

Two or More Pursuits—Actually Engaged.—

An Act of Congress of the Confederate states exempted persons **engaged** in certain occupations from military service in the armies of the Confederate states. There was a proviso that declared “that the exemptions granted under this act shall only continue whilst the persons exempted are actually **engaged** in their respective pursuits or occupations.” It was contended that this must be construed to mean “that all those persons who are exempted shall continually employ their own personal skill and labor in and about the pursuits or occupations on account of which they are exempted;” so that they are also impliedly exempted from state militia service. But the court took a different view of the matter, saying: “When we say, in common parlance, of a man that he is ‘actually **engaged**’ in farming or planting, does it necessarily imply that he must give his constant personal supervision to his farm or plantation? Does it mean anything more than that such a man has a farm or plantation in active operation, on his own account, whether he conducts its daily affairs through an overseer, or in person? The words embrace both cases. And so of many, if not most, other pursuits and occupations. The words ‘actually **engaged**,’ in common parlance, mean ‘really or truly **engaged**’—**engaged** in fact; and, according to the same law of common use, are the opposite or antithesis of ‘seemingly’ or ‘pretendently’ or ‘feignedly **engaged**.’ In the common acceptance of the words, the same man may be ‘actually **engaged**’ in two or more pursuits or occupations at the same time.” State ex rel. Dawson, 39 Ala. 383.

Transacted and Carried On—Engaged In.—

Counties were authorized to establish license taxes on certain businesses transacted and carried on in their territory. It was held that an ordinance requiring a license of every person **engaged** in one of the specified businesses was valid. The court said: “The power to license is thus limited to lawful businesses ‘transacted and carried on’ in the county, and it is urged that when the supervisors imposed the license upon those **engaged** in a business they exceeded their powers, for the words ‘transacted and carried on,’ it is contended, are not equivalent to or synonymous with the words ‘**engaged** in.’ In *Ex p. Mirande*, 73 Cal. 365, and *El Dorado County v. Meiss*, 100 Cal. 268, the ordinances under consideration were identical in language with the one here in question, and the validity of these ordinances was upheld; but against this it is said that the precise point now presented was not called to the attention of this court. Even so, we fail to see either force or cogency in the argument. It is difficult to conceive of one being **engaged** in a business who does not transact and carry it on, and it is equally diffi-

appointment or by contract.¹

ENGAGEMENT. — See note 2.

cult to picture one transacting and carrying on a business who is not engaged in it." *Inyo County v. Erro*, 119 Cal. 119.

Engage In — Carry On or Conduct. — A statute provided that a person who should carry on or conduct any business for which a license was required, without first obtaining such license, should be guilty of a misdemeanor. In *Roberts v. State*, 26 Fla. 362, the defendant was indicted for *engaging* in and managing a business requiring a license, without having procured such license. It was held that the indictment was good. The court said: "To *engage* in means 'to embark; to take a part; to employ one's self; to devote attention and effort; to enlist.' (Webster's Dictionary.) To *manage* is defined by Webster to be, 'to have under control and direction; to conduct; to guide; to administer; to treat; to handle.' These definitions of the words used in the indictment substantially mean the same thing as the words 'carry on' and 'conduct,' used in the statute, and for this reason we think the indictment sufficiently sets forth the offense with which the defendant was charged, without charging a sale." *Jordan v. State*, 22 Fla. 528; *Dansey v. State*, 23 Fla. 316."

Engaged in an Unlawful Act. — Where a person who is insured deserts from the army, and is shot by a sheriff who is attempting to arrest him, as alleged, in self-defense, it cannot be held, as matter of law, that he was *engaged* in an unlawful act, within the meaning of a policy of accident insurance providing that no claim shall be made "when the death or injury may have happened * * * while *engaged* in, or in consequence of, any unlawful act." *Utter v. Travellers' Ins. Co.*, 65 Mich. 545, 26 Am. L. Reg. N. S. 477. See generally the titles ACCIDENT INSURANCE, vol. I, p. 319; LIFE INSURANCE.

A Statute Regulating the Alaskan Fisheries provided for the forfeiture of a vessel, tackle, etc., found *engaged* in violating its provisions. In construing this provision the court in *The Alexander*, 60 Fed. Rep. 917, said: "Webster defines *engage* as: 'to embark; to take a part; to devote attention and effort.' It is admitted that the *Alexander* was *engaged* in sea-otter hunting. That was her business on the cruise. These animals are not usually killed from the deck of a schooner. To successfully hunt them it is necessary to send out the hunters in small boats or bidarkas, the latter always being used by the Aleuts. I think, where a vessel is out on a hunting voyage, her master, officers, and crew, or hunters on board, are all to be considered as *engaged* in a common enterprise or business, and every necessary action for the effectuation of the common purpose constitutes an essential part of the *res gesta* of any violation of law committed by any one of the party, and the vessel must be held responsible for such violation. If the *Alexander* was in Alaskan waters while the boats were out under control of her master, killing said animals, or received their catch while in such waters, then she violated the statute."

Engaged in Working a Mine, English Companies Act, 1862, § 81, means "is or has been

engaged in working," or "now or formerly *engaged* in working." *In re Silver Valley Mines*, 18 Ch. Div. 472.

To Engage in Business. — The English Trade-marks Act provides: "The court may, on the application of any person aggrieved, remove any trademark from the register, on the ground, after the expiration of five years from the date of the registry thereof, that the registered proprietor is not *engaged* in any business concerned in the goods within the same class as the goods with respect to which a trademark is registered." The owner of a patent for a washing machine applied to it the name of "The Home-washer," and registered that name as his trademark in respect of it. He did not manufacture the machines, or any other goods in the same class, but granted an exclusive license to a manufacturing firm, which paid him royalties. After the expiration of the patent (six years from the registration of the trade-mark) this firm continued to manufacture the machines, and to describe them by the old name, but paid no royalties. The former owner of the patent, and the registered proprietor of the name, had not, after a year and nine months from the expiration of the patent, begun to manufacture, though he had been in negotiation with manufacturers to get them to do so in conjunction with him. It was held that one year and nine months was sufficient cesser to bring the registered proprietor of the mark within the description of a "registered proprietor not *engaged* in any business concerned in the goods within the same class as the goods with respect to which a trademark is registered," notwithstanding the pending negotiations. It seems that a patentee is "*engaged* in any business," etc., so long as he receives royalties under his patent, even though he does not himself manufacture. *In re Ralph's Trademark*, 53 L. J. Ch. 188, 25 Ch. Div. 194.

1. In Sense of Promise. — A father signed and delivered to his son therein named, a paper expressed in the following terms: "This [is] to certify that I *engage* to my son Isaac the farm [on] which he now lives." This was held to be an agreement to convey the farm to his son. The court said: "One definition of the word *engage* is 'to bind by appointment or contract;' and in common parlance it is often used as synonymous with the word 'promise.' I *engage* to do, or omit to do, an act, is nothing more than a promise to do or omit it." *Rue v. Rue*, 21 N. J. L. 379.

Engage in the Sense of Agree With. — In *Martin v. Martin*, 3 Pin. (Wis.) 272, the court said: "The term *engage* is used by the witness in the sense of agree with or bind by contract. That clause, then, of the testimony, 'I *engaged* the plaintiffs,' is equivalent to saying: 'The plaintiffs agreed to do the threshing.'"

Covenant. — In *Rigby v. Great Western R. Co.*, 15 L. J. Exch. 60, 14 M. & W. 816, Parke, B., said that to *engage* to do anything "has the same force as the word 'covenant.'"

2. An Engagement is an agreement entered into by a married woman, with the intention of binding her separate estate, that would be

ENGINE. — See note 1.

a contract if it were not for the incompetency of a married woman to become a party to a contract. "On principle," says Pollock, "it should seem that a married woman's *engagement* with respect to her separate estate, while not bound by any peculiar forms, is, on the other hand, bound in every case by the ordinary forms of contract; in other words, that no instrument or transaction can take effect as an *engagement* binding separate estate which could not take effect as a contract if the party were *sui juris*. That is to say, the creditor must first produce evidence appropriate to the nature of the transaction which would establish a legal debt against a party *sui juris*, and then he must show, by proof or presumption, as explained above, an intention to make the separate estate the debtor." Pollock on Contracts (4th ed.), App., p. 651. See generally the titles HUSBAND AND WIFE; SEPARATE PROPERTY OF MARRIED WOMEN.

General *engagements* are defined in Rap. & Lawrence's Law Dict. as follows: "The promises or debts of a married woman which are not expressly charged by her on her separate estate are sometimes called her '*general engagements*,' and do not bind her separate estate unless made with reference to and upon the faith and credit of that estate."

In London Chartered Bank v. Lemprière, L. R. 4 P. C. 593, James, L. J., said: "The term '*general engagement*' is an ambiguous and misleading one. If it is meant merely to say that goods sold to a married woman in the ordinary course of domestic life, that contracts expressed to be made by her in respect of property not her separate estate, *e. g.*, for buying or selling, or letting or hiring, a house, do not necessarily impose a liability to be satisfied out of the separate estate which she may happen to have, in that sense, and to that extent, the proposition that her separate estate is not liable to her general *engagements* is quite accurate." See also Johnson v. Gallagher, 3 De G. F. & J. 404; Shattock v. Shattock, L. R. 2 Eq. 182; Pollock on Contracts, (4th ed.) 647 *et seq.*

An Engagement Is Not a Banknote. — A charter of an insurance company contained the following provisions: "Any policy or *engagement* signed by the president and attested by the secretary, when done conformably to any by-laws of the directors, shall be valid against, and effectually bind, the said corporation, without the presence of a board of directors, and as effectually as if under the seal of the said corporation; provided, however, * * * that no policies or *engagements* whatsoever, which shall as aforesaid be entered into by this corporation, with any individual, body corporate or politic, either without the seal of this corporation or otherwise, shall be transferable, negotiable, or assignable, so as to give such second holder or assignee a claim on the said corporation, either in his own name or the name of the person originally concerned, unless the consent of this corporation shall have been previously obtained and indorsed in writing on such instrument, or unless such a privilege form a part of the original agreement, and

be expressly granted by this corporation." Under these provisions, it was contended that the insurance company had a right to issue banknotes. Said the court: "It is a very strained construction of the term *engagement* to suppose it means a banknote. This is not the usual and ordinary acceptance of the term. * * * The word *engagement*, as used in the act, may very fairly be considered as synonymous with policy. Yet a more enlarged sense might be given it, and still limit it to contracts in and about the business of insurance, and the transactions expressly authorized by the charter." People v. Utica Ins. Co., 15 Johns. (N. Y.) 385.

1. Engine — Patent. (See also the title PATENT LAW.) — In Hornblower v. Boulton, 8 T. R. 95, which was an action for the infringement of a patent, in which the question of the validity of the patent arose, Lawrence, J., held that the word *engine*, in the Act of Parliament extending the term of the patent, signified a contrivance or device. "Some of the difficulties in the case," said he, "have arisen from considering the term of the patent, signified in its popular sense, namely, some mechanical contrivance to effect that to which human strength, without such assistance, is unequal; but it may also signify 'device;' and that Watt meant to use it in that sense, and that the legislature so understood it, is evident from the words *engine* and 'method' being used as convertible terms."

Movable Frames. — The Statute 52 Geo. III., c. 130, makes it a capital offense "if any person * * * shall unlawfully and with force demolish or pull down, or begin to demolish or pull down, any erection and building or *engine* which shall be used in the carrying on * * * of any trade or manufactory;" and provides that the injured person shall be entitled to recover damages from the hundred in which the property may be situated. In an action for damages, under this statute, against a hundred, it was held that movable frames for the manufacture of framework lace are not an *engine* within the meaning of the act. Said Lord Ellenborough: "The word *engine*, as it is found in this act, does not apply to all the utensils and tools which afford the means of carrying on the trade, such as are the tools and utensils mentioned in the 52 Geo. III., c. 16, but is to be accepted in a much more limited sense. * * * The word *engine* is indeed used in both these acts, and perhaps it is owing to this equivocal use of it that we are engaged with this argument to-day. In the act for the protection of the trade [52 Geo. III., c. 16], it means the utensil by which the trade is carried on. * * * In the 52 Geo. III., c. 130, the act with which we are at present concerned, the word *engine* is also used; but it seems to me to demand a different interpretation from that which it bears in the other act, as much as if it had been a different word. * * * This act [52 Geo. III., c. 130] constitutes it a felony to demolish or pull down, or begin to demolish or pull down, any erection, building, or *engine*, which must mean *engine ejusdem generis*; and there is no remedy against the hundred for damage to

ENGINEER. (See also the titles INDEPENDENT CONTRACTS; WORKING CONTRACTS.)—An “engineer” is defined as an engine driver; one who manages an engine; a person who has charge of an engine and its connected machinery.¹

ENGINEERING PURPOSES.—See note 2.

engines unless where it is an *engine* analogous to an erection or building. These frames are, indeed, in some degree connected with the building; but they are not so necessarily, and only so for a temporary purpose; they are movables, like a bed, although of too large dimensions to be moved away without taking them down; they are not in their nature fixed, and therefore not of that description for which this remedy will lie.” *Orgill v. Smith*, 6 M. & S. 182.

Engine to Kill Game.—A gun is not necessarily an *engine* to kill game. In an action of trover for a gun taken by the defendants from the plaintiff, the defendants, in their plea, alleged that the plaintiff kept the gun to kill game, without being qualified; and they justified the taking on the ground that they were the gamekeeper and servants of J. S., the lord of the manor. But the plea did not state that the plaintiff was out sporting with the gun, nor where it was taken. The court held, sustaining a demurrer to this plea, that “a gun is not necessarily to be taken to be an *engine* to kill game, as it does not appear upon this record that the plaintiff killed game with it; he might use it to shoot crows or destroy vermin; and it is not like nets, and pointers and such dogs, which can only be kept for killing the game.” *Wingfield v. Stratford*, 1 Wils. 315.

By 1 & 2 Wm. IV., c. 32, “If any person whatsoever shall kill or take any game, or use any dog, gun, net, or other *engine* or instrument for the purpose of killing or taking game on a Sunday,” he shall, on conviction, be liable to a penalty. It was held that a snare was an *engine* or instrument within the meaning of the act, and that putting down a snare on a day before Sunday for the purpose of killing game, and keeping it set on Sunday, was using an *engine* or instrument on Sunday. Blackburn, J., said: “The word *engine*, derived from *ingenium*, includes a snare, which is a device or contrivance—an *engine*—for killing game.” *Allen v. Thompson*, L. R. 5 Q. B. 336. See generally the title GAME AND GAME LAWS.

Fixed Engine. (See generally the title FISH AND FISHERIES.)—The Salmon Fishery Act, 1861, 24 & 25 Vict., c. 109, enacts: “No fixed *engine* of any description shall be placed or used for catching salmon in any inland or tidal waters; * * * and for the purposes of this section a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed *engine*.” Three nets were set twelve yards apart, and extended to near the middle of a river; they were fixed at one end to a large stone on the bank, and at the other end they were kept up by corks with lead attached to keep them down. It did not appear whether or not the nets reached to the bottom of the river. Whenever a salmon touched a net, it gave

way, gathered together, and entangled and so caught the salmon. It was held that they were not fixed *engines* within the act. The court said: “It is impossible to say that a net moored at one end of it to a great weight, but so that part of the apparatus gives way when a fish comes to it, is a fixed *engine*” within the statute. *Thomas v. Jones*, 5 B. & S. 916, 117 E. C. L. 916.

By 28 & 29 Vict., c. 121, § 39, it is further provided that a “fixed *engine*” shall include “any net or other implement for taking fish, fixed to the soil or made stationary in any other way, not being a fishing weir or fishing milldam.” Under this section it was held that a “stop net” is not a “fixed *engine*.” A “stop net” is used as follows: The fisherman fixes his boat athwart the current of the river, by lashing it at each end to a pole driven in the bed of the river. The net, which is thirty feet wide at the mouth, and tapers to a point, is stretched by two poles twenty-two feet long, which are tied together at the upper end, and kept extended (to the width of the net at the mouth) by a pole lashed across at about seven feet from the upper end. The net is lowered overboard until the two poles rest at about eight feet from the upper end on the side of the boat. The net and poles are thus nearly on the balance, and the fisherman presses slightly on the upper end, and so keeps the net steady at an angle of about twelve degrees; he also holds a string attached to the bottom of the net, and when he feels a fish, he presses down the upper end of the poles with both hands, using the edge of the boat as a fulcrum, and so raises the net out of the water, and catches the fish. *Gore v. English Fisheries Com'rs*, L. R. 6 Q. B. 561. See also *Olding v. Wild*, 30 J. P. 295; *Holford v. George*, 37 L. J. Q. B. 185.

Engine and Machine.—As to whether *engine* and “machine” are equivalent terms, see *Blanchard v. Sprague*, 3 Fed. Cas. No. 1518.

1. *Devere v. Delaware, etc., R. Co.*, 60 Fed. Rep. 887.

Engineer—Locomotive.—A statute provided that process might be served upon foreign corporations by serving any officer, director, agent, clerk, or *engineer* thereof. It was held that the word *engineer* included locomotive *engineer*. *Devere v. Delaware, etc., R. Co.*, 60 Fed. Rep. 887. And that *engineer* means locomotive *engineer*, see *Hartford v. Northern Pac. R. Co.*, 91 Wis. 374.

2. **Engineering Purposes.**—The legislature of Minnesota granted certain franchises to a railroad company on condition that it would construct a certain portion of its road on its present located line, “except so far as may be necessary to change the same for *engineering purposes*.” Under this act, it was held that an *engineering purpose* “can only mean a purpose of constructing the road on that route * * * on which it can be built, operated,

ENGLISH. — See note 1.

ENGRAVINGS. — See the title COPYRIGHT, vol. 7, p. 580; and see PRINT.

ENGROSS — ENGROSSMENT. (As to the offense of engrossing, see the title FORESTALLING AND ENGROSSING.) — 1. Formerly to "engross" a document was to write it in a peculiar hand derived from the court hand in which records were anciently written. 2. At the present day, "engrossing" means copying a deed, statute, agreement, or the like, with all words, dates, and amounts written at length, and with the formal testatum and attestation clauses, so as to be ready for execution.²

ENHANCED. — See note 3.

ENJOIN. (See also the title INJUNCTIONS.) — To command; to require; as, private individuals are not only permitted but enjoined by law to arrest an offender when present at the time when a felony is committed or a dangerous wound given, on pain of fine and imprisonment if the wrongdoer escape through their negligence; to command or order a defendant in equity to do or not to do a particular thing by writ of injunction.⁴

or kept in repair, in the best, cheapest, and safest manner." *McRoberts v. Southern Minnesota R. Co.*, 18 Minn. 108.

1. **English Bill.** — Formerly an ordinary suit in chancery was called a suit by *English* bill, by way of distinction from suits on the common-law side of that court, which were conducted in Norman-French or Latin. *Sweet's Law Dict.*

English Marriage. — The phrase "an *English* marriage" may refer to the place where the marriage was solemnized, or it may refer to the nationality and domicile of the parties between whom it was solemnized; the place where the union so created was to have been enjoyed. *Harvey v. Farnie*, 6 Prob. Div. 51.

English Education. — In *Board of Education v. Welch*, 51 Kan. 806, it was said: "In the high school of the city of Topeka there are taught, among other branches, mathematics, physics, history, *English* classics, rhetorical exercises, vocal training, physical culture, Latin, and German. An education acquired through the medium of the *English* language is an *English* education. If the same branches were taught in the Latin or the German language, it would not be an *English* education; but the mere fact that the Latin and German languages are taught does not change the character of the school from an *English* one. The common-school medium of instruction is the *English* language, in accordance with the provisions of the statute. *Powell v. Board of Education*, 97 Ill. 375."

Abbreviations — English Language. (See also the title ABBREVIATIONS, vol. 1, p. 97; and see the title ENGLISH LANGUAGE, 7 ENCYC. OF PL. AND PR. 720.) — The mark commonly used to denote dollars, viz., \$, is not part of the *English* language within the meaning of the statute of the state of *Vermont* that requires declarations and other pleadings to be drawn in the *English* language. *Clark v. Stoughton*, 18 Vt. 50. Neither are the signs of degrees and minutes, viz., °, '. *State v. Jericho*, 40 Vt. 121, 94 Am. Dec. 387. But the words *Anno Domini* are *English* within the statute. *State v. Gilbert*, 13 Vt. 647. See also *Brown v. State*, 16 Tex. App. 245; *Com. v. Clark*, 4 Cush. (Mass.) 596.

2. *Sweet's Law Dict.*

3. By an act of the legislature of *Oregon*, a

widow is entitled to dower in "all the lands whereof her husband was seized of an estate of inheritance at any time during marriage." But if the husband aliens such lands, and they "shall have been *enhanced* in value after the alienation," the same "shall be estimated in setting forth the widow's dower according to their value at the time they were so aliened." Under these provisions of the act it was held that in estimating the value of a widow's dower, she ought to have the benefit of the increase in value between the date of such alienation and the death of the husband, not arising from improvements made or placed on the land. Said the court: "It may be admitted that the word *enhanced*, taken in an unqualified sense, is equivalent to 'increased,' and comprehends any increase of value, however caused or arising; but under the circumstances it ought to be construed to include only the value caused by the improvements put upon the land by the tenant or those under whom he claims, and not that which arises fortuitously, or from what may be called natural causes." *Thornburn v. Doscher*, 32 Fed. Rep. 810.

4. *Bouv. Law Dict.*

Sheriff's Return. — Where a sheriff returned an execution indorsed *enjoined*, it was held that the return was sufficient. The court said: "We do not concur with the counsel at the bar in his criticism on the word *enjoined*. No case has been cited, and we suspect none can be, in which a sheriff or any officer has employed the word *enjoined* to express a direction by the plaintiff in an execution or his agent, to stop his proceeding further under it. The return in such a case is, 'stayed by order of the plaintiff.' It is true that the word *enjoined* implies a command to do or not to do a particular thing by one having authority; and it is equally true that the word *enjoined*, though not strictly a technical word, has by common usage acquired a technical meaning. Nothing is more common than to say, and to say correctly, after an injunction does issue from a court of equity, that the party plaintiff in the execution is *enjoined*; and a bill for injunction is frequently called a bill to *enjoin*. And whenever the word *enjoin* is used in legal proceedings, it must be understood that further

ENJOY—ENJOYMENT. (See also the titles EASEMENTS, vol. 10, p. 426; PRESCRIPTION.)—Enjoyment is the exercise of a right. It is to a right what possession is to a corporeal thing, and is therefore divisible, like possession, into simple, rightful, permissive, adverse, etc. Adverse enjoyment is more commonly known in the English books as “enjoyment as of right,” and occurs where a person exercises a right which does not belong to him, in the same manner as if he were entitled to it, and without the permission of the owner. Enjoyment which is open, peaceable, continuous, and of right resembles adverse possession in being a mode of acquiring by lapse of time the right so enjoyed.¹

proceedings upon the execution are stayed by order of a court of equity; and in such sense it must be understood as used by the defendant in this case—the same as if he had returned on the *feri facias*, ‘stayed by injunction,’ a return which would have been sufficient. *Tagert v. Hill*, Conf. Rep. (3 N. Car.) 164. And yet such a return is open to all the objections urged against the one in this case. It does not state from what source the command issued, whether from the plaintiff in the execution or from a court of equity, and if from the latter, what court; it is not precise and definite, and not free from uncertainty; yet it is sufficiently certain to enable the court to see that he was restrained from executing the process by a mandate from a court (under the penalty of incurring punishment for a contempt, *Edney v. King*, 4 Ired. Eq. (39 N. Car.) 465) of competent authority, and which the sheriff was bound to obey.” *Patton v. Marr*, Bush. L. (44 N. Car.) 379.

The Use of the Word “Enjoin” in a Will Does Not Necessarily Create a Precatory Trust. (See also the title PRECATORY TRUSTS.)—A bequest was as follows: “I give to my brother, in trust for my sisters, M., C., and H., £4,000 * * * on condition that they will support M. M.; at the demise of either or any of the above, the survivors or survivor to receive the increased income produced thereby. They are hereby *enjoined* to take care of my nephew J., as may seem best in the future.” It was held that the sisters took absolutely as joint tenants, and that there was no precatory or other trust in favor of the nephew. The court said: “Is the word *enjoin* sufficient to create a precatory trust? It is obvious on the face of the will that the testator drew a distinction between the *quasi* obligation which he wished to commend to his sisters to take care of the nephew, and the positive obligation which he made a condition in the case of M. M. The nephew was not placed on the same footing as M. M. Coupling that indication of his meaning with the vague words ‘as may seem best in the future,’ I do not think that a precatory trust has been sufficiently imposed upon these legatees to enable the nephew to bring an action to have it carried into effect.” *Moore v. Roche*, 55 L. J. Ch. 418.

Where, by one clause of his will, a father devised his residuary estate to his daughter, “to have and to hold the same unto her and her heirs and assigns forever,” and in the following clause committed to her the guardianship of his grandchild, the child of a deceased daughter, with the words: “I *enjoin* upon her to make such provision for said grandchild out of my residuary estate now in her hands,

in such manner, at such times, and in such amounts, as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate;” and the general guardian of the grandchild, in a complaint, alleged that for more than two years after the will took effect the daughter had refused and neglected to make any provision for his ward, and asked to have a trust in her favor declared and enforced; and the daughter answered, denying that a trust was created by the will, but admitted the force of the moral considerations in favor of the ward, and averred her intention fully and in good faith to comply with the same; the judgment of the general term declaring and enforcing a trust was reversed on appeal, and the judgment of the special term was affirmed, dismissing the complaint. The court said that if by the clause the testator had *enjoined* the defendant to make a suitable provision out of the residuary estate for the support of the grandchild, the daughter would have taken it subject to a charge, the amount of which might be ascertained by a court of equity, and satisfaction decreed. But as the provision was drawn, it was not intended to relieve the father of the grandchild from his legal obligation to support his own child. It was the will of the testator that the daughter should be the sole judge of the manner in which provision for the grandchild should be made, at what time it should be made, and to what amount. It was beyond the power of any court to substitute its discretion for hers; and no trust was created which a court of equity could exclude, contrary to her judgment. The provision vested the absolute title to the testator’s residuary estate in his daughter. *Lawrence v. Cooke*, 104 N. Y. 632.

1. Sweet’s Law Dict.

Easements.—In *Cooper v. Straker*, 40 Ch. Div. 21, it was held that the use of light had been *enjoyed* with the building, within the meaning of the English Prescription Act, if the owner of the building had had the advantage of using the access of light, and that it was not necessary that there should be a continuous use. *Kay, J.*, said: “‘*Enjoying* the use’ cannot mean ‘shall have continuously used.’ If that had been the intention of the statute some such word as ‘continuously’ should be found in this section, and it might then be necessary to show that the plaintiffs had never closed their shutters for a day during twenty years next before the action. I take *enjoyed* to mean ‘having had the amenity or advantage of using’ the access of light; that is, nearly equivalent to ‘having had the use,’ the inten-

For other meanings of the term see note 1.

ENLARGE. (See generally the titles LANDLORD AND TENANT; LEASES; RELEASES; REMAINDERS.)—To enlarge an estate is to increase the tenant's

tion being that the owner of a house may acquire the right to have the access of light over adjoining land to an opening which he has used in such manner as suited his convenience for the passage of light during twenty years."

To an action for throwing the water back upon and obstructing the plaintiff's mill by the erection of a dam lower down the stream for the use of the defendant's mill, the plea was that the defendant and the occupiers of his mill had had, "and actually *enjoyed* as of right and without interruption, for the full period of twenty years next before the commencement of this suit," a certain right of erecting and continuing a certain milldam and divers bounds of his (the defendant's) premises, in all of the height of eight feet. It was held sufficient on demurrer without alleging more particularly that the defendant exercised the right, the term *enjoyed* under the 10th and 11th Vict., c. 5, bearing the sense of actually exercising the rights therein referred to, and it was not necessary by the plea to deny that the water had been backed more than eight feet in height. *Smith v. Wallbridge*, 6 U. C. C. P. 324.

The phrases "*enjoyed* by any person claiming right," and "*enjoyment* thereof as of right," applied to easements in the statute 2 & 3 Wm. IV., c. 71, in sections 2 and 5 respectively, mean "an *enjoyment* had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or on many; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription and adverse user, or by deed, or shall have been merely lawful so far as to excuse a trespass." *Tickle v. Brown*, 4 Ad. & El. 369, 31 E. C. L. 91.

1. **To Be Enjoyed With and to Go With the Title.**—A testatrix bequeathed a leasehold house to the sixth Earl of Essex "and to his successors, to be *enjoyed* with and to go with the title." It was held that the earl was absolutely entitled to the leasehold house, the words "to be *enjoyed* with and to go with the title" not being sufficient to create an executed or executory trust, or to cut down his interest therein to a life estate. *Re Johnson*, 53 L. J. Ch. 645.

Enjoyment and Occupation.—A statute allowed a mechanics' lien upon all realty necessary to the convenient use and occupation of the house. A complainant claimed a lien on all realty for the convenient use and *enjoyment* of said building. It was contended that this was a fatal variance. The court said: "It is argued that there is a wide difference between the words *enjoyment* and 'occupation'; that a much larger parcel of land might be required for the former than the latter; and that hence the finding and decree may embrace more land than is authorized by the statute. We see no material distinction between the two

words in this connection. In *Tunis v. Lakeport Agricultural Park Assoc.*, 98 Cal. 286, it was said: 'The expression "the land upon which any building * * * is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof," should be construed to mean such space or area of land as is necessary to the enjoyment of the building for the purpose in view in its construction;' thus using the word *enjoyment* as synonymous with occupation. Besides, in the absence of evidence as to the size of the lot, it will be presumed, in support of the judgment, that the whole of it is necessary for the convenient use and occupation of the dwelling." *Ward v. Crane*, 118 Cal. 676.

Same—Homestead.—The Constitution of Florida provides that a homestead of a certain size shall be exempt from forced sale under any process of law, with certain specified exceptions; and that "this exemption shall accrue to the heirs of the party having *enjoyed* or taken the benefit of such exemption." Under this clause it was held that "any one who has owned and occupied with his family the limited amount of land and improvements mentioned has *enjoyed* it as exempt from forced sale, whether he has or has not been threatened with executions or other process, because the *enjoyment* of a homestead consists in the use and occupation of it with his family, according to the clear intent and purpose of the provision." *Baker v. State*, 17 Fla. 408.

Enjoy—Wills.—A will provided that the testator's wife should hold, use, occupy, and *enjoy* his entire real estate. It was held that the power to sell the surplus crops was implied by the right to use and *enjoy* the property. *Rountree v. Dixon*, 105 N. Car. 354.

The Beneficial Enjoyment mentioned in section 21 of the Succession Duty Act of 16 & 17 Vict., c. 51, means no more than the *enjoyment* of the possessor in his own right, and for his own benefit, not as trustee for another. *Atty.-Gen. v. Sefton*, 11 H. L. Cas. 257. See generally the title SUCCESSION TAXES.

Enjoyment of an Office.—By the Corporation Act, 13 Car. II., st. 2, c. 1, § 12, one who had not taken the sacrament according to the rites of the Church of England within a year before his election in fact to a corporate office was disqualified from being elected; and if the electors had been notified of such disqualification at the time of the election, votes afterwards given to such person were then thrown away; and any candidate having the most legal votes, though in fact inferior in number to those of the disqualified candidate, was duly elected and entitled to be sworn in. By the Annual Indemnity Act, 50 Geo. III., c. 4, it was provided that disqualified persons might qualify themselves within a certain time, and that the said qualification of such persons should be as effectual as if such persons had qualified under the previous acts. It was, however, further provided that the act should

interest, as where the tenant in remainder conveys to the tenant of the first estate, thus increasing his estate to a fee.¹ To enlarge a rule or order of the court is to extend the time of complying with it.²

ENLARGING STATUTE. (See generally the title STATUTES.)—An enlarging statute extends or enlarges the common law.

ENLIST — ENLISTMENT. (See also the titles HABEAS CORPUS; INFANTS; MILITARY LAW; PARENT AND CHILD.)—“To enlist” is to enrol for military service.³ An enlistment is the act of making a contract to serve the government in a subordinate capacity, either in the army or the navy.⁴

not extend “to restore or entitle any person to any office [already] legally filled up and *enjoyed* by any other person.” Under these acts it was held that the office of a common councilman of the town of H. W. was not “legally filled up and *enjoyed*” by a candidate who had received the greatest number of legal though not of actual votes, but who had not been sworn in. Said Lord Ellenborough, C. J.: “There can be no legal *enjoyment* of an office unless there be an *enjoyment* of it *de facto*.” *Rex v. Parry*, 14 East 549.

Covenant for Quiet Enjoyment. — See the title COVENANTS, vol. 8, p. 97.

1. 2 Black. Com. 324.

2. See *Reid v. Fryatt*, 1 M. & S. 2.

Enlarge and Extend. — A stipulation to extend the time for taking testimony was entered into after the time had expired. It was held that the extension agreed on ran from the date of the stipulation and was not merely an *enlargement* of the time first limited. *James v. McMillan*, 55 Mich. 136. The court said: “In granting this decree the court construed the stipulation of November 13th as one which merely *enlarged* the time for taking proofs under the rules. On that construction the parties would have under it sixty days from October 12th. But we do not think the construction the correct one. The parties extend the time sixty days; and by this we think they must be understood as speaking from that day and giving sixty days for taking testimony thereafter. Had they made use of the word *enlarged* instead of ‘extended’ it might have conveyed to the mind a different meaning.”

3. *Erichson v. Beach*, 40 Conn. 283.

4. **When Complete.** — *Erichson v. Beach*, 40 Conn. 283. And in that case it was held that an *enlistment* was completed where one, together with others, had petitioned the governor to be organized into a company of infantry, and the petition had been granted, although no formal *enlistment* paper was signed.

Under the Act of Congress of 1855, c. 136, § 11, punishing the enticing of any seaman “who may have *enlisted* into the naval service of the United States” to desert therefrom, a seaman who has passed the examination at the naval rendezvous merely, but who has not been examined and passed on the receiving ship, in accordance with the regulations of the navy, is not *enlisted*. *Enlistment*, said the court, “must be deemed to be a contract between the party and the government. * * * Now if the seaman, on signing the papers and passing the rendezvous, was not entitled to anything, then the contract for service on the one hand, and pay on the other, had not been

completed; the seaman had not *enlisted*, and so was not a deserter.” *U. S. v. Thompson*, 2 Sprague (U. S.) 103.

In *Tyler v. Pomeroy*, 8 Allen (Mass.) 485, it is said: “The words *enlist* and *enlistment*, in the law, as in common usage, may signify either the complete fact of entering into the military service, or the first step taken by the recruit towards that end.” See also *Barker v. Chesterfield*, 102 Mass. 127; *Sheffield v. Otis*, 107 Mass. 284.

Officer. — In *Hilliard v. Stewartstown*, 48 N. H. 280, it was held that one who entered the army as a commissioned officer of volunteers was not entitled to the bounty voted by a town under a statute which authorized towns to raise and appropriate money to encourage *enlistments* in the army. In construing this provision the court said: “I do not find that in military usage the term *enlist* or *enlistment* is ever used to signify the engagement of a commissioned officer in the military service; it is always, so far as I can find, limited to the rank and file, and the popular meaning is the same; no one would understand that a man who was said to have *enlisted* in the army had obtained a commission and entered the service as a commissioned officer. Whether the term is taken in a technical or in the popular sense, the man who enters the service as a commissioned officer cannot be said to *enlist* or to be an *enlisted* man.”

Volunteers. — A by-law of an incorporated beneficial association provided that “no soldier of a standing army, seaman, or mariner shall be capable of admission; and any member who shall voluntarily *enlist* as a soldier, or enter on board any vessel as a seaman or mariner, shall thenceforth lose his membership.” The relator, a member of the association, joined a volunteer corps, raised in another state, which tendered its services to the United States under the Act of 1846, and was accepted and mustered into the service. The relator continued in such service in Mexico until the expiration of his term. It was held that this act did not authorize his expulsion from the association. The court said: “If the exact signification of the word *enlist* * * * were doubtful, it would be fixed by the words standing army in the first [clause], with which it is intimately associated. The relator became a soldier, but not a regular one; in other words, he did not embrace the profession of arms as a business. He was a citizen soldier. I doubt not that the case of a recruit in the regular regiments raised to serve during the war would be within the exception; but the words ‘standing army,’ in connection with the word *enlist*, mean no more than the regular army,

ENORMOUS. — See note 1.

ENQUIRY. — See INQUIRY.

ENROLMENT. — See the titles RECORDS; RECORDING ACTS; SHIPS AND SHIPPING. And see ENCYC. OF PL. AND PR., titles DECREES, vol. 5, p. 1035: RENDITION AND ENTRY.

ENTAIL. See the title ESTATES, *post*. See also note 2.

in contradistinction to a force composed of volunteers. They certainly have no exclusive regard to the regiments on the permanent establishment, in which the personal risks of the soldier in time of peace are no greater than the personal risks of the citizen in time of war. But the relator did not *enlist* even as a volunteer. The word is to be taken in the popular sense of it; and in England, whence we brought it, as well as in the American states, it means not merely to enrol the name, but to sign a written contract of military service made on the part of the government by a recruiting officer." Franklin Beneficial Assoc. v. Com., 10 Pa. St. 357.

Status. — An *enlistment* is not a contract only, but effects a change of status. *In re Grimley*, 137 U. S. 151; *In re Morrissey*, 137 U. S. 159.

False Name. (See also the title POOR AND POOR LAWS.) — Under a statute providing that any person *enlisted* and mustered into the military service of the United States, as part of the quota of a city or town, would be deemed to have acquired a settlement in such city or town, it was held that the fact that a person was *enlisted* and mustered by a false name did not prevent his acquiring settlement. *Milford v. Uxbridge*, 130 Mass. 107.

Conscription. — Does an enlistment resemble a contract in being necessarily a voluntary act? In *Babbitt's Case*, 16 Ct. of Cl. 213, Davis, J., said in a *dictum*: "*Enlistment* is a technical word, derived from Great Britain, with a technical meaning. In the English Cyclopaedia it is defined to be 'a voluntary engagement to serve as a private soldier for a certain number of years.' Chambers defines it as 'the mode by which the English army is supplied with troops as distinguished from the conscription prevailing in many other countries.' Littré, the best French authority, defines conscription as an *appel au service militaire, par voie du tirage au sort*; and he defines an *enrolé*, which is the equivalent of an '*enlisted man*,' as an *enrolé volontaire*. True to this distinction between a voluntary engagement as distinguished from a conscription or draft, the statutes of the United States allow only persons who are able to contract to enter the army by *enlistment* (Rev. Stat., §§ 1116–1118), and require the contract to be made for a term of years."

But it has been held in *Massachusetts*, that a statute giving to men that had "been duly *enlisted*, and mustered into the military or naval service of the United States, as a part of the quota of any city or town in this commonwealth" during the civil war, under certain circumstances, a settlement in such city or town, applied to drafted men, as well as to volunteers. "By the primary meaning of the word," said the court, "a person is *enlisted* whose name is duly entered upon the military rolls; and it applies to those who are drafted

as well as to those who volunteer." *Sheffield v. Otis*, 107 Mass. 282.

Enlisted Men. — It is generally understood that the words "officers and *enlisted men*" include the whole personnel of the navy; those who sign the shipping articles being regarded as *enlisted men*, and those who take the oath of office prescribed by the Revised Statutes, § 1757, as officers. *Mouat v. U. S.*, 22 Ct. of Cl. 293.

A West Point cadet is not an *enlisted man* within the statutes of the United States. The court said: "The statutes employ the term *enlist* only with reference to contracts with persons who enter the army as privates, and to certain other classes of men, like Indian scouts and hospital stewards, who rank like soldiers, and voluntarily put themselves under military law. Rev. Stat., §§ 1099–1104, 1107, 1108, 1111, 1112, 1115, 1155, 1162, 1180." *Babbitt's Case*, 16 Ct. of Cl. 214.

1. **Enormous — Self-defense.** (See also the title SELF-DEFENSE.) — The trial court instructed the jury upon the question of self-defense as follows: "A party is not compelled to flee from his adversary who assaults him, but before he can justify the homicide the assault must be so fierce as to not allow the party assailed to yield without manifest danger to his life or *enormous* bodily harm. In such case, if there be no other way of saving his own life, or saving himself from great bodily harm, he may, in self-defense, kill his assailant." Upon the propriety of this instruction, the court in *Ritchey v. People*, 23 Colo. 314, said: "The use of the word *enormous* instead of the word 'great' is disapproved in *McDonald v. State*, 89 Tenn. 161, and the case was reversed upon that ground. It was there said that *enormous* is a word of richer, deeper color than the word 'great,' and its use naturally had a tendency to lead the jury to believe that something more than great bodily harm must be apparent. As in the last sentence of the instruction the court here uses the word 'great' as apparently synonymous with the word *enormous* (which has authority in Webster's Dictionary), it is possible that the jury were not misled. It is appropriate for us, however, in connection with this and the preceding point, to add with our approval the following language of the court in the *McDonald* case, *supra*: 'When the path is plain and well marked by long and consistent travel, it is always safe to pursue it, while it is always dangerous to undertake to make a new one to the same end, or to qualify old, unbroken, and well-understood expressions of what the law is.'"

2. **Wills.** — A testator devised certain property to one "and to his heirs *entail* the same forever." In construing this devise the court, in *Doty v. Teller*, 54 N. J. L. 163, said: "Its construction must depend upon the force or effect which is to be accorded to the words '*entail* the same.' Without those words the

ENTER — ENTRY. (See also the titles ADVERSE POSSESSION, vol. 1, p. 787; CONDITIONS, vol. 6, p. 499; EJECTMENT, vol. 10, p. 467; FORCIBLE ENTRY AND DETAINER; LEASES; REVENUE LAWS; and see RE-ENTRY.) — I. To go upon.¹ Entry is the taking possession of lands by the legal owner.² It is a remedy for the wrongful dispossession of lands.³ Entry also "means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several states by the epithet of an entry taker, and corresponding very much in his functions with the registers of land offices, under the Acts of the United States."⁴ II. To set down in writing,⁵

devisees would clearly take the lands devised in fee. Their natural import, in the connection in which they are used, is to condition or qualify the fee that is given. The effect designed by them is expressed by the word *entail*, the well-recognized import of which is to restrain the fee to heirs of the body of the donee to the exclusion of collateral heirs, and to imply a condition that if the donee dies without lineal heirs the land shall revert to the donor. After the enactment of the statute of Westminster the Second (13 Edw. I.), commonly called *de donis conditionalibus*, the conditional fee was by judicial construction resolved into a particular estate known as a fee-tail. *Den v. Spachius*, 16 N. J. L. 172. Lands held by that estate were commonly said to be *entailed*."

1. **Game Law.** (See generally the title GAME AND GAME LAWS.) — Under an act prescribing a penalty for *entering* upon the lands of another for purposes of hunting, a man does not incur the penalty who *enters* with the owner's consent, which is subsequently withdrawn. The court said: "The unlawful *entry* upon the land which calls down the penalty of the law is the first crossing of the owner's line. This is one entire and single act. It cannot be divided or multiplied, and it constitutes a complete offense." *Kellogg v. Robinson*, 32 Conn. 335.

The phrase "*entering* or being," in the English Game Acts (1 & 2 Wm. IV., c. 32, § 30; 9 Geo. IV., c. 69, § 1) constitutes but one offense, *Rex v. Mellor*, 2 Dowl. P. C. 173; and means a personal and not a constructive *entry*, and does not include the mere sending a dog into a cover, or firing into cover. *Reg. v. Pratt*, 24 L. J. M. C. 113; *Mayhew v. Wardley*, 8 L. T. N. S. 504.

2. *Guion v. Anderson*, 8 Humph. (Tenn.) 306.

3. 3 Black. Com. 174.

An *entry* at common law is nothing more than an assertion of the title by going on the land, or, if that is hazardous, by claiming continual title. *Innerarity v. Mims*, 1 Ala. 674.

Common-law Remedy. — In *Ft. Dearborn Lodge No. 214 v. Klein*, 115 Ill. 191, it was said: "The word *entry*, occurring in the statute, is used in its appropriate legal sense, as signifying that remedy which the common law gives to the paramount owner of real property to redress, without legal process, the injury which he sustains when wrongfully deprived of the possession thereof by one having no right thereto." See also *Riley v. People*, 29 Ill. App. 142.

4. **Public Lands.** (See also the titles PUBLIC LANDS; STATE LANDS.) — *Chotard v. Pope*, 12

Wheat. (U. S.) 588; *Lockwitz v. Larson*, (Utah 1898) 52 Pac. Rep. 281, *citing* 6 AM. AND ENG. ENCYC. OF LAW (1st ed.) 649. See also *Sturr v. Beck*, 133 U. S. 547; *McGuire v. Brown*, 106 Cal. 660; *Goddard v. Storch*, 57 Kan. 714; *Chotard v. Pope*, 12 Wheat. (U. S.) 586; *Dealy v. U. S.*, 152 U. S. 544; *Northern Pac. R. Co. v. Sanders*, 47 Fed. Rep. 607.

In *Phillips v. Robertson*, 2 Overt. (Tenn.) 415, it was said: "An *entry*, agreeably to the laws of North Carolina, possesses one or the other of two characters, vague or special. The first is so entirely defective in its description of locality as to furnish no rational ground of belief that one place, more than another, was intended. The latter, or a special *entry*, possesses properties the reverse of those that are vague. It has some call, which, according to the decisions of our courts, is ascertainable by reasonable inquiry and exertion." See also *Barnes v. Sellars*, 2 Sneed (Tenn.) 33; *Rogers v. Burton*, Peck. (Tenn.) 116; *Simms v. Dickson*, Cooke (Tenn.) 138.

In *Dealy v. U. S.*, 152 U. S. 544, it was said: "It is further objected that the indictment is defective in its statement of the means by which the conspiracy was to be carried into effect. The language is by means of 'false, feigned, illegal, and fictitious *entries* under the homestead laws of the United States.' It is insisted that the word *entry* in homestead cases has a settled technical meaning, and refers simply to the initiation of the proceedings, and the language of Mr. Justice Lamar, speaking for this court in *Hastings*, etc., R. Co. v. Whitney, 132 U. S. 357, 363, is cited: 'Under the homestead law three things are needed to be done in order to constitute an *entry* on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an *entry*; second, he must make a formal application; and third, he must make payment of the money required. When these three requisites are complied with, and the certificate of *entry* is executed and delivered to him, the *entry* is made — the land is *entered*.' * * * But the popular understanding of the word is not thus limited. It is common to speak of an *entry* of land under the homestead law, meaning thereby not a mere preliminary application, but the proceedings as a whole, the complete transfer of title."

5. *Bissell v. Beckwith*, 32 Conn. 517.

Recording, Filing, etc. (See also FILING, and the titles RECORDING ACTS; RECORDS.) — In *Thomason v. Ruggles*, 69 Cal. 475, the court said: "To *enter* a paper upon a public journal or record is to inscribe; to enroll; to re-

as entering a paper of record, or filing the same.

cord it. Webster's Dictionary, tit. *Enter*. '*Entry*, as a matter of record, is the act of setting down or causing to be set down, in writing; recording or causing to be recorded, in due form.' Abbott's Law Dictionary, p. 430, tit. *Entry*. Enrolment or recordation is therefore the meaning of the constitution, and that meaning is not satisfied by a mere 'identifying reference.'"

In *Lent v. New York, etc., R. Co.*, 130 N. Y. 599, it was said: "The words *entered* and *entry* are frequently used as synonymous with 'recorded' in the law books. Code Civ. Pro., § 1236. All through the statutes, code, and rules, the word 'filing' describes the indorsement on a paper of the date when left in a public office, not for record, but for safe keeping. The word *entry* or *entered* describes the duty of a public officer when something more is required than filing. When we speak of *entering* a satisfaction of judgment we mean that the 'satisfaction piece' or execution is filed and the appropriate words written in the docket indicating that it has been paid. If one should plead that a satisfaction of judgment had been duly *entered* it would imply that the clerk had done his whole duty. The law requires orders made on notice and in special proceedings to be *entered*, that is, recorded in an order book. Judgments are to be *entered*—recorded—in a judgment book. If a pleader should aver that a judgment or order had been duly *entered*, I think it would be held on demurrer to be equivalent to averring that the judgment or order had been recorded, that the clerk had done his whole duty."

In *Waldron v. Dickerson*, 52 Iowa 175, it was said: "The expression '*entered* of record' is not obscure. It means the writing of the recognizance upon the record of the court. The filing of a paper may make it of record, but it is not *entering* it of record. That is, a paper filed in the cause is considered a part of the record. But when we use the expression '*entered* of record,' we mean that the paper spoken of is copied into the record of the court."

A statute provided that for the purposes of an appeal from an order, either party might require the order to be *entered* by the clerk of record. It was contended that "*entered* of record" meant that it should be filed by the clerk and placed among the papers on file in the case. In *State v. Lamm*, 9 S. Dak. 418, the court said: "There is, however, a marked distinction between *entering* a paper of record and filing the same. Mr. Anderson, in his Law Dictionary, gives, as one of the definitions of *entry*: 'Recording in due form and order a thing done in court.' In the same work, 'file' is defined as receiving a paper into custody and giving it a place among other papers. Bouvier gives substantially the same definitions of the two terms, as does Webster also. The terms *entered* and 'filed' frequently occur in the statute, but they are never used as synonymous terms. In *Locke v. Hubbard*, 9 S. Dak. 364, this court held that, to constitute a judgment, it must be *entered* in the judgment book, thereby giving it permanent form as a record of the court. As the statute uses the same term as to orders, we are of the opinion

that the term *entry* should receive the same construction; and, until *entered* as a permanent record of the court, no appeal from the order can legally be taken."

In *Naylor v. Moody*, 2 Blackf. (Ind.) 248, it was said: "Filing and *entering* of record are not synonymous; they are nowhere so used. These phrases frequently occur in our statutes, and they always convey distinct ideas. Filing originally signified placing papers in order on a thread or wire, for safe keeping. In this country, and at this day, it means, agreeably to our practice, depositing them in due order in the proper office. *Entering* of record uniformly means writing. It appears clearly, by the manner in which the words are used in our statutes, that the legislature has recognized this distinction."

To *enter* on a docket is to write upon or in the docket. Where a statute required an undertaking of replevin bail to be *entered* on the docket in order to be valid, it is not *entered* and is void if written upon a separate piece of paper and pinned to the docket. *Lockwood v. Dills*, 74 Ind. 59.

Same—Legislative Journals. (See also the title *STATUTES*.)—A constitutional provision that proposed amendments to the constitution shall be *entered* in the journals of the Senate and Assembly was held not to require a proposed amendment to be copied at large in the journals. A reference to it by title and number was held sufficient. The court said: "Now the word *enter* primarily means to go in, or to come in, but has many derivative meanings, and is often employed in elliptical expressions, and is quite apt to be so used that the literal or most obvious meaning cannot be attributed to it. We read, for instance, in the laws of Congress that citizens may *enter* at the land office a tract of land, and the expression is repeated in different forms many times. We are often told that a certain horse has been *entered* for a race, or an animal has been *entered* at a fair. What is really done in each instance is to make a record of certain important facts for preservation or notice. And such is certainly a very ordinary meaning of the word *enter* when used in this derivative sense; that is, to register the essential facts concerning the thing said to be *entered*. And we think it may be fully admitted that the most natural and obvious meaning of the word when employed in this derivative sense is to copy, without greatly affecting the argument. We find near the title-page of nearly every book printed that it has been *entered* in the office of the librarian of Congress. What is really left with the librarian is the title-page of the proposed book, and this constitutes the *entry*, although after it is printed the author is now required to present a copy of the book for the Congressional Library. We sometimes read that a certain play of Shakespeare was *entered* at Stationers' Hall. We find that the *entry* really made was a brief identifying reference, preliminary to obtaining license to print. Such instances of the use of the word, and of the phrase in which it occurs, might be multiplied indefinitely, but these are enough to show that this usage is quite common.

Now, if we substitute in all these and like cases the word 'copy' or the phrase 'enter at large' for the word *enter*, we are conscious at once that a great change has been made. Indeed, the mere fact that the qualifying words 'at large,' 'at length,' 'in full,' do so often accompany the word *enter* is proof that all feel that it is not a synonym of the word 'copy.'" *Oakland Paving Co. v. Tompkins*, 72 Cal. 7. See *Kochler v. Hill*, 60 Iowa 581.

Rendering Distinguished from Entering a Judgment. (See also ENCYC. OF PL. AND PR., title RENDITION AND ENTRY.)—The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and the verdict. The *entry* of a judgment is a ministerial act which consists in spreading upon the record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action. It is the former, therefore, that is the effective result of the litigation. In the nature of things, a judgment must be rendered before it can be *entered*. 1 Black on Judgments, § 106; *Matter of Cook*, 77 Cal. 220; *Gray v. Palmer*, 28 Cal. 416; *California State Tel. Co. v. Patterson*, 1 Nev. 151.

In *Schuster v. Rader*, 13 Colo. 333, it was said: "Discriminating law writers speak of judgments by confession as being entered, while other judgments are spoken of as being 'given' or 'rendered.' Such is the language of the code. The distinction is significant. At common law the giving of judgment was a judicial act, to be performed only by the court sitting at stated times and places."

An *Illinois* statute provided that "whenever any judgment shall have been rendered in the Supreme Court which, upon further consideration, is found to have been erroneously *entered* up, the judges thereof are authorized, during vacation, to change the same without ordering a rehearing thereof, by *entering* a proper judgment in said cause." In *Blatchford v. Newberry*, 100 Ill. 489, upon the construction of the words "rendered" and *entered*, as used in this statute, the court said: "It will be observed that the power here assumed to be conferred upon the judges is not to grant rehearings, but when a judgment is found to have been erroneously *entered* up, to change the same without ordering a rehearing. The words 'rendered' and *entered* are plainly used antithetically, and each in its distinctive correct legal sense, 'rendered' being used to indicate the giving of judgment, and *entered* to indicate the act of placing the judgment rendered on record—in other words, enrolling or recording it. 'Erroneously *entering* up a judgment' expresses only an error in the clerical act of placing it upon the record, and implies that the judgment enrolled or recorded is not the judgment rendered or given."

In *Uhe v. Chicago, etc., R. Co.*, 4 S. Dak. 505, it was said: "To *enter* is to make a record of, and not merely to announce. 6 AM. AND ENG. ENCYC. OF LAW (1st ed.) 649. Webster says it is 'the act of committing to writing, or of recording in a book.' To take an order or a judgment is not to *enter* it. Either may be taken, and never *entered*."

Same—Statutes Limiting the Time Within Which an Appeal May Be Taken or a Writ of Error Issued to a Certain Period After the Rendition or Rendering of the Judgment. (See also ENCYC. OF PL. AND PR., vol. 2, p. 237, title APPEALS.)—A *New York* statute of limitations provided that a writ of error should be brought within two years after the rendering of the judgment or final determination of the court, and not after. In *Fleet v. Youngs*, 11 Wend. (N. Y.) 528, upon the question whether the statute commenced running from the time of the *entry* of the rule for judgment, or from the time of the filing of the record, Tracy, Senator, said: "So far as the policy of the statute is concerned, it is indifferent whether we construe the time of limitation to commence on the *entry* of the rule for final judgment, or not until the filing of the record; and it would not be doing violence to the language of the statute to give to it either construction. But it strikes me that the more obvious and natural import of the expression 'rendering of such judgment' is the annunciation or declaring the decision of the court indicated by the rule for judgment." Accordingly it was held that the statute commenced running from the time of the *entry* of the rule for judgment. And to the same effect see *Lee v. Tillotson*, 4 Hill (N. Y.) 29.

In *Gray v. Palmer*, 28 Cal. 416, the question was whether an appeal from a judgment had been taken in time, the statute then requiring the appeal to be taken within one year after the "rendition of the judgment." In that case the judgment had been rendered more than two months before it had been *entered* by the clerk; and the appeal had been, taken within a year after the *entry*, but not within a year after the rendition. The court held that the appeal was too late. See also *Matter of Newman*, 75 Cal. 213; *McLaughlin v. Doherty*, 54 Cal. 519.

The *California* Code Civ. Pro., § 939, provides that an exception to the decision or verdict because not supported by the evidence cannot be reviewed unless the appeal is taken within sixty days after the rendition of the judgment. In *re Rose*, (Cal. 1888) 20 Pac. Rep. 712, which was an appeal from the decree settling an administrator's account taken within sixty days of the *entry* of the decree, but not within sixty days from the announcement of the decision and the filing of the findings. It was held that the question of the sufficiency of the evidence could not be raised upon the appeal, the court saying: "The words 'rendition of the judgment' do not mean the same thing as 'entry' of the judgment." They mean either the announcement from the bench entered in the minutes, or the filing of the findings, if there are findings, or both. But it is not necessary to decide what is the precise meaning of the term here, for in this case both things occurred more than sixty days before the appeal was taken." This was reversed upon the rehearing, 80 Cal. 166; but upon the ground that an appeal from the action of a court in settling an administrator's account was not an appeal "from a final judgment in an action or special proceeding" so as to bring it within the provision in section 939.

In conformity with these decisions and with

III. For other meanings of the word, see note 1.

the proper construction of the term "rendition of judgment," it was held in *Furlong v. Griffin*, 3 Minn. 207, that the statute limiting the issuance of writs of error to one year after the "rendition of the judgment" had "reference to the time of making the decision by which the rights of the parties are determined and adjudged, and not to the time when such judgment is perfected by being *entered* of record." But in *Humphrey v. Havens*, 9 Minn. 318, this case was *overruled*. It was there held that the time for bringing an appeal or writ of error begins to run from the *entry* of the judgment or order upon the record; the court assigning as reasons for the reversal of *Furlong v. Griffin*, 3 Minn. 207, that the interpretation as given that case was not in accordance with the spirit, however it might be with the letter, of the law; that the question was one of mere practice, involving no principle, and that the change was as much for convenience as anything else.

When a written order is signed by the judge and filed with the clerk, who *enters* a brief statement thereof in his minute book, the order is *entered* within the meaning of Rev. Stat. *Wisconsin*, § 3042, limiting the time for appeal, although not recorded in the order book until some days later. *Uren v. Walsh*, 57 Wis. 98.

Entered and Rendered Used as Equivalents. — In *McClain v. Davis*, 37 W. Va. 336, it was said: "Our statute says the judgment must be *entered* within the time. What does the word *entered* here mean? It means that judgment must be rendered — pronounced — within the time, but not necessarily *entered* in the docket within that time. In *Conwell v. Kuykendall*, 29 Kan. 707, though the section of the statute required judgment within four days, the court said, to obviate difficulty, the word *entered* should be interpreted as '*rendered*;' that when the justice formed his mind, and announced it, that was judgment, while recording it afterwards would do; that it was the almost universal practice in all courts to announce judgments and afterwards record them." See also *Jasper v. Schlesinger*, 22 Ill. App. 641; *Ætna L. Ins. Co. v. Hesser*, 77 Iowa 387.

Book Entries. — See the title DOCUMENTARY EVIDENCE, vol. 9, p. 993.

1. An Action Is Entered, within a statutory provision that a rule for reference to arbitration may be taken at any time after *entry*, from the time it is placed on the prothonotary's docket. *Hertzog v. Ellis*, 3 Binn. (Pa.) 209.

Entering on Trial. — An announcement by the parties to an action that they are ready for trial is not an *entering* on trial, within the Code of *Alabama*, § 2810, providing that objections to the admissibility of a deposition in evidence must be made before *entering* on the trial. *National Fertilizer Co. v. Holland*, 107 Ala. 472.

Arbitration. — Under an order directing an arbitrator to make an award within a fixed time after he had *entered* on the reference, he was held to have *entered* on the reference, not at the time he gave notice of his intention to proceed, but when he began the real business

of the reference. *Baker v. Stephens*, L. R. 2 Q. B. 523, 8 B. & S. 445.

Entry of a Foreclosure. — A policy of fire insurance on personal property contained a proviso that if the title of the property were transferred or changed, "this policy shall be void; and the *entry* of a foreclosure of a mortgage * * * shall be deemed an alienation of the property, and this company shall not be holden for loss or damage thereafter." The insured property was mortgaged at the time when the insurance was effected, and notice of foreclosure had been duly served, certified, and recorded when the fire occurred. It was held that the policy was avoided. *McIntire v. Norwich F. Ins. Co.*, 102 Mass. 231, 3 Am. Rep. 459, the court saying: "The parties, in their contract, have taken pains to avoid saying simply that 'the foreclosure of a mortgage' shall be deemed an alienation. There would be no occasion for them to say that, inasmuch as the law would plainly have said it for them. The meaning of the policy, in our judgment, is that something short of an actual and complete foreclosure shall be considered, for the purposes of their contract, as a transfer or change of title, and that an *entry* for foreclosure, or an act which of itself, and without any further formality or process on the part of the mortgagee, will deprive the assured of all right and title in the property, unless he pay the debt, shall be deemed sufficient to terminate the risk."

Revenue Laws. (See also the title REVENUE LAWS.) — In construing the word as used in an Act of Congress providing for a forfeiture where an importer makes or attempts to make an *entry* by a false or fraudulent paper or practice, *Hoffman, J.*, in *U. S. v. Cargo of Sugar*, 3 Sawy. (U. S.) 46, said: "The term *entry* in the Acts of Congress is used in two senses. In many of the acts it refers to the bill of *entry* — the paper or declaration which the merchant or importer in the first instance hands to the entry clerk. In other statutes, it is used to denote, not a document, but a transaction; a series of acts which are necessary to the end to be accomplished, viz., the *entering* of the goods. In the latter sense it is used in this statute. * * * The acts which accomplish this result, and which taken together constitute an *entry*, must have a beginning and an end. There is a moment when the *entry* is attempted to be made or begun; there is a moment when it is accomplished. The *entry* may be said to be commenced or attempted when the merchant presents his declaration or bill of *entry*. When the bill of entry has gone to the requisite clerks' desks, when, accompanied by the certificate of the consul, the invoice, and the oath, it is delivered to the collector and accepted by him, then the goods may, in a just sense, be said to be admitted to *entry*, and the *entry* to be accomplished." "The word *entry*," said *Blatchford, J.*, in interpreting the same act, "means the entire transaction by which the importer obtains the entrance of his goods into the body of the merchandise of the United States," including the liquidation and payment of duties. Until the entire transaction between him and

the government is closed, the *entry* of the goods is not to be regarded as completed. *U. S. v. Baker*, 5 Ben. (U. S.) 25.

An Act of Congress provided that whenever goods should have been *entered* and passed free of duty, after the expiration of one year from the time of the *entry* should be final and conclusive upon all parties. In construing this provision, the court in *U. S. v. Seidenberg*, 17 Fed. Rep. 230, said: "What *entry* is intended in the foregoing section? An examination of all the statutes in relation to the importation, warehousing, appraising of, and the collection of duties upon goods, wares, and merchandise shows only one *entry* required or referred to. That *entry* is the original *entry* provided for, regulated, and defined by sections 2785 to 2790, inclusive, of the Revised Statutes. That *entry* is undoubtedly the one referred to in the section aforesaid. A construction of all the statutes on the subject, or of the particular section, points conclusively to such an *entry* as being the one from which the year's limitation provided shall commence to run. No other *entry* can be found as referred to, unless we go outside of the statutes. The treasury regulations speak of *entries* for warehouse, *entries* for withdrawal, and other *entries*, and Mr. Justice Strong, in *Westray v. U. S.*, 18 Wall. (U. S.) 322, speaks of '*entry* for warehouse' and '*withdrawal entry*.' The *entry* for warehouse is the original *entry*, but the term '*entry* for withdrawal' is a misnomer. There may be an application for permission to withdraw goods already *entered*, which is called in the treasury regulations the '*entry* for withdrawal,' which has certain requisites as to form, and it may be for withdrawal, for consumption, transportation in bond, or exportation; but certainly no such application can be the *entry* meant in the statute. And I see no good reason for arguing that any other than the original *entry* of goods was intended by the law."

Entry into Port — Arrive. — Under an act forbidding British vessels to *enter* or attempt to *enter* any port of the United States under pain of forfeiture, a libel must not depart from the words of the statute. An allegation that such a vessel "came and arrived" is insufficient. The court said: "The words 'arrive' and *enter* are not always synonymous, and there certainly may be an arrival without an actual *entry*, or attempt to *enter*. Perhaps an arrival within a port cannot be without an *entry* into the port." *U. S. v. An Open Boat*, etc., 5 Mason (U. S.) 120.

False Entry. (See also the titles ALTERATION OF INSTRUMENTS, vol. 2, p. 181; NATIONAL BANKS.) — Rev. Stat. U. S., § 5209, makes it a misdemeanor for an officer or clerk of a national bank to make, with intent to injure or defraud, any false *entry* in any book, report, or statement of the bank. In construing this provision, the court in *U. S. v. Creclius*, 34 Fed. Rep. 31, said: "In section 5209 the word *entry* is used with reference to books of account, reports, and statements. When used in such connection Webster defines the word as 'the act of making or *entering* a record;' that is to say, the act of making a record of a fact or transaction. But in section 5209, it is

obviously used to denote the result of the act, rather than the act itself. It signifies that which is written, be it words or figures, and if that which is so written misrepresents the fact or transaction which it was intended to authenticate, then it is a false *entry*, within the meaning of the statute. When a person makes an *entry* in books of account, the act may involve, and oftentimes does involve, an alteration of an *entry* previously made; but the act does not lose its character on that account. An *entry* is made, notwithstanding the fact that a previous *entry* is altered. Adopting the definition above stated of the words *entry* and 'false *entry*,' it appears to me that a person makes a false *entry*, within the meaning of the statute, who erases one or more figures from a number already written in a book of account, and writes other figures in lieu thereof, so that the fact intended to be recorded is falsified."

Entering Short. — In *Blaine v. Bourne*, 11 R. I. 121, it was said: "It would seem that in London it was a custom (*Giles v. Perkins*, 9 East 12, and counsel *arguing* in *Exp. Thompson*, 1 Mont. & M. 102, 110) for bankers to receive bills for collection and to *enter* them immediately in their customers' accounts, but never to carry out the proceeds in the column to their credit until actually collected; and this was called a *short entry*, or *entering short*. And such bills always continued the property of the customer, unless the contrary was to be inferred from some course of dealing. Whereas country bankers in England generally credited to their customers at once all bills considered good, and generally allowed drafts upon the proceeds. And even in the latter cases Lord Ellenborough held such bills did not pass to the assignees in bankruptcy if there was a balance in favor of the customer over and above the bills. *Giles v. Perkins*, 9 East 12; *Exp. Harford*, 2 Rose 163. But Lord Eldon held that where they were with the knowledge of the customer *entered* as cash, and the customer was entitled to draw against them, he could not claim the specific bills. *Exp. Sargeant*, 1 Rose 153; *Exp. Thompson*, 1 Mont. & M. 102. But even where the custom was to *enter short* and it was not done, this would not change the property, unless some act of the customer concurred. *Exp. Sargeant*, 1 Rose 153; *Exp. Pearce*, 1 Rose 232; and the vice-chancellor's opinion in *Exp. Thompson*, 1 Mont. & M. 102, 112."

Entry — Burglary. (See also the title BURGLARY, vol. 5, p. 50.) — On a trial for burglary the judge's instruction contained the following words: "If the brick walls of the building occupied by the Boylston National Bank were in the night-time broken, and any *entry* made into the walls so broken," etc. The appellate court said: "The proper interpretation of this language is, 'if the walls were broken through;' and the '*entry* made into the walls so broken' can only mean an *entry* through, and not merely into the body or substance of, the wall itself." *Com. v. Glover*, 111 Mass. 403.

Entries — Letters. — A statute provided that in suits by or against the representatives of deceased persons, the *entries* and written memoranda of the deceased, relative to the

ENTERPRISE. — The term “enterprise” means an undertaking of hazard; an arduous attempt.¹

ENTERTAINMENT. (See also the titles INNS AND INNKEEPERS; INTOXICATING LIQUORS; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES; THEATRES.) — “Entertaining” is defined to be “affording entertainment,” and “entertainment” means a hospitable repast; a banquet; and a banquet is said to be a grand entertainment of eating and drinking; a sumptuous feast.²

matter in issue, might be received as evidence. A woman who claimed to have been defrauded of her property wrote letters to her counsel and to other friends stating the facts of the case. It was held that these letters were written memoranda, within the meaning of the statute, and admissible in evidence in a suit brought by her representatives for the recovery of the property after her death. *Bissell v. Beckwith*, 32 Conn. 517, the court saying: “The first objection is that the terms *entries* and ‘memoranda’ have attached to them by usage an established technical legal or mercantile import, and that letters as such never come within the meaning of the expressions. It is obvious that so narrow a construction would, in many cases at least, defeat the ends of the statute. The definitions in the best dictionaries do not require it. To *enter* is ‘to set down in writing.’ An *entry* is ‘a setting down in writing.’ A memorandum is ‘a note to help the memory,’ ‘a memorial,’ ‘a record.’ The object of a memorandum is as frequently to help the memory of another person as that of the writer. A list of articles to be purchased, or a note of things to be done by a friend or an agent, specifying persons, places, mode of doing the business, etc., is certainly a memorandum, although in the form of a letter. It is well settled that a letter may be a sufficient memorandum of an agreement under the statute of frauds.” See also the titles DOCUMENTARY EVIDENCE, vol. 9, p. 913; WITNESSES.

Entry and Stairway. — A lease contained the following clause: “Also demise, set over, and lease to the same parties, as a part of said contract, and for the same consideration, an *entry* and stairway on the west side of the said building, situated as above described, the said *entry* and stairway leading from the ground floor and street to said second story.” In *Guild v. Ohio Lodge No. 132*, 6 Kan. App. 67, the court in construing this provision said: “By the terms of the lease there was leased an ‘*entry* * * * leading from the street.’ According to Webster, an *entry* is ‘a passage leading into a house or other building or to a room; a vestibule.’ A passage is defined as ‘a common avenue to various apartments in a building; a hall; a corridor.’ Under this lease the lodge was entitled to a covered and inclosed *entry* hall or vestibule upon lot 7 for an entrance to the lodge room. The written instrument was a lease of an *entry* and stairway, and not mere easement over or right to use and occupy them with other occupants of the premises. By the terms of the lease the lodge’s right to the exclusive use of the *entry* and stairway is as certain and absolute as its right to the exclusive use of the second story of the building on lot 7.”

1. *U. S. v. Ybanez*, 53 Fed. Rep. 538. That case was upon the construction of United

States neutrality laws. See generally the title INTERNATIONAL LAW.

2. *Matter of Breslin*, 45 Hun (N. Y.) 213, affirmed 107 N. Y. 609. This was upon the construction of a statute regulating the sale of intoxicating liquors, and it was held that authority to *entertain* travelers included the right to serve them with liquors.

License Acts. — A café where men and women are supplied with cigars, coffee, and ginger beer, which they there consume, is within the meaning of an act providing that “all houses, rooms, shops, or buildings kept open for public refreshment, resort, and *entertainment*” during certain hours of the night are to be deemed refreshment houses, and require licenses. *Muir v. Keay*, L. R. 10 Q. B. 595. So is a shop for the sale of lemonade and ginger beer, consisting of only one room, open in front, and without seats. *Howes v. Board of Inland Revenue*, 1 Exch. Div. 385. In the former case *Lush, J.*, said: “The main objection is that there was no public *entertainment*, for that means a musical or other public performance. I think that is wrong. I think *entertainment* is something connected with the enjoyment of refreshment rooms, tables, and the like. It is something beyond refreshment; it is the accommodation provided, whether that includes a musical or other amusement or not.” “It does not,” said *Blackburn, J.*, “apply to the mere giving of refreshment, nor to the mere fact of persons coming in; it means public reception.” In *Howes v. Board of Inland Revenue*, 1 Exch. Div. 385, *Grove, J.*, said: “I do not think that we can decide this case merely upon the interpretation of that word as found in dictionaries; but it may be useful to notice that in Webster’s its meaning, amongst others, is said to be ‘the receiving and accommodating of guests, either with or without reward,’ and also ‘reception, admission.’ Other definitions are given with respect to another sense of the word, namely, when it is applied to amusement; but I do not think that it is used in that sense in the present statute.” In the same case *Mellish, L. J.*, said: “It seems to me that *entertainment* qualifies ‘refreshment,’ and that the two words taken together mean in the statute the receiving of a customer and the providing him with drink and food of an agreeable nature. When a guest is received into the house of a friend, and drink and food of an agreeable nature are placed before him, he is *entertained*; and in my opinion a man is not the less *entertained* because he is not asked to sit down whilst he takes refreshment.”

An anteroom to a dance hall where beer was sold, and for admission to which a charge was made, is not open for public *entertainment* under this act. *Taylor v. Oram*, 1 H. & C. 370.

ENTICE. (See also the titles ABDUCTION, vol. 1, p. 162; APPRENTICES, vol. 2, p. 507; KIDNAPPING; MASTER AND SERVANT; SEDUCTION; and see INVEIGLE.) — To entice means to allure to ill; to attract; to lure; to draw by blandishments or hopes; to decoy; to tempt; to seduce; to coax.¹

ENTIRE, ENTIRELY, ETC. — "Entire" means whole, undivided; not participated in by others.²

Where the phrase "tavern or house of *entertainment*" was used in a license act, the terms were held to be synonymous, and to mean common inns. *Bonner v. Wellborn*, 7 Ga. 296.

Board and Entertainment. — In *Scattergood v. Waterman*, 2 Miles (Pa.) 323, it was said: "But as to the case before us, the 17th section applies, which is 'that every innkeeper shall keep good *entertainment* for man and horse,' under a certain penalty. The plain meaning of this is that the price of board at an inn or tavern is not prohibited as to its recovery. The term 'board' includes the ordinary necessities of life, and must be considered as being synonymous with the word *entertainment*, in the act."

Sunday. (See also the title SUNDAY.) — Meetings of "Recreative Religionists" on Sunday evenings, the proceedings at which consisted of sacred music and the delivery of an address, and admission to which was free, a charge being made, however, for reserved seats, are not public *entertainments* within the meaning of an act making places open for public *entertainment* or amusement, or for publicly debating on any subject on Sunday, to which persons shall be admitted by the payment of money, disorderly places. *Baxter v. Langley*, L. R. 4 C. P. 21. But an aquarium and restaurant are. *Terry v. Brighton Aquarium Co.*, L. R. 10 Q. B. 306; *Warner v. Brighton Aquarium Co.*, L. R. 10 Exch. 291.

"A Place of Dramatic Entertainment," as used in a copyright law, means a place where a dramatic *entertainment* is exhibited or performed, even though used but once for that purpose. *Russell v. Smith*, 12 Q. B. 217, 64 E. C. L. 217; *Lee v. Simpson*, 3 C. B. 871, 54 E. C. L. 871.

Entertainment of the Stage. — Tumbling is not an *entertainment* of the stage within the meaning of an act forbidding the performance of such without authority. *Rex v. Handy*, 6 T. R. 286. See also *Day v. Simpson*, 12 L. T. N. S. 386; *Wigon v. Strange*, L. R. 1 C. P. 175, 12 Jur. N. S. 9.

1. *U. S. v. Aucarola*, 17 Blatchf. (U. S.) 430.

Entice and Inveigle. — In *Mooney v. State*, 8 Ala. 331, it was said: "There does not appear to be any tangible or substantial distinction between the terms 'inveigle' or *entice*, as employed in this act. Both signify to allure, to incite, to instigate, to seduce, to the doing some improper act. It is true, *entice* may be used in a good sense, but that is not its natural meaning, and when so used it is figurative, and shown to be so by the context."

Children's Aid Society. — The inducement to travel westward and find new homes, held out by a children's aid society to destitute children, is not an unlawful *enticement*. It springs from the very nature of, and is incident to, the enterprise, and has its sanction in the act incorporating the society. The court

said: "The words *entice*, 'solicit,' 'persuade,' or 'procure,' as used in the pleadings in an action, and acted upon by the courts, have been well defined; they import an initial, active, and wrongful effort." *Nash v. Douglass*, 12 Abb. Pr. N. S. (N. Y. City Ct.) 187.

2. *Heathman v. Hall*, 3 Ired. Eq. (38 N. Car.) 421.

Entire signifies undivided, unmingled, complete in all its parts. *Williams v. Vancleave*, 7 T. B. Mon. (Ky.) 393.

Married Women. (See also the title SEPARATE PROPERTY OF MARRIED WOMEN.) — A conveyance in trust "for the *entire* use, benefit, profit, and advantage" of a *feme covert*, creates a separate use. The court said: "The best lexicographers define *entire* to be, whole, undivided, not participated in with others. If this be the proper meaning of *entire*, as it certainly is, then it is evident that it was not the intention of the deed that the husband should have any interest in the negroes whatever." *Heathman v. Hall*, 3 Ired. Eq. (38 N. Car.) 414.

Entire Satisfaction. (See also the titles ARCHITECTS, vol. 2, p. 815; CONTRACTS, vol. 7, p. 88; WORKING CONTRACTS; and see SATISFACTION.) — Where a contract states that the work is to be done in the best workmanlike manner, and also to the employer's *entire* satisfaction, the latter condition is qualified by the other provisions of the contract, and the employer must not attempt to defeat a just claim by arbitrarily and unreasonably saying that he is not satisfied. *Doll v. Noble*, 116 N. Y. 230. See also *Logan v. Berkshire Apartment Assoc.*, 1 Misc. Rep. (N. Y. City Ct.) 18; *Sloan v. Hayden*, 110 Mass. 141.

A contract for the erection of a building which provides that the builder shall make a complete and workmanlike job, to the *entire* satisfaction of the proprietor and architect, who shall have full power to reject all work and materials not the best of the kind specified, and that if such materials or labor be introduced they must be replaced at the builder's expense, and that the whole of the work is to be inspected as it goes on, and be accepted by the owner and architect before a final settlement is made, by implication requires that the work and materials are to be accepted or rejected at the time of the inspection and during the progress of the work; and if not then rejected, the defects must be deemed waived. *Laycock v. Moon*, 97 Wis. 59.

Entire Day. (See also the titles DAY, vol. 8, p. 737; INTOXICATING LIQUORS; TIME, COMPUTATION OF.) — An undivided day; not parts of two days, but the whole of twenty-four hours beginning and ending at twelve o'clock at night. *Robertson v. State*, 43 Ala. 325; *Haines v. State*, 7 Tex. App. 30; *Lawrence v. State*, 7 Tex. App. 192.

Entire Interest. — See the title FIRE INSURANCE.

ENTIRE CONTRACTS. — See the title **CONTRACTS**, vol. 7, p. 95.

ENTIRETIES. (See also the titles **HUSBAND AND WIFE**; **JOINT TENANTS AND TENANTS IN COMMON**.) — A tenancy by entirety (in the case of husband and wife) or entireties is a tenancy in which the entire or sole possession is in one person, as distinguished from a joint or several possession by two or more persons; in other words, tenants by entireties are seized *per tout*, and not also *per my*, whereas joint tenants are seized *et per my et per tout*. Consequently, upon the death of either of the tenants by entireties the other takes the whole under the old original grant, and not (as is the case in joint tenancy) by the new or independent title of survivorship. The effects of such a tenancy are that neither tenant can convey the whole of his estate without the other, and neither can sever without the other; and this curious result follows from the unity of the two persons of husband and wife, that a gift to them and a third person of lands or of goods in words which purport to make the three parties joint tenants in common carries one moiety or equal half part only to the husband and wife, and leaves the other moiety to the third person.¹

ENTIRETY. — See note 2.

Entire in the Sense of All. — In *Guthrie v. Wheeler*, 51 Conn. 213, it was said: "The testator doubtless meant by the expression 'the entire rents and profits' all the rents and profits; and it is as applicable to the net income as to the gross income."

Entire Control. — In *Griffin v. Camack*, 36 Ala. 696, it was said: "The language of the transfer of the judgment is as follows: 'For value received, I hereby transfer the entire control of the fl. fa. from the above-stated judgment, and of the judgment above stated, from this date, to A. B. Griffin.' We construe this language as making an unqualified transfer of the judgment. The giving of the entire control of a judgment to another, for a valuable consideration, has precisely the effect of a sale of the judgment."

Entire Services. — A contract to render a person's entire services precludes him from accepting any other employment. *Woodworth v. Sugdan*, 32 S. J. 742.

Entirely Satisfied — Reasonable Doubt. (See also the title **REASONABLE DOUBT**.) — In *State v. Ferguson*, 9 Nev. 118, it was said: "It is claimed that the court erred in refusing this instruction: 'The jury must be satisfied beyond a reasonable doubt and to a moral certainty, or in other words entirely satisfied, of the guilt of defendant, or they should acquit.' * * * The last sentence in the instruction under review was evidently intended by counsel as explanatory of the first. If the jurors were 'satisfied beyond a reasonable doubt and to a moral certainty,' they must have been entirely satisfied; and taken in this sense the addition of the latter sentence was, as we think, a useless repetition, surplusage, but not erroneous. * * * The words 'entirely satisfactory' may be so used as to convey the idea that the jury must be satisfied to a mathematical certainty, beyond the possibility of a doubt, and when so used should always be rejected by the court." In *People v. Phipps*, 39 Cal. 334, *Crockett, J.*, said: "I concur in the judgment on the ground that the court erred in charging the jury that 'if they shall be satisfied from the evidence of the defendant's guilt to a moral certainty, and be-

yond a reasonable doubt,' they must convict him," although they may not be entirely satisfied from the evidence that the defendant, and no other or different person, committed the alleged offense." The first branch of this instruction is a correct exposition of the law; but the latter clause of it was not only calculated to mislead the jury, but is repugnant to the first clause. Unless the jury was 'entirely satisfied from the evidence that the defendant, and no other or different person,' committed the offense, they must of necessity have had a reasonable doubt of his guilt. An absence of all reasonable doubt necessarily implies that the fact was established in so conclusive a manner that the jury was 'entirely satisfied' of its truth. If not 'entirely satisfied' of the defendant's guilt, his conviction would be the result of the opinion of the jury that the probability of his guilt was very strong, but they were not 'entirely satisfied' of it."

1. *Brown's Law Dict.*

Entireties Distinguished from Joint Tenancy. — In *Hiles v. Fisher*, 144 N. Y. 312, it was said: "The grand characteristic which distinguishes a tenancy by the entirety from a joint tenancy is its inseparability, whereby neither the husband nor the wife, without the assent of the other, can dispose of any part of the estate so as to affect the right of survivorship in the other. 1 *Black. Com.* 182; *Wash. on Real Prop.* 425. Each is said to be seized of the whole estate, and they do not take by moieties, and the reason assigned in the old books for this anomalous characteristic of this estate is the legal unity of the husband and wife, and the incapacity of the wife to hold a separate and severable estate in lands under a joint conveyance to both."

2. **Entirety.** — In *Neilson v. Iowa Eastern R. Co.*, 51 Iowa 191, it is said: "It is claimed the contract was to furnish ties for a contemplated road much longer than that on which the lien was claimed, and that the road is an entirety; therefore it is insisted, as the lien was only claimed on that constructed road, that no relief can be granted. The evidence shows the work of construction ceased in 1872. The lien was

ENTITLED. — To entitle means to give a claim to; to qualify for, with a direct object of the person, and a remote object of the thing; to furnish with grounds for seeking; as, an officer's talents entitle him to command.¹

claimed on all there was in sight; that is, the constructed road extending between the actual termini. The word *entirety*, as applied to a railroad, means the tangible property. It does not include a projected or paper line which may never be built. This we think must be true as between the mechanic seeking a lien and the corporation."

1. Webster's Dict., quoted in *Hibberd v. Slack*, 84 Fed. Rep. 579, where it was held that the term *entitled* did not necessarily signify "having title." The court said: "When used to express the idea of ownership it does not signify complete ownership, but merely a claim or right thereto."

Husband and Wife. (See also the titles HUSBAND AND WIFE; MARRIAGE SETTLEMENTS.) — In the absence of special words, a covenant to settle property to which the intended wife shall become *entitled* will be construed to mean, shall become *entitled* to during the coverture. *In re Edwards*, L. R. 9 Ch. 97. See also *Carter v. Carter*, L. R. 8 Eq. 551; *Dickinson v. Dillwyn*, L. R. 8 Eq. 546. Compare *Stevens v. Van Voorst*, 17 Beav. 305; *Fisher v. Shirley*, 34 S. J. 31.

Same — Succession. (See generally the title SUCCESSION.) — A statute provided that if a married woman having a separate estate died intestate, leaving a husband, he should be *entitled* to one-half of the personalty. In construing this provision the court, in *Thompson v. Thompson*, 107 Ala. 163, said: "The word *entitled*, the statute employs, when used as definitive or descriptive of the right to an interest in property, signifies to give title, right, and claim." And in *Conoly v. Gayle*, 54 Ala. 270, construing the same statutory provision, it was said: "The word *entitle* is a strong one. It means, in this connection, to give a claim or right to. In the case of *Marshall v. Crow*, 29 Ala. 280, we held that, under the section of the code we are construing, the surviving husband of an intestate wife 'takes as distributee in all the transmissible estate of which the wife died the owner, whether in possession or not.'"

Wills — Entitled To. — The words "*entitled to*" will pass all kinds of property in which the person spoken of has any title at law or in equity; and this whether the property is in possession, reversion, or remainder. *Hughes v. Young*, 32 L. J. Ch. 137; *Archer v. Kelly*, 26 L. J. Ch. 912.

In *Atcherley v. Du Moulin*, 2 K. & J. 186, it was held that a mere contingent interest did not pass under the words "*entitled to*."

Wills — Entitled in Possession or to Payment. — In a gift over on death before becoming "*entitled in possession*" or "*entitled to the payment*," or "*entitled to the receipt*," these phrases generally mean "*entitled in interest*," and so receive a construction similar to that of "*payable*." *Stroud's Judicial Dict.*, citing *In re Yates*, 21 L. J. Ch. 281; *West v. Miller*, 37 L. J. Ch. 425; *In re Williams*, 19 L. J. Ch. 46; *Hayward v. James*, 29 L. J. Ch. 822.

Person for the Time Being Entitled. — This

phrase has been held to include persons absolutely or presumptively *entitled*. *Sidney v. Wilmer*, 25 Beav. 260.

Person Entitled in Immediate Expectancy. — Personal estate was given upon a contingency, and the income was to accumulate in the meanwhile as long as lawful. There was a proviso that subject thereto the income was to be paid to the person *entitled in immediate expectancy*. In construing this provision in *Westcar v. Westcar*, 21 Beav. 331, the master of the rolls said: "I think the person *entitled in immediate expectancy* is he who, if he lives long enough, will be first *entitled* to have the possession of the property."

Entitled in Possession. — In a covenant in a marriage settlement that if either husband or wife should in any way become entitled to any real or personal property, the same should be conveyed to the trustees upon the trusts already declared *entitled* was held to mean "*entitled in possession*." *In re Clinton's Trust*, L. R. 13 Eq. 295.

The same construction was put upon the word as used in a devise in *Brown v. Rigg*, 55 L. J. Ch. 114.

And that *entitled* means "*entitled in possession*," and not "*entitled in right*," see *In re Noyce*, 31 Ch. Div. 75; *Jopp v. Wood*, 28 Beav. 53; *Chorley v. Loveband*, 33 Beav. 189; *Fryer v. Morland*, 3 Ch. Div. 675; *Turner v. Gosset*, 34 Beav. 593. Compare *Hunter v. Hanke*, 29 S. J. 556; *Commissioners of Charitable Donations v. Cotter*, 1 Dr. & War. 498; *Henderson v. Kennicot*, 2 DeG. & Sm. 492; *De Rechberg v. Beeton*, 38 Ch. Div. 192.

The *cestui que trust*, in a separate use, is not "*entitled to the possession or to the receipt of the rents and profits*," within the meaning of a statute which gives to persons who are so *entitled* the right to lease for any term not exceeding twenty-one years. *Taylor v. Taylor*, L. R. 20 Eq. 297.

Tenant in Tail Expectant. — In *Umbers v. Jaggard*, L. R. 9 Eq. 200, it was held that a tenant in tail expectant on the failure of sons of his uncle was not *entitled* to real estate within the meaning of a will, excluding from the benefits of its provisions persons who should be *entitled* to the testator's real estate at his death.

Legal Rights. — An English school act provided that the privileges and educational advantages which any class of persons were *entitled* to should be considered in any scheme abolishing or modifying them. It was held that by the term "*entitled to*" was meant legal rights, and not benefits merely enjoyed by permission or bounty. *Matter of Sutton Coldfield Grammar School*, L. R. 7 App. 91; *In re Endowed School Act*, L. R. 12 App. 444.

Equitable Rights. — In *In re Griffiths*, 20 Ch. Div. 248, it was held that an English statute authorizing the surrender of leases to which infants are *entitled* applied to a lease to which an infant was beneficially *entitled* as well as to one in which he had a legal interest.

Attachment Affidavit. — An attachment affidavit stated that the affiant believed that the

ENTREAT. — See note 1.

ENTRIES. — See ENTER — ENTRY.

ENTRUST. — See INTRUST.

ENTRY. — See ENTER — ENTRY.

ENTRY, WRIT OF. — See 7 ENCYC. OF PL. AND PR. 723.

ENUMERATE. — To enumerate means to mention in detail, or reckon up singly; to tell; to recount; to relate.²

ENUMERATED MOTIONS. — See ENCYC. OF PL. AND PR., title MOTIONS, vol. 14, p. 95.

ENURE. — See INURE.

ENVOY. (See also the titles CONSULS, vol. 7, p. 6; MINISTERS AND AMBASSADORS.) — A minister or representative of the second class.³

EPIDEMIC. — See note 4.

plaintiff "should recover," instead of using the statutory words "*entitled to recover*." The affidavit was held bad, the court saying: "The affidavit says that the affiant believes that plaintiffs 'should' recover, instead of *entitled to recover*. Are 'should' and *entitled* tantamount? The word *entitled* means that the party has legal ground to recover, while 'should' may mean merely the expression of the affiant's opinion. I do not think this will do under the rigid doctrines relating to attachments." *Sommers v. Allen*, 44 W. Va. 120.

Entitled to Vote. — The charter of a city required as one of the essential qualifications of an elector that he should be *entitled to vote* for members of the Assembly. In construing this provision the court, in *Davis v. Dawson*, 90 Ga. 820, said: "The language employed in prescribing what should constitute the qualifications of voters being used without reference to the subject of registration, the term *entitled*, as used in the phrase quoted, is synonymous with, and should be construed as meaning the same as, 'qualified.' As ruled in *Madison v. Wade*, 88 Ga. 699, 'registration adds no qualification to voters, but only serves to identify them as persons qualified to vote,' and it follows that the managers of the election improperly rejected the ballots of persons duly registered for the city election and otherwise qualified to vote, simply because they had not registered in accordance with the provisions of the Act of September 29th, 1887, * * * applicable alone to certain elections of federal and state officers therein specified."

Same — Dead Voter. — A man cannot be convicted of personating a person *entitled to vote* if the one personated be dead at the time. *Whiteley v. Chappell*, L. R. 4 Q. B. 147. But where the words of the statute are "*entitled or supposed to be entitled*," the case is different. *Rex v. Martin*, R. & R. C. C. 324.

1. **Entreat.** (See also the title PRECATORY TRUSTS.) — In *Prevost v. Clarke*, 2 Madd. 457, the use of the word *entreat* by a testator was held to give rise to a trust. See also *Mercedith v. Heneage*, 1 Sim. 553, 555; *Taylor v. George*, 2 Ves. & B. 378.

2. **Enumerate.** — A statute provided that the assessment of personal property should show the number, kind, amount, and quality assessed, but declared that a failure to *enumerate* in detail such personal property would not invalidate the assessment. It was held that *enumerate* did not mean merely the

number, but meant to designate or specifically mention, and applied to each of the specifications previously named in the clause. *San Francisco v. Pennie*, 93 Cal. 469, in which case the court said: "The word *enumerate* is very frequently used with the meaning of 'designate,' or 'specifically mention.' Lexicographers give as definitions of the word, 'to mention in detail,' or 'reckon up singly,' 'to tell,' 'to recount,' 'to relate.' It must be held that this word applies to each of the specifications previously named in the clause, and that the legislature intended that the assessment should not be invalidated if neither the number, kind, amount, nor quality of the personal property should be specifically mentioned."

In a provision in Rev. Stat. *New York*, the terms of which were that "no beneficial power, general or special, hereafter to be created, other than such as are already *enumerated* and defined in this article, shall be valid," the words "*enumerated and defined*," it was held, are not to be read literally as limiting beneficial powers to the few specially detailed in the previous sections. The court said: "The use of the word *enumerated* may have been infelicitous and inexact. That it was used in the sense of 'mentioned,' 'indicated,' 'referred to,' 'authorized,' cannot well be doubted; that is the true construction." *Cutting v. Cutting*, 20 Hun (N. Y.) 360, *affirmed* 86 N. Y. 522.

Construction. (See also the titles INTERPRETATION; STATUTES; WILLS; and see OTHER.) — In *Corwin v. Hood*, 58 N. H. 402, it was said: "The *enumeration* of particular things in a written instrument may exclude others of the same class; and there is no absolute rule of construction that such *enumeration* excludes things of a different class, when the general terms used are broad enough to include them." See also *Matter of Swigert*, 119 Ill. 89.

3. *Heathfield v. Chilton*, 4 Burr. 2015.

4. **Epidemic — Life Insurance.** (See also the title LIFE INSURANCE.) — In *Pohalaski v. Mutual L. Ins. Co.*, 45 How. Pr. (N. Y. Super. Ct.) 511, *affirmed* 56 N. Y. 640, the insured obtained permission from the insurance company to proceed to Cuba, "he to take his own risk of death from *epidemics*." He died in Havana of yellow fever. The court refused the admission of parol evidence to explain the meaning of *epidemic*, saying: "It is not allowable to interpret what has no need of interpretation (*Broom's Leg. Max.*); and parol evidence

EPISCOPACY. — “Episcopacy” is defined as a government of a church by bishops or prelates; that form of ecclesiastical government in which diocesan bishops are established as distinct from and superior to priests or presbyters; government of the church by three distinct orders of ministers — bishops, priests, and deacons.¹

EQUAL — EQUALLY. (See also the titles EXEMPTION FROM TAXATION; SPECIAL ASSESSMENTS; SUCCESSION; TAXATION; WILLS.) — “Equal” means being of the same magnitude or extent; having the same value; possessing the same qualities or conditions. “Equal” also means being in just proportion.² “Equally” means equal in degree or quantity.³

should never be allowed to create an ambiguity where none exists. *Auburn City Bank v. Leonard*, 40 Barb. (N. Y.) 119. The word *epidemics*, in the permit, is not shown to have been used in the peculiarly medical sense attributed to it by the learned counsel for the company; nor was it used in a sense peculiar to the business of life insurance. On the contrary, it is plainly to be seen that it was used and understood in its plain, ordinary, and popular sense as a familiar word in our language. No evidence of any kind from any other source was therefore admissible to change that meaning. *First Baptist Church v. Brooklyn F. Ins. Co.*, 28 N. Y. 153; *Neff v. Friedman*, 2 Sweeny (N. Y.) 607. The company evidently did not intend to stipulate solely against diseases which usually assume an *epidemic* character. It meant to stipulate and did stipulate for exemption from liability in case of death from any disease, however simple and harmless under ordinary circumstances at home, that might by any possibility prevail in Cuba to an extent which could be called *epidemic*.”

1. Webster's Dict., *quoted in* Trustees, etc., *v. Colgrove*, 4 Hun (N. Y.) 366. This case was upon the construction of a bequest “to the officers of the Protestant Episcopal Church, into the fund to support the *episcopacy* of said church.”

2. *Fry v. Hawley*, 4 Fla. 279, in which case where a contract provided that all losses should be *equally* borne, it was held that this meant that they should be borne in proportion *equal* to the respective interests of the parties.

Equal To in the Sense of Not Less Than. — A canal company contracted with a partnership to lease to the latter a certain number of boats on its canal, to enable such partnership to establish a freight line for the transportation of goods over the canal, and the partnership further agreed to keep the number of boats in the freight line, during the term of five years, *equal* to the number of boats leased in the first instance. It was held that “*equal* to” here meant “not less than.” *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 517. The court said: “In the first place the defendants agree to keep the number of boats in the freight line *equal* to the number of boats leased, of which there are just thirty-two; and on this it is argued that ‘*equal* to’ means neither more nor less. If, in the statement of a mathematical problem, we found these words, we would not dare to question this interpretation, for in that exact science equality conveys the idea of identity in size and form at least. But one of the primary rules of legal construction, founded upon common sense, and fortified by

impregnable authorities, is that words in a contract are to be construed not according to any technical or scientific standard, but their ordinary import, if they have one. And in common use, words which are absolutely exact in mathematics are inexact and vague. A line, mathematically, has no breadth. The line of a railroad is a highway a hundred feet wide. A point has neither length nor breadth nor thickness. The point of an argument has often much of all. With similar indefiniteness may we employ the phrase ‘*equal* to.’” It always, I think, excludes the idea of inferiority, and therefore when we assert that two things are equal to each other, we give it more of mathematical accuracy, because we deny the inferiority of either to the other; but when we say that one person or thing is equal to another, we do not necessarily nor ordinarily deny its superiority to that other.”

Equal Synonymous with Uniform. — See *Crawford v. Lynn County*, 11 Oregon 482. See also the title TAXATION.

3. **Equally.** — *Gulf, etc., R. Co. v. Warlick*, (Indian Ter. 1896) 35 S. W. Rep. 236, in which case the court refused to give the term the meaning of “likewise” or “in like manner,” as used in an instruction that “unless you should conclude from the evidence that she, by her own negligence, contributed *equally* with defendant to her own injuries.”

In a statute of descent and distribution, which, after providing for descent to children, continued: “And if the intestate shall have no child or children at the time of his decease, such estate shall descend *equally* to the next of kin, in *equal* degree, and those who represent them,” the word “*equally*” is not used in its verbal sense, as it is in the former part of the section, where it is said that “the portions of all the male children shall be *equal*,” where it intends that they shall be on a level, or to the same amount; but the term *equally*, as an adverb, is used in one of its adverbial senses, and intends, “in like manner,” or “in the same manner as has been before provided.” *Auger v. Taylor*, 2 Tyler (Vt.) 260.

The word, however, generally refers to size or quantity, meaning “like” or “same.” *Bannister v. Bull*, 16 S. Car. 220.

Equally in the Sense of Alike — Transactions with Deceased Persons. (See also the title WITNESSES.) — A statute forbade parties, plaintiff or defendant, testifying against the representatives of a deceased person, where the matters, if true, must have been *equally* within the knowledge of the deceased. It was held that the statute did not make the admissibility of the party's testimony depend upon the degree

A Direction in a Will to divide a sum of money or an estate "equally" among the next of kin or relations or other designated persons usually causes a division *per capita*.¹ This, however, is not always the case, the courts having frequently, in order to give effect to the intention of the testator, directed that the beneficiaries should take *per stirpes*.²

of his knowledge, but it was designed to prohibit his testifying at all upon matters within the knowledge of himself and the deceased alike. The court said: "I am of opinion that the court erred in its construction of the statute, and that the word *equally*, as employed in this section, does not relate to the degree of knowledge possessed by the parties, but is used in the sense of 'alike,' to preclude the party's evidence where the facts to which he is called were known to both. The word *equally* is often used in this sense, and it cannot be employed in any other here, without leading to manifest absurdities." *Kimball v. Kimball*, 16 Mich. 215.

Wills. (See also the title WILLS.) — A debtor in his will directed that his real estate be sold and the proceeds *equally* divided between his wife and his brother and sister. It was held that the wife took one-half dower, and his brother and sister the other half between them. *Hutchinson v. La Fortune*, 28 Ont. Rep. 329.

The testator directed his estate to be *equally* divided among his ten children, but provided that two of his daughters should hold only a life estate. The court held that the words "*equally* divided" referred to the size or quantity of the estate, saying: "In regard to the words 'to be *equally* divided,' reference was had to the size of the shares, and not to the terms or conditions which he might attach to any one of them. The word *equally*, in its context, does not mean that the shares of the ten children were to be given and held in the same manner, but to be *equal* in quantity." *Bannister v. Bull*, 16 S. Car. 227.

Equal Proportions. — In *Treadwell v. Cordis*, 5 Gray (Mass.) 341, the children, under a will, were entitled to *equal* proportions of the income of a trust fund, but the debts of each child in excess of twenty thousand dollars were to be deducted from his proportional share in the fund. Shaw, C. J., in speaking of the words "*equal* proportions," said: "This, we think, does not mean in *equal* aliquot parts or quarters, but in proportions *equalized* or made *equal* by charging advantages previously made, to those who had received them, deducting them from their shares, and replacing the amounts thus obtained as a part of the estate to be divided." See also *Cummings v. Bramhall*, 120 Mass. 552.

Same — Joint Tenancy and Tenancy in Common. (See also the titles JOINT TENANTS AND TENANTS IN COMMON; LEGACIES AND DEVISEES; WILLS.) — An estate given to two persons, *equally* to be divided between them, is, under a deed, a joint tenancy; under a will, a tenancy in common. In the case of a deed is implied no more than the law has annexed to the estate, viz., divisibility; in the case of a will, the deviser may be presumed to have meant what is most beneficial to both devisees. 2 Black. Com. 193; *Jackson v. Luquere*, 5 Cow. (N. Y.) 221.

Same — Survivorship. — But in *Louisiana* a legacy to two persons, to be divided *equally* between them, is a joint one. If but one of them survives the testator, he is entitled, by accretion, to the whole of the thing bequeathed. *Mackie v. Story*, 93 U. S. 589.

Same — Value or Area. — A testatrix devised a tract of land to be *equally* divided between her son and daughter, the dividing line to run across the tract so as to give the son the east part and the daughter the west part. It was held that the parts were to be *equal* in value rather than in area. *Sanderson v. Bigham*, 40 S. Car. 501.

Value or Area — Partition. (See also the title PARTITION.) — The words "*equal* half parts" in regard to partition do not mean *equal* acreage, acre for acre, but include value, location, availability, and contiguity. *Hawaiian Commercial, etc., Co. v. Waikapu Sugar Co.*, 9 Hawaiian 424.

1. Per Capita. (See also the title WILLS.) — *England.* — *Thomas v. Hole*, Cas. temp. Talb. 251; *Phillips v. Garth*, 3 Bro. C. C. 64; *Rickabe v. Garwood*, 8 Beav. 579; *Butler v. Stratton*, 3 Bro. C. C. 367; *Lincoln v. Pelham*, 10 Ves. Jr. 176; *Green v. Howard*, 1 Bro. C. C. 31; *Rayner v. Mowbray*, 3 Bro. C. C. 234; *Lenden v. Blackmore*, 10 Sim. 626; *Lincoln v. Pelham*, 10 Ves. Jr. 166; *Lugar v. Harman*, 1 Cox 250; *Blackler v. Webb*, 2 P. Wms. 383.

Connecticut. — *Lord v. Moore*, 20 Conn. 122. *Delaware.* — *Kean v. Hoffecker*, 2 Harr. (Del.) 103.

Illinois. — *Best v. Farris*, 21 Ill. App. 49; *Richards v. Miller*, 62 Ill. 417; *Kelley v. Vigas*, 112 Ill. 242.

Kentucky. — *Wells v. Newton*, 4 Bush (Ky.) 158.

Maryland. — *Maddox v. State*, 4 Har. & J. (Md.) 539; *Brittain v. Carson*, 46 Md. 189.

Mississippi. — *Nichols v. Denny*, 37 Miss. 61. *New Hampshire.* — *Farmer v. Kimball*, 46 N. H. 435.

New York. — *Stevenson v. Lesley*, 70 N. Y. 513.

North Carolina. — *Hill v. Spruill*, 4 Ired. Eq. (39 N. Car.) 244; *Harris v. Philpot*, 5 Ired. Eq. (40 N. Car.) 324.

Virginia. — *McMaster v. McMaster*, 10 Gratt. (Va.) 275.

A *per capita* division is intended by the words "divided *equally*," whether the devisees are children and grandchildren, brothers or sisters, nephews or nieces, or strangers in blood to the testator. "Divided *equally* between" a nephew, two nieces, and two children of another nephew has been held to mean and intend an *equal* division *per capita*. *Purnell v. Culbertson*, 12 Bush (Ky.) 369. To the same effect is *Bender's Appeal*, 3 Grant's Cas. (Pa.) 210.

Equally and Share Alike Are Equivalent Expressions. — *Gross's Estate*, 10 Pa. St. 302.

2. Per Stirpes. — *Lachland v. Downing*, 11 B. Mon. (Ky.) 34; *Roome v. Counter*, 6 N. J. L.

EQUALIZATION. — See the titles SPECIAL ASSESSMENTS; TAXATION.

EQUAL PROTECTION OF LAWS. — See the titles CONSTITUTIONAL LAW, vol. 6, p. 967; DUE PROCESS OF LAW, vol. 10, p. 289.

EQUAL TO SAMPLE. — See the titles IMPLIED WARRANTY; SALES; WARRANTY.

EQUIPMENT. — “Equipment” is defined as the act of equipping or being equipped, as for a voyage or expedition.¹

111; Wintermute v. Snyder, 3 N. J. Eq. 489; Petition of Swinburne, 16 R. I. 212; Balcom v. Haynes, 14 Allen (Mass.) 204; Lyon v. Acker, 33 Conn. 222; Young's Appeal, 83 Pa. St. 59; Walker v. Griffin, 11 Wheat. (U. S.) 375; Henderson v. Womack, 6 Ired. Eq. (41 N. Car.) 437.

Examples.—The words “*equally* to be divided” and “share and share alike” in a will usually mean a division *per capita*, and not *per stirpes*; but where the devise is not to the several children of brothers and sisters, but to the children of several brothers and sisters, and the classes are distinguished by the word “and” between each, it amounts to a classification, and the children of each class take their parent's share, notwithstanding the use of the words “share and share alike.” Hiestand v. Meyer, 150 Pa. St. 501. See also Minter's Appeal, 40 Pa. St. 111.

In Butler v. Butler, 97 Ky. 136, a testatrix devised certain of her property equally to her two sons, and by another clause gave “to my said sons, in trust for their children, *equal* interests in a house and lot.” Upon the death of the testatrix one son had seven and the other four children. It was held that each son took one-half of the property in trust for his children. The court said: “The question on this appeal is, do the children take *per stirpes* or *per capita*? The chancellor decided that the two sons took the property equally, and each held one-half of it for his children; and this, we think, was the proper construction. The sentence may be read thus: ‘I give to my sons, Richard and Joseph, *equal* interests in the house and lot in Louisville, in trust for their children.’ It seems to us manifest that the gift of the ‘*equal* interests’ in the property is to the two sons, and that the clause, when grammatically construed, can mean nothing else. * * * In the disposition of her property in the first and fourth clauses of her will, the testatrix had manifested an intention to equalize her two sons, her only children; and so she intended, we may fairly assume, that the property which she placed in each son's control for his children should consist of *equal* proportions.”

In Kelley v. Vigas, 112 Ill. 245, it was said: “The only doubt as to its correctness arises out of the use of the words ‘*equal* among’ in the will. It is understood the words ‘*equal* among,’ or *equally*, or ‘share and share alike,’ when used in a will, mean a division of the estate *per capita*; but this meaning of these words may be controlled by the context, and is often so done. That is the case here. The testator, by making a bequest of money to his own daughter and a devise of land to his daughter-in-law, evidently intended to make an *equal* division of his estate between his daughter and the family of his deceased son, and it is not unreasonable to believe that was

all he meant by the use of the words ‘*equal* among.’ This most just intention ought not to be defeated by giving to the words employed in the will an arbitrary and technical meaning never understood, or perhaps thought of, by the testator when he used them.”

A testator, having directed an *equal* division of a portion of his estate among his children, ordered that his real estate should be sold, and, after giving out of the proceeds one thousand two hundred dollars to one of his two sons, directed that the residue should be *equally* divided between his two sons and the children of his daughter Catharine, who was then married and living. It was held that Catharine's children took *per stirpes*. The court said: “*Equally* means that the class should share *equally* with George and Joseph. This is the grammatical construction of this adverb, for the names George and Joseph and the class are connected by copulatives that apply all the qualifying terms to them alike. Now if similar words in other wills have been interpreted devises *per capita*, it has been because no inconsistent interest was perceptible in the whole will, but in the preference to George and the equality provided for the rest, we find in this will an intent that is wholly inconsistent with a *per capita* division among Catharine's children, and therefore we reject it without intentional violence to the authorities.” Risk's Appeal, 52 Pa. St. 273.

If a testator gives the income of a residuary fund to his wife during her life, and directs that the principal at her death be divided *equally* between his blood relations of the degree which the law permits, the bequest over is to those who are the heirs of the testator at the time of his death, each of several classes taking *per stirpes*, and not *per capita*. Cummings v. Cummings, 146 Mass. 501.

Descent and Distribution. (See also the title SUCCESSION.)—It has been held that the degrees of consanguinity mentioned in the sixth section of the *New Jersey* statute of descents must be ascertained by the common-law rule as to descent of real estate, allowing representation among collaterals, which, like the rule prohibiting ascents, has never been changed. The rule of the civil law for computing next of kin has never been adopted in this state, and it is not required by any implication from the provision of this section. And the “*equal* parts” in this section must be held to mean *equal per stirpes*, as the like words “*equal* portions” in the statute of distributions are settled to mean. Fidler v. Higgins, 21 N. J. Eq. 138.

1. Metz v. California Southern R. Co., 85 Cal. 329.

Equipments—Exemption from Taxation. (See generally the title EXEMPTION FROM TAXATION.)—**Equipments** mean “the visible,

EQUITABLE. — "Equitable" is defined as meaning marked by a due consideration for what is fair, unbiased, or impartial; pertaining to equity.¹

EQUITABLE ASSETS. (See also the titles EXECUTORS AND ADMINISTRATORS, *post*; INSOLVENCY AND BANKRUPTCY; MARSHALING ASSETS.) — The property of a deceased person which is available at common law for the purpose of satisfying his creditors is commonly called legal assets, and will be applied both at law and in equity, in the ordinary course of administration, which gives debts of a certain nature a priority over others. Where, however, the assets are such as are available only in a court of equity, they are termed "equitable" assets, and according to the well-known maxim that "equality is equity," will, after satisfying those who have liens on any specific property,

tangible furniture, fixtures, and apparatus on the premises, which are usual and necessary for the operations there conducted." Appeal Tax Ct. *v.* St. Peter's Academy, 50 Md. 346, in which case it was held that the word embraced the library. See also Appeal Tax Ct. *v.* Grand Lodge, etc., 50 Md. 421; Appeal Tax Ct. *v.* Baltimore Academy of Visitation, 50 Md. 437; Redemptionists *v.* Howard County, 50 Md. 449.

Deed of Trust. — Under a description of property in a deed of trust as "all equipments, machinery, implements, tools, instruments, and fixtures of whatever kind or nature, that now are, or may hereafter be, belonging or appertaining to said mines, or any of them, or used in connection therewith," *equipments* was held to include the pit mules that were essential to the operation of the mines. Said Hall, J.: "One of the definitions of the word *equipment*, given by Mr. Webster, is 'third (Civ. Eng.), the necessary adjuncts of a railway, as cars, locomotives.' The equipments of a coal mine are all its necessary adjuncts, and include pit mules, which are an essential part of its apparatus, and without which it cannot be operated." And the absence of such a connecting phrase as "such as," "consisting of," or "as follows," the meaning of the general word *equipment* cannot be held to be limited by the particular words which follow it. Rubey *v.* Missouri Coal, etc., Co., 21 Mo. App. 159.

Railroads. (See also the title RAILROADS.) — *Equipment* as applied to railroads has been defined to be the necessary adjuncts of a railway, as cars, locomotives, etc. People *v.* St. Louis, etc., R. Co., (Ill. 1896) 45 N. E. Rep. 826, citing 6 AM. AND ENG. ENCYC. OF LAW (1st ed.), 655.

Equipment Mortgage by Railroad. — A contract by which the defendant agreed to sell the plaintiffs a controlling interest in the stock of certain railroad companies contained a clause that the railroads in question were subject to only a certain amount of indebtedness, including an *equipment* mortgage of four hundred thousand dollars. In construing the term "*equipment* mortgage," as thus used, the court, in Chicago, etc., R. Co. *v.* Hoyt, 89 Wis. 314, said: "By *equipment*, as used, we understand reference is made to the locomotives, cars, furniture, etc., with which the three railroads mentioned were, at the time of closing the deal, to be equipped. The *equipment* mortgage was to secure bonds which had been issued prior to the making of the contract, and

also such as should thereafter be issued, up to the time of closing the deal. The bonds so issued prior to closing the deal would, we infer from the language employed, be equivalent in value to the locomotives, cars, furniture, etc., with which the three railroads mentioned were then equipped."

Maritime Liens. (See also the title MARITIME LIENS.) — When a barge becomes necessary in navigating a boat, and one is hired for that purpose, its letting is material furnished for the *equipment* of the boat within the meaning of a lien law. Gleim *v.* Steamboat Belmont, 11 Mo. 113.

1. Gas Light, etc., Co. *v.* New Albany, 139 Ind. 660.

Equitable Grounds. — An English procedure act provided that the defendant in any cause in which, if judgment were obtained, he would be entitled to relief against such judgment upon *equitable* grounds, might plead the facts which would entitle him to such relief by way of defense. In construing this provision, Turner, L. J., in Phelps *v.* Prothero, 7 De G. M. & G. 735, said: "The expression '*equitable* grounds,' as I understand this enactment, means grounds depending upon the laws by which courts of equity are governed, and not upon the course and practice of those courts."

Equitable Right. — An *equitable* right is such right as may be asserted and maintained in a court of equity. Browning *v.* Watkins, 10 Smed. & M. (Miss.) 485. See the title EQUITY, *post*.

Discretion. — A statute authorized the conveyance of certain public property wherever it could be shown to the satisfaction of the commissioners appointed that the city had sold it and received value therefor, and it should appear *equitable* to the commissioners to make such conveyance. In construing this provision the court in Provisional Municipality *v.* Lehman, 57 Fed. Rep. 332, said: "The words 'and it shall appear *equitable* to said board' can refer only to existing, well-defined equities, and ought not to be construed into vesting an arbitrary discretion in the municipality."

Equitable Levy. — In Miller *v.* Sherry, 2 Wall. (U. S.) 249, it was said: "The filing of a creditor's bill and the service of process creates a lien in equity upon the effects of the judgment debtor. It has been aptly termed an '*equitable* levy.' " See also Tilford *v.* Burnham, 7 Dana (Ky.) 110.

Equitably in the Sense of Fairly. — New York, etc., R. Co. *v.* Dennis, 40 N. J. L. 367.

be distributed among the creditors of all grades *pari passu*, without regard to legal priority.¹

EQUITABLE ASSIGNMENTS — See the title ASSIGNMENTS, vol. 2, pp. 1007-1014; 7 ENCYC. OF PL. AND PR. 730.

EQUITABLE ATTACHMENTS. — See the titles ATTACHMENTS, vol. 3, pp. 193, 194; GARNISHMENT: and see 7 ENCYC. OF PL. AND PR. 787.

EQUITABLE CONVERSION. — See the title CONVERSION AND RECONVERSION, vol. 7, p. 463.

EQUITABLE DEFENSES. — See 7 ENCYC. OF PL. AND PR. 799.

1. *Silk v. Prime*, 2 Hare & Wall. L. Cas. 88.

Equitable Assets. — In *Heiman v. Fisher*, 11 Mo. App. 280, it was said that *equitable assets* are such as can be reached only by the aid of a court of equity, and the established rule is, that which can only be reached in equity must be distributed *pari passu* among all creditors. See also *St. Louis v. O'Neil Lumber Co.*, 114 Mo. 74.

In *Freedman's Sav., etc., Co. v. Earle*, 110 U. S. 717, it was said: "Ordinarily and strictly, the term '*equitable assets*' applies only to property and funds belonging to the estate of a decedent, which by law are not subject to the payment of debts, in the course of administration by the personal representatives, but which the testator has voluntarily charged with the payment of debts generally, or which, being nonexistent at law, have been created in equity, under circumstances which fasten upon them such a trust. *Adams on Equity* 254. But, as was said by Chancellor Kent in *Williams v. Brown*, 4 Johns. Ch. (N. Y.) 682, the doctrine 'does not apply to the case of a debtor in full life, for there is no equitable trust created and attached to the distribution of the effects in the latter case.' Property held by a trustee for the testator is legal assets, for although the benefit of the trust, if resisted, cannot be enforced without equitable aid, yet the analogy of the law will regulate the application of the fund. To constitute *equitable assets*, the trust imposed by the party, or by the court, must be for the benefit of creditors generally. It is true that in *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 119, 7 Am. Dec. 478, Chancellor Kent held surplus money arising from the sale of mortgaged premises to be *equitable assets*, but that was in a case where the mortgagor was deceased and the fund was in a court of equity for distribution, and when the judgment to which priority was refused was confessed by the administrator. In *Purdy v. Doyle*, 1 Paige (N. Y.) 558, the rule was stated by Chancellor Walworth in these words: 'If it is such property as the judgment creditors could ob-

tain a specific or general lien on at law, they are entitled to the fruits of their superior vigilance, so far as they have succeeded in getting such lien. But if the property was in such a situation that it could not be reached by a judgment at law, and the fund is raised by a decree of this court, and the creditors are obliged to come here to avail themselves of it, they will be paid on the footing of equity only.' But a specific lien, whether legal or equitable, on property liable as *equitable assets*, was always respected by courts of equity. *Fremoult v. Dedire*, 1 P. Wms. 429; *Finch v. Winchelsea*, 1 P. Wms. 277; *Ram on Assets* 318. And Lord Chancellor Parker, in *Wilson v. Fielding*, 2 Vern. 763, 10 Mod. 426, drew the distinction between property which is assets in a court of equity only, and certain property which a creditor cannot come at without the aid of a court of equity. In that case the mortgage debt had been paid out of the personal estate by the executor, thus exonerating the mortgaged premises which had descended to the heir. The unsatisfied creditors filed a bill to require the heir at law to refund, which was 'a matter purely in equity and a raising of assets where there were none at law.' "

Funds of Corporation. — In *Catlin v. Eagle Bank*, 6 Conn. 243, it was said: "The funds of the corporation, after its insolvency, have been called *equitable assets*; but the name was wholly misapplied. *Equitable assets*, generally speaking, are such as the debtor has made subject to his debts generally, that would not thus be subjected without his act, 2 Fonb. Eq. 402, n. d., and which can be reached only by the aid of a court of equity. They are divisible among the creditors, as all property is, when placed under the jurisdiction of a court of chancery, *pari passu* in ratable proportions. *Riggs v. Murray*, 2 Johns. Ch. (N. Y.) 577. But they must be assets, or they cannot be *equitable assets*; and this term does not express the nature of property, in the hands of an individual, partnership, or corporation actually insolvent."

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CROSS-REFERENCES.

As to other points of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: ALLOWANCES, vol. 2, p. 156; *DOWER*, vol. 10, p. 122; *LEGACIES AND DEVISES*; *SATISFACTION*; *WILLS*.

I. DEFINITION, FOUNDATION, AND RELATIONS OF DOCTRINE — 1. Definition. —

Election in equity is a choice which a party is compelled to make between the acceptance of a benefit under an instrument and the retention of some property, already his own, which is attempted to be disposed of in favor of a third party by virtue of the same instrument.¹ More comprehensively election is defined as the choosing between two rights by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both.²

Illustration — Taking Under and Against the Instrument. — Thus, if by one clause of a will an estate is given to A, and by another clause of the same instrument an estate of which A is the owner is given to B, A must adopt one of two courses. On the one hand, he may elect to take under the will, in which event he takes the property devised to him by the testator, and B will take the property of A of which the will attempts to dispose; on the other hand, he may elect to take against the will, that is, to retain his own property, but if he does so he must make compensation to B out of the estate which is devised to himself, to the extent of the benefit which B would have derived from A's property under the terms of the will.

2. Rational Foundation of Doctrine. — The doctrine of election is founded upon the principle that one cannot accept and reject under the same instru-

1. **Definition of Election.** — Bispham's Principles of Eq., § 295, adopted in *Fitzhugh v. Hubbard*, 41 Ark. 68; *Goodrum v. Goodrum*, 56 Ark. 535.

Other Definitions. — Election is "the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one, that he should not enjoy both." 2 Story's Eq. Jur., § 1075, adopted in *Washburn v. Van Steenwyk*, 32 Minn. 350.

The Doctrine of Approbate and Reprobate in Scotch Law answers to the doctrine of election in the English law. *Codrington v. Codrington*, L. R. 7 H. L. 854; *In re Chesham*, 31 Ch. Div. 466; *In re Vardon's Trusts*, 28 Ch. Div. 128; *Van Dyke's Appeal*, 60 Pa. St. 490. But the principle of approbate and reprobate implies not only that a case of election has arisen but that the person has bound himself by an actual election. See 3 Eng. Rul. Cases 326, note.

2. *Carter's Appeal*, 59 Conn. 587.

ment. He must give effect to the whole intention of the donor, and not merely to provisions which are intended as beneficial to himself,¹ and the

1. A Person Cannot Accept and Reject under the Same Instrument — *England*. —

Streatfield v. Streatfield, Cas. temp. Talb. 176, 1 White & T. L. Cas. 404; *Dillon v. Parker*, 1 Swanst. 379, 1 Jac. 505, 7 Bligh N. S. 325, 1 Cl. & F. 303; *Gretton v. Haward*, 1 Swanst. 421; *Noys v. Mordaunt*, 2 Vern. 582; *Raneliffe v. Parkyns*, 6 Dow. App. Cas. 149, 19 Rev. Rep. 36; *Codrington v. Lindsay*, L. R. 8 Ch. 578; *In re Vardon's Trusts*, 28 Ch. Div. 129; *In re Chesham*, 31 Ch. Div. 472; *In re Brooksbank*, 34 Ch. Div. 164; *Cooper v. Cooper*, L. R. 7 H. L. 63; *Coutts v. Acworth*, L. R. 9 Eq. 522; *Ker v. Wauchope*, 1 Bligh 1, 20 Rev. Rep. 1; *Gibson v. Gibson*, 17 Eng. L. & Eq. 352, 22 L. J. Ch. N. S. 346, 1 Drew. 42; *Atty.-Gen. v. Lonsdale*, 1 Sim. 105, 5 L. J. Ch. 99; *Stephens v. Stephens*, 1 De G. & J. 70; *Whistler v. Webster*, 2 Ves. Jr. 372; *Welby v. Welby*, 2 Ves. & B. 187; *Macnamara v. Jones*, 1 Bro. C. C. 481; *Freke v. Barrington*, 3 Bro. C. C. 283; *Blake v. Bunbury*, 4 Bro. C. C. 21; *Cookes v. Hellier*, 1 Ves. 234; *Wilson v. Mount*, 3 Ves. Jr. 191; *Wollen v. Tanner*, 5 Ves. Jr. 218; *Blount v. Bestland*, 5 Ves. Jr. 515; *Cowper v. Scott*, 3 P. Wms. 124; *Boughton v. Boughton*, 2 Ves. 12; *Villareal v. Galway*, Amb. 682; *Roberts v. Kingsly*, 1 Ves. 238; *Allen v. Poulton*, 1 Ves. 121; *Bigland v. Huddleston*, 3 Bro. C. C. 285, note; *Finch v. Finch*, 4 Bro. C. C. 38, 1 Ves. Jr. 534; *Wilson v. Townshend*, 2 Ves. Jr. 693; *Broome v. Monck*, 10 Ves. Jr. 609; *Thellusson v. Woodford*, 13 Ves. Jr. 209; *Birmingham v. Kirwan*, 2 Sch. & Lef. 444; *Andrew v. Trinity Hall*, 9 Ves. Jr. 533; *Griffith-Boscawen v. Scott*, 26 Ch. Div. 358; *Doe v. Cavendish*, 3 Doug. 55, 26 E. C. L. 34, 4 T. R. 743, note a.

United States. — *Peters v. Bain*, 133 U. S. 695; *Schley v. Collis*, 47 Fed. Rep. 251.

Arkansas. — *Fitzhugh v. Hubbard*, 41 Ark. 68.

Georgia. — *McGinnis v. McGinnis*, 1 Ga. 496.

Illinois. — *Brown v. Pitney*, 39 Ill. 468; *Woolley v. Schrader*, 116 Ill. 29; *Van Schaack v. Leonard*, 164 Ill. 602.

Indiana. — *Moore v. Baker*, 4 Ind. App. 115.

Kentucky. — *Huhlein v. Huhlein*, 87 Ky. 247.

Maine. — *Weeks v. Patten*, 18 Me. 47, 36 Am. Dec. 696; *Smith v. Guild*, 34 Me. 447.

Maryland. — *Waters v. Howard*, 1 Md. Ch. 120; *McElfresh v. Schley*, 2 Gill (Md.) 182; *Barbour v. Mitchell*, 40 Md. 169; *Hyatt v. Vanneck*, 82 Md. 465.

Massachusetts. — *Hyde v. Baldwin*, 17 Pick. (Mass.) 308; *Tyler v. Wheeler*, 160 Mass. 209; *Smith v. Smith*, 14 Gray (Mass.) 532; *Hapgood v. Houghton*, 22 Pick. (Mass.) 483; *Watson v. Watson*, 128 Mass. 152.

New Jersey. — *Yawger v. Yawger*, 37 N. J. Eq. 218; *Kearney v. Macomb*, 16 N. J. Eq. 195.

New York. — *Glen v. Fisher*, 6 Johns. Ch. (N. Y.) 35, 10 Am. Dec. 310; *Havens v. Sackett*, 15 N. Y. 365; *Caulfield v. Sullivan*, 85 N. Y. 159; *Chipman v. Montgomery*, 63 N. Y. 234; *Haack v. Weicken*, 118 N. Y. 75; *Lee v. Tower*, 124 N. Y. 370.

North Carolina. — *Wilson v. Arny*, 1 Dev. &

B. Eq. (21 N. Car.) 376; *McQueen v. McQueen*, 2 Jones Eq. (55 N. Car.) 19, 62 Am. Dec. 205; *Flippin v. Banner*, 2 Jones Eq. (55 N. Car.) 455; *Weeks v. Weeks*, 77 N. Car. 421.

Ohio. — *Jennings v. Jennings*, 21 Ohio St. 80; *Huston v. Cone*, 24 Ohio St. 11; *Hibbs v. Union Cent. L. Ins. Co.*, 40 Ohio St. 554.

Pennsylvania. — *Stump v. Findlay*, 2 Rawle (Pa.) 174, 19 Am. Dec. 632; *Hamilton v. Buckwalter*, 2 Yeates (Pa.) 398, 1 Am. Dec. 350; *Irwin v. Tabb*, 17 S. & R. (Pa.) 423; *Cox v. Rogers*, 77 Pa. St. 160; *Armstrong v. Walker*, 150 Pa. St. 585; *Zimmerman v. Lebo*, 151 Pa. St. 345; *Tompkins v. Merriman*, 155 Pa. St. 440.

South Carolina. — *Buist v. Dawes*, 3 Rich. Eq. (S. Car.) 281; *Bailey v. Boyce*, 4 Strobb. Eq. (S. Car.) 91.

Vermont. — *Drake v. Wild*, (Vt. 1897) 39 Atl. Rep. 250.

Virginia. — *Rutherford v. Mayo*, 76 Va. 117; *Penn v. Guggenheimer*, 76 Va. 839.

West Virginia. — *Moore v. Harper*, 27 W. Va. 362.

In *Birmingham v. Kirwan*, 2 Sch. & Lef. 449, a case which has often been cited, Lord Redesdale said: "The general rule is that a person cannot accept and reject the same instrument; and this is the foundation of the law of election."

No Partial Election. — A widow put to her election cannot elect to take against the will as to part of the properties left by her husband or as to certain of the devises, and under the will as to other properties or devises. *Hamilton v. Phillips*, 83 Ga. 293; *Cunningham's Estate*, 137 Pa. St. 621, 21 Am. St. Rep. 901; *Cauffman v. Cauffman*, 17 S. & R. (Pa.) 16.

Election Between Testamentary Disposition and Custom of London. — Where a freeman of London undertook by will to dispose of all his real estate, as well the orphanage as the testamentary part, and some of the children elected to abide by the custom, and others to take under the will, it was held that the latter's shares of the orphanage part should not accrue to that part, but should go according to the disposition of the father, although the title of the children to the orphanage part was paramount to the will. *Morris v. Burroughs*, 1 Atk. 399, 2 Atk. 627.

A child by a freeman must abide by the will *in toto* or by the custom *in toto*. *Pugh v. Smith*, 2 Atk. 43; *Streatfield v. Streatfield*, Cas. temp. Talb. 176; 1 White & T. L. Cas. 404; *Cowper v. Scott*, 3 P. Wms. 124, note.

Donor Need Not Intend to Create an Election. — In *Cooper v. Cooper*, L. R. 7 H. L. 74, Lord O'Hagan, speaking of the intention that is meant in this connection, said: "But what is the intention that the court must apprehend upon clear evidence? Not an intention on the part of the testatrix that there shall be an election under certain circumstances. If such a thing were required, the whole doctrine of election would be practically put away. A testator or a testatrix does not generally know or understand anything about the doctrine of election, and you cannot find any instrument,

donor is presumed to have intended that every part of the instrument of donation should take effect, as well those portions which deprive the donee of an advantage as those which confer a benefit upon him.¹ In other words, the benefit conferred has annexed to it, in accordance with the donor's presumed intention, the tacit condition that the donee will give full effect to the instrument of donation by relinquishing all rights which are inconsistent therewith.² Some authorities, however, declare the doctrine to rest not upon presumed intention, but upon the equitable principle that he who seeks equity must do equity.³

3. Origin and History. — The doctrine of election appears to be derived from the civil law.⁴ Although it has been said by high authority to have been introduced in *England* in the beginning of the eighteenth century, it is certain that it was known and invoked as early as the reign of Queen Elizabeth.⁵

perhaps, in which any such an intention was expressed. The intention that must be clearly demonstrated in evidence to the court, is an intention to do the particular thing — to give the property which the party has not a right to give, and to give a benefit to a person who has an interest in the property. Those two intentions being ascertained upon clear evidence, the law draws the conclusion. It is a conclusion of equity, and it is not necessary that there should be an intention shown upon evidence which never could be shown upon evidence. Having shown as matters of fact the two intentions to which I have referred, the law draws the conclusion, and there is an end of the matter." See also *McGinnis v. McGinnis*, 1 Ga. 503, to the same effect.

1. Founded on Intent. — *In re Vardon's Trusts*, 31 Ch. Div. 275, 10 Eng. Rul. Cas. 370; *Cooper v. Cooper*, L. R. 7 H. L. 53. See also *Whistler v. Webster*, 2 Ves. Jr. 367, 2 Rev. Rep. 260, 10 Eng. Rul. Cas. 316; *Philadelphia v. Davis*, 1 Whart. (Pa.) 506.

In *Havens v. Sackett*, 15 N. Y. 373, it was said: "The courts assume to know what the testator would have done had he foreseen that his attempt would have been ineffectual. They conjecture that he would have withheld the gift to the person who will not relinquish his claims to his own property; or that it is so probable that he would have done so that they will interpose to produce that result."

Election Excluded by Express Declaration of Contrary Intention. — Being based on intention, the application of the doctrine of election is excluded by an express declaration of intention on the part of the testator inconsistent with the presumption which lies at the foundation of the doctrine. *In re Vardon's Trusts*, 31 Ch. Div. 279. Such a case would be very similar to one where the testator, instead of giving the donee's property, merely requested him to convey it. See *infra*, this title, *Scope and Application of Doctrine*, subdiv. 3, c. (1) *An Essential with Respect to Wills*.

2. Anonymous. Gilb. Eq. Rep. 15, 10 Eng. Rul. Cas. 315.

3. Rule Based on General Equitable Principles, Not on Intent. — This position is earnestly contended for by Mr. Pomeroy, 1 Pom. Eq. Jur., § 465, and is adopted in a dictum by Chief Justice Fuller in *Peters v. Bain*, 133 U. S. 695. In *Cooper v. Cooper*, L. R. 7 H. L. 67, Lord Chancellor Cairns, in explaining that the

doctrine is applied without reference to whether the donor knew that the property of which he attempted to dispose belonged to another, said: "The rule * * * does not proceed either upon an expressed intention or upon a conjecture of a presumed intention, but it proceeds on a rule of equity founded upon the highest principles of equity, and as to which the court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will." See also *Whiting's Appeal*, 67 Conn. 389.

4. Election Derived from the Civil Law. — Mr. Swanston, in a note to *Dillon v. Parker*, 1 Swanst. 396, says: "The doctrine of election, in common with many other doctrines of our courts of equity, appears to be derived from the civil law. In that system a bequest of property which the testator knew to belong to another was not void, but entitled the legatee to recover from his heir, either the subject of the bequest, or, if the owner was unwilling to part with it at a reasonable price, the pecuniary value. Inst., lib. 2, tit. 20, § 4; tit. 24, § 1. Dig., lib. 30, l. 39, § 7; l. 104, § 2; l. 71, § 3; lib. 32, l. 30, § 6. It was also competent to the testator, by express direction (originally in the form of *fidei commissum*, at a later period in terms of gift, under the denomination of *legatum ab aliquo*), to impose the obligation of providing the bequest or its value, on any person deriving a benefit under his will (Dig., lib. 32, l. 1, § 6; l. 14, § 2. Cod., lib. 6, tit. 37, l. 10; tit. 42, l. 9), to the extent of that benefit. Inst., lib. 2, tit. 24, § 1; Dig., lib. 30, l. 114, § 3." See also *Domat's Civil Law* (Cushing's ed.), pt. 2, bk. 4, tit. 2, § 3, pp. 509-511; 2 *Herman on Estoppel*, § 1032; 2 *Story's Eq. Jur.*, § 1078; *McGinnis v. McGinnis*, 1 Ga. 496.

The French Code refuses to adopt the doctrine of election, a bequest or donation of another's property being void under section 1021 of the Civil Code.

5. Introduction into English Jurisprudence. — The case of *Noys v. Mordaunt*, 2 Vern. 582, determined in 1706, is said to be the first case on the subject of election in English jurisprudence. Boughton v. Boughton, 2 Ves. 14, *per* Lord Hardwicke, L. C.; *Gretton v. Haward*, 1 Swanst. 421, *per* Sir T. Plumer, M. R. The truth of this statement was doubted by Lord Eldon, L. C., in *Randliffe v. Parkyns*, 6 Dow. App. Cas. 149, 19 Rev. Rep. 36, and the doctrine is now known to have been introduced at

4. Kindred Equities and Distinctions — *a*. GENERALLY. — Though the term "election" or "equitable election" is usually applied only to the case of a gift to a person upon the implied condition that he give effect to a gift of his own property, there are several closely allied equities which are administered upon more or less similar principles. Such equities may arise in the case of gifts upon the express condition that the donee consents to or makes a donation of property belonging to him; gifts accompanied with a burdensome condition, or plural gifts to one person, one or more being burdensome; gifts upon the express or implied condition that the donee shall receive the thing given in satisfaction of some claim which he has a right to assert against the estate of the donor; gifts in the alternative or where priority of choice is given.

***b*. GIFTS UPON EXPRESS CONDITION.** — As is fully stated elsewhere, courts of equity, in administering the equity of election, proceed upon the principle of compensation, and not upon the principle of forfeiture.¹ When a legacy or gift is made upon express condition, on the other hand, the donee can enjoy no part of it unless he completely conforms to the terms of the instrument of donation. In other words, the case is one for forfeiture, and not for compensation.² But while an election to take against the will in the case of an express condition creates a complete forfeiture of the conditional benefit under the will so far as the refractory donee is concerned, yet, at least in the case of testamentary provisions expressly given in lieu of dower, compensation is administered as to the donees disappointed by the widow's election; that is, the substance of the gift which fails by reason of the election goes, so far as may be, to compensate disappointed donees; it does not fall into the residue.³

***c*. GIFTS ACCOMPANIED WITH A BURDEN.** — Where a legacy or devise has attached to it a burdensome condition, the case is simply one of an estate upon condition. The donee may of course refuse to accept, but if he does accept he takes *cum onere*.⁴

Plural Gifts, Some Burdensome. — Where a testator gives two or more properties

an earlier period, for it was invoked in the reign of Queen Elizabeth in the case of Lacy *v.* Anderson (*an*. 24 Eliz.), Choice Cas. in Ch. 155, 156, 1 Swanst. 445, note *b*, to stay a suit at law in a writ of dower on the ground that the defendant's widow had certain copyhold land devised to her in lieu of dower, and the court thought it was unconscionable that she should have both. And in an earlier case, *Rose v. Reynolds* (23 and 24 Eliz.), Choice Cas. in Ch. 147, 1 Swanst. 446, note *a*, the court assumed jurisdiction upon the principle that dower was barred in equity by the acceptance of a benefit designed as a recompense, though not constituting a bar at law. See the note to *Dillon v. Parker*, 1 Swanst. 398.

1. See *infra*, this title, *Effect of Election*, subd. 3. *a*. *Compensation to Disappointed Donee*.

2. **Forfeiture Not Compensation.** — 2 Spence's Eq. Jur. 592; 2 Sugden on Powers (7th ed.) 146; Theobald on Wills (4th ed.) 89; Boughton *v.* Boughton, 2 Ves. 12; Roundel *v.* Currer, 2 Bro. C. C. 67; Marriott *v.* Badger, 5 Md. 306; Van Dyke's Appeal, 60 Pa. St. 492. See also Middleton *v.* Windross, L. R. 16 Eq. 212.

Upon the subject of conditional devises and legacies, see generally the titles CONDITIONS, vol. 6, p. 499; LEGACIES AND DEVISES.

3. See *infra*, this title, *Effect of Election*, subd. 3. *c*. *Effect of Widow's Renunciation*.

Express Condition — Conveyance Impossible. — If, however, a legacy be given to a married

woman upon an express condition that she convey her own estate which she is restrained from alienating, it has been held that the doctrine of election is inapplicable, and that the legacy fails by reason of her inability to comply with the condition. *Robinson v. Wheelwright*, 21 Beav. 214, affirmed 6 DeG. M. & G. 547.

4. *Whiting's Appeal*, 67 Conn. 379; *Kuykendall v. Devecmon*, 78 Md. 537. See the titles CONDITIONS, vol. 6, p. 499; LEGACIES AND DEVISES.

Lien upon Land for Burden Imposed. — If land be devised for a certain sum of money and other benefits are given, the payment required is a lien upon the land which may be enforced by the donee's executor in the event of his death. *Yawger v. Yawger*, 37 N. J. Eq. 216. See also *Re Marriott*, 2 Moll. 516.

Disposition of Accumulated Income Where Donee Refuses to Take. — Where a testator gave his estate to trustees, in trust to pay the income to his wife during her life provided she support his daughters A. and H., and on the death of his wife to pay such income to his three daughters during life, with remainder to his grandchildren, it was held that on the refusal of the wife to take under the will the income in the trustees' hands should be first applied to the support of the daughters A. and H. during the wife's life. *Ballantine's Estate*, 42 Pittsb. Leg. J. (Pa.) 416.

of his own to the same person, and one or more would be beneficial to the donee, while the other or others would be onerous, the question arises as to whether or not the donee may accept what is beneficial and reject what is onerous. This species of election is different from election properly so called, which arises, as we have seen, where the donor disposes not alone of his own property, but of property belonging to the donee who is put to an election. In the absence of an intention on the part of the donor to make the acceptance of what is beneficial conditional with what is burdensome, the donee is entitled to take the property that is beneficial and reject the other,¹ even though the burden upon the rejected gift will have to be borne by the donor's general estate.² Where, however, onerous and beneficial properties are included in a single and undivided gift, the donee cannot reject the onerous and accept the beneficial; he must take the whole or nothing.³

d. GIFTS IN SATISFACTION OF CLAIMS. — Satisfaction has been defined as the donation of a thing with the intention, expressed or implied, that it is to be an extinguishment of some existing right or claim of the donee.⁴ The principle here, as in election, is the presumed intention of the donor,⁵ and there is an obvious similarity between these rules of equity.⁶ The subject will be found discussed under other titles.⁷

e. GIFTS IN THE ALTERNATIVE OR WITH PRIORITY OF CHOICE. — Where a testator gives a devisee or legatee the choice among two or more properties, such devisee or legatee must make an election.⁸ Where a testator possessed of two properties leaves one to one person and the other to another, without designating which is for the one and which is for the other, the case has been

1. Election Where Gift Cum Onero. — Guthrie *v.* Walrond, 22 Ch. Div. 573; Syer *v.* Gladstone, 30 Ch. Div. 614; Andrew *v.* Trinity Hall, 9 Ves. Jr. 534; Warren *v.* Rudall, 1 Johns. & H. 1; Aston *v.* Wood, 43 L. J. Ch. 715, 31 L. T. N. S. 293.

2. Moffett *v.* Bates, 3 Sm. & G. 468. See also Long *v.* Kent, 11 Jur. N. S. 724, 12 L. T. N. S. 794.

3. Green *v.* Britten, 42 L. J. Ch. 187, 27 L. T. N. S. 811.

Single and Undivided Gift. — Thus, where a testator gave to his third son all his estate and effects in the island of Mauritius absolutely, which consisted in part of an onerous lease, it was held that this was a single and undivided gift, that it was *prima facie* evident that it was the testator's intention that the gift should be one, and that the legatee should either take it all or take none of it. Guthrie *v.* Walrond, 22 Ch. Div. 577.

So also where two estates, one of which was encumbered, were not specifically mentioned, but only formed parts of one gift in general terms. Freke *v.* Calmady, 32 Ch. Div. 417.

Where a testator bequeathed a leasehold house to his sister and also an annuity for her life, but the rent reserved by the lease was higher than the house would rent for, it was held that it was plainly the testator's intention that his estate should no longer be subject to the rent of the leasehold, and that the legatee could not reject the leasehold and accept the annuity. Talbot *v.* Radnor, 3 Myl. & K. 252. See also Fairtlough *v.* Johnstone, 16 Ir. Ch. Rep. 442.

4. 2 Story's Eq. Jur., § 1099.

5. 2 Story's Eq. Jur., § 1099. See also *Ex p.* Pye, 18 Ves. Jr. 140, 2 White & T. Lead. Cas. 364; Chancey's Case, 1 P. Wms. 408, 2 White & T. L. Cas. 379; Goldsmid *v.* Goldsmid, 1

Swanston, 211; Chichester *v.* Coventry, L. R. 2 H. L. 71; Eaton *v.* Benton, 2 Hill (N. Y.) 576.

6. Thus, speaking of the satisfaction of a portion by a will, Lord Romilly, in Chichester *v.* Coventry, L. R. 2 H. L. 71, said: "When a father, on the marriage of a child, enters into a covenant to settle either land or money, * * * if he give benefits by his will to the same objects, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenant the right to elect whether they will take under the covenant, or whether they will take under the will."

7. See the titles LEGACIES AND DEVISES; SATISFACTION. See also the title ADEMPMENT OF LEGACIES, vol. 1, p. 611.

8. Harby *v.* Moore, 6 Jur. N. S. 883. See also Grindem *v.* Grindem, 89 Iowa 295.

A devise of two acres of land out of four together is a good devise, and the devisee shall have election. Marshal's Case, 3 Dyer 281a, note.

In the Case of a Grant of One of Several Things, Lord Coke says that "always he who is the first agent and who ought to do the first act shall have the election." Thus, if one grants to another twenty shillings or a robe annually, "the grantor shall have the election, for he is the first agent by payment of the one or delivery of the other." But if one gives another one of the horses in the donor's stable, then the election is with the donee, for he "shall be the first agent by taking or seizure of one of them." Heyward's Case, 2 Coke 35. See also Co. Litt. 145a; Reniger *v.* Fogossa, Plowd. 13.

When Election Is Given to Several Persons, then the first election made by any of the parties shall stand. Co. Litt. 145b; Heyward's Case, 2 Coke 35.

held one for election, the provision being equivalent to leaving a choice to the person first named and the property not chosen to the other.¹

II. SCOPE AND APPLICATION OF DOCTRINE — 1. Jurisdiction — Whether Jurisdiction Exists at Law. — It has been said that the principle of election is applicable in a court of law as well as in a court of equity.² But while in some cases a party, having elected, would, in a court of law, be bound by the election made, as where a widow has accepted a provision made for her in lieu of dower,³ there are certain classes of cases which must of necessity be exclusively of equitable jurisdiction, because they are incapable of being enforced in a court of law, as where the claim for dower is resisted on the ground that the testator could not have intended that the widow should have both the provision made for her and her dower;⁴ or generally where an election is to be compelled;⁵ or where an election already made effects a transfer of real estate;⁶ or where there are inconsistent titles to property the title to which cannot be transferred by acts *in pais*, and the completion of the assertion of one title does not depend on a negation of the other;⁷ or where the devisee elects to take against the will, and it becomes necessary to apply the doctrine of compensation in favor of the disappointed donee.⁸ Accordingly, several authorities, both in *England* and the *United States*, describe the doctrine of election as exclusively equitable.⁹

Probate Courts with Equitable Jurisdiction. — In some of the United States, courts of probate having equity jurisdiction may compel an election.¹⁰

1. *Duckmanton v. Duckmanton*, 5 H. & N. 219. See also *Weigall v. Brome*, 6 Sim. 99.

2. **Jurisdiction of Election at Law.** — *Wilson v. Townshend*, 2 Ves. Jr. 696; *Adams v. Adams*, 39 Ala. 274; *Weeks v. Patten*, 18 Me. 42, 36 Am. Dec. 696; *Smith v. Smith*, 14 Gray (Mass.) 533; *Watson v. Watson*, 128 Mass. 154.

In *Cauffman v. Cauffman*, 17 S. & R. (Pa.) 28, it was said: "Wherever chancery would restrain execution, our courts of common law would hold there should be no recovery." But in *Pennsylvania* there is no separate chancery jurisdiction, law and equity being blended. See *Marriott v. Badger*, 5 Md. 313.

In *Birmingham v. Kirwan*, 2 Sch. & Lef. 450, Lord Redesdale said: "The rule of election, however, I take to be * * * a rule of law as well as of equity; and the principal reason why courts of equity are more frequently called upon to consider the subject (particularly as to wills) than courts of law, I apprehend, is that at law, in consequence of the forms of proceeding, the party cannot be put to elect; for in order to enable a court of law to apply the principle, the party must either be deemed concluded, being bound by the nature of the instrument, or must have acted upon it in such a manner as to be deemed concluded by what he has done; that is, to have elected. This frequently throws the jurisdiction into equity, which can compel the party to make an election, and not leave it uncertain under what title he may take."

The cases of *Butler's Case*, 3 Coke 27, 3 Leon. 272, and *Gosling v. Warburton*, Cro. Eliz. 128, are referred to by Lord Redesdale in *Birmingham v. Kirwan*, 2 Sch. & Lef. 450, in support of the assertion that the principle of election is applicable in courts of law; but these cases appear to have been merely decisions under that provision of the statute of frauds, 27 Hen. VIII., c. 10, which declared that a jointure settled upon a wife after mar-

riage should constitute a bar of dower at her election. See the title *DOWER*, vol. 10, pp. 208, 211. They are, therefore, but decisions under a special statute and do not support the doctrine for which they are cited. See *Swanston's* note to *Gretton v. Haward*, 1 Swanst. 425 *et seq.*

3. **Acceptance by Widow of Provision in Lieu of Dower.** — *Adams v. Adams*, 39 Ala. 274; *Simmons v. Simmons*, 78 Ala. 368; *Kennedy v. Mills*, 13 Wend. (N. Y.) 555; *Van Orden v. Van Orden*, 10 Johns. (N. Y.) 31, 6 Am. Dec. 314; *Walton v. Hill*, 8 U. C. Q. B. 562.

4. **Applications Possible Only in Equity.** — *Walton v. Hill*, 8 U. C. Q. B. 565.

5. *Adams v. Adams*, 39 Ala. 274; *Simmons v. Simmons*, 78 Ala. 368; *Carper v. Crowl*, 149 Ill. 465; *Marriott v. Badger*, 5 Md. 306.

A devise or bequest of that which is not the property of the testator is void at law, and it is not therefore apparent how a court of law could compel an election. See the note by Mr. *Swanston* to *Gretton v. Haward*, 1 Swanst. 428.

6. *Adams v. Adams*, 39 Ala. 274.

7. *Simmons v. Simmons*, 78 Ala. 368.

8. 2 Story's Eq. Jur., § 1082.

9. **Doctrine Recognized as Exclusively Equitable.** — In the case of *Griggs v. Gibson*, L. R. 1 Eq. 691, decided in 1866, it is said that the right of election is an equitable doctrine; and in *Spread v. Morgan*, 11 H. L. Cas. 588, 13 L. T. N. S. 164, it is said that the doctrine is not properly a rule of positive law, but a rule of practice in equity. To the same effect is *Beal v. Miller*, 1 Hun (N. Y.) 390. See also *Morris v. Burrows*, 2 Atk. 629; *Blake v. Bunbury*, 1 Ves. Jr. 523, 4 Bro. C. C. 24; 2 Story's Eq. Jur., § 1080-1082; and the note to *Gretton v. Haward*, 1 Swanst. 430.

10. **Administered in Probate Courts.** — In *Connecticut*, where an estate is in settlement before a court of probate, and an equity arises

Jurisdiction to Compel Conveyance of Lands in Foreign State. — Where a court of equity has jurisdiction of the person of a donee who has accepted a benefit under a will, it will compel him to make a conveyance of lands belonging to him which have been disposed of by the testator in favor of a third person, although the lands are situated in a foreign state. In such a case the subject-matter of the suit is not the land whose conveyance is directed, but the action is one *in personam*, and the fact that such third person could not himself maintain an action for the recovery of such lands in the foreign state, by reason of the will not having been there recorded, makes no difference.¹

2. Under What Instruments Election May Arise. — Although election most frequently arises under wills, it is also applicable to claims under all other instruments of donation, such as deeds, bonds, etc.,² as where parties claim under settlements,³ under a bond,⁴ or under contracts.⁵

3. Essentials to Raise Election — *a.* **GENERALLY.** — In order to put the donee of a benefit under a will to an election, two things are essential: first, the testator must give property of his own; and second, he must profess to dispose of property belonging to his donee.⁶ But while this is undoubtedly

between the persons interested in such estate incidental to and growing out of such interest, it has been held that that court not only may, but must, apply and enforce it, in order to do justice to all parties and to settle the estate, and that to that extent courts of probate have the fullest equity powers. *Carter's Appeal*, 59 Conn. 587.

In *Wisconsin* the Probate Court may make an election for an insane widow. *Washburn v. Van Steenwyk*, 32 Minn. 354.

In *Pennsylvania* jurisdiction to compel election is not exclusively in the Orphans' Court. *Van Dyke's Appeal*, 60 Pa. St. 481.

1. *McQuerry v. Gilliland*, 89 Ky. 434.

2. **Election Applies to Deeds as Well as to Wills.** — *Moore v. Butler*, 2 Sch. & Lef. 249; *Dillon v. Parker*, 1 Swanst. 359; *Freke v. Barrington*, 3 Bro. C. C. 274; *Birmingham v. Kirwan*, 2 Sch. & Lef. 444; *Wilson v. Townshend*, 2 Ves. Jr. 696; *Codrington v. Lindsay*, L. R. 8 Ch. 578; *Thellusson v. Woodford*, 13 Ves. Jr. 209; *Llewellyn v. Mackworth*, Barn. Ch. 445; *Anderson v. Abbott*, 23 Beav. 460; *Carper v. Crowl*, 149 Ill. 465; *Weeks v. Patten*, 18 Me. 46, 36 Am. Dec. 696.

3. **Where Parties Claim under Settlements.** — *Smith v. Lyne*, 2 Y. & Coll. Ch. 345; *Blake v. Bunbury*, 4 Bro. C. C. 21; *Herne v. Herne*, 2 Vern. 555; *Mackey v. Maturin*, 15 Ir. Ch. Rep. 150; *Beckton v. Barton*, 5 Jur. N. S. 349, 28 L. J. Ch. 673; *Bradish v. Br. dish*, 2 B. & B. 479; *O'Neil v. Hamill*, Beat. 618; *Newman v. Newman*, 1 Bro. C. C. 186; *Bacon v. Cosby*, 20 L. J. Ch. 213, 15 Jur. 695; *Graham v. Thynne*, 2 Ir. Eq. Rep. 402; *Seton v. Smith*, 11 Sim. 59; *Kirkham v. Smith*, 1 Ves. 260; *Wright v. Rutter*, 2 Ves. Jr. 673; *Savill v. Savill*, 2 Coll. 721; *Brown v. Brown*, L. R. 2 Eq. 481.

4. **Claim under a Bond.** — *Graves v. Boyle*, 1 Atk. 509.

5. **Claim under Contract.** — *Bigland v. Hudleston*, 3 Bro. C. C. 285, note; *Chetwynd v. Fleetwood*, 4 Bro. P. C. 435; *Green v. Green*, 2 Meriv. 86; *Bacon v. Cosby*, 4 De G. & Sm. 261; *Mosley v. Ward*, 29 Beav. 407; *Willoughby v. Middleton*, 2 John. & H. 344.

Contract to Devise Property. — Where a testator contracted to devise to the plaintiff an undivided half of his farm and certain per-

sonalty, and afterwards by his will devised to the plaintiff half of his farm for life and the income for life of a certain fund, which provision was for several years acquiesced in by the plaintiff, who received from the income of the fund thereby bequeathed an amount in excess of the value of the property to which he was entitled under the contract, it was held that the will was intended by the testator as a substitute for the contract, and that the plaintiff, by electing to receive the benefits thereof, had abandoned his right to enforce the contract. *Towle v. Towle*, 79 Wis. 596.

6. *Adams's Equity* 93.

In Order to Raise a Case of Election under a Will it must have been the intention of the donor to dispose of property belonging to the donee, and by the same instrument to give a benefit to the latter out of the testator's own property.

England. — *Pickersgill v. Rodger*, 5 Ch. Div. 170; *In re Warren's Trusts*, 26 Ch. Div. 219; *Whitley v. Whitley*, 31 Beav. 173; *Rutter v. Maclean*, 4 Ves. Jr. 531; *Broome v. Monck*, 10 Ves. Jr. 597; *Judd v. Pratt*, 13 Ves. Jr. 168; *Thellusson v. Woodford*, 13 Ves. Jr. 209; *Atty.-Gen. v. Lonsdale*, 1 Sim. 105; *Dashwood v. Peyton*, 18 Ves. Jr. 41; *In re Fowler's Trust*, 27 Beav. 362.

Florida. — *Young v. McKinnie*, 5 Fla. 543.

Georgia. — *McGinnis v. McGinnis*, 1 Ga. 496.

Illinois. — *Wilbanks v. Wilbanks*, 18 Ill. 21; *Brown v. Pitney*, 39 Ill. 468; *Carper v. Crowl*, 149 Ill. 465.

Kentucky. — *Clay v. Hart*, 7 Dana (Ky.) 5.

Maryland. — *McLaughlin v. Barnum*, 31 Md. 442.

Minnesota. — *Washburn v. Van Steenwyk*, 32 Minn. 352.

Missouri. — *Pemberton v. Pemberton*, 29 Mo. 409; *O'Reilly v. Nicholson*, 45 Mo. 160.

New York. — *Havens v. Sackett*, 15 N. Y. 373; *Matter of Hayden*, 1 Connoly (N. Y.) 454.

Ohio. — *Hibbs v. Union Cent. L. Ins. Co.*, 40 Ohio St. 544.

Pennsylvania. — *Philadelphia v. Davis*, 1 Whart. (Pa.) 502; *Pennsylvania Ins. Co. v. Stokes*, 2 Brews. (Pa.) 597; *Van Dyke's Appeal*, 60 Pa. St. 481.

South Carolina. — *Hunter v. Mills*, 29 S. Car.

true with regard to cases of election arising under wills, cases of election may arise under settlements and other instruments although the second requisite is not in strictness present.¹

b. DONOR MUST GIVE PROPERTY OF HIS OWN. — Of course, in order that one may be put to an election under an instrument, some benefit must be conferred upon him by the instrument.²

Partial Failure of Benefit. — But although a part of the benefit proposed by the testator fails, the donee may be put to election between his other property and the remainder of the benefit.³

Property Must Be Given out of Which Compensation Can Be Made. — The benefit granted to the donee under the instrument must consist of such property that, if an election is made contrary to the instrument, the interest that would pass by the instrument can be laid hold of to compensate for what is taken away.⁴

72; *Thompson v. Thompson*, 2 Strobb. L. (S. Car.) 48; *Long v. Wier*, 2 Rich. Eq. (S. Car.) 283, 46 Am. Dec. 51.

Tennessee. — *Colvert v. Wood*, 93 Tenn. 454.

Virginia. — *Gregory v. Gates*, 30 Gratt. (Va.) 90.

Washington. — *Lewis v. Lichty*, 3 Wash. 221, 28 Am. St. Rep. 25.

1. See *infra*, this section, *Donor's Attempt to Dispose of Donee's Property — Not Essential under Deeds*.

2. **Election Applicable Only Where a Benefit Is Conferred under an Instrument.** — *Crosbie v. Murray*, 1 Ves. Jr. 561; *In re Fowler's Trust*, 27 Beav. 362; *M'Donnell v. M'Donnell*, 2 Con. & L. 481, 4 Dr. & War. 376; *Bennett v. Harper*, 36 W. Va. 546.

Where a husband qualifies as executor of his wife's will, in which nothing is devised to him, his conduct in assuming the position of executor is not an election that the will should be given full effect, or a waiver of his claim to that portion of his wife's estate which he is entitled to receive under the statute. *Tyler v. Wheeler*, 160 Mass. 208.

3. **Where Part of the Benefit Fails.** — *Newman v. Newman*, 1 Bro. C. C. 186.

A testator devised and bequeathed real and personal property to his wife in bar of her claims under a settlement. The devise being void, it was held that the widow must elect between her claims and the bequest, the testator not intending that any benefit under the will should be enjoyed unless all benefit under the settlement should be relinquished. *Andrew v. Trinity Hall*, 9 Ves. Jr. 534. See also *Wilson v. Wilson*, 1 De G. & Sm. 152, 11 Jur. 793.

Where Part of the Provision Fails Because Contrary to Law. — A resident of Pennsylvania, owning property there and in New York, made a will by which he gave his wife certain personal and real estate, and devised to her the income of other real estate, which included lands in New York. This provision was declared to be in lieu of all dower rights. The attempted disposition of the real estate in New York from which the income was to flow was invalid because it suspended the power of alienation for a longer period than was permitted by the statutes of New York; but the widow having voluntarily elected to accept the provisions of the will, it was held that the failure of the testator's intention to settle on her the income of such real estate did not permit

the court to disappoint his expressed intentions in regard to dower; that the widow had consented to all the terms and conditions annexed, and yielded any right inconsistent therewith; and, therefore, she was not entitled to dower, at least in the absence of any offer to surrender the benefit she had received under the will and to take what the law would allow her. *Lee v. Tower*, 124 N. Y. 370.

4. **Property out of Which Compensation Can Be Made Essential.** — *Bristow v. Warde*, 2 Ves. Jr. 336; *In re Fowler's Trust*, 27 Beav. 362; *Church v. Kemble*, 5 Sim. 526; *Carper v. Crowl*, 149 Ill. 477.

Bequest of Heirlooms Which Went with a Mansion. — A testator gave certain chattels upon trust for sale, for the benefit of his two younger sons, and the residue of his estate to his eldest son. The chattels so bequeathed were heirlooms settled by a deed upon trust to go and be held with a certain mansion house, of which the eldest son was tenant for life. It was held that no case of election arose, as the eldest son was not bound to make any compensation out of his legacy to his younger brothers, for he had no interest in the chattels apart from the mansion house which he could make over for their benefit. *In re Chesham*, 31 Ch. Div. 466.

Settlement Making Property Inalienable in the Donee. — Where the benefit conferred under the instrument consists in a gift so settled as to be inalienable by the donee, as where property is settled upon a married woman with restraints upon alienation and anticipation, the donee, although refusing to settle her own property in accordance with the terms of the instrument, is not put to her election; for her retention of her own property cannot be construed as an act of election, because, in order to give effect to it as such, she would have to alienate the property which, by the terms of the instrument, she is restrained from alienating. *In re Vardon's Trusts*, 31 Ch. Div. 275, 10 Eng. Kul. Cas. 370, reversing 28 Ch. Div. 124, following *Smith v. Lucas*, 18 Ch. Div. 531, and *In re Wheatley*, 27 Ch. Div. 606, and overruling *Willoughby v. Middleton*, 2 Johns. & H. 344, which had been followed in *In re Queade's Trusts*, 53 L. T. N. S. 74, 54 L. J. Ch. 786.

But where the benefit conferred consists of an annuity settled, not in such a way as to be inalienable, but so that an attempted alienation on the part of the annuitant ends his estate and gives effect to a limitation over — settled,

c. DONOR'S ATTEMPT TO DISPOSE OF DONEE'S PROPERTY—(1) *An Essential with Respect to Wills.*—It is well established in cases of election under wills that a second requisite for the application of the doctrine is that the testator shall attempt to dispose of property belonging to the donee;¹ and where he attempts to dispose only of his own property, and makes no disposition of any property belonging to the donee, a case of election does not arise.²

Mere Recital.—Where an erroneous or mistaken recital in a will that a person is entitled to certain property from some source *dehors* the will is made the basis of the testator's scheme of distribution, this fact does not raise a case of election in favor of the person recited to be entitled to the property, and against the person actually entitled thereto who takes some benefit under the will. The instrument does not purport actually to dispose of property of the beneficiary.³

Precatory Words.—Where precatory words in an instrument are used to express a mere wish, desire, or expectation that a beneficiary will dispose of property in a certain way, no case for election arises.⁴

in other words, until alienation—and by the instrument the annuitant promises to bring into settlement certain future-acquired property, his refusal, when he acquires such property, to bring it into settlement is to be construed as an act of election to take against the settlement, and determines his interest thereunder and gives effect to the disposition over. *Carter v. Silber*, (1891) 3 Ch. 553, *reversed* on other points (1892) 2 Ch. 278, *sub nom.* *Edwards v. Carter*, (1893) App. 360. See also *McCaragher v. Whieldon*, L. R. 3 Eq. 236.

1. Must Be a Claim Dehors the Will.—The rule of election, properly so called, in the case of wills is to be confined to a gift under a will and a claim *dehors* the will and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will. *Wollaston v. King*, L. R. 8 Eq. 174; *Wallinger v. Wallinger*, L. R. 9 Eq. 301; *Burton v. Newbery*, 1 Ch. Div. 242; *Bizzev v. Flight*, 3 Ch. Div. 274; *In re Warren's Trusts*, 26 Ch. Div. 219. See also *Allen v. Boomer*, 82 Wis. 364.

Relinquishment of Rights under Will.—Where a will proceeds upon a mistake a devisee insisting upon the benefit of such mistake must relinquish what the will gives him. *Vane v. Dunganon*, 2 Sch. & Lef. 130.

2. Where Property of Donee Is Not Disposed of.—*Crosbie v. Murray*, 1 Ves. Jr. 561; *Smith v. Townshend*, 27 Md. 369, 92 Am. Dec. 637; *Hattersley v. Bissett*, 50 N. J. Eq. 577; *Haby v. Fuos*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1121; *Bennett v. Harper*, 36 Va. 546. See also *Read v. Crop*, 1 Bro. C. C. 492.

Where a testator bequeathed to his son a slave, and to his daughter a legacy, but after the execution of the will, on the marriage of the daughter, gave her the slave, it was held that she was not bound to elect, as she had no interest in the property at the time of the execution of the will. *Long v. Wier*, 2 Rich. Eq. (S. Car.) 283, 46 Am. Dec. 51. See also *Thompson v. Thompson*, 2 Strobb. L. (S. Car.) 48, and *Hattersley v. Bissett*, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, upon practically the same state of facts; but in these two cases the decision was based upon the principle that it was the testator's intention that the donee

should take both gifts, and that any other disposition would defeat his intention.

3. Mere Recital Without Express Gift Insufficient to Raise Election.—*Langslow v. Langslow*, 21 Beav. 552; *Box v. Barrett*, L. R. 3 Eq. 244; *Blake v. Bunbury*, 1 Ves. Jr. 523. See also *Dashwood v. Peyton*, 18 Ves. Jr. 27; *Ruby v. Foot*, Beat. 581.

Illustration of Mere Recital.—Under a settlement, the four daughters of a testator took equal shares, subject to his life interest, and in his will the testator recited that, under the settlement, his two daughters A and B would become entitled, and that in making his will he had taken the same into consideration, and had not devised to them so large a share under his will as he otherwise should have done. He then devised to A and B certain estates, and to his two other daughters, C and D, other estates of much greater value. It was held that the will did not purport to make any disposition of the settled property, and was only made under a mistaken impression, and accordingly C and D were not put to their election. *Lord Romilly, M. R.*, delivering judgment, said: "If I were to hold that a case for election arises here, the most serious and yet strange results would follow; for, suppose a man recited in his will that his nephew would have a large fortune from his father, and that, therefore, he left all his property to his other nephew, and that recital turned out to be incorrect, would any question of election arise upon that because the supposed intention of the testator was that the property should be divided equally?" *Box v. Barrett*, L. R. 3 Eq. 244.

4. Precatory Words.—*Langslow v. Langslow*, 21 Beav. 552. See also *Blacket v. Lamb*, 14 Beav. 482, where it was held that where a testator duly appointed a fund in favor of objects of the power absolutely, and also bequeathed to them his own property, especially requesting them to leave the appointed fund to persons not objects of the power, no case for an election was created.

Where a testator devised to his son and heir his real and personal estate with this recommendation: "And I do hereby recommend to

(2) *Knowledge by Testator of Donee's Title.* — It is immaterial whether the testator attempts to dispose of the donee's property in the belief that he has the right to do so, or, knowing the extent of his authority, intends to exceed it by an arbitrary exercise of power. The donee in either case is put to his election, for there is no certainty that the donor's intention to bestow the property would have been changed by the mere knowledge of the true state of the title, and the court will not speculate upon the point.¹

(3) *Where Testator Does Not Intend to Exceed His Right.* — No case for election arises where the language of the instrument shows that the donor is doubtful of his power to dispose of the property, and that it is his intention to bestow it only in case he has power to do so, as where he gives certain directions concerning it, or declares what shall be the consequence in case he has not power to devise it.²

(4) *Proof of Donor's Intent to Dispose of Donee's Property.* — The intention of the donor to dispose of the property of another to whom, by the same instrument, he has given a benefit must plainly appear beyond all reasonable doubt from the will itself, either by express declaration or necessary implication from the circumstances disclosed by the will; and parol evidence is therefore inadmissible to show such intention.³

my said son to continue his cousins James Tibbits and Richard Tibbits in the occupation of their respective farms as heretofore, and so long as they continue to manage the same in a good and husbandlike manner, and to duly pay their rents," it was held that these words were imperative, and that there was no uncertainty either in the object or in the subject-matter; that a trust for the cousins was raised, and that the son was therefore decreed to elect either to continue them as tenants or to make them a compensation for the value of the tenancy out of the property given him by the testator. *Tibbits v. Tibbits*, 1 Jac. 318. This case was said, in *Shaw v. Lawless*, 1 Dru. & W. 510, to carry the doctrine as to precatory words further than any of the preceding cases.

1. Donor's Knowledge as to Title of Donee's Property Immaterial. — 3 Story's Eq. Jur., § 1093.

England. — *Whistler v. Webster*, 2 Ves. Jr. 370; *Thellusson v. Woodford*, 13 Ves. Jr. 221; *Cooper v. Cooper*, L. R. 6 Ch. 20, L. R. 7 H. L. 78; *In re Brooksbank*, 34 Ch. Div. 160; *Welby v. Welby*, 2 Ves. & B. 187; *Coutts v. Acworth*, L. R. 9 Eq. 519.

Georgia. — *McGinnis v. McGinnis*, 1 Ga. 503.

Illinois. — *Van Schaack v. Leonard*, 164 Ill. 602.

Maine. — *Weeks v. Patten*, 18 Me. 44, 36 Am. Dec. 696.

North Carolina. — *Brown v. Ward*, 103 N. Car. 173.

Ohio. — *Hibbs v. Union Cent. L. Ins. Co.*, 40 Ohio St. 554.

Pennsylvania. — *Stump v. Findlay*, 2 Rawle (Pa.) 173, 19 Am. Dec. 632.

Virginia. — *Gregory v. Gates*, 30 Gratt. (Va.) 90; *Upshaw v. Upshaw*, 2 Hen. & M. (Va.) 389, 3 Am. Dec. 632.

West Virginia. — *Moore v. Harper*, 27 W. Va. 362.

Contra. — In *Cull v. Showell*, Ambl. 727, it was held that a case of election did not arise where a testatrix devised property which she supposed she had power to dispose of. The

principle in this case, which was *overruled* by the case of *Whistler v. Webster*, 2 Ves. Jr. 370, was *approved* by Lord Redesdale in *Moore v. Butler*, 2 Sch. & Lef. 267. See also *Forrester v. Cotten*, Ambl. 388; 3 Woodes Lect., App. 1; *id.*, lect. 59, p. 493.

These cases were apparently based upon the rule of the civil law which held the devise to be void where the testator erroneously supposed the property to be his own, unless the legatee stood in a certain degree of relation to the testator, or the subject was the property of the heir. *Dillon v. Parker*, 1 Swanst. 396, note a; 2 Domat's Civil Law, bk. 4, tit. 2, § 3, p. 511. See also 2 Story's Eq. Jur., § 1093, note 1.

2. Where Testator Is Doubtful of His Power to Dispose of Property. — *Bor v. Bor*, 5 Bro. P. C. (ed. 1784) 165, 3 Bro. P. C. (Toml. ed.) 167; *Church v. Kemble*, 5 Sim. 525.

3. Parol Evidence Inadmissible to Show Testator's Intention — *England.* — *Blake v. Bunbury*, 4 Bro. C. C. 21, 1 Ves. Jr. 514; *Pickersgill v. Rodger*, 5 Ch. Div. 163; *Stratton v. Best*, 1 Ves. Jr. 285; *Clementson v. Gandy*, 1 Keen 309; *Dummer v. Pitcher*, 2 Myl. & K. 262; *Dillon v. Parker*, 1 Cl. & F. 303, 1 Swanst. 402, note; *Wintour v. Clifton*, 21 Beav. 447, 8 De G. M. & G. 641; *Stephens v. Stephens*, 1 De G. & J. 70, 3 Drew 697; *Wollaston v. King*, L. R. 8 Eq. 173; *Dashwood v. Peyton*, 18 Ves. Jr. 41; *Crabb v. Crabb*, 1 Myl. & K. 511; *Forrester v. Cotten*, Ambl. 390; *French v. Davies*, 2 Ves. Jr. 580; *Ayres v. Willis*, 1 Ves. 230; *Blommart v. Player*, 2 Sim. & S. 597. See also *Seaman v. Woods*, 24 Beav. 372.

Arkansas. — *Fitzhugh v. Hubbard*, 41 Ark. 69.

California. — *Morrison v. Bowman*, 29 Cal. 351.

Florida. — *Young v. McKinnie*, 5 Fla. 543.

Kentucky. — *Timberlake v. Parish*, 5 Dana (Ky.) 346.

Maryland. — *Hall v. Hall*, 1 Bland (Md.) 135; *McElfresh v. Schley*, 2 Gill (Md.) 181; *Jones v. Jones*, 8 Gill (Md.) 198; *Waters v.*

Parol Evidence as to Property. — But parol evidence of the state and circumstances of the property devised or bequeathed, the comparative amounts of realty and personality, and the surrounding circumstances that will place the court in the position of the testator may be received.¹

(5) *Not Essential under Deeds.* — Although the doctrine of election in the case of wills is applied only where the testator attempts to dispose of property belonging to another, yet in the case of deeds, such as settlements, a person may be compelled to elect whether he will take under or adversely to the provisions of the instrument, although there is not a clear intention on the part of the settlor to dispose of property which is not his own; and this on the ground that a person cannot accept and reject the same instrument. Thus a person who claims part of the property included in a settlement by a title paramount to the provisions of the instrument, and whose claim involves the withdrawal of part of the consideration for which the settlement was executed, must elect between the assertion of such claims and the acceptance of other beneficial provisions under the settlement.²

Howard, 1 Md. Ch. 119; McLaughlin v. Barnum, 31 Md. 442.

Minnesota. — Washburn v. Van Steenwyk, 32 Minn. 352; Sherman v. Lewis, 44 Minn. 107.

Missouri. — O'Reilly v. Nicholson, 45 Mo. 160; Hall v. Smith, 103 Mo. 289.

New York. — Havens v. Sackett, 15 N. Y. 365; Matter of Hayden, 1 Connolly (N. Y.) 454.

North Carolina. — Wilson v. Army, 1 Dev. & B. Eq. (21 N. Car.) 376.

Ohio. — Huston v. Cone, 24 Ohio St. 11.

Pennsylvania. — Pennsylvania Ins. Co. v. Stokes, 2 Brews. (Pa.) 597; Van Dyke's Appeal, 60 Pa. St. 481; Pennsylvania Co. v. Stokes, 61 Pa. St. 136.

Virginia. — Gregory v. Gates, 30 Gratt. (Va.) 90; Penn v. Guggenheimer, 76 Va. 839.

West Virginia. — Moore v. Harper, 27 W. Va. 362.

1. **Parol Evidence as to Property Devised Admissible — England.** — Judd v. Pratt, 13 Ves. Jr. 168.

Arkansas. — Fitzhugh v. Hubbard, 41 Ark. 60.

Maryland. — Waters v. Howard, 1 Md. Ch. 112.

Minnesota. — Sherman v. Lewis, 44 Minn. 107.

New Jersey. — Adamson v. Ayres, 5 N. J. Eq. 349.

Virginia. — Dixon v. McCue, 14 Gratt. (Va.) 550.

See also Shuttleworth v. Greaves, 4 Myl. & C. 35.

Parol Evidence as to Meaning of Terms Used by Testator. — In Clementson v. Gandy, 1 Keen 309, Lord Langdale, M. R., while stating the general rule that the intention to dispose of another's property must in all cases appear by the will alone, said: "In cases which require it, the court may look at external circumstances, and, consequently, receive evidence of such circumstances for the purpose of ascertaining the meaning of the terms used by the testator. But parol evidence is not to be resorted to except for the purpose of proving facts which make intelligible something in the will which, without the aid of extrinsic evidence, cannot be understood."

2. **Election under Settlements.** — Brown v. Brown, L. R. 2 Eq. 481; Anderson v. Abbott, 23 Beav. 457; Willoughby v. Middleton, 2

Johns. & H. 344; Codrington v. Lindsay, L. R. 8 Ch. 578. In this last case it is said that the facts in the case of Willoughby v. Middleton, 2 Johns. & H. 344, are imperfectly stated in the report. See also Campbell v. Ingilby, 21 Beav. 567, 1 De G. & J. 393.

In Codrington v. Lindsay, L. R. 8 Ch. 586, Lord Selborne, L. C., said: "I lay aside, as not directly relevant to the present question, the whole of that large class of cases of election upon wills as to which Lord Eldon (in Dashwood v. Peyton, 18 Ves. Jr. 41) and other authorities have said that 'a clear intention' on the part of the testator 'to give that which is not his property is always required.' * * * But I conceive the true rule for the decision of this case to be that which is so well stated by Lord Redesdale in Birmingham v. Kirwan, 2 Sch. & Lef. 449: 'The general rule is that a person cannot accept and reject the same instrument, and this is the foundation of the law of election, on which courts of equity particularly have grounded a variety of decisions in cases both of deeds and of wills, though principally in cases of wills, because deeds being generally matter of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires.' The application of this rule is illustrated as to cases of voluntary deeds by Llewellyn v. Mackworth, Barn. Ch. 445, and Anderson v. Abbott, 23 Beav. 457; as to cases of contract for valuable consideration resting in articles, by Savill v. Savill, 2 Coll. 721, and Brown v. Brown, L. R. 2 Eq. 481; and as to contracts for value completely executed by conveyance and assignment, by Bigland v. Huddleston, 3 Bro. C. C. 285, note; Chetwynd v. Fleetwood, 4 Bro. P. C. 435 (ed. 1784); Green v. Green, 2 Meriv. 86; Bacon v. Cosby, 4 De G. & Sm. 261; Mosley v. Ward, 29 Beav. 407; and Willoughby v. Middleton, 2 Johns. & H. 344. In two of those cases—Green v. Green, 2 Meriv. 86, and Willoughby v. Middleton, 2 Johns. & H. 344—the husband's father was a party to an antenuptial settlement, and part of the consideration proceeded from him. Another, Chetwynd v. Fleetwood, 4 Bro. P. C. 435, was a case of settlement for value, not between husband and wife at all, nor in consideration of marriage. In all of them the party who, claiming by a

d. ATTEMPTED DISPOSITIONS VOID — (1) *Donation Void for Want of Testamentary Capacity*. — Where the instrument confers a benefit and makes a donation of the property of the recipient of such benefit, which donation is void by reason of the testator's infancy¹ or coverture,² no case for an election is raised.

(2) *Disposition Invalid for Want of Formality in Execution* — (a) **Execution Sufficient as to Personalty, Insufficient as to Realty**. — Where a will, by reason of its defective execution, is insufficient to pass realty, but sufficient to pass personalty, a donee is not compelled to elect between a legacy given to him by the testator and his own real property which the testator attempted to donate.³ Such an instrument, being absolutely void as a will of land, is to be read, it is said, exactly as if it contained nothing as to land, and the void provision is, therefore, inadmissible to show intention or to raise an election.⁴

title not bound by the deeds, thereby withdrew part of the consideration for which the deeds were intended to be made was held obliged to give up, by way of compensation, what he or she was entitled to under the deeds, or *ex converso* (as in *Chetwynd v. Fleetwood*, 4 Bro. P. C. 435) was held bound, if taking the benefit of the deeds, to adopt and make good the contract forming the consideration for those benefits as to matters by which, without such election, he would not have been bound."

1. **Will of Realty Void for Infancy**. — An heir is not put to his election between a gift of personalty bestowed upon him and his own real property devised away by an infant testator, who has power to dispose of personalty but not of realty. In such case the heir may keep both the gift of personalty and his own property thus attempted to be disposed of. *Hearle v. Greenbank*, 3 Atk. 695, 1 Ves. 298; *Thellusson v. Woodford*, 13 Ves. Jr. 223; *McElfresh v. Schley*, 2 Gill (Md.) 182; *Tongue v. Nutwell*, 17 Md. 229, 79 Am. Dec. 649.

Settlement. — The same principles apply in the case of a settlement partially invalid. *Campbell v. Ingilby*, 21 Beav. 567.

2. **Will Ineffectual by Reason of Coverture**. — Where a married woman to whom a power of appointment is given makes by will a valid appointment to the husband, while disposing of her personal property to a stranger, the husband is not put to an election between the benefit given to him by virtue of the exercise of the power by the wife and the property bestowed upon the stranger, but may retain the benefit given and also claim the personal property by virtue of his marital right; for the wife has no power to dispose of her property by will. *Rich v. Cockell*, 9 Ves. Jr. 381; *McElfresh v. Schley*, 2 Gill (Md.) 182; *Jones v. Jones*, 8 Gill (Md.) 206 [*cit. Rich v. Cockell*, 9 Ves. Jr. 370]; *Tongue v. Nutwell*, 17 Md. 229, 79 Am. Dec. 649. But see *Coutts v. Acworth*, L. R. 9 Eq. 519.

Will Valid When Made Becoming Inoperative. — When a married woman's will, made under a power, is valid when executed, but is rendered inoperative by subsequent events, it seems that no case for an election is raised. *Blaiklock v. Grindle*, L. R. 7 Eq. 215.

3. **Devise by Will Defectively Executed**. — When under a will sufficiently executed to pass personal property, but not executed as a will of lands, a legacy is given to the heir of the testator, and lands which would descend to him are

devised to another, the heir is not put to his election. He may take the legacy and enjoy the lands.

England. — *Hearle v. Greenbank*, 1 Ves. 306, 3 Atk. 695; *Sheddon v. Goodrich*, 8 Ves. Jr. 496; *Thellusson v. Woodford*, 13 Ves. Jr. 223; *Cary v. Askew*, 1 Cox 241; *Gardiner v. Fell*, 1 Jac. & W. 22; *Ex p. Ilchester*, 7 Ves. Jr. 375.

Maryland. — *McElfresh v. Schley*, 2 Gill (Md.) 182; *Jones v. Jones*, 8 Gill (Md.) 198.

Mississippi. — *Nutt v. Nutt*, Freem. (Miss.) 128.

New Jersey. — *Kearney v. Macomb*, 16 N. J. Eq. 189.

North Carolina. — *Melchor v. Burger*, 1 Dev. & B. Eq. (21 N. Car.) 634.

See also *Buckeridge v. Ingram*, 2 Ves. Jr. 665. But in *Hume v. Rundell*, 2 Sim. & S. 174, the testator, in accordance with the provisions of a settlement, directed a maintenance for his younger children to be raised from the time of his death; but the will not being duly attested, it was held that the eldest was put to his election, as he had other benefits under the will, and was the only party that could be benefited by withholding the maintenance. See also *Wilson v. Wilson*, 1 De G. & Sm. 152.

4. *Ker v. Wauchope*, 1 Bligh 23, 20 Rev. Rep. 16.

By Statute at the Present Time, the formalities for executing wills of realty and personalty are the same in England and in most American jurisdictions, and where such is the case questions of this kind can no longer arise. See the title **WILLS**.

Void Devise of Copyholds. — Analogous principles were applied under the former law in England with regard to copyholds. Under the old law, a surrender to the use of wills was necessary to give validity to a will of copyhold estates, and a devise of such lands without surrender, though void, put the heir to his election if he received benefits under the will. *Unett v. Wilkes*, Amb. 430, 2 Eden 187; *Rumbold v. Rumbold*, 3 Ves. Jr. 65; *Pettward v. Prescott*, 7 Ves. Jr. 541; *Blunt v. Clitherow*, 10 Ves. Jr. 589; *Frank v. Standish*, 15 Ves. Jr. 391, note a. But see *Jeffreys v. Duhamel*, Romilly's N. Cas. 129.

Where an unsundered copyhold was devised by will upon the express condition that the heir, who received benefits under the will, should convey such copyhold to the devisee, the heir must elect. *Wardell v. Wardell*, 3 Bro. C. C. 116.

Gifts upon Express Condition. — But a different rule is applied in case of devises or bequests upon express conditions, as where, in a will sufficient to pass personal but not real estate, the testator annexes to a legacy the express condition that the legatee shall permit the person named in the will to take his land, or that, if the legatee disputes the will, he shall forfeit the benefit given him.¹ Here the condition, in itself lawful, is annexed to and becomes a part of a duly executed disposition of personal property, and effect must be given to it.² The soundness of the distinction has been questioned.³

(b) **Will Insufficiently Executed as to Foreign Property.** — It seems established that a will executed in conformity with the law of the testator's domicile, and effective, therefore, to pass his property situated there, which purports to pass property belonging to him in another country or state, although not executed in conformity with the laws of the latter, is sufficient to raise a case of election. This rule was formulated with respect to a testator in *England* assuming by a will imperfectly executed under the Scotch laws to devise property in Scotland, or *vice versa*.⁴ It has, however, been applied in England with regard to other portions of Great Britain and its colonies,⁵ and has been adopted in the *United States* in the case of a testator making a will in one state purporting to pass land in another.⁶ But where general words are used in such a will it has been held that they will not be applied to lands situated in a foreign jurisdiction; for it will be intended that the testator meant these general words to be applied to such property as would in its nature pass by his will.⁷

(3) **Devise Void for Remoteness.** — A donee is not put to an election between an estate given to him by the testator and his own estate disposed of thereby, where the disposition of his estate is void by reason of violating an established rule of public policy, such as the rule against perpetuities.⁸

(4) **Will Attempting Disposition of After-acquired Property.** — Unless a different rule prevails by force of modern statutes, it is well established that a

Where the words employed were general and might be applied to freeholds of the testator, they would not be applied to copyholds so as to put the heir to an election. *Judd v. Pratt*, 13 Ves. Jr. 168, 15 Ves. Jr. 390.

By statute 55 Geo. III., c. 192, a surrender to the uses of the will becomes unnecessary.

1. **Void Devise upon Express Condition.** — *Boughton v. Boughton*, 2 Ves. 12; *Whistler v. Webster*, 2 Ves. Jr. 371; *Sheddon v. Goodrich*, 8 Ves. Jr. 481; *Cary v. Askew*, 1 Cox 241; *Ker v. Wauchope*, 1 Bligh 1, 20 Rev. Rep. 10; *Jones v. Jones*, 8 Gill (Md.) 198; *Melchor v. Burger*, 1 Dev. & B. Eq. (21 N. Car.) 636; *Philadelphia v. Davis*, 1 Whart. (Pa.) 509.

2. *Boughton v. Boughton*, 2 Ves. 12; *Ker v. Wauchope*, 1 Bligh 23, 20 Rev. Rep. 16.

3. *Ker v. Wauchope*, 1 Bligh 23, 20 Rev. Rep. 16; *Brodie v. Barry*, 2 Ves. & B. 127; *Melchor v. Burger*, 1 Dev. & B. Eq. (21 N. Car.) 636; *Philadelphia v. Davis*, 1 Whart. (Pa.) 509; *Van Dyke's Appeal*, 60 Pa. St. 481.

4. **Devise of Lands in Foreign Country by Will Imperfectly Executed.** — *Brodie v. Barry*, 2 Ves. & B. 127; *Gainer v. Cunyngham*, 1 Bligh 27, note, 20 Rev. Rep. 19, note. See also *Ker v. Wauchope*, 1 Bligh 24, 20 Rev. Rep. 17.

5. **Where a Testator Domiciled in Scotland**, by a will formally executed by the Scotch laws, but invalid as to real estate in England, attempts to dispose of lands in England, the English heir is put to his election. *Dundas v. Dundas*, 2 Dow. & Cl. 349. So where a testator domiciled in Ireland devised property in

Scotland, by a will duly executed as to Irish lands, *M'Call v. M'Call*, 1 Dru. 283; or where a testator domiciled in England, by a will valid there, devised lands in the island of St. Kitts, where the will was inoperative, *Dewar v. Maitland*, L. R. 2 Eq. 834.

6. *Van Dyke's Appeal*, 60 Pa. St. 481.

7. **General Words Restricted to Lands in Jurisdiction.** — *Johnson v. Telford*, 1 Russ. & M. 244; *Allen v. Anderson*, 5 Hare 163, 10 Jur. 196; *Maxwell v. Maxwell*, 2 De G. M. & G. 705, 13 Eng. L. & Eq. 440, *affirming* 16 Beav. 106; *Maxwell v. Hyslop*, L. R. 4 Eq. 407.

See also *Jones v. Jones*, 8 Gill (Md.) 197, where the Maryland court refused to raise an election as against the heir of the testator who died domiciled in Pennsylvania and left a will good in Pennsylvania, but not executed so as to pass realty in Maryland. The court proceeded on the apparent ground that the expressions in the will were too general to call for the application of the doctrine of election, but no allusion was made to the English cases cited in this note nor to those which enforced election in cases of devises of foreign realty.

A Devise of "All the Residue of My Real Estate situate in any part of the United Kingdom or elsewhere" is sufficiently clear and specific to put the heir to his election. *Orrell v. Orrell*, L. R. 6 Ch. 302.

8. **Devise Infringing Rule Against Perpetuities.** — *Wollaston v. King*, L. R. 8 Eq. 175. See also *Sanford v. Goodell*, 82 Hun (N. Y.) 369, *reversing* 7 Misc. Rep. (N. Y.) 324.

will of realty speaks as of the date of the instrument, and does not, therefore, affect lands acquired after that date and before the death of the testator, although it expressly purports to do so.¹ It was held in *England*, however, that where the testator indicated a plain purpose to devise after-acquired lands, the heir who received a benefit under the will was put to his election and could not claim under the will and also as heir take such after-acquired lands.²

4. To What Interests Election Applicable — *a. FUTURE AND CONTINGENT INTERESTS.* — The doctrine of election is applicable whether the interests disposed of are present or future, vested or contingent, of value or not of value.³

1. *Bunter v. Coke*, 1 Salk. 237. See also the title *WILLS*.

2. **Express Reference to After-acquired Property.** — *Thellusson v. Woodford*, 13 Ves. Jr. 209, *sub nom.* *Rendlesham v. Woodford*, 1 Dow. App. Cas. 249; *Plowden v. Hyde*, 2 Sim. N. S. 171, 16 Jur. 512; *Churchman v. Ireland*, 1 Russ. & M. 250, 4 Sim. 520 [*overruling Back v. Kett*, 1 Jac. 534]; *Hance v. Trawhitt*, 2 Johns. & H. 216; *McElfresh v. Schley*, 2 Gill (Md.) 182; *Gable v. Daub*, 40 Pa. St. 230. See also *Tenant v. Tennant*, Ll. & G. temp. Plunk. 531. *Contra*, *Philadelphia v. Davis*, 1 Whart. (Pa.) 490, in which case it was held that there was no case of election where the testator, after devising his property, said: "All which, as well as any real estate that I may hereafter purchase, it is my wish and intention to pass by the said will." This decision was placed upon the ground that the will was no will as to such land.

Words Indicating Intent to Pass After-acquired Property. — A devise of "all my real estate which I am now, or at any time of my decease, shall be seized of or entitled to," etc., is sufficiently certain to indicate an intention to pass after-acquired estates. *Schroder v. Schroder*, 1 Kay 578.

A testator, in a codicil reciting that he had purchased certain freeholds since the date of his will, devised them to trustees upon trusts expressed in his will, and directed that if any hereditaments purchased by him thereafter should happen to be conveyed, his heir at law or other real representatives and every other person in whom the same should be vested should forthwith, upon his decease, convey and assure the same to his trustees upon the trusts of his will. Having purchased other estates afterwards, it was held that as to them a case of election was not raised against the heir taking benefits under the will, for the expressions used were not sufficiently certain to exclude the coheirs from the purchased estates, the language used in the codicil not referring to estates purchased after the codicil, but to estates which should happen to be conveyed. *Johnson v. Telford*, 1 Russ. & M. 244.

3. **To What Interests Applicable.** — *Wilson v. Townshend*, 2 Ves. Jr. 697; *Webb v. Shaftesbury*, 7 Ves. Jr. 480; *In re Vardon's Trusts*, 28 Ch. Div. 129; *Graves v. Forman*, cited in *Rumbold v. Rumbold*, 3 Ves. Jr. 67; *Brown v. Ward*, 103 N. Car. 173; *Tiernan v. Roland*, 15 Pa. St. 451. In *Weeks v. Patten*, 18 Me. 46, 36 Am. Dec. 696, it is said that election is applicable to every species of right.

Contra. — In *Bor v. Bor*, 5 Bro. P. C. (ed.

1784) 181, note, 3 Bro. P. C. (Toml. ed.) 178, note, Lord Hardwicke expressed the opinion that the doctrine of election is not applicable to interests in remainder after an estate tail, on the ground that "in cases of wills, things are to be taken as they stood at the testator's death;" and that if at that time the remainderman had been directed to confirm the devise, as far as he could, by levying a fine, in order to bar his issue, the tenant in tail might the next moment have barred all the remaindermen, and such a decree, therefore, would have given no substantial benefit. This conclusion was adopted by the Court of Exchequer of Ireland, in *Stewart v. Henry*, Vern. & S. 49, but it is inconsistent with Lord Hardwicke's own decision in *Graves v. Forman*, cited in *Rumbold v. Rumbold*, 3 Ves. Jr. 67.

In *Forrester v. Cotten*, Ambl. 388, 1 Eden 532, Lord Keeper Henley declared that the rule of election must be confined to plain and simple devises of the inheritance, and cannot be extended to limitations. See also *Crosbie v. Murray*, 1 Ves. Jr. 555, where it was said that election can exist only where a person has a decided interest before, and something is left to him by will, and *Long v. Wier*, 2 Rich. Eq. (S. Car.) 284, 46 Am. Dec. 51, where a similar rule is laid down.

Where at Death Testator Had No Interest in Property Devised. — Where the testator undertakes by his will to dispose of property which he expects to receive under the will of another, *Barbour v. Mitchell*, 40 Md. 170, or requires beneficiaries under his will to dispose in a certain fashion of property which they are to receive under the will of another, *McQueen v. McQueen*, 2 Jones Eq. (55 N. Car.) 16, 62 Am. Dec. 205, and these contingent interests are realized after the testator's death, if the other requisites are present, a case for election is raised.

Contingency Too Remote. — A testator devised his real estate to his children in tail with cross-remainders; and in the event of their dying without issue the estate was to go to his brother. He directed his wife to receive the rents and profits during widowhood; but in the event of her marrying she was to receive only one-half thereof during her life. It was held that the contingency of the widow's surviving all the children was too remote to put her to an election. *Travers v. Gustin*, 20 Grant's Ch. (U. C.) 106.

Reversionary Interest of Married Woman Falling in After Dissolution of Marriage. — A married woman joined during coverture in a deed by which her husband and her father each brought property into settlement, and whereby

Both Real and Personal Property Within Rule. — In this respect there is no distinction between real and personal estate.¹

b. DERIVATIVE INTERESTS. — A donee claiming a benefit under an instrument is not put to an election between the benefit and an interest in property which he derives through another person who had elected to take against the instrument.² But if the title, although derivative, be, at the testator's death, vested in a donee claiming under the will, he is put to his election; for it makes no difference by what previous title it had become his, the point of time to be regarded being the death of the testator.³

c. INTERESTS ARISING BY APPOINTMENTS UNDER POWERS. — The appointee under a deed of appointment who receives benefits under the will of the appointor, which also purports to dispose of the property previously appointed, is bound to elect between the benefits under the will and his claims under the deed of appointment.⁴

she also purported to settle her reversionary interest in certain personal property. The marriage was afterwards dissolved, and then the wife's reversion fell into possession, and she claimed to take it against the settlement. But it was held that the wife was put to her election between the interests provided for her by the settlement, and her right to receive this fund free from the settlement, and that in the event of her electing to take against the settlement she was bound to account for all income received under it since the date of the order *nisi* for dissolution; but that she was not liable to account for income received during the coverture. *Codrington v. Lindsay*, L. R. 8 Ch. 578.

1. Applicable to Personal as Well as Real Estate. — *Cooper v. Cooper*, L. R. 6 Ch. 21, L. R. 7 H. L. 74; *Gretton v. Haward*, 1 Swanst. 424. See also *Wilson v. Townshend*, 2 Ves. Jr. 693.

Grant from the Crown. — Where there was a grant to two persons from the crown, it was held that one of them who had petitioned for the grant could not afterwards set up a claim to part of the premises under a prior title, while taking the benefit as to the rest. *Cumming v. Forrester*, 2 Jac. & W. 334. In delivering judgment, Sir T. Plumer, M. R., doubted the application of the doctrine of election to the crown, saying: "The crown, being always in existence, may always be applied to to set right the grant; and if the party elects to renounce what the grant has given him, the consequence is that as to that part the grant does not take effect; and then does not that part revert to the crown? Can the court take hold of it to make satisfaction to the other?"

Unascertained Residue of Intestate's Personal Estate. — Election has been held to be applicable to the unascertained residue of an intestate's personal estate. *Cooper v. Cooper*, L. R. 7 H. L. 74.

2. Election Not Applicable to Derivative Interest. — *Cavan v. Pulteney*, 2 Ves. Jr. 544, 3 Ves. Jr. 384; *Beem v. Kimberly*, 72 Wis. 343. See also *Howell v. Jenkins*, 2 Johns. & H. 706; *Brodie v. Barry*, 2 Ves. & B. 127; *Bennett v. Harper*, 36 W. Va. 546.

Where at the time when a testator made his will one of his children had died leaving as his only heir a son to whom the testator bequeathed certain property, and where the said testator assumed by the said will to dispose of the proceeds of a certain insurance policy pay-

able at the testator's death to his children, the son of said deceased child is not put to his election to take under the will or claim under the policy, as the interest of the deceased child in the policy went to his administrator. *Hartwig v. Schiefer*, 147 Ind. 64. But see *Cooper v. Cooper*, L. R. 6 Ch. 15, *affirmed* L. R. 7 H. L. 53.

Where Donee under Will Claims Against It as Administrator. — Thus, a testator, being entitled under a settlement, subject to a life interest, to a moiety of a fund, by will, after reciting (erroneously) that he was, under the settlement, "subject to the trusts therein contained," entitled to the whole, purported to bequeath the whole, and to give one moiety to the husband of the woman who was really entitled under the settlement to a moiety of the fund. It was held that the husband, who had become his wife's administrator, was not bound to elect between the legacy and his wife's moiety, the gift being to him in his own right, whereas his claim was as administrator of his wife. *Grissell v. Swinhoe*, L. R. 7 Eq. 291. Sir W. M. James, who decided this case, afterwards explained it in *Cooper v. Cooper*, L. R. 6 Ch. 21, by saying: "The decision there, whether right or wrong, proceeded on the assumption that the legatee's title to the property did not exist at the death, but was a derivative title through the title of another person who was the true owner at the death."

3. Derivative Title Vested at Donor's Death. — *Cooper v. Cooper*, L. R. 6 Ch. 21, L. R. 7 H. L. 53; *Bennett v. Houldsworth*, 6 Ch. Div. 671.

4. Guillebaud v. Meares, 7 L. J. Ch. 136.

Property Undisposed Of by Devisee under a Power to Dispose. — A testator bequeathed to his wife the enjoyment of his estate, with power to dispose thereof by deed or will directing that what she left undisposed of at her death should be sold, and the money divided among all his children. The widow of the testator made a gift of part of the estate to one of the testator's daughters for life, with remainder to the daughter's children. The widow died, leaving the rest of the estate undisposed of. The daughter claimed, in addition to what was given under the will of the testator's widow, an equal share with the other children, under the will of her father, in the property undisposed of. It was held that she was not entitled to both, but must make her

Appointment to Stranger Where Power Special. — Where a testator having a special power of appointment appoints the property to a stranger, the appointment is void; but having by the same instrument given a benefit to the object of the power, the latter is bound to elect between the gift and the property to which he is entitled under the power.¹

Attempted Reappointment After Valid Appointment. — Where the donee of a special power assumes by will to dispose of the subject of the power in a manner inconsistent with the rights of certain of the objects of the power as settled by a previous appointment or as arising under the instrument creating the power, and at the same time confers benefits on the objects of the power who would be disappointed by the attempted reappointment, the latter are put to an election.²

Appointment Void for Remoteness. — It has been held that if an appointment under a power is void for remoteness as violating the rule against perpetuities, the person who is entitled in default of appointment and who takes a benefit under the will is not put to his election. The attempted appointment, being unlawful, is not to be considered.³

To Object with Invalid Condition Superadded. — Where an absolute appointment of property subject to a special power is made to the objects of the power, who also receive benefits under the same instrument, and a direction or condition as to the property is superadded in favor of strangers, such superadded direction or condition is simply void, and no case of election arises; the court reads the will as if such attempts to modify the interest thus absolutely appointed were swept out of it.⁴

election. *Deveaux v. Barnwell*, 1 Desaus. (S. Car.) 498.

1. **Appointment Made to Strangers to the Power.** — *Whistler v. Webster*, 2 Ves. Jr. 367; *Reid v. Reid*, 25 Beav. 469; *Tomkyns v. Blane*, 28 Beav. 422; *England v. Lavers*, L. R. 3 Eq. 63; *Carver v. Bowles*, 2 Russ. & M. 301; *Blacket v. Lamb*, 14 Beav. 482; *White v. White*, 22 Ch. Div. 555; *Prescott v. Edmunds*, 4 L. J. Ch. 111. See also *Coutts v. Acworth*, L. R. 9 Eq. 519; *Cooke v. Briscoe*, 1 Dr. & Wal. 596; *Bulwer v. Hoare*, 3 L. J. Ch. 227. And compare *Robinson v. Hardcastle*, 2 Bro. C. C. 344.

No Election Unless Compensation Possible. — Under the principle already stated that the benefit conferred must be of such a character that, if the object of the power elects to take against the instrument, the property intended to benefit him can be laid hold of to compensate the disappointed appointee, it is held that where the only property which would be available in the event of such an election is property subject to a special power of appointment, no case for an election is raised. *In re Fowler's Trust*, 27 Beav. 362; *In re Aplin's Trust*, 13 W. R. 1062.

2. **Upon Attempt to Reappoint, After Valid Appointment.** — Where a valid appointment under a power has been made by deed, and by subsequent will the donee professes to make another and inconsistent appointment, among the objects of the power, at the same time conferring benefits upon certain objects excluded in the attempted reappointment, such excluded objects are put to an election between their interests under the valid appointment and under the will. *Cooper v. Cooper*, L. R. 7 H. L. 53, affirming L. R. 6 Ch. 15.

Where a Person Having a Power to Appoint to Two appoints to one only, and gives the other

a benefit, the latter must elect. 2 Sugden on Powers (7th ed.) 148 [citing *Wollen v. Tanner*, 5 Ves. Jr. 218; *Vane v. Dungannon*, 2 Sch. & Lef. 118].

Delegation of Power. — A father, having power to appoint an estate among his children, directed by his will that it should be divided in such proportions as his wife should think proper, and in default of appointment by her, in equal shares between his two children. The wife accordingly appointed it by will. It was held that while the father could not delegate the power, the child who should defeat the mother's attempted appointment could have no benefit under the father's will. *Ingraham v. Ingraham*, cited in *Kirkham v. Smith*, 1 Ves. 259.

3. **Appointment Void for Remoteness.** — *Wollaston v. King*, L. R. 8 Eq. 175; *In re Warren's Trusts*, 26 Ch. Div. 208. But compare *Tomkyns v. Blane*, 28 Beav. 422; *Albert v. Albert*, 68 Md. 352.

4. **Superadded Words to an Absolute Appointment.** — *Wollaston v. King*, L. R. 8 Eq. 165; *Carver v. Bowles*, 2 Russ. & M. 301; *Churchill v. Churchill*, L. R. 5 Eq. 44; *Woolridge v. Woolridge*, Johns. 63, 5 Jur. N. S. 566; *Blacket v. Lamb*, 14 Beav. 482; *King v. King*, 15 Ir. Ch. Rep. 479. See also *Rauch v. Trood*, 3 Ch. Div. 444; *Wallinger v. Wallinger*, L. R. 9 Eq. 301.

Contra. — In *Moriarty v. Martin*, 3 Ir. Ch. Rep. 26, there was doubt expressed as to whether or not the rule stated in the text is law, unless as in the case of *Carver v. Bowles*, 2 Russ. & M. 301, the proviso is in terms "so far as lawfully may be." But this doubt has not prevailed in the subsequent cases above cited.

In some cases, the facts of which would seem to bring them within the rule here laid

d. DONOR AND DONEE BOTH INTERESTED IN PROPERTY BESTOWED —

(1) *General Presumption of Intent* — **Election Excluded.** — Where the testator or donor and the donee upon whom a benefit is bestowed and against whom an election is sought to be enforced have each an undivided share, or a partial and limited interest in the property intended to be devised away to another person by the donor, the difficulty in applying the doctrine of election is greater than in the ordinary case of a disposition of property belonging entirely to the donee. In such cases the presumption is that the donor intended to dispose only of what he had power to dispose of, namely, his own interest in the property, and that he did not intend to include the interest of his co-owner. Unless this presumption is overcome, election is excluded.¹

(2) *Proof to Overcome Presumption* — **Extrinsic Evidence Inadmissible.** — The donor's intention to dispose not only of his own but of his co-owner's interest in the property bestowed, so as to put the latter to an election, must appear by clear and unambiguous expression, either directly or by necessary implication from the circumstances disclosed by the will. Extrinsic evidence as to the testator's intention is inadmissible.²

(3) *Devise in General Words.* — In accordance with these rules of construction, a devise in general words, such as "all my estate," "all my lands," etc., of property in which the testator is partially interested must be presumed to indicate an intention by the testator to dispose of his own interest only, the language being applicable to that interest, and the presumption being that he intends to dispose only of that.³ But even though general words are used,

down, the doctrine of election was applied upon the ground that the condition did not constitute a superadded limitation upon a prior absolute appointment, but was in effect a direct gift to the strangers in whose favor it was intended to operate, and the objects of the power were put to an election to effectuate such gift or to surrender benefits conferred by the will. *Tomkyns v. Blane*, 28 Beav. 422; *White v. White*, 22 Ch. Div. 555; *King v. King*, 13 L. R. Ir. 531.

1. Donor and Donee Both Interested in Property Devised. — *Rancliffe v. Parkyns*, 6 Dow. App. Cas. 149, 19 Rev. Rep. 36; *Wintour v. Clifton*, 21 Beav. 467; *Toney v. Spragins*, 80 Ala. 545; *Van Schaack v. Leonard*, 164 Ill. 602; *Hall v. Hall*, 1 Bland (Md.) 135; *Pratt v. Douglas*, 38 N. J. Eq. 536; *Leonard v. Steele*, 4 Barb. (N. Y.) 20; *Beal v. Miller*, 1 Hun (N. Y.) 390; *Penn v. Guggenheimer*, 76 Va. 839; *Gregory v. Gates*, 30 Gratt. (Va.) 90; *Lewis v. Lichty*, 3 Wash. 221, 28 Am. St. Rep. 25.

If a testator devise land in a particular locality, and there is any property of the testator answering the description, it will be confined to that. *Rancliffe v. Parkyns*, 6 Dow. App. Cas. 149; *Maddison v. Chapman*, 1 Johns. & H. 470.

A devise to uses in strict settlement will not extend general words to more than the testator's interest, though his devisable interest is only an estate *pur autre vie*. *Cosby v. Ashdown*, 10 Ir. Ch. Rep. 219.

2. Intention to Dispose of Interest of Co-owner Must Appear by Will. — *Clementson v. Gandy*, 1 Keen 309; *Blake v. Bunbury*, 4 Bro. C. C. 21; *Honywood v. Forster*, 30 Beav. 14; *Seaman v. Woods*, 24 Beav. 372; *Tracey v. Shumate*, 22 W. Va. 474; *Atkinson v. Sutton*, 23 W. Va. 197. See also *supra*, this section, *Essentials to Raise Election*, subd. c. (4) *Proof of Donor's Intent to Dispose of Donee's Property*;

and *infra*, this title, *Election as to Dower and Other Rights Arising on Marriage*, subd. 1. a. (3) *Whether Testamentary Provision Raises Election*.

It is said by Lord Commissioner Eyre in *Blake v. Bunbury*, 4 Bro. C. C. 21, 1 Ves. Jr. 524, that the court is not to refuse attention to what amounts to a moral certainty of the testator's intention, where that is to be gathered either from the state of the property or the purview of the will. This remark has sometimes been quoted with approval. *McElfresh v. Schley*, 2 Gill (Md.) 199; *Waters v. Howard*, 1 Md. Ch. 119.

Contra. — In some of the older cases, extrinsic evidence was admitted in order to show that the testator included in a gift property which was not his own, and thus to raise a case of election. *Druce v. Denison*, 6 Ves. Jr. 385; *Pulteney v. Darlington*, cited in *Hinchcliffe v. Hinchcliffe*, 3 Ves. Jr. 521, and *Druce v. Denison*, 6 Ves. Jr. 399. And the doctrine in these cases is stated to be law in a dictum of Jessel, M. R., in *Pickersgill v. Rodger*, 5 Ch. Div. 163. The cases are also recognized by Lord St. Leonards, 2 Sugden on Powers (7th Eng. ed.) 149. But they are disapproved by Vice-chancellor Wigram, *Wigram on Wills* (2d Am. ed.) 95, and may be considered as overruled by later cases. *Clementson v. Gandy*, 1 Keen 309; *Dixon v. Samson*, 2 Y. & Coll. 566. See also *Doe v. Chichester*, 4 Dow. App. Cas. 65, 16 Rev. Rep. 32; 1 *Jarman on Wills* (5th ed.) 425.

3. Devise in General Words. — *Miller v. Thurgood*, 33 Beav. 496, 10 Jur. N. S. 304; *Forster v. Cotten*, Amb. 390, 1 Eden 532; *In re Bidwell*, 8 L. T. N. S. 107, 9 Jur. N. S. 37, 32 L. J. Ch. 71; *Blommart v. Player*, 2 Sim. & S. 597; *Seaman v. Woods*, 24 Beav. 372; *Sherman v. Lewis*, 44 Minn. 107; *Matter of Gotzian*, 34 Minn. 159, 57 Am. Rep. 43; *Pratt v.*

an intention to dispose of the property in its entirety, and not alone of the testator's interest therein, may appear from the provisions of the will and the scheme of testamentary disposition.¹

(4) *Specific Devise*. — If, however, a testator who has an undivided interest in any particular property disposes of the property specifically by a description sufficient to identify it, the words will be applied to the entire *corpus*, and a question of election arises.² But it has been said that even in such a case the court will construe the disposition as limited to the testator's interest in the property only, if such a construction is admissible.³

(5) *Donor with Reversionary or Future Interest*. — Where a testator is possessed of only a reversionary or future interest in property, a devise by him of such property is to be taken, in accordance with the general rule, as referring to the reversionary interest merely; but if other provisions in the will and the limitations annexed to the devise are inconsistent with a gift of the mere reversion, and make clear an intent to dispose also of the present interest in the property, the intention prevails and a case of election is raised.⁴

Douglas, 38 N. J. Eq. 537; *Sanford v. Jackson*, 10 Paige (N. Y.) 266; *Penn v. Guggenheimer*, 76 Va. 839.

A devise of "all and every my freeholds in Potter street and South street and elsewhere, with the appurtenances," does not put the devisee to his election. *Miller v. Thurgood*, 33 Beav. 496. See also *Durfee's Petition*, 14 R. I. 47, where a devise of "all my interest" in certain property was held consistent with an intention to dispose only of such interest as the testator had, and consequently not to raise an election.

Bequest of "My" Shares of Stock. — A bequest of "my" shares of stock in a particularly described company, where the only shares of such stock in which the testator was interested were shares which belonged to himself and his wife jointly, has been held sufficient to create a case of election. *Shuttleworth v. Greaves*, 4 Myl. & C. 35.

So a bequest of "my present funded stock" has been held to raise an election. *Grosvenor v. Durston*, 25 Beav. 98.

But a bequest in nearly the same words was held in *Dummer v. Pitcher*, 2 Myl. & K. 262, not to be sufficiently distinct and explicit to raise a case of election.

1. Devise in General Words Showing an Intent to Dispose of Entirety. — *Wintour v. Clifton*, 8 De G. M. & G. 650; *McGregor v. McGregor*, 20 Grant's Ch. (U. C.) 450; *Matter of Gotzian*, 34 Minn. 159, 57 Am. Rep. 43. See also *Rancliffe v. Parkyn*, 6 Dow. App. Cas. 179, 19 Rev. Rep. 43.

A testator may in his will show an intention under a general devise to dispose of lands which are not absolutely his own by describing them as being in the occupation of himself or his tenants. *Honywood v. Forster*, 30 Beav. 14.

2. Miller v. Thurgood, 33 Beav. 496, better reported 10 Jur. N. S. 304, 33 L. J. Ch. 511; *Padbury v. Clark*, 2 Macn. & G. 298; *Howells v. Jenkins*, 2 Johns. & H. 706, 1 De G. J. & S. 617; *Honywood v. Forster*, 30 Beav. 14; *Ditch v. Sennott*, 117 Ill. 363; *Pratt v. Douglas*, 38 N. J. Eq. 537; *Sanford v. Jackson*, 10 Paige (N. Y.) 266; *Colvert v. Wood*, 93 Tenn. 454; *Penn v. Guggenheimer*, 76 Va. 839.

A testator being the owner in fee of a moiety

of the Goose Green property, the other moiety belonging to his wife by his will devised to his wife, to whom he gave other benefits, "all that his messuage, tenement," etc., situate at Goose Green. It was held that this was a specific devise of the entirety, and that the widow was put to her election. *Fitzsimons v. Fitzsimons*, 28 Beav. 417, 6 Jur. N. S. 641.

Direction by Testator that Compensation Be Made for Improvements. — A father advanced money in payment of land bought by his son, and took the title in his own name as security. The son occupied the land until his father's death, made improvements worth eight hundred dollars, and paid back the greater part of the money advanced. The father directed in his will that this and three other tracts should be equally divided between his four children, subject to the repayment to the first-named son of the value of the improvements made by him. It was held that the provision directing that compensation be made for the improvements was decisive in showing that the testator intended to dispose of the entire fee, and that the son, by ratifying the will and claiming under it, was estopped from claiming the equitable title thereto. *Wocley v. Schrader*, 116 Ill. 29.

3. In Sherman v. Lewis, 44 Minn. 107, it was said: "Even where specific property is disposed of by will, in which the testator had only a partial interest, the courts will, if possible under any reasonable rule of construction, construe the language of the will as intended to apply only to the interest which the testator was able to dispose of; the presumption being that he did not intend it to apply to that over which he had no disposing power."

4. Donor with Reversionary Interest. — *Welby v. Welby*, 2 Ves. & B. 187; *Wintour v. Clifton*, 21 Beav. 447, 2 Jur. N. S. 456, affirmed 3 Jur. N. S. 74; *Ustick v. Peters*, 4 Kay & J. 437, 4 Jur. N. S. 1271. See also *Swan v. Holmes*, 10 Beav. 471.

Future Contingent Interest. — Where the testator devises property in which he has only a contingent interest, it will be presumed that he intended to give only such contingent interest, unless the contrary sufficiently appears, and no case for election arises. *Havens v. Sackett*, 15 N. Y. 366.

(6) *Gift of Encumbered Property*. — Where an estate is subject to an incumbrance and a testator devises it simply without saying more, he is taken to intend the estate in its encumbered condition, and no case of election arises.¹ But if the terms of the devise are inconsistent with the existence of the incumbrance,² especially if the testator repudiates the instrument creating the incumbrance,³ the intention to devise free from the incumbrance is manifest, and the incumbrancer must elect.

(7) *Devise of Lands in Which Testator's Wife Dowable*. — A devise of lands in which the wife of the testator is dowable, by a will which confers a benefit upon the wife, is an instance of the interests treated of in this section. For reasons of convenience such devises are considered in a separate subdivision.⁴

5. Competency of Persons to Elect — *a. INFANTS*. — An infant is not competent to elect.⁵ Nor can his guardian *ad litem*⁶ or next friend elect for him.⁷ But when an election is cast upon an infant the court will make a reference to a master to ascertain whether or not it is to the interest of the infant to take under or against the instrument, and will make an election for him of that which will be the more advantageous to him;⁸ or where sufficient evidence is before the court to guide an election, an order electing for the infant will be made without a reference.⁹

Postponing Election until Majority. — The court may also postpone the election

Confirmation of Settlement by Testator. — Where the testator expressly confirms the settlement which creates the preceding estate and the reversion, this overcomes the effect of inconsistent provisions from which an intent to overturn the settlement may be gathered, and prevents an election. *Rancliffe v. Parkyns*, 6 Dow. App. Cas. 149, 19 Rev. Rep. 36.

But if there was a confirmation of a part only of the settlement, the remainder would be unconfined, and the donee therefore put to an election. *Blake v. Bunbury*, 1 Ves. Jr. 514.

1. Devise of Encumbered Property. — *Stephens v. Stephens*, 1 De G. & J. 71, 3 Drew. 697. See also *Blake v. Bunbury*, 1 Ves. Jr. 525, 4 Bro. C. C. 26.

Where the Testator Is the Incumbrancer, and he makes a devise of the encumbered property, an intention to dispose of more than his own interest will not be imputed to him, and no case of election arises. *Maddison v. Chapman*, 1 Johns. & H. 470.

2. Blake v. Bunbury, 1 Ves. Jr. 514. See also *Wilkinson v. Dent*, L. R. 6 Ch. 339; *Hyde v. Baldwin*, 17 Pick. (Mass.) 303.

3. Sadler v. Butler, 1 Ir. Eq. Rep. 415.

4. See infra, this title, *Election as to Dower and Other Rights Arising on Marriage*.

5. Infant Cannot Elect. — *Van v. Barnett*, 19 Ves. Jr. 109; *Chipman v. Montgomery*, 63 N. Y. 235. But see the old case of *Rushout v. Rushout*, 3 Bro. P. C. (ed. 1784) 132, 6 Bro. P. C. (Toml. ed.) 89, and the observation of the court in *Ridgway v. Manifold*, 39 Ind. 58. The observation in the last case is not supported by the authority cited, and Lord Redesdale offers an explanation of the first case in *Moore v. Butler*, 2 Sch. & Lef. 267.

6. Guardian Ad Litem Cannot Elect. — *Chipman v. Montgomery*, 63 N. Y. 235.

7. Haggard v. Benson, 3 Tenn. Ch. 276.

8. Reference to Master as to Election by Infant. — *England*. — *Bennett v. Houldsworth*, 6 Ch. Div. 671; *In re Chesham*, 31 Ch. Div. 472;

Ebrington v. Ebrington, 5 Madd. 117; *Ashburnham v. Ashburnham*, 13 Jur. 1111; *Chetwynd v. Fleetwood*, 4 Bro. P. C. 435; *Moore v. Butler*, 2 Sch. & Lef. 266; *Brown v. Brown*, L. R. 2 Eq. 481; *Goodwyn v. Goodwyn*, 1 Ves. 228; *Bigland v. Huddleston*, 3 Bro. C. C. 285, note; *Gretton v. Haward*, 1 Swanst. 413; *Morrison v. Bell*, 5 Ir. Eq. Rep. 354.

Maryland. — *Addison v. Bowie*, 2 Bland (Md.) 623.

North Carolina. — *McQueen v. McQueen*, 2 Jones Eq. (55 N. Car.) 16, 62 Am. Dec. 205; *Flippin v. Banner*, 2 Jones Eq. (55 N. Car.) 455.

Pennsylvania. — *Kennedy v. Johnston*, 65 Pa. St. 451, 3 Am. Rep. 650.

Virginia. — *Turner v. Street*, 2 Rand. (Va.) 404.

In re Chesham, 31 Ch. Div. 473, Chitty, J., in delivering judgment, said: "In all cases that I am aware of, the court, where the election is thus made to take under the will, effectually binds the interest of the party entitled to set up a paramount title by an appropriate declaration in favor of persons taking under the instrument on which the question of election arises, with incidental directions, where necessary, for conveyance, assignment, release, or the like, adapted to the special circumstances of the case."

A court will not elect for an infant between a right to land and the following of the purchase money of the land to other land, without having such a case before it as will enable it to make an intelligent and effectual election. *Haggard v. Benson*, 3 Tenn. Ch. 268.

Disadvantageous Sale by Guardian — Court May Elect. — Where an infant has an equitable right to land or its proceeds, he may elect to take either; and if his guardian sell the land at a disadvantage to the infant, the court may elect for the infant and bind him by such election. *Turner v. Street*, 2 Rand. (Va.) 404.

9. When Election Made Without Reference. — *Lamb v. Lamb*, 5 W. R. 720; *Blunt v. Lack*, 26 L. J. Ch. 148.

until a certain time after the infant attains his majority,¹ and will make provision for the rents and profits of the property in the meantime.²

b. MARRIED WOMEN — Election by Court After Reference. — Where a married woman is required to elect, the court will, as in a case of infancy, usually direct a reference to ascertain which course would be for her benefit,³ unless it be clear to the court on which side her interest lies, when the court will elect without a reference.⁴

Ability to Elect. — These cases wherein courts, with or without a reference to a master, have elected for *femes covert* would indicate that married women are under a disability to elect for themselves, yet the point is not free from doubt. Indeed, it is laid down by some authorities that a married woman can elect during coverture.⁵ And it seems established by the English cases that a married woman may make a binding election to confirm an antenuptial settlement.⁶ And there are authorities which hold that the acts of a *feme*

1. Postponement of Election until Infant's Majority. — *Streatfield v. Streatfield*, 1 White & T. L. Cas. 405; *Bor v. Bor*, 5 Bro. P. C. (ed. 1784) 165; *Thomas v. Gyles*, 2 Vern. 232; *Hervey v. Desbouverie*, Cas. temp. Talb. 130. See also *Davis v. Kriger*, 69 Miss. 39.

2. Boughton v. Boughton, 2 Ves. 12.

3. Election by Married Woman — England. — *Cooper v. Cooper*, L. R. 7 H. L. 53, affirming L. R. 6 Ch. 15; *Frank v. Frank*, 3 Myl. & C. 171; *Campbell v. Ingilby*, 21 Beav. 567; *Vane v. Dunganon*, 2 Sch. & Lef. 133; *In re Chesham*, 31 Ch. Div. 473.

North Carolina. — *Robertson v. Stevens*, 1 Ired. Eq. (36 N. Car.) 251; *Weeks v. Weeks*, 77 N. Car. 424.

Pennsylvania. — *Kennedy v. Johnston*, 65 Pa. St. 455, 3 Am. Rep. 650; *Kreiser's Appeal*, 69 Pa. St. 193.

See also *Howell v. Tomkins*, 42 N. J. Eq. 305; *Jernegan v. Baxter*, 6 Madd. 32.

Reversionary Interests. — A married woman cannot, by election, part with her reversionary choses in action. *Williams v. Mayne*, 16 W. R. 173, 1 Ir. Eq. Rep. 519, overruling *Wall v. Wall*, 15 Sim. 513. See also *Whittle v. Henning*, 2 Phil. 731; *Robinson v. Wheelwright*, 6 De G. M. & G. 546.

The consent of a married woman, by her counsel, to elect to release her jointure in land to arise upon the death of her husband, and accept an allowance for maintenance during the life of her husband, without prejudice to her right to dower, has been held not to be binding upon her after his decease. *Frank v. Frank*, 3 Myl. & C. 177.

Election by a Feme Covert Resident Abroad cannot be effectuated under a power of attorney from the husband and wife. She must be present in court, so that the court may know whether she consents or not; or something in the nature of a commission must issue. *Parsons v. Dunne*, 2 Ves. 60, 3 Ves. 276.

4. Wilson v. Townshend, 2 Ves. Jr. 696; *Carter v. Silber*, (1891) 3 Ch. 553.

5. Capacity of Females Covert to Elect. — 1 Pomeroy's Eq. Jur., § 508; *Theobald on Wills* (4th ed.) 90. The authorities in the preceding and following notes seem not to support this position in its full extent.

In the notes to *Streatfield v. Streatfield*, 1 White & T. L. Cas. 423, it is declared that "a married woman may elect so as to affect her interest in real property; and where she has

once so elected, though without deed acknowledged, the court can order a conveyance accordingly, the ground of such order being that no married woman shall avail herself of a fraud."

In 2 *Redfield on Wills* (3d ed.) 358 the decisions cited in the note following this, especially *Barrow v. Barrow*, 4 Kay & J. 409, are cited as establishing the proposition that *femes covert* may make an election under a will, which, after being acted upon by other parties, will be upheld by courts of equity. And it is said that, as thus understood, the decisions are not perhaps in conflict with the decision in *Cooper v. Cooper*, L. R. 7 H. L. 53, wherein a reference was ordered to determine whether a proposed election would be for the benefit of a married woman.

6. Election under Antenuptial Settlement. — In *Barrow v. Barrow*, 4 Kay & J. 409, 4 Jur. N. S. 1049, it was held that a married woman, by obtaining a decree for specific performance of a covenant in an antenuptial settlement relating to her real estate made when she was an infant, had elected so to bind in equity her interest in the real estate, and had become herself bound to carry the whole of the instrument into effect.

In *In re Hodson*, (1894) 2 Ch. 421, it was held that where a married woman, after attaining majority, by unacknowledged deed affirms a settlement executed by her before her marriage while an infant, such settlement is binding on her. In delivering judgment, Chitty, J., said: "The disability of coverture does not extend to a case of equitable election; she can elect whether she will take under or against an instrument executed by another person, and she can elect out of court. *Williams v. Baily*, L. R. 2 Eq. 731; *Smith v. Lucas*, 18 Ch. Div. 531; *Greenhill v. North British, etc., Ins. Co.*, (1893) 3 Ch. 474." To the same effect is *Wilder v. Pigott*, 22 Ch. Div. 263, except that here the confirmation was by an acknowledged deed.

But a married woman has no power to confirm a postnuptial settlement made while an infant so as to bind a reversionary interest in personality to which she was entitled under a will which came into operation before the passing of Vice-chancellor Malins's Act (20 and 21 Vict., c. 57). *Seaton v. Seaton*, L. R. 13 App. 61. See this case distinguished in *Greenhill v. North British, etc., Ins. Co.*, (1893) 3 Ch. 474.

7. Against Whom Election Enforceable.—The doctrine of election may be enforced against married women,¹ infants,² residuary legatees,³ and heirs at law;⁴ and election has been enforced against the next of kin of an intestate who would have been compelled to elect.⁵

The Claim of a Creditor against the testator's estate is not such an interest as compels him to elect between enforcing it against property devised or bequeathed to others and the acceptance of an interest in property specially devised for the payment of debts which would otherwise not be liable therefor.⁶

Where Election Devolves upon Several Persons Composing a Class, it seems that each has

tween specific and residuary legatees, or between legatees and next of kin of an intestate, and that a residuary legatee under a will has a clear and tangible interest in the residue. In that case, however, the doctrine was invoked against the residuary legatee, and not by him.

1. Married Women.—*Cavan v. Pulteney*, 2 Ves. Jr. 560; *Wilson v. Townshend*, 2 Ves. Jr. 696; *In re Chesham*, 31 Ch. Div. 472; *Vane v. Dunganon*, 2 Sch. & Lef. 133; *Clay v. Hart*, 7 Dana (Ky.) 5; *McIlvain v. Porter*, (Ky. 1888) 7 S. W. Rep. 309; *Robertson v. Stevens*, 1 Ired. Eq. (36 N. Car.) 247; *Tiernan v. Roland*, 15 Pa. St. 451; *Robinson v. Buck*, 71 Pa. St. 386.

Election Between Provision in Will and Gift Revoked Thereby.—Where a testator bequeathed a sum of money to his wife in lieu of all dower, etc., and revoked "all gifts or deeds or deed of gift of any real estate made by me at any time heretofore to her," it was held that the widow was put to her election whether she would accept the bequest or retain an estate conveyed to her by deed of gift during the lifetime of her husband. *Lee v. McKinly*, 18 Grant's Ch. (U. C.) 527.

Between Gift in Will and Decree in Wife's Favor.—Where a husband died after having obtained a decree in right of his wife, and by his will bequeathed to his wife, in addition to other property, a certain sum "in lieu of the decree," it was held that the wife must elect between the decree and the sum given in lieu of it; and in case of her taking the decree, she must, out of the other property bequeathed to her, compensate the residuary legatee for the excess of the decree over the sum given in lieu of it. *Key v. Griffin*, 1 Rich. Eq. (S. Car.) 67.

Wife's Paraphernalia.—Although a husband has no right to dispose of a wife's paraphernalia, yet if he does so she must either abide by the will or relinquish all benefit therefrom. *Churchill v. Small*, 2 Ken. 6; *Re Hewson*, 23 L. J. Ch. 256. See also *Jervoise v. Jervoise*, 17 Beav. 566.

Under a bequest of the use of all household goods, furniture, plate, jewels, linen, etc., for life, a wife is not barred of her paraphernalia. *Marshall v. Blew*, 2 Atk. 217.

2. Infants.—*Chetwynd v. Fleetwood*, 1 Bro. P. C. 300; *Boughton v. Boughton*, 2 Ves. 12; *Rushout v. Rushout*, 6 Bro. P. C. 89, 3 Bro. P. C. 138; *Gretton v. Haward*, 1 Swanst. 413; *Ebrington v. Ebrington*, 5 Madd. 117; *Blunt v. Lack*, 26 L. J. Ch. 148, 3 Jur. N. S. 195; *Bennett v. Houldsworth*, 6 Ch. Div. 671; *Robertson v. Stevens*, 1 Ired. Eq. (36 N. Car.) 251; *Tiernan v. Roland*, 15 Pa. St. 451.

Where a Trustee Receives a Legacy for an In-

fant During Minority, Which Is Not Paid.—Where an infant, being entitled to an estate which was not well devised away from him by the testator, was left a legacy by the latter, with power to a trustee for him during his minority, which legacy was paid to the trustee, but no satisfaction thereof made to the infant, Lord Hardwicke said that he would not put the donee to election merely because the trustee received the legacy for him during his minority. *Moore v. Moore*, 2 Ves. 603.

3. Residuary Legatees.—*Cooper v. Cooper*, L. R. 6 Ch. 21, L. R. 7 H. L. 53; *Pemberton v. Pemberton*, 29 Mo. 409.

4. Heir at Law.—Where a testator devises to an heir property in fee over which he has an absolute power of disposition, although the devise in such case was, previous to the English act for the amendment of the laws of inheritance, 3 & 4 Wm. IV., c. 106, in a certain sense inoperative, as the heir took by descent and not by purchase as devisee, whether admitting or disputing the will, the heir will be compelled to elect between that and another estate belonging to him which the testator assumed to dispose of to another. *Anonymous*, Gilb. Eq. Rep. 15; *Welby v. Welby*, 2 Ves. & B. 187; *Thellusson v. Woodford*, 13 Ves. Jr. 224; *Wilbanks v. Wilbanks*, 18 Ill. 20; *McElfresh v. Schley*, 2 Gill (Md.) 182; *Colvert v. Wood*, 93 Tenn. 454.

5. Next of Kin.—*Cooper v. Cooper*, L. R. 7 H. L. 53, L. R. 6 Ch. 15; *Fytche v. Fytche*, L. R. 7 Eq. 494. See also *Re Hewson*, 23 L. J. Ch. 256. But see further *infra*, this title, *Effect of Death Before Election*.

6. Creditor.—*Kidney v. Coussmaker*, 12 Ves. Jr. 136. See also *Cooper v. Cooper*, L. R. 7 H. L. 66.

The broad doctrine that election is inapplicable to creditors is denied in *Adlum v. Yard*, 1 Rawle (Pa.) 170, 18 Am. Dec. 611. See also *Irwin v. Tabb*, 17 S. & R. (Pa.) 419.

One who was both heir at law and creditor, though as heir at law he opposed a devise of lands to pay debts, was held entitled as creditor to share in the residue of the fund raised by the will for the payment of debts. *Deg v. Deg*, 2 P. Wms. 412.

Erroneous Recital of a Debt Due, and Bequest of Legacy.—Where a debtor erroneously recited the amount of a debt due by him and directed payment thereof, and also bequeathed an annuity to his creditor, it was held that the creditor was not put to an election, but might claim the annuity and dispute the calculation, for in such case it was not clear that the testator did not intend to pay the full amount of the actual debt. *Clark v. Guise*, 2 Ves. 617.

a separate right of election which is not affected by the election made by any other member of the class.¹

8. How Election Compelled and Enforced. — The Court Compels a Person to Elect by a decree that unless he elects within a certain time he shall be understood as electing to take in opposition to the instrument under which he is bound to elect.²

Upon an Election to Take under the Will, the court directs the donee to execute a proper conveyance or release, in accordance with the terms of the will, of his own property of which the will attempted to dispose.³

Under an Election to Take Against the Will, the court sequesters the property given to the donee under the will so far as is necessary to compensate the donees disappointed by the election.⁴

III. ELECTION AS TO DOWER AND OTHER RIGHTS ARISING ON MARRIAGE —

1. Married Women — *a. ELECTION BETWEEN DOWER AND PROVISION IN WILL* — (1) *Generally.* — The doctrine of election, when applied to a widow claiming a devise or bequest under her husband's will in addition to her dower, is founded on the same reasons and governed by the same rules as in any other case.⁵

(2) *Notice to Widow.* — The devisees and legatees under the husband's will are under no obligation to give notice to the widow of the provisions made for her by the will and to require her to make her election.⁶ But by statute in some of the United States provision is made for giving notice to the widow, as that notice shall be given by the other parties interested,⁷ or that it shall be the duty of the court where letters testamentary on her husband's estate are issued to cause a notice to be served on the widow apprising her of her rights and requiring her to file her election.⁸

(3) *Whether Testamentary Provision Raises Election* — (a) **General Principles** — *aa. PROVISION PRESUMED CUMULATIVE.* — It has been stated that where the testator

1. Where the next of kin of an intestate are put to an election each may elect separately for himself, and is not bound by the election of the majority or of the administrator. *Fytche v. Fytche*, L. R. 7 Eq. 494. See also *Dunlap v. Ingram*, 4 Jones Eq. (57 N. Car.) 178.

2. **How Court Compels Election.** — Decree in *Streatfield v. Streatfield*, 1 Swanst. 447 note *b*. See also *Weeks v. Patten*, 18 Me. 42, 36 Am. Dec. 696.

Where by will an heir at law was directed to elect, and trustees had power to appoint, and from the circumstances of the case if the heir had been held to have elected at all it would have been in a manner contrary to the prayers of bills filed to compel him to elect and the appointments to be made by the trustees, the court only referred it to the master to compel him to elect generally. *Tucker v. Sanger*, M'Clel. 430, 13 Price 607.

Election Voluntary. — In *Dewar v. Maitland*, L. R. 2 Eq. 838, it was said that although the court compels persons to elect, yet election itself is a voluntary act.

3. *Adams's Equity* 96; Decree in *Fleming v. Buchanan*, 2 Seton on Decrees, (pt. i., 4th ed.) 935.

"The effect of election is not to divest the property out of the donee, but to bind him to deal with it as the court shall direct." *Adams's Eq.* 96.

In the Case of a Widow Electing to Take under the Will, the court decrees that the property belonging to her mentioned in the testator's will passed in equity under the devise or be-

quest in the testator's will. Decree in *Peck v. P.*, 2 Seton on Decrees (pt. i., 4th ed.) 934.

4. "In the event of election to take against the instrument, courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints." *Gretton v. Haward*, 1 Swanst. 441, note *a*. See decree in *Howells v. Jenkins*, 2 Seton on Decrees (pt. i., 4th ed.) 934. See also *infra*, this title, *Effect of Election — When Donee Elects to Take Against Instrument*.

5. **Doctrine of Election Applicable to Dower.** — *Gibson v. Gibson*, 1 Drew. 42, 17 Eng. L. & Eq. 352; *Dillon v. Parker*, 1 Swanst. 398, note *a*; *Leonard v. Steele*, 4 Barb. (N. Y.) 20; *Mills v. Mills*, 28 Barb. (N. Y.) 458; *Hibbs v. Union Cent. L. Ins. Co.*, 40 Ohio St. 554; *Rutherford v. Mayo*, 76 Va. 117; *Dixon v. McCue*, 14 Gratt. (Va.) 540.

6. **Notice to Widow by Devisees and Legatees.** — *Palmer v. Voorhis*, 35 Barb. (N. Y.) 483.

7. **Statutory Provisions for Giving Notice to Widow.** — *Howard v. Watson*, 76 Iowa 230. In this case it is held that under section 2452 of the code, giving to a widow six months after the service of a notice of the provisions of the will to file her election, her failure to file her election to take under her husband's will does not affect her right so to take, where no notice has been served on her; and the fact that she has knowledge of the provisions of the will makes no difference.

8. **Provision for Notice by Court.** — *Price v. Woodford*, 43 Mo. 252; *Ewing v. Ewing*, 44 Mo. 23; *Howard v. Watson*, 76 Iowa 229.

and the donee have undivided interests in the property devised or bequeathed, it is presumed that the testator intends to dispose of his own share only.¹ This principle is applied where a testamentary provision for the widow is alleged to exclude her from dower, and in the absence of statute the rule is that if a widow entitled to dower has, by her husband's will, a provision made for her without any declaration that it is made in lieu of dower, she is entitled both to dower and to the provision under the will, unless upon the whole will a necessary implication arises that the gift by the will is in substitution of her right to dower.²

bb. BY STATUTE PROVISION PRESUMED EXCLUSIVE. — Under statutes in *England* and in several of the *United States* the rule just stated is reversed, and unless the testator declares in his will that the provision which he makes for his widow is

1. See *supra*, this title, *Scope and Application of Doctrine*, subdiv. 4. *d. Donor and Donee Both Interested in Property Bestowed*.

2. **Intention to Exclude Widow from Dower Must Be Expressed or Implied** — *England*. — Warbuton v. Warbuton, 2 Sm. & G. 163, 23 Eng. L. & Eq. 415, 18 Jur. 415; Gibson v. Gibson, 1 Drew. 42, 17 Eng. L. & Eq. 352; Miall v. Brain, 4 Madd. 119; Birmingham v. Kirwan, 2 Sch. & Lef. 452.

Alabama. — Hilliard v. Binford, 10 Ala. 977; Dean v. Hart, 62 Ala. 308.

Connecticut. — Lord v. Lord, 23 Conn. 334; Alling v. Chatfield, 42 Conn. 276.

Florida. — Stephens v. Gibbes, 14 Fla. 342.

Georgia. — Tooke v. Hardeman, 7 Ga. 20.

Indiana. — Shipman v. Keys, 127 Ind. 356.

Iowa. — Clark v. Griffith, 4 Iowa 405; Metteer v. Wiley, 34 Iowa 214; Snyder v. Miller, 67 Iowa 261; Bare v. Bare, 91 Iowa 143; Baldwin v. Hill, 97 Iowa 586; Matter of Franke, 97 Iowa 704.

Kentucky. — Huhlein v. Huhlein, 87 Ky. 247; Timberlake v. Parish, 5 Dana (Ky.) 346.

Massachusetts. — Reed v. Dickerman, 12 Pick. (Mass.) 148.

Minnesota. — Matter of Gotzian, 34 Minn. 159, 57 Am. Rep. 43; McGowan v. Baldwin, 46 Minn. 477.

Mississippi. — Wilson v. Cox, 49 Miss. 538.

Missouri. — Hall v. Smith, 103 Mo. 289; Schorr v. Etling, 124 Mo. 42.

New Hampshire. — Brown v. Brown, 55 N. H. 106.

New Jersey. — Norris v. Clark, 10 N. J. Eq. 54; White v. White, 16 N. J. L. 202, 31 Am. Dec. 232; Stewart v. Stewart, 31 N. J. Eq. 398.

New York. — Leonard v. Steele, 4 Barb. (N. Y.) 20; Lasher v. Lasher, 13 Barb. (N. Y.) 106; Mills v. Mills, 28 Barb. (N. Y.) 459; Fuller v. Yates, 8 Paige (N. Y.) 325; Adsit v. Adsit, 2 Johns. Ch. (N. Y.) 448, 7 Am. Dec. 539; Sheldon v. Bliss, 8 N. Y. 35; Konvalinka v. Schlegel, 104 N. Y. 125, 58 Am. Rep. 494; Gray v. Gray, 5 N. Y. App. Div. 132.

North Carolina. — Craven v. Craven, 2 Dev. Eq. (17 N. Car.) 345.

Ohio. — Huston v. Cone, 24 Ohio St. 11.

Pennsylvania. — M'Cullough v. Allen, 3 Yeates (Pa.) 10; Cunningham's Estate, 137 Pa. St. 621, 21 Am. St. Rep. 901.

South Carolina. — Gordon v. Stevens, 2 Hill Eq. (S. Car.) 46, 27 Am. Dec. 445; Snelgrove v. Snelgrove, 4 Desaus. (S. Car.) 274; Cunningham v. Shannon, 4 Rich. Eq. (S. Car.)

135; Braxton v. Freeman, 6 Rich. Eq. (S. Car.) 35, 57 Am. Dec. 776; Pickett v. Peay, 3 Brev. (S. Car.) 545, 6 Am. Dec. 594; Hair v. Goldsmith, 22 S. Car. 566; Sumerel v. Sumerel, 34 S. Car. 85.

Tennessee. — Reid v. Campbell, Meigs (Tenn.) 378.

Texas. — Carroll v. Carroll, 20 Tex. 731.

Vermont. — Meech v. Meech, 37 Vt. 418; *In re Hatch*, 62 Vt. 300.

Virginia. — Higginbotham v. Cornwell, 8 Gratt. (Va.) 83, 56 Am. Dec. 130; Ambler v. Norton, 4 Hen. & M. (Va.) 44.

West Virginia. — Douglas v. Feay, 1 W. Va. 26; Atkinson v. Sutton, 23 W. Va. 197.

"As the husband has no power to dispose of his wife's estate of dower, the presumption always is that when he makes a devise of real estate, such devise is subject to the wife's right of dower, and hence the burden is upon those who seek to deprive her of such right to show that the terms of the will are such as necessarily imply that the intention was that she should not take both dower and the provision made for her in the will." Sumerel v. Sumerel, 34 S. Car. 88.

Statutes have changed the rule in several of the jurisdictions from which these cases are cited. See the next paragraph of text, *infra*. In a few states the common-law presumption is declared by statute. See the statutes of *Indiana*, *Iowa*, *Kansas*, and *Ohio*, and see 1 Stimson's Am. Stat. Law, § 3266.

Doubtful Provision Construed in Favor of Widow. — Where the language of the will is doubtful or ambiguous so as to render it uncertain whether or not the testator intended that the widow should have both, she will not be put to her election. Birmingham v. Kirwan, 2 Sch. & Lef. 452; Clark v. Griffith, 4 Iowa 407; Stark v. Hunton, 1 N. J. Eq. 224; Church v. Bull, 2 Den. (N. Y.) 430, 43 Am. Dec. 754, *affirming* Bull v. Church, 5 Hill (N. Y.) 206; Meech v. Meech, 37 Vt. 418; Lewis v. Lichty, 3 Wash. 220, 28 Am. St. Rep. 25.

Where a husband assigned his property for the benefit of creditors, expressly reserving the wife's dower, and subsequently devised valuable property to her, it was held that the devise was not to be taken as in lieu of dower right; for the purchaser at the judicial sale did not pay for the dower interest, and it is not to be presumed from the subsequent devise that the husband intended to take it away from his wife and give it to the purchaser. Pepper v. Thomas, 85 Ky. 539.

not intended to be in lieu of dower, it will be presumed that it is, and the widow will be put to her election between the gift and her claim to dower. In some of these states a devise by a husband to his wife of any part of his real estate will be presumed to be in lieu of dower.¹

Application of Statutes Illustrated. — What provisions in the husband's will are sufficient to put the widow to her election depends, of course, upon the terms of the statute creating a change in the rule of construction established in courts of common law and in equity. In some jurisdictions it seems that a direct devise to the widow is essential,² while in others the creation of a trust for her benefit is sufficient.³ A chattel interest in realty has been held not enough,⁴ but the devise of an estate during widowhood may render an election

1. Devise Presumed to Be in Lieu of Dower — *Delaware*. — McCaulley v. McCaulley, 7 Houst. (Del.) 129.

Illinois. — Jennings v. Smith, 29 Ill. 116; Brown v. Pitney, 39 Ill. 468; Warren v. Warren, 148 Ill. 641; Carper v. Crowl, 149 Ill. 465. But see Gauch v. St. Louis Mut. L. Ins. Co., 88 Ill. 251, 30 Am. Rep. 554, which holds that under the code of 1874 any provision made by the will of a deceased husband or wife is sufficient to bar dower.

Maryland. — Gough v. Manning, 26 Md. 366.

Mississippi. — Wilson v. Cox, 49 Miss. 544.

Missouri. — Pemberton v. Pemberton, 29 Mo. 409; Schorr v. Etling, 124 Mo. 42; Martien v. Norris, 91 Mo. 465.

Montana. — Chadwick v. Tatem, 9 Mont. 354.

New Jersey. — Griggs v. Veghte, 47 N. J. Eq. 179; White v. White, 16 N. J. L. 212, 31 Am. Dec. 232; Stark v. Hutton, 1 N. J. Eq. 216; English v. English, 3 N. J. Eq. 508, 29 Am. Dec. 730.

New York. — Chamberlain v. Chamberlain, 43 N. Y. 441.

See also the provisions of the various local statutes. They are collected in 1 Stimson's Am. Stat. Law, §§ 3266, 3267.

Where the Will Gives Nothing to the Wife that She Would Not Have Had Without It, it has been held, under such a statute, that she was not put to her election. Carper v. Crowl, 149 Ill. 465.

A Will under Which No Benefit Is Conferred on the Wife does not put her to her election. Green v. Green, 7 Port. (Ala.) 19; Martin v. Martin, 22 Ala. 86; Turner v. Cole, 24 Ala. 364; Martin v. Martin, 35 Ala. 560; Cummings v. Daniel, 9 Dana (Ky.) 361; Roberts v. Roberts, 34 Miss. 322. See also Drummond v. Drummond, 40 Me. 35. To the same effect is Miller v. Chambers, a case in the North Carolina Supreme Court, stated by Gaston, J., in Craven v. Craven, 2 Dev. Eq. (17 N. Car.) 338. The case of Lewis v. Lewis, 7 Ired. L. (29 N. Car.) 72, is *contra*, but may perhaps be distinguished on the ground that the will contained a large legacy for a son and directed him to support the widow.

Statute Does Not Affect Right to Elect. — A statutory provision that a devise or bequest shall be intended to be in lieu of dower, or of a distributive share in the personal estate, unless the contrary is expressed, does not prevent the widow's election to take her dower under the law. McCaulley v. McCaulley, 7 Houst. (Del.) 129; Brown v. Pitney, 39 Ill. 468; Reed v. Dickerman, 12 Pick. (Mass.) 149;

Kennedy v. Johnston, 65 Pa. St. 451, 3 Am. Rep. 650. See also Wilber v. Wilber, 52 Wis. 298.

2. Direct Devise to Widow Required. — A statute providing that a devise to the wife of "any lands or real estate for her life or otherwise" shall bar dower does not apply in the case of a devise in trust for the wife. Van Arsdale v. Van Arsdale, 26 N. J. L. 404; Colgate v. Colgate, 23 N. J. Eq. 372. See also Chandler v. Woodward, 3 Harr. (Del.) 428, where, under a somewhat similar statute, it was held that the settlement upon the widow during widowhood of the income of a fund to be raised out of the testator's "estate" did not put her to her election.

3. Creation of Trust for Widow Held Within Statute. — In *England* under the Dower Act, 3 & 4 Wm. IV., c. 105, § 9, it is provided that "where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband unless a contrary intention shall be declared by his will." Under this statute a devise of land in trust for the use of the widow deprives her of dower. Rowland v. Cuthbertson, L. R. 8 Eq. 466, and it is sufficient that real estate is left to trustees to sell, with a provision for the payment or investment of part of the proceeds for the benefit of the widow. Lacey v. Hill, L. R. 19 Eq. 346; *In re* Thomas, 34 Ch. Div. 166. See also *In re* Greenwood, (1892) 2 Ch. 295.

This statute operates also to deprive a widow of her right to free-bench in copyhold estates under the same circumstances which deprive her of dower in other lands. Lacey v. Hill, L. R. 19 Eq. 350.

Under the *North Carolina* statute of 1784, in force also in *Tennessee*, which gave dower to the widow of any person who dies testate, without in his will making "any express provision for his wife by giving and devising unto her such part or parcel of his real or personal estate, or to some other for her use, as shall be satisfactory to her," if the widow signified her dissent from the will, it was held that a provision in trust was sufficient to put her to an election. Craven v. Craven, 2 Dev. Eq. (17 N. Car.) 338; Reid v. Campbell, Meigs (Tenn.) 378; Demoss v. Demoss, 7 Coldw. (Tenn.) 258.

4. Van Arsdale v. Van Arsdale, 26 N. J. L. 404. See also Freeland v. Mandeville, 28 N. J. Eq. 559.

necessary.¹ The statutes do not create a presumption against dower in the case of a devise of land outside the state.²

A Bequest of Personalty not declared to be in lieu of dower is not within the operation of many of the statutes, and therefore the widow is not put to an election, but is entitled to the bequest in addition to her dower right.³ But in other states any devise or bequest of realty or personalty will suffice to raise the presumption that the testator intended it to be in lieu of dower, and the widow is put to her election between such provision and her dower right.⁴

cc. EVIDENCE AS TO TESTATOR'S INTENT. — In construing a will to ascertain whether or not a provision in it is intended to be in lieu of dower, when such intention is not expressed, parol evidence is inadmissible.⁵ But this rule does not pre-

1. *Stone v. Vandemark*, 146 Ill. 312.

A Life Estate is, of course, enough to raise an election. *Haynie v. Dickens*, 68 Ill. 267; *Young v. Boardman*, 97 Mo. 181; *Morgan v. Titus*, 3 N. J. Eq. 201.

2. **Devise of Lands in Another State.** — *Staigg v. Atkinson*, 144 Mass. 564; *Van Arsdale v. Van Arsdale*, 26 N. J. L. 404.

When Statute Prevails in Foreign, Not in Home State. — A testator domiciled in West Virginia made provision by will for his wife by giving her one-half of all his personal property and one-third of all his real estate, wherever situate, without declaring it to be in lieu of dower. Under the law of *West Virginia* the common-law rule prevails that such provision is to be regarded as in addition to dower unless declared in express terms or by necessary implication to be in lieu of dower. The will was probated in West Virginia and admitted to record in Ohio, where the testator owned lands and personal property. Under the *Ohio* statute the widow is not entitled to dower in addition to the provision made for her, unless it plainly appears, by the will, that she should have such provision in addition to dower, thus reversing the rule of the common law. The widow elected to take against the will, and filed a petition in Ohio asserting her statutory rights to the lands there situate. It was held that the will, as to the lands in Ohio, should be construed in accordance with the law of Ohio, as well as domestic wills, and that therefore the widow was not entitled to dower in addition to the provision, but while entitled to her statutory rights, she must make compensation to the disappointed devisees in Ohio. *Jennings v. Jennings*, 21 Ohio St. 56.

3. **Bequest of Personalty.** — *Brown v. Pitney*, 39 Ill. 468; *Fulton v. Fulton*, 30 Miss. 586; *Booth v. Stebbins*, 47 Miss. 161; *Pemberton v. Pemberton*, 29 Mo. 408; *Martien v. Norris*, 91 Mo. 465; *Van Arsdale v. Van Arsdale*, 26 N. J. L. 411.

But when the bequest is intended to be in lieu of dower, as shown by the express words of the will or by necessary implication therefrom, the widow is held under some statutes to be put to her election. *Brown v. Pitney*, 39 Ill. 475. See also *Jennings v. Smith*, 29 Ill. 116; *Haszard v. Haszard*, 19 R. I. 374. But compare *Halbert v. Halbert*, 19 Mo. 453; *Wisely v. Findlav*, 3 Rand. (Va.) 361, 15 Am. Dec. 712.

4. **Devise or Bequest Presumed to Be in Lieu of Dower** — *Alabama*. — *Hilliard v. Binford*, 10 Ala. 990; *Adams v. Adams*, 39 Ala. 274; *Dean*

v. Hart, 62 Ala. 308; *McGhee v. Stephens*, 83 Ala. 466.

Indiana. — *Young v. Pickens*, 49 Ind. 23; *Collins v. Collins*, 126 Ind. 562; *Like v. Cooper*, 132 Ind. 393; *McClanahan v. Williams*, 136 Ind. 30.

Maine. — *Hastings v. Clifford*, 32 Me. 132. See also *Allen v. Pray*, 12 Me. 142.

Massachusetts. — *Reed v. Dickerman*, 12 Pick. (Mass.) 148; *Pratt v. Felton*, 4 Cush. (Mass.) 176; *Atherton v. Corliss*, 101 Mass. 46; *Delay v. Vinal*, 1 Met. (Mass.) 63; *Adams v. Adams*, 5 Met. (Mass.) 278.

Minnesota. — *Washburn v. Van Steenwyk*, 32 Minn. 336.

North Carolina. — *Craven v. Craven*, 2 Dev. Eq. (17 N. Car.) 345.

Ohio. — *Luigart v. Ripley*, 19 Ohio St. 24; *Jennings v. Jennings*, 21 Ohio St. 78; *Huston v. Cone*, 24 Ohio St. 11; *Bowen v. Bowen*, 34 Ohio St. 180.

Pennsylvania. — *Kennedy v. Johnston*, 65 Pa. St. 451, 3 Am. Rep. 650; *Reed v. Reed*, 9 Watts. (Pa.) 263.

Tennessee. — *Reid v. Campbell*, Meigs (Tenn.) 378; *Malone v. Majors*, 8 Humph. (Tenn.) 577; *Demoss v. Demoss*, 7 Coldw. (Tenn.) 258.

Virginia. — *Nelson v. Kownslar*, 79 Va. 468.

Wisconsin. — *Hardy v. Scales*, 54 Wis. 452.

In Mississippi this provision applies only when the widow is one of several heirs who would be entitled in the absence of a will to share in the estate. Where there are no children the statute has no application and the widow may accept under the will. *Wall v. Dickens*, 66 Miss. 655.

In Tennessee a widow may sue for dower without formally dissenting from her husband's will, where the husband dies insolvent, making in his will a provision in personal estate for the wife. *Jarman v. Jarman*, 4 Lea (Tenn.) 671; *Tennessee Code* (1896), § 4146.

Provision for Wife in Addition to Dower. — Where the language of the will clearly shows an intention to give to the wife an estate or property in addition to that given her by law, there is no necessity for an election, for she may take under the law and take also by devise the estate or property specifically devised to her. *Like v. Cooper*, 132 Ind. 393.

5. **Parol Evidence that a Provision for Wife Is in Lieu of Dower Inadmissible.** — *Fairweather v. Archibald*, 15 Grant's Ch. (U. C.) 255; *Hall v. Hall*, 8 Rich. L. (S. Car.) 407, 64 Am. Dec. 758. See also *supra*, this title, *Scope and Application*

clude evidence of the situation of the testator when his will was made and the circumstances then surrounding him.¹ And under the laws of some states there may be an averment that an estate conveyed by deed or will was intended to be in lieu of dower, and such averment may be supported by parol testimony.²

(b) **Provision Expressed to Be in Lieu of Dower** — *aa. GENERALLY.* — Where a testator declares in express terms that the provision for the widow is in lieu of dower, she is of course bound to elect.³

bb. AFTER-ACQUIRED PROPERTY. — In jurisdictions where the common-law rule⁴ that wills of realty speak from their dates is unchanged, a devise of land by husband to wife in lieu of dower does not exclude the wife from claiming dower in lands acquired by the testator after the date of the will.⁵ But though this rule seems to be in accord with sound principle, since the widow may take the subsequently acquired land without hostility to any of the provisions of the will, yet there are authorities which hold that her acceptance of the provision in the instrument is a bar to her accepting dower from the subsequently acquired property.⁶

of Doctrine, subdiv. 3. c. (4) *Proof of Donor's Intent to Dispose of Donee's Property.*

A husband in his lifetime gave a bond in the penalty of one thousand pounds in trust to secure to his wife five hundred pounds in case she survived him. It was held that parol evidence to show that the provision was intended at the time to be in lieu of dower, and that the wife acknowledged it to be so, could not be allowed, being within the statute of frauds and perjuries. *Tinney v. Tinney*, 3 Atk. 8.

But in *Bubier v. Roberts*, 49 Me. 460, it was held that where a husband made a deed of lands to his wife during coverture, the consideration named being "love and esteem," facts outside of the deed, proved by parol evidence, were insufficient to prove that it was given in lieu of dower, unless there was proof of a direct and explicit declaration, or its equivalent, by the husband, at the time of the execution and delivery of the deed, that if received and retained it should be so considered.

1. *Tracey v. Shumate*, 22 W. Va. 499; *Atkinson v. Sutton*, 23 W. Va. 197.

2. **Averment that Provision Is in Lieu of Dower.** — *Ambler v. Norton*, 4 Hen. & M. (Va.) 23; *Herbert v. Wren*, 7 Cranch (U. S.) 374.

In *Bailey v. Duncan*, 4 T. B. Mon. (Ky.) 266, it was said: "Formerly the intention was to be collected from the will itself; but the act of Virginia, from which that of this country upon the subject of dower was taken, has been construed by the appellate court of Virginia to authorize an averment that the provision in the will is made in lieu of dower, and to support that averment by matter *dehors* the will."

3. **Express Declaration that Provision Is in Lieu of Dower.** — *Boynton v. Boynton*, 1 Bro. C. C. 445; *Nottley v. Palmer*, 2 Drew 93; *Young v. Pickens*, 49 Ind. 23; *Collins v. Collins*, 126 Ind. 562; *Hall's Case*, 1 Bland (Md.) 203, 17 Am. Dec. 275; *Hovey v. Hovey*, 61 N. H. 599; *Kennedy v. Mills*, 13 Wend. (N. Y.) 555; *Bannister v. Bannister*, 37 S. Car. 529.

Devise in Lieu of Dower "Therein." — Where a testator in the first clause of his will indicated that he was then dealing with all his estate, but in the second clause devised to his wife, "in lieu and satisfaction of all her dower and other right therein," certain houses enumer-

ated, it was held this clearly showed that she was thereby intended to be debarred of dower in the whole of the testator's real estate, the word "therein" not referring to the property given her by that clause. *Knighton v. Young*, 22 Md. 359.

Bequest Whose Acceptance Excludes Wife from Further Demands. — A bequest, the acceptance of which is forever to exclude the wife from any further demands on the testator's estate puts her to her election. *Norris v. Clark*, 10 N. J. Eq. 51.

Sale by Testator of Realty Devised in Lieu of Dower. — A testator devised to his wife, "in lieu of dower and thirds, and all right and interest in my estate (and in addition to the other and further provisions for her hereinafter made)," a certain house, and also bequeathed her certain personalty. The testator afterwards sold the house. It was held that the subsequent provisions of the will were not in lieu of dower, and that she was entitled to dower, and also the provisions thereafter made for her in the will. *Gray v. Gray*, 5 N. Y. App. Div. 132, 16 Misc. Rep. (N. Y.) 226.

Electing as Against Heir Claiming by Death of Devisee. — Where a testator, after making provision for his wife in lieu of dower, devises his estate to a person other than the heir, and the devisee dies in the lifetime of the testator, the heir takes the property, but the widow is bound to elect. *Pickering v. Stamford*, 3 Ves. Jr. 337.

4. Strictly speaking, this rule is the result of a construction of the Statute of Wills, 32 Hen. VIII., and not a part of the common law. *Bunter v. Coke*, 1 Salk. 237.

5. **Provision in Will Does Not Exclude Dower in After-acquired Property.** — *Laidlaw v. Jackes*, 25 Grant's Ch. (U. C.) 293; *Beilstein v. Beilstein*, 27 Grant's Ch. (U. C.) 41; *Hall v. Hall*, 2 McCord Eq. (S. Car.) 269.

6. **Contrary Doctrine.** — *Raines v. Corbin*, 24 Ga. 185; *Gibbon v. Gibbon*, 40 Ga. 562; *Chapin v. Hill*, 1 R. I. 446. In the last case cited it was held that a letter of the testator, inclosed with his will, showing that he did not intend to bar his wife of her right of dower in the after-acquired estates, was inadmissible, as it had none of the legal requisites of a testa-

(c) **Provision Implying Intent to Exclude Dower.** — In the absence of any expression of an intention to exclude the widow's claim of dower, such an intention will be implied when the provision made for her in the will is inconsistent with or repugnant to such claim, and when the assertion of a right to dower would defeat the intention of the testator.¹

aa. NATURE AND EXTENT OF BENEFICIAL INTEREST PROVIDED FOR WIFE — (aa) *Generally.*

— **The Amount of the Provision** is a material circumstance in indicating the testator's intention, but it is not conclusive.²

mentary devise, and would not alter, enlarge, or diminish the rights of the parties under the will.

1. When Intent to Exclude Dower Implied — *England.* — *French v. Davies*, 2 Ves. Jr. 572; *Strahan v. Sutton*, 3 Ves. Jr. 249; *Roadley v. Dixon*, 3 Russ. 200; *Harrison v. Harrison*, 1 Keen 765; *Hitchin v. Hitchin*, Pre. Ch. 133.

Delaware. — *Kinsey v. Woodward*, 3 Harr. (Del.) 464.

Georgia. — *Worthen v. Pearson*, 33 Ga. 387, 81 Am. Dec. 213.

Minnesota. — *Washburn v. Van Steenwyk*, 32 Minn. 354.

New Jersey. — *Colgate v. Colgate*, 23 N. J. Eq. 372; *Stewart v. Stewart*, 31 N. J. Eq. 398; *Pratt v. Douglas*, 38 N. J. Eq. 517.

New York. — *Adsit v. Adsit*, 2 Johns. Ch. (N. Y.) 448, 7 Am. Dec. 539; *Jackson v. Churchill*, 7 Cow. (N. Y.) 287, 17 Am. Dec. 514; *Tobias v. Ketchum*, 32 N. Y. 325; *Konvalinka v. Schlegel*, 104 N. Y. 125, 58 Am. Rep. 494; *Asche v. Asche*, 113 N. Y. 232; *Leonard v. Steele*, 4 Barb. (N. Y.) 20; *Lasher v. Lasher*, 13 Barb. (N. Y.) 106; *Sanford v. Jackson*, 10 Paige (N. Y.) 268; *Church v. Bull*, 2 Den. (N. Y.) 430, 43 Am. Dec. 754, *affirming Bull v. Church*, 5 Hill (N. Y.) 206; *Young v. Boyd*, 64 How. Pr. (N. Y. Supreme Ct.) 213.

Pennsylvania. — *Evans v. Webb*, 1 Yeates (Pa.) 424, 1 Am. Dec. 308; *Duncan v. Duncan*, 2 Yeates (Pa.) 302; *Sample v. Sample*, 2 Yeates (Pa.) 433; *Webb v. Evans*, 1 Binn. (Pa.) 565.

South Carolina. — *Gordon v. Stevens*, 2 Hill Eq. (S. Car.) 47, 27 Am. Dec. 445.

Vermont. — *Meech v. Meech*, 37 Vt. 418.

Virginia. — *Upshaw v. Upshaw*, 2 Hen. & M. (Va.) 381, 3 Am. Dec. 632; *Rutherford v. Mayo*, 76 Va. 117.

West Virginia. — *Atkinson v. Sutton*, 23 W. Va. 197.

Test as to Intention. — The test is whether the setting off of one-third of the real estate by metes and bounds to the widow for her dower would make the carrying out of the devise of the will impossible. *Birmingham v. Kirwan*, 2 Sch. & Lef. 453; *Closs v. Eldert*, 16 Misc. Rep. (N. Y. Supreme Ct.) 104; *Matter of Zahrt*, 94 N. Y. 609. Or, in other words, whether the two are so manifestly repugnant that they cannot stand together. *Hiers v. Gooding*, 43 S. Car. 428; *Callaham v. Robinson*, 30 S. Car. 254. See also *Holdich v. Holdich*, 2 Y. & Coll. 23.

Fair Inference or Probable Intent Insufficient. — But it is not sufficient that the intention may fairly be inferred, or that the testator probably intended that one should be a substitute for the other; the intention to exclude such right must be shown by an entire inconsistency between them. *French v. Davies*, 2

Ves. Jr. 576; *Gibson v. Gibson*, 1 Drew. 42, 17 Eng. L. & Eq. 349; *Mills v. Mills*, 28 Barb. (N. Y.) 459; *Fuller v. Yates*, 8 Paige (N. Y.) 329; *In re Hatch*, 62 Vt. 304.

2. Amount of Provision a Material Circumstance. — *Warburton v. Warburton*, 2 Sm. & G. 163, 18 Jur. 415, 23 L. J. Ch. 467; *Hall v. Hill*, 1 Dr. & War. 94, 1 Con. & L. 120; *Rudd v. Harper*, 16 Ont. Rep. 427; *Griggs v. Veghte*, 47 N. J. Eq. 179; *Atkinson v. Sutton*, 23 W. Va. 197.

Devise or Bequest of Greater Value than Dower.

— Thus the fact that the provision under the will for the widow is greater than her dower, while entitled to weight, is not conclusive of an intent to exclude dower. *Galton v. Hancock*, 2 Atk. 427; *Bending v. Bending*, 3 Kay & J. 57, 3 Jur. N. S. 535, 26 L. J. Ch. 469; *Havens v. Havens*, 1 Sandf. Ch. (N. Y.) 329; *Evans v. Webb*, 1 Yeates (Pa.) 424, 1 Am. Dec. 308; *Kennedy v. Nedrow*, 1 Dall. (Pa.) 418. See also *Atkinson v. Sutton*, 23 W. Va. 197.

If the rents and profits of the real estate, after payment of the provision made thereout for the widow, would be insufficient to satisfy a claim for dower, and the provision is such as to exclude the probability that she would require any other means for her support, the claim for dower is inconsistent with the provision, and the widow must elect. *Becker v. Hammond*, 12 Grant's Ch. (U. C.) 485.

Inadequacy of Provision. — Where, under statute, a presumption arises that a testamentary provision excludes dower, the inadequacy of the provision does not justify a decree in favor of dower, where the widow has not renounced the provisions of the will. *Reed v. Dickerman*, 12 Pick. (Mass.) 150; *Cunningham's Estate*, 137 Pa. St. 621, 21 Am. St. Rep. 901; *Shaw v. Shaw*, 2 Dana (Ky.) 341.

Devise of Use of Realty till Son of Age. — A devise to his widow of the benefits of all the testator's real estate till his sons come of age has been held not inconsistent with dower. *M'Cullough v. Allen*, 3 Yeates (Pa.) 11; *Kelley v. Ball*, (Ky. 1892) 19 S. W. Rep. 581.

Where a Testator Gave to His Wife All the Residue of His Estate for her separate use, but provided that if she should again marry she was to have one-third of his real estate and personal property for herself and her heirs, it was held that the provisions for the widow were impliedly in lieu of dower. *Bennett v. Packer*, 70 Conn. 357.

General Devise to Wife to Carry on Business. —

A general devise of all the testator's property to his wife, with a direction to carry on his business, is inconsistent with a claim for dower in the property in which the business is to be carried on, and the widow is bound to elect. *Melms v. Pabst Brewing Co.*, 93 Wis. 140. See also *Butcher v. Kemp*, 5 Madd. 61.

Provision for Home and Support. — The question whether or not a provision by the testator for the support of his wife for life, or of a home and support, which is not expressed to be in lieu of dower, is inconsistent with a claim therefor, has given rise to conflicting opinions.¹ And this conflict of opinion appears even in cases where the support and maintenance are charged upon the lands given to another.²

Annuity or Rent Charge During Life or Widowhood. — A gift of an annuity by the testator to his widow, or of a rent charge upon his land, during life or widowhood, will not, in the absence of an express declaration that it is given in lieu of dower, put the widow to her election between the annuity and her claim for dower, even though there be a clause giving the widow the right of entry and distress in case of nonpayment,³ and even though there be other benefits given in addition.⁴ Dower is excluded, however, where the annuity is given

Estate Left in Trust in First Place for Widow.

— Where a testator gives all his real and personal estate in trust, in the first place to pay a provision to his wife, this is not of itself a sufficient indication of his intention that it is in lieu of dower. *Thompson v. Nelson*, 1 Cox 447.

A Devise to the Widow of All the Property Which Came by Her in Marriage, with a direction by the testator that his estate should be sold to pay debts to provide for his children, is not inconsistent with a claim of dower. He will be presumed to have known that the wife would be entitled to be endowed of his lands; and as he had not thought proper to annex to the legacy to her the condition that she should renounce her dower, it is a fair and reasonable conclusion that they should be sold subject to that right, and in this way the provisions of the will are rendered perfectly consistent. *Gordon v. Stevens*, 2 Hill Eq. (S. Car.) 46, 27 Am. Dec. 447.

1. Home and Support for Wife for Life. — The cases holding that giving the wife a support, or a home and support, for life is not inconsistent with dower are the following:

New York. — *Smith v. Kniskern*, 4 Johns. Ch. (N. Y.) 9; *Matter of Smith*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 269.

South Carolina. — *Hiers v. Gooding*, 43 S. Car. 428.

West Virginia. — *Douglas v. Feay*, 1 W. Va. 30.

Canada. — *Murphy v. Murphy*, 25 Grant's Ch. (U. C.) 81; *McGarry v. Thompson*, 29 Grant's Ch. (U. C.) 287; *Baker v. Baker*, 25 U. C. Q. B. 448. See also *McLennan v. Grant*, 15 Grant's Ch. (U. C.) 65, where the decision was put upon the ground that the personal occupancy by the testator's sons of the farm in which dower was claimed was inconsistent with such claim, and not upon the ground that the ample provision of a home and support for the widow was inconsistent therewith.

Contra. — *Worthen v. Pearson*, 33 Ga. 387, 81 Am. Dec. 213; *Collins v. Carman*, 5 Md. 503; *White v. White*, 16 N. J. L. 202, 31 Am. Dec. 232; *Turner v. Scheiber*, 89 Wis. 1.

2. Support Charged on Lands Devised. — Thus, where a testator devised to his widow his "house and orchard for a home for herself and children as long as she may live," and to his son Duncan all his title and interest in the farm lot, and all implements thereon, "at the death of my wife as aforesaid, on condition that he shall provide for her * * * board

and maintenance, he, my son Duncan, holding possession of the land from the time of my decease, subject to the proviso aforesaid," it was held that the widow was put to her election between her dower and the provision made for her by the will, the latter forming a charge upon the lands devised. *McLellan v. McLellan*, 29 Grant's Ch. (U. C.) 1.

On the other hand, in *New York* it has been held that where a testator devised the bulk of his estate and also provided for the support of his widow by a charge upon the property devised, an acceptance of dower did not deprive her of the support provided for. *Lasher v. Lasher*, 13 Barb. (N. Y.) 109.

3. Annuity or Rent Charge Not Inconsistent With Dower. — *Pitts v. Snowden*, cited in *Pearson v. Pearson*, 1 Bro. C. C. 202, note; *Foster v. Cook*, 3 Bro. C. C. 347; *Greatorex v. Cary*, 6 Ves. Jr. 615; *Pearson v. Pearson*, 1 Bro. C. C. 292; *Hall v. Hill*, 1 Dr. & War. 94, 1 Con. & L. 129; *Dowson v. Bell*, 1 Keen 761; *Harrison v. Harrison*, 1 Keen 765; *Miall v. Brain*, 4 Madd. 119; *Strahan v. Sutton*, 3 Ves. Jr. 249; *Thompson v. Nelson*, 1 Cox 447; *Coleman v. Glanville*, 18 Grant's Ch. (U. C.) 47; *Cowan v. Allen*, 26 Can. Sup. Ct. Rep. 292; *Leys v. Toronto General Trusts Co.*, 22 Ont. Rep. 603; *Hatch v. Bassett*, 52 N. Y. 359. See also *French v. Davies*, 2 Ves. Jr. 572; *Roadley v. Dixon*, 3 Russ. 192.

Contra. — Some of the early English cases decided that the widow was bound to elect between an annuity and dower, but they were expressly overruled by the subsequent cases above referred to. *Arnold v. Kempstead*, Ambl. 466, 2 Eden 236; *Villareal v. Galway*, Ambl. 682, 1 Bro. C. C. 292, note; *Jones v. Collier*, Ambl. 730; *Wake v. Wake*, 3 Bro. C. C. 255, 1 Ves. Jr. 335.

See also *Worthen v. Pearson*, 33 Ga. 387, 81 Am. Dec. 213; *White v. White*, 16 N. J. L. 211, 31 Am. Dec. 232; *Birmingham v. Kirwan*, 2 Sch. & Lef. 453.

Annuity Given in a Deed of Separation. — By a deed of separation between husband and wife, the husband conveyed a fee-simple estate to trustees upon trusts, out of the rents to pay an annuity to his wife, and the residue to himself and heirs. It was held that the wife, who survived her husband, was not bound to elect between the annuity and her dower. *Hill v. Hemsworth*, Ll. & G. temp. Plunk. 87.

4. Where Other Benefits Are Given in Addition to Annuity. — *Holdich v. Holdich*, 2 V. & Coll.

expressly in lieu thereof,¹ or where the annuity would be manifestly inconsistent with the claim for dower.²

Request of Income of Estate. — Where the income of all the testator's estate, after the payment of bequests, is given to the widow, a claim for dower is inconsistent therewith.³

A Bequest of Personalty is not *per se* inconsistent with dower.⁴

(*bb*) *Effect of Devise During Life or Widowhood* — **Whether Widow Takes Dower in Residue.** —

A devise by the testator to his wife, of part of his lands during her life or widowhood, whether with or without other benefits, in the absence of an express declaration that it is given in lieu of dower, is not of itself inconsistent with her dower right in the residue of his lands devised to others.⁵ But the

18; *Wilson v. Wilson*, 7 Ont. Rep. 177; *In re Biggar*, 8 Ont. Rep. 372; *Laidlaw v. Jackes*, 25 Grant's Ch. (U. C.) 293; *Ripley v. Ripley*, 28 Grant's Ch. (U. C.) 610; *Sumner v. Sumner*, 34 S. Car. 85.

But in *Hall v. Hill*, 1 Dr. & War. 94, 1 Con. & L. 129, Sir E. Sugden said: "Though alone, either of these circumstances [*viz.*, the gift of an annuity to the wife charged upon the lands, or a devise of part of the realty to her] is not sufficient to bar the right of dower, yet coupled together they are entitled to much weight."

1. Annuity Given in Lieu of Dower. — *Nottley v. Palmer*, 2 Drew. 93; *Boynton v. Boynton*, 1 Bro. C. C. 445; *Davidson v. Boomer*, 18 Grant's Ch. (U. C.) 475. See also *Robinson v. Wilson*, 13 Ir. Eq. Rep. 168.

2. Annuity Inconsistent with Dower. — *Marrriott v. McKay*, 22 Ont. Rep. 320; *Speer v. Speer*, 67 Ga. 748; *Endicott v. Endicott*, 41 N. J. Eq. 93.

A testator devised all his property to his executors in trust to rent the real estate and collect the rents thereof and the income of the personal estate, during the life of his son, with power to convey the real estate, and directed them to pay his widow one thousand five hundred dollars per annum, and provide her with suitable apartments to live in during her life. It was held that such provisions were inconsistent with a claim for dower, and put the widow to her election; for it would be impossible for the executors to take possession of all the testator's estate, or to sell it, if the widow had a right of dower. *Sullivan v. McCann*, (Supreme Ct.) 2 N. Y. Supp. 193.

Where Will Deals with Real Estate as Personalty. — Where the testator provides an annuity for his wife and deals with his whole real and personal estate as a blended fund to be distributed as personalty, and where, consequently, an assertion of the widow's dower right would defeat the disposition of the will, the widow must elect. *Re Quimby*, 5 Ont. Rep. 738.

3. Bequest of Income of Estate. — *Asch v. Asch*, 47 Hun (N. Y.) 285, affirmed 113 N. Y. 232.

Where the will provided that two-thirds of the entire income of the personal property and the use of nearly one-half of the real estate be given to the widow, it was held that such provision would be implied to be in lieu of dower. *Anthony v. Anthony*, 55 Conn. 256.

So also one-third of the annual rents and interests, after deducting certain necessary expenditures for taxes and repairs or improve-

ments. *Warren v. Warren*, 148 Ill. 641. See also *Reynolds v. Torin*, 1 Russ. 129.

4. Bequest of Personalty. — *Craven v. Craven*, 2 Dev. Eq. (17 N. Car.) 338; *Wiseley v. Findlay*, 3 Rand. (Va.) 361, 15 Am. Dec. 712. See also *supra*, this section, *By Statute Provision Presumed Exclusive*, *ante*, p. 84.

A gift of personalty, declared in writing by the testator to be for the widow's individual use and benefit, accepted by her as part provision for her, and as part of her interest in her husband's estate, nothing being said or written in relation to dower, or to waiving the same, or to taking personalty in lieu thereof, is not inconsistent with dower. *Mitchell v. Word*, 60 Ga. 525.

Estate Wholly Personal — **Whether Bequest Bars Distributive Share.** — A testator bequeathed to his wife one-third of his estate, and after making bequests of different sums of money to certain named children bequeathed the remainder of his estate to be equally divided among his three daughters. The estate consisted wholly of personal property. It was held that the will did not show, either in express terms or by fair implication, an intention of the testator to deprive his wife of her distributive share allowed in lieu of dower under the statute, and that she was not required to elect whether she would take under the will or under the statute, but was entitled to both. *Blaney's Estate*, 73 Iowa 113.

5. Devise of Land During Life or Widowhood Does Not Per Se Bar Dower — *England*. — *Lawrence v. Lawrence*, 2 Vern. 365, *Freem. Ch.* 235, 3 Bro. P. C. (Toml. ed.) 483; *Lemon v. Lemon*, 8 Vin. Abr. 366; *Holdich v. Holdich*, 2 Y. & Coll. 21; *Birmingham v. Kirwan*, 2 Sch. & Lef. 444; *Dorchester v. Effingham*, *Cooper* 319; *Inclendon v. Northcote*, 3 Atk. 436; *Hall v. Hill*, 1 Dr. & War. 94.

Canada. — *Cowan v. Besserer*, 5 Ont. Rep. 624.

Iowa. — *Richards v. Richards*, 90 Iowa 606; *Watrous v. Winn*, 37 Iowa 72; *Daugherty v. Daugherty*, 69 Iowa 677.

Minnesota. — *McGowan v. Baldwin*, 46 Minn. 477.

New York. — *Havens v. Havens*, 1 Sandf. Ch. (N. Y.) 324; *Mills v. Mills*, 28 Barb. (N. Y.) 454; *Lefevre v. Lefevre*, 59 N. Y. 434.

See also *Kennedy v. Nedrow*, 1 Dall. (Pa.) 418, in which case it was said that while such an estate might be a bar of dower, it must, in order to do so, be intended by the words of the will, and not inferred from its silence or presumed upon conjecture.

circumstances, considered in connection with the devise, may render a claim for dower inconsistent therewith.¹

Dower in the Property Devised. — Where there is a devise of land to the widow for life or during widowhood, the question arises whether or not this provision is inconsistent with a claim of dower in the lands thus devised, or, in other words, in all the testator's lands.² This question has been presented generally in cases where the estate of the widow in the property devised terminated by her remarriage, or where for the common-law right of dower has been substituted an estate in fee given to the widow in a portion of her husband's property. The authorities upon this question are conflicting. According to some there is no inconsistency in a claim to dower in the devised lands, and consequently it is held that the widow need not elect, but is entitled both to her life interest under the will and to dower.³ Other cases hold that the allow-

1. A Devise of One-third of the testator's personality and a life estate in one-third of his lands, specifically disposing of the remainder, puts the wife to her election. *Creacraft v. Dille*, 3 Yeates (Pa.) 79, Add. (Pa.) 350. So a gift to the testator's widow of "one-third part of my whole estate according to law." *Warren v. Morris*, 4 Del. Ch. 289.

Wife Provided For — Entire Residue Disposed Of. — A provision for the wife by giving to her a life estate in lands and a bequest of personality, followed by a disposition of the entire remainder of the testator's estate, has been held to exclude dower. *Apperson v. Bolton*, 29 Ark. 418. See also *Ferris v. Ferris*, 10 Misc. Rep. (N. Y. Supreme Ct.) 320.

Where a testator devised specific parts of his real estate to his wife in fee, and bequeathed to her all his personal property, and ordered that the other part of his real estate should be disposed of "as the law directs," it was held that she was not entitled to the provision under the will and to dower in the other part of the real estate. *Adams v. Adams*, 5 Met. (Mass.) 279.

Devise Which "Shall Be My Wife's Portion During Her Natural Life." — Where a testator by his will gave to his widow one hundred acres of land, which he expressed "shall be my wife's portion during her natural life," and the remainder of his real estate, fifty acres, he directed to be sold, and until sold the rent was to be given to his wife to assist her in keeping and supporting herself and such of her children as might choose to reside with her, it was held that the widow was not entitled to her dower in the fifty acres and also to the provision made for her by the will, but that she was bound to elect. *Armstrong v. Armstrong*, 21 Grant's Ch. (U. C.) 351.

Bequest for Life of Residue of Realty and Personality. — A testator, after making special bequests of money to his two daughters, devised and bequeathed to his wife for life the remainder of his property, both personal and real, and after the decease of his wife all the property remaining was to be divided equally between his daughters. It was held that she could not take this life estate and also the one-third absolutely allowed her by law in the absence of a will. *In re Foster*, 76 Iowa 364.

Where There Would Be No Residue if the Widow Had Dower. — A testator having real estate to the value of \$7,600 and personal estate to the value of \$305, devised of the realty

\$3,805 in amount during his wife's life, and left legacies to the amount of \$3,100. To his wife he left a life interest in his homestead farm and a legacy of \$1,000. The other real estate he directed to be sold. The residue he divided; but there would have been no residue had the widow been entitled to dower in the residue. It was held that the widow must elect between the provision made for her by the will and her dower. *Lapp v. Lapp*, 19 Grant's Ch. (U. C.) 608. See also *Severson v. Severson*, 68 Iowa 656.

Use of Farm Until Child's Majority or Marriage. — Where a testator devised his farm to his daughter, giving his wife the use of it until the daughter should arrive at her majority or marry, it was held that the wife was put to her election. *Brabant v. Lalonde*, 26 Ont. Rep. 379.

2. Devise During Widowhood — Remarriage Does Not Revoke Dower. — Where a testator makes provision for his wife determinable upon her marrying again, the remarriage of the widow, after having elected to take under the will, will not have the effect of resuscitating dower. *Coleman v. Glanville*, 18 Grant's Ch. (U. C.) 42.

3. Devise of Lands to Wife for Life Not Inconsistent with Claim of Dower Therein — *Iowa*. — *Sully v. Nebergall*, 30 Iowa 339; *Metteer v. Wiley*, 34 Iowa 214; *Watrous v. Winn*, 37 Iowa 72; *Potter v. Worley*, 57 Iowa 67; *Daugherty v. Daugherty*, 69 Iowa 679; *Howard v. Watson*, 76 Iowa 229; *Herr v. Herr*, 90 Iowa 538; *Parker v. Hayden*, 84 Iowa 493; *Bare v. Bare*, 91 Iowa 143; *Hunter v. Hunter*, 95 Iowa 728; *Franke v. Wiegand*, 97 Iowa 704; *Watson v. Watson*, 98 Iowa 132; *Matter of Proctor*, 103 Iowa 232.

New York. — *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Jackson v. Churchill*, 7 Cow. (N. Y.) 287, 17 Am. Dec. 514; *Mills v. Mills*, 28 Barb. (N. Y.) 454.

In *Bull v. Church*, 5 Hill (N. Y.) 206, 2 Den. (N. Y.) 430, 43 Am. Dec. 754, the testator devised all his real and personal estate to his wife during widowhood, with remainder to his children. The widow entered under the will and occupied the property for several years and then married a second husband. It was held that she was entitled to dower in the land devised to her. Very similar is *Sanford v. Jackson*, 10 Paige (N. Y.) 266.

As to the rule in *Ontario* see *Amsden v. Kyle*, 9 Ont. Rep. 441; *Beilstein v. Beilstein*.

ance of dower in lands thus devised is inconsistent with the provisions of such a devise. This ruling is placed upon the ground that the estate under the will is a freehold estate, that the two estates cannot exist concurrently, and that the widow could not bring a writ of dower against herself; ¹ or upon the particular circumstances of the property and of the parties interested, considered in connection with other clauses of the will and the probable intention of the testator. ²

bb. WHERE THE ASSERTION OF DOWER WOULD DEFEAT USES OF PROPERTY MARKED OUT —
Devise for Purpose of Sale. — Where a testator, after making provision for his wife, devises his lands to trustees upon trust for sale, or with directions to executors to sell for certain purposes, the widow's claim of dower in the lands is not inconsistent with the provision made for her, and she is entitled to both; for the purchaser takes subject to the claim of dower, which is paramount to the will. ³ This rule applies even though the testator directs that a share of the

27 Grant's Ch. (U. C.) 41. See also the dictum contained in the first of these cases, remarked on and corrected in *Leys v. Toronto General Trusts Co.*, 22 Ont. Rep. 607.

Estate "to Take the Course Designated by Existing Laws" if Widow Marries. — Where a testator gave to his wife a life estate in part of his land during her widowhood, and provided that in the event of her marriage "the same is to take the course designated by existing laws," it was held that as the law did not provide for any particular emergency, but did make provision for the descent and distribution of real property not disposed of by will, it was clear that the testator intended that the property should be distributed according to the laws establishing the rules of descent of the real property of an intestate; and there being nothing in the will showing an intention to exclude the widow on her marriage from taking as an heir, she was entitled to the same share of the land as if no will had been made. *McGuire v. Brown*, 41 Iowa 650.

1. *Leys v. Toronto General Trusts Co.*, 22 Ont. Rep. 607; *Westacott v. Cockerline*, 13 Grant's Ch. (U. C.) 79; *Hamilton v. Buckwalter*, 2 Yeates (Pa.) 389, 1 Am. Dec. 350.

2. **Dependent on Circumstances.** — *Birmingham v. Kirwan*, 2 Sch. & Lef. 444; *Stark v. Hutton*, 1 N. J. Eq. 216; *Wilson v. Hayne*, Cheves Eq. (S. Car.) 37; *Caston v. Caston*, 2 Rich. Eq. (S. Car.) 1; *Cunningham v. Shannon*, 4 Rich. Eq. (S. Car.) 135. See also *Smith v. Bone*, 7 Bush (Ky.) 367; *Havens v. Havens*, 1 Sandf. Ch. (N. Y.) 329.

Where There Is No Other Claim Which Can Conflict While Widow Lives. — Where no one takes an interest under the will during the widow's life, with which the claim of dower will conflict, there is no incongruity in the widow taking both dower and the devise. So where the testator gives to the widow his whole estate for life with remainder over. *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706, *affirming* 11 Barb. (N. Y.) 152, 9 N. Y. Leg. Obs. 292.

Devise of One-third in Fee on Remarriage. — Where a testator devised all his property, real and personal, to his wife for life, or until she remarried, for her sole use and benefit, with a further provision that if she should remarry she should retain one-third of the then remaining estate, and that the residue should be divided among four children, it was held that this was a devise to the widow, on remarriage,

of one-third of the then remaining estate in fee, in lieu of dower, and that a claim of dower would be inconsistent with the provision; for if she were allowed dower there would then remain only one-third to be divided among the children. *Jurgens v. Rogge*, 16 Misc. Rep. (N. Y. Supreme Ct.) 100.

Where the Widow on Remarriage Was to Be Limited to Her Statutory Rights. — Where a testator gave his entire estate to his widow during widowhood, with the right to use the principal for her support while a widow, and furthermore provided that she should be limited to her statutory rights, if she remarried, it was held that this provision was inconsistent with a claim for dower. *Schwatken v. Daudt*, 53 Mo. App. 1.

3. **Devise for Sale After Provision for Wife** — *England.* — *Bending v. Bending*, 3 Kay & J. 57, 26 L. J. Ch. 469, 3 Jur. N. S. 535; *Ellis v. Lewis*, 3 Hare 310; *French v. Davies*, 2 Ves. Jr. 572; *Gibson v. Gibson*, 1 Drew. 42, 17 Eng. L. & Eq. 353; *Foster v. Cook*, 3 Bro. C. C. 351. *Canada.* — *Beilstein v. Beilstein*, 27 Grant's Ch. (U. C.) 41; *Fairweather v. Archibald*, 15 Grant's Ch. (U. C.) 257.

Delaware. — *Kinsey v. Woodward*, 3 Harr. (Del.) 459.

New York. — *Adsit v. Adsit*, 2 Johns. Ch. (N. Y.) 448, 7 Am. Dec. 539; *Church v. Bull*, 2 Den. (N. Y.) 432, 43 Am. Dec. 754; *Kimbel v. Kimbel*, 14 N. Y. App. Div. 570; *Fuller v. Yates*, 8 Paige (N. Y.) 325.

South Carolina. — *Gordon v. Stevens*, 2 Hill Eq. (S. Car.) 46, 27 Am. Dec. 445; *Hall v. Hall*, 8 Rich. L. (S. Car.) 407, 64 Am. Dec. 758; *Sumerel v. Sumerel*, 34 S. Car. 85; *Whilden v. Whilden*, Riley Eq. (S. Car.) 205.

A Direction to Convey the Lands by Good and Sufficient Fee-simple Titles of Equal Tenor with those by which the testator held them is not such a provision as renders the claim of dower inconsistent with a gift of personality. *Kinsey v. Woodward*, 3 Harr. (Del.) 465.

Annuity out of Real and Personal Property Directed to Be Sold. — Where a testator devised and bequeathed all his real and personal estate to a trustee, to be sold and converted into money, and to pay to his wife an annuity out of the income of the mixed fund composed of the proceeds thereof, it was held that this of itself was not sufficient to show that the testator intended such provision for his wife to be in lieu of dower, so as to compel her to

proceeds be given to the widow.¹

Special Provisions, however, in addition to the direction to sell may render the claim of dower inconsistent with the provision.²

Where Property Is to Be Leased, Managed, Enjoyed, etc., as Directed. — Where the testator devises his lands to trustees, with power to lease, manage, and control them, and in the same will makes provision for his wife, a claim of dower is inconsistent with the provision, and the widow is bound to elect; for the power given to the trustees could not be exercised if the widow were entitled to dower.³ So where a testator, after making provision for his wife, devises his real estate, clearly indicating an intention that the donee is to have the personal use, occupation, and enjoyment thereof, a claim of dower is inconsistent with such use.⁴

elect between such annuity and her dower in the real estate. *Wood v. Wood*, 5 Paige (N. Y.) 596, 28 Am. Dec. 451.

1. *Warren v. Morris*, 4 Del. Ch. 289.

Investments Standing in Names of Husband and Wife to Whom the Proceeds Were Bequeathed. — A testator gave eight hundred pounds consols and all his estate and interest in two leasehold houses to trustees, to pay his wife the interest and proceeds for her life, and after her decease to pay an annuity of forty-four pounds to his daughter for life, with a gift over of eight hundred pounds to his grandson and his children. At the death of the testator the eight hundred pounds consols were standing in the names of himself and his wife. It was held upon bill filed by the trustees against the wife's executor for a transfer of the fund, that the gift of the eight hundred pounds was a general bequest, that the sum survived to the wife, and that she was not put to her election. *Poole v. Odling*, 31 L. J. Ch. 439, 10 W. R. 337.

2. Thus where the testator devised and bequeathed all his estate, real and personal, to trustees; the real estate upon trust to sell after the death of his wife. During her life she was to have one-third of the clear rents and profits, and the other two-thirds were to go into the general trust fund for distribution among the testator's children and the children of his daughters. It was held that a claim of dower would be inconsistent with the provision thus made. *Savage v. Burnham*, 17 N. Y. 577. See also *Vernon v. Vernon*, 53 N. Y. 362.

When the will clothes the executors with a power of sale, so as to work an equitable conversion of the realty into personalty, and, after making provision for the widow out of the proceeds, disposes absolutely of the remainder, the widow is put to her election. *Young v. Boyd*, 64 How. Pr. (N. Y. Supreme Ct.) 214.

In *Gibson v. Gibson*, Drew. 42, 17 Eng. L. & Eq. 349, it was said: "If it were impossible to sell lands subject to a widow's right to dower, or to sell the remaining two-thirds, after setting out by metes and bounds one-third for dower, or to sell the reversion of the third part thus set out, that might defeat the disposition made by the will for sale of the estate; and then she might be put to her election."

Where by Statute Dower Is a Fee-simple Estate. — But where dower is an absolute fee-simple title, a claim thereto in inconsistent with a direction to sell, *Cain v. Cain*, 23 Iowa 31; or to use the income of the real estate for a certain

purpose. *Van Guilder v. Justice*, 56 Iowa 669.

3. **Power to Lease, Manage, or Control Lands.** — *Parker v. Sowerby*, 4 De G. M. & G. 321; *Pepper v. Dixon*, 17 Sim. 200; *Thompson v. Burra*, L. R. 16 Eq. 592; *Roadley v. Dixon*, 3 Russ. 192; *Lowes v. Lowes*, 5 Hare 501, 15 L. J. Ch. N. S. 369, 10 Jur. 453; *Taylor v. Taylor*, 1 Y. & Coll. 727; *O'Hara v. Chaine*, 1 J. & L. 662; *Grayson v. Deakin*, 3 De G. & Sm. 298, 18 L. J. Ch. 114, 13 Jur. 145; *Hall v. Hill*, 1 Dr. & War. 94, 1 Con. & L. 120, 4 Ir. Eq. Rep. 27; *Bending v. Bending*, 3 Kay & J. 57, 3 Jur. N. S. 535, 26 L. J. Ch. 469; *Dawson v. Fraser*, 18 Ont. Rep. 496; *Rody v. Rody*, 29 Grant's Ch. (U. C.) 324; *Patrick v. Shaver*, 21 Grant's Ch. (U. C.) 123; *Tobias v. Ketchum*, 32 N. Y. 319, reversing 36 Barb. (N. Y.) 304. See also *Goodfellow v. Goodfellow*, 18 Beav. 356; *Villareal v. Galway*, Amb. 682, 1 Bro. C. C. 292, note.

But in *Warbutter v. Warbutter*, 2 Sm. & G. 163, 18 Jur. 415, 23 L. J. Ch. 467, it was said that a power to lease and manage his real estate, given by a testator to his trustees, does not, by itself, raise an implication of the testator's intention to exclude his wife from dower, so as to compel her to elect.

Will Providing for Conveyance by Executor. — A tenant in common, having agreed to make a partition, by his will confirmed the agreement and devised the estate to trustees to convey the part agreed to the other tenant in common and his heirs, and to receive a conveyance of the other part; and he devised it and all his real and personal estate to his trustees to receive the rents and pay an annuity to his widow, etc. It was held that the widow was bound to elect, as the trustee was to convey. *Reynard v. Spence*, 4 Beav. 103.

Direction to Executors to Distribute Estate in Their Discretion. — Where a testator directed his executors to distribute his estate among his widow and children in such a manner as in their judgment should be best, it was held that the widow was not put to her election. *Conner v. Watson*, 1 N. Y. App. Div. 54.

4. **Personal Use, Occupation, and Enjoyment by Donee.** — *Miall v. Brain*, 4 Madd. 119; *Coleman v. Glanville*, 18 Grant's Ch. (U. C.) 42; *Cowan v. Besserer*, 5 Ont. Rep. 633; *McLennan v. Grant*, 15 Grant's Ch. (U. C.) 65; *Hutchinson v. Sargent*, 16 Grant's Ch. (U. C.) 78.

A Devise to Trustees to Continue the Testator's Farming Business on his farm puts the widow to her election in respect of her dower out of this farm. *Butcher v. Kemp*, 5 Madd. 61.

Gift to Provide for Dependant After Provision for Wife. — Where, after making provision for his widow, a testator makes a specific devise for the maintenance of a child or other person dependent upon him, the devise being not more than sufficient for the purpose, the widow is put to her election; it will not be presumed that the testator intended the devise to be diminished by a charge of dower.¹

Devise to Widow and Others in Equal Shares. — Where a testator makes a devise to the widow and others in equal shares, a claim of dower is inconsistent with the share given to the widow under the will, and she is bound to elect.²

b. ELECTION BETWEEN DOWER AND JOINTURE. — A legal jointure settled on the wife before marriage bars dower,³ but a jointure which is settled upon her, after marriage merely puts her to her election after the death of her husband either to accept the settlement or to demand dower.⁴

Personal Use, by Third Person, of One Part. — A testator gave a house for the residence of his wife during her life, and also another house for the use of certain nephews and nieces until the youngest attained twenty-one, or until they married. It was held that the right of personal occupation of the latter house by the nephews and nieces was, while it lasted, inconsistent with a claim of dower therein, but was not sufficient to put her to her election as to the residue of the estate, and she was therefore put to her election as to both houses. *Leys v. Toronto General Trusts Co.*, 22 Ont. Rep. 603.

Devise to Trustees with Direction for Partial Occupation by Third Person. — Where there is a general devise of the whole estate to trustees, with directions to permit and suffer a third person to use, occupy, and enjoy a particular part, thus indicating an intention to devise it free from the claim of dower, the same intention must necessarily be applied to the whole estate. *Miall v. Brain*, 4 Madd. 119; *Roadley v. Dixon*, 3 Russ. 204; *Hutchinson v. Sargent*, 16 Grant's Ch. (U. C.) 80; *Worthing v. Pearson*, 33 Ga. 387, 81 Am. Dec. 213.

1. Specific Devise for Support or Maintenance of Devisee. — *Herbert v. Wren*, 7 Cranch (U. S.) 378; *Alling v. Chatfield*, 42 Conn. 276.

2. Devise to Widow and Others in Equal Shares — *England.* — *Chalmers v. Storil*, 2 Ves. & B. 222; *Gibson v. Gibson*, 1 Drew. 42, 17 Eng. L. & Eq. 355; *Dickson v. Robinson*, 1 Jac. 503; *Roberts v. Smith*, 1 Sim. & S. 513; *Reynolds v. Torin*, 1 Russ. 129. See also *Goodfellow v. Goodfellow*, 18 Beav. 365.

Canada. — *McGregor v. McGregor*, 20 Grant's Ch. (U. C.) 451; *Card v. Cooley*, 6 Ont. Rep. 229; *Re Quimby*, 5 Ont. Rep. 744; *Patrick v. Shaver*, 21 Grant's Ch. (U. C.) 123; *Kerr v. Leishman*, 8 Grant's Ch. (U. C.) 435.

New Jersey. — *Colgate v. Colgate*, 23 N. J. Eq. 372; *Brokaw v. Brokaw*, 41 N. J. Eq. 304; *Griggs v. Veghte*, 47 N. J. Eq. 179; *Helme v. Strater*, 52 N. J. Eq. 591.

New York. — *Closs v. Eldert*, 16 Misc. Rep. (N. Y. Supreme Ct.) 104. See also *Cole v. Cole*, 2 How. Pr. N. S. (N. Y. Supreme Ct.) 516.

Rhode Island. — *Durfee's Petition*, 14 R. I. 47.

South Carolina. — *Bailey v. Boyce*, 4 Strobb. Eq. (S. Car.) 84; *Hair v. Goldsmith*, 22 S. Car. 566; *Callahan v. Robinson*, 30 S. Car. 249; *Bannister v. Bannister*, 37 S. Car. 529.

Virginia. — *Higginbotham v. Cornwell*, 8 Gratt. (Va.) 83, 56 Am. Dec. 130.

Contra. — *In re Hatch*, 62 Vt. 300; *Konvalinka v. Schlegel*, 104 N. Y. 125, 58 Am. Rep. 494, affirming 39 Hun (N. Y.) 451. These decisions were put upon the ground that the intention to exclude the widow's dower was not expressed in the will. See also *Ellis v. Lewis*, 3 Hare 315.

Equal Division of Land and Personalty. — Where a testator devised all his real and personal property, subject to a one-third interest devised to his wife in all his real and personal estate so long as she should remain unmarried, it was held that the wife was bound to elect between the will and her dower, for the former imported that there was to be the same manner of division of the land as of the personalty, viz., a division of the entire property of each kind, which would be defeated if dower were first subtracted from the realty. *Amsden v. Kyle*, 9 Ont. Rep. 439.

Rule Criticised. — The case of *Chalmers v. Storil*, 2 Ves. & B. 222, was the first to lay down the rule stated in the text. As the citations in this note show, the case has been frequently followed, but it has been criticised by both courts and text-writers on the ground that it is opposed to the general principle of construction in accordance with which a testator will be presumed to intend to dispose only of that of which he has a right to dispose. See 1 *White & Tudor's Lead. Cas.* (6th ed.) 424; *Gibson v. Gibson*, 1 Drew. 42, 17 Eng. L. & Eq. 349; *Bending v. Bending*, 3 Kay & J. 57, 3 Jur. N. S. 535; *Re Quimby*, 5 Ont. Rep. 744.

3. Toronto General Trusts Co. v. Quin, 25 Ont. Rep. 250. See the title DOWER, vol. 10, p. 207.

4. Co. Litt. 36b; Stat. 27 Hen. VIII., c. 10. § 9; Vernon's Case, 4 Coke 1; *McCauley v. McCauley*, 7 Houst. (Del.) 124; *Butts v. Trice*, 69 Ga. 74; *Roberts v. Walker*, 82 Mo. 200; *Kennedy v. Nedrow*, 1 Dall. (Pa.) 415; *Craig v. Walthall*, 14 Gratt. (Va.) 518. See also the title DOWER, vol. 10, p. 208, note 1, and p. 211.

A Devise in Lieu of Dower is a species of postnuptial jointure which has already been considered. See *supra*, this section, *Election between Dower and Provision in Will*.

Where Widow's Election Would Defeat Creditors. — In the case of a postnuptial settlement, the widow electing to take dower has been required, on a principle analogous to marshalling, to take the estate settled on her and

Settlement Before Marriage Without Consent of Wife. — By statute in a number of states, a jointure settled upon a wife before marriage is not, in the absence of her consent, an absolute bar to dower, but merely puts her to her election.¹

c. ELECTION BETWEEN DOWER AND CERTAIN STATUTORY RIGHTS. — Under some statutes the widow is entitled, upon the death of her husband, to take dower in his estate, or, at her election, an absolute share fixed by statute in his property, frequently a child's or widow's part, according to the statute of distributions.²

convey it in trust for the testator's creditors in return for the conveyance to her of one-third of her husband's estate as dower, where her insisting on dower and abandoning the settlement would have resulted in diminishing the securities available for creditors. *Mills v. Eden*, 10 Mod. 487.

Postnuptial Deed to Wife. — A postnuptial conveyance from the husband to the wife of the title to certain lands in fee simple will not be held to constitute an intended jointure or to put the wife to her election, where the fact that the deed bars dower is not expressed in the instrument and is not made a condition of its delivery and acceptance; and the statutory presumption that a devise is in lieu of dower does not apply in such a case. *Bubier v. Roberts*, 49 Me. 460. And this although the conveyance is in the will recited to have been intended in lieu of dower. *Martien v. Norris*, 91 Mo. 465.

Under the Missouri Statute a settlement, either antenuptial or postnuptial, must be expressed to be in lieu of dower in order to create a bar. *Perry v. Perryman*, 19 Mo. 469; *Dudley v. Daventport*, 85 Mo. 462.

Election Between Jointure and Devise. — Where a wife whose dower is barred by an antenuptial jointure receives benefits under her husband's will, she is not put to an election between such jointure and the benefits under the will, and a statute requiring election between dower and a provision by will is inapplicable. If, however, the jointure is not a complete legal bar, but is merely of a character to put the widow to her election between it and her dower, it is doubtful whether a subsequent devise in her favor requires her to elect between her dower and such devise; but where she has accepted the devise and thus rejected her dower, she may take her rights under the settlement. *Bowen v. Bowen*, 34 Ohio St. 164.

1. See the various statutes; also 1 Stim. Am. Stat. Law, § 3241 (B).

2. **Distributive Share in Place of Dower.** — See Rev. Stat. Mo. (1889), §§ 4520, 4523; Rev. Stat. N. H. (1891), c. 195, § 11; Rev. Stat. Ont., c. 108, § 4, subsec. (2). See also Stimson's Am. Stat. Law, § 3264; *Re Ingolsby*, 19 Ont. Rep. 283; *Re Galway*, 17 Ont. Pr. Rep. 49.

The widow takes this estate in lieu of dower, subject to legal and equitable claims existing against it. *Hunkins v. Hunkins*, 65 N. H. 95.

The estate which she receives under the statutes carries with it none of the privileges of dower, such as a right to widow's quarantine. *Wigley v. Beauchamp*, 51 Mo. 544, *overruling Orrick v. Pratt*, 34 Mo. 226.

Since the estate is given to the widow in lieu of dower, she cannot elect to take a child's

part in lands of which she was never dowable. *Payne v. Payne*, 119 Mo. 174.

An election to take an absolute child's share in the place of dower does not deprive the widow of her dower rights in lands which the husband had conveyed away during the coverture in fraud of her dower rights. *Crecelius v. Horst*, 4 Mo. App. 419, 11 Mo. App. 304. See also *Leinaweaver v. Stoeve*, 1 W. & S. (Pa.) 160.

The widow cannot elect to take dower in some part of the estate and a child's share in the rest. So when she has elected to take dower she cannot claim a child's part in lands subsequently found to have belonged to her husband. *Hamilton v. Phillips*, 83 Ga. 293.

In a Case of Partial Intestacy resulting from the lapse of a devise because of the death of the devisee, the widow, under the statute of *Ontario*, may elect between her dower right in the property undisposed of and her intestate share therein. *Rudd v. Harper*, 16 Ont. Rep. 428.

Presumption as to Election. — Under the *Georgia* statute the widow is presumed to have elected to take dower, so that, unless it affirmatively appears that she has taken a child's part in lieu of dower, she will not be presumed to have any vested estate in fee in her husband's property. *Snipes v. Parker*, 98 Ga. 522; *Truett v. Funderburk*, 93 Ga. 686.

So in *Missouri* under the Code of 1845. *Welch v. Anderson*, 28 Mo. 293; *Hamilton v. O'Neil*, 9 Mo. 11. Consequently before making her election to take her absolute share the widow has only a dower right in the lands, and a quitclaim deed executed by her before election conveys only her dower right; and though she subsequently elects her after-acquired title will not inure to her grantees. *Brawford v. Wolfe*, 103 Mo. 391.

A contrary presumption would apparently exist under other statutes. See Stat. Vt. (1894), § 2532; Pub. Stat. Mass. (1882), c. 124, § 3.

Widow's Statutory Right of Election in Iowa between Homestead and Dower. — In Iowa, by statute, the widow has the right to elect between the distributive share in her husband's estate which the statute confers upon her in lieu of common-law dower, and the right to occupy the family homestead. Code Iowa (1897), §§ 2085, 3377. See also *Whited v. Pearson*, 87 Iowa 513; *Whitehead v. Conklin*, 48 Iowa 478; *Conn v. Conn*, 58 Iowa 747; *Thomas v. Thomas*, 73 Iowa 657; *Matter of Franke*, 97 Iowa 704.

The fact that the widow who by continued possession is considered to have elected to take the homestead, executes a mortgage thereon does not show an election to take dower. *Butterfield v. Wicks*, 44 Iowa 310.

d. ELECTION BETWEEN BENEFIT UNDER WILL AND SHARE OF PERSONALTY. — Under the statutes of many states, a widow, by dissenting from the beneficial provisions of her husband's will, becomes entitled not only to dower in his realty, but to a distributive share of his personal estate.¹ A devise of

Proceedings to Require the Widow to Elect, in conformity with the provisions of this statute, whether she will take dower or homestead should be delayed until the estate is fully settled. *Thomas v. Thomas*, 73 Iowa 660.

Presumption from Occupancy under the Iowa Statute. — The widow's primary right is that to the distributive share of her husband's estate, and the right to her distributive share is defeated only when a homestead election is made. In the absence of any act showing an election to take the homestead, the occupation of the homestead by the widow for a reasonable time after her husband's death does not prejudice her rights to her distributive share; but when she has occupied after a reasonable time without having the distributive share set apart, or otherwise making an election, the presumption of an election to take the homestead arises from the continued occupancy. *Egbert v. Egbert*, 85 Iowa 525; *Wilcox v. Wilcox*, 89 Iowa 393; *Stephens v. Hay*, 98 Iowa 37; *Peebles v. Bunting*, 103 Iowa 489. The first of these cases explains, in a way which is acquiesced in by the later authorities, the case of *McDonald v. McDonald*, 76 Iowa 137, and the numerous authorities which are cited therein.

In *Stephens v. Hay*, 98 Iowa 37, the earlier authorities upon the construction of the statute are exhaustively examined in the opinion of the court by Robinson, J., and in the dissenting opinion of Deemer, J., concurred in by Kinne, J. The same two judges expressed in *Peebles v. Bunting*, 103 Iowa 489, a dissent from the views of the majority in regard to the rule here laid down.

Where the widow, by the provisions of her husband's will, is entitled to the occupancy of the homestead, her continued occupancy thereof will be presumed to be in accordance with the terms of the will, and will not constitute an election by her to take the homestead in lieu of her distributive share of the real estate. *Matter of Franke*, 97 Iowa 704; *Hunter v. Hunter*, 95 Iowa 728.

And where the occupation is not exclusive, or where there is a recognition of the rights of others in the property, it is not evidence of an election. *Larkin v. McManus*, 81 Iowa 723.

1. The statutes on this subject are outlined in 1 *Stimson's Am. Stat. Law*, § 3262.

Under the *Pennsylvania Act of April, 1848* (2 Bright. *Purd. Dig.* 1894, tit. Wills, par. 14, p. 2103), explaining section 11 of the Wills Act of 1833 (2 Bright. *Purd. Dig.*, *ubi supra*, par. 13), a widow who renounces a devise under her husband's will is entitled to the share of his personal estate provided for her by the intestate laws. *Melizet's Appeal*, 17 Pa. St. 449, 55 Am. Dec. 573.

At the Common Law as it existed in England in the early part of the seventeenth century and before, it was contended that the wife was entitled to her "reasonable part," *pars rationabilis*, of her husband's personal property, as absolutely as she was entitled to dower in his

real estate. The widow's reasonable part was a third if there were children, one-half if there were none. Without special enactment, this law was gradually altered, until it became established that the husband could dispose absolutely of all his personal property. See 2 Black. *Com.* 492, 493, where it is declared that this conclusion is supported by Glanvil, Bracton, Fleta, Fitzherbert, Finch, and the statutes and Year Books. This is the view adopted also by modern writers. 1 *Williams on Executors* (7th Am. ed.) 2; *Williams on Personal Property* (4th Am. ed.) 321.

Other authorities declare that the wife's right to a reasonable part was by special custom in particular localities, and not by the common law. *Co. Litt.* 176*b*; 2 *Co. Inst.* 33; *Somner on Gavelkind* 91. To the same effect seems to be *Swinburne on Wills*, pt. 3, § 16, though Mr. Hargrave (*Co. Litt.* 176*b*, note 6) cites this author as agreeing with Blackstone. Fitzherbert (*F. N. B.* 122) declares that by *Magna Charta* and Glanvil the widow's right to her reasonable part seems to be a part of the common law, yet he admits that the writs in the register recite special customs. In *Viner's Abr.*, title *Rationabili Parte Bonorum*, may be found several cases from the Year Books which count upon a special custom, but others are given which allege the right as upon the custom of the realm.

In Maryland the common-law right of the wife to her reasonable part in opposition to the will of her husband is recognized. Consequently, when a widow elects to renounce a will which makes a provision in real estate for her, but leaves her no personal property, she is entitled to her share of the personalty. *Coomes v. Clements*, 4 Har. & J. (Md.) 480.

A gift by will of realty and personalty bars the widow of dower and of her distributive share, unless she renounces; but a gift of either realty or personalty operates to put her to her election only as to dower or her distributive share, as the case may be, unless it is expressed to be in bar of her interests in both species of property. *Collins v. Carman*, 5 Md. 503, construing Md. statute of 1798.

Thus, where the husband leaves the widow a devise in lieu of dower, but not expressed to be in lieu of her interest in his personalty, and disposes of the personalty to others, she is entitled to the devise and to her third of the personalty. *Griffith v. Griffith*, 4 Har. & M. (Md.) 101.

In Other States, however, where the widow's claim to receive a distributive share of her husband's personal estate, upon renouncing his will, is held to be entirely dependent on statute, the acceptance of a devise under the will, though construed to be cumulative as to dower, will bar her of her distributive share. *Shaw v. Shaw*, 2 Dana (Ky.) 341.

So where there is no provision by statute entitling the dissenting widow to receive a share of her husband's personalty, upon her dissent she can receive no part of his personal

real or a bequest of personal estate, therefore, puts the widow to her election, in accordance with the terms of the statutes, with regard to dower and her distributive share of the personality.¹

e. ELECTION BETWEEN BENEFIT UNDER WILL AND HOMESTEAD. — The doctrine of election between inconsistent benefits is applicable as between a provision in a husband's will in the wife's favor and her homestead right, just as it is between such a provision and dower.² But the election to which the widow is put in this case is not affected by the presumption created by the statutes which declare that a provision in a will shall be considered to be in lieu of dower. In order to exclude the homestead right, the intent of the testator must be actually expressed or plainly manifest from the language of the instrument, otherwise both stand together.³

f. ELECTION UNDER WILL CONVEYING WIFE'S SHARE OF COMMUNITY PROPERTY. — In those jurisdictions where husband and wife form a com-

estate, although under the statute she is then entitled to dower. *Perkins v. Little*, 1 Me. 148.

Share in Kind. — Under the *Maryland* statute a widow renouncing under her husband's will may take her share of the personality in kind. *Kuykendall v. Devecmon*, 78 Md. 537.

1. *Dean v. Hart*, 62 Ala. 308; *Carper v. Crowl*, 149 Ill. 465. See also *Bowen v. Bowen*, 34 Ohio St. 180; *Haszard v. Haszard*, 19 R. I. 374.

A Devise of Realty is not, under some statutes, presumed to be in lieu of the widow's interest in the personal estate of the testator. *Collins v. Carman*, 5 Md. 503; *Pemberton v. Pemberton*, 29 Mo. 409.

A Bequest of Personality under the *Michigan* statute of 1881, if accepted, bars the widow from claiming any interest by intestacy in her husband's personal estate. *Matter of Smith*, 60 Mich. 136.

Right to Distributive Share Created by Testament. — Where a provision expressed to be in lieu of the widow's "dower right and distributive share in my estate" is rejected, the words "distributive share" have been held to involve a bequest by implication of such distributive share to the widow in the event of her refusing the provision of the will; the provision, in fact, amounts to an alternative donation. *Matter of Vowers*, 113 N. Y. 569. But see this case commented on in *Bradhurst v. Gray*, 135 N. Y. 564, and compare *Gray v. Gray*, 5 N. Y. App. Div. 132.

2. Election Applicable to Homestead. — *Cowdrey v. Hitchcock*, 103 Ill. 263; *Stunz v. Stunz*, 131 Ill. 210; *Schorr v. Etling*, 124 Mo. 42; *Meech v. Meech*, 37 Vt. 414; *Wells v. Congregational Church*, 63 Vt. 116. See also *Burgess v. Bowles*, 99 Mo. 549, following *Davidson v. Davis*, 86 Mo. 440, and explaining *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767.

Iowa — The Election Between Homestead and Distributive Share given by the statute of Iowa to the surviving spouse is noticed *supra*, this section, *Election Between Dower and Certain Statutory Rights*, p. 93, note 2.

Iowa — No Compensation. — In Iowa it has been held under the provisions of the code relative to the wife's right to a homestead that in case her husband leaves her by will a devise which is intended to bar her homestead rights, and she elects to take against the will, the devisee of the homestead under the will is not en-

titled to recover compensation out of the devise left to the wife by the will. *Gainer v. Gates*, 73 Iowa 140.

Gift under Will Not Equal to Homestead. — The doctrine of election does not apply where the property received by the widow under the will is not greater than she would have the right to take under the homestead law without reference to her husband's will. *Burgess v. Bowles*, 99 Mo. 544.

Cannot Elect Party under Will, Partly Against It. — The widow must elect entirely under the will or in opposition thereto. Thus, where a provision is left to her in lieu of dower and homestead, she cannot accept under the will as to her dower and reject as to the provision made in lieu of homestead. *Warren v. Warren*, 148 Ill. 641.

Devise in Lieu of Homestead Subject to Creditors' Demands. — Where a widow elected to take under the will of her deceased husband, which passed to her all his estate subject to the payment of all his debts, it was held that she had waived her homestead right, and that the homestead was subject to the demands of the testator's creditors. *Watson v. Christian*, 12 Bush (Ky.) 524; *Taylor v. Loller*, (Ky. 1887) 3 S. W. Rep. 165.

Provision in Will and Chattel Exemption. — In *New York* it was held that where a husband and wife had entered into an antenuptial agreement by which the husband was to make a certain settlement by will upon the wife, which she was to accept "in lieu of dower or any other portion of" the husband's property, a provision in the husband's will which was not a performance of such antenuptial agreement did not bar the wife of her claim to the chattel exemption allowed her by the statute (N. Y. Code Civ. Pro., § 2713). *Sheldon v. Bliss*, 8 N. Y. 31, affirming 7 Barb. (N. Y.) 152.

3. Cowdrey v. Hitchcock, 103 Ill. 262; *McGowan v. Baldwin*, 46 Minn. 477; *Schorr v. Etling*, 124 Mo. 42; *Bogart v. Bogart*, 138 Mo. 427; *In re Hatch*, 62 Vt. 300.

Presumption from Widow's Occupancy of Homestead. — The wife's continued residence in the house where she and her husband lived and where he died will be presumed to be in accordance with a provision in the husband's will, and not in the exercise of her statutory right of homestead. *Stunz v. Stunz*, 131 Ill. 210; *Warren v. Warren*, 148 Ill. 641.

munity in regard to their property rights, the dispositions of the will of the husband will, if possible, be presumed to refer to his own moiety of the property.¹ Where, however, there is such a clear manifestation of intent to devise the whole community property as to overcome this presumption, the widow is put to her election either to take under the will or to take what she is entitled to by law.²

2. Husband's Election as to Rights in Wife's Property. — In some states the husband's rights in the wife's property are assimilated to the wife's rights in the property of her husband,³ and he is put to his election between a provision in his wife's will and his curtesy or dower, so called.⁴

IV. MANNER AND TIME OF ELECTION — 1. What Acts Amount to an Election — a. ELECTION EXPRESS OR IMPLIED. — A person may be bound by an election either expressly or impliedly made.⁵

Express Election. — An election is express where the party by some specific and unequivocal act clearly indicates an intention to elect, as by the execution of a written instrument declaring the election.⁶

Implied Election. — A party not having made an express election may, by acts *in pais*, be held to have elected, but what acts of acceptance or acquiescence constitute an implied election must be decided rather by the circumstances of each case than by any general principle.⁷

1. *Matter of Gilmore*, 81 Cal. 240. See also *Chadwick v. Tatem*, 9 Mont. 354. A further discussion is to be found under the title COMMUNITY PROPERTY, vol. 6. p. 346.

Where there are two possible constructions of a will, that which favors the conclusion that the testator is disposing only of his own half of the community property will be adopted. *Matter of Smith*, 108 Cal. 115.

2. Election Where Community Property Devised or Bequeathed. — *Matter of Gilmore*, 81 Cal. 240; *Matter of Stewart*, 74 Cal. 98; *Noe v. Splivalo*, 54 Cal. 209; *Morrison v. Bowman*, 29 Cal. 337; *Wells v. Petree*, 39 Tex. 428. See also *Pratt v. Douglas*, 38 N. J. Eq. 517; *Carroll v. Carroll*, 20 Tex. 731.

General Words will be limited to the testator's interest. *Matter of Gilmore*, 81 Cal. 240; *Matter of Gwin*, 77 Cal. 313; *Payne v. Payne*, 18 Cal. 301.

A Division of the Testator's Estate between the wife and others, indicating an intention to dispose of the property as an entirety, has been held to put the widow to an election. *Smith v. Butler*, 85 Tex. 126; *Chace v. Gregg*, 88 Tex. 552. But compare *Theall v. Theall*, 7 La. Ann. 226, 26 Am. Dec. 501; *Carroll v. Carroll*, 20 Tex. 731.

Where the Wife Is Made Residuary Legatee this does not put her to an election as to whether she will take under the will or claim by virtue of her legal rights. *Moss v. Helsley*, 60 Tex. 434.

Condition that Widow Shall Renounce All Claim Against Testator's Estate. — Where the language of the will was: "The foregoing bequests to my wife are made upon the condition that she shall renounce all claim against my estate except under this will," it was held that the widow was not put to a waiver of her rights as survivor of the community; that the words "all claim against my estate," did not embrace her share of the community property, but that which the testator owned and could dispose of. *Mumford's Estate*, Myr. Prob. (Cal.) 133.

Disposition of Community Estate Made with Knowledge and Consent of Wife. — Where a will, in terms disposing of all the community property, stated that it was "made with full knowledge of property rights of husband and wife, and with the knowledge and consent of my said wife," it was held that it indicated the intention of the testator to dispose of all his property, including the interest of his wife. *Matter of Smith*, 108 Cal. 115.

3. See *Stimson's Am. Stat. Law*, §§ 3303-3306; 2 *Bright. Purd. Dig.*, Pa., p. 2105, § 22.

4. Husband's Election. — *Cribben v. Cribben*, 136 Ill. 609; *Wright v. Jones*, 105 Ind. 17; *Clark v. Clark*, 132 Ind. 25; *Rowley v. Sanns*, 141 Ind. 179; *Lyon's Estate*, 3 Pa. Dist. Rep. 739; *Lee's Appeal*, 124 Pa. St. 74. See also *Robinson v. Buck*, 71 Pa. St. 386.

In *West Virginia* a provision in the wife's will does not put the husband to his election between such provision and his curtesy. He may take both curtesy and the benefit under the will, but he cannot take such benefit and a share in his wife's personal property. Between them he is put to an election. *Cunningham v. Cunningham*, 30 W. Va. 599.

Election Between Homestead and Statutory Share of Estate. — In *Iowa* the husband, on the wife's death, may elect between the homestead and his statutory share of his wife's estate, and his election must be personal, the court having no authority to elect for him. *Holbrook v. Perry*, 66 Iowa 286. See also *Butterfield v. Wicks*, 44 Iowa 310.

5. Election May Be Express or Implied. — *Burroughs v. De Coutts*, 70 Cal. 370; *Whitridge v. Parkhurst*, 20 Md. 63; *Bradford v. Kent*, 43 Pa. St. 474; *Penn v. Guggenheimer*, 76 Va. 839.

6. Express Election. — *Burroughs v. De Coutts*, 70 Cal. 370; *Mathews v. Mathews*, 141 Mass. 511; *Hair v. Goldsmith*, 22 S. Car. 566.

7. Implied Election. — *Dillon v. Parker*, 1 Swanst. 382, note a; *Worthington v. Wigninton*, 20 Beav. 82; *Reaves v. Garrett*, 34 Ala. 562; *Whitridge v. Parkhurst*, 20 Md. 63; *Eng-*

The Burden of Showing Acts of Election is upon him who alleges that an election has been made.¹

b. REQUISITES FOR ACT OF ELECTION — (1) *Generally.* — In order that an act may amount to an election, two things are essential: first, it must be clear that the person alleged to have elected was aware of the nature and extent of his rights; second, it must be shown that, having that knowledge, he intended to elect.²

(2) *Knowledge of Rights.* — A person will never be held to have made an election binding upon him unless it is perfectly clear that he knew the condition and value of the properties between which he was required to choose, and also his duty to make an election between them.³

lish v. English, 3 N. J. Eq. 509, 29 Am. Dec. 730. See also *Beem v. Kimberly*, 72 Wis. 365.

Acquiescence in Provisions of Will. — A devisee under a will is held by acquiescing in its provisions to have elected to take under it rather than an heir. *Drake v. Wild*, (Vt. 1897) 39 Atl. Rep. 248.

1. Burden of Proof. — *Worthington v. Wiginton*, 20 Beav. 67; *Reaves v. Garrett*, 34 Ala. 563; *Wetherill v. Harris*, 67 Ind. 452; *Madden v. Louisville, etc., R. Co.*, 66 Miss. 259; *Anderson's Appeal*, 36 Pa. St. 476; *Cox v. Rogers*, 77 Pa. St. 160; *Rhodes's Estate*, 11 Phila. (Pa.) 103, 32 Leg. Int. (Pa.) 440.

2. Worthington v. Wiginton, 20 Beav. 67; *Spread v. Morgan*, 11 H. L. Cas. 588; *Wilson v. Thornbury*, L. R. 10 Ch. 239; *Mr. Swans-ton's note to Dillon v. Parker*, 1 Swanst. 359; *2 Spence Eq. Jur.* 599.

Unequivocal Acts Clearly Proven. — Election, to be binding, must be evidenced by unequivocal acts clearly proven, and must be made with full knowledge of the facts. *Dickinson v. Dickinson*, 61 Pa. St. 401; *Cox v. Rogers*, 77 Pa. St. 160; *Wise v. Rhodes*, 84 Pa. St. 402; *Miller's Estate*, 159 Pa. St. 562. Equivocal acts are of course insufficient. *Cooper v. Watson*, 23 U. C. Q. B. 345.

3. Knowledge of Rights Essential — *England.* — *Dillon v. Parker*, 1 Swanst. 359, 18 Rev. Rep. 72; *Reynard v. Spence*, 4 Beav. 103; *Worthington v. Wiginton*, 20 Beav. 74; *Wintour v. Clifton*, 21 Beav. 447; *Wake v. Wake*, 1 Ves. Jr. 335; *Douglas v. Douglas*, L. R. 12 Eq. 637; *Dewar v. Maitland*, L. R. 2 Eq. 838; *Spread v. Morgan*, 11 H. L. Cas. 588; *Wilson v. Thornbury*, L. R. 10 Ch. 239; *Chalmers v. Storil*, 2 Ves. & B. 225; *Sweetman v. Sweetman*, 2 Ir. Eq. Rep. 141; *Edwards v. Morgan*, 13 Price 782; *M'Clellan*, 541, *affirmed* 1 Bligh N. S. 401.

United States. — *U. S. v. Duncan*, 4 McLean (U. S.) 102.

Alabama. — *Reaves v. Garrett*, 34 Ala. 563; *Adams v. Adams*, 39 Ala. 274; *Key v. Jones*, 52 Ala. 238.

Arkansas. — *Clark v. Hershy*, 52 Ark. 473.

California. — *King v. Lagrange*, 50 Cal. 328, 61 Cal. 221; *Burroughs v. De Couts*, 70 Cal. 371; *Matter of Smith*, 108 Cal. 116.

Georgia. — *Tooke v. Hardeman*, 7 Ga. 30; *Dabney v. Bailey*, 42 Ga. 521; *Johnston v. Duncan*, 67 Ga. 61.

Illinois. — *Cowdrey v. Hitchcock*, 103 Ill. 262; *Stone v. Vandermark*, 146 Ill. 312.

Indiana. — *Garn v. Garn*, 135 Ind. 690.

Kansas. — *Sill v. Sill*, 31 Kan. 248.

Massachusetts. — *Watson v. Watson*, 128 Mass. 155.

Mississippi. — *Madden v. Louisville, etc., R. Co.*, 66 Miss. 259; *Davis v. Kriger*, 69 Miss. 39.

New Jersey. — *Thompson v. Egbert*, 17 N. J. L. 466; *Young v. Young*, 51 N. J. Eq. 491; *Pratt v. Douglas*, 38 N. J. Eq. 539.

New York. — *Adsit v. Adsit*, 2 Johns. Ch. (N. Y.) 451, 7 Am. Dec. 539. See also *Duffy v. Duffy*, 70 Hun (N. Y.) 135.

North Carolina. — *Dunlap v. Ingram*, 4 Jones Eq. (57 N. Car.) 178.

Ohio. — *Huston v. Cone*, 24 Ohio St. 11; *Millikin v. Welliver*, 37 Ohio St. 460.

Pennsylvania. — *Anderson's Appeal*, 36 Pa. St. 476; *Bradford v. Kent*, 43 Pa. St. 474; *Kreiser's Appeal*, 69 Pa. St. 195; *Cox v. Rogers*, 77 Pa. St. 160; *Elbert v. O'Neil*, 102 Pa. St. 302; *Woodburn's Estate*, 138 Pa. St. 606, 21 Am. St. Rep. 932.

Rhode Island. — *Payton v. Bowen*, 14 R. I. 375.

South Carolina. — *Pinckney v. Pinckney*, 2 Rich. Eq. (S. Car.) 218; *Snelgrove v. Snelgrove*, 4 Desaus. (S. Car.) 274.

Virginia. — *Dixon v. McCue*, 14 Gratt. (Va.) 540; *Hill v. Huston*, 15 Gratt. (Va.) 357.

Wisconsin. — *Leach v. Leach*, 65 Wis. 284.

In *Spread v. Morgan*, 11 H. L. Cas. 602, it was said by Lord Westbury, L. C., while stating that there may be a series of unequivocal acts from which an intention to elect may be inferred: "It is true, as a general proposition, that knowledge of the law must be imputed to every person, but it would be too much to impute knowledge of this rule of equity." The court held that the doctrine of election is not a rule of positive law, but a rule of practice in equity, and that the knowledge of it is not therefore to be imputed as a matter of obligation.

Declarations of the Widow to the effect that her husband had given land to all the children except the appellee, who, after the widow's death, was to have the land on which she had lived, were admissible to prove knowledge on the part of the widow of the provisions of the will. *Rogers v. Trevathan*, 67 Tex. 406.

Express Election. — It makes no difference that the election is expressly made, formally and in writing, provided it is repudiated upon ascertaining its effect. *Woodburn's Estate*, 138 Pa. St. 606, 21 Am. St. Rep. 932.

Effect of Lapse of Time After Mistaken Election. — A person electing in ignorance of his rights has been permitted to elect after many years when he discovered his true rights. *Reynard*

Ignorance of Dower Right. — Although the courts broadly state the doctrine that the party must have a knowledge of his rights, the question as to whether or not a widow can allege an ignorance of her right to dower as widow has seldom been adjudicated. In *England* it has been held that she can,¹ but the contrary has been held in *Pennsylvania* and in *Canada*.²

Entitled to Ascertain Condition of Properties — Bill in Equity. — A party bound to elect is entitled first to ascertain the condition and value of the funds or properties between which he is to elect;³ and it has been said that for this purpose he is entitled to file a bill in equity.⁴

Revocation of Election Made in Ignorance. — Applying the principle that knowledge is essential to constitute a valid election, it is established that where the act is induced by deception or fraud,⁵ or where the person electing acted under an ignorance of the facts or under a misapprehension of his rights, and innocent third parties will not suffer by a revocation, the act may be revoked or set

v. Spence, 4 Beav. 103; *Sopwith v. Maughan*, 30 Beav. 235. But see *Cox v. Rogers*, 77 Pa. St. 160. Consult also *infra*, this section, *Time Within Which Election Must Be Made — At Common Law*.

1. *Sopwith v. Maughan*, 30 Beav. 235.

2. In *Light v. Light*, 21 Pa. St. 407, it was held that an election by a widow to take under the will of her husband, where she knew the material facts of the case, though she did not understand her legal rights, no imposition having been practised upon her or unfair advantage taken of her ignorance of the law, was an estoppel against her claim for dower. In this case Black, C. J., in delivering judgment, said: "In some of the books, 'knowledge of one's legal rights' is a phrase used to express that degree of information upon both fact and law which enables a party to judge how far a demand can be enforced by him or against him. The relief which equity gives for such ignorance of legal rights is based on the mistake of fact." See also *Rhodes's Estate*, 11 Phila. (Pa.) 103, 32 Leg. Int. (Pa.) 440, and *Gillam v. Gillam*, 29 Grant's Ch. (U. C.) 379, to the same effect.

3. **Party Bound to Elect Entitled to Ascertain Value of Properties.** — *Newman v. Newman*, 1 Bro. C. C. 186; *Boynton v. Boynton*, 1 Bro. C. C. 445; *Wake v. Wake*, 3 Bro. C. C. 255, 1 Ves. Jr. 335; *Whistler v. Webster*, 2 Ves. Jr. 371; *Chalmers v. Storil*, 2 Ves. & B. 222; *Kidney v. Coussmaker*, 12 Ves. Jr. 152; *Salkeld v. Vernon*, 1 Eden 64; *Weeks v. Patten*, 18 Me. 42, 36 Am. Dec. 696; *Anderson's Appeal*, 36 Pa. St. 476; *Kreiser's Appeal*, 69 Pa. St. 194.

Ascertainment by Widow of Debts of Decedent. — A widow cannot be compelled to elect between dower and homestead until the indebtedness of her deceased husband's estate is determined. *Thomas v. Thomas*, 73 Iowa 657.

In *Hall v. Hall*, 2 McCord Eq. (S. Car.) 269, it is said that a widow cannot be compelled to elect before the estate is settled, and if the will allows her an annuity until the estate is settled it is no objection to the payment of the annuity that she has not elected.

In *Tennessee* the code, § 2405, expressly requires the personal representative of the estate, upon the application of the widow, to disclose the condition of the estate, to enable her to act as her interest may require. *Wright v. West*, 2 Lea (Tenn.) 83.

If a New Right Arises Not Known Before. — though a party may be taken to have elected, he will be allowed time to be informed of his interests. *Gratton v. Haward*, 1 Swanst. 421, 18 Rev. Rep. 95.

4. **Filing Bill to Ascertain Knowledge of Properties.** — In *Buttricke v. Broadhurst*, 1 Ves. Jr. 171, 3 Bro. C. C. 88, there is a dictum by Lord Thurlow, L. C., that a party bound to elect may file a bill to ascertain the state of the properties; but in *Douglas v. Douglas*, L. R. 12 Eq. 637, it was said: "It is perhaps too broadly stated by Lord Thurlow, in *Buttricke v. Broadhurst*, 1 Ves. Jr. 171, whose dictum has been adopted by Mr. Swanston in the note to *Dillon v. Parker*, 1 Swanst. 381, note *a*, and other text writers, that the court of chancery will in all cases entertain a suit by a person put to election to ascertain the value of the objects between which election is to be made. No doubt there is, in almost all cases, jurisdiction in equity to compel a final election, so as to quiet the title of those interested in the objects of which one is to be chosen; and the court, as a condition of compelling such a final election, secures to the person compelled to make it all the information necessary to guide him in doing so. It is also generally, though perhaps not universally, true that a person for whose benefit conditions will be imposed by the court before it makes an order against him can entitle himself to the benefit of the conditions by filing a bill and offering by it to submit to the order."

Taking Account. — In the cases of *Pusey v. Desbouvrie*, 3 P. Wms. 320, and *Hender v. Rose*, 3 P. Wms. 124, note *a*, it was said that a party is entitled before electing to have an account taken.

Filing Bill to Recover Legacy. — In *Georgia* it was held that where there had been no inventory of the estate, and the executor refused to give information to the widow concerning it, so that she was ignorant of its condition, she could file her bill to recover the legacies, electing to take them in lieu of dower, provided she received them, but otherwise reserving her right to dower. *Johnston v. Duncan*, 67 Ga. 61.

5. **Revocation for Fraud.** — *Garn v. Garn*, 135 Ind. 687; *Fosher v. Williams*, 120 Ind. 172; *Burden v. Burden*, 141 Ind. 471; *Reed v. Dickerman*, 12 Pick. (Mass.) 150; *McDaniel v. Douglas*, 6 Humph. (Tenn.) 229.

aside.¹ But such election can be revoked only by restoring the property received under it.²

(3) *Intent to Elect.* — In order to conclude a party by an election there must have been an intention to elect.³ But there may be a series of unequivocal acts from which an intention to elect and the fact of actual election may be inferred.⁴

c. PARTICULAR ACTS FROM WHICH ELECTION MAY BE IMPLIED —

(1) *Performing Acts of Ownership* — (a) *Illustrations of Principle.* — When a party has notice that he is bound to elect to take under or against a will, and deals with the property given to him by the will as his own, that is a clear, deliberate act of election to take the property so given to him.⁵

Possession or Receipt of Property or Proceeds. — Taking possession of the property devised or bequeathed and exercising acts of ownership over it for a series of years constitute sufficient evidence of election to take under the will.⁶

1. Revocation of Election Made in Ignorance or Mistake. — *Goodrum v. Goodrum*, 56 Ark. 532; *Dabney v. Bailey*, 42 Ga. 521; *Reed v. Dickerman*, 12 Pick. (Mass.) 151; *Watson v. Watson*, 128 Mass. 152; *Macknet v. Macknet*, 29 N. J. Eq. 54; *Pratt v. Douglas*, 38 N. J. Eq. 539; *Hill v. Huston*, 15 Gratt. (Va.) 350. See also *Dillon v. Parker*, 1 Swanst. 382, note *a*; *Davis v. Davis*, 11 Ohio St. 386.

Sale of Land Before Retraction of Election Made in Ignorance. — Where a widow had elected to take a bequest in lieu of dower, in ignorance of the insolvency of her husband's estate, but before she retracted such election the executor had sold certain lands of her husband's estate, it was held that she was not entitled to dower therein, but an equivalent would be assigned to her out of other lands of the estate. *Goodrum v. Goodrum*, 56 Ark. 532.

Widow's Right of Revocation Not Transmissible. — In *Indiana* it was held that a widow's right of revocation under her husband's will is a personal right, and not transmissible by descent so as to be exercised either by her heirs or personal representatives, much less by the creditors of her estate. *Eltzroth v. Binford*, 71 Ind. 456.

2. Restoration of Property. — *Adams v. Adams*, 30 Ala. 274; *Steele v. Steele*, 64 Ala. 439, 38 Am. Rep. 15; *Goodrum v. Goodrum*, 56 Ark. 532; *Young v. Young*, 51 N. J. Eq. 502.

A party who has received a legacy under a will cannot be permitted to contest the validity of such will without repaying the amount of the legacy or bringing the money into court. *Hamblett v. Hamblett*, 6 N. H. 333; *Holt v. Rice*, 54 N. H. 398, 20 Am. Rep. 138.

Failure of Consideration of Election. — Where a widow elected to take under a will giving her one-third of her husband's real estate in lieu of dower, in consideration that all of the heirs should agree to give her one-third of the personalty in addition, but some only of the heirs having consented to the agreement, it was held that the widow was not estopped from afterwards relinquishing all rights conferred by the will, and claiming her right of dower. *Richart v. Richart*, 30 Iowa 465.

3. Intention to Elect Essential — *England*. — *Dillon v. Parker*, 1 Swanst. 382, note *a*; *Worthington v. Wiginton*, 20 Beav. 74; *Wilson v. Thornbury*, L. R. 10 Ch. 239, 32 L. T. N. S. 350.

California. — *Matter of Smith*, 108 Cal. 115; *Burroughs v. De Coutts*, 70 Cal. 371.

Illinois. — *Cowdrey v. Hitchcock*, 103 Ill. 262.

Kansas. — *Sill v. Sill*, 31 Kan. 248.

New Jersey. — *Pratt v. Douglas*, 38 N. J. Eq. 539; *English v. English*, 3 N. J. Eq. 504, 29 Am. Dec. 730. See also *Freeland v. Mandeville*, 28 N. J. Eq. 559.

Ohio. — *Millikin v. Welliver*, 37 Ohio St. 466.

Loose Conversations or Casual Declarations expressive of an intention to elect will not suffice, especially when not acted on to the prejudice of another. *Reaves v. Garrett*, 34 Ala. 562; *Key v. Jones*, 52 Ala. 238; *Stone v. Vandermark*, 146 Ill. 312. See also *English v. English*, 3 N. J. Eq. 504, 29 Am. Dec. 730.

Acting upon Advice of Counsel. — Acts done upon the advice of counsel that the right given her by a will is not inconsistent with her claiming dower will not amount to an election by the widow. *Carper v. Crowl*, 149 Ill. 465.

4. Intention to Elect Inferred from Unequivocal Acts. — *Worthington v. Wiginton*, 20 Beav. 74; *Spread v. Morgan*, 11 H. L. Cas. 602; *Key v. Jones*, 52 Ala. 238; *Burroughs v. De Coutts*, 70 Cal. 371; *Sill v. Sill*, 31 Kan. 248; *Madden v. Louisville, etc., R. Co.*, 66 Miss. 259; *Anderson's Appeal*, 36 Pa. St. 496; *Cox v. Rogers*, 77 Pa. St. 160; *Dickinson v. Dickinson*, 51 Pa. St. 401; *Duncan v. Duncan*, 2 Yeates (Pa.) 302; *Cauffman v. Cauffman*, 17 S. & R. (Pa.) 25.

5. Dealing with Devised Property as His Own. — *Briscoe v. Briscoe*, 1 J. & L. 335, 7 Ir. Eq. Rep. 123.

Dealings by Widow with Property Given in Lieu of Dower. — Where a testator, by express terms in his will, makes provision for his wife in lieu of dower, thus bringing directly to her mind that she cannot have dower and the benefits of the will as well, much less dealing with the property left to her will evidence an election on her part to take under the will than would be sufficient in the absence of such express provision. *Nixon v. Ashenhurst*, 7 Ont. Rep. 664.

6. Taking Possession of Property and Exercising Acts of Ownership — *England*. — *Dillon v. Parker*, 1 Cl. & F. 303; *Northumberland v. Aylesford*, Amb. 540; *Ardesoife v. Bennett*, 2 Dick. 463; *Giddings v. Giddings*, 3 Russ. 257.

Canada. — *Walton v. Hill*, 18 U. C. Q. B. 562.

Arkansas. — *Apperson v. Bolton*, 29 Ark. 429.

Receiving Property or Rents, Dividends, and Profits. — Receiving the property from the executor,¹ or the rents and profits,² or the dividends of the property devised or bequeathed,³ has been held to be conclusive evidence of election. But if the devisee takes possession as heir at law, contesting the will, this is not an election by him.⁴

Sale of Property Devised, or Execution of Deeds. — A sale by the devisee of the property given by the will, or the execution of deeds containing recitals of the character in which the party claimed and the exercise of a power to dispose of the property in that character, will amount to conclusive evidence of election.⁵

Connecticut. — Bennett *v.* Packer, 70 Conn. 357.

Iowa. — Schlarb *v.* Holderbaum, 80 Iowa 394.

Kentucky. — Dawson *v.* Hayes, 1 Metc. (Ky.) 460.

Massachusetts. — Delay *v.* Vinal, 1 Met. (Mass.) 57.

New Hampshire. — Hovey *v.* Hovey, 61 N. H. 599.

New Jersey. — Stark *v.* Hunton, 1 N. J. Eq. 216; English *v.* English, 3 N. J. Eq. 512, 29 Am. Dec. 730; Cory *v.* Cory, 37 N. J. Eq. 198.

North Carolina. — Sigmon *v.* Hawn, 87 N. Car. 454.

Ohio. — Thompson *v.* Hoop, 6 Ohio St. 481; Stockton *v.* Wooley, 20 Ohio St. 184.

Pennsylvania. — Bradford *v.* Kent, 43 Pa. St. 475.

Vermont. — Drake *v.* Wild, (Vt. 1897) 39 Atl. Rep. 248.

Virginia. — Upshaw *v.* Upshaw, 2 Hen. & M. (Va.) 381, 3 Am. Dec. 632; Ambler *v.* Norton, 4 Hen. & M. (Va.) 23; Craig *v.* Walthall, 14 Gratt. (Va.) 518; Rutherford *v.* Mayo, 76 Va. 117.

In Rhode Island a widow's sole occupation and use of the mansion house and furniture will not be tantamount to an election, for she has a right to retain the mansion house under statute, and may retain possession of the household furniture, at least until it is claimed by the administrator. Payton *v.* Bowen, 14 R. I. 375.

Acts Not Showing an Acceptance. — By his will a testator gave all his real and personal property to his wife during her widowhood, and in the event of her marriage again it was to be divided among his children. The widow was present when the will was read and appeared satisfied with it. After her husband's death she took possession of the personal property and of the farm that was occupied by her and her husband as the homestead. She married again. There was evidence that she had accepted the personal property under the will and that the will was what she wanted it to be. It was held that the widow had not accepted the provision of the will, and was nevertheless entitled to dower, as she had a right to occupy the homestead until it was set off to her, and there was as much reason for holding that her occupancy of it was as widow as there was for holding that she occupied it as devisee; and as to the personal property, it did not amount to more than her specific allowance, if it had been appraised. Her loose expressions as to accepting the personal property could not be regarded as sufficient to establish the fact that she had a full knowledge of the

condition of the estate. Stone *v.* Vandermark, 146 Ill. 312.

Possession of Widow Is a Question of Fact. — In Zimmerman *v.* Lebo, 151 Pa. St. 345, it was said that whether the widow's possession ought not to be regarded as evidence of an election to hold under the will is a question of fact.

Acts of Husband as Precluding Wife's Election. — Where a married woman was bound to elect between an annuity by will to her separate use for life, charged upon a devised estate, and a title paramount to part of the same estate upon which it was charged, it was held that possession taken by her husband under that title did not preclude her election. Wilson *v.* Townshend, 2 Ves. Jr. 693.

But in Harvy *v.* Ashley, 3 Atk. 617, it was held that where a jointure was made upon a *feme* infant after her marriage, and the husband died during her infancy, and she, without electing, married again, the entry by the second husband on the jointured estate was binding on both during the coverture.

1. Receiving Property. — Walmsley *v.* Walmsley, 29 U. C. Q. B. 214; Franke *v.* Wiegand, 97 Iowa 704.

Where a farm was devised to a widow for life, determinable upon her marrying again, and also a certain portion of the dwelling house thereon, and the widow remained on the farm, and received some small sums of money for her own use, but had never had set apart for her exclusive enjoyment the portion of the house devised to her, it was held that these acts did not amount to that deliberate and well-considered choice, made with a knowledge of rights and in full view of consequences, which is necessary to constitute an election. Coleman *v.* Glanville, 18 Grant's Ch. (U. C.) 42.

2. Receiving Rents and Profits. — Dewar *v.* Maitland, L. R. 2 Eq. 834; Buttrick *v.* Broadhurst, 1 Ves. Jr. 172, 3 Bro. C. C. 88; Chapman *v.* Chick, 81 Me. 109; Wilson *v.* Hayne, Cheves Eq. (S. Car.) 37.

3. Receiving Dividends. — Parker *v.* Downing, 2 Jur. 28.

4. Devisee Taking Possession as Heir at Law. — Simpson *v.* Vickers, 14 Ves. Jr. 341; Buttrick *v.* Brodhurst, 3 Bro. C. C. 90.

Receipt of Money. — In Miller's Estate, 159 Pa. St. 562, it was doubted whether the receipt of money by a legatee claiming to be entitled to receive it and much more as an heir at law can be treated as an election to affirm the will.

5. Sale of Devised Property or Execution of Deeds — *England.* — Dillon *v.* Parker, 1 Swanst. 359; Wilder *v.* Pigott, 22 Ch. Div. 263.

(b) *Acts of Ownership over Both Property Taken under Will and Given by It.* — Where a party who has not been called on to elect holds both the property given to him by the will and the property belonging to himself which the testator has attempted to bestow upon another, or receives the rents and profits thereof, it cannot be said that he has made an election, for the right of choosing between the two has not been exercised.¹

(2) *Accepting Devise or Bequest.* — Where a testator assumes to dispose of the property of another, and such person accepts a bequest or devise under the will, such acceptance is a confirmation of the testamentary disposition of the testator.²

Acceptance by Widow of Provision in Lieu of Dower. — Where a testator makes provision for his widow in lieu of dower, or where such provision would be inconsistent with a claim for dower, an acceptance by her of such provision will be deemed an election to take such provision, and will estop her from setting up a claim for dower in her husband's estate.³

California. — *In re Smith*, (Cal. 1894) 38 Pac. Rep. 950.

Delaware. — *Warren v. Morris*, 4 Del. Ch. 289.

Georgia. — *Brown v. Cantrell*, 62 Ga. 257; *Churchill v. Bee*, 66 Ga. 621.

Indiana. — *Rowley v. Sanns*, 141 Ind. 180.

Iowa. — *Pellizzarro v. Reppert*, 83 Iowa 497.

Maine. — *Chapman v. Chick*, 81 Me. 109.

North Carolina. — *Brown v. Ward*, 103 N. Car. 173.

Texas. — *Rogers v. Trevathan*, 67 Tex. 406; *Chace v. Gregg*, 88 Tex. 552.

Execution of Mortgage. — Where a widow occupied the estate for more than five years after her husband's death, and executed two mortgages on what would be her distributive share, this was in effect an election to take her distributive share, though such share had not been actually set off when the mortgages were given. *Wilcox v. Wilcox*, 89 Iowa 393.

Where Statute Requires Specific Acts. — Where the statute prescribes certain formalities to effect an election, of course a conveyance cannot have the effect of one. See *Brawford v. Wolfe*, 103 Mo. 391, which was a case of election between dower and a distributive share under statute.

1. *Holding Both Properties Is Not an Election.* — *Padbury v. Clark*, 2 Macn. & G. 298; *Spread v. Morgan*, 11 H. L. Cas. 588; *Marriott v. Badger*, 5 Md. 306.

Mortgaging One Property and Receiving the Rents of the Other. — If one of the properties does not yield rent to be received by the party liable to elect, and he deals with it as his own by mortgaging it, particularly if done with the knowledge and concurrence of the party entitled to call for an election, and he receives the rents and profits of the other property, such dealing will be unavailable to prove an actual election, for there is an equal dealing with the two properties, and an absence of proof of an intention to elect one and reject the other. *Padbury v. Clark*, 2 Macn. & G. 208.

Where the Question Is Whether a Party Holds by Election under One or the Other of Two Wills of different testators, receiving rents and profits of the estates devised by one will is not sufficient evidence of an election to take under that will, when the same party at the same time has taken possession of the property de-

vised by the other will. *Whitridge v. Parkhurst*, 20 Md. 63.

2. *Acceptance of Devise or Bequest by the Devisee or Legatee.* — *Whitley v. Whitley*, 31 Beav. 176; *Noe v. Splivalo*, 54 Cal. 207; *Coe's Appeal*, 64 Conn. 352; *Gorham v. Dodge*, 122 Ill. 528; *Hartwig v. Schiefer*, 147 Ind. 64; *McIlvain v. Porter*, (Ky. 1888) 7 S. W. Rep. 309; *Brossenne v. Schmitt*, 91 Ky. 465; *Huhlein v. Huhlein*, 87 Ky. 249; *Weeks v. Patten*, 18 Me. 42, 36 Am. Dec. 696; *Smith v. Smith*, 14 Gray (Mass.) 533; *Hyde v. Baldwin*, 17 Pick. (Mass.) 303; *Young v. Young*, 51 N. J. Eq. 491; *Caulfield v. Sullivan*, 85 N. Y. 153; *Chipman v. Montgomery*, 63 N. Y. 221; *Preston v. Jones*, 9 Pa. St. 456; *Cox v. Rogers*, 77 Pa. St. 160; *Wise v. Rhodes*, 84 Pa. St. 402; *Witherspoon v. Watts*, 18 S. Car. 397; *Wells v. Congregational Church*, 63 Vt. 116.

Settling Funds Left for Settlement by Will. — A testator directed certain of his own moneys, together with moneys belonging to his daughter, to be settled, on her marriage, upon certain trusts specified in his will. On the marriage of the daughter the entire funds were settled upon trusts not in accordance with the directions of the will. It was held that the settlement was an election to take under the will; but that the funds were bound by the trusts in the will, and not of the settlement. *Briscoe v. Briscoe*, 1 J. & L. 335, 7 Ir. Eq. Rep. 123.

3. *Acceptance by Widow of Provision Made for Her by Her Husband* — *Alabama.* — *Adams v. Adams*, 39 Ala. 274.

Arkansas. — *Goodrum v. Goodrum*, 56 Ark. 532.

Georgia. — *Forester v. Watford*, 67 Ga. 509; *Speer v. Speer*, 67 Ga. 748.

Iowa. — *Stoddard v. Cutcompt*, 41 Iowa 329.

Maine. — *Allen v. Pray*, 12 Me. 138; *O'Brien v. Elliot*, 15 Me. 125, 32 Am. Dec. 137.

Missouri. — *Schwatken v. Daudi*, 53 Mo. App. 1; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767.

New Jersey. — *Snook v. Snook*, 43 N. J. Eq. 132.

New York. — *Van Orden v. Van Orden*, 10 Johns. (N. Y.) 30, 6 Am. Dec. 314; *Kennedy v. Mills*, 13 Wend. (N. Y.) 553; *Haack v. Weicken*, 118 N. Y. 76; *Nelson v. Brown*, 144 N. Y. 384, *affirming* 66 Hun (N. Y.) 311.

Acceptance of Provision in Lieu of Share of Community Property. — And where it appears from the will that the husband intended to dispose of his wife's share of the community property, an acceptance by the widow of the provision made for her will likewise estop her from setting up a claim to her half of such property;¹ or she will be estopped where the provision would be inconsistent with such claim.²

Agreement to Abide by the Will. — Where a widow put to her election under a will agrees with the heirs or other parties in interest to receive in lieu of dower³ the benefits conferred on her in the will, the agreement, if acted upon so that the position of other parties would be disadvantageously affected by a decision to claim against the will, is binding upon her as an election,⁴ unless she restores the estate to its *status quo* and no parties have been injured by acting on the faith of her agreement.⁵

Pennsylvania. — *Bradford v. Kent*, 43 Pa. St. 484; *Cox v. Rogers*, 77 Pa. St. 160.

South Carolina. — *Gordon v. Stevens*, 2 Hill (S. Car.) 47, 27 Am. Dec. 445; *Bailey v. Boyce*, 4 Strobb. Eq. (S. Car.) 90; *Sumerel v. Sumerel*, 34 S. Car. 85; *Stokes v. Norwood*, 44 S. Car. 424.

Canada. — *Walmsley v. Walmsley*, 26 U. C. Q. B. 392.

Acceptance of One Small Instalment of income, by the widow, soon after her husband's death, she having refused several others afterwards, and having brought suit, is not a conclusive election to accept the provisions of the will. *Crocker v. Beal*, 1 Lowell (U. S.) 416.

And where a widow received from her husband's executor a very small part of what she would be entitled to either under the will or by law, the sum received being necessary for her support, and being paid to her before her share under the will had been set apart, she is not estopped from electing, within the time allowed by law, to take her share under the law. *Beem v. Kimberly*, 72 Wis. 343.

Acceptance of Promissory Note of Executor. — Where a person named as executor in a will gave his note to a widow for the amount of a legacy given in lieu of dower and year's support within a month after her husband's death, he not having qualified as executor, and the will not having been admitted to record, but only probated in common form in vacation, the widow is not bound by her acceptance thereof; and the receipt given by her for the legacy is not admissible. *Hill v. Hill*, 88 Ga. 612.

An Acceptance of the Widow's Award, though the widow is not entitled thereto under the will, under the belief that she is so entitled, is not an election to take under the statute and to renounce the provisions of the will. *Cowdrey v. Hitchcock*, 103 Ill. 262.

Dower Barred by Devise from Husband's Heir. — Upon the death of an intestate, his son inherited his property, consisting of two farms, in neither of which was dower ever assigned to the widow. The son subsequently died, leaving a will by which the farms were devised, the one to such widow, his mother, and the other to his own wife. It was held that neither mother nor wife, after having accepted the devises given them in the will, was entitled to claim dower. *Snook v. Snook*, 43 N. J. Eq. 132.

Acceptance Where Will Proves Invalid. — The

acceptance of a devise where the will proves invalid will not bar the widow from subsequently claiming dower. *Truett v. Funderburk*, 93 Ga. 686.

If the Provision for the Widow Be Not Inconsistent with a Claim for Dower, her acceptance thereof, where it is not expressly declared to be in lieu of dower, will not bar her from her claim for dower. *Hunter v. Hunter*, 95 Iowa 728; *Hovey v. Hovey*, 61 N. H. 599; *Matter of Frazer*, 92 N. Y. 240. See also *supra*, this title, *Election as to Dower and Other Rights Arising on Marriage*.

1. Community Property. — *Bead v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *Morrison v. Bowman*, 29 Cal. 347; *Matter of Smith*, 108 Cal. 115; *Moss v. Helsley*, 60 Tex. 434. See also *supra*, this title, *Election as to Dower and Other Rights Arising on Marriage*, subd. 1. *f. Election under Will Conveying Wife's Share of Community Property*.

2. *Mayo v. Tudor*, 74 Tex. 471.

3. Of course if the agreement is not inconsistent with a claim to dower, there is no bar. Thus, an agreement by the widow relative to the management of the realty and the collection and distribution of the rents, which is in disregard of rights and titles under the will, and where it would be consistent with a claim by either party to ascertain such rights, is not tantamount to an election. *Payton v. Bowen*, 14 R. I. 375. See also *Beere v. Prendergast*, Hay & J. 384.

4. *Yorkly v. Stinson*, 97 N. Car. 236; *Cauffman v. Cauffman*, 17 S. & R. (Pa.) 16.

Agreement that Devise Is in Lieu of Dower. — Where a testator devises property to his wife, without stating that it is, or is not, in bar of dower, and the widow makes an agreement with the heir, reciting that it is in lieu of dower, and that she accepts certain things in satisfaction of it, she will be barred of her dower. *Shotwell v. Sedam*, 3 Ohio 5.

But in *Sumerel v. Sumerel*, 34 S. Car. 85, it was held that an agreement by the widow to accept the terms of the will and to abide by its provisions cannot affect her right to dower where the will does not put her to an election.

5. Where a widow agrees to adhere to the provisions of the will, and afterwards wishes to dissent, she is not estopped if she offers to put the estate *in statu quo*, and the executor has not acted under her agreement so as to cause him any loss. *Yorkly v. Stinson*, 97 N. Car. 236.

(3) *Instituting Legal Proceedings.* — Where a donee asserts a right to the property devised or bequeathed by instituting legal proceedings therefor, or presents a claim for the value thereof, or joins with others in proceedings respecting it, this is evidence of an election to take such property.¹ Upon the same principles a person is deemed to have made an election to claim against a will by bringing a suit to set it aside.²

(4) *Qualifying and Acting as Executrix.* — In a few cases it has been held that the fact that a widow who was entitled to benefits under her husband's will in which she was appointed executrix, proved the will and qualified as executrix, was an election by her to take under the will.³ Other cases, without going so far, hold that if, after qualifying under an appointment as executrix in her husband's will, the widow acts as such and does acts inconsistent with her claim for dower, she is regarded as having elected to take under the will;⁴

1. Legal Proceedings Respecting the Property Given — England. — *Barrow v. Barrow*, 4 Kay & J. 409, 4 Jur. N. S. 1049.

Canada. — *Montgomery v. Douglas*, 14 Grant's Ch. (U. C.) 268; *Rudd v. Harper*, 16 Ont. Rep. 428.

Connecticut. — *Carter's Appeal*, 59 Conn. 576.

Georgia. — *Johnston v. Duncan*, 67 Ga. 61.

Maryland. — *Hall's Case*, 1 Bland (Md.) 203, 17 Am. Dec. 275.

New Jersey. — *Camden Mut. Ins. Assoc. v. Jones*, 23 N. J. Eq. 171.

New York. — *Van Orden v. Van Orden*, 10 Johns. (N. Y.) 30, 6 Am. Dec. 314.

North Carolina. — *Sigmon v. Hawn*, 87 N. Car. 450; *Cutchin v. Johnston*, 120 N. Car. 51.

Texas. — *Smith v. Butler*, 85 Tex. 126.

Virginia. — *Kinnaird v. Williams*, 8 Leigh (Va.) 400, 31 Am. Dec. 658.

Wisconsin. — *Zaegel v. Kuster*, 51 Wis. 40.

Filing Petition to Enforce Will. — If a petition be filed asking that the provisions of the will be enforced, this is an election to take under the will. *Ashlock v. Ashlock*, 52 Iowa 319.

Proceedings for the Recovery or Assignment of Dower. — Where a widow institutes proceedings for the recovery or assignment of dower, this is an election to take against the will. *Apperson v. Bolton*, 29 Ark. 429; *Wilson v. Hamilton*, 9 S. & R. (Pa.) 424; *Watkins v. Watkins*, 7 Yerg. (Tenn.) 283; *Wilber v. Wilber*, 52 Wis. 302. See also *Ashlock v. Ashlock*, 52 Iowa 319.

Becoming a party to a foreclosure action is a proceeding for the assignment of dower, within the intent and meaning of the statute of *Wisconsin*, and is therefore a valid election by the widow. *Zaegel v. Kuster*, 51 Wis. 40.

But a suit brought by a widow to set aside an instrument executed and acknowledged by her, by which she elected to accept certain provisions in the will in lieu of dower, is not a proceeding for the recovery of dower within the meaning of the Revised Statutes of *New York*, compelling her to take such proceeding within a year. *Chamberlain v. Chamberlain*, 43 N. Y. 440.

Petition to Borrow Money and Pay Decedent's Debts. — Where a widow petitioned for and obtained an order of court authorizing her to borrow money to pay debts of the estate, and to execute therefor her promissory note and a mortgage on the testator's lands to secure the same, and she thereupon borrowed the money, and, without the knowledge or consent of her second husband, executed such note and mort-

gage, it was held that this was evidence of an election to take under the law and not under the will. *Wetherill v. Harris*, 67 Ind. 452.

Filing a Bill for Partition — In Illinois. — Where a widow, after renunciation of her husband's will, files a bill for partition of his estate, claiming to be the owner in fee simple of an undivided half of the real and personal estate, this is notice that she has elected to take under section 12 of the Dower Act. *Gullett v. Farley*, 164 Ill. 566.

The Appearance of the Heirs in Court and their renunciation of the land will also constitute an election. *O'Reilly v. Nicholson*, 45 Mo. 160.

2. Proceeding to Set Aside Will. — *George v. Bussing*, 15 B. Mon. (Ky.) 559.

3. Mendenhall v. Mendenhall, 8 Jones L. (53 N. Car.) 287; *Syme v. Badger*, 92 N. Car. 706. See also *Yorkly v. Stinson*, 97 N. Car. 236.

4. Qualifying and Acting. — Thus, if, as executrix, the widow mortgages the testator's property and treats it as assets, *Churchill v. Bee*, 66 Ga. 621; or if she acts as executrix, receiving for five or six years the rents of the property devised to her under the will, *Buttrick v. Brodhurst*, 3 Bro. C. C. 88, 1 Ves. Jr. 171; she is deemed to have elected to take under the will. See also *Allen v. Boomer*, 82 Wis. 364.

Where a husband became administrator with the will annexed under his wife's will, the executor named therein having renounced, and acted as administrator for two or three years, and filed accounts as such, and received benefits under the will, it was held that he had elected to take under the will and could not claim an estate by curtesy in his wife's property. *Scholl's Appeal*, (Pa. 1889) 17 Atl. Rep. 206.

Statements in Accounts Rendered as Personal Representative. — Where a widow to whom a life estate in all his realty was given by her husband, who also named her as his executrix, stated in one of her reports that by the will she was to have the use of the real estate for life, and in her final report the same statement was in substance repeated, and she consented to the closing of the estate, and her reports were approved upon her petition, it was held that this was a sufficient election to take under the will. *Craig v. Conover*, 80 Iowa 355.

So also where a widow in her administration account as executrix took credit as follows: "By balance of personal property retained by the executrix according to the will." *Cox v. Rogers*, 77 Pa. St. 160.

but merely qualifying¹ and acting as executrix have been held no bar to dower.²

d. ELECTION BY WILL. — It has been held that where a positive act of dissent is required on the part of a widow renouncing the provisions of her husband's will, a declaration of election by will is not a sufficient election, for the will is a mere private declaration of intention which may be changed at any time, and is not a binding instrument until rights become fixed under it by the widow's death.³ But it has been held, on the other hand, that a will, while ambulatory in other respects, is a sufficient declaration of an election, speaking in this respect from its date.⁴

e. IN DOUBTFUL CASES ELECTION A QUESTION FOR JURY. — When the question of election is doubtful, it may be sent to a jury.⁵

f. STATUTES AS TO WIDOW'S ELECTION — (1) *Forms Required in Electing Against Will* — *Must Elect in Person.* — In some of the United States an election by a widow as between the provisions of her husband's will and her dower must be made in person.⁶

Election by Instrument in Writing. — In many jurisdictions a written notice of election is necessary,⁷ and some of the statutes prescribe further formalities in

In *Worthington v. Wiginton*, 20 Beav. 67, stress was laid upon the fact that the widow qualified and acted as executrix, to show that she was acquainted with the provisions of her husband's will and could not, therefore, revoke on the ground of ignorance an election to which her acts had bound her.

1. Qualifying as Executrix. — The mere fact of proving the will and qualifying as personal representative is not an election. *Matter of Gwin*, 77 Cal. 313; *Churchill v. Bee*, 66 Ga. 621; *Tyler v. Wheeler*, 160 Mass. 206.

Where the husband and wife own community property, a wife, by qualifying as executrix, and by claiming and taking under her husband's will, is not deemed to have renounced her rights to one-half of the common property. *Matter of Frey*, 52 Cal. 658.

Where the question is whether a party holds under one or the other of two wills of different testators, the taking out letters testamentary under one is not of itself sufficient evidence of his election to take under that will. *Whitridge v. Parkhurst*, 20 Md. 63.

2. Wife Acting as Executrix Held Not to Have Elected. — Where a testator devised slaves belonging to his wife's separate estate, together with other property, to his wife, it was held that an election to take under the will would not be implied from the facts that the widow propounded her husband's will for probate, qualified as executrix, acted in that capacity for about fifteen months, returned the slaves in her inventory of the estate, charged herself in an annual settlement with their appraised value, kept possession of all the property until her resignation as executrix, and once declared that she intended to abide by the will, notwithstanding she was apprised of her adverse right; for these acts might have been done in her capacity as executrix, and as the period for the presentation of claims against the estate had not expired, it was not likely that she knew or could have ascertained with accuracy the value of the estate, and until so informed she was not bound to make an election. *Reaves v. Garrett*, 34 Ala. 558.

3. Kyne v. Kyne, 48 Iowa 21. See also *Darrah v. Cunningham*, 72 Iowa 123; *Mobley v. Mobley*, 73 Iowa 654.

4. *Re Ingolsby*, 19 Ont. Rep. 283.

5. When Question of Election a Fact for Jury. — *Roundel v. Currier*, 2 Bro. C. C. 73, 1 Swanst. 382 (note to *Dillon v. Parker*); *Weeks v. Patten*, 18 Me. 45, 36 Am. Dec. 696. In *Mayo v. Tudor*, 74 Tex. 471, it was said that the question of election is one of fact for a jury.

6. Election in Person. — In *Kansas* the widow is generally required to elect in person, but if she is unable to appear in person in court, a commission may issue with a copy of the will annexed, to some suitable person to take her election. *James v. Dunstan*, 38 Kan. 290, 5 Am. St. Rep. 741; *Sill v. Sill*, 31 Kan. 248.

In *Ohio* an election by the widow between the provisions of her husband's will and her claim for dower and a distributive share in the personalty must be made in person and in the Probate Court, except where a commission is authorized to take her election. *Millikin v. Welliver*, 37 Ohio St. 465.

Dissent in Open Court. — A statute providing that the widow "shall dissent in open court" imports that she must appear in *propria persona*; and therefore an appearance by attorney is insufficient. *Hinton v. Hinton*, 6 Ired. L. (28 N. Car.) 274.

7. Written Notice of Election. — *Fosher v. Williams*, 120 Ind. 172; *Price v. Woodford*, 43 Mo. 252.

In several states a renunciation of the provisions of the will must be in writing.

Connecticut. — *Lord v. Lord*, 23 Conn. 332.

Illinois. — *Stone v. Vandermark*, 146 Ill. 316.

Michigan. — *Matter of Andrews*, 92 Mich. 449.

Mississippi. — *Wilson v. Cox*, 49 Miss. 544.

New Jersey. — *Thompson v. Egbert*, 17 N. J. L. 459.

In *Kansas* if a widow has not consented in writing to the provisions in her husband's will she is cited to make her election. *James v. Dunstan*, 38 Kan. 290, 5 Am. St. Rep. 741.

In *Pennsylvania* a written notice of election is not essential. *Cunningham's Estate*, 137 Pa. St. 621, 21 Am. St. Rep. 901.

By Deed or Attested Writing. — By statute in *Ontario* a widow's election to take a distributive share in her husband's undisposed-of real

the shape of attestation, filing, recording, and the like.¹

(2) *Failure to Dissent Is an Election to Take under Will.* — Under statute in several of the United States a widow or a surviving husband failing to dissent from the will of the husband or the wife, as the case may be, within a certain time, is conclusively presumed to have elected to take under the will, and an affirmative act of election is not therefore required.² In other states the widow is deemed to have elected unless she elects within the time prescribed, or enters on the lands to be assigned for dower, or commences proceedings for the recovery or assignment thereof.³

When Prevented by Fraud from Dissenting. — But the presumption as to having elected to take under the will does not arise where the widow has been prevented by fraud from dissenting in time.⁴

estate in lieu of dower is required to be made "by deed or instrument in writing attested by at least one witness." Ontario Rev. Stat., c. 108, § 4, subsec. 2; *Re Galway*, 17 Ont. Pr. Rep. 49. See also *Rudd v. Harper*, 16 Ont. Rep. 422.

An election made by will has been held to be sufficient under this statute, and the will, so far as it is a declaration of election, must be held to take effect immediately upon its execution. *Re Ingolsby*, 19 Ont. Rep. 283.

1. Acknowledgment, Filing, Record. — An unacknowledged statement of election by a widow is insufficient in *Indiana* under Rev. Stat. 1894, § 2666, because the statute requires an instrument in writing, acknowledged, filed, and recorded. *Draper v. Morris*, 137 Ind. 169.

Under the *Wisconsin* statute (Rev. Stat., § 2172), the widow's election must be filed by the widow, and a notice of election sealed and acknowledged by her, but not filed at her death, is insufficient, though afterwards filed by her executor within the time allowed by statute. *Church v. McLaren*, 85 Wis. 122.

In *Iowa* the widow's acceptance must be entered of record, and no other evidence thereof is sufficient or competent; but the widow need not file a written election. *Baldozier v. Haynes*, 57 Iowa 683; *Craig v. Conover*, 80 Iowa 355; *Bulfer v. Willigrod*, 71 Iowa 620; *Whited v. Pearson*, 87 Iowa 513.

In *Ohio* an election by a widow between the provisions in the will and her dower in the lands is to be entered of record. *Millikin v. Welliver*, 37 Ohio St. 465. See also *Stockton v. Wooley*, 20 Ohio St. 188; *Stilley v. Folger*, 14 Ohio 610.

In construing a statute requiring an election by the widow to be made within six months and to be made known to the county Common Pleas and entered upon the minutes, it was held that the election should be made a matter of record at some convenient period after the expiration of six months, and that if made before any one is prejudiced by its omission it will suffice; for the statute is not imperative as to the period when the election made shall be recorded. *Ward v. Ward*, 5 West. L. J. (Ohio) 503, 1 Ohio Dec. (Reprint) 257.

The entry in the Probate Court of an election by a widow to take under the will of her deceased husband need not show affirmatively that the judge had explained to her the provisions of the will, and in the absence of averment or proof to the contrary such explanation will be presumed. *Davis v. Davis*, 11 Ohio St. 386.

In *Virginia* the widow's election, when not made in court or in the clerk's office, must be by instrument executed so as to authorize its record, and recorded in such court or clerk's office. Code Va. 1887, § 2271. See also an earlier statute very similar in its provisions construed in *Kinnaird v. Williams*, 8 Leigh (Va.) 400, 31 Am. Dec. 658.

Presumption as to Regularity of Notice Filed. — Where a widow's notice of election is found duly filed, nothing else appearing, the presumption is that it was properly filed; and where the paper is delivered for filing by a reputable attorney, the presumption, in the absence of proof to the contrary, is that he was authorized to file it on behalf of the widow. *Beem v. Kimberly*, 72 Wis. 343.

2. Election by Failure to Dissent from Will. — *Illinois.* — *Cowdrey v. Hitchcock*, 103 Ill. 262; *Warren v. Warren*, 148 Ill. 641; *Carper v. Crowl*, 149 Ill. 465; *Stone v. Vandermark*, 146 Ill. 312.

Indiana. — *Garn v. Garn*, 135 Ind. 690; *Archibald v. Long*, 144 Ind. 451; *Burden v. Burden*, 141 Ind. 471; *Fosher v. Williams*, 120 Ind. 172.

Iowa. — *Kyne v. Kyne*, 48 Iowa 21; *Everett v. Crowskey*, 92 Iowa 333.

Maine. — *Hastings v. Clifford*, 32 Me. 132.

Massachusetts. — *Pratt v. Felton*, 4 Cush. (Mass.) 174; *Reed v. Dickerman*, 12 Pick. (Mass.) 146.

Michigan. — *Matter of Andrews*, 92 Mich. 449.

North Carolina. — *Craven v. Craven*, 2 Dev. Eq. (17 N. Car.) 345.

Ohio. — If the widow fails to make her election within six months she shall retain her dower, but not the provision made for her. *Stilley v. Folger*, 14 Ohio 647; *Luigart v. Ripley*, 19 Ohio St. 24.

Pennsylvania. — *Kennedy v. Johnston*, 65 Pa. St. 454, 3 Am. Rep. 650.

Tennessee. — *Malone v. Majors*, 8 Humph. (Tenn.) 579; *McClung v. Sneed*, 3 Head (Tenn.) 224; *Waterbury v. Netherland*, 6 Heisk. (Tenn.) 512.

See also the several state statutes.

3. Pumphry v. Pumphry, 52 Ark. 193; *Kennedy v. Mills*, 13 Wend. (N. Y.) 555; *Akin v. Kellogg*, 119 N. Y. 441; *Sullivan v. McCann*, (Supreme Ct.) 2 N. Y. Supp. 193; *Matter of Nagel*, (Surrogate Ct.) 35 N. Y. St. Rep. 246; *Matter of Smith*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 269; *Duffy v. Duffy*, 70 Hun (N. Y.) 135.

4. Fraud on Widow. — *Smart v. Waterhouse*, 10 Yerg. (Tenn.) 94; *McDaniel v. Douglas*, 6 Humph. (Tenn.) 229.

2. Time Within Which Election Must Be Made—*a.* AT COMMON LAW. — At the common law no time was fixed in which an election was to be made.¹

Lapse of Time Where Equities Supervene. — But a party having a right of election may permit the enjoyment of the property by others until it would be inequitable to disturb it.² It has sometimes been said that the donee must have a reasonable time in which to make his election,³ and in some instances the time within which an election must be made has been fixed by a decree of court.⁴

***b.* BY STATUTE.** — In most of the United States the time within which an election must be made by a widow, as between the provisions made for her in her husband's will and her dower or statutory allowances, is prescribed by statute, and unless made within the time prescribed she is barred of her right to elect.⁵ Thus, in some states, she must elect within a certain time after her

Where a widow has been prevented by fraud from dissenting to her husband's will, the executor will be deemed a trustee, and the widow will in equity be placed in the same situation in every respect as if she had dissented in time, and therefore the act of limitations will not bar her from relief. *Smart v. Waterhouse*, 10 Yerg. (Tenn.) 94.

But in *Waterbury v. Netherland*, 6 Heisk. (Tenn.) 512, it seems that even if the executor had fraudulently deceived the widow as to the time within which she might make her election, yet if in fact she was fully advised of the condition of the estate, and did elect to take under the will, such fraudulent advice would not prevent the operation of the statute, as courts of equity relieve only against fraud which is operative. In this case one of the executors, a lawyer, had advised the widow that she had two years within which to make the election, and she had not been informed of the mistake until after the lapse of more than a year from the date of the probate of the will. No fraud having been charged or suggested, it was held that the maxim *ignorantia legis neminem excusat* applied, and that failing to dissent within the time prescribed she must be presumed to have elected; nor would she be relieved from the operation of the statute by the fact that by the events of the war the provision made for her in the will had been rendered wholly disproportionate to the value of the estate of her husband.

1. Common-law Rule as to Time of Election. — *Brice v. Brice*, 2 Moll. 21; *Spread v. Morgan*, 11 H. L. Cas. 588; *Stephens v. Gibbs*, 14 Fla. 353; *McGinnis v. McGinnis*, 1 Ga. 496; *Piercy v. Percy*, 19 Ind. 467. See also *Beaulieu v. Cordigan*, Amb. 535, note.

Where the Interest of the Donee Is Reversionary. — The liability of a party to be called upon to elect will not be affected by lapse of time so long as his interest in either of the subject-matters of election is reversionary. *Padbury v. Clarke*, 2 Macn. & G. 298.

As to Laches as a Bar, see *Clark v. Hershy*, 52 Ark. 473. Here delay was held no bar, the donee being ignorant of her rights and the delay occurring while business was suspended on account of the civil war.

2. When Inequitable to Disturb Enjoyment of Property. — *Tibbits v. Tibbits*, 19 Ves. Jr. 663; *Dewar v. Maitland*, L. R. 2 Eq. 838; *Austell v. Swann*, 74 Ga. 278. See also *Young v. Young*, 51 N. J. Eq. 491; *Yate v. Moseley*, 5 Ves. Jr. 480.

3. Reasonable Time to Elect. — *McLaren v. Clark*, 62 Ga. 116; *Reed v. Dickerman*, 12 Pick. (Mass.) 146; *Hovey v. Hovey*, 61 N. H. 599.

Illustrations. — Where a bequest was made to an infant, to be paid to him at majority upon condition that he should give up certain land owned by him, it was held that as no time had been prescribed within which he was to elect, he was entitled to a reasonable time after coming of age to make his election. *Davis v. Kriger*, 69 Miss. 39.

In *Sopwith v. Maughan*, 30 Beav. 235, Sir John Romilly, M. R., said: "When is a widow bound to make her election? It certainly is not necessary that she should do so within twenty-four hours after the testator's death, and if the matter had come before the court it would have given her some reasonable time to consider, * * * and the court might not consider twelve months after the testator's death an unreasonable time."

4. Time Fixed by Decree of Court. — *McElfresh v. Schley*, 2 Gill (Md.) 182.

Illustrations. — In *Streatfield v. Streatfield*, Cas. temp. Talb. 176, 1 White & T. L. Cas. 405, the infant plaintiff was allowed six months after he came of age to make his election.

In *Stokes v. Norwood*, 44 S. Car. 424, the widow was allowed thirty days.

5. Statutory Time of Election. — See generally the codes and statutes of the several states and the authorities cited in the notes immediately succeeding.

In Connecticut, where a provision is made for the widow in lieu of dower she must, within two months next after the time limited for the exhibition of claims against her husband's estate, give notice in writing whether she elects to accept the provision or claim her dower. *Lord v. Lord*, 23 Conn. 332.

In Kansas election by a widow must be made within thirty days after service of a citation issued to her after the probate. *Gen. Stat. Kan. 1897, c. 110, § 41*; *James v. Dunstan*, 38 Kan. 290, 5 Am. St. Rep. 741.

In Ohio, within one year from such time. *Rev. Stat. 1894, § 5963*; *Bowen v. Bowen*, 34 Ohio St. 164.

The year begins to run from the date of the service of the citation; and where a widow, appearing in open court without service of a citation, declines to make her election, she does not thereby waive the issuing and service of a citation, or estop herself from denying

husband's death; ¹ in others, within a certain time after probate of the will; ² and in others, within a certain time after letters testamentary are issued. ³

V. EFFECT OF DEATH BEFORE ELECTION. — When a donee upon whom an election devolves without having elected, dies either in the lifetime of him whose donation created the obligation to elect or afterwards, the question arises whether those who succeed to the donee's rights are entitled to elect. The cases are not numerous nor harmonious, and it may be that the matter turns somewhat upon the nature of the gift and the title which devolves. Where the next of kin of a donee who died during the donor's life succeeded to personal property belonging to the donee of which the will attempted to dispose, and at the same time took legacies in their own right under the will, election was enforced against them. ⁴ So where the benefit conferred in a will was personal property and the donee's property disposed of therein was also personal property, the next of kin of the donee who died without having elected, since they were entitled to both funds, were permitted to elect. ⁵ But where, upon a donee's death without election, the property beneficially devised to him, being land, went to his heir, while the property devised away from him, being personalty, would have gone to his personal representatives, it

that a citation had been issued and served. *Bowen v. Bowen*, 34 Ohio St. 164.

1. Within One Year After Husband's Death. — *Pumphry v. Pumphry*, 52 Ark. 193; *Matter of Andrews*, 92 Mich. 449; *Kennedy v. Mills*, 13 Wend. (N. Y.) 555; *Akin v. Kellogg*, 119 N. Y. 441; *Sullivan v. McCann*, (Supreme Ct.) 2 N. Y. Supp. 193; *Bradhurst v. Field*, (Supreme Ct.) 10 N. Y. Supp. 452; *Matter of Smith*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 269; *Matter of Nagel*, (Surrogate Ct.) 35 N. Y. St. Rep. 246; *Anderson's Appeal*, 36 Pa. St. 492; *Kinnaird v. Williams*, 8 Leigh (Va.) 400, 31 Am. Dec. 658; *Albright v. Albright*, 70 Wis. 528.

No Extension of Time When Will Contested. — In *Albright v. Albright*, 70 Wis. 528, it was held that a contest of the will which gave rise to the necessity for an election, and the stay of proceedings pending an appeal to the Circuit Court from the Probate Court, did not extend the time within which a widow is required to make her election by the Wisconsin statute.

In New York, however, it is provided by statute that "where the time within which such election may be made has begun to run, and has not expired, it may be enlarged by the order of any court competent to pass upon the accounts of executors, administrators, or testamentary trustees, or to admeasure dower, upon an affidavit showing the tendency of a proceeding to contest the probate of the will containing such jointure, devise, or pecuniary provision, or of an action to construe or set aside such will." *Bradhurst v. Field*, (Supreme Ct.) 10 N. Y. Supp. 452.

2. Within a Fixed Time After Probate of Will. — In some states a widow is obliged to elect within six months after probate of the will. *Hastings v. Clifford*, 32 Me. 132; *Pratt v. Felton*, 4 Cush. (Mass.) 174; *Atherton v. Corliss*, 101 Mass. 40; *Wilson v. Cox*, 49 Miss. 544; *Thompson v. Egbert*, 17 N. J. L. 459; *Craven v. Craven*, 2 Dev. Eq. (17 N. Car.) 345; *Reid v. Campbell*, Meigs (Tenn.) 378; *Malone v. Majors*, 8 Humph. (Tenn.) 577; *Demoss v. Demoss*, 7 Coldw. (Tenn.) 258.

In others the widow is allowed one year after probate of the will within which to elect.

Hilliard v. Binford, 10 Ala. 977; *Stephens v. Gibbes*, 14 Fla. 353; *Wilson v. Fridenberg*, 21 Fla. 386; *Archibald v. Long*, 144 Ind. 451; *Huhlein v. Huhlein*, 87 Ky. 247; *Dougherty v. Barnes*, 64 Mo. 159; *Gant v. Henly*, 64 Mo. 162. See also *Price v. Woodford*, 43 Mo. 252; *Ewing v. Ewing*, 44 Mo. 23.

Insane Widow. — In *Wright v. West*, 2 Lea (Tenn.) 78, it was held that a widow who was put to an election by her husband's will, and who was insane at the time of his death and continued to be so, might by her next friend file a bill in equity asking that her dower be assigned to her, after the expiration of the time within which a widow is required by the *Tennessee* statute to make her election.

3. Within a Fixed Time After Issuance of Letters Testamentary. — In *Georgia* and *Illinois* election by a widow must be made within one year after letters testamentary are issued. *Smith v. King*, 50 Ga. 192; *Cowdrey v. Hitchcock*, 103 Ill. 262; *Stone v. Vandermark*, 146 Ill. 312.

In *Maryland*, within six months from such time. *Rev. Code Maryland*, 1878, p. 475, §§ 227-230.

Widow Remaining in Possession of Land. — But in *Smith v. King*, 50 Ga. 192, it was held that the statute of limitations does not run against the widow's application for dower if she remains in possession of the land until the application is made. *Smith v. King*, 50 Ga. 192.

4. Cooper v. Cooper, L. R. 7 II. L. 63, L. R. 6 Ch. 15.

5. Fytche v. Fytche, L. R. 7 Eq. 494. Here the next of kin of a donee who died intestate without having elected were permitted to elect as to stock belonging to the donee which was by the will bequeathed away from her after her death, and personal property which she took beneficially under the will. A better report of the case is to be found in 19 L. T. N. S. 343; that in the Law Reports fails to mention the gift over after the donee's death, and this was the provision on which the case turned. See 1 *Jarman on Wills* (5th ed.) 435, note.

was held that there was no one who could elect. The donees disappointed by the failure of the personal bequest were, however, compensated, and thus a result was reached much the same as if election had been allowed.¹

Widow's Election Between Dower and Will. — The widow's right of electing between dower and a provision in her husband's will has frequently been held to be a personal right which dies with her.² It would seem that this could not be otherwise, both because the right is one regulated by statutes which confer it upon the widow and no one else,³ and because, her dower being a mere life estate, one alternative necessary to an election is in general ended by her death.

Election Between Alternative Gifts. — In the case of election between alternative gifts, the heir or executor may elect if a present interest passes to the donee, but the election must be personal where nothing passes until the election is made.⁴

Election Presumed. — Where the benefit of electing in a certain way was marked, courts have in some instances presumed that the beneficial course was followed.⁵ Under modern statutes which presume an election by the widow

1. No Election Proper After Death of Person Who Should Elect. — In *Pickersgill v. Rodger*, 5 Ch. Div. 163, Sir George Jessel, M. R., said: "It is not true that any one can now elect when the proper person to elect is dead." In this case S. died, leaving a will by which she left certain real estate to her son J., and attempted to dispose of personal estate which she had previously settled in his favor. J. died while S. was living, and left a will in which he devised such real estate as he should be entitled to at his death, and bequeathed his personal property on certain trusts. It was held that, under a statute which provided that the death of the devisee or legatee in the testator's life should not produce a lapse, J.'s estate was the same under S.'s will as if he had survived her; that the devisee under J.'s will took the realty, and the title to the personalty to which J. was previously entitled was not affected by S.'s will; that there could be no election in the ordinary sense, but as J.'s devisee took title to the real estate under S.'s will, he could take it only *cum onere*, and the burden of compensating the persons disappointed by the failure of the personal bequest in S.'s will fell upon the realty.

Donee Dying During Testator's Life, the Devise Lapsed. — Before the statute, if a devisee of realty died during the life of the testator, the devise lapsed, so that the heir took as heir and was not therefore put to an election. *Pickering v. Stamford*, 3 Ves. Jr. 337.

2. Widow's Right to Elect Does Not Devolve. — In the *United States* the uniform current of authority is that the right of a widow to elect, being purely personal to herself, is terminated at her death, and therefore does not descend to her heirs or representatives. *Eltzroth v. Binford*, 71 Ind. 456; *Fosher v. Williams*, 120 Ind. 172; *Collins v. Carman*, 5 Md. 504; *Boone v. Boone*, 3 Har. & M. (Md.) 95; *Sherman v. Newton*, 6 Gray (Mass.) 307; *Welch v. Anderson*, 28 Mo. 293; *Davidson v. Davis*, 86 Mo. 444; *Howell v. Newman*, 59 Hun (N. Y.) 538; *Doty v. Hendrix*, (Supreme Ct.) 16 N. Y. Supp. 286; *Crozier's Appeal*, 90 Pa. St. 384, 35 Am. Rep. 666; *Church v. McLaren*, 85 Wis. 122. See also *Jackson's Appeal*, 126 Pa. St. 105.

In *Sherman v. Newton*, 6 Gray (Mass.) 307, it was held that under the statute giving the widow six months after probate of the husband's will within which to elect, the right to elect for the widow did not pass to her administrator, although she died before probate of the will.

A testator made provisions by will for his wife, who was insane at its date, and continued so until her own death, more than four years after that of her husband, never renouncing the will, but enjoying the benefits thereby provided for her during her life. It was held that upon her death her administrator could not make the renunciation for her, nor, by reason of her insanity, claim her legal share of the estate, notwithstanding the provisions of the will. *Collins v. Carman*, 5 Md. 504.

Where a husband devised his wife's jewels to the wife for life, remainder to his son, and the wife made no election or claim to have the jewels as her paraphernalia, it was held that her administrator could not make the claim. *Clarges v. Albemarle*, 2 Vern. 247, Nels. Ch. Rep. 174.

3. Collins v. Carman, 5 Md. 503.

4. When Election Between Gifts Devolves. — In *Heyward's Case*, 2 Coke 35, it was said: "When nothing passeth to the feoffee or grantee before the election, to have one thing or the other, there the election ought to be in the life of the parties, and the heir or executor cannot make the election. But when an estate or interest passeth presently to the feoffee, donee, or grantee, there election may be made by them or by their heirs or executors. When a thing passeth to the donee or grantee, and the donee or grantee hath election in what manner or degree he will take it, there the interest passeth presently, and the party, his heirs, or executors may make election when they will." These propositions are repeated in *Co. Litt.* 145 *a*. These rules appear to rest upon the idea that if the estate passes before election, rights under it vest in the heir or executor; if nothing passes before, then the heir or executor succeeds to and can claim no right. The distinction is that between conditions precedent and subsequent.

5. Beneficial Election Presumed. — *Merrill v.*

for or against her husband's will unless she elects otherwise with certain prescribed formalities, effect is given to the presumption if the widow dies without electing, although the whole period within which she might have elected has not expired.¹

VI. EFFECT OF ELECTION — 1. Persons Bound by Election. — An election once made, expressly or impliedly, binds not only the legatee or devisee, but his heirs, representatives, and all other persons claiming under him.² When, how-

Emery, 10 Pick. (Mass.) 507; Yawger v. Yawger, 37 N. J. Eq. 216. See also Sewell v. Smith, 54 Ga. 567.

Where a Testator's Will Was Not Discovered Until After His Widow's Death it was held that the court would make that election for the benefit of her estate which would be the more advantageous, for she was deprived of the privilege of electing by circumstances beyond her control. Spruance v. Darlington, (Del. 1894) 30 Atl. Rep. 663.

Presumption as to Election Where No Steps Taken Until After Time for Election Had Expired.

— A widow whose apparent interest was to take a child's part in lieu of dower, and to whom, by division made substantially in the mode prescribed by law for dividing estates in kind, was assigned a child's part of her late husband's realty as well as personalty, which she accepted and appropriated, may, after her death, be presumed to have elected against her dower in due time (nothing to the contrary appearing), though no steps for making the division were taken until after the time for so electing had expired. Sloan v. Whitaker, 58 Ga. 319.

1. Fosher v. Guilliams, 120 Ind. 172; Millikin v. Welliver, 37 Ohio St. 465; Jackson's Appeal, 126 Pa. St. 105. See also Truett v. Funderburk, 93 Ga. 686.

In Doty v. Hendrix, (Supreme Ct.) 16 N. Y. Supp. 284, a widow dying before election and before the expiration of the time in which she was entitled to elect was presumed to have taken under the will, such a course being for her benefit.

Whole Estate Bequeathed and Devised to Widow. — Where a husband devised and bequeathed his entire estate, both real and personal, to his wife, and the wife died without manifesting an election to take under the will in the manner required by law, it was held, nevertheless, that as the property which she received under the will included dower, she would be held to have taken under the will. Baxter v. Bowyer, 19 Ohio St. 490. See also Taylor v. Loller, (Ky. 1887) 3 S. W. Rep. 165.

2. What Persons Bound by Election. — Dewar v. Maitland, L. R. 2 Eq. 834; Ardesoife v. Bennett, 2 Dick. 463, cited in Campbell v. Ingilby, 21 Beav. 582; Archer v. Pope, 2 Ves. 525; Tomkyns v. Ladbroke, 2 Ves. 593; Worthington v. Wiginton, 20 Beav. 70; Whitely v. Whitley, 31 Beav. 173; Cory v. Cory, 37 N. J. Eq. 195; Wells v. Petree, 39 Tex. 419; Penn v. Guggenheimer, 76 Va. 839. See also Barrow v. Barrow, 4 Kay & J. 409, 4 Jur. N. S. 1050.

But there are early cases to the effect that where a party has accepted benefits under an instrument, without explicitly electing, if his representatives can place the other party in the same situation as if those benefits had not

been accepted, they may renounce them and elect for themselves. Tyssen v. Benyon, 2 Bro. C. C. 5; Moore v. Butler, 2 Sch. & Lef. 268; Dillon v. Parker, 1 Swanst. 385.

Setting Aside or Revoking Election. — A party having made an election cannot in general have it set aside or revoked. Evans's Appeal, 51 Conn. 435; Stephens v. Gibbs, 14 Fla. 331; Ashlock v. Ashlock, 52 Iowa 319; Katz v. Schnaier, 87 Hun (N. Y.) 346; Buist v. Dawes, 3 Rich. Eq. (S. Car.) 281; Cannon v. Apperson, 14 Lea (Tenn.) 592; Penn v. Guggenheimer, 76 Va. 839; Cooper v. Cooper, 77 Va. 199.

Election under Invalid Will Is Not Binding. — Truett v. Funderburk, 93 Ga. 686. See also *supra*, this title, *Manner and Time of Election*, subdiv. 1. b. (2) *Knowledge of Rights*.

Remainderman Not Bound. — A person entitled to an interest in property by way of remainder is not bound by an election made by a person having a prior interest in such property. Ward v. Baugh, 4 Ves. Jr. 623. See also Long v. Long, 5 Ves. Jr. 447; Hutchinson v. Skelton, 2 Macq. 492.

A man, on his marriage, covenanted to purchase and settle lands of four hundred pounds a year to the use of himself for life, then to his wife for life, remainder to the heirs of their two bodies; and if he died before a settlement made, the wife might elect to have the four hundred pounds a year, or three thousand pounds in money in lieu of dower and thirds. There being several children of the marriage, and the husband dying before any purchase and settlement was made, a bill was brought by the creditors against the wife, who was also administratrix of her husband, for a discovery and account of assets. The wife by answer set forth the articles, and that, no purchase or settlement having been made, she claimed and elected to have three thousand pounds paid to her according to the articles; and the children by their answer insisted to have four hundred pounds per annum purchased, and settled according to the articles expectant on the mother's decease; by which means the mother and children would have exhausted all the assets. It was held, notwithstanding the election of the mother, that a settlement of four hundred pounds per annum on the wife for life, remainder to the children *nunc pro tunc*, should be made. Hancock v. Hancock, 2 Vern. 605.

Right to Separate Election. — When several persons are put to an election by a will, each may elect separately. Some of such persons may elect to take one way and some the other. Fytche v. Fytche, L. R. 7 Eq. 494. See also Dunlap v. Ingram, 4 Jones Eq. (57 N. Car.) 187.

Election as Affecting Competency of Witness. — A person having elected to take against a will, is not competent to testify in favor of it,

ever, a wife, during coverture, is put to an election between real estate to which she is entitled as heir, and a legacy given her for her separate use, by the will of the ancestor from whom she inherits such real estate, her election to take the legacy will not affect the marital rights of her husband, who derives no benefit from the will.¹

Purchaser for Value Without Notice. — It has been held that a right to land which devolved under a will assuming to dispose thereof, in consequence of the election of its real owner to take benefits under the will, was inferior to the title of a purchaser of the land for value without notice from the record owner thereof.²

2. When Donee Elects to Take Under Instrument — *a. IN GENERAL.* — Election to take under a will imposes an obligation, to the extent at least of the benefit taken, to give effect to the whole instrument, by the relinquishment of every inconsistent right, and carries with it the burden of complying with the requests or directions attached to the devise.³

b. WIDOW'S RIGHTS — (1) *As Heir.* — It has been said that the election of the widow to take under a will does not estop her from contesting the will, denying the validity of its devises or setting up her claims as heir.⁴

where his interest under a testacy would be more than under an intestacy. *Dickinson v. Dickinson*, 61 Pa. St. 401.

1. *Brodie v. Barry*, 2 Ves. & B. 127. See also *Griggs v. Gibson*, L. R. 1 Eq. 685.

2. *Mansfield Coal, etc., Co. v. Boice*, 165 Pa. St. 27.

3. **General Effect of Election.** — *Whistler v. Webster*, 2 Ves. Jr. 372; *Dillon v. Parker*, 1 Swanst. 404. See also *Huhlein v. Huhlein*, 87 Ky. 247; *Wells v. Petree*, 39 Tex. 419. And see *supra*, this title, *Definition, Foundation, and Relations of Doctrine*.

Under the Civil Law the effect of an election to take under the will varied according as the subject-matter was pecuniary or specific. If the property of which the will assumed to deprive the devisee was pecuniary, he was compelled to perform the bequest to the extent of the principal and interest which he had received. If the property was specific, then a peremptory obligation was imposed upon him to deliver the specific object, although exceeding the amount of the benefit conferred upon him. *Dillon v. Parker*, 1 Swanst. 396, note *a*; 2 Story's Eq. Jur., § 1079.

Statute of Limitations Does Not Run. — Where a testator devises his own estate or a part of it to a person, and also devises that person's estate to another, and the first devisee accepts the estate thus devised to him, such first devisee thereafter holds his own estate, which was given by the testator to the second devisee in trust for such second devisee; and the right of such second devisee is not barred by time, for the trust continues all the time. *McQuerry v. Gilliland*, 89 Ky. 434.

4. Right of Widow as Heir Not Affected by Election to Take under Will. — *Carter v. Fayette County*, 16 Ohio St. 354, *per Welch, J.* See also *Jennings v. Jennings*, 21 Ohio St. 81.

Illustration. — In *Rice v. Saxon*, 28 Neb. 380, it was held that when a widow accepted the provisions of the will of her deceased husband in lieu of dower, whereby she took an estate during widowhood, she could, as between the heirs at law and herself, claim nothing pertaining to such husband's estate, except in accordance with the terms of his will; but that

when the provisions of such will had lapsed by her marriage, the fact of such acceptance did not debar her from taking a part of such estate by inheritance from her own son.

Widow Taking as Trustee. — In *Beshore v. Lytle*, 114 Ind. 8, a will provided as follows: "It is my will that my wife S. have the sole control, use, and benefit of the remainder of my estate, real and personal, for the support and maintenance of herself and our child G., * * * so long as she remains my widow." The widow elected to accept the provisions of this will, and afterwards married. The court, in construing this will and determining the rights of the beneficiaries, said: "The will conferred upon the appellee [the wife] no separate or individual estate in the property of the testator. It simply placed his property in her hands for a limited time for the joint use and benefit of herself and the appellant [the child] during that period of time. It was not obligatory upon the appellee to accept the control and use of the property on the terms proposed, but when she did so accept, the property became a trust estate in her hands during her widowhood, and she was thereby made a trustee, charged with the management and control of the property, coupled only with a beneficiary interest in its use during the continuance of the trust. When the appellee's widowhood terminated on account of her subsequent marriage, the trust was at an end. As the will made no further disposition of the testator's property, whatever remained of his estate after the trust expired became subject to the law governing the estates of persons dying intestate, and descended accordingly. * * * When, therefore, the will had expended its force and the purpose for which the trust was created had been accomplished, one-half of the estate, remaining undisposed of, descended to the appellant and the other half to the appellee" under the statute. *Rev. Stat. Ind.*, 1881, § 2486.

Copyhold Estates. — An annuity given to the widow "in lieu and satisfaction of all dower and thirds, or other claims and demands which she could or might otherwise have had or been entitled to" out of the testator's estate, will

(2) *As Dowress* — (a) **In Land Conveyed During Coverture.** — An election to take the provisions of a will, not expressed or implied to be in lieu of dower, will not bar the widow of her dower in lands conveyed by her husband during the coverture by a deed or mortgage in which she did not join.¹ But if the provision be given in lieu of dower and the widow accepts it, she cannot also claim dower in such lands.² The widow will also be barred in such lands if the claim of dower be inconsistent with the provisions of the will.³

(b) **In Land Sold under Judicial Sale.** — A widow is not put to her election between a provision in her husband's will and dower in lands of her husband sold under judicial sale, her right in which she had not released.⁴

(c) **In Land Discovered After Election.** — When a widow elects to take dower in the estate of her husband, and it is assigned to her, that election estops her from claiming a child's part under the *Georgia* statute in any land which may afterwards be discovered, and which belonged to her husband at the time of his death. She may still, however, assert her right to dower thereunder, and

not bar her right, as customary heir to her husband, as to copyhold lands undisposed of; for any release of her claims and demands would only allow the land to descend to her, and she is not therefore put to her election between the annuity and the copyhold estates. *Norcott v. Gordon*, 14 Sim. 258.

1. **Entitled to Dower in Lands Conveyed During Coverture.** — *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Braxton v. Freeman*, 6 Rich. Eq. (S. Car.) 35, 57 Am. Dec. 775; *Higginbotham v. Cornwell*, 8 Gratt. (Va.) 83, 56 Am. Dec. 130. See also *Hall v. Smith*, 103 Mo. 289.

2. **Not Entitled to Dower in Such Lands, When Widow Accepts a Provision in Lieu of Dower.** — *Steele v. Fisher*, 1 Edw. Ch. (N. Y.) 435; *Palmer v. Voorhis*, 35 Barb. (N. Y.) 479; *Stokes v. Norwood*, 44 S. Car. 424. In the first of these cases it is said: "It would involve the law in an absurdity if, under such circumstances, a widow was permitted to say that a substitute for dower should only be so in regard to a portion of the property to which it is attached, leaving another portion unprotected, notwithstanding the substitute was intended for the whole and entire right."

Under Statutes providing that the provision is to be deemed as intended to be in lieu of dower, unless it plainly appears that it is to be in addition thereto, it has generally been held that a widow electing to take the provision made for her is not entitled to dower in lands previously conveyed by her husband by deed in which she did not join. *Haynie v. Dickens*, 68 Ill. 267; *Corry v. Lamb*, 45 Ohio St. 203; *Spalding v. Hershfield*, 15 Mont. 253. Compare *Borland v. Nichols*, 12 Pa. St. 38, 51 Am. Dec. 576; *Leinaweaver v. Stoeve*, 1 W. & S. (Pa.) 160.

Dower "in Lands of Her Husband." — When by one statute the widow is entitled to dower in all lands whereof her husband was seized "at any time during the marriage," unless lawfully barred thereof, an acceptance by her of the provisions of her husband's will does not bar her right of dower in lands previously conveyed by the husband by deed in which she did not join, when by another statute she is required to make her election between the provisions made for her in her husband's will and her dower interest in "the lands of her hus-

band;" for the latter statute has reference only to such lands as the husband dies seized of; if he had previously conveyed them they would not be his. *Westbrook v. Vanderburgh*, 36 Mich. 30.

In West Virginia, c. 78, § 11, of the code provides that a widow may, within a year from the time when her husband's will is probated, renounce the provisions made therein for her, and that "if such renunciation be made, or if no provision be made for her in the will, she shall have such share of her husband's real and personal estate as she would have had if he had died intestate, leaving children; otherwise she shall have no more thereof than is given her by the will." Chapter 70, § 4, of such code provides that "if any estate, real or personal, intended to be in lieu of her dower, shall be conveyed or devised for the jointure of the wife, such conveyance or devise shall bar her dower of the real estate, or the residue thereof." Where a husband during coverture conveyed a tract of land by deed in which his wife did not join, and afterwards made a will in which he made a provision for his wife in both real and personal property, and the widow failed to renounce the will within one year, it was held that, construing together the code provisions above recited, the widow was entitled to dower in the land conveyed during coverture, notwithstanding her failure to renounce the will, unless upon a fair construction of the will it should plainly appear that the testator intended to exclude her from dower in such land. *Shuman v. Shuman*, 9 W. Va. 50, approved in *Cunningham v. Cunningham*, 30 W. Va. 599.

In Massachusetts it was held that, under the statute providing that if the widow makes no waiver of the provision made for by her husband's will she shall not be endowed of his lands unless it plainly appears that the testator intended "that she should have such provisions in addition to her dower," the widow will not be entitled to dower in the lands conveyed during the coverture, where she has not waived the provision made for her. *Buffinton v. Fall River Nat. Bank*, 113 Mass. 246.

3. *Allen v. Pray*, 12 Me. 138; *Fairchild v. Marshall*, 42 Minn. 14.

4. **Land Sold under Judicial Sale.** — *Corriell v. Ham*, 2 Iowa 558.

thus carry out the previous election. She cannot take dower in part of the estate and claim a child's part or interest in any other land which may subsequently be discovered to belong to her husband at the time of his death. Having once made her election, she is bound by it.¹

(d) **In After-born Child's Part.** — While a widow will be prevented from claiming dower as against devisees in a will, where she elects to take under the will by failing to renounce its provisions, this rule does not apply as to her claim to dower in that part of the estate which by statute, independently of the will, is given to a child born after the making of the will; as to such part she may claim her dower, as well as the provision made for her in the will.²

(3) **As to Intestate Property.** — When a part of the husband's property is undisposed of by his will, it becomes a question how the widow's election to take under the will affects her rights in the property as to which the husband dies intestate. It has been held that a devise in lieu of dower does not prevent the widow from claiming a distributive share of the personalty undisposed of,³ and the same rule applies in case of a bequest in lieu of dower.⁴ Whether a gift in lieu of dower operates to prevent the widow claiming dower in real property undisposed of by the will is a question about which some difference of opinion exists.⁵

1. **Dower in Land Discovered After Election.** — *Hamilton v. Phillips*, 83 Ga. 293, *per* Simmons, J.

2. **Dower in After-born Child's Part.** — *Ward v. Ward*, 120 Ill. 112.

3. **Devise in Lieu of Dower Does Not Bar Share of Personalty.** — *Kempton*, Appellant, 23 Pick. (Mass.) 163; *Parker v. Linden*, 44 Hun (N. Y.) 518, *affirmed* 113 N. Y. 28; *Edsall v. Waterbury*, 2 Redf. (N. Y.) 48; *Bane v. Wick*, 14 Ohio St. 505; *Carman's Appeal*, 2 Penny. (Pa.) 332; *Reed's Estate*, 82 Pa. St. 431; *Demoss v. Demoss*, 7 Coldw. (Tenn.) 256. See also *Rudd v. Harper*, 16 Ont. Rep. 422. And compare *Leake v. Watson*, 60 Conn. 513.

Thus the widow is not barred of her intestate share where the partial intestacy is due to the lapse of a legacy through the death of the legatee during the testator's life, *Hatch v. Bassett*, 52 N. Y. 359; or is owing to the incapacity of the legatee, *Candfield v. Crandall*, 4 Dem. (N. Y.) 111.

A provision for a wife given "in lieu of dower and thirds at common law" does not bar a distributive share in the undisposed-of personalty. *Colleton v. Garth*, 6 Sim. 19.

The acceptance of a devise not given in lieu of dower is held to be no bar to a distributive share in the personal property not disposed of by the will. *Vernon v. Vernon*, 53 N. Y. 351; *Lefevre v. Lefevre*, 59 N. Y. 434. As, by statute in *New York*, a devise bars dower unless the widow renounces within a year (1 N. Y. Rev. Stat. 741, § 41), the fact that the devisees in these cases were not expressed to be in lieu of dower is perhaps unimportant, though referred to by the court.

4. *Nelson v. Pomeroy*, 64 Conn. 257; *Johnson v. Goss*, 132 Mass. 274; *Philleo v. Holliday*, 24 Tex. 38.

5. **Whether Devise Bars Dower in Realty Undisposed Of.** — The acceptance of a devise intended to bar dower, or given that effect by statute, has been held to bar the widow's claim to dower in the real estate undisposed of. *Malone v. Majors*, 8 Humph. (Tenn.) 577; *McClung v. Sneed*, 3 Head (Tenn.) 218; *Hardy*

v. Scales, 54 Wis. 452. See also *Leake v. Watson*, 60 Conn. 498; *Jackson's Appeal*, 126 Pa. St. 105.

To the same effect is *Swihart v. Swihart*, 7 Ohio Cir. Ct. Rep. 338, 4 Ohio Cir. Dec. 624, which rests on the assumed authority of *Corry v. Lamb*, 45 Ohio St. 203. But the latter case is *distinguished*, *Swihart v. Swihart* is *disapproved*, and the contrary doctrine that a devise in lieu of dower does not affect the widow's claim to dower in the undisposed-of realty is declared in *In re McDonald*, 4 Ohio Dec. 396. See also *Bane v. Wick*, 14 Ohio St. 505; *Mitchener v. Atkinson*, Phil. Eq. (62 N. Car.) 26.

In *Indiana* it has been held that the widow's acceptance of a devise under her husband's will, which bars her from her statutory substitute for dower in the lands disposed of by the will, does not bar her of her statutory dower in lands as to which her husband died intestate on account of a lapsed devise. *Collins v. Collins*, 126 Ind. 559.

And in *New Jersey* the same ruling has been made in respect to the widow's dower rights in the lands of her husband as to which he died intestate. *Van Arsdale v. Van Arsdale*, 26 N. J. L. 411.

In *Mississippi*, whether or not the widow's dower right in her husband's undisposed-of realty is affected by her acceptance of a devise under his will, yet where, by statute, she is the sole heir of her husband in lands as to which he died intestate, and the rights of others are not, therefore, involved, her right to inherit the undisposed-of lands as heir is not affected by the acceptance of such devise. *Wall v. Dickens*, 66 Miss. 655.

In *South Carolina* a devise in lieu of dower was held not to exclude the widow from dower in real estate acquired by her husband after the making of the will, as to which he died intestate. *Hall v. Hall*, 2 McCord Eq. (S. Car.) 269.

Of course a devise, however large, which was not intended to bar dower does not affect the widow's right to dower in realty undis-

A Gift in Satisfaction of All Claims Against the Testator's Estate has been held to be no bar in respect of the widow's right to a distributive share of the undisposed-of realty, when the partial intestacy results from the failure of a complete testamentary scheme.¹ This decision has, however, been disapproved in some jurisdictions,² and it appears not to be applicable where the intestacy is apparent on the face of the will.³ And a similar declaration in a settlement bars the widow.⁴

(4) *As to Lands Situated in Several Jurisdictions.*—Since it is a general principle of law that one cannot claim both under a will and against it, it seems well settled that where a will disposes of lands in two or more jurisdictions an election to accept or reject the provisions of such will made by the widow in one jurisdiction is binding upon her in all the jurisdictions where such lands are situated.⁵

Place of Election.—It has been said that the widow's election in such a case must be made in the forum of the original probate.⁶

Time and Manner of Election.—In *Arkansas* it has been decided that as to the rights of the widow in the lands of her husband and the time and manner of making an election, the *lex rei sitæ* governs in the construction of foreign wills;⁷ while in *Ohio* it has been said: "It may not be necessary, in the case of a foreign will, that she [the widow] make her election within the time, or in the manner, prescribed by the statute in the case of domestic wills. Nevertheless, the will, properly construed, having created a case for election, at common law, such election must be made whenever the protection of the rights of other interested parties makes it necessary, and in such manner as will be binding upon her."⁸

(5) *As Against Creditors, Legatees, and Devisees*—(a) **Subject to Debt.**—In the absence of a statutory provision to the contrary, according to the weight of authority, a widow who elects to take the provision made for her by the will of her deceased husband in lieu of dower takes the property devised or

posed of. *Havens v. Havens*, 1 Sandf. Ch. (N. Y.) 324; *Rudd v. Harper*, 16 Ont. Rep. 422.

1. *Pickering v. Stamford*, 3 Ves. Jr. 492, where the widow was held not to be barred by such a gift of her intestate share in property undisposed of by reason of the failure of a charitable bequest held to be illegal. See also *Norcott v. Gordon*, 14 Sim. 258.

2. *Matter of Benson*, 96 N. Y. 499. In this case, the court *disapproves* *Pickering v. Stamford*, 3 Ves. Jr. 492, and holds that a gift to the testator's widow, "in lieu and bar of her dower and of all claims she may have upon or against my estate as my widow," is a bar to the widow's sharing in a lapsed legacy. See also *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Lee v. Tower*, 124 N. Y. 375; *Coyne v. Duigan*, (1894) 1 Ir. Rep. 138.

3. *Lett v. Randall*, 3 Sm. & G. 83. But the widow has been let in, even in cases of apparent intestacy. *Johnson v. Johnson*, 4 Beav. 318; *Tavernor v. Grindley*, 32 L. T. N. S. 424.

4. *Gurly v. Gurly*, 8 Cl. & F. 760; *Druce v. Denison*, 6 Ves. Jr. 386. The first of these cases appears to overrule *Slatter v. Slatter*, 1 Y. & Coll. 28.

5. **Election in One Jurisdiction Binds in All.**—*Apperson v. Bolton*, 29 Ark. 429; *Washburn v. Van Steenwyk*, 32 Minn. 336; *Wilson v. Cox*, 49 Miss. 538. See also *Garland v. Rowan*, 2 Smed. & M. (Miss.) 636; *Slaughter v. Garland*, 40 Miss. 177; *Staigg v. Atkinson*, 144 Mass.

564. And see the title PRIVATE INTERNATIONAL LAW.

6. **Proper Place to Make Election.**—*Wilson v. Cox*, 49 Miss. 538.

Right to Make Election in a Foreign Jurisdiction.—In *Washburn v. Van Steenwyk*, 32 Minn. 336, the testator, who was domiciled in Wisconsin, died, leaving lands in both Wisconsin and Minnesota. His widow was insane, and it therefore devolved upon the court to make an election for her. In passing upon this point the Minnesota court said: "The doctrine of election is applicable if the will is to be construed as making provision for the widow in lieu of her legal estate, and not merely as cumulative thereto, so that the intention of the testator is apparent that she shall not enjoy both. * * * The power of the courts of Wisconsin to exercise an election in behalf of the appellant is not a matter of doubt, assuming that none had been first made elsewhere. The only question presented in this connection is as to the scope and effect of that election. So, too, our Probate Court, which had to administer upon real property here, had from necessity, and as incident to the exercise of its jurisdiction concerning the property, the power to make an election in behalf of the widow, provided none had already been made."

7. **Arkansas Doctrine.**—*Apperson v. Bolton*, 29 Ark. 418.

8. **Ohio Doctrine.**—*Jennings v. Jennings*, 21 Ohio St. 79.

bequeathed to her subject to the claims of the creditors of the testator.¹

(b) **Superior to Legacies and Devises.** — It is well settled that a legacy accepted by a widow in lieu of dower is entitled to priority over general legacies, which are mere bounties, the widow being regarded as a purchaser for a valuable consideration;² and this is true although the bequest greatly exceeds the value

1. Provision for Widow Subject to Debt.—Steele v. Steele, 64 Ala. 438, 38 Am. Rep. 15; Kayser v. Hodopp, 116 Ind. 428; Brant v. Brant, 40 Mo. 266; Bray v. Neill, 21 N. J. Eq. 343; Beeckman v. Vanderveer, 3 Dem. (N. Y.) 619. See also Isenhardt v. Brown, 1 Edw. Ch. (N. Y.) 411.

Michigan Rule — Widow Shares Pro Rata with Other Creditors. — "The husband, during his lifetime, wishing to make arrangements to have his wife release her dower interest in the lands of which he should die seized, makes an offer therefor which is not to be submitted to her for acceptance until after his decease. If then accepted, the consideration to be paid becomes a claim and charge against his estate, and takes precedence over the legacies. It is but a debt against the estate. If there are sufficient assets to pay all the claims allowed against the estate in full, the widow receives the full amount of her claim; if not, she receives her *pro rata* share with the other creditors. This, while just to the creditors, cannot be considered as unjust to the widow, as she has ample time, after the decease of her husband, to determine whether she will sell her dower right by accepting the provisions of the will, or reject such legacy and retain her dower." Tracy v. Murray, 44 Mich. 111.

Georgia Rule — Superior to Claims of Creditor. — "The wife is a purchaser of a legacy, which she chooses, under a will, in lieu of her dower. At the death of the testator she has a legal right to her dower. It overtops all legacies, specific as well as general. It is a right superior even to the claims of creditors, and when she accepts the offer of exchange tendered her in the will, and gives up her dower, she pays a valuable consideration for the portion which she accepts. * * * The cases * * * even go so far as to hold that this exemption from abatement, in case of a legacy, though general, in lieu of dower, in case of a deficiency of assets to pay debts and specific legacies, exists, though the legacy be of greater value than the dower. How far this may be true as against creditors, there seems to be no decision. Perhaps in such a case the amount of the excess might be of moment. That this exemption from abatement is good even as to creditors does not appear to have been expressly settled. When it is a *bona fide* option, the principle would seem to go even to this extent. If it is a purchase, the creditors are not injured, since, in lieu of the legacy, the widow has thrown into the fund, out of which they are to be satisfied, her dower. The point, however, is not distinctly made in this case, and we do not settle it." Clayton v. Akin, 38 Ga. 320, 95 Am. Dec. 393.

Maryland Statute. — By statute in Maryland (Act of 1798, c. 101, sub-chapter 13, § 5) a widow who accepts the provisions of her husband's will, given in lieu of dower, is to be deemed a purchaser for a fair consideration to

the value of her dower, and is entitled to have her claim sustained as a lien to that extent in preference to creditors; but if the devise exceeds the value of the dower, it is, to the extent of the excess, void as to creditors. Hall's Case, 1 Bland (Md.) 203, 17 Am. Dec. 275. See also Thomas v. Wood, 1 Md. Ch. 296; Durham v. Rhodes, 23 Md. 233.

Mississippi Statute. — By statute in Mississippi (Rev. Code 1867, 469, art. 170) it is provided that a widow accepting or abiding by a devise in lieu of her legal right shall be considered as a purchaser for a fair consideration. Booth v. Stebbins, 47 Miss. 161.

North Carolina Statute. — By section 2105 of the Code of North Carolina it is provided that such lands as may be devised to a widow by the will of her deceased husband, if they do not exceed the quantity to which she would be entitled by right of dower, shall not be subject to the payment of debts due from the estate of her husband during the term of her life. Shackelford v. Miller, 91 N. Car. 181.

Colorado Statute. — Under the Colorado statute (Gen. Laws, § 1751) when a widow renounces the will of her deceased husband and elects to take one-half of the whole estate of the deceased, she is not entitled to such moiety clear of the debts of the deceased, but she takes one-half of the estate remaining after the discharge of such debts. Hanna v. Palmer, 6 Colo. 156, 45 Am. Rep. 524.

New Hampshire Statute. — In Hunkins v. Hunkins, 65 N. H. 95, it was held that under the New Hampshire statute (Gen. Laws, c. 202, § 10) providing that a widow may waive her right to dower and homestead and take a distributive share of her husband's real estate, after the payment of debts and expenses of administration, such widow does not take as a purchaser, but subject to all the claims and demands existing against the estate, both legal and equitable; and that though technically and in law not the heir of her husband, the widow waiving her homestead and dower right and taking her share in the estate by election under the statute may be said to take as an heir, and therefore has no claim which can prevail against a person having, under a parol agreement, an equitable title to the land in which she claims such distributive share.

2. Superior to General Legacies — England. — Heath v. Dendy, 1 Russ. 543; Burridge v. Bradyl, 1 P. Wms. 127; Davenhill v. Fletcher, Amb. 244; Blower v. Morret, 2 Ves. 420; Norcott v. Gordon, 14 Sim. 258.

Connecticut. — Lord v. Lord, 23 Conn. 327; Security Co. v. Bryant, 52 Conn. 311, 52 Am. Rep. 599.

Delaware. — Warren v. Morris, 4 Del. Ch. 289.

Maine. — Moore v. Alden, 80 Me. 301, 6 Am. St. Rep. 203.

Massachusetts. — Pollard v. Pollard, 1 Allen

of the widow's dower right.¹ And in several well-considered cases it has been expressly decided that a legacy to a widow in lieu of her dower is entitled to priority over all other legacies, whether general or specific.² But it seems that such a legacy is not a charge upon the testator's real estate unless it is so stated in the will.³ A legacy given to a widow in lieu of her dower has no priority over other legacies when the testator leaves either no real estate at all or no real estate which is subject to dower.⁴ According to the weight of authority, when a devise in lieu of dower is accepted by a widow, she is entitled to have the land devised to others, not standing in the same position as herself, sold first for the payment of the testator's debts, before the lands given to her are proceeded against.⁵

3. When Donee Elects to Take Against Instrument — *a*. COMPENSATION TO DISAPPOINTED DONEE. — Where a donee elects to take against a deed or will by retaining his own property which the donor has attempted to bestow upon another, the question arises whether the refractory donee incurs a forfeiture of the benefit or estate conferred upon him by the donor, or is merely bound to make compensation out of it to the person disappointed. According to the great weight of authority as now conclusively established, the refractory donee does not in such event forfeit the benefit or estate conferred upon him,

(Mass.) 490; *Hubbard v. Hubbard*, 6 Met. (Mass.) 50.

Minnesota. — *Matter of Gotzian*, 34 Minn. 159, 57 Am. Rep. 43.

New Jersey. — *Duncan v. Franklin Tp.*, 43 N. J. Eq. 143; *Howard v. Francis*, 30 N. J. Eq. 444; *Perrine v. Perrine*, 6 N. J. L. 133, 10 Am. Dec. 392; *Justice v. Justice*, (N. J. 1889) 18 Atl. Rep. 674.

New York. — *Orton v. Orton*, 3 Abb. App. Dec. (N. Y.) 415; *Brink v. Masterson*, 4 Dem. (N. Y.) 525; *Babcock v. Stoddard*, 3 Thomp. & C. (N. Y.) 207; *Williamson v. Williamson*, 6 Paige (N. Y.) 298; *Matter of Dolan*, 4 Redf. (N. Y.) 511; *Isenhardt v. Brown*, 1 Edw. Ch. (N. Y.) 411; *Matter of McKay*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 123, citing 13 AM. AND ENG. ENCYC. OF LAW (1st ed.) 136.

Rhode Island. — *Potter v. Brown*, 11 R. I. 232.

South Carolina. — *Cogdell v. Widow, etc.*, 3 Desaus. (S. Car.) 389; *Stuart v. Carson*, 1 Desaus. (S. Car.) 500; *Loock v. Clarkson*, 1 Desaus. (S. Car.) 471.

Virginia. — *Brown v. Brown*, 79 Va. 648.

See also *Tevis v. McCreary*, 3 Metc. (Ky.) 151; *Additon v. Smith*, 83 Me. 551. Compare *Mitchener v. Atkinson*, Phil. Eq. (62 N. Car.) 23; and see the title ABATEMENT OF LEGACIES, vol. 1, p. 48.

1. *Warren v. Morris*, 4 Del. Ch. 289; *Matter of Dolan*, 4 Redf. (N. Y.) 511; *Orton v. Orton*, 3 Abb. App. Dec. (N. Y.) 411; *Matter of McKay*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 123.

2. **Superior to All Legacies.** — *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15; *Clayton v. Akin*, 38 Ga. 320, 95 Am. Dec. 393; *Addison v. Addison*, 44 Md. 182; *Borden v. Jenks*, 140 Mass. 562, 54 Am. Rep. 507. See also *Earp's Will*, 1 Pars. Eq. Cas. (Pa.) 453.

3. **Not a Charge upon Realty.** — *Paxson v. Potts*, 3 N. J. Eq. 313; *Snyder v. Warbasse*, 11 N. J. Eq. 463; *Babcock v. Stoddard*, 3 Thomp. & C. (N. Y.) 207; *Sanford v. Sanford*, 4 Hun (N. Y.) 753; *Brink v. Masterson*, 4 Dem. (N. Y.) 524; *Beekman v. Vanderveer*, 3 Dem. (N. Y.) 619; *Boykin v. Boykin*, 21 S. Car. 534.

Compare *Addison v. Addison*, 44 Md. 182; *Borden v. Jenks*, 140 Mass. 562, 54 Am. Rep. 507.

4. **Not Preferred When There Is No Dower Right.** — *Acey v. Simpson*, 5 Beav. 35; *Roper v. Roper*, 3 Ch. Div. 714; *Moore v. Alden*, 80 Me. 301, 6 Am. St. Rep. 203; *Perrine v. Perrine*, 6 N. J. L. 133, 10 Am. Dec. 392.

5. **Superior to Other Devises.** — *Kirk's Estate*, 13 Phila. (Pa.) 276, 36 Leg. Int. (Pa.) 436; *Gaw v. Huffman*, 12 Gratt. (Va.) 628. Compare *Chambers v. Davis*, 15 B. Mon. (Ky.) 522; *Hinson v. Ennis*, 81 Ky. 363.

Illustrations. — A testator made provision for his wife by giving her *inter alia*, in lieu of dower, a life estate in realty. To his adopted daughter he gave other realty, to be occupied by her during her life, remainder to her children. The assets of the estate being insufficient to pay the debts, it was held that the widow was a purchaser for value and entitled to her life estate in preference to the other devisees, the devises to whom should be sold to meet the deficiency. *Taylor's Estate*, 175 Pa. St. 60.

A testator gave to his widow a specific piece of land, and to his niece a legacy of one thousand dollars to be paid from the avails of a certain other piece, the remainder of his property to be applied to the payment of his debts. The remainder proving insufficient, the estate charged with the legacy was sold and the avails applied to the payment of the debts. On a petition brought by the niece against the widow for contribution, it was held that the devise to the widow was to be regarded as in lieu of dower, and that she was therefore not liable to contribute. *Hickey v. Hickey*, 26 Conn. 261.

Land Charged with Legacies. — Where a testator charges his lands with the payment of legacies, and devises the use of the land to his wife as long as she remains his widow, in lieu of her dower, if the widow accepts the devise she takes it subject to the incumbrance of the legacies. *Stephenson v. Brown*, 4 N. J. Eq. 503.

but is bound only to make compensation out of it to the disappointed donee, to the extent of the value of the property of such refractory donee which the donor has attempted to bestow upon such disappointed donee.¹ In such case a court of equity treats the refractory donee as a trustee, and will sequester the benefit intended for him, in order to secure compensation to the disappointed donee. But the excess does not go to the personal representative of the testator, as if undisposed of, but is to be given to the refractory donee, the purpose being satisfied for which alone the court controlled the legal right.²

1. Effect of Election to Take Against Instrument

— *Compensation* — *England*. — *Dillon v. Parker*, 1 Swanst. 404, note *a*; *Whistler v. Webster*, 2 Ves. Jr. 372; *Gretton v. Haward*, 1 Swanst. 442, note *a*; *Cavan v. Pulteney*, 2 Ves. Jr. 560, 3 Ves. Jr. 384; *Ward v. Baugh*, 4 Ves. Jr. 627; *Streatfield v. Streatfield*, Cas. temp. Talb. 176, 1 White & T. L. Cas. 405; *Freke v. Barrington*, 3 Bro. C. C. 286; *Lewis v. King*, 2 Bro. C. C. 603; *Welby v. Welby*, 2 Ves. & B. 191; *Tibbitts v. Tibbitts*, 1 Jac. 319; *Dashwood v. Peyton*, 18 Ves. Jr. 49; *Rancliffe v. Parkyns*, 6 Dow. App. Cas. 149; *Ker v. Wauchope*, 1 Bligh. 1; *Cumming v. Forrester*, 2 Jac. & W. 338; *Rogers v. Jones*, 3 Ch. Div. 688, 7 Ch. Div. 345; *Pickersgill v. Rodger*, 5 Ch. Div. 173; *Howells v. Jenkins*, 1 De G. J. & S. 617; *Blake v. Bunbury*, 1 Ves. Jr. 521; *Ardesoife v. Bennett*, 2 Dick. 463; *Cooper v. Cooper*, L. R. 7 H. L. 53; *Tennant v. Tennant*, Ll. & G. temp. Plunk. 531; *Atty.-Gen. v. Fletcher*, 5 L. J. Ch. N. S. 75; *Rich v. Cockell*, 9 Ves. Jr. 379; *Smith v. Lucas*, 18 Ch. Div. 545.

Alabama. — *Key v. Jones*, 52 Ala. 244.

Illinois. — *Wilbanks v. Wilbanks*, 18 Ill. 21; *Carper v. Crowl*, 149 Ill. 476.

Maryland. — *Marriott v. Badger*, 5 Md. 306.

Minnesota. — *Brown v. Brown*, 42 Minn. 270.

New Jersey. — *Young v. Young*, 51 N. J. Eq. 502.

New York. — *Beal v. Miller*, 1 Hun (N. Y.) 390.

Ohio. — *Hibbs v. Union Cent. L. Ins. Co.*, 40 Ohio St. 544; *Maskell v. Goodall*, 2 Disney (Ohio) 282.

Pennsylvania. — *Lewis v. Lewis*, 13 Pa. St. 79, 53 Am. Dec. 443; *Stump v. Findlay*, 2 Rawle (Pa.) 174, 19 Am. Dec. 632; *Van Dyke's Appeal*, 60 Pa. St. 492; *Sandoe's Appeal*, 65 Pa. St. 315; *Pennsylvania Ins. Co. v. Stokes*, 2 Brews. (Pa.) 597; *Cauuffman v. Cauuffman*, 17 S. & R. (Pa.) 16; *Philadelphia v. Davis*, 1 Whart. (Pa.) 512.

South Carolina. — *Key v. Griffin*, 1 Rich. Eq. (S. Car.) 67.

Tennessee. — *Colvert v. Wood*, 93 Tenn. 454.

Virginia. — *Higginbotham v. Cornwell*, 8 Gratt. (Va.) 87, 56 Am. Dec. 130.

See also 2 Story's Eq. Jur. § 1085; 1 Jarman on Wills (6th Am. ed.) 418.

But see *Hamilton v. Jackson*, 8 Ir. Eq. Rep. 195, 2 J. & L. 295; *Villa Real v. Galway*, 1 Bro. C. C. 292, note; *Thellusson v. Woodford*, 13 Ves. Jr. 220.

Statement of Rule. — In *Pickersgill v. Rodger*, 5 Ch. Div. 173, the testatrix devised certain property to the eldest son, and on the question of compensation *Jessel, M. R.*, in delivering judgment, said: "Any disappointed legatee is entitled to say, 'You shall not take the

benefit given to your estate by the will unless I have made up to me an equivalent benefit to that which the testatrix intended me to take.' Sometimes this is called the doctrine of compensation, which is the meaning of the doctrine of election as it now stands. The disappointed legatee may say to the devisee, 'You are not allowed by a court of equity to take away out of the testatrix's estate that which you would otherwise be entitled to, until you have made good to me the benefit she intended for me.' That means that no one can take the property which is claimed under the will without making good the amount; or, in other words, as between the devisees and legatees claiming under the will, the disappointed legatees are entitled to sequester or to keep back from the other devisees or legatees the property so devised and bequeathed until compensation is made. Thence arises the doctrine of an equitable charge or right to realize out of that property the sum required to make the compensation. If you follow out that doctrine, you will see that the person taking the property so devised or bequeathed takes it subject to an obligation to make good to the disappointed legatee the sum he is disappointed of. Once get the doctrine into that shape and you will then see that the eldest son cannot get the estate at all without making good the necessary amount to the disappointed legatees, and it follows, as a matter of plain principle, that he has nothing to complain of. The very instrument which gives him the benefit gives him the benefit burdened with the obligation, and the old maxim, *Qui sentit commodum, sentire debet et onus*, applies with the greatest force to such a case as this."

Under the Civil Law, the effect of election to take in opposition to the will was forfeiture of the benefit offered by it. *Dillon v. Parker*, 1 Swanst. 396, note *a*; 2 Story's Eq. Jur., § 1085.

Rule Inapplicable When Donee Takes under Instrument. — The doctrine of compensation does not apply where a donee elects to take under the instrument which gives rise to the election. *In re Chesham*, 31 Ch. Div. 466.

2. Sequestration of Refractory Donee's Property for Purpose of Compensation. — *Gretton v. Haward*, 1 Swanst. 443, note *a*; *Welby v. Welby*, 2 Ves. & B. 190; *Pulteney v. Darlington*, cited in *Cavan v. Pulteney*, 2 Ves. Jr. 560; *Carper v. Crowl*, 149 Ill. 465; *Lewis v. Lewis*, 13 Pa. St. 79, 53 Am. Dec. 443; *Hamilton v. Jackson*, 8 Ir. Eq. Rep. 195, 2 J. & L. 295.

In *Pennsylvania* the Orphans' Court may, under the Acts of March 29, 1832, and of June 16, 1836, enforce compensation by sequestration or other process. *Lewis v. Lewis*, 13 Pa. St. 79, 53 Am. Dec. 443.

Statute of Limitations. — It has been held that, assuming that compensation is in the nature of a simple contract debt, the statute of limitations can begin to run against it only when the election has been made.¹

b. LIABILITY OF DONEE FOR BENEFITS. — If a person who is put to an election by a will, after the expiration of the time within which he must make his election, elects to take against the will, he must repay all sums of money which he has received under the will by way of rents and profits, or otherwise.²

c. EFFECT OF WIDOW'S RENUNCIATION — (1) *Upon Her Own Rights.* — The rights of a widow in her husband's property when she refuses to take under his will are generally regulated by statute.³ Her general rights when she renounces under the will have been referred to above in this article.⁴

(2) *Upon the Rights of Others* — (a) **In General.** — The general rule is that the refusal of a widow to take under a will does not render the will inoperative, except as to her, and though her refusal may render it difficult or impossible to carry out the provisions in the way intended by the testator, yet it is the duty of the courts to protect the rights of others claiming under the will, and to have the provisions thereof carried out, if not in the precise mode directed by the testator, yet as near in that mode as possible.⁵

(b) **Compensation.** — In applying this rule it has been generally decided that when the rejection by a widow of the provisions made for her by her deceased husband's will results in the diminution or contravention of devises and legacies to other persons, the renounced devises and legacies given by the will to the widow should be used to compensate, so far as may be, those whom her election disappoints, and that a court of equity will sequester for that purpose the benefits intended for the widow.⁶ And when the provision rejected by

1. When Statute of Limitations Begins to Run Against Compensation. — *Spread v. Morgan*, 11 H. L. Cas. 588.

2. Liable for All Benefits Taken under the Will. — *Greenwood v. Penny*, 12 Beav. 403; *Boughton v. Boughton*, 2 Ves. 12; *Codrington v. Lindsay*, L. R. 8 Ch. 578; *Padbury v. Clark*, 2 Macn. & G. 308; *Carter v. Silber*, (1891) 3 Ch. 564; *McElfresh v. Schley*, 2 Gill (Md.) 181.

3. Statutory Rights of Widow Taking Against Will. — *Gullett v. Farley*, 164 Ill. 566; *Morris v. Morris*, 119 Ind. 341; *Worsley v. Worsley*, 16 B. Mon. (Ky.) 455; *Phillips v. Phillips*, 91 Mich. 433; *Lilly v. Menke*, 126 Mo. 190; *Brawford v. Wolfe*, 103 Mo. 391; *Hoover v. Landis*, 76 Pa. St. 354; *Heineman's Appeal*, 92 Pa. St. 95; *Witherspoon v. Watts*, 18 S. Car. 396; *Hendrick v. Cleveland*, 2 Vt. 329. See the title *DOWER*, vol. 10, p. 127, and see the statutes of the various jurisdictions.

4. See *supra*, this title, Election as to Dower and Other Rights Arising on Marriage.

5. Provisions as to Others Still Operative. — *Hoskins v. Hoskins*, 43 Iowa 452; *Allen v. Hannum*, 15 Kan. 625; *Perkins v. Little*, 1 Me. 148; *Fox v. Rumery*, 68 Me. 124; *Firth v. Denny*, 2 Allen (Mass.) 468; *Plympton v. Plympton*, 6 Allen (Mass.) 178; *Brandenburg v. Thorndike*, 139 Mass. 102; *Roe v. Roe*, 21 N. J. Eq. 253; *Tehan v. Tehan*, 83 Hun (N. Y.) 368; *Worth v. Atkins*, 4 Jones Eq. (57 N. Car.) 272; *Portuondo's Estate*, 185 Pa. St. 472; *Wallace v. Wallace*, 15 W. Va. 722.

6. Compensation from Provisions Rejected by the Widow — *Alabama*. — *Dean v. Hart*, 62 Ala. 308.

Kentucky. — *Timberlake v. Parish*, 5 Dana (Ky.) 346.

New York. — *Tehan v. Tehan*, 83 Hun (N. Y.) 368.

Ohio. — *Jennings v. Jennings*, 21 Ohio St. 56; *Maskell v. Goodall*, 2 Disney (Ohio) 282.

Pennsylvania. — *Cauffman v. Cauffman*, 17 S. & R. (Pa.) 26; *Sandoe's Appeal*, 65 Pa. St. 314; *Gallagher's Estate*, 76 Pa. St. 296; *Gallagher's Appeal*, 87 Pa. St. 200; *Young's Appeals*, 108 Pa. St. 17; *Batione's Estate*, 136 Pa. St. 308; *Ferguson's Estate*, 138 Pa. St. 208; *Evans's Estate*, 150 Pa. St. 212. See also *Stewart's Appeal*, 110 Pa. St. 410.

Tennessee. — *Latta v. Brown*, 96 Tenn. 343, citing 6 AM. AND ENG. ENCYC. OF LAW (1st ed.) 255.

Vermont. — *Jones v. Knappen*, 63 Vt. 391.

Virginia. — *McReynolds v. Counts*, 9 Gratt. (Va.) 242; *Morris v. Garland*, 78 Va. 215. See also *Kinnaird v. Williams*, 8 Leigh (Va.) 409, 31 Am. Dec. 658.

Wisconsin. — *Ford v. Ford*, 70 Wis. 56, 5 Am. St. Rep. 117.

"Specific Legatees and Devisees shall be first satisfied, and any deficiency or loss must fall upon the residuary legatees." *Gallagher's Appeal*, 87 Pa. St. 200.

Specific Legacies Not Increased. — When by will a legatee is given annually a certain part of the net annual income of the estate of the testator, his share cannot be increased by any part of the net annual income of the estate which is undisposed of by reason of the election of the widow to take against the will. *Ford v. Ford*, 70 Wis. 10, 5 Am. St. Rep. 117.

Rule Applicable When Husband Dissents from Wife's Will. — Persons who are disappointed by the election of the husband to take against his wife's will must be compensated out of the provisions made for him by the will. *Lyon's Estate*, 3 Pa. Dist. Rep. 739.

Devisees of Homestead Not Compensated. — In *Gainer v. Gates*, 73 Iowa 149, it was held that

the widow is not sufficient to compensate the disappointed legatees and devisees, they sometimes have the right to contribution from other legatees and devisees or from the heirs.¹

(c) **Acceleration.** — As a general rule, when the widow has dissented from the will of her husband, by which certain property was given to her for her life,

under the statute of that state, providing that the husband can do no act which will affect the wife's interest or right in the homestead, unless with her concurrence and joinder, where a testator leaves to his widow all his property for life and devises to another his homestead, and the devise of the homestead fails for the reason that the widow refuses to take under the will, the devisee of the homestead cannot recover its value of the estate. The court, in discussing this question, said: "All there is of it is that the testator devised to plaintiff property which under the law he could not devise, except with assent of the widow. The law presumes that the execution of the will was with a knowledge of the law by the testator. He knew that nothing would pass to plaintiff except with the widow's consent. The law will presume that it was his purpose to make the devise contingent upon such consent; that his purpose and wish was that if the wife did not hold the homestead, plaintiff should, but if she did, plaintiff should take nothing by the will."

Maryland Doctrine. — In *Hinkley v. House of Refuge*, 40 Md. 461, the rule as to compensation, above stated, was sanctioned by the Supreme Court of Maryland; but in *Devecmon v. Shaw*, 70 Md. 219, a different rule seems to be announced. In the latter case the facts were these: The testator, having devised and bequeathed a certain portion of his estate, both real and personal, to his wife and daughter, and devised the house and lot to a nephew, and given pecuniary legacies to certain persons named, disposed of the residue of his estate by the following words: "I direct and empower my executors hereinafter named to dispose of all real and personal property not otherwise herein disposed of, to the best advantage as shall in their judgment appear, and the proceeds to divide between my wife W., and daughter A., one-third to my said wife and two-thirds to my said daughter." The widow elected to take against the will. Alvey, C. J., delivering the opinion of the court below, which was adopted by the Court of Appeals, said: "The widow of the testator having renounced the devises and bequests in her favor, and elected to take under the law, such devises and bequests, so far as she is concerned, utterly fail of effect, and the property intended to pass thereby remains as if no such devises and bequests had been made. Nor does such renunciation affect other devises and legacies, except as they may be diminished by the award to the widow of her legal portion out of the estate. * * * The specific property intended to pass to the widow under the will, by her renunciation, became subject to the power of sale vested in the executors, as part of the estate not otherwise disposed of. In other words, such property fell into the residue of the estate, to be administered and disposed of as directed by

the will. And I am clearly of opinion that the effect of such renunciation is to produce an intestacy as to the one-third of the real and personal estate of the deceased, embraced in and operated upon by the residuary clause of the will; such one-third being the portion of such residue given to the widow. This one-third of all that constitutes the residue of the estate, in the events that have happened, passes to the daughter of the deceased, as heir and distributee, absolutely, as being undisposed-of estate, by reason of the renunciation of the widow. This one-third, of course, like the other portions of the estate, is subject to the rights of the widow under the law. Of this I think there can be no doubt." See also *Darlington v. Rogers*, 1 Gill (Md.) 403; *Hanson v. Worthington*, 12 Md. 418.

In **Colorado** it is provided by statute (Gen. Stat., c. 115, § 3627), that "in all cases where the widow shall renounce all benefit under the will, and the legacies and bequests therein contained to other persons shall, in consequence thereof, become increased or diminished in amount, quantity, or value, it shall be the duty of the court, upon the settlement of such estate, to abate from or add to such legacies and bequests in such manner as to equalize the loss sustained, or advantage derived thereby, in a corresponding ratio to the several amounts of such legacies and bequests, according to the intrinsic value of each." *Logan v. Logan*, 11 Colo. 44.

1. Contribution. — *Henderson v. Green*, 34 Iowa 437, 11 Am. Rep. 149; *Sandoe's Appeal*, 65 Pa. St. 314; *Robinson v. Harrison*, 2 Tenn. Ch. 11; *Latta v. Brown*, 96 Tenn. 343. And see the titles CONTRIBUTION and EXONERATION, vol. 7, p. 358; LEGATEES AND DEVISEES; MARSHALING ASSETS.

Illustration. — In *Latta v. Brown*, 96 Tenn. 343, the testator died, leaving surviving him his widow M. B., his daughter M. T., and his grandchildren L. and W. by a deceased daughter. He left a will by which he devised to his daughter M. T. for life, with remainder to her children, his residence, two storehouses, and other property; and left a farm, which by his will he devised in two equal parts, one-half of which he gave to his daughter for life and the other half to his grandchildren, with certain limitations over in the event of their dying without issue. The half given to the wife was, upon her death, to be equally divided between his daughter and his grandchildren. The widow dissented from the will, and dower was thereupon assigned to her, embracing the residence, one storehouse, and the rent of the other for four years, all of which was property given by the will to his daughter. It was held that the other devisees must contribute in order to make up the deficit between the property given to the daughter under the will and the property refused by the widow.

with a limitation over to other persons, those persons to whom the property was limited over by way of remainder are entitled to the immediate enjoyment of so much of such property as remains after satisfying the claims of the widow; for by such acceleration of enjoyment the remaindermen are, in part at least, compensated for the diminution of their devises or legacies.¹ But there are cases in which the operation of this rule, which is known as the doctrine of acceleration, would affect prejudicially the rights of some of the devisees or legatees who take under the will, and in which therefore this rule should not be applied.² Thus, when the acceleration of enjoyment would increase the specific pecuniary legacies, to the detriment of residuary legatees whose shares only are diminished by the renunciation of the widow, it has been held that the life use of the property given by the will to the widow and renounced by her should be used to compensate the residuary legatees.³ "This may be accomplished by allowing that portion of the estate not taken by the widow to accumulate during her natural life, or, by the consent of the parties interested, the same result could be reached by reducing to their pres-

1. **Acceleration** — *Alabama*. — *Dean v. Hart*, 62 Ala. 308.

District of Columbia. — *Capron v. Capron*, 6 Mackey (D. C.) 346.

Illinois. — *Blatchford v. Newberry*, 99 Ill. 11; *Marvin v. Ledwith*, 111 Ill. 144.

Kansas. — *Allen v. Hannum*, 15 Kan. 625.

Kentucky. — *Woods v. Woods*, 1 Metc. (Ky.) 512.

Maine. — *Fox v. Rumery*, 68 Me. 121.

New Hampshire. — *Yeaton v. Roberts*, 28 N. H. 459.

North Carolina. — *Holderby v. Walker*, 3 Jones Eq. (56 N. Car.) 46; *Adams v. Gillespie*, 2 Jones Eq. (55 N. Car.) 244.

Ohio. — *Millikin v. Welliver*, 37 Ohio St. 460.

Pennsylvania. — *Coover's Appeal*, 74 Pa. St. 143; *Ferguson's Estate*, 138 Pa. St. 208; *Evans's Estate*, 150 Pa. St. 212; *Woodburn's Estate*, 151 Pa. St. 586; *Portuondo's Estate*, 185 Pa. St. 472.

South Carolina. — *Witherspoon v. Watts*, 18 S. Car. 396.

Tennessee. — *Waddle v. Terry*, 4 Coldw. (Tenn.) 51; *Armstrong v. Park*, 9 Humph. (Tenn.) 105; *Robinson v. Harrison*, 2 Tenn. Ch. 15; *Brown v. Hunt*, 12 Heisk. (Tenn.) 404; *Latta v. Brown*, 96 Tenn. 343.

Vermont. — *Jones v. Knappen*, 63 Vt. 396.

And see the title REMAINDERS AND EXECUTORY INTERESTS.

In *Indiana* it has been held that when a widow rejects a life estate bestowed upon her by her husband's will, the husband dies intestate, at least as to such life estate, and it goes wherever the law of descent would cast it. *Dale v. Bartley*, 58 Ind. 101; *Hauk v. McComas*, 98 Ind. 460.

2. **Limitation of the Rule**. — *Latta v. Brown*, 96 Tenn. 343. See also *Brandenburg v. Thorndike*, 139 Mass. 102; *Portuondo's Estate*, 185 Pa. St. 472 [*distinguishing Ferguson's Estate*, 138 Pa. St. 208; *Vance's Estate*, 141 Pa. St. 201, 23 Am. St. Rep. 267; and *Woodburn's Estate*, 151 Pa. St. 586].

Illustration. — The testator, by his will, devised his real estate to his wife for life, and at her death to his son J., and bequeathed his personal estate, after the payment of his debts, equally to his eight children. The widow

renounced the provision made for her by the will. It was held that the two-thirds of the land remaining after the assignment of the widow's dower should be applied to indemnify the legatees of the personal estate for the loss they sustained by the widow's renunciation of the provisions made for her by the will and her claim of her third of the personal estate; that for this purpose the said two-thirds of the land should be rented out and the proceeds applied to the satisfaction of the legatees; and that after the legatees had been satisfied for the loss of so much of their legacies as was taken by the widow, or after the death of the widow, whichever event should first occur, the said two-thirds of the land should be delivered to J., as devisee in remainder under the will. *McReynolds v. Counts*, 9 Gratt. (Va.) 242.

Application Depends upon the Effect Produced.

— "As a general rule, where real or personal estate is devised to one person for life, with an ulterior devise to another person, the ulterior devise vests absolutely upon the death of the testator, and takes effect in possession, whenever the prior devise ceases or fails from any cause whatever. But inasmuch as in a case like the present, the act of the widow, by which the prior devise is terminated, may, by withdrawing a considerable part of the estate from the operation of the provisions of the will, tend to defeat some of the gifts made by the testator, and affect prejudicially the interests of some of the devisees, the application of this general rule will depend, in each case, upon the effect it produces on the rights of the other devisees in the will." *Woods v. Woods*, 1 Metc. (Ky.) 512. See also *Timberlake v. Parish*, 5 Dana (Ky.) 353.

3. **Life Estate Used to Compensate Residuary Legatees**. — *Firth v. Denny*, 2 Allen (Mass.) 468; *Sarles v. Sarles*, 19 Abb. N. Cas. (N. Y. Supreme Ct.) 322; *Jones v. Knappen*, 63 Vt. 391. See also *Plympton v. Plympton*, 6 Allen (Mass.) 178.

In *Pennsylvania*, however, it has been expressly held otherwise. *Coover's Appeal*, 74 Pa. St. 143; *Ferguson's Estate*, 138 Pa. St. 208, *explaining Young's Appeals*, 108 Pa. St. 17; *Vance's Estate*, 141 Pa. St. 201, 23 Am. St. Rep. 267, *disapproving Firth v. Denny*, 2 Allen (Mass.) 468.

ent worth the specific pecuniary legacies, on the basis of the expectation of the life of the widow, and distributing the estate at once."¹ And the doctrine of acceleration should not be applied when it is evident from the language of the will that the testator did not intend the remaindermen to enjoy the property limited over to them until after the death of his widow, whether she dissented from the will or not.²

4. Legacies in Lieu of Particular Thing.—If a testator gives one benefit expressly in lieu of a right of the donee which is disposed of in the will, and confers another benefit on the same donee not so conditioned, the donee, by choosing to retain his right instead of taking the first benefit, does not lose the second benefit, for the condition which is expressed in reference to the first gift will not be taken to be implied with the second. There is no case for an election here, since the donee, by accepting an alternative offered in express terms in the will, does not take in hostility to the instrument.³ If, however, one who is under a will the donee of a gift which is expressed to be in lieu of a particular thing, accepts that gift, he is bound by the will in its entirety and cannot assert his claims against the will to other property of which the instrument professes to dispose.⁴

5. Rights Acquired by Election Date from Election.—The right to property acquired by an election dates from the election and does not come into existence until the election is actually made.⁵ As a consequence, it has been held that a conveyance by quitclaim before election did not convey a title subsequently acquired by election.⁶

EQUITABLE ESTATE.—(See also the titles TRUSTS AND TRUSTEES; USES, STATUTE OF.)—An estate acquired by operation of equity, or cognizable in a court of equity: such as the estate or title of a person for whose use or benefit lands are held in trust by another, the latter having the legal estate; and the estate of a mortgagor, after the mortgage has become forfeited by non-payment, and before foreclosure.⁷

1. *Jones v. Knappen*, 63 Vt. 391, *per* Ross, C. J.

2. **Acceleration Expressly Prohibited by Will.**—*Muirhead v. Muirhead*, L. R. 15 App. 289 [doubting *Lucas v. Lucas*, 8 Ct. Sess. Cas. (4th ser.) 502, *commenting* on *Annandale's Case*, 9 Ct. Sess. Cas. (2d ser.) 1201]; *Blatchford v. Newberry*, 99 Ill. 11; *Hinkley v. House of Refuge*, 40 Md. 461; *Bradenburg v. Thorndike*, 139 Mass. 102; *Sawyer v. Freeman*, 161 Mass. 543. See also *Roe v. Roe*, 21 N. J. Eq. 253.

3. **Two Gifts, One on Express Condition.**—*Brown v. Parry*, Romilly's N. Cas. 84, 2 Dick. 685; 1 Jarm. on Wills (4th Eng. ed.) 469; *Wilkinson v. Dent*, L. R. 6 Ch. 339. See also *Fytche v. Fytche*, 19 L. T. N. S. 345; *Coote v. Gordon*, 11 Ir. Eq. Rep. 180; *Hagood v. Houghton*, 22 Pick. (Mass.) 480; *Gray v. Gray*, 5 N. Y. App. Div. 132, 16 Misc. Rep. (N. Y.) 226; *Cogdell v. Widow*, etc., 3 Desaus. (S. Car.) 388.

This principle was first stated by Lord Hardwicke in *East v. Cook*, 2 Ves. 30, where he is reported to have said that the rule requiring an election has its exceptions. Thus, where a man gives a child or other person a legacy or portion in lieu or satisfaction of particular things expressed, this does not exclude the donee from another benefit, though it may happen to be contrary to the will, for the court will not construe it as meant in lieu of every-

thing else when he has said a particular thing. It may perhaps be doubted whether the phrase "though it may happen to be contrary to the will," which is here attributed to Lord Hardwicke, is correctly reported, for in such a case it is plain that the donee takes in conformity to, and not against, the will.

4. **Accepting Bounty on Condition Expressed—When Election Required.**—*Wilkinson v. Dent*, L. R. 6 Ch. 341. See also *Graves v. Boyle*, 1 Atk. 509, *citing* *Jenkins v. Jenkins*, reported in 3 Ves. 250. Perhaps the necessity of an election is excluded if the amount and circumstances of the gift show it to have been intended solely as the settlement of a claim, and exclude entirely the idea of testamentary bounty. See the judgment of Sir W. M. James, L. J., in the case first cited.

5. *Hamilton v. O'Neil*, 9 Mo. 11; *Welch v. Anderson*, 28 Mo. 298. See also *U. S. v. Grundy*, 3 Cranch (U. S.) 337.

6. *Brawford v. Wolfe*, 103 Mo. 391. This decision presupposes special acts required to constitute an election, otherwise the conveyance might itself operate as such. See *supra*, this title, *Manner and Time of Election*, subd. 1. c. (1) *Performing Acts of Ownership*.

7. *Burrill's Law Dict.* An equitable interest in lands may be real estate. See *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 316; *Avery v. Dufrees*, 9 Ohio 147.

EQUITABLE ESTOPPEL. — See the title *ESTOPPEL*, *post*.

EQUITABLE LIENS. — See the titles *ASSIGNMENTS*, vol. 2, p. 1084; *ATTORNEY AND CLIENT*, vol. 3, p. 447; *BANKS AND BANKING*, vol. 3, p. 835; *EQUITABLE MORTGAGES*, *post*, p. ; *IMPROVEMENTS*; *LOST PROPERTY*; *LEGACIES AND DEVISES*; *LIENS*; *PARTNERSHIP*; *STOCK AND STOCKHOLDERS*; *VENDOR'S LIEN*.

EQUITABLE MORTGAGES.

BY BRISCOE B. CLARK.

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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *CHATTEL MORTGAGES*, vol. 5, p. 945;

DEBENTURES, vol. 8, p. 960; *EQUITY OF REDEMPTION*, *post*; *FORECLOSURE OF MORTGAGES*; *LIENS*; *LIMITATION OF ACTIONS*; *MORTGAGES*; *RECORDING ACTS*; *TRUST DEEDS*.

I. DEFINITION. — An equitable mortgage may be defined as a transaction which has the intent but not the form of a mortgage, and which a court of equity will enforce to the same extent as a mortgage.¹

II. SCOPE OF TITLE. — It is the design of this article to present a treatment of the transactions intended by the parties thereto as a security, which, though they do not constitute mortgages at law, are in equity treated as mortgages, viewing the subject from the character of the transaction and not from the character of the property subject to the charge.

Mortgage upon Equitable Estate. — A mortgage upon a purely equitable estate or interest, due to the character of the property mortgaged, is recognized in equity only, and is, of course, properly an equitable mortgage.² The treatment of this subject will, however, be found elsewhere.³

III. PARTICULAR EQUITABLE MORTGAGES — 1. In General. — As a general rule, any deed or written contract entered into by the parties, for the purpose of pledging property or some interest therein as security for a debt, which is informal and insufficient as a common-law mortgage, but which shows that it was the intention of the parties that it should operate as a lien or charge upon specific property, will constitute an equitable mortgage and may be enforced as such in equity.⁴ And on the other hand, whenever property is conveyed,

1. Definition. — Cent. Dict., tit. Mortgage.

Bouvier defines an equitable mortgage as a "lien upon real estate of such a character that it is recognized in equity as a security for the payment of money, and is treated as a mortgage."

Chancellor Kent (4 Kent's Com. 150), in speaking of equitable mortgages, says: "A mortgage may arise in equity out of the transactions of the parties, without any deed or express contract for that special purpose."

Justice Harlan. — In *Ketchum v. St. Louis*, 101 U. S. 317, Mr. Justice Harlan quoted with approval the following extract from Jones on Mortgages, vol. 1, § 162: "In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds and contracts which are wanting in one or both of these characteristics of a common-law mortgage are often used by parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intentions. Mortgages of this kind are therefore called equitable mortgages."

Alabama Court. — "Every agreement for a lien or charge *in rem* * * * is called an equitable mortgage, because courts of chancery, regarding them as trusts to be enforced, attach to them the incidents of a mortgage." *Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431.

2. Mortgages of Equitable Estates. — In *Jarvis v. Dutcher*, 16 Wis. 307, the court said that an equitable mortgage is created when the estate mortgaged is equitable, though the mortgage is legal in form.

3. See the title MORTGAGES.

4. Informal Mortgages — England. — *Matter of Strand Music Hall Co.*, 3 De G. J. & S. 147;

Legard v. Hodges, 1 Ves. Jr. 478, 3 Bro. C. C. 531, affirmed 4 Bro. C. C. 421; *Eyre v. McDowell*, 9 H. L. Cas. 619; *Carew v. Arundell*, 8 Jur. N. S. 71; *Dodsley v. Varley*, 12 Ad. & El. 632, 40 E. C. L. 141; *Craddock v. Scottish Provident Inst.*, 63 L. J. Ch. 15, 69 L. T. 380; *Baynard v. Woolley*, 20 Beav. 583; *Ex p. Rogers*, 2 Jur. N. S. 480. Compare *In re Drew's Estate*, L. R. 2 Eq. 206.

United States. — *Ketchum v. St. Louis*, 101 U. S. 306; *Flagg v. Mann*, 2 Sumn. (U. S.) 533; *Gest v. Packwood*, 39 Fed. Rep. 525.

Alabama. — *Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431; *Hall v. Mobile, etc.*, R. Co., 58 Ala. 22; *Newlin v. McAfee*, 64 Ala. 357.

Arkansas. — *Bell v. Pelt*, 51 Ark. 433, 14 Am. St. Rep. 57.

California. — *Daggett v. Rankin*, 31 Cal. 321.

Georgia. — *Jackson v. Carswell*, 34 Ga. 279.

Indiana. — *Brown v. Brown*, 103 Ind. 23.

Iowa. — *Whiting v. Eichelberger*, 16 Iowa 422.

Kentucky. — *Courtney v. Scott*, Litt. Sel. Cas. (Ky.) 457.

Massachusetts. — *Pinch v. Anthony*, 8 Allen (Mass.) 536; *Harriman v. Woburn Electric Light Co.*, 163 Mass. 85.

Missouri. — *Blackburn v. Tweedie*, 60 Mo. 505.

New Jersey. — *Cummings v. Jackson*, 55 N. J. Eq. 805.

New York. — *Chase v. Peck*, 21 N. Y. 581; *Watkins v. Vrooman*, 51 Hun (N. Y.) 175.

Oregon. — *Manaudas v. Heilner*, 12 Oregon 335.

South Dakota. — *Merrill v. Hurley*, 6 S. Dak. 592.

West Virginia. — *Wayt v. Carwithen*, 21 W. Va. 516.

Where Two Persons Purchased Land Jointly, and the one furnished an excess of his proportion of the purchase price, a written agreement

no matter in what form or by what conveyance, as the mere security for a debt, the transferee will be treated in equity as a mere mortgagee, and will be accorded no other rights or remedies than as mortgagee.¹ This principle is

by the other, promising to pay his proportion of the price thus advanced by the other, and stating that the money so promised to be paid was for the promisor's portion of the price advanced by the promisee for the purchase of the land, was held to be an equitable mortgage. *Leiweke v. Jordan*, 59 Mo. App. 619, *citing* 13 AM. AND ENG. ENCYC. OF LAW (1st ed.) 608.

Indorsement on Notes. — An agreement on the back of a note making it a charge upon particular land has been held to be an equitable mortgage. In this way an agreement intended to operate as a revival of the mortgage note may be rendered effectual as an equitable mortgage, although ineffectual to revive the mortgage lien. *Peckham v. Haddock*, 36 Ill. 38. See also *Smith v. Hiles-Carver Co.*, 107 Ala. 272.

Power of Attorney to Mortgage. — P., being seized under a lease, renewable forever, of premises in Dublin, and being indebted to F. in four hundred and forty-eight pounds, in order to secure the repayment executed a power of attorney whereby he authorized F. to mortgage the premises, and declared the power of attorney to be "irrevocable until F. should have received the whole of his account against P., or payment of any bill, promissory notes, or bills of exchange for which P. is or shall become liable to or on behalf of F." It was held that the power of attorney constituted an equitable mortgage of the premises. *Re Parkinson*, 13 L. T. N. S. 26.

Bond to Indemnify. — In *Hoyt v. Doughty*, 4 Sandf. (N. Y.) 462, where A and B mortgaged lands owned by them in severalty, B's bond to A, conditioned to pay the whole debt and to indemnify him, was held to be an equitable mortgage.

Agreement for Payment from Proceeds of Property. — An agreement that bills shall be paid out of the proceeds of certain property has been held to create an equitable mortgage. *Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431. See also *Johnson v. Johnson*, 40 Md. 189.

A bankrupt, being indebted to the petitioners as the acceptor of two bills of exchange, entered into an agreement with them and W. L. that the bills should be paid out of the proceeds of certain property, the deeds of which were then in the hands of W. L. for sale. It was held that the petitioners might claim as equitable mortgagees, but subject to any prior lien of W. L. *Ex p. Greenhill*, 2 Dea. & Ch. 334.

Reservation of Lien on Crops. — The reservation by a vendor of land of a lien on the crops to be raised thereon in certain years, for payment of the purchase money, creates an equitable mortgage, which attaches as soon as the crops come into existence; and it is immaterial that it is called a landlord's lien, as equity looks through the form to the substance of the agreement. *Martin v. Schichtl*, 60 Ark. 595. See also *Valentine v. Washington*, 33 Ark. 795; *Williams v. Cunningham*, 52 Ark. 439.

Equitable Chattel Mortgages. — A contract under seal between a workman and one of the part owners of a steamboat, by which the former agrees to make and put up an engine on the boat, and the latter agrees to pay him a stipulated sum in cash, and to give three notes or acceptances for another sum, payable four, six, and eight months after date, and by which it was stipulated that, for the better security of the payment of the said notes, the workman should retain a special lien on said boat and engine until the notes were paid, creates an equitable mortgage in favor of the workman, which is not dependent for validity on his retention of the possession of the boat. *Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431.

An equitable mortgage is created by an indorsement at the time of her sale, on a ship's register, which is thereupon retained by the vendor, that the vessel shall not be sold until the notes given for her purchase money have been paid. *Welsh v. Usher*, 2 Hill Eq. (S. Car.) 167, 29 Am. Dec. 63.

1. Conveyances as Security. — *Reed v. Lansdale*, Hard. (Ky.) 8; *Hoile v. Bailey*, 58 Wis. 434.

In *Flagg v. Mann*, 2 Sumn. (U. S.) 533, Story, J., said: "If the transaction resolve itself into a security, whatever may be its form, it is in equity a mortgage."

Illustrations. — Effect has been given, upon this principle, to an instrument given by the maker of two notes to his surety, reciting that the notes were for the purchase of land, and, in case the maker should fail to pay them, binding him to convey the land to his sureties. It was held that upon the failure of the maker to pay the notes, the transaction created merely an equitable mortgage in favor of the sureties, and on default in the payment of the notes the sureties were not entitled to an absolute conveyance. *Courtney v. Scott*, Litt. Sel. Cas. (Ky.) 457. See also *Lyon v. Lyon*, 67 N. Y. 250.

A contract by which it was agreed between M. and T. that if the latter would advance a specified sum of money to redeem M.'s negroes from an incumbrance the said negroes should become his property, subject to the right of the said T. to redeem them within a short space of time, on the repayment of the money so advanced with interest thereon, and under which the money was advanced by T., was held to create a mortgage and not a conditional sale. *Morrow v. Turney*, 35 Ala. 131.

Intention of Parties that Transaction Should Be Other than It Appears Must Be Shown. — In *Packard v. Corporation for Relief of Widows*, etc., 77 Md. 240, the rule that a transaction will not be construed to create an equitable mortgage unless it appears that it was the real intention of the parties that it should have such an effect, was applied to a case where the owner of land executed the deed therefor and the grantee therein executed a lease to the grantor, together with an agreement to convey within a certain time on the condition of the payment of a certain sum.

chiefly exemplified in the case of absolute deeds intended merely as security, and will be fully discussed elsewhere.¹

An Ineffectual Attempt to Appropriate Specific Property to the Payment of a Debt may constitute an equitable mortgage.²

Stipulation in Lease for Lien. — And a provision in a lease giving the lessor a lien for rent on certain property,³ or on the buildings and machinery to be erected by the lessee,⁴ has been held to constitute an equitable mortgage.

Debenture Bonds. — Another instance of equitable mortgages arises in the case of debenture bonds issued by a corporation, pledging its property for the payment of the bonds.⁵

Agreements for Support in Consideration of the Conveyance of Land. — Where land is conveyed in consideration, in part or in whole, for an agreement on the part of the grantee to support the grantor, and the agreement for support recites that the land is pledged as security therefor, an equitable mortgage is created in favor of the grantor.⁶

Necessity for Evidences of Indebtedness. — Notes or other evidences of an indebtedness are not necessary to render a transaction an equitable mortgage; if there was in fact an indebtedness secured by the transaction, that is sufficient.⁷

2. Agreement to Execute Mortgage — *a.* **IN GENERAL.** — In the application of the rule that equity regards that as done which ought to be done, an agreement to give a mortgage *in futuro* is, as a general rule, given effect in courts of equity as an equitable mortgage.⁸

1. Absolute Deeds Construed as Mortgages. — See the title MORTGAGES.

2. *McQuie v. Peay*, 58 Mo. 58; *Blackburn v. Tweedie*, 60 Mo. 505; *Gale v. Morris*, 29 N. J. Eq. 224.

3. Stipulation in Lease for Lien. — *Barroilhet v. Battelle*, 7 Cal. 450; *Whiting v. Eichelberger*, 16 Iowa 422.

4. *First Nat. Bank v. Adam*, (Ill. 1890) 25 N. E. Rep. 576.

5. Debenture Bonds. — *Duncan v. Manchester*, etc., *Water Works*, 8 Price 697; *Seymour v. Canandaigua*, etc., R. Co., 25 Barb. (N. Y.) 284; *Poland v. Lamoille Valley R. Co.*, 52 Vt. 171. See the title DEBENTURES, vol. 8, p. 668.

Bonds of a corporation which pledge the real and personal property of the corporation for the payment of the debt and interest will be treated and enforced by courts of equity as mortgages. *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 414.

A debenture bond reciting that "the company hereby charges with such payment [the payment of the bond] its undertaking, all its property whatsoever and wheresoever, both present and future," has been held to create as between the parties an equitable mortgage. *Howard v. Iron*, etc., Co., 62 Minn. 298.

6. Agreements for Support in Consideration of the Conveyance of Land. — *Chase v. Peck*, 21 N. Y. 581. See also *Campau v. Chene*, 1 Mich. 409.

A written instrument under seal, not acknowledged, in which the signer agrees to maintain his father and mother during their natural lives, and as security for the fulfilment of the agreement conveys and grants to them, "each and severally, a life lien or dower or lien of maintenance for life" in real estate, is an equitable mortgage. *Gilson v. Gilson*, 2 Allen (Mass.) 115.

Implied Vendor's Lien. — It seems that in such a conveyance, unless a lien is expressly re-

served upon the land, the agreement for the support of the vendor is too uncertain to support a vendor's lien. *Meigs v. Dimock*, 6 Conn. 458; *Peters v. Tunell*, 43 Minn. 473, 19 Am. St. Rep. 252; *Arlin v. Brown*, 44 N. H. 102; *McKillip v. McKillip*, 8 Barb. (N. Y.) 552; *Camp v. Gifford*, 67 Barb. (N. Y.) 434; *Brawley v. Catron*, 8 Leigh (Va.) 522. See the title VENDOR'S LIEN.

7. Necessity for Evidences of Indebtedness Secured. — *Bradley v. Merrill*, 88 Me. 319; *Graham v. Stevens*, 34 Vt. 166, 80 Am. Dec. 675. See also *Reed v. Reed*, 75 Me. 272.

8. Agreement to Mortgage Creates Equitable Mortgage — *England.* — *Burn v. Burn*, 3 Ves. Jr. 582; *Ex p. Heathcoat*, 2 Mont. D. & D. 711, 6 Jur. 1001; *Finch v. Winchelsea*, 1 P. Wms. 283; *Shakel v. Marlborough*, 4 Madd. 463. See also *Metcalf v. York*, 1 Myl. & C. 547, 6 Sim. 224; *Tebb v. Hodge*, L. R. 5 C. P. 73.

United States. — *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 422; *Gest v. Packwood*, 39 Fed. Rep. 525; *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753; *Bridgeport Electric*, etc., Co. v. *Meador*, 72 Fed. Rep. 115; *Ketchum v. St. Louis*, 101 U. S. 306.

Alabama. — *Coster v. Georgia Bank*, 24 Ala. 59; *Morrow v. Turney*, 35 Ala. 131; *O'Neal v. Seixas*, 85 Ala. 80.

Arkansas. — *Driver v. Jenkins*, 30 Ark. 120; *Richardson v. Hamlett*, 33 Ark. 237.

California. — *Daggett v. Rankin*, 31 Cal. 322; *Racouillat v. Sansvain*, 32 Cal. 376; *Love v. Sierra Nevada Lake Water*, etc., Co., 32 Cal. 639, 91 Am. Dec. 602; *Remington v. Higgins*, 54 Cal. 620.

Connecticut. — *Hall v. Hall*, 50 Conn. 104.

Iowa. — *Cole v. Dealham*, 13 Iowa 551. Compare *Humphreys v. Snyder*, 1 Morr. (Iowa) 263.

Maryland. — *Gill v. McAttee*, 2 Md. Ch. 264; *M'Mechen v. Maggs*, 4 Har. & J. (Md.) 132; *Alexander v. Ghiselin*, 5 Gill (Md.) 138; *Trie-*

Agreement for Execution of Mortgage in Præsent. — A distinction has been made between an agreement to execute a mortgage *in futuro* and an agreement to execute one *in præsent*; in the latter case, when the mortgage fails by mere want of execution, it has been held that a court of equity would not construe the agreement as a mortgage.¹

Merger. — On the execution of the legal mortgage in pursuance of an agreement to execute a mortgage, the equitable mortgage arising out of the agreement becomes merged in the legal mortgage.² Still the mortgagee would be entitled to the protection of the mortgage as from the time of the agreement to execute it.³

bert v. Burgess, 11 Md. 452; *Nelson v. Hagerstown Bank*, 27 Md. 51; *Johnson v. Johnson*, 40 Md. 189; *Cole v. Cole*, 41 Md. 301. Compare *Sullivan v. Tuck*, 1 Md. Ch. 59.

Massachusetts. — *Pinch v. Anthony*, 8 Allen (Mass.) 536.

Mississippi. — *Petrie v. Wright*, 6 Smed. & M. (Miss.) 647; *Adams v. Johnson*, 41 Miss. 258.

Missouri. — *McQuie v. Peay*, 58 Mo. 58; *Carter v. Holman*, 60 Mo. 498; *Blackburn v. Tweedie*, 60 Mo. 505; *Martin v. Nixon*, 92 Mo. 26.

New Jersey. — *Oliva v. Bunaforza*, 31 N. J. Eq. 395.

New York. — *In re Howe*, 1 Paige (N. Y.) 125, 19 Am. Dec. 395; *Burdick v. Jackson*, 7 Hun (N. Y.) 488; *Sprague v. Cochran*, 144 N. Y. 104.

North Carolina. — *Miller v. Moore*, 3 Jones Eq. (56 N. Car.) 431.

Ohio. — *Muskingum Bank v. Carpenter*, 7 Ohio (pt. i.) 21, 28 Am. Dec. 616; *Bloom v. Noggle*, 4 Ohio St. 45.

South Carolina. — *Read v. Gaillard*, 2 Desaus. (S. Car.) 552, 2 Am. Dec. 696; *Welsh v. Usher*, 2 Hill Eq. (S. Car.) 167, 29 Am. Dec. 63; *Delaire v. Keenan*, 3 Desaus. (S. Car.) 74, 4 Am. Dec. 604.

Tennessee. — *Cook v. Cook*, 3 Head (Tenn.) 719.

Texas. — *Boehl v. Wadgymer*, 54 Tex. 589.

Vermont. — *Poland v. Lamoille Valley R. Co.*, 52 Vt. 174.

Basis of Doctrine. — In *Sprague v. Cochran*, 144 N. Y. 104, O'Brien, J., in speaking of equitable mortgages arising out of agreements to execute mortgages, said that "the whole doctrine of equitable mortgages is founded upon that cardinal maxim of equity which regards that as done which has been agreed to be done and ought to have been done. In order to apply this maxim according to its true meaning, the court will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, and not as the parties might have executed them, always regarding the substance and not the form of the transaction."

An Agreement by the Promoter of a Corporation which was ratified by the corporation on its organization, to execute a mortgage in payment for a machine to be furnished to the corporation, which was executed on the part of the vendor by the delivery of such machine, was held to create an equitable mortgage. *Bridgeport Electric, etc., Co. v. Meader*, 72 Fed. Rep. 115.

Land Subsequently to Be Acquired. — A contract in writing whereby the contractor agrees to purchase a particular tract of land and execute a mortgage thereon to secure a debt creates an equitable mortgage on such land when purchased which a court of equity will enforce against the contractor and purchasers and volunteers with notice. *Smith v. Patton*, 12 W. Va. 541. See also *Wright v. Shumway*, 1 Biss. (U. S.) 23.

Application of Rule in Case of Bankruptcy of Mortgagor. — In *Burdick v. Jackson*, 7 Hun (N. Y.) 488, the court applied the rule that an agreement to execute a mortgage *in futuro* creates an equitable mortgage, and thereby sustained a mortgage executed by a bankrupt in pursuance of a prior agreement, though the mortgage was executed within the time during which the statute prohibited the execution of mortgages by bankrupts to prefer creditors.

1. Agreement for Mortgage in Præsent. — In *Price v. Cutts*, 29 Ga. 142, 74 Am. Dec. 52, Stephens, J., in speaking of an agreement to execute a mortgage *in præsent* which failed by mere want of execution, said: "Cases were read to show that such an equitable lien is created by an agreement to execute a mortgage, but all these were cases where the mortgage was to be executed at some future day, not where the mortgage was to be had *in præsent*, but failed by mere want of execution. There is a difference, as it seems to me, between such a contract as equity will set up as a mortgage, treating it as having been a mortgage from the beginning, after it is set up on the one hand, and on the other hand a mere agreement for a mortgage at a future time."

As to the effect of defectively executed mortgages, see *infra*, this section, *Defectively Executed Mortgages*.

2. Merger. — *Petrie v. Wright*, 6 Smed. & M. (Miss.) 647.

The lien of the equitable mortgage arising from such an agreement is not, however, merged in a subsequently executed mortgage, which, by reason of fraud or mistake, is insufficient to create a lien on the land agreed to be mortgaged, as where part of such lands is omitted from the mortgage. *Sprague v. Cochran*, 144 N. Y. 104, *reversing* 70 Hun (N. Y.) 512.

3. In *Miller v. Moore*, 3 Jones Eq. (56 N. Car.) 431, a corporation entered into an agreement to pledge a bond for title as security to certain of its members for liabilities which they were to incur for the corporation. Subsequently a deed of trust was made in conformity with this resolution, but after the members had acted upon the faith of the agreement to pledge the bond. The court

b. REQUISITES OF AGREEMENT — Certainty. — In order that an agreement to execute a mortgage may create an equitable mortgage, it is necessary that the agreement be plain and explicit;¹ and therefore an agreement to execute a mortgage which fails to specify the property to be mortgaged is insufficient to create an equitable mortgage.²

Statute of Frauds. — Owing to the conflict in the several jurisdictions as to the effect of a mortgage as a conveyance of an interest in land, the decisions as to whether a parol agreement to execute a mortgage is within the statute of frauds, and therefore unenforceable in equity, will be found conflicting; but in jurisdictions where a mortgage does convey an interest in land, courts of equity will not give effect to a parol agreement to execute a mortgage as an equitable mortgage.³

c. PROOF OF AGREEMENT — Must Be Clear and Satisfactory. — And in order that a court of equity may give effect to an agreement to execute a mortgage, the proof of the agreement, as in cases for specific performance, must be clear and satisfactory.⁴

3. Defectively Executed Mortgages. — An ineffectual attempt to create a legal mortgage or deed of trust, the instrument failing as a legal instrument by reason of some defect in its execution or form, will, as a general rule, be given effect in a court of equity as an equitable mortgage;⁵ and in order that this

held that the deed of trust should be regarded only as a confirmation of the agreement and as having relation to such agreement, and that the members who acted on the faith of it were entitled to the security as from the time of the agreement.

1. Certainty. — *Cole v. Dealham*, 13 Iowa 551; *Nelson v. Hagerstown Bank*, 27 Md. 51; *Gill v. McAttee*, 2 Md. Ch. 255.

Agreement Must Be Consummated. — In *Gill v. McAttee*, 2 Md. Ch. 255, the court said that an agreement to execute a mortgage, in order to create an equitable mortgage, must be certain, distinct, and consummated, and the court refused to sustain a claim for an equitable mortgage based on an alleged agreement to execute a mortgage, on the ground that the agreement had never been consummated.

2. Property Must Be Specified. — *Sanderson v. Stockdale*, 11 Md. 563; *Adams v. Johnson*, 41 Miss. 258; *Boehl v. Wadgymer*, 54 Tex. 589, citing *Williams v. Lucas*, (2 Am. Cas. Eq.) 2 Cox 160. See also *Langley v. Vaughn*, 10 Heisk. (Tenn.) 553.

Agreement to Give Mortgage upon All of Mortgagor's Land. — In *Sprague v. Cochran*, 144 N. Y. 104, an agreement to give a mortgage upon all of the mortgagor's land was held sufficient to create an equitable mortgage upon land which by mistake of the scrivener was omitted from a subsequently executed mortgage.

3. Statute of Frauds. — *Alexander v. Pardue*, 30 Ark. 359; *Six v. Shaner*, 26 Md. 415; *Gale v. Morris*, 29 N. J. Eq. 224; *Marquat v. Marquat*, 7 How. Pr. (N. Y. Supreme Ct.) 417; *Bower v. Oyster*, 3 P. & W. (Pa.) 239; *Bailey v. Warner*, 28 Vt. 87. See the title FRAUDS (STATUTE OF).

In *Boehl v. Wadgymer*, 54 Tex. 589, the rule that a parol agreement to execute a mortgage was within the statute of frauds was laid down and applied so as to exclude parol evidence of the land the description of which was omitted from a written contract to execute a mortgage.

In *McCarty v. Brackenridge*, 1 Tex. Civ. App. 170, a parol agreement to execute a

mortgage was held to create an equitable mortgage.

Part Performance. — In *Sprague v. Cochran*, 144 N. Y. 104, O'Brien, J., in speaking of the effect of the statute of frauds upon parol agreements to execute mortgages which have been executed in part by the mortgagees by the advance of the money to be secured by the mortgage, said: "It is not necessary that such * * * agreements as to lands should be in writing in order to take them out of the operation of the statute of frauds, for two reasons; first, because they are completely executed by at least one of the parties and are no longer executory, and secondly, because the statute by its own terms does not affect the power which courts of equity have always exercised to compel specific performance of such agreements." See also *Smith v. Smith*, 125 N. Y. 228.

In *Burdick v. Jackson*, 7 Hun (N. Y.) 488, the court recognized the rule that a parol agreement to execute a mortgage on lands was within the statute of frauds, but held that where the mortgage is executed in pursuance of such an agreement the case is taken out of the statute of frauds, and sustained a mortgage executed in pursuance of a parol agreement to execute it, though the mortgage was not executed by the mortgagor until after he became bankrupt and therefore would not have been valid in the absence of such parol agreement.

4. Proof of Agreement Must Be Clear and Satisfactory. — *Girault v. Adams*, 61 Md. 1.

5. Defective Mortgages — England. — *Russell v. Russell*, 1 Bro. C. C. 269; *Taylor v. Wheeler*, 2 Vern. 565 [citing *Burgh v. Francis*]; *Flint v. Walker*, 5 Moo. P. C. 180.

United States. — *Hunt v. Rhodes*, 1 Pet. (U. S.) 1.

Alabama. — *O'Neal v. Seixas*, 85 Ala. 80; *Wood v. Holly Mfg. Co.*, 100 Ala. 326.

California. — *Daggett v. Rankin*, 31 Cal. 321; *Racouillat v. Sansevain*, 32 Cal. 376; *Love v. Sierra Nevada Lake Water, etc., Co.*, 32

rule may operate it is held immaterial whether the defect in the instrument

Cal. 639, 91 Am. Dec. 602; *Remington v. Higgins*, 54 Cal. 624; *Peers v. McLaughlin*, 88 Cal. 294, 22 Am. St. Rep. 306.

Florida. — *Margam v. J. S. Christie Orange Co.*, 37 Fla. 165.

Maryland. — *Price v. McDonald*, 1 Md. 414, 54 Am. Dec. 657; *Johnston v. Canby*, 29 Md. 217; *Dyson v. Simmons*, 48 Md. 214; *Milholand v. Tiffany*, 64 Md. 455; *Tiernan v. Poor*, 1 Gill & J. (Md.) 216, 19 Am. Dec. 225.

Michigan. — *Abbott v. Godfroy*, 1 Mich. 178.

Minnesota. — *Ross v. Worthington*, 11 Minn. 438, 88 Am. Dec. 95; *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322.

Mississippi. — *Burnet v. Boyd*, 60 Miss. 627. See also *Coppage v. Barnett*, 34 Miss. 621.

Missouri. — *Davis v. Clay*, 2 Mo. 161; *McClurg v. Phillips*, 49 Mo. 315; *McQuie v. Peay*, 58 Mo. 58; *Blackburn v. Tweedie*, 60 Mo. 505; *Martin v. Nixon*, 92 Mo. 26.

New Jersey. — *Gale v. Morris*, 29 N. J. Eq. 222.

New York. — *Chase v. Peck*, 21 N. Y. 583; *Payne v. Wilson*, 74 N. Y. 348; *Husted v. Ingraham*, 75 N. Y. 257; *Coman v. Lakey*, 80 N. Y. 350; *Perry v. Board of Missions, etc.*, 102 N. Y. 99; *Smith v. Smith*, 125 N. Y. 224; *Sprague v. Cochran*, 144 N. Y. 104; *De Pierres v. Thorn*, 4 Bosw. (N. Y.) 266; *National Bank v. Lanier*, 7 Hun (N. Y.) 623; *Lanning v. Tompkins*, 45 Barb. (N. Y.) 316.

Ohio. — *Muskingum Bank v. Carpenter*, 7 Ohio (pt. i.) 21, 28 Am. Dec. 616; *Lake v. Doud*, 10 Ohio 415.

Oregon. — *Moore v. Thomas*, 1 Oregon 201; *Brown v. Farmers' Supply Co.*, 23 Oregon 544.

South Carolina. — *Delaire v. Keenan*, 3 DeSaus. (S. Car.) 74, 4 Am. Dec. 604.

Vermont. — *Miller v. Rutland, etc.*, R. Co., 36 Vt. 452.

Wyoming. — *Frank v. Hicks*, 4 Wyoming 502.

Compare *Price v. Cutts*, 29 Ga. 142, 74 Am. Dec. 52.

Omission of Word "Heirs." — In *Gale v. Morris*, 30 N. J. Eq. 285, a mortgage intended to be in fee, which was ineffectual as such by reason of the omission of the word "heirs" in the grant to the mortgagee, was sustained as an equitable mortgage in fee.

A Mortgage Signed in Blank and given to an agent, by whom it is afterwards filled in and delivered, is not a legally executed deed. *Fox v. Palmer*, 25 N. J. Eq. 416. The court said that it might, however, create an equitable lien, which, under proper circumstances, the court would enforce.

Defective Execution of Power. — In *Beatty v. Clark*, 20 Cal. 11, it was held that when there is a defect in the execution of a power to make a mortgage, the condition of the mortgage not following the terms of the power, and the design to execute a mortgage in pursuance of the power is apparent, the mortgage will be enforced in equity. See also *Schenck v. Ellingwood*, 3 Edw. Ch. (N. Y.) 175.

Omission of Land. — In *Sprague v. Cochran*, 144 N. Y. 104, reversing 70 Hun (N. Y.) 512, a landowner agreed to give a mortgage upon all his lands, but by mistake of the scrivener a parcel was omitted from the mortgage subsequently executed. It was held that the mort-

gagee had an equitable lien upon the land omitted. See also *Martin v. Nixon*, 92 Mo. 26.

Defect of Livery of Seizin. — In *Burgh v. Francis*, cited in *Taylor v. Wheeler*, 2 Vern. 564, a mortgage ineffectual as a legal mortgage by reason of a defect in the livery of seizin was given effect as an equitable mortgage.

Defect in Regard to the Seal. — When a mortgage fails as a legal mortgage by reason of the omission of a seal, a court of equity will give effect to it as an equitable mortgage. *Racouillat v. Sansevain*, 32 Cal. 376; *Portwood v. Outton*, 3 B. Mon. (Ky.) 247; *Sanders v. McDonald*, 63 Md. 503; *Sappington v. Boly*, 12 Mo. 568; *Bullock v. Whipp*, 15 R. I. 195. See also *Woods v. Wallace*, 22 Pa. St. 171.

A mortgage purporting to be under seal, but to which no seal was attached, will nevertheless be treated as an executory contract which the chancellor will complete. *M'Gee v. Davie*, 4 J. J. Marsh. (Ky.) 70.

Defect in Witnesses. — Where by inadvertence or mistake a mortgage is not witnessed as required by statute, and therefore fails as a legal mortgage, effect will be given to it in equity as an equitable mortgage. *Abbott v. Godfroy*, 1 Mich. 178; *Muskingum Bank v. Carpenter*, 7 Ohio (pt. i.) 21, 28 Am. Dec. 616; *Lake v. Doud*, 10 Ohio 415; *White v. Denman*, 16 Ohio 59; *Moore v. Thomas*, 1 Oregon 201.

And it has been held that the fact that the instrument was altered by the addition of a witness's name will not prevent the mortgage from being valid as an equitable mortgage. *Muskingum Bank v. Carpenter*, 7 Ohio (pt. i.) 21, 28 Am. Dec. 616. See the title ALTERATION OF INSTRUMENTS, vol. 2, p. 181.

Acknowledgment. — And so a mortgage or deed of trust defectively acknowledged has been given effect as an equitable mortgage. *Price v. McDonald*, 1 Md. 403, 54 Am. Dec. 657; *Dyson v. Simmons*, 48 Md. 214; *Moore v. Thomas*, 1 Oregon 201.

Absence of Affidavit. — The absence of the necessary affidavit does not affect the validity of the mortgage as between the parties thereto, or persons claiming by or through the mortgagors or grantors with notice of the debt. *Phillips v. Pearson*, 27 Md. 242.

Omission of Trustee in Deed of Trust. — Where the name of the trustee in a deed of trust is left blank, the instrument, though ineffectual as a deed of trust, will still be enforced as an equitable mortgage. *Burnside v. Wayman*, 49 Mo. 356. See also *McQuie v. Peay*, 58 Mo. 56.

Omission of Mortgagee. — If a party makes a mortgage or affects to make one, but it proves to be defective by reason of some informality or omission, even if it is the omission of the mortgagee himself, as the instrument is at least evidence of an agreement to convey, the conscience of the mortgagor is bound, and it will be enforced by a court of equity. *Dyson v. Simmons*, 48 Md. 207.

Attempt to Carry Out Agreement Necessary. — It has been said that in order that a defectively executed mortgage may be enforced as an equitable mortgage, it must appear that the mortgagor agreed to pledge the property mentioned, and that he attempted to carry out the

arose from a mistake of law or of fact.¹

Mortgages by Married Women. — The doctrine of the creation of an equitable mortgage by a defective mortgage has been extended to a mortgage by a married woman upon her separate estate,² but as a married woman is incompetent to contract except as to her separate estate, without a compliance with the statutory requirements, a defective mortgage executed by her upon land not her separate estate cannot be given effect as an equitable mortgage.³

Consideration — Antecedent Debt. — A court of equity will sustain a defectively executed mortgage as an equitable mortgage, though it was given to secure an antecedent debt.⁴

4. Assignments of Rents and Profits. — An assignment of the rents and profits of land for the payment of a debt has been held to constitute an equitable mortgage.⁵ A mere agreement, however, to apply such rents and profits to the payment of a debt has been held insufficient to create an equitable mortgage.⁶

5. Agreements for the Sale of Land — American Rule. — In agreements for the sale of land the relation between the vendor and the vendee is in equity analogous to that of an equitable mortgagee and mortgagor, the vendee holding an equity which is liable to foreclosure at the suit of the vendor.⁷

agreement. *Brown v. Farmers' Supply Co.*, 23 Oregon 541.

1. Cause of Defect Immaterial. — *Love v. Sierra Nevada Lake Water, etc., Co.*, 32 Cal. 639, 91 Am. Dec. 602.

2. Mortgage by Married Woman. — A separate mortgage by a married woman upon her separate estate is given effect in equity as an equitable mortgage to the same extent as mortgages by other persons, as she has in equity the same power over it, and may bind it by mortgage or deed of trust as if she were a feme sole. *McQuie v. Peay*, 58 Mo. 56. Compare *Drury v. Foster*, 2 Wall. (U. S.) 24.

3. By a sealed instrument in the form of an indenture a party purported to convey, in order to secure the payment of certain notes made by him, land held by his wife in her own right, but not as her separate estate. In the commencement of the deed the wife was mentioned in connection with her husband as "of the first part," but in the body of the deed the husband alone was named as grantor. The husband and wife both signed and acknowledged the deed. It was held that the instrument did not create even an equitable mortgage. *Whiteley v. Stewart*, 63 Mo. 360. See also *Shroyer v. Nickell*, 55 Mo. 264.

4. Antecedent Debt. — *Burn v. Burn*, 3 Ves. Jr. 582; *National Bank v. Lanier*, 7 Hun (N. Y.) 623.

5. Assignment of Rents and Profits. — In *Ex p. Wills*, 1 Ves. Jr. 162, the lord chancellor said: "An assignment of rents and profits is an odd way of conveying, but it amounts to an equitable lien, and would entitle the assignee to come into equity and insist upon a mortgage."

A father, upon the marriage of his daughter, executed a deed whereby he covenanted to pay his daughter an annuity, and, for the purpose of securing the annuity, appointed a receiver of the rents and profits of lands in which he had an estate for life, with a direction to apply the moneys received as specified in the deed. The deed contained provisions that the appointment should not be revoked by the appointor, and for the appointment of subse-

quent receivers, if necessary. It was held that the deed created a charge upon the father's life estate in the lands. *Cradock v. Scottish Provident Inst.*, 63 L. J. Ch. 15, 69 L. T. 380.

Power of Attorney to Collect Rents and Profits. — Upon the advance of a sum of money by K. to S. the latter executed her bond and warrant, and effected an assurance upon her life; and also perfected a letter of attorney, authorizing K. to receive the rents of her estates, and, by contemporaneous instruments, stated that the letter of attorney was given for the repayment of the money borrowed, and agreed not to revoke it until the sum borrowed should be repaid, with interest; and authorized K. to apply the rents in payment of the premiums on the policy, and the interest on the debt. It was held that this constituted an equitable mortgage of the lands. *Abbott v. Stratten*, 3 J. & L. 603, 9 Ir. Eq. Rep. 233.

6. Mere Agreement to Apply Rents to Payment of Debt. — *Alexander v. Berry*, 54 Miss. 422.

And so an agreement whereby a planter agrees to ship his crop to a factor, to reimburse him for advances and supplies furnished, does not create an equitable mortgage on the crops produced. *Allen v. Montgomery*, 48 Miss. 101. See also the title CROPS, vol. 8, p. 301.

7. Agreements for the Sale of Land — American Rule — United States. — *Hardin v. Boyd*, 113 U. S. 756. Compare *Lewis v. Hawkins*, 23 Wall. (U. S.) 125.

Alabama. — *Bankhead v. Owen*, 60 Ala. 457; *Haley v. Bennett*, 5 Port. (Ala.) 470; *Lowery v. Peterson*, 75 Ala. 109; *Roper v. McCook*, 7 Ala. 322; *Moses v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58; *Conner v. Banks*, 18 Ala. 42, 52 Am. Dec. 209; *Chapman v. Chunn*, 5 Ala. 397.

California. — *Sparks v. Hess*, 15 Cal. 186; *Gessner v. Palmateer*, 89 Cal. 89; *Merritt v. Judd*, 14 Cal. 59.

Colorado. — *Wells v. Francis*, 7 Colo. 396.

Illinois. — *Wright v. Troutman*, 81 Ill. 374; *Hutchinson v. Crane*, 100 Ill. 269. Compare

English Rule. — In England the relationship between the parties seems, however, to be rather that of trustee and *cestui que trust*,¹ and in *Massachusetts* it seems that the English rule prevails.²

6. Assignments of Contracts for the Purchase of Land. — As a general rule, an assignment by the vendee of a contract for the purchase of land, made as a security for a debt, makes the assignee an equitable mortgagee.³

Assignment of Partial Interest. — And the same rule applies to the assignment of a partial interest in such a contract.⁴

Deed Acquired by Assignee. — When the assignee of the land contract acquires the deed from the vendor, he still holds the land merely as an equitable mortgagee.⁵

Assignment in Form Absolute. — Irrespective of the form of the assignment, if it was intended as a security it will be construed in equity as a mortgage.⁶ The burden, however, of proving that an assignment which is absolute in form was

Greene v. Cook, 29 Ill. 186; *Robinson v. Appleton*, 22 Ill. App. 351.

Michigan. — *Fitzhugh v. Maxwell*, 34 Mich. 138.

Mississippi. — *Strickland v. Kirk*, 51 Miss. 795; *Tanner v. Hicks*, 4 Smed. & M. (Miss.) 300.

North Carolina. — *Edward v. Thompson*, 71 N. Car. 177.

Tennessee. — *Graham v. McCampbell*, Meigs (Tenn.) 56, 33 Am. Dec. 126.

Texas. — *Baker v. Compton*, 52 Tex. 252.

Washington. — *Wood v. Mastick*, 2 Wash. Ter. 64; *St. Paul, etc., Lumber Co. v. Bolton*, 5 Wash. 763.

Wisconsin. — *Button v. Schroyer*, 5 Wis. 598; *Schriber v. Le Clair*, 66 Wis. 579; *Church v. Smith*, 39 Wis. 495.

Statements of Rule. — In *Church v. Smith*, 39 Wis. 492, Lyon, J., said, *quoting* *Button v. Schroyer*, 5 Wis. 598: "The relation between the parties is analogous to that of equitable mortgagor and mortgagee."

In *Strickland v. Kirk*, 51 Miss. 795, Simrall, J., said: "The vendor is treated by the courts as mortgagee; his retention of the title operates as an equitable mortgage, which is of equal import as the ordinary mortgage."

In *Conner v. Banks*, 18 Ala. 42, 52 Am. Dec. 209, Dargan, C. J., said: "If he [the vendor] has executed a bond to make titles when the purchase money is paid, the contract in a court of equity will be considered in the nature of a conveyance to the purchaser and a reconveyance back by way of mortgage."

1. English Rule. — *Lysaght v. Edwards*, 2 Ch. Div. 499; *McCreight v. Foster*, L. R. 5 Ch. 604; *Shaw v. Foster*, L. R. 5 H. L. 321; *Rose v. Watson*, 10 H. L. Cas. 678; *Hadley v. London Bank*, 3 De G. J. & S. 70.

2. Massachusetts Rule. — In *Felch v. Hooper*, 119 Mass. 52, Colt, J., said: "The doctrine is well established in equity that, from the time a valid contract for the sale of land is made, that which ought to have been done is treated, as between the parties, as already done; and the seller and his representatives, and subsequent purchasers from him with notice, will be held to be trustees for the purchaser, for the purpose of affording the latter a remedy against the estate." See also *Lewis v. Hawkins*, 23 Wall. (U. S.) 125; 1 Story's Eq. Jur. (13th ed.), § 789.

3. Assignments of Contracts for the Purchase of Land — *Alabama.* — *Hays v. Hall*, 4 Port. (Ala.) 374, 30 Am. Dec. 530.

Michigan. — *Gamble v. Ross*, 88 Mich. 315; *Meigs v. McFarlan*, 72 Mich. 194.

Minnesota. — *Niggeler v. Maurin*, 34 Minn. 118.

Missouri. — *Hackett v. Watts*, 138 Mo. 502.

Nebraska. — *Malloy v. Malloy*, 35 Neb. 224; *Burrows v. Hovland*, 40 Neb. 464; *Lipp v. South Omaha Land Syndicate*, 24 Neb. 692; *Scharman v. Scharman*, 38 Neb. 39.

Pennsylvania. — *Fredericks v. Corcoran*, 12 W. N. C. (Pa.) 60; *Russell's Appeal*, 15 Pa. St. 319.

South Carolina. — *Roddy v. Elam*, 12 Rich. Eq. (S. Car.) 345.

Wisconsin. — *Brayton v. Jones*, 5 Wis. 117. See also *Andrews v. Cone*, 124 U. S. 720; *Gilkinson v. Connor*, 24 S. Car. 321.

Deposit of Contract Accompanied by Written Agreement. — The deposit of a contract for the sale of land by the vendee, accompanied by a writing reciting that the deposit was made to secure all indebtedness due from the depositor to the deposittee, was held to create an equitable mortgage upon the interest of the vendee of the land. *Hackett v. Watts*, 138 Mo. 502.

4. Assignment of Partial Interest. — A and B having made an agreement for the conveyance of 248 acres of land, B, the purchaser, assigned it to C, his creditor, to the extent of one hundred acres, to secure a debt payable at a future time, and subsequently sold the contract to third persons, who took it with notice of C's right. It was held that C was an equitable mortgagee, and might maintain an action before his debt was due, to prevent a transfer to a *bona fide* purchaser. He might ask for satisfaction of his debt; and, his debt having become due pending the suit, the decree might provide for satisfaction. *Northrup v. Cross*, Seld. Notes (N. Y.) 111.

5. Deed Acquired by Assignee. — *Purdy v. Bulard*, 41 Cal. 444; *Smith v. Cremer*, 71 Ill. 185; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Newhouse v. Hill*, 7 Blackf. (Ind.) 584; *Gamble v. Ross*, 88 Mich. 315; *Sinclair v. Armitage*, 12 N. J. Eq. 174; *Fessler's Appeal*, 75 Pa. St. 483.

6. Assignment in Form Absolute. — *Fitzhugh v. Smith*, 62 Ill. 486; *Meigs v. McFarlan*, 72 Mich. 194; *Crawford v. Osmon*, 70 Mich. 561; *Brockway v. Wells*, 1 Paige (N. Y.) 617; *Lovejoy v. Chapman*, 23 Oregon 571.

intended as a mortgage is upon the assignor, and in the absence of any showing as to the intention of the parties the transaction will not be decreed a mortgage.¹

7. Assignments of State Land Certificates. — The general rule that the assignment of a contract for the purchase of land as a security creates a mortgage applies to an assignment of a certificate of the purchase of state lands.²

8. Reservation of Lien by Vendor. — While the implied lien of the vendor may not properly be an equitable mortgage, still it is generally held that where a lien is expressly reserved by the vendor, either in the deed of conveyance or in other writings, the transaction creates in equity the relation of mortgagor and mortgagee.³ The subject of vendors' liens, both expressed and implied, will be fully discussed in a separate article.⁴

9. Future-acquired Property. — A mortgage or agreement to mortgage property to be acquired in the future, though invalid as a common-law mortgage, is often given effect in equity as a mortgage.⁵ The question of the mortgage of property to be acquired in the future will be fully discussed in another title.⁶

10. Mortgage by Deposit of Title Deeds — *a. GENERAL ENGLISH RULE.* — In England the doctrine that the deposit of title deeds as security for a debt created an equitable mortgage was asserted at an early date⁷ and has been generally accepted and acted upon.⁸

1. Burden of Proof. — *Morris v. Nyswanger*, 5 S. Dak. 307.

See the title MORTGAGES for a full discussion of the question when a deed absolute on its face will be construed by courts of equity to create a mortgage.

2. Assignment of State Land Certificates — *California*. — *Hill v. Eldred*, 49 Cal. 398.

Colorado. — *Stewart v. McLaughlin*, 11 Colo. 458.

Illinois. — *Dwen v. Blake*, 44 Ill. 135.

Michigan. — *Gunderman v. Gunnison*, 39 Mich. 313; *Case v. McCabe*, 35 Mich. 100.

Nebraska. — *Malloy v. Malloy*, 35 Neb. 224; *Burrows v. Hovland*, 40 Neb. 464.

Ohio. — *Stover v. Bounds*, 1 Ohio St. 107.

Wisconsin. — *Dodge v. Silverthorn*, 12 Wis. 644; *Mowry v. Wood*, 12 Wis. 413; *Jarvis v. Dutcher*, 16 Wis. 307.

A person holding a pre-emption right upon public lands procured a capitalist to pay the purchase money due upon the land into the land office of the United States, and allowed him to hold the receipt and certificate of location as security for payment, receiving back a bond of the capitalist to give a deed upon repayment, on a certain day, of the purchase money with interest. It was held that these facts constituted, as between the parties and persons claiming under them, an equitable mortgage of the land subject to redemption, and to foreclosure by decree of sale in equity. *Wright v. Shumway*, 1 Biss. (U. S.) 23.

3. Equitable Mortgage Arising Out of Reservation of Vendor's Lien — *Alabama*. — *Hall v. Mobile*, etc., R. Co., 58 Ala. 22.

Arkansas. — *Stix v. Chaytor*, 55 Ark. 116; *Bell v. Pelt*, 51 Ark. 433, 14 Am. St. Rep. 57.

California. — *Dingley v. Ventura Bank*, 57 Cal. 467.

Illinois. — *Yates v. Smith*, 11 Ill. App. 459.

Indiana. — *Gibson v. Eller*, 13 Ind. 124.

Louisiana. — *Brooks v. Walker*, 3 La. Ann. 150.

Mississippi. — *Moore v. Lackey*, 53 Miss. 85.

New Jersey. — *Gale v. Morris*, 29 N. J. Eq. 222, 30 N. J. Eq. 285.

West Virginia. — *Cole v. Smith*, 24 W. Va. 287.

4. See the title VENDOR'S LIEN.

5. Mortgages of Property to Be Acquired in Futuro. — *Metcalf v. York*, 1 Myl. & C. 547, 6 Sim. 224, 6 L. J. Ch. N. S. 65; *Robinson v. Macdonnell*, 5 M. & S. 228; *Curtis v. Auber*, 1 Jac. & W. 506; *Douglas v. Russell*, 4 Sim. 524, 1 Myl. & K. 488; *Alexander v. Wellington*, 2 Russ. & M. 35; *Poland v. Lamoille Valley R. Co.*, 52 Vt. 171.

6. See the title MORTGAGES.

7. Mortgage by Deposit of Title Deeds — *English Rule.* — *Russel v. Russel*, (1783) 1 Bro. C. C. 269, wherein the deposit of a lease was held to create an equitable mortgage upon the leasehold interest.

8. *Richards v. Borrett*, 3 Esp. N. P. 102; *Lloyd v. Attwood*, 3 De G. & J. 614; *Pain v. Smith*, 2 Myl. & K. 417; *Astbury v. Astbury*, 78 L. T. N. S. 494; *Lewthwaite v. Clarkson*, 2 Y. & Coll. 370; *Watson v. Chapman*, 18 L. T. N. S. 705; *Burgess v. Moxon*, 2 Jur. N. S. 1059; *Darke v. Williamson*, 25 Beav. 622; *Meggison v. Forster*, 7 Jur. 546; *Matthews v. Goodday*, 8 Jur. N. S. 90; *Baynard v. Woolley*, 20 Beav. 583; *Ashworth v. Mounsey*, 9 Exch. 175; *Ex p. Skinner*, 1 Dea. & Ch. 403; *Ex p. Bowdaile*, 2 Mont. & A. 398; *Ex p. Crossfield*, 3 Ir. Eq. Rep. 67; *Edge v. Worthington*, 1 Cox 211; *Ex p. Bulted*, 2 Cox 243; *Ex p. Mountfort*, 14 Ves. Jr. 606; *Unity Joint-Stock Banking Assoc. v. King*, 4 Jur. N. S. 470; *Casberd v. Ward*, 6 Price 411; *Bozon v. Williams*, 3 Y. & J. 150; *Ex p. Kensington*, 2 Ves. & B. 79; *Mellor v. Porter*, 25 Ch. Div. 158; *Ex p. Langston*, 17 Ves. Jr. 230; *Ex p. Coombe*, 17 Ves. Jr. 369; *National Bank v. Cherry*, L. R. 3 P. C. 299; *Hankey v. Vernon*, 2 Cox 12; *Meux v. Smith*, 2 Mont. D. & D. 789; *Ball v. Harris*, 3 Jur. 140.

Scotland. — It seems that in Scotland an equitable mortgage cannot be effected by the deposit of the title deeds. *Ex p. Pollard*, Mont. & Ch. 239.

b. RULE IN UNITED STATES. — The decisions in the United States in regard to the creation of an equitable mortgage by the deposit of the title deeds are conflicting;¹ but in the jurisdictions which fail to sustain as an

Fiduciary with Beneficial Interest. — In *Ex p. Smith*, 2 Mont. D. & D. 587, it was held that a trustee having a partial beneficial interest in the trust property might, by the deposit of the title deeds, as security for a debt of his own, create a good equitable mortgage.

One of two executors who has a beneficial interest in property may create a good equitable mortgage of such interest by depositing the title deeds relating thereto and signing a memorandum of deposit, although he makes the deposit without the consent of his co-executor. *Ex p. Sheffield Union Banking Co.*, 13 L. T. N. S. 477.

An Agreement to Mortgage with a Subsequent Delivery of the Title Deeds will amount, in equity, to a mortgage, and will be effectual from the time of the agreement. *Edge v. Worthington*, 1 Cox 211.

A Mere Deposit of Deeds, even without a word, may constitute an equitable mortgage, but as against strangers it can occur only in cases where the possession of the title deeds can be accounted for in no other manner except from their having been deposited by way of equitable mortgage, or by the holder being otherwise a stranger to the title and to the lands. *Bozon v. Williams*, 3 Y. & J. 150.

Submortgage. — Where the owner of land has created an equitable mortgage by a deposit of part of the title deeds, he may create a sub-mortgage by depositing the remainder of the deeds, or by a re-deposit of the deeds in case all of the deeds were deposited in the first instance. *Lacon v. Allen*, 3 Drew. 579; *Ex p. Smith*, 2 Mont. D. & D. 587; *Roberts v. Croft*, 24 Beav. 223.

In *Fector v. Philpott*, 12 Price 197, it was held that a further debt agreed to be secured by a pledge of property thus equitably mortgaged, is tantamount to a further equitable mortgage, and possession of the deeds by the first mortgagee is a possession by the second.

Effect upon Crown. — The deposit of title deeds by a simple contract debtor of the crown, for securing part of the purchase money to be paid in consideration of other lands sold to him, is an equitable mortgage, and binds the crown, though the purchaser has also given his bond to the vendor for the whole amount. *Casberd v. Ward*, 6 Price 411.

1. American Rule — United States. — In *Biebinger v. Continental Bank*, 99 U. S. 143, the court seemed to recognize the validity of an equitable mortgage by the deposit of title deeds, but held in that case that no equitable mortgage was created, as no money was loaned or debt created on the faith of the deposit of the deeds. See also *Mandeville v. Welch*, 5 Wheat. (U. S.) 277; *First Nat. Bank v. Caldwell*, 4 Dill. (U. S.) 314. Compare *Williams v. Hill*, 19 How. (U. S.) 246.

Alabama. — In *Lehman v. Collins*, 69 Ala. 127, it was held that the English doctrine of mortgage by the deposit of title deeds was in violation of the statute of frauds and did not prevail in Alabama.

Georgia. — In Georgia it is expressly pro-

vided by statute (Code, § 2138) that the deposit of title deeds does not create an equitable mortgage. *Davis v. Davis*, 88 Ga. 191.

In *Mounce v. Byars*, 16 Ga. 469, the validity of mortgages by the deposit of title deeds was assumed, but it was held that such a mortgage, the consideration being an antecedent debt, was subject to a prior vendor's lien.

Kentucky. — In *Vanmeter v. McFaddin*, 8 B. Mon. (Ky.) 435, the court said: "We are strongly inclined to the opinion that the mere deposit of title deeds should not be regarded in this state as constituting any lien upon real estate. If permitted to have this effect, an interest in landed property is created by the contract of the parties, not reduced to writing, in direct violation of the statute of frauds."

Maine. — In *Hall v. McDuff*, 24 Me. 311, the court seems to recognize that an equitable mortgage might be created by the deposit of title deeds.

Minnesota. — In *Gardner v. McClure*, 6 Minn. 250, it was held that the doctrine of the creation of equitable mortgages by the deposit of title deeds was contrary to the policy of the land and registry laws, and did not prevail in Minnesota, though the deposit was accompanied with a writing stating the object of the deposit.

Mississippi. — In *Gothard v. Flynn*, 25 Miss. 58, it was held that an equitable mortgage could not be created in Mississippi by a mere deposit of the title deeds as security for a debt, without any deed or express written contract for that purpose, so as to encumber the estate for a longer period than one year.

In *Williams v. Stratton*, 10 Smed. & M. (Miss.) 418, Chief Justice Sharkey held that an equitable mortgage could be made by a deposit of the title deeds, but remarked that all the deeds must be left at the time. "Such equitable liens," he said, "have met with very decided opposition in England, though they have been generally sustained, but it is admitted on all hands that they should not be extended beyond their present limit. Such a mortgage is in direct opposition to the statute of frauds, in regard to which we have said that we will create no exceptions not found in the statute."

Missouri. — In *Hackett v. Watts*, 138 Mo. 502 (citing 6 AM. AND ENG. ENCYC. OF LAW (1st ed.) 683), the court, while recognizing that in England a lien is implied from the deposit of the title deeds, said that in the United States "the better doctrine seems to be that the mere deposit of title deeds should not be regarded as constituting any lien upon real estate, the reason being that such a rule 'would be in conflict both with the universally established system of public registration and the statute of frauds.'"

Nebraska. — In *Bloomfield State Bank v. Miller*, (Neb. 1898) 75 N. W. Rep. 569, it was held that the doctrine of an equitable mortgage by a deposit of the title deeds did not prevail in Nebraska, and that it was immaterial that a loan had been made on the faith of the

equitable mortgage a mere deposit of title deeds as a security for a debt, it has been held that such a transaction may constitute an equitable mortgage where

deposit. The decision was based on the two grounds: first, that such a doctrine was virtually a repeal of the statute of frauds; second, that it was inconsistent with the system of registration in force in that state. The court said that the question was for the first time presented, and the opinion contains quite an exhaustive criticism of the decisions in the other states.

New Jersey. — In *Robinson v. Urquhart*, 12 N. J. Eq. 523, the court said that "a debtor may deposit his title deeds to an estate with his creditor, as security for an antecedent debt or upon a fresh loan, and thereby create an equitable lien which a court of equity will enforce."

In *Brewer v. Marshall*, 19 N. J. Eq. 542, 97 Am. Dec. 679, it was held that if a title deed be deposited as security for money, and another creditor, knowing these facts, takes a subsequent mortgage of the same property, he will be postponed to the equitable mortgage of the prior creditor, and a trust will be raised in him to the amount of such equitable incumbrance.

In *Gale v. Morris*, 29 N. J. Eq. 224, the court again announced the rule that an equitable mortgage might be created by a deposit of the title deeds.

In *Martin v. Bowen*, 51 N. J. Eq. 452, the court held that the deposit of title deeds under a written agreement stating that the deposit was made as security for a debt, and reciting that the depositor agreed not to sell, assign, transfer, or in any way dispose of the property until the deed shall be returned to him, amounted to an equitable mortgage. See also *Griffin v. Griffin*, 18 N. J. Eq. 104, announcing the rule in *New York*.

New York. — At an early date in New York the English rule regarding the creation of equitable mortgages by the deposit of title deeds was adopted, and it was held that evidence of an advance of money and the title deeds of the borrower being found in the hands of the lender was sufficient to establish an equitable mortgage. *Rockwell v. Hobby*, 2 Sandf. Ch. (N. Y.) 9. See also *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 51; *Jackson v. Parkhurst*, 4 Wend. (N. Y.) 376; *Chase v. Peck*, 21 N. Y. 581; *Griffin v. Griffin*, 18 N. J. Eq. 104 (announcing the rule in *New York*); *Jackson v. Dunlap*, 1 Johns. Cas. (N. Y.) 114, 1 Am. Dec. 100, *per Kent*, J.

Ohio. — In *Bloom v. Noggle*, 4 Ohio St. 45, the question as to the effect of a deposit of the title deeds was left undecided. The court said, however, that at most it could only operate as an agreement to execute a mortgage.

In *Probasco v. Johnson*, 2 Disney (Ohio) 96, the question as to the creation of equitable mortgages came directly before the Superior Court of Cincinnati, and it was held that equitable mortgages could not be thus created in Ohio, though the deposit was accompanied by a parol declaration that it was for such a purpose.

Pennsylvania. — In *Shitz v. Dieffenbach*, 3 Pa. St. 233, it was held that an equitable mort-

gage could not be created in Pennsylvania by the deposit of the title deeds as a security. See also *Bower v. Oyster*, 3 P. & W. (Pa.) 239; *Spencer v. Haynes*, 12 Phila. (Pa.) 454, 34 Leg. Int. (Pa.) 140; *Gebensleben's Estate*, 3 Lack. Jur. (Pa.) 19; *Sidney v. Stevenson*, 11 Phila. (Pa.) 178, 33 Leg. Int. (Pa.) 42; *Edwards v. Trumbull*, 50 Pa. St. 509; *Rickert v. Madeira*, 1 Rawle (Pa.) 325.

Rhode Island. — In *Hackett v. Reynolds*, 4 R. I. 512, it was held that the deposit of a deed conveying the legal title of an estate as security for the amount of a mortgage upon it, relinquished by the mortgagee to the depositor to enable him to obtain the title from the holder of the equity of redemption, constituted an equitable mortgage upon the estate as between the original parties to the deposit and those subject to their equities, which a court of equity would establish and enforce by sale of the depositor's interest in it, and the interest of those holding the legal title for him, or subject to his equity, especially when necessary to prevent a gross fraud and breach of trust from being practiced by the purchaser upon the mortgagee.

South Carolina. — In *Hutzler v. Phillips*, 26 S. Car. 137, 4 Am. St. Rep. 687, the question as to the creation of equitable mortgages by the deposit of the title deeds arose, and the court said that where the deposit is made as a *bona fide* immediate security it was inclined to sustain the transaction as an equitable mortgage, but held that in the case at hand no equitable mortgage arose, as the deposit was merely for the purpose of preparing a mortgage. The court further said that the validity of a mortgage from the deposit of title deeds, though not directly involved, was recognized in *Welsh v. Usher*, 2 Hill Eq. (S. Car.) 170, 29 Am. Dec. 63; *Harper v. Barsh*, 10 Rich. Eq. (S. Car.) 154, and *Boyce v. Shiver*, 3 S. Car. 528.

Tennessee. — In *Meador v. Meador*, 3 Heisk. (Tenn.) 562, it was held that an equitable mortgage could not be created in Tennessee by the mere deposit of the title deeds. The court said that a contrary holding would be a judicial repeal of the statute of frauds making void sales of lands, etc., not evidenced by writing.

Vermont. — In *Bicknell v. Bicknell*, 31 Vt. 503, the court, in considering the question as to the creation of equitable mortgages by deposit of the title deeds, said: "We are not aware that the subject has ever been agitated before the tribunals of this state, and there has not, to our knowledge, ever been an attempt before to create a lien upon real estate by depositing the title deeds. We certainly are not now prepared to say this mode of creating an incumbrance is valid by the law of the state, nor do we feel called upon in the present case to decide the question at all in order to dispose of this appeal."

Wisconsin. — In *Jarvis v. Dutcher*, 16 Wis. 307, the court recognized the doctrine as to the creation of equitable mortgages by the deposit of title deeds. See also *Mowry v. Wood*, 12 Wis. 413; *Dodge v. Silverthorn*, 12 Wis. 644.

the deposit is accompanied with a written agreement that the deposit is intended as a security for a certain debt;¹ these decisions might, however, fall under the class of equitable mortgages arising out of agreements to execute a mortgage.² And even though the deposit of title deeds may not create an equitable mortgage, still a court of equity will not compel the depositor to surrender the deeds to either the depositor or his heirs until the debt is paid.³

c. NOT RECOGNIZED AT LAW. — Mortgages arising from the deposit of title deeds are purely equitable mortgages and are not recognized at law.⁴

d. STATUTE OF FRAUDS AS AFFECTING SUCH MORTGAGES. — The question has often arisen in *England* as to the effect of the statute of frauds upon the creation of mortgages by the deposit of the title deeds, and it was early held that the deposit of the title deeds as security for a debt constituted an equitable mortgage, though unaccompanied by any written evidence.⁵ This decision, though subjected to considerable adverse criticism, has become the accepted doctrine.⁶

e. WHAT PROPERTY MAY BE MORTGAGED. — As a general rule, all property which can be made the subject of a legal or equitable mortgage may also be made the subject of an equitable mortgage by deposit of the title deeds or evidences of title.⁷

1. Deposit of Deeds Accompanied by Written Agreement. — *Webb v. Carter*, 62 Ga. 415; *Martin v. Bowen*, 51 N. J. Eq. 452; *Spencer v. Haynes*, 12 Phila. (Pa.) 454, 34 Leg. Int. (Pa.) 140; *Luch's Appeal*, 44 Pa. St. 519; *Edwards v. Trumbull*, 50 Pa. St. 509. See, however, *Gardner v. McClure*, 6 Minn. 250.

In *English v. McElroy*, 62 Ga. 413, the deposit of title deeds accompanied by an agreement reciting that the depositor had borrowed a certain sum from the depositor, "for which I have placed in his hands two deeds to one hundred acres of land, whereon I now reside, to hold as collateral security," was held to create an equitable lien on the land.

2. In *English v. McElroy*, 62 Ga. 413, title deeds were deposited under an agreement that they should be held as security for an advance. The court, after stating that such a transaction did not constitute a statutory mortgage, said: "What then * * * ought a court of equity to do? Obviously to consider that done which ought to have been done, and which the parties intended should be done, and that is to compel the defendant to specifically perform his agreement according to the true intent and meaning of the parties, and as between themselves, that the complainant should be decreed to have a lien upon the land as a security for the payment of the money borrowed, and that the same be enforced by a sale thereof under a decree of the court."

3. Equity Will Not Compel Surrender of Deeds Deposited. — *Griffin v. Griffin*, 18 N. J. Eq. 104; *Sidney v. Stevenson*, 11 Phila. (Pa.) 178, 33 Leg. Int. (Pa.) 42.

B., owning land by deed not recorded, deposited his deed with H. as security for advances made, until he should execute a mortgage therefor. B. afterwards, for valuable consideration, quitclaimed to the orator, who had notice of the agreement between B. and H. It was held, without determining the respective rights of the parties in the land, that the orator was entitled to a decree that B. and H. should procure the deed to be recorded. *Bicknell v. Bicknell*, 31 Vt. 498.

4. Mortgage by Deposit of Title Deed Not Recognized at Law. — *Jackson v. Parkhurst*, 4 Wend.

(N. Y.) 369.

5. Statute of Frauds. — *Russel v. Russel*, 1 Bro. C. C. 269.

6. *Ex p. Haigh*, 11 Ves. Jr. 403; *Norris v. Wilkinson*, 12 Ves. Jr. 192; *Ex p. Finden*, decided Jan. 11 (1805), cited in note to *Ex p. Haigh*, 11 Ves. Jr. 403; *Ex p. Hooper*, 19 Ves. Jr. 477; *Ex p. Coming*, 9 Ves. Jr. 115; *Ex p. Wetherell*, 11 Ves. Jr. 398; *Richards v. Borrett*, 3 Esp. N. P. 102; *Keys v. Williams*, 3 Y. & Coll. 55; *Ex p. Langston*, 17 Ves. Jr. 227; *Watson v. Chapman*, 18 L. T. N. S. 705; *Birch v. Ellames*, 2 Anstr. 427; *Robarts v. Jefferys*, 8 L. J. Ch. 136. See also *Whitmore v. Farley*, 45 L. T. 99, and cases cited in support of the statement as to the general English dictum, *supra*. See the American cases set out *supra*, *Rule in United States*, for observations by the courts in this connection.

Statement of Doctrine. — In *Lacon v. Allen*, 3 Drew 579, *Kindersley, V. C.*, said: "Since the case of *Russel v. Russel*, 1 Bro. C. C. 269, this is well settled: that, supposing A, owing money to B, deposits the title deeds of his estate with B for the purpose of a security, even without any writing, it is a good equitable mortgage; it gives B a lien; and notwithstanding the expressions of regret of Lord Eldon that the law should be so, even in his time, we find him saying he could not disturb it; since that time it has been acted upon over and over again. That doctrine cannot now then be disturbed."

Lord Eldon's disapproval of this doctrine was expressed in *Ex p. Whitbread*, 19 Ves. Jr. 209, wherein, in upholding an equitable mortgage by the mere deposit of the title deeds, he stated that the doctrine permitting the creation of equitable mortgages by the mere deposit of the title deeds as a security was practically a repeal of the statute of frauds. See also *Ex p. Hooper*, 19 Ves. Jr. 477; *Ex p. Kensington*, 2 Ves. & B. 83; *Norris v. Wilkinson*, 12 Ves. Jr. 192.

7. What Property May Be Mortgaged by Deposit of Title Deeds. — In *Ex p. Barnett*, 1 De Gex 104, the deposit by way of mortgage of a

f. BY WHOM SUCH MORTGAGES MAY BE MADE. — Mortgages by the deposit of title deeds may, as a rule, be made by any person who has the legal capacity to execute a mortgage, including corporations as well as individuals.¹

g. THE SUFFICIENCY AND CHARACTER OF THE DEPOSIT — (1) *In General.* — It has been said that in order to constitute an equitable mortgage there must be some sort of an actual deposit of the title deeds, and it is therefore held that a mere agreement to deposit title deeds is insufficient;² and *a fortiori* the expression by a debtor of an intention to deposit deeds, though in writing, would be insufficient to create an equitable mortgage.³ Still, however, an agreement showing a present intention to deposit title deeds by way of equitable mortgage has been held sufficient to create an equitable mortgage, without an actual deposit of the deeds with the mortgagee.⁴ And where the deeds are in the possession of the creditor an agreement by the debtor that the creditor should hold them as security has been held a sufficient deposit.⁵

Conditional Deposit. — It seems that the deposit may be upon conditions imposed upon the depositor, and to entitle him to a lien thereby it is necessary that he comply with the terms of the deposit.⁶

land order of the New Zealand Company was held to create an equitable mortgage.

Copyhold Estates may be mortgaged by a deposit of the muniments of title. *Ex p.* Warner, 1 Rose 286; *Whitbread v. Jordan*, 1 Y. & Coll. 303; *Tylee v. Webb*, 6 Beav. 552.

Leasehold Estate. — And so also as regards leasehold estates. *Russel v. Russel*, 1 Bro. C. C. 269. And it has also been held that an agreement to give a lease may be mortgaged by deposit. *Unity Joint-Stock Mut. Banking Assoc. v. King*, 25 Beav. 72; *Ex p.* Reid, 17 L. J. Bank. 19.

Mortgage of a Mortgage. — In *Lacon v. Liffen*, 4 Giff. 75, it was held that a mortgage of a registered mortgage of a ship could be effected by deposit.

Insurance Policy. — In *Ferris v. Mullins*, 2 Sm. & G. 379, it was held that a mortgage of a policy of insurance could be created by deposit.

Stock Certificates. — A mortgage of stock certificates may also be created by deposit. *Ex p.* Moss, 3 De G. & Sm. 299; *Ex p.* Stewart, 24 L. J. Bank. 6. Compare *Ex p.* Boulton, 1 De G. & J. 163.

1. Corporations. — *In re General Provident Assur. Co.*, L. R. 14 Eq. 507; *In re Patent File Co.*, 40 L. J. Ch. 190, 19 W. R. 193.

Formal Requisites in Regard to Execution of Mortgages by Corporations. — It has been held that a corporation may effect a valid equitable mortgage by deposit of the title deeds, though a compliance with the statute or articles of association prescribing the manner in which corporate mortgages shall be executed is thereby obviated. *In re General Provident Assur. Co.*, L. R. 14 Eq. 507; *In re Patent File Co.*, L. R. 6 Ch. 83; *In re Imperial Land Co.*, L. R. 10 Eq. 298; *Re Williams*, 3 Ir. Eq. R. 346.

Officers of Corporation. — It is held, however, that a mortgage cannot be created by a corporation in favor of one of its officers by deposit of the title deeds, or otherwise than in the manner prescribed by the statutes or articles of association, so as to be binding against the general creditors of the company, as it is the duty of an officer of a corporation to see that all mortgages executed by the corporation are made in compliance with such requirements.

In re General Provident Assur. Co., L. R. 14 Eq. 513; *In re Wynn Hall Coal Co.*, L. R. 10 Eq. 515. Compare *In re International Exp., etc.*, Co., 6 Ch. Div. 556.

2. Agreement to Deposit Is Insufficient. — *Ex p.* Perry, 3 Mont. D. & D. 252; *Ex p.* Coombe, 4 Madd. 249. See also *Ex p.* Hallifax, 2 Mont. D. & D. 544. Compare *Ex p.* Ossett, 3 Mont. & A. 153; *Ex p.* Sheffield Union Banking Co., 13 L. T. N. S. 477; *Ex p.* Smith, 2 Mont. D. & D. 587.

3. Wilson v. Balfour, 2 Campb. 579; *Re Bankhead*, 2 K. & J. 560.

In *Adams v. Claxton*, 6 Ves. Jr. 226, it was held that where the deeds remained in the possession of the debtor, though accompanied by a memorandum stating that they were deposited as security for a debt due a creditor, an equitable mortgage was not created thereby. See also *Ex p.* Coming, 9 Ves. Jr. 115.

4. Present Intention to Deposit. — *Ex p.* Sheffield Union Banking Co., 13 L. T. N. S. 477; *Ex p.* Edwards, 1 Deacon 611, 38 E. C. L. 622. See also *Ex p.* Jones, 4 Dea. & Ch. 750; *Roberts v. Jefferys*, 8 L. J. Ch. 136.

Order on Custodian of Deeds. — A, being entitled to three properties, the title deeds to one of which were held by his bankers as a security, deposited the title deeds of the other two with B as a security for a debt and gave him an order to the bankers to deliver over the deeds of the third property when their lien had been satisfied. It was held that this gave B a valid equitable mortgage on the property mortgaged to the bankers. *Daw v. Terrell*, 33 Beav. 218. See also *Ex p.* Farley, 1 Mont. D. & D. 685; *Ex p.* Heathcoate, 2 Mont. & D. 711.

Failure to Deposit Deeds Caused by Mistake. — In *Ex p.* Leathes, 3 Dea. & Ch. 112, where freehold title deeds were intended to be deposited with an equitable mortgagee, together with deeds relating to leasehold property, and were accordingly specified in the memorandum of deposit, the freehold property was included in the order for sale.

5. Fenwick v. Potts, 8 De G. M. & G. 506; *James v. Rice*, 18 Jur. 818, 5 De G. M. & G. 461.

6. Compliance by Deposit with Terms of Deposit. — In the application of this rule it has

(2) *With Whom Made.* — The deposit need not be made directly with the mortgagee, but may be made with another person to hold for him.¹ And there may even be such a change of possession as to constitute a sufficient deposit though the deeds remain in the custody of the depositor, as where he retains them as the servant or agent of the depositor.²

(3) *Deposit Must Be Intended as a Present Security.* — In order that a deposit of title deeds may constitute an equitable mortgage it is also necessary that the deposit be made as a present security and for the purpose of creating an equitable mortgage;³ and it seems that a deposit merely for the purpose of preparing a legal mortgage is insufficient to create an equitable mortgage.⁴

A Distinction is, however, to be made between a deposit merely to prepare a legal mortgage and a deposit as security until a mortgage can be prepared; in the latter case the deposit is sufficient to create an equitable mortgage.⁵

been held that where deeds are deposited on condition that the depositee advance a certain sum to a third person for a certain length of time, he is not entitled to a lien unless he complies with such condition. *Burton v. Gray*, L. R. 8 Ch. 932.

1. *Deposit with Agent of Deposit.* — In *Lloyd v. Attwood*, 3 De G. & J. 652, the court said: "It was further urged in support of the respondent's argument on this part of the case that no security could be created by the mere deposit of deeds with a man's own solicitor; but the answer to this argument is that the solicitor, by the deeds being deposited with him for the purpose of the security, is constituted agent and trustee for that purpose; and it cannot surely be denied that a man's own solicitor may be constituted by him a trustee for others. I feel no doubt, therefore, that an equitable charge upon the estate was well created by the deposit of the deeds with Messrs. Pooley, Beisley, and Read." See also *Ex p. Whitbread*, 19 Ves. Jr. 209.

Deposit with Wife of Debtor. — In *Ex p. Com.*, 9 Ves. Jr. 115, it was held that an equitable mortgage could not be created by a deposit of the deeds with the wife of the debtor. In this case, however, the lord chancellor recognized the rule that the deeds may be deposited with a third person to hold as agent of the equitable mortgagee.

2. *Custody Retained by Depositor.* — *M.*, a solicitor, having in his hands £2,000 belonging to the estate of *J.* of which he and *A.* were trustees, and £600 belonging to the estate of *R.* of which *A.* and *B.* were trustees, and being pressed by *A.* to give security for the two sums, in *A.*'s presence placed a parcel which he represented to contain deeds of his own worth £4,000 in a box belonging to the estate of *J.*, and a parcel which he represented to contain other deeds of his own sufficient to secure £600 in a box belonging to the estate of *R.*, both boxes being in his custody as solicitor to the respective trusts. At the death of *M.* it was found that both parcels had been removed from the boxes; and thereupon *M.*'s widow, who afterwards took out administration with the will annexed, to his estate, deposited with *A.* deeds belonging to *M.*'s estate as a security for the £2,000 due to the estate of *J.* It was held that the deposit of deeds by *M.* in the box belonging to the estate of *R.* was a sufficient change of possession to give *A.* and *B.* a lien on the deeds deposited; and that as

these deeds had been taken away, and could not be identified, *A.* and *B.* were entitled to a lien for the £600 on all deeds belonging to *M.* at the time of the deposit. *Mason v. Morley*, 11 Jur. N. S. 459, 34 L. J. Ch. 422, 13 W. R. 669, 12 L. T. N. S. 414.

A Secretary of a Banking Company had a credit account with the bank to the extent of £5,000, secured by a memorandum specifying certain securities by way of equitable mortgage. On his dying a debtor to the bank in £3,000, the securities mentioned in the memorandum, with others tied in a bundle and indorsed and labeled as securities, were found in his office in the banking house. There was evidence that he had stated that the bank was secured in £5,000. It was held that the bank was the equitable mortgagee of all the securities. *Ferris v. Mullins*, 2 Sm. & G. 379, 2 Eq. R. 809, 18 Jur. 718.

3. *Intention to Create Mortgage Essential.* — In *Lucas v. Dorrien*, 7 Taunt. 278, 2 E. C. L. 278, deeds were left with a banker after he had refused to make advances thereon, and it was held that he did not have a lien for a prior indebtedness of the depositor.

4. *Deposit to Prepare Legal Mortgage.* — *Norris v. Wilkinson*, 12 Ves. Jr. 192; *Ex p. Bulteel*, 3 Cox. 243; *Brander v. Boles*, Pre. Ch. 375; *Lloyd v. Attwood*, 3 De G. & J. 614; *Brizick v. Manners*, 9 Mod. 284; *Pain v. Smith*, 2 Myl. & K. 417; *King v. Benson*, 6 Price 233; *Hutzler v. Phillips*, 26 S. Car. 136, 4 Am. St. Rep. 687. Compare *Ex p. Bruce*, 1 Rose 374; *Bulfin v. Dunne*, 11 Ir. Ch. Rep. 198; *Edge v. Worthington*, 1 Cox 211; *Hockley v. Bantock*, 1 Russ. 141; *Keys v. Williams*, 3 Y. & Coll. 55; *James v. Rice*, 5 De G. M. & G. 461.

B., having contracted a debt with the defendant, proposed to mortgage his estate to him as a security, and left his title deeds with his attorney to prepare a mortgage, but the attorney died before it was done. Afterwards the defendant carried the deeds to another scrivener for the same purpose; but before he had prepared the mortgage, *B.* became bankrupt, and the plaintiff, as his assignee, brought a bill to have the deeds delivered up and the estate sold for the benefit of the creditors, which was decreed. *Brander v. Boles*, Pre. Ch. 375; *Gilb. Eq. Rep.* 35.

5. *Deposit as Security Until Mortgage Can Be Prepared.* — *Lloyd v. Attwood*, 3 De G. & J. 614; *Ex p. Bulteel*, 2 Cox 243; *Ex p. Wright*, 19 Ves. Jr. 258; *Hockley v. Bantock*, 1 Russ. 145;

(4) *Presumption as to Purpose of Deposit.* — Where a deposit of title deeds is made at the same time when an advance is made by the deposittee, the law implies that the purpose of the deposit was to create an equitable mortgage, though there was no express agreement between the parties to that effect.¹ And it has been held that the mere possession by a creditor of title deeds belonging to a debtor is *prima facie* evidence of their deposit by way of equitable mortgage.²

h. WHAT DEEDS MUST BE DEPOSITED. — In order to create an equitable mortgage by the deposit of title deeds, it is not necessary that all the title deeds or even all the material title deeds should be deposited so as to show a perfect title in the depositor. It is sufficient if the deeds deposited are material evidences of the title and are shown to be deposited with the intention of creating a mortgage.³ And where the remaining deeds are deposited with

Keys v. Williams, 3 Y. & Coll. 55. See also *Fenwick v. Potts*, 8 De G. M. & G. 506.

In Order to Prevent Immediate Proceedings Against a Debtor, the title deeds of an intestate were deposited by him with his creditor's attorney, for the purpose of preparing a mortgage of the property. It was held that this transaction amounted to an equitable mortgage by deposit of title deeds. *Keys v. Williams*, 3 Y. & Coll. 55. 7 L. J. N. S. Exch. Eq. 59, 2 Jur. 611.

1. **Presumption as to Purpose of Deposit.** — *Hankey v. Vernon*, 2 Cox 12; *Ex p. Mountfort*, 14 Ves. Jr. 606; *Ex p. Langston*, 17 Ves. Jr. 230; *Ex p. Kensington*, 2 Ves. & B. 79; *Ex p. Haigh*, 11 Ves. Jr. 403; *Russel v. Russel*, 1 Bro. C. C. 269; *Richards v. Borrett*, 3 Esp. N. P. 102.

Deposits Accompanied by Written Memoranda. — In *Shaw v. Foster*, L. R. 5 H. L. 321, *per* Lord Cairns, it was held that the mere deposit of title deeds as security for a debt would, without more, create an equitable mortgage; but when the deposit is accompanied by a written document, the terms of that document must be referred to, in order to ascertain the exact nature of the charge.

And Parol Evidence to contradict the purposes of such deposit as evidenced by the written memoranda accompanying it is inadmissible. *Ex p. Coombe*, 17 Ves. Jr. 369. See also the title PAROL EVIDENCE.

2. **Mere Possession.** — *Ex p. Langston*, 17 Ves. Jr. 227; *Dixon v. Muckleston*, L. R. 8 Ch. 155; *Edge v. Worthington*, 1 Cox 211; *Rockwell v. Hobby*, 2 Sandf. Ch. (N. Y.) 9. *Compare Chapman v. Chapman*, 13 Beav. 308.

A filed a bill against B, a stock and share broker, for the recovery of indentures which, as alleged, had been deposited with B for safe custody. B claimed to hold the indentures as having been deposited with him by A, his customer, as a collateral security, by way of equitable mortgage, to secure the payment of a balance of an account found due to him; and in support of his claim he produced a memorandum, signed by A, but not dated, containing a statement to the effect that A was agreeable to deposit the indentures with B as security for the amount he owed to him. In answer, A alleged that the indentures were left with B for safe custody merely, and he denied that they were deposited by way of security, and he further denied that a balance of account had been ascertained. It was held that

under the circumstances the burden of proof lay upon A, who sought to recover the deeds; and that B was entitled to hold the deeds by way of equitable mortgage to secure the balance due. *Burgess v. Moxon*, 2 Jur. N. S. 1059.

3. **All of the Title Deeds Need Not Be Deposited.** — *Roberts v. Croft*, 24 Beav. 223, *citing* *Rice v. Rice*, 2 Drew. 76; *Ex p. Farley*, 5 Jur. 512; *Ex p. Wetherell*, 11 Ves. Jr. 401; *Ex p. Pott*, 7 Jur. 159; *Lacon v. Allen*, 3 Drew. 579, 26 L. J. Ch. 18; *Thorpe v. Holdsworth*, L. R. 7 Eq. 139; *Ex p. Haigh*, 11 Ves. Jr. 403; *Ex p. Arkwright*, 3 Mont. D. & D. 129; *Dixon v. Muckleston*, 20 W. R. 619, 26 L. T. N. S. 752; *Ex p. Chippendale*, 1 Deacon 67, 38 E. C. L. 375; *Whitbread v. Jordan*, 1 Y. & Coll. 303. *Compare* *Gothard v. Flynn*, 25 Miss. 58; and also *Ex p. Pearce*, Buck 525, wherein a bankrupt agreed with A to execute a mortgage of certain premises for the security of a debt, and sent, in order that A might prepare the mortgage, all the title deeds except the immediate conveyance to himself; the bankrupt, being also indebted to B, took that conveyance and deposited it with him as a security for his debt, at the same time promising to send him the remainder of the title deeds. It was held that A and B had not, either separately or collectively, an equitable mortgage upon the premises.

Enunciation of Rule. — In *Lacon v. Allen*, 3 Drew. 579, *Kindersley*, V. C., said: "The question is, is it necessary that every title deed should be deposited? Suppose the owner has lost an important deed, could he not deposit the rest? In each case we must judge whether the instruments deposited are material parts of the title; and if they are, it is not necessary to say there are other deeds material if there is sufficient evidence to show that the deposit was made for the purpose of creating a mortgage."

Deposit of One of the Title Deeds — Others in Hands of Depositor's Solicitor. — In *Ex p. Chippendale*, 2 Mont. & A. 299, it was held that an equitable mortgage might be created by a deposit of one of the title deeds, where the others are in the hands of the depositor's solicitors, but not as an equitable mortgage.

Letter and Schedule. — A wrote to B that he had inclosed the particulars of certain title deeds of property which he had deposited with B for the security of a debt, and in the schedule inclosed, among other entries, was the following: "9,000^l., buildings, houses, etc., at

another person as security, the priority between the two equitable mortgages depends, as a rule, upon the dates of their deposit.¹ A prior depositee might, however, be guilty of such negligence as would defeat his right to claim a mortgage as against a subsequent mortgagee,² and even a legal mortgagee, by surrendering the title deeds to the mortgagor, might be precluded from claiming the priority of his mortgage over that of a subsequent equitable mortgagee.³

Deeds Must Relate to Property Mortgaged. — The deposit of deeds cannot, of course, create a mortgage on property to which they do not relate.⁴

i. PROPERTY CHARGED — (1) *In General.* — A deposit of title deeds creates, as a general rule, an equitable mortgage upon the whole property comprised in them;⁵ where, however, the deposit is accompanied by a memoran-

Titherington." A sent B a box containing the deeds and other securities, which B did not examine until after A's bankruptcy, when he found that the only deed relating to the Titherington estate was an old paid-off mortgage. It was held that the letter and the schedule, taken together, created an equitable charge on the Titherington estate. *Ex p. Arkwright*, 3 Mont. D. & D. 129.

Conveyance to Depositor Omitted. — A solicitor made an equitable deposit of the title deed of his estate to a client, omitting the conveyance to himself. He afterwards deposited the latter as a security with his bankers. It was held that the client had a mortgage which was entitled to priority over the mortgage of the banker. *Roberts v. Croft*, 24 Beav. 223.

In *Ex p. Farley*, 1 Mont. D. & D. 683, 10 L. J. N. S. Bky. 55, 5 Jur. 512, it was held that upon a deposit of deeds by a joint tenant, after partition, the omission of the partition deed, as it did not belong to him solely, did not impeach the security.

Deposit of Receipt for Purchase Price. — In *Goodwin v. Waghorn*, 4 L. J. N. S. Ch. 172, a deposit of the receipt for the purchase price of land which contained the terms of the agreement for the sale of the land was held sufficient to create an equitable mortgage, no title deeds being in the hands of the purchaser.

Copyhold Estates. — An equitable mortgage of copyhold estates may be created by the mere deposit of the copy of court roll. *Whitbread v. Jordan*, 1 Y. & Coll. 303; *Ex p. Warner*, 19 Ves. Jr. 202; *Lewis v. John*, 9 Sim. 366.

Copy of Deed. — It seems that the deposit of an attested copy of a deed to land is, however, insufficient to create an equitable mortgage thereon. *Ex p. Broadbent*, 1 Mont. & A. 635.

1. **Priority.** — *Roberts v. Croft*, 24 Beav. 223.

2. **Prior Deposittee Estopped.** — *Roberts v. Croft*, 24 Beav. 223; *Layard v. Maud*, L. R. 4 Eq. 397; *Waldron v. Sloper*, 1 Drew. 193; *Adsetts v. Hives*, 33 Beav. 52.

The owner in fee of a farm deposited deeds of conveyance of the farm, dated 1774, by way of security for money due, writing at the same time a letter which stated that the deeds were the title deeds of the farm, and were to be a security. He afterwards deposited the subsequent title deeds of the farm, the earliest being dated 1787, with his bankers, by way of security for money due to them; the title was investigated by his bankers, and they had no notice of the prior charge. It was held that the letter created an equitable charge on the farm, and that, under the circumstances, credit must be taken to have been given by the

owner of the prior charge to the statement made by the mortgagor, that the deposited deeds were the whole of the title deeds; and that the owner of the prior charge had therefore not been guilty of negligence so as to deprive herself of her priority. *Dixon v. Muckleston*, 20 W. R. 619, 26 L. T. N. S. 752.

3. **Legal Mortgagee Parting with Title Deeds.** — *Briggs v. Jones*, L. R. 10 Eq. 92; *Hunter v. Walters*, L. R. 11 Eq. 292; *Clarke v. Palmer*, 21 Ch. Div. 124. See also *McHenry v. Davies*, L. R. 10 Eq. 88; *Herrick v. Attwood*, 25 Beav. 205.

4. **Deeds Must Relate to Property Mortgaged.** — Adjoining premises (X and Y) were respectively conveyed to a testator by deeds of 1840 and 1843, and then united. He devised them to his sons, who made an equitable mortgage by deposit of the deeds of Y and the probate of the will. The mortgagee believed, from the son's statement, that the whole property was comprised. It was held that the property X was not comprised in the equitable mortgage. *Jones v. Williams*, 24 Beav. 47, 3 Jur. N. S. 1606.

5. **Property Charged.** — *Ashton v. Dalton*, 2 Colly. 565; *Ex p. Bisdee*, 1 Mont. D. & D. 333.

The Unexpired Term in a House and the Good Will of a Business established in it were sold in a creditors' suit, with the consent of a person with whom the lease had been deposited as a security, and brought a price less than the amount of his debt. It was held that the equitable mortgagee was entitled to the whole of the purchase money, whether arising from the value of the good will, or from the value of the lease independently of the good will. *Chissum v. Dewes*, 5 Russ. 29.

An Equitable Mortgage of a Licensed Public House, created by deposit of the title deeds, confers upon the owner of the mortgage the right to the license, as against the assignee in bankruptcy of the licensed owner of the public house. *Rutter v. Daniel*, 30 W. R. 724, *followed in Re Brien*, 11 L. R. Ir. 213.

Fixtures. — A mortgage by deposit of the title deeds includes the fixtures upon the premises. *Ex p. Barclay*, 5 De G. M. & G. 413; *Ex p. Price*, 2 Mont. D. & D. 518; *Williams v. Evans*, 23 Beav. 239; *Ex p. Astbury*, L. R. 4 Ch. 630; *Longbottom v. Berry*, L. R. 5 Q. B. 123; *Meux v. Jacobs*, L. R. 7 H. L. 481; *Ex p. Moore*, etc., *Banking Co.*, 14 Ch. Div. 379; *Ex p. Tagart*, 1 De Gex 531; *Ex p. Broadwood*, 1 Mont. D. & D. 631; *Ex p. Lloyd*, 3 D. & C. 765; *Mather v. Fraser*, 2 K. & J. 536; *Waterfall v. Penistone*, 6 El. & Bl. 876, 88 E. C. L. 876.

In *Williams v. Evans*, 23 Beav. 239, it was

dum specifying the property to be charged, the charge of the equitable mortgage must be limited to the property so specified.¹ And of course, as a general rule, the depositor can give a lien on deeds only as against himself and to the extent of his own interest.²

(2) *Subsequent Improvements.* — Subsequent buildings or improvements erected upon land mortgaged by the deposit of title deeds are included in the mortgage, unless at the time of the deposit the mortgagor excepts such buildings or improvements.³

(3) *Removal of Incumbrances.* — And where incumbrances are removed by the mortgagor after such a mortgage, the mortgage will extend to the property unencumbered.⁴

(4) *After-acquired Interest.* — And any after-acquired interest of the mortgagor will, as in case of a legal mortgage, be subject to the charge of a mortgage by the deposit of the title deeds.⁵

j. EXTENT OF CHARGE — (1) *In General.* — As a general rule, the extent of the charge secured by the deposit of title deeds is, of course, to be determined by the contract between the parties;⁶ and it has been held that

held that where an equitable mortgage is created by the deposit of a lease, unaccompanied by any agreement, the tenant's fixtures are included in the mortgage.

1. Deposit Accompanied with Memoranda. — *Ex p. Glyn*, 1 Mont. D. & D. 25; *Ex p. Hunt*, 1 Mont. D. & D. 139; *Daw v. Terrell*, 33 Beav. 218; *Ex p. Lloyd*, 1 M. & A. 494; *Ex p. Leathes*, 3 Dea. & Ch. 112; *Ex p. Heathcoate*, 2 Mont. D. & D. 711; *Ex p. Robinson*, 1 D. & C. 119; *Pryce v. Bury*, 18 Jur. 967, 23 L. J. Ch. 676.

Illustrations. — A, being indebted to his bankers, sent them certain title deeds, with a letter in which he stated that he thereby pledged his grant of coal under a certain estate, which he specified, as a security for the money advanced, and also as a general cover for his banking account with them. There were other estates belonging to A comprised in the deed sent. It was held that the bankers could claim a lien only upon the estate specified. *Wylde v. Radford*, 9 Jur. N. S. 1169, 33 L. J. Ch. 51, 12 W. R. 38, 9 L. T. N. S. 471.

A, by deed, mortgaged freeholds to B. At the same time the title deeds, not only of the freeholds but of leaseholds belonging to A, were delivered to B. It was held, in the absence of proof to the contrary, that B had no lien on the leaseholds for money advanced. *Wardle v. Oakley*, 36 Beav. 27.

2. Deeds Not Belonging to Depositor. — *Turner v. Letts*, 20 Beav. 185; *Williams v. Medlicot*, 6 Price 495.

In *Joyce v. De Moleyns*, 8 Ir. Eq. R. 215, 2 J. & L. 374, it was held that a person who advances money *bona fide* on the deposit of title deeds, made by one who has no right to them or the estate to which they relate, will be protected in equity as a purchaser for a valuable consideration without notice, and may retain the deeds, though the person making the deposit was not in possession of the property, if it be an incorporeal hereditament.

In *Spackman v. Foster*, 11 Q. B. Div. 99, it was held that where a person fraudulently obtains the possession of title deeds he cannot create a lien as against the true owner by a deposit of the deeds.

3. Subsequent Improvements. — *Turner v. Dickenson*, 3 Cl. & F. 593; *Ex p. Cowell*, 12 Jur. 411; *Williams v. Evans*, 23 Beav. 239; *Ex p. Astbury*, L. R. 4 Ch. 630; *Meux v. Jacobs*, L. R. 7 H. L. 481.

The memorandum of deposit accompanying an equitable mortgage stated that the bankrupt had deposited "the deeds and documents under which I hold the steam-mills, cottages, land, buildings, and premises, at L." It was held that the equitable mortgagee had a lien on the fixtures, whether erected before or after the time of the deposit, and including tenants fixtures. *Ex p. Price*, 2 Mont. D. & D. 518, 11 L. J. N. S. Bky. 27, 6 Jur. 327.

4. Removal of Incumbrances by Depositor. — The purchaser of an equity of redemption in premises subject to a mortgage term deposited the purchase deed as a security. He afterwards paid off the mortgage and took a surrender of the term, retaining the deed of surrender in his own possession, and became bankrupt. It was held that the lien created by the deposit extended to the whole estate freed from the incumbrance. *Ex p. Bisdee*, 1 Mont. D. & D. 333.

A mortgagee of a term gave an equitable mortgage and subsequently purchased the equity of redemption. It was held that the equitable mortgagee was entitled to a sale of the equity of redemption, if rejected by the assignees. *Ex p. Tuffnell*, 1 Mont. & A. 620, 4 Dea. & Ch. 29.

5. After-acquired Interest. — In *Ex p. Farley*, 1 Mont. D. & D. 683, it was held that a share taken by the mortgagor, on partition of the land, was subject to the mortgage.

6. Extent of Charge. — Where deeds are deposited for the purpose of obtaining credit, the person with whom they are deposited has no lien upon them for what is due to him in respect of moneys previously advanced. *Mountford v. Scott*, T. & R. 274.

Bankers having securities deposited as a pledge for one thousand pounds, though the depositor at his death was indebted in a larger sum, were held to have no lien farther than the thousand pounds. *Vanderzee v. Willis*, 3 Bro. C. C. 21.

where the deposit is accompanied with a memorandum in writing, the kind and amount of the charge intended to be created by the deposit must be ascertained solely by reference to the written document.¹

Antecedent Indebtedness. — Though a deposit of title deeds may be made to secure an antecedent indebtedness,² it will not, where an advance is made at the time of the deposit, be extended by implication so as to cover such an indebtedness.³

(2) *Further Advances.* — Where title deeds have been deposited as security for a debt, the deposit may, by agreement of the parties, be made to secure a further advance;⁴ but in order that it shall be so extended there must be clear proof that such advance was made on the faith of the deposit.⁵ Such proof may, however, be by parol,⁶ even though a written memorandum accompanied the original deposit.⁷

(3) *Future Advances.* — A mortgage by deposit of title may also be made as security for future advances.⁸

A debtor deposited his title deeds with his creditor until such time as his account should not reach one hundred pounds, at which time they were to be restored to him. The debtor died indebted to the creditor in the sum of two hundred and seventy-four pounds. It was held that the creditor's lien extended to the whole two hundred and seventy-four pounds. *Ashton v. Dalton*, 2 Colly. 565, 10 Jur. 451.

1. **Deposit Accompanied with Memorandum.** — *Shaw v. Foster*, 42 L. J. Ch. 49, affirmed L. R. 5 H. L. 521. Compare *Ede v. Knowles*, 2 Y. & Coll. 172. See also *Ex p. Farley*, 5 Jur. 512.

2. **Antecedent Indebtedness** — "**May Advance.**" — The expression "may advance" in the written memorandum accompanying an equitable mortgage does not necessarily prevent the deposit from being a security for past advances. *Ex p. Smith*, 2 Mont. D. & De G. 587. See also *Ex p. Farley*, 5 Jur. 512.

3. *Ex p. Martin*, 4 D. & C. 457; *Mountford v. Scott*, T. & R. 274.

4. **Further Advances.** — *Ex p. Hooper*, 19 Ves. Jr. 477; *Ex p. Nettleship*, 2 Mont. & D. 124; *Baynard v. Woolley*, 20 Beav. 583; *Ex p. Langston*, 17 Ves. Jr. 227; *Ex p. Kensington*, 2 Ves. & B. 79; *Ex p. Hearn*, Buck 165; *Ex p. Whitbread*, 19 Ves. Jr. 209; *Ede v. Knowles*, 2 Y. & Coll. 172. See also *Kebell v. Philpott*, 2 Jur. 739.

In *Ex p. Smith*, 3 Mont. & A. 63, an equitable mortgagee was allowed to add to the amount of his charge sums expended in improvements upon the land.

Redelivery Unnecessary. — In order that a deposit may be made to cover further advances, it is not necessary that the deeds should be returned to the mortgagor and redelivered by him. *Ex p. Hooper*, 19 Ves. Jr. 477. See also *James v. Rice*, 5 De G. M. & G. 461.

5. *Ex p. Whitbread*, 19 Ves. Jr. 209. See also *Kebell v. Philpott*, 2 Jur. 739.

6. *Ex p. Kensington*, 2 Ves. & B. 79; *Baynard v. Woolley*, 20 Beav. 583.

7. *Ex p. Nettleship*, 2 Mont. & D. 124; *Ede v. Knowles*, 2 Y. & Coll. 172; *Ex p. Kensington*, 2 Ves. & B. 79.

8. **Future Advances.** — *Ex p. Farley*, 5 Jur. 512; *Ex p. Oakes*, 2 Mont. D. & D. 234; *Ex p. Smith*, 2 Mont. D. & D. 314.

In *Ex p. Wake*, 2 Deacon 352, it was held that a solicitor could not receive a deposit of title deeds as security for future costs, such a transaction being against public policy.

Advances After Notice of Subsequent Mortgage or Sale. — Where there is a mortgage for present and future advances and a subsequent mortgage of the same description, further advances made by the first mortgagee, with notice of the second mortgage, have no priority over antecedent advances made by the second mortgagee. *Rolt v. Hopkinson*, 3 De G. & J. 177, 4 Jur. N. S. 1119, 28 L. J. Ch. 41, affirmed *sub nom.* *Hopkinson v. Rolt*, 9 H. L. Cas. 514.

The owner of land, after depositing the title deeds with a bank as security for all sums then or thereafter to become due on the general balance of his account with the bank, contracted, with the knowledge of the bank, to sell the land to one who had notice of the terms of the deposit. The vendor afterwards paid into his own account at the bank sums which in the whole exceeded the debt due to the bank on his balance at the time of the contract of sale, so that, on the principle of *Clayton's Case*, 1 Meriv. 585, that debt was discharged. The bank, without giving notice to the purchaser, continued the account and made fresh advances to the vendor, so that on the general balance there was always a debt to the bank. The purchaser, who never had notice of the fresh advances, paid the purchase money by instalments to the vendor. It was held, on the principle of *Hopkinson v. Rolt*, 9 H. L. Cas. 514, that the bank had no charge on the land as against the purchaser for the fresh advances. *London, etc., Banking Co. v. Ratcliffe*, L. R. 6 App. 722, 51 L. J. Ch. 28, 45 L. T. N. S. 322, 30 W. R. 109.

Duty of Purchaser to Inquire in Regard to Fresh Advances. — A purchaser of land, with notice that the title deeds had been deposited with a bank as security for the general balance on the vendor's present and future account, is not bound to inquire whether the bank has, after notice of the purchase, made fresh advances. The burden lies on the bank advancing on the security on the unpaid vendor's lien to give the purchaser notice that it had so done or intends so to do. *London, etc., Banking Co. v. Ratcliffe*, L. R. 6 App. 722, 51 L. J. Ch. 28, 45 L. T. N. S. 322, 30 W. R. 109.

k. **ASSIGNMENT OF MORTGAGE.**—It seems that a mortgagee by the deposit of title deeds may assign his mortgage by the mere delivery of the deeds deposited.¹

l. **CONFLICT OF LAWS.**—It seems that the validity of a mortgage by the deposit of title deeds is to be determined by the law of the place of deposit rather than by the law of the place where the land affected by the mortgage is situated; and under this principle effect was given in *England* to a deposit of title deeds of a Scottish estate, though such mortgages were not recognized in *Scotland*.²

IV. AGAINST WHOM EQUITABLE MORTGAGES WILL BE ENFORCED.—The rule is that the charge of an equitable mortgage, like other equities, will be enforced not only against the mortgagor but also against third persons.³ Thus it has been held that such a mortgage will be enforced against voluntary grantees,⁴ purchasers with notice,⁵ purchasers in consideration of an antecedent

1. Assignment of Mortgage.—*Ex p. Smith*, 2 Mont. D. & D. 587. See also *Ex p. Kensington*, 2 Ves. & B. 79; *Ex p. Oakes*, 2 Mont. D. & D. 234; *In re O'Brien*, 11 L. R. Ir. 213.

The assignee of such a mortgage will, of course, take subject to the state of accounts between the mortgagor and mortgagee. *Matthews v. Wallwyn*, 4 Ves. Jr. 118.

2. Conflict of Laws.—*Ex p. Pollard*, Mont. & Ch. 239. See also *Cooté v. Jecks*, L. R. 13 Eq. 597. See, generally, the title PRIVATE INTERNATIONAL LAW.

In *Ex p. Holthausen*, L. R. 9 Ch. 722, the deposit of the title deeds of a house in Shanghai was held to create a good equitable mortgage though no memorandum of the deposit was made with the British consulate in Shanghai.

In *Varden Seth San v. Luckeathy Loyee Lal-lah*, 9 Moo. Ind. App. 303, it was held that where the law of the place where the land is situated does not forbid, and the contract is not made with reference to any particular law, and the general law of the place is English, an equitable lien may be created upon land by the deposit of the title deeds.

3. Enforcement of Equitable Mortgages Against Third Persons.—*Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431; *Martin v. Nixon*, 92 Mo. 26.

4. Voluntary Grantees.—*De Peyster v. Hasbrouck*, 11 N. Y. 582.

An Assignee in Bankruptcy takes subject to an equitable mortgage. *In re Howe*, 1 Paige (N. Y.) 125, 19 Am. Dec. 395.

In *Meggison v. Foster*, 2 Y. & Coll. 336, it was held that an equitable mortgage by deposit of the title deeds, to secure a voluntary bond debt, was valid as against a subsequent assignment in bankruptcy, if there was no fraud and the mortgagor was solvent at the time of the transaction.

In *Ex p. Ainsworth*, 3 Mont. & A. 451, it was held that a mortgage by deposit of the title deeds was good as against the creditors of the mortgagor, a bankrupt, unless made so near the bankruptcy, in point of time, as to be deemed a fraudulent preference.

5. Purchasers with Notice.—*United States v. Fletcher v. Morey*, 2 Story (U. S.) 555; *Ketchum v. St. Louis*, 101 U. S. 306.

Arkansas.—*Williams v. Cunningham*, 52 Ark. 439.

California.—*Racouillat v. Sansevain*, 32 Cal. 376.

Iowa.—*Cole v. Dealham*, 13 Iowa 551.

Kansas.—*Jones v. Lapham*, 15 Kan. 540.

Maryland.—*M'Mechen v. Maggs*, 4 Har. & J. (Md.) 132; *Dyson v. Simmons*, 48 Md. 207.

Minnesota.—*Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322.

Missouri.—*Davis v. Clay*, 2 Mo. 161; *Martin v. Nixon*, 92 Mo. 26.

New Jersey.—*Oliva v. Bunaforza*, 31 N. J. Eq. 395; *Sinclair v. Armitage*, 12 N. J. Eq. 174.

New York.—*Wadsworth v. Wendell*, 5 Johns. Ch. (N. Y.) 224; *National Bank v. Lanier*, 7 Hun (N. Y.) 623; *Shenck v. Ellingwood*, 3 Edw. Ch. (N. Y.) 175.

West Virginia.—*Smith v. Patton*, 12 W. Va. 541.

In *Watkins v. Vrooman*, 51 Hun (N. Y.) 175, it was held that where a purchaser from the mortgagor has no notice of an equitable mortgage at the time of his purchase, but acquires notice before payment of the purchase money, the mortgage will constitute a lien on the land to the extent of the purchase money unpaid at the time of such notice.

Deposit of Title Deeds.—The rule of the text applies as regards mortgages by deposit of the title deeds. *Birch v. Ellames*, 2 Anstr. 427; *Hiern v. Mill*, 13 Ves. Jr. 114; *Jones v. Williams*, 24 Beav. 47; *Leigh v. Lloyd*, 35 Beav. 455. And notice of the deposit of the deeds, it seems, would as a rule be notice that they were deposited by way of equitable mortgage. See the cases cited above. Though perhaps this would not be the case where the deeds are deposited with the solicitor of the depositor, as it is usual for solicitors to be in possession of their clients' deeds. *Bozon v. Williams*, 3 Y. & J. 150; *Lloyd v. Attwood*, 3 De G. & J. 651.

Constructive Notice.—In *Plumb v. Fluit*, 2 Anstr. 432, it was held that a purchaser of land which was subject to an equitable mortgage by a deposit of the title deeds would not be deemed, as a matter of law, to have constructive notice of such mortgage, because at the time of his purchase the deeds were not forthcoming.

The owner of land, who had deposited part of the title deeds by way of equitable mortgage, handed, preparatory to the execution of a legal mortgage, the balance of his deeds, tied up in a bundle, to the solicitor of the mortgagee. It was held that the failure of the solicitor to examine the bundle was not such

debt,¹ purchasers at judicial sales,² general creditors,³ attaching creditors,⁴ and judgment creditors of the mortgagor.⁵

Effect as Against the Crown. — And an equitable mortgage by the deposit of title deeds has been given effect as against a claim due the crown.⁶

Bona Fide Purchasers. — As against *bona fide* purchasers or legal mortgagees for value, without notice, equitable mortgages will not, however, be enforced, because the latter have an equal equity to the protection of the courts.⁷

Equities Against Mortgagor. — As a general rule an equitable mortgagee takes subject to all the equities affecting the mortgagor.⁸

Priority Between Equitable Mortgages. — The rule that where equities are equal priority will be given to the elder equity applies to equitable mortgages.⁹

negligence as would entitle the equitable mortgagee to enforce his lien as against the lien of the subsequent legal mortgagee. *Ratcliffe v. Barnard*, L. R. 6 Ch. 652.

Duty of Purchaser to Inquire as to Missing Deeds. — But if the purchaser omits all inquiry as regards the missing deeds, it seems that he will be held to have had notice of the lien of the equitable mortgagee. *Hewitt v. Loosemore*, 9 Hare 449; *Northern Counties F. Ins. Co. v. Whipp*, 26 Ch. Div. 482; *Lloyd's Banking Co. v. Jones*, 29 Ch. Div. 221.

1. Consideration — Antecedent Debt. — *Cook v. Cook*, 3 Head (Tenn.) 719.

Deposit of Title Deeds. — In *Plumb v. Fluitt*, 2 Anstr. 432, it was held that an equitable mortgage by deposit of the title deeds would not be enforced as against a subsequent purchaser without notice, though the consideration of the conveyance was an antecedent debt.

2. Purchasers at Judicial Sales. — *Chase v. Peck*, 21 N. Y. 581; *Fredericks v. Corcoran*, 12 W. N. C. (Pa.) 60. Such purchaser may, however, be within the protection of the recording acts. *Gill v. McAttee*, 2 Md. Ch. 255.

3. General Creditors. — *Burn v. Burn*, 3 Ves. Jr. 582; *Alexander v. Ghiselin*, 5 Gill (Md.) 138; *Carter v. Holman*, 60 Mo. 498.

4. Attaching Creditors. — *Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431; *Welsh v. Usher*, 2 Hill Eq. (S. Car.) 167, 29 Am. Dec. 63; *Bullock v. Whipp*, 15 R. I. 195.

5. Judgment Creditors — England. — *Eyre v. McDowell*, 9 H. L. Cas. 619; *McAuley v. Clarendon*, 8 Ir. Ch. N. S. 568; *Burn v. Burn*, 3 Ves. Jr. 582; *Taylor v. Wheeler*, 2 Vern. 564, citing *Burgh v. Francis*.

United States. — *Lane v. Ludlow*, 2 Paine (U. S.) 591; *Hurst v. Hurst*, 2 Wash. (U. S.) 69. *Iowa.* — *Welton v. Tizzard*, 15 Iowa 500.

Minnesota. — *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322.

Missouri. — *Carter v. Holman*, 60 Mo. 498; *Martin v. Nixon*, 92 Mo. 26.

Nebraska. — *Galway v. Malchow*, 7 Neb. 286. **New York.** — *Robinson v. Williams*, 22 N. Y. 386; *Payne v. Wilson*, 74 N. Y. 348; *White v. Carpenter*, 2 Paige (N. Y.) 217; *National Bank v. Lanier*, 7 Hun (N. Y.) 623; *In re Howe*, 1 Paige (N. Y.) 125, 19 Am. Dec. 395.

North Carolina. — *Miller v. Moore*, 3 Jones Eq. (56 N. Car.) 431.

Ohio. — *Muskingum Bank v. Carpenter*, 7 Ohio (pt. i.) 21, 28 Am. Dec. 616; *Lake v. Doud*, 10 Ohio 425.

Pennsylvania. — *Foster v. Foust*, 2 S. & R. (Pa.) 11.

South Carolina. — *Delaire v. Keenan*, 3 De-
saus. (S. Car.) 74, 4 Am. Dec. 604.

Wyoming. — *Frank v. Hicks*, 4 Wyoming
502.

Compare Price v. Cutts, 29 Ga. 142, 74 Am.
Dec. 52.

Deposit of Title Deeds. — *Whitworth v. Gaugain*,
3 Hare 416, affirmed 1 Phil. 728; *Abbott v.*
Stratten, 9 Ir. Eq. Rep. 233; *Anderson v.*
Kemshead, 16 Beav. 329; *Battersby v. Homan*,
2 Ir. Ch. Rep. 232.

Recording Acts. — Judgment creditors may
fall within the protection of the recording acts.
Dyson v. Simmons, 48 Md. 207; *White v. Den-*
man, 16 Ohio 59. See the title RECORDING
ACTS.

6. Casberd v. Ward, 6 Price 411.

7. Purchasers Without Notice — *Alabama.* —
Donald v. Hewitt, 33 Ala. 534, 73 Am. Dec.
431.

Kansas. — *Jones v. Lapham*, 15 Kan. 540.
Massachusetts. — *Pinch v. Anthony*, 8 Allen
(Mass.) 536.

Missouri. — *Martin v. Nixon*, 92 Mo. 26.
New York. — *Hoyt v. Doughty*, 4 Sandf. (N.
Y.) 462; *Watkins v. Vrooman*, 51 Hun (N. Y.)
175.

South Carolina. — *Welsh v. Usher*, 2 Hill
Eq. (S. Car.) 167, 29 Am. Dec. 63.

West Virginia. — *Smith v. Patton*, 12 W.
Va. 541.

Wisconsin. — *Bull v. Shepard*, 7 Wis. 449.

Deposit of Title Deeds. — In *Plumb v. Fluitt*,
2 Anstr. 432, it was held that an equitable
mortgage by way of deposit of title deeds
would not be enforced against a purchaser
without notice.

**8. Equitable Mortgagee Takes Subject to Equi-
ties Affecting Mortgagor.** — *Parker v. Clarke*, 30
Beav. 54; *Manningford v. Coventry Union*
Bank, 8 W. R. 729; *Shropshire Union R., etc.,*
Co. v. Reg., L. R. 7 H. L. 496.

9. Priority Between Equitable Mortgagees. —
A mortgage without seal or scroll is not con-
structive notice to subsequent purchasers and
creditors, though on record; yet it transfers
an equity to the mortgagee, and, being prior
to a mere covenant to mortgage, must prevail
against such covenant, irrespective of whether
the person claiming under such covenant had
notice of the prior equitable mortgage or not.
Portwood v. Outton, 3 B. Mon. (Ky.) 247.

Mortgage by Deposit of Title Deeds. — *Roberts*
v. Croft, 24 Beav. 223; *Dixon v. Muckleston*,
L. R. 8 Ch. 155; *Pickington v. Baker*, W. N.
(1877) 201. See also *Société Générale de Paris*
v. Tramways Union Co., 14 Q. B. Div. 424.

V. RECORDING ACTS. — In some jurisdictions equitable mortgages are the subject of record under the recording acts,¹ while in others it is held that they are not entitled to be recorded. This question will be fully discussed in another title.²

VI. REMEDY OF EQUITABLE MORTGAGEE. — The general remedy of an equitable mortgagee is by a bill in equity for a foreclosure of his mortgage,³ but the mortgagee may be entitled to a decree for the sale of the property mortgaged,⁴ or to a decree for the specific execution of a formal mortgage,⁵ and, when necessary for his protection, may be entitled to a decree enjoining the mortgagor from conveying the land to a *bona fide* purchaser.⁶

Tacking. — In case of successive equitable mortgages, a later mortgagee who has made his advance without notice of the prior equitable mortgages may, by securing the legal title, gain priority over the prior mortgagees. See the title TACKING.

1. Recording Acts. — *Carter v. Holman*, 60 Mo. 408; *Russell's Appeal*, 15 Pa. St. 319.

In *O'Neal v. Seixas*, 85 Ala. 80, *overruling* a dictum in *Bailey v. Timberlake*, 74 Ala. 221, it was held that an equitable mortgage was entitled to be recorded as "an instrument in the nature of a mortgage." Code 1886, § 1810.

2. See the title RECORDING ACTS.

3. Foreclosure of Mortgage. — *Parker v. Housefield*, 2 Myl. & K. 419; *Sappington v. Boly*, 12 Mo. 567; *Perry v. Board of Missions*, etc., 102 N. Y. 106.

An equitable mortgagee may proceed to foreclose the equitable mortgage arising from an agreement to give a mortgage or a defectively executed mortgage, without the necessity of first seeking the specific enforcement of the agreement or the reformation of the defective mortgage. *Sprague v. Cochran*, 144 N. Y. 104, *reversing* 70 Hun (N. Y.) 512. See also *Love v. Sierra Nevada Lake Water, etc., Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Cummings v. Jackson*, 55 N. J. Eq. 805.

Where there is a defect in the execution of a power to make a mortgage, the condition of the mortgage not following the terms of the power, and the design to execute a mortgage in pursuance of the power is apparent, and the object sought by its execution is substantially accomplished, equity will afford relief and enforce the mortgage. This it will do either by directing a correction in the condition of the mortgage and then enforcing the mortgage in its corrected form, or by construing the defectively executed instrument in connection with the power to which it refers, thus qualifying and restricting the condition, and giving effect to the mortgage conformably to the intention of the donors of the power and of the mortgagor. *Beatty v. Clark*, 20 Cal. 11.

If the equitable mortgagor renders the equitable lien unavailing by executing a mortgage on the land in favor of a party having no notice of such equitable lien, such conduct would not justify a court in charging any other lands of the mortgagor with the debt. *Smith v. Patton*, 12 W. Va. 541.

Foreclosure by Advertisement. — An equitable mortgage arising from the defective execution of a legal mortgage cannot be foreclosed by advertisement. *Ross v. Worthington*, 11 Minn. 438, 88 Am. Dec. 95.

Scire Facias. — In *Spencer v. Haynes*, 4 W.

N. C. (Pa.) 152, it was held that a scire facias would not lie on an equitable mortgage not under seal.

Statute of Limitations. — The right to enforce the lien of an equitable mortgage is not lost by lapse of time, or barred by the statute of limitations, until such time has elapsed as would bar relief upon the instrument creating such lien — the dignity and character of the lien depending upon the nature of the instrument creating it, and not upon the antecedent debt or lien intended to be revived or preserved. *Wayt v. Carwithen*, 21 W. Va. 516.

4. Deposit of Title Deeds — Right to Decree for Sale. — Under the earlier decisions a mortgagee by deposit of title deeds was held entitled to a decree for the sale of the mortgaged property. *Meux v. Ferne*, *Spring v. Allen*, cited in *Parker v. Housefield*, 2 Myl. & K. 422; *Russell v. Russell*, 1 Bro. C. C. 269; *Pain v. Smith*, 2 Myl. & K. 417; *Tipping v. Power*, 1 Hare 405; *King v. Leach*, 2 Hare 57; *Wiseman v. Cartwell*, 1 Eq. Ca. Ab. 212; *Dashwood v. Bithazey*, *Mosely* 196; *Daniel v. Skipwith*, 2 Bro. C. C. 155.

In the later case of *James v. James*, L. R. 16 Eq. 153, it was held, however, that the relief to which an equitable mortgagee by a deposit of title deed was entitled was foreclosure and not sale. This decision was based on the authority of *Pryce v. Burry*, a report of which will be found in the note to the above case.

In *Redmayne v. Forster*, L. R. 2 Eq. 467, it was also held that the remedy of an equitable mortgagee, by deposit of shares in a mining company, was by a decree for a foreclosure and not for a sale.

The jurisdiction of the Chancery Court to order a sale in case of a mortgage by the deposit of title deeds has, however, been enlarged by the Conveyance Act 1881 (44 & 45 Vict., c. 41). *Wade v. Wilson*, 22 Ch. Div. 235; *Oldham v. Stringer*, W. N. Dec. 13, 1884, p. 235.

Deposit Accompanied by Agreement to Execute Mortgage. — Where an agreement to execute a mortgage accompanies a deposit of title deeds by way of equitable mortgage, the mortgagee is entitled to a decree of foreclosure or for the sale of the premises. *York Union Banking Co. v. Artley*, 11 Ch. Div. 205.

5. Specific Performance. — *De Pierres v. Thorn*, 4 Bosw. (N. Y.) 266. See the title SPECIFIC PERFORMANCE.

6. Injunction. — *Northrup v. Cross*, *Seld. Notes* (N. Y.) 111; *London, etc., Banking Co. v. Lewis*, 21 Ch. Div. 490; *Spiller v. Spiller*, 3 Swanst. 556; *Hadley v. London Bank*, 3 De G. J. & S. 63.

EQUITABLE SEPARATE ESTATE.—See the title *SEPARATE PROPERTY OF MARRIED WOMEN*.

EQUITABLE SET-OFF. (See also the title *SET-OFF, RECOUPMENT, AND COUNTERCLAIM*.)—Equitable set-off exists where, by reason of the nature of the cross-demand, there can be no set-off at law.¹

EQUITABLE WASTE.—See the title *WASTE*.

EQUITIES.—See the title *EQUITY, post*; and see such titles as *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65; *LOST PAPERS*.

Injunction Refused.—In a suit by a purchaser for specific performance, an injunction to restrain the vendor from reselling the property was dissolved, it not being clear that the plaintiff would be able to establish his right to specific performance, and it appearing that the granting the injunction would, in case of the plaintiff's ultimately failing, be more injurious to the defendant than the refusal of it would be to the plaintiff in the event of his ultimately succeeding. Lord Justice Turner said: "I also am of opinion that this injunction ought to be dissolved. I do not feel prepared to go so far as Mr. Baily, founding himself on the authority of *Spiller v. Spiller*, 3 Swanst. 556, has carried his argument; namely, that the general rule of the court is, where there is a contract for sale, not to interfere with the vendor's continuing to deal with his property as he may think fit. I think that in all probability if we had before us the whole of what Lord Eldon said in *Spiller v. Spiller*, we should find that he intended the dictum given in the report to apply only to cases in which there was some doubt as to there being a contract which the court would enforce. I have always understood the rule of the court to be, that if there is a clear valid contract for sale, the court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by *lis pendens*. I think this rule well founded in principle, for the property is in equity transferred to the purchaser by the contract, the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him. 1 Sugden V. & P. (8th Am. ed.) 175, 176, and notes. In a case, therefore, where there is a clear undisputed contract, the court would in my opinion inter-

fere. But in the present case it is open to serious doubt what the result of the suit will be, and that being so, the question whether the vendor should be allowed to transfer the estate to a third party becomes a question of comparative convenience or inconvenience, and I think that in the present case there is no doubt on which side the balance of convenience inclines. On the one hand, if the legal estate is transferred, it may become necessary for the plaintiff to amend his bill or to file a supplemental bill, the only evil of which is that extra costs will be occasioned. It is a mere question of costs, which can be set right at the hearing if the plaintiff succeeds. On the other hand, if this injunction is maintained and the defendants are thus prevented from dealing with the estate, the consequence may be, and it is said at the bar will be, that the liquidators will be prevented from entering into contracts and arrangements from which great benefit would arise to the creditors of the company. There is no question as to the balance of convenience or inconvenience when consequences like these are weighed against a mere question of extra costs. I am of opinion, therefore, that the injunction ought to be dissolved." *Hadley v. The London Bank of Scotland*, 3 De G. J. & S. 69.

Interim Injunction.—In an action by an equitable mortgagee for sale or foreclosure the court granted an interim injunction to restrain dealing with the legal estate till the next motion day, on an *ex parte* application by the plaintiff; there being ground for believing that the defendants intended to part with the legal estate *pendente lite*. *London, etc., Banking Co. v. Lewis*, 21 Ch. Div. 490.

1. *Whyte v. O'Brien*, 1 Sim. & S. 551.

EQUITY.

BY CHARLES SUMNER LOBINGIER, M.A., LL.M.

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CROSS-REFERENCES.

For matters of *EQUITY PLEADING AND PRACTICE*, see the appropriate titles in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see such titles in this work as the following: *ACCIDENT (IN EQUITY)*, vol. 1, p. 277; *ASSIGNMENTS*, vol. 2, p. 1007; *BOUNDARIES*, vol. 4, p. 756; *CLOUD ON TITLE*, vol. 6, p. 149; *CONTRIBUTION AND EXONERATION*, vol. 7, p. 325; *CONVERSION AND RECONVERSION*, vol. 7, p. 463; *DEPOSITIONS*, vol. 9, p. 295; *DIVORCE*, vol. 9, p. 723; *DOWER*, vol. 10, p. 122; *EQUITABLE ELECTION*, ante, p. 57; *EQUITABLE MORTGAGES*, ante, p. 122; *EQUITY OF REDEMPTION*, post; *ESTOPPEL*, post; *EXECUTORS AND ADMINISTRATORS*, post; *FORECLOSURE*; *FRAUD AND DECEIT*; *FRAUDULENT SALES AND CONVEYANCES*; *GUARDIAN AND WARD*; *IMPLIED TRUSTS*; *INFANTS*; *INJUNCTIONS*; *INSANITY*; *LIENS*; *LIQUIDATED DAMAGES*; *LOST PAPERS*; *MARSHALING ASSETS*; *MIS-TAKE*; *MORTGAGES*; *NUISANCES*; *PROBATE AND LETTERS OF ADMINISTRATION*; *RECEIVERS*; *REFORMATION AND CANCELLATION*; *RESCISSION*; *SEPARATE PROPERTY OF MARRIED WOMEN*; *SET-OFF, RECOUPMENT, AND COUNTERCLAIM*; *SPECIFIC PERFORMANCE*; *SUBROGATION*; *SURETYSHIP*; *TRUSTS AND TRUSTEES*; *USURY*; *VENDOR'S LIEN*.

I. INTRODUCTORY — SCOPE AND PLAN OF ARTICLE. — The plan of this work does not permit a comprehensive treatise in one place of the topics commonly grouped under the title of equity. Almost every one of these forms the subject of a separate article and is there treated in detail. Nor is it clear that, even if the plan of this work were different, these various topics ought logically to be treated together; for the fact is becoming recognized¹ that equity is not now, if it ever was, the name of a clearly defined, connected, and homogeneous branch of English law, but is rather a collection of diverse and unrelated topics, doctrines, and remedies belonging to many different departments of

1. **New Classification for Modern Equity.** — See an article on the query, "Would it be practicable to divide the doctrines of equity among other branches of law and to cease treating equity as an independent subject?" 33 Cent. L. J. 339. The author says: "There was a time when it could be urged with some reason that equity should be studied as a separate branch of our system of jurisprudence. When the two courts existed in fact and legislatures had corrected none of the manifest deficiencies

of the law, when the two courts were in active and bitter rivalry and every point of difference was drawn sharply and distinctly, it could be plausibly argued that equity should be studied separate and distinct from the remedies obtainable in law courts. But though such a condition did exist, it has long ceased, and now it is not only perfectly feasible, but would result in immense advantage, to incorporate what is left of equity with the branches of the law they modify or perfect. Equity would not

jurisprudence. Nevertheless all these disconnected subjects have this much in common — they originated in the court of chancery and not in the court of common law. We may still therefore use the term "equity jurisprudence" to indicate the source of many, perhaps more than half of all, legal doctrines and remedies. Now it is desirable that there be one place where the products of this common source may be viewed together and their relations to each other defined, though the treatment of their details is left to separate articles. It is also desirable that there be some discussion of this common source, of its nature and its history, none of which is covered in the treatment of these separate heads of equity. To supply these needs is the purpose of the present article. It aims to be an introduction to, and a summary of, those heads of equity jurisprudence which are elsewhere treated. Concerning these it will go but little into detail. The attempt will be to enumerate and classify rather than explain. As to other topics which are not elsewhere discussed — such as the nature of equity, its maxims, and its history — the treatment will be more elaborate. In this way it is hoped that the discussion of no subject will be either duplicated or ignored.

II. NATURE OF EQUITY — 1. Definitions. — It is not easy to define the system of jurisprudence known as equity. One obstacle in the way of precise definition is the use of the term "equity" in several distinct senses.¹ In its popular sense it is given much the same meaning as the phrase "natural justice,"² and it appears to be so used by the earlier writers.³ But it has long been recognized that this was entirely too broad to serve as a definition or even as an accurate description of equity jurisprudence;⁴ accordingly, some of the later commentators, while utilizing the term "natural justice," define equity as that portion thereof which is administered in a particular forum,⁵ or which failed of enforcement under the common-law system.⁶

2. Sir Henry Maine's View. — Perhaps the most helpful conception of equity is that so skilfully elaborated by Sir Henry Maine. Equity in his view is the second of a series of "agencies by which law is brought into harmony with society."⁷ It is one of three factors which operate successively in juridical evolution,⁸ beginning with Legal Fictions⁹ and ending with

cease to be learned, but it would be acquired incidentally and naturally instead of being treated as an isolated subject capable of complete divorcement from the legal doctrines affected by it."

1. See 1 Pomeroy's Eq. Jur. (2d ed.), §§ 44, 45.

2. **Popular Use of Term.** — 1 Pomeroy's Eq. Jur. (2d ed.), § 45; Snell, Principles of Equity (1st Am. ed.), p. 1.

3. St. Germain, Doctor and Student, Dial. 1, c. 16; Fonbl. Eq., bk. 1, c. 1, § 3.

4. **Equity Not Synonymous with Justice.** — "Now it would be a great mistake to suppose that equity, as administered in England or America, embraced a jurisdiction so wide and extensive as that which arises from the principles of natural justice above stated. Probably the jurisprudence of no civilized nation ever attempted so wide a range of duties for any of its judicial tribunals. Even the Roman law, which has been justly thought to deal to a vast extent in matters *ex æquo et bono*, never effected so bold a design." 1 Story's Eq. Jur. (13th ed.) 2. Compare Snell's Principles of Equity Jurisprudence (1st Am. ed.) 1; Fetter's Handbook of Equity Jurisprudence, c. 1.

"Equity is not the chancellor's sense of moral right, or his sense of what is just and equal. It is a complex system of established law." Portland Sav. Inst. v. Makin, 23 Me. 360.

"It was not pretended on the argument that the set-off came within any known rule; but it seems to be imagined that there is some vague equity out of which the court may work it. But courts have no power to create equities contrary to law." Hendricks v. Toole, 29 Mich. 340.

5. "Equity may then be defined as being that portion of natural justice which, though of such a nature as properly to admit of being judicially enforced, was, from circumstances hereafter to be noticed, omitted to be enforced by the common-law divisions, and which the chancery division, or Court of Chancery, for reasons of its own, enforced." Snell's Principles of Equity (1st Am. ed.) 3.

6. "As understood in English and American jurisprudence, equity may be defined to be that portion of natural justice, susceptible of judicial enforcement, which was either not recognized at all by the common law, or only inadequately enforced by reason of its cramped procedure." Fetter's Handbook of Equity Jurisprudence 1.

7. Maine's Ancient Law (3d Am. ed.) 23, 24.

8. Maine's Ancient Law (3d Am. ed.) 24.

9. **Legal Fictions.** — "I employ the word 'fiction' in a sense considerably wider than that in which English lawyers are accustomed to use it, and with a meaning much more extensive than that which belonged to the

Legislation.¹ Equity succeeds the former and precedes the latter, but differs materially from either.² Moreover, equity, according to this conception, is not peculiar to English legal development, but is common to all juridical systems which have reached a corresponding stage of evolution.³

3. Equity a Source, Not a Subject. — It has already been suggested⁴ that the one common feature in the different heads of equity jurisprudence is the fact that they spring from the same source. This truth goes far to explain the nature of equity. It is not a particular subject in the law, with fixed boundaries and logical subdivisions. It is a source which has contributed largely to the body of our jurisprudence just as the common law and legislation have. And these contributions of equity are not to any one department of the law, but to all, and they are often found to supplement those of so-called rival systems. When this is better understood the supposed antagonism between equity and other sources of our law will be less emphasized and the similarities between them will be more apparent.⁵

III. HISTORY OF EQUITY — 1. Introductory. — Knowledge of the history of any branch of the law is a valuable aid to the clear understanding of it, but in the study of English equity such knowledge is not merely valuable, it is essential; for the subject itself is so interwoven with its history that equity can be understood only by tracing its development. It will be convenient to divide the history of equity into four periods: (1) The period of establishment (1272–1422); (2) the struggle for supremacy (1422–1673); (3) the influential period (1673–1827); (4) amalgamation (1827 to the present time).

2. First Period — Establishment (1272–1422). — For the beginnings of equity as a distinct and recognized system in English law we need not go back to the origin of that law; for although the term is to be found much earlier,⁶ the

Roman *fictiones*. But I now employ the expression 'legal fictions' to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." Maine's *Ancient Law* (3d Am. ed.) 24, 25.

In *State v. Standard Oil Co.*, 49 Ohio St. 176, 34 Am. St. Rep. 541, the court, in discussing the fiction that a corporation is "a legal entity, existing separate and apart from the natural persons composing it," observed: "All fictions of law have been introduced for the purpose of convenience and to subserve the ends of justice. It is in this sense that the maxim *in fitione juris subsistit equitas* is used, and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction they have always been disregarded by the courts. Broom's *Legal Maxims* 130. 'It is a certain rule,' says Lord Mansfield, C. J., 'that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted.' *Johnson v. Smith*, 2 Burr. 962. 'They were invented,' says Brinckerhoff, J., in *Wood v. Ferguson*, 7 Ohio St. 291, 'for the advancement of justice, and will be applied for no other purpose.' And it is in this sense that they have been constantly understood and applied in this state. *Hood v. Brown*, 2 Ohio 269; *Rossman v. McFarland*, 9 Ohio St. 381; *Collard v. Donaldson*, 17 Ohio 266."

1. "Legislation, the enactments of a legislature, * * * whether it takes the form of an autocratic prince or of a parliamentary assem-

bly, as the assumed organ of the entire society, is the last of the ameliorating instrumentalities. It differs from legal fictions just as equity differs from them, and it is also distinguished from equity, as deriving its authority from an external body or person. Its obligatory force is independent of its principles. The legislature, whatever be the actual restraints imposed on it by public opinion, is in theory empowered to impose what obligations it pleases on the members of the community. There is nothing to prevent its legislating in the wantonness of caprice. Legislation may be dictated by equity, if that last word be used to indicate some standard of right and wrong to which its enactments happen to be adjusted; but then these enactments are indebted for their binding force to the authority of the legislature, and not to that of the principles on which the legislature acted; and thus they differ from rules of equity, in the technical sense of the word, which pretend to a paramount sacredness entitling them at once to the recognition of the courts, even without the concurrence of prince or parliamentary assembly." Maine's *Ancient Law* (3d Am. ed.) 28.

2. Equity as a Remedial Agent. — Maine's *Ancient Law* (3d Am. ed.) 27, 28.

3. Equity in Roman and English Law. — Maine's *Ancient Law* (3d Am. ed.) 42, 43.

4. See *supra*, this title, *Introductory* — *Scope and Plan of Article*.

5. Similarity Between Law and Equity. — See the observations of Lord Esher, M. R., in *In re Terry's Contract*, 32 Ch. Div. 14.

6. "I assume without discussion that the reference to *equitas* in Glanville Bracton and some of the early statutes passed before the

system itself did not originate until English jurisprudence had reached a comparatively mature and settled stage.¹ In the reign of Edward I., aptly called the English Justinian² — the age in which so many of our legal institutions find their source³ — English equity as a system administered by a tribunal apart from the established courts makes its first appearance.⁴

a. THE CHANCELLOR. — The separate administration of equity began in the practice of referring causes to the chancellor.⁵ That office was a very ancient one,⁶ but up to the period now under consideration its functions had been ministerial rather than judicial.⁷ In this reign of the first Edward it became not uncommon to refer to the chancellor petitions which had been presented to the king and his council.⁸ Such petitions had long constituted a means of obtaining relief either against, or independently of, the ordinary courts of law.⁹ At first they had been considered directly by the body to whom they were addressed, but as their volume increased such consideration became, in addition to other business, exceedingly burdensome.¹⁰ Hence arose the custom of sending them to the chancellor. In time this led to the addressing of such petitions to that official directly,¹¹ and in this way chancery became a recognized forum for the relief of litigants and the correction of legal abuses.

b. OPPOSITION AND FINAL ESTABLISHMENT. — The growth of chancery as a judicial institution was not, however, permitted to proceed unchallenged. In the fourteenth century the Great Council of the Norman kings had grown into the Parliament of the realm.¹² It still continued to exercise the judicial powers of its predecessor,¹³ and the increasing authority of this new court seems to have excited the jealousy of the commons. During the last quarter of the fourteenth century and the greater part of the fifteenth petitions and complaints from the commons were frequently sent to the king, asking him to prevent the exercise of some power on the part of chancery;¹⁴ but notwithstanding the opposition the new tribunal continued to advance towards greater independence. One mark of this is the fact that the chancellor, who had been originally a member of the royal household,¹⁵ gradually ceased, except in theory, to "follow the king,"¹⁶ and during the reign of Edward III. (1327–1337) came to sit regularly at Westminster for hearing causes.¹⁷ By the end of the reign of Henry V. (1413–1422) the purely formative period was over, and chancery was one of the established courts of the realm.¹⁸ The procedure of chancery even at this early period seems to have been strikingly similar to that of modern times;¹⁹ and this may be due to the fact that the chancellor,

existence of a chancery jurisdiction, have no bearing on that question." O. W. Holmes, *Early English Equity*, 1 *Law Quar. Rev.* 162.

1. Pollock and Maitland, *History of the English Law*, vol. 2, p. 670.

2. Taswell-Langmead's *English Constitutional History* (3d ed.) 101.

3. Stubbs, *Constitutional History of England* (2d ed.), vol. 2, § 182.

4. Kerly, *History of Equity* (1890), c. 3.

5. Kerly, *History of Equity* (1890), p. 20.

6. 4 *Coke's Inst.* 78; Kerly, *History of Equity* (1890), p. 23. The latter says: "It certainly existed before the Conquest."

7. Pollock and Maitland, *History of the English Law*, vol. 1, pp. 172–176.

8. Pollock and Maitland, *History of the English Law*, vol. 1, p. 176. An ordinance of the first half of this reign required all petitions "that touch the seal" to go to the chancellor. Kerly, *History of Equity* (1890), p. 26.

9. Kerly, *History of Equity* (1890), p. 13 *et seq.*

10. See Ordinance of Edward I., Introduction

to *Close Rolls*, p. xxviii, reciting the multitude of these petitions.

11. Maitland, *Justice and Police* (1885), pp. 36, 37; Kerly, *History of Equity* (1890), pp. 20, 21.

12. Taylor, *Origin and Growth of the English Constitution*, pp. 494, 495; Gneist, *The English Parliament*, pp. 144, 145; Skottowe, *A Short History of Parliament*, p. 16.

13. Kerly, *History of Equity* (1890), p. 19.

14. Kerly, *History of Equity* (1890), c. 4.

15. Stubbs, *Constitutional History of England*, vol. 1, § 121.

16. Pollock and Maitland, *History of the English Law*, vol. 1, p. 173, where the authors add in a note: "The stages by which chancery ceased as a matter of fact to be a peripatetic office, following the king in his progresses, have never yet been accurately ascertained; but it seems probable that Chancellor Burnel made some noteworthy change in 1280. *Annales Monastici*, ii. 393, iv. 477."

17. Kerly, *History of Equity* (1890), pp. 30, 31.

18. Holmes, *Early English Equity*, 1 *Law Quar. Rev.* 162.

19. There was the same order of bill, answer,

who was usually a dignitary of the church,¹ found a fully developed system of procedure in vogue in the ecclesiastical courts and borrowed it entire.²

c. JURISDICTION. — The aid of chancery seems to have been most frequently invoked during this period to prevent the infliction of outrage and violence, the remedies of the common law being in many such cases clearly inadequate.³ But the chancellor's jurisdiction was increasing, and being gradually extended to subjects afterwards recognized as peculiarly its own, such as uses and trusts, relief against fraud and duress, and the enforcement of contracts.⁴

3. Second Period — The Struggle for Supremacy (1422–1673). — Up to the close of the period just reviewed, chancery, though constantly extending its functions, came but little into conflict with the regular courts of the realm; but now that it had become an established tribunal, offering relief which the other courts could not give, rivalry was inevitable. The period following the establishment of chancery was marked by a struggle for supremacy between it and the other courts.⁵ While this extended to other matters, the centre of the conflict was the right of chancery to interfere by injunction with the proceedings of the common-law courts. From the reign of Henry VI. (1422–1461), and even earlier, the chancellor had granted the extraordinary writ to enjoin the enforcement of judgments, and even to prevent the commencement of actions; but this was always against the protests of the common-law judges, who lost no opportunity to make these writs ineffectual.⁶ A succession of unusually able chancellors,⁷ from Wolsey⁸ to Bacon,⁹ upheld the prerogatives of the High Court on this point, and after a controversy lasting for nearly two centuries, and towards its close maintained on its common-law side by no less a champion than Sir Edward Coke, these prerogatives were finally confirmed by a royal decree in 1616.¹⁰ Meanwhile chancery was extending its functions in other ways. The writ of *ne exeat regno*, which had previously been employed by the crown as a political instrument to prevent the departure of subjects,¹¹ was, during this period, adopted by the High Court as an aid to its proceedings.¹² The employment of the writ of certiorari was a powerful auxiliary to bring causes into chancery and increase its power.¹³ Its jurisdiction was, moreover, extended to nearly its modern scope.¹⁴ During the Commonwealth an unsuccessful attempt was made to restrict its functions,¹⁵ and at the Restoration it had become the most powerful of the courts of the realm.

4. The Influential Period (1673–1827). — In the third period of its history English equity assumes more obviously its true character as one of "the agencies by which law is brought into harmony with society."¹⁶ Up to this

and replication and examination under oath. There were also instances of amended and cross bills. See Kerly, *History of Equity* (1890), p. 51.

1. Kerly, *History of Equity* (1890), p. 94.

2. Holmes, *Early English Equity*, 1 *Law Quar. Rev.* 162.

3. Kerly, *History of Equity* (1890), pp. 71, 72. The ancient writ of supplicavit afforded the relief sought.

4. Holmes, *Early English Equity*, 1 *Law Quar. Rev.* 162. Section 2 of chapter 3 of Kerly's *History of Equity* discusses at some length the jurisdiction exercised by the chancellor at this time.

5. 3 Reeves' *History of the English Law* (Am. ed., 1880), c. 22.

6. Kerly, *History of Equity* (1890), p. 89 *et seq.*

7. The list included Sir Thomas More and Lord Ellesmere.

8. Wolsey's term ended in 1529.

9. Lord Bacon held the Great Seal from 1616 to 1620.

10. Hallam's *Const. Hist.*, vol. 1, p. 469; Kerly, *History of Equity* (1890), p. 115.

11. *Ne Exeat*. — "The question then is, whether going to Ireland is going to foreign parts, considering the original object of the writ itself, which is to prevent a subject going to the king's enemies." Lord Eldon, in *Bernal v. Donegal*, 11 Ves. Jr. 43.

12. Beames on *Ne Exeat* 16; Kerly, *History of Equity* (1890), p. 151; Story's *Eq. Jur.* (13th ed.), § 1467.

13. See Kerly, *History of Equity* (1890), pp. 76, 96.

14. A full discussion of this is contained in Kerly's *History of Equity* (1890), c. 9.

15. Kerly, *History of Equity* (1890), c. 10; Gardiner, *The Commonwealth and the Protectorate*, vol. 2, pp. 241, 262, 317.

16. Maine, *Ancient Law* (3d Am. ed.), p. 24.

time its influence upon the common law had been chiefly negative, and any recognition of its doctrines by the other courts had been for the most part unwilling. The period now treated is remarkable for the extent to which equitable principles permeated and leavened the entire body of English jurisprudence. Several chancellors of exceptional ability and learning contributed to this process — among them Lord Nottingham, who has been called the “father of equity,”¹ Lord Hardwicke,² whose extensive knowledge of both systems³ enabled him to harmonize them in his judgments, and Lord Thurlow.⁴ But much was also due to the common-law judges of this period, notably Lord Mansfield,⁵ who is said to have observed that he “never liked the law so much as when it was most like equity.”⁶ The period ends with the long chancellorship of Lord Eldon,⁷ who established the doctrine of *stare decisis* in equity jurisprudence,⁸ and gave to the system form, clearness, and consistency.⁹ Thenceforth equity ceased to be a mere corrective agency and became a definite system of jurisprudence occupying the field side by side with the common law.¹⁰

5. Amalgamation (1827–Present) — a. IN ENGLAND. — The process just reviewed had removed many of the differences between the rival systems, by ingrafting equitable principles upon the common law and introducing legal doctrines, like that of *stare decisis*, into equity. It was but a step further to amalgamate the two systems and to cause them to be administered by the same court and upon fixed principles. In England this result was reached after about half a century of effort. Serious and repeated complaints of the delay, expense, and uncertainty caused by the dual system in course of time brought about the appointment of parliamentary commissions to investigate these charges.¹¹ The movement was accelerated if not suggested by the success of corresponding efforts in the *United States*, notably the adoption of the *New York Code*.¹² A series of enactments followed which were intended to correct the evils complained of¹³ and culminated in the Judicature Acts of 1873.¹⁴ By this statute and subsequent amendments the courts which had sat so many centuries at Westminster Hall were consolidated into one Supreme Court of which chancery became simply a division,¹⁵ while it was provided that equitable relief should in a proper case be administered concurrently with law in each division and that in case of conflict the principles of equity should

1. *Brydges v. Brydges*, 3 Ves. Jr. 127; 1 Madd. Ch. Pr., preface, p. 13; Story's Eq. Jur. (13th ed.) 49, 50. Nottingham's term lasted from 1673 to 1682.

2. Campbell, *Lives of the Lord Chancellors*, vol. 5, pp. 44, 50. His term lasted from 1736 to 1756.

3. Kerly, *History of Equity* (1890), p. 177; Campbell, *Lives of the Lord Chancellors*, vol. 5, pp. 44, 45. Lord Hardwicke had been chief justice of the King's Bench before taking the woolsack.

4. Thurlow's chancellorship lasted from 1778 to 1792.

5. Chief Justice of the King's Bench 1756–1788.

6. Kerly, *History of Equity* (1890), p. 180.

7. 1801–1827, except during a short interval, 1806–1807.

8. **Precedent Established in Chancery.** — “The doctrines of this court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater

pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot.” Lord Chancellor Eldon, in *Gee v. Pritchard*, 2 Swanst. 414.

9. Maine's *Ancient Law* (3d Am. ed.) 66.

10. Maine's *Ancient Law* (3d Am. ed.) 65, 66.

11. Kerly, *History of Equity* (1890), p. 273 *et seq.*

12. See an introductory article by David Dudley Field on Law Reform in the *United States and Its Influence Abroad*, 25 *Am. Law Rev.* 515, especially pp. 523–526.

13. Kerly, *History of Equity* (1890), p. 275 *et seq.*

14. See *English Statutes at Large*, 36 & 37 Vict., c. 66.

15. **Modern English Courts.** — The Supreme Court has two branches, the High Court of Appeal and the High Court of Justice. The latter has now, by the Act of 1881, three divisions, viz., (1) Chancery, (2) Queen's Bench, and (3) Probate, Admiralty, and Divorce. Appeal lies from any division of the High Court of Justice. See 25 *Am. Law Rev.* 1, and the act cited in the preceding note; also 10 *Harvard Law Rev.* 442.

prevail over those of the common law.¹ Similar enactments have since been passed in many other parts of the British empire. Thus in England and her colonies the cycle was complete. Chancery, which had been differentiated from the other judicial institutions of the realm six centuries before, was once more merged in them, and the jural fabric which it had reared became the common property of all English courts.²

b. IN THE UNITED STATES—(1) *The Earliest Period*.—The English colonies in America were settled either just before or during the period when chancery was exerting its greatest influence upon the legal system of the mother country.³ In the case of the judiciary as in all other phases of civic life, the institutions which the colonists founded in their new homes were copies, often crude and imperfect, of those with which they had been most familiar in England.⁴ Accordingly the idea of a court of chancery, administering a peculiar system of jurisprudence of its own, found lodgment and expression in the judicial framework of all the colonies.⁵ In most of them equity powers were conferred upon the royal governor, acting usually in conjunction with his council,⁶ but in *Rhode Island* during most of the colonial period the assembly constituted the chancery court,⁷ and in some other colonies the legislative branch exercised the functions of a chancellor.⁸ But in all save one of the colonies equitable relief was administered by some tribunal distinct from the common-law courts. The exception was *Pennsylvania*,⁹ where until almost the middle of the present century equity was administered, during the greater portion of the period, not only by the ordinary courts, but in the forms and according to the procedure of the common law.¹⁰ The other commonwealths, in the course of their development, either established regular courts of equity, presided over by chancellors, or, as in New England, conferred equity powers upon the ordinary courts, to be exercised in accordance with the forms and procedure of chancery. The Pennsylvania experiment seems to

1. English Statutes at Large, 36 & 37 Vict., c. 66, §§ 24, 25.

2. Kerly, *History of Equity* (1890), p. 294.

3. See *supra*, this section, *The Influential Period* (1673-1827).

4. *Equity in the Colonies*.—"Equity, as a great branch of the law of their native country, was brought over by the colonists, and has always existed as a part of the common law, in its broadest sense, in New Hampshire." *Wells v. Pierce*, 27 N. H. 512, *quoted in Copp v. Henniker*, 55 N. H. 210, 20 Am. Rep. 194. And see *Penhallow v. Kimball*, 61 N. H. 596; *Carroll v. McCullough*, 63 N. H. 95; *Eckstein v. Downing*, 64 N. H. 259, 10 Am. St. Rep. 404. See also *State v. Saunders*, 65 N. H. 39.

5. "Prior to the Revolution courts of chancery had existed in some shape or other in every one of the thirteen colonies." Wilson, *Courts of Chancery in America*, 18 Am. Law Rev. 226.

6. See a valuable article by Solon D. Wilson on *Courts of Chancery in America, Colonial Period*, 18 Am. Law Rev. 226, where the early judicial history of the colonies is reviewed. In addition to the material there collected, see Appendix to 19 N. J. Eq. Rep., containing a sketch of chancery in colonial New Jersey, by Chancellor Zabriskie; also 1 Story's Eq. Jur. (13th Am. ed.), § 56 and notes.

7. Wilson, *Courts of Chancery in America*, 18 Am. Law Rev. 233-236.

8. Notably in *Virginia and Massachusetts*. See Wilson, *Courts of Chancery in America*, 18 Am. Law Rev. 250, 226.

9. *Pennsylvania*.—"The equitable jurisdiction in Pennsylvania, until the recent legislation quoted in the last section, (§ 341) has been so peculiar, so unlike that prevailing in any other state, that I shall only attempt to describe it in a very general manner." 1 Pomeroy's Eq. Jur. (2d ed.), § 338. And see a valuable article by Sidney G. Fisher on the Administration of Equity Through Common-law Forms, 4 Law Quarterly Rev. 455.

10. "With the exception of the sixteen years from 1620 to 1636, the courts of Pennsylvania were, for over a hundred and fifty years, left in this predicament—that, in an enlightened community whose trade and commerce were growing every day, they were obliged to administer justice without the aid of a court of equity. It is not surprising that they struck out into a new path and did something unheard of in the annals of Anglo-Saxon jurisprudence. If their action was a piece of judicial audacity, it was authorized and justified by the circumstances." Fisher, *The Administration of Equity Through Common-law Forms*, 4 Law Quarterly Rev. 458.

In *Torr's Estate*, 2 Rawle (Pa.) 250, Chief Justice Gibson said: "Equity is a part of our law; and I would just as willingly disturb the foundations of the common law, laid in the time of Lord Coke, as shake a principle of equity settled by Lord Talbot, Hardwicke, or Northington. We ought to disclaim everything like a discretion to adopt or reject, according to our notions of expediency; nor, if we had the power, is there one of those principles which I would desire to reject. How-

be the link which connects those prevailing systems with the innovations whose history will now be briefly traced.

(2) *The Code Movement*. — For more than a half century after the close of the Revolution the original thirteen states and those which followed them into the Union retained for the most part the systems of courts and legal procedure which had grown up in colonial times. The first exceptions to this were the states formed from the non-English settlements of the southwest. In *Louisiana* the procedure of the civil law was an inheritance from an older sovereignty, and the dual system of law and equity, with its corresponding diversity of courts, never found a place there.¹ In *Texas*, likewise influenced by an alien system, some of the features of the modern code practice had been anticipated as early as 1834,² while the administration of both forms of judicial relief through the single action was an accomplished fact by 1840. But the first continuous movement away from the colonial system, in the states where it prevailed, was begun in *New York* about 1826,³ and culminated in 1848 in the adoption by that state of its first Code of Civil Procedure.⁴ Thence the movement spread westward and southward until at the present writing about two-thirds of all the states and territories have adopted the substantial features of the reformed procedure,⁵ including the enforcement of rights, both equitable and legal, through the single civil action.

(3) *Present Status of Chancery in America* — (a) *The First Group*. — The changes wrought by the code movement have resulted in dividing the American states and territories into three groups as regards the method of administering equity jurisprudence. In the first group separate courts of chancery are maintained, and law and equity are administered by their respective tribunals under different modes of procedure.⁶ In these states the court which administers equity is a copy of the High Court of Chancery in England, and usually possesses all its powers and jurisdiction,⁷ and the enlargement by the legislature of the jurisdiction of this court does not change the well-established principles

ever they may have been strained in particular instances, they are intrinsically just in their application to the most complicated cases. As we cannot hope to see a separate administration of equity, we are bound to introduce it into our system as copiously as our limited powers will admit."

1. *Louisiana*. — See letters of Judge John F. Dillon and others reprinted in 30 *Am. Law Rev.* 823, 824, 819; Hennen's *Louisiana Digest* (1867), pp. 480, 481; *Mussina v. Alling*, 11 *La. Ann.* 568.

2. *Early Texas Procedure*. — Sayle's *Early Laws of Texas* 119.

3. *The Beginning of the Code Movement*. — "Agitation began soon after a revision of the Constitution of 1826, and it increased in intensity until another constitutional convention was called. As early as 1842 a bill was submitted to the legislature 'for the more simple and speedy administration of justice in civil cases in the courts of common law,' another for the like in the courts of equity, and a third 'to simplify indictments.' Law and equity being separated by the constitution of that day, the first two bills had to be kept apart. They may be found in Assembly Document 81 of 1842, and became forerunners of and often identical with the Code of 1848." David Dudley Field, *Law Reform in the United States and Its Influence Abroad*, 25 *Am. Law Rev.* 515.

4. The author of this code, Mr. David Dudley Field, says: "The New York commission-

ers reported to the legislature the first instalment of the Code of Civil Procedure in February, 1848. It was soon enacted, and went into effect on the first of July, 1848. Stated in fewest words, its essential features were the demolition of the forms of action, the abolition in that respect of the distinction between actions at law and suits in equity, and the substitution of one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, in which [in] one action should be determined all the rights of the parties, legal or equitable, in respect of the subjects in litigation." *Law Reform in the United States*, 25 *Am. Law Rev.* 523.

5. "The new procedure which was devised by the codifiers and inaugurated by the legislature of New York, in the year 1848, now prevails in more than twenty other states and territories of this country, and may, therefore, be properly termed 'The Reformed American System of Procedure.'" Pomeroy's *Code Remedies*, preface to first edition.

6. This group includes the states of Alabama, Delaware, Mississippi, New Jersey, and Tennessee. *Barton's Suit in Equity* 22; *Bispham's Principles of Equity* (5th ed.), § 15; 1 *Pomeroy's Eq. Jur.* (1st ed.) 364. But in *Mississippi* the Circuit Court has its law and chancery sides. See *Mobley v. Buchanan*, 30 *Miss.* 174.

7. See the case of *Fox v. Wharton*, 5 *Del. Ch.* 213.

according to which it conducts its business.¹

(b) **The Second Group.** — The second group is that in which law and equity are still administered in their distinct and appropriate forms, but by the same court.² In these jurisdictions the boundaries between common-law and chancery procedure are jealously guarded,³ and it is even held to be beyond the power of the legislature to obliterate them.⁴ Moreover, the fact that equity jurisdiction is conferred upon courts of law will not operate to deprive chancery tribunals of their ordinary and inherent powers.⁵

The Most Important Member of This Group is that which comprises the federal tribunals, whose equity jurisdiction and the mode of administering it is uniform throughout the United States,⁶ and cannot be affected by state legislation.⁷ Thus, a state statute providing an equitable remedy for the enforcement of stockholders' liability will not be applied by the federal courts where no original ground of equitable cognizance exists.⁸ By virtue of their chancery powers these courts have jurisdiction over the administration of estates where the other essentials are present,⁹ but they will not enforce a mere money demand unacknowledged and unaccompanied by any lien.¹⁰ But the rule which preserves the distinction between equitable and legal procedure in the federal courts does not apply to the tribunals of a territory.¹¹ Moreover, the maintenance of a law and an equity docket is not equivalent to the docket of separate courts, and where a demurrer is sustained on the equity side because of adequate legal remedy the case may still be transferred to the law side, especially where this is in harmony with the practice of the state in which the court sits.¹²

(c) **The Code States.** — The third group includes the states and territories which have adopted the reformed procedure. Here the distinction between actions at law and suits in equity is declared to be abolished, and all relief is, at least professedly, administered through one form of proceeding styled the civil action. The effect of this declaration, however, is not to abolish the distinction between law and equity; it only affords a common method of administering them.¹³ Again, this provision of the code creates no new substantive

1. *Lenoir v. Mining Co.*, 88 Tenn. 174.

2. **Distinct Modes of Procedure in Same Court.** — This group includes United States, Arkansas, Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Mexico, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia. See Bispham's *Principles of Equity* (5th ed.) 25 *et seq.*; *Barton's Suit in Equity* 23.

That the above list does not correspond in all respects to those in the text books is due largely to changes made since their publication.

3. See *Krippendorf v. Hyde*, 110 U. S. 276.

4. See *Brown v. Buck*, 75 Mich. 274, 13 Am. St. Rep. 438; *Owens v. Heidebreder*, 78 Fed. Rep. 837.

5. *England.* — *Kemp v. Pryor*, 7 Ves. Jr. 249. *Alabama.* — *Byrd v. Jones*, 84 Ala. 336; *Lee v. Lee*, 55 Ala. 590.

Illinois. — *McNab v. Heald*, 41 Ill. 330; *Latham v. McGinnis*, 29 Ill. App. 152.

Maryland. — *Union Pass. R. Co. v. Baltimore*, 71 Md. 238.

Pennsylvania. — *McClain v. Smith*, 158 Pa. St. 49.

West Virginia. — *Hall v. Wilkinson*, 35 W. Va. 167.

So also as to the code remedy. *Brandon v. Carter*, 119 Mo. 572, 41 Am. St. Rep. 673.

6. **Federal Courts.** — *Livingston v. Story*, 9

Pet. (U. S.) 632; *Noonan v. Lee*, 2 Black. (U. S.) 499; *Neves v. Scott*, 13 How. (U. S.) 268.

7. *Mississippi Mills v. Cohn*, 150 U. S. 202; *Scott v. Neely*, 140 U. S. 106; *Pennefeather v. Baltimore Steam Packet Co.*, 58 Fed. Rep. 481; *Robinson v. Campbell*, 3 Wheat. (U. S.) 212; *Potts v. Accident Ins. Co.*, 35 Fed. Rep. 566; *Alderson v. Dole*, 74 Fed. Rep. 29.

8. *Alderson v. Dole*, 74 Fed. Rep. 29.

9. *Ball v. Tompkins*, 41 Fed. Rep. 486.

10. *Greenwood, etc., R. Co. v. Strang*, 77 Fed. Rep. 498; *Smith v. Ft. Scott, etc., R. Co.*, 99 U. S. 398; *Scott v. Neely*, 140 U. S. 106.

11. *Houghtaling v. Ellis*, 1 Arizona 383, the court saying: "The courts of the territories are not United States constitutional courts, but United States territorial courts acting under the statutes of the respective territories; and the question in the case at bar is whether an equitable defense to an action at law can be authorized by territorial statutes, and if so, whether it has been so authorized by territorial enactments in Arizona."

12. *U. S. Bank v. Lyon County*, 48 Fed. Rep. 632.

13. **Law and Equity Not Blended by the Code** — *Arizona.* — *Houghtaling v. Ellis*, 1 Arizona 383; *Henry v. Mayer* (Arizona 1898) 53 Pac. Rep. 590.

California. — *Smith v. Rowe*, 4 Cal. 6; *De Witt v. Hays*, 2 Cal. 468, 56 Am. Dec. 352.

rights, and will not usually, therefore, authorize the granting of relief in cases where none was available under the old system of procedure.¹ In some cases it even appears that the professed abolition of the distinction between suits and actions has been hardly more than a verbal one. Thus, in *Wisconsin* the writ of *ne exeat* was denied in aid of an action on a promissory note, the ground of the denial being that the writ was available only for equitable demands;² and in the code states generally it is still common to speak of equitable as distinguished from legal actions.³ In *New York*, on the other hand, it was held that the equitable remedies of injunctions and receiverships were available in actions at law;⁴ and while the title of the pleading is the same, the character of the action to which it belongs will be determined by its contents and prayer.⁵

IV. EQUITABLE MAXIMS—1. **The Value of Maxims in General.**—A great authority⁶ has described maxims as "the condensed good sense of nations."⁷ In the English law these modes of expression were once much more highly valued than now. It was declared that "Maxims are the foundations of the law, and the conclusions of reason,"⁸ and the early commentators and judges were especially fond of stating the law in the form of maxims. In recent years there has been a reaction from this attitude, and it has become rather the fashion to decry the value of maxims as vehicles of legal expression. But it is still recognized by good authority that legal maxims have not wholly lost their importance, and that, when used with proper discrimination, they form a not unimportant part of the literature of our jurisprudence.⁹

Indiana.—Emmons v. Kiger, 23 Ind. 483.
Compare Troost v. Davis, 31 Ind. 34.

Iowa.—Claussen v. Lafrenz, 4 Greene (Iowa) 224.

Missouri.—Bliss v. Prichard, 67 Mo. 181; Lackland v. Garesche, 56 Mo. 267; Magwire v. Tyler, 47 Mo. 128; Rutherford v. Williams, 42 Mo. 18; Meyers v. Field, 37 Mo. 434; Richardson v. Means, 22 Mo. 498.

Nebraska.—Wilcox v. Saunders, 4 Neb. 569; Turner v. Althaus, 6 Neb. 54. *Compare* Campbell v. Farmers', etc., Bank, 49 Neb. 143; Stenberg v. State, 48 Neb. 316; Cochran v. Cochran, 42 Neb. 621.

Nevada.—Crosier v. McLaughlin, 1 Nev. 348.

New York.—Phillips v. Gorham, 17 N. Y. 270; Reubens v. Joel, 13 N. Y. 492. *Compare* Wright v. Wright, 54 N. Y. 443.

Ohio.—Klonne v. Bradstreet, 7 Ohio St. 326; Lamson v. Pfaff, 1 Handy (Ohio) 449.

Oregon.—Smith v. Griswold, 6 Oregon 447.

Wisconsin.—Lawe v. Hyde, 39 Wis. 345; Horn v. Ludington, 32 Wis. 73; Kewaunee County v. Decker, 30 Wis. 624.

1. No New Rights Created—*California*.—White v. Lyons, 42 Cal. 279.

Indiana.—Woodford v. Leavenworth, 14 Ind. 311, the court saying: "The abolition of the distinction between actions at law and suits in equity does not entitle a party to recover in a case where, before such abolition, he could not have recovered either at law or in equity."

Kentucky.—"The code makes no change in the law which determines what facts constitute a cause of action, except that by reducing all forms of action to the single one by petition, it changes the question whether the plaintiff's statement of his cause shows facts constituting a cause of action in trespass, or assumpsit, or other particular form, into the more general question, whether it shows facts which constitute a cause of action at all—that

is, whether the facts stated are sufficient to show a right in the plaintiff, an injury to that right by the defendant, and consequent damage." Hill v. Barrett, 14 B. Mon. (Ky.) 67. *Compare* Richmond, etc., Turnpike Road Co. v. Rogers, 7 Bush (Ky.) 532.

New York.—Cole v. Reynolds, 18 N. Y. 74; Peck v. Newton, 46 Barb. (N. Y.) 173; Cropsey v. Sweeney, 27 Barb. (N. Y.) 310, the court saying: "It cannot be supposed that the abolition, in words, of the distinction between actions at law and suits in equity, by the code, was intended to break up the well-settled fundamental principles and limits of common-law and equitable jurisdiction, and open to courts, as proper subjects of judicial discretion, a class of moral wrongs or misfortunes, not before the legitimate subjects of legal or equitable investigation or redress. Nor can it be supposed that the abolition of the forms of actions was intended to create or justify novel and unprecedented causes of action."

Wisconsin.—Turner v. Pierce, 34 Wis. 658.

2. Ne Exeat in Wisconsin.—Bonesteel v. Bonesteel, 28 Wis. 245.

3. "This is not a suit in equity, but strictly a law action." Stenberg v. State, 48 Neb. 316. *Compare* Cochran v. Cochran, 42 Neb. 612.

4. See Ireland v. Nichols, 1 Sweeney (N. Y.) 208.

5. White v. Lyons, 42 Cal. 279; Magwire v. Vice, 20 Mo. 429.

6. Sir James Mackintosh.

7. Adopted as the motto on the title page of Broom's Legal Maxims (8th ed.).

8. Morgan, Serjeant, *arguendo* in Colthirst v. Bejushin, 1 Plowd. 27. *Compare* a similar remark by Lord Coke as to maxims in general. Co. Litt. 10b, 11a.

9. Fetter on Equity 20; Smith, The Use of Maxims in Jurisprudence, 9 Harvard L. Rev. 13, 26.

The Maxims of Equity possess a peculiar value not attaching to those of law, because the former are "the fruitful germs from which these doctrines and rules [of equity] have grown by a process of natural evolution."¹ Around these maxims, too, there have accumulated a vast number of decisions which construe them; and to collect and interpret these cases in connection with the maxims which they interpret is one of the chief purposes of this article.

2. Enumeration and Classification of Equitable Maxims. — While the maxims of equity are less abundant than those of law, they are nevertheless quite numerous. Among them are some twelve or thirteen² which are given especial prominence in the text books as embodying the basic doctrines of equity jurisprudence. These are not always given in the same order, nor stated in precisely the same language, but there is a substantial agreement upon the following:

I. Prerequisite Maxims: (1) He who seeks equity must do equity. (2) He who comes into equity must come with clean hands. (3) Equity aids the vigilant, not the slothful.

II. Descriptive Maxims: (4) Equity acts specifically. (5) Equity acts *in personam*. (6) Equity follows the law.

III. Substantive Maxims: (7) Equity suffers no wrong without a remedy. (8) Equity regards that as done which ought to have been done. (9) Equity regards the substance and intent, not the form. (10) Equity imputes an intent to fulfil an obligation. (11) Equality is equity. (12) Where the equities are equal the law will prevail. (13) Where the equities are equal priority of time will prevail.

The Classification of These Maxims is original with this work,³ and is designed to clarify the subject by grouping together those maxims which are analogous or which pertain to the same general subject. The first group is entitled the "prerequisite maxims" because it includes those which declare the requisites which a suitor must possess before he may invoke the aid of equity. The second group embraces those which describe the manner in which chancery dispenses relief, and is hence called "descriptive maxims." The third group, including all the others, consists of those maxims which declare the fundamental doctrines which equity applies in administering relief, and is therefore styled the "substantive maxims."

3. Equitable Maxims Discussed in Detail⁴ — *a. PREREQUISITE MAXIMS* — (1) *He Who Seeks Equity Must Do Equity* — (a) **Generally.** — In discussing the maxims of equity one of the foremost in respect of its antiquity,⁵ of its invocation, and the extent of its application,⁶ is the maxim, "He who seeks equity must do equity."⁷ The maxim is rather a general guiding principle in the adminis-

1. Pomeroy's Eq. Jur. (2d ed.), § 360.

2. Bispham in his Principles of Equity omits from his collection the maxim, "Equity regards the substance and intent, not the form," thus enumerating only twelve. Pomeroy, Fetter, and other commentators include this, and its importance would seem to require that it should have a place in the group.

3. **Other Classification.** — Phelps in his Judicial Equity Abridged, p. 296, divides the maxims into "enabling," or those which "impel the court to action," and "restrictive," or those which "operate to keep it passive." Maxims 1, 2, 3, 6, 12, and 13, as numbered in the text, are grouped under the second head; the remaining ones under the first. This classification is adopted by Mr. Fetter in his recent Handbook of Equity Jurisprudence, c. 3, where the author says that it was first suggested in Haynes's Outlines of Equity, p. 19.

4. It is intended to include here only those cases where the particular maxim under discussion is both quoted and applied.

5. **Antiquity of This Maxim** — "The most venerable maxim of the law is that 'He who asks equity must do equity.'" Allen v. Wall, 7 Wash. 316.

"The questions involved in this record present a series of facts in the main undisputed, and which, it is insisted by appellant, require the application of one of the oldest principles of equity, viz., 'He who asks equity must do equity.'" De Walsh v. Braman, 160 Ill. 415.

6. "It is a principle of most extensive application. It may be applied, in fact, in every kind of litigation and to every species of remedy." 1 Pomeroy's Eq. Jur. (2d ed.), § 385.

7. **Judicial Applications of the Maxim.** — In the following cases the maxim is quoted and applied generally. Its application to particular cases and remedies is discussed later on.

tration of equity jurisprudence than an exact rule governing specific and well-defined cases.¹ It is an announcement of the policy of the High Court and of the terms upon which it aids the suitor,² and it will not be construed so as to require of him terms which could not have been imposed had he not sought relief.³ It has been said that the rule applies only as against the actor or parties seeking the aid of equity.⁴ But this does not mean that it may be

England. — *Browne v. Jones*, 1 Atk. 190; *Godfrey v. Watson*, 3 Atk. 517.

Canada. — *Clemow v. Booth*, 27 Grant's Ch. (U. C.) 15; *Allen v. Furness*, 20 Ont. App. 34.

United States. — *Brown v. Lake Superior Iron Co.*, 134 U. S. 535; *Hager v. Thomson*, 1 Black (U. S.) 93; *Bonsach Mach. Co. v. Smith*, 70 Fed. Rep. 385.

Arkansas. — *Jacoway v. Dyer*, 50 Ark. 226; *Irons v. Rayburn*, 11 Ark. 378.

Colorado. — *Bliley v. Wheeler*, 5 Colo. App. 287.

Georgia. — *Charleston, etc., R. Co. v. Hughes*, (Ga. 1898) 30 S. E. Rep. 972.

Illinois. — *Starrett v. Keating*, 61 Ill. App. 196; *Winslow v. Noble*, 101 Ill. 194; *Angell v. Jewett*, 58 Ill. App. 596.

Indiana. — *McAllister v. Henderson*, 134 Ind. 453.

Kentucky. — *Richardson v. Linney*, 7 B. Mon. (Ky.) 574.

Maryland. — *Diamond Match Co. v. Taylor*, 83 Md. 394.

Michigan. — *Gates v. Cornett*, 72 Mich. 435; *Dwight v. Scranton, etc., Lumber Co.*, 82 Mich. 632.

Missouri. — *Sampson v. Mitchell*, 125 Mo. 232; *Woodard v. Mastin*, 106 Mo. 324.

Nebraska. — *Dimick v. Grand Island Bank- ing Co.*, 37 Neb. 399.

New Jersey. — *Yard v. Pacific Mut. Ins. Co.* 10 N. J. Eq. 484.

New York. — *M'Donald v. Neilson*, 2 Cow. (N. Y.) 139, 14 Am. Dec. 431; *Werner v. Tuch*, 127 N. Y. 223, 24 Am. St. Rep. 443; *New York, etc., R. Co. v. New York*, 1 Hilt. (N. Y.) 562; *Winterson v. Hitchings*, 9 Misc. Rep. (N. Y. C. Pl.) 322; *Mowbray v. Mowbray*, 3 N. Y. App. Div. 227.

Ohio. — *Kemper v. Campbell*, 44 Ohio St. 216.

Oregon. — *Putnam v. Webb*, 15 Oregon 440.

Pennsylvania. — *Hayes's Appeal*, 123 Pa. St. 139.

South Carolina. — *Clinton v. McKeown*, 39 S. Car. 21; *Walling v. Aiken*, McMull. Eq. (S. Car.) 14; *Booker v. Smith*, 38 S. Car. 236; *Secrest v. McKenna*, 1 Strobb. Eq. (S. Car.) 356, the court saying: "It is a settled principle of the court not to grant merely equitable relief, without requiring of the party asking it to do equity himself, to do what is morally right, of which many examples arising under this branch of the jurisdiction might be given."

Virginia. — *Kerr v. Kerr*, 84 Va. 157.

West Virginia. — *Thompson v. Merchants', etc., Bank*, 3 W. Va. 658.

Wisconsin. — *Hinckley v. Pfister*, 83 Wis. 79. *Hawaii.* — *Lathrop v. Wood*, 1 Hawaiian 75; *Wilfong v. Paty*, 7 Hawaiian 226.

1. "It is a rule which, *per se*, can by no possibility decide what the rights of the defendants are. It only raises the question what equity, if any, a defendant has against a plain-

tiff in the circumstances of the case to which the rule is sought to be applied. If, for example, a party, as plaintiff, seeks an account in equity against the defendant, the court will take the account wholly, and not partially, between the parties; and it therefore requires the plaintiff to do equity by submitting himself to account, as the price of his obtaining a decree against the defendant, and in order that the subject of the suit may once for all be settled between the parties." *Hanson v. Keating*, 8 Jur. 950.

2. "The true meaning of the rule, whose frequency of invocation would seemingly argue a better knowledge of its import, that 'he who seeks equity must do equity,' is simply this: that where a complainant comes before a court of conscience invoking its aid, such aid will not be granted except upon equitable terms. These terms will be imposed as the price of the decree it gives him. The rule 'decides nothing in itself,' for you must first inquire what are the equities which the plaintiff must do in order to entitle him to the relief he seeks." *Kline v. Vogel*, 90 Mo. 239.

"I conceive the true meaning of that maxim only to be this, that a man who comes to seek the aid of a court of equity to enforce a claim must be prepared to submit in that suit to any directions which the known principles of a court of equity may make it proper to give." *Colvin v. Hartwell*, 5 Cl. & F. 522.

3. "Accepting the maxim above referred to as in the highest degree authoritative, it becomes proper to inquire concerning the manner of its application in the practical adjustment of controversies between parties. What is the 'equity' which a party appealing to a court of chancery must do before he is entitled to relief? Can a party who becomes plaintiff in a court of equity be compelled, as the price of the relief demanded, to surrender to the defendant something which the latter could not have compelled by some proceeding, either at law or in equity, in case the former had not appealed to the court? If he can, then the rule that he who would have equity must do equity depends for its application in each case upon the arbitrary notions of the chancellor concerning the equities between the parties. The effect of such an application of the rule would inevitably, in many cases, be to refuse aid to which a plaintiff would be entitled, except upon condition that the latter should concede to the defendant some supposed equitable right which was not enforceable at law or cognizable in a court of equity, and hence not within any description of a legal or equitable right." *Otis v. Gregory*, 111 Ind. 504.

4. "In the first place, the rule only applies where a party is appealing as actor to a court of equity in order to obtain some equitable relief; that is, either some relief equitable in its essential nature, as an injunction or a cancel-

invoked only as against the complainant; it is available as against a cross-complainant,¹ and sometimes even as against the defendant.²

(b) **Injunctions — Taxes.** — A most common application of this maxim is in cases where injunctions are sought to restrain the collection of taxes which are alleged to be void or illegal in part. As a rule the relief will not be granted until the complainant does equity by paying that portion of the tax to which no objection is offered.³

Sale of Stock. — So the maxim was applied against a stockholder who sought to enjoin the sale of his shares to satisfy an assessment.⁴

Condemnation of Land. — A property owner sought to enjoin a municipality from taking his land for public use without paying him interest on the condemnation money, and it was held that he must, as a condition of relief, do equity by accounting for the rents and profits during the time the interest was computed.⁵

Abutters. — One who has erected buildings projecting into the street, but believed them at the time to be on his own land, will not be compelled to remove them at the instance of abutting owners who may enter complaint, until they have done equity by paying the damages incident to such removal.⁶

Suretyship. — A surety liable for only one-half of a debt, against whom a voidable judgment has been rendered in favor of the other surety, will be relieved only on condition of his doing equity by paying his moiety.⁷

Execution of Judgment. — So a petition to enjoin the execution of a judgment which admits that there is a sum due thereon, but makes no tender, fails to state a case for equitable relief.⁸

Mortgage. — In *Massachusetts* it is held that the grantee of a mortgagor cannot obtain an injunction against the sale under a power in the mortgage with-

lation, or equitable because it may come within the power of the court to administer by virtue of its concurrent jurisdiction, as an accounting, or a pecuniary recovery; and it is necessarily assumed that the party would, but for the operation of the rule, be entitled to all the relief which he demands. Unless the party were otherwise so entitled, there would plainly be no occasion for invoking the rule." 1 Pomeroy's Eq. Jur. (2d ed.), § 386.

1. **Applicable to Cross-complainant.** — *Brighton v. Doyle*, 64 Vt. 616, the court saying: "The rule that 'he who seeks equity must do equity' is ordinarily applied against a party plaintiff. The books would seem at first view to require that its application be thus restricted. But Mr. Pomeroy, in discussing this subject in his work on Equity Jurisprudence, usually employs the word 'actor' to indicate the person against whom the rule may be invoked; and this term may have been chosen as sufficiently broad to include one who relies upon the protection of an equitable doctrine, although in name a defendant." See also *McLeod v. Griffis*, 51 Ark. 18.

2. **Sometimes to a Defendant.** — "The maxim 'He who seeks equity must do equity' is as appropriate to the conduct of the defendant as to that of the complainant; and it would be strange if a debtor, to destroy equality and accomplish partiality, could ignore its long acquiescence and plead an unsubstantial technicality to overthrow protracted, extensive, and costly proceedings carried on in reliance upon its consent. Surely no such imperfection attends the administration of a court of equity. Good faith and early assertion of rights are as essential on the part of the defendant as of the

complainant." *Brown v. Lake Superior Iron Co.*, 134 U. S. 530.

3. **Injunction Against Taxes — United States.** — *Neblett v. Macfarland*, 92 U. S. 101, the court saying: "In cases of this character the general principle is that he who seeks equity must do equity; that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. The court proceeds on the principle that as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction." Compare *Whitney Nat. Bank v. Parker*, 41 Fed. Rep. 402.

Alabama. — *Montgomery v. Sayre*, 65 Ala. 564.

Arkansas. — *Hickman v. Kempner*, 35 Ark. 505; *Bridewell v. Morton*, 46 Ark. 80; *Worthen v. Badgett*, 32 Ark. 534.

Illinois. — *Alexander v. Merrick*, 121 Ill. 606.

Indiana. — *Peckham v. Millikan*, 99 Ind. 352.

Michigan. — *Smith v. Humphrey*, 20 Mich. 398.

Montana. — *Casey v. Wright*, 14 Mont. 315.

Nebraska. — *Weston v. Meyers*, 45 Neb. 66.

Oregon. — *Welch v. Clatsop County*, 24 Oregon 452; *Welch v. Astoria*, 26 Oregon 89.

4. *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 26.

5. *Plum v. Kansas City*, 101 Mo. 525.

6. *Broumel v. White*, (Md. 1898) 39 Atl. Rep. 1047.

7. *Creed v. Scruggs*, 1 Heisk. (Tenn.) 590.

8. *Wilson Sewing Mach. Co. v. Curry*, 126

out paying the entire debt, though the mortgage has been assigned for less than its face value;¹ and in *New York* one who seeks to restrain foreclosure proceedings and secure an adjudication that the mortgage is extinguished must do equity by tendering the debt, interest, and costs.²

(c) **Rescission of Contracts.** — The maxim now under discussion is frequently applied where one party to a contract seeks to rescind or discharge it after it has been partly performed, and the principle of the maxim is invoked so as to require the *status quo* to be restored before relief will be granted.³ So, too, the maxim operates to prevent a party from claiming a forfeiture under a contract without the repayment of money advanced thereon by the other party.⁴ But it seems that the maxim does not require that the rescinding party actually tender back the consideration received, but that an offer to do so in his complaint is sufficient.⁵

(d) **Specific Performance.** — Opinions in specific-performance cases frequently embody the maxim, "He who seeks equity must do equity," and the courts make it a condition to granting the relief asked for that the complainant on his part carry out substantially all the terms of the contract.⁶

Illustrations. — Thus where gold and silver coin were the only legal tender at the time of making a contract for the sale of lands, the courts granted specific performance only upon condition that payment should be made in those mediums.⁷ A municipality which withholds money due on a contract with a gas company for supplying a system of lighting is not entitled to the specific performance of the contract.⁸ A post-nuptial contract between a separated husband and wife, by the terms of which the wife relinquishes her rights in the husband's property and the husband gives up the custody of their child, will not be enforced at the instance of guardians of the child against the wife where she has been deprived of its custody as provided by the contract.⁹

(e) **Quieting Title.** — The maxim is also frequently employed in actions to quiet title; and if the claim sought to be cut off is founded upon an acknowledged indebtedness, the complainant must pay this before he obtains relief.¹⁰

Ind. 161; *Stroeh v. Doggett Dry Goods Co.*, 65 Mo. App. 103.

1. *Foster v. Wightman*, 123 Mass. 100.

2. **Injunction Against Foreclosure.** — *Tuthill v. Morris*, 81 N. Y. 94, 100.

3. **Doing Equity by Restoring Status Quo** — *Colorado*. — *Travelers Ins. Co. v. Redfield*, 6 Colo. App. 190.

Illinois. — *Starrett v. Keating*, 61 Ill. App. 196.

Mississippi. — *Deans v. Robertson*, 64 Miss. 195.

Montana. — *Waite v. Vinson*, 14 Mont. 405.
New Jersey. — *Crandall v. Grow*, 41 N. J. Eq. 482.

New York. — *Mumford v. American L. Ins., etc., Co.*, 4 N. Y. 482; *Bruen v. Hone*, 2 Barb. (N. Y.) 596; *Duff v. Hutchinson*, 57 Hun (N. Y.) 155.

4. *Bliley v. Wheeler*, 5 Colo. App. 287.

5. *Maloy v. Berkin*, 11 Mont. 138.

6. **The Maxim in Specific Performance.** — *Willard v. Tayloe*, 8 Wall. (U. S.) 557; *Pensacola Gas Co. v. Provisional Municipality*, 33 Fla. 322; *Bodwell v. Bodwell*, 66 Vt. 101; *Wintermute v. Carner*, 8 Wash. 585.

In *Eastman v. Plumer*, 46 N. H. 480, the court said: "There are few cases in which courts of equity will insist on the maxim that he who seeks equity must do equity, with more rigor than in those of suits for specific performance."

Omitted Term in Written Contract. — In an ac-

tion for specific performance of an agreement for the sale of lands it appeared that the parties intentionally omitted from the writing a part of the agreement as to the tenor of which both parties agreed, and the defendant asked to have this inserted in the judgment for specific performance, but the plaintiff objected. It was held that on the principle that he who comes into equity must do equity it was proper that the omitted portion of the agreement should be inserted as claimed. *Jones v. Dale*, 16 Ont. Rep. 717.

7. **Coin Contracts.** — *Willard v. Tayloe*, 8 Wall. (U. S.) 557.

8. **Maxim Applied Against Municipality.** — "The city is in a court of chancery, and before it can ask equity it must do equity. It cannot withhold from the gas company a large sum of money due it under the contract for supplying lamps and gaslight service, and at the same time ask the company to comply with the contract on its part in erecting more lamps. To permit this would be to enforce the contract for the city's benefit when it was not complying with the contract in an essential particular." *Pensacola Gas Co. v. Provisional Municipality*, 33 Fla. 348.

9. **Post-nuptial Contracts.** — *Bodwell v. Bodwell*, 66 Vt. 101.

10. **Quieting Titles** — *United States*. — *McQuiddy v. Ware*, 20 Wall. (U. S.) 14.

Alabama. — *Tyler v. Jewett*, 82 Ala. 93.

California. — *Benson v. Shotwell*, 87 Cal.

Illustrations. — Thus a mortgagor who has escaped liability under a decree of foreclosure through a technical omission will not be relieved of the cloud upon his title without paying the mortgage debt;¹ and even where the mortgage has been barred by the statute of limitations the maxim operates to prevent quieting title in the mortgagor without payment on his part.² One who seeks the reconveyance of lands held in trust for him by another and the quieting of title therein may be required to reimburse the defendant for improvements made thereon, though the right of recovery for such improvements had been barred by the statute of limitations.³

(f) **Bills to Redeem.** — The right of redemption on the part of a mortgagor is usually required to be exercised in accordance with this maxim, and he must offer to do equity by paying the debt, interest, and costs before the relief sought will be granted.⁴ Where the debt is payable in gold, payment in that medium is a condition precedent to the exercise of the right to redeem.⁵

(g) **Usury.** — A peculiar application of the maxim is made in proceedings to obtain relief against usury. Notwithstanding the legal limitations upon the rate of interest, the rule in equity is that a borrower who seeks relief against usury must offer to pay the amount legally due from him, and this rule is based upon the maxim that "He who seeks equity must do equity."⁶ In some states the chancery rule in this regard has been changed by statute,⁷ and in such jurisdictions the maxim no longer applies in proceedings to obtain relief against usury. But a statute which abrogates this rule in behalf of the borrower is not available to his grantee.⁸

(h) **Partition.** — In partition proceedings the maxim is frequently applied so as to require the moving party to compensate the other for improvements made on the land.⁹

(i) **Set-off.** — A set-off is sometimes allowed in equity in pursuance of this

49; *De Cazara v. Orena*, 80 Cal. 132; *Johnston v. San Francisco Sav. Union*, 75 Cal. 134, 7 Am. St. Rep. 129; *Booth v. Hoskins*, 75 Cal. 271.

Illinois. — *Lane v. Allen*, 60 Ill. App. 457; *De Walsh v. Braman*, 160 Ill. 415.

Nebraska. — *Dimick v. Grand Island Bank- ing Co.*, 37 Neb. 399.

1. *Johnston v. San Francisco Sav. Union*, 75 Cal. 134, 7 Am. St. Rep. 129.

2. *Booth v. Hoskins*, 75 Cal. 271.

3. *De Walsh v. Braman*, 160 Ill. 415.

4. **Bills to Redeem.** — *Arkansas.* — *German Nat. Bank v. Barham*, 57 Ark. 533, the court saying: "The right of redemption is a necessary incident to a mortgage. The rule in equity required that, to redeem property sold under a mortgage for less than the mortgage debt, the whole mortgage debt must be tendered or paid into court, and that it is not sufficient to tender the amount for which the property sold. This is upon the principle that 'he who seeks equity must do equity.'" See also *Anthony v. Anthony*, 23 Ark. 479.

California. — *Cowing v. Rogers*, 34 Cal. 648.

Illinois. — See *Bennett v. Wilmington Star Min. Co.*, 119 Ill. 9.

Missouri. — *Kline v. Vogel*, 90 Mo. 239.

Pennsylvania. — *Lanning v. Smith*, 1 Pars. Eq. Cas. (Pa.) 13.

5. *Cowing v. Rogers*, 34 Cal. 648.

6. **Usury.** — *England.* — *Fitzroy v. Gwillim*, 1 T. R. 153.

Arkansas. — *Grider v. Driver*, 46 Ark. 64; *Anthony v. Lawson*, 34 Ark. 630; *Pickett v. Merchant's Nat. Bank*, 32 Ark. 346; *Ruddell v. Ambler*, 18 Ark. 309.

Georgia. — *Campbell v. Murray*, 62 Ga. 86, the court saying: "Though a deed be void for usury, why should it be canceled so long as the debt and lawful interest remain unpaid? The cancellation of a deed is equitable relief, not a legal remedy; and equity grants its relief against usury on terms. Whoever would have equity must do equity."

Illinois. — *Heacock v. Swartwout*, 28 Ill. 294; *Cushman v. Sutphen*, 42 Ill. 256.

Maryland. — *Jordan v. Trumbo*, 6 Gill & J. (Md.) 103; *Trumbo v. Blizzard*, 6 Gill & J. (Md.) 18.

Minnesota. — *Scott v. Austin*, 36 Minn. 460.

Missouri. — *Corby v. Bean*, 44 Mo. 379.

Nebraska. — *Eiseman v. Gallagher*, 24 Neb. 79.

New Jersey. — *Ware v. Thompson*, 13 N. J. Eq. 66.

New York. — *Rogers v. Rathbun*, 1 Johns. Ch. (N. Y.) 367; *Bissell v. Kellogg*, 60 Barb. (N. Y.) 631.

North Carolina. — *Ballinger v. Edwards*, 4 Ired. Eq. (39 N. Car.) 452; *Beard v. Bingham*, 76 N. Car. 285; *Simonton v. Lanier*, 71 N. Car. 498; *Purnell v. Vaughan*, 82 N. Car. 134; *Carver v. Brady*, 104 N. Car. 219.

7. *Bissell v. Kellogg*, 60 Barb. (N. Y.) 617; *Moore v. Beaman*, 112 N. Car. 564; *Gore v. Lewis*, 109 N. Car. 539.

8. *Bissell v. Kellogg*, 60 Barb. (N. Y.) 617; *Post v. Utica Bank*, 7 Hill (N. Y.) 391; *Schermerhorn v. Talman*, 14 N. Y. 93.

9. **Partition Proceedings.** — *Leake v. Hayes*, 13 Wash. 213; *Thomas v. Evans*, 105 N. Y. 601, 59 Am. Rep. 519; *Ford v. Knapp*, 102 N. Y. 135.

maxim, as in the case of a foreclosure where a decree is rendered for the amount of the debt less deductions to which the mortgagor is entitled.¹ But, on the other hand, the operation of the maxim will prevent a stockholder from setting off a claim upon an insolvent corporation against his liability on a subscription to the capital stock.²

(j) **Miscellaneous Applications.** — The maxim is applicable as against a vendee who seeks ejectment against his vendor without tendering the unpaid balance of the purchase money.³ The doctrine of preferential debts which is applied in the foreclosure of railway mortgages finds one of its strongest supports in this maxim.⁴ It is likewise the foundation of the doctrine of the wife's equity to a settlement, formerly so important, but now rendered nearly obsolete by the Married Woman's Acts.⁵ One who concealed a trustee's sale from other parties for the purpose of reimbursing himself on account of another transaction was held to have infringed the maxim.⁶ Where one who sought a conveyance of land alleged to have been obtained by fraud was shown to have accepted the defendant's services for many years without pay, the maxim was invoked as a ground for denying relief.⁷

(k) **Qualifications of the Maxim.** — The principle that "He who seeks equity must do equity" is applied with qualifications, one of the most important of which is that the equity which the complainant is required to do must arise from and belong to the transaction in which he seeks relief.⁸ It is not applicable, therefore, to an equity which a third party may have against the complainant.⁹ Where money is improperly paid to another as a reward for continuing the wrong for which the complainants ask relief, a restitution cannot be compelled as a condition thereof.¹⁰ Other cases where the maxim was quoted but held inapplicable to the facts under consideration will be found in the notes.¹¹

(2) **HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS** ¹²—

(a) **Generally.** — This is another expression of the desire of chancery to aid only

1. *Set-off.* — *Ingalsbe v. Murphy*, 84 Hun (N. Y.) 181.

2. *Scammon v. Kimball*, 5 Biss. (U. S.) 431.

3. *Dwyer v. Wright*, 162 Pa. St. 405.

4. *Merchants Bank v. Moore*, 106 Ala. 646.

5. *Sturgis v. Champneys*, 5 Myl. & C. 97. Compare 1 Pom. Eq. Jur. (2d ed.), § 389.

6. *Steckman v. Harber*, 55 Mo. App. 71, the court saying: "By reference to authorities cited by counsel, those principles of equity which have found expression in a variety of maxims will be found: 'He who seeks equity must do equity,' that is, he will only be allowed to obtain equity upon equitable terms or conditions which will be imposed by the chancellor. Now, in this case the evidence preponderates in favor of the contention that it was understood and agreed, between all the parties to the land purchase, that Lewis preferred that the notes continue at interest after maturity, and when he wanted the money on them he would notify the parties. Plaintiff, being a party to this understanding, of course knew of it when he obtained the notes from Lewis. He knew that the parties lived a long distance from the place of sale and were not likely to see an advertisement of sale in the papers. Notwithstanding this, and the fact that he was on friendly terms and in daily contact with defendants, boarding at the same hotel with one of them, and knew that they were pecuniarily responsible for the amount represented by the notes, he never mentioned the matter to them. We must conclude that his keeping his actions and intentions secret from defendants was for a purpose not equi-

table or just to them, and such was the result. Indeed, plaintiff does not deny but that his object was 'to get even' with defendant Carnes on account of 'another trade,' with which, of course, we have nothing to do."

7. *Bumpus v. Bumpus*, 59 Mich. 95.

8. **Equity Must Spring from Same Transaction** — *England.* — *Hanson v. Keating*, 4 Hare 1; *Gibson v. Goldsmid*, 5 DeG. M. & G. 757; *U. S. v. McRae*, L. R. 3 Ch. 79.

Canada. — *Botsford v. Crane*, 17 New Bruns. 154.

California. — *Mahoney v. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175.

Indiana. — *Otis v. Gregory*, 111 Ind. 504.

Nebraska. — *Loney v. Courtney*, 24 Neb. 580. But see *Lewis v. Holdrege*, (Neb. 1898) 77 N. W. Rep. 656.

New York. — *New York, etc., R. Co. v. Schuyler*, 38 Barb. (N. Y.) 554; *Tripp v. Cook*, 26 Wend. (N. Y.) 143; *Comstock v. Johnson*, 46 N. Y. 615.

Ohio. — *Finch v. Finch*, 10 Ohio St. 507.

Virginia. — *Garland v. Rives*, 4 Rand. (Va.) 282, 15 Am. Dec. 756.

9. *Garland v. Rives*, 4 Rand. (Va.) 282, 15 Am. Dec. 756.

10. *Mortland v. Mortland*, 151 Pa. St. 599.

11. **Miscellaneous Qualifications.** — *Bound v. South Carolina R. Co.*, 47 Fed. Rep. 30; *Lane v. Allen*, 162 Ill. 426; *Angell v. Jewett*, 58 Ill. App. 596; *Staughton v. Simpson*, (Minn. 1898) 75 N. W. Rep. 744; *Galloway v. Merchants Bank*, 42 Neb. 266.

12. **He Who Comes into Equity Must Come with Clean Hands.** — The phraseology of this maxim

worthy claimants. It has been said to be more efficient and restrictive in its operation than the preceding maxim,¹ but it is hardly less extensive in the frequency with which it has been employed in judicial opinions.²

Illustrations. — This maxim has been applied in divorce proceedings, and where a complainant was found to have been guilty of corrupt practices in procuring testimony in such a proceeding the divorce was denied on that ground.³ So where a husband procures his wife to be lured into the commission of adultery he will not be allowed a divorce therefor, but on the strength of the maxim will be denied relief.⁴ By virtue of the maxim a party is not entitled to subrogation where a claim grows out of an agreement which is void on account of usury.⁵ And generally when a party seeking the intervention of equity has been attempting to secure his ends by means resembling those which he seeks to enjoin he will be denied relief.⁶ One will not be allowed the abatement as a nuisance of a structure on his neighbor's premises, if he maintains an equally offensive structure on his own.⁷

is given: "Who does iniquity shall not have equity." *Bleakley's Appeal*, 66 Pa. St. 192; *Millington v. Hill*, 47 Ark. 311.

The spirit of the maxim was observed in the common-law courts. In *Wilson v. Bird*, 28 N. J. Eq. 352, it was said: "One who comes into a court of conscience to take advantage of a forfeiture must come with skirts free from blame."

"The rule is familiar, that no man can be permitted to found a claim on his own iniquity — *frustra legis auxilium querit qui in legem committit*." *Dunaway v. Robertson*, 95 Ill. 419. See *Collins v. Blantern*, 2 Wils. 347, where Chief Justice Wilmut observed: "All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice; whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul O procul este profani*." See Doct. & Stud., fo. 12 and c. 24.

1. *i Pomeroy's Eq. Jur.* (2d ed.), § 397.

2. **Employment of the Maxim — Cases Collected** — *England*. — *Cadman v. Horner*, 18 Ves. Jr. 10.

United States. — *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Creath v. Sims*, 5 How. (U. S.) 192; *Kitchen v. Rayburn*, 19 Wall. (U. S.) 263; *California Redwood Co. v. Little*, 79 Fed. Rep. 854; *Bischoffsheim v. Brown*, 34 Fed. Rep. 156.

Arkansas. — *Roe v. Kiser*, 62 Ark. 92; *Shattuck v. Watson*, 53 Ark. 147.

Illinois. — *Winslow v. Noble*, 101 Ill. 194.

Michigan. — *Van Voorhis v. Van Voorhis*, 94 Mich. 60.

Minnesota. — *Evans v. Folsom*, 5 Minn. 422. *Nebraska*. — *Goble v. O'Connor*, 43 Neb. 58; *Lewis v. Holdridge*, (Neb. 1898) 77 N. W. Rep. 656.

New Jersey. — *Woodward v. Woodward*, 41 N. J. Eq. 224.

New York. — *Fetridge v. Wells*, 4 Abb. Pr. (N. Y. Super. Ct.) 144; *Sinsheimer v. United Garment Workers of America*, 77 Hun (N. Y.) 218; *Weiss v. Herlihy*, 23 N. Y. App. Div. 608; *Farrow v. Holland Trust Co.*, 74 Hun (N. Y.) 600.

North Carolina. — *Harrell v. Wilson*, 108 N. Car. 97.

Pennsylvania. — *Palmer v. Harris*, 60 Pa. St. 159, 100 Am. Dec. 557; *McVey v. Brendel*, 144 Pa. St. 235, 27 Am. St. Rep. 625; *Hays's Estate*, 159 Pa. St. 385; *Smith v. Kammerer*, 152 Pa. St. 98.

South Carolina. — *Booker v. Smith*, 38 S. Car. 228.

Tennessee. — *Harton v. Lyons*, 97 Tenn. 180.

Texas. — *Strain v. Walton*, 11 Tex. Civ. App. 624.

Virginia. — *Helsley v. Fultz*, 76 Va. 675.

3. **Divorce Proceedings.** — *Van Voorhis v. Van Voorhis*, 94 Mich. 76.

4. **Adultery.** — *Woodward v. Woodward*, 41 N. J. Eq. 224. The statement appears in this opinion by way of dictum, since the divorce was granted on another ground.

5. **Subrogation — Usury.** — *Roe v. Kiser*, 62 Ark. 92.

6. "It seems to me obvious that the clothing manufacturers had the right to lock out all operatives connected with the defendants' association because of demands which they considered unjust, made by the defendants upon one of their number, and that the defendants had an equal right to endeavor to persuade those who had been accustomed to deal with members of the Manufacturers Association to discontinue their trade. It is a familiar principle in equity that the plaintiff must come into court with clean hands. Under the circumstances disclosed by the papers in this case, if the defendants were guilty of any violation of law, the plaintiffs were certainly equally implicated, and under this condition of affairs it is difficult to see how they would have a right to the intervention of a court of equity. In dealing with questions of this nature the court should be studious to see that the rights of all parties are protected; and that the forms of law should not be permitted to be used on behalf of one party against another, when the party seeking the intervention of the court has been endeavoring to secure his ends by means similar to those which he seeks to enjoin on the part of his antagonist." *Sinsheimer v. United Garment Workers of America*, 77 Hun (N. Y.) 215. Compare *McVey v. Brendel*, 144 Pa. St. 235, 27 Am. St. Rep. 625.

7. **Nuisances.** — *Cassady v. Cavenor*, 37 Iowa

(b) **Specific Performance.** — Another important application of the maxim is in applications for specific performance, and it is well settled that if the complainant is guilty of iniquity, such as misrepresentation, however slight, in procuring the formation of the contract, he will be denied relief.¹ The binding force of this maxim is not destroyed by legislation which enlarges the jurisdiction of courts of equity.²

(c) **Limitations of the Maxim.** — But while the force of the maxim that "He who comes into equity must come with clean hands" is well established within certain limits, yet it is not every species of iniquity that will deprive a suitor of relief in chancery; for, as has been well remarked, most litigants are somewhat at fault, and all are fallible,³ and if this maxim were literally applied and carried to its furthest extreme, it would leave nothing for courts of equity to do. It is therefore a qualifying principle, as well settled as the maxim itself, that the iniquity which will bar a complainant must be directly connected with the matter in litigation.⁴

300, the court saying: "If one coming into a court of equity for relief must do so with clean hands, it is not unreasonable that he should not be allowed to abate his neighbor's premises because of their uncleanness when it appears that his own are equally filthy." Compare *Curtis v. Winslow*, 38 Vt. 691; *Medford v. Levy*, 31 W. Va. 649, 13 Am. St. Rep. 887.

1. **Specific Performance.** — *Cadman v. Horner*, 18 Ves. Jr. 10, where Sir William Grant, M. R., observed: "The evidence of the inadequacy of the price in this case is considerably shaken by the defendant's admission of the clear rent of the premises. It is difficult to conceive that he could be ignorant of the value, having so recently purchased the estate and laid out money in the improvement of it, and it is not easy to comprehend his conduct; nor does misrepresentation by the plaintiff in regard to what was requisite for the repairs of the houses by any means account for the disparity between the price paid for the estate and the sum at which the witnesses value it. Yet as upon the evidence the plaintiff has been guilty of a degree of misrepresentation operating to a certain, though a small, extent, that misrepresentation disqualifies him from calling for the aid of a court of equity, where he must come, as it is said, with clean hands. He must, to entitle him to relief, be liable to no imputation in the transaction." See also *Livingston v. Cochran*, 33 Ark. 294.

2. "The act of the legislature enlarging the jurisdiction of courts of equity does not deprive these tribunals of the right to require, as heretofore, that parties seeking relief shall come into court with clean hands. There is no more occasion nor necessity now than before the passage of such legislation for a court of equity to tolerate and encourage fictions and expedients which have sometimes been permitted in law courts for the purpose of avoiding the hardships of the rigid rules of law." *Lenoir v. Mining Co.*, 88 Tenn. 168.

3. "The rule that a complainant must come into equity with clean hands does not go so far as to prohibit a court of equity from giving its aid to a bad or a faithless man. The dirt upon his hands must be his bad conduct in the transaction complained of. All complainants in equity are human beings, full of faults and sin, and I doubt if there is one case in ten in which the complainant is not somewhat to

blame. If the complainant does equity himself, or offers to do it (except in those cases where the rule *in pari delicto*, etc., comes in), his hands are as clean as the court can require. 'He who asks equity must do equity' is the maxim on which the expression as to 'clean hands' is based." *Ansley v. Wilson*, 50 Ga. 418.

4. **Iniquity Must Relate to Subject of Litigation** — *England.* — *Dering v. Winchelsea*, 1 Cox 318, the court saying: "A man must come into a court of equity with clean hands; but when this is said it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for."

United States. — *Bonsack Mach. Co. v. Smith*, 70 Fed. Rep. 386; *Bateman v. Fargason*, 4 Fed. Rep. 32.

Alabama. — *Foster v. Winchester*, 92 Ala. 497; *Waller v. Jones*, 107 Ala. 331.

Colorado. — *Sylvester v. Jerome*, 19 Colo. 128.

Georgia. — *Ansley v. Wilson*, 50 Ga. 418.

Illinois. — *Mossler v. Jacobs*, 66 Ill. App. 571; *Chicago v. Union Stock Yards, etc., Co.*, 164 Ill. 224.

Maryland. — *Equitable Gas Light Co. v. Baltimore Coal Tar, etc., Co.*, 65 Md. 73.

Pennsylvania. — *Lewis's Appeal*, 67 Pa. St. 166; *Hays's Estate*, 159 Pa. St. 384.

Vermont. — *Langdon v. Templeton*, 66 Vt. 173.

In *Foster v. Winchester*, 92 Ala. 497, the court said: "The defendants Rhea and Leister, as a further defense, invoke the equitable principle that 'He who comes into a court of equity must come with clean hands,' and insist, if the facts stated in the plea be proven, the complainant has been guilty of such iniquity as to deprive him of any standing in a court of equity. The principle invoked does not and never was intended to apply to all the transactions of the party seeking the aid of a court of equity. The principle has its limitations, and must be confined to misconduct in regard to the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the parties and arising out of the transaction. 1 Pom. Eq., § 399." But see *Lewis v. Holdrige*, (Neb. 1898) 77 N. W. Rep. 656.

Possession of Land. — In *Langdon v. Templeton*, 66 Vt. 173, the fact that the complainant

(3) *Equity Aids the Vigilant, Not the Slothful*¹ — (a) **Generally.** — This maxim has been termed "a special form of the yet more general principle, He who seeks equity must do equity."² But in the form above stated it has a particular importance because for a long time it supplied in equity the place of the statute of limitations at law. Very early in their history the courts of chancery began to require of suitors before them promptness as a condition of relief.³ Indeed, the application of this maxim is defended for the same reasons and upon the same grounds as the statute of limitations.⁴

violated a statute by taking forcible possession of an entire lot was held not to disentitle him to his equitable right to a part of it by virtue of prior possession.

Duress. — A bill to reopen the settlement of an account on the ground of usury and fraud is not demurrable by reason of allegations by the complainant that through coercion he procured his wife to execute a mortgage which formed part of the settlement. *Bateman v. Fargason*, 4 Fed. Rep. 32.

Infringement of Trade Name — Mendacity. — The fact that the complainants in a bill to enjoin the infringement of a trade name had been guilty of exaggeration in advertising their business will not warrant an application of the maxim so as to deprive them of the relief sought. *Mossler v. Jacobs*, 66 Ill. App. 571.

Ultra Vires. — The fact that a railway company may have used its road for purposes not authorized by its charter will not afford a defense to a bill to prevent the unlawful removal of its tracks. *Chicago v. Union Stock Yards, etc., Co.*, 164 Ill. 224.

Wrongful Detention. — In *Lewis's Appeal*, 67 Pa. St. 153, it was held not a sufficient defense to a bill for an accounting that the complainant had previously withheld certain property from the defendant which the latter afterwards replevied.

The maxim is not applicable in a patent infringement case where it is claimed that the complainant is attempting to secure a monopoly of the business to which the patent relates. *Bonsack Mach. Co. v. Smith*, 70 Fed. Rep. 383.

1. "The principle embodied in this maxim, the original Latin form of which is, *vigilantibus, non dormientibus, equitas subvenit*, operates throughout the entire remedial portion of equity jurisprudence, but rather as furnishing a most important rule controlling and restraining the courts in the administration of all kinds of reliefs than as being the source of any particular and distinctive doctrines of jurisprudence." *Pomeroy's Eq. Jur.* (2d ed.), § 418. See also *Curlee v. Rembert*, 37 S. Car. 214; *Pomeroy v. Benton*, 57 Mo. 531, maxim discussed but not applied. Compare *Bispham's Eq. Jur.* (5th ed.), § 39; *Snell's Principles of Equity* (1st Am. ed.) 43.

2. *Pomeroy's Eq. Jur.* (2d ed.), § 418. Compare *Kline v. Vogel*, 90 Mo. 230.

3. "The Doctrine of Laches in Equity Courts is much older than any statute of limitations. The jurisdiction of equity courts was established by Act of Parliament in 1349, though these courts had existed long prior thereto, with a somewhat uncertain jurisdiction. The statute of limitations of James I. was enacted in 1624, nearly three hundred years after the establishment of equity courts by Act of Par-

liament." *Pratt v. California Min. Co.*, 24 Fed. Rep. 876.

"Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation to suits in this court." Lord Camden in *Smith v. Clay*, Ambler, 645, quoted in *Deloraine v. Browne*, 3 Bro. C. C. 640, note.

"It is and always has been the practice of courts of equity to remain inactive where a party seeking their interference has been guilty of unreasonable laches in making his application." *Calhoun v. Millard*, 121 N. Y. 81.

"Equity can only help the diligent. The principle laid down by Lord Camden more than a century ago is still the guide of the court in cases where the party seeking its aid has been guilty of great delay." *Norfolk, etc., Hosiery Co. v. Arnold*, 49 N. J. Eq. 397.

4. **Analogy of Statute of Limitations.** — *Akins v. Hill*, 7 Ga. 573; *Briggs v. Smith*, 5 R. I. 213. In the former case the court said: "There is no principle of equity sounder, more conservative, and more prolific in all the fruits of peace than this: that he who slumbers over his rights with no impediment to his asserting them, until the evidence upon which a counterclaim is founded may from lapse of time be presumed to be lost, until the generation cognizant of the transactions between the parties has passed away, and until original actors are in their graves and their affairs are left to representatives — the law, in the exercise of an equitable sovereignty, presumes it to be unjust, that under such circumstances a complainant should be heard; and in nine cases out of ten it is unjust in fact as well as in theory. It is presumed, and the presumption grows out of the principles of human nature, developed in universal experience, that men will use reasonable diligence to get what rightfully belongs to them. Our observation of men teaches that they are more likely hurriedly to assert a false claim than tardily to assert an equitable one. If the claim be equitable, and an adverse claim is acquiesced in until the rights of third persons are involved, or until, from the obliterations of time, the proofs of the adverse claimant are lost, yet that equitable claim ought to yield to that general social peace upon which its exclusion is founded. Nor ought the demandant to complain, for, for long years, the courts of justice were open to him — he might have entered but would not. He loses his rights because from stupidity, indifference, convenience, or some other cause he has failed to assert them. His laches cannot be made avail-

Injunctions. — A frequent application of the maxim is in bills for injunctions, and it is well settled that even when the applicant had originally ample grounds for equitable relief, this may be denied him if he delays unduly.¹ Indeed, a delay for much less than the period of the statute of limitations may be an effectual bar to relief in equity.²

Other Applications. — The maxim now under discussion has also been applied in bills to redeem,³ proceedings to set aside judgments,⁴ accounting,⁵ discovery,⁶ specific performance,⁷ surrender and cancellation of instruments,⁸ partnership bills,⁹ and in bills for relief against fraud¹⁰ and against illegal forfeiture of corporate stocks.¹¹

(b) **When Inapplicable.** — Like its legal counterpart, the statute of limitations, this maxim does not apply to parties under disability, such as a *feme covert* at common law,¹² an infant,¹³ or an insane person.¹⁴ So the principle embodied in the maxim is inapplicable to a proceeding by or in behalf of the state.¹⁵

b. DESCRIPTIVE MAXIMS — (i) *Equity Acts Specifically.* — This maxim is used to describe the character of relief which equity affords. In no one respect was the common-law system more unlike that of chancery than as regards the sort of remedy which it provided for the suitor. To parties who had stipulated for a specific result chancery offered remedies designed to bring about that specific thing, such as specific performance,¹⁶ injunction,¹⁷ and reformation.¹⁸ The common law, on the other hand, offered merely damages by way of substitution for the specific thing. The maxim is not often quoted in opinions.

able to him through a visitation of wrong and disaster to hundreds of his fellows. The laws are not for the individual alone — they are also for the safety and peace of the whole state."

1. Laches a Bar to Injunction — *England.* — *Cooper v. Hubbuck*, 30 Beav. 160; *Graham v. Birkenhead, etc., R. Co.*, 2 Macn. & G. 146; *Lord v. Sutcliffe*, 2 Sim. 273; *Senior v. Pawson*, L. R. 3 Eq. 330.

Massachusetts. — *Fuller v. Melrose*, 1 Allen (Mass.) 166; *Tash v. Adams*, 10 Cush. (Mass.) 252.

Nebraska. — *North v. Platte County*, 29 Neb. 447.

New Jersey. — *East Newark Co. v. Gilbert*, 12 N. J. Eq. 78.

Pennsylvania. — *Grey v. Ohio, etc., R. Co.*, 1 Grant's Cas. (Pa.) 412.

In *North v. Platte County*, 29 Neb. 447, the court, in denying a taxpayer's application to enjoin the payment of county bonds, observed: "The action was brought nine years after the bonds were issued and delivered, and the plaintiff shows by his petition that he has been a taxpayer of Platte county during 'many years past.' There are many cases holding that such delay and laches will defeat an action where relief would have been granted had the application been seasonably made. *Marshall County v. Schenck*, 5 Wall. (U. S.) 772; *Clay County v. Savings Soc.*, 104 U. S. 579; *Johnson v. Stark County*, 24 Ill. 75; *Keithsburg v. Frick*, 34 Ill. 421; *Com. v. Pittsburgh*, 43 Pa. St. 391; *Steines v. Franklin County*, 48 Mo. 167, 8 Am. Rep. 87; *Bradley v. Franklin County*, 65 Mo. 638; *Burr v. Carbondale*, 76 Ill. 455; *Burlington, etc., R. Co. v. Saunders County*, 16 Neb. 123."

2. Fuller v. Melrose, 1 Allen (Mass.) 166, where an application to restrain an alleged illegal appropriation of money was denied be-

cause of a delay of ten months on the part of the petitioner.

3. Redemption. — *Kline v. Vogel*, 90 Mo. 239. *Compare Matter of Cuddeback*, 3 N. Y. App. Div. 103.

4. Vacation of Judgments. — *Russell v. Pew*, 12 Mont. 509; *Briggs v. Smith*, 5 R. I. 213; *Walet v. Haskins*, 68 Tex. 418, 2 Am. St. Rep. 501.

5. Accounting. — *Ellison v. Moffatt*, 1 Johns. Ch. (N. Y.) 46; *Pratt v. California Min. Co.*, 24 Fed. Rep. 869.

6. Discovery. — *Phillips v. Prevost*, 4 Johns. Ch. (N. Y.) 205.

7. Specific Performance. — *Lehmann v. McArthur*, L. R. 3 Ch. 496.

8. Cancellation of Instruments. — *Calhoun v. Millard*, 121 N. Y. 69.

9. Partnership Bills. — *Slemmer's Appeal*, 58 Pa. St. 168, 98 Am. Dec. 255.

10. Fraud. — *Hathaway v. Noble*, 55 N. H. 512.

11. Forfeiture. — *Germantown Pass. R. Co. v. Fittler*, 60 Pa. St. 124, 100 Am. Dec. 546.

12. Parties under Disability. — *Blandford v. Marlborough*, 2 Atk. 542; *Baker v. Morris*, 10 Leigh (Va.) 294.

13. McMillan v. Rushing, 80 Ala. 402.

14. Craig v. Leiper, 2 Verg. (Tenn.) 193, 24 Am. Dec. 479, where specific performance of a title bond executed in 1785 was allowed upon a bill filed in 1820, the complainant's intestate and the one to whom the bond ran having been insane from 1790 to 1817.

15. When State a Party. — *U. S. v. Dalles Military Road Co.*, 140 U. S. 632; *U. S. v. Beebe*, 127 U. S. 338; *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256.

16. See the title SPECIFIC PERFORMANCE.

17. See the title INJUNCTIONS.

18. See the title REFORMATION OF INSTRUMENTS.

(2) *Equity Acts in Personam and Not in Rem*¹ — (a) *In General*. — The great importance of this maxim lies in the fact that it formerly (and to a great extent it is still so) determined the venue of equitable proceedings. In the early chancery practice the classification of actions into local and transitory seems not to have been recognized; for as at common law all actions were local,² so in chancery all proceedings were transitory and could be maintained wherever jurisdiction of the person was acquired.³ The applications of this maxim will best appear from a brief consideration of the more important equitable remedies with special reference to their venue.

(b) *Specific Performance*. — One of the earliest illustrations of the principle embodied in this maxim was the willingness of chancery to decree the specific performance of contracts relating to lands lying outside the territorial jurisdiction of the court. In a leading case decided in 1750 Lord Hardwicke rendered such a decree regarding articles of agreement as to the boundaries of colonies in America,⁴ and this has ever since been universally followed.⁵ Upon this principle the courts of one state⁶ or the federal courts therein sitting⁷ may decree the specific performance of contracts to convey lands which lie in

1. See *New Castle Circle Boundary Case*, 6 Pa. Dist. Rep. 184.

2. *Livingston v. Jefferson*, 1 Brock. (U. S.) 203, 4 Hughes (U. S.) 606, 611.

3. *Clements v. Tillman*, 79 Ga. 451, 11 Am. St. Rep. 441; *Newnan v. Stuart, Cooke* (Tenn.) 339; *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448, the court saying: "Jurisdiction in equity does not depend upon the *situs rei*, or the residence or nonresidence of the defendant."

"Where property in controversy is within the limits of the state, and the claimant resides abroad, the Chancery Court has undeniable jurisdiction over the case. * * * So where the party defendant is within the state, and the land or other property in contest is beyond its limits, although the proceeding is *in rem*, we apprehend there is no want of jurisdiction in the chancellor. To enforce a decree in a case of this kind, the proceedings may be *in personam*, as well as by injunction, to recover the possession of the thing disputed." *Carroll v. Lee*, 3 Gill & J. (Md.) 504, 22 Am. Dec. 350.

In *Clements v. Tillman*, 79 Ga. 451, 11 Am. St. Rep. 441, it was observed: "Originally, in the absence of statutes providing otherwise, decrees of courts of equity, of whatever kind or nature, operated strictly and exclusively *in personam*. The only remedy for their enforcement was by what is termed process of contempt, under which the party failing to obey them was arrested and imprisoned until he yielded obedience, or purged the contempt by showing that disobedience was not wilful, but the result of inability not produced by his own fault or contumacy. The writ of assistance to deliver possession, and even the sequestration to compel the performance of a decree, are comparatively of recent origin." See also *Dickinson v. Hoomes*, 8 Gratt. (Va.) 410.

4. *Equity Acts in Personam and Not in Rem — Specific Performance*. — *Penn v. Baltimore*, 1 Ves. 444. The boundaries in controversy were those of Pennsylvania, Maryland, and "the three lower counties," afterwards known as Delaware. This, however, while the leading case, was not the earliest instance of the exercise of such jurisdiction on the part of chancery. In *Archer v. Preston*, commented on in

1 Vern. 77, chancery rendered a similar decree regarding lands in Ireland. Of the last-named case it was observed in *De Klyn v. Watkins*, 3 Sandf. Ch. (N. Y.) 185: "The counsel was well aware that the court had uniformly decreed performance of such contracts, whenever it had jurisdiction of the defendant's person, from about 1663, when *Archer v. Preston* was decided, until the present day."

Cass v. Rudele, 2 Vern. 280 (1692), was another early instance of the same kind. There the Court of Chancery decreed specific performance of an agreement to purchase certain houses located at Port Royal, Jamaica, and this notwithstanding the houses had been destroyed by an earthquake. The decree was afterwards affirmed upon an appeal to the House of Lords.

See also, for another early instance, *Kildare v. Eustace*, 1 Vern. 419.

5. *Specific Performance of Contracts Relating to Foreign Lands Decreed — United States*. — *Massie v. Watts*, 6 Cranch (U. S.) 148; *Caldwell v. Carrington*, 9 Pet. (U. S.) 86; *Watkins v. Holman*, 16 Pet. (U. S.) 25.

Massachusetts. — *Brown v. Desmond*, 100 Mass. 267; *Davis v. Parker*, 14 Allen (Mass.) 98; *Pingree v. Coffin*, 12 Gray (Mass.) 304.

Missouri. — *Olney v. Eaton*, 66 Mo. 563. *New York*. — *De Klyn v. Watkins*, 3 Sandf. Ch. (N. Y.) 185; *Shattuck v. Cassidy*, 3 Edw. Ch. (N. Y.) 152; *Ward v. Arredondo*, Hopk. (N. Y.) 213, 14 Am. Dec. 543; *Sutphen v. Fowler*, 9 Paige (N. Y.) 280; *Newton v. Benson*, 13 N. Y. 587.

6. *Massachusetts*. — *Brown v. Desmond*, 100 Mass. 267 (land in Rhode Island); *Pingree v. Coffin*, 12 Gray (Mass.) 288 (land in Maine).

Missouri. — *Olney v. Eaton*, 66 Mo. 563 (land in Kansas).

New York. — *De Klyn v. Watkins*, 3 Sandf. Ch. (N. Y.) 185, and *Shattuck v. Cassidy*, 3 Edw. Ch. (N. Y.) 152 (lands in New Jersey); *Sutphen v. Fowler*, 9 Paige (N. Y.) 280 (land in Michigan).

7. *Caldwell v. Carrington*, 9 Pet. (U. S.) 86 (lands partly in Virginia and partly in Kentucky); *Massie v. Watts*, 6 Cranch (U. S.) 148 (land in Ohio, and suit brought in Kentucky).

another state, even where the defendant is a nonresident alien.¹ A similar rule has been applied where the land was entirely outside the territorial limits of the United States.² It is probably on similar grounds that several courts have held that in reference to lands within the same state the court having jurisdiction of the person might decree specific performance³ notwithstanding the existence of statutes requiring actions for the recovery of real property to be brought only in the county of the *situs* of the subject-matter.⁴ There is, however, very respectable authority opposed to this latter view, and holding that the effect of such enactments is to make specific performance as to such contracts a local action maintainable only in the county where the land is situated.⁵

Conveyance of Foreign Lands Decreed. — The doctrine that equity acts *in personam* has also been applied to many cases which, though not strictly instances of specific performance, yet called for the exercise of the power to decree a conveyance of lands beyond the territorial jurisdiction of the court.⁶

Qualifications of the Doctrine. — But while such is the general rule regarding the action of equity relative to a foreign subject-matter, there are nevertheless some restrictions on its operation even apart from statutory changes. Thus while chancery may decree the conveyance of lands in another jurisdiction, such decree will not, of course, there operate as a conveyance *ipso facto*.⁷ So it has been held that a court of equity in one state could not compel trustees to complete contracts for the sale of lands in another state,⁸ nor compel a domestic

1. *Ward v. Arredondo*, Hopk. (N. Y.) 213, 14 Am. Dec. 543.

2. *Wood v. Warner*, 15 N. J. Eq. 81, where the subject-matter was the island of Sombbrero in the Caribbean sea.

3. *Davis v. Parker*, 14 Allen (Mass.) 94; *Hearst v. Kuykendall*, 16 Tex. 327; *Miller v. Rusk*, 17 Tex. 170; *Fitch v. Edmonson*, 9 Tex. 504; *Morgan v. Bell*, 3 Wash. 554, *distinguishing* *McLeod v. Ellis*, 2 Wash. 117. Compare *State v. Superior Ct.*, 13 Wash. 187.

4. *Morgan v. Bell*, 3 Wash. 554; *Miller v. Rusk*, 17 Tex. 170; *Hearst v. Kuykendall*, 16 Tex. 327.

5. *Indiana*. — *Parker v. McAllister*, 14 Ind. 12. *Kentucky*. — *Collins v. Park*, 93 Ky. 6.

Minnesota. — *Gill v. Bradley*, 21 Minn. 15.

New York. — *Ring v. McCoun*, 3 Sandf. (N. Y.) 524, where the opinion contains an elaborate discussion of the question. See also *Kearr v. Bartlett*, 47 Hun (N. Y.) 245, which was an action in New York county to compel the performance of a contract to exchange lands, those of the plaintiff lying in New York county and those of the defendant in Kings. The court, *per* Brady, J., observed: "The learned counsel for the appellant seems to think that as the agreement in reference to the transfer of the property involves an exchange of lands situate in two counties the venue may be laid in either. This is an erroneous view, for the reason that the exchange affects the consideration to be paid, and is really a question of consideration only. What the plaintiff seeks is that the defendant be directed to convey to him lands situated in the county of Kings, and that brings it clearly within the section referred to. It is wholly immaterial whether, in exchange for the lands thus sought to be secured, land in the city of New York is to form a part of such exchange."

Compare *White v. Adler*, (Cal. 1895) 42 Pac. Rep. 1070.

The federal statute of July 20, 1882 (Supp. to U. S. Rev. Stat., p. 359, § 9), establishing United States courts in Iowa, provides for two districts, each consisting of three divisions, and requires that suits be brought in the division where the defendant resides, except where the suit is "of a local nature." In *Riddell v. Maine* (unreported, but decided as to this point in 1898) Judge Woolson of the Circuit Court for the Southern District of Iowa held that a suit for the specific performance of a contract to convey lands lying partly in the western division should not be transferred to the central division merely because the defendant lived there, since the nature of the action brought it within the exception of the statute. The ruling is believed to be the first one regarding the peculiar statute referred to. In *Johnston v. Wadsworth*, 24 Oregon 494, it was held that the objection that a suit for the specific performance of a land contract was not commenced in the county where the land lay could not be raised after a trial on the merits.

In Iowa specific performance is an action for the recovery of lands within the terms of the statute of limitations. *Wright v. Leclair*, 3 Iowa 221.

6. Other Cases than Specific Performance — District of Columbia. — *Moore v. Jaeger*, 2 MacArthur (D. C.) 465.

Iowa. — *MacGregor v. MacGregor*, 9 Iowa 65.

Minnesota. — *Towne v. Campbell*, 35 Minn. 231.

New Jersey. — *Wood v. Warner*, 15 N. J. Eq. 81.

New York. — *Gardner v. Ogden*, 22 N. Y. 335, 78 Am. Dec. 192; *Bailey v. Ryder*, 10 N. Y. 363 (conveyance by judgment debtor).

Pennsylvania. — *Vaughan v. Barclay*, 6 Whart. (Pa.) 392.

7. *MacGregor v. MacGregor*, 9 Iowa 65.

8. *Glen v. Gibson*, 9 Barb. (N. Y.) 634.

corporation to go into a foreign state and there specifically execute a contract.¹

(c) **Foreclosure** — *aa. EARLY CHANCERY RULE — FORECLOSURE SUIT PERSONAL AND TRANSITORY.* — A striking illustration of the force which this maxim has in equity is found in the fact that the foreclosure suit, which has now in most jurisdictions many of the marks of a local action,² was originally not such at all, but was personal and transitory in its character. For one of the distinguishing features of a local action is that title to land may be determined therein,³ and it has always been the general rule that a foreclosure suit is not a proper proceeding in which to litigate questions of title.⁴ Moreover, the original powers of chancery enabled it to act only *in personam*,⁵ and jurisdiction merely of the *res* without that of the person was insufficient to justify its action.⁶ Hence it was that the foreclosure suit was formerly brought wherever the mortgagor might be found, regardless of the place where the land lay or where the mortgage was executed.⁷

bb. STATUTORY CHANGES MAKING FORECLOSURE SUIT EITHER TRANSITORY OR LOCAL. — Venue Determined at Option of Complainant. — The first departure from the early chancery rule, under which the foreclosure suit was treated as transitory, was effected by statutes permitting the suit in some cases to be brought in the county where the land lay.⁸

1. Port Royal R. Co. v. Hammond, 58 Ga. 523.

2. **Foreclosure Suits.** — "It is in its nature local." Peabody, J., in *Wheeler v. Maitland*, 12 How. Pr. (N. Y. Supreme Ct.) 35.

3. *Palmer v. Mead*, 7 Conn. 157. Compare *Broome v. Beers*, 6 Conn. 198; 2 *Swift's Digest* 197.

4. *Chapin v. Walker*, 2 McCrary (U. S.) 175; *Dial v. Reynolds*, 96 U. S. 340.

It was formerly the rule in *Connecticut* that title could not be litigated in a foreclosure suit. *Bull v. Meloney*, 27 Conn. 560; *Palmer v. Mead*, 7 Conn. 149; *Broome v. Beers*, 6 Conn. 198; *Austin v. Burbank*, 2 Day (Conn.) 474. But these decisions have since been overruled and a contrary doctrine now prevails in that state. *De Wolf v. A. & W. Sprague Mfg. Co.*, 49 Conn. 306; *Cowles v. Woodruff*, 8 Conn. 35; *Williams v. Robinson*, 16 Conn. 517; *Wooden v. Haviland*, 18 Conn. 101; *Hill v. Meeker*, 23 Conn. 592.

5. *Lord Chancellor Hardwicke in Penn v. Baltimore*, 1 Ves. 444; *Grace v. Hunt, Cooke* (Tenn.) 341.

6. *Grace v. Hunt, Cooke* (Tenn.) 341.

7. **England.** — Thus in a very early English case involving the foreclosure of a mortgage on the island of Sark, the fact that the mortgagor was served with process in England was deemed sufficient to give the Court of Chancery of that country full jurisdiction, though the mortgaged isle was subject to a distinct system of courts. *Toller v. Carteret*, 2 Vern. 494 (1705). And in England still, where strict foreclosure is employed, equity has jurisdiction to render a decree cutting off the right of redemption respecting mortgaged land situated in the colonies, the mortgagor and mortgagee being resident Englishmen. *Paget v. Ede*, L. R. 18 Eq. 118.

In *Connecticut* it was held in early decisions that a bill of foreclosure might be brought in a county other than that in which the land was situated. *Palmer v. Mead*, 7 Conn. 149; *Broome v. Beers*, 6 Conn. 198. And while the rule has since been changed by statute in

reference to suits where all parties are non-residents, it seems otherwise to remain the same in that state. Conn. Gen. Stat. 1887, § 967.

In *South Carolina* the place of trial in a foreclosure suit was formerly determined, not by the locality of the land, but by the county in which the defendants or a majority of them resided, *Trapier v. Waldo*, 16 S. Car. 276; and it was then the practice to transfer the cause to the county of the defendant's residence if originally brought elsewhere, *Smith v. Petigru*, 2 Strobb. Eq. (S. Car.) 324; *Trapier v. Waldo*, 16 S. Car. 276. The rule has now been changed by statute. See *South Carolina Code Pro.*, § 146.

In *Tennessee* it was once held a good plea in abatement to a bill of foreclosure that the cause of action did not originate within the state, and that the original process was not served upon the defendant personally. *Grace v. Hunt, Cooke* (Tenn.) 341. See also *Avery v. Holland*, 2 Overt. (Tenn.) 71. It is now provided by statute that the suit may be brought in any county where the land or a portion thereof lies. See *Code Tenn.*, § 35, p. 15.

In *Kentucky* it was formerly held that a suit merely to foreclose the equity of redemption was transitory, and could be brought in any county where the defendant might be served with process. *Caufman v. Sayre*, 2 B. Mon. (Ky.) 202; *Owings v. Beall*, 3 Litt. (Ky.) 103. The Civil Code, § 62, now requires suit to be brought in the county where the land is located.

In *Massachusetts* it has been recently held that a bill to redeem was within the statutory provision that suits might be brought in any county where a transitory personal action between the same parties was proper. *Dary v. Kane*, 158 Mass. 376.

8. **Venue Determined at Option of Plaintiff.** — Thus in *Alabama* the complainant may elect to foreclose either in the forum of the mortgagor's residence or in that where the property is situated. *Reeves v. Brown*, 103 Ala. 537 *distinguishing* *Bolling v. Munchus*, 65 Ala.

Venue Local Unless Waived by Defendant or Changed by Court. — A still further innovation upon the earlier chancery practice was made by statutes enacted in some jurisdictions which changed foreclosure into a local action except in cases where the defendant took steps to make it transitory.¹

10. STATUTORY CHANGES MAKING FORECLOSURE SUIT PURELY LOCAL — In General. —

Foreclosure as a local action is now the method which more generally prevails than any other, by virtue of statutes which have completely revolutionized the original form of the action. The usual provision in these statutes is, that the suit must be brought in the county wherein the subject thereof, or some part of it, is situated.² Some of these acts merely provide that the suit may

558. *Compare Harwell v. Lehman*, 72 Ala. 344.

And where the land lies in two different counties, the bill brought in one does not disclose on its face a want of jurisdiction. *Bolling v. Munchus*, 65 Ala. 558.

But this right of election on the part of the complainant is limited to suits where land is the exclusive subject-matter, and is inapplicable to the foreclosure of a mortgage covering both real and personal property. *Ashurst v. Gibson*, 57 Ala. 584.

In *Iowa*, while the statutory rule was formerly different, *Chadbourne v. Gilman*, 29 Iowa 181, it is now optional with the plaintiff to bring foreclosure either in the county where the land is situated or in that where the note is payable, *Equitable L. Ins. Co. v. Gleason*, 56 Iowa 47; *Iowa L. & T. Co. v. Day*, 63 Iowa 459 (it was formerly permissible to bring the suit either in the county where the premises were located, or in that of the mortgagor's residence, *Cole v. Conner*, 10 Iowa 299; *Finnagan v. Manchester*, 12 Iowa 522, but the statute under which these latter decisions were rendered has been changed, *Equitable L. Ins. Co. v. Gleason*, 56 Iowa 47; *Iowa L. & T. Co. v. Day*, 63 Iowa 459); unless the maker of the note is served by publication only, in which case the action must be brought in the county where the land is situated, *Iowa L. & T. Co. v. Day*, 63 Iowa 459.

In *Tennessee* (Tenn. Code 1896, § 4515) and *Texas* (Sayles's Texas Civil Statutes 1889, art. 1198, § 11; *Kinney v. McCleod*, 9 Tex. 78), it is also permissible to sue either in the county of the defendant's domicile or in that of the *situs* of the mortgaged property. And this rule is applicable to a suit for the purpose of foreclosing a vendor's lien. *Joiner v. Perkins*, 59 Tex. 300. But it will not permit the maintenance of a suit in the county where the land is situated, against a purchaser who has assumed the payment of the mortgage and who resides in another county, the mortgagor not being made a party. *Higgins v. Frederick*, 32 Tex. 283.

In *Kentucky* it was formerly the rule that if the bill sought merely the foreclosure of the equity of redemption, the suit was transitory, but if a sale of the premises was asked, the action became local. *Caufman v. Sayre*, 2 B. Mon. (Ky.) 202; *Owings v. Beall*, 3 Litt. (Ky.) 103.

There are similar dicta elsewhere. *Cole v. Conner*, 10 Iowa 299; *Lichty v. McMartin*, 11 Kan. 565.

1. Venue Local Unless Waived by Defendant or Changed by Court. — Thus, in the former territory of *Dakota* (Code Civ. Pro., § 92, construed

in *Territory v. Judge*, 5 Dakota 275) and in the states of *North Dakota* (Rev. Code N. Dak., 1895, § 5244), *North Carolina* (Code N. Car., §§ 190, 195, construed in *Falls of Neuse Mfg. Co. v. Brower*, 105 N. Car. 440; but see *Frale v. March*, 68 N. Car. 160), and *South Carolina* (S. Car. Code Pro., § 149, construed in *Trapier v. Waldo*, 16 S. Car. 276), statutes were enacted which required that the mortgage be foreclosed in the county where the land was situated, but which also provided that suits brought in other counties might be tried therein, unless the defendant before answering made a written demand for trial in the proper county.

A similar statute was formerly in force in *New York*, Old Code of New York, § 126, construed in *March v. Lowry*, 16 How. Pr. (N. Y. Supreme Ct.) 41, 26 Barb. (N. Y.) 197; and also in *Wisconsin*, *Pereles v. Albert*, 12 Wis. 666. For the present Wisconsin rule, see *Brockway v. Carter*, 25 Wis. 510; *Beach v. Sumner*, 20 Wis. 274.

Under such provisions it has been held that the failure of the defendant to make the demand constitutes a waiver of the requirement as to the bringing of the suit in a particular place, and that the suit may proceed in any county where it has thus been brought.

Dakota. — *Territory v. Judge*, 5 Dakota 275. *New York.* — *March v. Lowry*, 16 How. Pr. (N. Y. Supreme Ct.) 41.

South Carolina. — *Trapier v. Waldo*, 16 S. Car. 276.

Wisconsin. — *Pereles v. Albert*, 12 Wis. 666.

Compare O'Neil v. O'Neil, 54 Cal. 187; *Gill v. Bradley*, 21 Minn. 15; *Beardsley v. Dickerson*, 4 How. Pr. (N. Y. Supreme Ct.) 81; *Lane v. Burdick*, 17 Wis. 95.

But where a demand for the transfer of the cause is properly made, it is mandatory on the part of the trial judge to grant it, even though there are other questions to be determined in the suit than those which affect the property. *Falls of Neuse Mfg. Co. v. Brower*, 105 N. Car. 440. *Compare Jones v. Statesville*, 97 N. Car. 86.

In *New York* it is the general rule that the foreclosure suit should be brought in the county where the premises are located, Code Civ. Pro., 1891, § 982; even though the mortgage may have been executed and delivered and the money loaned in another county, *Miller v. Hull*, 3 How. Pr. (N. Y. Supreme Ct.) 325. But this is subject to the right of the court to change the place of trial. Code Civ. Pro., 1891, § 987.

2. Jurisdictions Where Venue Is Local — Arkansas. — *Sand. & H. Ark. Dig. Stat.*, 1894, § 4994.

be brought in the county of the *situs* of the mortgaged property,¹ and these may, therefore, still be regarded as leaving the venue to the election of the plaintiff. But where the language of the statute is that the suit shall be brought in the county where the land lies, its provisions are not merely directory, but prohibit the pendency of the action elsewhere.²

Rule Where Land Lies in Different Counties. — The statutes of many of the states where the foreclosure action is local provide that in case the mortgaged lands are situated in more than one county, a suit to foreclose the whole mortgage may be brought in any of such counties.³

California. — Constitution, art. 6, § 5, construed in *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100. This was also the rule in California prior to the adoption of the present constitution. *Goldtree v. McAlister*, 86 Cal. 93; *Campbell v. West*, 86 Cal. 197. Compare *Southern Pac. R. Co. v. Pixley*, 103 Cal. 118; *Vallejo v. Randall*, 5 Cal. 461; Code Civ. Pro., 1897, § 392.

Delaware. — The statutory foreclosure by scire facias is required to be brought in the county where the mortgaged premises are situated. Rev. Stat., 1893, c. III, § 55.

Florida. — *Central Trust Co. v. Florida R., etc., Co.*, 43 Fed. Rep. 751. Compare *Pittsburgh, etc., R. Co.'s Appeal*, (Pa. 1886) 4 Atl. Rep. 385, 26 Am. & Eng. R. Cas. 57.

Georgia. — Code, § 3962, construed in *Hackenhull v. Westbrook*, 53 Ga. 285.

Indiana. — Revised Stat., 1896, § 307.

Kansas. — See Code Civ. Proc., §§ 41, 42; *App v. Bridge*, *McCahon* (Kan.) 118; *Shields v. Miller*, 9 Kan. 390; *Lichty v. McMartin*, 11 Kan. 565.

Kentucky. — Civil Code, § 62, construed in *Hendrix v. Nesbitt*, 96 Ky. 652.

Nebraska. — Code Civ. Pro., 1897, §§ 51, 845.

New Hampshire. — *Tucker v. Lake*, (N. H. 1892) 29 Atl. Rep. 406.

New York. — Code Civ. Pro., 1891, § 982; *Miller v. Hull*, 3 How. Pr. (N. Y. Supreme Ct.) 325.

Pennsylvania. — Act of March 23, 1877; *Prospect Bldg., etc., Assoc. v. Russel*, (C. Pl.) 36 W. N. C. (Pa.) 260.

South Carolina. — Code Civ. Pro., 1893, § 146; *Kaminisky v. Trantham*, 45 S. Car. 8; *Trapier v. Waldo*, 16 S. Car. 276; *Wagener v. Swygert*, 30 S. Car. 296. Compare *Barrett v. Watts*, 13 S. Car. 441.

Tennessee. — Code 1896, § 4515.

Washington. — Laws 1877, § 48, construed in *Wood v. Mastick*, 2 Wash. Ter. 69; *Stevens v. Ferry*, 48 Fed. Rep. 7.

Wisconsin. — Laws 1862, c. 243, § 1, construed in *Brockway v. Carter*, 25 Wis. 510; *Beach v. Sumner*, 20 Wis. 274.

1. See for example, Code Tenn., 1896, § 4515.

2. *Beach v. Sumner*, 20 Wis. 274.

Such a Statute Constitutes a Limitation upon another which authorizes judges to hear and determine foreclosure matters at chambers, and a judge holding court in one county is without jurisdiction to order the purchaser at foreclosure sale in another county to show cause why he should not comply with his bid. *Kaminisky v. Trantham*, 45 S. Car. 8.

So in *New York* the statute authorizing the adjournment of special terms to the chambers of any justice residing in the district will not

warrant the transfer of a foreclosure suit to another county to be there heard at chambers, even though, by a subsequent adjournment, the cause is afterwards heard in the county where the premises are located. *Gould v. Bennett*, 59 N. Y. 124.

But in *California*, where the land lies in more than one county a court in one of the counties which forms the *situs* of a part of the land may render a decree of sale and direct the issue of a sheriff's deed embracing those portions of the premises which lie outside the *locus fori*. *Goldtree v. McAlister*, 86 Cal. 95.

Where a Foreclosure Suit Is Commenced in the Proper County it will not be defeated by a subsequent division of the county, *Buckinghouse v. Gregg*, 19 Ind. 401; and the courts of the old county retain jurisdiction over it. *Arnold v. Styles*, 2 Blackf. (Ind.) 391; *Buckinghouse v. Gregg*, 19 Ind. 401.

Even Where Suit Is Begun After the Division of the County, but prior to the time when the terms of the court therein are provided for, the courts of the old county are empowered to render a valid decree. *Milk v. Kent*, 60 Ind. 226.

But if a Complaint Describes the Lands as Situated in the Old County, but contains nothing to identify them as located in the new county where the action is brought, a finding that they are so located cannot be sustained. *Campbell v. West*, 86 Cal. 197.

In California an Action to Foreclose a Vendor's Lien is local, and a court of the county where the land lies alone has jurisdiction. *Southern Pac. R. Co. v. Pixley*, 103 Cal. 118.

3. Where Land Lies in Different Counties — *Alabama.* — Compare *Bolling v. Munchus*, 65 Ala. 558, construing Code 1876, § 3760.

California. — Code Civ. Pro., 1897, § 392; Constitution, art. 6, § 5; *Goldtree v. McAlister*, 86 Cal. 93.

Kentucky. — Civil Code, § 62, construed in *Hendrix v. Nesbitt*, 96 Ky. 652.

Nebraska. — Code Civ. Pro., 1897, § 52.

New York. — Code Civ. Pro., 1891, § 982; *Miller v. Hull*, 3 How. Pr. (N. Y. Supreme Ct.) 325.

Pennsylvania. — Act of March 23, 1877, construed in *Prospect Bldg., etc., Assoc. v. Russel*, (C. Pl.) 36 W. N. C. (Pa.) 260.

South Carolina. — Code, § 144, construed in *Wagener v. Swygert*, 30 S. Car. 296.

Washington. — Code, § 48, construed in *Stevens v. Ferry*, 48 Fed. Rep. 7.

In *Delaware* a single provision is made for the maintenance of the statutory foreclosure by scire facias in any one of several counties where the land lies. Rev. Stat. Del. 1893, p. 845.

Under statutes of this character it is imma-

Rule Where Mortgaged Premises Lie in Another State — In General. — Thus far, the law relative to the *locus* of the foreclosure suit has been discussed in reference to different counties within the same state. Much more complicated questions arise, however, where part or all of the mortgaged property is located wholly without the boundaries of the state where the suit is commenced. It was held at an early day that while a court of chancery might decree the conveyance of land in another state, and enforce the same by process against the defendant, yet neither the decree itself nor any conveyance thereunder, except by the party in whom the title was vested, could operate beyond the jurisdiction of the court.¹

Railway Mortgages. — The question of the powers of a court in foreclosure proceedings to render a decree affecting property in another state has most frequently arisen in the foreclosure of railway mortgages covering lines of road running through several states.²

terial that one of the defendants resides outside of the county where the suit is brought. *Hendrix v. Nesbitt*, 96 Ky. 652.

The *Pennsylvania* statute does not require that the tract be adjacent. *Prospect Bldg., etc., Assoc. v. Russel*, (C. Pl.) 36 W. N. C. (Pa.) 260.

Where a suit to foreclose a mortgage covering lands in several counties may be brought in one county, it is proper not merely to decree a sale in that county, but to conduct the sale there and direct the issue of the sheriff's deed. *Goldtree v. McAlister*, 86 Cal. 93.

In *Iowa* it was once held under a statute like those above noticed that a foreclosure of six different mortgages upon distinct parcels of land lying in as many counties, and securing separate portions of a promissory note, could not be maintained in one county. *Chadbourn v. Gilman*, 29 Iowa 181. But it was subsequently decided by the same court that several deeds in connection with a defeasance clause sufficiently constituted one mortgage to permit foreclosure of the whole in one county, though the property was situated in several. *Lomax v. Smyth*, 50 Iowa 223.

A similar construction has recently been placed upon a section of the Code of *Washington*. *Stevens v. Ferry*, 48 Fed. Rep. 8.

The *Indiana* court, while not denying the right of the mortgagee to obtain a decree of foreclosure in a suit brought in one county involving a mortgage which covered tracts in several counties, nevertheless held that, as the statute required the foreclosure sale to be conducted at the court-house door of the county, only those lands located in the county where the decree was obtained could be sold thereunder. *Holmes v. Taylor*, 48 Ind. 169.

1. Where Mortgaged Premises Lie in Another State. — *Watkins v. Holman*, 16 Pet. (U. S.) 25. See also *Farmers' L. & T. Co. v. Bankers', etc.*, Tel. Co., 44 Hun (N. Y.) 406; *Elliott v. Wood*, 45 N. Y. 71.

So in *Connecticut* it was held that a foreclosure in the courts of New York of a mortgage upon land in the former state had no validity. *Farmers' L. & T. Co. v. Postal Tel. Co.*, 55 Conn. 334.

But where the parties to a suit for the strict foreclosure in the courts of *New York* of a mortgage covering land in *Illinois* were before the court, it was held erroneous on the part of the referee to dismiss the action merely be-

cause of the location of the premises. *House v. Lockwood*, 40 Hun (N. Y.) 532.

Statutory provisions as to foreclosure by advertisement and sale cannot, of course, affect real property outside the state where they were enacted. *Elliott v. Wood*, 45 N. Y. 77.

The federal Circuit Court has jurisdiction of a suit to foreclose a mortgage on a bridge connecting the state where the court sits with a foreign country. *International Bridge, etc., Co. v. Holland Trust Co.*, 81 Fed. Rep. 422.

A mortgage of property situated in two states cannot be compelled by a junior mortgagee of that portion of the property located in one of the states to leave the jurisdiction where such first mortgagee resides and pursue his remedy in the other state. *Denham v. Williams*, 39 Ga. 312.

2. Railway Mortgages. — The federal courts have generally taken jurisdiction of such cases and rendered decrees affecting not merely those portions of the road situated in the state where the court was sitting, but also those which lay outside of the state. *Muller v. Dows*, 94 U. S. 444. See also *Central Trust Co. v. Wabash, etc., R. Co.*, 29 Fed. Rep. 618. So the courts of *Connecticut* assumed the jurisdiction to foreclose a mortgage covering a line of railway operating both in that state and in New York. *Mead v. New York, etc., R. Co.*, 45 Conn. 199.

In *Pennsylvania* it was held that where a trustee of a railroad mortgage was within the jurisdiction of the court he might be required to sell whatever interest of the company's would pass under the terms of the mortgage, though part of the line covered thereby was in another state. *McElrath v. Pittsburg, etc., R. Co.*, 55 Pa. St. 189.

In the federal courts a common practice has been to bring the main foreclosure proceedings in the Circuit Court sitting in one state, and at the same time file ancillary bills in the Circuit Courts for those other states where the remaining portions of the road were situated. *Central Trust Co. v. Wabash, etc., R. Co.*, 29 Fed. Rep. 618. See also *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 27 Fed. Rep. 148; *Central Trust Co. v. East Tennessee, etc., R. Co.*, 30 Fed. Rep. 895.

Where this custom has been followed, it is held in the federal courts, a judgment creditor of the railway corporation who seeks an allowance of his claim from the receiver should

(d) **Setting Aside Conveyances.** — The maxim that equity acts *in personam* operates as well in canceling as in compelling conveyances. An early instance of this was an assertion of power on the part of chancery to relieve against a fraudulent grant of an annuity or rent charge upon land in Ireland.¹ And chancery has frequently set aside conveyances of lands lying outside its geographical jurisdiction.² It seems, however, that in *Michigan* an action to set aside conveyances of land is local.³

(e) **Injunctions.** — Another application of the maxim now under discussion is in the granting of injunctions to restrain the commission of acts outside the jurisdiction of the court. The power of chancery in this regard seems not to have been exercised so anciently as in the case of specific performance, and there is at least one early instance of its denial;⁴ but it is now well settled that chancery will restrain a party over whom it has acquired jurisdiction from instituting proceedings elsewhere to enforce an unconscionable or unlawful demand.⁵

make his application in the court where the original bill was filed, and not in those where the ancillary bills are pending. *Central Trust Co. v. East Tennessee, etc.*, R. Co., 30 Fed. Rep. 895.

But the contrary rule prevails in *West Virginia*, and the creditor is there allowed to intervene in either court. *Crumlish v. Shenandoah Valley R. Co.*, 32 W. Va. 271.

After the bringing of a bill of foreclosure in the Circuit Court for one jurisdiction, a so-called ancillary bill in another Circuit Court, not seeking foreclosure, was dismissed, the latter court holding that if its powers were required they should be invoked by an independent suit. *Mercantile Trust Co. v. Kanawha, etc.*, R. Co., 39 Fed. Rep. 337.

Courts of one jurisdiction have exercised the right to appoint receivers for a railroad company which has lines running through other jurisdictions. *Wilmer v. Atlanta, etc.*, R. Co., 2 Woods (U. S.) 418; *Ellis v. Boston, etc.*, R. Co., 107 Mass. 1.

Where foreclosure suits were brought in each of the three states where the mortgaged railroad was situated, and the same receiver was appointed by each, it was held that the proceedings were independent, and that the two latter suits were not merely ancillary to the one first begun. *Matter of U. S. Rolling Stock Co.*, 55 How. Pr. (N. Y. Supreme Ct.) 286, 57 How. Pr. (N. Y.) 16.

But the complaint may be so amended as to make one of the suits ancillary. *Taylor v. Atlantic, etc.*, R. Co., 57 How. Pr. (N. Y. Supreme Ct.) 9.

Where the Circuit Court sitting in one state has assumed jurisdiction of a foreclosure of a mortgage covering a railroad partly in that state and partly in another, the fact that the Circuit Court for the state wherein the remaining portion of the line is situated entertains a similar bill will not oust the former of jurisdiction. *Atkins v. Wabash, etc.*, R. Co., 29 Fed. Rep. 161.

An early *Indiana* case held that, in the foreclosure of a mortgage covering a line of railway, which, as a result of consolidation, operated both in that state and in Ohio, the courts of the latter state had no jurisdiction. *Eaton, etc.*, R. Co. v. *Hunt*, 20 Ind. 457.

The purchaser of the equity of redemption of a mortgaged railroad situated in two states,

and who desires to redeem, should redeem the entire road, and not that part of it which lies in the state where the purchase is effected. *Wood v. Goodwin*, 49 Me. 260, 77 Am. Dec. 259.

1. **Setting Aside Conveyances.** — *Arglasse v. Muschamp*, 1 Vern. 75. The lord chancellor, in answering the objections to jurisdiction, observed: "This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands, and grant a sequestration to execute a decree, then they readily tell you that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must *agere in personam* only; and when, as in this case, you prosecute the person for a fraud, they tell you you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local; and so would wholly elude the jurisdiction of this court."

2. *England.* — *Cranston v. Johnston*, 3 Ves. Jr. 170 (land in Jamaica).

New York. — *De Klyn v. Watkins*, 3 Sandf. Ch. (N. Y.) 185 (land in New Jersey); *D'Ivernois v. Leavitt*, 23 Barb. (N. Y.) 63.

Tennessee. — *Roper v. Roper*, 3 Tenn. Ch. 53 (land in another county).

Virginia. — *Guerrant v. Fowler*, 1 Hen. & M. (Va.) 5 (land in Kentucky).

3. *Chapin v. Dodds*, 104 Mich. 232. Compare *Casey v. Adams*, 102 U. S. 66, holding that an action to cancel certain mortgages was local and should be brought in the county where the land was situated, notwithstanding it involved the rights of a national banking association in another county and the federal statute provided that actions against such an association should be brought in the county where it was located.

4. **Injunctions.** — *Lowe v. Baker*, Freem. Ch. 125 (1692), where the lord chancellor said that "an injunction doth not lie to stop a suit at Leghorn or any other foreign parts." See this case commented on and criticised in *Portarlington v. Soulby*, 3 Myl. & K. 104.

5. *England.* — *Wharton v. May*, 5 Ves. Jr. 71; *Portarlington v. Soulby*, 3 Myl. & K. 104; *Campbell v. Houlditch*, discussed in preceding case. Compare *Kennedy v. Cassillis*, 2 Swanst. 313; *Bushby v. Munday*, 5 Madd. 297; *Harri-*

Illustrations. — Thus an injunction has been granted to prevent proceedings in a foreign jurisdiction to enforce a gambling debt,¹ or a judgment fraudulently acquired,² or to evade the domestic insolvency³ or exemption laws.⁴ Similarly a legatee will be enjoined from proceeding in a foreign tribunal to enforce payment of money by an executor to the prejudice of other legatees,⁵ and a party within the jurisdiction may be enjoined from injuring real property situated outside the state.⁶

Constitutionality. — The practice of equity in this regard is not in conflict with the federal Constitution.⁷

Suits Already Begun. — But while such is the rule, adopted to prevent the commencement of foreign legal proceedings, it has been held that equity will not interfere to enjoin the maintenance of such a proceeding if already begun.⁸ So the chancellor refused to enjoin a judicial sale in the course of proceedings in one of the colonial courts.⁹

(f) **Miscellaneous Proceedings — Administration.** — The jurisdiction of chancery has been exercised in the administration of foreign estates.¹⁰

Rescission of Contract. — Actions to rescind contracts for the purchase of land are usually transitory and may be brought where the defendant is served with process.¹¹

Reformation of Contract. — In *California* an action to reform a contract to convey is local.¹²

(3) *Equity Follows the Law* — (a) **In General.** — The Latin form of this maxim

son v. Gurney, 2 Jac. & W. 563; Beauchamp v. Huntley, Jac. 546.

United States. — *Cole v. Cunningham*, 133 U. S. 107.

Georgia. — *Engel v. Scheuerman*, 40 Ga. 206.

Indiana. — *Wilson v. Joseph*, 107 Ind. 490.

Maryland. — *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448.

Massachusetts. — *Dehon v. Foster*, 4 Allen (Mass.) 545.

New Jersey. — *Hutton v. Hutton*, 40 N. J. Eq. 461.

New York. — *Vail v. Knapp*, 49 Barb. (N. Y.) 299.

Ohio. — *Snook v. Snetzer*, 25 Ohio St. 516.

Vermont. — *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792, the court saying: "The right of a court of equity to restrain parties resident in England from the prosecution of suits in foreign countries was recognized more than two hundred years ago, by the highest judicial tribunal of that country, and is as well established there as any other principle of equity law."

1. *Portarlington v. Soulby*, 3 Myl. & K. 104.

2. *Engel v. Scheuerman*, 40 Ga. 206.

3. *Dehon v. Foster*, 4 Allen (Mass.) 545; *Cole v. Cunningham*, 133 U. S. 107. Compare *Hunter v. Potts*, 4 T. R. 182.

4. *Wilson v. Joseph*, 107 Ind. 490; *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448.

5. *Hutton v. Hutton*, 40 N. J. Eq. 461.

6. *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462. The court presents an extensive review of the authorities, and closes the opinion as follows: "It would be a great defect in the administration of the law if the mere fact that the property was out of the state could deprive the court of the power to act. As much injustice may be perpetrated in a given case against the citizens of this state by going out of the jurisdiction and committing a wrong as by staying here and doing it. The injustice

does not lose its quality by being committed elsewhere than in New Hampshire, and as the legislature has conferred upon the court the power to issue injunctions whenever it is necessary to prevent injustice, it is the duty of the court to exercise that power upon the presentation of a proper case, and when it can be done consistently with the acknowledged practice in courts of equity. As the principle which is sought to be applied here has been recognized for nearly two hundred years, we have no hesitation in holding that the court has jurisdiction to issue the injunction prayed for."

7. *Cole v. Cunningham*, 133 U. S. 107.

8. *Mead v. Merritt*, 2 Paige (N. Y.) 202.

9. *White v. Hall*, 12 Ves. Jr. 321. The proceedings involves an estate in the colony of Demarara. The lord chancellor said: "The only question for me to consider upon this motion is whether I have authority to set aside a judicial sale, had under the process and judgment of a court having a competent jurisdiction, not only intrinsically but under the acts of the parties. I have no such authority. I hope, however, means may be found to deliver this estate from sale, if the law of this colony is not peremptory and essentially different in that respect from the law of this country. The lords of the council may perhaps give some direction to prevent a sale until an appeal, or security may be given. That is for their consideration; but I am obliged to refuse this injunction."

10. *Ewing v. Orr Ewing*, L. R. 9 App. 35; *Stirling-Maxwell v. Cartwright*, 11 Ch. Div. 522.

11. *Morris v. Runnells*, 12 Tex. 176; *Neal v. Reynolds*, 38 Kan. 432. In the latter case, however, it was held that the action might be brought in the county where the land was situated.

12. *Franklin v. Dutton*, 79 Cal. 605.

is *equitas sequitur legem*,¹ and though frequently stated as a general principle, it is really quite restricted in scope.² There are, however, two classes of cases in which equity may be said to follow the law: (1) in determining purely legal rights, and (2) in determining analogous equitable rights.

(b) **In Determining Legal Rights.**—The use of the maxim in judicial opinions appears to have been most frequent in dealing with legal rights and interests.³ In the first place, it must be remembered that equity creates neither rights nor liabilities,⁴ nor can it change or unsettle rights already established at law⁵ nor disregard constitutional or statutory provisions.⁶ Again, when a court of law has established a right it is not within the province of equity to disregard it, as in the case of determining the amount of a debt by reducing it to judgment⁷ or of adjudicating the validity of a tax.⁸ So in affording relief similar to that granted at law, such as awarding interest,⁹ fixing the priority of liens,¹⁰ and in foreclosure proceedings in jurisdictions where a statutory action at law is the prevailing method,¹¹ the maxim applies.

(c) **In Determining Equitable Rights Analogous to Legal.**—The maxim is also employed in dealing with rights and interests which though equitable in their nature bear a close analogy to those adjudicated at law.¹² Thus it was determined at an early day that equitable estates would be guided by the same rules of descent as legal estates,¹³ and in construing the limitations imposed by a

1. **Equity Follows the Law.**—See *Magniac v. Thomson*, 15 How. (U. S.) 281; *Roediger v. Simmons*, 2 Abb. N. Cas. (N. Y. C. Pl.) 279.

2. *Hedges v. Dixon County*, 150 U. S. 190.

3. "A court of equity, in dealing with legal rights, adopts and follows the rules of law in all cases to which those rules are applicable; and whenever there is a direct rule of law governing the case in all its circumstances, the court is as much bound by it as would be a court of law, if the controversy was there pending." *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85.

4. *Heard v. Stamford*, 3 P. Wms. 409; *Henderson v. Overton*, 2 Yerg. (Tenn.) 394, 24 Am. Dec. 492; *Combs v. Young*, 4 Yerg. (Tenn.) 218, 26 Am. Dec. 225.

5. "Wherever the rights or the situation of the parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable." *Magniac v. Thomson*, 15 How. (U. S.) 299.

6. *Hedges v. Dixon County*, 150 U. S. 192.

7. "It is not to be expected, however, that a person about to purchase property subject to the lien of a judgment should be required to inspect the pleadings and files to ascertain, at his peril, whether the judgment should not have been for a different and larger amount. The court had judicially determined that matter, and whether right or wrong, such determination was conclusive as long as it was permitted to remain without amendment. No other rule would enable one to deal safely with property subject to judgment lien. Such is certainly the legal view of the matter, and how will equity regard it? Equity follows the law, and where no equitable considerations intervene, or where equities are equal, it will leave parties to the situation assigned them at law." *Calef v. Parsons*, 48 Ill. App. 258.

8. "It is a sufficient answer to this objection, that the Court of Errors and Appeals has declared that the taxes in question are invalid.

Equity follows the law." *Provident Sav. Inst. v. Allen*, 37 N. J. Eq. 36.

9. **Interest.**—*Atchison, etc., R. Co. v. Chicago, etc., R. Co.*, 54 Ill. App. 395, the court saying: "Interest in equity is allowed because of equitable considerations. Equity follows the law, and ordinarily, if it gives interest, does so because, under the statutes, the party is entitled to it; but a court of equity, subject to rules of law, gives or withholds interest as under all the circumstances of the case and the law applicable thereto it deems equitable and just."

10. **Priority of Liens.**—*Hamilton Trust Co. v. Clemes*, 17 N. Y. App. Div. 152; *Sanborn v. Adair*, 29 N. J. Eq. 338; *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85, where it is observed: "We can discover no reason for displacing the prior lien of the execution issuing from the court of probate. If the controversy were in a court of law, which was proceeding to direct the sheriff in the distribution of the proceeds of the sale of the lands, they would be entitled to priority of payment; and it is the duty of the court of equity, in this respect, to follow the law."

"Although a judgment lien is a legal right, yet it will be recognized, protected, and enforced by courts of equity in the same manner as a law, in accordance with the maxim *equitas sequitur legem*. And courts of equity, in the administration of assets, follow the rules of law in regard to legal assets, and enforce antecedent liens, claims, and charges existing upon property, according to priority." *Lawson v. Jordan*, 19 Ark. 305.

11. **Foreclosure.**—*Hannah v. Davis*, 112 Mo. 599.

12. "It is a common maxim that equity follows the law; in dealing with cases of an equitable nature it adopts and follows the analogies furnished by the rules of law." *Sanborn v. Adair*, 29 N. J. Eq. 338.

13. **Descent of Equitable Estates.**—*Cowper v. Cowper*, 2 P. Wms. 753. Sir Joseph Jekyll, M. R., in delivering the opinion, observed:

deed of trust the rules of law will be followed.¹ A dower proceeding will generally be determined upon legal principles,² and it is said to be a general rule that "if an action at law will not lie upon a contract to recover damages for its breach, a court of equity will not decree its specific execution."³

(a) **Statute of Limitations.**—The most extensive application of the doctrine embodied in this maxim is in determining the limitation of equitable proceedings. The original statute of limitations applied only to actions at law,⁴ and in matters over which chancery has peculiar and exclusive jurisdiction, such as, for example, express trusts, it has always been the rule, where law and equity were kept distinct, that the statute of limitations did not operate.⁵ But from an early period courts of equity have observed the statute in determining causes over which their jurisdiction was concurrent with law.⁶ It

"The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue; and though proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked *vir bonus est quis?* the answer is *qui consulta patrum, qui leges juraque servat*; and as it is said in *Rooke's Case*, 5 Coke 99 *b*, that discretion is a science, not to act arbitrarily according to men's wills and private affections, so the discretion which is exercised here is to be governed by the rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other; this discretion, in some cases, follows the law implicitly, in others assists it, and advances the remedy; in others, again, it relieves against the abuse or allays the rigor of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with."

1. Construction of Trust Deed.—*Dibrell v. Carlisle*, 48 Miss. 691, the court saying: "The first question involves the construction of the limitations in the deed creating the trust estate. It is a common maxim that equity follows the law: *equitas sequitur legem*. Where a rule of the common or statute law is direct and governs the case with all its circumstances or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it. A court of equity cannot disregard the canons of descent. In general, in courts of equity the same construction and effect are given to perfect trust estates as are given by courts of law to legal estates. The incidents, properties, and consequences of the estates are the same. The same restrictions are applied as to creating estates and bounding perpetuities and giving absolute dominion over property. The same modes of construing the language and limitations of the trusts are adopted. 1 Story Eq. (Redf. ed.) 53-55, § 64."

2. "Dower, when founded on a legal seizure, is a pure legal right; and while courts of equity possess concurrent jurisdiction with courts of law for its enforcement, yet in cases where no equitable right is involved they determine the right set up by the widow by precisely the same principles which would govern the decision of a court of law in a like case. And if her right to dower is denied on legal

grounds, equity will defer the final determination of her claim until her legal right has been established by a judgment at law." *Drost v. Hall*, 52 N. J. Eq. 68; *Ocean Beach Assoc. v. Brinley*, 34 N. J. Eq. 438.

3. Hickman v. Grimes, 1 A. K. Marsh. (Ky.) 86, 10 Am. Dec. 714.

4. Statute of Limitations.—"The statute of limitations does not apply in terms to proceedings in courts of equity; it applies to particular actions at common law, and limits the time within which they shall be brought, according to the nature of these actions; but it does not say there shall be no recovery in any other mode of proceeding. The first part of the preamble applies to particular writs; the second part, to quiet possessions; and the enactment proceeds on the first part only." *Bond v. Hopkins*, 1 Sch. & Lef. 413.

"It is said that courts of equity are not within the statutes of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies." *Hovenden v. Annesley*, 2 Sch. & Lef. 629.

"It was a rule of the common law that a right never dies, and therefore the power existed of instituting actions at any length of time, however distant, from the period when the right first accrued. To quiet possessions, to secure repose from litigation, and to prevent perjury, fraud, and injustice, it was found necessary to restrain the exercise of this power. For this purpose the several statutes of limitation were passed, prescribing certain periods within which actions were required to be instituted; and in case of neglect, that the lapse of time might be insisted upon as a complete bar. These statutes in their terms are confined to actions at law, and do not extend to suits in equity." *Perkins v. Cartmell*, 4 Harr. (Del.) 270, 42 Am. Dec. 753. See also *White v. Sheldon*, 4 Nev. 289; *Pitzer v. Burns*, 7 W. Va. 69; *Frame v. Kenny*, 2 A. K. Marsh. (Ky.) 145, 12 Am. Dec. 367.

5. Cocke v. McGinnis, Mart. & Y. (Tenn.) 361, 17 Am. Dec. 809; *Terrill v. Murry*, 4 Yerg. (Tenn.) 104; *McDonald v. McDonald*, 8 Yerg. (Tenn.) 145; *Lafferty v. Turley*, 3 Sneed (Tenn.) 157; *Shelby v. Shelby*, *Cooke* (Tenn.) 179, 5 Am. Dec. 686; *McClane v. Shepherd*, 21 N. J. Eq. 76.

6. England.—*Hovenden v. Annesley*, 2 Sch. & Lef. 625, where Lord Redesdale observed: "I think it is a mistake in point of language to say that courts of equity act merely by analogy to the statutes; they act in

was but a step further to extend the doctrine to cases in which there was no concurrent jurisdiction, but in which the equitable remedy was a substitute for the legal one. Here equity followed the law, and it became the established rule that if the corresponding legal remedy was barred chancery would usually grant no relief.¹

Application to Mortgages. — The application of this doctrine to mortgages affords a peculiar interest and value. At the time when it arose a mortgage was viewed as a conveyance, the mortgagee usually took possession, and the aid of the courts was quite as often invoked by the mortgagor to redeem from the mortgage as by the mortgagee to foreclose. In entertaining suits to redeem chancery followed the analogy of ejectment, that being the most similar legal remedy, and usually refused its aid if the suitor had postponed his proceeding until such a time as ejectment would have been barred under similar circumstances.² This rule was not, however, universal as regards redemption.³

obedience to them. The statute of limitations applying itself to certain legal remedies, for recovering the possession of lands, for recovering of debts, etc., equity, which in all cases follows the law, acts on legal titles and legal demands, according to matters of conscience which arise and which do not admit of the ordinary legal remedies. Nevertheless, in thus administering justice according to the means afforded by a court of equity, it follows the law."

United States. — *Wagner v. Baird*, 7 How. (U. S.) 258, the court saying: "In cases of concurrent jurisdiction courts of equity consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy."

Illinois. — *Sloan v. Graham*, 85 Ill. 30; *Boone v. Colehour*, 165 Ill. 305.

Kentucky. — *Clay v. Clay*, 7 Bush. (Ky.) 95.

1. Analogy of Statute of Limitations Followed. — *England.* — *Smith v. Clay*, 3 Bro. C. C. 639, note; *Deloraine v. Browne*, 3 Bro. C. C. 633; *Lytton v. Lytton*, 4 Bro. C. C. 441; *Beckford v. Wade*, 17 Ves. Jr. 88; *Barron v. Martin*, 19 Ves. Jr. 327; *Stackhouse v. Barnston*, 10 Ves. Jr. 453; *Medlicott v. O'Donel*, 1 B. & B. 156. *Compare Cook v. Arnham*, 3 P. Wms. 287; *In re Hollingshead*, 37 Ch. Div. 659.

Ireland. — *Bond v. Hopkins*, 1 Sch. & Lef. 413.

United States. — *Amory v. Lawrence*, 3 Cliff. (U. S.) 523; *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *Miller v. McIntyre*, 6 Pet. (U. S.) 61; *Wagner v. Baird*, 7 How. (U. S.) 234; *Carroll v. Green*, 92 U. S. 509; *Badger v. Badger*, 2 Cliff. (U. S.) 137; *Hall v. Russell*, 3 Sawy. (U. S.) 506.

Alabama. — *Gunn v. Brantley*, 21 Ala. 644; *Goodwyn v. Baldwin*, 59 Ala. 127. But *Compare Askew v. Hooper*, 28 Ala. 634.

Delaware. — *Perkins v. Cartmell*, 4 Harr. (Del.) 270, 42 Am. Dec. 753.

Georgia. — *McDonald v. Sims*, 3 Ga. 383.

Illinois. — *Castner v. Walrod*, 83 Ill. 171; *Sloan v. Graham*, 85 Ill. 30; *Manning v. Warren*, 17 Ill. 267; *Greenman v. Greenman*, 107 Ill. 404.

Kentucky. — *Brunk v. Means*, 11 B. Mon. (Ky.) 214; *Frame v. Kenny*, 2 A. K. Marsh. (Ky.) 145, 12 Am. Dec. 367.

Maine. — *Phillips v. Sinclair*, 20 Me. 269.

Maryland. — *Crook v. Glenn*, 30 Md. 69; *Baltimore, etc., R. Co. v. Trimble*, 51 Md. 112. *Massachusetts.* — *Upham v. Wyman*, 7 Allen (Mass.) 503.

Michigan. — *Cook v. Finkler*, 9 Mich. 131. *New Jersey.* — *McClane v. Shepherd*, 21 N. J. Eq. 76.

New York. — *Lansing v. Starr*, 2 Johns. Ch. (N. Y.) 150; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467; *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417.

Ohio. — *Clark v. Potter*, 32 Ohio St. 49.

Pennsylvania. — *Neely's Appeal*, 85 Pa. St. 390; *Todd's Appeal*, 24 Pa. St. 429.

West Virginia. — *Pitzer v. Burns*, 7 W. Va. 69.

Hawaii. — *Rose v. Parker*, 4 Hawaiian 593.

Suspension of Statute of Limitations. — In *Reed v. West*, 47 Tex. 240, it was held that during the suspension of the statute of limitations equity follows the law, and in the absence of some equitable reason will not hold a complainant guilty of laches for failure to file his bill in the interval.

2. Bills to Redeem Barred on the Analogy of Ejectment. — *England.* — *Pearson v. Pulley*, 1 Ch. Ca. 102; *Whiting v. White*, 2 Cox 290; *Aggas v. Pickerell*, 3 Atk. 225; *Foster v. Hodgson*, 19 Ves. Jr. 180; *Barron v. Martin*, 19 Ves. Jr. 327; *Hodley v. Healey*, 1 Ves. & B. 536.

United States. — *Dexter v. Arnold*, 1 Sumn. (U. S.) 109.

Alabama. — *Byrd v. McDaniel*, 33 Ala. 18. In this case the mortgage covered personality, but the case was decided upon the analogy of real property cases, and the opinion contains a valuable review of the authorities.

Connecticut. — *Crittendon v. Brainard*, 2 Root (Conn.) 485; *Skinner v. Smith*, 1 Day (Conn.) 124; *Lockwood v. Lockwood*, 1 Day (Conn.) 295; *Jarvis v. Woodruff*, 22 Conn. 548.

Georgia. — *Morgan v. Morgan*, 10 Ga. 300.

Iowa. — *Crawford v. Taylor*, 42 Iowa 260.

Massachusetts. — *Ayres v. Waite*, 10 Cush. (Mass.) 72.

Michigan. — *Hoffman v. Harrington*, 33 Mich. 392; *Reynolds v. Green*, 10 Mich. 355.

Missouri. — *McNair v. Lot*, 34 Mo. 285, 84 Am. Dec. 78.

3. Yarbrough v. Newell, 10 Yerg. (Tenn.) 376. *Compare Wood v. Jones*, Meigs (Tenn.)

Foreclosure. — In foreclosure proceedings chancery applied a similar rule, for the right to foreclose and the right to redeem were said to be "reciprocal and commensurable."¹ Accordingly, where a suit was not brought until after the expiration of the period which would bar ejectment, there was said to be a presumption that the debt was paid.² But, on the other hand, the possession of the mortgagor was presumed to be subordinate to that of the mortgagee, and hence the limitation did not begin to run until such possession became adverse, open, and notorious;³ and the possession of one who enters upon the mortgaged premises under a contract with the mortgagor to pay off the debt is not adverse to that of the mortgagee.⁴ Moreover, this presumption of payment raised by lapse of time was one which might be rebutted by disproving payment or proving facts which would suspend the running of the statute in an action at law.⁵

513; *Drayton v. Marshall*, Rice Eq. (S. Car.) 373, 33 Am. Dec. 84.

1. *Caufman v. Sayre*, 2 B. Mon. (Ky.) 206. See also *Arrington v. Liscom*, 34 Cal. 372.

2. **Presumption of Payment After Limitation Period** — *England*. — *Christophers v. Sparke*, 2 Jac. & W. 225. This view was not arrived at, however, without some expression of contrary opinion. See *Toplis v. Baker*, 2 Cox 123; *Trash v. White*, 3 Bro. C. C. 289; *Du Vigier v. Lee*, 2 Hare 326.

United States. — *Cleveland Ins. Co. v. Reed*, 1 Biss. (U. S.) 180.

Alabama. — *Goodwyn v. Baldwin*, 59 Ala. 127.

Arkansas. — *Hall v. Denckla*, 28 Ark. 506.

Connecticut. — *Haskell v. Bailey*, 22 Conn. 569.

Georgia. — *McDonald v. Sims*, 3 Ga. 383.

Illinois. — *Manning v. Warren*, 17 Ill. 267; *Harris v. Mills*, 28 Ill. 44, 81 Am. Dec. 259; *Locke v. Caldwell*, 91 Ill. 417; *Reynolds v. Dishon*, 3 Ill. App. 173.

Maine. — *Joy v. Adams*, 26 Me. 330; *Sweetser v. Lowell*, 33 Me. 446; *Blethen v. Dwinall*, 35 Me. 556; *Chick v. Rollins*, 44 Me. 104; *Roberts v. Littlefield*, 48 Me. 61; *Jarvis v. Albro*, 67 Me. 310.

Maryland. — *Baltimore, etc., R. Co. v. Trimble*, 51 Md. 112; *Webster v. Hall*, 2 Har. & M. (Md.) 19, 1 Am. Dec. 370.

Massachusetts. — *Cheever v. Perley*, 11 Allen (Mass.) 584; *Bacon v. McIntire*, 8 Met. (Mass.) 87; *Howland v. Shurtleff*, 2 Met. (Mass.) 26, 35 Am. Dec. 384; *Inches v. Leonard*, 12 Mass. 379.

Michigan. — *Michigan Ins. Co. v. Brown*, 11 Mich. 265; *Reynolds v. Green*, 10 Mich. 355; *Hoffman v. Harrington*, 33 Mich. 392. Compare *Burrow v. Debo*, 47 Mich. 242. This presumption afforded the only bar to foreclosure proceedings in Michigan prior to 1879. See *Baent v. Kennicutt*, 57 Mich. 271.

Minnesota. — See *Ayer v. Stewart*, 14 Minn. 97.

Mississippi. — *Nevitt v. Bacon*, 32 Miss. 212, 66 Am. Dec. 609; *Benson v. Stewart*, 30 Miss. 49.

Missouri. — *Wilkerson v. Allen*, 67 Mo. 502; *Wilson v. Albert*, 89 Mo. 537. Compare *Kelly v. Hurt*, 61 Mo. 463; *McNair v. Lot*, 34 Mo. 285, 84 Am. Dec. 78.

New Hampshire. — *Tripe v. Marcy*, 39 N. H. 439; *Sheafe v. Gerry*, 18 N. H. 245.

New Jersey. — *Evans v. Huffman*, 5 N. J. Eq. 354; *Downs v. Sooy*, 28 N. J. Eq. 55.

New York. — *Giles v. Baremore*, 5 Johns.

Ch. (N. Y.) 545; *Dunham v. Minard*, 4 Paige (N. Y.) 441; *Jackson v. Pratt*, 10 Johns. (N. Y.) 381; *Jackson v. Wood*, 12 Johns. (N. Y.) 242, 7 Am. Dec. 315; *Belmont v. O'Brien*, 12 N. Y. 394; *Newcomb v. St. Peter's Church*, 2 Sandf. Ch. (N. Y.) 637; *Bander v. Snyder*, 5 Barb. (N. Y.) 63.

North Carolina. — *Roberts v. Welch*, 8 Ired. Eq. (43 N. Car.) 287; *Brown v. Becknall*, 5 Jones Eq. (58 N. Car.) 423; *Parker v. Banks*, 79 N. Car. 480; *Ray v. Pearce*, 84 N. Car. 485.

Pennsylvania. — See *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489.

South Carolina. — *Agnew v. Renwick*, 27 S. Car. 562. Compare *Drayton v. Marshall*, Rice Eq. (S. Car.) 373, 33 Am. Dec. 84.

Vermont. — *Martin v. Bowker*, 19 Vt. 526; *Atkinson v. Patterson*, 46 Vt. 750.

3. *Alabama*. — *Boyd v. Beck*, 29 Ala. 703, the court saying: "Until foreclosure the mortgagor owns the equity of redemption. This he may alien or transfer to another. It cannot be known, without some overt act, throwing off allegiance, that the mortgagor or his vendee is not quietly enjoying the possession of the equity of redemption, at all times acknowledging the rights of the mortgagee." Compare *Herbert v. Hanrick*, 16 Ala. 581; *Coyle v. Wilkins*, 57 Ala. 108.

Arkansas. — *Birnie v. Main*, 29 Ark. 591; *Coldcleugh v. Johnson*, 34 Ark. 312.

Illinois. — *Medley v. Elliott*, 62 Ill. 532.

Maine. — *Noyes v. Sturdivant*, 18 Me. 104.

Missouri. — *Wilkerson v. Allen*, 67 Mo. 502.

New Hampshire. — *Howard v. Hildreth*, 18 N. H. 105; *Sheafe v. Gerry*, 18 N. H. 245; *Tripe v. Marcy*, 39 N. H. 439.

South Carolina. — *Lynch v. Hancock*, 14 S. Car. 88.

Vermont. — *Richmond v. Aiken*, 25 Vt. 324.

4. *Wilkerson v. Allen*, 67 Mo. 502.

5. *England*. — *Leman v. Newnham*, 1 Ves. 51. *United States*. — *Hughes v. Edwards*, 9 Wheat. (U. S.) 406.

Alabama. — *Cook v. Parham*, 63 Ala. 456.

Kentucky. — *Stockton v. Johnson*, 6 B. Mon. (Ky.) 408.

Maine. — *Philbrook v. Clark*, 77 Me. 176.

Massachusetts. — *Bacon v. McIntire*, 8 Met. (Mass.) 87; *Cheever v. Perley*, 11 Allen (Mass.) 584.

Michigan. — *Abbott v. Godfroy*, 1 Mich. 179.

Missouri. — *Wilkerson v. Allen*, 67 Mo. 502.

New York. — *Park v. Peck*, 1 Paige (N. Y.)

Statutory Changes. — In many states there have been legislative enactments by which the statute of limitations is expressly made to govern equitable proceedings, and in these jurisdictions it is not necessary to rely upon the chancery doctrine of presumption of payment, but it is quite as necessary in a case of foreclosure as in any other legal action that suit be commenced within the time prescribed by the statute.¹ A foreclosure proceeding will not, as a rule, be barred within a shorter period than that prescribed by the statute of limitations;² and the same rule has been applied to redemption.³

c. SUBSTANTIVE MAXIMS — (1) *Equity Suffers No Wrong Without a Remedy* — (a) **In General.** — This is usually classed by text writers among the equitable maxims, though it is recognized as an application of the larger principle *ubi jus ibi remedium*.⁴ The principle of the maxim is not infrequently invoked by the courts,⁵ especially in dealing with newly created rights and duties.⁶ It is under this last phase of the principle that injunctions were granted by the federal courts to prevent railroad employees from refusing to perform their usual duties.⁷

477; *Heyer v. Pruyn*, 7 Paige (N. Y.) 465, 34 Am. Dec. 355.

Vermont. — *Martin v. Bowker*, 19 Vt. 526.

1. **Statutory Bar to Foreclosure** — *Alabama.* — *Coyle v. Wilkins*, 57 Ala. 108.

California. — *Boyd v. Blankman*, 29 Cal. 45, 87 Am. Dec. 146.

Iowa. — *Newman v. De Lorimer*, 19 Iowa 244; *Hendershott v. Ping*, 24 Iowa 134.

Mississippi. — *Benson v. Stewart*, 30 Miss. 49.

Wisconsin. — *Cleveland Ins. Co. v. Reed*, 24 How. (U. S.) 284.

2. *Richey v. Sinclair*, 167 Ill. 184; *Boon v. Pierpont*, 28 N. J. Eq. 7; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385. But compare *Castner v. Walrod*, 83 Ill. 171; *Sadler v. Kennedy*, 11 W. Va. 187. And in *Gould v. White*, 26 N. H. 178, it was held proper to consider the lapse of a shorter time in connection with other evidence as tending to show payment.

3. *Merriam v. Barton*, 14 Vt. 501.

4. **Where There Is a Right, There Is a Remedy.** — 1 Pom. Eq. Jur. (2d ed.), § 423.

5. *England.* — *Charitable Corp. v. Sutton*, 2 Atk. 406, Lord Hardwicke saying: "The tribunals of this kingdom are wisely formed both of courts of law and equity, and so are the tribunals of most other nations; and for this reason there can be no injury but there must be a remedy in all or some of them."

United States. — *Southern California R. Co. v. Rutherford*, 62 Fed. Rep. 796.

California. — *Wickersham v. Crittenden*, 93 Cal. 33, the court saying: "A court of equity will always find the means of enforcing its decrees against a delinquent defendant, and its power in this respect is as extensive as the exigencies of the case."

New Jersey. — *Britton v. Royal Arcanum*, 46 N. J. Eq. 112, 19 Am. St. Rep. 376.

New York. — *People v. Tweed*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 81. In *Hadden v. Spader*, 20 Johns. (N. Y.) 554, the court, per Woodworth, J., said: "It would be a matter of surprise as well as regret, if, in a system of jurisprudence that has been matured by the wisdom of ages, adequate remedies were not provided for the violation of every important civil right. Although this consideration will have no influence in deciding on a case where the power of the court to redress an alleged

wrong is drawn in question, it may nevertheless be useful in calling for the most careful and strict examination, before the point is conceded that there is no efficient remedy. The rules and maxims of a court of chancery are as fixed as those which govern inferior jurisdictions. To break in upon these rules because the court may deem it expedient and salutary, would justly excite alarm and be the source of incalculable evils. Every man of intelligence knows too well the value of stability and uniformity in judicial decisions to countenance for a moment any indirect attempt, under the semblance of resisting a particular mischief, to invade or encroach on the legislative power. To determine in every case the precise boundary may be a difficult and delicate task. Such a conflict, however, cannot be of frequent occurrence, because the general powers of courts are defined with sufficient accuracy to guard against an excess of jurisdiction."

6. *Joy v. St. Louis*, 138 U. S. 1; *Smith, etc., Mfg. Co. v. Mellon*, 58 Fed. Rep. 705; *Gibson v. Trinity County*, 80 Cal. 363; *Innes v. Lansing*, 7 Paige (N. Y.) 583, where Chancellor Walworth observed: "I regret that I am obliged to extend the jurisdiction of this court to this new class of cases. But whenever the legislature creates new rights in parties, for the protection and enforcement of which rights the common law affords no effectual remedy, and the statute itself does not prescribe the mode in which such rights are to be protected, this court, in the exercise of its acknowledged jurisdiction, is bound to give to a party the relief to which he is equitably entitled under the statute."

7. **Injunctions Against Railway Employees.** — *Southern California R. Co. v. Rutherford*, 62 Fed. Rep. 796, where the court said: "It is manifest that for this state of affairs the law neither civil nor criminal affords an adequate remedy. But the proud boast of equity is, *ubi jus, ibi remedium*. It is the maxim which forms the root of all equitable decisions. Why should not men who remain in the employment of another perform the duties they contract and engage to perform? It is certainly just and right that they should do so, or else quit the employment. And where the

(b) *Qualifications.* — But the application of this maxim in equity jurisprudence is far from universal; indeed, it has been squarely denied that the maxim is binding upon equity courts at all.¹ At any rate, it is only in a most general and not in a literal sense, that the maxim has force;² and not even courts of equity will now create new remedies.³ Thus, no matter how completely the machinery of the common law may fail to relieve a creditor of a municipal corporation, equity will not, as a rule, interfere through the medium of the extraordinary remedy of a receiver or similar means to collect the debt.⁴ As a rule, moreover, chancery will not interfere in merely political matters, like contested elections, even though the machinery provided by statute is lame and unsatisfactory.⁵ So it has been held that equity will not interfere to determine the validity of a county-seat removal,⁶ though there is authority opposed to this.⁷ Even where the suitor is clearly without relief at law, he will not be aided by chancery, unless he belongs to the class recognized by it as entitled to relief.⁸ Thus, a mere general creditor is not entitled to an injunction to prevent a debtor from transferring property, although the result will be to prevent the satisfaction of the claim. The suitor in such a case must be a lien creditor.⁹ Nor can a judgment creditor invoke the aid of equity to subject a chose in action of the debtor to the payment of the judgment, in the absence of some recognized ground of equity jurisdiction, such as fraud or trust.¹⁰

(2) *Equity Regards That as Done Which Ought to Have Been Done* ¹¹ —

(a) *Meaning and Scope of the Maxim.* — By some authorities this has been given the

direct result of such refusal works irreparable damage to the employer and at the same time interferes with the transmission of the mail and with commerce between the states, equity, I think, will compel them to perform the duties pertaining to the employment so long as they continue in it. If I unlawfully obstruct by a dam a stream of flowing water, equity, at the suit of the party injured, will compel me by injunction, mandatory in character, to remove the dam, and, prohibitory in character, from further interfering with the flow of the stream; and if I unlawfully erect a wall shutting out the light from another, equity will compel me to tear it down and to refrain from further interference with the other's rights. It is true that such cases are not precisely like the present one, yet the principle upon which the court proceeds in such cases is not substantially different." *Compare* Toledo, etc., R. Co. v. Pennsylvania Co., 54 Fed. Rep. 751.

1. Powers's Appeal, 125 Pa. St. 175, 11 Am. St. Rep. 882, the court saying: "The maxim of the common law that wherever there is a right there is a remedy for its infraction has never been adopted by courts of equity. A party whose right is clear may sleep upon it until his demand becomes stale. He may look on while valuable structures are erected, when he might successfully object, and remain silent until large sums have been expended or important intervening interests have grown up. In such cases the fact that he might have objected at the outset will not avail him. A suitor must not only appear in a court of equity with clean hands, but he must come with reasonable promptness, in good faith, and with a just and equitable demand; otherwise the conscience of the chancellor will not be moved. If an injunction is prayed for where upon a consideration of the whole case

it ought not in good conscience to issue, a mere legal right in the plaintiff will not move the chancellor."

2. "The maxims that every right has a remedy, and that where the law does not give redress equity will afford relief, however just in theory, are subordinate to positive institutions, and cannot be applied either to subvert established rules of law or to give the courts a jurisdiction hitherto unknown." *Greene v. Keene*, 14 R. I. 395, 51 Am. Rep. 400.

3. *Hedges v. Dixon County*, 150 U. S. 182. *Compare* *Heard v. Stamford*, 3 P. Wms. 412.

4. *Claims Against Municipalities — Inadequacy of Legal Remedy.* — *Rees v. Watertown*, 19 Wall. (U. S.) 107; *Thompson v. Allen County*, 115 U. S. 550; *Finnegan v. Fernandina*, 15 Fla. 379.

5. *Election Contests.* — *Moulton v. Reid*, 54 Ala. 320; *Moore v. Hoisington*, 31 Ill. 243; *Cochran v. McCleary*, 22 Iowa 75; *Hagner v. Heyberger*, 7 W. & S. (Pa.) 104, 42 Am. Dec. 220. *Compare* *Dickey v. Reed*, 78 Ill. 261.

6. *Hamilton v. Carroll*, 82 Md. 326.

7. *People v. Wiant*, 48 Ill. 263; *Boren v. Smith*, 47 Ill. 482.

8. "Counsel invokes the doctrine that, where a party has a clear, equitable right, a court of equity may invent an appropriate remedy. The insurmountable difficulty of doing so in the case at bar is the failure of Stearns and Spingarn to put themselves in a position to maintain such right in a court of equity." *Weber v. Weber*, 90 Wis. 467.

9. *Wiggins v. Armstrong*, 2 Johns. Ch. (N. Y.) 144; *Crowell v. Horacek*, 12 Neb. 622.

10. *Greene v. Keene*, 14 R. I. 388, 51 Am. Rep. 400.

11. *Different Forms.* — Mr. Pomeroy states this maxim as follows: "Equity regards and treats that as done which in good conscience ought to be done." 1 Pomeroy's Eq. Jur. (2d

place of first importance in the list of maxims.¹ In one aspect its meaning has been judicially declared to be that "the party to a contract, or his legal representatives, may insist upon being placed in a situation equally as advantageous as if the contract had been fulfilled,"² or, as more broadly stated elsewhere, it means that "whenever the holder of property is subject to an equity in respect of it, the court will, as between the parties to the equity, treat the subject-matter as if the equity had been worked out, and as impressed with the character which it would then have borne."³ But the maxim does not mean that equity looks upon that as done which merely might have been done, unless also it ought to have been done;⁴ but in order to prevent a party from profiting by his own wrong, he will be deemed to have done what he is bound to do.⁵ The maxim has, it has been held, "no application to errors and omissions in the record of judicial proceedings."⁶ It will not be applied "when it would injure third persons who have incurred detriment and acquired consequent rights by the acts that are done,"⁷ nor will it be invoked in favor of every one.⁸ But in actions involving contracts it is available to parties thereto,⁹ and may be waived by them.¹⁰

(b) **Equitable Conversion.** — One of the oldest and most familiar applications of this maxim is the doctrine of equitable conversion. Where a will, deed, or contract directs land to be converted into money, or money expended for land, the courts, in pursuance of the maxim, will treat the property as having that character which by the terms of the instrument it was directed to have.¹¹

(c) **Contracts to Convey.** — The maxim that equity regards as done that which ought to have been done finds a most important application in construing contracts for the conveyance of real property. Chancery, viewing such agreements as though the obligation imposed by them had been met, treats the vendee or contractee as the owner from the time of making the contract and as a trustee for the purchase money, while the vendor is regarded as holding the land in trust for the vendee until the time when the conveyance is finally and formally made.¹² In accordance with this principle such a contract passes to

ed.), § 364. Judge Story and Mr. Snell state it as follows: "Equity looks upon that as done which ought to have been done." 1 Story's Eq. Jur., § 64g; Snell's Eq. 37. Adams and Spence give the following forms: "What ought to be done is to be considered as done." 2 Spence's Eq. Jur. 253. "What ought to be done is considered in equity as done." Adams's Eq. 135. In *Burgess v. Wheate*, 1 W. Bl. 123, 1 Eden 177, the language is: "What ought to be done, or is agreed to be done, is looked upon as done." In *McCaig v. Woolf*, 42 Ala. 389, the court speaks of "the principle that a court of equity will presume that to be well done which ought to have been done," and applies it to the division of an estate by agreement instead of in the regular course of administration, which it says will be upheld in the absence of unfairness. In *Re Strand Music Hall Co.*, 14 W. R. 6, it was held that the principle of equity that "what is agreed to be done is considered as done," applies equally to companies as to individuals.

1. *Sourwine v. Supreme Lodge, etc.*, 12 Ind. App. 447.

2. *Gardiner v. Gerrish*, 23 Me. 46.

3. *Severens, J.*, in *Williamson v. Krohn*, 66 Fed. Rep. 655, quoting and approving Adams's Eq. 135.

In *Daggett v. Rankin*, 31 Cal. 327, the court said: "The maxim of equity upon which this

doctrine rests is that equity looks upon things agreed to be done as actually performed; the true meaning of which is that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been." See this case approved in *Beverly v. Blackwood*, 102 Cal. 83.

4. *Com. v. Martin*, 5 Munf. (Va.) 122; *Burgess v. Wheate*, 1 W. Bl. 127, 1 Eden 177; 1 Pomeroy's Eq. Jur. (2d ed.), § 365.

5. *London, etc., R. Co. v. South Eastern R. Co.*, (1892) 1 Ch. 143. Compare *Moore v. Crawford*, 130 U. S. 122.

6. *Deady, J.*, in *King v. French*, 2 Sawy. (U. S.) 445, adding: "If this were otherwise, there would be no necessity for applications to courts to amend the records of their proceedings, or for leave to make entries *nunc pro tunc*."

7. *Casey v. Cavaroc*, 96 U. S. 491.

8. *Com. v. Martin*, 5 Munf. (Va.) 122.

9. *In re Anstis*, 31 Ch. Div. 605.

10. *Gardiner v. Gerrish*, 23 Me. 51.

11. See the title CONVERSION AND RECONVERSION, vol. 7, p. 463.

12. **Contract to Convey Carries Equitable Title** — *England*. — *Green v. Smith*, 1 Atk. 572; *Pollexfen v. Moore*, 3 Atk. 272; *Revell v. Hussey*, 2 B. & B. 283, 12 Rev. Rep. 87; *Paine v. Meller*, 6 Ves. Jr. 349; *Rose v. Cuninghame*, 11

the heir¹ or devisee² of the vendee or contractee, since in contemplation of equity it is an interest in real estate. Then if meanwhile the contractor should convey or contract to convey the property to a third party with notice of the contract, the latter would obtain no rights as against the original contractee, whose title had already vested in equity;³ and in this respect the judgment creditor has no better standing than such a purchaser.⁴

Losses Prior to Conveyance. — The doctrine by which the contractee is treated as the equitable owner is a reciprocal one and affords him disabilities as well as benefits;⁵ for while he is protected against subsequent conveyances by the contractor and is entitled to any increase in the value of the property which forms the subject of the contract, he must also bear the loss or deterioration which it may undergo and the burdens to which it may be subjected.⁶

(d) **Miscellaneous Applications.** — The maxim has also been frequently applied in cases not falling strictly within the foregoing classes, but where some act necessary to the rights of the parties had been omitted.⁷

Ves. Jr. 550; *Cass v. Rudele*, 2 Vern. 280; *Farrar v. Winterton*, 5 Beav. 1. *Harford v. Purrier*, 1 Madd. 532.

United States. — *Smith v. Burnham*, 3 Sumn. (U. S.) 461, the court saying: "A contract for the conveyance of lands is a contract respecting an interest in lands. It creates an equitable estate in the vendee in the very lands, and makes the vendor a trustee for him."

Illinois. — *Dougherty v. Catlett*, 129 Ill. 438; *Vail v. Drexel*, 9 Ill. App. 448; *Atchison, etc., R. Co. v. Chicago, etc., R. Co.*, 54 Ill. App. 395, 411.

Kansas. — *Douglas County v. Union Pac. R. Co.*, 5 Kan. 623. The attempt in this case to limit the doctrine to contracts where time is not of the essence is criticised by Pomeroy in his *Equity Jurisprudence*, vol. 1, p. 401.

Maryland. — *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582; *McRae v. McRae*, 78 Md. 270; *Hampson v. Edelen*, 2 Har. & J. (Md.) 66, 3 Am. Dec. 530.

Massachusetts. — *Felch v. Hooper*, 119 Mass. 56.

Nebraska. — *Hendrix v. Barker*, 49 Neb. 369; *Gardels v. Kloeke*, 36 Neb. 493; *Dorsey v. Hall*, 7 Neb. 460.

New Jersey. — *Haughwout v. Murphy*, 22 N. J. Eq. 546; *Huffman v. Hummer*, 17 N. J. Eq. 267; *Crawford v. Bertholf*, 1 N. J. Eq. 458.

New York. — *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 398, 10 Am. Dec. 343; *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 312; *Swartwout v. Burr*, 1 Barb. (N. Y.) 495; *Seaman v. Van Rensselaer*, 10 Barb. (N. Y.) 86; *Worrall v. Munn*, 38 N. Y. 142.

Pennsylvania. — *Siter, etc., Co.'s Appeal*, 26 Pa. St. 178; *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526; *Richter v. Selin*, 8 S. & R. (Pa.) 425.

Hawaii. — *Lathrop v. Wood*, 1 Hawaiian 75. See the title VENDOR AND PURCHASER.

1. *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 398, 10 Am. Dec. 343.

2. *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 312.

3. *Snowman v. Harford*, 57 Me. 397, the court saying: "Neither does it make any difference that the defendant had contracted to make the conveyance to Saddler before the commencement of the plaintiff's process. Long before that he had made a contract to

convey to the plaintiff, which contract the court, upon a full hearing, have held him bound in equity to fulfil. He could not subsequently make any effectual agreement in violation of the plaintiff's rights; and Saddler's remedy, if the bargain was made on Saddler's part in good faith, must be by suit against the defendant for the breach of a contract which he could not make good." See also *Hoagland v. Latourette*, 2 N. J. Eq. 254; *Downing v. Risley*, 15 N. J. Eq. 93.

4. *Hoagland v. Latourette*, 2 N. J. Eq. 254.

5. "Equity looks upon things agreed to be done as actually performed. Consequently, when a contract is made for the sale of land, equity considers the vendee as the purchaser of the estate sold, and the purchaser as a trustee for the vendor for the purchase money. So much is the vendee considered, in contemplation of equity, as actually seized of the estate, that he must bear any loss which may happen to the estate between the agreement and the conveyance, and he will be entitled to any benefit which may accrue to it in the interval; because by the contract he is the owner of the premises, to every intent and purpose, in equity." *Richter v. Selin*, 8 S. & R. (Pa.) 425.

6. *Rawlins v. Burgis*, 2 Ves. & B. 382; *Rose v. Cunynghame*, 11 Ves. Jr. 550; *Cass v. Rudele*, 2 Vern. 280; *Mortimer v. Capper*, 1 Bro. C. C. 156; *Coles v. Trecothick*, 9 Ves. Jr. 234; *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582; *Richter v. Selin*, 8 S. & R. (Pa.) 440; *Paine v. Meller*, 6 Ves. Jr. 349; *Hawkes v. Eastern Counties R. Co.*, 1 De G. M. & G. 737. See also *Harford v. Purrier*, 1 Madd. 532.

For Further Discussion of this doctrine, see the title VENDOR AND PURCHASER. Compare *Petre v. Eastern Counties R. Co.*, 1 Eng. Ry. & C. Cas. 462.

7. **For Other Instances** than those mentioned in the succeeding notes see *Williamson v. Krohn*, 66 Fed. Rep. 655; *Whitney v. Marshall*, 138 Ind. 472; *Beverly v. Blackwood*, 102 Cal. 83; *Taylor v. Russell*, 119 N. Car. 30; *Jordan v. Cooper*, 3 S. & R. (Pa.) 585.

Illustrations. — Thus, the delivery of a deed which actually remained in the custody of the grantor, *Marvin v. Stimpson*, 23 Colo. 174; the issue of a land patent, *Newkirk v. Marshall*, 35 Kan. 77; the execution of a mortgage agreed to be given, *Hall v. Hall*, 50 Conn. 111; the

(e) **Equitable Mortgages.** — The doctrine that equity regards as done that which ought to have been done is often advanced as the basis for equitable mortgages. These are peculiar creations of courts of chancery, and they are based upon the theory that where parties have bound themselves to execute a mortgage they will be considered as having done so, though some of the formal and even essential steps therein have been omitted.

Agreements to Mortgage. — On this ground mere agreements to mortgage have been treated as mortgages.¹

Deposit of Title Deeds — Statute of Frauds. — Some courts have carried the rule even further, and have held that a simple deposit of title deeds or papers for the purpose of securing a debt would constitute a mortgage.² But this doctrine of mortgage by deposit of title deeds has been justly criticised as a practical repeal of the statute of frauds, and though established in *England*, where the system of registration of title differs from that prevailing in the United States, it has occasioned even there expressions of disfavor on the part of eminent judges.³ In the *United States* it has been repudiated in a

procurement of an insurance policy by a mortgagor in favor of a mortgagee, *Ames v. Richardson*, 29 Minn. 333; the transfer of stock where the transferor had used all possible efforts to comply with the necessary formalities, *Basting v. Northern Trust Co.*, 61 Minn. 307; the signing of a partnership account or conversion by one partner, *Coventry v. Barclay*, 3 De G. J. & S. 320; were all treated by the court as accomplished facts in accordance with the maxim, though in reality in each instance they had been left undone.

Where a wife advanced money to her husband for the purpose of enabling him to procure assignments to her of mortgages upon his real estate, this was treated as having been done, though the money was in fact used to pay off the mortgages. *Alden v. Barnard*, 15 Misc. Rep. (N. Y. Supreme Ct.) 512.

The maxim has also been so applied that the court considered that as not having been done which ought not to have been done; and where certain moneys, the proceeds of fire-insurance policies which had been assigned, were deposited by mistake in a bank which was a creditor of the assignor, it was held that such deposit would be disregarded, so as to give the assignee priority over the bank. *Farmers', etc., Bank v. Farwell*, 58 Fed. Rep. 633.

Where a member of an insurance order had asked for and complied with the requirements for transfer to a different class of membership, he was held to come within the maxim, and his beneficiaries were allowed to recover for insurance of that class. *Sourwine v. Supreme Lodge, etc.*, 12 Ind. App. 447.

But the maxim will not be applied so as to justify a court in assuming that assessments have been paid by a member because they ought to have been, nor that he was suspended because the facts would authorize a suspension. *Osterman v. District Grand Lodge No. 4, etc.*, (Cal. 1896) 43 Pac. Rep. 412.

1. Agreements to Mortgage Considered as Mortgages — *Alabama*. — *Morrow v. Turney*, 35 Ala. 131. Compare *Coster v. Georgia Bank*, 24 Ala. 59.

Arkansas. — *Richardson v. Hamlett*, 33 Ark. 237.

California. — *Daggett v. Rankin*, 31 Cal. 321. Compare *Racouillat v. Sansevain*, 32 Cal. 376.

Connecticut. — *Hall v. Hall*, 50 Conn. 111.

Georgia. — *English v. McElroy*, 62 Ga. 415.

Missouri. — *McQuie v. Peay*, 58 Mo. 56.

Compare *Hackett v. Watts*, 138 Mo. 502.

New York. — *In re Howe*, 1 Paige (N. Y.) 125, 19 Am. Dec. 395; *Burdick v. Jackson*, 7 Hun (N. Y.) 488; *Sprague v. Cochran*, 144 N. Y. 112.

Ohio. — *Cotterell v. Long*, 20 Ohio 464.

South Carolina. — *Delaire v. Keenan*, 3 De-
saus (S. Car.) 74, 4 Am. Dec. 604.

West Virginia. — *Wayt v. Carwithen*, 21
W. Va. 516.

United States. — *Wright v. Shumway*, 1
Biss. (U. S.) 23.

The case of *Humphreys v. Snyder*, 1 Morr. (Iowa) 263, appears to be in conflict with the foregoing.

See the title EQUITABLE MORTGAGES, *ante*.

2. Mortgage by Deposit of Title Deeds — *England*. — *Russell v. Russell*, 1 Bro. C. C. 269 (deposit of lease); *Plumb v. Fluitt*, Anstr. 432; *Keys v. Williams*, 3 Y. & Coll. 55; *Shaw v. Foster*, L. R. 5 H. L. 321; *De Rochefort v. Dawes*, L. R. 12 Eq. 540; *Ex p. Wetherell*, 11 Ves. Jr. 398.

United States. — *First Nat. Bank v. Caldwell*, 4 Dill. (U. S.) 314. This was a case arising under the laws of *Nebraska*, and while the court disclaimed an intention to pass on the doctrine of mortgages by deposit of title deeds, the decision may be fairly claimed as in favor of that doctrine. Compare *Meador v. Everett*, 3 Dill. (U. S.) 214.

New Jersey. — *Gale v. Morris*, 29 N. J. Eq. 222; *Griffin v. Griffin*, 18 N. J. Eq. 104; *Robinson v. Urquhart*, 12 N. J. Eq. 523.

New York. — *Rockwell v. Hobby*, 2 Sandf. Ch. (N. Y.) 10; *Jackson v. Dunlap*, 1 Johns. Cas. (N. Y.) 114, 1 Am. Dec. 100; *Chase v. Peck*, 21 N. Y. 584; *Jackson v. Parkhurst*, 4 Wend. (N. Y.) 369.

Rhode Island. — *Hackett v. Reynolds*, 4 R. I. 512.

South Carolina. — *Hutzler v. Phillips*, 26 S. Car. 139, 4 Am. St. Rep. 687; *Welsh v. Usher*, 2 Hill Eq. (S. Car.) 170, 29 Am. Dec. 63.

Wisconsin. — *Jarvis v. Dutcher*, 16 Wis. 307; *Mowry v. Wood*, 12 Wis. 413.

3. *Ex p. Mountfort*, 14 Ves. Jr. 606; *Ex p. Hooper*, 1 Meriv. 7; *Ex p. Coombe*, 17 Ves. Jr. 369; *Ex p. Whitbread*, 1 Rose 299.

majority of those jurisdictions where it has thus far been passed upon.¹ Under the prevailing rule, therefore, it will not be permitted to apply the maxim now under discussion to the extent of nullifying or even impairing the statute of frauds.

Intention. — Neither will it authorize a court to create a mortgage where the parties themselves have done nothing to accomplish that result.² There must at least be an intention to create a mortgage (*i. e.*, a specific charge on the land), and this must be clear and unequivocal.³

(3) *Equity Regards the Substance and Intent, Not the Form* — (a) **Generally.** — This maxim is not usually expressed in the combined form as above, but either in the phrase, "Equity regards the substance and not the form,"⁴ or, "Equity regards the intent and not the form;"⁵ but as the meaning is much the same in either case, the principle of the maxim probably finds its fullest expression in the combined form. The doctrine herein embodied is an epitome of the method employed by chancery in solving the problems presented to it, and signifies the purpose of that forum to consider transactions purely upon their merits, and apart from formality, technicality, or other disguise by which they may be surrounded. The maxim is one of frequent application, though less often embodied than others in judicial opinions. A collection of cases which both quote and apply it will be found in the notes.⁶

(b) **Equitable Mortgages.** — A common application of the maxim is in the case

1. **Doctrine of Mortgage by Deposit of Title Deeds Repudiated** — *Alabama.* — *Lehman v. Collins*, 69 Ala. 132.

Georgia. — *Davis v. Davis*, 88 Ga. 191. Compare *English v. McElroy*, 62 Ga. 413. But see *Smith v. Rogers*, 16 Ga. 479.

Kentucky. — *Vanmeter v. McFaddin*, 8 B. Mon. (Ky.) 435.

Maine. — *Hall v. McDuff*, 24 Me. 311.

Minnesota. — *Gardner v. McClure*, 6 Minn. 250.

Mississippi. — *Gothard v. Flynn*, 25 Miss. 58; *Connor v. Tippet*, 57 Miss. 594. But see *Williams v. Stratton*, 10 Smed. & M. (Miss.) 418.

Missouri. — *Doubted in Curle v. Eddy*, 24 Mo. 117, 66 Am. Dec. 699; *Hackett v. Watts*, 138 Mo. 502.

Nebraska. — *Bloomfield State Bank v. Miller*, (Neb. 1898) 75 N. W. Rep. 569.

North Carolina. — *Harper v. Spainhour*, 64 N. Car. 629.

Ohio. — *Probasco v. Johnson*, 2 Disney (Ohio) 96.

Pennsylvania. — *Bower v. Oyster*, 3 P. & W. (Pa.) 239; *Shitz v. Dieffenbach*, 3 Pa. St. 233.

Tennessee. — *Meador v. Meador*, 3 Heisk. (Tenn.) 562.

Vermont. — *Doubted in Bicknell v. Bicknell*, 31 Vt. 498.

See the title **EQUITABLE MORTGAGES**, *ante*.

2. **Intention.** — *Boehl v. Wadgymer*, 54 Tex. 589; *Price v. Cutts*, 29 Ga. 146, 74 Am. Dec. 52; *Forest Lawn Co. v. Hanley*, 94 Wis. 23.

3. *New Orleans Nat. Banking Assoc. v. Adams*, 109 U. S. 211; *Biebinger v. Continental Bank*, 99 U. S. 143; *Gilkerson v. Connor*, 24 S. Car. 321.

See the title **EQUITABLE MORTGAGES**, *ante*.

4. **Phraseology.** — "Equity looks through forms to substance." *Chase, C. J.*, in *Texas v. Hardenberg*, 10 Wall. (U. S.) 89. See also *Craig v. Leslie*, 3 Wheat. (U. S.) 577; *Badgerow v. Manhattan Trust Co.*, 64 Fed. Rep.

938; *Dodd v. Wilson*, 4 Del. Ch. 114, 408; *Stockton v. Central R. Co.*, 50 N. J. Eq. 73; *St. Louis, etc., R. Co. v. Gracy*, 126 Mo. 485.

"Looking, as equity always does, to substance and not shadows, to the thing done and not the misnomer of that thing." *Jackson, C. J.*, in *Sandeford v. Lewis*, 68 Ga. 484.

5. "Equity looks beyond the form of a transaction and shapes its judgments in such a way as to carry out the purposes of the parties to the agreement, and to protect each of them against any unconscionable advantage to be derived from the apparent form in which their transaction has taken place." *Campbell v. Freeman*, 99 Cal. 546.

"It is a maxim in equity that it looks to the intent and not to the form. It always looks at the substance of things, and attempts to reach that, and to enforce the rights and duties which spring from that and the real intent of the parties. As well said by Mr. Pomeroy: 'It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction. The principle of looking after the intent and giving it effect was fully recognized and distinctly formulated at an early day.'" *Varner v. Rice*, 44 Ark. 251.

6. **General Applications** — *United States.* — *Texas v. Hardenberg*, 10 Wall. (U. S.) 89; *Craig v. Leslie*, 3 Wheat. (U. S.) 578; *Badgerow v. Manhattan Trust Co.*, 64 Fed. Rep. 938; *U. S. v. Shapleigh*, 54 Fed. Rep. 130.

California. — See *Campbell v. Freeman*, 99 Cal. 546.

Delaware. — *Dodd v. Wilson*, 4 Del. Ch. 114, 408.

Georgia. — *Sandeford v. Lewis*, 68 Ga. 484.

Missouri. — *Pomeroy v. Benton*, 57 Mo. 551.

Nevada. — *Hardin v. Emmons*, (Nev. 1898) 53 Pac. Rep. 854.

New Jersey. — *Stockton v. Central R. Co.*, 50 N. J. Eq. 73.

Ohio. — *Meier v. Cardington First Nat. Bank*, 55 Ohio St. 460.

of equitable mortgages. Courts of law determine whether or not an instrument is a mortgage by considering its form and the closeness with which it conforms to prescribed standards. But equity often disregards these tests and settles the question according to the nature of the transaction and the intent of the parties thereto.¹ It is on this principle that a conveyance absolute on its face but intended as security is treated as a mortgage,² even though not issuing from the debtor,³ and that an incomplete agreement may be given the same effect.⁴

(c) **Penalties.** — The maxim now under discussion finds another illustration in the doctrine by which damages agreed upon as the result of a breach of contract may be viewed as a penalty and enforced only to the extent of actual injury.⁵

(d) **Usury.** — The principle of the maxim is not infrequently used by courts of law as well as of equity in determining whether a transaction is usurious, and though "countless are the devices by which usurers endeavor to avoid the provisions of the statute,"⁶ the spirit and purpose of the transaction will be considered to the exclusion of the form.⁷

(e) **Miscellaneous Cases.** — The maxim has also been expressly applied in construing contracts of suretyship,⁸ trusts⁹ and leases,¹⁰ and in establishing equitable liens.¹¹

1. Test of Mortgage in Equity. — *Flagg v. Mann*, 2 Sumn. (U. S.) 533. See also *Stinchfield v. Milliken*, 71 Me. 567; *Delaire v. Keenan*, 3 Desaus. (S. Car.) 74, 4 Am. Dec. 604; *In re Alison*, 11 Ch. Div. 284. See the title **EQUITABLE MORTGAGES**, *ante*, p.

The reservation by a vendor of land of a lien on the crops to be raised thereon in certain years for payment of the purchase money creates an equitable mortgage, which attaches as soon as the crops come into existence; and it is immaterial that the lien is called "a landlord's lien," as equity looks through the form to the substance of the agreement. *Martin v. Schichtl*, 60 Ark. 595.

2. *In re Alison*, 11 Ch. Div. 284; *Stinchfield v. Milliken*, 71 Me. 567; *Campbell v. Freeman*, 99 Cal. 546.

3. *Stinchfield v. Milliken*, 71 Me. 567, the court saying: "Although different at law, in equity a mortgage is not prevented because the conveyance does not come from the equitable mortgagor. It is sufficient that the debtor has an interest in the property conveyed, either legal or equitable. Having such an interest, if he procures a conveyance to one who advances money upon it for him, taking the property as security for the money advanced, he has a right to redeem. The grantee in such case, acquiring the title by his act, holds it as his mortgagee." *Jones on Mort.* (2d ed.), § 331; *Stoddard v. Whiting*, 46 N. Y. 627; *Carr v. Carr*, 52 N. Y. 251."

4. *Delaire v. Keenan*, 3 Desaus. (S. Car.) 74, 4 Am. Dec. 604. And see the title **EQUITABLE MORTGAGES**, *ante*.

5. Penalty — Liquidated Damages. — *Sloman v. Walter*, 1 Bro. C. C. 418, where an injunction was granted against enforcing the penalty of a bond, the court saying: "The rule that where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred, is too strongly

established in equity to be shaken." See also the title **LIQUIDATED DAMAGES**.

6. 3 *Parsons on Contracts* (8th ed.) 108.

7. See the title **USURY**.

8. Suretyship. — "A court of equity will look to the substance and purpose of a transaction without respect to the legal forms under which it is clothed. This is especially true in the case of suretyship, with respect to which, whatever may be the form of the instrument or the obligations of the parties on the face of the instrument or in a court of law, a court of equity will always inquire into the real nature and objects of the transaction and afford relief accordingly." *Dodd v. Wilson*, 4 Del. Ch. 108, 399. See the title **SURETYSHIP**.

9. "Equity looks through forms to substance; and the substance of this transaction clearly was the substitution of one set of securities in the hands of the comptroller of the treasury for another, for the benefit of the parties really entitled." *Texas v. Hardenberg*, 10 Wall. (U. S.) 68. See the title **TRUSTS AND TRUSTEES**.

10. Railway Leases. — "Equity looks at the substance, not merely the outward form. The transaction of the 12th of January, 1892, between the three defendants consists, in form, of a lease between two of them, and a guaranty of that lease, coupled with a traffic agreement to which all three of them are parties. Such is the form. But when the fact that a law which, in its terms, prohibits a lease to a foreign corporation without legislative sanction is contemplated, and regard is had to the characters and relations of the contracting parties, and to the terms of the instruments they have entered into, and the simultaneous execution of those instruments, a substantial status differing from the form is disclosed." *Stockton v. Central R. Co.*, 50 N. J. Eq. 73.

11. Equitable Liens. — *Badgerow v. Manhattan Trust Co.*, 64 Fed. Rep. 931, the court saying: "It must be remembered that the form of the agreement which creates a lien is not as material as the ultimate intent of the parties."

(4) *Equity Imputes an Intent to Fulfil an Obligation.*¹ — The most important application of this maxim is the doctrine of resulting trusts,² according to which one who acquires property impressed with a trust character is treated as a trustee in respect thereto. There are few cases which both quote and apply this maxim.

(5) *Equality Is Equity* — (a) **In General.** — As in the case of the others, the principle embodied in this maxim is very ancient,³ though the phraseology⁴ is not always the same.

(b) **Joint Estates.** — Formerly one of the most important applications of this maxim was in cases where there were several owners of property, and in pursuance of the maxim courts of equity preferred to give such owners the status of tenants in common rather than that of joint tenants.⁵

(c) **Insolvency** — *aa.* **PREFERENCE OF CREDITORS.** — In more recent years this maxim seems to have met with most extensive application in the settlement of the affairs of insolvent debtors.⁶ The maxim itself is directly opposed to the common-law toleration of preferring creditors;⁷ and after the aid of equity has been once invoked, a creditor will not usually be permitted to obtain a preference, even by pursuing a legal remedy.⁸

Equity looks through form to substance. If the intent to charge designated property is established the lien follows. 3 Pom. Eq. Jur., § 1237." See the title LIENS.

1. **Meaning of the Maxim.** — "This principle is the statement of a general presumption upon which a court of equity acts. It means that wherever a duty rests upon an individual, in the absence of all evidence to the contrary, it shall be presumed that he intended to do right rather than wrong; to act conscientiously rather than with bad faith; to perform his duty rather than to violate it." 1 Pomeroy's Eq. Jur. (3d ed.), § 420.

"What is meant by this maxim is that when a person covenants to do an act, and he does that which may either wholly or partially be converted to or towards a completion of the covenant, he shall be presumed to have done it with that intention." Bispham's Principles of Equity (5th ed.), § 46.

2. See the title IMPLIED TRUSTS.

3. **Equality Is Equity.** — For an early instance see *Petit v. Smith*, 1 P. Wms. 7 (1695). Compare *Plunket v. Penon*, 2 Atk. 291; *Codwise v. Gelston*, 10 Johns. (N. Y.) 518.

4. "It was said by Lord Somers that equity did delight in equality, and that the distribution according to the statute was most agreeable to natural justice." *Petit v. Smith*, 1 P. Wms. 7.

5. **Tenancies in Common Preferred.** — The leading case is *Lake v. Gibson*, 1 Eq. Cas. Ab. 294, Pl. 3, 1 White & T. L. Cas. 215, where Sir Joseph Jekyll, Master of the Rolls, held: "When two or more purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, * * * this is a joint tenancy; that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other; but where the proportions of the money are not equal, and this appears in the deed itself, this makes them in the nature of partners; and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the others, in proportion to the sums advanced by each of them." See

also *Rigden v. Vallier*, 2 Ves. 252; *Morley v. Bird*, 3 Ves. Jr. 629.

Mr. Pomeroy, in his work on *Equity Jurisprudence* (2d ed., vol. 1, § 408), observes regarding this maxim: "One of the most remarkable illustrations of the principle, being in direct antagonism with a specially favorite dogma of the old common law, is seen in the preference which equity gives to ownership in common over joint ownership of lands." See also *Watkins v. Turner*, 34 Ark. 682. See the title JOINT TENANTS AND TENANTS IN COMMON.

6. **"In the Distribution of Property Among Creditors equality is equity."** Swayne, J., in *International Bank v. Sherman*, 101 U. S. 403. See the titles ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 1; INSOLVENCY AND BANKRUPTCY.

7. **Changes Common Law.** — "The right to prefer creditors is an infirmity still remaining in the body of the common law. It is contrary to the letter and spirit of the maxim that equality is equity. It is condemned in all our state insolvent laws. The federal bankrupt laws have never omitted to annex penalties to its exercise. It makes our law in relation to voluntary assignments a poor, lame piece of legislative work, intended only for debtors who desire to deal fairly with their creditors. It is the result, very often, not of the voluntary choice of debtors already weak and discouraged, but of persistent and harassing importunities or of flattering promises which often amount to fraudulent bargains. Creditors may accept preferences, but they cannot accept them in consideration of promises, express or implied, to further the plans of the debtor to hinder, delay, or defraud other creditors. The law favors the diligent and active creditor, but it warns him that he can enter into no bargain or plan the object of which is not the collection of his own debt solely, but in part the defeat of some one else equally worthy with himself." J. W. Butler Paper Co. v. Robbins, 151 Ill. 632.

8. *Roseboom v. Whittaker*, 132 Ill. 81; *Russell v. Chicago Trust, etc.*, 139 Ill. 549;

Bankruptcy. — The maxim is applied in bankruptcy and similar proceedings.¹

bb. RECEIVERSHIPS. — Receiverships are to be conducted, if possible, in accordance with this maxim, and the creditors whom the receiver represents will generally be required to share equally.² Indeed it is one of the prime purposes of a receivership to insure that equal distribution which this maxim requires.³ In winding up the affairs of an insolvent bank, the court, in accordance with this maxim, decided that the holders of protested notes were entitled to no priority over others whose notes had not been protested, but that all note holders were to be paid ratably.⁴

cc. CONVERSE OF RULE. — The equality among creditors which this maxim insures is an equality of burden as well as of benefit. And where a mortgage intended as a preference of one creditor was declared a general assignment for the benefit of all, the expenses of the litigation by which the funds were brought into court were charged ratably upon all the creditors, including the original mortgagee, who elected to share with the others.⁵

(d) **Contribution.** — Another important application of this maxim is found in the equitable doctrine of contribution.⁶ And in those jurisdictions where the doctrines of equity prevail over the rules of law this maxim is applied in the ordinary action for contribution by a surety who has paid the debt,⁷ and he will not be limited in his recovery against a sole resident cosurety to the latter's

Breed v. Glasgow Invest. Co., 71 Fed. Rep. 903; *Matter of Thompson*, 10 N. Y. App. Div. 40. Compare *Chicago Title, etc., Co. v. Smith*, 158 Ill. 417; *Myers v. Myers*, 18 Misc. Rep. (N. Y. Supreme Ct.) 663.

1. **Bankruptcy.** — *International Bank v. Sherman*, 101 U. S. 403; *In re Sands Ale Brewing Co.*, 3 Biss. (U. S.) 175. See the title *INSOLVENCY AND BANKRUPTCY*.

2. **Maxim Applied to Receivers.** — "The rule in the administration of insolvent estates is that equality is equity, and the burden of proof is on the claimant to show the facts which entitle him to claim as owner and not merely as a creditor. The receiver represents all the creditors, in a general sense; and the presumption, in the absence of proof, as between different claimants is in favor of equality of right. The petitioner has shown no facts entitling him to the securities in question to the exclusion of other owners of trust funds similarly situated. While the owners of one or more trust funds may trace their money into specific property purchased with them, or it may be in part with them and funds of the trustee, each party, in order to assert and enforce his equitable rights as owner, can do so only upon proof of the amount contributed by each, of their respective funds, in the purchase. Each claimant is entitled to his own, but only upon clearly identifying it; and, failing to do this, he cannot be allowed to take property which equitably belongs to others, to make himself whole. He cannot maintain his position as owner by merely showing facts which entitle him to the position of a mere creditor." *Burnham v. Barth*, 89 Wis. 362. See the title *RECEIVERS*.

3. *Blum v. Van Vechten*, 92 Wis. 378, the court saying: "There is nothing in the case to show that the court, upon the admitted insolvency of the partnership, ought not to have appointed the defendant receiver, in order to wind up and settle its affairs and apply the firm property equally to the payment of the partnership creditors. Equality is equity, and

we fail to perceive any reason for saying that such a proceeding is either fraudulent or void." See the title *RECEIVERS*.

4. *Shepherd v. Guernsey*, 9 Paige (N. Y.) 357.

5. **Equality of Burden.** — *Anniston L. & T. Co. v. Ward*, 108 Ala. 85, where it was observed: "The general principle cannot be doubted that a trust fund must bear the expenses of its administration, and all who claim benefits from it must contribute proportionately to the expenses. This is but a just application of the maxim that equality is equity. The litigation by which the fund was brought into court for administration was necessitated by the delinquency of the appellant, and it is not reasonable or equitable that the creditors who were compelled into it should bear its burdens exclusively, while the appellant shares in its benefits. If the appellant had not intervened, and intervened in the only capacity in which there could be intervention — that of an unpreferred creditor, a creditor claiming the equality and the trust the statute creates — there could not have been participation in the fund the court was administering. The intervention placed the appellant on terms of equality with the other creditors — equality of burden as well as of benefit. *Internal Imp. Fund v. Greenough*, 105 U. S. 527; *Central R., etc., Co. v. Pettus*, 113 U. S. 116."

6. **Contribution.** — *Hawker v. Moore*, 40 W. Va. 49; *Norton v. Coons*, 6 N. Y. 33, the court saying: "The doctrine of contribution was first established and enforced in equity. It rested upon, and resulted from, the maxim that 'equality is equity.' This principle has been so long established that persons becoming bound as sureties for a principal debtor are regarded as acting under a contract implied from the settled rules which regulate their liability to each other. *Craythorne v. Swinburne*, 14 Ves. Jr. 169." See the title *CONTRIBUTION AND EXONERATION*, vol. 7, p. 325.

7. *Norton v. Coons*, 6 N. Y. 33; *Wells v. Miller*, 66 N. Y. 255.

aliquot proportion of the liability.¹

(e) **Subrogation.** — Subrogation is another equitable doctrine which finds one of its ultimate sources in this maxim. And where one has been compelled to pay the debt of another, equity, applying the maxim, will permit him to be subrogated as far as possible to the rights and remedies of the creditor.²

(f) **Wills.** — The principle that "equality is equity" has been applied in the construction of a will. And where a testator had loaned a large sum of money to one child and made a general bequest of the entire estate to all the children it was held that the bequest would not be treated as an extinguishment of the debt, but that all the devisees would be required to share in accordance with the will, taking into account the previous loan.³ But this maxim has no application in the construction of wills where a contrary intent on the part of the testator is clearly mentioned.⁴

(g) **Inverse Liability of Stockholders.** — On account of the necessity of applying this maxim it has been held that the statutory liability of stockholders cannot be enforced in a court of law, but that the suitor must resort to equity where the benefits of the maxim are available.⁵

(6) *Where the Equities Are Equal the Law Will Prevail.* — This maxim is closely connected with the succeeding one, and indeed has been termed its complement.⁶ Like the other, it is one of great importance and much quoted by the courts.⁷

Rival Claims to Mortgage — Assignment. — A recent application of it was in determining the rival claims of two parties to the same mortgage, each having advanced money to a third party to be invested therein, but one of them hav-

1. *Faurot v. Gates*, 86 Wis. 569. See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 325. Compare *Hawker v. Moore*, 40 W. Va. 49.

2. **Subrogation.** — *Hawker v. Moore*, 40 W. Va. 49, the court saying: "The doctrine is eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, and is one, therefore, which is much encouraged and protected. 'Equality is equity' is on this branch its maxim. It springs naturally out of the two equities of contribution and exoneration, and is in fact one of the means by which those equities are enforced. Bisp. Pr. Eq. (4th ed.), § 325; *Dering v. Winchelsea*, 1 Cox 318; *Pendlebury v. Walker*, 4 Y. & Coll. 441; *Steel v. Dixon*, 17 Ch. Div. 825; *Brett L. Cas. in Mod. Eq.* (2d ed.) 285, notes." See the title SUBROGATION.

3. **Wills.** — *Glover v. Patten*, 165 U. S. 394. See the title WILLS.

4. *Condell v. Glover*, 56 Ill. App. 107, the court saying: "The maxim that equality is equity and means shares equalized by deducting advancements, and the rule that advancements shall be brought into hotchpot, has, moreover, no application against the manifest intention of the testator to the contrary, and here we think a contrary intention is manifested."

5. **Maxim Requires Resort to Equity.** — *Smith v. Huckabee*, 53 Ala. 191; *Friend v. Powers*, 93 Ala. 114. Compare *Farmers L. & T. Co. v. Funk*, 49 Neb. 353. In the case first cited the court, *per* Brickell, C. J., said: "The statutory liability is an additional security for the corporate debts, springing up on the dissolution of a corporation, to which the legislature intended the principle that equality is equity should be applied. Any creditor of the cor-

poration suing for himself and on behalf of all other creditors can in equity enforce it. In such suit all rights and equities can be fully adjusted, and every creditor receive satisfaction of his debt to the extent to which he is entitled. A court of law is incapable of this adjustment, and therefore the remedy is in equity only." See the title STOCKHOLDERS.

6. *Where the Equities Are Equal the Law Will Prevail.* — "The first applies to a certain condition of facts; the other supplements its operation by applying to additional facts by which equitable rights and duties may be affected. The two are in fact counterparts of each other, and taken together they form the source of the doctrines, in their entire scope, concerning priorities, notice, and purchasers for a valuable consideration and without notice." 1 *Pomeroy's Eq. Jur.* (2d ed.), § 416.

7. *United States.* — *Boone v. Chiles*, 10 Pet. (U. S.) 210; *Fitzsimmons v. Ogden*, 7 Cranch (U. S.) 2; *Philips v. Crammond*, 2 Wash. (U. S.) 441.

Arkansas. — *Haskill v. Sevier*, 25 Ark. 16; *Woolridge v. Thiele*, 55 Ark. 48.

California. — *Maina v. Elliott*, 51 Cal. 8.

Kentucky. — *Vanmeter v. McFaddin*, 8 B. Mon. (Ky.) 435; *Russell v. Petree*, 10 B. Mon. (Ky.) 184; *Carlisle v. Jumper*, 81 Ky. 282.

New York. — *Grimstone v. Carter*, 3 Paige (N. Y.) 421, 24 Am. Dec. 230; *Reeves v. Kimball*, 40 N. Y. 311; *Newton v. McLean*, 41 Barb. (N. Y.) 285; *Rexford v. Rexford*, 7 Lans. (N. Y.) 10; *Williams v. Charlier*, 15 N. Y. App. Div. 128.

North Carolina. — *Ellis v. Davis*, 2 Jones Eq. (55 N. Car.) 465.

Vermont. — *St. Johnsbury v. Morrill*, 55 Vt. 165.

West Virginia. — *Hoult v. Donahue*, 21 W. Va. 300.

ing received an assignment thereof, and thereby the legal title.¹

Where a Debtor Promised to Secure Two Creditors holding equal claims, one of them, who obtained a conveyance, was held to have thereby acquired a legal advantage over the other which gave him the priority.²

As Between Two Tax Purchasers having equal equities, one who had obtained the legal title through a sheriff's deed was awarded priority.³

So, as Between Claimants to Land having equal equities, the fact of possession by one may constitute a legal right which will turn the scale in his favor.⁴

Where Purchaser of Prior Equity Obtains Legal Title. — A frequent application of the maxim is where a purchaser for value without notice of a prior equitable right obtains the legal estate and thereby the entire priority;⁵ for though the equities may at first be exactly equal, the subsequent acquisition of the legal estate by one will destroy the equality and give that one the priority.⁶ Thus where one conveyed land to another by a deed absolute on its face, and the grantee mortgaged the land to a third party, it was held that the mortgagee's title could not be divested by proof that the mortgagor held the property merely in trust and without any real title thereto.⁷

But One Who Has the Junior Equity will not be allowed to defeat a prior one after he has notice thereof by conveyance of the legal estate;⁸ and if the party having the legal right acquires another interest inconsistent with his equity, so that he cannot honestly claim both, his priority is lost and the equities will prevail in order of time.⁹

(7) *Where the Equities Are Equal He Who Is First in Time Will Prevail.*¹⁰ — This maxim expresses only a different phase of the doctrine embodied in

1. *Williams v. Charlier*, 15 N. Y. App. Div. 128.

2. "In this case, the promise made to the complainants and the conveyance actually made to the trustees both being in consideration of pre-existing debts, the equity of each is equal, and this court will not take from the trustees the legal advantage which their vigilance has conferred upon them." *Philips v. Crammond*, 2 Wash. (U. S.) 441.

3. *Maina v. Elliott*, 51 Cal. 8.

4. *St. Johnsbury v. Morrill*, 55 Vt. 165.

5. *Hoult v. Donahue*, 21 W. Va. 300; *Townsend v. Little*, 109 U. S. 504. Compare *Basset v. Nosworthy*, Rep. temp. Finch 102, 2 White & T. L. Cas. 1; *Le Neve v. Le Neve*, Amb. 436, 2 White & T. L. Cas. 26.

6. *Newton v. McLean*, 41 Barb. (N. Y.) 285; *Rexford v. Rexford*, 7 Lans. (N. Y.) 10; *Russell v. Petree*, 10 B. Mon. (Ky.) 184.

7. *Newton v. McLean*, 41 Barb. (N. Y.) 285, the court saying: "To overreach the mortgage to Chappell, which vested him with a legal estate in the premises, the defendant was bound to go further than simply to show his prior equity. He was bound to show that Chappell had notice of such prior equity, before he advanced the consideration for the mortgage; that is to say, before he indorsed the notes of Hector which the said mortgage was given to secure. The rule in equity is that as between two parties having equal equities, the prior equity must prevail; but if the party having the subsequent equity clothes himself with the legal title before he has notice of the prior equity, such legal title must prevail."

8. *Grimstone v. Carter*, 3 Paige (N. Y.) 421, 24 Am. Dec. 230.

9. *Ellis v. Davis*, 2 Jones Eq. (55 N. Car.) 465.

10. **Form of the Maxim.** — This principle is

often expressed in the Latin phrase *qui prior tempore prior in jure est*. *Cave v. Cave*, 15 Ch. Div. 647; *Willoughby v. Willoughby*, 1 T. R. 774; *Schafer v. Reilly*, 50 N. Y. 68; *Fuller v. Claffin*, 51 Hun (N. Y.) 609.

In *Rice v. Rice*, 2 Drew. 73, 10 Eng. Rul. Cas. 507, Vice-Chancellor Kindersley thus discusses the phraseology of the maxim: "What is the rule of a court of equity for determining the preference as between persons having adverse equitable interests? The rule is sometimes expressed in this form: 'As between persons having only equitable interests, *qui prior est tempore potior est jure*.' This is an incorrect statement of the rule, for that proposition is far from being universally true. In fact, not only is it not universally true as between persons having only equitable interests, but it is not universally true even where their equitable interests are of precisely the same nature, and in that respect precisely equal; as in the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the names of trustees, where the second assignee has given notice and the first assignee has omitted it. Another form of stating the rule is this: 'As between persons having only equitable interests, if their equities are equal *qui prior est tempore potior est jure*.' This form of stating the rule is not so obviously incorrect as the former, and yet even this enunciation of the rule (when accurately considered) seems to me to involve a contradiction. For when we talk of two persons having equal or unequal equities, in what sense do we use the term 'equity'? For example, when we say that A has a better equity than B, what is meant by that? It means only that according to those principles of right and justice which a court of equity recognizes and acts upon, it will prefer A to B,

that last above discussed. It illustrates the favor with which equity regards the diligent suitor, and is a maxim of long-settled and universal acceptance.¹ Though applied in a great variety of cases, its most frequent application is probably in determining the priority among different lienholders, and here the courts will seek to ascertain the real rather than the apparent priority.²

V. EQUITY JURISDICTION — 1. Scope and Subjects — a. INTRODUCTORY. — The limits of this article do not permit of an extended survey of the broad field of equity jurisprudence. Its various divisions are treated in detail in

and will interfere to enforce the rights of A as against B. And therefore it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which a court of equity would altogether refuse to lend its assistance to either party as against the other. If the court will interfere to enforce the right of one against the other on any ground whatever, say on the ground of priority of time, how can it be said that the equities of the two are equal; *i. e.*, in other words, how can it be said that the one has no better right to call for the interference of a court of equity than the other? To lay down the rule, therefore, with perfect accuracy, I think it should be stated in some such form as this: 'As between persons having only equitable interests, if their equities are in all other respects equal priority of time gives the better equity, or *qui prior est tempore potior est jure*.'"

1. *England*. — *Bristol v. Hungerford*, 2 Vern. 524; *Rice v. Rice*, 2 Drew. 73; *Cory v. Eyre*, 1 De G. J. & S. 149; *Société Générale de Paris v. Walker*, L. R. 11 App. 20; *Cave v. Cave*, 15 Ch. Div. 639.

United States. — *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459; *Boone v. Chiles*, 10 Pet. (U. S.) 177.

Arkansas. — *Byers v. Fowler*, 12 Ark. 285, 54 Am. Dec. 271.

Illinois. — *Chicago Title, etc., Co. v. Smith*, 158 Ill. 426.

Indiana. — *Paxton v. Sterne*, 127 Ind. 289.

Michigan. — *Johnson v. Bratton*, 112 Mich. 379.

Mississippi. — *Wailles v. Cooper*, 24 Miss. 208.

Missouri. — *State v. Netherton*, 26 Mo. App. 427.

New York. — *Grimstone v. Carter*, 3 Paige (N. Y.) 421, 24 Am. Dec. 230; *Wilkes v. Harper*, 2 Barb. Ch. (N. Y.) 338; *Cherry v. Monro*, 2 Barb. Ch. (N. Y.) 618; *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. (N. Y.) 603; *Anderson v. Roberts*, 18 Johns. (N. Y.) 515, 9 Am. Dec. 235; *Schafer v. Reilly*, 50 N. Y. 61; *Fuller v. Clafin*, 51 Hun (N. Y.) 612.

Ohio. — *Anketel v. Converse*, 17 Ohio St. 11; *Hume v. Dixon*, 37 Ohio St. 66.

Tennessee. — *Ingram v. Morgan*, 4 Humph. (Tenn.) 66, 40 Am. Dec. 626.

West Virginia. — *Pratt v. Clemens*, 4 W. Va. 443; *Camden v. Harris*, 15 W. Va. 554.

2. **Illustrations.** — Thus in a leading *English* case a mortgage by the deposit of title deeds was held to have priority over the lien of the vendor of the premises, who had conveyed without receiving the purchase money, but had receipted therefor on the deed and delivered it to the vendee, the court saying: "The mortgagee was guilty of no negligence; he was perfectly justified in trusting to the security of the equitable mortgage by deposit

of the deeds, without the slightest obligation to go and inquire of the vendors whether they had received all their purchase money, when they had already given their solemn assurance in writing that they had received every shilling of it, and had conveyed the estate and delivered over the deeds; and I do not think that the fact of the conveyance bearing date only the day before the mortgage imposed on him any such obligation. The defendant omitted nothing that was necessary to constitute a complete and effectual equitable mortgage; and although the mortgage was taken, not for money actually advanced at the time, but for an antecedent debt, the forbearance of that debt constitutes a full and sufficient valuable consideration. Upon a comparison, then, of the conduct of the two parties, and a consideration of all the circumstances of the case, and especially the fact of the possession of the deeds, which the mortgagee acquired with perfect *bona fides*, and without any wrong done to the vendors, I am of opinion that the equity of the mortgagee is far better than that of the vendor, and ought to prevail." *Rice v. Rice*, 2 Drew. 73, 10 Eng. Rul. Cas. 507. This case appears to be a better instance of the maxim, "Where one of two innocent parties must suffer, he who has put it in the power of another to commit the wrong must bear the loss," but the opinion applies the maxim here under discussion.

In *Kentucky*, however, the maxim was applied so as to give the assignee of a vendor's lien priority over subsequent mortgagees of the vendor. *Carlisle v. Jumper*, 81 Ky. 282.

A mechanics' lienor was held to have priority over an accommodation mortgage executed prior to the attachment of the lien, but not assigned for value until thereafter, and this although the assignee obtained from the mortgagor an affidavit that the whole sum represented by the mortgage had been advanced and that there was no defense thereto. *Schafer v. Reilly*, 50 N. Y. 61.

The vendee in a sale to arrive, though not in all respects complete, was held by virtue of the maxim to have priority over a receiver subsequently appointed. *Fuller v. Clafin*, 51 Hun (N. Y.) 609.

And where the consideration of a note has failed the maker has a prior equity which will prevail over that of a holder who received the note by delivery without indorsement in payment of a pre-existing debt, notwithstanding the maker subsequently, but ignorant that the consideration had failed, paid a portion of the proceeds and promised to pay the remainder. *Ingram v. Morgan*, 4 Humph. (Tenn.) 66, 40 Am. Dec. 626.

But the maxim applies only where the equities are equal, and a junior equity will prevail.

other parts of this work to which reference is made in the notes. But it is desirable, nevertheless, that there be one place where the different subjects of equitable cognizance are brought together, where they may be viewed in their relation to each other, and where the scope and boundaries of the field may be more clearly defined. Attempts have been made to group the subjects of equity jurisdiction under heads more or less artificial,¹ and to find a particular domain which belongs to it. But the results of such efforts must necessarily be partial and unsatisfactory;² for, as was shown at the outset of this article, equity is not a distinct department of jurisprudence,³ but rather a source and transverse section thereof, sharing with the common law the parentage of the English legal system.⁴ Hence equity ramifies through the whole of that system; there is probably no branch to which it has not contributed some doctrine or principle, and hardly any in which its remedies are not available. A survey of equity jurisdiction, therefore, however brief, requires a survey of the whole field of private law. This field may be conveniently divided into the following departments: I. Status; II. Torts; III. Contracts; IV. Property. The subject of crimes, though perhaps a department of public law, should also be considered in defining the scope of equity, but as a rule courts of chancery will not assume jurisdiction over matters of a political nature.⁵ It will now be in order to take up in detail the several departments above enumerated, to ascertain what equity has contributed to each, how it operates therein, and thus to illustrate, in the only logical way, the nature and extent of its jurisdiction.

b. OUTLINE — (1) *Status*. — The law of status, or, as it is termed by the elementary writers, the law of persons,⁶ is perhaps the oldest part of our jurisprudence, and much of it had passed out of the formative stage before the modifying influence of chancery was felt. Nevertheless it has much to do in this field, and it early became the protector of persons whose status was not *sui juris*.

Infants became "wards of the court" when brought before it for any purpose,⁷

if superior in merit to an older one. *Hume v. Dixon*, 37 Ohio St. 66.

1. **Divisions of Equity.** — Thus Mr. Bispham makes "three great divisions" of equity, viz., titles, rights, and remedies. Bispham's Principles of Eq., § 19.

2. "From the nature of society, it is difficult, if not impossible, to embrace the powers of a court of chancery in a general definition. Peculiar and extraordinary cases will arise, in the complex and diversified affairs of men, which perhaps cannot be classed under any of the distinct heads of chancery jurisdiction, but which must be acknowledged, nevertheless, to come within the legitimate powers of the chancellor, because complete justice cannot otherwise be done between the parties." *Oliver v. Pray*, 4 Ohio 192, 19 Am. Dec. 595.

3. "The power of this court to deal with any matter brought before it does not depend upon the nature or character of the issue to be tried or question to be determined; but it depends upon the nature of the right to be administered and enforced, and the character of the remedy necessary or appropriate to its enforcement. If the right to be enforced be one properly cognizable by a court of equity, and the remedy necessary to enforce it be such as only a court of equity can administer, then a court of equity has jurisdiction, and the circumstance that, in the course of its administration, it has to deal with questions of law and fact, of whatever nature they may be, does not stand

in its way." *Union Water Co. v. Kean*, 52 N. J. Eq. 111.

4. See *supra*, this title, *Nature of Equity*.

5. **No Political Jurisdiction.** — Thus, in *Taylor v. Kercheval*, 82 Fed. Rep. 497, the complainant sought an injunction to prevent his removal from the office of deputy United States marshal, but the court, in denying the writ, said: "It is firmly settled that courts of chancery concern themselves only with matters of property and the maintenance of civil rights. Such courts have no jurisdiction in matters of an executive or political nature; nor do they interfere with the duties of any department of the government except under special circumstances, and then only when necessary to the protection of rights of property. * * * And it is clear that the complainant has in no just sense a right of property in his office or employment, for if he had, Congress would be powerless to abolish his office or to impair its tenure. To assume jurisdiction to control the exercise of executive or political powers, or to protect individuals in the enjoyment of purely political rights, would be to invade the domain of other departments of the government, or to intrench upon the jurisdiction of the courts of common law." See also *Georgia v. Stanton*, 6 Wall. (U. S.) 50; *In re Sawyer*, 124 U. S. 200; *Muhler v. Hedekin*, 119 Ind. 481.

6. **The Law of Persons.** — See 1 Black. Com.

7. *Pomeroy's Eq. Jur.* (2d ed.), § 1305. See the title *INFANTS*.

and it exercised jurisdiction to appoint guardians¹ to supervise the management of the infant's property, and even to exercise custody and control over his person.²

Parties Non Compotes Mentis, like idiots and lunatics, were under the special guardianship of chancery, which in this regard succeeded to some of the powers of the king as *parens patriæ*. Not only was the status of such persons determined and declared by the High Court, but their property was given special protection.³

The Identity of Married Women, who, at common law, had no legal existence apart from their husbands, was first recognized in equity, and this was carried to the extent of enforcing their contracts and subjecting their separate estates.⁴

Corporations as artificial persons are properly considered under the law of status, and though the influence of equity has been less extensive here than in certain other fields, it is not entirely wanting. The chancellor formerly exercised a visitorial power over corporations,⁵ and the remedy of injunction is always available in a proper case to protect and enforce the rights of a stockholder as against the corporate body.⁶ On the other hand, the stockholder's liability is usually enforced in courts where the peculiar doctrines of equity are applied.⁷ The dissolution of a corporate body may also be decreed in equity.⁸

(2) **Torts**. — While equity does not concern itself with torts merely for the purpose of awarding compensation,⁹ still from an early period the prevention of torts through the interposition of chancery has constituted a not inconsiderable feature of its jurisdiction. Anciently the writ of *supplicavit* was available in certain cases to prevent the more violent forms of tort, such as assault and battery.¹⁰ This has now become obsolete¹¹ through the development of other remedies, but injunction is available to prevent the commission of many species of torts, and in this field as well as others it has been con-

1. See the title **GUARDIAN AND WARD**.

2. See the title **INFANTS**.

3. See the title **INSANITY**.

4. See the titles **HUSBAND AND WIFE**; **SEPARATE PROPERTY (OF MARRIED WOMEN)**.

5. 1 Black. Com. 481. See the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 855.

6. See the titles **INJUNCTION**; **STOCKHOLDERS**; **ULTRA VIRES**.

7. See the title **STOCKHOLDERS**.

8. See the title **DISSOLUTION OF CORPORATIONS**, vol. 9, p. 544.

9. **Torts**. — *Brown v. Wabash R. Co.*, 96 Ill. 297, where in dismissing a bill for unliquidated damages for a personal injury the court said: "We are aware of no authority which would sanction the right to resort in the first instance to a court of equity. A court of chancery is not the forum in which a question of damages should be settled. If it was, the sacred right of trial by jury could easily be abrogated and set aside by merely resorting to such a tribunal."

10. **Supplicavit**. — See Story's Eq. Jur. (13th ed.), §§ 1476, 1477. In Gilbert's *Forum Romanum*, pp. 202, 203, the nature and purposes of *supplicavit* are thus described: "It is granted upon complaint and oath made of the party where any suitor of the court is abused and stands in danger of his life, or is threatened with death by another suitor. The contemnor is taken into custody and must give bail to the sheriff; and if he moves to discharge the writ of *supplicavit*, the court hears both

parties on affidavit and continues or discharges it as the case appears before them. If they order the contemnor to give security for his good behavior (for this writ is in the nature of a lord chief justice's warrant to apprehend a man for a breach of the peace), he must do it by recognizance to be taken before one of the masters of the court, who must be in the commission of the peace. He is to find sureties to be of his good behavior. If he beats or assaults the party a second time, the court will order the recognizance to be put in suit and permit the party to recover the penalty; for the recognizance is never to be sued but by leave of the court. But this proceeding very rarely or never happens. So if any suitor is arrested either in the face of the court or out of the court as he is going and coming to attend and follow his cause (for so far the court does and will protect every man), upon complaint made thereof, sitting the court, they will send out the tipstaff and bring in the bailiffs and prisoner into court instantly, sitting the court, and they will order them forthwith to discharge him or lay them by the heels, and the plaintiff in the action upon complaint and oath made thereof will certainly stand committed. He shall lie in prison till he petitions, submits, and begs pardon, and pays the costs to the other party."

11. Kerly, *History of Equity* (1890), p. 71, note 3. And see *Codd v. Codd*, 2 Johns. Ch. (N. Y.) 141; *Adams v. Adams*, 100 Mass. 365, 1 Am. Rep. 111.

stantly extended.¹ Thus, in *England*,² though not as a rule in the *United States*,³ equity interferes by injunction to prevent libel and slander.⁴ Injunction lies to restrain trespass where the remedy in damages would be inadequate;⁵ to prevent the commission of waste;⁶ to restrain the continuation of nuisances;⁷ to protect easements⁸ such as those of support,⁹ party walls,¹⁰ the right of way,¹¹ and the flow of water;¹² and to prevent the infringement of copyrights,¹³ patents,¹⁴ and trademarks.¹⁵

(3) *Contracts*. — The law of contracts was among the first of the various branches of our system of jurisprudence to feel the influence of chancery. By some that forum has been regarded as the source of the doctrine of consideration;¹⁶ and while this view has been rejected by authority equally high,¹⁷ it seems to be established that one of the earliest instances of the exercise of judicial power by the chancellor was the enforcement of contracts by remedies unknown to the courts of the common law.¹⁸

Formation of Contracts. — Equity has contributed much to the law governing the formation of contracts. Where fraud¹⁹ or mistake²⁰ vitiated the apparent consent of the parties, chancery provided new and more effective remedies than those of the common law. For either of these grounds it offered the remedy of rescission²¹ or cancellation,²² and the failure to express the intent of the parties through a mistake was remedied by reformation.²³

The Law of the Operation of Contracts was enriched by chancery with the very important doctrine of the validity of assignments,²⁴ by which new contractual rights and titles were created. In the construction of contracts equity substituted for the harsh rule of the common law that in all cases "time was of the essence," the juster doctrine that it was so only when the parties clearly intended that result.²⁵

1. **Injunction.** — See the title *INJUNCTION* for a full discussion of this subject.

2. **England — Libel and Slander.** — Pollock on Torts (Webb's ed.) 227, 347; *Loog v. Bean*, 26 Ch. Div. 306, where injunction was allowed against slander.

3. **American Rule.** — 3 Pomeroy's Eq. Jur. (2d ed.), § 1358; *Life Assoc. of America v. Boogher*, 3 Mo. App. 173, where the English authorities are distinguished.

4. See the title *LIBEL AND SLANDER*.

5. See the title *TRESPASS*.

6. See the title *WASTE*.

7. See the title *NUISANCES*.

8. See the title *EASEMENTS*, vol. 10, p. 397.

9. See the title *LATERAL AND SUBJACENT SUPPORT*.

10. See the title *PARTY WALLS*.

11. See the title *PRIVATE WAYS*.

12. See the title *WATERS AND WATERCOURSES*.

13. See the title *COPYRIGHTS*, vol. 7, p. 508.

14. See the title *PATENTS*.

15. See the title *TRADEMARKS*.

16. **Consideration of Contracts.** — Anson on Contracts (Knowlton's ed.) 49, where the author says: "It is a hard matter to say how consideration came to form the basis upon which the validity of informal promises might rest. Perhaps it may suffice for our present purpose to say that the *quid pro quo*, as it is styled in some of the early reports, was probably borrowed by the common-law courts from the chancery." See the title *CONSIDERATION*, vol. 6, p. 667.

17. Judge Oliver Wendell Holmes, in 1 *Law Quarterly Rev.* 171. Compare Holmes's *Common Law*, 253-272.

18. See Holmes, *Early English Equity*, :

11 C. of L.—13

Law Quar. Rev. 162, where the learned author, after describing certain contracts the enforcement of which was usually left to the ecclesiastical courts, adds (p. 174): "Thus the old contracts lingered along into the reign of Edward III. until the common law had attained a tolerably definite theory which excluded them on substantive grounds, and the chancery had become a separate court. The clerical chancellors seem for a time to have asserted successfully in a different tribunal the power of which they had been shorn as ecclesiastics, to enforce contracts for which the ordinary king's courts afforded no remedy. But I think I have now proved that in so doing they were not making reforms or introducing new doctrines, but were simply retaining some relics of ancient custom which had been dropped by the common law, but had been kept alive by the church."

19. See the title *FRAUD AND DECEIT*.

20. See the title *MISTAKE*.

21. See the title *RESCISSION*.

22. See the title *REFORMATION AND CANCELLATION*.

23. See the title *REFORMATION AND CANCELLATION*.

24. See the title *ASSIGNMENTS*, vol. 2, p. 1010.

25. **When Time of the Essence.** — "Equity, however, looks further into the intention of the parties, so as to ascertain whether in fact the performance of the contract was meant to depend upon A's promise being fulfilled to the day, or whether a day was named in order to secure performance within a reasonable time. If the latter was found to be the intention of the parties, equity would not refuse to A the enforcement of X's promise if his own was

The Enforcement of Contracts is a branch of the law which has received many additions from chancery. While, as in dealing with torts, it does not as a rule¹ take jurisdiction merely to award damages, it has nevertheless influenced the rule of compensation. It originated the doctrine that a stipulation for damages intended not as indemnity but to insure performance is in the nature of a penalty, and therefore to be enforced only to the actual extent of the loss,² and it also afforded the remedy of equitable assumpsit.³ Where the breach is merely threatened and not yet accomplished, and the contract itself is valid and enforceable, certain, and not one for mere manual service, the remedy of injunction is available.⁴ In case of the loss of a written contract the remedy of re-execution was provided.⁵ And finally, from the ecclesiastical courts,⁶ chancery borrowed and greatly extended that most valuable of all the remedies for a breach of contract — specific performance.⁷

Special Forms of Contract have drawn much from equity. The contract of suretyship — one of the oldest in the law⁸ — was strengthened by the doctrine of contribution, which enables one of several sureties, equally liable, and who pays the debt, to recover a *pro rata* share from his cosureties,⁹ and by the analogous principle of exoneration, by which a surety secondarily liable may be reimbursed for payment from one primarily so.¹⁰ The doctrine of subrogation likewise originated in equity and gives the surety who has paid his principal's debt the benefit of any securities which the creditor may hold against the debtor.¹¹

The Contract of Partnership confers rights which obtain valuable protection from courts of equity. A violation of the terms of the contract, such as a misappropriation of firm assets, will be prevented by injunction.¹² An adjustment of the financial affairs of the partnership may, in a proper case, be secured by a bill for an accounting, which affords many advantages not possessed by the common-law action of account render.¹³ A dissolution of the firm may be decreed upon a bill for that purpose,¹⁴ and a receiver appointed to preserve its assets and wind up its affairs.¹⁵ All these proceedings might be aided, moreover, by the equitable remedy of discovery.¹⁶

The Contract of Employment is one which equity protects by injunction¹⁷ where the service to be rendered is of an extraordinary kind, such as that requiring artistic skill,¹⁸ or where the interests of the general public would be jeopardized by its violation.¹⁹

performed within a reasonable time. It was nevertheless open to the parties, by express agreement, to make time of the essence of the contract." Anson on Contracts (Knowlton's ed.) 332. See also the title INTERPRETATION AND CONSTRUCTION.

1. But compare the remedy of equitable assumpsit, mentioned below.

2. See the title LIQUIDATED DAMAGES.

3. *Equitable Assumpsit*. — See Langdell, A Brief Survey of Equity Jurisprudence, 2 Harvard Law Rev. 242, where this remedy is described. Sandeford v. Lewis, 68 Ga. 482, seems to have been an attempt to apply this remedy. The complainant there brought his bill to recover back moneys which he had paid for land purchased at execution sale. The bill was dismissed because the complainant's conduct had been inequitable.

4. *Injunction to Prevent Breach of Contract*. — Lumley v. Wagner, 1 De G. M. & G. 605, 5 De G. & Sm. 485; Great Northern R. Co. v. Manchester, etc., R. Co., 5 De G. & Sm. 138; Wolverhampton, etc., R. Co. v. London, etc., R. Co., L. R. 16 Eq. 433; Singer Sewing-Mach. Co. v. Union Button-Hoie, etc., Co., Holmes (U. S.) 253. See the title INJUNCTIONS.

5. See the title LOST PAPERS.

6. See Holmes, Early English Equity, 1 Law Quarterly Rev. 162; Fry, Specific Performance and Laesio Fidei, 5 Law Quarterly Rev. 235.

7. See the title SPECIFIC PERFORMANCE.

8. Holmes, Early English Equity, 1 Law Quarterly Rev. 171.

9. See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 325.

10. See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 325.

11. See the title SUBROGATION.

12. See the titles INJUNCTIONS; PARTNERSHIP.

13. See the titles ACCOUNTS AND ACCOUNTING, 1 ENCYC. OF PL. AND PR. 83; PARTNERSHIP.

14. See the title PARTNERSHIP.

15. See the title RECEIVERS.

16. See the title DISCOVERY, PRODUCTION, AND INSPECTION, 6 ENCYC. OF PL. AND PR. 728.

17. See the title INJUNCTIONS.

18. Lumley v. Wagner, 1 De G. M. & G. 604; McCaull v. Braham, 16 Fed. Rep. 37; Daly v. Smith, 38 N. Y. Super. Ct. 158.

19. Toledo, etc., R. Co. v. Pennsylvania Co., 54 Fed. Rep. 730, where an injunction was granted to prevent the ordering of a strike of railway employees.

(4) *Property*. — The law of property is a field in which almost from its beginning equity jurisprudence has played an important part. One of its earliest contributions was the doctrine of uses,¹ developing later into trusts,² and affording scope for the remedy of accounting.³ The right of redemption from mortgages is a creation of courts of equity,⁴ and one of its immediate consequences was the development of the remedy of foreclosure, by which at first the mortgagee acquired, through judicial process, that which had formerly vested in him by operation of law, viz., title to the mortgaged land.⁵ The remedy of foreclosure was further supplemented by that of receivership, by which the property could be preserved and its profits appropriated pending the suit.⁶ Chancery, moreover, extended the domain of mortgages and treated as having that character many transactions not so recognized at law.⁷ In the same way it created new rights in the form of liens, the most important being the vendor's lien for purchase money.⁸ For the fraudulent conveyance⁹ of property chancery provided the valuable remedy of a creditor's bill.¹⁰ The doctrines of notice¹¹ and of *lis pendens*,¹² both so important in determining property rights, originated in equity. In the division of joint estates it afforded the remedy of partition,¹³ or, in the case of a widow's estate, that of dower.¹⁴ In former times chancery also frequently took jurisdiction to adjust disputed boundaries¹⁵ and to afford relief to the owner of rents.¹⁶ In the construction of wills equity originated the doctrine of election, by which the beneficiary under a will is compelled to choose between the acceptance of its terms in full and the retention of other rights which it attempts to cut off.¹⁷ The administration of estates was formerly an important branch of equity jurisdiction,¹⁸ but in most American states the legislature has created special courts for this purpose.¹⁹

(5) *Crimes* — (a) *Prevention of Crimes* — *aa. GENERAL RULE*. — In the earliest period of its history the Court of Chancery assumed to exercise the power of preventing crimes.²⁰ But the exercise of this prerogative grew less frequent with advancing civilization as the ordinary remedies for the punishment of crime became more effective and acts of lawlessness and violence less common.²¹

1. *Property*. — "Down to the end of the reign of Henry V. there is no evidence of the chancery having known or enforced any substantive doctrines different from those which were recognized in the other courts, except two. One of them, a peculiar view of contracts, has left no traces in modern law. But the other is the greatest contribution to the substantive law which has ever been set down to the credit of the chancery. I refer to uses, the parent of our modern trusts. I propose to discuss these two doctrines in a summary way as the first step towards answering the question of the part which equity has played in the development of English law." O. W. Holmes, *Early English Equity*, 1 *Law Quar. Rev.* 162.

2. See the title TRUSTS AND TRUSTEES.

3. See the title ACCOUNTS AND ACCOUNTING, 1 *ENCYC. OF PL. AND PR.* 83.

4. See the title EQUITY OF REDEMPTION, *post*.

5. See the title FORECLOSURE OF MORTGAGES, 9 *ENCYC. OF PL. AND PR.* 84, especially pp. 118 *et seq.*, where the history of this process is traced.

6. See the titles FORECLOSURE; RECEIVERS.

7. See the title EQUITABLE MORTGAGES, *ante*.

8. See the title VENDOR'S LIEN.

9. See the title FRAUDULENT SALES AND CONVEYANCES.

10. See the title CREDITOR'S BILLS, 5 *ENCYC. OF PL. AND PR.* 388.

11. See the title NOTICE.

12. See the title LIS PENDENS.

13. See the title PARTITION.

14. See the title DOWER, vol. 10, p. 122.

15. See the title BOUNDARIES, vol. 4, p. 756.

16. See the title LANDLORD AND TENANT.

17. See the title EQUITABLE ELECTION, *ante*.

18. 1 *Pomeroy's Eq. Jur.* (2d ed.), § 346.

19. See the title PROBATE AND LETTERS OF ADMINISTRATION.

20. *Former Criminal Jurisdiction of Chancery*. — *Stuart v. La Salle County*, 83 Ill. 341.

"In the earliest periods the jurisdiction was ill defined, and was in some respects even much more extensive than it afterwards became when the relations between the equity and the common-law tribunals were finally adjusted. This was chiefly due to the troublous times, the disturbed condition of the country, while violence and oppression everywhere prevailed, and the ordinary courts could give but little protection to the poor and the weak; when the powerful landowners were constantly invading the rights of their inferiors and overawing the local magistrates. In the reign of Richard II. the chancellor actually exercised some criminal jurisdiction to repress violence and restrain the lawlessness of the great against the poor and helpless." 1 *Pomeroy's Eq. Jur.* (2d ed.), § 36.

21. "Prior to the reign of Richard II., and long after, the chancellor entertained jurisdiction to restrain persons from committing *quasi*-

It is now the settled doctrine that equity has no inherent power to interfere for the purpose of preventing a mere crime where no pecuniary or other property right is involved.¹

Illustrations. — Thus a corporation conducting a fair will not be enjoined from permitting gambling on the ground;² neither will a violation of the Sunday law be enjoined;³ nor the transaction of banking business in contravention of law;⁴ nor the keeping of an unlicensed dramshop,⁵ or a bawdy house.⁶ Injunction will not lie at the instance of one who is not a stockholder, and shows no injury of his private rights, to prevent a corporation from transacting other business than that for which it was organized.⁷

bb. EXCEPTION WHERE INJUNCTION IS AUTHORIZED BY STATUTE. — But the doctrine

criminal offenses and acts of violence. He also heard such cases and rendered decrees. But it was always averred that by reason of combination or the power of the party threatening or doing the wrong, he had power to prevent or pervert the administration of justice in the common-law courts. But when the state of society became more quiet and orderly, this jurisdiction was abandoned, and has never since been claimed or exercised. Nor do we find, even in those tumultuous times, or at any period since, that the court of chancery has ever exercised a preventive jurisdiction in the administration of criminal justice, further than in some cases to require security to keep the peace, or the granting of writs of habeas corpus." *Stuart v. La Salle County*, 83 Ill. 341.

"At one time the Court of Chancery in England exercised a jurisdiction partaking of a criminal character, but it was not without objection and protest from the Commons, and the common-law courts. It was excused, rather than justified, because of the inability of other tribunals to maintain internal peace and order, and because it was exercised for the defense of the poor and helpless. It passed away when the necessity for its exercise ceased, and the common-law tribunals were restored to power sufficient for the repression of violence and wrong. 1 Spence Eq. Jur. 341, c. 4. Since, the jurisdiction of a court of equity has been purely and exclusively civil." *Moses v. Mobile*, 52 Ala. 198.

"Any jurisdiction over criminal matters that the English Court of Chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of habeas corpus for the discharge of persons unlawfully imprisoned." *In re Sawyer*, 124 U. S. 200.

1. No Inherent Power to Enjoin Crimes — *England*. — See *Atty.-Gen. v. Cleaver*, 18 Ves. Jr. 216.

United States. — "It is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court." *In re Debs*, 158 U. S. 593. See *Taylor v. Kercheval*, 82 Fed. Rep. 499.

Illinois. — *Cope v. District Fair Assoc.*, 99

Ill. 489, 39 Am. Rep. 30, the court saying: "It is no part of the mission of equity to administer the criminal law of the state or to enforce the principles of religion and morality, except so far as it may be incidental to the enforcement of property rights, and perhaps other matters of equitable cognizance."

Massachusetts. — *Atty.-Gen. v. Tudor Ice Co.*, 104 Mass. 239, 6 Am. Rep. 227; *Worthington v. Waring*, 157 Mass. 421, 34 Am. St. Rep. 294.

Missouri. — *State v. Uhrig*, 14 Mo. App. 413; *State v. Schweickardt*, 109 Mo. 496.

New York. — *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371; *Davis v. American Soc.*, etc., 75 N. Y. 362.

Pennsylvania. — *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 422.

2. *Cope v. District Fair Assoc.*, 99 Ill. 489, 39 Am. Rep. 30.

3. *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401.

4. *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371.

5. Unlicensed Dramshop. — *State v. Uhrig*, 14 Mo. App. 413; *State v. Schweickardt*, 109 Mo. 496. In the former case the court, *per* Thompson, J., said: "The 'information' here spoken of [in the Missouri Const., art. 2, § 22] unquestionably means, not an information in equity, but an information exhibited in a court of criminal jurisdiction, in which proceeding the accused has the right to a trial by jury. But we are asked to substitute for this information an information in a court of equity, in which the whole matter, both of law and fact, is passed upon by a single judge. But there is in the same instrument another provision which makes it still more clear that this jurisdiction cannot be extended. The right of trial by jury, as heretofore enjoyed, shall remain inviolate." Const., art. 2, § 28. We have already sufficiently indicated that the right of trial by jury has always been enjoyed in England and America in prosecutions for public nuisances, except in three classes of cases, of which the present case is not one."

6. Bawdy Houses. — *Neaf v. Palmer*, (Ky. 1898) 45 S. W. Rep. 506; *Anderson v. Doty*, 33 Hun (N. Y.) 160. But see *contra*, *Hamilton v. Whitridge*, 11 Md. 128, 69 Am. Dec. 184. And compare *Carleton v. Rugg*, 149 Mass. 550, 14 Am. St. Rep. 446; *Cranford v. Tyrrell*, 128 N. Y. 341.

7. *Atty.-Gen. v. Tudor Ice Co.*, 104 Mass. 239, 6 Am. Rep. 227.

just stated is true only respecting the inherent jurisdiction of equity; it does not apply where the court has been empowered by statute to enjoin a criminal act. Thus in *Iowa* it is provided that the sale of liquors, when it becomes a public nuisance, may be restrained by injunction,¹ and such a statute has been upheld as constitutional.² A similar ruling was made in regard to a corresponding statute in *New Hampshire*.³ So in *Massachusetts* an act authorizing a court of equity to enjoin the maintenance of houses of ill fame was sustained.⁴

cc. EXCEPTION WHERE PROPERTY RIGHTS ARE INVOLVED. — Moreover, the general rule above stated applies only when the relief sought is the prevention of a mere crime; but many acts have both a private and a public aspect, are torts as well as crimes, and an exception more important than the rule itself is the principle that where a private wrong has been committed, even though it may also be a crime, and where property and pecuniary rights are involved, equitable relief will not be denied simply because the offender may be amenable to criminal proceedings.⁵

Illustrations. — Thus an injunction was allowed to prevent the maintenance of a house of ill fame adjoining the complainant's premises and interfering with the use and enjoyment of the latter, although the acts complained of constituted a crime under the statute.⁶ So the fact that the accumulation of nitro-glycerine within the corporate limits of a city is a crime will not bar an injunction to prevent the use of that explosive for the purpose of increasing the flow of a gas well, where the result would be to diminish the supply of an adjoining owner and to endanger the lives and property of others.⁷ The maintenance of a patrol in front of the complainant's premises in pursuance of a conspiracy to prevent workmen from entering into its employment will be

1. *Iowa Code*, 1897, § 2405 *et seq.*

2. *Littleton v. Fritz*, 65 *Iowa* 488; *Eilenbecker v. Plymouth County*, 134 *U. S.* 31.

3. *State v. Saunders*, 66 *N. H.* 39.

4. *Carleton v. Rugg*, 149 *Mass.* 550, 14 *Am. St. Rep.* 446.

5. *Where Property Rights Involved — England.* — *Emperor v. Day*, 3 *De G. F. & J.* 217.

United States. — *In re Debs*, 158 *U. S.* 593; *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 *Fed. Rep.* 744, the court saying: "The rule that equity will not enjoin a crime has here no application. The authorities where the rule is thus stated are cases where the injury about to be caused was to the public alone, and where the only proper remedy, therefore, was by criminal proceedings. When an irreparable and continuing unlawful injury is threatened to private property and business rights, equity will generally enjoin on behalf of the person whose rights are to be invaded, even though an indictment on behalf of the public will also lie."

Alabama. — "The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights." *Mobile v. Louisville, etc., R. Co.*, 84 *Ala.* 115.

Illinois. — *People v. St. Louis*, 10 *Ill.* 351; *Minke v. Hopeman*, 87 *Ill.* 450; *Cope v. District Fair Assoc.*, 99 *Ill.* 489, 39 *Am. Rep.* 30.

Indiana. — *People's Gas Co. v. Tyner*, 131 *Ind.* 277, 31 *Am. St. Rep.* 433; *Greenfield Gas Co. v. People's Gas Co.*, 131 *Ind.* 599.

Louisiana. — *Blanc v. Murray*, 36 *La. Ann.* 162, 51 *Am. Rep.* 7.

Massachusetts. — *Vegeahn v. Guntner*, 167 *Mass.* 92. See this case for a full review of the authorities.

New York. — *Cranford v. Tyrrell*, 128 *N. Y.* 341. Compare *Gilbert v. Mickle*, 4 *Sandf. Ch.* (N. Y.) 357.

North Carolina. — *Atty.-Gen. v. Hunter*, 1 *Dev. Eq.* (16 *N. Car.*) 12.

6. *Illustrations.* — *Cranford v. Tyrrell*, 128 *N. Y.* 341, the court saying: "That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner." But see note 6, p. 674, *supra*.

7. *People's Gas Co. v. Tyner*, 131 *Ind.* 277, 31 *Am. St. Rep.* 433; *Greenfield Gas Co. v. People's Gas Co.*, 131 *Ind.* 599. In the former case the court said: "If the appellants in this case have been guilty of the folly of sinking a gas well in the centre of a thickly populated city, where they cannot collect the necessary quantity of nitro-glycerine to shoot it without endangering the property and lives of those who have no connection with their operations, they should be content with such flow of gas as can be obtained without such shooting. It certainly cannot be maintained that the destruction of human life is an injury which can be compensated in damages. No authority has been cited, and we know of none, supporting the position of the appellants that the appellee is not entitled to an injunction because the accumulation of

enjoined, though it might be punished criminally.¹ Generally, moreover, the fact that a nuisance is indictable is no reason for the denial of an injunction to prevent its continuance, when such relief is sought at the instance of one who shows a special injury.² In *England* it was held that a foreign sovereign might obtain an injunction to prevent an English subject from issuing notes purporting to be receivable as money in the complainant's realm.³

(b) **Interference with Criminal Proceedings** — *aa.* GENERAL RULE. — The rule that chancery will not exercise its power to prevent the commission of mere crimes is counterbalanced by another doctrine that it will not interfere to prevent their punishment, and that criminal proceedings of whatever character will not, as a rule, be restrained by injunction.⁴ This rule applies not merely to ordinary prosecutions for felonies, but quite as well to proceedings to punish infractions of city ordinances.⁵ The rule also operates to prevent interference with proceedings to punish contempts⁶ which are criminal in their nature.⁷ For the same reason equity will not interfere to prevent the prosecution of a criminal action to recover a penalty.⁸ The rule applies to every stage of a

nitro-glycerine within the corporate limits of a town or city is a crime."

1. *Vegeahn v. Guntner*, 167 Mass. 92, the court saying: "Nor does the fact that the defendants' acts might subject them to an indictment prevent a court of equity from issuing an injunction. It is true that ordinarily a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime."

2. *Minke v. Hopeman*, 87 Ill. 450; *People v. St. Louis*, 10 Ill. 351; *Atty.-Gen. v. Hunter*, 1 Dev. Eq. (16 N. Car.) 12; *Blanc v. Murray*, 36 La. Ann. 162, 51 Am. Rep. 7.

3. *Emperor v. Day*, 3 De G. F. & J. 217. This case grew out of a transaction by which Kossuth, the Hungarian patriot, employed the defendant, Day, to lithograph the notes in controversy. The court recognized the limitation that if the relief asked extended only to restraining the commission of acts which would violate the political privileges of the complainant, it would not be granted; but the injunction was allowed on the ground that the complainant showed a pecuniary loss resulting from the offense complained of.

4. **No Injunction Against Criminal Proceedings** — *England*. — "This court has not originally and strictly any restraining power over criminal prosecutions; and in this case, if the defendant had applied to the attorney-general, he would have granted a *noli prosequi*. For when a complaint is grounded on a civil right, for which an action of trespass would lie, the attorney-general of course grants a *noli prosequi*." *York v. Pilkington*, 2 Atk. 302, opinion by Lord Chancellor Hardwicke.

In *Holderstaffe v. Saunders*, 6 Mod. 16, Holt, C. J., said: "Surely chancery will not grant an injunction in a criminal matter under examination in this court; and * * * if they did, this court would break it, and protect any that would proceed in contempt of it;" and he said that he thought that the copies of the affidavits upon which the rule was made, and an oath of their being true copies, ought to be ground sufficient to stay the chancery from granting an injunction.

See also *Montague v. Dudman*, 2 Ves. 396.

And see *Saull v. Browne*, L. R. 10 Ch. 64; *Kerr v. Preston Corp.*, 6 Ch. Div. 463.

United States. — *In re Sawyer*, 124 U. S. 200; *Suess v. Noble*, 31 Fed. Rep. 855; *Hemsley v. Myers*, 45 Fed. Rep. 283.

Alabama. — *Moses v. Mobile*, 52 Ala. 198.

Arkansas. — *Portis v. Fall*, 34 Ark. 375; *Medical, etc., Institute v. Hot Springs*, 34 Ark. 559; *Waters-Peirce Oil Co. v. Little Rock*, 39 Ark. 412; *New Home Sewing Mach. Co. v. Fletcher*, 44 Ark. 139.

Connecticut. — See *Tyler v. Hamersley*, 44 Conn. 419, 26 Am. Rep. 479.

District of Columbia. — *Washington, etc., R. Co. v. District of Columbia*, 6 Mackey (D. C.) 570.

Georgia. — *Phillips v. Stone Mountain*, 61 Ga. 386; *Gault v. Wallis*, 53 Ga. 675; *Garrison v. Atlanta*, 68 Ga. 64.

Illinois. — *Poyer v. Des Plaines*, 123 Ill. 111, 5 Am. St. Rep. 494; *Stuart v. La Salle County*, 83 Ill. 341.

Indiana. — *Joseph v. Burk*, 46 Ind. 59.

Louisiana. — *Devron v. First Municipality*, 4 La. Ann. 11.

Mississippi. — *Crighton v. Dahmer*, 70 Miss. 602.

New York. — *Davis v. American Soc., etc.*, 75 N. Y. 362.

Texas. — *Chisholm v. Adams*, 71 Tex. 678.

5. *Moses v. Mobile*, 52 Ala. 198; *Medical, etc., Institute v. Hot Springs*, 34 Ark. 559; *Poyer v. Des Plaines*, 123 Ill. 111, 5 Am. St. Rep. 494; *Devron v. First Municipality*, 4 La. Ann. 11.

6. **Illustrations**. — *Tyler v. Hamersley*, 44 Conn. 419, 26 Am. Rep. 479.

7. See the title CONTEMPT, vol. 7, p. 25.

8. *Kerr v. Preston Corp.*, 6 Ch. Div. 463; *Washington, etc., R. Co. v. District of Columbia*, 6 Mackey (D. C.) 570, the court saying: "Authorities were cited by counsel for complainant on the invitation of the court, but they all relate to the restraining of parties from bringing a civil action; no case has been produced where a court of equity has restrained a criminal prosecution or a proceeding in the nature of a criminal prosecution, and we do not think that has ever been done by a court of equity. There is, we think, an apparent reason for it. Courts of equity in-

criminal proceeding; equity will restrain neither the making of a preliminary affidavit¹ nor the execution of the sentence by imprisonment, even though the place of confinement is alleged to be dangerous to the health of the prisoners,² nor will it interfere to prevent the collection of costs in such a proceeding.³

bb. QUALIFICATIONS. — The doctrine above elaborated will not apply where the parties against whom relief is sought have submitted themselves to the jurisdiction of the court.⁴ So where a question of property rights arises, as where one claims title to land for holding the exclusive possession of which as against the city he is about to be prosecuted and fined, and he has no remedy by appeal, the prosecution may be enjoined.⁵ So where arrest will involve a destruction of property⁶ or is made to enforce a void ordinance, it may be enjoined.⁷ In *New York* the prosecution of numerous suits to recover penalties for the breach of the city ordinances was enjoined.⁸

2. Prerequisites — Inadequacy of Legal Remedy — a. IN GENERAL. — The jurisdiction of chancery even over the subjects already enumerated is not unlimited. Certain facts must exist and certain well-established rules be

terpose to prevent multiplicity of suits and vexatious litigation by private parties, who are shown to be actuated either by desire of gain or to gratify their malice. But prosecutions in the nature of criminal prosecutions are conducted by officers of the state representing the public and looking to public interests, as well as the just punishment of the guilty, and it would not be proper for a court of equity to undertake to restrain an officer, acting in his official capacity and under the responsibilities of his office, from discharging what to him may appear to be a plain duty pertaining to his office." But see *Third Ave. R. Co. v. New York*, 54 N. Y. 159, where an injunction was allowed.

1. *Crighton v. Dahmer*, 70 Miss. 602.

2. *Stuart v. La Salle County*, 83 Ill. 341, the court saying: "To grant this injunction and prevent the sheriff from confining plaintiffs in error in the county jail in accordance with the terms of the sentence would be an unprecedented interference by a court of chancery with administration of criminal justice. No precedent for such relief has been referred to, and we believe none can be found."

3. *Gault v. Wallis*, 53 Ga. 675; *Joseph v. Burk*, 46 Ind. 59.

4. *Qualifications of Doctrine.* — *Spink v. Francis*, 19 Fed. Rep. 670, the court saying: "The extent to which such a bill will lie is well defined. It is when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court by a bill in equity as to the matter or right affected by or involved in the criminal procedure. In such case the court will, by a decree affecting the parties so situated personally, enjoin. *Atty.-Gen. v. Cleaver*, 18 Ves. Jr. 220; *Story's Eq. Jur.*, § 893; *Jeremy's Eq. Jur.* 308, 309, and 3 *Daniell Ch. Pr.* (Perkins' ed. 1865), p. 1721. These cases have been considered upon the ground that the parties defendant in these bills are in this category."

5. *Shinkle v. Covington*, 83 Ky. 420, the court saying: "In this case no action at law can be maintained for an entry on appellant's possession, for none has been made. He has no appeal from the judgment of the municipal court enforcing the ordinance, and is met with

a warrant, in the name of the city, under which he is fined fifteen dollars for each twenty-four hours that he uses the river bank or permits his boats to remain there. By this mode of proceeding the civil remedy by the city is ignored, and the appellant compelled to abandon the possession in order to avoid the penalties. The injury is irreparable, and a court of equity should not hesitate to grant the relief."

6. *Manhattan Iron Works Co. v. French*, 12 Abb. N. Cas. (N. Y. Super. Ct.) 446, where the complainant's business was such as required labor on Sunday in order to maintain it at all, and an injunction was granted to prevent his arrest for such labor.

7. *Void Ordinance.* — *Baltimore v. Radecke*, 49 Md. 217, where it is observed: "As to the question of jurisdiction we have no doubt. It has been decided by this court in too many cases to be longer open to question that where a municipal corporation is seeking to enforce an ordinance which is void, a court of equity has jurisdiction, at the suit of any person injuriously affected thereby, to stay its execution by injunction; this was distinctly announced in *Page v. Baltimore*, 34 Md. 564, where it is said: 'There is no doubt that where an ordinance is void, and its provisions are about to be enforced, any party whose interests are to be injuriously affected thereby may, and properly ought to, go into a court of equity and have the execution of the ordinance stayed by injunction; this course of proceeding has been sanctioned and approved by this court in numerous cases,' and they refer to *Holland v. Baltimore*, 11 Md. 187; *Bouldin v. Baltimore*, 15 Md. 18, and *Baltimore v. Porter*, 18 Md. 284. To these may be added *Frederick v. Groshon*, 30 Md. 436; *Baltimore v. Gill*, 31 Md. 375; *Hazlehurst v. Baltimore*, 37 Md. 220, and *St. Mary's Industrial School v. Brown*, 45 Md. 310. The averments of the bill as well as the facts established by the proof bring the present case clearly within the principles upon which jurisdiction in equity was sustained in the cases cited." See also *Wood v. Brooklyn*, 14 Barb. (N. Y.) 425.

8. *Third Ave. R. Co. v. New York*, 54 N. Y. 159.

applied before such jurisdiction attaches; and among these none is more universally established than the doctrine that the aid of equity may be invoked only where there is no adequate remedy at law.¹

Meaning and Test of "Adequate Remedy." — But while this principle is firmly established as a condition precedent to the interference of chancery, the application of it necessarily depends largely upon the meaning given to the phrase "adequate remedy."² The construction given to this phrase by the courts requires that the remedy at law must be as practical and efficient as the remedy afforded by chancery in order to exclude the latter from jurisdiction.³ In the federal

1. Legal Remedy Must Be Inadequate. — This doctrine is undoubtedly accepted in all jurisdictions where the English law prevails. Citations are appended from nearly all such, but in some of the younger states the rule seems not to have been expressly announced, though it is, of course, none the less binding there. The doctrine in the text has been laid down, or at least recognized, in the following authorities from nearly all of these jurisdictions:

United States. — In the federal courts the doctrine was re-enacted by the Judiciary Act of 1879, but it has also been the subject of frequent reiteration in decisions. *Lewis v. Cocks*, 23 Wall. (U. S.) 470; *Whitehead v. Shattuck*, 138 U. S. 147; *Buzard v. Houston*, 119 U. S. 347; *Killian v. Ebbinghaus*, 110 U. S. 573; *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205; *Root v. Lake Shore, etc., R. Co.*, 105 U. S. 213; *Grand Chute v. Winegar*, 15 Wall. (U. S.) 375; *Summerlin v. Fronteriza Silver Min., etc., Co.*, 41 Fed. Rep. 249; *Densmore v. Tanite Co.*, 32 Fed. Rep. 544; *Mann v. Appel*, 31 Fed. Rep. 378.

Alabama. — *Curry v. Peebles*, 83 Ala. 225; *Youngblood v. Youngblood*, 54 Ala. 486.

Arkansas. — *Memphis, etc., R. Co. v. Woodruff*, 26 Ark. 649.

California. — *De Witt v. Hays*, 2 Cal. 463, 56 Am. Dec. 352; *Lupton v. Lupton*, 3 Cal. 120.

Colorado. — *Derry v. Ross*, 5 Colo. 295; *Fuller v. Swan River Placer Min. Co.*, 12 Colo. 12.

Connecticut. — *Hine v. New Haven*, 40 Conn. 482; *Welles v. Rhodes*, 59 Conn. 504.

Delaware. — *Godwin v. Collins*, 4 Houst. (Del.) 28.

District of Columbia. — *Bohrer v. Fay*, 3 MacArthur (D. C.) 145.

Florida. — *Cavedo v. Billings*, 16 Fla. 261.

Georgia. — *Williams v. Haynes*, 78 Ga. 133; *Nicholson v. Cook*, 76 Ga. 24; *Huff v. Ripley*, 58 Ga. 11.

Idaho. — *Wilkerson v. Walters*, 1 Idaho 564.

Illinois. — *School Directors v. Miller*, 54 Ill. 338; *Wylder v. Crane*, 53 Ill. 490; *McConnel v. Dickson*, 43 Ill. 99.

Iowa. — *Council Bluffs v. Stewart*, 51 Iowa 385.

Kansas. — *Jordan v. Updegraff*, McCahon (Kan.) 103; *Howe Mach. Co. v. Miner*, 28 Kan. 441.

Kentucky. — *Ferguson v. Bullock*, 1 A. K. Marsh. (Ky.) 71; *Mills v. Metcalf*, 1 A. K. Marsh. (Ky.) 477; *Louisville v. Gwathmey*, 1 A. K. Marsh. (Ky.) 554.

Massachusetts. — *Jones v. Newhall*, 115 Mass. 244, 15 Am. Rep. 97; *Suter v. Matthews*, 115 Mass. 253.

Michigan. — *Smith v. Walker*, 57 Mich. 456.

Minnesota. — *Turnbull v. Crick*, 63 Minn. 91.

Mississippi. — *Bowdre v. Carter*, 64 Miss. 221.

Missouri. — *Wilson v. Hart*, 98 Mo. 618.

Nebraska. — *Taylor v. Ainsworth*, 49 Neb. 696; *Sherwin v. Gaghen*, 39 Neb. 238.

Nevada. — *Champion v. Sessions*, 1 Nev. 478; *Conley v. Chedic*, 6 Nev. 222.

New Hampshire. — *Walker v. Cheever*, 35 N. H. 339.

New Jersey. — *Osborne v. O'Reilly*, 42 N. J. Eq. 467.

New Mexico. — *Waddingham v. Robledo*, 6 N. Mex. 347.

New York. — *McHenry v. Jewett*, 90 N. Y. 58.

North Carolina. — *Ragland v. Currin*, 64 N. Car. 355.

Ohio. — *Miami Exporting Co. Bank v. Turpin*, 3 Ohio 518; *Mawhorter v. Armstrong*, 16 Ohio 188.

Oklahoma. — *Laughlin v. Fariss*, (Okla. 1897) 50 Pac. Rep. 254.

Pennsylvania. — *Edelman v. Latshaw*, 159 Pa. St. 644.

South Carolina. — *Solomons v. Shaw*, 25 S. Car. 112.

Texas. — *Galveston, etc., R. Co. v. Hume*, 59 Tex. 47.

Vermont. — *Currier v. Rosebrooks*, 48 Vt. 34; *Smith v. Pettingill*, 15 Vt. 82; *Washburn v. Titus*, 9 Vt. 211.

Washington. — See *Rigney v. Tacoma Light, etc., Co.*, 9 Wash. 576.

West Virginia. — *Nease v. Aetna Ins. Co.*, 32 W. Va. 286.

Wisconsin. — *Knight v. Ashland*, 61 Wis. 246.

2. Meaning of "Adequate Remedy." — An early discussion of this phrase is found in *Rose v. Nicholas*, Wythe (Va.) 59, where the court said: "The terms 'adequate remedy' are relative. An adequate remedy must be accommodated to the wrong which is to be redressed by it. The manifest analogy between an adequate remedy and its correlative wrong limits the progress of the former by the extent of the latter. The remedy which doth more than redress the wrong is not adequate so far as it goeth beyond the wrong, is not a remedy, unless its metaphorical sense, in which it is here used, vary from its proper sense, any more than the remedy in medicine whose virtue and efficacy are adapted peculiarly to some certain disease and are adequate to it can be called a remedy for a different disease."

3. Legal Remedy Must Be as Practical and Efficient as the Equitable Remedy — *United States.* — *Watson v. Sutherland*, 5 Wall. (U. S.) 79.

courts the test of the adequacy of the legal remedy is according to conditions existing at the passage of the Judiciary Act of 1789 or its amendments.¹ The fact that by proceeding in equity a multiplicity of suits might be avoided is deemed sufficient to make it more practical and efficient than the legal remedy, though in other respects the latter might offer all the advantages of the former.² This doctrine is not universal, however;³ it does not apply where the suits would be between different parties, even though the issue in each case would be determined by the same state of facts.⁴

b. RETAINING JURISDICTION AFTER DENIAL OF RELIEF IN EQUITY.—A more substantial exception than the foregoing to the doctrine that equity will not take jurisdiction where the legal remedy is adequate is found in the rule that if jurisdiction has once been assumed, equity will often retain it throughout the litigation, though the relief originally sought is denied and that finally granted is not equitable in its nature.⁵ This rule has been applied in applications for injunctions,⁶ suits for specific performance,⁷

"It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce v. Grundy*, 3 Pet. (U. S.) 210.

"The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances." *Gormley v. Clark*, 134 U. S. 338. See to the same effect *Kilbourn v. Sunderland*, 130 U. S. 514.

Arkansas.—*Witter v. Arnett*, 8 Ark. 57, the court saying: "It is no objection to the jurisdiction of courts of equity that a party has a remedy at law, unless it be shown that the legal remedy is plain, direct, and complete."

Colorado.—*Henderson v. Johns*, 13 Colo. 280, the court saying: "The remedy at law which defeats a suit in equity must be full, adequate, and complete. Anything less than this will not be sufficient to deprive equity of jurisdiction."

Connecticut.—*Hodges v. Kowing*, 58 Conn. 12; *Atwood v. Partree*, 56 Conn. 80; *Hartford v. Chipman*, 21 Conn. 488.

Georgia.—*Scott v. Scott*, 33 Ga. 102.

Illinois.—*Morris v. Thomas*, 17 Ill. 112.

Indiana.—*Michener v. Springfield Engine, etc., Co.*, 142 Ind. 130; *Fitzmaurice v. Mosier*, 116 Ind. 363, 9 Am. St. Rep. 854; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731.

Michigan.—*Godfrey v. White*, 60 Mich. 443, 1 Am. St. Rep. 537; *McKinney v. Curtiss*, 60 Mich. 611.

Nebraska.—*Welton v. Dickson*, 38 Neb. 767, 41 Am. St. Rep. 771; *Bankers' L. Ins. Co. v. Robbins*, (Neb. 1897) 73 N. W. Rep. 269; *Thatcher v. Adams County*, 19 Neb. 485.

New Jersey.—*Morse v. Nicholson*, 55 N. J. Eq. 705.

Oregon.—*Smith v. Griswold*, 6 Oregon 440.

1. *McConihay v. Wright*, 121 U. S. 206; *Bunce v. Gallagher*, 5 Blatchf. (U. S.) 481.

2. *Legal Remedy Inadequate if It Permits Multiplicity of Suits—United States.*—*Pennfeather v. Baltimore Steam-Packet Co.*, 58 Fed. Rep. 481; *Louisville, etc., R. Co. v. Ohio Valley Imp., etc., Co.*, 57 Fed. Rep. 42; *Whitney Nat. Bank v. Parker*, 41 Fed. Rep. 402;

De Forest v. Thompson, 40 Fed. Rep. 375; *Potts v. Hahn*, 32 Fed. Rep. 660.

Georgia.—*Orton v. Madden*, 75 Ga. 83; *Young v. Brown*, 75 Ga. 1; *Butler v. Thomasville*, 74 Ga. 570.

Kansas.—*Martin v. Martin*, 44 Kan. 295.

Mississippi.—*Mills v. New Orleans Seed Co.*, 65 Miss. 391, 7 Am. St. Rep. 671.

New York.—*Wheelock v. Noonan*, 108 N. Y. 179, 2 Am. St. Rep. 405; *Whittlesey v. Delaney*, 73 N. Y. 578.

Pennsylvania.—*Andriessen's Appeal*, 123 Pa. St. 328.

3. See *Bellevue Imp. Co. v. Bellevue*, 39 Neb. 876, where the fact that the plaintiffs, who sought to restrain the collection of a tax on three thousand three hundred lots, would be obliged, if the relief sought were denied them, to pay the taxes for each lot under protest and sue to recover back the same, was deemed insufficient to warrant interference of equity on the ground of multiplicity of suits. See also *Scott v. McFarland*, 70 Fed. Rep. 280.

4. *Dyer v. School Dist. No. 1*, 61 Vt. 96, the court saying: "The original bill could not be maintained for the relief of the taxpayers for whose benefit it was brought, for it is not denied that the taxes paid by them were legal taxes, and were appropriated for the purpose for which they were legally voted. The rule that a court of equity will interfere to prevent a multiplicity of suits is not applicable, as there would appear to be no danger of a multiplicity of suits between the parties to the bill, but only a possibility or probability that other persons, not parties, might bring other suits for the enforcement of rights asserted by them upon substantially the same basis of fact. The Court of Chancery could acquire no jurisdiction, then, upon the ground of preventing a multiplicity of suits."

5. *Thorne v. French*, 4 Misc. Rep. (N. Y. Super. Ct.) 436; *McDaniel v. Lee*, 37 Mo. 204.

6. *Injunctions.*—*Domschke v. Metropolitan El. R. Co.*, 74 Hun (N. Y.) 442; *Smith v. Ingersoll-Sergeant Rock Drill Co.*, 7 Misc. Rep. (N. Y. C. Pl.) 374; *Hanly v. Watterson*, 39 W. Va. 214.

7. *Specific Performance.*—*Hart v. Brown*, 6 Misc. Rep. (N. Y. Supreme Ct.) 238; *McPherson v. Schade*, 8 Misc. Rep. (N. Y. Super. Ct.) 424.

and in foreclosure proceedings.¹

c. OTHER EXCEPTIONS. — It seems, moreover, to be the rule that there are subjects, like fraud,² mistake,³ and specific performance,⁴ of which equity has jurisdiction *per se*, and that therefore the rule first above stated would not apply to these. In *Pennsylvania* the rule is broadly laid down that equity may assume jurisdiction where the remedy provided by it is more convenient.⁵

VI. EQUITABLE REMEDIES. — Most of the remedies which equity affords have been mentioned above in illustrating the scope of its jurisdiction. It remains briefly to notice these apart from the doctrines which call them into play. This is desirable both for purposes of classification and in order to round out the bird's-eye view of equity which this article is designed to be.

Classification. — Equitable remedies may be divided into five great classes,⁶ viz.: I. Preventive; II. Contractual; III. Real Property; IV. Ancillary; and V. Miscellaneous.

The First or Preventive Class includes those which are among the oldest and most characteristic remedies afforded by chancery. To it belong (a) injunc-

1. Foreclosure. — *Bellinger v. Lehman*, 103 Ala. 385. In this case the complainant, in an amendment to his bill to foreclose a mortgage on crops, claimed the proceeds of a sale of such crops made by the administrator of the mortgagor. The court, in replying to the objections to this proceeding, observed: "It is contended also that complainants had an adequate and complete remedy at law. It is true they might have maintained the equitable action for money had and received against William Bellinger in a court of law, but that does not take away the right to enforce the equity in a court of chancery, as we held in *Westmoreland v. Foster*, 60 Ala. 448. Besides, the enforcement of complainant's mortgage security, in its original form, involved a foreclosure of the mortgage itself, involving a settlement of the partnership, and the corporate stock, held in pledge for the same debt, had to be disposed of. The bill was properly filed for these purposes. Jurisdiction was properly assumed, and it was competent for the court to do complete justice in the cause, even had it been necessary, in some respects, to grant relief for which legal remedies were adequate."

2. Fraud — *United States v. Jones v. Bolles*, 9 Wall. (U. S.) 364, the court saying: "It is objected that a court of equity has no jurisdiction of the case because the law affords a complete remedy in damages. This objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation, and concealment; and it does not depend on discovery."

Illinois. — *Truett v. Wainwright*, 9 Ill. 418.

Michigan. — *Wheeler v. Clinton Canal Bank*, Harr. (Mich.) 449; *Wright v. Hake*, 38 Mich. 532; *Wyckoff v. Victor Sewing Mach. Co.*, 43 Mich. 309; *Tompkins v. Hollister*, 60 Mich. 479; *McKinney v. Curtiss*, 60 Mich. 620.

3. Mistake. — *Hull v. Watts*, 95 Va. 10.

4. Specific Performance. — *Schroeppel v. Hopper*, 40 Barb. (N. Y.) 425.

5. *Johnston v. Price*, 172 Pa. St. 427; *Brush Electric Co.'s Appeal*, 114 Pa. St. 574, the court saying: "Equitable jurisdiction does not depend on the want of a common-law remedy; for whilst there may be such a remedy it may be inadequate to meet all the requirements of a given case, or to effect complete justice between the contending parties, hence the exer-

cise of chancery powers must often depend on the sound discretion of the court. *Bierbower's Appeal*, 107 Pa. St. 14. So a bill may be sustained solely on the ground that it is the most convenient remedy. *Kirkpatrick v. M'Donald*, 11 Pa. St. 387."

6. Other Classifications of Remedies. — Various attempts have been made by the text writers to classify equitable remedies. Mr. Justice Story, following in part the older commentators like Mitford and Cooper, divides them into (I.) original bills and (II.) bills not original. Class I. he subdivides into (1) bills for final relief, including ordinary contested bills, bills of interpleader, and bills of certiorari; and (2) bills not praying for relief, including bills to perpetuate testimony, to examine witnesses *de bene esse*, and bills of discovery. Class II. he subdivides into (1) additional bills, including supplemental bills and bills of revivor; and (2) miscellaneous bills, including (a) cross-bills, (b) bills of review, (c) bills to impeach decrees for fraud, (d) bills to suspend decrees, (e) bills to execute decrees, (f) composite bills, partaking of the nature of one or more of the preceding. See Story's Commentaries on Equity Pleading, c. 2.

Mr. Pomeroy, in his *Equity Jurisprudence*, divides the remedies into seven groups, viz.: (1) ancillary and provisional, including (a) interpleader and (b) receivers; (2) preventive, discussing only injunctions; (3) those immediately protecting primary rights, including (a) reformation, (b) re-execution, and (c) cancellation; (4) those directly protecting primary rights and interests, including (a) dower, (b) boundaries, (c) partition, (d) bills of peace, *quia timet*, and to quiet title; (5) specific performance; (6) those to enforce liens, including (a) foreclosure, (b) marshaling securities, (c) creditor's suits; (7) pecuniary, including (a) contribution, (b) exoneration, (c) subrogation, (d) accounting. See Pomeroy's *Eq. Jur.*, Table of Contents.

The Classification Presented in the Text is an attempt to arrange the various groups of equitable remedies according to their natural relations to each other. While some of its features were suggested by the classifications of other writers, the plan is original and has been adopted after considerable study.

tion; ¹ (*b*) *ne exeat*, which resembles injunction and might almost be termed a species of the latter; ² (*c*) the now obsolete *supplicavit*,³ really another species of injunction; and (*d*) bills of the peace and *quia timet*.⁴ Some of these might indeed also be classed under the other heads, as *ne exeat* under the ancillary remedies. But in each instance the leading characteristic of the remedy is its preventive feature, and this should determine the classification.

The Second Class of Equitable Remedies may be denominated contractual because they are available only as between parties occupying the contract relation. This class may be subdivided into two groups: (A) nonpecuniary, or those in which the relief sought is something other than the payment of money; and (B) pecuniary, or those in which the payment of money is the sole relief asked. Group A includes (*a*) specific performance,⁵ (*b*) re-execution,⁶ (*c*) reformation,⁷ (*d*) rescission,⁸ (*e*) cancellation,⁹ (*f*) subrogation,¹⁰ (*g*) marshaling assets,¹¹ (*h*) creditor's bills,¹² (*i*) foreclosure,¹³ (*j*) bills to redeem,¹⁴ and (*k*) bills to enforce liens.¹⁵ The remedy of foreclosure is classed with this group because it was originally only a proceeding to cut off the right of redemption. It has now in most of the states become a pecuniary remedy attaining the desired relief through the enforcement of a lien.¹⁶ Group B comprises (*a*) account,¹⁷ (*b*) equitable assumpsit,¹⁸ (*c*) contribution,¹⁹ and (*d*) exoneration.²⁰ The last two are sometimes classed as equitable rights or doctrines rather than remedies.²¹

The Third Class of the classes first enumerated above is concerned with real property alone. It includes (*a*) bills to quiet or remove clouds from titles,²² (*b*) partition,²³ (*c*) assignment of dower,²⁴ (*d*) adjustment of boundaries,²⁵ (*e*) the now obsolete apportionment of rent,²⁶ (*f*) bills to establish and construe wills,²⁷

1. See the title INJUNCTIONS. That form of this writ known as the mandatory injunction is sometimes restrictive rather than preventive in its effects, but it is now of such rare occurrence that for most purposes the relief sought by the writ is prevention.

2. See the title NE EXEAT.

3. "The Writ of *Supplicavit*, which only became obsolete in the last century, was sued regularly out of chancery, and is mentioned in the *Natura Brevium*. It was granted upon the exhibition of sworn 'Articles of the Peace,' of which these bills are the ancestors." Kerly, *History of Equity* (1890), p. 71, note 3.

"No writ of *supplicavit* has ever issued from this court. The novelty of the application makes it necessary to examine into the origin and character of the process. A full account of it is given in Fitzherbert, N. B. 79. It appears that it was a writ de securitate pacis. It might be sued out by any person, upon proper petition and oath, requiring another, who had threatened him, to keep the peace. A wife might have it against her husband. But after the statute 1 Edw. III., c. 16, other forms of writ were resorted to. * * * In its nature it is a criminal proceeding, and this is a good reason why it should have gone into disuse, for it does not seem to be desirable that courts of chancery should retain this small modicum of criminal jurisdiction. The provisions of the Gen. Stat., c. 113, which prescribe chancery jurisdiction and regulate chancery practice in this commonwealth, render it clear that the legislature did not intend to include criminal cases. And c. 169, which regulates the process by which parties may be required to give sureties to keep the peace, limits the term of the recognizance to six months. This limitation would substantially destroy the value of a writ of *supplicavit*." *Adams v. Adams*, 100

Mass. 365, 1 Am. Rep. 111. The court also held that in any event the writ was not available for the purpose of obtaining alimony.

4. See the title BILLS OF PEACE, 3 ENCYC. OF PL. AND PR. 556.

5. See the title SPECIFIC PERFORMANCE.

6. See the titles LOST PAPERS; REFORMATION AND CANCELLATION.

7. See the title REFORMATION AND CANCELLATION.

8. See the title RESCISSION.

9. See the title REFORMATION AND CANCELLATION.

10. See the title SUBROGATION.

11. See the title MARSHALING ASSETS.

12. See the title CREDITORS' BILLS, 5 ENCYC. OF PL. AND PR. 388.

13. See the title FORECLOSURE in this work; also the title FORECLOSURE OF MORTGAGES, 9 ENCYC. OF PL. AND PR. 84.

14. See the title EQUITY OF REDEMPTION, *post*.

15. See the title LIENS.

16. See the title FORECLOSURE.

17. See the title ACCOUNTS AND ACCOUNTING, 1 ENCYC. OF PL. AND PR. 83.

18. See a discussion of this remedy by Prof. C. C. Langdell in a series of articles entitled *A Brief Survey of Equity Jurisdiction*, 2 *Harvard Law Rev.* 242.

19. See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 325.

20. See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 325.

21. Bispham's *Principles of Equity*, § 27.

22. See the titles CLOUD ON TITLE, vol. 6, p. 149; QUIETING TITLE, ENCYC. OF PL. AND PR.

23. See the title PARTITION.

24. See the title DOWER, vol. 10, p. 122.

25. See the title BOUNDARIES, vol. 4, p. 756.

26. See the title LANDLORD AND TENANT.

27. See the title WILLS.

and (*g*) bills of administration.¹

Then There Is a Class of Ancillary Remedies, or those which are rarely if ever employed except in conjunction with and auxiliary to other and ultimate relief. This comprises (*a*) a subclass of remedies in aid of evidence, including (*aa*) bills of discovery,² (*bb*) bills to perpetuate testimony,³ (*cc*) bills to take testimony *de bene esse*,⁴ and (*dd*) bills for commissions to examine witnesses abroad;⁵ (*b*) interpleader;⁶ and (*c*) receivers.⁷ The practice originated by chancery of allowing a set-off may perhaps likewise be classed as one of these remedies, and is at any rate a valuable aid to simplifying litigation and settling connected controversies in the same suit.⁸

Finally There Is a Miscellaneous Class of Remedies corresponding to the last class enumerated by Judge Story,⁹ and including (*a*) cross-bills,¹⁰ (*b*) bills to impeach decrees,¹¹ (*c*) bills to suspend decrees,¹² (*d*) bills to enforce decrees,¹³ (*e*) bills of review,¹⁴ (*f*) bills of revivor,¹⁵ (*g*) stockholders' bills,¹⁶ and (*h*) bills to enforce subrogation.¹⁷ Bills for divorce, when brought in chancery, likewise fall under this head.¹⁸

Such Is a Bare Outline of the Remedies afforded by chancery. Anything like a comprehensive discussion of them would be out of place here, and must be sought under the various heads in this work to which reference is made in the notes. But the foregoing summary will serve to illustrate the character and extent of equity jurisprudence as well as the weapons which its creators have, through the ages, forged for its application and defense.

1. This group of bills may perhaps also be classed as "miscellaneous."

2. See the title DISCOVERY, PRODUCTION, AND INSPECTION, 6 ENCYC. OF PL. AND PR. 728.

3. See the title PERPETUATING TESTIMONY, ENCYC. OF PL. AND PR.

4. See the title BILLS DE BENE ESSE, 3 ENCYC. OF PL. AND PR. 329.

5. See the title DEPOSITIONS, vol. 9, p. 295.

6. See the title INTERPLEADER.

7. See the title RECEIVERS.

8. See the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM.

9. Story's Eq. Pl., c. 2.

10. See the title CROSS-BILLS, 5 ENCYC. OF PL. AND PR. 624.

11. See the title BILLS TO IMPEACH DECREES

AND JUDGMENTS, 3 ENCYC. OF PL. AND PR. 607.

12. See Mitford's Eq. Pl. (1890) 192; Story's Eq. Pl., § 21.

13. See the title BILLS TO ENFORCE DECREES AND JUDGMENTS, 3 ENCYC. OF PL. AND PR. 607. This was never of frequent occurrence, and is now obsolete.

14. See the title BILLS OF REVIEW, 3 ENCYC. OF PL. AND PR. 569.

15. See the title REVIVOR, ENCYC. OF PL. AND PR.

16. See the title STOCKHOLDERS.

17. See the title SUBROGATION.

18. See the title DIVORCE, vol. 9, p. 723; also article on the same subject in 7 ENCYC. OF PL. AND PR. 49.

EQUITY OF REDEMPTION.

BY CHARLES PORTERFIELD.

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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ATTACHMENT*, vol. 3, p. 181; *CHATTEL MORTGAGES*, vol. 5, p. 945; *CONTRIBUTION AND EXONERATION*, vol. 7, p. 325; *CURTESY*, vol. 8, p. 506; *DOWER*, vol. 10, p. 122; *EQUITABLE MORTGAGES*, *ante*; *FORECLOSURE*; *LIENS*; *LIMITATION OF ACTIONS*; *MORTGAGES*; *PLEDGE AND COLLATERAL SECURITY*; *RECORDING ACTS*; *SUBROGATION*; *TAX TITLES*; *TRUST DEEDS AND POWER OF SALE MORTGAGES*.

I. DEFINITION. — Equity of redemption is the right which the mortgagor of an estate has of redeeming it, after it has been forfeited at law by nonpayment, at the time appointed, of the money secured by the mortgage to be paid, by paying the amount of the debt, interest, and costs.¹

II. ORIGIN AND NATURE OF RIGHT — 1. **Origin of Right.** — At common law, when the condition of a mortgage was broken the title of the mortgagor

1. **Equity of Redemption Defined.** — 1 Bouv. Law Dict., tit. Equity of Redemption.

"In case of failure [to pay the mortgage debt], whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility at law of being afterwards evicted by the mortgagor, to whom the land is now forever dead. But here again the courts of equity interpose; and though a mortgage be thus forfeited and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And if the estate be of greater value than the sum lent thereon, they will

allow the mortgagor at any reasonable time to recall or redeem his estate, paying to the mortgagee his principal, interest, and expenses; for otherwise, in strictness of law, an estate worth £1000 might be forfeited for non-payment of £100 or a less sum. This reasonable advantage allowed to mortgagors is called the equity of redemption; and this enables a mortgagor to call on the mortgagee who has possession of his estate to deliver it back and account for the rents and profits received, on payment of his whole debt and interest, thereby turning the *mortuum* into a kind of *vivum vadium*." 2 Black. Com. 158.

was completely divested, and the estate of the mortgagee became absolute and indefeasible; but in the course of time the court of equity, regarding the substance of the transaction rather than its form, permitted the mortgagor, within a reasonable time after forfeiture, to redeem by paying the amount due on the mortgage.¹

In *Regard to Chattel Mortgages* the rule is the same as in the case of mortgages of real property; that is, on breach of the condition the absolute ownership of the mortgaged chattels vests in the mortgagee at common law, without any right of redemption.² But in equity the mortgagor may redeem within a reasonable time after the law day and before a sale of the chattels by the mortgagee. This rule is well settled by the authorities,³ though it has been

1. Mortgagor's Estate Absolute at Law on Breach of Condition.—"By the common law, when the condition of the mortgage was broken the estate of the mortgagee became indefeasible. At an early period equity interposed and permitted the mortgagor, within a reasonable time, to redeem upon the payment of the amount found to be due. The debt was regarded by the chancellor, as it has been ever since, as the principal, and the mortgage as only an accessory and a security. The doctrine seems to have been borrowed from the civil law. After the practice grew up of applying to the chancellor to foreclose the right to redeem upon default in the payment of the debt at maturity, it was always an incident of the remedy that the mortgagor should be allowed a specified time for the payment of the debt. This was fixed by the primary decree, and it might be extended once or oftener, at the discretion of the chancellor, according to the circumstances of the case. It was only in the event of final default that the foreclosure was made absolute. In this country the proceeding in most of the states, and perhaps in all of them, is regulated by statute. * * * The settled English practice is for the decree to order the amount due to be ascertained, and the costs to be taxed, and that upon the payment of both within six months, the plaintiff shall reconvey to the defendant; but in default of payment within the time limited, 'that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of and in said mortgaged premises.'" *Clark v. Reyburn*, 8 Wall. (U. S.) 318. See also *Goodal's Case*, 5 Coke 95; *Barnard v. Eaton*, 2 Cush. (Mass.) 294; *Parsons v. Welles*, 17 Mass. 419; *Shields v. Lozeau*, 34 N. J. L. 496, 3 Am. Rep. 256; *Lansing v. Goelet*, 9 Cow. (N. Y.) 401; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Hagar v. Brainerd*, 44 Vt. 301.

The Principle of the Doctrine is that a mortgage is intended merely as a security for the debt; that the forfeiture at law for nonpayment on the day named (called the law day) is a penalty, the enforcement of which would be unconscionable, and that adequate compensation may be made to the mortgagee by paying his debt with interest. *Emanuel College v. Evans*, 1 Ch. Rep. 18; *Pritchard v. Elton*, 38 Conn. 434.

For a Full Discussion of the nature of a mortgagor's interest or estate in the mortgaged property after breach of condition, see the title MORTGAGES.

2. Chattel Mortgage — Mortgagee's Title Absolute at Law on Breach of Condition — England. — *Lockwood v. Ewer*, 2 Atk. 303; *Westerdell v. Dale*, 7 T. R. 306; *Tucker v. Wilson*, 1 P. Wms. 261; *Ryall v. Rowles*, 1 Ves. 365.

Massachusetts. — *Taber v. Hamlin*, 97 Mass. 489, 93 Am. Dec. 113.

Missouri. — *Robinson v. Campbell*, 8 Mo. 365, sub nom. *Robertson v. Campbell*, 8 Mo. 615.

New Jersey. — *Hall v. Snowhill*, 14 N. J. L. 8.

New York. — *Brown v. Bement*, 8 Johns. (N. Y.) 96; *Ackley v. Finch*, 7 Cow. (N. Y.) 290; *Langdon v. Buel*, 9 Wend. (N. Y.) 80; *Case v. Boughton*, 11 Wend. (N. Y.) 106; *Smith v. Acker*, 23 Wend. (N. Y.) 653.

North Carolina. — *Holmes v. Hall*, 3 Dev. L. (14 N. Car.) 98.

3. Chattel Mortgages — Redemption in Equity — Alabama. — *Davis v. Hubbard*, 38 Ala. 185. *California.* — *Wilson v. Brannan*, 27 Cal. 258; *Heyland v. Badger*, 35 Cal. 404.

Illinois. — *Dupuy v. Gibson*, 36 Ill. 197; *Wylder v. Crane*, 53 Ill. 490.

Maine. — *Flanders v. Barstow*, 18 Me. 357.

Michigan. — *Flanders v. Chamberlain*, 24 Mich. 305; *Brink v. Freoff*, 40 Mich. 610.

New York. — *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; *Charter v. Stevens*, 3 Den. (N. Y.) 33, 45 Am. Dec. 444; *Hinman v. Judson*, 13 Barb. (N. Y.) 629; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 100; *West v. Crary*, 47 N. Y. 423; *Pratt v. Stiles*, 17 How. Pr. (N. Y. Supreme Ct.) 211; *Stoddard v. Denison*, 38 How. Pr. (N. Y. Super. Ct.) 296.

Vermont. — *Blodgett v. Blodgett*, 48 Vt. 32.

Wisconsin. — *Saxton v. Williams*, 15 Wis. 292.

In *Davis v. Hubbard*, 38 Ala. 185, Walker, C. J., said: "It is certain that courts of chancery originally had jurisdiction to decree the redemption of mortgaged chattels, as well as real estate. Indeed, the right to redeem after default made is a doctrine which originated with the chancery court, and is recognized as an equitable doctrine in the text-books. 2 Story's Equity, §§ 1014, 1015, 1030. As the redemption of mortgaged chattels originally belonged to the jurisdiction of the chancery court, it is not divested of that jurisdiction, even though it may now be exercised by courts of law."

In *Wilson v. Brannan*, 27 Cal. 258, Currey, J., said: "The cases which hold that at law the title of the mortgagee to the chattels mortgaged becomes absolute upon the breach of the stipulation to pay at a particular day recognize that the mortgagor has an equitable right or interest in the property of which he

sometimes questioned.¹

When the Equity of Redemption Was First Allowed is not precisely known. The growth of the doctrine was gradual. It was mooted in the latter part of the reign of Queen Elizabeth, but the court then held that the mortgagor's estate was forfeited if he failed to perform "truly and effectually" the condition of the mortgage. In the reign of James I. redemption was decreed after forfeiture, and it became settled in the reign of Charles I. that payment after the law day would save the mortgagor's estate from forfeiture as effectually as if made on or before that day.²

2. Nature of Right — *a. EQUITY OF REDEMPTION PROPER AND STATUTORY RIGHT TO REDEEM DISTINGUISHED.* — There are two rights of redemption: the general equitable right, or equity of redemption proper, and the statutory right to redeem.³

b. CHARACTERISTICS OF EQUITY OF REDEMPTION PROPER — (1) *Is Inherent in All Mortgages.* — The general equitable right of redemption, or equity of redemption proper, is inherent in every mortgage, without regard to the form of the instrument, existing alike whether that instrument be a formal mortgage, a deed of trust, or an absolute deed intended as a mortgage; and so inseparably is it connected with the contract that it cannot be waived or released by the terms thereof or by a contemporaneous agreement.⁴

may avail himself by paying the debt due and thus redeeming the property; and as long as the right of redemption remains in the mortgagor, it may be said, viewing the subject from an equitable standpoint, that the title of the mortgagee is not to every intent absolute. In mortgages of personal property there exists, after condition broken, as in mortgages of land, an equity of redemption, which may be asserted by the mortgagor if he brings his suit to redeem within a reasonable time."

1. Equity of Redemption in Chattels Questioned. — In *Taber v. Hamlin*, 97 Mass. 489, 93 Am. Dec. 113, Foster, J., said: "At common law a mortgage, not a pledge, of personal property seems to have transferred the property absolutely to the mortgagee upon a breach of the condition. No process of foreclosure was necessary, and no right of redemption remained. Some authorities held that the mortgagor might maintain a bill in equity to redeem within a reasonable time after forfeiture; but this rule was neither clearly settled nor universally admitted, and has never been recognized in this commonwealth."

2. Growth of Equity of Redemption. — 2 Fonbl. Eq. 256; Williams on Real Prop. 253; Washburn on Real Prop. 478.

Of the Growth of the Doctrine Chancellor Kent says: "Not only the original severity of the common law, treating the mortgagor's interest as resting upon the exact performance of a condition, and holding the forfeiture or the breach of a condition to be absolute by non-payment or tender at the day, is entirely relaxed, but the narrow and precarious character of the mortgagor at law is changed, under the more enlarged and liberal jurisdiction of the courts of equity. Their influence has reached the courts of law, and the case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law. Without any prophetic anticipation we may

well say that 'returning justice lifts aloft her scale.' The doctrine now regarded as a settled principle was laid down in the reign of Charles I., very cautiously, and with a scrupulousness of opinion. 'The court conceived, as it was observed in chancery, that the said lease being but a security, and the money paid, though not at the day, the lease ought to be void in equity.' [*Emanuel College v. Evans*, 1 Ch. Rep. 18.] The equity of redemption grew in time to be such a favorite with the courts of equity, and was so highly cherished and protected, that it became a maxim that 'once a mortgage always a mortgage.' The object of the rule is to prevent oppression; and contracts made with the mortgagor to lessen, embarrass, or restrain the right of redemption are regarded with jealousy, and generally set aside as dangerous agreements, founded in unconscientious advantages assumed over the necessities of the mortgagor. The doctrine was established by Lord Nottingham, as early as 1681, in *Newcomb v. Bonham* [1 Vern. 7, 232; 2 Vent. 364]; for in that case the mortgagor had covenanted that if the lands were not redeemed in his lifetime they should never be redeemed; but the chancellor held that the estate was redeemable by the heir, notwithstanding the agreement; and though the decree in that case was subsequently reversed, it was upon special circumstances, not affecting the principle. The same general doctrine was pursued in *Howard v. Harris* [1 Vern. 190], and it pervades all the subsequent and modern cases on the subject, both in England and in this country." 4 Kent's Com. 158.

3. Equity of Redemption and Statutory Right Distinguished. — *Cramer v. Watson*, 73 Ala. 127; *Eiceman v. Finch*, 79 Ind. 511; *Mayer v. Farmers' Bank*, 44 Iowa 212.

The statutory redemption is from the sale, and not from the mortgage. *Tuttle v. Dewey*, 44 Iowa 306; *Day v. Cole*, 44 Iowa 452.

4. Equity of Redemption Is Inherent in All Mortgages. — An equity of redemption must

(2) *Attributes of Property in General.* — An equity of redemption is an estate in the mortgaged property, and is subject to all the incidents of ownership.¹

exist to constitute a mortgage, and it cannot be waived either by a covenant in the mortgage or by a separate contemporaneous contract. *German Nat. Bank v. Barham*, 57 Ark. 533; *Lee v. Evans*, 8 Cal. 424; *Wilmerding v. Mitchell*, 42 N. J. L. 476; *King v. Warrington*, 2 N. Mex. 318; *Benzein v. Lenoir*, 1 Dev. Eq. (16 N. Car.) 225; *Benzein v. Robenett*, 1 Dev. Eq. (16 N. Car.) 448.

Nor Can It Be Restricted either as to time or persons, if the restriction is a substantial denial of the right to redeem. *Floyer v. Lavington*, 1 P. Wms. 269; *Howard v. Harris*, 1 Vern. 33; *Newcomb v. Bonham*, 1 Vern. 7; *Mellor v. Lees*, 2 Atk. 494; *Spurgeon v. Collier*, 1 Eden 55; *Youle v. Richards*, 1 N. J. Eq. 534, 23 Am. Dec. 722; *Stover v. Bounds*, 1 Ohio St. 107. But see *Tasburgh v. Echlin*, 2 Bro. P. C. 265. See also *infra*, this title, *Relinquishment or Bar of Right*.

Form of Instrument. — The existence of the equity of redemption does not depend on the form of the instrument. Where a deed, though absolute in form, is intended as security for a debt, it is in effect a mortgage, and the right of redemption exists in the grantor.

England. — *Spurgeon v. Collier*, 1 Eden 55.

United States. — *Jackson v. Lawrence*, 117 U. S. 679.

Connecticut. — *Daniels v. Alvord*, 2 Root (Conn.) 196; *Belton v. Avery*, 2 Root (Conn.) 279, 1 Am. Dec. 70.

Illinois. — *Workman v. Greening*, 115 Ill. 477.

Maine. — *Linnell v. Lyford*, 72 Me. 280; *Snow v. Pressey*, 82 Me. 552; *Baxter v. Child*, 39 Me. 110.

Michigan. — *Wadsworth v. Loranger*, Harr. (Mich.) 113.

New Jersey. — *Venderhaise v. Hugues*, 13 N. J. Eq. 410; *Wilmerding v. Mitchell*, 42 N. J. L. 476.

New Mexico. — *King v. Warrington*, 2 N. Mex. 318.

New York. — *Clark v. Henry*, 2 Cow. (N. Y.) 324.

Pennsylvania. — *Stoeve v. Stoeve*, 9 S. & R. (Pa.) 434; *Random v. Swartz*, 1 Yeates (Pa.) 579.

Vermont. — *Morgan v. Walbridge*, 56 Vt. 405; *Still v. Buzzell*, 60 Vt. 478.

Wisconsin. — *Rogan v. Walker*, 1 Wis. 527; *Orton v. Knab*, 3 Wis. 576; *Plato v. Roe*, 14 Wis. 453.

Deed of Trust. — A conveyance in trust by a debtor to secure his debt is to be considered a mortgage to which the right of redemption is incident. *Beach v. Shaw*, 57 Ill. 17; *Hodgen v. Guttery*, 58 Ill. 431; *Chowning v. Cox*, 1 Rand. (Va.) 306, 10 Am. Dec. 530; *Pennington v. Hanby*, 4 Munf. (Va.) 140.

If the right of redemption applies to a mortgage, it as well applies to a deed of trust. The difference is only in form. In one case the mortgagee is the trustee; in the other, a third person. *Levy v. Burkle*, (Cal. 1887) 14 Pac. Rep. 564.

Assignment of Mortgage as Security. — An assignment of a mortgage to secure a debt is a mortgage of a mortgage, and the assignor

has the same right to redeem as in the case of other mortgages. *Graydon v. Church*, 7 Mich. 36; *Wallace v. Finnegan*, 14 Mich. 170, 90 Am. Dec. 243; *McKinney v. Miller*, 19 Mich. 142.

Mortgage Conditioned to Support Mortgagee. — A mortgage conditioned for the support of the mortgagee may be redeemed after breach. *Austin v. Austin*, 9 Vt. 420; *Henry v. Tupper*, 29 Vt. 358.

But where a mortgage is conditioned to pay a sum of money to the mortgagees or to support them during their lives, an assignee of the equity of redemption cannot redeem after breach unless the mortgagees assented to the assignment. *Bryant v. Erskine*, 55 Me. 153.

Exercise of Right Not Compulsory. — Neither the owner of an equity of redemption nor a junior incumbrancer can be compelled to redeem. They have the right, but there is no compulsion. *Rogers v. Meyers*, 68 Ill. 92; *McIntier v. Shaw*, 6 Allen (Mass.) 83.

But the purchaser at a foreclosure sale may sue a junior mortgagee who was not a party to the foreclosure proceeding to compel him to redeem within a reasonable time. *Parker v. Child*, 25 N. J. Eq. 41.

Illegal Consideration. — A mortgagor may redeem notwithstanding that the consideration of the note secured by the mortgage was illegal, or contrary to public policy. *Cowles v. Raguet*, 14 Ohio 38.

An Intent to Defraud Creditors on the part of a grantor who conveyed property by an absolute deed to secure a debt will not affect his right to assert his equity of redemption in the property so conveyed. *Over v. Carolus*, 171 Ill. 552.

1. Equity of Redemption Is an Estate. — *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Simonton v. Gray*, 34 Me. 50; *Watson v. Spence*, 20 Wend. (N. Y.) 260.

In *Casborne v. Scarfe*, 1 Atk. 603, the lord chancellor said: "An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seizin; the person therefore entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets."

It Is the Real and Beneficial Estate, and is subject to all the incidents thereof. *State v. Lawson*, 6 Ark. 269; *Moore v. Anders*, 14 Ark. 630, 60 Am. Dec. 551; *Hannah v. Carrington*, 18 Ark. 85; *Kannady v. McCarron*, 18 Ark. 166; *Denton v. Nanny*, 8 Barb. (N. Y.) 618.

Differs from Mortgagee's Estate. — The equity of redemption is a distinct estate from that which is vested in the mortgagee before or after condition broken. It is descendible, devisable, and alienable like other interests in real property. *Clark v. Reyburn*, 8 Wall. (U. S.) 318.

In *Paget v. Ede*, L. R. 18 Eq. 118, Sir James Bacon, V. C., said that it was "by a figure of speech only" that an equity of redemption could be called an estate. The question in-

It may be conveyed ¹ or devised; ² it descends to the owner's heirs or personal representatives, according to the nature of the mortgaged property, ³ and is subject to curtesy ⁴ and homestead. ⁵

(3) *Dower in Equity of Redemption.* — At Common Law an equity of redemption was not subject to dower, because dower was not allowed in equitable estates. ⁶

In the District of Columbia it is said that this rule still obtains. ⁷

But the Common-law Rule Has Been Changed in most jurisdictions, either by statute or by judicial decision, and the right of widows to dower has been extended to equities of redemption owned by their deceased husbands. ⁸

involved in this case, however, was whether the court sitting in England had jurisdiction of a suit to foreclose a mortgage of land situate in one of the English colonies, the mortgagor being within the jurisdiction of the court.

1. Equity of Redemption May Be Conveyed — *England.* — Casborne v. Scarfe, 1 Atk. 603; Blake v. Foster, 2 B. & B. 402; Burgess v. Wheate, 1 Eden 225, 1 W. Bl. 123.

Alabama. — Paulling v. Barron, 32 Ala. 9.

Arkansas. — State v. Lawson, 6 Ark. 269; Moore v. Anders, 14 Ark. 630, 60 Am. Dec. 551; Hannah v. Carrington, 18 Ark. 85; Kannady v. McCarron, 18 Ark. 166.

California. — Simpson v. Castle, 52 Cal. 644.

Delaware. — Grant v. Jackson, etc., Co., 5 Del. Ch. 404.

Maine. — Blaney v. Bearce, 2 Me. 132.

Massachusetts. — Gould v. Newman, 6 Mass. 239.

Nebraska. — Kyger v. Ryley, 2 Neb. 20.

New Hampshire. — Brewer v. Hyndman, 18 N. H. 9.

2. Equity of Redemption May Be Devised. — Blake v. Foster, 2 B. & B. 402; Casborne v. Scarfe, 1 Atk. 603; Burgess v. Wheate, 1 Eden 225, 1 W. Bl. 123; Moore v. Anders, 14 Ark. 637, 60 Am. Dec. 551; Kannady v. McCarron, 18 Ark. 170; Denton v. Nanny, 8 Barb. (N. Y.) 618.

3. Equity of Redemption Descends to Owner's Heirs — *England.* — Blake v. Foster, 2 B. & B. 402; Burgess v. Wheate, 1 Eden 225, 1 W. Bl. 123.

Arkansas. — State v. Lawson, 6 Ark. 269; Moore v. Anders, 14 Ark. 630, 60 Am. Dec. 551, Hannah v. Carrington, 18 Ark. 85; Kannady v. McCarron, 18 Ark. 166.

Indiana. — Shaw v. Hoadley, 8 Blackf. (Ind.) 165.

New York. — Denton v. Nanny, 8 Barb. (N. Y.) 618.

Tennessee. — Elliot v. Patton, 4 Verg. (Tenn.) 10.

4. Equity of Redemption Subject to Curtesy. — Casborne v. Scarfe, 1 Atk. 603; Jones v. Meredith, Bunb. 346; Wicks v. Scrivens, 1 John. & H. 215; Davis v. Wetherell, 13 Allen (Mass.) 60, 90 Am. Dec. 177; Lamson v. Drake, 105 Mass. 564; Gatewood v. Gatewood, 75 Va. 407. See also the title CURTESY, vol. 8, p. 506.

5. Equity of Redemption Is Subject to Homestead. — Burton v. Spiers, 87 N. Car. 87; Cheatham v. Jones, 68 N. Car. 153; Crummen v. Bennet, 68 N. Car. 494. See also the title HOMESTEAD.

6. Equity of Redemption Not Subject to Dower at Common Law — *England.* — Dixon v. Saville, 1 Bro. C. C. 326; Dawson v. Whitehaven Bank, 6 Ch. Div. 218, reversing 4 Ch. Div. 639; Hatchell v. Eggleso, 1 Ir. Ch. Rep. 215.

United States. — Steile v. Carroll, 12 Pet. (U. S.) 201; Mayburry v. Brien, 15 Pet. (U. S.) 21.

Delaware. — Cornog v. Cornog, 3 Del. Ch. 407.

Illinois. — Burson v. Dow, 65 Ill. 146.

Indiana. — M'Mahan v. Kimball, 3 Blackf. (Ind.) 1.

Massachusetts. — Snow v. Stevens, 15 Mass. 278, explaining Bird v. Gardner, 10 Mass. 364, 6 Am. Dec. 137.

Michigan. — May v. Tillman, 1 Mich. 262.

New Jersey. — Harrison v. Eldridge, 7 N. J. L. 392.

Virginia. — Claiborne v. Henderson, 3 Hen. & M. (Va.) 322.

"It is not necessary to refer to adjudged cases for the purpose of proving that, according to the principles of the common law, a widow is not dowerable in her husband's equity of redemption; and if a man mortgages in fee before marriage, and dies without redeeming the mortgage, his widow is not entitled to dower." Stelle v. Carroll, 12 Pet. (U. S.) 201.

"By the common law, dower does not attach to an equity of redemption. The fee is vested in the mortgagee, and the wife is not dowerable on an equitable seizin." Mayburry v. Brien, 15 Pet. (U. S.) 38.

Mortgage of Term of Years. — "There can be no dower of an equity of redemption reserved upon a mortgage in fee, though there may of an equity of redemption upon a mortgage for a term of years." D'Arcy v. Blake, 2 Sch. & Lef. 387, disapproving Banks v. Sutton, 2 P. Wms. 700.

For a Full Discussion of the right of a widow to dower in an equitable estate, see the title DOWER, vol. 10, p. 122.

7. Rule in District of Columbia. — In re Thompson's Estate, 6 Mackey (D. C.) 536.

8. Dower Right Extended to Equities of Redemption — *Alabama.* — Fry v. Merchant's Ins. Co., 15 Ala. 810; Boynton v. Sawyer, 35 Ala. 497; Gillespie v. Somerville, 3 Stew. & P. (Ala.) 447.

Arkansas. — Cockrill v. Armstrong, 31 Ark. 580; Hewitt v. Cox, 55 Ark. 225.

Connecticut. — Fish v. Fish, 1 Conn. 559; Barkhamsted v. Farmington, 2 Conn. 600; Clark v. Beach, 6 Conn. 142; Platt's Appeal, 56 Conn. 572.

Delaware. — Cornog v. Cornog, 3 Del. Ch. 407.

Florida. — McLane v. Piaggio, 24 Fla. 71.

Illinois. — Cox v. Garst, 105 Ill. 342; Bailey v. Bailey, 115 Ill. 551.

Indiana. — Hunsucker v. Smith, 49 Ind. 114; Leary v. Shaffer, 79 Ind. 567.

Iowa. — McReynolds v. Anderson, 69 Iowa 208.

(4) *Liability to Execution and Attachment.* — At common law an equity of redemption was not subject to levy and sale under execution;¹ but the common-law doctrine as to the equitable nature of the mortgagor's estate has been modified, and the remedy by execution has been extended in many jurisdictions so as to permit an equity of redemption to be sold under execution against the owner.² As a general rule, however, the right to sell an equity of

Kentucky. — Harrow v. Johnson, 3 Metc. (Ky.) 578.

Maine. — Smith v. Eustis, 7 Me. 41; Carll v. Butman, 7 Me. 103; Wilkins v. French, 20 Me. 111; Campbell v. Knights, 24 Me. 332; Manning v. Laboree, 33 Me. 343; Simonton v. Gray, 34 Me. 50; Young v. Tarbell, 37 Me. 509; Pratt v. Skolfield, 45 Me. 386; Moore v. Rollins, 45 Me. 493; Wing v. Ayer, 53 Me. 138.

Maryland. — Hopkins v. Frey, 2 Gill (Md.) 359; Chew v. Farmers Bank, 9 Gill (Md.) 361; Maybury v. Brien, 15 Pet. (U. S.) 21.

Massachusetts. — McCabe v. Bellows, 1 Allen (Mass.) 269; Snow v. Stevens, 15 Mass. 278; Barker v. Parker, 17 Mass. 564; Clark v. Munroe, 14 Mass. 351; Eaton v. Simonds, 14 Pick. (Mass.) 98; Peabody v. Patten, 2 Pick. (Mass.) 517; Gibson v. Crehore, 5 Pick. (Mass.) 146; Walker v. Griswold, 6 Pick. (Mass.) 416; Jennison v. Hapgood, 14 Pick. (Mass.) 345; Messiter v. Wright, 16 Pick. (Mass.) 151; Newton v. Cook, 4 Gray (Mass.) 46.

Michigan. — Snyder v. Snyder, 6 Mich. 470; Young v. McKee, 13 Mich. 552; Burrall v. Bender, 61 Mich. 608.

Mississippi. — Rutherford v. Munce, Walk. (Miss.) 370.

New Hampshire. — Cass v. Martin, 6 N. H. 25; Robinson v. Leavitt, 7 N. H. 102; Rossiter v. Cossit, 15 N. H. 38; Hastings v. Stevens, 29 N. H. 564; Woods v. Wallace, 30 N. H. 384; Norris v. Morrison, 45 N. H. 490.

New Jersey. — Montgomery v. Bruere, 5 N. J. L. 1001, reversing 4 N. J. L. 295; Thompson v. Boyd, 21 N. J. L. 58; Hartshorne v. Hartshorne, 2 N. J. Eq. 349; Ely v. Perrine, 2 N. J. Eq. 396; Vreeland v. Jacobus, 19 N. J. Eq. 231; Woodhull v. Reid, 16 N. J. L. 128; Eldridge v. Eldridge, 14 N. J. Eq. 105; Opdyke v. Bartles, 11 N. J. Eq. 133; Hinchman v. Stiles, 9 N. J. Eq. 454; Brown v. Richards, 17 N. J. Eq. 32; Yeo v. Mercereau, 18 N. J. L. 397; Chiswell v. Morris, 14 N. J. Eq. 101; Wade v. Miller, 32 N. J. L. 296.

New York. — Matthews v. Duryee, 45 Barb. (N. Y.) 69; Hitchcock v. Harrington, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229; Collins v. Torry, 7 Johns. (N. Y.) 278, 5 Am. Dec. 273; Bell v. New York, 10 Paige (N. Y.) 49; Coles v. Coles, 15 Johns. (N. Y.) 319; Van Duyn v. Thayer, 14 Wend. (N. Y.) 234, 19 Wend. (N. Y.) 162; Denton v. Nanny, 8 Barb. (N. Y.) 618; McGowan v. Smith, 44 Barb. (N. Y.) 232; Mills v. Van Voorhies, 20 N. Y. 412; Russell v. Austin, 1 Paige (N. Y.) 192; Tabele v. Tabele, 1 Johns. Ch. (N. Y.) 45; Wheeler v. Morris, 2 Bosw. (N. Y.) 524; Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28; Titus v. Neilson, 5 Johns. Ch. (N. Y.) 452.

North Carolina. — Campbell v. Murphy, 2 Jones Eq. (55 N. Car.) 357; Hare v. Jernigan, 76 N. Car. 471; Miller v. Tharel, 75 N. Car. 148; Davis v. Inscow, 84 N. Car. 396; Austin v. King, 91 N. Car. 286.

Ohio. — Welch v. Buckins, 9 Ohio St. 331; McArthur v. Franklin, 16 Ohio St. 193; Kling v. Ballentine, 40 Ohio St. 391; Mandel v. McClave, 46 Ohio St. 407, 15 Am. St. Rep. 627.

Pennsylvania. — Reed v. Morrison, 12 S. & R. (Pa.) 18.

Rhode Island. — Eddy v. Moulton, 13 R. I. 105.

South Carolina. — Tibbetts v. Langley Mfg. Co., 12 S. Car. 465; Trenholm v. Wilson, 13 S. Car. 174; Seibert v. Todd, 31 S. Car. 206.

Tennessee. — Turbeville v. Gibson, 5 Heisk. (Tenn.) 565; Pillow v. Thomas, 1 Baxt. (Tenn.) 121; Atwater v. Butler, 9 Baxt. (Tenn.) 299; Hudson v. Conway, 9 Lea (Tenn.) 410; Perkins v. McDonald, 10 Lea (Tenn.) 732; Gwynne v. Estes, 14 Lea (Tenn.) 662.

Virginia. — Heth v. Cocke, 1 Rand. (Va.) 344; Daniel v. Leitch, 13 Gratt. (Va.) 195.

West Virginia. — Martin v. Smith, 25 W. Va. 579.

Wisconsin. — Posten v. Miller, 60 Wis. 494.

Canada. — Collins v. Story, 2 Nova Scotia 141; Dobbin v. Dobbin, 11 Ont. Rep. 534; *Re* Hague, 14 Ont. Rep. 660; *Re* Croskery, 16 Ont. Rep. 207; Sheppard v. Sheppard, 14 Grant's Ch. (U. C.) 174.

A Release by the Husband of his equity of redemption in lands mortgaged, not executed by the wife, though she joined in the mortgage, is no bar to her claim of dower in the equity of redemption, or remaining interest of the husband in the land, after satisfaction of the mortgage. She is, however, bound to contribute ratably to the redemption of the mortgage. Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318.

1. Equity of Redemption Not Subject to Execution at Common Law. — *England.* — Metcalf v. Scholey, 2 B. & P. N. R. 461; Scott v. Scholey, 8 East 467; Lyster v. Dolland, 1 Ves. Jr. 431.

United States. — Van Ness v. Hyatt, 13 Pet. (U. S.) 294; Piatt v. Oliver, 2 McLean (U. S.) 267; Hill v. Smith, 2 McLean (U. S.) 448.

Alabama. — M'Gregor v. Hall, 3 Stew. & P. (Ala.) 397.

Mississippi. — Boarman v. Catlett, 13 Smed. & M. (Miss.) 149.

North Carolina. — Camp v. Cox, 1 Dev. & B. L. (18 N. Car.) 52.

2. Equity of Redemption Subject to Execution in Some Jurisdictions. — *United States.* — Van Ness v. Hyatt, 13 Pet. (U. S.) 294.

Alabama. — M'Gregor v. Hall, 3 Stew. & P. (Ala.) 397; Magee v. Carpenter, 4 Ala. 469; Marriott v. Givens, 8 Ala. 706; Powell v. Williams, 14 Ala. 476, 48 Am. Dec. 105; Harbison v. Harrell, 19 Ala. 753; Barker v. Bell, 37 Ala. 354; Boswell v. Carlisle, 55 Ala. 554; Shaw v. Lindsey, 60 Ala. 344.

Colorado. — Seaman v. Hax, 14 Colo. 536.

Connecticut. — Hobart v. Frisbie, 5 Conn. 592.

Illinois. — Lloyd v. Lee, 45 Ill. 277; Cottingham v. Springer, 88 Ill. 90.

redemption under execution does not include the right to sell under an execution on a judgment for the mortgage debt,¹ though in some jurisdictions the rule is the other way;² and it has even been doubted whether a mortgagee can sell the equity of redemption under an execution issued on a judgment in his favor against the mortgagor for a debt other than that secured by the mortgage.³

An Attachment may be levied on an equity of redemption when such property is included in the statute giving that remedy.⁴

Indiana. — *Heimberger v. Boyd*, 18 Ind. 420; *Linville v. Bell*, 47 Ind. 547; *Raymond v. Parish*, 70 Ind. 256.

Kentucky. — *Crow v. Tinsley*, 6 Dana (Ky.) 402; *Bronston v. Robinson*, 4 B. Mon. (Ky.) 142; *Waller v. Tate*, 4 B. Mon. (Ky.) 529.

Maine. — *Lord v. Crowell*, 75 Me. 399.

Maryland. — *Ford v. Philpot*, 5 Har. & J. (Md.) 312.

Massachusetts. — *Atkins v. Sawyer*, 1 Pick. (Mass.) 351, 11 Am. Dec. 188; *Ingersoll v. Sawyer*, 2 Pick. (Mass.) 276; *Cushing v. Hurd*, 4 Pick. (Mass.) 253, 16 Am. Dec. 335; *Carpenter v. First Parish*, 7 Pick. (Mass.) 49; *Washburn v. Goodwin*, 17 Pick. (Mass.) 137.

Michigan. — *Preston v. Ryan*, 45 Mich. 174; *Nelson v. Ferris*, 30 Mich. 497.

Mississippi. — *Carpenter v. Bowen*, 42 Miss. 28; *Davis v. Hamilton*, 50 Miss. 213.

Missouri. — *Young v. Ruth*, 55 Mo. 515.

Nebraska. — *Renard v. Brown*, 7 Neb. 449.

New Hampshire. — *Dunbar v. Starkey*, 19 N. H. 160.

New York. — *Waters v. Stewart*, 1 Cai. Cas. (N. Y.) 47; *Jackson v. Hull*, 10 Johns. (N. Y.) 481.

North Carolina. — *Camp v. Coxe*, 1 Dev. & B. L. (18 N. Car.) 52.

Canada. — *Heward v. Wolfenden*, 14 Grant's Ch. (U. C.) 188; *Shaw v. Tims*, 19 Grant's Ch. (U. C.) 496; *Kerr v. Styles*, 26 Grant's Ch. (U. C.) 399.

Under the Ontario Law the interest of one of several owners of an equity of redemption cannot be sold under execution, but the sale must be of the entire estate. *Cronn v. Chamberlin*, 27 Grant's Ch. (U. C.) 551.

1. *Equity of Redemption Not Subject to Execution for Mortgage Debt* — *United States.* — *Hill v. Smith*, 2 McLean (U. S.) 448; *Pugh v. Fairmount Gold, etc.*, Min. Co., 112 U. S. 243.

Alabama. — *Powell v. Williams*, 14 Ala. 476, 48 Am. Dec. 105; *Boswell v. Carlisle*, 55 Ala. 554.

Delaware. — *Lesley v. Shock*, 3 Houst. (Del.) 130.

Indiana. — *Linville v. Bell*, 47 Ind. 547. But see the cases from this state cited in the next note below.

Kentucky. — *Goring v. Shreve*, 7 Dana (Ky.) 64; *Swigert v. Thomas*, 7 Dana (Ky.) 220; *Bronston v. Robinson*, 4 B. Mon. (Ky.) 142; *Waller v. Tate*, 4 B. Mon. (Ky.) 529.

Massachusetts. — *Atkins v. Sawyer*, 1 Pick. (Mass.) 351, 11 Am. Dec. 188; *Washburn v. Goodwin*, 17 Pick. (Mass.) 137.

Michigan. — *Preston v. Ryan*, 45 Mich. 174.

Mississippi. — *Carpenter v. Bowen*, 42 Miss. 28.

Missouri. — *Thornton v. Pigg*, 24 Mo. 249.

New Jersey. — *Snyder v. Blair*, 33 N. J. Eq. 208.

New York. — *Tice v. Annin*, 2 Johns. Ch.

(N. Y.) 125; *Palmer v. Foote*, 7 Paige (N. Y.) 437.

North Carolina. — *Camp v. Coxe*, 1 Dev. & B. L. (18 N. Car.) 52; *Deaver v. Parker*, 2 Ired. Eq. (37 N. Car. 40); *Shaffner v. Fogleman*, Winst. Eq. (60 N. Car.) 12.

South Carolina. — *Schnell v. Schroder*, Bailey Eq. (S. Car.) 334; *M'Lure v. Wheeler*, 6 Rich. Eq. (S. Car.) 343.

Canada. — *Shaw v. Tims*, 19 Grant's Ch. (U. C.) 496; *Kerr v. Styles*, 26 Grant's Ch. (U. C.) 399.

Assignment of Debt Without Assignment of Mortgage. — If a negotiable note secured by a mortgage of the promisor's land is transferred without the mortgage, the equity of redemption may be attached and sold on execution, in a suit by the transferee against the mortgagor. *Crane v. March*, 4 Pick. (Mass.) 131, 16 Am. Dec. 329; *Andrews v. Fiske*, 101 Mass. 422.

Levy on Equity of Redemption of Junior Mortgage. — An execution issued on a judgment for a debt secured by mortgage may be levied on the equity of redemption of a junior mortgage in the same land. *Johnson v. Stevens*, 7 Cush. (Mass.) 431.

2. **Equity of Redemption Subject to Execution for Mortgage Debt in Some Jurisdictions** — *Colorado.* — *Seaman v. Hax*, 14 Colo. 536.

Illinois. — *Fitch v. Pinckard*, 5 Ill. 69; *Cottingham v. Springer*, 88 Ill. 90.

Indiana. — *Youse v. McCreary*, 2 Blackf. (Ind.) 243; *Sharts v. Awalt*, 73 Ind. 304. But see the case from this state cited in the note immediately preceding.

Maine. — *Porter v. King*, 1 Me. 297; *Crooker v. Frazier*, 52 Me. 405; *Lord v. Crowell*, 75 Me. 399.

Ohio. — *Freeby v. Tupper*, 15 Ohio 467; *Holister v. Dillon*, 4 Ohio St. 197.

Sale of Part of Mortgaged Land under Execution for Mortgage Debt. — A mortgagee who has obtained execution against the mortgagor, on the note secured by his mortgage, may levy on a part of the mortgaged premises, and the title to such portion becomes absolute in him if the mortgagor neglects for a year to redeem. The residue, however, may be redeemed by the mortgagor after the expiration of the year, and the mortgagee must account for the rents and profits of the whole of the premises until the levy, and of the residue until possession is surrendered to the mortgagor. *Crooker v. Frazier*, 52 Me. 405.

As to sale of equity of redemption under execution, see also the title *EXECUTIONS*, *post*.

3. *Camp v. Coxe*, 1 Dev. & B. L. (18 N. Car.) 52; *Thompson v. Parker*, 2 Jones Eq. (55 N. Car.) 475.

4. **Attachment of Equity of Redemption.** — The equity of redemption is subject to levy under attachment only if made so by statute.

c. **CHARACTERISTICS OF STATUTORY RIGHT TO REDEEM.** — The statutory right to redeem differs essentially from the equity of redemption proper. It is not an estate in the mortgaged property, but is a mere personal privilege of redeeming the property within a certain time after the mortgage has been foreclosed.¹ But it exists only in such cases and in favor of such persons as are designated in the statute by which it is created.²

Creation or Alteration of Right — Effect as to Existing Mortgages. — The question has been raised in many cases whether a statute giving the right to redeem after foreclosure, or altering a right previously given, can be applied to mortgages existing at the time when the statute took effect. At first it was held that such statutes merely affected the remedy of the parties to a mortgage, and were valid in respect to existing mortgages;³ but it was afterwards held by

Alabama. — *Powell v. Williams*, 14 Ala. 476, 48 Am. Dec. 105; *Barker v. Bell*, 37 Ala. 354; *Boswell v. Carlisle*, 55 Ala. 554.

Indiana. — *Sharts v. Awalt*, 73 Ind. 304.

Maine. — *Porter v. King*, 1 Me. 297; *Crooker v. Frazier*, 52 Me. 405; *Lord v. Crowell*, 75 Me. 399.

Massachusetts. — *Prout v. Root*, 116 Mass. 410.

Missouri. — *McNair v. Biddle*, 8 Mo. 257; *Thornton v. Pigg*, 24 Mo. 249; *Lumley v. Robinson*, 26 Mo. 364; *Young v. Ruth*, 55 Mo. 515.

Ohio. — *Fosdick v. Risk*, 15 Ohio 84, 45 Am. Dec. 562.

1. **Statutory Right to Redeem — In General.** — The statutory right to redeem is separate and distinct from the equitable right. It does not come into existence until a foreclosure sale takes place, and it continues for the statutory period thereafter and then expires. *Cramer v. Watson*, 73 Ala. 127; *Eiceman v. Finch*, 79 Ind. 511.

Statutory Right Not Subject to Sale under Execution. — *Junkins v. Lovelace*, 72 Ala. 303; *Bailey v. Timberlake*, 74 Ala. 221; *Parmer v. Parmer*, 74 Ala. 285; *Powers v. Andrews*, 84 Ala. 289; *Commercial Real Estate, etc., Assoc. v. Parker*, 84 Ala. 298.

After the Foreclosure of a mortgage the only right of redemption by mere act of the parties is that given by statute, and it can be exercised only as prescribed in the statute. *Mewburn v. Bass*, 82 Ala. 622; *Dickerson v. Hayes*, 26 Minn. 100.

Under the Alabama Statute, redemption from a foreclosure sale cannot be had unless the redemptioner delivered possession of the premises to the purchaser on demand within ten days after the sale. *Nelms v. Kennon*, 88 Ala. 329.

Statutory Right Not Affected by Terms of Foreclosure. — The right to redeem from a foreclosure sale, as provided by statute, cannot be defeated by the terms of the decree of foreclosure. *D'Wolf v. Haydn*, 24 Ill. 525.

Recognition by Federal Courts. — The right given by statute is a substantial one, to be recognized even in courts of the United States sitting in equity, because the statute constitutes a rule of property in the state which enacts it. *Parker v. Dacres*, 130 U. S. 43; *Brine v. Hartford F. Ins. Co.*, 96 U. S. 627; *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77; *Mason v. Northwestern Mut. L. Ins. Co.*, 106 U. S. 163; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51.

2. **Extent of Statutory Right.** — A statute allowing redemption after a sale under a decree foreclosing a mortgage does not apply to trust deeds. *Bloom v. Van Rensselaer*, 15 Ill. 503.

Nor does a statute authorizing redemption from a sale under a mortgage apply to sales under decrees of foreclosure. *Martin v. Ward*, 60 Ark. 510.

Mortgages Given by Quasi-public Corporations. — A statute giving the right to redeem mortgaged lands and tenements sold under a decree of foreclosure does not apply to the real estate of a railroad company which with its franchises and personal property is mortgaged as an entirety. *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77; *Simmons v. Taylor*, 38 Fed. Rep. 682; *Peoria, etc., R. Co. v. Thompson*, 103 Ill. 187.

A statute authorizing the redemption of property sold under a decree of foreclosure does not apply to the property of a quasi-public corporation necessary to the exercise of its franchises and mortgaged therewith. *Farmers' L. & T. Co. v. Iowa Water Co.*, 78 Fed. Rep. 881.

Mortgages to Secure Performance of Collateral Undertaking. — The provisions of the *Vermont* statute (Comp. Stat., c. 38, §§ 7-12) relating to redemption of mortgages do not apply to a case where the condition of the mortgage is other than to pay money. *Harrington v. Donaldson*, 31 Vt. 535.

Limitation as to Persons. — The statutory right to redeem from a sale under a mortgage is confined to the person specified therein. *Powers v. Andrews*, 84 Ala. 289; *Aiken v. Bridgeford*, 84 Ala. 295; *Commercial Real Estate, etc., Assoc. v. Parker*, 84 Ala. 298; *Walden v. Speigner*, 87 Ala. 379; *Kimmell v. Willard*, 1 Dougl. (Mich.) 217.

Purchasers of Mortgaged Property are not entitled to redeem from a foreclosure sale under the *Ohio* statute. *Dennison v. Allen*, 4 Ohio 496; *Lytle v. Reed*, *Wright* (Ohio) 248.

3. **Statute Creating Right Held Valid as to Existing Mortgages.** — *Delahay v. McConnell*, 5 Ill. 156, *citing Williams v. Waldo*, 4 Ill. 264.

Shortening Time for Redemption. — In *Butler v. Palmer*, 1 Hill (N. Y.) 324, it was held that a statute shortening the time within which a mortgagor might redeem from a foreclosure sale did not impair the obligation of the contract and was valid.

Right to Redeem Relates to Remedy. — "The right to redeem is solely the creature of statute."

the Supreme Court of the United States that a statute giving the right to redeem from a foreclosure sale was unconstitutional as to mortgages existing before the statute took effect,¹ and the doctrine is now well settled in accordance with this decision.² The same rule applies to amendatory statutes changing the time for redemption.³

III. WHO MAY REDEEM — 1. **General Rule.** — The mortgagor or any one who has acquired any legal or equitable interest in or lien on mortgaged property, by operation of law or otherwise, in privity of title with the mortgagor, may redeem; but he must have an interest derived mediately or immediately from, through, or in the right of the mortgagor, so as to constitute him the owner of part of the mortgagor's original equity; otherwise it cannot be affected by the mortgage, and needs no redemption.⁴

ute; it relates to the remedy, and is not, as it is held, so essentially and intrinsically a contract right as to be entirely beyond legislative control." *Anderson v. Anderson*, 129 Ind. 573, 28 Am. St. Rep. 211. See also *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515.

1. **Former Doctrine as to Existing Mortgages Overruled.** — *Bronson v. Kinzie*, 1 How. (U. S.) 311, followed in *Smoot v. Lafferty*, 7 Ill. 383. Compare *Bugbee v. Howard*, 32 Ala. 713.

2. **Statute Giving Right to Redeem Held Unconstitutional as to Existing Mortgages** — *United States*. — *Barnitz v. Beverly*, 163 U. S. 118; *Bronson v. Kinzie*, 1 How. (U. S.) 311; *McCracken v. Hayward*, 2 How. (U. S.) 608.

Arkansas. — *Robards v. Brown*, 40 Ark. 423; *Hudgins v. Morrow*, 47 Ark. 515.

Illinois. — *Smoot v. Lafferty*, 7 Ill. 383.

Iowa. — *Rosier v. Hale*, 10 Iowa 470, 77 Am. Dec. 127; *Malony v. Fortune*, 14 Iowa 417.

Kansas. — *Watkins v. Glenn*, 55 Kan. 417; *Beverly v. Barnitz*, 55 Kan. 451. On a rehearing after a change in the personnel of the court, the decision in the case last cited was reversed, the court holding, by Martin, C. J., that the Kansas statute giving the right to redeem within eighteen months after foreclosure applied to existing mortgages and was constitutional. *Beverly v. Barnitz*, 55 Kan. 466. The Supreme Court of the United States reversed this decision, however, and held that the statute could not constitutionally apply to a mortgage executed before its passage. *Barnitz v. Beverly*, 163 U. S. 118.

Minnesota. — *Heyward v. Judd*, 4 Minn. 483; *Dunwell v. Bidwell*, 8 Minn. 34; *Carroll v. Rossiter*, 10 Minn. 174; *Berthold v. Holman*, 12 Minn. 335, 93 Am. Dec. 234; *Goenen v. Schroeder*, 8 Minn. 387; *Berthold v. Fox*, 13 Minn. 501, 97 Am. Dec. 243; *Thompson v. Foster*, 21 Minn. 319.

New Jersey. — *Champion v. Hinkle*, 45 N. J. Eq. 162.

3. **A Statute Extending the Time for redemption is inoperative as to existing mortgages.** *Wilder v. Campbell*, (Idaho 1896) 43 Pac. Rep. 677; *State v. Sears*, 29 Oregon 580.

A Statute Shortening the Time of redemption is unconstitutional in respect to mortgages existing at the time when the statute took effect. *Cargill v. Power*, 1 Mich. 369.

In *Stone v. Bassett*, 4 Minn. 298, it was held that the Act of July 29, 1858, "to regulate the foreclosure of real estate," which provided that a mortgagor might retain possession of the mortgaged premises for one year after foreclosure sale by paying interest on the purchase

money at the rate of twelve per centum per annum, but which did not change the time of redemption, did not impair the obligation of mortgage contracts entered into before the passage of the act, and therefore was not in contravention of either the state or the federal constitution. See also *Freeborn v. Pettibone*, 5 Minn. 277.

4. **Who May Redeem in General** — *England*. — *Pearce v. Morris*, L. R. 5 Ch. 227; *James v. Biou*, 3 Swanst. 234; *Lomax v. Bird*, 1 Vern. 182.

United States. — *Upham v. Brooks*, 2 Woodb. & M. (U. S.) 407.

Alabama. — *Rapier v. Gulf City Paper Co.*, 64 Ala. 330; *Butts v. Broughton*, 72 Ala. 294.

Arkansas. — *State v. Lawson*, 6 Ark. 269; *Scott v. Henry*, 13 Ark. 112.

Connecticut. — *Goodman v. White*, 26 Conn. 317; *Lyon v. Robbins*, 45 Conn. 513.

Illinois. — *Beach v. Shaw*, 57 Ill. 17; *Morse v. Smith*, 83 Ill. 396; *Ogle v. Koerner*, 41 Ill. App. 452.

Iowa. — *Rice v. Nelson*, 27 Iowa 148.

Maine. — *Frisbee v. Frisbee*, 86 Me. 444.

Massachusetts. — *Gibson v. Crehore*, 5 Pick. (Mass.) 146; *Platt v. Squire*, 12 Met. (Mass.) 494.

Michigan. — *Smith v. Austin*, 9 Mich. 465; *Brink v. Freoff*, 40 Mich. 610; *Powers v. Golden Lumber Co.*, 43 Mich. 468; *Millard v. Truax*, 50 Mich. 343; *Sinclair v. Learned*, 51 Mich. 335; *Shutes v. Woodard*, 57 Mich. 213.

Minnesota. — *Hospes v. Sanborn*, 28 Minn. 48; *O'Brien v. Krenz*, 36 Minn. 136.

Mississippi. — *Boorman v. Catlett*, 13 Smed. & M. (Miss.) 149.

New Hampshire. — *Brewer v. Hyndman*, 18 N. H. 9; *Moore v. Beasom*, 44 N. H. 215.

New York. — *Pardee v. Van Anken*, 3 Barb. (N. Y.) 534; *Grant v. Duane*, 9 Johns. (N. Y.) 611; *Chamberlin v. Chamberlin*, 44 N. Y. Super. Ct. 116.

North Carolina. — *Purvis v. Brown*, 4 Ired. Eq. (39 N. Car.) 413.

Oregon. — *Sellwood v. Gray*, 11 Oregon 534.

Rhode Island. — *Hazard v. Robinson*, 15 R. I. 226.

Tennessee. — *Ballard v. Jones*, 6 Humph. (Tenn.) 455.

The Owner of a Homestead which is subject to mortgage may redeem therefrom. *Kirby v. Reese*, 69 Ga. 452; *Davis v. Wetherell*, 13 Allen (Mass.) 60, 90 Am. Dec. 177; *Lamb v. Montague*, 112 Mass. 352.

A Jointress may redeem, whether her jointure

Conversely no one has the right to redeem unless he has an interest in the property.¹

The Title on which a right to redeem may be founded is not necessarily one that is clear and undisputed.² Neither is it necessary that there should be a

is in the whole or only a part of the mortgaged property. *Howard v. Harris*, 1 Vern. 33.

Owner of Easement.—A person having only an easement in mortgaged property may redeem. *Bacon v. Bowdoin*, 22 Pick. (Mass.) 405.

Legatees.—A legatee whose legacy is charged on mortgaged land may redeem. *Batchelor v. Middleton*, 6 Hare 75.

Senior Mortgagee.—A person can redeem only when he has an interest to protect, and where without such redemption he would be a loser, and therefore a senior mortgagee has no right to redeem from a junior mortgagee. *Dawson v. Overmyer*, 141 Ind. 439. Nor does he acquire such right by foreclosing the senior mortgage. *Goodman v. White*, 26 Conn. 317. But if the senior mortgagee purchased the mortgaged property under foreclosure of his mortgage, the junior mortgagee not having been made a party to the foreclosure proceeding, he (the senior mortgagee), as owner of the equity of redemption, may redeem from the junior mortgagee. *Smith v. Shay*, 62 Iowa 119.

Mortgaged Property Conveyed in Trust for Wife.—A wife has an equitable interest in property which her husband had conveyed in trust for her, and which she and her husband occupied as a homestead, and she may therefore redeem it from a mortgage given by her husband. *Whitcomb v. Sutherland*, 18 Ill. 578.

Purchaser under Foreclosure of Junior Mortgage.—The purchaser at the sale under foreclosure of a junior mortgage is a lien creditor and entitled as such to redeem the prior mortgage, as long as the statutory right of redemption from such sale continues. *Buchanan v. Reid*, 43 Minn. 172.

Surety of Mortgagor.—One who is surety for a debt secured by a second mortgage may redeem the first mortgage. *Ex p. Crisp*, 1 Atk. 133; *Wade v. Coope*, 2 Sim. 155; *Wright v. Morley*, 11 Ves. Jr. 12; *Averill v. Taylor*, 8 N. Y. 44.

Under the Iowa Statute a surety on a note secured by a mortgage has no right to redeem the mortgaged property from the purchaser at the foreclosure sale, though judgment was rendered against him in the foreclosure proceeding. *Miller v. Ayres*, 59 Iowa 424.

Under the Missouri Statute the owner of the equity of redemption in property subject to a deed of trust with a power of sale may redeem from a sale under it only when the *cestui que trust* or some one for him is the purchaser. *Keith v. Browning*, 139 Mo. 190.

Right of Persons Claiming under Mortgagor.—Where the mortgagor's right of redemption is barred, the right of those claiming under him is generally barred also. *Tucker v. White*, 2 Dev. & B. Eq. (22 N. Car.) 289.

Sale under School-fund Mortgage.—The owner of land sold under a school-fund mortgage cannot redeem as a matter of right, by payment of the amount paid, with interest thereon. *Bonnell v. Ray*, 71 Ind. 141.

Redemption from the State.—Under the *Arkansas* statute, only the owners of the equity of redemption in the real estate bank lands sold to the state can redeem them from the state. *Davies v. Hunt*, 37 Ark. 574.

1. Strangers in Interest Not Entitled to Redeem.—*Lomax v. Bird*, 1 Vern. 182; *Fray v. Drew*, 11 Jur. N. S. 130; *Byington v. Buckwalter*, 7 Iowa 512, 74 Am. Dec. 279; *Skinner v. Young*, 80 Iowa 234; *Harwood v. Underwood*, 28 Mich. 427.

In *James v. Biou*, 3 Swanst. 234, Lord Eldon said: "It is extremely clear that a mortgagee may retain possession of the estate until he is paid, and that no one has a right to make a tender of the money due except the party entitled to the equity of redemption; against all other persons the estate is the property of the mortgagee."

In *Grant v. Duane*, 9 Johns. (N. Y.) 611, the court, by Thompson, J., said: "If the respondents have shown no interest in themselves, or a right to redeem the mortgage, on their own account or on account of others with whom some connection is shown and whose interest they have a right to represent, their claims cannot be supported, notwithstanding some other person might have a right to enforce the same claim. It cannot be allowed to them to speculate on the claims of others, and redeem at their peril, and then litigate with those who may have the right. No person can come into a court of equity for a redemption of a mortgage but he who is entitled to the legal estate of the mortgagor or claims a subsisting interest under him."

The Trustee in a Deed of Trust of Mortgaged Lands, who by the terms of the trust deed was to acquire a beneficial interest in the land on payment of the mortgage and certain other claims, cannot redeem from the mortgage after repudiating the trust. *Smith v. Austin*, 11 Mich. 34.

Conveyance of Premises by Mortgagor.—If a mortgagor conveys the mortgaged premises to a third person by a warranty deed, he has no longer any interest therein and cannot redeem. *Phillips v. Leavitt*, 54 Me. 405; *True v. Haley*, 24 Me. 297.

But a Verbal Contract to Sell mortgaged premises does not change the ownership so as to affect the right of redemption. *Patterson v. Yeaton*, 47 Me. 308.

See also *infra*, this title, *Relinquishment or Bar of Right—Acquisition of Title by Mortgagee*.

2. Title of Redemptioner.—A *prima facie* title is sufficient to entitle a person to redeem. *Pym v. Bowreman*, 3 Swanst. 241, note.

The Mortgagor may redeem regardless of whether he has a valid title to the premises or not. *Hall v. Arnott*, 80 Cal. 348. But see *Farr v. Dudley*, 21 N. H. 373; *Eastman v. Batchelder*, 36 N. H. 141, 72 Am. Dec. 295.

Proof of Title.—A redemptioner need not produce and file certified copies of the documents showing his title. The production of

beneficial title in order to give a person the right to redeem, but it is sufficient if he holds the legal title as a trustee, or in other fiduciary capacity.¹

2. Heirs and Devisees.—The devisees of mortgaged property, or, if the deceased owner of the equity of redemption did not dispose of it by will, then his heirs at law, may redeem.²

3. Purchasers.—Within the general rule stated above, a purchaser of mortgaged property from the mortgagor or from one who acquired title subject to the mortgage may redeem,³ and the same right passes to a purchaser of an

the original record is sufficient. *Sardeson v. Menage*, 41 Minn. 314.

1. Trustees of mortgaged property may redeem. *Franklyn v. Ferne*, Barn. 30; *Hanson v. Preston*, 3 V. & Coll. 229.

Where debts are secured by a deed of trust on property subject to a prior mortgage, the trustee is the proper person to redeem, and the creditors have not the right, in the absence of special circumstances, such as the refusal of the trustee to act. *Troughton v. Binkes*, 6 Ves. Jr. 573.

Special Guardian of Infant.—Where a mortgage is given to the special guardian of an infant for the infant's benefit, the special guardian is the proper person to redeem a prior mortgage on the premises. *Pardee v. Van Anken*, 3 Barb. (N. Y.) 534.

Assignee in Bankruptcy.—The equity of redemption passes to the assignee in bankruptcy of the mortgagor. *Robinson v. Denny*, 57 Ala. 492; *Lloyd v. Hoo Sue*, 5 Sawy. (U. S.) 74; *Wright v. Morley*, 11 Ves. Jr. 12.

2. Redemption by Heirs—England.—*Pym v. Bowreman*, 3 Swanst. 241, note.

United States.—*Chew v. Hyman*, 10 Biss. (U. S.) 240.

Alabama.—*Butts v. Broughton*, 72 Ala. 294.

Connecticut.—*Sheldon v. Bird*, 2 Root (Conn.) 509.

Illinois.—*Hunter v. Dennis*, 112 Ill. 568.

New Mexico.—*King v. Warrington*, 2 N. Mex. 318.

Tennessee.—*Elliot v. Patton*, 4 Yerg. (Tenn.) 10.

Wisconsin.—*Zaegel v. Kuster*, 51 Wis. 31.

Heirs of Mortgagor Supposed to Be Dead.—In *Squire v. Wright*, 85 Mich. 76, the owner of land, after mortgaging it, disappeared and was not heard from afterwards. About two years later the mortgage was foreclosed, and the mortgagor's brother, to whom his father, as heir of the mortgagor, had conveyed the premises, was permitted to redeem, though there was no proof that the mortgagor was dead. The court, by Champlin, C. J., said: "The circumstances are peculiar. George F. Wright [the mortgagor] may have become insane or imprisoned. He may be, and the testimony shows that he was, a person not intellectually bright, and his fears may have been so worked upon by threats of being arrested that he dare not return to his home, though what he was to be arrested for does not appear. His whereabouts are unknown. He may be dead, but that fact is incapable of proof. Shall his heirs be obliged to lose their inheritance in the one case, or, in the other, shall no relative by blood be permitted to step in and save the property for his brother's benefit? The circumstances are such that, in my judgment, authority should be presumed

from the necessity of the case. If, during the time of redemption after the sale, the mortgagor had been stricken with insanity, can it be said that his brother would have had no right to redeem the premises for him?"

Redemption by Devisees of Mortgaged Property.—The devisees of a mortgagor are entitled to redeem the mortgaged premises, to the exclusion of the mortgagor's heirs. *Philips v. Hele*, 1 Ch. Rep. 190; *Faulkner v. Daniel*, 3 Hare 199; *Stokes v. Salomons*, 9 Hare 75; *Finch v. Newnham*, 2 Vern. 216; *Lewis v. Nangle*, 2 Ves. 431; *Denton v. Nanny*, 8 Barb. (N. Y.) 618.

3. Purchasers May Redeem—Alabama.—*Lovelace v. Webb*, 62 Ala. 271; *Watson v. Steele*, 78 Ala. 361; *Booker v. Waller*, 81 Ala. 549.

Arkansas.—*Scott v. Henry*, 13 Ark. 112; *Turner v. Watkins*, 31 Ark. 429; *Cohn v. Hoffman*, 56 Ark. 119.

Connecticut.—*Calkins v. Munsel*, 2 Root (Conn.) 333.

Illinois.—*Dunlap v. Wilson*, 32 Ill. 517; *Farrell v. Parlier*, 50 Ill. 274; *Beach v. Shaw*, 57 Ill. 17; *Rogers v. Meyers*, 68 Ill. 92.

Indiana.—*Coombs v. Carr*, 55 Ind. 303; *Nesbit v. Hanway*, 87 Ind. 400.

Iowa.—*Hammond v. Leavitt*, 59 Iowa 407.

Kansas.—*Jenkins v. Green*, 22 Kan. 562.

Maine.—*Wood v. Goodwin*, 49 Me. 260, 77 Am. Dec. 259.

Massachusetts.—*Gerrish v. Mace*, 9 Gray (Mass.) 235; *Wellington v. Gale*, 13 Mass. 488; *White v. Bond*, 16 Mass. 400.

Michigan.—*Stone v. Welling*, 14 Mich. 514.

Missouri.—*Hall v. Morgan*, 79 Mo. 47.

New York.—*Lowry v. Tew*, 3 Barb. Ch. (N. Y.) 414.

Texas.—*Willis v. Smith*, 66 Tex. 31.

Vermont.—*Chandler v. Dyer*, 37 Vt. 345.

Virginia.—*Dust v. Conrod*, 5 Munf. (Va.) 411.

Wisconsin.—*Hodson v. Treat*, 7 Wis. 263; *Carney v. Emmons*, 9 Wis. 114; *Green v. Dixon*, 9 Wis. 532; *Stark v. Brown*, 12 Wis. 572, 78 Am. Dec. 762; *Pratt v. Frear*, 13 Wis. 462; *Allen v. Case*, 13 Wis. 621; *Moore v. Cord*, 14 Wis. 213; *Briggs v. Seymour*, 17 Wis. 255; *McNaughton v. Thayer*, 17 Wis. 290; *State Bank v. Abbott*, 20 Wis. 570; *Hoppin v. Doty*, 22 Wis. 621.

Canada.—*Waters v. Shade*, 2 Grant's Ch. (U. C.) 457; *Sheldon v. Chisholm*, 3 Grant's Ch. (U. C.) 655.

Under the Ohio Statute a purchaser of mortgaged premises cannot redeem from a foreclosure sale, though he was not a party to the foreclosure suit. *Dennison v. Allen*, 4 Ohio 496; *Lytle v. Reed*, *Wright* (Ohio) 248.

Purchaser of Legal Title Without Beneficial Interest.—As a general rule, the holder of the legal estate is the proper person to redeem.

equity of redemption sold under execution or other legal process.¹

A Purchaser of a Part of the equity of redemption may redeem the entire property.²

An Executory Contract to Sell mortgaged property does not give to the vendee named in it the right to redeem, unless the vendor could be compelled to specifically perform the contract.³

4. Part Owners. — Ownership of the entire estate in mortgaged property is not necessary to give the right to redeem from the mortgage. A partial ownership is sufficient, whether it be an undivided interest, or a separate parcel,⁴

whether he holds as trustee for others or in his own right, by a voluntary conveyance from the mortgagor, but where he acquired the naked legal title as a mere formal purchaser, paying nothing, and not expected by others to acquire any benefit, or intending to do so himself, he will not be permitted to redeem. *Beach v. Shaw*, 57 Ill. 17.

Purchaser from Assignee in Bankruptcy. — The purchaser of an equity of redemption from the mortgagor's assignee in bankruptcy cannot redeem, where the foreclosure proceeding was commenced before the appointment of the assignee, and the assignee did not apply to be made a party thereto. *Cleveland v. Boerum*, 23 Barb. (N. Y.) 201, 3 Abb. Pr. (N. Y.) 294, 27 Barb. (N. Y.) 252.

Payment of Consideration. — The right of a purchaser of an equity of redemption to redeem is not affected by the fact that the price was paid by a third person, or that no consideration at all was paid, as the mortgagee cannot question the redemptioner's right on this account. *Howard v. Harris*, 1 Vern. 193; *Green v. Dixon*, 9 Wis. 532.

Deed Valid Only as Between the Parties. — A purchaser of mortgaged premises without notice of the mortgage, though not entitled to priority over the mortgage, because his deed was given under such circumstances that as against the mortgagee he was not a *bona fide* purchaser, is nevertheless entitled to redeem. *Stone v. Welling*, 14 Mich. 514.

Purchasers Pending Foreclosure. — The equity of redemption is not extinguished by a decree of foreclosure until the decree is executed by sale, and therefore one who purchased after the decree, but before the sale thereunder, may redeem. *Willis v. Smith*, 66 Tex. 31.

1. Purchaser at Sale under Legal Process May Redeem — *Alabama.* — *Lovelace v. Webb*, 62 Ala. 271; *Watson v. Steele*, 78 Ala. 361.

Arkansas. — *Turner v. Watkins*, 31 Ark. 429; *Cohn v. Hoffman*, 56 Ark. 119.

Indiana. — *Nesbit v. Hanway*, 87 Ind. 400.

Kansas. — *Henkins v. Green*, 22 Kan. 562.

Canada. — *Waters v. Shade*, 2 Grant's Ch. (U. C.) 457; *Sheldon v. Chisholm*, 3 Grant's Ch. (U. C.) 655.

Such right is not abrogated by the *Iowa* statute which gives a judgment creditor the right to redeem from a prior mortgage if execution has been issued. The statute gives an additional right and does not take away any existing or prior right. *Hammond v. Leavitt*, 59 Iowa 407.

If a sale of mortgaged land under execution issued on a judgment rendered by a justice of the peace is invalid because the statute authorizing the issuance of executions on justices'

judgments had not been complied with, the purchaser is not entitled to redeem. *Wooters v. Pinkel*, (Ill. 1890) 25 N. E. Rep. 791.

A Purchaser of a Tax Title to an undivided interest in land may redeem a mortgage on such interest, and his right is not affected by the fact that since his purchase the land was partitioned between the joint tenants and the mortgage was foreclosed, he not having been made a party to those proceedings. *Allen v. Swope*, 64 Ark. 576.

Until the Purchaser Has Received a Deed from the sheriff, though the time for redeeming from the execution sale has expired, he has not an equitable estate in the property, but only an equitable interest, and therefore he is not entitled to redeem as the holder of an equitable title. His only right to redeem is as a lien creditor. *Robertson v. Van Cleave*, 129 Ind. 217.

2. Purchaser of Part of Mortgaged Premises. — The right of a purchaser to redeem does not depend on his acquiring the entire equity of redemption, but the purchaser of a part may redeem the whole property. *Calkins v. Munsel*, 2 Root (Conn.) 333; *Chandler v. Dyer*, 37 Vt. 345; *Green v. Dixon*, 9 Wis. 532.

Where a railroad company, owning a road lying in two states, and chartered by both, mortgaged its whole road and franchise, and its right of redemption in one state was sold on execution, the purchaser was entitled to redeem the whole road. *Wood v. Goodwin*, 49 Me. 260, 77 Am. Dec. 259.

3. Executory Contract to Sell. — A verbal contract for the sale of mortgaged lands does not give the proposed purchaser named therein such an interest as will entitle him to redeem. *Porter v. Read*, 19 Me. 363; *Patterson v. Yeaton*, 47 Me. 308.

Bond for Title. — Nor does a bond for the conveyance of mortgaged land on the performance by the obligee of certain conditions give the obligee a sufficient title to entitle him to redeem. *McDougald v. Capron*, 7 Gray (Mass.) 278.

Possession under Oral Contract of Purchase. — But a person in possession of mortgaged land under an oral contract of purchase which has been so far consummated as to entitle him to specific performance has the right to redeem. *Lowry v. Tew*, 3 Barb. Ch. (N. Y.) 407.

4. Redemption by Part Owner of Mortgaged Property. — Where several persons are interested in mortgaged lands, whether as owners of different parcels, or of undivided interests in the whole, each of them may redeem for the protection of his own interests.

England. — *Pearce v. Morris*, L. R. 5 Ch. 227.

or an estate for life or in tail,¹ or for a term of years,² or in reversion or remainder;³ but a part owner must, as a general rule, redeem the entire property, and not merely his own interest.⁴ So also a creditor who has a lien on a part only of mortgaged property, or the owner of a part of the debt secured by a mortgage, may redeem as against the others.⁵

5. Creditors—*a. GENERAL CREDITORS.*—General creditors of a deceased owner of mortgaged property are not entitled to redeem though their debts have been allowed as claims against the estate.⁶

Alabama.—Booker *v.* Waller, 81 Ala. 549; Lehman *v.* Moore, 93 Ala. 186.

Connecticut.—Calkins *v.* Munsel, 2 Root (Conn.) 333; Young *v.* Williams, 17 Conn. 393.

Maine.—McPherson *v.* Hayward, 81 Me. 329.

Massachusetts.—Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Taylor *v.* Porter, 7 Mass. 355.

Michigan.—Laylin *v.* Knox, 41 Mich. 40.

Minnesota.—Buettel *v.* Harmount, 46 Minn. 481.

New York.—Matter of Willard, 5 Wend. (N. Y.) 94; Boquet *v.* Coburn, 27 Barb. (N. Y.) 230.

Vermont.—Hubbard *v.* Ascutney Mill Dam Co., 20 Vt. 402, 50 Am. Dec. 41; Chandler *v.* Dyer, 37 Vt. 345.

Wisconsin.—McLaughlin *v.* Curtis, 27 Wis. 644; Green *v.* Dixon, 9 Wis. 532.

But where an undivided interest in land is mortgaged by the owner thereof, a co-owner has no right of redemption. Nichol *v.* Allenby, 17 Ont. Rep. 275.

Redemption by Person Having Lien on Undivided Interest.—An undivided interest in the real estate is "some part" of it, within the *Minnesota* statute authorizing redemption by creditors having a lien on the real estate or some part thereof. Willis *v.* Jelineck, 27 Minn. 18. See also O'Brien *v.* Krenz, 36 Minn. 136.

1. Redemption by Life Tenant.—Wicks *v.* Scrivens, 1 John. & H. 215; Lamson *v.* Drake, 105 Mass. 564; Wicks *v.* Scrivens, 1 John. & H. 215.

Redemption by Tenant in Tail.—Playford *v.* Playford, 4 Hare 546.

2. Redemption by Tenant for Term of Years—*England.*—Tarn *v.* Turner, 39 Ch. Div. 456.

Canada.—Martin *v.* Miles, 5 Ont. Rep. 404.

Massachusetts.—Bacon *v.* Bowdoin, 22 Pick. (Mass.) 401, 2 Met. (Mass.) 591.

New Jersey.—Hamilton *v.* Dobbs, 19 N. J. Eq. 227.

New York.—Averill *v.* Taylor, 8 N. Y. 44.

But see McDermott *v.* Burke, 16 Cal. 580.

Redemption by Mortgagee of Term of Years.—Campbell *v.* McElevey, 2 Disney (Ohio) 574.

3. Redemption by Owner of Reversion or Remainder.—Smith *v.* Provin, 4 Allen (Mass.) 516.

4. Part Owner Must Redeem Entire Property—*England.*—Pearce *v.* Morris, L. R. 5 Ch. 227; Howard *v.* Harris, 1 Vern. 33; Palk *v.* Clinton, 12 Ves. Jr. 48.

Connecticut.—Calkins *v.* Munsel, 2 Root (Conn.) 333; Lyon *v.* Robbins, 45 Conn. 513.

Illinois.—Durley *v.* Davis, 69 Ill. 133; Meacham *v.* Steele, 93 Ill. 135; Bozarth *v.* Largent, 128 Ill. 95.

Indiana.—Eiceman *v.* Finch, 79 Ind. 511.

Iowa.—Street *v.* Beal, 16 Iowa 68, 85 Am. Dec. 504.

Massachusetts.—Taylor *v.* Porter, 7 Mass. 355.

Minnesota.—O'Brien *v.* Krenz, 36 Minn. 136; Buettel *v.* Harmount, 46 Minn. 481.

Exceptions to Rule.—It is well settled that although one has the equity of redemption in a part only of the mortgaged premises, he has no right to confine his redemption to that part alone, but if he comes to redeem he must pay the whole amount of the mortgage and redeem the whole mortgaged premises. But this rule is one which was established for the benefit of the mortgagee, and it will not be enforced where the equities of the mortgagee are such that injustice will be done to him thereby. Shearer *v.* Field, 6 Misc. Rep. (N. Y. Supreme Ct.) 189.

When, upon foreclosure by advertisement of a mortgage embracing two parcels of land, such parcels have been separately sold to the mortgagee, at a separate price for each, a junior mortgagee of one of the parcels may redeem from the sale that parcel only which is embraced in his mortgage; and the rule is the same when such junior mortgagee has foreclosed his mortgage by advertisement, and has purchased at the foreclosure sale the parcel embraced in his mortgage. Tinkcom *v.* Lewis, 21 Minn. 132.

Under the *Illinois* statute (Rev. Stat. 1874, c. 77, § 26), one of several joint owners of land sold under a decree of foreclosure may redeem whatever interest he had in the premises, by paying a proportionate part of the price for which the land was sold. Schuck *v.* Gerlach, 101 Ill. 338.

5. Separate Owners of Several Notes Secured by Same Mortgage.—Where several notes secured by one mortgage are owned by different persons, and the mortgage is foreclosed by one of the holders, the others may redeem. Hocker *v.* Reas, 18 Cal. 650; Grattan *v.* Wiggins, 23 Cal. 16; Preston *v.* Hodgen, 50 Ill. 56; State Bank *v.* Tweedy, 8 Blackf. (Ind.) 447, 46 Am. Dec. 486; Davis *v.* Langsdale, 41 Ind. 399.

Where a mortgage is given to secure several notes falling due at different times, if the holder of the later notes is not made a party to the foreclosure suit of the party holding earlier notes, he may redeem from the purchaser under the decree rendered in such suit. Murdock *v.* Ford, 17 Ind. 52.

6. General Creditors of Decedents.—A general creditor of a deceased person, though his claim has been allowed against the estate, has no lien on the real estate of the deceased which entitles him to redeem from the foreclosure of a mortgage executed by the deceased in his lifetime. Whitney *v.* Burd, 29 Minn. 203; Nelson *v.* Rogers, 65 Minn. 246.

A statute making the real estate of a decedent liable for his debts does not give a general

b. LIEN CREDITORS — (1) *Junior Mortgagees*. — A junior mortgagee has, by virtue of his mortgage, such an interest in the mortgaged property as entitles him and his successors in interest to exercise the equitable right of redemption in respect to the prior mortgage;¹ and he is also, as a general rule, if not always, within the terms of the statutes giving the right to redeem from the foreclosure sale.²

The General Equitable Right Accrues to a junior mortgagee at the maturity of the prior mortgage, and is not ordinarily subject to be postponed or defeated by any dealings between the parties to such prior mortgage;³ but such right may

creditor such a right to, interest in, or lien on a decedent's real estate as to give him the right to redeem from a mortgage thereon. *McNiece v. Eliason*, 78 Md. 168.

1. *Junior Mortgagee May Redeem Senior Mortgage* — *Alabama*. — *Wiley v. Ewing*, 47 Ala. 418.

Arkansas. — *Scott v. Henry*, 13 Ark. 112.

California. — *Kirkham v. Dupont*, 14 Cal. 559; *Gamble v. Voll*, 15 Cal. 507; *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 516; *Frink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149; *Black v. Gerichten*, 58 Cal. 58.

Connecticut. — *Osborn v. Carr*, 12 Conn. 202; *Duke v. Warner*, 36 Conn. 233; *Lewis v. Hinman*, 56 Conn. 55.

Illinois. — *Wylder v. Crane*, 53 Ill. 490; *Morse v. Smith*, 83 Ill. 396; *Rogers v. Herron*, 92 Ill. 583.

Indiana. — *Hosford v. Johnson*, 74 Ind. 479; *Duke v. Beeson*, 79 Ind. 24.

Iowa. — *Knowles v. Rablin*, 20 Iowa 101; *Spurgin v. Adamson*, 62 Iowa 661.

Kentucky. — *Cooper v. Martin*, 1 Dana (Ky.) 24.

Maine. — *Treat v. Gilmore*, 49 Me. 34.

Maryland. — *Lee v. Stone*, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589.

Massachusetts. — *Bigelow v. Willson*, 1 Pick. (Mass.) 493; *McIntier v. Shaw*, 6 Allen (Mass.) 33; *Long v. Richards*, 170 Mass. 120.

Michigan. — *Kimmell v. Willard*, 1 Dougl. (Mich.) 217; *Carter v. Lewis*, 27 Mich. 241; *Sager v. Tupper*, 35 Mich. 134; *Lamb v. Jeffrey*, 41 Mich. 719.

Nebraska. — *Renard v. Brown*, 7 Neb. 449.

New Jersey. — *Hill v. White*, 1 N. J. Eq. 435.

New York. — *Norton v. Warner*, 3 Edw. Ch. (N. Y.) 106; *Ellsworth v. Lockwood*, 42 N. Y. 189; *Clark v. Mackin*, 95 N. Y. 346.

Vermont. — *Downer v. Wilson*, 33 Vt. 1; *Walker v. King*, 44 Vt. 601.

Wisconsin. — *Smith v. Coolbaugh*, 21 Wis. 427.

Nature of Junior Mortgagee's Right of Redemption. — A junior mortgagee receives by his mortgage a transfer of the mortgagor's equity of redemption, and acquires thereby a distinct and independent right to redeem from the prior mortgage. *Goodman v. White*, 26 Conn. 317; *Dings v. Parshall*, 7 Hun (N. Y.) 522; *Dauchy v. Bennett*, 7 How. Pr. (N. Y. Supreme Ct.) 37; *Jenkins v. Continental Ins. Co.*, 12 How. Pr. (N. Y. C. Pl.) 66.

It is an Equitable Right founded on common-law principles, and is independent of the statutory right of redemption given to judgment creditors. *Judson v. Emanuel*, 1 Ala. 598; *Wiley v. Ewing*, 47 Ala. 418; *Swift v. Edson*, 5 Conn. 531; *Haines v. Beach*, 3 Johns. Ch. (N. Y.) 459.

Successive Mortgagees. — The owner of land may mortgage it by successive mortgages without limitation, and the puisne mortgagee will be entitled to redeem, however remote his title may be from the legal estate. *Bigelow v. Willson*, 1 Pick. (Mass.) 485.

Heirs of Junior Mortgagee. — Where the administrator of a mortgagee has foreclosed the mortgage and collected the amount thereof, the mortgagee's heirs cannot redeem the premises from a prior mortgage. *Moreland v. Thorn*, 143 Ind. 211.

Assignee of Junior Mortgagee. — The right of the assignee of a junior mortgage to redeem from the prior mortgage is not defeated by the fact that the assignment was not recorded, where the recording of assignments of mortgage is not provided for by statute. *Hasselman v. McKernan*, 50 Ind. 441; *Skinner v. Miller*, 5 Litt. (Ky.) 84.

Judgment Creditor of Junior Mortgagee. — In *Abadie v. Lobero*, 36 Cal. 390, the owner of land agreed to pasture the cattle of one A. thereon, and gave to A. a mortgage on the land to secure the performance of the contract. A judgment creditor of A. levied on the cattle, and purchased them at sale thereunder, but there was no seizure or sale of the contract to pasture. It was held that such judgment creditor was not entitled to redeem the land from sale under a mortgage prior to the mortgage given to secure the contract to pasture.

2. **Statutory Right of Junior Mortgagee to Redeem.** — A second mortgagee is a "creditor having a lien" within a statute giving to such creditors the right to redeem from the mortgage foreclosure. *Nopson v. Horton*, 20 Minn. 268.

But he is not an "assign" of the mortgagor, as the word is used in the *Minnesota* statute (Gen. Stat. 1878, c. 81, § 12) specifying the person who may redeem from foreclosure sales. The statute divides the persons to whom it reserves a right of redemption into two classes: first, "the mortgagor, his heirs, executors, administrators, or assigns;" second, creditors having liens, legal or equitable, on the real estate, or some part thereof, subsequent to the mortgage foreclosed. *Cuilerier v. Brunelle*, 37 Minn. 71. See also various local codes and statutes in the United States.

3. **Extension of Time of Payment of Senior Mortgage.** — The right of a junior mortgagee to redeem at any time after maturity of the prior mortgage is not affected by the fact that the time of the payment of the debt secured by the prior mortgage had been extended, where the junior mortgagee did not have notice thereof when he took his mortgage. *Wheeler v. Menold*, 81 Iowa 647; *Sager v. Tupper*, 35 Mich. 134.

not exist when the senior mortgagee desires to hold his mortgage as an invest-

Conveyance of Equity of Redemption to Senior Mortgagee. — A conveyance by the mortgagor of his equity of redemption to the senior mortgagee, after the execution of the junior mortgage, does not affect the junior mortgagee's right to redeem. *Rogers v. Herron*, 92 Ill. 583; *Thompson v. Chandler*, 7 Me. 377; *Wilson v. Vanstone*, 112 Mo. 315.

Fraudulent Interposition of Liens. — Nor can it be defeated by the interposition of the liens of fraudulent and simulated securities. *Parker v. St. Martin*, 53 Minn. 1.

Redemption by Junior Mortgagee Not Compulsory. — While a junior mortgagee has the right to redeem the prior mortgage, he is under no obligation to do so. *McIntier v. Shaw*, 6 Allen (Mass.) 83.

But a purchaser at a foreclosure sale may sue a junior mortgagee who was not a party to the foreclosure suit, to compel him to redeem within a reasonable time. *Parker v. Child*, 25 N. J. Eq. 41; *Moulton v. Cornish*, 61 Hun (N. Y.) 438.

The Assignment of a Junior Mortgage as Collateral Security for a debt owing by the junior mortgagee will not affect his right to redeem. *Manning v. Markel*, 19 Iowa 103.

Foreclosure of Junior Mortgage. — The right of a junior mortgagee to redeem is not lost by the foreclosure of his mortgage and the sale of the land thereunder, at which sale he bid the full amount of the judgment with interest and costs. *McCormick Harvesting Mach. Co. v. Llewellyn*, 96 Iowa 745.

Foreclosure of Senior Mortgage. — But the lien of a junior mortgage is discharged by foreclosure of the senior mortgage under a statute (Civ. Code *Oregon*, §§ 410-414) which requires junior incumbrancers to be made parties, and provides that the court shall determine the amount and priority of the lien, and direct the premises to be sold and the proceeds applied to the debt, in the order specified therein; and therefore a junior mortgagee in such case cannot redeem from the foreclosure sale. *Lauriat v. Stratton*, 6 Sawy. (U. S.) 339.

Possession by Senior Mortgagee. — A junior mortgagee cannot redeem after the mortgagor's right of redemption has been barred; under the *New Hampshire* statute, by possession of the mortgaged premises by the senior mortgagee for one year, though the junior mortgagee had no notice of the entry by the senior mortgagee. *Downer v. Clement*, 11 N. H. 40.

Redemption from Senior Mortgage on Several Tracts. — A mortgagee of several tracts of land, part of which are subject to prior mortgages, may redeem all the tracts from the prior mortgages without showing that it is necessary to protect the security of his mortgage debt. He is not bound to take any risks as to the adequacy of his security. *Morse v. Smith*, 83 Ill. 396.

Mortgagee of Reversion in Mortgaged Premises. — The mortgagee of a reversionary interest may redeem a prior mortgage. *Smith v. Provin*, 4 Allen (Mass.) 516.

Junior Mortgagee Without Interest. — A junior mortgagee has no right to redeem the prior mortgage after his debt has been paid, or after

he has parted with his lien, or if his mortgage was without consideration. *Bigelow v. Stringfellow*, 25 Fla. 366; *McHenry v. Cooper*, 27 Iowa 137; *Farr v. Dudley*, 21 N. H. 373.

In *Skinner v. Young*, 80 Iowa 234, B took a second mortgage on land for which he paid nothing, assigning it with the note secured thereby as security for a debt which the mortgagor owed the assignee, and it was held that the heirs of B had no right to redeem from the prior mortgage in the absence of a showing that B had paid the debt to secure which the assignment of the second mortgage was made.

Priority of Right. — Redemption will be decreed according to the priority of claimants, where several claim the right of redemption. *Moore v. Beasom*, 44 N. H. 215.

Junior Mortgage Made with Intent to Defraud Creditors. — The holder of the first mortgage cannot resist redemption by the junior mortgagee on the ground that the junior mortgage was fraudulent as to creditors of the mortgagor. *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687.

Right of Junior Mortgagee to Assignment of Senior Mortgage. — In *Pardee v. Van Anken*, 3 Barb. (N. Y.) 534, it was held that the junior mortgagee, on redeeming, is entitled to an assignment of the senior mortgage, where a satisfaction thereof would not be as beneficial to him as an assignment, and the doctrine was laid down that the right to an assignment might spring directly from a mere right of redemption. This doctrine was disclaimed by the Court of Appeals in *Ellsworth v. Lockwood*, 42 N. Y. 89, and the law was declared to be that the junior mortgagee succeeds by subrogation, on settled principles of equity, to the rights and interest of the prior mortgagee, as security for the land in possession, without any assignment or act of transfer of the right of redemption; that subrogation by law was inconsistent with the right to an assignment of the debt and of evidence of it, inasmuch as the assignment assumes the continued existence of the debt, and the subrogation by law assumes its payment; and that the right to redeem a mortgage does not carry with it the right to an assignment of the mortgage, unless the redeeming party occupies the position of the surety of the mortgage debt.

In *Lamson v. Drake*, 105 Mass. 564, the court refused to compel the mortgagee to assign his mortgage to a life tenant of the premises.

In *Hamilton v. Dobbs*, 19 N. J. Eq. 227, it was held that a junior mortgagee does not strictly the right to a written assignment of the bond and mortgage, but he stands by redemption in the place of the first mortgagee, and is subrogated to his rights. See also, to the same effect, *Dodge v. Fuller*, 48 Fed. Rep. 347. And see the title SUBROGATION.

In *Bigelow v. Cassidy*, 26 N. J. Eq. 557, it was held that the right to redeem a mortgage does not carry with it the right to an assignment of the mortgage, unless the redemptioner occupies the position of the surety of the mortgage debt.

Necessity for Recording Junior Mortgage. — A junior mortgagee whose mortgage was not

ment, and does not seek or threaten to enforce its collection.¹

(2) *Judgment Creditors*. — Any judgment creditor who has a lien by virtue of his judgment on mortgaged property may redeem the mortgage, or, in those jurisdictions where redemption after foreclosure is permitted by statute, he may redeem from a foreclosure sale.² This right depends on the existence

recorded at the commencement of a proceeding to foreclose the senior mortgage cannot redeem when the senior mortgagee has no notice of the unrecorded mortgage. *Harlock v. Barnhizer*, 30 Ind. 370.

1. *When Junior Mortgagee May Not Redeem*. — The mere fact that a person occupies the position of a second mortgagee does not, in the absence of some special equity, entitle him to redeem a prior mortgage. If the holder of the senior mortgage wishes to retain his mortgage as an investment, the junior mortgagee will not be permitted to redeem. *Bigelow v. Cassidy*, 26 N. J. Eq. 557; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553.

2. *Judgment Creditors May Redeem — England*. — *Stonehewer v. Thompson*, 2 Atk. 440; *Mildred v. Austin*, L. R. 8 Eq. 220.

United States. — *Lauriat v. Stratton*, 6 Sawy. (U. S.) 339; *Connecticut Mut. L. Ins. Co. v. Crawford*, 21 Fed. Rep. 281.

Alabama. — *Jones v. Burden*, 20 Ala. 382; *Cramer v. Watson*, 73 Ala. 127.

California. — *Kent v. Laffan*, 2 Cal. 595; *Frink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149.

Connecticut. — *Loomis v. Knox*, 60 Conn. 343.

Illinois. — *Schuck v. Gerlach*, 101 Ill. 338.

Iowa. — *Tootle v. Taylor*, 64 Iowa 629.

Kentucky. — *Hitt v. Holliday*, 2 Litt. (Ky.) 332.

Massachusetts. — *Warren v. Childs*, 11 Mass. 222; *White v. Bond*, 16 Mass. 400.

Minnesota. — *Willis v. Jelineck*, 27 Minn. 18; *O'Brien v. Krenz*, 36 Minn. 136.

Nebraska. — *Renard v. Brown*, 7 Neb. 449.

New Jersey. — *Lambert v. Miller*, 38 N. J. Eq. 117; *Mallalieu v. Wickham*, 42 N. J. Eq. 297.

New York. — *Niagara Bank v. Roosevelt*, 9 Cow. (N. Y.) 409; *Benedict v. Gilman*, 4 Paige (N. Y.) 58; *Van Buren v. Olmstead*, 5 Paige (N. Y.) 9; *Quin v. Brittain*, Hoffm. Ch. (N. Y.) 353; *Brainard v. Cooper*, 10 N. Y. 356; *Dauchy v. Bennett*, 7 How. Pr. (N. Y. Supreme Ct.) 375.

North Carolina. — *Stainback v. Geddy*, 1 Dev. & B. Eq. (21 N. Car.) 479.

Tennessee. — *Burton v. Robinson*, 9 Baxt. (Tenn.) 364.

Early Recognition of Principle. — The principle that a judgment creditor may redeem was recognized by Lord Hardwicke in 1693. *Stonehewer v. Thompson*, 2 Atk. 440.

Redemption by Judgment Creditors Favored. — It is the policy of the law to encourage redemption by junior incumbrancers so that the debtor's property may be applied as far as it will go to the satisfaction of his debts; and therefore where a junior redemptioner having a lien seasonably redeems from the senior creditor, who had previously redeemed from the purchaser at a mortgage sale and had received a certificate of redemption, and the purchaser had accepted the redemption money, the second redemption must be deemed valid though it turn out that the lien of the senior creditor,

though valid on its face, was not in fact a valid lien. *Todd v. Johnson*, 56 Minn. 60; *Smith v. Mace*, 137 Ill. 68.

Nature of Judgment Creditor's Right to Redeem. — A judgment creditor whose judgment is a lien on mortgaged lands has the same right of redemption as a junior mortgagee. *Loomis v. Knox*, 60 Conn. 343.

Judgment Creditor Cannot Redeem When Mortgagor's Right Is Barred. — A judgment creditor cannot redeem where he recovered his judgment against the mortgagor after the mortgage had been foreclosed without the right of redemption, nor where the mortgagor's right of redemption is barred after recovery of the judgment. *Cook v. McFarland*, 78 Iowa 528; *Tucker v. White*, 2 Dev. & B. Eq. (22 N. Car.) 289.

On Redeeming from a Foreclosure Sale the judgment creditor is subrogated to all the rights of the purchaser at the foreclosure sale. *Lamb v. Richards*, 43 Ill. 312.

But if the foreclosure sale was for any reason void, he acquires no title. *Bozarth v. Largent*, 128 Ill. 95.

The Fact that the Judgment Is a Lien on Other Lands than those sold under the mortgage does not affect the right of the judgment creditor, under the *Indiana* statute, to redeem from the foreclosure sale. *Warford v. Sullivan*, 147 Ind. 14.

What Law Governs. — A judgment creditor's right to redeem from a foreclosure sale is governed by the statute in force when his judgment was docketed. *O'Brien v. Krenz*, 36 Minn. 136; *Willis v. Jelineck*, 27 Minn. 18.

Who Are Judgment Creditors. — Where two separate actions, brought to foreclose two mortgages affecting in part the same property, were consolidated, and separate judgments were entered foreclosing each mortgage, the decree as to the junior mortgage stating that it should be subordinate to the decree as to the senior mortgage, the junior mortgagee became a judgment creditor within the meaning of the redemption statutes. *Bowen v. Van Gundy*, 133 Ind. 670.

The fact that a junior mortgagee was made a party to a bill to foreclose a prior mortgage, and by decree therein was allowed twelve months after the sale in which to redeem, will not deprive him of the right to redeem as a judgment creditor after obtaining a decree finding the amount due under his mortgage. *Whitehead v. Hall*, 148 Ill. 253.

A creditor, by obtaining a decree for foreclosure of a mortgage and sale of the mortgaged premises, does not become "a judgment creditor," so as to entitle him to redeem the premises from the purchaser, under the *Alabama* statute of 1842. *Branch Bank v. Furness*, 12 Ala. 367.

Plaintiff in Creditor's Suit. — The plaintiff in a creditor's suit, after a decree for the sale of mortgaged property, may redeem. *Christian v. Field*, 5 Jur. 1130.

of a lien on the mortgaged property, in the absence of a statute dispensing with such requirement,¹ and if the judgment ceases to be a lien the judgment creditor's right to redeem ceases also.²

Necessity of Issuing Execution. — The necessity of issuing an execution on a judgment in order to give the judgment creditor the right to redeem depends on the necessity of an execution to create a lien. He may redeem without issuing execution, if the judgment itself creates a lien,³ but not if an execution is necessary to give a lien.⁴

(3) **Attachment Creditors.** — The preponderance of authority is to the effect that the lien created by the levy of an attachment on mortgaged property gives to the attaching creditor such an interest in the property as will entitle him to redeem the mortgage,⁵ though it has been decided to the contrary.⁶

Redemption by Creditor of One Tenant in Common. — A judgment creditor of one tenant in common of mortgaged premises cannot redeem the interest of the other tenant in common. His right is limited to the interest of his debtor. *Fischer v. Eslaman*, 68 Ill. 78.

Redemption by Creditor of One of Two Joint Mortgagors. — A judgment creditor of one of two joint mortgagors may redeem the whole property where the entire estate in it belongs to his debtor. *Florence Land, etc., Co. v. Warren*, 91 Ala. 533.

Redemption by Creditor of Mortgagor's Heir. — A judgment creditor of one of the heirs of the mortgagor has such an interest in the mortgaged property as entitles him to redeem. *Willis v. Jelineck*, 27 Minn. 18; *Schuck v. Gerlach*, 101 Ill. 338.

Judgment Creditor of Mortgagor's Grantee. — A judgment creditor of the mortgagor's grantee has the same right, under the *Minnesota* statute, to redeem from a foreclosure as though he were a creditor of the mortgagor. *Hospes v. Sanborn*, 28 Minn. 48.

Restriction to Judgments of Courts of Record. — Under the *Illinois* statute it is only judgments of courts of record that give the judgment creditor the right to redeem from a foreclosure sale. *Thornley v. Moore*, 106 Ill. 496.

Right to Make Successive Redemptions. — When a judgment creditor redeems property sufficient in value to satisfy his judgment, he cannot make any further redemption. *Scripter v. Bartleson*, 43 Fed. Rep. 259.

1. Necessity of Lien. — *Shirley v. Watts*, 3 Atk. 200; *Long v. Mellet*, 94 Iowa 548; *Spurgen v. Adamson*, 62 Iowa 661; *Harwood v. Underwood*, 28 Mich. 427; *Quin v. Brittain*, Hoffm. Ch. (N. Y.) 353.

The necessity of a lien in order to entitle judgment creditors to redeem may be dispensed with by statute. *Shroeder v. Bauer*, 140 Ill. 135.

Redemption of Mortgage on Homestead. — Within the principle that a judgment must be a lien on mortgaged land in order to give the judgment creditor the right to redeem, a judgment creditor of the owner of mortgaged land in which the judgment debtor had a homestead cannot redeem as to the part of the land covered by the homestead, where the judgment was recovered while the homestead right existed, but he may redeem as to the part not covered by the homestead. *Sutherland v. Tyner*, 72 Iowa 232; *Grant v. Duane*, 9 Johns. (N. Y.) 591.

Necessity of Filing Assignment. — Under a

statute which provides that an assignment of a judgment shall be void as against creditors levying on or attaching the judgment and subsequent purchasers of it in good faith and for value, the right of an assignee of a judgment to redeem land of the judgment debtor from a mortgage foreclosure sale is not affected by the fact that the assignments under which he claims were not filed. *Swanson v. Realization, etc., Corp.*, (Minn. 1897) 73 N. W. Rep. 165.

2. If a Judgment Has Ceased to Be a Lien on mortgaged premises, the judgment creditor has no right of redemption, either in law or in equity. *Long v. Mellet*, 94 Iowa 548 [citing *Wright v. Howell*, 35 Iowa 288; *Jones v. Hartsock*, 42 Iowa 147; *Stadler v. Allen*, 44 Iowa 198; *Ayres v. Adair County*, 61 Iowa 728; *Newell v. Pennick*, 62 Iowa 123; *Spurgen v. Adamson*, 62 Iowa 661].

3. Execution Not Necessary if Judgment Creates Lien. — *Brainard v. Cooper*, 10 N. Y. 356; *Augur v. Winslow*, Clarke Ch. (N. Y.) 258.

When Judgment Creates Lien. — See the title JUDGMENTS.

4. If an Execution Is Necessary to Create a Lien on the judgment debtor's property, the creditor has no right of redemption in respect to a prior mortgage until execution has been issued. *Shirley v. Watts*, 3 Atk. 200; *Quin v. Brittain*, Hoffm. Ch. (N. Y.) 353.

A judgment creditor who has issued an execution which has been returned "no property found" may redeem a prior mortgage, as against the mortgagee, or an assignee of the mortgage. *Raisin Fertilizer Co. v. Bell*, 107 Ala. 261.

If an execution be levied by appraisal, on lands mortgaged as the estate of the mortgagor, without any deduction on account of the incumbrance, the judgment creditor may redeem in the same manner as if he had purchased at a regular sale. *White v. Bond*, 16 Mass. 400; *Warren v. Childs*, 11 Mass. 222.

5. Attachment Creditors May Redeem — *United States*. — *Dickinson v. Lamoille County Nat. Bank*, 12 Fed. Rep. 747.

Arkansas. — *Scott v. Henry*, 13 Ark. 128.

Connecticut. — *Lyon v. Sandford*, 5 Conn. 545; *Bridgeport v. Blinn*, 43 Conn. 274.

Massachusetts. — *Briggs v. Davis*, 108 Mass. 322.

Michigan. — *Lucking v. Wesson*, 25 Mich. 443.

New York. — *Hinman v. Judson*, 13 Barb. (N. Y.) 629.

Vermont. — *Chandler v. Dyer*, 37 Vt. 345.

6. Right of Attachment Creditors Questioned. — In *Fisher v. Tallman*, 74 Mo. 39, the right of

The Statutory Right of redemption from a foreclosure sale is given to attaching creditors only when they are included in the terms of the statute creating such right, and for the determination of this question a reference to the statute of each jurisdiction is necessary.¹

6. Dowress. — A woman who has a right of dower subordinate to a mortgage on the premises of which she is dowable is entitled to redeem, whether her dower right has become consummate by her husband's death,² or is still inchoate.³

an attachment creditor to redeem mortgaged land on which his attachment had been levied was denied. Hough, J., delivering the opinion of the court, said: "The general rule is that as an ordinary creditor before judgment and execution has no certain claim upon the property of his debtor, he has no concern with conveyances of any kind affecting such property. *Martin v. Michael*, 23 Mo. 50, 66 Am. Dec. 656; *Turner v. Adams*, 46 Mo. 95; *Pendleton v. Perkins*, 49 Mo. 565; *Story's Eq.*, § 1023. After the decision of this court in *Martin v. Michael*, 23 Mo. 50, 66 Am. Dec. 656, *supra*, a change was made in the law by the Act of January 14, 1860, which has continued in force ever since, and is now found in section 448, Revised Statutes, whereby any attachment creditor may maintain an action for the purpose of setting aside any fraudulent conveyance, assignment, charge, lien, or incumbrance of or upon any property attached in any action instituted by him. This statute, however, is not broad enough to cover the case we are now considering. In the absence of statutory provisions on the subject, the party seeking to redeem from a mortgage must not only have a *jus ad rem*, but a *jus in re*. We are aware that it has been held in the case of *Chandler v. Dyer*, 37 Vt. 345, that an attaching creditor may redeem; but we are not satisfied with the reasoning in that case. If an attaching creditor has such an interest in land as will warrant the court in permitting him to come in and redeem, it must necessarily follow that he is a proper party to a bill of foreclosure. That he is not considered in this state a proper party to a bill of foreclosure is evident from the language of our statute providing who may be parties. That statute limits the right of coming in to persons claiming an interest in the mortgaged property. Nor is it at all necessary for the protection of the interests of an attaching creditor that he should have the right to file a bill to redeem. His attachment binds the interest of the mortgagor, and in the event of a sale under the mortgage before the attaching creditor can have judgment and execution, the proceeds of the sale, after satisfying the mortgage, will be subject, under the attachment, to the payment of his demand. On the other hand, great inconvenience and sometimes oppression might result from permitting a person to redeem who may ultimately be shown to be not even a general creditor of the mortgagor."

1. Statutory Right of Attachment Creditors to Redeem. — A statute giving to a "creditor having a lien" on the mortgage property the right to redeem from a foreclosure sale includes attachment creditors. *Atwater v. Manchester Sav. Bank*, 45 Minn. 341.

See local codes and statutes in other jurisdictions.

2. Redemption by Widow Entitled to Dower in Mortgaged Premises — *Alabama*. — *Boynton v. Sawyer*, 35 Ala. 497.

Indiana. — *Fletcher v. Holmes*, 32 Ind. 497; *May v. Fletcher*, 40 Ind. 575.

Maine. — *Wilkins v. French*, 20 Me. 111; *Simonton v. Gray*, 34 Me. 50; *Wing v. Ayer*, 53 Me. 138.

Maryland. — *Mantz v. Buchanan*, 1 Md. Ch. 202.

Massachusetts. — *Gibson v. Crehore*, 5 Pick. (Mass.) 146; *Eaton v. Simonds*, 14 Pick. (Mass.) 98; *Henry's Case*, 4 Cush. (Mass.) 257; *McCabe v. Bellows*, 1 Allen (Mass.) 269.

New Hampshire. — *Rossiter v. Cossit*, 15 N. H. 38.

New Jersey. — *Opdyke v. Bartles*, 11 N. J. Eq. 133; *Merselis v. Van Riper*, 55 N. J. Eq. 618.

New York. — *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Mills v. Van Voorhies*, 20 N. Y. 412, 23 Barb. (N. Y.) 125; *Wheeler v. Morris*, 2 Bosw. (N. Y.) 524.

Ohio. — *McArthur v. Franklin*, 16 Ohio St. 193.

South Carolina. — *Trenholm v. Wilson*, 13 S. Car. 174; *Crafts v. Crafts*, 2 McCord L. (S. Car.) 54.

Virginia. — *Daniel v. Leitch*, 13 Gratt. (Va.) 195.

Wisconsin. — *Posten v. Miller*, 60 Wis. 494.

Canada. — *Carrick v. Smith*, 34 U. C. Q. B. 389; *Sheppard v. Sheppard*, 14 Grant's Ch. (U. C.) 174.

Dower Right Must Be Subject to Mortgage. — The widow has no right to redeem and call the mortgagee to account for the rents and profits where the mortgage is not an incumbrance on her right, and cannot be set up to defeat it. *Opdyke v. Bartles*, 11 N. J. Eq. 133.

Assignment of Dower Not Necessary. — A legal assignment of dower is not necessary to enable the widow to redeem. *Gibson v. Crehore*, 5 Pick. (Mass.) 146.

3. Wife of Mortgagor May Redeem in Husband's Lifetime — *Alabama*. — *Butts v. Broughton*, 72 Ala. 294.

Indiana. — *Patton v. Stewart*, 19 Ind. 233; *Vaughan v. Dowden*, 126 Ind. 406; *Butler v. Thornburgh*, 141 Ind. 152.

Massachusetts. — *Davis v. Wetherell*, 13 Allen (Mass.) 60, 90 Am. Dec. 177; *Lamb v. Montague*, 112 Mass. 352.

Minnesota. — *Williams v. Stewart*, 25 Minn. 516.

New Hampshire. — *Smith v. Hall*, (N. H. 1892) 30 Atl. Rep. 409.

New York. — *Taggart v. Rogers*, 49 Hun (N. Y.) 265; *Campbell v. Ellwanger*, 81 Hun (N. Y.) 259.

7. Tenants by Curtesy. — On the same principle that applies to the case of a woman who has a right of dower, it is held that a tenant by the curtesy of mortgaged property may redeem.¹

8. Personal Representatives. — At common law the personal representatives of a deceased owner of an equity in a fee-simple estate could not redeem, because such estate passes directly to the decedent's heirs;² but in some jurisdictions this right is conferred on the personal representatives, either expressly or by implication.³

In *Regard to Mortgaged Chattels*, or chattel interests in real estate, the right to redeem belongs to the personal representatives, because they alone are entitled to possession of that class of property.⁴

IV. TIME TO REDEEM — 1. Equitable Right. — The equitable right to redeem, as distinguished from the statutory right, accrues when the condition of the mortgage is broken,⁵ unless the mortgage by its terms reasonably postpones the time for the exercise of the right.⁶

Virginia. — *Gatewood v. Gatewood*, 75 Va. 407.

In *Davis v. Wetherell*, 13 Allen (Mass.) 60, 90 Am. Dec. 177, Hoar, J., said: "Upon general principles of equity it is difficult to find a reason why an inchoate right of dower should not be protected against extinguishment by the foreclosure of a mortgage, especially where the husband has parted with his whole interest in the land, and can no longer be regarded as in any sense representing the interests of the wife. * * * A woman entitled to an inchoate right of dower cannot be regarded as 'holding' under her husband, as she certainly has no estate in possession. But she may well enough be considered as 'claiming' under him."

In *Barr v. Vanalstine*, 120 Ind. 590, it was held, *following* *May v. Fletcher*, 40 Ind. 575, which *overruled* *Fletcher v. Holmes*, 32 Ind. 497, that a married woman who did not join in the purchase-money mortgage given by her husband, and was not made a party to a proceeding to foreclose the mortgage, had no right to redeem until her husband's death, as her rights were not affected by the foreclosure.

Estoppel. — In *Pierce v. Chace*, 108 Mass. 254, a married woman who, solely for the purpose of releasing her dower, joined her husband in a mortgage of land conveyed to them by *entireties* was held not to be estopped after her husband's death to redeem the entire premises from a prior mortgage, to which the premises were subject when conveyed to them, where the mortgage in which she joined was executed by her under a mistake as to her right of property and without fraud or intent to deceive.

Conditional Denial of Right. — In *Taggart v. Rogers*, 58 Hun (N. Y.) 608, 12 N. Y. Supp. 113, a married woman, during the lifetime of her husband, sought by virtue of her inchoate right of dower to redeem from a foreclosure sale under a mortgage executed by herself and her husband, she not having been served with process in the foreclosure action, and it was held that she should not be allowed to redeem, as against the grantee of the purchaser at the foreclosure sale, if such grantee would release her right of dower from the mortgage, or would pay the present value of her inchoate right.

1. Tenants by the Curtesy May Redeem. — *Jones v. Meredith*, Bunb. 346.

2. Personal Representatives — Not Entitled to Redeem Mortgage of Fee-simple Estate at Common Law. — *Catley v. Sampson*, 33 Beav. 551.

3. Right of Redemption Given to Personal Representatives by Statute. — In *Indiana*, by statute, the personal representatives of a mortgagor are given the right to redeem. *Whisnand v. Small*, 65 Ind. 120.

Possession of Land for Purposes of Administration. — If the personal representatives of a decedent are entitled to the possession of his real estate for purposes of administration, they may redeem it from any mortgages to which it may be subject. *Enos v. Sutherland*, 11 Mich. 538; *Merriam v. Barton*, 14 Vt. 501; *Rossiter v. Cossit*, 15 N. H. 38.

In *Merriam v. Barton*, 14 Vt. 501, the court said: "In England, where the real estate, upon the death of the interstate, passes directly to the heir, and is not assets in the hands of the administrator for the payment of debts, the bill should be brought by the heirs. But with us the law is different. The action of ejectment is given to the administrator, and the heirs cannot have the action until there has been a division of the estate, under a decree of the Probate Court, in cases where a division is necessary. It is the duty of the administrator to pay off the debts out of the personal estate, if sufficient for that purpose, and prepare the estate for distribution among the heirs. To discharge this duty he must, of necessity, be permitted to maintain a bill of this description, as the only means of ascertaining what may be due, if anything, on the mortgage."

Land Conveyed by Decedent Subject to Deed of Trust. — Where the owner of land conveyed it subject to a deed of trust, reserving a lien for the purchase money, his administrator may redeem from the deed of trust. *Pearcy v. Tate*, 91 Tenn. 478.

4. Personal Representative May Redeem Chattel Mortgages. — *Murphy v. Eddy*, 19 R. I. 41.

5. Right to Redeem Accrues on Condition Broken. — *Heimberger v. Boyd*, 18 Ind. 420.

6. Postponement of Time by Terms of Mortgage. — The right to redeem may, by the terms of the mortgage, be postponed for a reasonable time; but if the time of redemption is post-

Before Breach of Condition there can be no redemption, as a general rule, though the full amount of the mortgage debt, with interest computed to the day of maturity, is tendered.¹

After Breach of the Condition of the mortgage any person having the right may redeem at any time until the equity of redemption is cut off by foreclosure or by lapse of time.²

If the Equity of Redemption Is Subject to a Particular Estate, the owner of such estate has the first right to redeem, and during the continuance of that estate the remainderman has no right to redeem without the consent of the owner of the particular estate.³

As to Chattel Mortgages, the rule in equity, in the absence of statutory regulation, is that redemption must be sought within a reasonable time,⁴ but in no

poned so far as to become oppressive to the mortgagor, an earlier redemption will be permitted. *Talbot v. Braddill*, 1 Vern. 183, 394; *Cowdry v. Day*, 1 Giff. 316.

1. No Redemption Before Debt Is Due.—Ordinarily there can be no redemption before the day of payment named in the mortgage. *Brown v. Cole*, 14 Sim. 427, 14 L. J. Ch. N. S. 167, 9 Jur. 290; *Burrowes v. Molloy*, 2 J. & L. 521, 8 Ir. Eq. Rep. 482; *Abbe v. Goodwin*, 7 Conn. 377; *Stinchfield v. Milliken*, 71 Me. 567.

In *Brown v. Cole*, 14 Sim. 427, 14 L. J. Ch. N. S. 167, 9 Jur. 290, Vice-Chancellor Shadwell said that if mortgagors were allowed to pay off their mortgage money at any time after the execution of their mortgage, it might be attended with extreme inconvenience to the mortgagees, who generally advance their money as an investment.

Before the time of payment specified in a mortgage deed, chancery will not, on a tender of the principal, with interest to the stipulated time of payment, and costs, allow the mortgagor to redeem, as this would be to substitute another contract for that which the parties had entered into. *Abbe v. Goodwin*, 7 Conn. 377.

If a Mortgage Is Payable on or Before a Certain Day, it may be paid immediately, and therefore redemption may be had at any time. *Matter of John, etc., Streets*, 19 Wend. (N. Y.) 660.

Mortgage Tainted with Usury.—A security void at the time of its creation on the ground of usury is not rendered valid by a subsequent statute; and therefore where the mortgage was made on a usurious agreement, a judgment creditor of the mortgagor may redeem on paying the amount actually advanced before the expiration of the time appointed for payment. *Isherwood v. Dixon*, 5 Grant's Ch. (U. C.) 314.

If the Mortgagee Takes Possession Before Condition Broken, the mortgagor may redeem at any time thereafter, though the debt is not due. *Bovill v. Endle*, (1896) 1 Ch. 648.

If the mortgagee has entered and dispossessed the mortgagor before condition broken, and continues in possession afterwards, the mortgagor may elect to consider him in for condition broken, and may redeem. *Pomeroy v. Winship*, 12 Mass. 514, 7 Am. Dec. 91; *Scott v. McFarland*, 13 Mass. 315.

Who May Object to Redemption Before Maturity of Debt.—In *Kalscheuer v. Upton*, 6 Dakota 440 it was held that the statutory provision authorizing any person having an interest in

the property, subject to a lien, to redeem "at any time after the claim is due," was for the benefit of the lienholder, and that no one but he could object to its being paid before maturity.

2. Equity of Redemption Barred by Foreclosure of Mortgage or by Lapse of Time.—See *infra*, this title, *Relinquishment or Bar of Right*.

3. Equity of Redemption Subject to Particular Estate—Redemption by Remaindermen.—*Ravald v. Russell*, *Younge* 9; *Raffety v. King*, 1 Keen 601; *Riley v. Croydon*, 2 Dr. & Sm. 293.

In *Prout v. Cock*, (1896) 2 Ch. 808, the rule stated in the text was applied where the mortgagee of land devised by the mortgagor to his widow during the minority of his sons, with a direction that when the sons should be of age the property should be equally divided among them and the widow, took a mortgage of the interest of the widow under the will. It was held that the sons could not, during their minority, redeem the testator's mortgage without the consent of the mortgagee as the owner of the particular estate given to the widow by the will.

4. Reasonable Time Allowed to Redeem from Chattel Mortgage—*England*.—*Kemp v. Westbrook*, 1 Ves. 278.

California.—*Wilson v. Brannan*, 27 Cal. 258.

Illinois.—*Dupuy v. Gibson*, 36 Ill. 197.

Maine.—*Flanders v. Barstow*, 18 Me. 357.

New York.—*Pratt v. Stiles*, 17 How. Pr. (N. Y. Supreme Ct.) 211.

What Is a Reasonable Time is a question to be determined on the facts of each case. *Winchester v. Ball*, 54 Me. 558; *Joyner v. Vincent*, 4 Dev. & B. L. (20 N. Car.) 512; *Bartlett v. Thynes*, 2 Hill Eq. (S. Car.) 171; *Lavigne v. Naramore*, 52 Vt. 267.

In *Greene v. Dispeau*, 14 R. I. 575, *Durfee*, C. J., said: "Evidently twenty years is unreasonably long; for personal property is not permanent and indestructible, like real estate, but ordinarily it is movable, liable to be lost, perishable from use or time, and, even when, it consists of shares of stock, subject to great fluctuations in value. If six years is long enough for an action at law, when personal property belonging to one person has been appropriated by another, we see no reason why, in the absence of fraud or some other special ground of equitable relief, six years is not likewise long enough for the institution of a suit to redeem a chattel mortgage, when the mortgagee in possession, having an absolute title

case can redemption be had after an action to recover possession of the chattels is barred by the statute of limitations.¹

2. Statutory Right. — The statutory right to redeem from foreclosure sales can be exercised only within the period prescribed by the statute.²

V. TERMS OF REDEMPTION — 1. In Equity — a. PAYMENT OF MORTGAGE DEBT — (1) In General. — One who seeks to redeem a mortgage must, as a general rule, pay the mortgage debt in full, with interest,³ though the debt

at law, ceases to recognize any right in the mortgagor and treats the property as his own. Indeed, it is difficult to see why, in such a case, equity should not follow the law and hold the mortgage irredeemable at the end of sixty days after default."

Statutory Regulation. — In some jurisdictions the time to redeem is fixed by statute, and no redemption can be had after the expiration of the time so fixed, unless the bar of the statute has been waived or special circumstances exist which would make it inequitable to refuse redemption. *Clapp v. Glidden*, 39 Me. 448; *Winchester v. Ball*, 54 Me. 558; *Boston, etc., Iron Works v. Montague*, 108 Mass. 248; *Gordon v. Clapp*, 111 Mass. 22; *Arnold v. Chapman*, 13 R. I. 586; *Murphy v. Eddy*, 10 R. I. 41.

1. No Redemption After Recovery of Chattels Is Barred by Limitation. — *Hatfield v. Montgomery*, 2 Port. (Ala.) 58; *Byrd v. McDaniel*, 33 Ala. 18; *Baker v. Baker*, 13 B. Mon. (Ky.) 406; *Perry v. Craig*, 3 Mo. 516; *Stoddard v. Denison*, 38 How. Pr. (N. Y. Super. Ct.) 296.

2. Time for Redemption under Statute — Alabama. — Within two years after the sale. *Pryor v. Hollinger*, 88 Ala. 405.

Arkansas. — Within one year after the sale. *Hudgins v. Morrow*, 47 Ark. 515; *Wood v. Holland*, 53 Ark. 69; *Danenhauer v. Dawson*, (Ark. 1898) 46 S. W. Rep. 131.

California. — Within six months after the sale. *Collins v. Scott*, 100 Cal. 446.

Colorado. — The mortgagor, his executors, etc., may redeem from foreclosure sale within six months thereafter, and judgment creditors may redeem after six months but within nine months from the sale. *Mills's Annot. Stat.* 1891, §§ 2547, 2548, 2556.

Idaho. — Within six months after sale. *Rev. Stat.* 1887, § 4492.

Illinois. — Redemption from foreclosure sale may be had by the mortgagor within twelve months thereafter, and by judgment creditors after twelve months and within fifteen months. *Seligman v. Laubheimer*, 58 Ill. 124; *Bozarth v. Largent*, 128 Ill. 95.

Indiana. — Within one year after sale. *Davis v. Langsdale*, 41 Ind. 399; *Vaughan v. Dowden*, 126 Ind. 466; *Bowen v. Van Gundy*, 133 Ind. 670.

Iowa. — Within one year after sale. *Davis v. Spaulding*, 36 Iowa 610; *Stephens v. Mitchell*, 103 Iowa 65; *Newell v. Pennick*, 62 Iowa 123. Formerly the right to redeem after sale did not exist in Iowa. *Krarr v. Rebman*, 9 Iowa 114; *Stoddard v. Hays*, 12 Iowa 576; *Stoddard v. Forbes*, 13 Iowa 296.

Michigan. — Within one year after sale. *Sanford v. Cahoon*, 63 Mich. 223.

Minnesota. — The mortgagor, his heirs, executors, etc., may redeem within one year after the sale where foreclosure was by advertisement, and within a year from the order of con-

firmation of the sale where it was made under decree. Creditors have five days after the expiration of the year in which to redeem. The redemption is to be made in the order of their respective liens, each having five days after the time allowed those prior to him. *Cuilerier v. Brunelle*, 37 Minn. 71; *Buchanan v. Reid*, 43 Minn. 172; *Continental Mut. L. Ins. Co. v. King*, (Minn. 1898) 75 N. W. Rep. 376.

Nebraska. — The mortgagor may redeem from a foreclosure sale at any time before the sale is confirmed by the court. *Philadelphia Mortg., etc., Co. v. Gustus*, (Neb. 1898) 75 N. W. Rep. 1107. See also *Tootle v. White*, 4 Neb. 401; *Swearingen v. Roberts*, 12 Neb. 333.

Nevada. — Redemption may be had within six months after sale, unless the mortgaged estate is a leasehold of less than two years unexpired duration, in which case there is no redemption. *Gen. Stat.* 1885, §§ 3253, 3258.

New Jersey. — Redemption may be had after sale where a deficiency judgment has been recovered, if suit for redemption is brought within six months after entry of the judgment. *Champion v. Hinkle*, 45 N. J. Eq. 162.

North Dakota. — Redemption may be had within one year after sale. *Rev. Codes* 1845, §§ 5854, 5881.

Utah. — Redemption may be had within six months after sale. *McCormick v. Greenhow*, 2 Utah 363.

Washington. — Redemption may be had within one year after sale. 2 *Hill's Annot. Stat.* 1891, § 513.

A statutory redemption after foreclosure sale must be made within the time named in the statute, though a different time is certified by the officer who made the sale. *Johnstone v. Scott*, 11 Mich. 232.

A Purchaser of the Equity of Redemption who was a party to the foreclosure proceeding must redeem from the sale within the time prescribed for the mortgagor, and he is not entitled to the longer period allowed to judgment creditors. *Dunn v. Rodgers*, 43 Ill. 260.

3. Redeptioner Must Pay Entire Debt Secured, with Interest — England. — *Cholmondeley v. Clinton*, 2 Jac. & W. 1; *Palk v. Clinton*, 12 Ves. Jr. 48; *Williams v. Springfield*, 1 Vern. 476.

Alabama. — *Gliddon v. Andrews*, 14 Ala. 733; *Dozier v. Mitchell*, 65 Ala. 511.

California. — *Cuddeback v. Detro*, 61 Cal. 80.

Connecticut. — *Franklin v. Gorham*, 2 Day (Conn.) 142, 2 Am. Dec. 86; *Andreas v. Hubbard*, 50 Conn. 351.

Illinois. — *Meacham v. Steele*, 93 Ill. 135.

Iowa. — *White v. Hampton*, 13 Iowa 259; *Street v. Beal*, 16 Iowa 68, 85 Am. Dec. 504; *Knowles v. Rablin*, 20 Iowa 101; *Douglass v. Bishop*, 27 Iowa 214.

Maine. — *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595.

has ceased to be enforceable at law,¹ or the mortgage is void by statute because it is tainted with usury;² and he must ascertain and tender, at his peril, the amount necessary to effect a redemption.³ The rule that the entire debt must be paid before a party will be permitted to redeem applies even where separate parcels of property are mortgaged to secure the debt, and the redemptioner claims a right or interest in respect to one only of said parcels.⁴

Maryland. — *Trumbo v. Blizzard*, 6 Gill & J. (Md.) 18.

Massachusetts. — *Merritt v. Hosmer*, 11 Gray (Mass.) 276, 71 Am. Dec. 713; *Adams v. Brown*, 7 Cush. (Mass.) 220; *Stone v. Ellis*, 9 Cush. (Mass.) 95; *Lamb v. Montague*, 112 Mass. 352; *Ryer v. Gass*, 130 Mass. 227.

Michigan. — *Cowles v. Marble*, 37 Mich. 158.

Nebraska. — *Loney v. Courtney*, 24 Neb. 580.

New Hampshire. — *Fletcher v. Chase*, 16 N. H. 42; *Kezer v. Clifford*, 59 N. H. 208.

New York. — *Fogal v. Pirro*, 10 Bosw. (N. Y.) 100; *Coffin v. Parker*, 127 N. Y. 117.

Ohio. — *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512.

Pennsylvania. — *Lanning v. Smith*, 1 Pars. Eq. Cas. (Pa.) 13.

South Carolina. — *Levi v. Blackwell*, 35 S. Car. 511.

A mortgagor has no right to have a part of the mortgaged premises estimated in payment of his debt, with a view to a redemption of the residue, though the part which he seeks to have estimated has been entered on by the mortgagee. *Spring v. Haines*, 21 Me. 126.

Reason of Rule. — The right to claim that the whole and not a part shall be redeemed is a right which pertains to the mortgagee, and not to the mortgagor. The reason of the rule is that the mortgagee shall not be compelled to divide or apportion his security. *Boquet v. Coburn*, 27 Barb. (N. Y.) 230; *Robinson v. Fite*, 3 Ohio St. 551; *Wilson v. Tarter*, 22 Oregon 504.

What Constitutes Mortgage Debt. — The mortgage debt comprises not only the debt secured and interest, but also all other sums which the mortgagor is required by the mortgage to pay, such as attorney's fees, insurance, etc. *Hosford v. Johnson*, 74 Ind. 479; *Dayton v. Dayton*, 68 Mich. 437; *State Bank v. Rose*, 1 Strobb. Eq. (S. Car.) 257.

What Constitutes Payment. — Payment of redemption money by check is sufficient where such check was accepted as money, was duly paid, and the money was ready for the person entitled thereto within the time required. *Sardeson v. Menage*, 41 Minn. 314.

If, on application to redeem, the sheriff receives, without objection, United States treasury notes and national bank notes, it is a good payment. *Nopson v. Horton*, 20 Minn. 268. See generally the title PAYMENT.

Set-off Against Mortgage Debt. — In a suit by a mortgagor for redemption, the mortgagor cannot set off against the mortgage debt any demand he may have against the mortgagee. This rule rests upon the ground that such a suit is not a personal action, but a proceeding *in rem*. *Brown v. Coriell*, 50 N. J. Eq. 753, 35 Am. St. Rep. 789.

Failure to Make Payment Within Time Named in Decree. — Where the decree directed the redemptioner to pay the redemption money into

court before a certain day, and provided that on default of payment "the action be dismissed with costs," it was held that failure to make the payment before the day named did not *ipso facto* terminate the action, but that the redemptioner might apply for leave to make the payment afterwards and show a reason for his default. *Collinson v. Jeffery*, (1896) 1 Ch. 644.

1. Mortgage Debt Barred by Statute of Limitations. — Where the holder of the legal title is in fact an equitable mortgagee, the mortgagor cannot redeem without paying the debt secured, though an action for the debt is barred by the statute of limitations. *Boyce v. Fisk*, 110 Cal. 107; *Oakman v. Walker*, 69 Vt. 344; *Phelan v. Fitzpatrick*, 84 Wis. 240.

Mortgage Debt Discharged under Bankruptcy Law. — In a proceeding to redeem brought by the grantee of a mortgagor, it was held that it was incumbent on him to perform the condition of the mortgage by payment of the amount which the mortgage was given to secure, though the mortgagor and obligor in the bond mentioned in the condition had been discharged under the bankruptcy act. *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512.

2. Mortgage Void for Usury. — Though a mortgage tainted with usury is void by statute, the redemptioner must nevertheless pay the amount actually due before he will be permitted to redeem in equity. *Isherwood v. Dixon*, 5 Grant's Ch. (U. C.) 314; *Thompson v. Campbell*, 6 T. B. Mon. (Ky.) 120; *Woodward v. Fitzpatrick*, 9 Dana (Ky.) 117.

"It is said to be the settled doctrine of courts of equity, where a statute has made a usurious contract void, that while, if the usurer or lender comes into court seeking to enforce the contract, the court will refuse any assistance and repudiate the contract, yet, on the other hand, if the borrower comes into court seeking relief against the usurious contract, the only terms upon which equity will interfere are that the plaintiff will pay to the defendant what is really due to him, deducting the usurious interest. * * * The reason given by Lord Hardwicke for the distinction is this: "That this court considers usurious contracts in somewhat a different light from what the law does, which considers them upon the foot of the statutes; but this court as a fraud and advantage taken on necessitous persons." *Hart v. Goldsmith*, 1 Allen (Mass.) 145.

3. Redemptioner Must Ascertain and Tender Sum Due. — *Tirrell v. Merrill*, 17 Mass. 117; *Jones v. Porter*, 29 Tex. 456.

4. Separate Parcels Subject to One Mortgage. — Where two separate parcels of land are subject to a mortgage, a purchaser of one parcel cannot redeem such parcel by paying a proportionate part of the debt, but he must pay the whole debt. *Andreas v. Hubbard*, 50 Conn. 351.

So, too, though a part of the debt has been separated from the mortgage.¹

If the Debt Is Payable in Instalments, and the condition is broken by the failure to pay one of these, redemption may be had on payment of so much only as is due. In such case payment of the entire debt is not required.² But if the other instalments become due pending the proceeding to redeem, then payment of the entire debt is necessary.³

(2) *Quantity of Redemptioner's Interest.* — The quantity of the redemptioner's interest or estate in the mortgaged property does not ordinarily affect the amount necessary to be paid by him in order to redeem. He must pay the entire mortgage debt, whatever the quantity of his estate or interest may be,⁴ and whether it is in severalty or undivided,⁵ unless the mortgagee consents to a proportionate payment.⁶ But there are exceptions to this rule.⁷

Separate Mortgages on Separate Parcels of Land.

— The entire debt must be paid, though it is secured by separate mortgages, each on a separate parcel of land, but conditioned for the payment of the whole mortgage debt, and the redemptioner has a right or interest in respect to only one of the parcels. *Franklin v. Gorham*, 2 Day (Conn.) 142, 2 Am. Dec. 86.

Where a mortgagee holds a specific mortgage against one parcel and an accruing mortgage against another parcel, the mortgagor may redeem the first parcel by paying the amount secured by that mortgage, but he cannot redeem the second parcel without paying the entire indebtedness. *Gleason v. Kinney*, 65 Vt. 560.

1. *Separation of Part of Debt from Mortgage.* — The entire debt must be paid, though part of it has been separated from the mortgage by becoming the property of a different person. *Johnson v. Candage*, 31 Me. 28; *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595.

2. *Debt Payable in Instalments — Redemption on Payment of Instalment Due.* — *Hocker v. Reas*, 18 Cal. 650.

3. *Deferred Payments Becoming Due Pending Proceeding to Redeem.* — Where the mortgagee enters for nonpayment of interest on the mortgage debt, the mortgagor cannot redeem without paying both principal and interest, if the principal becomes due while the redemption suit is pending. *Adams v. Brown*, 7 Cush. (Mass.) 220.

The entire mortgage debt must be paid, though it was payable in successive instalments, and possession for the purpose of foreclosure was taken on default in the first payment, if the others became due while the possession was thus held. *Saunders v. Frost*, 5 Pick. (Mass.) 259, 16 Am. Dec. 394; *Mann v. Richardson*, 21 Pick. (Mass.) 355; *Deming v. Comings*, 11 N. H. 474.

Whole Mortgage Declared Due for Default as to Part. — When, by virtue of a provision in the mortgage, the entire mortgage debt has been declared due for default in payment of any instalment of interest or principal, the redemptioner must pay the whole debt. *Stinson v. Pepper*, 10 Biss. (U. S.) 107; *Williams v. Dickerson*, 66 Iowa 105.

But it has been held that such provision is in the nature of a penalty, against which relief may be granted on payment of the instalment due, with interest, and any costs that may have been incurred by the mortgagee in consequence of the default. *Tiernan v. Hinman*, 16 Ill. 400.

4. *Redemptioner Having Partial Interest — Entire Debt Must Be Paid — England.* — *Pearce v. Morris*, L. R. 5 Ch. 227.

Connecticut. — *Calkins v. Munsel*, 2 Root (Conn.) 333; *Lyon v. Robbins*, 45 Conn. 513.

Illinois. — *Durley v. Davis*, 69 Ill. 133; *Meacham v. Steele*, 93 Ill. 135; *Bozarth v. Largent*, 128 Ill. 95.

Indiana. — *Eiceman v. Finch*, 79 Ind. 511.

Iowa. — *Street v. Beal*, 16 Iowa 68, 85 Am. Dec. 504.

Massachusetts. — *Merritt v. Hosmer*, 11 Gray (Mass.) 276, 71 Am. Dec. 713; *Crafts v. Crafts*, 13 Gray (Mass.) 360; *Taylor v. Porter*, 7 Mass. 355.

Michigan. — *Laylin v. Knox*, 41 Mich. 40.

Minnesota. — *O'Brien v. Krenz*, 36 Minn. 136; *Buettel v. Harmount*, 46 Minn. 481.

A Mortgagee of an Undivided Interest in a tract of land cannot redeem such interest from a prior mortgage covering the whole tract, without paying the entire amount of the prior mortgage debt. *Knowles v. Rablin*, 20 Iowa 101.

5. *If Separate Parcels of Land Are Subject to One Mortgage* a purchaser of one of the parcels may redeem only on payment of the entire debt. He cannot compel the mortgagor to accept a proportionate part of his debt. *Andreas v. Hubbard*, 50 Conn. 351.

If Separate Parcels Are Subject to Separate Mortgages, each conditioned for the payment of the whole debt, a person having an interest in only one parcel must pay the whole debt before he will be allowed to redeem. *Franklin v. Gorham*, 2 Day (Conn.) 142, 2 Am. Dec. 86.

6. *Consent of Mortgagee to Proportionate Payment.* — *Kerse v. Miller*, 169 Mass. 44.

7. *Exceptions to Rule that Redemption Must Be Entire.* — The rule does not apply where the mortgage has been foreclosed without making all of the owners of the land parties to the suit, and the mortgagee has purchased at the sale, because he has by such proceeding and purchase voluntarily severed his right, and obtained an indefeasible title to part of the land, and only a defeasible title to another part. The owner not made a party may redeem the portion owned by him on paying a part of the mortgage debt bearing such proportion to the whole as the value of his land bears to that part of the whole mortgaged premises. *Wilson v. Tarter*, 22 Oregon 504.

Nor does the rule apply where the mortgage was foreclosed as to part of the premises. *Dukes v. Turner*, 44 Iowa 575. Nor where entire redemption would be unjust to the ten-

Redemption by Dowress. — A woman who seeks to redeem by virtue of her right of dower, whether inchoate or consummate, must pay the entire amount of the mortgage debt. This is well settled by the authorities, though opinions expressed in some cases are to the contrary.¹

(3) *Redemption After Invalid Foreclosure.* — If redemption is sought on general equitable principles after a sale under foreclosure proceedings which are not binding on the redemptioner for any reason, such as a failure to make him a party, he must pay the entire mortgage debt without regard to the price for which the foreclosure sale was made.²

(4) *Interest Payable on Redemption.* — As a general rule the redemptioner will be required to pay only simple interest on the mortgage debt,³ but simple interest on interest has been allowed where the mortgage expressly covenanted for the payment of interest on defaulting instalments of interest, and this was permitted by statute.⁴

If the Mortgage Is Usurious the redemptioner must nevertheless pay interest at the legal rate, as a condition of being permitted to redeem, though usurious contracts are declared void by statute;⁵ but the mortgagor, on redeeming, is

ant. *Shearer v. Field*, 6 Misc. Rep. (N. Y. Supreme Ct.) 189.

Grantee of Part of Premises. — The grantee of a part of the mortgaged premises under a warranty deed may redeem such part without paying the mortgage debt, or any part of it, if the other part was of sufficient value to pay the debts in full, and was owned by the assignee of the mortgage. *Bradley v. George*, 2 Allen (Mass.) 392.

Condemnation of Part of Property. — A corporation which has taken a part of mortgaged land by virtue of the right of eminent domain may redeem such part on payment of a proportionate part of the debt. *North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. 450; *Dows v. Congdon*, 16 How. Pr. (N. Y. Supreme Ct.) 571.

Prior Incumbrancers. — The rule that a mortgagee of several estates may refuse to be redeemed in respect of one only does not apply where a sale is asked by a prior incumbrancer. *Merritt v. Stephenson*, 6 Grant's Ch. (U. C.) 567.

1. **Dowress Redeeming Must Pay Entire Debt** — *United States*. — *Collins v. Riggs*, 14 Wall. (U. S.) 491.

Alabama. — *McGough v. Sweetser*, 97 Ala. 361.

Massachusetts. — *McCabe v. Bellows*, 7 Gray (Mass.) 148, 66 Am. Dec. 467; *Newton v. Cook*, 4 Gray (Mass.) 46; *Brown v. Lapham*, 3 Cush. (Mass.) 551; *Gibson v. Crehore*, 5 Pick. (Mass.) 146; *Kerse v. Miller*, 160 Mass. 44.

Mississippi. — *Rutherford v. Munce*, Walk. (Miss.) 370.

New Jersey. — *Merselis v. Van Riper*, 55 N. J. Eq. 618; *Chiswell v. Morris*, 14 N. J. Eq. 101.

New York. — *Ross v. Boardman*, 22 Hun (N. Y.) 527; *Wheeler v. Morris*, 2 Bosw. (N. Y.) 524; *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Bell v. New York*, 10 Paige (N. Y.) 67.

Ohio. — *McArthur v. Franklin*, 16 Ohio St. 193.

Conflicting Expressions of Opinion Explained. — In *Van Vronker v. Eastman*, 7 Met. (Mass.) 157, which was a bill by the widow of a mortgagor against the assignee of the mortgage to redeem, the court said that the plaintiff was

"entitled to redeem the mortgaged premises by paying her due proportion of the mortgage debt." But in *McCabe v. Bellows*, 7 Gray (Mass.) 148, 66 Am. Dec. 467, the court explained the decision in *Van Vronker v. Eastman*, 7 Met. (Mass.) 157, and reiterated the rule that as against the mortgagee a dowress can redeem only on payment of the whole mortgage debt. See also *Russell v. Austin*, 1 Paige (N. Y.) 192, explained in *Bell v. New York*, 10 Paige (N. Y.) 49.

2. **Payment of Mortgage Debt in Full Necessary to Effect Redemption After Invalid Foreclosure** — *United States*. — *Collins v. Riggs*, 14 Wall. (U. S.) 491.

Illinois. — *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564.

Indiana. — *Hosford v. Johnson*, 74 Ind. 479.

Iowa. — *Iowa County v. Beeson*, 55 Iowa 262; *White v. Hampton*, 13 Iowa 259; *Johnson v. Harmon*, 19 Iowa 56.

Michigan. — *Baker v. Pierson*, 6 Mich. 522; *Powers v. Golden Lumber Co.*, 43 Mich. 468.

Minnesota. — *Martin v. Fridley*, 23 Minn. 13. *New York*. — *Benedict v. Gilman*, 4 Paige (N. Y.) 58; *Robinson v. Ryan*, 25 N. Y. 320; *Gage v. Brewster*, 31 N. Y. 218; *Raynor v. Selmes*, 52 N. Y. 579.

3. **Only Simple Interest Allowable as a General Rule.** — *Reed v. Reed*, 10 Pick. (Mass.) 398; *Montague v. Boston*, etc., R. Co., 124 Mass. 242.

The mortgagor, on redeeming, is not obliged to pay compound interest though the note secured by the mortgage may in terms require it; and where the mortgage was given to secure a note with interest payable annually, and the mortgagor gave a second note for the interest computed annually, he may redeem on payment of the original note and simple interest. *Parkhurst v. Cummings*, 56 Me. 155.

4. **Interest on Interest Allowed.** — *Millard v. Truax*, 73 Mich. 381.

5. **Redemptioner Must Pay Legal Interest though Mortgage Is Usurious.** — *Isherwood v. Dixon*, 5 Grant's Ch. (U. C.) 314; *Thompson v. Campbell*, 6 T. B. Mon. (Ky.) 120; *Woodard v. Fitzpatrick*, 9 Dana (Ky.) 117.

Right of Purchaser of Equity of Redemption to Take Advantage of Usury. — In *Perrine v. Poul-*

entitled to the benefit of the statute penalty for usury, in reduction of the mortgage debt.¹

Rate of Interest After Maturity. — The authorities differ as to the rate of interest to be allowed after maturity when the contract provides for interest at a certain rate, but does not specify the rate to be borne by the debt after maturity. By some it is held that the contract rate ceases at maturity, and that thereafter interest runs at the statutory rate.² Other authorities hold that where the contract specifies the rate of interest, but does not provide that it shall run at the specified rate after maturity, it nevertheless continues to run at such rate until the debt is paid.³

b. PAYMENT OF OTHER DEBTS BY REDEMPTIONER. — If a person entitled to redeem goes into equity for that purpose, and he owes the mortgagee other sums than that secured by the mortgage, relief will be granted only on the payment of the total amount of his indebtedness, in accordance with the maxim that "he who asks equity must do equity," and to prevent circuitry of action; but in a proceeding by the mortgagee to foreclose the mortgage, redemption will be allowed on payment of the mortgage debt alone,⁴ yet he cannot be

son, 53 Mo. 309, it was held that on redemption by a purchaser of mortgaged premises, the redemptioner was entitled to deduct from the debt so much as consisted of usurious interest, but that no deduction could be made for usurious interest already paid by the mortgagor. *Compare Cain v. Gimon*, 36 Ala. 168, holding that the defense of usury was personal to the debtor, and that a voluntary grantee of the mortgage seeking to redeem could not take advantage of usury in the mortgage.

1. Mortgagor Entitled to Statute Penalty for Usury. — *Adams v. McKenzie*, 18 Ala. 698; *Hart v. Goldsmith*, 1 Allen (Mass.) 145; *Minot v. Sawyer*, 8 Allen (Mass.) 78; *Smith v. Robinson*, 10 Allen (Mass.) 130; *Gerrish v. Black*, 104 Mass. 400, 99 Mass. 315; *Kirkpatrick v. Smith*, 55 Mo. 389.

2. Interest Allowed at Statutory Rate after Maturity — *England*. — *In re Roberts*, 14 Ch. Div. 49; *Cook v. Fowler*, L. R. 7 H. L. 27.

United States. — *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Burnhisel v. Firman*, 22 Wall. (U. S.) 170; *Holden v. Freedman's Sav., etc., Co.*, 100 U. S. 72.

Arkansas. — *Pettigrew v. Summers*, 32 Ark. 571.

California. — *Cummings v. Howard*, 63 Cal. 503.

Connecticut. — *First Ecclesiastical Soc. v. Loomis*, 42 Conn. 570.

Florida. — *Jefferson County v. Lewis*, 20 Fla. 980.

Kansas. — *Searle v. Adams*, 3 Kan. 515, 89 Am. Dec. 598.

Kentucky. — *Rilling v. Thompson*, 12 Bush (Ky.) 310.

Maine. — *Duran v. Ayer*, 67 Me. 145.

Maryland. — *Brown v. Hardcastle*, 63 Md. 484.

Minnesota. — *Moreland v. Lawrence*, 23 Minn. 84.

New Hampshire. — *Ashuelot R. Co. v. Elliot*, 57 N. H. 397.

New York. — *Hamilton v. Van Rensselaer*, 43 N. Y. 244.

Pennsylvania. — *Ludwick v. Huntzinger*, 5 W. & S. (Pa.) 51.

Rhode Island. — *Pearce v. Hennessy*, 10 R. I. 223.

South Carolina. — *Thatcher v. Massey*, 20 S. Car. 543.

Utah. — *Perry v. Taylor*, 1 Utah 63.

3. Interest Allowed at Contract Rate After Maturity — *Illinois*. — *Etnyre v. McDaniel*, 28 Ill. 201.

Indiana. — *Kerr v. Haverstick*, 94 Ind. 178; *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364.

Iowa. — *Thompson v. Pickel*, 20 Iowa 490.

Massachusetts. — *Downer v. Whittier*, 144 Mass. 448.

Michigan. — *Warner v. Juif*, 38 Mich. 662.

Mississippi. — *Meaders v. Gray*, 60 Miss. 400, 45 Am. Rep. 414.

Missouri. — *Macon County v. Rodgers*, 84 Mo. 66.

Nebraska. — *Kellogg v. Lavender*, 15 Neb. 256, 48 Am. Dec. 339.

Ohio. — *Hamilton, etc., Hydraulic Co. v. Chatfield*, 38 Ohio St. 575.

Tennessee. — *Overton v. Bolton*, 9 Heisk. (Tenn.) 762.

Texas. — *Hopkins v. Crittenden*, 10 Tex. 189.

Virginia. — *Cecil v. Hicks*, 29 Gratt. (Va.) 1, 26 Am. Rep. 391.

West Virginia. — *Pickens v. McCoy*, 24 W. Va. 344.

Wisconsin. — *Pruyn v. Milwaukee*, 18 Wis. 367.

See also the title INTEREST

4. Payment of Collateral Debts by Redemptioner — *England*. — *Powis v. Corbet*, 3 Atk. 556.

Arkansas. — *Anthony v. Anthony*, 23 Ark. 479.

Connecticut. — *Scripture v. Johnson*, 3 Conn. 211; *Rowan v. Sharps Rifle Mfg. Co.*, 33 Conn. 28.

Kentucky. — *Reed v. Lansdale*, 1 Hard. (Ky.) 8; *Ogle v. Ship*, 1 A. K. Marsh. (Ky.) 287.

Maryland. — *Lee v. Stone*, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589.

South Carolina. — *Walling v. Aiken*, Mc-Mull. Eq. (S. Car.) 1.

Subsequent Advances to Mortgagor. — If the mortgagee makes subsequent advances to the

required to pay any debts owing to the holder of the mortgage by the person through or under whom the redemptioner derives his right to redeem,¹ unless he succeeded to the equity of redemption charged with the payment of the mortgagor's debt.²

If Several Mortgages Are Held by the Same Person, though they cover different parcels of land, the rule in *England* is that a person having a right of redemption in respect to one parcel cannot redeem it without paying off all the mortgages;³ but in the *United States* the rule seems to be otherwise.⁴

c. PERFORMANCE OF COLLATERAL CONDITIONS. — If the condition of the mortgage is other than for the payment of money, the right to redeem will be allowed only on the performance of such condition.⁵

d. PAYMENT OF COSTS AND EXPENSES — (1) *Costs.* — A proceeding to redeem being a matter of equity jurisdiction, the awarding of costs rests in the

mortgagor or to a third person at the mortgagor's request, under an agreement that the mortgage shall stand as security therefor, neither the mortgagor nor any one without equities superior to his will be permitted to redeem without paying the amount of such advances in addition to the amount named in the mortgage. *Brown v. Gaffney*, 32 Ill. 251; *Reed v. Lansdale*, 1 Hard. (Ky.) 8; *Ogle v. Ship*, 1 A. K. Marsh. (Ky.) 287; *Joslyn v. Wyman*, 5 Allen (Mass.) 62; *Stone v. Lane*, 10 Allen (Mass.) 74; *Upton v. National Bank*, 120 Mass. 153; *Williamson v. Downs*, 34 Miss. 402. See also *Cox v. Hoxie*, 115 Mass. 120.

But the mortgagor will not be required to pay, as a condition of redemption, unauthorized advances to a third person. *Kelly v. Falconer*, 45 N. Y. 42.

Administrator of Mortgagor. — An administrator, on redeeming a chattel mortgage given by his intestate, will be required to pay another debt not secured by the mortgage due from the mortgagor to the mortgagee. *Craik v. Clark*, 2 Hayw. (2 N. Car.) 22.

1. A purchaser of an equity of redemption at an execution sale thereof, or a junior incumbrancer, may redeem on payment of the mortgage debt, and cannot be required to pay other debts of the mortgagor to the holder of the mortgage, not a charge on the premises. *Cohn v. Hoffman*, 56 Ark. 119; *Burnet v. Deniston*, 5 Johns. Ch. (N. Y.) 35; *Jenkins v. Continental Ins. Co.*, 12 How. Pr. (N. Y. C. Pl.) 66; *Benton v. Kent*, 61 N. H. 124.

If the Heir Assigns the Equity of Redemption, the assignee on redeeming cannot be compelled to pay any other debts of the mortgagor to the mortgagee except that secured by the mortgage, though such other debts are by bonds binding the heir. *Powis v. Corbet*, 3 Atk. 556; *Coleman v. Winch*, 1 P. Wms. 775; *Troughton v. Troughton*, 1 Ves. 87; *Morret v. Paske*, 2 Atk. 53.

2. **The Heir of a Mortgagor** cannot redeem at common law without paying also a bond wherein the heir is bound, given by the mortgagor to the mortgagee for another debt. The ground is to prevent circuity of action, because on the death of the obligor in such bond the debt becomes the debt of the heir. *Shuttleworth v. Laycock*, 1 Vern. 245; *Coleman v. Winch*, 1 P. Wms. 776; *Troughton v. Troughton*, 1 Ves. 87.

A Devisee of the Mortgagor, since the statute

against fraudulent devises, on redeeming must pay the specialty debts of the mortgagor binding the heirs. *Heams v. Bance*, 3 Atk. 630; *Price v. Fastnedge*, Amb. 686.

3. Several Mortgages Held by Same Person — Redemptioner Must Pay All in England. — *Tassell v. Smith*, 2 De G. & J. 713; *Mills v. Jennings*, 13 Ch. Div. 639; *Cummins v. Fletcher*, 14 Ch. Div. 699; *Roe v. Soley*, 2 W. Bl. 726; *Beavor v. Luck*, L. R. 4 Eq. 537; *Vint v. Padget*, 2 De G. & J. 611.

In *Beavor v. Luck*, L. R. 4 Eq. 537, it was held that in a suit by a mortgagee for foreclosure of several mortgages on different estates, where the plaintiff was the mortgagee in some of the mortgages and the assignee of the others, a purchaser of an equity of redemption from the mortgagor would not be permitted to redeem his estate without also redeeming all the other mortgages by the same mortgagor which had become united in the plaintiff, whether such union took place before or after the purchase, and whether or not the purchaser had notice of the existence of the other mortgages.

4. Redemption of One of Several Mortgages Held by Same Person Allowed in United States. — *Milliken v. Bailey*, 61 Me. 316.

In *Cleveland v. Clark*, *Brayt*. (Vt.) 165, the court said: "A mortgagee cannot purchase in a mortgage and compel the mortgagor to redeem both or neither. If one piece of land be of more value than the debt charged upon it, the interest of the mortgagor can be taken by his creditors by process of law only; it is not to be subjected to forfeiture for nonpayment of other debts, charged upon other lands, and to other creditors."

5. Performance of Collateral Conditions. — *Goldbeck's Appeal*, (Pa. 1887) 8 Atl. Rep. 29.

Conditions of Collateral Contract. — Where a deed conveying land imposed certain conditions on the grantee, who gave a mortgage for the purchase money, he was not allowed to redeem the mortgage without performing the conditions of the deed. *Stone v. Ellis*, 9 Cush. (Mass.) 95.

Mortgage for Support. — The purchaser of premises subject to a mortgage conditioned for the support of the mortgagee may, on breach of the condition, redeem by making compensation for the past neglect of the mortgagor, and paying an allowance for the future. *Austin v. Austin*, 9 Vt. 420.

sound discretion of the court, in the absence of statutory regulation.¹ In the exercise of this discretion, the usual practice is to require the redemptioner to pay the costs of the proceeding,² though they are sometimes imposed on the mortgagee,³ and sometimes they are divided between the parties.⁴ In some jurisdictions the matter is regulated by statute.⁵

(2) *Expenses.* — The redemptioner must also pay all expenses incurred by the mortgagee in consequence of the breach of the condition of the mortgage, unless it would be inequitable to require such payment because of the improper conduct of the mortgagee, or because of the existence of special circumstances.⁶

c. TIME OF PAYMENT OF REDEMPTION MONEY. — The court has authority to designate a limited time within which the redemption money must be paid, and to condition the right of redemption on payment being made accordingly.⁷

2. Terms of Statutory Redemption. — The statutory right to redeem can be allowed only on the terms prescribed by the statute, and the court has no authority to modify them.⁸

1. Discretion of Court of Equity in Awarding Costs. — See the title COSTS, 5 ENCYC. OF PL. AND PR. 184.

2. Costs Ordinarily Imposed on Redemptioner —
Alabama. — Blum v. Mitchell, 59 Ala. 535.

Illinois. — Harper v. Ely, 70 Ill. 581.

Indiana. — Hosford v. Johnson, 74 Ind. 479.

Missouri. — Turner v. Johnson, 95 Mo. 431, 6 Am. St. Rep. 62.

New Hampshire. — Bean v. Brackett, 35 N. H. 88.

New Jersey. — Phillips v. Hulsizer, 20 N. J. Eq. 308.

New York. — Slee v. Manhattan Co., 1 Paige (N. Y.) 48; Brockway v. Wells, 1 Paige (N. Y.) 617; Benedict v. Gilman, 4 Paige (N. Y.) 58; Vroom v. Ditmas, 4 Paige (N. Y.) 526.

Pennsylvania. — Wells v. Van Dyke, 109 Pa. St. 330.

Rhode Island. — Sessions v. Richmond, 1 R. I. 298.

In *Wetherell v. Collins*, 3 Madd. 255, the vice-chancellor said: "It seems at first sight a great hardship that the mortgagor is to pay the costs of persons claiming under the mortgage, and made necessary parties by his act, but it is the constant course of the court, and it is to be supported on this principle — that at law, after a mortgage is forfeited, the estate is the absolute property of the mortgagee, and he may deal with it as his own; and that if the mortgagor comes for the redemption which the equity of this court gives him, it must be upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts."

3. Costs Sometimes Imposed on Mortgagee. — The mortgagee will be compelled to pay the costs where he asserted an absolute title which he failed to maintain, *May v. Eastin*, 2 Port. (Ala.) 414; or where he set up an unwarranted defense, or one which wholly failed, and thereby made unnecessary delay and expense, *Turner v. Johnson*, 95 Mo. 431, 6 Am. St. Rep. 62; *Davis v. Duffie*, 18 Abb. Pr. (N. Y. Super. Ct.) 360; *Barton v. May*, 3 Sandf. Ch. (N. Y.) 450; *Still v. Buzzell*, 60 Vt. 478; or where he refused a tender of a sum sufficient to cover principal, interest, and costs, *Harmer v. Priestley*, 16 Beav. 569; *Grurgeon v. Gerrard*, 4 Y. & Coll. 119; *Squire v. Pardoe*, 40 W. R. 100; *Meigs v. McFarlan*, 72 Mich. 194; *King v. Duntz*, 11 Barb. (N. Y.) 191; *Van Buren v. Olmstead*, 5 Paige (N. Y.) 9.

4. Dividing Costs. — When both parties to a redemption proceeding are in fault, the costs will be divided. *Perdue v. Brooks*, 85 Ala. 459; *Hollingsworth v. Koon*, 117 Ill. 511.

As to Dividing Costs in Equity when the parties are mutually in fault, see the title COSTS, 5 ENCYC. OF PL. AND PR. 187.

5. Costs Regulated by Statute. — *Pease v. Benson*, 28 Me. 336; *Roby v. Skinner*, 34 Me. 270; *Sprague v. Graham*, 38 Me. 328; *Dinsmore v. Savage*, 68 Me. 191; *Woodward v. Phillips*, 14 Gray (Mass.) 132; *Montague v. Phillips*, 16 Gray (Mass.) 566.

6. Liability of Redemptioner for Expenses Incurred by Mortgagee. — As to the various items of expense with which the redemptioner is chargeable, see *infra*, this title, *Accounting on Redemption*.

A junior mortgagee may, after foreclosure of a prior mortgage, redeem without paying the costs of the foreclosure, where he was not a party to the foreclosure proceeding. *Hosford v. Johnson*, 74 Ind. 479; *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364; *Vroom v. Ditmas*, 4 Paige (N. Y.) 526; *Gage v. Brewster*, 31 N. Y. 218; *Moore v. Cord*, 14 Wis. 213.

Liability of Junior Mortgagee for Expenses Incurred by Senior Mortgagee. — A second mortgagee, on redeeming from the first mortgagee in possession, must pay the expenses incurred by the first mortgagee in obtaining possession, or in redeeming from a prior incumbrance. *Miller v. Whittier*, 36 Me. 577; *Hill v. White*, 1 N. J. Eq. 435.

7. Time for Payment of Redemption Money Fixed by Court. — *Cowing v. Rogers*, 34 Cal. 648; *Hannah v. Davis*, 112 Mo. 599.

Reasonable Time. — In *Taylor v. Dillenburg*, 168 Ill. 235, it was held, where redemption from foreclosure was decreed after the expiration of the time allowed therefor by statute, on the ground that the mortgagee had agreed to an extension of the time, but afterwards refused to keep to his agreement, that it was unreasonable to require the redemptioner to pay the redemption money, amounting to about six thousand dollars, within thirty days after the decree.

8. Terms of Statutory Redemption in General. — The statute regulates the terms of redemption of mortgaged lands sold under decrees of foreclosure. *Johnson v. Donnell*, 15 Ill. 97. See

VI. ACCOUNTING ON REDEMPTION — 1. Liability to Account. — When a mortgage is redeemed an accounting must be had, if the mortgagee has been in possession under his mortgage, in order to ascertain the exact amount to be paid by the redemptioner as the condition of his being allowed to redeem.¹

A "Mortgagee in Possession," who, as such, must account to the redemptioner, is any person in possession of the mortgaged property under or by virtue of the mortgage;² but a merely formal entry, without taking actual possession

the various local codes and statutes in the United States.

Sum Payable to Effect Statutory Redemption. — In order to redeem land in the possession of the mortgagee, it is sufficient to tender the amount of the mortgage debt; but to redeem from a sale under the mortgage, as provided by statute, the amount specified in the statute, with interest at the rate therein provided for, must be paid, and redemption cannot be conditioned on the payment of any other sum. *Parmer v. Parmer*, 74 Ala. 285; *Wood v. Holland*, 57 Ark. 198; *German Nat. Bank v. Barham*, 57 Ark. 533; *Vosburgh v. Lay*, 45 Mich. 455; *Bacon v. Cottrell*, 13 Minn. 194; *Evans v. Rhode Island Hospital Trust Co.*, 67 Minn. 160.

A statutory redemption from a foreclosure sale cannot be had for less than the amount for which the property was sold. *Dickerson v. Hayes*, 26 Minn. 100.

The holder of a junior mortgage who was made defendant in a suit for the foreclosure of a senior mortgage may redeem from the sale by paying the amount bid, with interest, within the time allowed by the statute, though the amount bid by the senior mortgagee, who was the purchaser, was less than the amount of the mortgage debt. *Tuttle v. Dewey*, 44 Iowa 306.

Increase of Bid After Sale. — When the purchaser at a foreclosure sale of one of two tracts mortgaged, who was interested in having the tract sold to pay the full balance due on the mortgage in order to prevent the sale of the other tract which was owned by himself (he having previously paid the share of the mortgage debt apportioned thereto), bid at the sale, through mistake, a sum less than the amount of the mortgage, and afterwards, with the consent of the receiver making the sale, in order to rectify the mistake, increased his bid to the full amount of the mortgage, and the sale was thereafter confirmed by the court at such increased bid, the owner of the property sold will not be allowed in equity to redeem it on payment of the amount of the first bid and percentage thereon, but, regardless of whether he is or is not legally liable therefor, will be compelled as a condition of relief in equity to pay the full amount due under the decree of foreclosure. *Weyant v. Murphy*, 78 Cal. 278.

Security for Payment of Redemption Money. — Under the *Missouri* statute (Rev. Stat., § 3298), security is required to be given by the redemptioner in order to redeem from a foreclosure sale, and it must be given at the time of the sale, or within a reasonable time thereafter. *Johnson v. Atchison*, 90 Mo. 48; *Udpike v. Merchants' Elevator Co.*, 96 Mo. 160; *Dawson v. Egger*, 97 Mo. 30.

Excessive Demand. — One who has a right to redeem after a foreclosure sale under a mort-

gage should pay the sheriff what he demands, under protest, if he demands too much. *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655.

Expenses of Foreclosure. — A person redeeming from a foreclosure sale must pay all the expenses of the foreclosure. *Whitcomb v. Harris*, 90 Me. 206.

Interest on Price at Foreclosure Sale. — Under the *Minnesota* statute, if the mortgage draws less than the legal rate of interest (seven per cent.), or if no rate is specified, interest on the price bid at the foreclosure sale must be paid at the legal rate on redemption; but if more than the legal rate is provided for in the mortgage, the redemptioner must pay at that rate, but not to exceed ten per cent. *Evans v. Rhode Island Hospital Trust Co.*, 67 Minn. 160.

If Several Parcels Are Sold Separately, any of such parcels may be redeemed independently of the rest under the *Washington* statute. *State v. Carpenter*, (Wash. 1898) 53 Pac. Rep. 342.

Successive Redemptions. — A judgment creditor redeeming from a foreclosure sale under a second mortgage, after redemption by the second mortgagee from a sale under the first mortgage, must pay the amount of both sales. *Flachs v. Kelly*, 30 Ill. 462.

1. This Proposition Is Obvious, and is recognized by all the authorities.

2. Who Are Mortgagees in Possession. — *A Purchaser at a Foreclosure Sale Which Is Defective* and therefore does not divest the title of the mortgagor is in effect a mortgagee in possession, and is accountable as such. *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364; *Backus v. Burke*, 63 Minn. 272.

The purchaser at a foreclosure sale under a purchase-money mortgage in which the mortgagor's wife did not join is, as against the wife who was not a party to the foreclosure proceeding, a mortgagee in possession, and is accountable to her for rents and profits on redemption by her after her husband's death. *Barr v. Vanalstine*, 120 Ind. 590.

But if the Foreclosure Is Valid as against the mortgagor, the purchaser is not in possession under the mortgage, according to some authorities. He stands in the place of the mortgagor, and cannot, therefore, be held accountable for rents and profits on redemption by a junior incumbrancer who was not made a party to the foreclosure proceeding. *Daniel v. Coker*, 70 Ala. 260; *Hart v. Chase*, 46 Conn. 207; *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364; *Catterlin v. Armstrong*, 79 Ind. 514, 101 Ind. 258; *Johnson v. Hosford*, 110 Ind. 572; *Renard v. Brown*, 7 Neb. 449; *Van Dyne v. Shann*, 41 N. J. Eq. 312.

On the other hand, it has been held that such a foreclosure operates merely as an assignment

or interfering with the possession of the mortgagor, does not create this status.¹

2 Who May Require. — An accounting may be required by a purchaser or an assignee of the equity of redemption,² or by a junior incumbrancer.³

3. Items of Account — *a. CHARGES* — (1) *Rents and Profits* — (a) **General Rule.** — A mortgagee in possession under his mortgage will be required to account for the rents and profits of the premises actually received by him while he was in possession, or which by the exercise of reasonable care and diligence he might have received.⁴

of the mortgage. On this theory the purchaser is considered as a mortgagee in possession and accountable as such for rents and profits to junior incumbrancers on redemption by them. *Ten Eyck v. Casad*, 15 Iowa 524.

If a *Foreclosure Was Fraudulent*, the mortgagee being in possession under such fraudulent foreclosure is, as against a second mortgagee, a "mortgagee in possession," and must account accordingly. *Long v. Richards*, 170 Mass. 120.

The *Grantee in an Absolute Deed* intended as a mortgagee is a mortgagee in possession. *Teal v. Walker*, 111 U. S. 242; *Clark v. Finlon*, 90 Ill. 245; *Barnard v. Jennison*, 27 Mich. 230; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *Morris v. Budlong*, 78 N. Y. 543; *Harper's Appeal*, 64 Pa. St. 315.

Possession under the Mortgage is necessary to constitute a person a mortgagee in possession.

England. — *Parkinson v. Hanbury*, L. R. 2 H. L. 1.

Alabama. — *Daniel v. Coker*, 70 Ala. 260.

Connecticut. — *Hart v. Chase*, 46 Conn. 207.

Maryland. — *Young v. Omohundro*, 69 Md. 424.

Massachusetts. — *Sanford v. Pierce*, 126 Mass. 146.

Minnesota. — *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613.

New Jersey. — *Onderdonk v. Gray*, 19 N. J. Eq. 65; *Davis v. Flagg*, 44 N. J. Eq. 109.

Oregon. — *Renshaw v. Taylor*, 7 Oregon 315.

As to what constitutes a person a mortgagee in possession, see also the title **MORTGAGES**.

1. Effect of Formal Entry. — A mortgagee is not accountable to an assignee of the equity of redemption, for the rents of the premises, where he entered thereon to foreclose a mortgage in which his wife had not joined, but did not take possession or receive rent therefor, the wife having continued in possession of the premises, claiming a homestead therein. *Taft v. Stetson*, 117 Mass. 471. Nor where he took formal possession for breach of condition, in order to protect the crops growing on the premises from attachments by the mortgagor's creditors, and had record of the entry made, but allowed the mortgagor to remain in actual possession, and to receive the rents and profits. *Charles v. Dunbar*, 4 Met. (Mass.) 498.

2. A Purchaser or Assignee of an equity of redemption has the same right to require an accounting that his vendor or assignor had. *Strang v. Allen*, 44 Ill. 428; *Ruckman v. Astor*, 9 Paige (N. Y.) 517.

3. Junior Incumbrancer May Require Mortgagee in Possession to Account. — *Catterlin v. Armstrong*, 79 Ind. 514; *Ten Eyck v. Casad*, 15 Iowa 524; *Long v. Richards*, 170 Mass. 120; *Renard v. Brown*, 7 Neb. 449; *Hill v. White*,

1 N. J. Eq. 435; *Leeds v. Gifford*, 41 N. J. Eq. 464.

On redemption by a junior mortgagee, he may compel the senior mortgagee who has been in possession under his mortgage to account to the same extent and in the same manner as the mortgagor might have done. His right to compel such accounting does not rest on any obligation of the senior mortgagee to him, for there is no contract between them, but it rests on the fact that the senior mortgagee is under obligation to the mortgagor to account, and that the junior mortgagee, by reason of his junior lien, has the right in equity to stand in the place of the mortgagor and compel the application of the rents and profits to the satisfaction of the senior mortgage. The junior mortgagee has no right, therefore, to compel an accounting where the mortgagor has no such right; and consequently, if the title of the mortgagor has been divested and the mortgagee has been in possession under a title derived from the mortgagor, he is not chargeable with the rents and profits of the mortgaged premises. *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364.

The holder of a second mortgage of real estate which is subject to the mortgagor's right of homestead in a part of the premises may, in a bill to redeem, compel the holder of the first mortgage, which is not subject to the right of homestead, after he has taken and maintained actual and exclusive possession for the purpose of foreclosure, for breach of condition, to account to him for all the rents and profits which by due diligence he might have received, including rent for the homestead. *Richardson v. Wallis*, 5 Allen (Mass.) 78.

4. Mortgagee in Possession Must Account for Rents and Profits — *England.* — *Millett v. Davey*, 31 Beav. 470; *Mayer v. Murray*, 8 Ch. Div. 424; *Kensington v. Rouverie*, 7 De G. M. & G. 134; *Parkinson v. Hanbury*, L. R. 2 H. L. 1; *Anonymous*, 1 Vern. 45; *Fulthorpe v. Foster*, 1 Vern. 476; *Hughes v. Williams*, 12 Ves. Jr. 493.

United States. — *Dexter v. Arnold*, 2 Sumn. (U. S.) 108; *Gordon v. Lewis*, 2 Sumn. (U. S.) 143.

Alabama. — *Hogan v. Stone*, 1 Ala. 496, 35 Am. Dec. 39; *Davis v. Lassiter*, 20 Ala. 561; *Blum v. Mitchell*, 59 Ala. 535; *Toomer v. Randolph*, 60 Ala. 356; *Downs v. Hopkins*, 65 Ala. 508; *Daniel v. Coker*, 70 Ala. 260.

Arkansas. — *Reynolds v. Canal, etc., Co.*, 30 Ark. 520; *Greer v. Turner*, 36 Ark. 17; *Harrill v. Stapleton*, 55 Ark. 1.

California. — *Murdock v. Clarke*, 59 Cal. 683. *Connecticut.* — *Harrison v. Wyse*, 24 Conn. 1, 63 Am. Dec. 151.

Illinois. — *Harper v. Ely*, 70 Ill. 581; *Clark*

The Degree of Diligence to which he is held before he may be relieved from liability when he fails to receive the rents and profits of the premises of which he was in possession is that which a provident owner would exercise.¹

(b) **Measure of Accountability.**—The general rule is that a mortgagee in possession is accountable only for the rents and profits actually realized, unless he be guilty of fraud or wilful default, and he cannot be required to account according to the value of the lands.² But if the amount received cannot be ascer-

v. Finlon, 90 Ill. 245; *Jackson v. Lynch*, 129 Ill. 72; *Rooney v. Crary*, 11 Ill. App. 213.

Iowa.—*Montgomery v. Chadwick*, 7 Iowa 114, Ten Eyck *v. Casad*, 15 Iowa 524.

Kentucky.—*Ballinger v. Worley*, 1 Bibb (Ky.) 196; *Tharp v. Feltz*, 6 B. Mon. (Ky.) 6.

Maine.—*Milliken v. Bailey*, 61 Me. 316; *Dela v. Stanwood*, 62 Me. 574. See also *Bailey v. Myrick*, 52 Me. 135.

Maryland.—*Hagthorpe v. Hook*, 1 Gill & J. (Md.) 270; *Booth v. Baltimore Steam Packet Co.*, 63 Md. 39.

Massachusetts.—*Miller v. Lincoln*, 6 Gray (Mass.) 556; *Hubbard v. Shaw*, 12 Allen (Mass.) 120; *Montague v. Boston*, etc., R. Co., 124 Mass. 242; *Brown v. South Boston Sav. Bank*, 148 Mass. 300.

Mississippi.—*Worthington v. Wilmot*, 59 Miss. 608.

Missouri.—*Anthony v. Rogers*, 20 Mo. 281; *Turner v. Johnson*, 95 Mo. 431, 6 Am. St. Rep. 62; *Stevenson v. Edwards*, 98 Mo. 622; *Hannah v. Davis*, 112 Mo. 599; *Vannmeter v. Darrah*, 115 Mo. 153; *Godfrey v. Stock*, 116 Mo. 403.

Nebraska.—*Renard v. Brown*, 7 Neb. 449.

New Jersey.—*Clark v. Smith*, 1 N. J. Eq. 121; *Onderdonk v. Gray*, 19 N. J. Eq. 65; *Leeds v. Gifford*, 41 N. J. Eq. 464; *Dawson v. Drake*, 30 N. J. Eq. 601; *Hill v. White*, 1 N. J. Eq. 435.

New York.—*Van Buren v. Olmstead*, 5 Paige (N. Y.) 9; *Ruckman v. Astor*, 3 Edw. Ch. (N. Y.) 373, 9 Paige (N. Y.) 517; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519.

North Carolina.—*Irwin v. Davidson*, 3 Ired. Eq. (38 N. Car.) 311.

Oregon.—*Swegle v. Belle*, 20 Oregon 323.

Pennsylvania.—*Reitenbaugh v. Ludwick*, 31 Pa. St. 131.

Vermont.—*Seaver v. Durant*, 39 Vt. 103.

Virginia.—*Robertson v. Campbell*, 2 Call. (Va.) 421.

Wisconsin.—*Lupton v. Almy*, 4 Wis. 242; *Brayton v. Jones*, 5 Wis. 117; *Ackerman v. Lyman*, 20 Wis. 454.

Right to Require Accounting Incidental to Right to Redeem.—The right to require the mortgagee to account for the rents and profits is incidental to the right to redeem, and can be enforced only in a suit to redeem. The theory on which he is held accountable is that the mortgage is a mere security for the debt until foreclosure, and that the mortgagee receives the rents and profits as trustee of the mortgagor, and is therefore chargeable with the duty of applying them to the mortgage debt. *Davis v. Lassiter*, 20 Ala. 561; *Toomer v. Randolph*, 60 Ala. 356; *Dailey v. Abbott*, 40 Ark. 275.

Demand for Accounting.—A demand on the mortgagee to state his account must be made, in respect to time and place, so as to give him

an opportunity to render the account. *Willard v. Fiske*, 2 Pick. (Mass.) 540; *Putnam v. Putnam*, 13 Pick. (Mass.) 129.

Joint or Several Liability.—In a proceeding against two persons for redemption, if only one of them actually received the rents and profits, he alone will be required to account therefor. *Merriam v. Goss*, 139 Mass. 77.

1. Diligence in Realizing Rents and Profits.—*England*.—*Parkinson v. Hanbury*, L. R. 2 H. L. 1; *Hughes v. Williams*, 12 Ves. Jr. 493.

United States.—*Peugh v. Davis*, 113 U. S. 542.

Alabama.—*Gresham v. Ware*, 79 Ala. 192.

Illinois.—*McConnel v. Holobush*, 11 Ill. 61; *Mosier v. Norton*, 83 Ill. 519; *Clark v. Finlon*, 90 Ill. 245; *Jackson v. Lynch*, 129 Ill. 72.

Maine.—*Milliken v. Bailey*, 61 Me. 316.

Massachusetts.—*Montague v. Boston*, etc., R. Co., 124 Mass. 242.

Missouri.—*Ely v. Turpin*, 75 Mo. 83.

Nebraska.—*Comstock v. Michael*, 17 Neb. 288.

New Jersey.—*Dawson v. Drake*, 30 N. J. Eq. 601.

New York.—*Walsh v. Rutgers F. Ins. Co.*, 13 Abb. Pr. (N. Y. Supreme Ct.) 33.

Lack of Diligence.—The mere facts that the buildings on the mortgaged property have deteriorated and the land has run out, or that the rental value exceeded the amount received, do not show a lack of diligence on the part of the mortgagee. *Brown v. South Boston Sav. Bank*, 148 Mass. 300.

Permitting Insolvent Tenant to Remain in Possession.—A mortgagee in possession is also accountable for the rent of the premises during the time for which he suffers a notoriously insolvent tenant to remain in possession, deducting the time reasonably necessary to expel him by legal means and to obtain a responsible tenant. *Miller v. Lincoln*, 6 Gray (Mass.) 556.

Permitting Tenant to Occupy Premises Without Paying Rent.—But if the mortgagee permits a tenant to occupy the premises without paying rent, he must account for the rents and profits. *Butts v. Broughton*, 72 Ala. 295; *Thayer v. Richards*, 19 Pick. (Mass.) 398.

2. Measure of Accountability.—*Hogan v. Stone*, 1 Ala. 496, 35 Am. Dec. 39.

"A mortgagee shall not account according to the value of the land; viz., he shall not be bound by any proof that the land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so had it not been for his wilful default; as if he turned out a sufficient tenant, that held it at so much rent, or refused to accept a sufficient tenant that would have given so much for it." *Anonymous*, 1 Vern. 45.

Bad Faith of a mortgagee in possession is

tained, a fair occupation rent will be charged,¹ and in determining the amount of such rent, an increase in the value of the lands by reason of improvements made by the accountant while in possession is not to be considered.²

Interest on Rents Received cannot ordinarily be charged as a part thereof,³ in the absence of special circumstances making such a charge proper.⁴

(c) **Period of Accountability.** — The mortgagee is accountable for the rents and profits accruing during the entire time that he was in possession.⁵

sufficient ground for charging him with the rents and profits that he might have made. *Long v. Richards*, 170 Mass. 120.

1. **A Fair Occupation Rent.** — *Gordon v. Lewis*, 2 Sumn. (U. S.) 143; *Dozier v. Mitchell*, 65 Ala. 511; *Sanders v. Wilson*, 34 Vt. 318; *Still v. Buzzell*, 60 Vt. 478.

"A mortgagee in possession is only bound to account for what he receives or might receive from the mortgaged premises by the use of fair, reasonable diligence and prudence, and if the premises are rented, and rents lost by the failure of a tenant, without fault of the mortgagee, he is not held liable to account. But when the mortgagee himself occupies, and especially when the premises are a farm in cultivation, upon which labor and expenditures are to be bestowed to produce annual crops and profits, the mortgagee will be charged with such sums as will be a fair rent for the premises, without regard to what he may, in fact, have realized as profits from the use of it. The rule is founded in sound policy, for the reason that the particular items of expenditure, in labor or otherwise, as well as the profits received, are wholly within the knowledge of the mortgagee, and if he is not disposed to render a full and honest account, it would be impossible for the mortgagor to show them, or to establish errors in the mortgagee's account." *Sanders v. Wilson*, 34 Vt. 318.

2. **Improvements Made by the Mortgagee in Possession**, other than ordinary repairs, whereby the rental value of the premises is increased, should be excluded in estimating the occupation rent with which he is chargeable. *Hidden v. Jordan*, 28 Cal. 302; *Catterlin v. Armstrong*, 79 Ind. 514; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *McArthur v. Franklin*, 16 Ohio St. 193. But he should be charged with rents that arise by reason of improvements made by a third person who claimed neither under the mortgagor nor the mortgagee. *Merriam v. Barton*, 14 Vt. 501.

3. **Interest Not Ordinarily Chargeable on Rents Received.** — *Shepherd v. Elliot*, 4 Madd. 254; *Hogan v. Stone*, 1 Ala. 496, 35 Am. Dec. 39; *Breckenridge v. Brooks*, 2 A. K. Marsh. (Ky.) 335, 12 Am. Dec. 401.

"The mortgagor can at any time regain the possession of the property by paying the debt. If he does not do so, and the mortgagee is at the trouble of paying himself, it is not reasonable that he should be charged with interest on the amount thus received, in small sums and at remote intervals, which are never of so much value as when the whole amount is received at once." *Hogan v. Stone*, 1 Ala. 496, 35 Am. Dec. 39.

4. **Interest Chargeable under Special Circumstances.** — If the rents and profits of the premises exceed the interest on the mortgage debt, annual rests should be made and the redemp-

tioner should be allowed interest on the surplus. *Green v. Westcott*, 13 Wis. 606.

"Where a mortgagee is in possession, taking the rents and profits, and these annually exceed the annual interest of the debt on the mortgage, there is the strongest reason for directing interest to be paid upon the surplus rents and profits, to keep pace (*pari passu*) with the interest on the debt. The cases of *Shepherd v. Elliot*, 4 Madd. 254; *Gibson v. Crehore*, 5 Pick. (Mass.) 160; *Saunders v. Frost*, 5 Pick. (Mass.) 259, 16 Am. Dec. 394, and *Reed v. Reed*, 10 Pick. (Mass.) 398, fully support such a charge. * * * There is great good sense in the doctrine held by Lord Gifford, in *Wilson v. Metcalfe*, 1 Russ. 535, that if a mortgagee, receiving the rents of a mortgaged estate, after his debt has been satisfied, does not immediately pay them over to the mortgagor, but retains them to his own use, he is availing himself of another man's money, and ought to be charged with interest; and that it makes no difference whether he is receiving such rents or is charged with an occupation rent. The case of *Quarrell v. Beckford*, 1 Madd. 269, turned upon similar conditions." *Gordon v. Lewis*, 2 Sumn. (U. S.) 143.

In *Gibson v. Crehore*, 5 Pick. (Mass.) 146, the court charged the mortgagee in possession with interest on the rents and profits; but that case was decided on its own circumstances, the court considering that the widow was precluded, by the purchase of the mortgage, from claiming her dower without filing a bill to redeem, and the court declined determining the general rule. But in that case it is to be observed that the five per cent. commission was allowed on the rents and profits received by the assignee of the mortgage.

5. **Mortgagee Accountable for Entire Period of Possession** — *Alabama*. — *Blum v. Mitchell*, 59 Ala. 535.

Arkansas. — *Reynolds v. Canal, etc., Co.*, 30 Ark. 520; *Harrill v. Stapleton*, 55 Ark. 1.

Illinois. — *Jackson v. Lynch*, 129 Ill. 72; *Mosier v. Norton*, 83 Ill. 519.

Maine. — *Dela v. Stanwood*, 62 Me. 574.

New York. — *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519.

Vermont. — *Gladding v. Warner*, 36 Vt. 54.

Wisconsin. — *Lupton v. Almy*, 4 Wis. 242; *Ackerman v. Lyman*, 20 Wis. 454.

Assignment by Mortgagee After Taking Possession. — A mortgagee who assigned the mortgage after he had been in possession under it is nevertheless obliged to account for the rents and profits for the time that he was in possession. *Fritz v. Simpson*, 34 N. J. Eq. 436.

If the mortgagor did not have actual notice of the assignment, the mortgagee is accountable for the rents and profits up to the time when the assignment was recorded. *Ackerson v. Lodi Branch R. Co.*, 31 N. J. Eq. 42.

(2) *Waste*. — A mortgagee in possession is accountable to the redemptioner for any voluntary waste committed while so in possession.¹

b. CREDITS — (1) *Repairs and Expenses*. — A mortgagee in possession is entitled to credit for all reasonable and necessary repairs made by him, because it is his duty to make such repairs and he is responsible for any loss or damage caused by his wilful default or gross neglect in regard thereto.² In some cases reasonable and necessary repairs cannot be readily distinguished from permanent improvements necessary to put the premises in proper condition, for which the mortgagee in possession may be allowed credit.³ Credit will also be allowed for all expenses incurred by the mortgagee in obtaining possession, or otherwise incident to the situation.⁴

Accounting on Redemption under Decree of Strict Foreclosure. — Where the mortgagor redeems within the time fixed by a decree of strict foreclosure, the mortgagee is accountable for the rents received after the decree. *Dailey v. Abbott*, 40 Ark. 275; *Ruckman v. Astor*, 9 Paige (N. Y.) 517; *Chapman v. Smith*, 9 Vt. 153.

1. Mortgagee in Possession Accountable for Waste. — *Sandon v. Hooper*, 6 Beav. 246; *Dexter v. Arnold*, 2 Sumn. (U. S.) 126; *Dozier v. Mitchell*, 65 Ala. 511; *Daniel v. Coker*, 70 Ala. 260.

He is not liable for damages done to the estate without his knowledge by his tenant, provided the tenant was one to whom the estate might properly be leased, or for wood cut and used on the premises for firewood and repairs by such tenant. *Hubbard v. Shaw*, 12 Allen (Mass.) 120.

A Grantee of a mortgagee in possession under a deed absolute in form is not chargeable with the neglect of his grantor to make repairs as required by such deed. *Oakman v. Walker*, 69 Vt. 344.

2. Credit Allowed for Reasonable and Necessary Repairs — *England*. — *Sandon v. Hooper*, 6 Beav. 246; *Neesom v. Clarkson*, 4 Hare 97.

United States. — *Dexter v. Arnold*, 2 Sumn. (U. S.) 126; *McCormick v. Knox*, 105 U. S. 122.

Maine. — *Rowell v. Jewett*, 73 Me. 365.

Massachusetts. — *Woodward v. Phillips*, 14 Gray (Mass.) 132; *Strong v. Blanchard*, 4 Allen (Mass.) 538.

Pennsylvania. — *Harper's Appeal*, 64 Pa. St. 315; *Wells v. Van Dyke*, 109 Pa. St. 330.

The duty to make repairs and the corresponding right to credit are limited to such as are reasonable and necessary. *Hidden v. Jordan*, 28 Cal. 301, 32 Cal. 307; *Adkins v. Lewis*, 5 Oregon 202; *Cook v. Ottawa University*, 14 Kan. 548; *Quin v. Brittain*, Hoffm. Ch. (N. Y.) 353; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *Clark v. Smith*, 1 N. J. Eq. 139.

A mortgagee in possession is not bound to rebuild structures that have been burned, or to repair such as have been injured without his fault. *Campbell v. Macomb*, 4 Johns. Ch. (N. Y.) 534; *Reid v. State Bank*, 1 Sneed (Tenn.) 262.

Repairs in Excess of Rents and Profits. — When a mortgagee has made proper repairs, credit therefor will not be refused though the amount of the repairs exceeds the rents and profits. *Reed v. Reed*, 10 Pick. (Mass.) 398.

3. Cost of Erecting Buildings. — A mortgagee will be allowed for money expended in build-

ing a barn and putting in a pump, where both were judicious under the circumstances. *Rowell v. Jewett*, 73 Me. 365.

Cost of Constructing Fences. — The mortgagee is entitled to an allowance for the cost of fencing the premises, if the fences were necessary for the protection of the crops. *Hidden v. Jordan*, 28 Cal. 301; *Adkins v. Lewis*, 5 Oregon 202.

Cost of Constructing Aqueduct. — In *Saunders v. Frost*, 5 Pick. (Mass.) 259, 16 Am. Dec. 394, a mortgagee was allowed to charge under repairs the expense of making an aqueduct, it appearing to have been necessary for the supply of water to the mortgaged premises.

As to the right to credit for improvements, see *infra*, this section, *Improvements*.

4. Expense of Obtaining Possession. — A mortgagee in possession will, on the redemption, be allowed the expense incurred by him in obtaining possession. *Hill v. White*, 1 N. J. Eq. 435.

Expense of Foreclosing First Mortgage. — In *Lomax v. Hide*, 2 Vern. 185, a second mortgagee brought a bill to redeem against the first mortgagee, who had been put to a great charge in foreclosing his mortgage, and it was decreed that these charges should be allowed him in the account.

Cost of Advertising Sale under Power in Mortgage. — A redemptioner will be charged with the cost of advertising the sale under a power in the mortgage, where he was notified several months before, but took no measures to redeem. *Means v. Anderson*, 19 R. I. 118.

Expense of Redeeming Prior Mortgage. — Where a junior mortgagee incurs necessary expenses to redeem a prior mortgage, which the mortgagor ought to have canceled, they are justly chargeable on the owner of the estate. *Miller v. Whittier*, 36 Me. 577.

Counsel Fees Paid by Mortgagee. — The grantee of a mortgagee seeking to redeem from a foreclosure sale cannot be required to pay the fees of the attorney of the mortgagee in the suit to foreclose, and in defending the redemption suit. *Bondurant v. Taylor*, 3 Greene (Iowa) 561.

The mortgagee is entitled to reasonable counsel fees paid in a proper endeavor to collect rents and profits. *Hubbard v. Shaw*, 12 Allen (Mass.) 120. But not to counsel fees paid in a forcible entry and detainer proceeding against the tenant, where it appears that the case went to judgment in his favor, and the parties to the recognizance settled the rents and costs. *Rowell v. Jewett*, 73 Me. 365.

Insurance Premiums paid by a mortgagee in possession do not, however, constitute one of the expenses for which credit should be allowed, unless the mortgage contains a condition that the premises should be kept insured for the benefit of the mortgagee, it being considered that the act of the mortgagee in procuring insurance is for his own benefit.¹

(2) *Improvements.* — Credit will not generally be allowed for the value of permanent improvements made by a mortgagee in possession of the mortgaged premises. The ordinary rule is that he will be allowed for such improvements no further than they appear to have been necessary to keep the premises in proper repair.² This rule, however, is not inflexible, but is subject to relaxa-

1. *Insurance Premiums Not Allowable unless Mortgage Stipulates for Insurance.* — *Stinchfield v. Milliken*, 71 Me. 567; *Saunders v. Frost*, 5 Pick. (Mass.) 259, 16 Am. Dec. 394; *White v. Brown*, 2 Cush. (Mass.) 412; *Boston, etc., R. Corp. v. Haven*, 8 Allen (Mass.) 359; *Long v. Richards*, 170 Mass. 120; *Overby v. Fayetteville Bldg., etc., Assoc.*, 81 N. Car. 56; *Clark v. Smith*, 1 N. J. Eq. 121.

A Condition in the Mortgage that the mortgagor should keep the premises insured in a certain sum for the benefit of the mortgagee entitles him to an allowance for premiums paid by him for such insurance, which the mortgagor did not obtain, even if the policy was "for whom it may concern," and was payable to the mortgagee. *Fowley v. Palmer*, 5 Gray (Mass.) 549. See also *Harper v. Ely*, 70 Ill. 581; *Johnson v. Hosford*, 110 Ind. 573; *American Button-Hole, etc., Co. v. Burlington Mut. Loan Assoc.*, 68 Iowa 326; *Montague v. Boston, etc., R. Co.*, 124 Mass. 242; *Carr v. Hodge*, 130 Mass. 55; *Neale v. Albertson*, 39 N. J. Eq. 382; *Madison Ave. Baptist Church v. Baptist Church*, 41 N. Y. Super. Ct. 360.

2. *Credit for Permanent Improvements Not Generally Allowed* — *England.* — *Godfrey v. Watson*, 3 Atk. 517; *Robinson v. Ridley*, 6 Madd. 2. *Illinois.* — *Smith v. Sinclair*, 10 Ill. 108.

Indiana. — *Goodrich v. Friedersdorff*, 27 Ind. 308; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 21 Am. St. Rep. 231.

Kansas. — *Cook v. Ottawa University*, 14 Kan. 548.

Massachusetts. — *Russell v. Blake*, 2 Pick. (Mass.) 505; *Saunders v. Frost*, 5 Pick. (Mass.) 259, 16 Am. Dec. 394; *Reed v. Reed*, 10 Pick. (Mass.) 398; *Sparhawk v. Wills*, 5 Gray (Mass.) 423; *Woodward v. Phillips*, 14 Gray (Mass.) 132.

New Jersey. — *Clark v. Smith*, 1 N. J. Eq. 122.

New York. — *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *Vroom v. Ditmas*, 4 Paige (N. Y.) 526; *Quin v. Brittain*, Hoffm. Ch. (N. Y.) 353.

Pennsylvania. — *Harper's Appeal*, 64 Pa. St. 315; *Wells v. Van Dyke*, 109 Pa. St. 330.

Wisconsin. — *Witt v. Grand Grove, etc.*, 55 Wis. 380.

"It is a well-established rule that the mortgagee will not be allowed for permanent improvements in the way of new structures not necessary for the preservation of the property and made without the consent of the mortgagor. He is entitled to allowance for all improvements and repairs necessary for the preservation of the estate, or to make the premises tenantable, but further than this he cannot go at the expense of the mortgagor

without his consent. * * * If the rule were otherwise it would be subject to great abuses, and would increase the difficulties in the way of the right to redeem, and would oftentimes be resorted to by unscrupulous mortgagees disposed to take advantage of the necessities of the mortgagor, as a means of defeating his power to redeem. There are exceptions to the general rule as above stated: (1) as where improvements have been made by the mortgagee under a *bona fide* but mistaken supposition that he was the absolute owner, and that the equity of redemption had become barred; or (2) where the mortgagee had reason to believe from the form of his conveyance or the circumstances of his purchase that he was the absolute owner." *Bradley v. Merrill*, 88 Me. 319.

"When a mortgagee goes into possession of the premises for breach of condition, with full knowledge of the right to redeem, and where there is nothing to show but that the mortgagor desires and intends to redeem, he has no right to expend the rents and profits for anything but such as are strictly necessary repairs. If he go beyond this, and make improvements, though they are such as are beneficial to the estate, and such as a judicious and prudent owner would make for the benefit of it, he will not be allowed for them; for if he might thus expend the profits in improving the estate, instead of applying them to keep down the interest of the mortgage debt, it might operate to clog, if not to wholly prevent, the mortgagor from redeeming, and in all transactions between mortgagor and mortgagee equity is watchful for the interest of the mortgagor, as the weaker party and the one who deals at a disadvantage." *Sanders v. Wilson*, 34 Vt. 318.

In *Sandon v. Hooper*, 6 Beav. 246, Lord Langdale, M. R., said: "Such repairs as are necessary for the support of the property he will be allowed for. He will not only be allowed for repairs, but he will be also allowed for doing that which is essential for the protection of the title of the mortgagor. Further, if he has got the consent of the mortgagor, or has given him notice, in which he acquiesces, then he may be allowed for sums of money which are laid out in increasing the value of the property; but he has no right to lay out money in what he calls increasing the value of the property, which may be done in such a way as to make it utterly impossible for the mortgagor, with his means, ever to redeem; this is what has been termed improving a mortgagor out of his estate—an expression which has been used both in this argument

tion in accordance with the equity arising out of the circumstances of each case; as where the improvements were made by the mortgagee in good faith, under a mistaken supposition that the equity of redemption had been barred,¹ or where from the form of the conveyance, or from other circumstances, he had reason to believe and did believe that he was the absolute owner.² But

and on former occasions. The mortgagee has not a right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and for protecting the title to the property."

Cost of Fencing Mortgaged Premises. — In *Hidden v. Jordan*, 28 Cal. 302, it was held that a mortgagee in possession was not entitled to compensation for new fences, constructed by him, unless they were necessary for the protection of crops, but that if the value of the rents and profits was enhanced by the fences, the mortgagee could not be charged with such enhanced value unless an allowance were made for the cost of the fences.

Reasonableness of Improvements. — Where it is provided by statute that the mortgagee shall be allowed for reasonable improvements made by him, a redemptioner is not precluded from contesting the reasonableness of the improvements made by the mortgagee in possession, by the mere fact that he knew that the improvements were being made, but did not object thereto. *Merriam v. Goss*, 139 Mass. 77.

Rule in Massachusetts. — In Massachusetts it is provided by statute that the mortgagee shall be allowed for "reasonable improvements," and in the cases decided under this statute it has been held that the only ground for charging the mortgagor is that he actually received benefit from the expenditures. *Tucker v. Buffum*, 16 Pick. (Mass.) 46; *Boston Iron Co. v. King*, 2 Cush. (Mass.) 400; *Adams v. Brown*, 7 Cush. (Mass.) 220; *Merriam v. Goss*, 139 Mass. 77. And therefore a mortgagee will not be allowed for improvements that are merely ornamental. *Reed v. Reed*, 10 Pick. (Mass.) 398; *Woodward v. Phillips*, 14 Gray (Mass.) 132; *Strong v. Blanchard*, 4 Allen (Mass.) 538.

In *Merriam v. Goss*, 139 Mass. 77, it was said, "Reasonable improvements may be allowed for, apart from contract, upon principles of equity. * * * When the allowance is made, however, it is made, not for the expenditure with which *ex hypothesi* the mortgagor had nothing to do, but for the benefit which he actually receives from that expenditure. The mortgagor's having actually received the benefit is the only ground for charging him, and it follows that, although justice will ordinarily be done by crediting the mortgagee in account with the sums expended, which is the usual direction in decrees, and is sanctioned by our statute, yet that the true rule undoubtedly is that the mortgagor should be charged no more of the cost than that which is beneficial to the estate."

1. Relaxation of General Rule — Belief that Equity of Redemption Is Barred. — *Fraser v. Prather*, 1 MacArthur (D. C.) 217; *Ensign v. Batterson*, 68 Conn. 298; *Roberts v. Fleming*, 53 Ill. 196; *Troost v. Davis*, 31 Ind. 34; *Montgomery v. Chadwick*, 7 Iowa 114; *American Button-Hole, etc., Co. v. Burlington Mut.*

Loan Assoc., 68 Iowa 326; *Putnam v. Ritchie*, 6 Paige (N. Y.) 390; *Miner v. Beekman*, 50 N. Y. 337; *Fogal v. Pirro*, 10 Bosw. (N. Y.) 100.

2. Belief of Mortgagee in Possession that He Was Absolute Owner — England. — *Webb v. Rorke*, 2 Sch. & Lef. 676; *Exton v. Greaves*, 1 Vern. 138; *Talbot v. Braddill*, 1 Vern. 183; *Quarrell v. Beckford*, 14 Ves. Jr. 177.

United States. — *Bright v. Boyd*, 1 Story (U. S.) 478.

Massachusetts. — *McSorley v. Larissa*, 100 Mass. 270.

Michigan. — *Barnard v. Jennison*, 27 Mich. 230.

Missouri. — *Bollinger v. Chouteau*, 20 Mo. 89.

New Jersey. — *Vanderhaise v. Hugues*, 13 N. J. Eq. 410.

New York. — *Moulton v. Cornish*, 61 Hun (N. Y.) 438, 21 Civ. Pro. Rep. (N. Y.) 343.

Utah. — *Wasatch Min. Co. v. Jennings*, 5 Utah 243.

Wisconsin. — *Green v. Dixon*, 9 Wis. 532.

Where a person who actually has the right of a mortgagee in possession, but in good faith believes himself to hold the absolute title, makes improvements on the property, the mortgagor for several years before and after the improvements asserting no title or interest in the premises, the mortgagor will, on bringing his bill in equity for redemption, be compelled to allow the mortgagee for the improvements, though they amount to more than the rents and profits. *Mickles v. Dillaye*, 17 N. Y. 80; *Wetmore v. Roberts*, 10 How. Pr. (N. Y. Supreme Ct.) 51.

Possession under Absolute Deed. — Where an absolute deed was given to secure a general indebtedness of the grantor to the grantee, and neither party supposed that the land would be redeemed, the grantee, on redemption by an execution creditor of the grantor, should be allowed the value of the improvements made by him. *Blair v. Chamblin*, 39 Ill. 521, 89 Am. Dec. 322.

Possession under Foreclosure Sale. — One who has acquired possession of mortgaged premises in the belief that he holds the title under foreclosure proceedings is entitled to claim, on redemption, the value of improvements made by him in good faith. *Barrett v. Blackmar*, 47 Iowa 565; *Poole v. Johnson*, 62 Iowa 611; *Walton v. Bagley*, 47 Mich. 385; *Millard v. Truax*, 73 Mich. 381; *Higginbottom v. Benson*, 24 Neb. 461, 8 Am. St. Rep. 211; *Van Dune v. Shann*, 39 N. J. Eq. 6.

Where a purchaser at a foreclosure sale makes permanent improvements on the premises, without notice of a judgment which is a lien on the equity of redemption, the judgment creditor will be permitted to redeem only on payment of the value of the improvements in addition to the amount of the mortgage debt. *Benedict v. Gilman*, 4 Paige (N. Y.) 58. But the case would be different if the purchaser had made the improvements with full knowledge of the judgment creditor's right to re-

the mere fact that he believed that the mortgagor would not be able to redeem will give him no right to an allowance for improvements made under such belief.¹

(3) *Taxes, Assessments, and Prior Incumbrances Paid by Mortgagee.* — The mortgagee in possession is also entitled, on his accounting, to the amount of all taxes, assessments, and prior incumbrances paid by him in order to protect his security.²

deem. *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385.

A Purchaser at a Void Foreclosure Sale holds under color of title in good faith, within the *Oregon* statutes (Comp. Stat. 1887, § 321), and is therefore entitled, on the redemption from the sale by the mortgagor, to an allowance for permanent improvements placed on the premises by him. *Hicklin v. Marco*, 46 Fed. Rep. 424, 56 Fed. Rep. 549.

Conduct of Mortgagor. — When a mortgagor pursues such a course as to lead the mortgagee to suppose that he has acquired the absolute title, the mortgagee will, on redemption, be awarded compensation for lasting improvements made under such erroneous supposition. *Bacon v. Cottrell*, 13 Minn. 194.

When the mortgagee has been lulled into the belief that the right of redemption has been barred or abandoned, and the mortgagor, knowing, or having reason to believe, that the mortgagee supposes himself to be the absolute owner, stands by and sees the mortgagee make lasting improvements upon the land, in kind and character such as the land in its condition and wants clearly requires, and which are obviously sanctioned by the usages of good husbandry and faithful stewardship, then the right to redeem will be burdened with the expense of such improvements. *Morgan v. Walbridge*, 56 Vt. 405.

1. Improvements Made in Belief that Mortgagor Would Be Unable to Redeem. — *McAbee v. Harrison*, 50 S. Car. 39.

2. Credit Allowed for Taxes and Assessments Paid by Mortgagee — *England*. — *Godfrey v. Watson*, 3 Atk. 518.

United States. — *McCormick v. Knox*, 105 U. S. 122; *Gormley v. Bunyan*, 138 U. S. 623.

Alabama. — *Blum v. Mitchell*, 59 Ala. 535; *Dozier v. Mitchell*, 65 Ala. 511.

California. — *Hidden v. Jordan*, 28 Cal. 301. *Illinois*. — *Harper v. Ely*, 70 Ill. 581; *Boone v. Clark*, 129 Ill. 466; *Sanders v. Peck*, 131 Ill. 407.

Indiana. — *West v. Hayes*, 117 Ind. 290.

Iowa. — *Strong v. Burdick*, 52 Iowa 630; *Barthell v. Syverson*, 54 Iowa 160.

Kansas. — *Waterson v. Devoe*, 18 Kan. 223.

Louisiana. — *Austin v. Citizens' Bank*, 30 La. Ann. 689.

Maine. — *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729.

Maryland. — *Young v. Omohundro*, 69 Md. 424.

Massachusetts. — *Strong v. Blanchard*, 4 Allen (Mass.) 538; *Davis v. Bean*, 114 Mass. 360.

Michigan. — *Walton v. Bagley*, 47 Mich. 385.

Minnesota. — *Smith v. Gibson*, 15 Minn. 97; *Allison v. Armstrong*, 28 Minn. 276, 41 Am. Rep. 281.

Missouri. — *Horrigan v. Wellmuth*, 77 Mo. 542; *Gooch v. Botts*, 110 Mo. 419.

Nebraska. — *McCreery v. Schaffer*, 26 Neb. 173; *Townsend v. J. I. Case Threshing Mach. Co.*, 31 Neb. 836; *Johnson v. Payne*, 11 Neb. 269.

New York. — *Dale v. M'Evers*, 2 Cow. (N. Y.) 118; *Burr v. Veeder*, 3 Wend. (N. Y.) 412; *Lawrence v. Cornell*, 4 Johns. Ch. (N. Y.) 542; *Eagle F. Ins. Co. v. Pell*, 2 Edw. Ch. (N. Y.) 631; *Williams v. Townsend*, 31 N. Y. 411; *Sidenberg v. Ely*, 90 N. Y. 264.

Compare *McAbee v. Harrison*, 50 S. Car. 39.

Prior Incumbrances Discharged by Mortgagee.

— A mortgagee who has paid a prior mortgage or other incumbrances on land is entitled to be repaid the sum so advanced, when the mortgagor or his vendee, or a junior mortgagee, comes to redeem.

England. — *Stretton*, 1 Ves. Jr. 266.

United States. — *McCormick v. Knox*, 105 U. S. 122.

Alabama. — *Grigg v. Banks*, 59 Ala. 311.

Illinois. — *Harper v. Ely*, 70 Ill. 581.

Iowa. — *Spurgin v. Adamson*, 70 Iowa 468.

Kentucky. — *Arnold v. Foot*, 7 B. Mon. (Ky.) 66.

Massachusetts. — *Davis v. Winn*, 2 Allen (Mass.) 111.

Missouri. — *Long v. Long*, 111 Mo. 12.

New Hampshire. — *Page v. Foster*, 7 N. H. 392; *Weld v. Sabin*, 20 N. H. 533, 51 Am. Dec. 240.

New York. — *Dale v. M'Evers*, 2 Cow. (N. Y.) 118; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; *Robinson v. Ryan*, 25 N. Y. 320.

Money Paid by First Mortgagee to Redeem from

Tax Sale. — A second mortgagee may redeem from the foreclosure of a prior mortgage without paying to the purchaser, though he was the mortgagee, money paid by him after sale to redeem the land from a tax sale. *Nopson v. Horton*, 20 Minn. 268.

If the mortgagee was in possession of the premises at the time of a tax sale, he will not be allowed the amount paid by him to redeem, but only the amount of taxes with interest. *Moshier v. Norton*, 100 Ill. 63.

Actual Payment of Prior Incumbrances. — He is entitled to allowance for only such prior incumbrances as he has actually paid. *Stone v. Bartlett*, 46 Me. 438.

Rate of Interest. — A mortgagee in possession will be allowed sums advanced to pay prior incumbrances with interest at the rate borne by such incumbrances. *Harper v. Ely*, 70 Ill. 581.

Incumbrance Covering Other Land. — The payments when made must be restricted to the land covered by the mortgage. *Weed v. Hornby*, 35 Hun (N. Y.) 580; *Crane v. Aultman Taylor Co.*, 61 Wis. 110. And if the incumbrance discharged covered other land in

(4) *Expense of Supporting Mortgagor's Title.* — If a mortgagee has been put to costs and expenses in supporting the title of the mortgagor to the mortgaged property, he is entitled on redemption to an allowance of credit for the amounts so paid by him.¹

(5) *Compensation to Mortgagee for Personal Services.* — A mortgagee in possession is not ordinarily entitled to compensation for his own personal services in taking care of a mortgaged estate, renting it, and collecting rents,² even if the mortgage contains a stipulation that he shall have such compensation,³ though in some jurisdictions he is allowed commissions on the rents for such services.⁴ If, however, he is obliged to employ persons to take care of the mortgaged property, or to render any services in regard to it, he is entitled to reimbursement.⁵

4. Application of Rents and Profits on Account. — From the amount of rents and profits found against a mortgagee in possession must be deducted any credits to which he may be entitled, and the balance, if any, is applicable first to the extinguishment of the interest on the mortgage debt, and any residue that may remain goes to the payment of the principal.⁶

VII. CONTRIBUTION TO REDEEM. — When the estates of two persons are subject to a common mortgage, and one of them pays it off for the benefit of both, he has the right to call on the other party to pay his equitable proportion of the amount paid, or be foreclosed of his right to redeem,⁷ if the equities of

addition to the mortgaged premises, the mortgagee will be allowed only a proportionate amount. *Lyman v. Little*, 15 Vt. 576.

1. Credit Allowed for Expenditures in Supporting Mortgagor's Title — *England.* — *Woley v. Drage*, 2 Anstr. 551; *Ramsden v. Langley*, 2 Vern. 536. *Godfrey v. Watson*, 3 Atk. 517.

Illinois. — *McCumber v. Gilman*, 15 Ill. 381.

Maine. — *Miller v. Whittier*, 36 Me. 577.

Maryland. — *Hagthorp v. Hook*, 1 Gill & J. (Md.) 270; *Neale v. Hagthorp*, 3 Bland (Md.) 551; *Neptune Ins. Co. v. Doisey*, 3 Md. Ch. 334.

New Hampshire. — *Riddle v. Bowman*, 27 N. H. 236; *Brown v. Simons*, 44 N. H. 477.

New Jersey. — *Clark v. Smith*, 1 N. J. Eq. 122.

Rhode Island. — *Allen v. Robbins*, 7 R. I. 33.

2. Compensation for Personal Services Not Ordinarily Allowed — *England.* — *Scott v. Brest*, 2 T. R. 238; *French v. Baron*, 2 Atk. 120; *Godfrey v. Watson*, 3 Atk. 517; *Bonithon v. Hockmore*, 1 Vern. 316; *Langstaffe v. Fenwick*, 10 Ves. Jr. 405.

California. — *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342.

Illinois. — *Harper v. Ely*, 70 Ill. 581.

Kentucky. — *Breckenridge v. Brooks*, 2 A. K. Marsh. (Ky.) 335, 12 Am. Dec. 401.

Missouri. — *Turner v. Johnson*, 95 Mo. 431, 6 Am. St. Rep. 62.

New Jersey. — *Vanderhaise v. Hugues*, 13 N. J. Eq. 410; *Elmer v. Loper*, 25 N. J. Eq. 475.

3. Compensation Denied though Stipulated For in Mortgage. — *Shultz v. Jerrard*, (N. J. 1886) 2 Cent. Rep. 211; *Clark v. Smith*, 1 N. J. Eq. 122.

4. Commissions on Rents Allowed in Some Jurisdictions. — *Waterman v. Curtis*, 26 Conn. 241; *Gerrish v. Black*, 104 Mass. 400; *Brown v. South Boston Sav. Bank*, 148 Mass. 300; *Adams v. Brown*, 7 Cush. (Mass.) 220; *Gibson v. Crehore*, 5 Pick. (Mass.) 146; *Tucker v. Buffum*, 16 Pick. (Mass.) 46.

The amount of compensation in such states may be fixed by agreement. *Cazenove v. Cutler*, 4 Met. (Mass.) 246.

A commission, however, will not be allowed where the mortgagee actually occupied the estate himself. *Eaton v. Simonds*, 14 Pick. (Mass.) 98.

In *Green v. Lamb*, 24 Hun (N. Y.) 87, it was held that there was no fixed rule determining whether or not a mortgagee in possession is, on an application by the mortgagor to redeem, entitled to commissions on the amount received and expended by him, but that the decision of such question rested in the discretion of the court.

5. Hire of Third Persons. — If the mortgagee is obliged to employ a watchman or other person to preserve the mortgaged property, or to render any services in regard thereto, he is entitled to reimbursement. *Bonithon v. Hockmore*, 1 Vern. 316; *Johnson v. Hosford*, 110 Ind. 572; *Hubbard v. Shaw*, 12 Allen (Mass.) 120.

The Employment of a Bailiff or Agent to receive the rents is proper where the mortgaged estate lies at a great distance, or if for other reasons the mortgagee cannot receive them personally. *Godfrey v. Watson*, 3 Atk. 517; *Davis v. Dendy*, 3 Madd. 170; *Gilbert v. Dyneley*, 3 M. & G. 12, 42 E. C. L. 16; *Scott v. Brest*, 2 T. R. 238; *Harper v. Ely*, 70 Ill. 581; *Turner v. Johnson*, 95 Mo. 431, 6 Am. St. Rep. 62.

6. Application of Rents and Profits. — *Jackson v. Lynch*, 129 Ill. 72; *Mosier v. Norton*, 83 Ill. 519; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; *Gladding v. Warner*, 36 Vt. 54.

7. Right to Contribution. — *Young v. Williams*, 17 Conn. 393; *Shoenewald v. Dieden*, 8 Ill. App. 389; *Allen v. Clark*, 17 Pick. (Mass.) 47; *Chase v. Woodbury*, 6 Cush. (Mass.) 143; *Taylor v. Porter*, 7 Mass. 355; *Weed v. Calkins*, 24 Hun (N. Y.) 582.

"The Foundation of Contribution is a principle of justice and equity, and when there is equal equity, and there is an incumbrance on land

the parties are equal;¹ but the duty of contributing to the payment of the redemption money is a burden on the land alone, not a personal duty, and the party has an option as to whether he will pay the money and have his interest in the land, or refuse to pay and let his interest be foreclosed.²

Contribution Between Dowress and Heirs. — If a mortgage is redeemed either by the widow or by the heirs, the party redeeming is entitled to contribution, as in other cases where a mortgage on property in which several persons are interested is paid off by one of them.³

Contribution Between Vendor and Vendee. — Within the principle that there is no right to contribution unless the equities of the parties are equal, a mortgagor who sells a part of the mortgaged property cannot claim contribution from his vendee;⁴ and the rule has been held to be the same as between the

belonging to different parties, they ought each to contribute towards removing it." *Allen v. Clark*, 17 Pick. (Mass.) 47.

The owner of an undivided interest in mortgaged land, on redeeming, has a lien in the nature of an equitable mortgage on the undivided half not owned by him, for his cotenant's proportionate share of the mortgage debt, which is superior to a second mortgage made by his cotenant. *Buettel v. Harmount*, 46 Minn. 481.

Rule as to Amount of Contribution. — Where several owners hold distinct parcels of the mortgaged premises, the present value of the several parcels, exclusive of improvements made subsequent to the mortgage, is the measure by which to determine what each owner shall contribute to redeem the mortgage. *Bailey v. Myrick*, 50 Me. 171.

Enforcement of Contribution by Decree of Foreclosure. — When a mortgage is foreclosed by suit or action, the equities of part owners of the mortgaged property may be protected by a direction in the decree of sale. *Chase v. Woodbury*, 6 Cush. (Mass.) 143; *Kilborn v. Robbins*, 8 Allen (Mass.) 466. But if the mortgage is foreclosed otherwise than by suit, the only remedy of a part owner is to redeem and then seek contribution. *Henderson v. Truitt*, 95 Ind. 309.

1. Equities Must Be Equal. — *Sanford v. Hill*, 46 Conn. 42; *Kilborn v. Robbins*, 8 Allen (Mass.) 466; *Parkman v. Welch*, 19 Pick. (Mass.) 231; *Weed v. Calkins*, 24 Hun (N. Y.) 582; *Gill v. Lyon*, 1 Johns. Ch. (N. Y.) 447; *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 240.

The Principle on which the right to contribution rests is that equality of right requires equality of burden. *Whiting v. Burke*, L. R. 10 Eq. 539; *White v. Banks*, 21 Ala. 705, 56 Am. Dec. 283; *Smith v. Anderson*, 18 Md. 520; *Campbell v. Mesier*, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570; *Aspinwall v. Sacchi*, 57 N. Y. 336; *Russell v. Failor*, 1 Ohio St. 327, 59 Am. Dec. 631; *Wayland v. Tucker*, 4 Gratt. (Va.) 268, 50 Am. Dec. 76.

2. Contribution Not Compulsory. — *Lyon v. Robbins*, 45 Conn. 513.

"When several are interested in an equity of redemption, and one only is willing to redeem, he must pay the whole mortgage debt; and the others interested in the equity who refuse to redeem are not compellable to contribute, for it would be unreasonable to compel a party to redeem when perhaps it might be for his benefit to suffer the mortgage to be

foreclosed." *Gibson v. Crehore*, 5 Pick. (Mass.) 146.

A Distinction in this respect is made between the effect of payment of the debt before and after foreclosure. It is held that where tenants in common have mortgaged the land for their joint debt, either of them, on paying the mortgage debt before a sale on foreclosure, has a claim against his cotenant for contribution, capable of being enforced in a personal action, and a lien to secure such claim on his cotenant's interest in the land. But after sale on foreclosure for the full amount due, if one tenant redeems from the sale he still has an equitable lien on his cotenant's interest for that portion of the redemption money properly chargeable thereon, but no personal claim against his cotenant or against his estate after his decease. *McLaughlin v. Curtis*, 27 Wis. 644.

3. Contribution Between Widow and Heirs — *Alabama*. — *Boynton v. Sawyer*, 35 Ala. 497.

Maryland. — *Mantz v. Buchanan*, 1 Md. Ch. 202.

Massachusetts. — *Gibson v. Crehore*, 3 Pick. (Mass.) 475; *Kerse v. Miller*, 169 Mass. 44.

New Hampshire. — *Norris v. Morrison*, 45 N. H. 490; *Rossiter v. Cossit*, 15 N. H. 38; *Hastings v. Stevens*, 29 N. H. 564.

New Jersey. — *Merselis v. Van Riper*, 55 N. J. Eq. 618.

New York. — *Denton v. Nanny*, 8 Barb. (N. Y.) 621; *Mills v. Van Voorhis*, 23 Barb. (N. Y.) 133; *Bell v. New York*, 10 Paige (N. Y.) 49.

4. Mortgagor Not Entitled to Contribution from His Vendee — *California*. — *Cheever v. Fair*, 5 Cal. 337.

Maine. — *Wallace v. Stevens*, 64 Me. 225.

Massachusetts. — *Allen v. Clark*, 17 Pick. (Mass.) 47; *Bradley v. George*, 2 Allen (Mass.) 392; *Welch v. Beers*, 8 Allen (Mass.) 151; *Kilborn v. Robbins*, 8 Allen (Mass.) 466.

Missouri. — *Hall v. Morgan*, 79 Mo. 47; *Sargeant v. Rowsey*, 89 Mo. 617.

New Hampshire. — *Brown v. Simons*, 44 N. H. 475.

In *Gill v. Lyon*, 1 Johns. Ch. (N. Y.) 447, Lyon was a purchaser from a mortgagor of a part of the mortgaged land, for which he paid full value, and his deed covenanted that the granted premises were free from all incumbrances. Afterwards Gill bought the residue of the mortgaged land at a sale on a judgment against the mortgagor. It was held that Lyon was not bound to contribute towards redeeming the mortgage, because the equities of the parties were not equal.

mortgagor's heirs and the vendee.¹

Contribution Among Several Vendees. — When portions of the mortgaged property are conveyed at different times to different persons, the portions so conveyed are liable for the mortgage debt in the inverse order of alienation, and therefore the grantee of the portion last conveyed, if it is of sufficient value to pay the entire debt, is not entitled to contribution from the other grantees.²

VIII. RELINQUISHMENT OR BAR OF RIGHT — 1. **Waiver or Release.** — The equity of redemption is so inseparably incident to every mortgage that it cannot be waived or released or unreasonably restricted in any respect, either by a covenant in the mortgage or by a separate agreement entered into contemporaneously therewith.³ It may, however, be released by a subsequent agreement; but even a subsequent release cannot be sustained unless it was given voluntarily and for a sufficient consideration, without any fraud on the part of the mortgagee, or the exercise of any undue influence by him.⁴

1. **Contribution Between Vendee and Vendor's Heir.** — In *Harbert's Case*, 3 Coke 116, it was held that if one is seized for three acres under an incumbrance and enfeoffs A for one acre and B for another, and the third acre descends to the heir, who discharges the incumbrance, he shall not have contribution, "for he sits in the seat of his ancestors."

2. **Successive Alienations of Mortgaged Property.** — *Sanford v. Hill*, 46 Conn. 42; *Henderson v. Truitt*, 95 Ind. 309; *Holden v. Pike*, 24 Me. 427; *Bradley v. George*, 2 Allen (Mass.) 392; *Gill v. Lyon*, 1 Johns. Ch. (N. Y.) 447; *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 240.

Grantees in Simultaneous Deeds Recorded at Different Times. — Where the owner of mortgaged land conveys an undivided half to each of two persons by simultaneous deeds, but one deed is recorded before the other, the grantee in the deed last recorded is not entitled to contribution. *Chase v. Woodbury*, 6 Cush. (Mass.) 143.

3. **Waiver or Release Not Effected by Covenant in Mortgage or by Contemporaneous Agreement** — *England*. — *East-India Co. v. Atkyns*, 1 Comyns Rep. 347; *Vernon v. Bethell*, 2 Eden 110; *Bonham v. Newcomb*, 2 Vent. 364; *Howard v. Harris*, 1 Vern. 191; *Jennings v. Ward*, 2 Vern. 520; *Seton v. Slade*, 7 Ves. Jr. 273; *Floyer v. Lavington*, 1 P. Wms. 268; *Toomes v. Conset*, 3 Atk. 261; *Goodman v. Grierson*, 2 B. & B. 275; *Cowdry v. Day*, 1 Giff. 316; *Spurgeon v. Collier*, 1 Eden 55; *In re Edward*, 11 Ir. Ch. Rep. 367.

United States. — *Livingston v. Story*, 11 Pet. (U. S.) 351; *Russell v. Southard*, 12 How. (U. S.) 139; *Villa v. Rodriguez*, 12 Wall. (U. S.) 323; *Peugh v. Davis*, 96 U. S. 337.

Alabama. — *Parmer v. Parmer*, 74 Ala. 285; *Fields v. Helms*, 82 Ala. 449; *Robinson v. Farrelly*, 16 Ala. 472; *Stoutz v. Rouse*, 84 Ala. 309; *McMillan v. Jewett*, 85 Ala. 476; *Nelson v. Kelly*, 91 Ala. 569.

Arkansas. — *Quartermous v. Kennedy*, 29 Ark. 544.

California. — *Pierce v. Robinson*, 13 Cal. 116; *Green v. Butler*, 26 Cal. 595.

Connecticut. — *Pritchard v. Elton*, 38 Conn. 434; *Lounsbury v. Norton*, 59 Conn. 170.

Georgia. — *Chapman v. Ayer*, 95 Ga. 581.

Illinois. — *Wynkoop v. Cowing*, 21 Ill. 570; *Brown v. Gaffney*, 28 Ill. 149; *Willetts v. Burpee*, 34 Ill. 494; *Tennery v. Nicholson*, 87 Ill. 404; *Clark v. Finlon*, 90 Ill. 245; *Bearss v.*

Ford, 108 Ill. 16; *Jackson v. Lynch*, 129 Ill. 72; *Shobe v. Luff*, 66 Ill. App. 414.

Indiana. — *Turpie v. Lowe*, 114 Ind. 37.

Iowa. — *Brush v. Peterson*, 54 Iowa 243.

Kentucky. — *Skinner v. Miller*, 5 Litt. (Ky.) 84; *Timmons v. Center*, 19 Ky. L. Rep. 1424, (Ky. 1897) 43 S. W. Rep. 437.

Maine. — *Baxter v. Child*, 39 Me. 110; *Linnell v. Lyford*, 72 Me. 280; *Reed v. Reed*, 75 Me. 264.

Maryland. — *Sheckel v. Hopkins*, 2 Md. Ch. 89.

Massachusetts. — *Waters v. Randall*, 6 Met. (Mass.) 479; *Bayley v. Bailey*, 5 Gray (Mass.) 505.

Michigan. — *Batty v. Snook*, 5 Mich. 231.

Missouri. — *Wilson v. Drumrite*, 21 Mo. 325.

New Jersey. — *Clark v. Condit*, 18 N. J. Eq. 358; *Youle v. Richards*, 1 N. J. Eq. 534, 23 Am. Dec. 722; *Vanderhaize v. Hugues*, 13 N. J. Eq. 244.

New York. — *Holridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 30; *Clark v. Henry*, 2 Cow. (N. Y.) 324; *Simon v. Schmidt*, 41 Hun (N. Y.) 318; *Henry v. Davis*, 7 Johns. Ch. (N. Y.) 40; *Remsen v. Hay*, 2 Edw. Ch. (N. Y.) 535.

North Carolina. — *Poindexter v. McCannon*, 1 Dev. Eq. (16 N. Car.) 377, 18 Am. Dec. 591; *Gillis v. Martin*, 2 Dev. Eq. (17 N. Car.) 470, 25 Am. Dec. 729.

Ohio. — *Marshall v. Stewart*, 17 Ohio 356; *Stover v. Bounds*, 1 Ohio St. 107.

Pennsylvania. — *Johnston v. Gray*, 16 S. & R. (Pa.) 361, 16 Am. Dec. 577.

Tennessee. — *Cherry v. Bowen*, 4 Sneed (Tenn.) 415.

Vermont. — *Wright v. Bates*, 13 Vt. 341; *Hyndman v. Hyndman*, 19 Vt. 9, 46 Am. Dec. 171; *Baxter v. Willey*, 9 Vt. 276, 31 Am. Dec. 623; *Wing v. Cooper*, 37 Vt. 169.

West Virginia. — *Shank v. Groff*, 43 W. Va. 337.

Wisconsin. — *Knowlton v. Walker*, 13 Wis. 264; *Plato v. Roe*, 14 Wis. 453; *Moeller v. Moore*, 80 Wis. 434.

"The right of redemption is considered in equity as inseparably incident to every contract founded on a mortgage, and can no more be restrained than the power of a tenant in tail to suffer a recovery; it being a maxim that the same estate or interest cannot at one time be a mortgage and at another time cease to be so." 1 Powell on Mortgages 128.

4. **Release by Agreement Subsequent to Mortgage** — *England*. — *Spurgeon v. Collier*, 1 Eden 55.

2. Foreclosure of Mortgage. — Ordinarily the equity of redemption in either real or personal property is barred by a valid foreclosure of the mortgage, or by a sale under a power contained therein,¹ unless the foreclosure has been

United States. — *Villa v. Rodriguez*, 12 Wall. (U. S.) 323.

Alabama. — *Stoutz v. Rouse*, 84 Ala. 309; *McMillan v. Jewett*, 85 Ala. 476.

California. — *McMillan v. Richards*, 9 Cal. 365; 70 Am. Dec. 655; *Green v. Butler*, 26 Cal. 595; *Phelan v. De Martin*, 85 Cal. 365; *Watson v. Edwards*, 105 Cal. 70.

Connecticut. — *Pritchard v. Elton*, 38 Conn. 434.

Illinois. — *Wynkoop v. Cowing*, 21 Ill. 570; *Brown v. Gaffney*, 28 Ill. 149; *Ennor v. Thompson*, 46 Ill. 214; *West v. Reed*, 55 Ill. 242; *Seymour v. Mackay*, 126 Ill. 341; *Scanlan v. Scanlan*, 33 Ill. App. 202.

Iowa. — *Vennum v. Babcock*, 13 Iowa 194.

Maine. — *Linnell v. Lyford*, 72 Me. 280; *Snow v. Pressey*, 82 Me. 552.

Maryland. — *Sheckel v. Hopkins*, 2 Md. Ch. 89; *Hicks v. Hicks*, 5 Gill & J. (Md.) 75; *Baughner v. Merryman*, 32 Md. 185.

Massachusetts. — *Trull v. Skinner*, 17 Pick. (Mass.) 213; *Falis v. Conway Mut. F. Ins. Co.*, 7 Allen (Mass.) 46.

Michigan. — *Batty v. Snook*, 5 Mich. 231.

Minnesota. — *Hoover v. Johnson*, 47 Minn. 434.

Missouri. — *Wilson v. Vanstone*, 112 Mo. 315.

New York. — *Holridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 30; *Odell v. Montross*, 68 N. Y. 499; *Remsen v. Hay*, 2 Edw. Ch. (N. Y.) 535.

Ohio. — *Marshall v. Stewart*, 17 Ohio 356; *Shaw v. Walbridge*, 33 Ohio St. 1.

Vermont. — *Hyndman v. Hyndman*, 19 Vt. 9, 46 Am. Dec. 171.

Wisconsin. — *Moeller v. Moore*, 80 Wis. 434.

Release of Equity of Redemption by Parol Agreement. — Though the release or transfer of an equity of redemption under a formal mortgage must be in writing, no writing is necessary when the original conveyance was in form an absolute deed, and the right of redemption was created by parol agreement. *McMillan v. Jewett*, 85 Ala. 476; *Scanlan v. Scanlan*, 134 Ill. 630.

1. Equity of Redemption Barred by Foreclosure

United States. — *Brine v. Hartford F. Ins. Co.*, 96 U. S. 627; *Swift v. Smith*, 102 U. S. 442; *Burley v. Flint*, 105 U. S. 247; *Parker v. Dacres*, 130 U. S. 43.

Alabama. — *Bugbee v. Howard*, 32 Ala. 713.

Georgia. — *Willis v. McIntosh*, 1 Ga. Dec. (pt. 1.) 163.

Illinois. — *Weiner v. Heintz*, 17 Ill. 259; *Seligman v. Laubheimer*, 58 Ill. 124; *Ballinger v. Bourland*, 87 Ill. 513, 29 Am. Rep. 69.

Indiana. — *Eiceman v. Finch*, 79 Ind. 511.

Iowa. — *Kramer v. Rebman*, 9 Iowa 114; *Stoddard v. Hays*, 12 Iowa 576; *Stoddard v. Forbes*, 13 Iowa 296; *Wagner v. Galyear*, 13 Iowa 598; *Mayer v. Farmers' Bank*, 44 Iowa 212.

Missouri. — *Ferguson v. Soden*, 111 Mo. 208, 33 Am. St. Rep. 512.

New Jersey. — *Wimpfheimer v. Prudential Ins. Co.*, (N. J. 1898) 39 Atl. Rep. 916.

New York. — *Brown v. Frost*, 10 Paige (N. Y.) 243.

Rhode Island. — *Holland v. Citizens' Sav. Bank*, 16 R. I. 734.

Texas. — *Maulding v. Coffin*, 6 Tex. Civ. App. 416.

Mortgagor's Assignee in Bankruptcy. — A foreclosure sale bars the right of the mortgagor's assignee in bankruptcy and persons claiming under him, where the assignee was appointed pending the foreclosure suit and did not apply to be made a party. *Cleveland v. Boerum*, 23 Barb. (N. Y.) 201, 27 Barb. (N. Y.) 252, 3 Abb. Pr. (N. Y.) 294.

Foreclosure of One of Two Mortgages Held by the Same Person. — Where the same person holds two mortgages on the same land, a foreclosure of one of the mortgages will extinguish the equity of redemption. *Weiss v. Alling*, 34 Conn. 60.

Sale under Power in Mortgage. — Sale of land under a power contained in a mortgage cuts off the equity of redemption the same as a decree of strict foreclosure, and leaves nothing in the mortgagor but the statutory right of redemption. *Bailey v. Timberlake*, 74 Ala. 221.

But a sale by the mortgagee, under a power in the mortgage, of part of mortgaged premises, prior to foreclosure, does not affect the equity of redemption. *Wilson v. Troup*, 7 Johns. Ch. (N. Y.) 25.

Right of Junior Mortgagees Not Affected by Sale under Senior Mortgage. — Under Rev. Stat. *Indiana*, 1843, § 58, a second mortgagee is not affected by a sale made under a power in the first mortgage after his mortgage was given, but he may redeem from the first mortgage as if no sale had been made. *Howe v. Woodruff*, 12 Ind. 214.

When Foreclosure Is Complete. — A sale to the mortgagee under a decree of foreclosure does not bar the mortgagor's right of redemption until the deed is delivered; but the rule is different where a stranger buys. *Brown v. Frost*, Hoffm. Ch. (N. Y.) 41.

Terms of Decree to Effect Bar. — No particular words are required in a decree of foreclosure to bar the equity of redemption. *Stoddard v. Forbes*, 13 Iowa 296.

Premature Foreclosure Not a Bar. — Foreclosure of a mortgage of indemnity before the mortgagee had been damaged does not bar the mortgagor's right of redemption. *Thurston v. Prentiss*, Walk. (Mich.) 529.

Invalid Foreclosure No Bar. — If the foreclosure proceeding is invalid for any reason, the equity of redemption is not barred. *Grover v. Fox*, 36 Mich. 461.

Redemption After Invalid Foreclosure Sale. — A mortgagor, or his infant heirs in case of his death, may redeem from a mortgage after foreclosure where the mortgagee purchased at his own sale without the consent of the mortgagor or without being authorized to do so by the terms of the mortgage. *Lovelace v. Hutchinson*, 106 Ala. 417.

A Defective or Fraudulent Foreclosure does not bar the right to redeem. *Robinson v. Bliss*, 121 Mass. 428; *Dohm v. Haskin*, 88 Mich. 144; *Bremer v. Fleckenstein*, 9 Oregon 266.

waived or opened;¹ and no right to redeem then remains except such as may be given by statute.² But if a person entitled to redeem was not made a party to the foreclosure proceeding, it is for that reason a nullity as to him, and therefore does not affect his right of redemption,³ unless he acquired his

Unforeseen Event Preventing Payment of Debt.

—A decree of foreclosure does not bar the equity of redemption when the mortgagee was prevented from paying the debt by an unforeseen event, as where he had obtained a promise from a third person to furnish the necessary money, but such third person failed to do so, and the mortgagor was not in fault. *Bostwick v. Stiles*, 35 Conn. 195; *Kopper v. Dyer*, 59 Vt. 477, 59 Am. Rep. 742.

Attempted Foreclosure by Heirs of Mortgagor.

—The right of a mortgagor to redeem is not affected by the fact that after the death of the mortgagee, intestate, his heirs at law entered and took all the steps which would have been needful to foreclose the mortgage for breach of the condition, if they had been lawfully entitled to foreclose it, and they held open and peaceable possession of the land for more than eight years, when an administrator was first appointed on the petition of the mortgagor. *Haskins v. Hawkes*, 108 Mass. 379.

Failure to Make Statement of Rents Received.

—A mortgagor's right to redeem is not barred by foreclosure where the mortgagee was in default in not furnishing, on request, a statement of the rents received by him, and in not having so kept his accounts of the rents that he could make such a statement. *Tetrault v. Labbé*, 155 Mass. 497.

Right of Redemption Restored by Reversal of Decree.

—A mortgagor's right of redemption is restored by the reversal of the judgment under which the mortgaged property was sold, where the mortgagee was the purchaser and was still the owner at the time of reversal. *Hubbell v. Broadwell*, 8 Ohio 120.

Stipulation That Foreclosure Shall Be Without Right to Redeem.

—The parties to a foreclosure suit may stipulate that the sale under the decree shall be without the statutory right of redemption. *Cook v. McFarland*, 78 Iowa 528.

Effect of Sale under Chattel Mortgage.

—The right to redeem from a chattel mortgage is cut off by a sale under the mortgage or an adequate legal proceeding. In case of a sale the buyer generally takes a good title, and the remedy of the mortgagor, if any, is then against the mortgagee personally.

Alabama. — *Williams v. Hatch*, 38 Ala. 338.

Illinois. — *Hungate v. Reynolds*, 72 Ill. 425.

Michigan. — *Drayton v. Chandler*, 93 Mich. 383.

New York. — *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; *Stoddard v. Denison*, 38 How. Pr. (N. Y. Super. Ct.) 296; *King v. Van Vleck*, 109 N. Y. 363.

Vermont. — *Lavigne v. Naramore*, 52 Vt. 267.

Wisconsin. — *Mowry v. Baraboo First Nat. Bank*, 54 Wis. 38; *Boyd v. Beaudin*, 54 Wis. 193.

1. **Waiver of Foreclosure.** — The receipt of a part of the mortgage debt after foreclosure is a waiver of the foreclosure, and permits redemption notwithstanding the foreclosure. *Deming v. Comings*, 11 N. H. 474; *Applegate v. Kingman*, 17 Neb. 338.

A mortgagee who, after foreclosure, sues for the full amount of the mortgage and takes judgment therefor will be held to have disclaimed the foreclosure and to have opened the mortgage for redemption. *Clarke v. Robinson*, 15 R. I. 231.

Time Fixed by Decree of Strict Foreclosure.

—The time for redemption to be allowed by the decree in a strict foreclosure proceeding depends on the circumstances of each case, and is to be regulated by the sound discretion of the chancellor. *Tunstall v. McClelland*, Hard. (Ky.) 528.

Time Fixed by Decree Opening Foreclosure.

—A decree setting aside a foreclosure and granting leave to redeem need not require the redemption to be made within the statutory period, but the time rests in the sound discretion of the court. *Bremer v. Calumet, etc., Canal, etc., Co.*, 127 Ill. 464.

2. **Statutory Right to Redeem from Foreclosure Sale.** — See *supra*, this title, *Characteristics of Statutory Right to Redeem*.

3. **Foreclosure Not a Bar as to Persons Not Parties to Proceeding** — *Alabama*. — *Wiley v. Ewing*, 47 Ala. 418.

California. — *Frink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149.

Connecticut. — *Lyon v. Sandford*, 5 Conn. 544.

Illinois. — *Smith v. Sinclair*, 10 Ill. 108; *Strang v. Allen*, 44 Ill. 428; *Hodgen v. Guttery*, 58 Ill. 431; *Scates v. King*, 110 Ill. 456.

Indiana. — *Murdock v. Ford*, 17 Ind. 52; *Eiceman v. Finch*, 79 Ind. 511; *Nesbit v. Hanway*, 87 Ind. 400; *Watts v. Julian*, 122 Ind. 124.

Iowa. — *Bates v. Ruddick*, 2 Iowa 423, 65 Am. Dec. 774; *Johnson v. Harmon*, 19 Iowa 56; *Knowles v. Rablin*, 20 Iowa 101; *Gower v. Winchester*, 33 Iowa 303; *Mayer v. Farmers' Bank*, 44 Iowa 212; *American Buttonhole, etc., Co. v. Burlington Mut. Loan Assoc.*, 61 Iowa 464; *Ayres v. Adair County*, 61 Iowa 728; *Spurgin v. Adamson*, 62 Iowa 661.

Kentucky. — *Shackleford v. Stockton*, 6 B. Mon. (Ky.) 390.

Michigan. — *Avery v. Ryerson*, 34 Mich. 362.

Mississippi. — *Worthington v. Wilmot*, 59 Miss. 608.

Nebraska. — *Miller v. Finn*, 1 Neb. 254.

New York. — *Wheeler v. Morris*, 2 Bosw. (N. Y.) 524; *Mills v. Van Voorhies*, 20 N. Y. 412; *Miner v. Beekman*, 50 N. Y. 337.

Oregon. — *Besser v. Hawthorne*, 3 Oregon 512; *De Lashmutt v. Sellwood*, 10 Oregon 319; *Sellwood v. Gray*, 11 Oregon 534; *Wilson v. Tarter*, 22 Oregon 504.

Wisconsin. — *Murphy v. Farwell*, 9 Wis. 102; *Green v. Dixon*, 9 Wis. 537; *Pratt v. Frear*, 13 Wis. 462.

Right of Purchasers to Be Made Parties. — A purchaser of an equity of redemption is not barred by a foreclosure proceeding to which he was not a party, though his deed had not been recorded when the decree was entered. *Hodson v. Treat*, 7 Wis. 203.

title subject to the foreclosure.¹

3. Acquisition of Title by Mortgagee. — A conveyance by the mortgagor to the mortgagee for adequate value will bar the equity of redemption where the transaction was fair and no unconscionable advantage was taken by the mortgagee of his position, but it must unequivocally appear that both parties intended that the conveyance should so operate;² yet the mortgagee cannot cut off the mort-

A sale under a decree of foreclosure will not bar the equity of redemption of the mortgagor's grantee, if the conveyance was made before the commencement of the foreclosure, and the mortgagee was chargeable with notice thereof, but did not make the grantee a party to the suit. *Shackleford v. Stockton*, 6 B. Mon. (Ky.) 390.

Under the Ohio Statute a purchaser of mortgaged premises cannot redeem from a foreclosure sale, though he was not a party to the foreclosure suit. *Dennison v. Allen*, 4 Ohio 496; *Lytle v. Reed*, *Wright* (Ohio) 248.

Persons Represented in Foreclosure Proceeding. — A decree of foreclosure rendered against the trustees, who, representing themselves and other judgment creditors, had purchased the mortgaged premises at a sale under an execution issued on their judgment, binds the other judgment creditors as well as the trustees, though they were not parties to the foreclosure suit. *Robertson v. Van Cleave*, 129 Ind. 217.

A wife who is part owner with her husband of the mortgaged property is not barred by a foreclosure sale, when she was not made a party, though her husband was a party. *Green v. Dixon*, 9 Wis. 532.

Redemption by Judgment Creditor After Foreclosure Sale. — In *Worthington v. Wilmot*, 59 Miss. 608, the right of a judgment creditor to redeem from a foreclosure sale under a prior mortgage, where he was not a party to the foreclosure proceeding, was questioned, *Chalmers, J.*, saying: "In *Coote on Mortgages* (4th ed.) 1072, it is said: 'It is a general principle that no person shall be entitled to redeem but he who can show a title to the estate of the mortgagor; but if there be fraud or collusion to the detriment of third parties, as if assignees or executors or trustees refuse to enforce their right, creditors, legatees, or other parties interested may bring their action for relief.' This language accords with our own ideas, but is inconsistent with much that is said by other authors, and with much found elsewhere in the works from which these quotations are made. The doctrine usually announced is that judgment creditors and junior mortgagees occupy the same position, and have the same right of redemption. To us their attitudes seem wholly different. The one class is vested by conveyance with the estate of the mortgagor, while the other has no rights either to or in the mortgaged premises, but a mere right to subject it or any other property then owned or afterwards acquired by the debtor to the payment of their demands. It is the difference between an actual conveyance of an equitable estate by contract, and a general, not a specific, lien by operation of law."

The Assignee of a Mortgage who was not made a party to the foreclosure proceeding may redeem notwithstanding the foreclosure, though

the assignment was not recorded. *Naylor v. Colville*, 20 N. Y. App. Div. 581.

1. Title Acquired Subject to Foreclosure. — In *Heller v. King*, (Neb. 1898) 74 N. W. Rep. 423, the owner of land subject to a mortgage sold it and delivered to the purchaser a deed with the name of the grantee omitted therefrom, in compliance with the request of the latter that the conveyance should be in blank as to the name of the grantee. Afterwards an action to foreclose the mortgage was commenced, to which the grantor of the deed was made a party, and was duly served with process. The purchaser, subsequent to the service of the process in the foreclosure suit on the grantor in the deed, inserted the name of a third party in the conveyance and delivered it to him. The foreclosure suit was prosecuted to decree, sale thereunder, and confirmation thereof, and there was a later conveyance by the vendee to another party. The person who had received the deed with his name inserted in the blank thereof brought an action to redeem, predicating his claim solely on the title and ownership derived from the delivery to him of said deed. It was held that if he acquired the title by the insertion of his name as grantee in the blanks of the conveyance and its subsequent delivery to him, it came to him subject to the full operation and effect of the proceedings in the foreclosure suit, and he could not maintain an action to redeem.

2. Equity of Redemption Barred by Conveyance of Premises to Mortgagee — *England*. — *Gossip v. Wright*, 9 Jur. N. S. 592.

Alabama. — *Thompson v. Lee*, 31 Ala. 292.

California. — *Green v. Butler*, 26 Cal. 595; *Watson v. Edwards*, 105 Cal. 70.

Georgia. — *Jackson v. Tift*, 15 Ga. 557.

Illinois. — *Brown v. Gaffney*, 28 Ill. 149; *Ennor v. Thompson*, 46 Ill. 214; *Scanlan v. Scanlan*, 134 Ill. 630; *Kirchoff v. Union Mut. L. Ins. Co.*, 33 Ill. App. 607; *Miller v. Green*, 37 Ill. App. 631.

Missouri. — *Wilson v. Vanstone*, 112 Mo. 315.

Conveyance by Mortgagee in Indigent Circumstances. — In *De Martin v. Phelan*, 47 Fed. Rep. 761, it was held that a mortgagee who had conveyed the equity of redemption to the mortgagee in satisfaction of the mortgage debt was not entitled to redeem merely because she was in indigent circumstances at the time, it not being shown that the amount paid by the mortgagor for the equity of redemption was inadequate. See also *supra*, this section, *Waiver or Release*.

Delivery of Mortgaged Property to Mortgagee. — The equity of redemption in mortgaged chattels is not cut off by the delivery of the chattels to the mortgagee pursuant to a provision of the mortgage that on default in the payment of the mortgage debt the mortgagor shall deliver the chattels to the mortgagee. *Landers v. George*, 49 Ind. 309.

gagor's right to redeem by acquiring an outstanding title under an agreement that it is to be held subject to redemption,¹ or by purchasing the equity of redemption at a tax sale,² or a sale under execution against the mortgagor.³

4. Lapse of Time — *a. LIMITATION IN EQUITY.* — Suits for redemption, being matters of exclusive equity jurisdiction, are not barred by the statute of limitations, strictly speaking, unless the statute is expressly made applicable to such suits.⁴ The principle of equity jurisprudence, however, which discountenances stale claims, is applied, and a period is adopted after which suit cannot be brought if the mortgagee has been in possession of the premises without recognizing in any manner the existence of the mortgage.⁵ The period thus adopted is by analogy to the statute of limitations, generally the old statute (21 Jac. I., 16) limiting writs of entry to twenty years, or the statute limiting actions of ejectment to the same period, the bar being applied not as a statutory rule, but on the presumption from lapse of time of a release or satisfaction of the equity of redemption.⁶ In some jurisdictions the limita-

Usury as Ground for Opening Settlement. — Where a usurious debt has been settled by the creditor's taking the mortgaged property in satisfaction, the transaction cannot be opened and redemption allowed on the ground of usury alone. *Adams v. McKenzie*, 18 Ala. 608.

1. Purchase of Outstanding Title by Mortgagor. — *Moore v. Titman*, 44 Ill. 367.

2. Purchase of Tax Title by Mortgagee. — The purchase by the mortgagee at a tax sale does not bar the equity of redemption. It is merely a payment of the taxes by the mortgagee. *Eck v. Swennumson*, 73 Iowa 423, 5 Am. St. Rep. 690; *Jones v. Wells*, 31 Mich. 170; *Maxfield v. Willey*, 46 Mich. 252; *Allison v. Armstrong*, 28 Minn. 276, 41 Am. Rep. 281.

In *Ragor v. Lomax*, 22 Ill. App. 628, it was held that a mortgagee, whether in or out of possession, cannot, by acquiring a tax title, bar the right of the mortgagor to redeem, but that such title when so acquired attaches to the security and becomes liable to redemption. See also *Harding v. Durand*, 36 Ill. App. 238.

3. Purchase by Mortgagee at Execution Sale. — The purchase of mortgaged property by the mortgagee at an execution sale does not bar the right of redemption. *Powell v. Williams*, 14 Ala. 476, 48 Am. Dec. 105; *Thornton v. Pigg*, 24 Mo. 249.

Assumption of Title by Mortgagee. — The equity of redemption cannot be barred by the mere assumption on the part of the mortgagee, evidenced by his giving a deed, that he has the title in fee, nor by an occasional occupation under such deed, or any occupation short of a continuous and notorious one adverse to the right to redeem. *Humphrey v. Hurd*, 29 Mich. 44.

4. Statute of Limitations Not Applicable to Suits for Redemption. — *Pratt v. Northam*, 5 Mason (U. S.) 95; *Crocker v. Clements*, 23 Ala. 296; *Teackle v. Gibson*, 8 Md. 70; *Bailey v. Carter*, 7 Ired. Eq. (42 N. Car.) 282; *Overton v. Bigelow*, 3 Verg. (Tenn.) 513; *Yarbrough v. Newell*, 10 Verg. (Tenn.) 376.

5. Adoption of Limitation in Equity — *England*, — *Harcourt v. White*, 28 Beav. 303; *McDonnell v. White*, 11 H. L. Cas. 570.

United States. — *Wyman v. Russell*, 4 Biss. (U. S.) 307.

Alabama. — *Hunt v. Ellison*, 32 Ala. 173; *Byrd v. McDaniel*, 33 Ala. 18.

Arkansas. — *Wilson v. Anthony*, 19 Ark. 16. *Georgia.* — *Morgan v. Morgan*, 10 Ga. 297.

Illinois. — *Marshall v. Peck*, 91 Ill. 187; *Miller v. Shaw*, 103 Ill. 278.

Maine. — *Blethen v. Dwinall*, 35 Me. 556; *Roberts v. Littlefield*, 48 Me. 61.

Michigan. — *Emmons v. Van Zee*, 78 Mich. 171.

North Carolina. — *Hamlin v. Mebane*, 1 Jones Eq. (54 N. Car.) 18.

In an anonymous case, 3 Atk. 313, Lord Hardwicke said that the rule in relation to redemptions, which had been established in that court for some time, and which was analogous to the statute of limitations, was a very right and proper rule; after twenty years' possession of the mortgagee he should not be disturbed, otherwise it would make property very precarious, and a mortgagee would be no more than a bailiff to the mortgagor, and subject to an account, which would be a great hardship.

In *Dexter v. Arnold*, 1 Sumn. (U. S.) 117, the court, by Story, J., said: "Generally speaking, no lapse of time will bar the right to redeem, so long as the mortgage has been treated between the parties as a subsisting mortgage and security only. But if the mortgagee has been in possession of the mortgaged premises for twenty years, taking the profits without any account or act done by which he admits himself to hold it as a qualified estate, the equity of redemption will be presumed to be extinguished, or abandoned by the mortgagee; and a bill to redeem will not be entertained by a court of equity. This, as a general principle, is not denied, and is too clearly established by the authorities to admit of doubt."

6. Limitation by Analogy to Statute of Limitations. — As a general rule the period of limitation by analogy to the statute of limitations is twenty years.

England. — *Aggas v. Pickerell*, 3 Atk. 225; *Blake v. Foster*, 2 B. & B. 387; *Pearson v. Pulley*, 1 Ch. Cas. 102; *Chapman v. Corpe*, 41 L. T. N. S. 22; *In re Alison*, 11 Ch. Div. 284; *Foster v. Hodgson*, 19 Ves. Jr. 180; *Barron v. Martin*, 19 Ves. Jr. 327; *Hodde v. Healey*, 1 Ves. & B. 536.

Canada. — *Dedford v. Boulton*, 25 Grant's Ch. (U. C.) 561.

United States. — *Hughes v. Edwards*, 9

tion is by analogy to the statute limiting actions for foreclosure.¹ After the expiration of the time so adopted or prescribed, the right of redemption is

Wheat. (U. S.) 489; *Slicer v. Pittsburg Bank*, 16 How. (U. S.) 571; *Dexter v. Arnold*, 3 Sumn. (U. S.) 152; *Amory v. Lawrence*, 3 Cliff. (U. S.) 523; *Fox v. Blossom*, 17 Blatchf. (U. S.) 353.

Alabama. — *Gunn v. Brantley*, 21 Ala. 633; *Coyle v. Wilkins*, 57 Ala. 108; *Dawson v. Hoyle*, 58 Ala. 44; *Goodwyn v. Baldwin*, 59 Ala. 127.

Arkansas. — *Guthrie v. Field*, 21 Ark. 379; *Hall v. Denckla*, 28 Ark. 506.

California. — *Arrington v. Liscom*, 34 Cal. 366, 94 Am. Dec. 722; *Taylor v. McClain*, 60 Cal. 651.

Connecticut. — *Bunce v. Wolcott*, 2 Conn. 27.

Georgia. — *Morgan v. Morgan*, 10 Ga. 297.

Illinois. — *Hallesy v. Jackson*, 66 Ill. 139; *Locke v. Caldwell*, 91 Ill. 417.

Iowa. — *Montgomery v. Chadwick*, 7 Iowa 114; *Crawford v. Taylor*, 42 Iowa 260.

Maine. — *Phillips v. Sinclair*, 20 Me. 269; *Roberts v. Littlefield*, 48 Me. 61; *Randall v. Bradley*, 65 Me. 43; *McPherson v. Hayward*, 81 Me. 329; *Frisbee v. Frisbee*, 86 Me. 444.

Maryland. — *Crook v. Glenn*, 30 Md. 55; *Hertle v. McDonald*, 2 Md. Ch. 128.

Massachusetts. — *Ayres v. Waite*, 10 Cush. (Mass.) 72; *Howland v. Shurtleff*, 2 Met. (Mass.) 26, 35 Am. Dec. 384; *Stevens v. Dedham Sav. Inst.*, 129 Mass. 547.

Michigan. — *Cook v. Finkler*, 9 Mich. 131; *Reynolds v. Green*, 10 Mich. 355; *Hoffman v. Harrington*, 33 Mich. 392.

Missouri. — *McNair v. Lot*, 34 Mo. 285, 84 Am. Dec. 78.

New Hampshire. — *Tripe v. Marcy*, 39 N. H. 439; *Clark v. Clough*, 65 N. H. 43.

New Jersey. — *Bates v. Conrow*, 11 N. J. Eq. 137; *Chapin v. Wright*, 41 N. J. Eq. 438.

New York. — *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467; *Slee v. Manhattan Co.*, 1 Paige (N. Y.) 48; *Miner v. Beekman*, 50 N. Y. 337.

North Carolina. — *Bailey v. Carter*, 7 Ired. Eq. (42 N. Car.) 282.

Ohio. — *Robinson v. Fife*, 3 Ohio St. 551; *Clark v. Potter*, 32 Ohio St. 49.

Tennessee. — *Yarbrough v. Newell*, 10 Yerg. (Tenn.) 376.

Virginia. — *Ross v. Norvell*, 1 Wash. (Va.) 14, 1 Am. Dec. 422.

Wisconsin. — *Rogan v. Walker*, 1 Wis. 527.

Other Periods of Limitation. — In those jurisdictions where other periods of limitation are prescribed by statute for writs of entry and actions to recover possession, suits to redeem are barred by analogy to such statutes. *Crittendon v. Brainard*, 2 Root (Conn.) 485; *Skinner v. Smith*, 1 Day (Conn.) 124; *Lockwood v. Lockwood*, 1 Day (Conn.) 295; *Jarvis v. Woodruff*, 22 Conn. 548; *Haskell v. Bailey*, 22 Conn. 569; *Merriam v. Barton*, 14 Vt. 501; *Byrd v. McDaniel*, 33 Ala. 18; *Askew v. Sanders*, 84 Ala. 356.

Computation of Time. — In computing the time after entry for breach of condition within which the mortgagor may redeem, the day of entry is excluded. *Ricker v. Blanchard*, 45 N. H. 39; *Fuller v. Russell*, 6 Gray (Mass.) 128.

Absolute Deed Intended as a Mortgage. — The time fixed by a statute as a bar to redemption in case of an express mortgage applies also to the right of redemption under an absolute deed intended as a mortgage. *Bailey v. Carter*, 7 Ired. Eq. (42 N. Car.) 282.

1. Limitation by Analogy to Actions to Foreclose. — *Lynch v. Jackson*, 28 Ill. App. 160; *Gower v. Winchester*, 33 Iowa 303; *Crawford v. Taylor*, 42 Iowa 260; *Bradley v. Norris*, 63 Minn. 156; *Backus v. Burke*, 63 Minn. 272.

Redemption and Foreclosure Reciprocal Rights. — It has been said in many cases that the right to redeem and the right to foreclose a mortgage are reciprocal and commensurable, and that when one is barred by the statute of limitations the other is barred also.

California. — *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 51; *Grattan v. Wiggins*, 23 Cal. 16; *Coster v. Brown*, 23 Cal. 143; *Cunningham v. Hawkins*, 24 Cal. 410, 85 Am. Dec. 73; *Arrington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722; *Wright v. Ross*, 36 Cal. 434; *Espinosa v. Gregory*, 40 Cal. 58; *Taylor v. McClain*, 60 Cal. 651; *Henderson v. Grammar*, 66 Cal. 336.

Florida. — *Judge v. Forsyth*, 11 Fla. 257.

Illinois. — *Green v. Capps*, 142 Ill. 286.

Iowa. — *Green v. Turner*, 38 Iowa 112.

Kentucky. — *Caufman v. Sayre*, 2 B. Mon. (Ky.) 202.

Minnesota. — *Holton v. Meighen*, 15 Minn. 69; *King v. Meighen*, 20 Minn. 264; *Parsons v. Noggle*, 23 Minn. 328.

North Carolina. — *Tucker v. White*, 2 Dev. & B. Eq. (22 N. Car.) 289.

See also 2 Hill on Mort. 1.

In *Bradley v. Norris*, 63 Minn. 156, the doctrine that the right to redeem and the right to foreclose, being reciprocal and commensurable, begin and end at the same time was denied. *Mitchell, J.*, delivering the opinion of the court, said: "The proposition that the right to redeem and the right to foreclose are mutual and reciprocal, or commensurable, when rightly understood, means merely that a mortgage cannot be a mortgage on one side only — that if it be a mortgage with one party it must be a mortgage with both. Thus, in *Coote on Mortgages* (page 26) it is said: 'It has been already mentioned that a mortgage cannot be a mortgage on one side only. It must be mutual — that is, if it be a mortgage with one party it must be a mortgage with both. * * * The mutuality, however, need not run *quatuor pedibus*. The rule only requires that it shall not be competent to one party alone to consider it a mortgage. In other respects the rights of the parties may be different, for it is every day's practice that one party may not be able to foreclose at a time when the other may redeem, as in the instance cited in *Talbot v. Braddil*, 1 Vern. 394. So, in a Welsh mortgage, the mortgagor may redeem at any time, but the mortgagee cannot foreclose, nor, without a covenant or bond, sue for the money.' The following are the cases in this court bearing more or less directly on this subject: *Holten v. Meighen*, 15 Minn. 69; *King v. Meighen*, 20 Minn. 264; *Parsons v. Noggle*, 23 Minn. 328; *Fisk v. Stewart*, 24 Minn. 97; *Meighen v.*

gone, and it cannot be exercised unless, by agreement of the parties or otherwise, there has been an extension of time.¹

King, 31 Minn. 115; Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613; Miller v. Smith, 44 Minn. 127; Jellison v. Halloran, 44 Minn. 199. We shall not consider these cases in detail. An examination of them, however, will show that in every case where the right of the mortgagor to redeem from the mortgagee in possession was held to be barred, the mortgagee had been in possession for the full period allowed by statute for foreclosure by action, unless Miller v. Smith, 44 Minn. 127, may be an exception. In that case the plaintiff had, more than twenty years before action, conveyed to the defendants by deed absolute in form. Defendants, after holding the land over fifteen years, sold it to third parties, who afterwards platted and sold it in town lots. After the lapse of so many years the plaintiff brought an action to recover the then present value of the land, seeking to impeach his own deed by parol evidence that it was only intended as a mortgage. While reference is made in the opinion to the reciprocity of the rights of foreclosure and of redemption, yet it is apparent that the case was rightly decided upon broader and entirely different grounds. And while it does not distinctly appear from the opinion, it is fairly to be presumed from what is stated that the defendant had been in possession during the whole of the twenty years. The first cases in which the court uses the phrase that the right to foreclose and the right to redeem are 'mutual and reciprocal,' or 'reciprocal and commensurable,' in the apparent sense that they necessarily accrue and expire at the same time, are Holton v. Meighen, 15 Minn. 69, and King v. Meighen, 20 Minn. 264. In each instance the remark was wholly *obiter*, and seems to have been borrowed from decisions in California, based on what was doubtless a misconception of a remark of Justice Field in Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651. That no such doctrine is now held by the Supreme Court of that state will be seen by reference to Raynor v. Drew, 72 Cal. 307, and Spect v. Spect, 88 Cal. 437. Parsons v. Noggle, 23 Minn. 328, is entirely inconsistent with any such doctrine. In that case the late chief justice explains clearly that, in fixing the equitable limitation upon suits to redeem, the court adopted, not the statutory rule in ejectment, but the rule in an action to foreclose, as more nearly analogous. That, on reason as well as authority, the time within which an action to redeem from a mortgagee in possession commences to run from the time the mortgagee goes into possession, is apparent from the whole history of the law of mortgages."

1. **Extension of Time to Redeem.** — The period for redemption may be extended by agreement between the parties. Stephens v. Illinois Mut. F. Ins. Co., 43 Ill. 327; Pensoneau v. Pulliam, 47 Ill. 58; Davis v. Dresback, 81 Ill. 393; Ross v. Sutherland, 81 Ill. 275; Union Mut. L. Ins. Co. v. Kirchhoff, 133 Ill. 368; Chytraus v. Smith, 141 Ill. 231; Quint v. Little, 4 Me. 495; Chase v. McLellan, 49 Me. 375.

Period of Extension. — The agreement does not extend the period for redemption beyond the time fixed thereby. Chase v. McLellan, 49 Me. 375. But it has been held that if the agreement operates to open a foreclosure, the failure of the redemptioner to perform his part of the agreement within the stipulated time does not work an absolute forfeiture of his right, but he may still redeem within a reasonable time. Dodge v. Brewer, 31 Mich. 227.

Consideration for Extension. — It must be supported by a valid consideration, if made after the time of redemption has passed. Davis v. Dresback, 81 Ill. 393; Smalley v. Hickok, 12 Vt. 153.

Parol Agreement for Extension. — An agreement to extend the time for redemption may be by parol. Fisher v. Shaw, 42 Me. 32; Chase v. McLellan, 49 Me. 375; Stetson v. Everett, 59 Me. 376; Brown v. Lawton, 87 Me. 83.

Effect of Agreement as to Terms of Payment of Price Bid at Foreclosure Sale. — An extension of the time to redeem is not effected by an agreement made after a foreclosure sale, at which the mortgagee was the purchaser, between the mortgagor's wife and the mortgagee, for a conveyance by the mortgagee to her for the price bid at the foreclosure sale, five hundred dollars, to be paid within one year, and the conveyance to be then made, no time being agreed on for the payment of the remainder. Williams v. Stewart, 25 Minn. 516.

Failure of Mortgagee to Make Statement of Amount Due. — The time to redeem is not extended by the neglect of a mortgagee in possession to render to the mortgagor, on demand, an account of the amount due on the mortgage. Sanborn v. Dennis, 9 Gray (Mass.) 208.

Suit Against Mortgagee for Accounting. — The time to redeem from a foreclosure sale is not extended by a suit by the second mortgagee for an accounting for rents received by the first mortgagee. Hoover v. Johnson, 47 Minn. 434.

Conveyance to Mortgagee in Possession. — A conveyance by the owner of the equity of redemption to the mortgagee after he had taken possession is not such a disseizin or interruption of the possession as will extend the time for redemption beyond the statutory period. Daniels v. Mowry, 1 R. I. 151.

Ignorance of Right of Redemption. — The time will not be extended because the redemptioner, who was the administrator of the mortgagor, did not come to a knowledge of his rights until it was too late, unless this was caused by the fault of the mortgagee. Cilley v. Huse, 40 N. H. 358.

Unlawful Devices for Procuring Extension of Time. — Under the Minnesota statute, a mortgagor may convey his equity of redemption and take back a mortgage to himself and redeem as a creditor five days after the expiration of the year allowed the owner in which to redeem, but he cannot divide the supposed value of his equity into a number of parts and take a separate mortgage on each part for the sole purpose of extending his time of redemption five days for each mortgage so taken.

The Time Begins to Run against the right to redeem when the mortgagee takes actual and open possession of the mortgaged property.¹

The Possession Which Will Set the Time Running must be an actual, unequivocal, and open possession, adverse to the mortgagor. As long as the mortgagee continues to hold as such, the time does not begin to run.² The possession must also be continuous and undisturbed.³

b. LIMITATION BY STATUTE.—In some jurisdictions suits for redemption are expressly limited by statute.⁴

New England Mut. L. Ins. Co. v. Capehart, 63 Minn. 120.

Extension of Time by Statute.—A statute extending the time within which mortgages may be foreclosed extends the time within which actions for redemption may be brought also. Backus v. Burke, 63 Minn. 272.

1. Time Begins to Run When Possession is Taken—*England.*—Barron v. Martin, 19 Ves. Jr. 327.

United States.—Babcock v. Wyman, 19 How. (U. S.) 289.

California.—Frink v. Le Roy, 49 Cal. 314; Warder v. Enslin, 73 Cal. 291.

Iowa.—Montgomery v. Chadwick, 7 Iowa 114; Green v. Turner, 38 Iowa 118; Crawford v. Taylor, 42 Iowa 260.

Maine.—Bird v. Keller, 77 Me. 270.

Michigan.—Humphrey v. Hurd, 29 Mich. 44.

Minnesota.—Bradley v. Norris, 63 Minn. 156; Backus v. Burke, 63 Minn. 272; Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613.

Mississippi.—Kohlheim v. Harrison, 34 Miss. 457; Anding v. Davis, 38 Miss. 574, 77 Am. Dec. 658.

Missouri.—Bollinger v. Chouteau, 20 Mo. 89.

New York.—Hubbell v. Sibley, 50 N. Y. 468.

North Carolina.—Bailey v. Carter, 7 Ired. Eq. (42 N. Car.) 282; Simmons v. Ballard, 102 N. Car. 105.

Wisconsin.—Knowlton v. Walker, 13 Wis. 264; Waldo v. Rice, 14 Wis. 286.

When time is given after sale within which to redeem, the relation of the mortgagor and mortgagee is held not to terminate, nor the statute to begin to run, until the expiration of the time for redemption. Rockwell v. Servant, 63 Ill. 429.

When Time Begins to Run Against Junior Mortgagee.—Time runs against a junior mortgagee from the date of the maturity of the junior mortgage. Gower v. Winchester, 33 Iowa 303.

2. Possession Must Be Open and Adverse.—Dexter v. Arnold, 3 Sumn. (U. S.) 152; Robinson v. Fife, 3 Ohio St. 551; Knowlton v. Walker, 13 Wis. 264.

In Whiting v. White, 2 Cox 290, the master of the rolls said: "The possession must be such as shows that the mortgagee held it as his own estate. If, therefore, any interest has been received, or if any account has been settled between the mortgagor and mortgagee of what is due upon the mortgage, whereby it appears that the mortgagee considers himself as having only a redeemable interest, or if by any solemn act of the mortgagee, such as a will or settlement made by the mortgagee, it appears that he considers it as redeemable, it shall, as against him and all claiming under

him, be held to be so, and the time will only run from the date of such acknowledgment. But this is always to be understood in cases where there is no fraud or improper covenant whereby the mortgagor may be prevented from redeeming."

There Must Be an Actual Possession, and payment of taxes on wild land is not sufficient. Locke v. Caldwell, 91 Ill. 417; Brown v. Rose, 48 Iowa 231; Bollinger v. Chouteau, 20 Mo. 89; Chapin v. Wright, 41 N. J. Eq. 438; Moore v. Cable, 1 Johns. Ch. (N. Y.) 385.

Possession Taken Before Breach of Condition—Notice of Adverse Claim.—Where the mortgagee takes possession of the mortgaged property before breach of condition, and continues in possession after breach, the time for redeeming will not commence until he gives due notice to the mortgagor, after the breach, that he holds possession for condition broken. Erskine v. Townsend, 2 Mass. 493, 3 Am. Dec. 71; Newall v. Wright, 3 Mass. 138; Scott v. McFarland, 13 Mass. 309; Pomeroy v. Winship, 12 Mass. 514, 7 Am. Dec. 91.

Entry Under Agreement with Mortgagor.—The presumption that an equity of redemption is released after twenty years' possession by a mortgagee does not apply to a case where the mortgagee was in possession under an absolute deed, with an agreement that the mortgagor might redeem when he found it convenient, no specific time being fixed, and the mortgagee made no request to redeem. Wyman v. Babcock, 2 Curt. (U. S.) 386.

Entry as Tenant of Mortgagor.—If the mortgagee enters as a tenant of the mortgagor, that relation is presumed to continue unless rebutted. Sanders v. Sanders, 44 L. T. N. S. 171, 19 Ch. Div. 373; Clowes v. Hughes, L. R. 5 Exch. 160; Orde v. Heming, 1 Vern. 418; Edwards v. Wray, 12 Fed. Rep. 42; Ayres v. Waite, 10 Cush. (Mass.) 72; Shields v. Lozeau, 34 N. J. L. 496, 3 Am. Rep. 256; Anderson v. Lanterman, 27 Ohio St. 104; Stedman v. Gassett, 18 Vt. 346.

3. Possession Must Be Continuous and Undisturbed.—Lockwood v. Lockwood, 1 Day (Conn.) 295; Maurhoffer v. Mitnacht, 12 Misc. Rep. (N. Y. Supreme Ct.) 585.

4. Limitation by Statute—*England.*—Suits to redeem are barred by twelve years' possession by the mortgagee, unless in the meanwhile he acknowledges in writing the title of the mortgagor. Forster v. Patterson, 17 Ch. Div. 132.

Canada.—Suits for redemption are limited to twenty years after the last payment on the mortgage. Doe v. Wright, 11 New Bruns. 241.

California.—Suits for redemption are barred by the adverse possession by the mortgagee for five years after breach of condition of the mortgage. Warder v. Enslin, 73 Cal. 291.

Kentucky.—Suits to redeem are barred by

c. **LIMITATION OF STATUTORY RIGHT TO REDEEM.** — The statutory right to redeem is limited by the statute creating the right, and can only be exercised within the time so fixed,¹ unless the parties have agreed to extend the time.²

5. **Laches.** — Redemption is sometimes denied after a lapse of time less than that adopted by equity, where the redemptioner has been guilty of laches.³

6. **Estoppel of Redemptioner.** — A person having a right to redeem may be estopped by his own acts to assert his right.⁴

IX. HOW RIGHT OF REDEMPTION IS ENFORCED. — In the absence of a statute prescribing the mode of enforcing the right of redemption, it can be enforced only by a suit in equity for that purpose,⁵ and a mere tender of the amount

fifteen years' adverse possession by the mortgagee. Gen. Stat. 1888, c. 71, art. 4, § 16.

Massachusetts. — Suits to redeem are limited to three years after possession is taken under the mortgage; but if the mortgagee recovers a deficiency judgment, the mortgagee may redeem within one year thereafter. *Fennyery v. Ransom*, 170 Mass. 303.

Mississippi. — Suits to redeem are limited to ten years after the accrual of the cause of action. *Tuteur v. Brown*, 74 Miss. 774.

New Jersey. — Suits to redeem are barred by twenty years' possession by the mortgagee. *Chapin v. Wright*, 41 N. J. Eq. 438; *Coogan v. McCarren*, 50 N. J. Eq. 611.

New York. — Suits to redeem are barred by twenty years' adverse possession by the mortgagee. *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *Maurhoffer v. Mitnacht*, 12 Misc. Rep. (N. Y. Supreme Ct.) 585.

North Carolina. — Suits to redeem are limited to ten years after forfeiture. *Houck v. Adams*, 98 N. Car. 519.

Wisconsin. — Suits to redeem are barred by ten years' open and actual possession by the mortgagee. *Knowlton v. Walker*, 13 Wis. 264.

Revival of Right to Redeem. — When the right to maintain an action for the redemption of the mortgaged property from the lien of the mortgage is barred by the statute of limitations, it cannot be revived by an offer of the mortgagee to pay the debt. *Cunningham v. Hawkins*, 24 Cal. 403, 85 Am. Dec. 73.

1. **Limitation of Statutory Right to Redeem.** See *supra*, this title, *Time to Redeem*.

A court of equity has no power to extend the time for redemption on a statutory foreclosure, even where the redemption within the time allowed by the statute has been prevented by accident and misfortune, or by an unavoidable mental and physical disorder. *Cameron v. Adams*, 31 Mich. 426; *Dodge v. Brewer*, 31 Mich. 227.

2. **Extension of Time to Redeem from Foreclosure Sale.** — See *supra*, this section, *Limitation in Equity*.

3. **Right to Redeem May Be Barred by Laches.** — *Askew v. Sanders*, 84 Ala. 356; *Mann v. Jobusch*, 70 Ill. App. 449; *Pickens v. Walker*, 3 Dana (Ky.) 167; *Hopkins v. Stephenson*, 1 J. J. Marsh. (Ky.) 344; *Hall v. Westcott*, 15 R. I. 375; *McAbce v. Harrison*, 50 S. Car. 39; *Skæe v. Chapman*, 21 Grant's Ch. (U. C.) 534.

Redemption after an invalid foreclosure will not be allowed unless the redemptioner proceeds within a reasonable time. *Mulvey v. Gibbons*, 87 Ill. 367; *Bergen v. Bennet*, 1 Cal. Cas. (N. Y.) 1, 2 Am. Dec. 281.

In *Fraker v. Houck*, 36 Fed. Rep. 403, the right to redeem from a sale under a deed of trust was denied on the ground of laches where the grantor in the deed of trust, who was confined in the penitentiary at the time when the sale was made, was pardoned a few months later, but took no measures to redeem until seven years afterwards.

But in *McPherson v. Hayward*, 81 Me. 329, it was held that the duration of the mortgagor's right to redeem is clearly defined by law, and that no question of laches arises under a bill to redeem a mortgage.

4. **What Acts Estop Redemptioner.** — The owner of an equity of redemption is estopped to assert his right as against a person whom he induced to purchase the mortgage by representing that the land was not worth more than the sum due on the mortgage, and that he would never redeem. *Fay v. Valentine*, 12 Pick. (Mass.) 40, 22 Am. Dec. 397.

A mortgagor is estopped to claim the right to redeem where he assisted the mortgagee in selling the property at auction, agreeing to give a warranty deed to the purchaser, and received the purchase money from the purchaser, who, in good faith, made extensive improvements. *Wright v. Whithead*, 14 Vt. 268.

So also, if the mortgagor stands idly by and does not disclose his title, he may lose his right to set up his claim to redeem. *Savage v. Foster*, 9 Mod. 35; *Parkhurst v. Van Cortland*, 14 Johns. (N. Y.) 43, 7 Am. Dec. 427; *Niven v. Belknap*, 2 Johns. (N. Y.) 573.

The mortgagor in a chattel mortgage may, by acquiescence in an irregular sale, or by his own wrongful acts, be estopped to assert his right to redeem. *Boutwell v. Steiner*, 84 Ala. 307, 5 Am. St. Rep. 375; *Massey v. Hardin*, 81 Ill. 330; *France v. Haynes*, 67 Iowa 139; *Richards v. Spicer*, 23 Minn. 212; *Hall v. Ditson*, 55 How. Pr. (N. Y. Supreme Ct.) 19.

Statement Made to Third Persons. — A mortgagor is not estopped as against the mortgagee to claim the right of redemption by the fact that the mortgage was in form an absolute bill of sale, and was after its execution, for the purpose of delaying creditors, declared by the mortgagor to be an absolute sale. *Ballard v. Jones*, 6 Humph. (Tenn.) 455.

5. **Right of Redemption Is Enforceable Only in Equity.** — *Smith v. Anders*, 21 Ala. 782; *Pearce v. Savage*, 45 Me. 90; *Pratt v. Skolfield*, 45 Me. 386; *Randall v. Bradley*, 65 Me. 43; *Hill v. Payson*, 3 Mass. 559; *Perkins v. Pitts*, 11 Mass. 134; *Parsons v. Welles*, 17 Mass. 419; *Blodgett v. Blodgett*, 48 Vt. 32.

It has been held, however, that payment of a mortgage even after maturity defeats the

due is not sufficient to revest the title of the mortgageor.¹

Necessity of Tender. — The general rule seems to be that a tender of the amount required to redeem must be made in the bill,² but it is not necessary to make a tender before suit is brought³ unless required by statute, as is the case in some jurisdictions.⁴

EQUIVALENT. — “Equivalent” means equally good; equal in value or worth; equal in power, force, or effect; of the same import or meaning.⁵

estate of the mortgagee at law, as well as in equity, and that the mortgage is then no bar to the mortgagor's recovery in ejectment. *Morgan v. Davis*, 2 Har. & M. (Md.) 9; *Brown v. Stewart*, 56 Md. 430.

Statutory Remedy. — When the mode of redemption from chattel mortgages is prescribed by statute, a bill in equity to redeem cannot be maintained unless the circumstances are such that the statutory mode will not fully protect the rights of the mortgagor. *Wearse v. Peirce*, 24 Pick. (Mass.) 141; *Hodgkins v. Moulton*, 100 Mass. 309; *Boston, etc., Iron Works v. Montague*, 108 Mass. 248; *Gordon v. Clapp*, 111 Mass. 22.

Against Whom Redemption May Be Had. — Redemption must be had against the mortgagee or those succeeding to his interests under the mortgage. *Dorkray v. Noble*, 8 Me. 278; *Mitchell v. Burnham*, 44 Me. 286; *Copeland v. Yoakum*, 38 Mo. 349; *Guthrie v. Sorrell*, 6 Ired. Eq. (41 N. Car.) 13.

Where the purchaser at a sale under a power contained in a mortgage alienates the property, a judgment creditor of the mortgagor who has no notice of the alienation may make his application for redemption to the purchaser at the sale under the power. *Lehman v. Collins*, 69 Ala. 127.

Redemption allowed by statute to be made from the sheriff may be made from a deputy sheriff in charge of the sheriff's office during the absence of the sheriff himself. *Willis v. Jelineck*, 27 Minn. 18.

1. Title of Mortgagor Not Revested by Tender. — *Smith v. Anders*, 21 Ala. 782; *Doton v. Russell*, 17 Conn. 146; *Stewart v. Crosby*, 50 Me. 130; *Wade v. Howard*, 11 Pick. (Mass.) 289; *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; *Blodgett v. Blodgett*, 48 Vt. 32.

2. Necessity of Tender — Alabama. — *Smith v. Conner*, 65 Ala. 371; *Cain v. Gimon*, 36 Ala. 168; *Adams v. Sayre*, 70 Ala. 318.

California. — *Daubenspeck v. Platt*, 22 Cal. 330.

Connecticut. — *Boles v. Calkins*, 1 Root (Conn.) 553.

Indiana. — *Kemp v. Mitchell*, 36 Ind. 249; *Nesbit v. Hanway*, 87 Ind. 400.

New Hampshire. — *Perry v. Carr*, 41 N. H. 371.

A tender when required must be made unconditionally. *Wendell v. State Bank*, 9 N. H. 404.

It must be kept in good order to be effectual as the basis of a subsequent action to compel a redemption brought after the time for redemption has expired. *Dunn v. Hunt*, 63 Minn. 484.

Tender Is Excused by the making of a false account by the mortgagee, *Meaher v. Howes*,

(Me. 1887) 10 Atl. Rep. 460; or by failure to give the party seeking to redeem information of the exact amount claimed to be due on the mortgage, within a reasonable time after request, *Pease v. Benson*, 28 Me. 336; *Roby v. Skinner*, 34 Me. 270; *Sprague v. Graham*, 38 Me. 328 (see also *Kittredge v. McLaughlin*, 38 Me. 513); or by absence from the state of the person to whom it should be made, *Lehman v. Collins*, 69 Ala. 127; or by the fact that the mortgagee has in his hands money which it is his duty to apply to the payment of the mortgage, and which is sufficient for that purpose, *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 21 Am. St. Rep. 231.

Necessity of Tender Denied. — *Casserly v. Witherbee*, 119 N. Y. 522; *Taylor v. Dillenburg*, 168 Ill. 235.

3. Tender Before Suit Not Necessary. — *McGuire v. Van Felt*, 55 Ala. 344; *Dwen v. Blake*, 44 Ill. 135; *Barnard v. Cushman*, 35 Ill. 451; *Spath v. Hankins*, 55 Ind. 155; *Lamson v. Drake*, 105 Mass. 564.

4. Tender Required by Statute. — *Dorkray v. Noble*, 8 Me. 278; *Dunn v. Hunt*, 63 Minn. 484; *Wendell v. State Bank*, 9 N. H. 404.

A state statute requiring tender of the money due on mortgages sought to be redeemed applies to the state courts only, and does not apply to the general equity jurisdiction of the federal courts. *Gordon v. Hobart*, 2 Sumn. (U. S.) 401.

5. Equivalent — Patent Law. (See also the title *PATENT LAW*.) — An *equivalent* is defined as a device which performs the same function as another, and in substantially the same way as the thing of which it is alleged to be an *equivalent*. *Pacific Cable R. Co. v. Battle City St. R. Co.*, 58 Fed. Rep. 421. See also *Duff Mfg. Co. v. Forgie*, 59 Fed. Rep. 775; *Jensen v. Norton*, 7 U. S. App. 120; *Carter Mach. Co. v. Hanes*, 70 Fed. Rep. 865; *Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 290; *Imhaeuser v. Buerk*, 101 U. S. 647.

In *Tyler v. Boston*, 7 Wall. (U. S.) 330, it was said: “This term *equivalent*, when speaking of machines, has a certain definite meaning; but when used with regard to the chemical action of such fluids as can be discovered only by experiment, it only means ‘equally good.’”

Equivalent — Mechanics' Lien. (See also the title *MECHANICS' LIENS*.) — A mechanics' lien statute provided that every one, save the contractor, must file his statement for a lien within thirty days after completion. An amendment added that cessation from labor for thirty days on any unfinished building should be *equivalent* to completion. In construing this provision the court, in *Kerckhoff-Cuzner Mill, etc., Co. v. Olmstead*, 85 Cal. 80,

EQUIVOCATION. (See also the titles AMBIGUITY, vol. 2, p. 287; PAROL EVIDENCE.) — See note 1.

ERASE — ERASURE. (See also the titles ALTERATION OF INSTRUMENTS, vol. 2, p. 181; INTERPRETATION; RECORDS; WILLS.) — To erase is to rub or scrape out, as letters or characters written, engraved, or printed.²

ERECT — ERECTION. (See also BUILD, vol. 4, p. 992; BUILDING, vol. 4, p. 994; and the title MECHANICS' LIENS.) — To erect is to build; to construct.³

said: "It is argued for respondent that it was intended by the amendment only to make it possible for a materialman or laborer to file his claim of lien before the actual completion of the building, and not to make it necessary for him to do so. But as we construe the last clause of the amendment, its operation cannot thus be restricted. The words 'shall be deemed *equivalent* to a completion' mean, shall be equal in legal effect to a completion; that is, shall be treated, for the purpose of filing a lien, as an actual completion. And this being so, it is clear that whenever there has been a cessation from labor for thirty days upon any unfinished building, the time within which a materialman or laborer must file his claim of lien at once begins to run."

Cash or Its Equivalent. — It seems that a power granted to the assignee in a deed of assignment for the benefit of creditors, to sell and dispose of goods, and collect accounts, "converting the same into cash or its *equivalent*," is not a power to sell on credit. "It may be doubted," said the court, "if this can be construed to empower the assignee to sell for anything but money. The meaning of the provision is not clear. It is not easy to conceive what is intended to be embraced by the use of the words 'its *equivalent*.' But to be *equivalent* to cash must be something commercially as good as cash, or, as we take it, something that could be readily converted into money at a fixed price." Kellogg v. Muller, 68 Tex. 182.

1. **Equivocation.** — In Begg v. Begg, 56 Wis. 537, it was said: "In a sense, as to the real person intended, there is a latent ambiguity in the deed, but more properly, perhaps, it is a question of identity; as in wills, 'where the words are neither ambiguous nor obscure, and the devise on the face of it is perfect and intelligible, but from some of the circumstances admitted in proof an ambiguity arises as to which of two or more things, or which of two or more persons (each answering the words in the will), the testator intended.' 1 Greenl. on Ev., § 289. This is what Lord Bacon called 'an *equivocation*;' that is, the words equally apply to two things or two persons."

2. **Nagle's Estate**, 134 Pa. St. 41.

Erasure. — In Messick v. Ward, 1 Grant's Cas. (Pa.) 437, it was held that where *erasures* occur in a record, the *erased* writing is to be left unread. It is not to be used as a means of construing the record itself. The court said: "We cannot possibly attribute so much importance to an *erasure*. Usually that which is *erased* is not to be read, but this would be to make it the means of announcing a most important part of the agreement. An *erasure* of one agreement cannot be equivalent to the expression of a contrary agreement. The *erasure* left the parties without agreement on

the subject, and then the rules of law must stand as their guide in relation to it. And besides, it would be most dangerous to establish a rule that any unexpressed intention is to be inferred from an *erasure*. We have enough to do to construe what is written in plain words, without requiring us to interpret *erasures*. There ought to be no such thing in a record, but if they be at all allowed, we must simply leave the *erased* writing unread."

3. **Mortmain.** — A Bequest to Erect a Charitable Foundation imports that land is to be bought, unless the will manifests a purpose that it is to be otherwise procured. Atty.-Gen. v. Parsons, 8 Ves. Jr. 186. See also Philpot v. St. George's Hospital, 6 H. L. Cas. 338, *overruling* Trye v. Gloucester, 14 Beav. 173; Chamberlayne v. Brockett, L. R. 8 Ch. 206; and compare *In re White's Trusts*, 33 Ch. Div. 453.

Erection and Completion. — A prisoner was indicted under a statute of New York making it a felony to set fire to or burn "any building *erected* for the manufacture of cotton or woolen goods, or both." It was proved upon the trial that the whole frame of the structure fired, designed for a factory, was not up at the time; that the part which had been raised was not entirely inclosed; the floors were not laid, the stairs were not up, and no part of the building was ready for occupation, or substantially ready for the reception of the machinery. It was held, Grover, Peckham, and Folger, JJ., dissenting, that this was not a building *erected* within the statute. Said the court: "A 'building *erected*' is quite distinct from a 'building being erected.' * * * To *erect*, when used in connection with a house or church or factory, is to build; and neither can be said to be *erected* until they are built, completed." McGary v. People, 45 N. Y. 153.

But in Johnston v. Ewing Female University, 35 Ill. 528, it was said: "The instructions asked by the appellant are all on the hypothesis that a building should be completed within eighteen months, worth ten thousand dollars. Such is not the terms of the contract, nor the intention of the parties, as we gather from the words used. There is a great difference between *erecting* a building and completing one. A building may be said, without doing violence to language, to be *erected* when the walls are up and the material on the ground to complete it. It may be, the appellant's subscription, if paid, would have gone far towards its full completion, and by his default it was not completed." This case was upon the construction of a contract subscribing a certain sum in aid of a university, payable when a building should be *erected*.

Build, Erect, or Construct. — In La Crosse, etc., R. Co. v. Vanderpool, 11 Wis. 119, it was

EROSION. (See also the titles ACCRETION, vol. 1, p. 467; RIPARIAN RIGHTS.) — The gradual eating away of the soil by the operation of currents

said: "In Crabbe's Synonyms, 498, cited by the counsel for the plaintiff in error, the most precise and accurate distinction between the words 'build,' *erect*, and 'construct' seems to be stated. It says: 'What is built is employed for the purpose of receiving, retaining, or confining; what is *erected* is placed in an elevated position; what is constructed is put together with ingenuity.' And again: 'Houses are built, monuments *erected*, and machines constructed.' Such nice distinctions and shades of meaning should never be observed in opposition to the ordinary and common understanding of men, unless the intent of the statute manifestly required it." This was upon the construction of a mechanics' lien law.

Lease — Trade Fixtures. — The lessees of a mill covenanted to deliver up the premises and all future *erections* and additions to or upon the same at the end of the term. It was held that the lessees were entitled to remove all machinery in the nature of trade fixtures. The court said: "The right of a tenant to remove trade fixtures may doubtless be qualified by the covenants in the lease. But we are of opinion that the covenant to deliver up in good order 'all future *erections* or additions' to or upon the premises is limited, in purpose and effect, to new buildings erected or old buildings added to — putting such *erections* and additions upon the same footing, in respect of the obligation to keep in repair, as the buildings upon the premises at the time of the execution of the lease; and cannot be extended so as to deprive the tenants of the right to remove trade fixtures, much less personal property, put by them upon the premises during the term. *Bishop v. Elliott*, 11 Exch. 113." *Holbrook v. Chamberlin*, 116 Mass. 162.

Same — A Greenhouse Is an Erection. — But it has been held that a covenant in a lease to yield up at the expiration of the term "all *erections* and improvements which during the said term should be *erected*, made, or set up," is broken by the removal of the sashes and framework of a greenhouse *erected* during the term, the framework of which was laid upon walls built for the purpose of receiving it and embedded in mortar thereon. Said Bosanquet, J.: "*Erection* and improvement' are not technical words. I think this greenhouse was an 'improvement' within the meaning of the covenant, and it was undoubtedly an *erection*." *West v. Blakeway*, 2 M. & G. 757, 40 E. C. L. 612. See generally the titles FIXTURES; LANDLORD AND TENANT; LEASES.

Vault. — A structure above ground, arranged and intended solely as a place for the permanent interment of the dead, is not a building within the meaning of the provisions of the *New York Penal Code*, §§ 498, 504, defining the crime of burglary in the third degree, nor is it an *erection* or inclosure within the provision (§ 504) specifying what the term "building," as used in the chapter in relation to burglary, includes; and an indictment for that offense cannot be sustained by proof of breaking and entering such a structure. *People v. Richards*, 108 N. Y. 137, *reversing* 44

Hun (N. Y.) 278. See the title BURGLARY, vol. 5 p. 44.

Erecting a Monument. — In *Campbell v. Board of Com'rs*, 115 Ind. 593, it was said: "As has been shown, \$200,000 is appropriated for the purpose of *erecting* a monument, and the commissioners are directed to 'build' a monument accordingly, on a particular tract of land belonging to the state, at a cost not to exceed that sum, except in so far as the amount may be increased by additional donations and contributions from other sources. We construe these provisions to mean that the amount appropriated by the state must, so far as it may be used at all in that connection, be devoted to the structural work of the monument, and hence not to merely incidental expenses, which do not enter into the cost value of the edifice, and which must be otherwise paid. In this view we are supported by the case of *State-House Com'rs v. Whittaker*, 81 Ind. 297."

Erection of Station. (See also the titles MUNICIPAL AID; STATIONS.) — A railroad-aid note was conditioned for the *erection* within fifteen months of a regular station for passengers, to be built at a designated point. In construing this condition the court, in *Port Huron, etc., R. Co. v. Richards*, 90 Mich. 579, said: "The agreement contemplated that facilities should be furnished, not only for the accommodation of passengers, but for the reception and shipment of freight. This involved more than a mere place of shelter. 'And have *erected* a regular station' means more than the *erection* of a station house. The word *erect* may mean 'to build,' or it may mean 'to set up or found or establish or institute,' according to the context. In the connection here used, it means 'to set up, to establish.'"

A Scaffold Is an Erection. — The bottom of a shaft of a mine had water in it, and the owner of the mine caused a scaffold to be *erected* at some distance above the bottom of the mine for the purpose of working a vein of coal which was on a level with the scaffold. It was held that this scaffold was "an *erection* used in conducting the business of a mine" within the statute 7 & 8 Geo. IV., c. 30, § 7, and that damaging it with intent to destroy it or to render it useless was felony. *Reg. v. Whittingham*, 9 C. & P. 234, 38 E. C. L. 96. And within the same statute a wooden trough by means of which water is conveyed to the mine is an *erection*. *Barwell v. Hundred of Winterstoke*, 14 Q. B. 704, 68 E. C. L. 704.

Flagging. — In *McDermott v. Palmer*, 8 N. Y. 383, it was held that the *New York Act* of 1830 did not confer a lien for work performed in flagging the sidewalks, yards, and areas of a building in the process of *erection*. The statute gave a lien for work performed towards the *erection* or construction or finishing of buildings.

The Painting of a House Is a Part of Its Erection. — In *Martine v. Nelson*, 51 Ill. 422, it was held that house painters are within the protection of a mechanics-lien law that secures a lien to persons who "furnish labor or materials for *erecting* or repairing" a building.

or tides. The proprietorship of lands may be lost by erosion, and regained by accretion.¹

"If the builder," said the court, "protects the walls of his house from the action of the elements by covering them with a coat of paint or stucco, is it reasonable to say he has not used these materials in *erecting* his house?"

Whether Alterations in a Building Constitute an Erection of a Building.—Under a statute which provided that "no building shall be *erected* within the town of Boston, and used and improved" as a livery stable, within one hundred and seventy feet of a church, it was held that the enlarging and fitting up as a livery stable of a dwelling house that was built before the act was passed was an *erection* of a livery stable. *Hastings v. Aiken*, 1 Gray (Mass.) 163.

Same—Fire Limits. (See also the title FIRE LIMITS.)—To elevate and enlarge a wooden building so as materially to alter its character is an offense within the meaning of a city ordinance passed "to prevent the *erection* of wooden buildings" within certain limits of the city. *Douglass v. Com.*, 2 Rawle (Pa.) 262. But in *Booth v. State*, 4 Conn. 65, it was held that where a wooden building *erected* originally for a meeting house, and subsequently used for a joiner's shop, was extensively repaired, and converted into a dwelling house, such repairs and alterations did not constitute the *erection* of a wooden dwelling house within the statute to secure the city of New Haven from damage by fire. Said the court: "That a former building was extensively repaired and converted to a new use, is not disputed; but whether regard be had to etymology or the popular meaning of language, no dwelling house was built or *erected*."

Same—Adding Story.—A city ordinance forbade any person to *erect* any building outside the fire limits and within thirty feet of any building not his own, except of such materials as are allowed for buildings inside said limits. It was held that adding a story to a house out of prohibited material was a violation of the ordinance. It was insisted by the plaintiff in error that adding a story could not constitute the *erection* of a building. The court said: "The corporation court was not able to perceive the substance in this shadow of an argument, and in this there is no error; for there is no difference in the meaning of the word *erect* when applied to a whole building, and when applied to a part of a building. In both cases it means 'to build.'" *Carroll v. Lynchburg*, 84 Va. 804.

Same—Ordinance.—If a building be so changed in plan, structure, dimensions, and general appearance that it might, according to the common understanding of men, in common parlance be called a new building, then it may be deemed a violation of an ordinance forbidding the *erection* of a building upon its site. The *erection* of a new kitchen, as an addition to an old dwelling, may be deemed a violation of such an ordinance. *Delione v. Long Branch Com'rs*, 55 N. J. L. 108.

Erection and Removal.—An indictment for burning in the night-time a building *erected* for public use is sustained by proof of burning

in the night-time a building removed by a city, and afterwards fitted up as a schoolhouse and engine house. The court said: "The exception cannot be sustained. The removal of the building to a new position, and there fitting it up for its intended occupancy, was as much *erecting* it there as if all the materials had been brought there and put together." *Com. v. Horrigan*, 2 Allen (Mass.) 159.

In *Burke v. Brown*, 10 Tex. Civ. App. 298, it was held that tools rented for use in moving a house are tools used in the *erection* thereof within a mechanics'-lien law. The court said: "As used in the law, the words *erection* and 'construction' seem to be synonymous in their meaning; and in common acceptance, when applied to a house, they mean the building of it by putting together the necessary material and raising it; but it does not require a strained sense to bring the removal of a house from the place where it has been put together, and placing it in position or setting it up in another place, within the meaning of these words as used in the law."

Where a building, partly brick and partly frame, after undergoing repairs, was removed, and after its removal a cellar was dug under it and walled up, and a new chimney built, and the house newly weather-boarded and plastered, it was held that it was a building *erected* and constructed, within the true intent and meaning of the act securing to mechanics and others payment for their labor and material. *Matter of Burling*, 1 Ashm. (Pa.) 377.

But in *Trask v. Searle*, 121 Mass. 229, it was held that no lien existed for labor performed or furnished in the removal of a building. The court said: "We can have no doubt that the word *erection* in the statute means construction, and that it cannot mean to include something very much like construction. The language of the statute is to be construed by the ordinary use of the words it employs. The moving a building is quite as technical and well-understood a phrase as the *erection* of a building, or altering a building, or repairing a building; and in the ordinary use of language no person would understand that either the *erection*, alteration, or repair of a building involved its removal from one place to another. If by implication the removal of a building is to be deemed an *erection*, alteration, or repair, the pulling down a building must also be included, and the work which would create a lien would be determined by judicial and not by legislative authority."

In *Brown v. Hunn*, 27 Conn. 332, it was held that the removal of a building from one part of a lot to another and its permanent location in the place to which it is removed do not constitute an *erection* of a building within the intent of the statute which forbids the *erection* of wooden buildings within fire limits.

1. *Mulry v. Norton*, 100 N. Y. 433. In this case the court said: "It is undoubtedly true that the proprietorship of lands may be lost by *erosion* or submergence, the one consisting of a gradual eating away of the soil by the opera-

ERRONEOUS. (See also **ILLEGAL**.)—Deviating from the law. The word is never used by courts or law writers as designating a corrupt or evil act.¹

ERROR. (See also the titles **MISTAKE**; **NEW TRIAL**; **VENDOR AND PURCHASER**.) As to clerical error, see **CLERICAL**, vol. 6, p. 131, and the references there given. As to appeals, see **ENCYC. OF PL. AND PR.**, vol. 2, p. 1. As to assignment of errors, see **ENCYC. OF PL. AND PR.**, vol. 2, p. 920.)—See note 2.

tion of currents or tides, and the other of its disappearance under the water and the formation of a navigable body over it. * * * It is not, however, every disappearance of land by *erosion* or submergence that destroys the title of the true owner, or enables another to acquire it, for the *erosion* must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by *erosion* may be returned by accretion, upon which the ownership temporarily lost may be regained. When portions of the mainland have been gradually encroached upon by the ocean so that navigable channels have been extended thereover, the people, by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners."

1. Corrupt Motive.—Thompson v. Doty, 72 Ind. 338. In that case the complaint alleged that the costs assessed against the complainant were "*erroneous* and illegal." Upon the question of implied corruption on the part of the clerk, the court said: "There is not the slightest intimation that the appellant acted from any corrupt motive. It is not even claimed that the appellant knowingly made a wrong taxation of costs. The allegation is that the costs taxed were '*erroneous* and illegal,' and we cannot, from this, infer that there was a corrupt motive, a demand by color of office, or any kind of compulsion. 'Illegal' means that which lacks authority of or support from law. People v. Kelly, 1 Abb. Pr. N. S. (N. Y.) 432. *Erroneous* means deviating from the law. Both terms have, sometimes, other significations attached, but in legal proceedings the meaning we have assigned is that generally annexed to them. Courts often speak of *erroneous* rulings, and always as meaning such as deviate from or are contrary to the law, but the term *erroneous* is never used by courts or law writers as designating a corrupt or evilact."

Erroneous and Illegal Assessment. (See also the titles **SPECIAL ASSESSMENTS**; **TAXATION**.) In Matter of New York Catholic Protectory, 8 Hun (N. Y.) 96, affirmed 77 N. Y. 342, it was said: "The distinction is between an *erroneous* and illegal assessment. The former is

when the officers have power to act and err in the exercise of the power. The latter is where they have no power to act at all, and it does not aid them to decide that they have." See also National Bank v. Elmira, 53 N. Y. 58.

Erroneous Judgment. (See also the title **JUDGMENTS AND DECREES**.)—An *erroneous* judgment is one rendered according to the course and practice of the courts, but contrary to law; as where it is for one party when it might be for another, or is for too little or too much. An irregular judgment is one contrary to the course and practice of the court, as a judgment without service of process. Wolfe v. Davis, 74 N. Car. 597. See also Koonce v. Butler, 84 N. Car. 223.

2. Error Apparent on the Face of the Decree.—In Eaton v. Dickinson, 3 Sneed (Tenn.) 400, it was said: "By error apparent on the face of the decree is not meant a decree merely erroneous and improper in itself, because based on inadmissible or improper evidence, or contrary to or unsupported by proof; but a decree that in point of law is erroneous upon the state of facts as assumed and set forth in the body of the decree itself. In the language of a distinguished chancellor, 'the question is not whether the cause is well decided, but whether the decree is right or wrong on the face of it.' Perry v. Phelps, 17 Ves. Jr. 178." See also Brown v. Severson, 12 Heisk. (Tenn.) 383; Burson v. Dosser, 1 Heisk. (Tenn.) 759.

Telegraph Company. (See also the title **TELEGRAPHS AND TELEPHONES**.)—The word *errors* in a contract with a telegraph company which exempts the company from liability for "delays, errors, and remissness" in the transmission of a message, implies sending or delivering a wrong message, or a correct message to the wrong person, and not a failure to deliver any message at all. Baldwin v. U. S. Telegraph Co., 54 Barb. (N. Y.) 515, 6 Abb. Pr. N. S. (N. Y. Supreme Ct.) 423, reversed upon other grounds, 45 N. Y. 744.

Drains. (See generally the title **DRAINS AND SEWERS**, vol. 10, p. 228.)—A statute provided that assessments for establishing a drain might be reviewed for *error* and inequality. In construing this provision, the court in Thomas v. Walker Tp., (Mich. 1898) 74 N. W. Rep. 1049, said: "A question of some difficulty arises as to what is included within the term *error*. The commissioner might make an *error* in the amount, so that the total assessments would be more or less than the total amount apportioned to the lands. This would be *error* which the board could correct. But does the statute contemplate that the board may change the assessment district as fixed by the commissioner and exclude any lands which, in its judgment, are not benefited? Does the term *error* mean that the commissioner erred in his judgment as to the lands

ERROR, WRIT OF. — See ENCYC. OF PL. AND PR., vol. 7, p. 817.

which are and those which are not benefited? The logical result of this holding would be that the board might determine that none of the lands were benefited, and thus defeat the construction of the drain."

Error of Judgment. (See also the title NEGLIGENCE.)— In *The Tom Lysle*, 48 Fed. Rep. 693, it was said: "The distinction between an *error* of judgment and negligence is not easily determined. It would seem, however, that if one, assuming a responsibility as an expert, possesses a knowledge of the facts and circumstances connected with the duty he is about to perform, and, bringing to bear all his professed experience and skill, weighs those facts and circumstances, and decides upon a course of action which he faithfully attempts to carry out, then want of success, if due to such course of action, would be due to *error* of judgment, and not to negligence. But if he omits to inform himself as to the facts and circumstances, or does not possess the knowl-

edge, experience, or skill which he professes, then a failure, if caused thereby, would be negligence."

A Receipt given by the consignees of goods to a carrier, acknowledging their receipt in good order, and in which the consignees are requested to give notice of any *errors* therein in twenty-four hours, subject to the condition that the carrier will otherwise consider itself discharged, does not exempt the carrier from liability for damages caused by negligence in transporting the goods, although no notice was given thereof to the carrier. Said the court: "Construing the word *errors* with relation to the subject-matter, it would mean *errors* in the delivery, as in a less or greater number of packages, or packages directed to different persons; *errors* which it is necessary to correct at once. The word *errors* in this connection means mistakes, not waste or negligence." *Sanford v. Housatonic R. Co.*, 11 Cush. (Mass.) 155.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, vol. 7, p. 913.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ACCESSORY*, vol. 1, p. 257; *ACCOMPLICES*, vol. 1, p. 389; *AIDER AND ABETTOR*, vol. 2, p. 29; *ARREST*, vol. 2, p. 832; *ATTEMPTS TO COMMIT CRIME*, vol. 3, p. 250; *BAIL (IN CIVIL CASES)*, vol. 3, p. 587; *BAIL AND RECOGNIZANCE (IN CRIMINAL CASES)*, vol. 3, p. 651; *CONFESSIONS*, vol. 6, p. 520; *CONSPIRACY*, vol. 6, p. 830; *CORONERS*, vol. 7, p. 598; *DEPUTY*, vol. 9, p. 368; *IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS*; *JUSTICES OF THE PEACE*; *LIMITATION OF ACTIONS*; *REWARDS*; *SHERIFFS, MARSHALS, AND CONSTABLES*; *WARRANTS*.

I. DEFINITIONS. — *Escape in General* is understood, where a person who is under lawful arrest, and restrained of his liberty, either violently or privily evades such arrest and restraint, or is suffered to go at large before delivered by due course of law.¹

Voluntary and Negligent Escapes. — There are at common law but two kinds of escape; one wilful, or voluntary as it is oftener called, the other negligent.²

1. Definition. — Bacon's Abr., title *Escape* in *Civil Cases*.

For Other Definitions, see: *Benton v. Sutton*, 1 B. & P. 24; *Colby v. Sampson*, 5 Mass. 311; *State v. Ritchie*, 107 N. Car. 858; *Currie v. Worthy*, 2 Jones L. (47 N. Car.) 106; *Carter v. State*, 29 Tex. App. 5. See also *Lockwood v. Mercereau*, 6 Abb. Pr. (N. Y. Super. Ct.) 209; *Cosgrove v. Bowe*, 10 Daly (N. Y.) 359.

After Judgment in a Civil Suit every discharge of a prisoner without the consent of the plaintiff or creditor, or without due course of law, is an escape, for which the sheriff or jailer is liable, with the exceptions only which are recognized as cases of necessity; such for

instance as the case of a prisoner who leaves the jail when in danger from a sudden fire within the jail, or when the jail is broken by a public enemy. *Cargill v. Taylor*, 10 Mass. 207; *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 152.

2. Classification of Escapes. — *Martin v. State*, 32 Ark. 126; *Butler v. Washburn*, 25 N. H. 258; *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 150. See also *State v. Mullen*, 50 Ind. 598.

Voluntary Escape. — An escape is said to be voluntary when it is by the consent or default of the officer. *Bonafous v. Walker*, 2 T. R. 131; *Tillman v. Lansing*, 4 Johns. (N. Y.) 47.

Actual or Constructive Escapes.—A voluntary escape may be either actual or constructive. The first occurs where the prisoner in fact gets out of prison and unlawfully regains his liberty;¹ the second, where the prisoner obtains more liberty than the law allows, although he still remains in confinement.²

An Escape May be Either With or Without Force.—It may be committed by the party himself, either without force before he is put in hold, or with force after he is restrained of his liberty; or it may be committed by others, and this also either without force, by their permission or negligence, or with force, by the rescuing of the party from custody. Where the liberation of a party is effected either by himself or others without force, it is more properly called

An escape from jail by the connivance of the sheriff is a voluntary escape. *Lash v. Ziglar*, 5 Ired. L. (27 N. Car.) 710.

If a sheriff by mistake releases a defendant against whom a ca. sa. had been lodged with him, it is a voluntary escape. *Filewood v. Clement*, 6 Dowl. P. C. 508, 1 W. W. & H. 165.

A complaint which states that the sheriff "suffered and permitted such person to escape and go at large," states a voluntary and not a negligent escape. *Loosey v. Orser*, 4 Bosw. (N. Y.) 391. See also *Holmes v. Lansing*, 3 Johns. Cas. (N. Y.) 74; *Grimes v. Butler*, 1 Bibb (Ky.) 192. Compare *Toll v. Alvord*, 64 Barb. (N. Y.) 570; *Warberton v. Woods*, 6 Mo. 8. In this last case it was held that under the 52d section of the act respecting Executions which provides that "if any officer to whom any execution shall be delivered," etc., "shall permit him to escape," etc., the word "permit" includes escapes both negligent and voluntary.

Taking Prisoner from one County to Another on Writ of Attachment.—Where a writ of attachment for contempt was directed to the sheriff of Westmoreland county to have the body of the defendant before the court in York county, and the sheriff took him out of the county, and while in the county of Sunbury on his way to York county, told the prisoner that he discharged him from custody under that writ, and re-arrested him under a similar writ directed to the sheriff of the county of York, who had deputed the sheriff of Westmoreland county to execute it, it was held that this discharge was not a voluntary escape, as there must have been an intention on the part of the sheriff to give the prisoner his liberty and to allow him to go at large. *Reg. v. Hawke*, 28 New Bruns. 407.

Negligent Escape takes place when the prisoner goes at large, unlawfully, either because the building or prison in which he is confined is too weak to hold him, or because the keeper by carelessness lets him go out of prison. *Bouvier's Law Dictionary*.

A negligent escape is where the party arrested or imprisoned escapes against the will of him that arrests or imprisons him, and is not freshly pursued and taken again before he has been lost sight of. *Dalt.*, c. 159; *Burn's Just.*, tit. Escape, IV.

In *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 152, it is said that every going out of prison without the knowledge or default of the keeper is a negligent escape.

The meaning of the term "negligent escape" as used in the *North Carolina Act of 1777*, c. 118, is the same as that given to the

term at common law. *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 159.

1. Actual Escape.—*Bouvier's L. Dict.* See also *Carter v. State*, 29 Tex. App. 5; *State v. Davis*, 14 Nev. 439, 33 Am. Rep. 563. And see the succeeding portions of the article.

2. Constructive Escape.—*Bouvier's L. Dict.*; *Benton v. Sutton*, 1 B. & P. 24; *Colby v. Sampson*, 5 Mass. 311; *Skinner v. White*, 9 N. H. 204; *Platt v. Lock*, *Plowd.* 37. And see the subsequent portion of this article.

In *Currie v. Worthy*, 2 Jones L. (47 N. Car.) 104, it was held not to be an escape in a sheriff to permit a debtor committed under a ca. sa. to remain in prison with the door of the prison open, unless such debtor passes out of the prison.

Committing Sheriff or Jailer to Jail of Which He Has Custody.—If the jailer be committed to his own jail, on execution by the sheriff, and no new keeper is appointed, it is an escape of the jailer, for which the sheriff is accountable; but it is not an escape of the other prisoners, if they are in fact kept in custody under the authority of the jailer or his agent. *Steere v. Field*, 2 Mason (U. S.) 486.

Where a deputy sheriff arrests a deputy jailer on process which requires his commitment, it is his duty to hold him, and notify the sheriff that he may take the custody of him, or appoint another deputy jailer; and if he releases him on giving a bond, after putting him in prison and taking the keys of the prison from him, with his assent, it is an escape from the deputy sheriff for which the sheriff is liable; and the subsequent assent of the sheriff to the act of his deputy will not invalidate the commitment. *Skinner v. White*, 9 N. H. 204; *Day v. Brett*, 6 Johns. (N. Y.) 24.

Giving Prisoner Keys of Jail.—Where the sheriff, after placing a prisoner in the jail delivered to him the key thereof, and the prisoner, during the possession of it, permitted such persons as he chose to enter into and depart from the jail, generally keeping the jail door open, and having it in his power to depart from the jail at his own pleasure, it has been held that this was an escape for which the sheriff was liable. *Wilkes v. Slaughter*, 3 Hawks (10 N. Car.) 211. This case is *dis-sented from* in *Currie v. Worthy*, 2 Jones L. (47 N. Car.) 104.

It is a voluntary escape in a jailer to make a prisoner for debt a turnkey and to intrust him with the keys of the outer doors as well as any other doors at all times by night and by day. *Steere v. Field*, 2 Mason (U. S.) 526, citing *Wilkinson v. Salter*, *Lee temp. Hardw.* 310.

an escape; where it is effected by the party himself with force, it is called prison breaking; and where it is effected by others with force, it is commonly called a rescue.¹

II. ESCAPE IN CIVIL PROCEEDINGS — 1. Effect upon Creditor's Rights — Election — No Discharge of Debt. — The assent of an officer to the escape of a defendant does not affect the rights of the plaintiff. In such case he has a two-fold remedy — one against the sheriff for his wrong or negligence; and the other, to obtain satisfaction from the defendant's lands or goods, or by retaking his body in execution.²

Or if the Prisoner Voluntarily Returns, and is in prison, the plaintiff may, by renewing the process, treat him as again in custody on his execution, or may hold the sheriff liable.³

1. 1 Hale 590; 2 Hawk. P. C., c. 17-21; 1 Russ. on Crimes (9th Amer. ed.) 581.

2. **Creditor's Rights After Escape.** — Jackson v. Bartlett, 8 Johns. (N. Y.) 367; Lansing v. Fleet, 2 Johns. Cas. (N. Y.) 3, 1 Am. Dec. 142; Hopkinson v. Leeds, 9 Phila. (Pa.) 7, 29 Leg. Int. (Pa.) 108. See also Arnold v. Steeves, 10 Wend. (N. Y.) 515.

It was formerly held that where the sheriff suffered a prisoner in execution to make a voluntary escape, the prisoner was, in such case, absolutely discharged from the creditor, and that the right of action was entirely transferred against the sheriff, who, by means of such escape, became debtor *ex delicto*. Arundell v. Wythan, Leon. 73, *per* Hobart, Essex's Case, Hob. 202.

But Later Adjudications are to the contrary, and the reason given is that the prisoner should not be permitted to take advantage of his own wrong, and the plaintiff should not be turned over to the sheriff, who might be insolvent, for satisfaction. Accordingly it has been held that the plaintiff may have an action of debt, or a *scire facias quare executionem non* against the prisoner. Allanson v. Butler, Sid. 330; Buxton v. Home, 1 Show. 174; Basset v. Salter, 2 Mod. 136; James v. Peirce, Vent. 269, Jones 21, 22; Compton v. Ireland, 1 Mod. 194; Sudall v. Witham, 2 Lutw. 1264; Jones v. Pope, 1 Saund. 35, note 1. See also Berry v. Hoke, 1 Rich. L. (S. Car.) 76, and the title ARREST, vol. 2, p. 830, note 4.

The Statute 8 and 9 Wm. III., c. 27, § 7, provides that when any prisoners confined in execution shall escape, their creditors may retake them by any new *capias* or *ca. sa.* or sue forth any other writ of execution on the judgment. But the plaintiff before that statute had a right to retake the prisoner. The only alteration made by the statute is, that the creditor may also have a remedy by any other species of execution. Jones v. Pope, 1 Saund. 35, note 1; Hesketh v. Ward, 17 U. C. C. P. 679; Lansing v. Fleet, 2 Johns. Cas. (N. Y.) 3, 1 Am. Dec. 142.

But if the debtor who escapes has goods, the plaintiff is not bound to avail himself of the privilege conferred by the statute 8 & 9 Wm. III., c. 27, and issue a writ of return against the sheriff for the escape, and the jury ought not, in estimating the damages, to take into consideration that the plaintiff might by writ of *f. fa.* have realized a portion of his debt. Arden v. Goodacre, 11 C. B. 367, 377, 73 E. C. L. 367, 377.

Supposition of Debtor's Escape. — Where suit had been brought against the sheriff by the plaintiff supposing that the defendant had escaped, in which suit the sheriff succeeded, it was held that the plaintiff might afterwards have a new *ca. sa.* or *f. fa.* issued on the original judgment. Anthony v. Dunbar, 1 How. Pr. (N. Y. Supreme Ct.) 117.

3. **Right of Creditor where Escaped Party Voluntarily Returns.** — Lansing v. Fleet, 2 Johns. Cas. (N. Y.) 3, 1 Am. Dec. 142; Thompson v. Lockwood, 15 Johns. (N. Y.) 256; Littlefield v. Brown, 1 Wend. (N. Y.) 398.

An execution against the debtor's property may be issued, even though there be a judgment against the sheriff for the escape, which has been unsatisfied; for the judgment is not a satisfaction of the debt. Kelly v. Wilson, 7 New Bruns. 476; Cheever v. Mirrick, 2 N. H. 376.

Satisfaction of Judgment Against Debtor. — The recovery of judgment in an action against the sheriff for an escape, though for the whole amount of the plaintiff's debt, is not a satisfaction of the original judgment obtained against the judgment debtor, unless such judgment against the sheriff be paid. Kelly v. Wilson, 7 New Bruns. 476.

Nor will a note taken by the creditor from the sheriff, for the amount of a judgment obtained against the sheriff for the escape, be a payment of the judgment against the original debtor, without an express agreement that it shall be so considered, and without giving a discharge of the execution. Cheever v. Mirrick, 2 N. H. 376.

Imprisonment of Body as a Satisfaction of Debt. — Formerly imprisonment of the body on a commitment in execution was, in contemplation of law, full satisfaction of the debt, so far as to prevent the plaintiff from having other recourse against the debtor. Cohen v. Cunningham, 8 T. R. 123; Wolverton v. Com., 7 S. & R. (Pa.) 278; Perkins v. Giles, 9 Leigh (Va.) 400, 33 Am. Dec. 249. See also Lakin v. State, 89 Ind. 72; Patterson v. Westervelt, 17 Wend. (N. Y.) 548.

But in Flack v. State, 95 N. Y. 471, it is held that an arrest on a body execution is now generally considered not to operate as a satisfaction of the judgment, but simply as a suspension for the time being of other remedies of the creditor therein. See also Howard v. Crawford, 15 Ga. 429, to the same effect. And see the title IMPRISONMENT FOR DEBT AND IN CIVIL CASES.

Assignment of Bond. — Or he may, at his election, take an assignment of the bond given by the prisoner, and wherever the sheriff may maintain an action under it, so may the assignee.¹

Payment. — There is no repugnance or inconsistency in suing for the debt and for the escape; but payment by either party will discharge the other.²

Waiver of Action Against Sheriff. — In *New Jersey* it has been held that the plaintiff in an execution having knowledge of an escape of the debtor, appearing in court as a creditor, and opposing the discharge of the debtor under the insolvent laws, who is thereupon remanded to the custody of the sheriff, has made his election, and that any action against the sheriff which he might have maintained is waived.³ But the contrary is held in *North Carolina*.⁴ But where the creditor has no knowledge of the escape at the time of opposing the application of the debtor for discharge, he does not thereby waive his right of action against the sheriff for the escape,⁵ even though he receives a dividend on his claim against the debtor under the insolvent proceedings.⁶

2. Escape on Mesne and on Final Process Distinguished. — On **Final Process**, the object is to deprive the defendant of his liberty in order that he may be induced to pay the judgment against him, and the object of the process is delayed if not defeated by an escape of any kind. The officer in such case is not to keep the defendant, but to commit him to jail, or deliver him to the keeper of the jail, and he is commanded to keep him in said jail until he shall pay or perform what he is required to do, and either the officer or the jailer will be guilty of an escape if he fails to do what he is thus commanded to do.⁷ In such a case nothing but the act of God or of the enemies of the country will excuse the officer for an escape, for in this respect his liability is like that of a common carrier.⁸

Mesne Process. — The object of mesne process is to have the defendant in court at its session, that the contested rights between the parties may be set-

1. Creditor May Take Assignment of Bond. — *Calcutt v. Ruttan*, 13 U. C. Q. B. 229.

2. *Hopkinson v. Leeds*, 9 Phila. (Pa.) 7, 29 Leg. Int. (Pa.) 108.

3. Waiver of Action by Creditors. — *Richardson v. Rittenhouse*, 40 N. J. L. 237.

4. Contra. — *Currie v. Worthy*, 3 Jones L. (48 N. Car.) 315.

Appearance by Attorney. — A prisoner gave notice to his creditor of his intention to disclose and to have a certificate issued to him on his taking the poor debtor's oath. In pursuance of such notice, the creditor's attorney appeared at the time and place appointed, before two justices, one chosen by the debtor and the other by the jailer, who, without authority, assumed to act for the creditor, on the attorney's refusing to choose a justice in accordance with the statute. The attorney having protested against the jurisdiction of the justices, it was held that his appearance was not a waiver of the escape, even though he examined the debtor after such protestation, but merely a prudent precaution against possible contingencies. *Hotchkiss v. Whitten*, 71 Me. 579.

Creditor Holding Back. — In *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 160, there is a dictum that "if the creditor choose to hold back and not sue the sheriff for the escape until he shall have been at the trouble and expense of a re-capture, and incurred the further risk of the debtor's detainer thenceforward, until he satisfy the judgment, the law may well, and does, deny any action for the previous escape."

5. *Browning v. Rittenhouse*, 38 N. J. L. 279; *Hopkinson v. Leeds*, 9 Phila. (Pa.) 5, 29 Leg. Int. (Pa.) 108.

6. *Hopkinson v. Leeds*, 9 Phila. (Pa.) 5, 29 Leg. Int. (Pa.) 108.

Sheriff's Defense of Suit Against Debtor, Not an Election by Creditor. — A debtor was arrested on mesne process and permitted by the jailer to escape. The sheriff, after the escape, obtained leave to appear and defend the original suit against the debtor, in which suit judgment was recovered against the debtor; it was held that the creditor did not thereby elect to consider the debtor in custody, nor discharge the sheriff. *Scarborough v. Thornton*, 9 Pa. St. 451.

7. Escape on Final Process. — *Riley v. Whittiker*, 49 N. H. 147, 6 Am. Rep. 474. See also *Lewis v. Morland*, 2 B. & Ald. 65.

8. England. — *Alsept v. Eyles*, 2 H. Bl. 108.

United States. — *Servis v. Marsh*, 38 Fed. Rep. 797.

New Jersey. — *Patten v. Halsted*, 1 N. J. L. 324.

New York. — *Fairchild v. Case*, 24 Wend. (N. Y.) 384; *Brown v. Tracy*, 9 How. Pr. (N. Y. Supreme Ct.) 94.

North Carolina. — *Rainey v. Dunning*, 2 Murph. (6 N. Car.) 386; *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 160; *Mabry v. Turrentine*, 8 Ired. L. (30 N. Car.) 205.

South Carolina. — *Cook v. Irving*, 4 Strobb. L. (S. Car.) 207.

Pennsylvania. — *Green v. Hern*, 2 P. & W. (Pa.) 167.

tled, and the defendant be present to abide any judgment which shall be rendered against him; and if the sheriff has the body of the defendant after arrest upon mesne process, at the return day of the writ, it is sufficient.¹

Escape After Return Day of Writ. — But the sheriff is liable at common law, as well as by the express words of 8 and 9 Wm. III., c. 27, for an escape of a defendant after the return day of the writ, and before execution, whether the escape be voluntary or negligent, where he has been arrested upon mesne process;² but not unless the plaintiff has sustained actual damage thereby, or the prosecution of his suit has been delayed.³

3. What Constitutes Escape — Grounds of Liability — *a. IN GENERAL.* — Under the common law it is the sheriff's duty to keep every prisoner taken by him by virtue of a writ of execution, *in salva et arcta custodia*, and if he does not, but suffers the prisoner to go at large for the shortest possible time either before or after the return day of the writ, without the creditor's con-

1. Escape on Mesne Process — England. — *Lewis v. Morland*, 2 B. & Ald. 64; *Atkinson v. Matteson*, 2 T. R. 177; *Hawkins v. Plomer*, 2 W. Bl. 1048.

United States. — *Servis v. Marsh*, 38 Fed. Rep. 796.

New Hampshire. — *Cady v. Huntington*, 1 N. H. 138; *Langdon v. Hathaway*, 1 N. H. 369.

New Jersey. — *Richardson v. Rittenhouse*, 40 N. J. L. 235.

New York. — *Stone v. Woods*, 5 Johns. (N. Y.) 186; *Clark v. Cleveland*, 6 Hill (N. Y.) 349.

Tennessee. — *M'Kee v. Love*, 2 Overt. (Tenn.) 245.

When a Party Is Arrested under Capias, Pending Action and Before Judgment, and gives bail, and after judgment *ca. sa.* to fix bail issues, which is returned *non est inventus*, and he is then surrendered to the sheriff's custody by his bail, in their own discharge, such prisoner is still held under mesne process, and is not confined in execution. *Hesketh v. Ward*, 17 U. C. C. P. 675.

Attachment. — It has been held that an attachment for nonpayment of money is in the nature of mesne process. *Lewis v. Morland*, 2 B. & Ald. 56.

Or an attachment for nonpayment of costs. *Atkinson v. Mitchell*, 11 New Bruns. 345.

But in *Huntley v. Smith*, 4 U. C. Q. B. 184, it was held that an attachment for not paying money awarded is not to be looked upon as mesne process, though in its language it directs that the party is to be brought up at the return of the writ to answer for the contempt; that it is, in fact, in the nature of a civil execution; and that it is not necessary, in order to make the sheriff liable for an escape, that the party should be brought up on the return of the writ, and formally committed by the court.

In an action on the case against a sheriff for an escape under an attachment issued for nonpayment of costs, the order for the attachment is of itself *prima facie* evidence that a suit had been pending in which the order had issued. *Blower v. Hollis*, 1 Crompt. & M. 491.

2. Escape on Mesne Process After Return Day of Writ. — *Lusk v. Falls*, 63 N. Car. 189; *Stone v. Ellison*, 9 Ired. L. (31 N. Car.) 274; *Stone v. Woods*, 5 Johns. (N. Y.) 186; *Savage v. Jarvis*, 8 U. C. Q. B. 334.

The statute 8 and 9 Wm. III., c. 27, refers to the ill practices of the persons who executed the offices of marshal of the King's Bench, warden of the Fleet and other prisons, and directs that all persons committed to the King's Bench and Fleet, either on contempt, mesne process, or in execution, shall be actually detained within the prisons or the rules of the same, until thence discharged by due course of law, otherwise the officers shall be considered guilty of an escape. *Hesketh v. Ward*, 17 U. C. C. P. 678.

Where a party had been arrested on mesne process, the sheriff made the following return: "The defendant arrested, signed the appearance bond, refused to give surety, and made his escape by jumping on his horse and running, there being no one present to assist;" it was held that this was an escape for which the sheriff was liable. *Lusk v. Falls*, 63 N. Car. 188.

Under the New York Statute (3 Rev. Stat. 5th ed., 870, § 38), providing that when any defendant, at the time judgment shall be rendered against him, in any court of record, shall be in the custody of a sheriff or other officer upon process in the suit in which judgment shall have been rendered, the plaintiff shall charge such defendant in execution therein within three months after the last day of the term following that in which the judgment shall have been obtained, and if not so charged he is entitled to a supersedeas, if a defendant be legally in arrest under mesne process, though he be not charged in execution within three months, the sheriff is liable for an escape if he permit him to go at large. *Smith v. Knapp*, 30 N. Y. 581.

3. Plaintiff Must Have Sustained Damage in Order to Recover for Escape on Mesne Process — England. — *Alexander v. Macauley*, 4 T. R. 611, citing *Gunter v. Cleyton*, 2 Lev. 85; *Williams v. Mostyn*, 4 M. & W. 145, 7 Dowl. P. C. 38, 2 Jur. 643; *Planck v. Anderson*, 5 T. R. 37. *Canada.* — *Atkinson v. Mitchell*, 11 New Bruns. 347; *Chapman v. Doherty*, 25 New Bruns. 274.

Maine. — *Riggs v. Thatcher*, 1 Me. 68.

If an action be brought against the sheriff for an escape upon mesne process for not taking sufficient bail, and good bail be afterwards put in and justified, instead of the bail before taken, the plaintiff cannot recover. *Allingham v. Flower*, 2 B. & P. 246.

sent, he is liable for an escape,¹ even though he may have had the custody of the prisoner only for an instant; for once having custody, he is obliged to have a sufficient force to hold him.² And although a sheriff after voluntarily permitting the escape of a prisoner cannot forcibly retake him,³ yet if the prisoner voluntarily surrenders himself, it has been held that he is liable for an escape if he refuses to commit him.⁴ But at common law it is not necessary that a prisoner should be locked up in a certain room in order to keep him *in salva et arcta custodia*, and therefore it is not an escape to allow a prisoner the benefit of all the apartments within the jail walls.⁵ The contrary has

1. **The Act of Escape — In General — England.** — *Boyton's Case*, 3 Coke 44; *Hawkins v. Plomer*, 2 W. Bl. 1048; *Hobart v. Stroud*, Cro. Car. 210; *Balden v. Temple*, Hob. 202.

United States. — *Servis v. Marsh*, 38 Fed. Rep. 797; *Steere v. Field*, 2 Mason (U. S.) 516. *New York.* — *Hassam v. Griffin*, 18 Johns. (N. Y.) 49, 9 Am. Dec. 184.

Pennsylvania. — *Hopkinson v. Leeds*, 78 Pa. St. 399, 9 Phila. (Pa.) 5, 29 Leg. Int. (Pa.) 108; *Keim v. Saunders*, 120 Pa. St. 121.

Where, after arrest, a prisoner is left in custody of a person having no authority to detain him, this is an escape. *Benton v. Sutton*, 1 B. & P. 24; *Olmstead v. Raymond*, 6 Johns. (N. Y.) 62; *Palmer v. Hatch*, 9 Johns. (N. Y.) 329.

Or where a prisoner is released upon a promise to give bail or surrender. *Richardson v. Rittenhouse*, 40 N. J. L. 235; *Moore v. Moore*, 25 Beav. 8, 27 L. J. Ch. 385, 4 Jur. N. S. 250.

Or upon the promise of a third person to pay the amount of the execution under which the prisoner was arrested. *Wheeler v. Bailey*, 13 Johns. (N. Y.) 366.

Or where a prisoner is released by mistake. *Filewood v. Clement*, 6 Dowl. P. C. 508, 1 W. W. & H. 165.

Or by false representations made to the sheriff. *Cook v. Irving*, 4 Strobb. L. (S. Car.) 206.

Escape for a Few Minutes. — Where a sheriff discharged the duties of his office so negligently that in consequence of such negligence the prisoner left the jail and went into the town of Troy, even though for a few moments only, and although he actually returned, it was held that this was an escape. *Nall v. State*, 34 Ala. 265.

Taking Prisoner into Another County. — Where a prisoner in Ludgate, London, went into Southwark, Surrey, with a servant of the keeper, there was held to be an escape. But if the sheriff had brought the prisoner there, or through divers other counties, by force of the king's writ or command, or by baston, yet he is supposed to be in the custody of the first sheriff continually. *Platt v. Lock*, Plowd. 35.

Allowing a Prisoner to Reside Out of Prison Is an Escape. — *Jones v. State*, 3 Har. & J. (Md.) 559; *Haines v. East India Co.*, 11 Moo. P. C. 39.

Allowing a Prisoner to Remain at Large until the return day of the writ is an escape, although the prisoner be then brought into court. *Koones v. Maddox*, 2 Har. & G. (Md.) 106.

Where a defendant arrested under a *ca. sa.* was permitted by the sheriff's deputies, for a

consideration paid them, to go at large from day to day upon presenting himself at the sheriff's office until he was discharged upon giving bond under the insolvent laws, there was held to be an escape. *Hopkinson v. Leeds*, 78 Pa. St. 399.

2. Officer Unable to Hold Prisoner. — A sheriff's officer went with the plaintiff in an execution to the debtor's house to arrest him upon a *ca. sa.* The officer read the warrant to the debtor, who rushed out against the officer, and the officer caught him around the waist, but was unable to hold him. It was held that this was an escape for which the sheriff was liable. *Nicholl v. Darley*, 2 Y. & J. 399.

3. See generally *infra*, this title, *Recapture of Escaping Prisoner*.

4. Escape of Prisoner Who Voluntarily Returned after a Voluntary Escape. — *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 3, 1 Am. Dec. 142; *Stickle v. Reed*, 23 Hun (N. Y.) 417.

Voluntary Return and Escape of Debtor After Appointment of New Warden. — If there is a voluntary escape from a warden, and a new warden is appointed, and the debtor afterwards voluntarily returns, the warden may detain him, and if he suffers him to go at large it will be an escape. *James v. Peirce*, 2 Lev. 132; *Lenthall v. Lenthall*, 2 Lev. 109; *Grant v. Southers*, 6 Mod. 183.

5. Salva et Arcta Custodia. — See the observations of Judge Story in *Steere v. Field*, 2 Mason (U. S.) 517.

Under a South Carolina Statute a sheriff, at his own risk, might permit a debtor confined in jail to occupy any of the apartments of the building, without being guilty of an escape, provided the debtor so confined was not permitted to be outside of the prison walls without lawful authority. *Burns v. Brian*, 1 Speers L. (S. Car.) 131.

Taking Prisoner to Lock-up House in Sheriff's Bailiwick. — A sheriff carried a prisoner taken in execution to a lock-up house within his own bailiwick and kept him there fourteen days before the return of the writ. It appeared that it was the ordinary practice for the sheriff, when he took a prisoner in execution, to carry him to the lock-up house and keep him there for a convenient time, usually for several days, in order to give opportunity for a compromise, or for raising sums for the payment of the debt. It was contended that the words of the statute, 13 Edw. I., c. 11, are express that the prisoner "shall be sent or delivered unto the nearest gaol of the king in those parts, and shall be received of the sheriff or gaoler, and imprisoned in iron under safe custody." But Lord Mansfield, C. J., said that the sheriff had him in as strict and close cus-

been held in *Massachusetts*¹ and in *New Hampshire*; the holding in the latter state being based upon the decisions of the former.² The practice of allowing prisoners the benefit of all the apartments within the jail walls was finally confirmed by Parliament by the statute 8 and 9 Wm. III., c. 27.³

b. **LAWFUL CUSTODY OF PRISONER.** — If the prisoner be not in lawful custody at the time of the escape, no escape in law has been committed, for which an action will lie.⁴

tody as could be; that "as to the words of the old statute, it is now too late to recur to them, if the universal practice has shown that the construction here contended for is not the meaning of it." *Houlditch v. Birch*, 4 Taunt. 609.

Policy of Common Law in Subjecting Debtors to Close Imprisonment. — The original object of the common law in subjecting debtors to close imprisonment on execution was that by duress of imprisonment they might be coerced to pay their debts. *Boynton's Case*, 3 Coke 44; *Hassam v. Griffin*, 18 Johns. (N. Y.) 49, 9 Am. Dec. 184; *Wilkes v. Slaughter*, 3 Hawks (10 N. Car.) 214.

By the ancient common law, prisoners were not allowed to be kept in irons for the reason assigned by Bracton, *quia carcer, ad continendos non ad puniendos haberi debeat*." *Steere v. Field*, 2 Mason (U. S.) 516.

But under the statute Westminster 2, c. 2, prisoners for debt might be kept in irons, *carceri mancipentur in ferris*. *Hassam v. Griffin*, 18 Johns. (N. Y.) 49, 9 Am. Dec. 184.

This statute is the first instance where authority is given to the sheriff if need require, to keep the prisoner in irons, and that in terms, though not in construction, is confined to servants, bailiffs and receivers. *Steere v. Field*, 2 Mason (U. S.) 516.

1. In *Massachusetts* it has been held that allowing prisoners to occupy apartments within the jail not appropriated to prisoners is an escape both at common law and under the statutes of the state. *Bartlett v. Willis*, 3 Mass. 105; *Clap v. Cofran*, 7 Mass. 101; *Freeman v. Davis*, 7 Mass. 201; *Burroughs v. Lowder*, 8 Mass. 380; *Call v. Hagger*, 8 Mass. 429; *Partridge v. Emerson*, 9 Mass. 123; *M'Lellan v. Dalton*, 10 Mass. 191.

In *Steere v. Field*, 2 Mason (U. S.) 524, Justice Story said that "the decisions in *Massachusetts*, although they profess to receive the doctrine of the common law as to escapes, are ultimately founded on what is deemed the proper construction of the provincial and state statutes," and that the doctrine in the above cases of *Bartlett v. Willis*, 3 Mass. 86, and *Clap v. Cofran*, 7 Mass. 98, was "so repugnant to the general practice as well as to legislative policy, that it is well known that the whole doctrine was immediately abolished in respect to future cases by the legislature, and the remedy in past cases was abridged in a very summary manner."

See *Spear v. Alden*, 11 Mass. 444, in which it is said: "The late acts of the legislature regulating prisons within this commonwealth have reduced the imprisonment for debt, from that *salva et arcta custodia* required by the common law, to a mere nominal confinement of the person of the debtor."

2. *Riley v. Whittiker*, 49 N. H. 149, 6 Am. Rep. 474.

3. Statute 8 & 9 Wm. III., c. 27. — *Steere v. Field*, 2 Mason (U. S.) 517. See also *Warden of Fleet's Case*, 2 Mod. 222, note a.

This statute enacts that all prisoners in execution, etc., committed to the custody of the marshal of the King's Bench, or warden of the Fleet, shall be actually detained within their prisons or the respective rules of the same; and if they, or any other keeper or keepers of any prison, shall permit or suffer any prisoner in execution, etc., to go or be at large out of the rules of their respective prisons, except in virtue of some writ, etc., every such going or being out of the said rules shall be adjudged an escape. See *Steere v. Field*, 2 Mason (U. S.) 521.

4. **Lawful Custody of Prisoner Essential to Maintenance of Action.** — *Rogers v. Jones*, 7 B. & C. 86, 14 E. C. L. 19, 9 D. & R. 878; *Contant v. Chapman*, 2 G. & D. 191, 2 Q. B. 771, 42 E. C. L. 905, 6 Jur. 666; *McPherson v. Hamilton*, 5 U. C. Q. B. (O. S.) 493; *Wragg v. Jarvis*, 5 U. C. Q. B. (O. S.) 113; *Carpentier v. Willet*, 6 Bosw. (N. Y.) 25, affirmed in 1 Abb. App. Dec. (N. Y.) 312, 28 How. Pr. (N. Y.) 225, 1 Keyes (N. Y.) 510, 31 N. Y. 90; *Partridge v. Westervelt*, 13 Wend. (N. Y.) 501. See also the succeeding subdivisions, especially *Where Prisoner Is Privileged from Arrest—Where Arrest is Made on Void or Insufficient Process*.

Meaning of "Custody." — Custody implies physical force sufficient to restrain the prisoner from going at large. When that physical force is removed, it is, in the eye of the law, an escape. No moral obligation can be received as a substitute for it. Although promises may be made, and may be observed, to remain in close jail, the moment compulsion and force are withdrawn, there is no legal custody; the prisoner becomes a free agent; there is no longer any imprisonment. *Wilkes v. Slaughter*, 3 Hawks (10 N. Car.) 216.

In *Steere v. Field*, 2 Mason (U. S.) 526, Story, J., said: "The whole doctrine of escapes rests upon the notion that there should be an imprisonment of the party within the proper limits. There may be an imprisonment, either by physical restraint, or by superior force acting as a moral restraint upon the party. Thus a person is not less in imprisonment by being in the presence of an officer, who has arrested him, and restrains his liberty of action, than he would be by a personal detention by imposition of hands, or the application of fetters. (Com. Dig., Imprisonment, G.) But in order to constitute imprisonment there must be actual or constructive custody or restraint. That a person is at liberty to go where he pleases, without any restraint acting or ready to act upon him either physically or morally, seems to exclude the notion of imprisonment. The law has therefore adjudged, that where a party imprisoned is allowed any liberty or authority incompatible with the notion of custody, not merely

Commitment to Custody.—When the custody of the prisoner has not been obtained by arrest, there must, in order to constitute a lawful commitment on execution, be at least a delivery of the prisoner, at the jail, to the sheriff, or deputy jailer, or some one authorized to confine in the jail.¹

Custody by Arrest.—In order to charge an officer for the escape of a prisoner arrested, it is sufficient if the person be within the power of the officer and submits to the arrest. No manual touching of the body is necessary if the party acquiesce.² The arrest of a prisoner and the retaking of him on a fresh pursuit, after an escape, constitute but one effective arrest.³

c. STATUTES—CONSENT OF OFFICER TO ESCAPE NECESSARY.—Under statute in some states it is necessary to the maintenance of an action for an escape of a debtor that the debtor should have escaped with the consent of the sheriff.⁴

salva et arcta custodia, but of any custody at all, it shall be deemed an escape."

Where an order of court directed that a party be in custody till he complied with the order, it was held that "custody" meant imprisonment, and that a discharge from prison under such a commitment made the sheriff liable for an escape. *Smith v. Com.*, 59 Pa. St. 320.

Instances of Unlawful Custody.—Where a debtor is arrested on process sworn to before an officer who had no authority to issue the process, the debtor was never in lawful custody, and no escape has been committed. *Rogers v. Jones*, 7 B. & C. 86, 14 E. C. L. 19, 9 D. & R. 878.

An insolvent who comes into court and surrenders himself in open court in discharge of his security, and prays himself in the custody of the sheriff, is not in lawful custody, there being no order of the court committing him to the custody of the sheriff; and the sheriff has therefore no authority to arrest or detain. *Siler v. McKee*, 2 Jones L. (47 N. Car.) 379.

Without the affidavit of debt required by 2 Geo. IV., c. 2, § 6, a writ of *ca. sa.* issued under a judgment obtained in a district court, is void, and the prisoner was never in legal custody. *Munson v. Hamilton*, 5 U. C. Q. B. (O. S.) 119; *Wragg v. Jarvis*, 5 U. C. Q. B. (O. S.) 113.

Where a justice of the peace having rendered judgment against a defendant for a certain sum, issued an execution thereon commanding a levy of the defendant's goods, and for want of goods to take his body, it was held that this writ not being known at the common law, nor authorized under the statute of *Indiana*, was not sufficient to authorize the arrest of the prisoner, or detain him in custody. *Gwinn v. Hubbard*, 3 Blackf. (Ind.) 17.

Waiver of Unlawful Custody.—If the sheriff, in an action against him, fails to rely upon the fact of unlawful custody in bar of the action, which would have prevailed, but sets up a satisfaction of the judgment previous to the issue of the writ, this is a waiver of the former defense; for it is to be supposed he intended to aver a legal writ under which satisfaction was obtained. *Munson v. Hamilton*, 5 U. C. Q. B. (O. S.) 118.

1. Commitment to Custody.—*Skinner v. White*, 9 N. H. 215. In this case it was held that where a sheriff is also by statute the jail keeper, if a deputy sheriff who discharges ex-

ecutive duties arrests the deputy jailer in charge of the jail, and takes the keys and confines him in jail, it is not a lawful commitment, he having no power to act as jailer, and the action for escape cannot be sustained. Here the sheriff was, nevertheless, held liable for an escape, on the ground that there was no jailer to receive the prisoner, and that the deputy sheriff had not done his whole duty, as he should have held the prisoner until the sheriff could have been notified and have appointed a keeper.

A surrender by his bail of a prisoner who has been arrested on civil process, is, under *Massachusetts Gen. Stat.*, c. 125, a lawful commitment. *Com. v. Barker*, 133 Mass. 400.

2. Custody by Arrest.—*Genner v. Sparks*, 6 Mod. 173, 1 Salk. 79; *Horner v. Battyn*, Buller's N. P. 626; *Richardson v. Rittenhouse*, 40 N. J. L. 235.

Where an officer says to one against whom he had a process, who is on horseback, or in a coach: "You are my prisoner, I have a writ against you," upon which he submits, turns back and goes with him, this is an arrest. *Horner v. Battyn*, Buller's N. P. 626.

As to What Constitutes an Arrest, see the title ARREST, vol. 2, p. 832.

3. Cooper v. Adams, 2 Blackf. (Ind.) 294. See generally the title ARREST, vol. 2, p. 832.

4. Consent of Sheriff—Statutes.—*Noble v. Beatty*, 4 Bibb (Ky.) 507.

The *New York Code of Civil Procedure*, § 171, provides that "in an action against a sheriff, or other officer, for the escape of a prisoner it is a defense that the escape was without the assent of the defendant, and that, at the commencement of the action, he had the prisoner within the liberties, either by his voluntary return or by recapture." *Didsbury v. Van Tassel* (Supreme Ct.) 12 N. Y. Supp. 30, 58 Hun (N. Y.) 607. In this case it was held that where there was testimony, in an action against the sheriff for the escape of a prisoner who had given bond for the jail limits, that the sheriff supposed he was constantly within the jail limits, and some to show that the escape was not by his consent, this was sufficient proof that the escape was without his assent.

Where a prisoner was admitted to the jail liberties on bond, and escaped, and returned before action brought, it was testified to by the sheriff and undersheriff that neither they nor the deputies assented to the escape, and that they knew nothing of it till after the prisoner's

d. ALLOWING PRISONERS JAIL LIBERTIES OR PRISON RULES—(1) *In General*.—Under the statute 8 & 9 Wm. III., c. 27, and statutes in the *United States* regulating the prison limits, the jail limits or rules are an extension of the prison walls, and if a prisoner keeps within the liberties or rules, he does not commit an escape by a departure from the walls,¹ even though the limits be coextensive with the town or county in which the prison is located. But the legislature may reserve to the courts the power to commit a prisoner to close custody in certain circumstances.²

(2) *Where Jail Liberties Given Without Bond*.—A jailer may at common law suffer a debtor to have the liberty of the prison bounds or rules without taking a bond and security from the prisoner not to depart, and is not liable for an escape by doing so; for the bond is given only for the indemnity of the sheriff, and he may waive it.³ But he may, if he choose, require a prisoner to give bond to remain a true prisoner within the liberties.⁴ In several

return. But it being the sheriff's understanding that the prisoner was entitled to be released, he so informed one of the bondsmen. It was held that this in itself was an assent to the escape, under section 171 of the Code Civ. Proc., and that at most it was only a question of fact. *Cortis v. Dailey*, 21 N. Y. App. Div. 1. See also *Loosey v. Orser*, 4 Bosw. (N. Y.) 402; *Holmes v. Lansing*, 3 Johns. Cas. (N. Y.) 74. And compare *Toll v. Alvord*, 64 Barb. (N. Y.) 570.

Under the *Virginia* statute (1 Rev. Code, c. 136, § 3), no judgment can be entered on verdict against the sheriff or his sureties unless it be found as prescribed by statute that the debtor escaped with the consent or through the negligence of the sheriff, or that he might have been retaken and that the sheriff neglected to make immediate pursuit; and if not strictly complied with the defect cannot be supplied by any intendment or conclusion in favor of a general verdict from the pleadings or issue. *Vanmeter v. Giles*, 1 Rob. (Va.) 365. But upon proof of the escape by the plaintiff, which is the gist of the action, the jury are bound to presume that the escape was by the consent or negligence of the sheriff, unless and until the sheriff negatives by his proof all consent or negligence on his part and also shows that he had used due means to retake the prisoner. *Stone v. Wilson*, 10 Gratt. (Va.) 542.

Inference as to Escape Against Consent.—When a witness states that while he was at breakfast a prisoner who was in custody of the sheriff "made his escape," the fair inference is that the prisoner fled from the custody of the sheriff, against the consent of the latter. *Howard v. Crawford*, 15 Ga. 424.

1. Jail Liberties an Extension of Prison Walls—*England*.—*Bonafous v. Walker*, 2 T. R. 131.

Canada.—*Dougall v. Moodie*, 19 U. C. Q. B. 571.

United States.—*Ammidon v. Smith*, 1 Wheat. (U. S.) 457; *Simms v. Slacum*, 3 Cranch (U. S.) 306; *Steere v. Field*, 2 Mason (U. S.) 517.

Connecticut.—*Drake v. Chester*, 2 Conn. 473; *Huntington v. Williams*, 3 Conn. 429; *Seymour v. Harvey*, 8 Conn. 70; *Bolton v. Cummings*, 25 Conn. 423.

Kentucky.—*Steinman v. Tabb*, 3 Bibb (Ky.) 202.

Massachusetts.—*Spear v. Alden*, 11 Mass. 444.

New York.—*Dole v. Moulton*, 2 Johns. Cas. (N. Y.) 207; *Holmes v. Lansing*, 3 Johns. Cas. (N. Y.) 74; *Tracy v. Whipple*, 8 Johns. (N. Y.) 379; *Wemple v. Glavin*, 57 How. Pr. (N. Y. Supreme Ct.) 109; *Feerick v. Conner*, 60 How. Pr. (N. Y. C. Pl.) 508; *Jansen v. Hilton*, 10 Johns. (N. Y.) 549; *Chamberlain v. Campbell*, 39 Barb. (N. Y.) 642; *Peters v. Henry*, 6 Johns. (N. Y.) 124, 5 Am. Dec. 196; *Develin v. Cooper*, 84 N. Y. 416.

Pennsylvania.—*Green v. Hern*, 2 P. & W. (Pa.) 167.

In Rhode Island the doctrine as to escape is that of the common law, and the statutes giving the liberty of the limits to prisoners, on giving bond not to escape, etc., have not altered the common law. *Steere v. Field*, 2 Mason (U. S.) 486.

2. *Dougall v. Moodie*, 19 U. C. Q. B. 571.

3. Jailer May Allow Prisoner Liberty of Prison Bounds Without Bond.—*Bonafous v. Walker*, 2 T. R. 126; *Steinman v. Tabb*, 3 Bibb (Ky.) 202; *Peters v. Henry*, 6 Johns. (N. Y.) 121, 5 Am. Dec. 196; *Dole v. Moulton*, 2 Johns. Cas. (N. Y.) 205; *Holmes v. Lansing*, 3 Johns. Cas. (N. Y.) 73; *Green v. Hern*, 2 P. & W. (Pa.) 167. See *Calcutt v. Ruttan*, 13 U. C. Q. B. 227, 14 U. C. Q. B. 33.

Under the New York Code Civ. Proc., § 155, so long as a sheriff keeps a prisoner within the jail liberties he is not liable for an escape, whether or not he has taken any undertaking for the limits.

Under section 151, security taken by the sheriff for the jail liberties is to be held as an indemnity for both the sheriff and the party at whose suit the prisoner is confined. And under section 152, if the latter discover that the security is insufficient, he may take proceedings for the commitment of the prisoner to close confinement. But the failure of the sheriff to deliver the undertaking to the person at whose instance the prisoner is in custody is a mere omission, and has no bearing upon the question of escape. *Cortis v. Dailey*, 21 N. Y. App. Div. 1.

4. *Bonafous v. Walker*, 2 T. R. 126; *Lenthall v. Cooke*, 1 Saund. 161; *Steere v. Field*, 2 Mason (U. S.) 520; *Bartlett v. Willis*, 3 Mass. 103; *Tracy v. Whipple*, 8 Johns. (N. Y.) 379; *Jansen v. Hilton*, 10 Johns. (N. Y.) 560.

instances where the limits were enlarged the sheriff was expressly authorized to require a bond.¹ In some states it has been held that the prison liberties cannot be granted except in the cases where the privilege is expressly given by statute, otherwise the sheriff or jailer is liable for an escape.²

(3) *Where Jail Liberties Given on Bond — Question of Intention.* — Although formerly any unintentional act whereby a prisoner who had given bond for the liberties got outside the jail limits constituted an escape for which the sheriff was liable,³ yet this is not, in modern times, an inflexible rule. According to the current of modern authority mere technical violations of the rules of the common law, which were formerly productive of many hard actions against officers and sureties for escapes unintentionally and inadvertently committed, are not sufficient to constitute an escape for which a liability accrues. While privileges and indulgences inconsistent with safe custody are not permitted with impunity, the mere fact of being outside the prison limits is not of itself sufficient to constitute an escape; the liability is to be determined by the circumstances of the escape; the act must be intentional; and therefore an involuntary escape on the part of the prisoner where he accidentally or inadvertently goes beyond the limits, is not an escape for which a liability accrues.⁴

Where Insufficient Bond Taken — Assignment of Bond. — It is held that if the sheriff take a bond for the jail liberties, which is, under the statute, insufficient, from the prisoner, he is liable for an escape.⁵ Under statute in some jurisdictions no action lies against a sheriff for an escape from the limits after the execution of a bond, until demand made upon him for the bond; nor then, if he assigns it upon such demand, until the sufficiency of the bond has been tested by a suit upon it in the creditor's name.⁶

Failure to Produce Prisoner Admitted to Jail Limits — Canada. — Where a sheriff, by virtue of a *ca. sa.*, committed a prisoner to close custody, and while in close custody and before the return of the *ca. sa.* took bond for the jail limits, and on the return day made return that he had taken the defendant, etc.; but being subsequently served with a notice to produce the prisoner within twenty-four hours, he failed to do so, it was held that he was liable for an escape under the 10th section, 11 Geo. IV., c. 3. *Wragg v. Jarvis*, 4 U. C. Q. B. O. S. 317.

1. *Dougall v. Moodie*, 19 U. C. Q. B. 571; *Howard v. Blackford*, 3 N. J. L. 344.

2. In *Vermont* it has been held that if a sheriff admit a prisoner confined on an execution founded on trespass to the jail liberties, it is an escape for which he is liable. *Leonard v. Hoyt*, *Brayt*. (Vt.) 73. Or where a debtor is committed on an execution issued upon a judgment rendered against him on *audita querela*; for the statute giving authority to the sheriff to admit the prisoner to the liberties, on the execution of a jail bond, does not provide for such cases. *Lowrey v. Barney*, 2 D. Chip. (Vt.) 15.

In *New Hampshire* it would seem that the prison liberties can be granted only under statute by the execution of a bond to the creditor as obligee. *Tappan v. Bellows*, 1 N. H. 106.

3. **Unintentional Escape from the Limits.** — *Clap v. Cofran*, 7 Mass. 101; *Freeman v. Davis*, 7 Mass. 201; *Burroughs v. Lowder*, 8 Mass. 373; *Call v. Hagger*, 8 Mass. 429; *Partidge v. Emerson*, 9 Mass. 123; *M'Lellan v. Dalton*, 10 Mass. 190; *Bissell v. Kip*, 5 Johns. (N. Y.) 98.

4. **Officer Not Liable for Unintentional Acts of Escape — Illinois.** — *Comer v. Huston*, 55 Ill. App. 158.

Kansas. — *Randolph v. Simon*, 29 Kan. 409; *Wheeler v. State*, 39 Kan. 163.

New Jersey. — *Howard v. Blackford*, 3 N. J. L. 344.

Ohio. — *Lucky v. Brandon*, 1 Ohio 59.

Canada. — *Boyd v. Kennedy*, 6 New Bruns. 629.

See also *Ballou v. Kip*, 7 Johns. (N. Y.) 175; *Wool v. Turner*, 10 Johns. (N. Y.) 423.

Act of God. — If a debtor in prison, having the liberty of the jail limits, be suddenly seized with illness in the highway, and by the humanity of others is carried to a private house, and dies there, this is not an escape; for it happened by the providence of God which shall hurt no man. *Baxter v. Taber*, 4 Mass. 361.

5. **Insufficient Bond for the Liberties.** — *Clap v. Cofran*, 7 Mass. 101; *Clapp v. Hayward*, 15 Mass. 276; *Whitehead v. Varnum*, 14 Pick. (Mass.) 523. See also *Tappan v. Bellows*, 1 N. H. 100.

6. **Assignment of Bond — Vermont.** — *Keith v. Ware*, 2 Vt. 178; *Udall v. Rice*, 1 Tyler (Vt.) 224; *Wheeler v. Pettes*, 21 Vt. 398.

Under a South Carolina Statute, which expressly declares that the sheriff shall be responsible for the solvency of the security which he shall take on a prison limits bond, taken for his own indemnity, the plaintiff in an action against the sheriff for an escape from the jail limits is not bound to prove the insolvency of the sureties before he can maintain an action against the sheriff. *Yates v. Yeaden*, 4 McCord L. (S. Car.) 18.

Where Debtor on Execution of Jail Bond Is No Longer a Prisoner. — Where, under statute, a prisoner on the limits by the execution of a jail bond is no longer a prisoner, and the sheriff has no control or authority over him, the sheriff is not liable for an escape where he has taken a prison-bonds bond from the debtor and assigned it to the creditor, for the debtor is then in the custody of the law. The remedy is against the obligors on the bond.¹

Where Jail Limits Changed after Execution of Bond. — In *Massachusetts* it has been held that the effect of a bond for the liberties is to restrain the debtor within the limits as they may from time to time be established by law, so that if after the limits have been narrowed, the debtor makes use of them in their former extent he is guilty of an escape.² The contrary, however, is held in *Ohio*, the debtor being considered bound by the limits as they existed at the date of the obligation only.³

Where Old Sheriff Omits to Assign to New Sheriff Prisoner on Limits. — It was the doctrine of the common law that the old sheriff must deliver by indenture to the new sheriff all the prisoners in his custody upon execution, and till such delivery by him they remain in the custody of the old sheriff, and he should be responsible for them.⁴

Under the Revised Statutes of New York it is not the imperative duty of a retiring sheriff to assign over at the end of his term to the new sheriff, a debtor taken in execution who is upon the jail limits so as to make him, if he omits so to do, liable to the judgment creditor in the amount of the debt as though it were an escape, and therefore where the old sheriff omits, by mistake, to assign over to the new sheriff a prisoner on execution who has been permitted to go within the limits of the jail liberties, on giving security, this is not an escape for which the old sheriff is liable so long as the prisoner remains within the limits.⁵ Nor is the new sheriff liable for the escape of a prisoner arrested by the old sheriff, to whom a bond was given for the liberties, although the prisoner go at large off the liberties subsequently to the new sheriff taking

In *Upper Canada* the 305th section of the Common Law Procedure Act of 1856 does not make it the duty of the sheriff to assign a bond for the limits until he has been required by the plaintiff in the action to do so. *Dougall v. Moodie*, 19 U. C. Q. B. 575.

1. Where Debtor on Execution of Jail Bond Is No Longer a Prisoner. — *Palmer v. Sawtell*, 3 Me. 447; *Lyle v. Stephenson*, 6 Call (Va.) 54; *Vanmeter v. Giles*, 1 Rob. (Va.) 361.

Where, after the execution of a statute bond, a debtor is not bound to remain on the limits, and there is no authority given to the sheriff to retake him if he escape, except upon a rule or order of court, the sheriff is not liable for an escape. *Kerr v. McEwan*, 12 U. C. C. P. 241.

But in *New York* it was held that although a sheriff had no power to restrain a prisoner after he had given the security required by the statute, he was liable for an escape where the prisoner went beyond the limits on Sundays, returning again in the evening, and that, though this was neither a voluntary nor negligent escape, yet it was such an escape under the statutes relative to jail liberties, as could not be purged by a voluntary return of the prisoner before a suit brought, and rendered the sheriff liable in the first instance, and that he must resort to the bail for his indemnity, as the bond was not made assignable. *Tillman v. Lansing*, 4 Johns. (N. Y.) 47.

Neglect of Prisoner to Get Bond Allowed. — *Canada*. — Under the statute 20 Vict., c. 57, § 25, providing that the debtor shall, within thirty days from the delivery of the bond to the

sheriff, procure it to be allowed by the judge of the county court, the sheriff is not liable for the escape of a prisoner arrested on attachment for nonpayment of costs, who gave the usual bond to the limits, but neglected to get the bond allowed within thirty days, but who had remained on the limits. And under this statute the sheriff is discharged from all responsibility unless the debtor be again committed to close custody. *Dougall v. Moodie*, 19 U. C. Q. B. 573.

2. Change of Jail Limits. — *Reed v. Fullum*, 2 Pick. (Mass.) 160. Compare *Walter v. Bacon*, 8 Mass. 468.

The Court of Sessions has no authority to extend the limits of the jail yard beyond the land of the county, with the highways adjoining or leading to the prison. *Baxter v. Taber*, 4 Mass. 361. But the legislature may, by a subsequent statute, establish the limits as they had been previously defined by the sessions. *Walter v. Bacon*, 8 Mass. 468.

3. Kent v. Burnett, 10 Ohio 392.

4. Delivery of Prisoners by Old Sheriff to New — *England*. — *Wesby v. Skinner*, Cro. Eliz. 366, 3 Coke 72; *Higginson v. Sheif*, 1 Comyns Rep. 155; *Hob. 266*, 2 Leon. 54; *Egerton v. Morgan*, 1 Bulst. 70.

New York. — *Partridge v. Westervelt*, 13 Wend. (N. Y.) 502; *Hempstead v. Weed*, 20 Johns. (N. Y.) 64, 11 Am. Dec. 244.

5. Omission to Assign Prisoner on Limits — *New York*. — *French v. Willet*, 10 Bosw. (N. Y.) 575.

The *New York Rev. Stat. 1830* retained the

charge of the jail, if such prisoner has not been assigned by the old sheriff to the new; for the prisoner is not in his custody until assigned. The remedy of the creditor in such case is against the old sheriff.¹ Under these statutes, if the old sheriff has a right of action on the limit bond, the fact that there has been a recovery against the new sheriff for the same escape is no bar to his action; nor is a voluntary return of the prisoner before suit brought against the sheriff a bar.²

In Canada, if prisoners are delivered over by the old sheriff to the new, within the jail, with the writ under which they are detained, and the new sheriff does not require an indenture, he is chargeable in case of an escape after such delivery.³

Escape After Death of Sheriff. — Under the 5 Geo. I., c. 15, § 8, a new sheriff is not liable for the escape of a debtor on the limits, where the deputy, on the death of the sheriff, fails to assign the debtor over by indenture, or to apprise the new sheriff of his detention, or the cause, or to put him in possession of the bonds given for the limits.⁴

c. WHERE PRISONER RELEASED ON BAIL BOND. — Where a prisoner arrested on a *ca. sa.* executes under statute a bail bond, the sheriff is not liable for an escape when the plaintiff in the execution takes an assignment of the bond, and recovers judgment thereon, for the sheriff is deprived of the power to resort to the bond for his own indemnity, and the acceptance of the bond and recovery of judgment thereon are a waiver of objections to the sufficiency of the sureties.⁵ But where he discharges a debtor on a forged bond,

principle of the common law as to prisoners at large on the liberties remaining in custody of the old sheriff until assigned to the new one. *Partridge v. Westervelt*, 13 Wend. (N. Y.) 500.

Before the revision a retiring sheriff was only relieved from the custody by a writ of discharge, the form of which was prescribed in the same statute with the commission to the new sheriff. *French v. Willet*, 10 Bosw. (N. Y.) 574.

But the Revised Statutes substitute for the writ of discharge the service of a county clerk's certificate on the old sheriff of the election and qualification of the new sheriff, and under these statutes it is held in *Partridge v. Westervelt*, 13 Wend. (N. Y.) 504, and *Hinds v. Doubleday*, 21 Wend. (N. Y.) 227, to be the duty of the old sheriff to deliver the prisoners to the new sheriff.

Where no certificate of election is shown to have been served by the incoming sheriff upon the outgoing sheriff, the latter will not be held liable for failure to deliver to his successor a prisoner held upon execution who was in the custody of such outgoing sheriff confined within the jail limits, or for his escape, because until such service the powers of the outgoing sheriff as to prisoners in his custody remain unchanged, and therefore there could be no escape so long as the prisoner was in actual custody, and had not left the jail limits. *Feerick v. Conner*, 60 How. Pr. (N. Y. C. Pl.) 507.

Under this statute providing that on the election or appointment of a new sheriff, and the service of a certificate of the county clerk that the new sheriff has qualified and given security, the powers of the old sheriff cease within ten days after the service of such certificate, and all prisoners who are not assigned within that term are at liberty to go

at large; the new sheriff has no control over them, and the powers of the old sheriff are at end. The latter cannot in such case even maintain an action on a bond for the liberties given by a prisoner not assigned. *Hinds v. Doubleday*, 21 Wend. (N. Y.) 223. See also *Feerick v. Conner*, 60 How. Pr. (N. Y. C. Pl.) 507.

1. *Partridge v. Westervelt*, 13 Wend. (N. Y.) 503.

2. **Where Old Sheriff Has Right of Action on Limit Bond.** — *Hinds v. Doubleday*, 21 Wend. (N. Y.) 229.

3. **Delivery of Prisoners by Old Sheriff to New, without Indenture** — Canada. — *Power v. Johnston*, 4 New Bruns. 43.

4. **Escape of Prisoner on Limits After Death of Sheriff.** — *McPherson v. Hamilton*, 5 U. C. Q. B. (O. S.) 490.

Before the passing of 5 Geo. I., c. 15, by the 8th section of which the deputy of the deceased sheriff is to continue in office until a new sheriff is appointed, a different principle was recognized when the office became vacant by death, and in such case the new sheriff, it appears, was bound at his peril, without delivery or notice, to take notice of the prisoners in the jail, and of the causes of their commitment. *McPherson v. Hamilton*, 5 U. C. Q. B. (O. S.) 490 [*citing* Westbie's Case, 3 Coke 72; *Wesby v. Skinner*, Cro. Eliz. 366; *Sid.* 335; *Noy* 51; *2 Leon* 54; *Hanmer v. Warner*, 2 Keb. 224; *Rex v. Andrews*, Cro. Jac. 380; *Barnes* 367; *Buller's N. P.* 68].

5. **Assignment of Bail Bond to Creditor.** — *Kerr v. McEwan*, 27 U. C. Q. B. 170.

Where the plaintiff, assignee of a bail bond, agrees to have a suit thereon reviewed on nominal bail whereby the debt is lost, he cannot recover for an escape. *Wait v. Dana*, *Brayt.* (Vt.) 37.

Nor where the sheriff took sufficient bail,

although ignorant of the forgery, he is liable for an escape;¹ or where he releases a prisoner before the statutory period, who was surrendered by his bail.²

f. WHERE PRISONER IS IN CUSTODY UNDER DIFFERENT WRITS. — A prisoner in actual custody on one writ is, by operation of law, in custody on every other writ lodged against him in the sheriff's office, and if he escape after a writ has been lodged, the plaintiff therein may maintain an action by virtue of such writ, for the delivery of the writ in such circumstances is, in law, an arrest,³ and it seems that if a prisoner committed escape after service of a declaration in another suit the sheriff is liable.⁴

g. WHERE PRISONER IS IN CUSTODY UNDER ONE OF TWO JUDGMENTS. — Where the plaintiff has two judgments against the same defendant, and it appears from the record that the defendant was ordered into custody on one only, the sheriff in an action for escape is liable for the amount of that one only.⁵

h. WHERE PRISONER IS ARRESTED UNDER WRIT OF NE EXEAT. — It has been held in *New York* that where a person is arrested under a writ of *ne exeat* in an equitable action, and required to give bail, or be committed, the sheriff is liable for his escape, and in such case the action may be brought against him without application to the court.⁶

i. WHERE PRISONER IS ARRESTED UNDER BASTARDY WARRANT. — An officer is liable for an escape of a person in his custody arrested under a bastardy warrant;⁷ and he will not be permitted, after the defendant has been found guilty upon a preliminary proceeding before a magistrate, to say that the defendant is not guilty.⁸

which he offered to assign to the creditor, but the bail afterwards became worthless. *Northum v. Phelps*, 1 Root (Conn.) 54.

But in *Udall v. Rice*, 1 Tyler (Vt.) 224, it was held that a sheriff must, at his own risk, take such bail as will be sufficient to satisfy a judgment in favor of the creditor against the sureties, in money, and that it is not sufficient that the sureties, at the time of executing the bond, have ample freehold, subject to the creditor's execution, but that he must take such bail as will be sufficient to respond to the judgment.

1. Discharge of Prisoner on Forged Bail Bond. — *Conyers v. Rhame*, 11 Rich. L. (S. Car.) 60.

2. Releasing Prisoner Surrendered by Bail. — *Randall v. Bridge*, 2 Mass. 550.

3. Where Prisoner Is in Custody under Different Writs. — *Jackson v. Humphreys*, 1 Salk. 273; Roll. Abr. 94.

The sheriff is liable for an escape where he has returned *non est inventus* to a *ca. sa.* which had been delivered to him, if, prior to the return day, his deputy had the defendant in custody under another *ca. sa.*, and discharged him; though it do not appear that the sheriff knew of the latter writ, or that the deputy knew of the former. *Wheeler v. Hambricht*, 9 S. & R. (Pa.) 390.

Escape After Notice of Second Execution Served. — A. recovered a judgment in Surry County Court, North Carolina, against B., and issued on it a *ca. sa.* to Surry County. The sheriff returned, "*non est inventus*, the defendant is in Hillsborough jail." An order of court then directed that the sheriff of Orange County, who had the custody of said defendant in Hillsborough jail, retain said prisoner till payment of said judgment, and not having done so, it was held that he was liable as if the prisoner

was committed on a *ca. sa.* *Mabry v. Turrentine*, 8 Ired. L. (30 N. Car.) 205.

Under the Rhode Island Statute, section 4, c. 197, Rev. Stat., providing that no person committed on execution shall have the privilege of the jail yard for more than thirty days unless he shall, within that time, make an assignment to the jailer of all his property for the equal benefit of his creditors, it was held that where a debtor executes only one assignment for the benefit of his creditors, where he is committed under two executions by the same creditor and gives two bonds, the sheriff is not liable for an escape. *Farrington v. Allen*, 6 R. I. 451.

4. Escape After Service of Declaration in Another Suit. — A prisoner in the custody of the warden of the Fleet, being served with a declaration in another suit, was afterwards voluntarily permitted to escape, and returned to the Fleet the same day. The plaintiff having proceeded to judgment, which was unsatisfied, it was held that the warden was liable for his escape. *Ravenscroft v. Eyles*, 2 Wils. 295.

5. Where Prisoner in Custody on One of Two Judgments. — *Lash v. Ziglar*, 5 Ired. L. (27 N. Car.) 702.

6. Escape of Prisoner Arrested on Writ of Ne Exeat. — *Beckwith v. Smith*, 4 Lans. (N. Y.) 183.

7. Where Prisoner Committed on Bastardy Warrant — *Illinois*. — *Pease v. Hubbard*, 37 Ill. 257; *Gruer v. People*, 60 Ill. App. 123.

Indiana. — *State v. Hamilton*, 33 Ind. 502; *State v. Mullen*, 50 Ind. 598; *Lakin v. State*, 89 Ind. 68; *State v. Newcomer*, 109 Ind. 243; *State v. Caldwell*, 115 Ind. 6; *Hongland v. State*, (Ind. App. 1895) 40 N. E. Rep. 931.

Pennsylvania. — *Lantz v. Lutz*, 8 Pa. St. 405.

8. *Lakin v. State*, 89 Ind. 68.

j. WHERE PRISONER IS COMMITTED UNDER COMMISSION OF BANKRUPTCY. — If a commission of bankruptcy issues against a person who refuses to be examined, and thereupon he is committed to prison, and the jailer suffers him to escape, as the commissioners had sufficient authority to commit, an action lies by the creditor for the escape.¹

k. WHERE PRISONER IS ARRESTED IN ANOTHER BAILIWICK. — Where a sheriff arrests a prisoner in another bailiwick, and suffers him to go at large therein, it has been held that he is liable for an escape.²

l. WHERE PRISONER IS COMMITTED FROM ANOTHER COUNTY. — Under the statutes of *Vermont* it has been held that a sheriff is not liable for the negligent escape of a debtor committed to his keeping from another county.³

m. WHERE PRISONER IS CONFINED IN STATE JAIL UNDER FEDERAL PROCESS. — Where, by statute, the sheriff has the lawful custody of prisoners confined in a state jail under process from the United States courts, and is made civilly responsible for the escape of prisoners committed to his care, he is liable for the escape of such prisoners.⁴

n. WHERE PRISONER IS PRIVILEGED FROM ARREST. — Where the person arrested is privileged from arrest, the sheriff is not liable for his escape, for in such case the creditor suffers no wrong or injury.⁵

o. WHERE ARREST IS MADE ON VOID OR INSUFFICIENT PROCESS. — If the process on which the arrest was made is void, or for any reason insufficient to authorize the arrest, the officer is not liable for an escape, and the

1. Where Prisoner Is Committed under a Commission of Bankruptcy. — Bacon's Abr., title Sheriff, (n) 1, *citing* Barnes v. Cary, 1 Rolle 47, 2 Bulst. 236, Moo. 834.

2. Prisoner Arrested in Another Bailiwick. — The sheriff having, within a liberty, where by charter the mayor, etc., of the borough claimed the exclusive privilege of executing all process, arrested a defendant upon a *ca. sa.* in which there was not any *non omittas* clause, suffered him to go at large before his removal from the liberty, and it was held that he was liable for an escape, for the arrest was not void, and once having taken a party, he was bound to keep him in custody, even though he might have subjected himself to an action at the suit of the bailiff of the liberty. *Piggott v. Wilkes*, 3 B. & Ald. 502, 5 E. C. L. 358.

3. Where Prisoner Committed from Another County — Vermont. — *Chipman v. Sawyer*, 1 Tyler (Vt.) 104, 2 Tyler (Vt.) 61.

4. Where Prisoner Confined in State Jail under Federal Process. — *Tennessee v. Hill*, 60 Fed. Rep. 1005.

Where a sheriff as jailer receives a debtor arrested by a United States marshal, and releases him upon a bond given under Rev. Stat. 682, c. 8, he is liable for an escape; for the act under which the bond was taken does not apply to the courts of the United States. It was passed subsequently to the Act of 1828, adopting the state laws in regard to the practice of courts of the United States, and it has not been adopted by a rule of court. *Spafford v. Goodell*, 3 McLean (U. S.) 97.

Where a sheriff, on an order of discharge by a judge of a state court under the insolvent laws of the state, released a debtor committed to his custody upon process from the United States court, he is liable for an escape; for the provisions of the Acts of Assembly apply only to executions from the state courts, and are not intended to control the process of the

United States in matters within their jurisdiction. *Duncan v. Klinefelter*, 5 Watts (Pa.) 141, 30 Am. Dec. 295.

5. Where Prisoner Privileged from Arrest. — *Phelps v. Barton*, 13 Wend. (N. Y.) 69; *Ray v. Hogeboom*, 11 Johns. (N. Y.) 433; *Green v. Edson*, 2 N. H. 293; *Ginochio v. Orser*, 1 Abb. Pr. (N. Y. C. Pl.) 434.

But in *Gill v. Miner*, 13 Ohio St. 199, it was held that it is no defense that the prisoner was privileged from arrest under the statute, on the ground of his being a suitor in court at the time of his arrest, as such privilege is personal to the party arrested; for the act nowhere declares the arrest of any person designated in the statute to be void, nor does it impose a penalty upon an officer for making such arrest; nor is it anywhere intimated that the officer making the arrest is empowered to determine the question of exemption, and release the prisoner in case he shall find him privileged from arrest.

Failure of Prisoner to Plead Deed of Composition under English Bankruptcy Act. — Where a deed of composition under the English Bankruptcy Act of 1861 is good, but the debtor has failed to plead it, and the certificate of registration is produced to the sheriff by the prisoner, the sheriff's attention is called to the dates of the execution and registration of the deed and of the judgment, which necessarily show that the debtor had the opportunity of pleading the deed, but has failed to do so; he is therefore bound to know that the deed affords no protection to the debtor, and if, with that knowledge, he discharges the debtor, he is liable for an escape. *Williams v. Rose*, L. R. 3 Exch. 5; *Dignam v. Baily*, L. R. 3 Q. B. 178; *Allen v. Carter*, L. R. 5 C. P. 414, 39 L. J. C. P. 212, 22 L. T. N. S. 586. See also *Lloyd v. Harrison*, L. R. 1 Q. B. 502, which holds that where the only information the sheriff has is from the certificate of registration, he is not bound to

creditor has no just ground of complaint that the person of his debtor is not held in custody.¹

p. WHERE COURT RENDERING JUDGMENT WAS WITHOUT JURISDICTION. — Where the court which rendered the judgment by force of which the prisoner was imprisoned had no jurisdiction, the sheriff is not liable for an escape.²

q. WHERE PRISONER IS DISCHARGED ON ORDER OF COURT — Where Court Is Without Jurisdiction. — Where a prisoner is discharged on an order of a court having no jurisdiction to make the order, the sheriff is liable for an escape, for in such case the proceeding is *coram non judice*, and the sheriff is not bound to obey him who is not judge of the cause any more than he is to obey a mere stranger.³ But if a statute indemnifies the sheriff for whatsoever shall be done by him in obedience to an order of court, he is not liable for an escape by discharging a prisoner thereunder, even though the court had no jurisdiction to make the order.⁴

Where Court Has Jurisdiction. — A sheriff is not liable for an escape where he discharges a prisoner under an order of a court of competent jurisdiction, and the order is a conclusive justification,⁵ even though the order be unauthorized,⁶ or be obtained by fraud and perjury; for it is nevertheless a good dis-

inquire further, and may release the debtor. But in that case the judgment was prior to the certificate of registration.

1. Arrest on Void Process — Canada. — *McManus v. Wells*, 29 New Bruns. 457; *Smith v. Jarvis*, (Ont.) H. T. 3 Vict.

Georgia. — *Howard v. Crawford*, 15 Ga. 424. *Illinois.* — *Gorton v. Frizzell*, 20 Ill. 295; *Tuttle v. Wilson*, 24 Ill. 561.

Indiana. — *Governor v. Stribling*, 2 Blackf. (Ind.) 24.

Massachusetts. — *Hitchcock v. Baker*, 2 Allen (Mass.) 431.

New Hampshire. — *Hutchins v. Edson*, 1 N. H. 139.

New York. — *Ginocchio v. Orser*, 1 Abb. Pr. (N. Y. C. Pl.) 433; *Carpenter v. Willett*, 31 N. Y. 90, affirming 1 Abb. App. Dec. (N. Y.) 312; *Hutchinson v. Brand*, 6 How. Pr. (N. Y. Supreme Ct.) 73; *Goodwin v. Griffiths*, 88 N. Y. 639.

North Carolina. — *Ellis v. Gee*, 1 Murph. (5 N. Car.) 445; *Walker v. Vick*, 2 Dev. & B. L. (19 N. Car.) 99.

Vermont. — *Kidder v. Barker*, 18 Vt. 454.

2. Where Court Rendering Judgment Had No Jurisdiction. — *Austin v. Fitch*, 1 Root (Conn.) 288.

3. Where Prisoner Discharged on Order of Court Having No Jurisdiction — England. — *Marshallsea Case*, 10 Coke 76; *Colston v. Ross*, Cro. Eliz. 893; *Brown v. Compton*, 8 T. R. 424.

New York. — *Bulmore v. Cooper*, 46 N. Y. 242; *Shaffer v. Riseley*, 114 N. Y. 25; *Van Slyck v. Taylor*, 9 Johns. (N. Y.) 146; *Bush v. Pettibone*, 4 N. Y. 300, 5 Barb. (N. Y.) 273; *Zenner v. Blessing*, (City Ct.) 4 N. Y. Supp. 866.

Contra. — *Orby v. Hales*, 1 Ld. Raym. 3. See also *Crum v. Halford*, 4 Mod. 353, recognizing this case.

4. Discharge by Court Having No Jurisdiction, Where Sheriff Indemnified by Statute. — *Saffery v. Jones*, 2 B. & Ad. 598, 22 E. C. L. 146; *Stevenson v. Carothers*, 3 Yeates (Pa.) 180.

5. Discharge on Order of Court Having Jurisdiction. — *Bush v. Pettibone*, 5 Barb. (N. Y.) 273,

4 N. Y. 300; *Develin v. Cooper*, 84 N. Y. 410; *Goodwin v. Griffiths*, 88 N. Y. 629, reversing 25 Hun (N. Y.) 61; *Ginocchio v. Orser*, 1 Abb. Pr. (N. Y. C. Pl.) 434; *Wiles v. Brown*, 3 Barb. (N. Y.) 37; *Hurst's Case*, 4 Dall. (U. S.) 387.

Order of Discharge Not Served. — A sheriff is not liable for discharging an imprisoned debtor on a valid order made by the court, although it was never formally served upon him. *Richmond v. Praim*, 24 Hun (N. Y.) 578.

But in *James v. Roach*, 11 New Bruns. 28, it appears that a prisoner committed to jail on final process was discharged by an order of a justice of the court of Common Pleas, on the ground that the prisoner was privileged from arrest as a suitor attending the trial of a cause in which he was defendant; but notice of the order was not served upon the sheriff. The order was subsequently rescinded. In an action against the surety on the limit bond, it was held that such order must be served on the officer before the prisoner can be discharged, and that the surety is liable to the plaintiff.

Release by Court on Invalid Recognizance. — Where the accused appeared, as they had undertaken to do, on informal and invalid recognizances taken by the sheriff, and the court permitted them to go on defective recognizances until the next term of the court, it was held that the sheriff was not liable for an escape, as it was the duty of the court to hold them in custody until they acknowledged unexceptionable recognizances, and the sheriff could not be deemed the cause of their non-appearance or escape. *Com. v. Reed*, 3 Bush. (Ky.) 517.

6. Discharge by Court Having Jurisdiction on an Unauthorized Order. — *Bender v. Graham*, Minor (Ala.) 269.

If a prisoner be discharged on an order of court, although the order be reversed on appeal, if the matter be within the jurisdiction of the court to determine, and where there is not an entire absence of judicial authority to act, the sheriff is not liable for an escape. *Perry v. Kent*, 88 Hun (N. Y.) 407.

charge.¹ If the order is regular on its face, and such as the court has power to grant, the sheriff may justify by it alone, without showing that all the preliminary steps prescribed by law to give jurisdiction had been taken,² in the absence of proof that he had knowledge of jurisdictional defects in the proceedings.³ And he is protected in discharging the prisoner even though the order does not recite the facts necessary to give the court jurisdiction; but in such case he must establish such facts by proof *aliunde*.⁴

r. WHERE PRISONER IS TAKEN FROM SHERIFF'S CUSTODY UNDER PROCESS OF LAW. — If a prisoner is taken from the sheriff's custody under process of law, he is liable for an escape.⁵

s. WHERE PRISONER IS TAKEN FROM JAIL ON HABEAS CORPUS. — Where a sheriff, in obedience to a writ of habeas corpus, makes a proper return, and brings a prisoner before the court, the safe keeping of the prisoner while before the court is entirely under the control and direction of the court, and the sheriff is not liable for the escape of the prisoner while thus in the custody of the court, and before a remand or other order placing new duties on him.⁶ If, in obedience to a writ of habeas corpus, the sheriff takes a prisoner in a roundabout way for his accommodation, it has been held that it is an escape, as it is the sheriff's duty to take him by the shortest and most convenient route to the court or office where the writ is returnable.⁷ So where a habeas corpus issues at one term to bring a prisoner before the court at the ensuing term, it will be an escape if he is permitted to go at large in the meantime without restraint.⁸ And the advice of the judge or the commissioner will not justify the escape.⁹ But if the sheriff takes a prisoner out of the county and returns with him again without unnecessary delay, the going about by the prisoner on his own business for a short time, and out of view of the sheriff, is not an escape,¹⁰ nor if the prisoner is discharged on habeas corpus by a

1. Discharge Obtained by Fraud and Perjury. — *Ammidon v. Smith*, 1 Wheat. (U. S.) 457; *Simms v. Slacum*, 3 Cranch (U. S.) 306.

2. Order of Discharge Regular on Its Face. — *Saffery v. Jones*, 2 B. & Ad. 598, 22 E. C. L. 146; *Clementson v. Coombes*, East T. 1871, (New Bruns.); *Bush v. Pettibone*, 5 Barb. (N. Y.) 273; *Bullymore v. Cooper*, 46 N. Y. 236; *Develin v. Cooper*, 84 N. Y. 414; *Goodwin v. Griffis*, 88 N. Y. 631, *reversing* 25 Hun (N. Y.) 61.

3. Develin v. Cooper, 84 N. Y. 419.

4. Bullymore v. Cooper, 46 N. Y. 236; *Develin v. Cooper*, 84 N. Y. 414; *Goodwin v. Griffis*, 88 N. Y. 631, *reversing* 25 Hun (N. Y.) 61. See also *Dunford v. Weaver*, 84 N. Y. 452.

5. Prisoner Taken from Sheriff's Custody under Warrant for Criminal Charge. — A prisoner was taken out of the sheriff's custody against his will and the will of the prisoner, under a warrant issued against such prisoner, for a criminal charge. It was held that the sheriff, having power to prevent his being taken from his custody, and failing to exercise it, was liable for his escape whether the prisoner had given bail for the liberties or not, for he was equally in the sheriff's custody; and the facts that he was not locked up, and was allowed the liberties of the jail, made no difference. *Brown v. Tracy*, 9 How. Pr. (N. Y. Supreme Ct.) 93.

Prisoner Taken from Sheriff's Custody in Another State After Recapture. — Where a debtor, although lured into one state for the purpose of subjecting him to the laws of that state, was arrested upon mesne process, and escaped into another state, and was retaken upon fresh pursuit in the latter state, but taken out of the

sheriff's custody by virtue of legal process in such state, it was held that although the sheriff could not resist the laws of such state, the fault was in suffering his prisoner to go where he had lost control of him, and the mere recapture without holding him was not an excuse. *Griffin v. Brown*, 2 Pick. (Mass.) 309.

Under the New York Rev. Stat. 437, as modified by c. 390, § 2, of the Laws of 1847, providing that being out of prison in certain cases is not an escape as "when the prisoner is at large out of prison by virtue of some writ of habeas corpus or rule of court, or in such other cases as may be provided by law," a sheriff is not liable for an escape where the defendant is compulsorily taken from the jail liberties, on a warrant, by the sergeant at arms of the House of Representatives. *Wickelhausen v. Willett*, 10 Abb. Pr. (N. Y. Super. Ct.) 164, 12 Abb. Pr. (N. Y.) 319, 21 How. Pr. (N. Y.) 40.

6. Escape of Prisoner While in Custody of Court under Habeas Corpus. — *Barth v. Clise*, 12 Wall. (U. S.) 402. See also *Wightman v. Mullins*, 2 Stra 1226; *Wigley v. Jones*, 5 East 440.

7. Taking Prisoner in Roundabout Way for His Accommodation. — *Benton v. Sutton*, 1 B. & P. 28, *per* Buller, J.; *Mosedell's Case*, 1 Mod. 116; *People v. Stone*, 10 Paige (N. Y.) 611. See also *Hawkins v. Plomer*, 2 W. Bl. 1050.

8. Holdroid v. Liddel, 1 Ld. Raym. 241; *People v. Stone*, 10 Paige (N. Y.) 610. See also *Benton v. Sutton*, 1 B. & P. 28, note a.

9. People v. Stone, 10 Paige (N. Y.) 610.

10. Taking Prisoner Out of County on Habeas Corpus. — *Boynton's Case*, 3 Coke 43, *citing* *Charnock's Case*, 31 Eliz.; *Niass v. Davis*, 11 Jur. 472; *Hassam v. Griffin*, 18 Johns. (N. Y.)

Supreme Court commissioner, although his decision is erroneous.¹

t. WHERE PRISONER IS RESCUED. — If a debtor is arrested on final process, and on the way to jail, or in jail, is rescued, unless it be by the public enemy, the officer is liable for an escape; for he is bound in any such case to have his posse sufficient to overcome all force.² But if he is arrested on mesne process, and while going to jail he rescues himself or is rescued by others, the officer may return the rescue, and such return is good, and no action for an escape lies against him, for in such case he is not obliged to raise his *posse comitatus*.³ But if he gets the prisoner within the prison, though the custody be by mesne process only, he must hold him at all events, and it has been held that the rescue will be no excuse unless it be by the public enemy.⁴

u. WHERE PRISONER ESCAPES THROUGH ACTS OF CREDITOR, HIS AGENT OR ATTORNEY. — Where a sheriff deviates from his line of duty, at the direction or request of the plaintiff or his agent — as where he takes a prisoner to some particular place for the purpose of obtaining security for the debt, and the prisoner escapes through the sheriff's negligence, or because of an agreement between the debtor and creditor, this is not an escape for which he is liable.⁵ If a prisoner is voluntarily permitted by his creditor to go at large, and is rearrested on new process, and subsequently escapes, the act of the creditor, it has been held, will prevent a recovery therefor.⁶ And where a sheriff appoints a special bailiff, upon request of the plaintiff, he is not liable for an escape from the bailiff.⁷

Fraudulent Acts. — If the creditor by himself or his agent, by artifice or fraud, induces the prisoner to escape, for the purpose of bringing suit therefor, the sheriff is not liable to the creditor,⁸ nor where the fraud is practiced

48, 9 Am. Dec. 184. But compare *People v. Stone*, 10 Paige (N. Y.) 610.

1. *Erroneous Discharge on Habeas Corpus by Supreme Court Commissioner.* — *Wiles v. Brown*, 3 Barb. (N. Y.) 37.

2. *Rescue of Prisoner in Custody on Final Process* — *England*. — *Elliott v. Norfolk*, 4 T. R. 789; *Alsept v. Eyles*, 2 H. Bl. 108; *O'Neil v. Marson*, 5 Burr. 2813. See also *Crompton v. Ward*, 1 Stra. 432.

Georgia. — *Abbott v. Holland*, 20 Ga. 599.

Massachusetts. — *Cargill v. Taylor*, 10 Mass. 207.

New Jersey. — *Patten v. Halsted*, 1 N. J. L. 320.

North Carolina. — *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 161.

South Carolina. — *Cook v. Irving*, 4 Strobb. L. (S. Car.) 207.

3. *England.* — *Crompton v. Ward*, 1 Stra. 432; Bacon's Abr., title *Rescue* (E) [*citing* *Waldo v. Lambert*, Cro. Eliz. 868, March. 1, Jon. 201; *May v. Proby*, 3 Bulst. 198, 1 Rolle 389, Noy 40, Moor 852, 2 Lev. 144, 6 Mod. 141, Lutw. 130, 131].

Connecticut. — *Clark v. Smith*, 9 Conn. 387.

Massachusetts. — *Whithead v. Keyes*, 1 Allen (Mass.) 350.

North Carolina. — *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 161; *Crumpler v. Glisson*, Term (4 N. Car.) 79.

South Carolina. — *Cook v. Irving*, 4 Strobb. L. (S. Car.) 206.

See also *Howard v. Blackford*, 3 N. J. L. 350.

4. *Rescue on Mesne Process from Prison.*

Crompton v. Ward, 1 Stra. 432; *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 161; *Savage v. Jarvis*, 8 U. C. Q. B. 334.

5. *Escape by Acts of Creditor.* — *State v. Woods*, 7 Mo. 536; *Weed v. Preston*, 54 Vi. 648. See also *Calcutt v. Ruttan*, 14 U. C. Q. B. 33.

Creditor's Consent to Debtor's Removal from Limits. — An imprisoned debtor being dangerously sick, the creditors gave a writing addressed to the jailer in these words: "We hereby consent that H. [the debtor] be removed from the jail limits, during such time as may be necessary to his recovery, in the opinion of his physicians; you being answerable for his return whenever he shall be deemed in a suitable situation as relates to his health." H. was removed; and in an action afterwards brought on the bond given for the liberties of the prison, it was held that such writing was not a license to depart the prison; the language of it importing a condition, according to which the jailer was not authorized to suffer the departure of H., without, at the same time, making himself responsible for his return. *Seymour v. Harvey*, 11 Conn. 275.

The Consent of an Agent of the Plaintiff to an escape may be implied as well as expressed, and if the fact existed and was satisfactorily proved, then the consequence would be the same as if the consent had been expressed. *Warberton v. Woods*, 6 Mo. 10.

6. *Andres v. Dowdall*, Trin. T. 1832 (New Bruns.).

7. *Escape from Special Bailiff Appointed at Plaintiff's Request.* — *De Moranda v. Dunkin*, 4 T. R. 120.

8. *Inducing Prisoner by Artifice or Fraud to Escape.* — *Dexter v. Adams*, 2 Den. (N. Y.) 650; *Van Wormer v. Van Voast*, 10 Wend. (N. Y.) 356. See also *Merry v. Chapman*, 3 P. & D.

by one acting in concert with such agent.¹

Furnishing Means of Escape. — Where the prisoner is furnished by the creditor's agent with the means of escape, the sheriff is not liable.²

Abuse of Process. — If the creditor abuses the process of court for his own advantage, the sheriff is not liable — as where a creditor, after a negligent escape of his debtor from the prison limits, has him arrested on a writ of attachment for the purpose of preventing his return until he can bring an action against the sheriff for an escape; for the creditor has no right to make use of the forms of law for an improper purpose, and he will not be allowed to take advantage of his own wrong.³

Acts of Creditor's Attorney. — A sheriff does not commit an escape if the creditor's attorney, after payment of the debt for which a prisoner has been arrested, authorizes the prisoner's release.⁴ But it seems that if the prisoner is released by direction of the creditor's attorney without receiving payment of the debt, this is an escape for which the sheriff is liable.⁵ But in *Pennsylvania* it has been held that the creditor's attorney has full power and authority to discharge the defendant without having received the amount of the debt, or without the same being paid, and that the sheriff is bound to receive and obey his instructions and not liable for releasing the prisoner.⁶ Where the creditor's attorney, without the knowledge, concurrence, or approbation of the creditor, consents that a party arrested may go to another place out of the sheriff's bailiwick for the purpose of getting money to pay the judgment, the sheriff is liable.⁷

v. WHERE FRAUDULENT DEBTOR IS COMMITTED. — If the sheriff suffers the escape of a fraudulent debtor committed to his custody, who, by statute, is liable to imprisonment, although imprisonment for debt is abolished, this is an escape for which he is liable.⁸

w. WHERE POOR DEBTOR IS RELEASED. — Under the Common Law, if a sheriff suffers a prisoner to go at large because he is unable to pay for his sustenance

25, 10 Ad. & El. 516, 37 E. C. L. 167, 8 Dowl. P. C. 81.

In the case of *Dexter v. Adams*, 2 Den. (N. Y.) 650, it is said that as to others than the creditor, an escape brought about through fraud or artifice might give a good right of action against the sheriff.

1. *Dexter v. Adams*, 2 Den. (N. Y.) 650.

2. *Love v. M'Alister*, 4 Hayw. (Tenn.) 68.

3. **Abuse of Process of Court by Creditor.** — *Drake v. Chester*, 2 Conn. 475.

4. **Acts of Creditor's Attorney — England.** — *Hemming v. Hale*, 7 C. B. N. S. 487, 97 E. C. L. 487, 29 L. J. C. P. 137, 6 Jur. N. S. 554; *Savory v. Chapman*, 11 Ad. & El. 829, 39 E. C. L. 242, 3 P. & B. 604, 8 Dowl. P. C. 656, 4 Jur. 411.

Canada. — *Stocking v. Cameron*, 6 U. C. Q. B. (O. S.) 475.

New York. — *Jackson v. Bartlett*, 8 Johns. (N. Y.) 367; *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 221, 6 Am. Dec. 335.

An attorney on receiving the payment of the debt and costs in an action against the debtor, cannot compromise the right of the plaintiff to bring an action for an escape which may have happened before the debt and costs were paid in the first suit. *Stocking v. Cameron*, 6 U. C. Q. B. (O. S.) 475.

5. **Release of Prisoner by Direction of Creditor's Attorney without Payment of Debt.** — *Davis v. Cunningham*, 5 U. C. L. J. 254; *Brock v. M'Lean*, Taylor (U. C.) 548; *Jackson v. Bartlett*, 8 Johns. (N. Y.) 367; *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 221, 6 Am. Dec. 335.

These cases hold that an attorney's authority terminates with judgment, or at least with the issuance of execution, and that he has no authority from his general character of attorney, to discharge the defendant until the money is paid. See also *Crozer v. Pilling*, 4 B. & C. 26, 10 E. C. L. 271. And see generally the title ATTORNEY AND CLIENT, vol. 3, p. 278.

Under the English Statute 15 & 16 Vict., c. 76, § 126, a written order under the hand of the attorney in the cause, by whom any writ of *ca. sa.* has been issued, shall justify the sheriff, jailer, or person in whose custody the party may be under the writ, in discharging such party, unless the party for whom such attorney professes to act shall have written notice to the contrary to such sheriff, jailer, or person in whose custody the opposite party may be; but such discharge shall not be a satisfaction of the debt, unless made by the authority of the creditor, and nothing herein contained shall justify any attorney in giving such order for discharge without the consent of his client. 4 Jacob's Fisher's Dig. 4688.

6. **Rule in Pennsylvania.** — *Scott v. Seiler* 5 Watts (Pa.) 246; *Hopkinson v. Leeds*, 78 Pa. St. 399.

7. **Consent of Creditor's Attorney.** — *Lovell v. Orser*, 1 Bosw. (N. Y.) 349. See also *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335.

8. **Where Fraudulent Debtor Is Committed.** — *Mewster v. Spalding*, 6 McLean (U. S.) 25.

in prison and the plaintiff refuses to pay for the same or to give security for it, he is liable for an escape.¹

But if a Statute Authorizes the Sheriff to Demand Security or money for the support of the prisoner, he is not liable for discharging him in the event the creditor does not comply.²

Release of Debtor by Special Act of Legislature. — It has been held that a special act of legislature releasing a debtor imprisoned on execution, and granting freedom from arrest for a limited time, will not release the sureties on his bond from liability for an escape, for the statute is unconstitutional and void, in that it operates directly upon the rights of creditors, and takes away their right to imprison their debtor to enforce payment of their debt.³

Under Insolvent Laws. — Where a prisoner, on taking the poor debtor's oath, was immediately permitted by the jailer to depart, under a supposed authority of law, it is an escape; for the creditor in such an event should have an opportunity to supply money for the prisoner's support while in custody.⁴

x. WHERE WIFE ESCAPES UNDER EXECUTION AGAINST HUSBAND AND WIFE. — Where, under execution against husband and wife, the wife only is arrested, and she escapes, the sheriff is liable, for the plaintiff may elect to take either the husband or wife in execution.⁵

4. Acts of Prisoner Subsequent to Escape. — The sheriff is not liable for the acts of the escaped prisoner subsequent to his escape, for they are not the natural and probable consequences of the escape.⁶

5. Parties Who May Sue — *a. IN GENERAL.* — In the action of escape, there is no particular disqualification of any person attending the right to sue.⁷

1. Release of Poor Debtor Unable to Sustain Himself. — *M'Lain v. Hayne*, 3 Brev. (S. Car.) 291.

2. Gill v. Miner, 13 Ohio St. 182; *Blood v. Austin*, 3 Pick. (Mass.) 259.

3. Release of Debtor by Act of Legislature. — *Keith v. Ware*, 2 Vt. 179; *Ward v. Barnard*, 1 Aik. (Vt.) 121.

But in *Fitch v. Badger*, 1 Root (Conn.) 72, it was held that a release by an act of the assembly was not an escape.

4. Release of Poor Debtor on Taking Poor Debtor's Oath. — *Fitch v. Cook*, 1 Root (Conn.) 285; *Wells v. Lindsley*, 2 Root (Conn.) 481; *Bowen v. Huntington*, 3 Conn. 423; *Carrington v. Parsons*, 4 Day (Conn.) 45.

Release of Poor Debtor on Improper Oath, Escape. — *Little v. Hasey*, 12 Mass. 320. See also *Com. v. Alden*, 14 Mass. 389.

Taking Defective Bond, Escape. — *Faircloth v. Freeman*, 10 Ga. 249; *Hotchkiss v. Whitten*, 71 Me. 578. Compare *Colley v. Morgan*, 5 Ga. 183.

Taking Poor Debtor's Oath Beyond the Limits. — In *Com. v. Alden*, 14 Mass. 388, it is said that a prisoner commits no escape in taking the poor prisoner's oath beyond the limits of the jail, at the time and place appointed by magistrates for administering the oath; but in this case the indictment was for perjury in taking the oath.

Surrender of Insolvent. — Where a debtor who has been released on giving a bond to file a petition for his discharge under the insolvent laws, the alternative condition of which bond is that he will surrender himself to the jail of the county in the event of his failure to obtain a discharge, surrenders himself, on the refusal of his application, to the jailer, who refuses to keep or hold him, an action for escape will not lie against the debtor and his sureties, for

he has complied with the alternative condition of the bond, which is therefore void. *Saunders v. Quigg*, 112 Pa. St. 546.

Nor will such surrender make the sheriff or board of inspectors liable, where the county prison is, by statute, managed by a board of inspectors, even though such board controls the internal affairs of the prison, appoints a superintendent, matron, and keepers, and serves without compensation. In such case the sheriff has not either personally or by deputy any control over such jail, or of the debtor's apartments therein. *Keim v. Saunders*, 120 Pa. St. 121; *Saunders v. Smith*, 132 Pa. St. 180, 25 W. N. C. (Pa.) 286.

Nor is his surrender sufficient to make the superintendent and keeper of the prison liable. *Saunders v. Perkins*, 140 Pa. St. 102.

Surrender of Insolvent in Open Court. — Where an insolvent comes into court and surrenders himself in open court in discharge of his security, and prays himself in the custody of the sheriff, the sheriff is not liable for his escape, for it is necessary to show that such insolvent was committed to the sheriff's custody, and a prayer made is by no means a prayer granted. *Siler v. McKee*, 2 Jones L. (47 N. Car.) 379.

5. Escape of Wife. — *Whiting v. Reynel*, Cro. Jac. 657; Roll. Abr. 810.

6. Acts of Prisoner Subsequent to Escape. — *Hullinger v. Worrell*, 83 Ill. 220.

7. Suit by Administratrix in Her Own Name. — An administratrix may maintain an action in her own name, for the escape of a person arrested under a judgment recovered by her as administratrix. *Bonafous v. Walker*, 2 T. R. 126.

The Nominal Plaintiff in Ejectment in whose name the mesne profits have been recovered, may bring suit against the sheriff for an

b. SUIT BY PERSON NOT A PARTY TO ORIGINAL PROCEEDING. — A person who was not a party to the proceeding under which the prisoner was committed cannot sue.¹

c. WHERE AUTHORITY GIVEN BY STATUTE TO SUE IN NAME OF STATE. — Where a state statute allows any aggrieved person to sue in the name of the state, on the bond given by the sheriff, the United States may sue in the name of the state, and maintain an action to recover pecuniary damages occasioned by allowing the escape of a prisoner indicted by a federal grand jury, and confined in a state jail.²

d. WHERE SHERIFF'S OFFICIAL BOND PAYABLE TO GOVERNOR AND HIS SUCCESSORS. — Where a sheriff's bond is made payable to the governor and his successors in office, it is payable to the officer, and not to the individual, and may be sued on by any successor of such officer without assignment.³

e. WHERE SHERIFF RESPONSIBLE BY STATUTE FOR SOLVENCY OF SECURITY. — The sheriff alone can sue on a bond for the jail limits, where the statute expressly declares that he shall be responsible for the solvency of the security which he takes; for the bond is considered as an indemnity to him, and not to the creditor, and is not assignable.⁴

6. Parties Liable — *a. SHERIFF* — (1) *In General.* — A sheriff who suffers a debtor to escape is liable in his official character, and not as bail, for a plaintiff is not to be compelled to rely merely on the personal responsibility of the sheriff, where he is entitled to the security afforded by the bond given by him for a faithful performance of his duties as sheriff.⁵ But where a statute provides that the sheriff shall himself be liable as bail for the escape of a prisoner arrested on an order of court, the common-law action against the sheriff for an escape is not abolished, and the plaintiff may elect which of the two remedies he will adopt.⁶

escape of the debtor in execution, instead of the real plaintiff who sustains the injury. *Doe v. Jones*, 2 M. & S. 473.

The Executor of a Creditor injured by an escape may sue, although the escape occurred in the latter's lifetime. *Berwick v. Andrews*, 6 Mod. 126.

The Mother of an Illegitimate Child may sue an officer for the escape of the putative father arrested under a bastardy warrant, for although a prosecution under the bastardy act is in the name of the people, it is a civil, not a criminal proceeding. *Pease v. Hubbard*, 37 Ill. 258.

To the same effect is *Lantz v. Lutz*, 8 Pa. St. 405, although it appears from *Maurer v. Mitchell*, 9 W. & S. (Pa.) 71, that the prosecution in *Pennsylvania* under the bastardy act is by indictment.

But in *Booz v. Engarman*, 18 Pa. St. 263, and *Downing v. Com.*, 21 Pa. St. 217, it was held that the mother cannot maintain the action before sentence directing payment of a sum of money is pronounced; that until such order is made she has no cause of action; that the criminal proceeding is not in her name, or for her benefit, but in the name of the commonwealth.

1. Suit by Person Not a Party to Original Proceeding. — *Hullinger v. Worrell*, 83 Ill. 220; *Cameron v. Beardsley*, 4 New Bruns. 598.

2. Where Authority Given by Statute to Sue in Name of State. — *Tennessee v. Hill*, 60 Fed. Rep. 1005.

3. Where Sheriff's Official Bond Payable to Governor and His Successors. — *Howard v. Crawford*, 15 Ga. 423.

4. Where Sheriff Responsible by Statute for Solvency of Security. — *Yates v. Yeaden*, 4 McCord L. (S. Car.) 18.

5. Liability of Sheriff. — *Brown v. Lord*, Kirby (Conn.) 209; *Carpenter v. Fifield*, 14 R. I. 75.

Failure of Sheriff to Pay Judgment in Bastardy Proceedings. — A sheriff permitting a defendant, committed to jail for nonpayment of a judgment in bastardy proceedings, to voluntarily escape, is not to be committed to jail like the principal defendant, for failure to pay or replevy the judgment rendered against him in favor of the judgment plaintiff, for permitting the escape. *Hoagland v. State*, (Ind. App. 1895) 40 N. E. Rep. 931.

6. Where Sheriff Liable as Bail. — *Smith v. Knapp*, 30 N. Y. 591; *Crane v. Stone*, 15 Kan. 98.

If the complaint makes no mention of the defendant as bail, and there is nothing in it manifesting an intention or election to hold him liable in that character, it is to be treated as an action for an escape. *Smith v. Knapp*, 30 N. Y. 581.

In *New York* a sheriff becomes liable as bail under Code, § 201, where, after executing an order of arrest he permits the defendant to go at large without giving bail or making a deposit. *Bensel v. Lynch*, 44 N. Y. 164, affirming 2 Robt. (N. Y.) 448; *Brady v. Brundage*, 59 N. Y. 312.

But the sheriff may exonerate himself from liability by the surrender of the defendant to actual custody, within twenty days after suit brought, or within such further time as may be granted by the court. *Brady v. Brundage*, 59 N. Y. 313.

(2) *Sheriff of Supreme Court.* — If an arrest be made by a county sheriff under process from the Supreme Court, the sheriff of the latter court is not, under the *Indiana* statute, liable for an escape suffered by the county sheriff.¹

(3) *Liability for Acts of Deputy.* — Wherever the person who makes the arrest is the deputy or servant of the sheriff, the custody and acts of the deputy are the custody and acts of his principal, and if the deputy or servant suffer an escape, the principal is liable.²

b. *SHERIFF'S BAILIFF.* — An action against a sheriff's bailiff, by the creditor, for an escape, will not lie against him as an officer, unless the act complained of amounted in effect to a rescue by him. In such case he would be a wilful wrongdoer.³ But an action on the case lies in favor of a sheriff against a bailiff for negligence in allowing a prisoner to escape, in consequence of which the sheriff is sued by the creditor. And it seems that in such action the sheriff is allowed to recover both the costs of the action against him, and his own costs, although no notice of the action had been given to the bailiff by the sheriff; but the judgment in such case is not conclusive upon him, if he has had no opportunity to defend in the sheriff's name.⁴

c. *SHERIFF'S SURETIES.* — The sureties of a sheriff are liable on his official bond, at the moment of the breach of his duty by suffering a prisoner in execution to escape; and this is so without fixing the liability of the principal, even though the prisoner is subsequently discharged under insolvent proceedings.⁵

Where the sheriff arrests a defendant under an order duly made under the code, § 179 and allows him to go at large on executing the proper bond with sureties who fail to justify on being excepted to, and the plaintiff in such action recovers judgment with costs, it has been held that he cannot maintain an action against such sheriff to recover the amount of said judgment, after an execution against the property of such defendant has been issued on said judgment, and returned unsatisfied; for the judgment should have been for the delivery of the property, and not for the damages. *Gallarati v. Orser*, 27 N. Y. 324, *overruling* *4 Bosw. (N. Y.) 94*; *Rosekrans, J., dissenting*.

Under the *North Carolina* statute providing that "if after being arrested the defendant escape, or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail," etc., a sheriff, after making an arrest upon mesne process, having permitted the defendant to go into his bedroom, from which he escaped by a back door and has never been recaptured, is liable as bail, under said section and also section 313. *Winborne v. Mitchell*, 111 N. Car. 14.

If the sheriff is bail for two persons, one of whom he voluntarily permitted to escape after arrest on execution, and subsequently recaptured; and returned *non est inventus* as to the other; the assent of the plaintiff in the execution, after such recaption, that the debtor should not be held in custody, will not deprive him of his remedy against the sheriff as the bail of the one not found. *Jackson v. Hampton*, 6 Ired. L. (28 N. Car.) 34.

1. *Liability of Sheriff of Supreme Court.* — *M'Gruder v. Russell*, 2 Blackf. (Ind.) 10.

2. *Liability of Sheriff for Acts of Deputy.* — *Wheeler v. Hambright*, 9 S. & R. (Pa.) 394; *Duncan v. Klinefelter*, 5 Watts (Pa.) 141, 30 Am. Dec. 295.

Special Bailiff Occasionally Employed. — A bailiff who was occasionally employed by the sheriff as his special bailiff to execute writs, having in his possession a writ which he had taken in the sheriff's absence, against a prisoner, arrested him without warrant against him. It was held that the mere possession of the writ conferred no authority from the sheriff, and therefore there was no privity between the sheriff as a public officer to whom the writ was directed, and the bailiff, who directed another bailiff to arrest the prisoner. *Rigney v. Ruttan*, 5 U. C. Q. B. (O. S.) 707.

3. *Liability of Sheriff's Bailiff.* — *Wilson v. McCullough*, 5 U. C. Q. B. (O. S.) 680.

The Bailiff of a Liberty, who has the return and execution of writs, is liable to an action of debt for escape, by removing a prisoner taken in execution to the county jail situated out of the liberties, and there delivering him to the sheriff. But the sheriff is not answerable for the acts of such bailiff; all that the sheriff can do is to command the bailiff of that liberty to execute the writ. *Boothman v. Surry*, 2 T. R. 5.

4. *Liability of Bailiff to Sheriff.* — *Ruttan v. Shea*, 5 U. C. Q. B. 210.

5. *Liability of Sheriff's Sureties.* — *Smith v. Com.*, 59 Pa. St. 326.

In *Georgia* under the Act of 1799 the sureties on a sheriff's bond are not liable for an escape suffered by a jailer, but only for that suffered by the sheriff, or a deputy sheriff proper. *Howard v. Crawford*, 15 Ga. 426.

In *New York* the sureties on the official bond of the sheriff are liable within the amount of the bond, for his failure to take sufficient security, upon the arrest of a party under an order of arrest; for such failure on his part makes him liable as bail under section 201 of the Code, and the liability of the sureties arises under section 202 of the Code, providing that if a judgment be recovered against the sheriff upon his liability as bail, and an execution

d. UNITED STATES MARSHAL — (1) *In General*. — In the absence of any law of Congress qualifying or limiting the liability of marshals in actions for escape, they are governed in these matters, as to the rights of third persons, by the law of the state where they are located and performing their duties.¹ But under a statute making it the duty of the keepers of jails to receive and safely keep therein all prisoners committed under the authority of the United States, pursuant to the recommendation of Congress of the 23d September, 1789, vol. 1, p. 362, the marshal is not liable for the escape of a debtor committed to a state jail under process from a court of the United States; for in such case the prisoner is no longer in the custody of the marshal, nor controllable by him.²

(2) *Liability of Marshal for Acts of Deputy*. — A United States marshal is liable for the act of his deputy in permitting the escape of a person committed to his custody.³

e. CORONER. — As a sheriff cannot be imprisoned in the jail of which he has the custody, and of which he appoints the keeper, if a coroner arrest him and put him into jail, it will be an escape for which he is liable, for in such case he is bound at common law to make his own house, or any other place, a prison, for the purpose of keeping the sheriff in custody if there be no statute providing otherwise.⁴

f. JAILER. — If a jailer suffers a prisoner to escape, and the sheriff is thereby made responsible, the jailer is liable to the latter in an action on the case; and the fact that the jailer took the advice of counsel and acted in good faith before releasing the prisoner will not relieve him from such liability.⁵

g. JAILER'S SURETIES. — Where bond is given by the jailer, his sureties are liable to the sheriff for the amount of the judgment recovered against the latter for an escape permitted by the jailer.⁶

thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the sheriff, to collect the delinquency as in the other cases of delinquency. *People v. Dikeman*, 3 Abb. App. Dec. (N. Y.) 522.

1. *Liability of United States Marshal*. — *Servis v. Marsh*, 38 Fed. Rep. 796.

A marshal is liable upon his official bond if he suffers a debtor to escape after arrest upon a *ca. sa.* although he has him in court at the return day. *U. S. v. Brent*, 1 Cranch (C. C.) 525.

In *U. S. v. Williams*, 5 Cranch (C. C.) 619, it was held that the marshal of the District of Columbia was not liable on his official bond, for the escape of persons taken and in custody under a *ca. sa.* for fines, etc., whether prayed in commitment in execution or not.

2. *Liability of Marshal where Prisoner Committed to State Jail*. — *Randolph v. Donaldson*, 9 Cranch (U. S.) 86.

3. *Acts of Deputy Marshal*. — *Servis v. Marsh*, 38 Fed. Rep. 796.

4. *Liability of Coroner*. — *Style* 465; *Day v. Brett*, 6 Johns. (N. Y.) 22.

If a coroner having an execution against a deputy sheriff, who is also deputy jailer in charge of the jail, arrests him and carries him to the jail house, and the sheriff is not at the jail, nor any keeper authorized by him, it has been held that a coroner leaving his prisoner at the jail is discharged, and the sheriff is guilty of an escape. *Colby v. Sampson*, 5 Mass. 311.

This case is criticised in *Skinner v. White*, 9 N. H. 215, in which it is said: "The sheriff

could not be held liable for an escape unless the prisoner was in his custody, and he was not in his custody unless he had been committed. But if the coroner had no power to confine in the jail and did not deliver his prisoner to any one there authorized to receive him, we do not readily perceive how he could be said to be committed."

5. *Liability of Jailer*. — *Duncan v. Klinefelter*, 5 Watts (Pa.) 144, 30 Am. Dec. 295. See also *Ruttan v. Shea*, 5 U. C. Q. B. 210.

It seems that a special action on the case sounding in tort at the suit of the sheriff where the jailer has not given bond to the sheriff, will not lie against the jailer, for a negligent escape for which a recovery has been had against the sheriff; for in such case the jailer is only answerable in assumpsit, on his implied undertaking to serve the sheriff with diligence and fidelity, and the charge not being brought against him on a contract, he is only a tortfeasor, in which case the sheriff himself is equally guilty. *Kain v. Ostrander*, 8 Johns. (N. Y.) 207, citing *Atterton v. Harward*, Cro. Eliz. 349.

In *Lane v. Cotton*, 1 Salk. 18, it is said that if a jailer suffer a voluntary escape, he is liable as a wrongdoer, even though the sheriff is liable for the escape, for such an escape is in the nature of a rescue by the jailer. But in the case of a negligent escape the sheriff only is liable. See also *Wheeler v. Hambright*, 9 S. & R. (Pa.) 394. And see *supra*, this section, *Sheriff—Liability for Acts of Deputy*.

6. *Liability of Jailer's Sureties*. — *Scarborough v. Thornton*, 9 Pa. St. 451.

A jailer covenanted with a sheriff, among

h. PRISONER'S SURETIES. — Where a sheriff, under statute, has the nomination and appointment of the jailer, and the latter is simply his deputy, the act of the jailer is, in law, the act of the sheriff himself, and the prisoner's sureties are not liable to the sheriff for an escape of a prisoner on the limits suffered by the jailer.¹

i. RESCUERS. — Rescuers of a person in execution are liable to the party injured, though the latter has his remedy against the sheriff, and the sheriff has his remedy over against the wrongdoers, for the sheriff might be dead or insolvent.² And for the rescue of a person arrested on mesne process, the rescuers are liable to an action of trespass *vi et armis*, or an action on the case.³

j. COUNTY. — Under statute a county may be liable to the sheriff for a loss sustained by him at the suit of a creditor for an escape by reason of the insufficiency of the jail, or because there was no jail.⁴

k. CO-DEBTORS. — Where one of two judgment debtors is arrested and escapes, a payment made by the surety of such escaping judgment debtor is equivalent to a payment made by such debtor, and the co-debtor is liable to contribute to him immediately; and at any rate on refunding the money to the surety he is entitled to contribution from his co-debtor. And a discharge of the co-debtor under the insolvent laws will not affect the claim for such contribution, where the payment of the debt is made subsequent to the insolvent assignment.⁵

l. PERSONAL REPRESENTATIVE. — No action lies at common law against the executor or administrator of a person who suffers an escape, because it is a personal tort, and comes within the rule of *actio personalis moritur cum persona*.⁶

7. Remedies. — Whether before or after judgment, the common law gave an action on the case only for either a voluntary or a negligent escape.⁷ But

other things, to attend quarter sessions, and to remove prisoners, under writs of habeas corpus, without permitting them to escape. The former being engaged at quarter sessions, the sheriff upon a writ of habeas corpus for the removal of a prisoner directed his warrant to the defendant, "and also to William Williams, for this time only, by me thereto specially appointed." Williams, who was the defendant's turnkey, proceeded with the prisoner towards the place of designation. The prisoner having escaped, it was held that the sheriff having specially directed the warrant to Williams, the jailer and his sureties were not liable upon his covenant; for Williams would have a right to control the proceedings under the writ, and the safe conduct of the prisoner intrusted to him was not an engagement within the scope of the jailer's covenant. *Ryland v. Lavender*, 2 Bing. 65, 9 E. C. L. 318.

1. Liability of Prisoner's Sureties. — *Huntington v. Williams*, 3 Conn. 429; *Wemple v. Glavin*, 5 Abb. N. Cas. (N. Y. Supreme Ct.) 361, 57 How. Pr. (N. Y.) 109.

2. Liability of Rescuers. — *Bacon's Abr.*, title *Rescue* (C), 585. See also *Cargill v. Taylor*, 10 Mass. 207.

3. Liability of Rescuers of Persons Arrested on Mesne Process. — *Bacon's Abr.*, title *Rescue* (C), 585.

In an action for rescue of a defendant in an attachment suit on a note the plaintiff must prove the debt. *Law v. Atwater*, 2 Root (Conn.) 72.

Sheriff's Return Not Conclusive on Rescuers. — In an action for damages against rescuers at

the suit of the plaintiff in the writ issued against the person rescued, and under which writ he was arrested, the return of the officer on such writ, that he had arrested the body of the debtor, the defendant therein, and that he was rescued from his custody by the rescuers, is not conclusive evidence of the facts stated in the return, on the trial of such action against the latter. *Francis v. Wood*, 28 Me. 73.

4. Liability of County. — Under the *Massachusetts* statute of February 21, 1785, which makes the sheriff chargeable to the creditor in case of an escape by reason of the insufficiency of the jail, the sheriff has his remedy over against the county. *Burrell v. Lithgow*, 2 Mass. 528.

In *Brown County v. Butt*, 2 Ohio 349 (*Burnett, J., dissenting*) it was held that where a recovery has been had against the sheriff for an escape of a prisoner by reason of the fact that there was no jail in the county in which to imprison the debtor, the county is liable to the sheriff for the damages sustained by him by reason of such escape. But this case was overruled in *Hamilton County v. Mighels*, 7 Ohio St. 117.

5. Liability of Co-debtors. — *Ransom v. Keyes*, 9 Cow. (N. Y.) 136.

6. Liability of Personal Representative of Party Suffering Escape. — *Berwick v. Andrews*, 6 Mod. 126.

7. Difference between Voluntary and Negligent Escapes. — *Bonafant v. Walker*, 2 T. R. 129; *Gwinn v. Hubbard*, 3 Blackf. (Ind.) 15; *Loosey v. Orser*, 4 Bosw. (N. Y.) 401; *Adams*

by the statute Westminster 2, 13 Edward I., c. 11, an action of debt against the sheriff is given. This statute, by a liberal construction, has been held to extend to all cases. The statute 1 Rich. II., c. 12, also gave an action of debt, and although in express terms only mentioning the warden of the Fleet prison, it has by construction been extended to all jailers.¹ The sense of these statutes is that the party who suffers by the escape shall have the same remedy against the jailer which he had against the debtor.² These statutes simply give the cumulative remedy of the action of debt; and unless changed by statute in the different states, the only difference as to the liability of the officer, between the two kinds of escape, is, that in the case of a voluntary escape he is liable absolutely; in the case of a negligent escape he is not liable to an action of debt given by the statutes, brought after recaption upon fresh pursuit, and when he has the prisoner in custody.³ But the action of debt lies only when the prisoner escaping is in execution.⁴

These statutes also apply where the prisoner has been committed under a decree in chancery, under 5 Anne, c. 9, which places the complainant in such a decree on the same footing as if his judgment had been obtained at common law.⁵ In some jurisdictions these statutes are considered to be not in force, and the injured party is left to his common-law remedy.⁶ In others they have been expressly declared to be in force.⁷

8. Defenses to Action — *a.* BY SHERIFF — (1) *Sheriff's Return*. — The sheriff cannot rely upon a false return made by himself in his own favor; but he is generally concluded by his own return when set up by a party that may claim anything under it.⁸

(2) *As to Indebtedness of Prisoner* — (a) *Where Prisoner Arrested on Mesne Process*. — Where the prisoner is arrested on mesne process the sheriff has a right to take issue upon the question of indebtedness, and to avail himself

v. Turrentine, 8 Ired. L. (30 N. Car.) 147; *Smith v. Com.*, 59 Pa. St. 327.

1. *Bonafous v. Walker*, 2 T. R. 126; *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 154.

2. *Bonafous v. Walker*, 2 T. R. 132.

The Distinction Between an Action of Debt and an Action on the Case is this: at common law an action on the case only lay against the sheriff or jailer for an escape, in which case the creditor might recover damages for the officer's misconduct; but still he had a right to recover the debt against the original debtor. But the statutes of Edw. I. and 1 Rich. II. gave an action of debt against the sheriff or jailer to recover at once the sum for which the prisoner was charged in execution. *Bonafous v. Walker*, 2 T. R. 129.

3. *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 153. See also *Stonehouse v. Mullins*, 2 Stra. 873.

4. Action of Debt Lies Only when Prisoner Is in Execution. — *Van Slyck v. Hogeboom*, 6 Johns. (N. Y.) 270.

When Prisoner Is in Execution. — A defendant can, under the *English* practice, be charged in execution without the issuance of a *ca. sa.* *Watson v. Sutton*, 1 Salk. 272. See also *Hutchins v. Kenrick*, 2 Burr. 1050.

But under the *New York* statute a defendant cannot be charged in execution without the issuance of a *ca. sa.* and therefore an action of debt will not lie for the escape of a person surrendered into the custody of the sheriff by bail. In such case the proper remedy is an action on the case. *Van Slyck v. Hogeboom*, 6 Johns. (N. Y.) 270.

5. Where Prisoner Committed under Decree in Chancery. — *Howard v. Crawford*, 15 Ga. 431.

6. *Canada*. — *Wilson v. Jones*, 6 New Bruns. 658.

Georgia. — *Howard v. Crawford*, 15 Ga. 423.

Ohio. — *Richardson v. Spencer*, 6 Ohio 14; *Hootman v. Shriner*, 15 Ohio St. 46.

The New York Statute does not authorize an action of debt for the escape of a prisoner committed "upon contempt," or "upon process for contempt," nor does it declare that when such prisoner is required, by the terms of the process on which he is committed, to be kept in close custody until he pays a certain sum, as a fine imposed upon him, the sheriff shall be liable, if an escape occurs, for such sum absolutely and at all events. He is only liable for the damages sustained. *Loosey v. Orser*, 4 Bosw. (N. Y.) 401.

7. *Illinois*. — *Plumleigh v. Cook*, 13 Ill. 669.

Indiana. — *Gwinn v. Hubbard*, 3 Blackf. (Ind.) 15; *Hall v. Johnson*, 3 Blackf. (Ind.) 364; *State v. Hamilton*, 33 Ind. 504.

Maine. — *Fullerton v. Harris*, 8 Me. 393.

Maryland. — *U. S. v. Brent*, 1 Cranch (C. C.) 525.

North Carolina. — *Lash v. Ziglar*, 5 Ired. L. (27 N. Car.) 702.

Pennsylvania. — *Smith v. Com.*, 59 Pa. St. 327; *Shuler v. Garrison*, 5 W. & S. (Pa.) 457; *Karch v. Com.*, 3 Pa. St. 269; *Duncan v. Klinefelter*, 5 Watts (Pa.) 144, 30 Am. Dec. 295; *Shewel v. Fell*, 3 Veates (Pa.) 17.

Rhode Island. — *Steere v. Field*, 2 Mason (U. S.) 486.

8. Sheriff's Return. — *Browning v. Flanigan*,

every defense which the prisoner would have against such indebtedness.¹

(b) **Payment of Debt by Prisoner.** — It was formerly held to be no defense that the debt had been paid to the sheriff under the execution, as the sheriff had no authority to receive the money.² But modern authority holds that if the process be discharged or satisfied, it will be a good defense.³

(c) **Where Debt Barred by Statute of Limitations.** — If the debt for which the debtor was sued was barred by the statute of limitations, the sheriff may rely upon this fact in mitigation of damages.⁴

(3) **Discharge of Prisoner under Insolvent Laws.** — The fact that a prisoner was, after his escape, discharged under the insolvent laws, is not a good defense in an action against the sheriff.⁵

(4) **Void or Voidable Judgment or Process Against Prisoner.** — The sheriff cannot avail himself of any defect or irregularity in the judgment or process under which the arrest was made, which simply renders it voidable; for the defendant therein might not wish to avail himself of it, and it is good for all practical purposes until set aside; or it may be amended. But if the process or judgment is void, this is a good defense.⁶

22 N. J. L. 567. See *infra*, Evidence — *Contradiction of Sheriff's Return*.

1. **Where Prisoner Arrested on Mesne Process.** — *Cosgrove v. Bowe*, 10 Daly (N. Y.) 359. See also *White v. Jones*, 5 Esp. N. P. 160. But see *Huntley v. Smith*, 4 U. C. Q. B. 181.

2. **Payment of Debt by Prisoner.** — *Stringer v. Stanlack*, Cro. Eliz. 404, 2 Jon. 97; *Langton v. Wallis*, 1 Ld. Raym. 399, Lutw. 587; *Slackford v. Austen*, 14 East 468.

In the last case it is said that the sheriff is strictly no agent of the plaintiff's, but the officer of the court for the execution of its process, and he cannot substitute one mode of proceeding in lieu of another.

3. *Browning v. Flanigan*, 22 N. J. L. 576. *Munson v. Hamilton*, 5 U. C. Q. B. (O. S.) 120.

4. **Where Debt Barred by Limitation.** — *Slocum v. Riley*, 145 Mass. 370.

Where the sheriff relies upon the fact that the debt was barred by the statute of limitations, the burden of proof is upon the plaintiff to show both a cause of action and the suing out of process within the period of limitations. *Slocum v. Riley*, 145 Mass. 370.

5. **Discharge under Insolvent Laws, After Escape.** — *Hopkinson v. Leeds*, 78 Pa. St. 399.

6. **Where Process or Judgment Against Prisoner Voidable — England.** — *Ognel v. Paston*, Cro. Eliz. 164, 2 Leon. 84, cited in 2 Coke 142; *Conier's Case*, Cro. Eliz. 576; *Leighton v. Garnons*, Cro. Eliz. 706; *Shirley v. Wright*, 2 Salk. 700.

Canada. — *Power v. Johnston*, 4 New Bruns. 43; *McManus v. Wells*, 29 New Bruns. 457.

United States. — *Spafford v. Goodell*, 3 McLean (U. S.) 97.

Georgia. — *Howard v. Crawford*, 15 Ga. 423.

Illinois. — *Tuttle v. Wilson*, 24 Ill. 553.

New York. — *Hutchinson v. Brand*, 6 How. Pr. (N. Y. Supreme Ct.) 73, 9 N. Y. 208; *Dunford v. Weaver*, 21 Hun (N. Y.) 349, 84 N. Y. 445; *Ames v. Webbers*, 8 Wend. (N. Y.) 545; *Bissell v. Kip*, 5 Johns. (N. Y.) 100; *Ontario Bank v. Hallett*, 8 Cow. (N. Y.) 192; *Ginochio v. Orser*, 1 Abb. Pr. (N. Y. C. Pl.) 434; *Bensel v. Lynch*, 44 N. Y. 164, affirming 2 Robt. (N. Y.) 448; *Renick v. Orser*, 4 Bosw. (N. Y.) 387; *Scott v. Shaw*, 13 Johns. (N. Y.) 378; *Hinman v. Brees*, 13 Johns. (N. Y.) 529; *Jones v. Cook*,

1 Cow. (N. Y.) 309; *Cable v. Cooper*, 15 Johns. (N. Y.) 152; *Goodwin v. Griffiths*, 88 N. Y. 640, reversing 25 Hun (N. Y.) 61.

New Jersey. — *Patten v. Halsted*, 1 N. J. L. 320.

South Carolina. — *Brissac v. Mooror*, Dudley L. (S. Car.) 230; *Bacon's Abr.*, title Sheriff (N). See also *Bull v. Steward*, 1 Wils. 255.

See *supra*, this section, *Lawful Custody of Prisoner; Where Prisoner is Privileged from Arrest; Where Arrest Is Made on Void or Invalid Process; Where Court Rendering Judgment Was Without Jurisdiction*.

Judgment Obtained Without Consideration. — It will not avail the sheriff that the judgment against the party escaping had been obtained without consideration. *Payne v. M'Lean*, Taylor (U. C.) 450.

In an action against the marshal, for the escape of a prisoner in custody under an execution on a judgment obtained adversely against him, it is no defense that the judgment was recovered on a bill of exchange given for money lost at play; for the statutes 16 Car. II., c. 7, § 3, and 9 Anne, c. 14, § 1, do not include judgments obtained adversely by an innocent party, where the defendant had an opportunity of setting up the illegality of the bill, but those only voluntarily given by the loser to secure money lost at play. *Lane v. Chapman*, 11 Ad. & El. 966, 980, 39 E. C. L. 286, 293, 1 G. & D. 523.

Satisfaction of the Judgment Previous to the Issuance of the Writ cannot be set up by the sheriff so long as the judgment and execution remain in force. *Munson v. Hamilton*, 5 U. C. Q. B. (O. S.) 120.

Jurisdiction Not Appearing in Declaration in Which Writ Issued. — A sheriff cannot set up as a defense that the jurisdiction of the court does not appear in the declaration in the suit in which the writ issued, for as against him it will be presumed that the process justifies him in making the arrest, and he is not to put the plaintiff to show that the court had jurisdiction. Moreover, the debtor in the original cause has had the opportunity of excepting to the jurisdiction, and if he has acquiesced in it, it is not necessary in the action against the sheriff for the escape, to make the jurisdiction

(5) *Acts of Creditor, or His Attorney, Subsequent to Escape.* — Where a prisoner has been permitted to escape, the sheriff is not relieved from liability by the subsequent assent of the creditor without consideration,¹ or the assent of his attorney,² to the prisoner remaining at large. The fact that a creditor paid for the prisoner's keeping in ignorance that he had previously escaped is no defense.³

(6) *Acts of Other Officers Done Without Authority.* — The sheriff cannot protect himself from liability because of the mistakes or errors of other officers, where they have no authority to act.⁴

(7) *Voluntary Return of Prisoner.* — A voluntary return of the prisoner, after a negligent escape, before suit brought, is equivalent to a recaption on fresh pursuit, and is a good defense in an action against the sheriff.⁵ But a voluntary return after a voluntary escape will not excuse the sheriff from liability.⁶

(8) *Recapture of Prisoner.* — Recaption of the prisoner on fresh pursuit before suit brought is a good defense in an action for a negligent escape on either mesne or final process; but not after suit brought.⁷ If recapture is

appear. *Munson v. Hamilton*, 5 U. C. Q. B. (O. S.) 119.

Improper Parties to Suit. — The defense that the plaintiff in the former suit was not the proper person to bring the action, on the ground that the cause of action upon which the judgment was obtained was not assignable, will not avail. *Richtmeyer v. Remsen*, 38 N. Y. 206.

Issuance of Body Execution Before Execution Against Property Returned. — Where a person is arrested under an execution against his body, it is no defense for the sheriff in an action against him for an escape of such person, that such execution was issued before an execution against the property of such person had been issued and returned unsatisfied. *Renick v. Orser*, 4 Bosw. (N. Y.) 384.

1. Assent to Debtor Remaining at Large After Escape. — *Scott v. Peacock*, 1 Salk. 271; *Powers v. Wilson*, 7 Cow. (N. Y.) 276. In this latter case it was said: "The right of action having once accrued, nothing but a release, or an agreement, for a valuable consideration, can defeat it."

2. *Hopkinson v. Leeds*, 78 Pa. St. 399; *Scott v. Seiler*, 5 Watts (Pa.) 247.

3. Payment by Creditor for Prisoner's Keeping After Escape. — *Servis v. Marsh*, 38 Fed. Rep. 794.

4. Clerk's Rescission of Order of Arrest. — A debtor was arrested on an order for bail issued by the clerk on an insufficient affidavit, and while in the custody of the sheriff the clerk rescinded the order on the belief that the affidavit was insufficient. The sheriff, on the supposition that he had no authority to detain him after the rescission, discharged him. It was held that neither the rescission, nor the affidavit upon which the order of arrest was predicated, constituted a good defense, in an action against the sheriff for an escape; for the clerk had no authority to rescind the order. *Brissac v. Moorer*, Dudley L. (S. Car.) 228.

5. Voluntary Return of Prisoner After Negligent Escape — England. — *Chambers v. Gambier*, 2 Com. Rep. 554; *Bonafous v. Walker*, 2 T. R. 126; *Jones v. Pope*, 1 Saund. 35, note 1. See also *Griffiths v. Eyles*, 1 B. & P. 413.

Connecticut. — *Drake v. Chester*, 2 Conn. 475; *Jones v. Abbee*, 1 Root (Conn.) 106.

New Jersey. — *Howard v. Blackford*, 3 N. J. L. 344. Compare *Tunison v. Cramer*, 5 N. J. L. 574.

New Hampshire. — *Butler v. Washburn*, 25 N. H. 259.

New York. — *Peters v. Henry*, 6 Johns. (N. Y.) 123, 5 Am. Dec. 196; *Tillman v. Lansing*, 4 Johns. (N. Y.) 47; *Bissell v. Kip*, 5 Johns. (N. Y.) 99; *Ballou v. Kip*, 7 Johns. (N. Y.) 175; *Middle Dist. Bank v. Deyo*, 6 Cow. (N. Y.) 732; *Dole v. Moulton*, 2 Johns. Cas. (N. Y.) 205; *Jansen v. Hilton*, 10 Johns. (N. Y.) 549; *Richmond v. Tallmadge*, 16 Johns. (N. Y.) 307; *Hassam v. Griffin*, 18 Johns. (N. Y.) 49, 9 Am. Dec. 184. See also *Borrodaile v. Leek*, 9 Barb. (N. Y.) 611.

Presumption in Case of Voluntary Return. — In case of a voluntary return of a prisoner after a negligent escape it will be presumed that the sheriff consented to receive him until the contrary be shown. *Drake v. Chester*, 2 Conn. 475.

6. Voluntary Return After Voluntary Escape — United States. — *Servis v. Marsh*, 38 Fed. Rep. 797.

Indiana. — *Hoagland v. State*, (Ind. App. 1895) 40 N. E. Rep. 931.

New York. — *Fairchild v. Case*, 24 Wend. (N. Y.) 381; *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 3, 1 Am. Dec. 142.

New Hampshire. — *Riley v. Whittiker*, 49 N. H. 147, 6 Am. Rep. 474.

North Carolina. — *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 151.

Pennsylvania. — *Hopkinson v. Leeds*, 78 Pa. St. 399.

7. Recapture of Prisoner on Fresh Pursuit, After Negligent Escape — England. — *Whiting v. Reynell*, Cro. Jac. 657, Roll. Abr. 808; *Rex v. Huggins*, 2 Com. Rep. 422; *Rigewaie's Case*, 3 Coke 52, Moo. 660; *Harvey v. Reynell*, W. Jones 145, 1 Sid. 330; *Jones v. Pope*, 1 Saund. 35, note 1.

Massachusetts. — *Whithead v. Keyes*, 1 Allen (Mass.) 350.

New Hampshire. — *Langdon v. Hathaway*, 1 N. H. 370.

New Jersey. — *Howard v. Blackford*, 3 N. J. L. 350.

New York. — *Tillman v. Lansing*, 4 Johns. (N. Y.) 47; *Hassam v. Griffin*, 18 Johns. (N. Y.)

prevented by the fraud of the plaintiff or his agent, it will constitute a good defense.¹ Recapture after a voluntary escape will not avail.²

(9) *Prior Escape of Prisoner.* — A prior escape of a prisoner will be no defense to an action for a subsequent escape where the plaintiff had no knowledge of the first escape.³

(10) *Where the Jail Is Insufficient, or There Is No Jail.* — It is no defense to the sheriff that the jail in which a prisoner who has escaped was confined is insufficient to prevent escape,⁴ or that there was no jail.⁵ But if the jail is blown down by a tempest it will be a good defense.⁶ And so if the prison takes sudden fire, as where it is struck by lightning, by means whereof the prisoners escape, this shall excuse the sheriff.⁷

(11) *Statute of Limitations.* — The action of debt for an escape is not within the statute of limitations of 21 Jac. I., c. 16; for the action is not founded upon any lending or contract.⁸

b. DEFENSES BY PRISONER'S SURETIES — (1) *In General.* — In *Vermont* it has been held that in an action for an escape brought by the sheriff's assignee on a bail bond executed to the sheriff the fact that the prisoner remained within the shrievalty, and was at all times amenable to the original execution, was not a defense.⁹ Nor was the surrender of the principal, after

49, 9 Am. Dec. 184; *Jansen v. Hilton*, 10 Johns. (N. Y.) 549; *Richtmeyer v. Remsen*, 38 N. Y. 208; *Middle Dist. Bank v. Deyo*, 6 Cow. (N. Y.) 732; *Lockwood v. Mercereau*, 6 Abb. Pr. (N. Y. Super. Ct.) 208.

Vermont. — *Sanderson v. Rutland*, 43 Vt. 389. See also *Howard v. Crawford*, 15 Ga. 428.

Fresh Pursuit Without Recapture. — The sheriff cannot be excused from liability on the ground alone of fresh pursuit. He must also recapture the prisoner before suit brought; as where a sheriff is guilty of a negligent escape, and in about an hour after the escape of the debtor enters upon fresh pursuit, and the debtor sends a message to him that he wishes to surrender, and, before the arrival of the sheriff, commits suicide, the sheriff is liable for an escape. *Whicker v. Roberts*, 10 Ired. L. (32 N. Car.) 487.

1. *Recapture Prevented by Fraud.* — *Richtmeyer v. Remsen*, 38 N. Y. 206.

2. *Recapture After Voluntary Escape.* — *Howard v. Blackford*, 3 N. J. L. 355, *Servis v. Marsh*, 38 Fed. Rep. 797.

The recapture of a debtor who had been discharged by the sheriff on a forged bail bond given before judgment obtained by the creditor, will not be a sufficient defense to an action for an escape brought by the creditor, even though the sheriff was ignorant of the forgery at the time of the discharge. *Conyers v. Rhame*, 11 Rich. L. (S. Car.) 60.

3. *Prior Escape of Prisoner.* — *Renick v. Orser*, 4 Bosw. (N. Y.) 384.

4. *Where Jail Is Insufficient* — *Maryland.* — *Slemaker v. Marriott*, 5 Gill & J. (Md.) 410. *Ohio.* — *Richardson v. Spencer*, 6 Ohio 13; *Kepler v. Barker*, 13 Ohio St. 177.

South Carolina. — *Smith v. Hart*, 1 Brev. (S. Car.) 146, 2 Bay (S. Car.) 397.

Pennsylvania. — *Green v. Hern*, 2 P. & W. (Pa.) 167.

Virginia. — *Parsons v. Lee*, Jeff. (Va.) 50.

But see *Howard v. Crawford*, 15 Ga. 423.

Under the Massachusetts Statute of February 21, 1875, if a prisoner escape through the insufficiency of the jail, the sheriff stands chargeable

to the creditor, leaving the nature of the remedy and the measure of damages as they were at common law. *Burrell v. Lithgow*, 2 Mass. 528.

5. *Where There Is No Jail.* — *Gwinn v. Hubbard*, 3 Blackf. (Ind.) 15; *Brown County v. Butt*, 2 Ohio 353; *Stone v. Wilson*, 10 Gratt. (Va.) 544. But see *Love v. M'Alister*, 4 Hayw. (Tenn.) 66, in which it is said that if there be no jail, or an insufficient one from which any one may escape at pleasure, this is a good defense to an action for an escape on mesne process.

6. *Where Jail Blown Down by Tempest.* — *M'Kee v. Love*, 2 Overt. (Tenn.) 246.

7. *Roll. Abr.* 808; *Alsept v. Eyles*, 2 H. Bl. 113. See also *Fairchild v. Case*, 24 Wend. (N. Y.) 383.

And in *Wheeler v. Hambright*, 9 S. & R. (Pa.) 396, and *Love v. M'Alister*, 4 Hayw. (Tenn.) 66, it is said that the sheriff is excused where the prisoners are released by fire. But see *Servis v. Marsh*, 38 Fed. Rep. 797, in which it is said that fire will not excuse the sheriff.

8. *Statute of Limitations.* — *Jones v. Pope*, 1 Saund. 38.

In *New York* if the plaintiff sue the sheriff for an escape of a defendant arrested on mesne process, the limitation of one year as prescribed by section 94 of the code is applicable. *Smith v. Knapp*, 30 N. Y. 591.

Under the Pennsylvania Act of 1772, which limits the period of bringing certain actions against constables, to six months from the time of a wrong, an action against a constable for an escape is not within the limitations of such act. *Lantz v. Lutz*, 8 Pa. St. 405.

Action by the State. — In the absence of any provision to the contrary, the defense of the statute of limitations will not avail in an action brought by the state, for the statute of limitations does not run against the state. It is applicable only to suits between individuals. *State Treasurer v. Weeks*, 4 Vt. 221. And see the title LIMITATION OF ACTIONS.

9. *Defenses by Prisoner's Sureties.* — *Warner v. Evens*, 2 Tyler (Vt.) 126.

an action brought for an escape on a limit bond.¹

(2) *Where Sheriff Has Waived Available Defense.* — If the sheriff in an action against him for an escape waives an available defense known to him, he does it at his peril, and in an action by him against the sureties to recover the amount of the judgment rendered against him they may have the advantage of it.²

c. *WHERE SCI. FA. IS A SUBSTITUTE FOR ACTION OF ESCAPE.* — Where a *sci. fa.* is substituted for the action of escape there must be transferred to the *sci. fa.* all the additional defenses which the sheriff would have to an action on the case for an escape on mesne process.³

9. **Evidence** — a. **PROOF OF ESCAPE.** — In an action against the sheriff for an escape from the limits, of a prisoner committed on execution, the plaintiff must show affirmatively that the prisoner escaped. In such action nothing can be intended unless it be plain and irresistible.⁴ But if the arrest was

The misinstruction of the sheriff as to the limits of the jail yard will not excuse the prisoner's sureties in an action for his escape. *Call v. Hagger*, 8 Mass. 429.

Taking Assignment of First Bond Where Second Bond Given. — A prisoner on the limits escaped and voluntarily returned, and the sheriff took a second limit bond. It was held that the taking of the second limit bond by the sheriff was no defense to an action against the obligors on the first bond, unless the plaintiff consented to waive such escape; even though the latter knew that the second bond had been given at the time he took an assignment of the first bond, upon which the suit was brought. *Goodwin v. Murray*, 8 New Bruns. 595.

1. **Surrender of Principal.** — *Goodwin v. Murray*, 8 New Bruns. 595.

Where a debtor escaped from the limits, and was arrested in another suit in another county, and there gave bond for the limits, the court will not make an order to surrender the debtor to the sheriff of the county from which he escaped, in discharge of the sureties' liability in an action against them for the escape. *Peters v. Perley*, 7 New Bruns. 585.

In *Campbell v. Henan*, 2 New Bruns. 72, it was held that if a sheriff bring an action of debt upon a limit bond under 10 and 11 Geo. IV., c. 30, it is a good defense to show that the sheriff had received the defendant again into close custody, either on being rendered by his bail, or by such defendant rendering himself in discharge of his bail.

2. **Effect of Waiver by Sheriff of Available Defense.** — *Ransom v. Keyes*, 9 Cow. (N. Y.) 128; *Scarborough v. Thornton*, 9 Pa. St. 454.

Judgment Recovered Against Sheriff Conclusive upon Surety. — Besides the general rule that where a party who is bound to indemnify the defendant in an action, and who receives notice of and has an opportunity to defend the action, is bound by the judgment therein, a judgment recovered against the sheriff for an escape is conclusive upon the surety, as to any defense which might have been made by the sheriff in such action, where, on being sued, he gives notice to the bail to defend. *Toll v. Alvord*, 64 Barb. (N. Y.) 572; *Kip v. Brigham*, 7 Johns. (N. Y.) 168.

And a *postea* is evidence without the judgment, to prove the recovery and actual damages. *Kip v. Brigham*, 7 Johns. (N. Y.) 168.

3. **Where Sci. Fa. Substituted for Action of Escape.** — *Love v. M'Alister*, 4 Hayw. (Tenn.) 68.

4. **Proof of Escape.** — *Visscher v. Gansevoort*, 18 Johns. (N. Y.) 496.

The Return "Not Found" upon an execution issued against a person arrested by a sheriff on an order of arrest to hold to bail, is sufficient evidence against the sheriff, of the escape of the debtor, and that the sheriff has not retained him in custody. *Bensel v. Lynch*, 44 N. Y. 165, *affirming* 2 Robt. (N. Y.) 448.

Prima Facie Evidence of Escape. — In an action against a sheriff for an escape, the proof was that J. G. W., the defendant in the execution, was, in January, 1854, captain of the ship Hudson, and that one W., acting as captain of that ship, went beyond the jail limits in March following. It was held that the similarity of surname and of officer was sufficient *prima facie* evidence to sustain the action, although the witness to the escape could not identify W. as the defendant in the execution, and did not know his Christian name. The plaintiff having made out a *prima facie* case, and there being no evidence in rebuttal, it was held error to charge the jury that the plaintiff was bound to produce clear and positive proof, and if there was any doubt the presumption should be against the plaintiff. *Jackson v. Orser*, 2 Hilt. (N. Y.) 99.

In order to charge a sheriff for an escape from the limits, it is sufficient *prima facie* on the part of the plaintiff, that the prisoner was seen at large walking through the middle of the street. *Steward v. Kip*, 7 Johns. (N. Y.) 165.

Proof of Substance of Issue — Escape of Husband and Wife. — Where the plaintiff brings an action for the escape of husband and wife in execution, and the jury find specially that the husband only was taken in execution, for a debt due from the wife before coverture, the plaintiff is entitled to judgment, for the substance of the issue is found, though not pursuant to the declaration. *Roberts v. Herbert*, 1 Sid. 5.

Proof of Delivery of Process. — The return "not found" upon a *ca. sa.* is sufficient evidence of the delivery of the process to the sheriff. *Blatch v. Archer*, 1 Cowp. 63.

Proof of Legal Custody. — In an action for a permissive escape, the plaintiff must prove that at the time of the escape the defendant in

made on mesne process it is sufficient, without producing the warrant, or giving direct evidence of the escape, to prove the sheriff's return of *cepi corpus*, and that the party arrested did not put in bail and was not in the sheriff's custody at the return of the writ.¹ Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape;² but the facts alleged must be proved as laid,³ unless the allegation is immaterial.⁴

Acts and Declarations of Prisoner. — Generally acts and declarations of the prisoner after the escape are inadmissible, but acts and declarations previous to the escape are admissible.⁵

b. PROOF OF DEBT DUE BY PRISONER. — In an action against a sheriff for an escape, such evidence as would be sufficient to charge the original defendant with the debt is sufficient, as against the sheriff, to support the averment in the declaration that the party escaping was so indebted.⁶

Prisoner's Ability to Pay Debt. — When it becomes necessary to ascertain the extent of the damages sustained by the creditor by reason of an escape from arrest on mesne process, or an action on the case being brought, proof of the prisoner's ability to pay the debt becomes essential, and on such inquiry general reputation of his insolvency is inadmissible.⁷

c. COMPETENCY OF WITNESSES FOR AND AGAINST SHERIFF. — If the

the writ was in the legal custody of the sheriff, at the suit of the plaintiff under the writ. *Duffy v. White*, 1 Alc. & Nap. 1. See *supra*, *Lawful Custody of Prisoner*.

1. **Proof of Escape on Mesne Process.** — *Fairlie v. Birch*, 3 Campb. 397.

2. **Evidence of Negligent Escape May Be Given under Count for Voluntary Escape.** — *Bonafoos v. Walker*, 2 T. R. 126; *Skinner v. White*, 9 N. H. 218; *Fairchild v. Case*, 24 Wend. (N. Y. 383; *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 151; *Smith v. Hart*, 1 Brev. (S. Car.) 146.

3. In an action against the marshal for an escape, the declaration alleged that the plaintiff and W. B., having divers disputes, by mutual bonds of submission referred them to the arbitration of C. and D.; that an award was made, ordering W. B. to pay the plaintiff a certain sum of money, etc., and because the award was not performed the plaintiff sued and prosecuted out of the court of C. P. a writ commanding the defendant to attach W. B. (then being in his custody), whom he afterwards suffered to escape. It was held that the plaintiff was bound to prove the execution of the bond of submission by himself as well as by W. B. *Brazier v. Jones*, 8 B. & C. 124, 15 E. C. L. 162.

4. *Bromfield v. Jones*, 4 B. & C. 380, 10 E. C. L. 362.

5. **Acts and Declarations of Prisoner.** — *Patterson v. Westervelt*, 17 Wend. (N. Y.) 543. In this case it was further held that the plaintiff, in an action for a negligent escape, may prove an ineffectual search for the prisoner; and a letter written by the latter after the escape is admissible for the purpose of showing him beyond the reach of process. See generally the titles **ADMISSIONS**, vol. 1, p. 670; **CONFESSIONS**, vol. 6, p. 520.

Sheriff Not Bound by Recitals in Proceedings to Which He Is Not a Party. — In an action against the sheriff for an escape, he is not bound by the recital in the prisoner's petition for his discharge under the insolvent debtor's act, that he was held under a *ca. sa.* The sheriff being no party to that petition, or to the proceedings

under it, may show the contrary. *McKenzie v. Barnes*, 12 Rich. L. (S. Car.) 221.

6. **Proof of Debt Due by Prisoner.** — *Pugh v. M'Rae*, 2 Ala. 393.

The admissions of a party, whether he can or cannot be examined as a witness, made previous to his escape, are evidence against the sheriff to show the extent of the liability of the former to the plaintiff. *Pugh v. M'Rae*, 2 Ala. 393.

So also is an acknowledgment of the debt made by a debtor after an arrest and before an escape. *Rogers v. Jones*, 7 B. & C. 86, 14 E. C. L. 19, 9 D. & R. 878. See also *Patterson v. Westervelt*, 17 Wend. (N. Y.) 549.

A judgment obtained after the escape of a defendant arrested under a judge's order to hold to bail, is evidence as against the sheriff, of the debt due by the debtor to the plaintiff. *Taylor v. McEwan*, 27 U. C. Q. B. 130.

The attorney for the original defendant cannot be called as a witness to prove the debt, where he became acquainted with the business only by the information of his client. *Sloan v. Herne*, 2 Esp. N. P. 695.

Where the bond taken by a new sheriff for his security on granting the liberties of the jail to a prisoner in execution stated the amount of the execution for which he was in custody, it was held, in an action for an escape against the sheriff, that such statement was conclusive as to notice to the sheriff of the true sum before the escape. *Tallmadge v. Richmond*, 9 Johns. (N. Y.) 85.

In an action for an escape on mesne process the judgment against the original debtor is conclusive against the sheriff as to the amount of the debt. *Patten v. Halsted*, 1 N. J. L. 321.

7. **Proof of Prisoner's Ability to Pay Debt.** — *Fairchild v. Case*, 24 Wend. (N. Y.) 384. See also *Griffin v. Brown*, 2 Pick. (Mass.) 309.

An Offer of Compromise made by an imprisoned debtor before his escape, may be given in evidence for the purpose of showing the circumstances of the debtor at the time of the escape. *Patterson v. Westervelt*, 17 Wend. (N. Y.) 544.

witness have no interest in the subject of the inquiry, or his answer will not affect his responsibility, he is a competent witness for the sheriff.¹

Declarations of Deputy as Evidence against Sheriff. — The declarations of a sheriff's deputy respecting the execution of a writ, made after the return day, but while the writ is in his hands, are evidence against the sheriff.²

d. CONTRADICTION OF SHERIFF'S RETURN. — Any evidence on behalf of the sheriff which contradicts his return is inadmissible.³ But a plaintiff, in an action against the sheriff, is not concluded thereby, but may show that the return is untrue.⁴

10. Measure of Damages — *a. IN ACTION ON THE CASE* — (1) *In General* — Where Prisoner Committed on Final Process. — In the absence of statutory regulation, the measure of the plaintiff's damages in an action on the case against an officer for an escape of a prisoner committed on final process, is the actual loss or injury which the plaintiff has sustained, and in such action evidence of the defendant's insolvency, or other circumstances of his property, is admissible in mitigation of damages.⁵ In these respects it is immaterial whether the

1. Keeper of Jail. — The keeper of a jail, after a release from the sheriff of any responsibility on the jailer's part to the sheriff, is a competent witness for him in an action for an escape. *Patten v. Halsted*, 1 N. J. L. 324.

Defendant in Original Suit. — In an action against a sheriff for an escape, the defendant in the writ of *ca. sa.* is a competent witness for the defendant as to facts tending to prove his release by the sheriff under instructions from the plaintiff's attorney. *Scott v. Seiler*, 5 Watts (Pa.) 247.

The defendant in the original suit is not a competent witness for the sheriff in an action against the latter for a negligent escape, for in such case he is liable over to the sheriff. *Greenl. on Ev.*, § 590. See also *Cass v. Cameron*, 1 Peake N. P. (ed. 1795) 124; *Eyles v. Faikney*, 1 Peake N. P. (ed. 1795) 144 note *a*; *Hunter v. King*, 4 B. & Ald. 210; *Norwich v. Bradshaw*, Cro. Eliz. 53.

2. Declarations of Deputy as Evidence Against Sheriff. — *Wheeler v. Hambright*, 9 S. & R. (Pa.) 390.

Where an undersheriff gives a sheriff a bond to save the latter harmless, the undersheriff's confession of an escape is admissible as evidence of the fact in an action against the sheriff, for such confession goes in effect to charge the undersheriff himself. *Yabsley v. Doble*, 1 Ld. Raym. 190.

But proof offered to show a declaration made by the undersheriff, that the sheriff had discharged the debtor, is inadmissible, if no foundation was laid for it by asking the undersheriff. *Toll v. Alvord*, 64 Barb. (N. Y.) 569.

3. Contradiction of Sheriff's Return. — *Scott v. Seiler*, 5 Watts (Pa.) 246.

The sheriff is bound by the statement in his return, not only as to the fact of the arrest, but also as to the day on which it was made. *Cook v. Round*, 1 M. & Rob. 512.

After an arrest under a *ca. sa.* and a permissive escape before the return day have been proved, the burthen of showing that the sheriff had the body of the defendant in court, according to the exigencies of the writ and his return of *cepi* thereto, is upon the sheriff. *State v. Lawson*, 2 Gill (Md.) 62.

A sheriff, on being sued for an escape from the limits, gave notice to the debtor and his bail to defend, who caused an answer to be

put in in the name of the sheriff, in which they set up the discharge of the debtor by the county judge as a justification for the escape, in these words: "This defendant in obedience to the requirements of said court, and not otherwise, permitted said B. to go at large, as he lawfully might, and as he was by law required to do," etc. A judgment having been recovered against the sheriff in such action, he brought suit against the bail, who set up the defense that the sheriff discharged the debtor from the limits, and permitted and authorized him to depart, and in evidence thereof, relied upon the defense put in in the former action. The sheriff having proved that he did not permit or authorize the departure of the debtor from the limits, it was held, that the statements in the answer were not contradictory of such proof, and must be taken to import only an omission to prevent the escape. *Toll v. Alvord*, 64 Barb. (N. Y.) 569.

But where an officer in a suit against him and the sureties on his bond for an escape has given, without objection on the part of the plaintiff, parol proof of facts flatly contradicting his return of process which shows that he had made an arrest, evidence offered by him in explanation of the apparent contradiction between his oral testimony and the return is admissible. *State v. Caldwell*, 115 Ind. 6.

4. State v. Lawson, 2 Gill (Md.) 62; *Neck v. Humphrey*, 3 Ad. & El. 130, 30 E. C. L. 51, 4 N. & M. 707, 1 H. & W. 419.

5. Measure of Damages in Action on the Case — *England.* — *Bonafous v. Walker*, 2 T. R. 132, *per* Grose, J.

Massachusetts. — *Brooks v. Hoyt*, 6 Pick. (Mass.) 468; *Slocum v. Riley*, 145 Mass. 370; *West v. Rice*, 9 Met. (Mass.) 569; *Chase v. Keyes*, 2 Gray (Mass.) 214; *Colby v. Sampson*, 5 Mass. 312.

New York. — *Loosey v. Orser*, 4 Bosw. (N. Y.) 401; *Patterson v. Westervelt*, 17 Wend. (N. Y.) 543; *Rawson v. Dole*, 2 Johns. (N. Y.) 454; *Van Slyck v. Hogeboom*, 6 Johns. (N. Y.) 270.

North Carolina. — *Willey v. Eure*, 8 Jones L. (53 N. Car.) 320; *Lusk v. Falls*, 63 N. Car. 188.

Ohio. — *Hootman v. Shriner*, 15 Ohio St. 43; *Richardson v. Spenser*, 6 Ohio 13.

Pennsylvania. — *Shuler v. Garrison*, 5 W. & S. (Pa.) 457; *Karch v. Com.*, 3 Pa. St. 273.

escape is voluntary or negligent.¹ Some courts, however, hold that where the escape is voluntary the amount of the debt due the plaintiff is the measure of damages; but the weight of authority makes no distinction between them.² The true measure of damages is the value of the custody of the debtor at the moment of the escape; and no deduction is to be made on account of anything which the plaintiff might have obtained by diligence after the escape.³ In estimating the value of such custody, the jury are not limited to the consideration of the actual available means of the debtor, but may consider, according to the evidence of the case, the value of the chances of the creditor obtaining payment by continuing such imprisonment.⁴ And the plaintiff may recover more than the face amount of the judgment if his actual damages are shown to exceed it.⁵

Where Prisoner Arrested on Mesne Process. — In an action on the case for the escape of a prisoner arrested on mesne process, the plaintiff is also entitled only to the actual damages sustained.⁶ It would seem, however, that in the

Vermont. — *State Treasurer v. Weeks*, 4 Vt. 215.

See also *Spafford v. Goodell*, 3 McLean (U. S.) 97; *Hemming v. Hale*, 7 C. B. N. S. 487, 97 E. C. L. 487, 6 Jur. N. S. 554; *Weld v. Bartlett*, 10 Mass. 470.

Under the Connecticut Statute making the keeper of a prison permitting the escape of a person imprisoned for the nonpayment of an execution liable to satisfy "the debt or damages for which he is committed," the fact of the debtor's insolvency cannot, in an action on the case for the escape, be received in mitigation of damages. *Bowen v. Huntington*, 3 Conn. 423.

Damages for Escape through Insufficiency of Jail — *Massachusetts.* — In an action on the case for an escape of a debtor committed on original process, and not on execution, through the insufficiency of the jail, the discretion which the jury has at common law, to assess for the plaintiff the damages which he has in fact sustained, and not to find for him his whole debt, is not limited by any statute. *Burrell v. Lithgow*, 2 Mass. 528.

Damages for Failure to Assign Prisoner to New Sheriff. — In an action for damages for an omission by the old sheriff to assign over at the end of his term, to the new sheriff, a debtor taken in execution, an omission by the plaintiff in the execution to cause the prisoner to be retaken by issuing a second execution to the new sheriff may be considered in mitigation of damages; so also evidence of the cause of not assigning the prisoner. *French v. Willet*, 10 Bosw. (N. Y.) 580.

The New York Code of Civil Procedure, § 158, is intended to provide that in all cases where a prisoner was committed on final process and escaped, the sheriff should be answerable for the sum for which he was committed, and restricts evidence in mitigation of damages to cases where the prisoner was committed on mesne process. *Dunford v. Weaver*, 21 Hun (N. Y.) 354.

Reduction of Damages by Equities Existing Between Debtor and Creditor. — It seems that in an action against a sheriff for an escape, he stands in the same situation as the original defendant, and may reduce his liability by any equities which the defendant would have had against the plaintiff. *Per Abinger, C. P.*, in *Evans v. Maners*, 9 Dowl. P. C. 256.

1. *Brooks v. Hoyt*, 6 Pick. (Mass.) 468; *Patterson v. Westervelt*, 17 Wend. (N. Y.) 543; *Wiley v. Eure*, 8 Jones L. (53 N. Car.) 320; *Hootman v. Shriner*, 15 Ohio St. 43.

2. *Patten v. Halsted*, 1 N. J. L. 320. See also *Savage v. Jarvis*, 8 U. C. Q. B. 331.

3. **Value of Custody of Debtor at Time of Escape.** — *Arden v. Goodacre*, 11 C. B. 367, 373, 73 E. C. L. 367, 373; *Macrae v. Clarke*, L. R. 1 C. P. 403, 35 L. J. C. P. 247, 12 Jur. N. S. 708, 14 L. T. N. S. 408, 14 W. R. 655, 1 H. & R. 479; *Hochkiss v. Whitten* 71 Me. 579; *Loosey v. Orser*, 4 Bosw. (N. Y.) 402.

Where a defendant who has been arrested on final process, and has given bond for the limits, escapes, and soon afterwards returns to custody, there is no actual damage proved if there was nothing to show that he would have paid the debt if he had continued on the limits, and the plaintiff, in an action for such an escape, is entitled only to such damages as the possession of the debtor's body would have been worth to the plaintiff during the absence from the limits; and if there be nothing lost by his temporary absence the plaintiff is only entitled to nominal damages. *Kelly v. Jones*, 7 New Bruns. 466.

4. **Value of the Debtor's Custody — How Estimated.** — Where in an action against a sheriff for an escape it was proved that the debtor, though insolvent, was the only son of a wealthy farmer, who was upwards of one hundred years old, and that shortly before the arrest the debtor's solicitor had offered to pay a composition on his debts of six shillings in the pound, the judge directed the jury to give as damages the value to the plaintiff of the chance that the debt, or any portion of it, would have been extracted by the debtor's remaining in custody. It was held that this was a right direction, and the jury having given substantial damages, the court refused to disturb the verdict. *Macrae v. Clarke*, L. R. 1 C. P. 403, 35 L. J. C. P. 247, 12 Jur. N. S. 708, 14 L. T. N. S. 408, 14 W. R. 655, 1 H. & R. 479. See also *McManus v. Wells*, 29 New Bruns. 460; *Moore v. Moore*, 4 Jur. N. S. 252, 25 Beav. 8, 27 L. J. Ch. 385.

5. *Renick v. Orser*, 4 Bosw. (N. Y.) 390.

6. **Damages in Action on the Case on Mesne Process — England.** — *Planck v. Anderson*, 5 T. R. 37.

Alabama. — *Pugh v. M'Rac*, 2 Ala. 393.

absence of evidence that would mitigate the damages the plaintiff in an action on the case against a sheriff for an escape is *prima facie* entitled to recover the amount of his judgment or debt against the prisoner escaping, and that the burden of proving the prisoner's insolvency is upon the defendant.¹

(2) *Where Prisoner Insolvent.* — Where the evidence discloses the existing insolvency and utter poverty of the debtor, and of their probable continuance, the plaintiff is only entitled to nominal damages.²

(3) *Where Creditor Relinquishes Competent Security After Escape.* — If the plaintiff, having real and competent security from the defendant for his debt, relinquishes it after knowledge of the escape, the sheriff may avail himself of this fact in mitigation of damages.³

(4) *Damages Recoverable by Sheriff Against Jailer.* — If a payment is made by the sheriff as a compromise of an action against him for an escape permitted by the jailer, without consulting the jailer, the amount so paid is not the legal measure of damages which he is entitled to recover from the jailer in an action on the case.⁴

b. IN ACTION OF DEBT — (1) *In General.* — In an action of debt against an officer under the statutes Westminster 2, 13 Edw. I., c. 11, and 1 Rich. II., c. 12, for either a negligent or voluntary escape on execution, the jury cannot give a less sum than the creditor could have recovered against the debtor, viz., the sum indorsed on the writ, and the costs;⁵ and in such

Connecticut. — *Swan v. Bridgeport*, 70 Conn. 143.

Massachusetts. — *Brooks v. Hoyt*, 6 Pick. (Mass.) 468.

New York. — *People v. Dikeman*, 3 Abb. App. Dec. (N. Y.) 523; *Potter v. Lansing*, 1 Johns. (N. Y.) 215, 3 Am. Dec. 310; *Russell v. Turner*, 7 Johns. (N. Y.) 189, 5 Am. Dec. 254.

South Carolina. — *Smith v. Hart*, 1 Brev. (S. Car.) 146.

Tennessee. — *Love v. M'Alister*, 4 Hayw. (Tenn.) 67.

Vermont. — *Vilas v. Barker*, 20 Vt. 603.

See also *Scott v. Henley*, 1 M. & Rob. 227.

In Upper Canada, under rule of court 89, the measure of damages in an action for an escape on mesne process is the sum sworn to, and costs up to the time of the escape, not the amount recovered in the suit. *Taylor v. M'Ewan*, 27 U. C. Q. B. 130.

In Kansas the provisions of the civil code, sections 164, 165, making the sheriff liable as bail, have not wholly abolished the common-law action for an escape, and therefore, where the sheriff has voluntarily permitted the escape of a person held by him on mesne process in a civil action, an action at common law may be prosecuted against him by the party injured for the actual damages sustained by such party, although the action in which the party escaping was arrested has never been prosecuted to final judgment. *Crane v. Stone*, 15 Kan. 94.

The Damage Which a Creditor May Sustain by the Escape of a Prisoner Arrested on Mesne Process is the delay and prejudice in recovering his debt so soon as he otherwise might. *Planck v. Anderson*, 5 T. R. 40, *per Buller*, J.

1. When Plaintiff *Prima Facie* Entitled to Recover Amount of Judgment. — *Moore v. Moore*, 25 Beav. 8; *Young v. Hosmer*, 11 Mass. 89; *Patterson v. Westervelt*, 17 Wend. (N. Y.) 543. But see *Chase v. Keyes*, 2 Gray (Mass.) 214. See also *Tempest v. Linley*, Clayt. 34, *cited in Patterson v. Westervelt*, 17 Wend. (N. Y.) 546.

2. When Plaintiff Entitled Only to Nominal Damages. — *Hotchkiss v. Whitten*, 71 Me. 578; *Loosey v. Orser*, 4 Bosw. (N. Y.) 402; *Spafford v. Goodell*, 3 McLean (U. S.) 97.

3. Where the Creditor Relinquishes Competent Security After Escape. — *Russell v. Turner*, 7 Johns. (N. Y.) 189, 5 Am. Dec. 254.

4. Damages Recoverable by Sheriff Against Jailer. — *Duncan v. Klinefelter*, 5 Watts (Pa.) 141, 30 Am. Dec. 295.

5. Where the Action Is Debt — England. — *Bonafous v. Walker*, 2 T. R. 126; *Robertson v. Taylor*, 2 Chit. Rep. 454, 18 E. C. L. 354.

Canada. — *Savage v. Jarvis*, 8 U. C. Q. B. 334.

Indiana. — *State v. Hamilton*, 33 Ind. 502; *State v. Mullen*, 50 Ind. 600.

Massachusetts. — *Whitehead v. Varnum*, 14 Pick. (Mass.) 523; *Porter v. Sayward*, 7 Mass. 377.

New Jersey. — *Patten v. Halsted*, 1 N. J. L. 324; *Browning v. Flanagan*, 22 N. J. L. 576.

North Carolina. — *Lash v. Ziglar*, 5 Ired. L. (27 N. Car.) 702; *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 147; *Willey v. Eure*, 8 Jones L. (53 N. Car.) 321.

Pennsylvania. — *Com. v. Sheriff*, 1 Grant's Cas. (Pa.) 187; *Shuler v. Garrison*, 5 W. & S. (Pa.) 457; *Scott v. Seiler*, 5 Watts (Pa.) 247; *Smith v. Com.*, 59 Pa. St. 327.

Under Rev. Code of Virginia 1819, c. 136, § 3, an action for debt may be maintained against a sheriff for either a wilful or negligent escape. Under c. 134, § 48, p. 542, a motion may be made against a sheriff for an escape when the return shows such a state of facts as would entitle the plaintiff to a verdict and judgment in an action of debt. Upon such motion the court, as to the facts, stands in the place of the jury, and must, upon a return of "executed" and proof of an escape, presume it to have been made with the consent of the sheriff; but the latter may rebut such presumption by due proof. *Stone v. Wilson*, 10 Gratt. (Va.) 543.

action the insolvency of the prisoner will not be received in mitigation of damages.¹

(2) *Where Action of Debt Is Abolished.* — Under statute in *England* and in some of the *United States* the action of debt is abolished, and the plaintiff can only bring an action on the case for damages.²

c. WHERE SUIT BROUGHT ON SHERIFF'S OFFICIAL BOND. — In an action against the sureties on a sheriff's bond for an escape, the measure of damages is the actual damage sustained by the creditor to the extent of the penalty of the bond,³ and in such action the sureties may show the insolvency of the original defendant from the time of the issuance of the *ca. sa.* until his return;⁴ for the action on the bond is the common-law remedy of action of debt on a bond with a penalty. The action on the case and the action of debt given by the statutes 13 Edward I. and 1 Richard II. lay against the sheriff alone and did not reach the sureties on his official bond.⁵

d. WHERE SHERIFF LIABLE AS BAIL. — Where the sheriff is liable as bail, the amount of the damages recoverable against him is the amount of the judgment, regardless of the solvency or insolvency of the prisoner.⁶ And where judgment has been recovered against him as bail, and returned unsatisfied in whole or in part, his sureties are liable for the deficiency, or the whole, as the case may be.⁷

e. WHERE SUIT BROUGHT ON PRISON-LIMITS BOND. — In an action on a prison-limits bond the rule of damages is the amount of the execution with interest and costs up to the penalty of the bond.⁸

1. *Zenner v. Blessing*, (City Ct.) 4 N. Y. Supp. 866. Compare *State v. Mullen*, 50 Ind. 600, where it was held that in case of a negligent escape the sheriff may show in mitigation of damages that the prisoner had no property or means with which he could have secured or paid the debt in whole or in part, and that he could not procure the same to be replevied.

2. In *England*, under the statute 5 and 6 Vict., c. 98, § 31, an officer is liable only to an action on the case for an escape under final process, and is not liable to an action of debt. *Arden v. Goodacre*, 11 C. B. 373, 73 E. C. L. 373; *Moore v. Moore*, 25 Beav. 14.

In *Massachusetts* the action of debt is abolished, and the plaintiff is entitled only to an action on the case in which he may recover such damages as he has sustained. *Chase v. Keyes*, 2 Gray (Mass.) 215.

In *New York* the code, by abolishing all forms of pleading, has abolished the action of debt, and it is provided that the sheriff shall be liable for the debt, damages, or sum of money for which the prisoner was committed; but in such case evidence of the latter's insolvency is not admissible. *McCreery v. Willett*, 23 How. Pr. (N. Y. Super. Ct.) 120, 9 Bosw. (N. Y.) 600, affirming 4 Bosw. (N. Y.) 643; *Dunford v. Weaver*, 84 N. Y. 446. See also *Hutchinson v. Brand*, 6 How. Pr. (N. Y. Supreme Ct.) 73; *Zenner v. Blessing*, (City Ct.) 4 N. Y. Supp. 866.

3. Where Suit Brought on Sheriff's Official Bond. *State v. Johnson*, 1 Ind. 158; *State v. Baden*, 11 Md. 317; *State v. Lawson*, 2 Gill (Md.) 62; *Governor v. Matlock*, 1 Hawks (8 N. Car.) 425; *Willey v. Eure*, 8 Jones L. (53 N. Car.) 320; *Lusk v. Falls*, 63 N. Car. 188.

4. *State v. Baden*, 11 Md. 317; *State v. Lawson*, 2 Gill (Md.) 62.

Where Debt Paid After Suit Brought. If it appear that, since the commencement of the suit,

the debt for which the judgment was obtained has been satisfied by a surety of the debtor, the plaintiff ought not to recover more than nominal damages, and the omission to assess nominal damages when substantial justice has been done is no cause for a new trial. *State v. Miller*, 5 Blackf. (Ind.) 381.

Under the *Pennsylvania Statute*, June 14, 1836, the plaintiff in an action on the official bond of the sheriff has a right to embrace in his recovery damages up to the time of judgment where they proceed from the cause of action originally assigned as a breach. *Karch v. Com.*, 3 Pa. St. 269.

5. See *State v. Lawson*, 2 Gill (Md.) 712; *Lusk v. Falls*, 63 N. Car. 188.

6. Measure of Damages where Sheriff Is Liable as Bail — *Kansas*. — *Crane v. Stone*, 15 Kan. 60.

New York. — *Metcalf v. Stryker*, 31 N. Y. 255; *Bensel v. Lynch*, 44 N. Y. 164, affirming 2 Robt. (N. Y.) 448; *Flack v. State*, 95 N. Y. 471; *Gallarati v. Orser*, 27 N. Y. 326.

North Carolina. — *Winborne v. Mitchell*, 111 N. Car. 14.

7. *People v. Dikeman*, 3 Abb. App. Dec. (N. Y.) 522.

8. Where Suit Brought on Prison-limits Bond. — *Tunison v. Cramer*, 5 N. J. L. 574.

Action of Debt upon Limit Bond — *Massachusetts*. — In *Little v. Hasey*, 12 Mass. 320, which was an action of debt upon a limit bond, it was held that an escape not wilful or designed, but caused altogether by the mistake of magistrates, was considered an escape "through accident" within the words of the *Massachusetts* statute 1810, c. 116. Judgment was therefore entered for the amount of the debt and costs with interest thereon, instead of for the penalty of the bond.

See note to this case, in which it is said that the escape was not accidental, and did not

f. WHERE DEFENDANT IN BASTARDY PROCEEDINGS ESCAPES. — Where a defendant in a bastardy proceeding against whom a judgment has been rendered is committed to jail for failure to pay or replevy said judgment, and is voluntarily permitted to escape, the sheriff is liable for the full amount of said judgment, and evidence of the prisoner's insolvency will not be received in mitigation of damages.¹ But if the escape is negligent, it has been held that the insolvency of the prisoner may be shown in mitigation of damages,² and where judgment in the bastardy proceedings is not rendered till after the escape, it has been held that *prima facie* the measure of damages against the officer for the escape is the amount of the judgment, and that the insolvency of the prisoner will not mitigate the damages.³ But in such case it has been held that the recapture of the prisoner will mitigate the damages, and that the plaintiff is only entitled to the actual damages sustained.⁴

g. INTEREST ON JUDGMENT OBTAINED AGAINST DEBTOR. — It has been held that the plaintiff in an action of debt for an escape cannot recover interest upon the judgment rendered in his favor against the prisoner.⁵ But it seems that in an action on the case the jury may allow interest so as to give the plaintiff all that he has lost.⁶

h. REDUCTION OF DAMAGES BY RECAPTURE. — Under statute in *Indiana* the damages against the sheriff may be reduced by the recapture of the prisoner; but this provision is limited to violent escapes and to recapture made within three months after an escape.⁷

i. IN EQUITY. — It has been held that the liability in equity for an escape

come within the provisions of said statute of 1810.

Under the *Vermont Statute*, if a recovery cannot be had by a creditor upon a jail-limits bond, by reason of any neglect or default of the jail keeper in taking it, or if the debt cannot be collected upon it, on account of the poverty of the signers, an action in the form of case may be brought against the sheriff, and the rule of damages is the amount of the debt. *Wheeler v. Pettes*, 21 Vt. 401.

Costs as Part of Damages in Action on Limit Bond. — The sheriff, in an action against the sureties on a limit bond, is entitled to recover the costs of defending a suit against him as a part of the damages; for such costs are only a charge accessory to the principal demand, and are analogous to the case of interest accruing after the suit brought. *Kip v. Brigham*, 7 Johns. (N. Y.) 168.

Where Debt Against Sheriff Is Barred. — Where the debt against the sheriff is barred by the statute of limitations he is entitled only to nominal damages in a suit against the prisoner's surety. *Abel v. Bennet*, 1 Root (Conn.) 127.

1. Damages for Escape of Defendant in Bastardy Proceedings. — *State v. Hamilton*, 33 Ind. 502; *Hoagland v. State*, (Ind. App. 1895) 40 N. E. Rep. 931; *Snyder v. Com.*, 1 P. & W. (Pa.) 94; *Karch v. Com.*, 3 Pa. St. 269; *Smith v. Com.*, 59 Pa. St. 326.

Contra. — It has, however, been held in *Ohio* that in an action on the case, or under the code, the fact of the insolvency of the defendant in the bastardy proceedings may be given in evidence in mitigation of damages. *Hootman v. Shriner*, 15 Ohio St. 43.

Judgment Payable in Instalments. — Where the judgment against a defendant in a bastardy proceeding is payable in instalments, and also liable to reduction in case of the death of the

child, it is error to render judgment against the sheriff for the instant payment of the entire sum, as the sheriff is only required to answer for the original judgment. *Hoagland v. State*, (Ind. App. 1895) 40 N. E. Rep. 931.

2. *State v. Mullen*, 50 Ind. 598.

3. *Lakin v. State*, 89 Ind. 68.

4. *State v. Newcomer*, 109 Ind. 243; *State v. Caldwell*, 115 Ind. 6.

5. Recovery of Interest. — *Rawson v. Dole*, 2 Johns. (N. Y.) 454; *Hutchinson v. Brand*, 6 How. Pr. (N. Y. Supreme Ct.) 75; *Littlefield v. Brown*, 1 Wend. (N. Y.) 399; *Lash v. Ziglar*, 5 Ired. L. (27 N. Car.) 710.

Under the *New York Code of Civil Procedure*, section 158, the plaintiff may, in an action against a sheriff for an escape of a person arrested under an attachment of a surrogate, recover interest on the sum awarded to him by the surrogate's decree. *Dunford v. Weaver*, 84 N. Y. 446.

Whether interest on a judgment recovered against a prisoner committed, and for whose escape the sheriff is sued, can be recovered under 2 Rev. Stat. 437, § 66 (§ 63), which makes the sheriff liable for the debt, damages, or sum of money for which the prisoner was committed, *quære*. *Renick v. Orser*, 4 Bosw. (N. Y.) 384.

Under the *Connecticut Statute* regulating jails and jailers (§ 16, p. 366), a plaintiff in an action on the case against a sheriff for an escape may recover interest on the judgment obtained against the debtor, although the latter would not be liable for such interest. *Bowen v. Huntington*, 3 Conn. 423.

In a note to this case it is said that the statute regulating the decision was modified at the revision of 1821.

6. *Rawson v. Dole*, 2 Johns. (N. Y.) 454.

7. Reduction of Damages by Recapture — Indiana. — *Hoagland v. State*, (Ind. App. 1895)

of a person committed upon an attachment for nonpayment of money is the same as at law where the remedy is by action on the case.¹

11. Rights of Sheriff Against Debtor — After a Voluntary Escape. — A voluntary escape of a party arrested under final process leaves the sheriff committing the escape without remedy. The original debtor is not liable to him as he is in the case of a negligent escape, in which he is a wrongdoer to the officer.²

After a Negligent Escape. — Where, however, the escape is negligent, the sheriff has every requisite remedy; either he may retake the defendant and keep him till he is indemnified, or he may elect not to retake him, but to bring an action against him for the escape.³

III. ESCAPE AS A CRIMINAL OFFENSE — 1. In General. — It has been seen that an escape may be effected either with or without force, and may be committed either by the party arrested or by others.⁴ It is a general principle that all persons are bound to submit themselves to the judgment of the law and to be ready to be justified by it; therefore those who, declining to undergo a legal imprisonment when arrested on criminal process, free themselves from it by any artifice and elude the vigilance of their keepers, before they are delivered by due course of law, are guilty of an offense.⁵ An escape therefore, in the criminal sense of the law, is effected where one who is arrested regains his liberty before he is delivered in due course of law.⁶

40 N. E. Rep. 931. See also *State v. Newcomer*, 109 Ind. 243; *State v. Caldwell*, 115 Ind. 6.

1. **Liability in Equity.** — *Moore v. Moore*, 25 Beav. 8, 27 L. J. Ch. 385, 4 Jur. N. S. 250.

2. **Sheriff's Right.** — *Appleby v. Clark*, 10 Mass. 59.

But it has been said that, inasmuch as the creditor is not without remedy, this remedy may be assigned to the sheriff, and that the latter may, by the creditor's consent, issue an alias execution or an attachment, and that a parol consent by the creditor's attorney is sufficient. *Cheever v. Mirrick*, 2 N. H. 376.

Payment by Sheriff of Judgment Against Debtor. — If an officer permit a prisoner to go at large on his promise to pay the debt to the creditor, in consequence of which he is obliged to pay the creditor himself, he cannot recover back the money from the debtor, inasmuch as he was guilty of a breach of duty, out of which he cannot derive a cause of action. *Eyles v. Faikney*, cited in 1 Peake N. P. (ed. 1795) 144, note a; *Pitcher v. Bailey*, 8 East 171; *Carpenter v. Fifield*, 14 R. I. 75.

Under Statute in Indiana, if the sheriff pay the amount of the judgment obtained against a prisoner who escapes by the negligence of the sheriff, the original judgment, under the statute, is not discharged by such payment, but remains in force for the use of the sheriff or the surety making such payment; but this statute gives the sheriff or surety no remedy until after the judgment shall have been paid, and then it would be a question whether the right would remain or exist to imprison the defendant, or only to have execution against his property. *Ex p. Voltz*, 37 Ind. 175, 10 Am. Rep. 86.

Suit to Recover Prison Charges on Bond. — A party was ordered by court to give a bond to the town of Plainfield to save said town harmless and pay costs of prosecution in a bastardy proceeding and to stand committed until the order was performed. The defendant not furnishing the bond, was committed to jail, and

citizens of said town gave a bond to the jailer on behalf of said town to pay the prison charges of the defendant, upon which he was released. It was held that the sheriff being guilty of a voluntary escape could not recover on said bond the prison charges of the defendant. *Riley v. Whittiker*, 49 N. H. 146, 6 Am. Rep. 474.

3. **Sheriff's Rights After a Negligent Escape.** — *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 3, 1 Am. Dec. 142; *Lockwood v. Mercereau*, 6 Abb. Pr. (N. Y. Super. Ct.) 208.

Sheriff Not Bound to Wait till Sued. — When a prisoner escapes, the sheriff is not bound to wait until he is sued, but may immediately take his remedy for a breach of the condition of the bond; and as he is liable to the creditor the moment the escape takes place, he need not wait for an action, but may discharge his liability without it. *Hinds v. Doubleday*, 21 Wend. (N. Y.) 230.

4. **Escape as a Criminal Offense.** — See *supra*, this title, *Definitions*.

5. **Nature of Criminal Offense of Escape.** — 2 Hawk. P. C., c. 17, § 5; 4 Bl. Com. 129; 1 Russ. on Cr. (9th Amer. ed.) 581; *State v. Doud*, 7 Conn. 387.

6. 1 Russ. on Cr. (9th Amer. ed.) 581; *State v. Johnson*, 94 N. Car. 926; *State v. Ritchie*, 107 N. Car. 858.

An Escape from Arrest upon a Charge for a Misdemeanor, and without force, is itself a misdemeanor at common law. *State v. Brown*, 82 N. Car. 586.

Escape in Going to Place of Confinement. — In *Massachusetts*, if a convicted criminal escape from the custody of the officer who is taking him by virtue of a mittimus to the place of confinement, he is punishable for an offense at common law. *Com. v. Farrell*, 5 Allen (Mass.) 131.

In *Pennsylvania* a prisoner escaping from the custody of an officer on his way from the court-house to the jail, after being tried and convicted of a crime, is guilty of the offense under the Act of March 31, 1860 (P. L. 385,

2. Escape Without Force — *a.* **BY PRISONER** — (1) *In General.* — If a prisoner go out of his prison without any obstruction, the doors being opened by the consent or negligence of the jailer, or if he escape in any other manner, without using any kind of force or violence; or if his prison be broken by others, without his procurement or consent, and he escape through the breach so made, he is guilty of a misdemeanor at common law.¹

(2) *By County Convict.* — In *Texas*, where a county convict is placed by his hirer with a third person with whom he remains up to the time of the prosecution, the convict is not guilty of an escape.²

(3) *Essentials to Commission of Offense* — (a) **Lawful Custody of Prisoner.** — For a prisoner to commit the offense of escape, it is essential that he should have been held in lawful custody.³

(b) **Intent to Escape.** — Another essential ingredient of the offense is that there should have been an intent on the part of the prisoner to escape.⁴

(4) *Justification by Prisoner.* — The necessity to excuse an escape must be real and urgent, and not be created by the fault or carelessness of the prisoner; and the plea of necessity is unavailable, without also showing that lawful measures had first been adopted to accomplish the desired result.⁵

§ 3), punishing those who "break prison or escape." *Com. v. Adams*, 3 Pa. Super. Ct. Rep. 167.

1. Escape Without Force by Prisoner. — 2 Hawk. P. C., c. 18 §§ 9, 10; 1 Hale's P. C. 611; 2 Inst. 589; Staund. P. C. 30, 31; 4 Bl. Com. 130; *State v. Brown*, 82 N. Car. 586. See also *State v. Doud*, 7 Conn. 387.

In *Missouri*, where a defendant is charged under section 1455, Rev. Stat. of 1879, with escaping from jail before conviction, it is not necessary to prove the use of force on his part in effecting the escape. *State v. Whalen*, 98 Mo. 226.

In *Nevada*, if a person legally committed to the custody of the sheriff to answer to a charge of felony, and by such sheriff confined in the jail of his county, escape or depart therefrom, with or without force, he is guilty of escape from such jail. *State v. Davis*, 14 Nev. 446, 33 Am. Rep. 563.

2. Escape of County Convict. — *Peoples v. State*, (Tex. App. 1890) 14 S. W. Rep. 352.

A county convict hired out is not guilty of an escape in absconding, where the hirer permits him to go at large, or takes no personal supervision or control of him, but relies on his paying the fine and costs for which he was imprisoned. *Simmons v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 968.

Hired County Convict Refusing to Work. — Where a county convict removed with his family to a farm to which he was sent by the hirer, and continued to reside there with his family, working as a farm hand, going through the town occasionally, without objection of his hirer, but after some months refused to work, it was held that this was not such an escape as the statute (art. 218, Tex. Pen. Code) contemplates, which provides that "any person who has been convicted of a misdemeanor or petty offense, and afterwards hired under authority of law, who shall escape from his employer or person hiring him during the term for which he may have been hired, shall be punished," etc. *Carter v. State*, 29 Tex. App. 5.

Convict "Trusty" — Arkansas. — A convict serving a term of imprisonment, who is required to remain within certain bounds and

obey prison rules, is guilty of an escape in fleeing from the state, though he had been made a "trusty," and was not confined within the prison walls, or kept under guard. *Jenks v. State*, 63 Ark. 312.

3. Lawful Custody of Prisoner Essential. — *People v. Ah Teung*, 92 Cal. 424.

Delivery of Prisoner Without Certified Copy of Recognizance. — *State v. Beebe*, 13 Kan. 593.

Delivery of Prisoner Without Copy of Judgment and Order of Court. — Where it does not appear that a prisoner delivered to a sheriff was in custody of said sheriff under a duly certified copy of said judgment and order of court, under Kansas Gen. Stat., p. 861, § 256, even though he was in custody under and by virtue of such order and judgment as entered of record, such prisoner is not guilty of a criminal offense in escaping from the sheriff. *State v. Hollon*, 22 Kan. 583.

When Custody Ceases. — An officer's custody of a prisoner whom he has arrested upon a warrant and brought before a court for trial, does not cease until the prisoner has been discharged, or a warrant of commitment made out. *Com. v. Morihan*, 4 Allen (Mass.) 587; *Reg. v. Shuttleworth*, 22 U. C. Q. B. 372.

Under a contract between the adjutant-general of the state and a contractor, entered into under the 5th section of c. 3034 of the laws of *Florida*, providing for the employment of persons convicted of crimes and sentenced to the state prison, etc., a party tried and sentenced to state prison is in legal custody of the sheriff of the county, after such sentence, until he is transferred to the state prison. *Murray v. State*, 25 Fla. 528.

For a Further Discussion as to the Necessity of Lawful Custody, see *supra*, this title, *Escape in Civil Proceedings*; and *infra*, this section, *Prison Breach; Rescue; Aiding and Assisting Prisoner to Escape*.

4. Intent by Prisoner to Escape Essential. — *Riley v. State*, 16 Conn. 51.

5. Filthy and Unwholesome Condition of Jail. — *State v. Davis*, 14 Nev. 444, 33 Am. Rep. 563. In this case the defendant admitted his escape from jail, but offered in excuse, and in mitigation of his leaving, and showing an absolute

(5) *Evidence*. — Where a prisoner who has been convicted and sentenced is charged with the offense of escape, it devolves upon the state to prove his conviction for the crime for which he was committed, by the record, and his personal identity by proof *aliunde*. But direct proof of identity is not required; circumstantial evidence is sufficient.¹ For the purpose of proving the conviction, however, a transcript of the judgment and the sentence of the court is sufficient without the indictment.²

6. *ESCAPE SUFFERED BY OFFICER* — (1) *In General*. — If a prisoner arrested on a criminal charge, in the custody of an officer, escape, the latter is guilty of the offense of escape;³ for it is his duty in criminal as in civil cases to keep the prisoner in *salva et arcta custodia*.⁴

(2) *Voluntary Escape*. — If an officer be guilty of a voluntary escape, it is a much more serious offense than a negligent escape.⁵ At common law such an escape amounts to the same kind of crime, and is punishable in the same degree, as the offense of which the party is guilty, and for which he was in custody, whether the person escaping was actually committed to some jail, or under an arrest only, and not committed, and whether he was attainted or only accused of such crime, and neither indicted nor appealed.⁶ But no

necessity therefor, that the jail was absolutely intolerable and injurious to his health by reason of being in a filthy and unwholesome and loathsome condition. But it was held that the testimony as to the condition of the jail was properly excluded, inasmuch as it was not shown or claimed that he had even complained to the sheriff or the board of county commissioners, or that he had endeavored to obtain relief by any lawful means.

In *Riley v. State*, 16 Conn. 50, the prisoner performed odd jobs by the direction of the jailer, sometimes going beyond the prison limits. Subsequently, without the knowledge of the jailer, the prisoner departed, leaving the state. It was held that the conduct of the jailer did not justify such departure, and that the prisoner was guilty of an escape.

1. *Evidence*. — *State v. Murphy*, 10 Ark. 74.

2. *Sanford v. State*, 11 Ark. 328.

3. *Escape Suffered by Officer*. — 1 Russ. on Cr. (9th Am. ed.) 582.

4. *Character of Custody in Which Prisoner Is to Be Kept*. — *Smith v. Com.*, 59 Pa. St. 325.

5. *Voluntary Escape Suffered by Officer*. — 4 Bl. 130; 1 Russ. on Cr. (9th Am. ed.) 583.

License to Prisoner to Go Abroad. — If the jailer or other officer license his prisoner to go abroad for a term and to come again, this is an escape, even though the prisoner return again. *Dalt. C.* 159.

But Hawkins says there are cases wherein an officer seems to have been found to have knowingly given his prisoner more liberty than he ought to have had (as, by allowing him to go out of prison on a promise to return, or to go amongst his friends to find some who would warrant goods to be his own which he is suspected to have stolen), and yet seems to have been adjudged guilty only of a negligent escape. 2 Hawk. P. C., c. 19, § 10.

Prisoner Allowed to Go into Jailer's Apartments. — It is a misdemeanor at common law for the sheriff to permit a prisoner charged with a criminal offense and committed for trial to go at large out of the prison appropriated for the purposes of a prison, into the part occupied by the sheriff as a residence for himself and his

family, and without taking any precaution against an escape. *People v. Stone*, 10 Paige (N. Y.) 610.

Rescue of Prisoner Not a Voluntary Escape. — If the prisoner be rescued, or rescue himself, against the will of him who has him in custody, this is not a voluntary escape. 1 Hale P. C. 596. See *infra*, this section, *Rescue*.

Officer Bailing Prisoner. — It is not in all cases a general rule that an officer is guilty of a voluntary escape by bailing his prisoner whom he has no power to bail, under the 5th Edw. III., c. 8, relating to the improper bailing of persons. It must depend upon the circumstances of the case, such as the heinousness of the crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning to render himself to justice, the intention of the officer, and the motives on which he acted. 2 Hawk. P. C., c. 19, § 10.

Allowing Convict to Vote at Election. — It was held to be a voluntary escape for a keeper to conduct a convict from Blackwell's island to the city of New York, to vote at an election. *People v. McLoughlin*, 2 Archb. Cr. Pl. & Pr. (8th ed.) 1863, citing *Police Gazette*, vol. 2, p. 182.

6. *Nature and Degree of Voluntary Escape*. — 2 Hawk. P. C., c. 19, §§ 10, 22; 4 Bl. Com. 130; *Martin v. State*, 32 Ark. 126; *Weaver v. Com.*, 29 Pa. St. 447; *Steph. Dig. Cr. L.* 98. See also *M'Cracken v. State*, 8 Yerg. (Tenn.) 172.

Fine and Imprisonment of Officer. — Where an officer was convicted for permitting three prisoners respectively charged with arson, counterfeiting, and larceny, to go at large, it was held that a sentence of five months imprisonment and hard labor in the county jail and to pay a fine of one hundred and fifty dollars and costs of prosecution, was not an unauthorized judgment. *Weaver v. Com.*, 29 Pa. St. 447.

Liability of Sheriff and Sureties for Fines, etc., Assessed Against Prisoner — Alabama. — The 12th and 13th sections of the 5th chapter of the penal code, (Alabama), prescribing the punishment of any sheriff, etc., for a voluntary or negligent escape, are merely substitutes for the common law, and do not repeal or abro-

escape will amount to a capital offense by the officer unless the cause for which the party was committed was actually such at the time of the escape; its becoming a capital offense afterwards — as by the death of a party wounded by the prisoner at the time of the escape, but not then dead — will not be sufficient.¹

Removal from Office. — One voluntary escape is said to amount to a forfeiture of the jailer's office.²

(3) *Negligent Escape.* — Where an officer is guilty of a negligent escape of a felon, the offense is not, at common law, felony, but a misdemeanor punishable, it would seem, by a fine.³ But if a jailer suffers many negligent escapes, it is said that he puts it in the power of the court to oust him of his office at discretion.⁴ A negligent escape occurs where a party arrested or imprisoned escapes against the will of him that arrests or imprisons him, and is not freshly pursued and taken again before he has been lost sight of.⁵

gate the Act of 1812, providing a remedy by motion against the sheriff, etc., for the fines, forfeitures, etc., for which the escaped prisoner may have been committed; but it is not competent for the court which rendered the judgments inflicting fines on the parties who afterwards escaped, *mero motu*, to institute the proceeding against the sheriff. *Hodges v. State*, 8 Ala. 58.

Forfeiture of Compensation — Tennessee. — Where a jailer suffered a prisoner convicted of a felony to escape, he was held not entitled to his fee or compensation for the time the prisoner was confined. *M'Cracken v. State*, 8 Verg. (Tenn.) 172.

1. When Escape Amounts to Capital Offense by Officer. — 2 Hawk. P. C., c. 19, § 25.

Arraignment and Punishment of Officer Suffering Voluntary Escape. — An officer cannot be arraigned for a voluntary escape before the prisoner has been convicted of the crime for which he was in custody, for it might happen that the prisoner was innocent. He may, however, before such conviction, be fined and imprisoned for a misdemeanor. 1 Hale P. C. 598, 2 Hawk. P. C., c. 19, § 26, 4 Bl. Com. 130.

If, however, the commitment were for high treason, and the person committed actually guilty of it, it is said that the escape is immediately punishable as high treason, also whether the party escaping be ever convicted of such crime or not, for the reason that there are no accessories in high treason. 2 Hawk. P. C., c. 19, § 26.

In *Weaver v. Com.*, 29 Pa. St. 447, it was held that in *Pennsylvania* there is no statute changing the character of the crime at common law of a keeper of a prison voluntarily permitting one charged with felony to escape.

Officer as an Accessory After the Fact. — In Stephen's Dig. Cr. Law 98, it is said that an officer permitting the voluntary escape of a prisoner in his custody and guilty of a felony, becomes an accessory after the fact to the felony of which the prisoner was guilty. See also 1 Archb. Cr. Pl. & Pr. (8th ed.) 73; 2 Hawk. P. C., c. 29, §§ 26, 27.

2. Removal from Office. — 2 Hawk. P. C., c. 19, § 30; *Rex v. Lenthal*, 3 Mod. 146.

In *Mississippi* under section 26 of article 6 of the Constitution (Code, § 321), the sheriff may be removed from office upon conviction for an escape of a prisoner committed to his custody. *Shattuck v. State*, 51 Miss. 580.

3. Negligent Escape Suffered by Officer — Nature and Degree of Offense. — 2 Hawk. P. C., c. 19, §§ 31–33; 1 Russell on Cr. (9th Am. ed.) 589; 1 Hale P. C. 600; 4 Bl. Com. 130.

In *Martin v. State*, 32 Ark. 126, it is said that the offense is punishable by fine and imprisonment of the officer, in support of which the above last two authorities are cited; but as to the imprisonment of the officer they do not sustain the court.

In the Encyc. of the Laws of England, vol. 5, p. 51, it is said that the view taken by Hawkins and adopted by Russell, of a negligent escape by an officer being punishable by fine only, is based on a misconception of the nature of fines in the mediæval courts, and on an omission to consider that they were made as a compromise of the proceeding, or substitution for the imprisonment which the court could impose, *citing* 2 Pollock & Maitland, Hist. of Eng. Law 512.

4. 2 Hawk. P. C., c. 19, § 30.

In *Arkansas* a negligent escape is indictable as a common-law offense, and punishable under the general statute adopting the common law. *Martin v. State*, 32 Ark. 126.

In *Indiana* the offense of an officer suffering a negligent escape, is a misdemeanor punishable by fine only. *State v. Sparks*, 78 Ind. 166.

5. When Officer Commits Negligent Escape. — 1 Russ. on Cr. (9th Amer. ed.) 584.

If a person in custody on a charge of larceny, suddenly and without the assent of the constable, kill, hang, or drown himself, this is considered as a negligent escape in the constable. Dalt., c. 159.

If the jailer so closely pursues the prisoner who flies from him that he overtakes him without losing sight of him, the law looks on the prisoner so far in his power at the time, as not to adjudge such a flight at all to amount to an escape; but if the jailer once lose sight of the prisoner and afterward overtake him, he seems to be guilty of the escape. *A fortiori* if he kills him in the pursuit, though he never lose sight of him, he is guilty of an escape. 2 Hawk. P. C., c. 19, § 6. But see *infra*, this title, *Recapture of Escaping Prisoner*.

Prisoner Breaking Jail. — In 1 Hale's P. C. 600, it is said: "If a prisoner for felony break the jail this seems to be a negligent escape, because there wanted either that due strength in the jail that should have secured him, or

(4) *Wilful or Negligent Escape*. — Where a statute makes it an offense in the officer to " wilfully or negligently " suffer a person to escape, the statute plainly prescribes, and intends to prescribe, two distinct kinds of escape — one that is wilfully, the other that is negligently, suffered or permitted by the officer. The mischief to be suppressed is twofold in its nature.¹

(5) *Essentials to Commission of Offense* — (a) *Justifiable Arrest or Imprisonment of Prisoner*. — In order to a conviction of an officer for an escape of a prisoner in his custody on a criminal charge, the arrest or imprisonment of the prisoner must be justifiable; for if the latter be arrested for a supposed crime, when no such crime was committed, or for such a slight suspicion of an actual crime as will justify neither the arrest nor imprisonment, the officer is not guilty of an escape by suffering him to go at large.² And it seems to be a good general rule that whenever an imprisonment is so far irregular that it will be no offense in the prisoner to break from it by force, it will be no offense in the officer to suffer him to escape.³ But the warrant of arrest or commitment need not be strictly formal. It is sufficient that it be good in substance.⁴

that due diligence in the jailer or his officers to have prevented it."

Failure to Handcuff Prisoner. — It is not negligence *per se* for a sheriff to fail to put handcuffs on a prisoner; whether it is proper or not depends upon the prisoner's character, and the attending circumstances. *State v. Hunter*, 94 N. Car. 835.

Officer Bailing Prisoner Not Bailable. — A person who has power to bail is guilty of a negligent escape by bailing one who is not bailable. Thus if a justice of the peace bails a person not bailable by law, it excuses the jailer, and is not a felony in the justice, but a negligent escape, for which he is finable at common law, and by the justices of the jail delivery. 1 Russ. on Cr. (9th Amer. ed.) 585.

Prisoner Arrested under Bastardy Warrant. — An indictment lies at common law, independently of the *North Carolina* statute (Code, § 1022), against an officer, for the negligent escape of a prisoner arrested under a bastardy warrant. *State v. Ritchie*, 107 N. Car. 858.

1. **Wilful or Negligent Escape.** — *State v. McLain*, 104 N. Car. 896.

2. **Justifiable Arrest or Imprisonment of Prisoner Essential to Constitute Escape in Officer.** — 2 Hawk. P. C., c. 19, § 2; *People v. Ah Teung*, 92 Cal. 424; *State v. Dean*, 3 Jones L. (48 N. Car.) 393.

Where Prisoner Never in Custody. — As there must be an actual arrest, it has been held that if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. 2 Hawk. P. C., c. 19, § 1.

Prisoner Committed to Custody When Put upon Trial. — Wherever a person charged with a criminal offense is put upon his trial, he is, by operation of law, committed to the custody of the sheriff, and there is no necessity for either a general or special order mandatory to that officer. From that moment the accused is in legal custody, and the sheriff, as executive officer, is charged with his safe keeping, and is liable for his escape. *Hodges v. State*, 8 Ala. 58.

Up to What Time Custody Continues. — A person arrested remains in custody of the officer

under the original warrant until final decision for commitment to jail, or a discharge on bail; and an officer permitting a prisoner to escape after a hearing, and pending the completion of the bail bond, is criminally liable for an escape. *Reg. v. Shuttleworth*, 22 U. C. Q. B. 372. See also *Burns's Justice*, vol. 6, p. 368; 1 Hale's P. C. 581; 2 Hale's P. C. 120.

Where Court Had No Jurisdiction to Issue Warrant. — A constable will not be liable to a criminal prosecution for voluntarily allowing a prisoner to escape, for whose arrest he holds a warrant, fair on its face, for a criminal offense, if the affidavit on which the same was issued fails to give the court issuing it jurisdiction. He can, if he chooses, take the responsibility of determining the question of jurisdiction, or any other question to which the process may give rise. *Housh v. People*, 75 Ill. 487.

3. 2 Hawk. P. C., c. 19, § 2.

4. **Formality of Warrant.** — 2 Hawk. P. C., c. 19, § 24; 1 Hale's P. C. 595.

A commitment to a prison, and not to a person, was held good in *Rex v. Fell*, 1 Ld. Raym. 424.

If a private person or a constable arrest a man for felony, and carry him to the common jail, as he may do by law, the jailer is bound to receive him if he be informed by the party arresting that the arrest is for felony, and if the jailer lets him escape it is at his peril, and yet there is no mittimus in such case but a notice *ore tenus*. 1 Hale's P. C. 595. See the titles ARREST, vol. 2, p. 832; WARRANTS.

Commitment Without Warrant or Positive Charge. — It appears to have been held that it is an escape in a constable to discharge a person committed to his custody by a watchman as a loose and disorderly woman and a street walker, although no positive charge was made. *Rex v. Bootie*, 2 Burr. 864.

Refusal of Officer to Arrest on a Charge of Felony. — An officer is liable on an indictment for a negligent escape if he refuses to arrest a person upon a warrant for a charge of felony, which does not designate the species of the felony committed; for the warrant is not void. *Martin v. State*, 32 Ark. 130.

For a Further Discussion of the Principle of Lawful Custody or imprisonment as an essential

Imprisonment Must Be for Criminal Offense. — The imprisonment must not only be justifiable, but also for some criminal matter.¹

Imprisonment Must Be Continuing. — The imprisonment must also be continuing at the time of the escape, and its continuance must be grounded on that satisfaction which the public demands for the crime committed.²

(b) **Intent.** — It is necessary, in order to constitute the crime of voluntarily permitting a prisoner to escape, that the act be done by the officer not through ignorance or mistake, but *malò animo*.³

(6) **Defenses.** — It is said that nothing but the act of God or other irresistible adverse force will avail as a defense.⁴ But while a jailer is responsible for the security of the jail, and the safe custody of the prisoners, it would seem that if the jail were considered by persons of competent judgment a place of perfect security, he would be excusable for the escape of a prisoner therefrom if all due vigilance had been used.⁵ An officer cannot justify the escape upon

ingredient, see *supra*, this title, *Escape in Civil Proceedings*; *supra*, this section, *Escape Without Force — By Prisoner*; and *infra*, this section, *Prison Breach*; *Rescue*; *Aiding and Assisting Prisoner to Escape*.

1. Imprisonment Must Be for Criminal Offense. — 2 Hawk. P. C., c. 19, § 3; 1 Hale 592.

2. Prisoner Detained for Fees. — If a prisoner be acquitted and detained only for his fees, it will not be criminal to suffer him to escape, if the judgment were that he should be discharged "paying his fees," he being in such case detained only as a debtor; but if a person convicted of a crime be condemned to prison for a certain time, and also "till he pays his fees," it is said that perhaps an escape of such person after the term of his imprisonment has elapsed, without paying his fees, may be criminal, as it was part of the punishment that the imprisonment should be continued till the fees should be paid. 2 Hawk. P. C., c. 19, § 4.

Prisoner Committed till Payment of Fine and Cost. — Where a prisoner is committed to jail until a fine and the costs be paid, the sheriff is liable for his escape. *Luckey v. State*, 14 Tex. 401.

Under the *Arkansas Statute* a sheriff is guilty of a misdemeanor if he voluntarily permits the escape of a prisoner upon a conviction of a misdemeanor, whom it was his duty to detain in custody till payment of the fine and cost, or to hire him out as directed by the judgment, if the fine and cost were not immediately paid. *Griffin v. State*, 37 Ark. 438.

3. Intent of Officer Essential. — *Staund. P. C.* 33; 2 Hawk. P. C., c. 19, § 10; *Meehan v. State*, 46 N. J. L. 355.

Release of Prisoner upon Written Discharge of Committing Magistrate. — If an officer releases a prisoner upon a written discharge from the committing justice, believing it to be legal, he is not guilty of the crime of voluntarily permitting an escape, but of a negligent escape. *Meehan v. State*, 46 N. J. L. 355.

But in *Arkansas* it was held that an officer in whose custody parties were placed, who were by inquest implicated in the crime of murder and held for trial, had no right to release them on the order of a justice of the peace admitting them to bail, who, prior to the deed, had them arrested for attempting to take the life of the deceased, the justice of the peace having no power to admit to bail in such case; and that therefore the officer was liable

for a voluntary escape under section 1487 Gantt's Digest (Ark.). *Bass v. State*, 29 Ark. 143.

4. Defenses of Officer. — *Shattuck v. State*, 51 Miss. 578.

Sickness of Sheriff as a Defense. — Under § 1022 of the *North Carolina Code* concerning escapes, providing that "in all such cases it shall be sufficient, in support of the indictment against such sheriff or other officer, to prove that such person so charged or sentenced was committed to his custody, and it shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence," where the sheriff is indicted for the escape of a prisoner, it would be a sufficient excuse for his personal failure to prevent the escape, that he was sick, and intrusted the keys of the jail to another whom he had hired to assist him in attending to the jail; and the only question to be determined is whether he had exercised due care in the employment of his assistant. *State v. Lewis*, 113 N. Car. 622.

Rescue by Fire or Rebels. — In 1 Hale's P. C. 596, it is said that if the prison be fired, and the jailer lets out the prisoners, there being no other means to save their lives, and uses the best means he can by his officers and irons to keep them safe, and this without fraud, or if enemies force him to open the prison doors, and he does it to save his life, it excuses from felony. And if it be done by rebels, though this is no excuse for the jailer or sheriff in civil actions, for he is liable to an action of debt, or upon the case for the escape, because the sheriff has his remedy over, yet it excuses the jailer from felony, and also from a fine, if it be *vis major, quam cui resisti potest*.

5. Insecurity of Jail. — 1 Russ. on Cr. (9th Am. ed.) 584.

But in *Shattuck v. State*, 51 Miss. 580, evidence offered by the sheriff that the jail, which was new, and supposed to be strong and safe, had been accepted and approved by the board of supervisors, was rejected, and this ruling was apparently approved by the Supreme Court, which based its decision upon the rule that nothing excused the sheriff but the act of God, or other irresistible force.

And under Miss. Rev. Code 1871, § 2850, in case the jail, in the opinion of the sheriff, is insufficient for the safety of prisoners, he may

the ground that there was error in the judgment of conviction of the prisoner, for until the sentence of the court is reversed it is his duty to hold and keep the prisoner, and it is not for him to look behind into the judgment to see if there be error or illegality therein, and to obey or not according to his pleasure.¹

(7) *Evidence*. — It has been held in *Alabama* that under an indictment against an officer for a negligent escape a conviction may be had on proof of a voluntary escape.² The burden of proof is on the state to show that the prisoner was committed to the custody of the officer, and that he escaped.³ But when the state proves the escape of the prisoner, and that he was committed to the custody of the officer, the burden of proof is shifted to the latter.⁴ Where an officer is charged with a negligent escape of a prisoner, it is not necessary for the state to prove negligence to procure a conviction, for wherever an escape is shown the law implies negligence.⁵ But this rule does not apply with the same strictness as to guards and overseers, where there is a negligent escape of a convict sent outside the prison walls to do public work.⁶ And where the keeper of a jail is charged with a voluntary escape, it is not necessary to prove that he knew that the prisoner was guilty of the offense of which he was charged, in order to convict him.⁷

(8) *Criminal Liability of Sheriff for Acts of His Officers*. — It seems that a sheriff is not punishable for a voluntary escape permitted by his jailer, in the same degree as the offense for which the prisoner was guilty, for no one shall suffer capitally for the crime of another; but the jailer is.⁸

(9) *Escape Suffered by Constable*. — If a constable arrests a man for felony, and brings him to the jail, and the jailer refuses to receive him, yet in law he is in the custody of the constable, and if he lets him go he is liable for an escape.⁹

(10) *Escape Suffered by De Facto Officer*. — A negligent escape may be suffered by a *de facto* jailer¹⁰ or deputy sheriff.¹¹

summon guards to secure the prisoners or protect the jail as long as the same may be necessary; and if the jail needs repairs, it is his duty, under § 240, to report it to the proper authorities, or in an emergency, to have the repairs done on his own order.

1. *Error in Judgment of Conviction of Prisoner as a Defense*. — *State v. Garrell*, 82 N. Car. 581.

2. *Evidence*. — *Nail v. State*, 34 Ala. 265. In this case it was further held that evidence going to show that the sheriff had instructed the jailer to obey his deputy's orders, and that the latter instructed the jailer to allow a prisoner to leave, is inadmissible against the sheriff, for the declarations of the agent do not bind the principal, if not within the scope of his agency; and the direction of the deputy to the jailer to allow the prisoner the liberties enjoyed by him is a command to violate the law — it is not a legal or proper direction, or within the scope of the authority conferred by the sheriff. If it be shown that the sheriff was cognizant of the orders which his deputy gave, and made no objection, the case might be different.

3. *Burden of Proof*. — *State v. Hunter*, 94 N. Car. 835.

Record of Judgment of Conviction of Prisoner. — Where a sheriff is prosecuted for permitting the escape of a prisoner convicted of a misdemeanor, the record of the judgment of conviction of the escaped prisoner is only *prima facie* evidence of a fact recited therein, and the sheriff is not estopped from disproving such fact, he not being a party to the record. *Griffin v. State*, 37 Ark. 442.

4. *State v. Hunter*, 94 N. Car. 829; *State v. Lewis*, 113 N. Car. 622.

5. *Necessity for Proof of Negligence*. — 1 Russ. on Cr. (9th Amer. ed.) 584; *Shattuck v. State*, 51 Miss. 575; *State v. Lewis*, 113 N. Car. 622.

6. *State v. Johnson*, 94 N. Car. 924.

7. *Knowledge of Prisoner's Guilt*. — *Weaver v. Com.*, 29 Pa. St. 447.

8. *Criminal Liability of Sheriff for Acts of His Officers*. — 2 Hawk. P. C., c. 19, § 27. In 1 Hale's P. C. 597, it is said that while the sheriff is not liable to corporal punishment for the acts of his jailer in suffering a voluntary escape, he is liable for a negligent escape, whether the escape was voluntary or negligent, in trusting such a person, who would be false to his trust, with the custody of his prisoners, and therefore that he shall be subjected to fine and imprisonment.

In *Rex v. Fell*, 1 Salk. 272, it is said that if a prisoner be committed to the sheriff and the jailer suffer him to escape, the jailer is punishable, for the sheriff shall answer civilly for the faults of his jailer, but not criminally. But in the reports of this case in *Rex v. Fell*, 1 Ld. Raym. 424, 12 Mod. 226, the holding is to the contrary. See also *Saunderson v. Baker*, 3 Wils. 316; *Woodgate v. Knatchbull*, 2 T. R. 156, which appear to hold that the sheriff is not liable criminally for the acts of his bailiff, to which those of the jailer seem analogous.

9. *Escape Suffered by Constable*. — 1 Hale P. C. 594.

10. *Escape Suffered by De Facto Jailer*. — 2 Hawk. P. C., c. 19, § 28; 2 Inst. 382. But see *Contant v. Chapman*, 2 G. & D. 191, 2 Q. B. 771, 42 E. C. L. 905, 6 Jur. 668.

11. A *de facto* deputy sheriff under special appointment may be prosecuted for allowing a prisoner to escape, though he had not taken

(11) *Escape Suffered by Specially Deputized Officer.* — A person specially deputized to make an arrest, whose authority ceases with the execution and return of the warrant, is not guilty of an offense by voluntarily permitting the escape of the person arrested, after such execution and return.¹

(12) *Escape Suffered by Guards and Overseers.* — A person hired as a guard or overseer of prisoners is criminally liable for the negligent escape of a "trusty" employed on the public roads or in a stockade.²

c. **ESCAPE SUFFERED BY PRIVATE PERSONS** — (1) *In General.* — The law in respect to escapes suffered by private persons is in general the same as in relation to those suffered by officers, and therefore, wherever any person has another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape if he suffers him to go at large before he has discharged himself by delivering him over to some one who, by law, ought to have the custody of him.³ But if he never had the party in lawful custody he is not liable.⁴

Punishment of Private Person. — If an escape suffered by a private person were voluntary, he is punishable as an officer would be for the same offense; and if he were negligent, he is punishable by fine and imprisonment at the discretion of the court.⁵

(2) *By Servants of Officer.* — The offense of suffering, by negligence, a prisoner to escape, is one that can be committed only by the officer upon whom the law casts the obligation of safe custody, for such a person alone has control of the imprisonment, and can take the measures necessary to prevent the escape of the prisoner, and therefore a servant of such officer is not liable for such an escape of a prisoner committed to his care.⁶

(3) *By Hirers of Convicts.* — A hirer of convicts is liable for negligently permitting a convict to escape.⁷

3. Escape by Force — a. **PRISON BREACH** — (1) *At Common Law.* — Where a party effects his own escape by force, the offense is usually called prison breaking; and such breach of the prison was felony at the common law, for whatever cause, civil or criminal, the party was lawfully imprisoned;⁸ or where the prisoner conspired to break prison.⁹

the oath of a deputy. *Pentecost v. State*, 107 Ala. 81. See generally the title *DE FACTO OFFICERS*, vol. 8, p. 771.

1. Escape Suffered by Specially Deputized Officer. — *State v. Dean*, 3 Jones L. (48 N. Car.) 393. In this case it appeared that the justice before whom the officer took the prisoner directed the officer orally to commit the prisoner to jail. It was held, however, that authority for this purpose could not be given by the justice by parol.

2. Criminal Liability of Guards and Overseers. — *State v. Sneed*, 94 N. Car. 806; *State v. Johnson*, 94 N. Car. 924.

3. Escape Suffered by Private Person. — 2 Hawk. P. C., c. 20, §§ 1-4; 1 Hale's P. C. 595; Sum. 112.

4. Voluntary Escape of Party Not in Custody. — If A. commits a felony, and B. receives him knowing him to be a felon, and B. then voluntarily suffers him to depart, though the receipt makes him accessory after, yet it is no escape by B. because he never arrested him, and so had him not in custody. 1 Hale's P. C. 594. See *supra*, this section, *Escape Without Force* — *Lawful Custody of Prisoner*; and *infra*, this section, *Escape By Force; Aiding and Assisting Prisoner to Escape*.

5. Punishment of Private Person. — 2 Hawk. P. C., c. 20, § 6.

6. Escape Suffered by Servants of Officers. — 1 Russ. on Cr. 585; *State v. Errickson*, 32 N. J. L. 422.

7. Escape Suffered by Hirers of Convicts. — *Smith v. State*, 76 Ala. 69. And here it was held that the bond executed by a hirer of convicts, reciting therein the terms of the contract of hiring, the name and sentence of the convict, etc., is admissible as proof of such facts, even though there be a record kept by the probate judge of the same facts. See *supra*, this section, *By Prisoner* — *By County Convict*.

8. Prison Breach. — 2 Hawk. P. C., c. 18, § 1; 1 Hale's P. C. 607; 2 Inst. 588; 4 Bl. Com. 130; *Rex v. Haswell, R. & R. C. C.* 340; *Com. v. Miller*, 2 Ashm. (Pa.) 62.

9. Conspiracy to Break Prison. — 4 Bl. Com. 130.

What Is a Prison under Statute de Frangentibus Prisonam. — Any place whatsoever wherein a person, under a lawful arrest for a supposed crime, is restrained of his liberty, whether in the stocks, or the street, or in the common jail, or the house of a constable or private person, or the prison of the ordinary, is properly a prison within the meaning of the statute *de frangentibus prisonam*; for imprisonment is nothing else but a restraint of liberty. 2 Hawk. P. C., c. 18, § 4. The statute, therefore, extends as well to a prison in law as to a

When Offense Committed. — The offense was committed though the prisoner was not indicted, tried, or convicted of the charge for which he was imprisoned; whether he was innocent of the crime or not, or arrested only on suspicion, provided he had been lawfully committed; for there was an accusation against him on record which made his commitment lawful, though he might be innocent, or the prosecution groundless.¹

Intent. — But it has been held that the breaking need not be intentional.²

(2) *Under Statute De Frangentibus Prisonam.* — The severity of the common law was moderated by the statute *de frangentibus prisonam* (1 Edward II., stat. 2), which enacts that a breach of prison by a person confined for a charge inferior to felony is only a high misdemeanor.³ But this statute did not affect offenses which were before felonies, so that to break prison and escape when lawfully committed for treason or felony remained still felony as at common law.⁴

(3) *Under Statute in United States.* — In some of the United States there has been a further departure from the common law than the statute of Edward II., by making the crime only a misdemeanor in all cases.⁵

Punishment in United States. — The punishment for prison breach is, in the United States, generally regulated by statute.⁶

(4) *Constituents of Offense* — (a) **Actual Breaking.** — The breach of the prison within the meaning of the statute *de frangentibus prisonam* must be an actual breaking, and not such force and violence only as may be implied by construction of law; therefore, if the party go out of prison without any obstruction, the prison doors being open through the consent or negligence of the jailer, or if he otherwise escape, without using any kind of force or violence, it is said that he is guilty of a misdemeanor only, but not of prison breach.⁷

(b) **By Whom Breaking to Be Done.** — The breaking must be either by the prisoner himself, or by others through his procurement, or at least with his privity; for if the prison be broken by others without his procurement or consent, and

prison in deed. 2 Inst. 589. See also 1 Russ. on Cr. (9th ed.) 592.

If the Prison Be Fired by Accident, and there be a necessity for the prisoner to break prison to save his life, this excuses the felony; but if the prison were fired by the prisoner himself, or by his procurement, the breaking to save his life is nevertheless felony, for it was a necessity of his own creating. 2 Co. Inst. 590; 1 Hale P. C. 596; 2 Hawk. P. C., c. 18, § 11.

1. When Prison Breach Committed. — 2 Hawk. P. C., c. 18, §§ 5, 6; 2 Inst. 590, 592; 1 Hale 610, 611; Com. v. Miller, 2 Ashm. (Pa.) 68.

2. Intent to Commit Prison Breach. — Where a prisoner made his escape from a house of correction, by tying two ladders together, and placing them against the wall of the yard, but in getting over threw down some bricks which were placed loose at the top (so as to give way by being laid hold of), the judges were unanimously of opinion that this was a prison breach. *Rex v. Haswell, R. & R. C. C.* 340. Richardson, J., thought that if this had been an escape only, it would not have been felony. See also 1 Russ. on Cr. (9th Am. ed.) 594.

3. Statute De Frangentibus Prisonam, 1 Edw. II., Stat. 2. — 2 Hawk. P. C., c. 18, § 1; 1 Hale's P. C. 607; 4 Bl. 130.

This statute enacts: "That none, from henceforth, that break prison, shall have judgment of life or member for breaking of prison only; except the cause for which he was taken and imprisoned did require such judgment, if he had been convict thereupon, according to

the law and custom of the realm." 1 Russ. on Cr. (9th Amer. ed.) 592.

4. 2 Hawk. P. C., c. 18, § 1 *et seq.*; 1 Hale's P. C. 608; 4 Bl. Com. 130.

5. *Under the North Carolina Statute*, the purpose and effect of the act are not to create a new offense, but to modify the rigors of the common law and reduce the act of prison breaking in all cases, upon whatever charge the prisoner might be confined, to the grade of a misdemeanor only. *State v. Brown*, 82 N. Car. 586.

In New Jersey prison breaking by a prisoner committed for a crime not punishable with death is a misdemeanor, and neither of the terms "feloniously" and "unlawfully" is necessary in its definition. *Randall v. State*, 53 N. J. L. 488.

In New York, in *People v. Duell*, 3 Johns. (N. Y.) 449, it was held that if a prisoner confined in the county prison, on conviction of petit larceny, break prison, it is a felony for which he may be sentenced to imprisonment in the state prison.

6. Punishment — Massachusetts. — See *Com. v. Farrell*, 5 Allen (Mass.) 132; *Stevens v. Com.*, 4 Met. (Mass.) 368; *State v. Strauss*, 50 N. J. L. 345; *Cleek v. Com.*, 21 Gratt. (Va.) 783.

7. Actual Breaking Essential. — 2 Hawk. P. C., c. 18, § 9; 1 Hale 611; 2 Inst. 590.

If a person climbs over the prison wall and escapes, he is not guilty of breaking prison, but is guilty of an escape from custody. *Rex v. Haswell, R. & R. C. C.* 340.

he escape through the breach so made, it seems that he cannot be indicted for the breaking, but only for the escape.¹

(c) **Lawful Imprisonment.** — Unless the prisoner be lawfully imprisoned he does not commit the offense of prison breach, for a person confined in jail, by virtue of a void warrant, may lawfully liberate himself by breaking the prison, using no more force than is necessary to accomplish this object.² And where it is the sole object of such prisoner to liberate himself, he is not guilty of a crime if other prisoners confined in the same room with him escape, in consequence of the breach so made.³ But a mere informality in the warrant is no justification for breaking prison.⁴

(d) **Escape of Prisoner.** — It seems that no breach of prison will amount to felony unless the prisoner escape.⁵

(5) **Defenses.** — At common law if the party breaking prison had been indicted and acquitted of the crime for which he was committed, he was not to be indicted afterwards for the breach of prison; so also, if he had been indicted for prison breach before his acquittal of the principal charge, and then acquitted of the latter, the acquittal was a defense to the charge of prison breach.⁶

1. **Breaking Must Be by Prisoner or Through His Procurement.** — 2 Hawk. P. C., c. 18, § 10.

Instances of Prison Breach. — Throwing down, in attempting to escape, loose bricks at the top of a prison wall, placed there to impede escape and give alarm, is a prison breach, though they are thrown down by accident. *Rex v. Haswell*, R. & R. C. C. 340.

Where a prisoner, being in the corridor of the jail with a wooden key, unlocked the padlock which fastened the door between the corridor and one of the cells, and thus escaped, he committed prison breach. *Randall v. State*, 53 N. J. L. 488.

In *New Jersey* any breaking which has been adjudged actual with respect to other crimes is deemed sufficient for this offense. *Randall v. State*, 53 N. J. L. 488.

Charging a prisoner with "breaking out of prison," is the same as charging him with "breaking prison." *Randall v. State*, 53 N. J. L. 488.

2. **Lawful Imprisonment Essential.** — *State v. Leach*, 7 Conn. 452, 18 Am. Dec. 118, citing *Marshalsea Case*, 10 Coke 68. See also 2 Hawk. P. C., c. 18, § 8.

If no felony at all were done, and the prisoner be neither indicted nor appealed, no mittimus for such a supposed crime will make him guilty within the statute, by breaking the prison; his imprisonment being unjustifiable. And though a felony were done, yet if there were no just cause of suspicion, either to arrest or commit the party, his breaking the prison will not be felony, if the mittimus be not in such form as the law requires; because the lawfulness of his imprisonment in such case depends wholly on the mittimus. 2 Hawk. P. C., c. 18, §§ 7, 8; c. 16, § 13 *et seq.*; 2 Inst. 590; Sum. 109; 1 Hale P. C. 610, 611; 1 Russ. on Cr. (9th Amer. ed.) 592.

For a further discussion of the principle of lawful imprisonment or lawful custody, see *supra*, this title, *Escape in Civil Proceedings*; *supra*, this section, *Escape Without Force*, and *infra*, *Rescue*; *Aiding and Assisting Prisoner to Escape*.

Imprisonment is the detention of another

against his will, depriving him of the power of locomotion. *U. S. v. Benner*, 1 Baldw. (U. S.) 234.

Lawful Imprisonment — *Massachusetts*. — A person who has been arrested on mesne process, admitted to bail, and afterwards surrendered by his bail to the keeper of a jail, is "lawfully imprisoned," within Mass. Gen. Stat., c. 178, § 46; and if he forcibly escapes from the jail, he may be convicted under said statute. *Com. v. Barker*, 133 Mass. 399.

Statute Referring to County Jails — Prison Breach of City Prison. — Under a statute providing that "if any person, confined in any county jail, * * * shall break such prison," etc., one breaking from a city prison does not commit the offense, for a city prison is not a county jail. *State v. Chapman*, 33 Kan. 134.

Prisoner Committed for Nonpayment of Fine — Kansas Statute. — Where a person being committed to a city prison until a fine and costs were paid, broke prison and escaped, he was held not guilty of a crime under Comp. Laws of 1881 (Kan.), § 179, providing that "if any person confined in a place of confinement * * * shall break such prison, * * * he shall, upon conviction, be punished by confinement * * * to commence at the expiration of the original term of imprisonment;" for he was committed to jail merely for the nonpayment of a fine, whereas the section has reference to a person committed for a term of imprisonment. *State v. Chapman*, 33 Kan. 134.

3. **Escape of Other Prisoners Caused by Person Unlawfully Imprisoned.** — *State v. Leach*, 7 Conn. 452, 18 Am. Dec. 118.

4. **Commitment on Informal Warrant Will Not Justify Prison Breach.** — 2 Hawk. P. C., c. 18, § 8; *State v. Murray*, 15 Me. 100.

5. **Escape of Prisoner Essential.** — 2 Hawk. P. C. c. 18, § 12.

6. **Acquittal of Principal Charge as a Defense to Prison Breach.** — 1 Hale's P. C. (12).

But under the *Kansas Statute* providing for the punishment of a person lawfully imprisoned who breaks jail "before conviction" on the charge against him, it has been held that a

(6) *Evidence*. — The state may show by any competent and relevant testimony that the defendant was lawfully imprisoned.¹

b. ATTEMPT TO COMMIT PRISON BREACH. — Under a statute making it a specific offense for a person lawfully imprisoned to attempt to commit prison breach, even though the attempt be unsuccessful, and providing punishment therefor in addition to the term for which he was imprisoned, it has been held that an unsuccessful attempt to break jail and escape by a prisoner held for trial or for noncompliance with an order to get bail, does not constitute the crime; that the statute applies only to convicts under sentence.²

c. RESCUE — (1) *Definition*. — Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment.³

(2) *Nature and Degree of Offense*. — Rescue takes place where there is no effort on the part of the prisoner to escape, but his deliverance is effected by the interference of others without his co-operation.⁴ It is generally the same offense in the stranger rescuing as it would have been in a jailer to have voluntarily permitted an escape; he is guilty of the same offense for which the party rescued was apprehended.⁵ But in rescue, as in the case of a voluntary escape, the principal must first be attained or receive judgment before the rescuer can be punished, and for the same reason, viz., because it may turn

prisoner acquitted of the charge for which he was imprisoned cannot plead the acquittal to the charge of prison breaking, and this on the ground that he was in legal custody at the time, and it did not depend upon some future contingency whether his escape was an offense or not. *State v. Lewis*, 19 Kan. 260, 27 Am. Rep. 113.

Acquittal of Principal Charge. — A dismissal by magistrates is not tantamount to an acquittal of the principal charge. *Reg. v. Waters*, 12 Cox C. C. 390, 5 Moak 469.

The refusal to prosecute, or a return of *ignoramus* by the grand jury, for the principal felony, is no acquittal. *Com. v. Miller*, 2 Ashm. (Pa.) 68.

1. *Evidence by State*. — *State v. Whalen*, 98 Mo. 222.

Proof of Material Facts. — On the trial of an offense for breaking jail and escaping, where the court instructed the jury to acquit if they entertained a reasonable doubt of the defendant's guilt on the whole evidence in the case, there is no error in refusing to instruct the jury that every material fact in the indictment must be established beyond a reasonable doubt. *State v. Whalen*, 98 Mo. 226.

Proof of Identity of Prisoner. — On the trial of the offense of breaking jail and escaping, it was correct to permit the sheriff to testify to the identity of the defendant with the party originally committed. Identity of name tends to establish identity of person, but not being conclusive, it may be strengthened by other testimony of actual identity. *State v. Whalen*, 98 Mo. 226.

2. *Attempt to Commit Prison Breach*. — *Com. v. Homer*, 5 Met. (Mass.) 556. See *Com. v. Briggs*, 5 Met. (Mass.) 559, for a case within the statute referred to in the text above.

Proof of Intent on a Charge of Attempt to Escape. — Where prisoners were charged with an attempt to escape, it was held that the indictments under which they were confined in jail, when they set fire to it, were the best evidence of the causes for which they were in prison, and were relevant proof of the intent

with which they set fire to the jail. *Luke v. State*, 49 Ala. 30, 20 Am. Rep. 269.

3. *Definition*. — 4 Bl. Com. 131.

Rescous is an ancient French word, coming from *rescouver*, that is *recuperare*, to recover; and signifies a forcible setting at liberty, against law, of a person arrested by the process or course of law. 1 Inst. 160.

4. *Nature of Offense*. — *Robinson v. State*, 82 Ga. 544; 1 Hale's P. C. 611. See *supra*, this section, *Prison Breach*.

5. *Degree of Offense of Rescue*. — 4 Bl. Com. 131.

Rescue is a common-law felony, if the party rescued be a felon. *Rex v. Haswell*, R. & R. C. C. 340. It is a misdemeanor if the party rescued be guilty of a misdemeanor. *Rex v. Stokes*, 5 C. & P. 148, 24 E. C. L. 249; 1 Russ. on Cr. (9th Am. ed.) 599. If the party rescued be guilty of high treason, the rescuer would be guilty of high treason, knowing him to be so committed. 2 Hawk. P. C., c. 21, § 7.

Punishment. — As those who break prison are still punishable as for a high misprision by fine and imprisonment in those cases wherein they are saved from judgment of death by the statute *de frangentibus prisonam*, so also are those who rescue such prisoners in the like cases in the same manner punishable. 2 Hawk. P. C., c. 21, § 6.

Rescue from Arrest under Warrant Grounded on Clerk's Certificate. — A warrant of a justice of the peace to apprehend a party, founded on a certificate of the clerk of the peace that an indictment for a misdemeanor had been found against such party, is good, and therefore if upon such a warrant the party is arrested and afterwards rescued, the offense is complete. *Rex v. Stokes*, 5 C. & P. 148, 24 E. C. L. 249.

Rescue in Court. — It is said that the rescue of a prisoner in any of the superior courts is a great misprision, for which the party and the prisoner, if assenting, will be liable to be punished even by imprisonment for life, and forfeiture of goods and chattels; though no stroke or blow were given. 1 East P. C., c. 8, § 3; Bac. Ab., Rescue (C).

out that there has been no offense committed.¹ But if the person rescued were imprisoned for high treason, the rescuer may immediately be arraigned, for in high treason all are principals. It seems also that he may be immediately proceeded against for a misprision.²

(3) *Constituents of Offense* — (a) *Lawful Custody of Prisoner*. — To make a rescue an offense it is necessary that the party rescued be in lawful custody. But it is not material whether he was in the custody of a private person, or of an officer.³

(b) *Knowledge of Custody*. — If the rescue is made from the custody of a private person, the offense is not complete unless the defendant knew that the prisoner was under arrest for a felony or a misdemeanor.⁴ But the custody of a person in the hands of a public officer is implied notice that such person is lawfully held.⁵

(c) *Escape of Prisoner*. — In rescue, as in prison breaking, it is essential to the commission of the offense that the prisoner escape.⁶

(4) *Conspiracy to Rescue*. — Where a conspiracy to rescue is established, evidence as to what was said and done by any one or more of the rescuers before the consummation of the design, and in furtherance of it, although the accused was not present when such things were said and done, is admissible.⁷

(5) *Accomplices in Rescue*. — A prisoner in a jail who aids and assists rescuers in liberating other prisoners in the jail, and himself escapes, although his own release was not originally contemplated, is an accomplice, under a statute which provides that all persons present aiding and abetting, etc., are principal offenders.⁸

1. 1 Hale's P. C. 607; 4 Bl. Com. 131.

2. 2 Hawk. P. C., c. 21, § 8.

3. *Custody Essential*. — 1 Hale's P. C. 606.

Rescue of Prisoner "Who Is in Custody." — A statute which provides for the punishment of any person "who shall by force * * * set any one at liberty who is in custody, after a lawful arrest, either before or after conviction for a felony," applies as well to the rescue of a person confined in jail as to the rescue of prisoners by personal violence to an officer; for one who is in jail is in custody, within the meaning of the statute. *Hillian v. State*, 50 Ark. 523.

4. *Rescue from Private Person*. — 1 Hale's P. C. 606; *State v. Porter*, 26 Mo. 201.

Where a party was arrested by a game-keeper for beating for game in a field, and rescued by others, it was held that while the party arrested might perhaps have lawfully resisted his apprehension, the others had no right to take part in that resistance. *Reg. v. Almey*, 3 Jur. N. S. 750.

5. *Prisoner in Custody of Public Officer*. — 1 Hale's P. C. 606; *State v. Porter*, 26 Mo. 201.

A charge that prisoners were confined in a city prison under convictions for misdemeanors, is in effect a charge that they were in the hands of a public officer, and implies that they were lawfully held as prisoners. *De Soto v. Brown*, 44 Mo. App. 151.

Knowledge that Prisoner Is Confined in Jail. — In *Benstead's Case*, Cro. Car. 583, 1 Hale's P. C. 606, it is said that it was resolved by all the ten judges on a special commission, *seriatim*, that the breaking of a prison where traitors are in durance, and causing them to escape, was treason, although the rescuer did not know there were any traitors there.

Although this case is spoken of by the re-

porter in *Rex v. Burrigge*, 3 P. Wms. 469, as having been cited and allowed to be law at an assembly of all the judges of England, except the chief justice of the Common Pleas, in *Limerick's Case*, Keyl. 77, it is said by Hawkins that the opinion therein is not approved by the authority of the case (1 Hen. VI. 5) on which it seems to be grounded. 2 Hawk. P. C., c. 21, § 7.

In the *Benstead* case it is also said that the breaking of prison whereby felons escape is felony without knowledge by the rescuers that the felons were in prison for such offense. 1 Hale P. C. 606.

6. *Escape of Prisoner Essential*. — 2 Hawk. P. C., c. 21, § 3, c. 18, § 12.

7. *Conspiracy to Rescue*. — *Williams v. State*, 24 Tex. App. 17. See the title *CONFESSIONS*, vol. 6, p. 571; *CONSPIRACY*, vol. 6, p. 866.

Proof of Identity of Conspirators. — Evidence showing the arrest, in the absence of the accused, of others of the parties implicated with him, who had in their possession a roan horse, is admissible as tending to show the identity of all parties connected with the crime, where the evidence showed that the accused had, immediately after being rescued, been seen on a roan horse for the purpose of making his escape in company with others. *Williams v. State*, 24 Tex. App. 17.

Proof of Understanding Between Accused and Prisoners. — It is competent to show for the purpose of proving an understanding between the party accused of rescue and the prisoners, that he had been found in the jail some months previously with them. *Watson v. State*, 32 Tex. Crim. Rep. 80.

8. *Accomplices in Rescue*. — *Hillian v. State*, 50 Ark. 523. See the title *ACCOMPLICES*, vol. 1, p. 389.

4. Aiding and Assisting Prisoner to Escape — a. NATURE AND DEGREE OF OFFENSE — (1) *At Common Law.* — The aiding and assisting a prisoner to escape out of prison, by whatever means it may be effected, is an offense of a mischievous nature and an obstruction to the course of justice, and the assisting a felon in making an actual escape is an offense of the degree of felony at common law.¹ At common law it is not necessary, in order to the commission of the offense, that the prisoner should have been confined on a criminal charge.²

(2) *Under Statute — (a) In General.* — The offense is generally regulated by statute. The first statute passed was the 16 Geo. II., c. 31, § 31;³ but it was held by a majority of the judges that the statute extended only to cases where an attempt to escape was made without effecting the escape, and not to cases where an actual escape was made.⁴ This statute did not apply where the prisoner aided or assisted was detained only on suspicion. It applied only where the offense for which such prisoner was arrested was clearly and plainly expressed in the warrant of commitment.⁵ Under this statute the offense might be committed where the prisoner assisted was in lawful custody, although not imprisoned.⁶

Statutes Create New Offense. — The statutes against aiding and assisting a prisoner to escape are held not to be merely declaratory of the common law, but to create a new and substantive offense.⁷

1. Aiding Persons to Escape at Common Law. — *Rex v. Tilley*, 2 Leach C. C. 671. See also 2 Hawk. P. C., c. 29, § 26.

2. Aiding Prisoner Not Confined on Criminal Charge. — It is a misdemeanor at common law to aid a person to escape from jail who is in custody under a remand of commissioners for the relief of insolvent debtors, and not on any criminal charge. *Reg. v. Allan*, 1 C. & M. 295, 41 E. C. L. 164, 5 Jur. 296.

3. Where Prisoner Pardoned. — A delivery of instruments to a prisoner to facilitate his escape from jail is within 16 Geo. II., c. 31, although the prisoner had been pardoned of the offense of which he was convicted on condition of transportation. *Rex v. Shaw*, R. & R. C. C. 392.

Under the Georgia Statute the offense of aiding a prisoner to escape consists in inciting, supporting, or reinforcing his exertions in his own behalf, tending to the accomplishment of that object. *Robinson v. State*, 82 Ga. 544.

In Iowa the offense is committed in assisting one to escape who has been arrested under warrant for having threatened to commit a public offense; for he is held upon a "criminal charge" within the meaning of the law, and evidence that the prisoner was not guilty of the crime charged is incompetent. *State v. Bates*, 23 Iowa 97.

Under the New York Statute, 2 R. S. 683, § 13 *et seq.*, against "aiding or assisting any person in jail in escaping or attempting to escape from such jail, though no escape be made," lying in wait near the jail, by agreement with a prisoner, and carrying him away, is not an offense against the statute, but is a misdemeanor at common law. The statute is confined to cases of assistance rendered to a prisoner in actual confinement, and to enable him to escape from such confinement. *People v. Tompkins*, 9 Johns. (N. Y.) 70.

Where Prisoner Alleged to Be Detained for Murder. — Where an indictment alleged that

the prisoner was detained on a charge of murder, a conviction is sustained by evidence of manslaughter; the gravamen of the charge being the aiding a prisoner to escape who was detained on a charge of felony, and manslaughter being included in a charge of murder. *Com. v. Eversole*, 98 Ky. 638.

4. *Rex v. Tilley*, 2 Leach C. C. 662.

5. Where Prisoner Committed on Suspicion. — *Rex v. Walker*, 1 Leach C. C. 97; *Rex v. Gibbons*, 1 Leach C. C. 98, note a; *Rex v. Greeniff*, 1 Leach C. C. 363.

6. 2 Hawk. P. C., c. 21, § 13; 1 Russ. on Cr. (9th Am. ed.) 603.

7. Statutes Create a New Offense. — *Reg. v. Holloway*, 15 Jur. 827; *Holloway v. Reg.*, "in error," 2 Den. C. C. 287, 17 Q. B. 319, 79 E. C. L. 319; *Rex v. Tilley*, 2 Leach C. C. 671; *Holland v. State*, 60 Miss. 944.

In Mississippi, under Code 1880, § 2791, it is not necessary that the person whose escape is intended to be facilitated must be guilty of felony, or known or believed to be by the person doing what it forbids. All that is necessary to constitute guilt is that one is lawfully in some place of legal confinement for a felony, without regard to the guilt or innocence of the prisoner whose escape is sought to be promoted; and that another shall convey into such place something proper or useful to the prisoner in his escape, with intent thereby to facilitate the escape. *Holland v. State*, 60 Miss. 944.

Holding One of the Posse — Georgia. — The offense of assisting one under legal arrest in an attempt to escape is itself a crime, and not an attempt to commit a crime, and does not come under section 4674 of the Georgia Code. Any person who holds one of the posse, to prevent his assisting to overtake and help secure a prisoner, while the officer and the posse are in hot pursuit in sight of the prisoner, and all running after him, is guilty of the crime of assisting a prisoner in an attempt to escape. *Perry v. State*, 63 Ga. 404.

(b) **Where Prisoner Confined under Federal Process in State Jail.** — The offense is not committed against the state by aiding a prisoner confined under federal process in a state jail for safe keeping, for a violation of the laws of the United States; for the accused violates, if any, a federal law for which, if he may be punished at all, it must be under a federal statute, and in a federal court.¹

b. **WHO MAY COMMIT OFFENSE.** — The offense may be committed by a prisoner in aid of a fellow prisoner,² or in aid of rescuers engaged in liberating other prisoners;³ or by prisoners acting in concert, when each is endeavoring to effect his own escape.⁴

c. **CONSTITUENTS OF OFFENSE** — (1) *Lawful Custody of Prisoner.* — Where the prisoner is not in lawful custody any person may assist him to escape without committing an offense.⁵

(2) *Knowledge of Lawful Custody.* — It is an indispensable ingredient of the offense that the accused had knowledge that the person assisted was in legal custody, or that the acts charged to have been done by the prisoner necessarily imply such knowledge.⁶

1. **Federal Prisoner in State Jail.** — Trammel v. State, 111 Ala. 77.

In this case it was held that the felony or misdemeanor referred to in sections 4002, 4003, Alabama Criminal Code, making it a penal offense to aid in the escape of a prisoner confined in jail under charge or conviction of felony or misdemeanor, is a felony or misdemeanor under the laws of the state only, and has no reference to crimes committed in violation of the laws of the United States.

2. **Under the Georgia Statute** it was held that where a person confined in jail, after effecting an exit from his own cell into a common hall, used a saw upon the fastening of the door to the cell of a fellow prisoner in such a way as to indicate a purpose to open that door, this is evidence enough to convict him on an indictment for aiding such fellow prisoner to escape, under the Code, § 4482, making it an offense if any person shall aid or assist any person to escape "or attempt to escape" from custody. Simmons v. State, 88 Ga. 160.

Under the New York Statute, it was held that where a person confined in a jail attempts to escape by breaking prison, in consequence of which a fellow prisoner confined for felony escapes, he is guilty of the offense. People v. Rose, 12 Johns. (N. Y.) 339.

3. Hillian v. State, 50 Ark. 523.

4. **Prisoners Acting in Concert** — Alabama. — Where two persons confined in jail under charges of felony attempt in concert to break prison by burning a hole through the floor of their apartment, each endeavoring to effect his own escape, each is guilty of a felony under Alabama Rev. Code, § 3573, prohibiting the assisting of another to escape. Luke v. State, 49 Ala. 32, 20 Am. Rep. 260.

5. **Lawful Custody of Prisoner Essential.** — People v. Ah Teung, 92 Cal. 424; State v. Beebe, 13 Kan. 596; State v. Jones, 78 N. Car. 422.

Prisoner in Custody of Officer de Facto — Georgia. — To aid the escape of a prisoner in the custody of a marshal *de facto* of town is an offense under the Georgia statute punishing any person aiding a prisoner to escape from the custody of any officer or other person who shall have lawful charge of such prisoner, and it is not error to reject evidence that the marshal was elected or appointed conditionally

where the evidence shows that he acted as marshal, and was in all respects an officer *de facto*. Robinson v. State, 82 Ga. 547.

Aiding Escape of Defendant on Bail. — When the accused is on bail, the return of a verdict of guilty does not, of itself, terminate his right to his liberty, or place him in the custody of the sheriff, nor does it give to the sheriff any right to arrest or imprison him; and hence a prosecution cannot be maintained under such circumstances against one who aids in the escape of the accused. Redman v. State, 28 Ind. 213.

Under Ohio Revised Statutes, section 6902, for conveying into the jail articles useful to effect the escape of a prisoner lawfully confined, it is no defense that such prisoner was not lawfully confined because of defects in his arrest, detention, preliminary hearing, indictment, and commitment, when the prisoner could not avail himself of such defects to procure his release. And a prisoner temporarily out of jail, but in the custody of the sheriff, is confined in the jail, within the meaning of said statute. Newberry v. State, 7 Ohio Cir. Dec. 622.

Custody a Conclusion of Law and Fact. — Legal custody or illegal custody is a conclusion consisting of law and fact blended, just as guilty or not guilty is a conclusion composed of the like elements; and a judge is not permitted to declare whether the particular custody disclosed by the evidence is legal or illegal. The fact of custody is for the jury; but the court should acquaint the jury with the needful rules of law to enable them to distinguish legal from illegal custody, and let them apply them to the facts. Habersham v. State, 56 Ga. 61.

6. **Knowledge of Lawful Custody.** — State v. Lawrence, 43 Kan. 128; Com. v. Filburn, 119 Mass. 299; State v. Porter, 26 Mo. 201.

A person may do many things which would aid a prisoner in an escape, without any criminal intent or liability. If he should receive and entertain one for a night, in ignorance that his hospitality was extended to a fugitive criminal, or if he should overtake him on a highway and innocently give him a ride, he might materially aid the prisoner to escape, but he would not be guilty of wrong, nor punishable under the statute. State v. Lawrence, 43 Kan. 128.

(3) *Intent*. — The act must be done with intent to facilitate the escape of the prisoner.¹

(4) *Means Employed in Aiding Escape*. — Generally, under the statutes, the instruments or other things employed for the purpose of aiding prisoners to escape must be calculated to effect the purpose, or useful to that end.²

d. JUSTIFICATION BY ACCUSED. — Informality in the complaint or in the sentence which was orally announced, but under which no commitment had taken place, furnishes no justification to a person forcibly aiding and assisting the prisoner to escape where he was held under a valid warrant.³

1. Intent to Facilitate Escape Essential. — *Hurst v. State*, 79 Ala. 59; *Walker v. State*, 91 Ala. 32.

Under the statute 16 Geo. II., c. 31, § 2, every person conveying and delivering any vizor or other disguise, or any instrument or arms proper to facilitate the escape of prisoners, was deemed to have delivered such vizor, disguise, instrument or arms with an intent to aid and assist such prisoner to escape, or attempt to escape. 1 Russ. on Cr. (9th Amer. ed.) 602.

General and Special Intent — Intent of Prisoner. — In *Hurst v. State*, 79 Ala. 58, it was held that it is not necessary to a conviction that there shall be independent proof that the accused had the specific intent to aid the particular prisoner alleged to have escaped, or any particular prisoner, to escape; that a general intent is sufficient, and that the jury may infer such general intent from intentional breaking or assistance in an attempt to so break the prison as that the prisoners found therein can escape. The court said: "Suppose there are prisoners, one or more, confined in the prison, who will not escape even if the opportunity is offered, who have no intention to escape, and the alleged jail breakers have knowledge that such prisoners do not intend to escape. This, if satisfactorily proven and found by the jury, disproves both special and general intent to aid or facilitate the escape of such prisoner or prisoners."

In *Rex v. Martin*, R. & R. C. C. 146, the defendant was indicted for a misdemeanor in unlawfully assisting and aiding a prisoner at war to escape. It appeared that such prisoner at war was taken in concert with those under whose charge he was placed, in order to effect the detection of the defendant who was supposed to have been instrumental in the escape of other prisoners; but it appearing in evidence that the prisoner neither escaped nor intended to escape, it was held that the conviction therefor was wrong.

Evidence of Acts Showing Prisoner's Intent. — Where the accused conveyed into the jail bottles of muriatic and nitric acid for the purpose of aiding prisoners to escape, the fact that a week afterwards a steel spring was found in the jail, and cuts were discovered on the iron and steel bars of the cells, is admissible for the purpose of showing the intention of the prisoners to effect an escape for which the acid might be utilized, where the court expressly charged the jury that such testimony was admitted only for that purpose, and not to show that the prisoner had conveyed the steel spring into the jail. *Watson v. State*, 32 Tex. Crim. Rep. 80.

2. Means Used in Aiding Escape. — *Ramsey v. State*, 43 Ala. 405; *Hurst v. State*, 79 Ala. 58; *Walker v. State*, 91 Ala. 32; *Holland v. State*, 60 Miss. 944; *Newberry v. State*, 7 Ohio Cir. Dec. 622; *Poncio v. State*, 28 Tex. App. 104.

The Word "Instrument" is comprehensively generic. A tool used for the work or purpose is its meaning under the statute of *Alabama*. *Hurst v. State*, 79 Ala. 57.

An Instrument of Writing informing the prisoner that he has a friend and can be released from confinement, is not included within the words "any instrument, arms, or other thing calculated to aid his escape." The design of the statute is to prohibit the conveying, etc., any substantial thing, which might be used by the prisoner in facilitating or effecting his escape. *Hughes v. State*, 6 Ark. 131.

Knife. — Under art. 210 of the *Texas* penal code, evidence that a knife thrown into the jail by the defendant was a common pocket knife, without evidence going to show how it could be used by the prisoner, or was useful, or that he had ever attempted to use it for such purpose, is insufficient to support a conviction. *Poncio v. State*, 28 Tex. App. 104.

A Crowbar comes within the words of the statute "any other article or thing." *Reg. v. Payne*, L. R. 1 C. C. 27, 12 Jur. N. S. 476, 14 L. T. N. S. 416.

Instrument Conveyed "Unto" Jail. — Under the *Michigan* statute making it punishable to convey an instrument "into" the jail, it has been held that the offense is not committed where it is alleged that the instrument was conveyed "unto" the jail. *People v. Rathbun*, 105 Mich. 699.

Giving Counsel and Advice — Texas Statute. — Under the *Texas* statute the offense is not committed by giving counsel and advice to the prisoner. The aid intended by the statute clearly means physical aid. The court said that while the offense is not committed by giving counsel and advice, yet if the indictment had charged the defendant with having the custody of the prisoner who escaped, and also with voluntarily permitting the escape, evidence of counseling and advising the escape would go far if not conclusively to show that the accused had committed a voluntary escape; or, if having the custody of the prisoner he had negligently permitted him to escape, and been indicted therefor, such counsel and advice would be evidence of a want of due diligence in guarding the prisoner. *White v. State*, 13 Tex. 134.

3. Justification by Accused. — *Com. v. Morihan*, 4 Allen (Mass.) 587. See also *Newberry v. State*, 7 Ohio Cir. Dec. 622.

c. EVIDENCE. — Where the accused is charged with aiding and assisting a prisoner to escape in a particular manner, the aid must be proved as laid, and it would be error for the court to charge the jury in such a case that they must convict the accused if they find that he aided the escape of the prisoner in "any manner."¹

Evidence of Conviction of Prisoner Assisted. — Under the statute 16 Geo. II., c. 31, § 2, the record of the conviction of the prisoner, whose escape was to have been effected, having been produced by the proper officer, no evidence is admissible to contradict what it states, or to show that it had never been filed among the records of the county, notwithstanding the indictment refers to it with a *prout patet* as remaining amongst those records.²

IV. RECAPTURE OF ESCAPING PRISONER — 1. What Constitutes Recapture. — A recapture requires either touch or something approaching it, or else a statement to the prisoner that he must consider himself in custody, and the prisoner obeying and following the officer, which would amount to the same thing.³

A Voluntary Return before suit brought is equivalent to a recapture.⁴

2. Recapture Beyond County Limits. — The right of recapture on fresh pursuit, after a negligent escape, may be enforced by the officer beyond the limits of his county. It is a personal or transitory right, like that to retake property rescued from him, and may with propriety be exercised wherever he may find the body of him who has escaped.⁵ But in *Vermont* it was held that the sheriff of another state has no right to pursue and recapture therein a prisoner who escaped from his custody under civil process.⁶

3. Recapture on Sunday. — The statute of 29 Charles II., c. 7, § 6, against arrests on Sunday, excepting cases of felony or breach of the peace, is not applicable to the case of a person wrongfully escaping from the custody of the law. In such case the party may be recaptured on Sunday on fresh pursuit, or by virtue of an escape warrant, which is in the nature of fresh pursuit; for it is not original process, and a commitment upon it is only the old commitment continued down.⁷

4. Means Allowable to Effect Recapture — a. IN GENERAL. — An officer, in

1. Evidence. — *White v. State*, 13 Tex. 133.

There is no error in admitting proof that the defendant held one of the posse though the latter's name was not set out in the indictment, where the indictment charges that the defendant aided the attempt to escape by impeding the officers and their posse, and sets out the names of the arresting officers; for it is enough to include the individuals composing the posse under the descriptive name of posse. *Perry v. State*, 63 Ga. 404. See also *Murray v. State*, 25 Fla. 528.

2. Evidence of Conviction. — *Rex v. Shaw*, R. & R. C. C. 392.

On a trial of a charge for aiding a prisoner to escape, the criminal court records of the conviction and sentence of the prisoner are proper evidence to show the trial, conviction, and sentence of such prisoner. *Murray v. State*, 25 Fla. 528.

3. What Constitutes Recapture. — *Moore v. Moore*, 25 Beav. 13. See generally the title ARREST, vol. 2, p. 832.

4. Voluntary Return Before Suit Brought. — *Bonafous v. Walker*, 2 T. R. 126; *Peters v. Henry*, 6 Johns. (N. Y.) 121, 5 Am. Dec. 196; *Butler v. Washburn*, 25 N. H. 258; *Sanderson v. Rutland*, 43 Vt. 389.

A prisoner voluntarily permitted to escape by one marshal may, on a voluntary surren-

der, be lawfully detained by his successor. *Grant v. Southers*, 6 Mod. 183.

Recapture on Return to Jail Limits Where No Bond Taken. — The limits of the liberties of the jail being considered as an extension of the walls of the prison, a return within the limits is the same as a return within the jail, and where no bond or security is taken by the sheriff, the right of recaption remains in full force. *Peters v. Henry*, 6 Johns. (N. Y.) 121, 5 Am. Dec. 196.

5. Recapture Beyond County Limits. — 2 Hawk. P. C., c. 19, § 12; *Rigewaies' Case*, 3 Coke 52; *Langdon v. Hathaway*, 1 N. H. 370; *Lockwood v. Mercereau*, 6 Abb. Pr. (N. Y. Super. Ct.) 210. See also *Boynton's Case*, 3 Coke 44.

It has been said generally in some books, without mentioning fresh pursuit, that an officer may recapture a prisoner after a negligent escape, and it would seem that Hawkins inclines to this opinion, on the ground that the prisoner cannot take advantage of his own wrong. 2 Hawk. P. C., c. 19, § 12.

6. Bromley v. Hutchins, 8 Vt. 194, 30 Am. Dec. 465.

7. Recapture on Sunday. — *Parker v. More*, 6 Mod. 95, 2 Salk. 626, 2 Ld. Raym. 1028, 2 Selw. N. P. 1221. See also *Atkinson v. Jameson*, 5 T. R. 25.

trying to recapture an escaped convict, may make use of such force as is necessary.¹

Killing Prisoner. — But public officers should use such means to secure their prisoners as will enable them to hold the prisoners in custody without resorting to the use of fire-arms or dangerous weapons, and they will not be excused for taking life in any case where, with diligence and caution, the prisoner could be otherwise held.²

b. BREAKING OPEN DOORS OF HOUSE. — Where an officer has arrested a criminal who afterwards escapes, he may, if necessary, break open the doors of his house to rearrest him, notwithstanding the doctrine that every man's house is his castle.³

5. Recapture After Escape under Civil Process — *a. BY OFFICER* — (1) *After Voluntary Escape.* — An officer or jailer who is guilty of a voluntary escape of a prisoner in custody under final process in a civil action has no right to recapture the prisoner,⁴ unless by the authority of the creditor. In such case, if the sheriff gets a new authority from the plaintiff in the execution, he may retake the prisoner; for the plaintiff has his election either to admit the prisoner to be in execution, or to charge the sheriff for an escape.⁵ But a prisoner may, in certain circumstances, as illustrated in the note hereto, be voluntarily permitted to leave the precincts of the prison, and yet be in the sheriff's custody, and in such case the sheriff may retake him.⁶

1. Means Allowable to Effect Recapture. — *Wallace v. State*, 20 Tex. App. 374.

Trailing a Prisoner with Dogs is not unlawful or improper, if it be the usual means resorted to in such cases. *Wallace v. State*, 20 Tex. App. 374.

2. Killing Prisoner. — *Reneau v. State*, 2 Lea (Tenn.) 720, 31 Am. Rep. 626. See also *State v. Bryant*, 65 N. Car. 328. It is said that at common law an officer cannot excuse himself for killing a prisoner in the pursuit, though he could not possibly retake him, but must be content to submit to such fine as his negligence appears to deserve. 2 Hawk. P. C., c. 19, § 13; 6 Staund. P. C. 33. Where the prisoner is in custody under civil process, or for a misdemeanor, the custodian is not entitled to kill him in trying to recapture him. *Forest's Case*, 1 Lew. C. C. 187. And if an officer kill a prisoner who is arrested or held in custody for a misdemeanor while trying to make his escape, he would be guilty of murder, or it might be, of manslaughter, if he did not intend to kill him. *Reneau v. State*, 2 Lea (Tenn.) 720, 31 Am. Rep. 626. And it would seem that killing is not justifiable where the accused is charged with felony of an inferior grade. *State v. Bryant*, 65 N. Car. 328; *Reneau v. State*, 2 Lea (Tenn.) 721, 31 Am. Rep. 626.

If the prisoner is accused of a capital offense, the custodian may kill him if he cannot otherwise retake him. *Reg. v. Dodson*, 2 Den. C. C. 35. See also *State v. Bryant*, 65 N. Car. 328.

In *Texas* it has been held that a penitentiary convict may be killed if he cannot be retaken in any other way. *Washington v. State*, 1 Tex. App. 649.

3. Officer May Break Open Doors of House to Effect Recapture. — 2 Hawk. P. C., c. 14, § 9; *Messenger v. Parker*, 18 Nova Scotia 237; *Cahill v. People*, 106 Ill. 625; *Com. v. McGahey*, 11 Gray (Mass.) 196; *Foster's Crown Law*, p. 310, § 22.

4. Recapture After Voluntary Escape — *England.* — *Atkinson v. Jameson*, 5 T. R. 25;

Ravenscroft v. Eyles, 2 Wils. 295; *Filewood v. Clement*, 6 Dowl. P. C. 508, 1 W. W. & H. 165.

United States. — *Servis v. Marsh*, 38 Fed. Rep. 797.

Indiana. — *Hoagland v. State*, (Ind. App. 1895) 40 N. E. Rep. 931.

Massachusetts. — *Doane v. Baker*, 6 Allen (Mass.) 260; *Houghton v. Wilson*, 10 Gray (Mass.) 365; *Brown v. Getchell*, 11 Mass. 11.

New Hampshire. — *Riley v. Whittiker*, 49 N. H. 147, 6 Am. Rep. 474; *Butler v. Washburn*, 25 N. H. 258.

New York. — *Lockwood v. Mercereau*, 6 Abb. Pr. (N. Y. Super. Ct.) 207; *Clark v. Cleveland*, 6 Hill (N. Y.) 344.

North Carolina. — *Jackson v. Hampton*, 6 Ired. L. (28 N. Car.) 35.

Pennsylvania. — *Com. v. Sheriff*, 1 Grant's Cas. (Pa.) 187.

5. *Hoagland v. State*, (Ind. App. 1895) 40 N. E. Rep. 932; *Richardson v. Rittenhouse*, 40 N. J. L. 236; *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256; *Stickle v. Reed*, 23 Hun (N. Y.) 419; *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 11, 1 Am. Dec. 142. See *supra*, this title, *Escape in Civil Proceedings* — *Effect upon Creditor's Rights* — *Election*.

Where Prisoner Admitted to Be in Execution. — In order to affirm the defendant in execution it requires some positive act — either new process, or notice that the prisoner is received again as a prisoner at the plaintiff's suit. A suit against the sheriff for the escape is an election on the part of the plaintiff to consider the prisoner out of custody. *Littlefield v. Brown*, 1 Wend. (N. Y.) 398.

6. Thus where a prisoner in the custody of the sheriff, and confined in the jail at Bombay under a writ of execution, was permitted by the sheriff with the sanction and authority of the judgment creditor, by reason of illness, to go out of prison, and temporarily reside outside the precincts of the jail, upon the condition that he should continue under the surveillance of the sheriff's officers, but upon his

Mesne Process. — If, however, a prisoner is arrested under mesne process, he may be recaptured after a voluntary escape, for in such case the sheriff is not, as in final process, commanded to commit the body of the defendant to jail, but to keep him safely so that he may bring him before the court to which the writ is returnable.¹

(2) *After Negligent Escape.* — After a negligent escape the officer has a right to recapture the prisoner, whether he has been committed on mesne or final process.²

(3) *Where Prisoner at Large Is under Control of Court.* — Where a prisoner at large is, under statute, under the control of the court, he may be recaptured and again taken into custody by the sheriff or jailer.³

b. BY CREDITOR. — The plaintiff in an execution may, by a new *ca. sa.*, recapture his debtor who has been suffered by a sheriff or jailer to escape, whether the escape be voluntary⁴ or negligent.⁵

Creditor's Assent. — If the creditor assents that his debtor be discharged, he cannot be again retaken.⁶

becoming convalescent, the sheriff, at the instance of the judgment creditor, took the prisoner back to jail, it was held that the prisoner was estopped from saying that he was out of the sheriff's custody when he was permitted to leave the jail, and that a change of the place of imprisonment, under the circumstances, did not amount to a discharge out of custody. *Haines v. East India Co.*, 11 Moo. P. C. 39.

1. Recapture After Voluntary Escape under Mesne Process. — *Atkinson v. Matteson*, 2 T. R. 172; *Lewis v. Morland*, 2 B. & Ald. 56; *Robinson v. Hall*, Taylor (U. C.) 664; *Riley v. Whittiker*, 49 N. H. 147, 6 Am. Rep. 474; *Arnold v. Steeves*, 10 Wend. (N. Y.) 515; *Clark v. Cleveland*, 6 Hill (N. Y.) 349; *Com. v. Sheriff*, 1 Grant's Cas. (Pa.) 187.

2. Recapture After Negligent Escape. — *Jones v. Abbee*, 1 Root (Conn.) 106; *Com. v. McGahey*, 11 Gray (Mass.) 196; *Lockwood v. Mercereau*, 6 Abb. Pr. (N. Y. Super. Ct.) 208; *Butler v. Washburn*, 25 N. H. 258; *Riley v. Whittiker*, 49 N. H. 148, 6 Am. Rep. 474; *Smith v. Com.*, 59 Pa. St. 320; *Sanderson v. Rutland*, 43 Vt. 389; *Jones v. Pope*, 1 Saund. 35, note 1. See also *Anderson v. Hampton*, 1 B. & Ald. 308.

Recapture of Debtor for Jailer's Fees. — If a debtor, after satisfying the plaintiff in the execution, escapes, he cannot be retaken for the jailer's fees. *Willing v. Goad*, 2 Stra. 908. See also *Gordon v. Edson*, 2 N. H. 157.

Recapture After Release on Insufficient Bond. — Where a sheriff in good faith takes a bond under the *Georgia* statute, from an insolvent debtor, for less than the amount required, he may afterwards recapture him, for the sheriff has committed only a negligent escape. *Colley v. Morgan*, 5 Ga. 183.

3. Under the Illinois Statute in Relation to Insolvent Debtors, providing that the county court on an application for a discharge may continue the hearing from time to time, "not exceeding thirty days," an insolvent debtor who voluntarily enters into bond for his appearance before the county court, even though the hearing is continued more than thirty days by his consent, will be in the control of the law and under the control of the court on the day set for the hearing; and the court on denying his

application may legally order him to be again taken into custody by the sheriff, for the provision as to the continuance for thirty days is for the benefit of the debtor, and may be waived by him. *People v. Hanchett*, 111 Ill. 95.

4. Creditor May Recapture Person Voluntarily Suffered to Escape. — *Jones v. Pope*, 1 Saund. 35, note 1; *Hesketh v. Ward*, 17 U. C. C. P. 680; *Currie v. Worthy*, 3 Jones L. (48 N. Car.) 318; *Jackson v. Hampton*, 6 Ired. L. (28 N. Car.) 36. See also *People v. Hanchett*, 111 Ill. 95.

5. In Case of Negligent Escape. — *Lockwood v. Mercereau*, 6 Abb. Pr. (N. Y. Super. Ct.) 208; *Jones v. Pope*, 1 Saund. 35, note 1. See *supra*, this title, *Escape in Civil Proceedings — Effect upon Creditor's Rights — Election*. And as to creditor's right to issuance of escape warrant, see *infra*, this section, *Recapture on Escape Warrant*.

Second Arrest under Mesne Process, Before Appearance. — Even before appearance to mesne process, if a party escapes by collusion with the sheriff's officer, and the plaintiff would be prejudiced in the recovery of his debt by the escape, the court or judge may permit a second arrest for the same cause, when such arrest would not be vexatious. *Hesketh v. Ward*, 17 U. C. C. P. 678.

6. Effect of Creditor's Assent to Debtor's Discharge. — *Tanner v. Hague*, 7 T. R. 416; *Little v. Newburyport Bank*, 14 Mass. 443; *Powers v. Wilson*, 7 Cow. (N. Y.) 276; *Poucher v. Holley*, 3 Wend. (N. Y.) 184; *Butler v. Washburn*, 25 N. H. 258; *Gould v. Gould*, 4 N. H. 174. See also *Goodman v. Chase*, 1 B. & Ald. 297.

In *Little v. Newburyport Bank*, 14 Mass. 447, it is said that cases of fraud, or of a temporary or conditional liberation under a promise to return if the terms are not complied with, and an actual return into custody in pursuance of such agreement, are exceptions to the general rule that a party once discharged from custody by the creditor's consent cannot be again taken upon the execution, or upon any other that may be issued upon the judgment.

But in *Yates v. Van Rensselaer*, 5 Johns. (N. Y.) 364, it was held that if a creditor assents to his debtor's going beyond the liberties, on

c. REDUCTION OF DAMAGES BY RECAPTURE. — The statute of *Indiana* giving a sheriff the right to reduce the damages for an escape, where the prisoner has been recaptured, is limited to violent escapes, and to recaptures made within three months.¹

d. ACTION FOR USING EXCESSIVE FORCE IN RECAPTURE. — In an action against an officer for using excessive force in the recapture, and in efforts to overcome resistance, and to prevent another escape, the *onus* is upon the plaintiff to prove that the force was excessive.²

6. Recapture of Criminals — *a.* IN GENERAL. — An escaped convict may, at common law, be recaptured without warrant.³ Where the accused is out on bail, the judge, during the trial, has no authority to order him to be retaken and remanded to prison, without some evidence to lead to the conclusion that he would attempt to escape.⁴

b. RECAPTURE BY OFFICER. — The rule in civil cases that a prisoner voluntarily permitted by an officer to escape cannot be again arrested by him does not apply where the prisoner has been arrested upon a criminal charge; for in such case the public is interested, and the state cannot be prejudiced by the acts of its officers.⁵ The question as to whether the rearrest in such case can be made upon the same warrant has produced conflicting opinions; but it would seem reasonable to hold that such warrant is not *functus officio*, and that the party may be retaken thereupon.⁶

c. WHO MAY RECAPTURE — At Common Law officers and private citizens can without warrant recapture an escaped convict.⁷

Under a Statute providing for the hiring out of persons committed in default of payment of the fines imposed, and that if such a convict escapes the hirer shall be liable for the full amount of a bond executed to secure his fine unless he rearrests him and places him in the custody of the sheriff, a convict who escapes from the hirer cannot be rearrested by a bondsman of the hirer; no one has authority to do so except the latter, and then only when the convict escapes from him.⁸

d. AS RESPECTS PUNISHMENT FOR PRINCIPAL CRIME. — Where a prisoner escapes without serving the full term of his sentence, he may, on being recaptured, in the absence of any statutory provision, be required to serve the remainder of the sentence; for the essential part of the sentence is the punishment, and he will not have borne such punishment until he has remained in custody for a period equal to that during which he has been at liberty, and this though the term for which he was imprisoned may have expired by limitation.⁹

covenanting to continue in the sheriff's custody, and not to go beyond the liberties prescribed by the creditor, the debtor cannot, on violating his agreement, be retaken; for the agreement is a permission to go at large.

1. Reduction of Damages by Recapture. — *Hoagland v. State*, (Ind. App. 1895) 40 N. E. Rep. 931.

2. Action for Using Excessive Force in Recapture. — *Henry v. Lowell*, 16 Barb. (N. Y.) 269.

3. Recapture Without Warrant. — *Ex p. Sherwood*, 29 Tex. App. 334.

Justice of the Peace May, Without Warrant, Command Assistance in Recapture. — A justice of the peace has the same authority to command assistance in pursuing and retaking an offender whom he has caused to be arrested without warrant, for an offense committed in his presence, and who has escaped, which he has to command in making the original arrest. *Com. v. McGahey*, 11 Gray (Mass.) 196.

4. Retaking Accused Who Is Out on Bail. — *State v. Black*, 42 La. Ann. 861.

5. Recapture of Criminal After Voluntary Escape. — *Butt v. Jones*, 1 Gow 99, 5 E. C. L. 473; *State v. McClure*, Phil. L. (61 N. Car.) 491; *Com. v. Sheriff*, 1 Grant's Cas. (Pa.) 188. See also 1 Chitty's Cr. L. 61.

6. Recapture upon Original Warrant. — *Clark v. Cleveland*, 6 Hill (N. Y.) 344; *Reg. v. Renton*, 2 Exch. 216; *Dickinson v. Brown*, 1 Esp. N. P. 218; *Peake N. P.* (ed. 1795) 234. See also 1 Bish. Cr. Pro., § 163, note 8; *State v. McClure*, Phil. L. (61 N. Car.) 491; *Com. v. Sheriff*, 1 Grant's Cas. (Pa.) 188. But compare *Doyle v. Russell*, 30 Barb. (N. Y.) 303. See 2 Hawk. P. C., c. 13, § 9.

7. Who May Recapture Convict at Common Law. — *Ex p. Sherwood*, 29 Tex. App. 334.

8. Recapture of Hired Convict — *Texas*. — *Ex p. Logsdon*, 35 Tex. Crim. Rep. 56.

9. As Regards Punishment for Principal Crime. — *Rex v. Okey*, 1 Lev. 61; *Rex v. Ratcliffe*, 18 How. St. Tr. 429; 1 Wils. 150; *Ex p. Vance*, 90 Cal. 208; *Ex p. Clifford*, 29 Ind. 106; *Holton v. Hopkins*, 21 Kan. 638; *Dolan's Case*,.

7. Recapture on Escape Warrant.—Under the statute of Anne, stat. 2, c. 6, § 1, a creditor could, by an escape warrant, retake a prisoner after an escape from the King's Bench or warden of the Fleet.¹ But it has been held that this statute did not contemplate an escape from the sheriff, and that it applied solely to escapes from the two prisons named, the keepers of which were jailers.²

101 Mass. 219; Matter of Edwards, 43 N. J. L. 555, 39 Am. Rep. 610; State v. Cockerham, 2 Ired. L. (24 N. Car.) 204; Luckey v. State, 14 Tex. 401; Cleek v. Com., 21 Gratt. (Va.) 777.

Where a prisoner is committed for a certain time and "until he shall pay the costs," he may be recaptured if the costs be not paid, although the time had expired; for the payment of the costs is a part of the punishment. Riley v. State, 16 Conn. 50; Ex p. Vance, 90 Cal. 208. Or where he is committed until he pays a fine and costs. Luckey v. State, 14 Tex. 401.

But in *Flora v. Sachs*, 64 Ind. 157, it was held that where a party was committed to the city prison of Vincennes, Ind., for thirty days, for failure to pay or replevy a judgment and costs under 1 Rev. Stat. 1876, p. 274, § 20, obtained by the city for violation of a city ordinance, he could not be retaken after the expiration of the thirty days, for an escape within the thirty days, on the ground that there can only be an imprisonment for the thirty days next after the rendition of the judgment, and that the time of such imprisonment cannot be made up of disconnected periods.

The Indiana Statute, 2 G. & H., §§ 55, 56, p. 454, authorizing the capture of convicts although the sentence may have expired, was not intended to change the common-law rule in regard to the capture of escaped felons, but simply to authorize the additional holding after the sentence of the law has been fulfilled,

not evaded, until opportunity is given for a prosecution of the new offense of escape. *Ex p. Clifford*, 29 Ind. 109.

The New Jersey Act, passed in 1881 (Pamph. L., p. 13), provides that a person escaping may, on recapture, be required to serve out the whole term for which he was sentenced, without deducting the time he shall have been at large; and the record kept by the warden of the prison shall be *prima facie* evidence of the time of the escape and return. Matter of Edwards, 43 N. J. L. 561, 39 Am. Rep. 610.

In Ohio a convict who escapes from the penitentiary, and is subsequently convicted of the crime and serves out his term of imprisonment therefor, may, at the expiration of such term of imprisonment, be held to serve out the remainder of the first sentence. *Henderson v. James*, 52 Ohio St. 242.

1. Recapture on Escape Warrant under Statute Anne, Stat. 2, c. 6, § 1.—*Ravenscroft v. Eyles*, 2 Wils. 295; *Hesketh v. Ward*, 17 U. C. C. P. 677; *M'Clintic v. Lockridge*, 11 Leigh (Va.) 268.

2. See M'Clintic v. Lockridge, 11 Leigh (Va.) 268; *Hesketh v. Ward*, 17 U. C. C. P. 677. In this last case it was held that the statute of Anne as to escape warrants is not in force in Ontario. *Wilson, J.*, dissented.

But in *Evans v. Shaw*, Draper (U. C.) 35, Sir James Macaulay says that after a voluntary escape the plaintiff can, if the defendant be at large, obtain an escape warrant, and is not obliged to resort to the officer.

ESCHEAT.

BY CHARLES SUMNER LOBINGIER, M.A., LL.M.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the title ESCHAT, ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 8, p. 1.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ALIENS, vol. 2, p. 64; BASTARDY, vol. 3, p. 892; FORFEITURE; SUCCESSION.

I. DEFINITION AND NATURE - 1. *Under the Feudal System.* — Escheat, in its original and strict signification, was essentially an incident of the feudal

system,¹ and some explanation of the latter must precede any successful attempt to define the subject of this article. Feudalism has been described as "a graduated system of jurisdiction based upon land tenure."² In its conception all ownership of real property was dual, the tenant or holder having one estate and his superior lord another.³ This superior lord might be the king, in which case the holder was called a tenant *in capite*, or he might be one who held mediately or immediately from the king, but in any case the king was the ultimate lord of the fee.⁴ If, by death or otherwise, the estate of the lowest or demesne holder (the one whom we should now call the owner) came to an end, and he left no lawful successor, the land was said to "escheat," or fall back to the superior lord.⁵ Such was the feudal idea of escheat, and if by it an estate came to the king he acquired it, not as a sovereign, but as a proprietor.⁶ The feudal escheat, moreover, was of land only; it had no application to chattels.⁷

1. Escheat an Incident of Feudal Tenure. —

"In order to convey a correct idea of this branch of the law, it cannot be too often insisted that an escheat is in the nature of an incident of tenure. It is the more necessary to keep this origin of the conception in view from the fact that it has been ignored or misunderstood in many of the authorities, and things having no connection with the relation of landlord and tenant have been classed among escheats. An escheat, it must be remembered, never falls to the king, as such, but goes always to the lord of the fee. Great confusion still exists on this point, arising from the fact that mesne lords are now seldom found, and that the crown is commonly entitled as the immediate lord. The title of the crown to escheats is entirely based upon the feudal idea that all land is held of some superior, and that where no badge of tenure can be traced, the land is to be considered as held immediately, as well as ultimately, of the crown. The king is lord paramount, and where no intermediate lord appears to claim, all tenants are assumed to hold of him directly by service of mere fealty." Hardman, *Law of Escheat*, 11 *Law Quar. Rev.* 318, 323. See also 2 *Black. Com.* 244; *Burgess v. Wheate*, 1 *Eden* 177; *Kynnauld v. Leslie*, L. R. 1 *C. P.* 389; *Com. v. Blanton*, 2 *B. Mon. (Ky.)* 393; *White v. Wayne*, T. U. P. *Charlt. (Ga.)* 94.

2. **Character of the Feudal System.** — Pollock on *Land Laws* (1883) 52, 53; *Jenks's Law and Politics in the Middle Ages* (1898) 82, 83.

3. **Dual Ownership.** — "The leading characteristic of the feudal conception is its recognition of a double proprietorship, the superior ownership of the lord of the fief coexisting with the inferior property or estate of the tenant." Maine's *Ancient Law* (3d Am. ed.) 286.

"The conception of escheat is inseparably connected with the idea of tenure. It proceeds upon the assumption that all lands in the occupation of a tenant are held of some superior under certain conditions, by virtue of an original grant. The tenant is not the owner of the land, but only of an estate in the land, and upon the determination of this lease the feud falls back into the lord's hands by a termination of the tenure." Hardman, *Law of Escheat*, 4 *Law Quar. Rev.* 318, 322.

4. 1 Pollock & Maitland's *Hist. Eng. Law* (1895) 211.

5. "One of the most valuable of the lord's

rights was that of escheat, or the right of having the lands of the tenant on failure of his heirs. This right arises directly from the relation of lord and tenant. The tenant is conceived as having only an estate in the lands — an interest which, though it may be capable of descending to his heirs, *in infinitum*, is something short of absolute ownership. The lord has a possibility of the land reverting to him which the tenant cannot defeat." Digby's *Hist. Law of Real Prop.* (1884) 42.

In the leading case of *Burgess v. Wheate*, 1 *Eden* 177, the master of the rolls thus discusses the feudal escheat: "An escheat was in its nature feudal. A feud was the right which a tenant had to enjoy lands, etc., rendering to the lord the duties and services reserved to him by contract. On the other hand a right remained in the lord (after a grant made) called a seignory, consisting of services to be performed by the tenant and the right to have the land returned on the expiration of the grant as a reversion; a right afterwards called an escheat. And as the grant was more or less extensive, the reversion was more or less remote; for feuds were sometimes temporary, sometimes hereditary, and a temporary one ended on the grantee's death. Sir Henry Spelman takes notice only of hereditary feuds, nor do our own laws. And though it may seem a paradox to modern ears, a feoffment to A. and his heirs did not pass a fee simple originally in the sense we now use it, but only an estate to be enjoyed as a *merum beneficium*, without the power of alienation in prejudice of the heir or lord. And the heir took it successively as an usufructuary interest; and in default of heirs, the lands escheated, or reverted, strictly speaking. If there was an heir, and by legal impediment he could not take, the land escheated. Bracton, fol. 23, a; 46 *Edw. III.* pl. 4; Bro., *Escheat*, pl. 2."

6. Hardman, *Law of Escheat*, 11 *Law Quar. Rev.* 318, 323.

7. **Inapplicable to Chattels.** — *White v. Wayne*, T. U. P. *Charlt. (Ga.)* 97; *Com. v. Blanton*, 2 *B. Mon. (Ky.)* 393, the court saying: "Escheats, being the legal fruits of the ancient doctrines of feudal tenure, were always applicable, of course, to immovable property alone; movable things never escheated in the technical sense. In England there has been some diversity of opinion as to the ultimate title to the goods of an intestate after payment of his

Distinctions. — A clear distinction was made between escheat and forfeiture, the latter consisting of an appropriation by the crown of a criminal's property in punishment of the crime.¹ Again, escheat has been distinguished from reversion, which was not applicable, like the former, to an estate in fee simple.²

2. Transition to Modern Law. — Originating, it is now thought, under the Roman Empire,³ the feudal system spread throughout western Europe,⁴ and upon the conquest of England by the Normans was introduced into that country,⁵ where for six hundred years it flourished in vigor,⁶ and where its results and traces are even yet perceptible.⁷

Feudal Escheat in the United States. — While the feudal system was still in vogue in the mother country the American colonies were settled, and in some of these, at least, feudalism was transplanted and reproduced. In that group of colonies known as proprietary,⁸ and which included Maryland,⁹ Pennsylvania,

debts, and when no person appeared who could claim under the statute of distributions. There is no trace of any British statute that can shed any light on that obscure subject. Nor, if we explore the labyrinth of the ancient common law, can we find any sure clue to a conclusion perfectly clear and satisfactory. * * * But the same history shows, as we are inclined to think, that the temporal court was wrong in withholding remedy when there was a clear right; and that, however this may be, the king, as the official organ of the public, had never surrendered his sovereign right as ultimate distributee in trust for all the people, who certainly had more title than any one of them who was a stranger in blood to an intestate could be admitted to possess, from the accidental circumstance of being appointed a trustee for every and any one who might be entitled to the effects of the deceased. And this deduction seems to be fortified by a preponderance of British authority. In cases of intestacy and defect of legal distributees, it seems to have been the practice of the crown to transfer the royal title to the undisposed of effects to the ordinary or an appointee on the king's nomination — reserving, as the consideration of the grant, a certain reversionary proportion of interest. 11 Vin Abr. 87; Com. Dig., Adm. A.; Jones v. Goodchild, 3 P. Wms. 33.

1. Forfeiture Distinguished. — "Great care must be taken to distinguish between forfeiture of lands to the king and this species of escheat to the lord, which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands and of whatever else the offender possessed was the doctrine of the old Saxon law, as a part of punishment for the offense, and does not at all relate to the feudal system, nor is the consequence of any seignior or lordship paramount; but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures, a fruit and consequence of which escheat must undoubtedly be reckoned. Escheat, therefore, operates in subordination to this more ancient and superior law of forfeiture." 2 Black. Com. 251. See also Wright on Tenures 117, 118; 4 Kent's Com. 426.

2. Reversion. — Atty.-Gen. v. Mercer, L. R. 8

App. 767, the court, *per* Lord Chancellor Selborne, saying: "From the use of the word 'revert,' in the writ of escheat, is manifestly derived the language of some authorities which speak of escheat as a species of 'reversion.' There cannot, in the usual and proper sense of the term, be a reversion expectant upon an estate in fee simple. What is meant is that where there is no longer any tenant, the land returns, by reason of tenure, to the lord by whom, or by whose predecessors in title, the tenure was created. Other writers speak of the lord as taking it by way of succession or inheritance, as if from the tenant, which is certainly not accurate. The tenant's estate (subject to any charges upon it which he may have created) has come to an end, and the lord is in by his own right." Compare, however, Burgess v. Wheate, 1 Eden 177.

3. Feudalism of Roman Origin. — 1 Pollock & Maitland's Hist. Eng. Law (1895) 45, note; Maine's Ancient Law (3d Am. ed.) 292.

4. Digby's History Law of Real Prop. (1884) 29 et seq.; Jenks's Law and Politics in the Middle Ages (1898) 82; Maine's Ancient Law (3d Am. ed.) 292, 293. Feudalism seems not to have been extended into Spain, however. See People v. Folsom, 5 Cal. 373, where the court said: "This system was adopted in almost every country on the continent of Europe with the exception of Spain, where it never prevailed to any extent, and in which the right of primogeniture did not exist, and the title to lands was allodial and not held by military service or tenure."

5. Digby's Hist. Law of Real Prop. (1884) 32, 33; Abdy's Lectures on Feudalism (1890) 353. Compare 1 Pollock & Maitland's Hist. Eng. Law (1895) 43 et seq.

6. The feudal tenures were abolished by the statute 12 Car. II., c. 24. 2 Black. Com. 77.

7. "To this day, though the really characteristic incidents of the feudal tenure have disappeared or left only the faintest of traces, the scheme of our land laws can, as to its form, be described only as a modified feudalism." Pollock on Land Laws (1883) 51, 52.

8. There were three groups of colonies at and prior to the Revolution; viz., (1) Royal or Provincial; (2) Democratic, Charter, or Corporate; and (3) Proprietary. See Fiske's Civil Government in the United States (1890) 153, 154.

9. Fiske's Civil Government in the United States (1890) 150, 151. See also Matthews v.

and Delaware,¹ and, at an early period of their history, still others,² the land was granted by the king to the proprietor, and under him, as a feudal lord, the settlers held. In these colonies, therefore, the feudal doctrine of escheat prevailed substantially as it had in England.³ Even in those colonies which were not proprietary, titles were derived from the crown,⁴ and were probably claimed by it upon failure of succession. With the American Revolution, however, came a change in the theory of tenure.⁵ In Maryland the proprietors' lands were confiscated,⁶ and generally the colony, and afterwards the state, succeeded to the rights of the crown,⁷ while American tenures became allodial.⁸

3. The Substituted Escheat of the Modern Law — a. TO WHOM PROPERTY ESCHETS. — With the passing of feudalism came a change in the notion of escheat. There being no longer intermediate lords of the fee, the estate, upon failure of succession, vested in the sovereign power as lord paramount. In *England* this is still the crown,⁹ but in *America* it is usually the state,¹⁰ even though the escheated land may have been patented by the general government.¹¹ But such land when situated in a territory escheats to the federal and not to the territorial government.¹² In *Canada* land escheating to the crown for defect of heirs goes not to the dominion government but to the province.¹³

Ward, 10 Gill & J. (Md.) 450; *Kelly v. Greenfield*, 2 Har. & M. (Md.) 121.

1. Fiske's Civil Government in the United States (1890) 152.

2. Fiske's Civil Government in the United States (1890) 152, 153; Bassett, Landholding in Colonial North Carolina, 11 Law Quar. Rev. 154, 155.

3. *Escheat in the Colonies.* — "The lord proprietary, by the express terms of the charter, held his lands in free and common socage, and his grantees, or tenants, anterior to the Revolution, held by the same tenure. Services of a feudal character, or of the nature of feudal services, were attached to his grants, and the incidents of fealty, rent, escheat, and fines for alienation, or some of them, were the necessary incidents thereto." *Matthews v. Ward*, 10 Gill & J. (Md.) 443. Compare *Kelly v. Greenfield*, 2 Har. & M. (Md.) 121.

4. See an interesting monograph on The Land System of the New England Colonies, 4 Johns Hopkins University Studies, p. 549.

5. *Matthews v. Ward*, 10 Gill & J. (Md.) 443.

"The revolution in property, as well as the revolution in government, which was produced by the separation of the United States from the mother country introduced a state of things for which in many respects no other country can furnish a precedent. Many persons never took possession of lands to which they were entitled, or abandoned their possessions and have never preferred their claims since. Others lost the evidence of theirs, and therefore were deprived of the means of prosecuting their rights where they were so disposed." *Nott, J., in Wilkins v. Tart*, 3 McCord L. (S. Car.) 518.

6. *Hall v. Gittings*, 2 Har. & J. (Md.) 112; *Ringgold v. Malott*, 1 Har. & J. (Md.) 299.

7. *Matthews v. Ward*, 10 Gill & J. (Md.) 451.

8. *Matter of Desilver*, 5 Rawle (Pa.) 111, 28 Am. Dec. 645, 4 Kent's Com. 2, 3.

9. *To Whom Property Escheats — In England.* — "The law of escheat for failure of heirs remains in substance at the present day as it is

stated in the following passage, the practical difference being that, as it is but comparatively seldom the case at the present day that freehold lands are held of any known mesne lord, escheat on the failure of heirs of a freeholder usually is to the crown as lord paramount." *Digby's Hist. Law of Real Prop.* (1884) 82.

10. *In the United States.* — *Matthews v. Ward*, 10 Gill & J. (Md.) 451; *State v. Meyer*, 63 Ind. 33; *Larreau v. Davignon*, 5 Abb. Pr. N. S. (Buffalo Super. Ct.) 367; *Holmes v. Pattison*, 25 Pa. St. 484.

But in *State v. Boston*, etc., R. Co., 25 Vt. 433, it is urged that escheat for alienation should be enforced by the general government only.

Cession of California — Mexican Law of Escheats. — In *People v. Folsom*, 5 Cal. 373, it was held that the Mexican law of escheats did not remain in force in California until the ratification of the treaty of Guadalupe Hidalgo, but was abrogated, in so far as citizens of the United States and aliens were affected, by the conquest of the country by the Americans.

11. *Lands Patented by General Government.* — *Etheridge v. Malempre*, 18 Ala. 565; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430. See also *King v. Ware*, 53 Iowa 97.

12. *Lands Situated in a Territory.* — *Williams v. Wilson*, Mart. & Y. (Tenn.) 248.

13. *In Canada.* — *Atty.-Gen. v. Mercer*, L. R. 8 App. 767, reversing 5 Can. Sup. Ct. Rep. 538, where Lord Chancellor Selborne said: "The conclusion at which their lordships have arrived is that the escheat in question belongs to the province of Ontario, and they will humbly advise her majesty that the judgment appealed from ought to be reversed, and that of the vice chancellor and Court of Appeal of Ontario restored. It is some satisfaction to know that in this result the courts of Quebec and Ontario have agreed; and though it differs from the opinion of four judges, constituting the majority in the Supreme Court of Canada, two of the judges of that court, including the chief justice, dissented from that opinion." See

b. CHARACTER OF THE STATE'S TITLE. — The substitution of the sovereign for a proprietor as the one to whom the escheated land goes has resulted in some variety of views as to the nature of its title. By some authorities the modern escheat has been described as a return of property to "the common stock to which the whole community is entitled."¹ In other jurisdictions the state is regarded as a statutory heir, and as such inherited to the succession.² Still others urge that the principle of escheat cannot be said to rest upon statute, but rather that it is a principle coeval with the existence of society and existed before the statute.³ Again, the right of the state in escheat is said to rest upon the universally recognized principle of the state as the original and ultimate proprietor of all lands within its jurisdiction,⁴ and therefore the state is said to take not as an heir but as a sovereign.⁵ The modern escheat is not confined to real estate, but affects personalty as well.⁶

c. CONSTITUTIONALITY OF ESCHATE STATUTES. — A statute providing for escheat is not an *ex post facto* law,⁷ nor one impairing the obligation of any contract involved in the grant by which the land was held.⁸ So a constitutional clause forbidding the legislature to grant lands except to actual settlers does not invalidate escheat proceedings,⁹ and a legislature may, even before office found, vest the property of an illegitimate intestate in half brothers and sisters born in lawful wedlock.¹⁰ Statutes prohibiting nonresident aliens from acquiring real property, and providing that in case of such attempted acquisition the lands shall escheat to the state, are constitutional,¹¹ except where they infringe treaty obligations.¹²

II. GROUNDS AND CAUSES — **1. Defect of Heirs.** — One of the grounds of escheat at the common law was the death of the intestate without heirs.¹³ In the

also *Atty.-Gen. v. Atty.-Gen.*, 2 Quebec L. Rep. 236; *Atty.-Gen. v. Atty.-Gen.*, 14 Can. Sup. Ct. Rep. 736.

1. Nature of State's Title upon Escheat. — 4 Kent's Com. 424. Compare *White v. Wayne*, T. U. P. Charl't. (Ga.) 94; *Hughes v. State*, 41 Tex. 10; *Gilmour v. Kay*, 2 Hayw. (2 N. Car.) 108; *Wallace v. Harmstad*, 44 Pa. St. 492.

2. *Wallace v. Harmstad*, 44 Pa. St. 492.

3. *White v. Wayne*, T. U. P. Charl't. (Ga.) 94; *Beavan v. Went*, 155 Ill. 592.

4. *Hughes v. State*, 41 Tex. 10; *Com. v. Blanton*, 2 B. Mon. (Ky.) 393.

5. *State v. Ames*, 23 La. Ann. 69; *Johnston v. Spicer*, 107 N. Y. 185. In the former case the court said: "The state is not in reality an heir or a successor, in the technical sense of this word, for it acquires by the title of escheat; that is to say, precisely in virtue of a title which supposes, necessarily, that there are no heirs; which caused Bacquet to say that when a man dies without heirs, the goods left by his death *non vocantur bona hereditaria sed vacantia nominantur*. In a word, the state exercises in this matter the eminent right of sovereignty, in virtue of which it appropriates all property without a master which is found within its territory."

6. Modern Escheat Affects Personalty as Well as Realty. — *White v. Wayne*, T. U. P. Charl't. (Ga.) 97; *Com. v. Blanton*, 2 B. Mon. (Ky.) 393; *Johnston v. Spicer*, 107 N. Y. 185.

The *Tennessee Code*, 1845, §§ 521, 524, providing for the payment of unclaimed money in the hands of clerks of courts into the county treasuries, is based upon escheat principles and is constitutional. *Deaderick v. Washington County*, 1 Coldw. (Tenn.) 202.

7. Not an Ex Post Facto Law. — *White v. Wayne*, T. U. P. Charl't. (Ga.) 94.

8. Impairment of Obligation of Contracts. — *Hamilton v. Brown*, 161 U. S. 256, wherein the court, *per* Gray, J., said: "When a man dies, the legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance for an indefinite period, but it may provide for promptly ascertaining, by appropriate judicial proceedings, who has succeeded to his estate. If such proceedings are had, after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the state, as by inquest of office or similar process to determine whether the estate has escheated to the public, is due process of law; and a statute providing for such proceedings and determination does not impair the obligation of any contract contained in the grant under which the former owner held, whether that grant was from the state or from a private person."

9. *Hamilton v. Brown*, 161 U. S. 256.

10. *Gresham v. Rickenbacher*, 28 Ga. 227.

11. *Wunderle v. Wunderle*, 144 Ill. 40; *De Graff v. Went*, 164 Ill. 485.

12. *Adams v. Akerlund*, 168 Ill. 632.

13. Defect of Heirs as Ground for Escheat — At Common Law. — "The first three cases wherein inheritable blood is wanting may be collected from the rules of descent laid down and explained in the preceding chapter, and therefore will need very little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors; secondly, when he dies without any relations on the part of those ancestors from whom his estate descended; thirdly, when he dies with-

United States this rule has been enacted into statutes and is generally in force,¹ and constitutes the principal ground of escheat at the present time.² But the intestate must have been actually seized of the land at the time of his death in order that it may be subject to escheat.³

2. Alienage⁴ — **Taking by Operation of Law.** — Under the early common law, an alien could not take an estate in lands by operation of law, as by descent.⁵ Nor could he inherit through a deceased alien ancestor.⁶ It therefore followed that an estate escheated when the only succession possible was to an alien directly by descent or to an alien who of necessity traced his claim of inheritance

out any relations of the whole blood. In two of these cases the blood of the first purchaser is certainly, in the other it is probably, at an end; and therefore in all of them the law directs that the land shall escheat to the lord of the fee; for the lord would be manifestly prejudiced if, contrary to the inherent conditions tacitly annexed to all feuds, any person should be suffered to succeed to the lands who is not of the blood of the first feudatory, to whom for his personal merit the estate is supposed to have been granted." 2 Black. Com. 246. See also *Johnson v. Norway*, Winch. 37.

Under the Feudal System. — "When the feudal system flourished in full vigor in this country, the causes of escheat were numerous, and this incident of tenure was a source of considerable profit to the lord. Besides the failure of an heir who could inherit, and the commission of felony, the tenant might do many acts which let in the lord to claim the land as an escheat. Thus the heir originally took by purchase, and independently of the ancestor to whom the grant was made, and any attempt to alien the land made by either the grantee or the heir operated as a cause of seizure by the lord." Hardman, *Law of Escheat*, 11 *Law Quar. Rev.* 318, 322.

1. In the United States — *United States*. — *Newman v. Crows*, 60 *Fed. Rep.* 220, where the statute of *Texas* respecting escheat by reason of failure of heirs is discussed.

California. — *Beckett v. Selover*, 7 *Cal.* 215, 68 *Am. Dec.* 237.

Illinois. — *Wallahan v. Ingersoll*, 117 *Ill.* 123.

Kentucky. — *Com. v. Blanton*, 2 *B. Mon. (Ky.)* 393; *Louisville Bank v. Public School Trustees*, 83 *Ky.* 219.

Maryland. — *Hammond v. Inloes*, 4 *Md.* 139; *Hall v. Gittings*, 2 *Har. & J. (Md.)* 112.

Massachusetts. — *Sewall v. Lee*, 9 *Mass.* 363.

Nebraska. — *State v. Reeder*, 5 *Neb.* 203.

New Jersey. — *O'Hanlin v. Den*, 20 *N. J. L.* 31; *Den v. O'Hanlon*, 21 *N. J. L.* 582.

New York. — *Johnston v. Spicer*, 107 *N. Y.* 185; *Bradley v. Dwight*, 62 *How. Pr. (N. Y. Supreme Ct.)* 300.

South Carolina. — *Harvey v. Harvey*, 25 *S. Car.* 283.

Tennessee. — *Hinkle v. Shadden*, 2 *Swan (Tenn.)* 46; *Parchman v. Charlton*, 1 *Coldw. (Tenn.)* 381.

Texas. — *Wiederanders v. State*, 64 *Tex.* 133; *Treasurer v. Wygall*, 51 *Tex.* 621; *Hall v. Claiborne*, 27 *Tex.* 218.

2. Failure of Heirs Principal Ground of Escheat. — "It is a general principle in the American law, and which, I presume, is everywhere de-

clared and asserted, that when the title to land fails from defect of the heirs or devisees, it necessarily reverts or escheats to the people, as forming part of the common stock to which the whole community is entitled." 4 *Kent's Com.* 424.

"The dying intestate without heirs is now practically the only ground of escheat which is worth considering; for relations succeed, however distant, provided only they give evidence of their propinquity." 3 *Washburn on Real Prop.* (5th ed.) 444.

"Our laws recognize but two cases of escheat; for corruption of blood is not here a consequence of attainder for felony. One of the cases is where an alien purchases and cannot hold against the government; and the other is when a citizen dies seized of lands, without heirs and intestate." *Parsons, C. J.*, in *Sewall v. Lee*, 9 *Mass.* 363.

3. Actual Seizin at Time of Death. — *Matter of Desilver*, 5 *Rawle (Pa.)* 111, 28 *Am. Dec.* 645, the court, *per Gibson, C. J.*, saying: "The authorities distinctly show that the feoffment and livery of an escheat by his death, because seizin must be found by the inquest, as well as a failure of heirs, devisees, or known kindred. His feoffee holds discharged, because an avoidance of the act would not restore the seizin of the lunatic at the time of his death, which is essential to an escheat of his estate to the immediate lord of the fee. It is true that our property is allodial, and that escheats, with us, take effect, not upon principles of tenure, but by force of our statutes to avoid the uncertainty and confusion inseparable from the recognition of a title founded in priority of occupancy; yet these statutes equally, and in terms, require the decedent to have been seized at his death. So far the argument made for the defendant in error seems to be unavailing."

4. In Beavan v. Went, 155 *Ill.* 592, the court said of this ground of escheat: "It existed in England, not as a part of the feudal system, as counsel seem to suppose, but was based upon general principles of public policy, having in view the protection of the kingdom from foreign influence and foreign domination — principles not altogether unlike those which have given rise to our recent legislation reimposing upon aliens the common-law disabilities in relation to taking and holding real estate in this state."

5. Alien Could Not Take by Descent. — See the title *ALIENS*, vol. 2, p. 73.

6. See the title ALIENS, vol. 2, p. 75.

through alien blood.¹ In *Vermont*, however, this strict rule of the common law has been modified by judicial decision,² and in *Connecticut* it is declared never to have been in force.³

What Law Governs. — It is a rule of absolute uniformity that the law in force at the time of descent governs with reference to the capacity to take and hold real property.⁴

Taking by Act of Parties. — But even at common law an alien could take an estate by act of the parties, as by deed, grant, or devise, or other act of purchase, though there were some contrary decisions.⁵

The Whole Subject of Alienage, at common law, under statutes, and under treaties, has been thoroughly treated in a preceding volume, to which reference is here made.⁶

3. Illegitimacy. — At common law a bastard was deemed incapable of either receiving or transmitting property except to his own legitimate children.⁷ Illegitimacy, therefore, either of the intestate or of his heirs, is a ground of escheat in those jurisdictions which have not modified the common-law rule.⁸ In many states, however, these disabilities have been removed, leaving illegitimacy there no longer a ground of escheat.⁹ In *Georgia* the legislature passed a special act to prevent, in a particular case, the operation of the escheat principle on this ground, and it was upheld.¹⁰

4. Abandonment. — Under the early colonization law of *Texas*, the abandonment of an entry was held to reinvest the title in the state *ipso facto*.¹¹

5. Attainder. — Under the English common law, attain of the intestate's blood for treason or felony cut off the power to transmit his property¹² and caused it to escheat.¹³ The Federal Constitution expressly prohibits the passage of bills of attainder,¹⁴ and that ground of escheat is, therefore, no longer operative in the *United States*. In *Canada*¹⁵ and also in

1. *Orr v. Hodgson*, 4 Wheat. (U. S.) 453; *Levy v. McCarree*, 6 Pet. (U. S.) 102; *Smith v. Zaner*, 4 Ala. 99; *Wunderle v. Wunderle*, 144 Ill. 40.

2. **Vermont Rule.** — *State v. Boston*, etc., R. Co., 25 Vt. 433. See also the title **ALIENS**, vol. 2, p. 64, where the authorities and statutes relating to this subject are collated.

3. **Connecticut Doctrine.** — *Campbell's Appeal*, 64 Conn. 277.

4. *Pilla v. German School Assoc.*, 23 Fed. Rep. 700; *Sullivan v. Burnett*, 105 U. S. 334; *De Franca v. Howard*, 21 Fed. Rep. 774; *Donovan v. Pitcher*, 53 Ala. 411, 25 Am. Rep. 634; *Krogan v. Kinney*, 15 Iowa 242; *Hauensteins v. Lynham*, 28 Gratt. (Va.) 62. See also the title **ALIENS**, vol. 2, p. 73.

5. See the title **ALIENS**, vol. 2, p. 70.

6. See the title **ALIENS**, vol. 2, p. 64.

7. See the title **BASTARDY**, vol. 3, p. 892.

8. **Property of Bastards Escheats.** — "As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs but such as claim by a lineal descent from himself. And therefore if a bastard purchases land and dies seized thereof without issue, and intestate, the land shall escheat to the lord of the fee." 2 Black. Com. 249.

"According to the common law, William Crawle being a bastard and dying intestate and without issue, the land in dispute would escheat to the state. By that law, at least so

far as inheritances are concerned, the intestate was the son of nobody, and could not have any legal heirs but of his own body. 1 Black. Com. 459; *Chitty on Descents* 27; 1 *Preston on Estates* 468; 2 *Kent's Com.* 212. The common law on the subject is in force here, and must govern the question before us, except so far as it has been changed by statute." *Doe v. Bates*, 6 Blackf. (Ind.) 533. See to the same effect *Bent v. St. Vrain*, 30 Mo. 268; and compare *Lewis v. Eutsler*, 4 Ohio St. 355. See the title **BASTARDY**, vol. 3, p. 892.

9. See the title **BASTARDY**, vol. 3, p. 892.

10. *Gresham v. Rickenbacher*, 28 Ga. 227.

11. **Abandonment.** — *Holliman v. Peebles*, 1 Tex. 673; *Horton v. Brown*, 2 Tex. 79.

12. **Attainder.** — 2 Black. Com. 252. See also the title **ATTAINER**, vol. 3, p. 248.

13. "The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony (under which denomination all treasons were formerly comprised), is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out forever." 2 Black. Com. 252.

14. Art. 1, § 9, subd. 3.

15. **Attainder in Canada.** — *Doe v. Wixon*, 5 U. C. Q. B. 132. Compare *Doe v. Clement*, 9 U. C. Q. B. 650. In the former case the lands of

*England*¹ the attainder principle was applied at a comparatively recent period, though it is now abolished in the latter country.² Even in the United States confiscation acts not greatly differing from bills of attainder have been upheld.³

III. PROPERTY SUBJECT — 1. Generally. — Under the common law,⁴ and by certain statutory enactments,⁵ the term "escheat" is applied to all classes of immovable property, including remainders⁶ and rents.⁷ Personal property never, technically, escheated at common law.⁸ The meaning of the term, however, has generally been extended by statute so as to be applicable to all forms of personal property. Thus a surplus unclaimed in the hands of an administrator,⁹ money in the possession of a public officer¹⁰ or a banking institution,¹¹ and chattels generally, are, by statute, now subject to escheat.¹² The same is true of partnership property where all members of the partnership die intestate without heirs.¹³ But neither under the common law nor by statute is any disability placed upon aliens acquiring personal property,¹⁴ nor can the state by statute destroy vested interests acquired by occupation¹⁵ and improvement,¹⁶ or vest property in the state¹⁷ or any of its institutions¹⁸ under a statute providing that a conclusive presumption of abandonment shall arise from nonassertion of claim.¹⁹ In *Pennsylvania* it was held that the surplus fund of a savings association was not subject to escheat under a statute limiting the amount of money that could be held by certain charitable societies, the object being to prevent the evils of mortmain and perpetuity.²⁰

one who had engaged in the Canadian rebellion of 1837 were declared forfeited by reason of attainder.

1. **In England.** — "The law of attainder is connected with the law of escheat, which has its origin in the feudal system. The fief was granted on the understanding that the right of inheritance should continue till a case arose in which the person entitled to it could not perform the duties which were owed to the lord, and that it should then revert to him, or, in case of immediate forfeiture for treason, to the crown. It must not, therefore, be supposed that the lands would not have escheated if the defendant had failed to make out his title. I am clearly of the opinion, however, that the corruption of blood was paramount to the line of succession along which the defendant must trace his title." *Willes, J., in Kynnaid v. Leslie, L. R. 1 C. P. 389.*

2. "After considerable modification by statute of the doctrine of attainder, the recent statute 33 and 34 Vict., c. 23, has totally abolished forfeiture and escheat (except when forfeiture is consequent upon outlawry), and provides instead for the appointment of an administrator to the property of the convict, and for the vesting of his property in such administrator during the continuance of his punishment." *Digby's Hist. Law of Real Prop. (1884) 382.*

3. **Confiscation Acts.** — *Wallach v. Van Risswick, 92 U. S. 202; Day v. Micou, 18 Wall. (U. S.) 156; Miller v. U. S., 11 Wall. (U. S.) 268; Semmes v. U. S., 91 U. S. 21.*

4. **Property Subject to Escheat.** — In *Com. v. Blanton, 2 B. Mon. (Ky.) 393*, the court said: "Escheats, being the legal fruits of the ancient doctrines of feudal tenure, were always applicable, of course, to immovable property alone; movable things never escheated in the technical sense. In England there has been some diversity of opinion as to the ultimate title to the goods of an intestate after payment of his debts, and when no person appeared

who could claim under the statute of distributions. There is no trace of any British statute that can shed any light on that obscure subject. Nor, if we explore the labyrinth of the ancient common law, can we find any sure clue to a conclusion perfectly clear and satisfactory."

5. *Hall v. Claiborne, 27 Tex. 217; State v. Reeder, 5 Neb. 203; Howard v. Schmidt, Rich. Eq. Cas. (S. Car.) 452.*

6. *Com. v. Naile, 88 Pa. St. 429.*

7. *Wright v. Methodist Episcopal Church, Hoffm. Ch. (N. Y.) 201.*

8. *Com. v. Blanton, 2 B. Mon. (Ky.) 393; Greenheld v. Morrison, 21 Iowa 538.*

9. *Fuhrer v. State, 55 Ind. 150.*

10. *Deaderick v. Washington County, 1 Coldw. (Tenn.) 202.*

11. *State v. Security Sav. Co., 28 Oregon 410.*

12. **Chattels Escheat.** — *State v. Reeder, 5 Neb. 203; Howard v. Schmidt, Rich. Eq. Cas. (S. Car.) 452; Hall v. Claiborne, 27 Tex. 217.*

13. *Com. v. North American Land Co., 57 Pa. St. 102.*

14. *Greenheld v. Morrison, 21 Iowa 538; Harney v. Donohoe, 97 Mo. 141.*

15. *Smith v. Gentry, 16 Ga. 31.*

16. *U. S. v. Tithing Yard, 9 Utah 273.*

17. *Louisville School Board v. State Bank, 86 Ky. 150.*

18. *Louisville Bank v. Public School Trustees, 83 Ky. 219.*

19. In *Louisville School Board v. State Bank, 86 Ky. 150*, and *Louisville Bank v. Public School Trustees, 83 Ky. 219*, it was held that an act which vests certain unclaimed money in the school board of the city of Louisville, upon a presumption from lapse of time that no owner exists is unobjectionable so far as establishing a presumption, but that such presumption may be overcome by testimony, and where there are claimants they should be brought before the court.

20. **Pennsylvania Statute.** — *West's Appeal, 64*

2. Trust Estates. — Under the English Decisions, following a doubtful precedent and based upon the feudal doctrine of tenure by service, it seems that a trust estate is not liable to escheat by reason of the failure of the *cestui que trust* to cast the descent.¹ But this doctrine has been sharply criticised by eminent English authority,² and in any event does not apply to leaseholds³ or chattels.⁴

In the United States the question has been settled by specific statutory provisions for the escheating of trust estates,⁵ by judicial enlargement of existing legislation,⁶ and by an absolute refusal to follow the English decisions.⁷ In

Pa. St. 186; *West v. Pennsylvania Co.*, etc., 64 Pa. St. 195. In the former case the court, *per* Agnew, J., said: "If there were no beneficial purposes to which the fund was devoted, the argument that it is without an owner might have some force. But the obvious purpose of producing a fund by improving and augmenting the property of the society is to furnish an adequate security for the repayment of depositors. The success attending the administration of the investment, in producing the large surplus now existing after nearly half a century of good management, detracts nothing from the charter right to enjoy the accumulation for the true purposes of the society. Besides the internal evidence afforded by the charter itself, of the business character of the corporation for pecuniary purposes, the general legislation of the state has heretofore classed such institutions with other business associations, such as bank, loan, insurance companies, etc., for various purposes, such as taxation, unclaimed dividends, and deposits. This being the true character of this society, it is obvious it is not the subject of escheat, and the proceeding to condemn its surplus fund (especially in a mode not prescribed by law) is illegal and injurious."

1. Trust Estates — In England. — *Burgess v. Wheate*, 1 W. Bl. 123, 1 Eden 177; *Gallard v. Hawkins*, 27 Ch. Div. 298; *Davall v. New River Co.*, 3 De G. & Sm. 394; *Taylor v. Haygarth*, 14 Sim. 8; *Beale v. Symonds*, 16 Beav. 406; *Re Adams*, 4 Ch. Chamb. Rep. 29.

Intestate's Estates Act — Proceeds of Sale of Realty Not Effectually Disposed of. — In *In re Wood*, (1896) 2 Ch. 596, a testatrix who was without heirs devised realty of which she was seized in fee to her executors, upon trust to sell the same and with the proceeds to pay her debts, funeral expenses, and legacies. There was no gift of the residue. It was held that the balance of the proceeds after paying the debts, funeral expenses, and legacies, did not belong to the executors, but under section 4, 47 & 48 Vict., c. 71, escheated to the crown.

2. Middleton v. Spicer, 1 Bro. C. C. 201.

3. Middleton v. Spicer, 1 Bro. C. C. 201.

4. Taylor v. Haygarth, 14 Sim. 8; *Barclay v. Russell*, 3 Ves. Jr. 424.

5. United States — Statutory Provisions. — *Com. v. Naille*, 88 Pa. St. 429; *Olmsted's Appeal*, 86 Pa. St. 284; *West's Appeal*, 64 Pa. St. 186; *West v. Pennsylvania Co.*, etc., 64 Pa. St. 195.

6. Matthews v. Ward, 10 Gill & J. (Md.) 443; *McCaw v. Galbraith*, 7 Rich. L. (S. Car.) 74.

7. English Doctrine Disapproved. — In *Hubbard v. Goodwin*, 3 Leigh (Va.) 492, the court said: "The case of *Burgess v. Wheate*, 1 W. Bl. 161,

has been cited. Of this case, I think it may be truly said that it is of very doubtful authority. It was decided by Lord Northington and Sir Thomas Clarke against Lord Mansfield; decided, as Lord Thurlow says (*Middleton v. Spicer*, 1 Bro. C. C. 204), 'upon divided opinions, and opinions which continue to be divided, of very learned men.' And when we find Lord Thurlow himself pronouncing that it was decided 'upon the scanty ground of the defect of a tenant,' and declaring an executor trustee of personality for the crown for want of next of kin, we cannot err very far in placing him on the side of Lord Mansfield in this matter. If we do so, the scales are balanced, and the opinions of other learned men will make that of Lord Mansfield decidedly preponderate. See 2 Kent's Com. 54, *citing* Sugden's *Gilbert* on Uses 86, 404. That learned judge there delivers it as received doctrine that the crown takes the trust of an alien. There certainly can be nothing more unreasonable, I think, than this decision of *Burgess v. Wheate*, if we consider it in any other light than as a mere question of tenure. That the trustee should be permitted, upon the death of the beneficial owner without heirs, to hold the estate to his own use, is utterly at variance, not only with the principles of equity, which consider him as a mere machine, an instrument, a conduit; which declare that trusts and legal estates shall be governed by the same rules and that the trust shall descend and pass as the legal estate would descend and pass; but, it seems to me, at variance with the natural justice of the case. It is right and proper that when the owner of property dies without giving it away, and without leaving any object having natural claims to his bounty, such as heirs or next of kin, his property should go to the community of which he is a member. But, in truth, *Burgess v. Wheate* was decided on the ground of tenure. It was a question of escheat for want of heirs, not of right in the crown because of alienage. And it was decided that there could be no escheat upon the death of the *cestui que trust* without heirs, because the trustee was in existence to do the services. It is to me very obvious that this principle has no application to the case of an alien. That is not (though it is often inaccurately so spoken of) a case of escheat. The devolving of the rights of the alien on the crown is arranged by the most distinguished commentator under the head of forfeiture; though in a case of more recent date than his work, it is said that it is not to be considered as a penalty or forfeiture, but as arising merely from the policy of law. *Atty.-Gen. v. Duplessis*, 2 Ves. 286, 1 Bro. P. C. 415. Be this as it may, it is confessedly altogether

forfeiture because of alienage it is a general rule that so long as the convertible title is in a citizen, it is not a proper subject for escheat, although an alien may be entitled to the proceeds of a sale.¹ So where a use is executed before office found the property does not escheat.² A secret trust made for the purpose of defrauding the rights of the state will not be upheld.³ In order to avoid escheat the law will consider land held in trust as money, where it is directed by the testator trustee to be sold.⁴

3. Curtesy and Dower. — For a treatment of this subject in its application to curtesy and dower, reference is made to preceding articles in this work.⁵

IV. ENFORCEMENT — 1. Accrual and Limitation of Actions. — Statutory provisions fixing the time within which claimants may appear and assert their rights to property operate to prohibit the commencement of an action by the state within the prescribed period,⁶ and to bar an assertion of such claim after the expiration of such period.⁷ In *Texas* it has been held that laches or limitation cannot be interposed as a bar to the state's right of recovery.⁸ A remainder interest cannot be escheated until the expiration of the life estate, and the statute of limitations first begins to run from that date.⁹ Escheat proceedings cannot operate against one who acquired title to the property under the statute of limitations before the intestate's death.¹⁰ But an uncompleted

distinct from escheat, of which no further evidence need be required than that, in case of escheat, the property in England goes to the lord of whom the tenant held, whereas in case of alienation to an alien, it always goes to the crown, even though the land be holden of a mesne lord. Now, though it be true as decided in *Burgess v. Wheate*, that the interest of *cestui que trust* shall not escheat (that is, devolve upon the lord for want of a tenant) because the lord has in fact a tenant in the trustee, yet it surely does not follow that the trust estate of an alien shall not devolve on the crown, for the same reason; since the want of a tenant is not the reason upon which it ever devolves on the crown. The case of *Burgess v. Wheate* has, therefore, I conceive, no application here."

1. Right to Proceeds of Land in Alien. — In *Ludlow v. Van Ness*, 8 Bosw. (N. Y.) 178, the court said: "Forfeiture for alienism retains its feudal character. As long as there is a native owner of the land there can be no forfeiture for the alienism of any one who has right only by contract. This principle pervades modern decisions, so that if an alien has no interest in or control over the soil itself, but only a right to its proceeds whenever it passes by sale to the hands of another citizen or subject, while the right of conversion without the consent of the alien continually exists, neither the fee of the land nor any less estate can be made the subject of escheat by reason of such alienage. *Du Houmelin v. Sheldon*, 1 Beav. 79; on appeal, 4 Myl. & C. 525. Land over which an alien has no other control except to compel its lease or conversion into personal estate, so far as regards forfeiture for such alienage, is looked upon as already converted into personality, whether such right arises from conveyance, *Anstice v. Brown*, 6 Paige (N. Y.) 448, or devise, *Meakings v. Cromwell*, 5 N. Y. 136."

2. *St. Philip's v. Smith*, 4 McCord L. (S. Car.) 452.

3. *Leggett v. Dubois*, 5 Paige (N. Y.) 114, 28 Am. Dec. 413; *Hammekin v. Clayton*, 2 Woods (U. S.) 336.

4. In *Taylor v. Benham*, 5 How. (U. S.) 269, the court said: "And if the whole scope and design of the will could not otherwise be accomplished, it might not therefore be unjustifiable in a court of equity, in a case like this, to let the title vest in the executors first, for the purpose of being sold and turned into personal estate for the alien legatees, in order to avoid the very escheat now set up by the respondent. *Craig v. Leslie*, 3 Wheat. (U. S.) 577; *Bagshaw v. Spencer*, 1 Ves. 144; *Gibson v. Montford*, 1 Ves. 485; 4 Kent's Com. 304, 310, note; *Coster v. Lorillard*, 14 Wend. (N. Y.) 268. Indeed, a court of equity, if it should appear necessary, in order to avoid an escheat and to enforce any apparent devise of the testator when trustee, directing land to be turned into money and to go to certain legatees or *cestui que trusts*, will look to substance rather than form, will consider the act as done at once which is directed to be done, and the land as money, and thus to be passed to those entitled to it. *Peter v. Beverly*, 10 Pet. (U. S.) 563; *Craig v. Leslie*, 3 Wheat. (U. S.) 563; *Hawley v. James*, 5 Paige (N. Y.) 318; *Bogert v. Hertell*, 4 Hill (N. Y.) 495; 2 Story's Eq. Jur., § 790; *Newland on Contr.*, 48-64, and authorities cited." *Compare Com. v. Martin*, 5 Munf. (Va.) 117.

5. See the titles ALIENS, vol. 2, p. 74; CURTESY, vol. 8, p. 526; DOWER, vol. 10, p. 202.

6. Limitation of Actions. — *State v. Smith*, 70 Cal. 153; *People v. Roach*, 76 Cal. 294.

7. *State v. Smith*, 70 Cal. 153, holding that any assertion of claim by adverse possession, conveyance, or otherwise will operate to suspend the statute.

8. *Ellis v. State*, 3 Tex. Civ. App. 170.

9. *Com. v. Naille*, 88 Pa. St. 420.

10. *Wilkins v. Tart*, 3 McCord L. (S. Car.) 518, the court saying: "The grantee and those claiming under him had been in the enjoyment of the land from the time of the grant to the time the plaintiff was ejected by the defendant. And though there were occasional intervals in which it was not in the actual occupation of any one, yet it was not occupied by any other

adverse possession will not avail against the state's title acquired meanwhile through escheat proceedings.¹

2. Who May Maintain Escheat Proceedings — *a. THE STATE.* — The law is uniform that the state alone can assert a right to property under and by virtue of a claim of escheat.² But the state prerogative in no manner prevents the settlement of other conflicting claims.³ This rule is simply a phase of the larger principle that where the state is a party in interest, it alone can assert such interest.⁴

Estoppel. — The state cannot interfere, by way of escheat proceedings, with a title which it has previously given.⁵ So, too, the passage of a law surrendering the title of the state, or removing a disability to the succession, precludes the state from asserting an escheat.⁶ In *Maryland* the chancellor, sitting as a judge of the land office, applied the principles of equity jurisprudence in relation to escheat proceedings.⁷

Injunction. — But a court of equity has no power to enjoin escheat proceedings where every question raised can be determined in such proceeding.⁸

Appropriation of Escheated Property to Specific Fund. — While the state may provide that escheat property be appropriated to a specific fund or board, an action for the recovery of such property must be brought in the name of the state.⁹

b. THE ESCHATOR. — The statutes of the various states usually impose upon some public officer the duty of proceeding in escheat cases,¹⁰ while under other jurisdictions such proceedings are carried on by or against a special officer known as the escheator,¹¹ and such escheator or deputy is entitled to reasonable compensation for services rendered, although the proceeding fails because of the discovery of next of kin.¹² So if the escheator employs counsel, a reasonable allowance should be made for that item.¹³

3. Who May Contest Escheat Proceedings. — In General all persons claiming an interest in the property may contest escheat proceedings.¹⁴

person, nor does there appear to have been any adverse claim. If, therefore, Walker was alive, and there was no evidence of his death until 1815, when the inquest was commenced, his right of action was barred before that time. If he was dead then the land was vested in the trustees of the Marion Academy, by the Act of 1814, which transferred to them all the escheated lands in the district. And the defendant was protected by his own possession against their claim, before the commencement of this action."

1. *Hall v. Gittings*, 2 Har. & J. (Md.) 112, *Holmes v. Pattison*, 25 Pa. St. 484.

2. **Who May Maintain Proceedings.** — *Beatty v. Benton*, 73 Ga. 187; *State v. Meyer*, 63 Ind. 33; *Johnston v. Spicer*, 107 N. Y. 185; *Maynard v. Maynard*, 36 Hun (N. Y.) 227.

3. *Beatty v. Benton*, 73 Ga. 187.

4. *Carlow v. Aultman*, 28 Neb. 672.

5. **Estoppel.** — *Com. v. André*, 3 Pick. (Mass.) 224, holding that a conveyance for a valuable consideration to an alien, his heirs and assigns, with warranty, by the commonwealth, estopped it from setting up such alienage as a ground of escheat. See also *Jackson v. Colver*, 1 Wend. (N. Y.) 488. In *Armstrong v. Bittinger*, 47 Md. 103, it was held that, in the absence of fraud or imposition, a party purchasing land supposed to be vacant would be protected in such purchase, although in fact such land came to the state by escheat.

6. *Wainwright v. Low*, 57 Hun (N. Y.) 386.

7. In *Jones v. Badley*, 4 Md. Ch. 167, the court said: "Now upon a bill in equity it

could not, it seems to me, be successfully contended that the state, after selling her lands, as has been done in this case, receiving the purchase money, and after the innocent purchaser had erected improvements upon the property purchased, could reclaim them on the ground that the mode in which the title was proposed to be acquired was not the appropriate one. In this case the state has neither been defrauded nor prejudiced, and if she withholds the grant will be inflicting a serious injury upon the purchaser, because, in that event, it would be depriving him of the privilege of testing the validity of his title in a court of law."

8. *Olmsted's Appeal*, 86 Pa. St. 284.

9. *Puckett v. State*, 1 Sneed (Tenn.) 355, construing the *Tennessee* Act of 1829, c. 43, § 1, and subsequent legislation.

10. See *Comp. Stat. Neb.* 1897, c. 73, § 71.

11. *Gresham v. Rickenbacher*, 28 Ga. 227; *Smith v. Gentry*, 16 Ga. 31; *Bolls v. Duncan*, *Walk. (Miss.)* 161; *Gill v. Douglass*, 2 *Bailey L. (S. Car.)* 387; *Nettles v. Cummings*, 9 *Rich. Eq. (S. Car.)* 440; *Sands v. Lynham*, 27 *Gratt. (Va.)* 291, 21 *Am. Rep.* 348; *Jakey's Estate*, (O. Ct.) 3 *Pa. Dist. Rep.* 750, 15 *Pa. Co. Ct. Rep.* 377, 35 *W. N. C. (Pa.)* 476; *Bassett, Landholding in Colonial North Carolina*, 11 *Law Quar. Rev.* 154, 158.

12. *Bryant's Estate*, (O. Ct.) 4 *Pa. Dist. Rep.* 192, 16 *Pa. Co. Ct. Rep.* 321; *Gresham v. Rickenbacher*, 28 Ga. 227.

13. *Gresham v. Rickenbacher*, 28 Ga. 227.

14. **All Interested Claimants May Defend** — *Indiana.* — *State v. Meyer*, 63 Ind. 33.

Thus the Grantee of a Child Adopted by the Intestate under the laws of another state may defend.¹

All Parties Interested Must Be Represented. — A sale of escheated lands is void where not all the parties were before the court.²

An Administrator of the deceased who claims to hold the property in controversy by gift may resist escheat.³

Heirs of course have an unquestioned right to appear and assert their claims,⁴ and so have the heirs and kindred of any partner in a proceeding to escheat partnership property.⁵ Even after escheat proceedings have been concluded and the property has passed into other hands by legislative grant, the heirs may raise an issue upon the question of compensation from the state.⁶ But after the state has acknowledged the claim of an heir he cannot continue the escheat proceeding in the name of the state for his own benefit.⁷

Occupants. — Possession of escheated property is a good defense against the claims of all except the state,⁸ and a mere occupant may defend.⁹ But one in possession may not plead the title of the state against a rival claimant.¹⁰ This, however, is subject to the right of a grantee from the state of escheat lands to enter and maintain ejectment under such title,¹¹ and in an action by the state the occupant must show good title in himself.¹²

Rents. — The state cannot, under claim of title by escheat, contest the right of an occupant to the rents of real estate where, upon the determination of a life estate, the fee reverts to the heirs of the grantor, such possession being subject only to the claims of one having a better title.¹³

But a Claimant for Improvements was refused a hearing.¹⁴

And an Amicus Curiae was denied the right of appeal.¹⁵

4. Evidence — a. IN GENERAL. — To establish escheat the state must show by competent evidence all the facts necessary therefor,¹⁶ and in general the established rules of evidence apply in escheat proceedings.¹⁷ In *Pennsylvania* a judgment for the traverser was reversed because the state had not been permitted to show the insanity of the intestate when he executed a deed of bargain and sale under which the traverser claimed.¹⁸ The record of the proceeding is the only competent evidence by which a title by escheat may be established.¹⁹

New York. — *People v. Cutting*, 3 Johns. (N. Y.) 1.

Pennsylvania. — *Com. v. Crompton*, 137 Pa. St. 138; *Com. v. North American Land Co.*, 57 Pa. St. 102.

Texas. — *Wiederanders v. State*, 64 Tex. 133.

Virginia. — *Dunlop v. Com.*, 2 Call (Va.) 284.

1. *State v. Meyer*, 63 Ind. 33.

2. In *Hinkle v. Shadden*, 2 Swan (Tenn.) 46, and *Parchman v. Charlton*, 1 Coldw. (Tenn.) 381, it was held that a sale without making the school commissioners (the school fund being beneficiary of escheat property) a party to the proceeding is void.

3. *Com. v. Crompton*, 137 Pa. St. 138.

4. *Ex p. Williams*, 13 Rich. L. (S. Car.) 77.

5. *Com. v. North American Land Co.*, 57 Pa. St. 102.

6. *Ex p. Williams*, 13 Rich. L. (S. Car.) 77.

7. *State v. Engle*, 21 N. J. L. 347.

8. *Beatty v. Benton*, 73 Ga. 187.

9. *People v. Cutting*, 3 Johns. (N. Y.) 1.

10. *Croner v. Cowdrey*, 139 N. Y. 471, 36 Am. St. Rep. 716.

11. *State University v. Johnston*, 1 Hayw. (I. N. Car.) 373.

12. *French v. Com.*, 5 Leigh (Va.) 512, 27 Am. Dec. 613.

13. *Linton's Estate*, 7 Pa. Dist. Rep. 129.

14. *Brown v. State*, 36 Tex. 282.

15. *Dunlop v. Com.*, 2 Call (Va.) 284.

16. **Evidence.** — In *Catham v. State*, 2 Head (Tenn.) 554, it was held that a failure to establish such necessary facts is sufficient ground for setting aside a verdict in favor of the state and for granting a new trial.

17. See the title EVIDENCE, *post*.

Particular Instances. — In *Den v. O'Hanlon*, 21 N. J. L. 582, and *O'Hanlin v. Den*, 20 N. J. L. 31, it was held that an inquisition in escheat is competent but not conclusive evidence of the facts therein found, although no judgment has been entered thereon. But see *Ramsey's Appeal*, 2 Watts (Pa.) 228, wherein it was held that an inquisition which does not find that the decedent died intestate and without heirs is a nullity.

In *Jackson v. Etz*, 5 Cow. (N. Y.) 314, it was held that hearsay evidence of the finding of the body and of the burial of one supposed to be dead is inadmissible, though otherwise as to the fact of his death; further, that it is *prima facie* evidence of death that one was missing at a particular time coincident with a report and general belief of death.

18. *Matter of Desilver*, 5 Rawle (Pa.) 111, 28 Am. Dec. 645.

19. *Wallahan v. Ingersoll*, 117 Ill. 123.

b. PRESUMPTIONS — Heirs. — The presumption of law is that every deceased person leaves one or more heirs who are capable of inheriting.¹ It therefore follows that in proceedings to obtain land by escheat the burden is upon the claimant to rebut such presumption by proof.² On the other hand, one claiming as an heir must prove his heirship, and mere negative testimony is not sufficient.³

Presumption as to Character of Land. — When the escheatable character of land has been once established it is presumed to continue.⁴

Abandonment — Death of Heirs. — And after a great lapse of time without the appearance of claimants, abandonment or death of heirs will be presumed.⁵

In Case of Aliens. — Although the law presumes an heir, yet if the person claiming to be such heir is an alien and for that reason cannot take by descent, no presumption will be indulged in his favor.⁶ Alienage once established is presumed to continue.⁷

Escheat Patent. — An escheat warrant is *prima facie* evidence that the land was liable to escheat at its date,⁸ but not of any fact prior thereto.⁹

1. Heirs Presumed — Illinois. — *Wunderle v. Wunderle*, 144 Ill. 40; *Fell v. Young*, 63 Ill. 106; *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Pile v. McBratney*, 15 Ill. 314.

Kentucky. — *Louisville Bank v. Public School Trustees*, 83 Ky. 219.

Massachusetts. — *Wilbur v. Tobey*, 16 Pick. (Mass.) 177.

New York. — *Ettenheimer v. Heffernan*, 66 Barb. (N. Y.) 374.

North Carolina. — *State University v. Harrison*, 90 N. Car. 385.

Texas. — *Hanna v. State*, 84 Tex. 664.

Mere Absence Not Sufficient. — *Louisville Bank v. Public School Trustees*, 83 Ky. 219, wherein the court said: "It is true that, speaking in the broadest legal sense, comparatively few persons die without heirs, either near or remote, and that the doctrine of escheat proceeds upon the ground that no person appears to claim the estate; but in a case like this, where nothing is shown by the testimony but mere absence, it should not be presumed that the person died without heirs, or that none will appear to claim the property. Other circumstances besides absence should be shown from which such a presumption may be fairly drawn."

In *State University v. Harrison*, 90 N. Car. 385, evidence was introduced to show that the deceased had not been heard from for a long period of time, and that no information had been received that he ever married or had children, and the trial court instructed the jury that this was presumptive that there were no heirs. Upon this instruction the court said: "Now while this negative evidence is competent and perhaps sufficient to warrant the finding of the jury, it does not raise such a presumption that there are no persons capable of succeeding to the inheritance, requiring the defendants to combat it; but it was for the jury to consider and estimate its proper force in arriving at a verdict upon the issue before them. Indeed, the presumption is the other way, and it rested upon the plaintiff to offer proof in overcoming it. It is true, language almost identical with that contained in the instruction is used in the opinion in *State University v. Johnston*, 1 Hawy. (1 N. Car.) 373, but it is an unsafe guide to follow, as a general rule, in determining upon an escheat. It was said in regard to a grantee who, within a year or two after the issue of the grant in

1763, left the country intending to go to Ireland, and of whom nothing had been heard for more than thirty years, during which had occurred events which rendered the people of Ireland aliens and incapable of transmitting lands, owned by them in this state, by descent."

In *Hanna v. State*, 84 Tex. 664, in an escheat proceeding by the state, the evidence relied upon by the state to raise the presumption of death of the original patentee without heirs was the failure to list the land for taxation and to pay taxes upon it; but this was held not to be sufficient proof that no lawful claim had been asserted to the land for the period of seven years.

2. Burden of Proof. — *State University v. Harrison*, 90 N. Car. 385.

3. Townsend's Succession, 40 La. Ann. 66.

4. In *Hammond v. Inloes*, 4 Md. 138, it was held that an escheat patent once issued between *prima facie* evidence that the land was liable to escheat at such time and an act of the assembly that the property had escheated would have the same effect.

5. Lapse of Time. — In *Sutton v. McLeod*, 29 Ga. 589, the court said: "The old grants bear date in 1795. Had proof been made that the grantee had not been known in that section of the state, from that time down, or for a half century, or any other long series of years, nor his heirs at law or representatives, or any one claiming said land as his, the jury would have been justified in presuming that the land had reverted to the state before it was regranted in 1845. For I hold that every reasonable presumption should be made against these old land titles. The public peace, as well as justice to private rights which have intervened, demands the enforcement of this policy to the fullest extent." See also *Vickery v. Benson*, 26 Ga. 582. But see *Peterkin v. Inloes*, 4 Md. 175, where, under the facts in the case, a lapse of thirty-eight years was held not sufficient to raise a presumption of escheat.

6. *Ettenheimer v. Heffernan*, 66 Barb. (N. Y.) 374.

7. *Hauenstein v. Lynham*, 100 U. S. 483.

8. *Hammond v. Inloes*, 4 Md. 138; *Casey v. Inloes*, 1 Gill (Md.) 430; *Lee v. Hoyer*, 1 Gill (Md.) 158; *Clements v. Ruckle*, 9 Gill (Md.) 326; *Goodwin v. Caton*, 4 Md. Ch. 160; *Hall v. Gittings*, 2 Har. & J. (Md.) 112.

9. *Wilson v. Inloes*, 6 Gill (Md.) 121.

Statutes. — In some states there are statutory provisions raising a presumption in favor of the state of death within a certain period.¹

V. CONSEQUENCES AND RESULTS OF ESCHAT PROCEEDINGS — 1. Conclusiveness of Judgment. — The proceeding in escheat being in the nature of one *in rem*, a judgment based upon a strict compliance with all of the requirements of the law is conclusive, as to the state's title, upon all persons having either actual or constructive notice.² But while a presumption of regularity may arise from recitals in the judgment such presumption cannot prevail against record evidence of insufficiency,³ or indisputable evidence of basic falsity.⁴ Further, the judgment must contain all of the findings necessary to authorize an escheat proceeding.⁵ Judgment in an action in which the state is not a party in no manner binds it, and a sale thereunder passes none of the state's rights.⁶

2. When Title of State Vests — a. GENERAL RULE. — Inasmuch as the freehold must always vest somewhere, the authorities uniformly hold that whenever there is a defect of heirs the title passes at once.⁷ But this rule is limited in some decisions to cases in which the intestate is an alien, because he can

1. In *Hanna v. State*, 84 Tex. 664, the following statute was quoted: "By the Act of March 24, 1895 (Gen. Laws, p. 35), it is provided: 'Where no lawful claim is asserted to or lawful acts of ownership exercised in such property for the period of seven years, and this has been proved to the satisfaction of the court, it shall be deemed *prima facie* evidence of the death of the owner and of the failure of heirs, and the court trying the case may, if such evidence is not rebutted, find therefrom in favor of the state.'"

2. **Judgment in Escheat Proceedings.** — *Hamilton v. Brown*, 161 U. S. 256, *Treasurer v. Wygall*, 51 Tex. 621.

3. *Newman v. Crows*, 60 Fed. Rep. 220; *State v. Teulon*, 41 Tex. 249.

4. In *Pinson v. Ivey*, 1 Yerg. (Tenn.) 296, it was held that a judgment reciting the death of a former owner, where as a fact he was not dead, is a nullity.

5. In *Ramsey's Appeal*, 2 Watts (Pa.) 228, the court said: "In the inquisition produced here it is not found that the decedent died intestate, and without heirs or any known kindred; but that is said to be no more than an irregularity which cannot be admitted collaterally to destroy the properties of the instrument, just as irregularities in a judgment cannot be admitted collaterally to destroy the incident of its lien, while the judgment itself is suffered to stand. But a judgment itself may be treated as a nullity when it is deficient in an integral part; as may be collected from *Helvete v. Rapp*, 7 S. & R. (Pa.) 306, the record of which was barely saved from that consequence by being found to contain the substance, though not the form, of all the essential parts of a judgment; and in *Philadelphia Bank v. Craft*, 16 S. & R. (Pa.) 347, where a judgment confessed for a sum to be ascertained by the prothonotary was held not to give a lien from the date, we have the very case. That is not all. By the act on which the lien depends, a copy of the inquisition is to be filed in the prothonotary's office for purposes of lien only when an escheat is found to have occurred; so that the omission of that indispensable fact is made fatal to the argument by the very words of the statute."

In *Dunlop v. Com.*, 2 Call (Va.) 284, the *quære* was raised whether or not the finding should not be in express words that the deceased "died without heirs."

6. In *Sands v. Lynham*, 27 Gratt. (Va.) 291, 21 Am. Rep. 348, an intestate of foreign birth died seized of real estate and without heirs. It was held that the property vested *eo instante* in the state, and that a judgment for debt and sale thereunder to which the state was not a party was a nullity and the purchaser acquired no title. See *Bradley v. Dwight*, 62 How. Pr. (N. Y. Supreme Ct.) 300.

7. **General Rule as to When Title Vests — England.** — In *Doe v. Redfern*, 12 East. 96, the common-law rule was not determined, but the opinion inclined to the view that upon the death of a tenant without heirs the right and possession must be presumed to be immediately in the crown.

United States. — *Taylor v. Benham*, 5 How. (U. S.) 233.

Alabama. — *Etheridge v. Malempre*, 18 Ala. 565.

Indiana. — *Reid v. State*, 74 Ind. 252.

Kentucky. — *White v. White*, 2 Metc. (Ky.) 185; *Fry v. Smith*, 2 Dana (Ky.) 39; *Stevenson v. Dunlap*, 7 T. B. Mon. (Ky.) 134.

Maryland. — *Jones v. Badley*, 4 Md. Ch. 167; *Casey v. Inloes*, 1 Gill (Md.) 430; *Hall v. Gittings*, 2 Har. & J. (Md.) 112.

Michigan. — *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430.

Missouri. — *Farrar v. Dean*, 24 Mo. 16.

Nebraska. — *State v. Reeder*, 5 Neb. 203.

New Hampshire. — *Montgomery v. Dorion*, 7 N. H. 475.

New Jersey. — *Colgan v. McKeon*, 24 N. J. L. 566; *Den v. O'Hanlon*, 21 N. J. L. 582; *O'Hanlin v. Den*, 20 N. J. L. 31.

New York. — *Ettenheimer v. Heffernan*, 66 Barb. (N. Y.) 374; *Jackson v. Lunn*, 3 Johns. Cas. (N. Y.) 109; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360; *McCaughal v. Ryan*, 27 Barb. (N. Y.) 376. But see *Jackson v. Adams*, 7 Wend. (N. Y.) 368, wherein, under a provision of the legislature, it was held that the right of the state to enter and take possession does not accrue until office found in the case of an alien dying without heirs.

have no heirs, and inasmuch as in other cases the presumption is that the deceased has heirs, the commonwealth does not become seized until, under proper proceedings, such presumption has been overcome, and therefore until such time the title is simply in abeyance.¹ Nor does the rule apply where under the constitution the legislature must provide specific methods for the enforcement of escheats.² Under the proprietary government in *Maryland* it was held that the proprietor could complete his title only by entry or writ of escheat, and that by previously accepting rent his title was barred.³

Devise — Purchase — Attainder. — In case of a devise, as where an alien who is incapable of inheriting takes under a will,⁴ or in the analogous case of purchase,⁵ the land vests in such devisee subject only to disposition by the state upon office found. And where lands are forfeited by attainder the same rule is applied.⁶

b. WHERE PARTIES ARE IN POSSESSION. — But an equally uniform rule prevails that the state cannot interfere with another's possession until the prescribed steps have been taken to establish its own.⁷ This rule is subject,

Pennsylvania. — *Rubeck v. Gardner*, 7 Watts (Pa.) 455. See also *Com. v. Weart*, 12 Phila. (Pa.) 345, 35 Leg. Int. (Pa.) 456.

Rhode Island. — *Haigh v. Haigh*, 9 R. I. 26.

South Carolina. — *In re Malone*, 21 S. Car. 435, the court said: "Although the title is thus vested in the state immediately upon the death of the intestate leaving no heirs, yet the state will not undertake to dispose of the property until after it has been ascertained, in the mode prescribed by law, that the property has in fact escheated, and then only in the mode provided for by the escheat law — by sale — and will not regrant the land as vacant land. *Bodden v. Speigner*, 2 Brev. (S. Car.) 321. As is said by Cheves, J., in *City Council v. Lange*, 1 Mill (S. Car.) 454, 'the state forbears to exercise the right which the common law casts upon it, until that right is ascertained.' But while the state thus forbears to exercise the right of disposing of the property until the escheat has been ascertained, or, as it is usually expressed, until office found, it has always exercised the right of granting its rights in escheated property to corporations as well as private individuals, whether such property has been already declared escheated or not; and our court has distinctly held, in the case of *Nettles v. Cummings*, 9 Rich. Eq. (S. Car.) 440, that the legislature may grant future escheats; that is, an act conferring upon the Sumterville Academical Society property theretofore or thereafter escheated, to the amount limited in the act, was a valid grant of property which escheated after the passage of the act as well as before, up to the amount so limited."

Tennessee. — *Puckett v. State*, 1 Sneed (Tenn.) 355; *Hinkle v. Shadden*, 2 Swan (Tenn.) 46.

Texas. — *Holliman v. Peebles*, 1 Tex. 674, and *Horton v. Brown*, 2 Tex. 79, holding that abandonment by a colonist under the early colonization acts vested title at once in the state.

Virginia. — *Sands v. Lynham*, 27 Gratt. (Va.) 291, 21 Am. Rep. 348. But see *Com. v. Hite*, 6 Leigh. (Va.) 588, 20 Am. Dec. 226, wherein it was held that the failure of heirs, if the property was vacant, vests the right of possession at once in the state, but if the property is occu-

pied escheat proceedings are necessary to give possession; and further, under the then existing statute, that even if the possession is vacant, the investment of the commonwealth depends upon an inquisition duly returned.

1. Overcoming Presumption as to Heirs. — *Wilbur v. Tobey*, 16 Pick. (Mass.) 177; *Slater v. Nason*, 15 Pick. (Mass.) 345.

2. Where Specific Method of Enforcement Must Be Provided. — *Wiederanders v. State*, 64 Tex. 133.

3. Entry — Writ of Escheat — Accepting Rent. — *Kelly v. Greenfield*, 2 Har. & M. (Md.) 138.

4. In Case of Devise. — *Taylor v. Benham*, 5 How. (U. S.) 233; *Fairfax v. Hunter*, 7 Cranch (U. S.) 604; *Etheridge v. Malempre*, 18 Ala. 565; *Reid v. State*, 74 Ind. 252; *State v. Tilghman*, 14 Iowa 474.

5. Montgomery v. Dorion, 7 N. H. 475; *Jackson v. Lunn*, 3 Johns. Cas. (N. Y.) 109; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360; *McCaughal v. Ryan*, 27 Barb. (N. Y.) 376.

6. Attainder. — *Doe v. Clement*, 9 U. C. Q. B. 650; *Doe v. Wixon*, 5 U. C. Q. B. 132.

7. Where Parties Are in Possession — United States. — In *Manuel v. Wulff*, 152 U. S. 505, it was held that a deed of a mining claim to an alien is a good transfer, subject only to an action by the state. In *Cross v. De Valle*, 1 Wall. (U. S.) 5, the court held that a statute imposing the necessity of obtaining a license from the Probate Court does not affect the rule. In *Gouverneur v. Robertson*, 11 Wheat. (U. S.) 333, the court said: "That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard to the peace of society, and a desire to protect the individual from arbitrary aggression. Hence it is usually said that it has regard to the solemnity of the livery of seizin, which ought not to be divested without some corresponding solemnity. But there is one reason assigned by a very judicious compiler, which, from its good sense and applicability to the nature of our government, makes it proper to introduce it here. I copy it from Bacon, not having had leisure to ex-

however, to the limitations that one who claims merely by operation of law, as by descent, and has no inheritable blood, cannot hold possession until office found,¹ that the state has the power by legislative grant to remove a disability,² and that when a grant is made for a valuable consideration the state is estopped from setting up the disability of the grantee.³

3. Disposition of Escheat Property — *a. IN GENERAL.* — While escheat property belongs exclusively to the sovereign power,⁴ its disposition is usually regulated and curtailed by statutes whose provisions must be strictly followed.⁵ Thus a provision for the sale of escheated lands precludes their location as vacant lands.⁶ But it was held in *New York* that an act authorizing the commissioners of the land office to release escheated lands was not, with respect to lands escheated since its passage, a law appropriating public money or property so as to require the constitutional two-thirds vote of the legislature.⁷

amine the authority which he cites for it: 'Every person,' says he, 'is supposed a natural-born subject that is resident in the kingdom, and that owes a local allegiance to the king, till the contrary be found by office.' This reason, it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold." See also *Fairfax v. Hunter*, 7 Cranch (U. S.) 604; *Craig v. Radford*, 3 Wheat. (U. S.) 595.

Alabama. — *Smith v. Zaner*, 4 Ala. 99.

California. — *Racouillat v. Sansevain*, 32 Cal. 376, holding the rule to prevail under the civil law as well as at common law, and that so far as the rights of an alien, as such, are in question they cannot be considered in a collateral proceeding. In *People v. Folsom*, 5 Cal. 374, the court held that an alien may contest his right against every one, including the government, until office found.

Indiana. — In *Halstead v. Lake County*, 56 Ind. 363, it was held that at common law an alien may convey or mortgage where no inquest has been instituted, subject only to divestiture by the state.

Iowa. — In *Purczell v. Smidt*, 21 Iowa 540, the decision was in the negative, *i. e.*, that at common law an alien cannot acquire by purchase or convey a good title.

Louisiana. — *Perry v. Liquidation Com'rs*, 11 Rob. (La.) 404.

Maryland. — *M'Creery v. Allender*, 4 Har. & M. (Md.) 409; *Buchanan v. Deshon*, 1 Har. & G. (Md.) 280.

Massachusetts. — *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; *Com. v. André*, 3 Pick. (Mass.) 224; *Sheaffe v. O'Neil*, 1 Mass. 257.

Montana. — *Quigley v. Birdseye*, 11 Mont. 439, *distinguishing* *Tibbitts v. Ah Tong*, 4 Mont. 536, and *Wulf v. Manuel*, 9 Mont. 279. See also *Manuel v. Wulff*, 152 U. S. 505.

New York. — *Maynard v. Maynard*, 36 Hun (N. Y.) 227; *Wadsworth v. Wadsworth*, 12 N. Y. 376. In *Bradstreet v. Oneida County*, 13 Wend. (N. Y.) 546, it was held that an alien has not only the right to hold until office found, but may maintain an action for the recovery of real estate. In *Jackson v. Adams*, 7 Wend. (N. Y.) 368, it was held that a grant of lands by the state before office found is void. The *People v. Conklin*, 2 Hill (N. Y.) 67.

Tennessee. — *Williams v. Wilson*, Mart. & Y. (Tenn.) 248.

Virginia. — *Com. v. Hite*, 6 Leigh (Va.) 588, 29 Am. Dec. 226; *Marshall v. Conrad*, 5 Call (Va.) 364. But see *Com. v. Selden*, 5 Munf. (Va.) 160.

Canada. — *Doe v. Ramsay*, 9 U. C. Q. B. 105; *Doe v. Clement*, 9 U. C. Q. B. 650.

1. Descent. — In *Smith v. Zaner*, 4 Ala. 99, the common-law rule was affirmed that an alien cannot be heir to any one, and therefore has no rights to be divested by office found.

In *Reid v. State*, 74 Ind. 252, the distinction was apparently drawn in favor of the exception in a case where an alien dies intestate, seized of the property, but without leaving any one in possession and without known heirs, and it was held that in such case the state may enter and take possession without information found. *Montgomery v. Dorion*, 7 N. H. 475, holding that the real estate of an intestate citizen, without heirs, vests immediately without office found in the state. See also *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360. In *Com. v. Hite*, 6 Leigh (Va.) 588, 29 Am. Dec. 226, the exception was sustained in the event of a further contingency, *i. e.*, that the possession be vacant.

2. Roodell v. Jackson, 20 Johns. (N. Y.) 694, 11 Am. Dec. 351.

3. Estoppel. — *Com. v. André*, 3 Pick. (Mass.) 224. In *Reid v. State*, 74 Ind. 252, the question as to how far the state may be estopped by the acts of its ministerial officers was raised but not decided.

4. State v. Meyer, 63 Ind. 33; *Larreau v. Davignon*, 5 Abb. Pr. N. S. (Buffalo Super. Ct.) 367; *Holmes v. Pattison*, 25 Pa. St. 484.

5. Disposition of Escheat Property — Statutes. — *Straub v. Dimm*, 27 Pa. St. 36; *Bodden v. Speigner*, 2 Brev. (S. Car.) 321; *Hughes v. State*, 41 Tex. 10. In *Com. v. Weart*, 12 Phila. (Pa.) 345, 35 Leg. Int. (Pa.) 456, it was held that no sale can be made until the year has expired for filing the administrator's account in case of an escheat effected after the grant of letters of administration.

6. Bodden v. Speigner, 2 Brev. (S. Car.) 321; *Hughes v. State*, 41 Tex. 10. But see *Armstrong v. Bittinger*, 47 Md. 103, wherein long and *bona fide* occupancy of escheated lands purchased as vacant was held to vest title in the grantor.

7. Englishb v. Helmuth, 3 N. Y. 294.

A Receiver may be appointed of escheated realty and also of the rents and profits thereof, but such receiver is not entitled to the custody of the personality belonging thereto.¹

b. RELEASE AND CONVEYANCE—(1) *After Termination of Escheat Proceedings*.—The legislative department may release its claim and make special grants of escheated property.² The state may also, by legislative enactment, remove a disability, and release to persons who would, in the absence thereof, be entitled to the property.³ It may grant such property to a private society⁴ or to a school fund, either general,⁵ primary,⁶ university,⁷ or special.⁸ Conveyance by the state of escheated lands prevails over a *mesne* grant to another person, and a relinquishment to the state by a superior claimant will not inure to the benefit of an inferior claim, but passes the superior to the state.⁹

(2) *Pending Enforcement*.—The state may also convey property subject to escheat before proceeding to recover possession thereof, and such conveyance vests the grantee with all the right of the state to institute and maintain actions for the recovery of the land so conveyed.¹⁰ So, too, the legislature may, during the pendency of escheat proceedings, order an abatement of the same and release to the parties claiming adversely.¹¹ But after such release the claimant cannot proceed with the escheat in the name of the state for his own benefit.¹²

1. *Territory v. Forrest*, 1 Arizona 49, construing pages 561, 562, and 563, Comp. Laws Arizona. The court said: "Conceding the proceeding had in the District Court to decree the escheat of the estate of Cavenaugh to have been regular, and the appointment of a receiver in such proceedings to have been necessary and proper, was there any authority in said court to compel the administrator to turn over the personality of said estate to the receiver? We think there was not, and that the court in making such order acted without authority of law and in excess of its legitimate jurisdiction. The statute relating to escheats, Compiled Laws, pages 561, 562, 563, nowhere contemplates, even when a receiver is appointed, that he shall be the custodian of the estate beyond the realty and the rents and profits thereof; but expressly provides that the administrator shall proceed to settle the estate as in other cases; and after all just debts against the estate are paid, together with the expenses of administration, shall pay over the residue of moneys belonging to the estate, if any there be, not to the receiver, but to the territorial treasurer, who shall place the same in the general fund of the territory. It is proper to add that the District Court of the territory have only appellate jurisdiction of matters properly cognizable in the Probate Courts, and that the exercise of other than appellate jurisdiction in such matters is unauthorized by law. Our decision is, and it is so ordered, that the District Court of the second judicial district in and for the county of Yuma so modify its order herein as to make the receiver so appointed the custodian only of the real property, with the rents and profits thereof, and that said order, so far as it requires the administrator, the relator herein, to turn over the moneys or other personal property of said estate to said receiver, be vacated."

2. *Special Grants of Escheat Property*.—Mc-

Caughal *v. Ryan*, 27 Barb. (N. Y.) 376.

In *Maryland* it has been held that the title of a party commences from the date of the escheat and warrant, and the patent, when granted, relates back to the date of the warrant. *Smith v. Devecmon*, 30 Md. 473; *Owings v. Norwood*, 2 Har. & J. (Md.) 96. See also *Howard v. Moale*, 2 Har. & J. (Md.) 249; *Casey v. Inloes*, 1 Gill (Md.) 507.

3. *Removal of Disability*—*Alabama*.—*Congregational Church v. Morris*, 8 Ala. 182.

California.—*State v. Smith*, 70 Cal. 153.

Connecticut.—*Evan's Appeal*, 51 Conn. 435.

Georgia.—*Gresham v. Rickenbacher*, 28 Ga. 227.

Iowa.—*Purczell v. Smidt*, 21 Iowa 540.

New Hampshire.—*Montgomery v. Dorion*, 7 N. H. 475.

New Jersey.—*Colgan v. McKeon*, 24 N. J. L. 566.

South Carolina.—*Nettles v. Cummings*, 9 Rich. Eq. (S. Car.) 440.

4. *Nettles v. Cummings*, 9 Rich. Eq. (S. Car.) 440.

5. See *Hinkle v. Shadden*, 2 Swan (Tenn.) 46.

6. *Crane v. Reeder*, 22 Mich. 322.

7. *State University v. Harrison*, 90 N. Car. 385; *Den v. Foy*, 1 Murph. (5 N. Car.) 58.

8. *Louisville Bank v. Public School Trustees*, 83 Ky. 219, construing a statute vesting all of certain deposits in the public schools of the city of Louisville and holding the same constitutional except so far as it provided for all deposits.

9. *Smith v. Hart*, 6 T. B. Mon. (Ky.) 625.

10. *Gresham v. Rickenbacher*, 28 Ga. 227; *Colgan v. McKeon*, 24 N. J. L. 566; *McCaughal v. Ryan*, 27 Barb. (N. Y.) 376; *Rubeck v. Gardner*, 7 Watts (Pa.) 455; *In re Malone*, 21 S. Car. 435. But see *contra*, *Jack-*

v. Adams, 7 Wend. (N. Y.) 368.

11. *State v. Tilghman*, 14 Iowa 474.

12. *State v. Engle*, 21 N. J. L. 347.

c. RIGHTS OF CREDITORS. — Aside from questions arising as to the jurisdiction of certain courts to direct the sale of escheat lands for the payment of debts, the decisions are uniform that the state takes title subject to liens existing at the death of the intestate.¹ In *Alabama* it has been held that the Orphans' Court has authority to direct escheat lands to be sold for the payment of debts,² but the contrary rule has been announced in *New Jersey*.³

1. Rights of Creditors. — *Congregational Church v. Morris*, 8 Ala. 182; *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Casey v. Inloes*, 1 Gill (Md.) 430; *Cunningham v. Browning*, 1 Bland (Md.) 299; *Sewall v. Lee*, 9 Mass. 364; *Den v. O'Hanlon*, 21 N. J. L. 582; *O'Hanlin v. Den*, 20 N. J. L. 31; *Farmer's L. & T. Co. v. People*, 1 Sandf. Ch. (N. Y.) 139; *Mooers v. White*, 6 Johns. Ch. (N.

Y.) 360; *Com. v. Weart*, 12 Phila. (Pa.) 345, 35 Leg. Int. (Pa.) 456; *Parchman v. Charlton*, 1 Coldw. (Tenn.) 381; *Hinkle v. Shadden*, 2 Swan. (Tenn.) 47; *Watson v. Lyle*, 4 Leigh (Va.) 236; *Day v. Murdoch*, 1 Munf. (Va.) 460.

2. *Congregational Church v. Morris*, 8 Ala. 182.

3. *Den v. O'Hanlon*, 21 N. J. L. 582.

ESCROW.

BY A. S. H. BRISTOW.

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CROSS-REFERENCES.

See also the titles *ALTERATION OF INSTRUMENTS*, vol. 2, p. 181; *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65; *BONDS*, vol. 4, p. 618; *DEEDS*, vol. 9, p. 87; *EXECUTION AND PROOF OF DOCUMENTS*, *post*.

I. DEFINITION. — A delivery in escrow is the delivery of a deed or other instrument to a stranger with the direction that he shall deliver it to the grantee or the party for whose benefit the instrument is made, upon the fulfilment by the latter of some condition or the performance of some obligation, or upon

the happening of some event, the depositor reserving the right to reclaim the deed if the condition is not fulfilled or the event does not happen.¹

II. HOW CREATED — 1. In General. — Whether, when an instrument is executed and not immediately delivered to the grantee, but handed to a stranger to be delivered to the grantee at a future time, it is to be considered as a deed of the grantor presently or as an escrow, is often a matter of doubt, and it will generally depend rather on the words and purposes expressed than upon the name which the parties give to the instrument.²

No Particular Form of Words Necessary. — It may be stated as a general rule that no particular form of words is necessary to constitute an escrow.³ Thus it is well settled that it is not necessary that the term "escrow" should be used, when an instrument is delivered to a third person, to prevent its taking immediate effect. That term would, perhaps, evince more clearly and distinctly than any other the actual intention of the parties; but where such intention is indicated in any other manner, effect is to be given to it unless the technical or legal phrasology employed by the parties renders it impracticable.⁴

1. Definition. — *Raymond v. Smith*, 5 Conn. 555; *Davis v. Clark*, 58 Kan. 100, *citing* 6 AM. AND ENG. ENCYC. OF LAW 857; *Day v. Lacasse*, 85 Me. 244; *Patrick v. McCormick*, 10 Neb. 1; *Wier v. Batdorf*, 24 Neb. 86; *Hinman v. Booth*, 21 Wend. (N. Y.) 267; *Easton v. Driscoll*, 18 R. I. 318, *citing* 6 AM. AND ENG. ENCYC. OF LAW 857; *Smith v. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179.

"Says Dixon, C. J., in *Prutsmann v. Baker*, 30 Wis. 644, 11 Am. Rep. 592: 'A conditional delivery is and can only be made by placing the deed in the hands of a third person, to be kept by him until the performance of some condition or conditions by the grantee, or some one else, or until the happening of some event, when, upon the performance or happening of which, the deed is to be delivered over by the depositary to the grantee.' " *Schmidt v. Deegan*, 69 Wis. 300.

In *Sheppard's Touchstone* 59, it is said: "The delivery of a deed as an escrow is said to be when one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed, and then be delivered to him to whom the deed is made to take effect as his deed. And so a man may deliver a deed, and such delivery is good." See also *Gaston v. Portland*, 16 Oregon 259; *Baum's Appeal*, 113 Pa. St. 58.

"Escrow" Used to Denote the Writing or Instrument. — The term "escrow" is used in the decisions to denote the writing or instrument as well as the conditional delivery itself. *White v. Bailey*, 14 Conn. 271; *Davis v. Clark*, 58 Kan. 100, *citing* 6 AM. AND ENG. ENCYC. OF LAW 857; *Jackson v. Sheldon*, 22 Me. 569; *Harkreader v. Clayton*, 56 Miss. 383, 31 Am. Rep. 369; *State Bank v. Evans*, 15 N. J. L. 155, 28 Am. Dec. 400; *Easton v. Driscoll*, 18 R. I. 318, *citing* 6 AM. AND ENG. ENCYC. OF LAW 857; *Evans v. Gibbs*, 6 Humph. (Tenn.) 405.

In *James v. Vanderheyden*, 1 Paige (N. Y.) 385, the court said: "It is essential to an escrow that it be delivered to a third person, to be delivered by him to the obligee or grantee, upon the happening of some event or the performance of some condition, from which time it becomes an absolute deed."

In *Mudd v. Green*, (Ky. 1889) 12 S. W. Rep. 139, the court said: "An escrow, as now interpreted, is a writing delivered to a third party to hold until the happening of some event, as until it is signed by another party, or until a suit be dismissed."

2. How Escrow Created in General. — *Foster v. Mansfield*, 3 Met. (Mass.) 412, 37 Am. Dec. 154.

3. No Particular Form of Language Necessary to Constitute an Escrow. — *White v. Bailey*, 14 Conn. 275; *Smith v. South Royalton Bank*, 32 Vt. 345, 76 Am. Dec. 179.

4. Term "Escrow" Not Essential. — *Murray v. Stair*, 2 B. & C. 82, 9 E. C. L. 33; *White v. Bailey*, 14 Conn. 271; *Jackson v. Sheldon*, 22 Me. 570; *Andrews v. Farnham*, 29 Minn. 249; *Lindley v. Groff*, 37 Minn. 338; *Clark v. Gifford*, 10 Wend. (N. Y.) 310; *Gilbert v. North American F. Ins. Co.*, 23 Wend. (N. Y.) 46, 35 Am. Dec. 543; *Gaston v. Portland*, 16 Oregon 255.

In *Bowker v. Burdekin*, 11 M. & W. 128, Parke, B., said: "I take it to be now settled, though the law was otherwise in ancient times, * * * that in order to constitute the delivery of a writing as an escrow it is not necessary it should be done by express words, but you are to look at all the facts attending the execution, to all that took place at the time, and to the result of the transaction; and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow."

Delivery of Writing "as Deed" Operative as Escrow. — In *State Bank v. Evans*, 15 N. J. L. 158, 28 Am. Dec. 400, the court said: "A distinction was taken by the counsel for the plaintiffs, and seems to be recognized in some of the books, between the delivery of the instrument as the deed of the party, to a third person as a trustee or agent, to be delivered to the grantee upon the happening of some contingency or the performance of a condition; and a delivery of the instrument as an escrow, to take effect as a deed upon such contingency happening or condition performed. In the former case it is supposed to be the party's deed presently, and in the latter, not until the

A Question for the Jury. — What the nature of the delivery was, whether absolute or conditional, and what were the actual intentions of the parties, are always questions of fact to be settled by the jury where the evidence leaves any doubt upon the subject.¹

2. The Contract or Instrument. — In order that an instrument may operate as an escrow, not only must there be sufficient parties, a proper subject-matter, and a consideration, but the parties must have actually contracted. When the instrument purports to be a conveyance of land, for instance, the grantor must have sold and the grantee must have purchased the land. A proposal to sell or a proposal to buy, though stated in writing, will not be sufficient. The minds of the parties must have met, the terms must have been agreed upon, and both must have assented to the instrument as a conveyance of the land, which the grantor would then have delivered and the grantee received, except for the agreement then made that it be delivered to a third person, to be kept until some specified condition be performed and thereupon be delivered to the grantee by such third person.² The instrument evidencing a contract to be deposited as an escrow, though usually, is not necessarily, a deed. It may be a mortgage, bond, or note, or other obligatory writing.³

event happens, or the condition be performed. Accordingly in Comyns's Dig., tit. Fait, A 3, it is said: 'If it be delivered as his deed to a stranger, to be delivered to the party upon the performance of a condition, it shall be his deed presently, and if the party obtain it, he may sue before condition performed;' and for this the Digest cites 2 Roll. 25, L. 30, and 1 Leon. 152. And again, in the same division of the Digest, it is said: 'If it be delivered to a stranger as an escrow, to be his deed upon performance of conditions, it is not his deed till the conditions are performed, though the party happens to have it before;' and for this is cited Co. Litt. 36a. The same distinction appears to be recognized by the court in the case of *Murray v. Stair*, 2 B. & C. 82, 9 E. C. L. 33; and Chancellor Kent in his Commentaries, vol. 4 (1st ed.) 447, takes notice of the doctrine, and refers to Perkins 143, 144; Holt, C. J., *Bushell v. Pasmore*, 6 Mod. 217; and Parsons, C. J., *Wheelwright v. Wheelwright*, 2 Mass. 452, 3 Am. Dec. 66, as sustaining it. But the learned commentator just mentioned says in a note: 'The distinction on this point is quite subtle, and almost too evanescent to be relied on.' In this I fully concur, and indeed do very much doubt whether there is any just foundation in the law for such a distinction. In *Johnson v. Baker*, 4 B. & Ald. 440, 6 E. C. L. 551, the court say that the case cited by Baron Comyns from 1 Leon. 152 is that of *Degory v. Roc*, and though three of the judges so expressed themselves in argument against the opinion of the court, yet it does not appear by the report of the case in 1 Leon. 152 to have been so decided; but that upon looking into the same case as reported in Moore 300 it was decided the other way. In *Murray v. Stair*, 2 B. & C. 82, 9 E. C. L. 33, although Chief Justice Abbott recognized the distinction between a writing delivered as a deed, to an agent or trustee, and one delivered as an escrow upon condition, yet he has drawn no distinctive marks by which to determine whether a delivery is of the one or the other character. He, however, told the jury that it was not necessary, in order to make the deliv-

ery conditional, that the party should say he delivered it as an escrow, or that he should use any express words of condition at the time; and I cannot but consider the embarrassment the court evidently felt upon that occasion as a clear illustration of the justice of Chancellor Kent's remark that the distinction is too subtle and evanescent to be relied on. My opinion, therefore, is that whether a party say, 'I deliver this writing as my deed, in the confidence that you will not deliver it to the grantee until a certain event happens, or until a certain condition be performed,' or whether he say, 'I deliver it to you as an escrow, to take effect as my deed upon a certain matter being done,' it is in either case an escrow, and will be inoperative in the hands of the party, by whatever means he may get possession of the instrument, until the condition is performed." See also *Millership v. Brookes*, 5 H. & N. 797.

1. A Question for Jury in Case of Doubt. — *White v. Bailey*, 14 Conn. 271; *Clark v. Gifford*, 10 Wend. (N. Y.) 310.

2. The Contract or Instrument to Be Delivered. — *Fitch v. Bunch*, 30 Cal. 212; *Miller v. Sears*, 01 Cal. 282, 25 Am. St. Rep. 176; *Stanton v. Miller*, 58 N. Y. 202; *Campbell v. Thomas*, 42 Wis. 440, 24 Am. Rep. 427.

3. Kinds of Instruments Deliverable in Escrow. — *Promissory Notes*, like deeds, may be delivered as escrows. *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246; *Taylor v. Thomas*, 13 Kan. 217; *Henshaw v. Dutton*, 50 Mo. 139; *Andrews v. Thayer*, 30 Wis. 228. See the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 204.

An Indenture of Apprenticeship sealed and delivered to an attorney who is acting for all the parties, with directions that it shall not be delivered except on condition that a covenant by the master to indemnify the apprentice for all traveling expenses incurred during his apprenticeship for and on account of the plaintiff, shall be inserted in the said indenture, and the indenture shall be executed by the master, operates as an escrow. *Millership v. Brookes*, 5 H. & N. 797.

The Execution. — The instrument must be duly and validly executed.¹ Thus it has been said that every act necessary to be performed by either party to a deed, in order that the present title may pass to the grantee, must also be performed in case of an escrow, except only the delivery of the deed to the grantee.²

3. Delivery to Depositary. — To constitute an escrow there must be an actual delivery to a depositary. A mere agreement between the parties that a deed shall not be delivered to the grantee until the performance of a certain condition, or happening of a contingency, will not be sufficient.³

By Whom the Deposit Must Be Made. — The deposit in such case must be made by the agreement of the parties to the instrument. A delivery made by the depositor alone will not be sufficient to constitute a valid escrow.⁴

Surrender of Control by Grantor. — To constitute an escrow the delivery must be such that the grantor surrenders all control over it. Thus, a deed which is deposited with a third person to be held subject to the order of the depositor cannot be said to be delivered in escrow, because it is deemed in law to be under the control of the depositor.⁵

Control Not to Be Vested in Grantee or Obligee. — On the other hand, the control of the instrument must not be vested in the grantee or obligee, for in that case it will operate as a deed presently.⁶ But it has been held that a deed may be delivered in escrow though the grantee is put in possession thereunder by the agreement of the parties before the performance of the condition stipulated.⁷

1. Valid Execution of Instrument Essential. — *Nichols v. Oppermann*, 6 Wash. 618; *Campbell v. Thomas*, 42 Wis. 440, 24 Am. Rep. 427. See the title EXECUTION AND PROOF OF DOCUMENTS, *post*.

2. Fitch v. Bunch, 30 Cal. 213.

3. Actual Delivery to Depositary Necessary. — *Exton v. Scott*, 6 Sim. 31; *Black v. Lamb*, 12 N. J. Eq. 116; *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592. See also *Young v. Hubbs*, 15 U. C. Q. B. 250.

4. Deposit to Be Made by Agreement of Both Parties. — *Parrish v. Steadham*, 102 Ala. 615; *Taylor County v. King*, 73 Iowa 153; *Flannigan v. Goggins*, 71 Wis. 28. Compare *Mayor v. Moore*, 1 Cranch (C. C.) 193.

5. Surrender of Control by Grantor Necessary. — *Fitch v. Bunch*, 30 Cal. 213; *Loubat v. Kipp*, 9 Fla. 60; *Shults v. Shults*, 159 Ill. 654; *James v. Vanderheyden*, 1 Paige (N. Y.) 385.

Thus, where the parties delivered certain deeds to third persons to be delivered by them "when everything is all right and perfected," and there was nothing in the evidence to indicate that the matter was to be determined except by the future agreement of the parties themselves, it was held that such third persons held the documents in controversy as mere depositaries subject to the future direction of the depositor, and consequently there was no delivery of the instruments in escrow. *Miller v. Sears*, 91 Cal. 282, 25 Am. St. Rep. 176.

Also, where a conveyance of land and a bond and mortgage to secure the purchase money were left "as escrows," subject to the direction of the parties, it was held that they were not escrows. *James v. Vanderheyden*, 1 Paige (N. Y.) 385.

Voluntary Conveyance. — Where a party executed a deed for land as a donation, and left it with a person, not to be delivered until signed and acknowledged by the grantor's

wife, and until the grantee should execute and have ready for delivery a mortgage, as it was called, securing to the grantor and his wife a life estate in the premises, and after the grantor's death the custodian placed the deed on record without authority, the wife never having signed and acknowledged it and the mortgage not having been delivered, it was held, on bill by the heirs of the grantor, that the deed should be set aside as a cloud upon their title. *Hoig v. Adrian College*, 83 Ill. 267. In this case, the court said: "Being a voluntary conveyance, without consideration, the grantor was at liberty at any time to withdraw the deed from the possession of the custodian, and the grantee could have no just cause to complain. The grantor was under no legal obligation to complete the donation." But the language quoted was not necessary in giving the decision, as it appears that the condition was not performed.

6. Control of Instrument Not to Be Vested in Grantee. — Where, pursuant to a previous agreement between the parties, notes were placed by the maker in the hands of a third person with directions to hand them to the payee when called for, it was held that there was an absolute delivery of the notes. The court in this case said: "It was not essential that the actual manual possession should have passed to some member of the board in order to effect a delivery. A constructive delivery was sufficient. All that was necessary was that the control of the notes should have passed from Sheidley with his consent, and that they should have been placed by his direction under the power and control of the board of education." *School Dist. v. Sheidley*, 138 Mo. 672. See also *infra*, this section, *Grantee*; and see the titles BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 202; DEEDS, vol. 9, p. 37.

7. Hoyt v. McLagan, 87 Iowa 746.

4. The Depositary — *a.* IN GENERAL. — It is laid down by many of the authorities that a delivery in escrow can be made only to a stranger, or a person not a party to the instrument.¹ But it has been said that when a delivery to a stranger is spoken of, what is meant is a delivery of a character negating its being a delivery to the grantee or to the party who is to have the benefit of the instrument.²

b. GRANTOR'S AGENT. — It has been held that an instrument cannot be delivered in escrow to the agent or attorney of the grantor, because the possession of the grantor's agent or attorney is the grantor's possession and revocable by him.³

c. GRANTEE. — It is a general rule that a deed or other instrument cannot be delivered to the grantee, obligee, or other party to have the benefit of the instrument as an escrow, to take effect on a condition not appearing on its face. To allow a different rule would be to permit the legal effect of a written instrument complete to all outside appearances to be varied and in many instances defeated by oral proof.⁴

1. Delivery in Escrow to Be Made to Stranger Alone as General Rule. — *Raymond v. Smith*, 5 Conn. 559; *Day v. Lacasse*, 85 Me. 244; *Wier v. Batdorf*, 24 Neb. 86; *Tyler v. Cate*, 29 Oregon 515.

2. Watkins v. Nash, L. R. 20 Eq. 262; *Cincinnati, etc., R. Co. v. Iliff*, 13 Ohio St. 254, the court said that "a stranger" means "a stranger to the deed as not being a party to it; or at most, this — a person so free from any personal or legal identity with the parties to the instrument as to leave him free to discharge his duty as a depositary to both parties, without involving a breach of duty to either."

3. Delivery to Grantor's Agent. — *Wier v. Batdorf*, 24 Neb. 86; *Day v. Lacasse*, 85 Me. 242. Compare *Tyler v. Cate*, 29 Oregon 515; *Confederation L. Assoc. v. O'Donnell*, 10 Can. Sup. Ct. Rep. 92; *Buck v. Knowlton*, 21 Can. Sup. Ct. Rep. 371.

The leaving of a deed by a grantor in the hands of his agents awaiting the arrival of certain funds by the grantee does not make such deed an escrow. *Wier v. Batdorf*, 24 Neb. 83.

4. Delivery to Grantee or Obligee Inoperative as Escrow — *England*. — *Co. Litt. 36a.*

Canada. — *Haggarty v. O'Leary*, 11 New Bruns. 360.

United States. — *Pawling v. U. S.*, 4 Cranch (U. S.) 219; *Moss v. Riddle*, 5 Cranch (U. S.) 351; *Darling v. Butler*, 45 Fed. Rep. 332; *Blewett v. Front St. Cable R. Co.*, 51 Fed. Rep. 625, 7 U. S. App. 285.

Alabama. — *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147; *Fuller v. Hollis*, 57 Ala. 435; *Williams v. Higgins*, 69 Ala. 517; *Cherry v. Herring*, 83 Ala. 458; *Shelby v. Tardy*, 84 Ala. 327; *Hargrave v. Melbourne*, 86 Ala. 270.

Arkansas. — *Campbell v. Jones*, 52 Ark. 493; *Pope v. Latham*, 1 Ark. 66; *English v. Brenceman*, 5 Ark. 377, 41 Am. Dec. 96.

California. — *Fitch v. Bunch*, 30 Cal. 208.

Connecticut. — *Raymond v. Smith*, 5 Conn. 555.

Delaware. — *Herdman v. Bratten*, 2 Harr. (Del.) 396.

District of Columbia. — *Newman v. Baker*, 10 App. Cas. (D. C.) 187.

Florida. — *Southern L. Ins., etc., Co. v. Cole*.

4 Fla. 359; *Loubat v. Kipp*, 9 Fla. 60; *Haworth v. Norris*, 28 Fla. 763.

Georgia. — *Jordan v. Pollock*, 14 Ga. 145; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Duncan v. Pope*, 47 Ga. 445.

Illinois. — *Jayne v. Gregg*, 42 Ill. 413; *Blake v. Fash*, 44 Ill. 305; *McCann v. Atherton*, 106 Ill. 31; *Stevenson v. Crapnell*, 114 Ill. 19; *Weber v. Christen*, 121 Ill. 91, 2 Am. St. Rep. 68; *Baker v. Baker*, 159 Ill. 394, citing 6 AM. AND ENG. ENCYC. OF LAW 858; *Neely v. Lewis*, 10 Ill. 31; *Ryan v. Cooke*, 172 Ill. 309.

Indiana. — *State v. Chrisman*, 2 Ind. 126; *Madison, etc., Plank Road Co. v. Stevens*, 10 Ind. 1; *Berry v. Anderson*, 22 Ind. 36; *Benoit v. Schneider*, 47 Ind. 13; *Roche v. Roanoke Classical Seminary*, 56 Ind. 198; *Stewart v. Anderson*, 59 Ind. 375; *Murray v. W. W. Kimball Co.*, 10 Ind. App. 141; *Foley v. Cowgill*, 5 Blackf. (Ind.) 18, 32 Am. Dec. 49.

Iowa. — *Marshall County High School Co. v. Iowa Evangelical Synod*, 28 Iowa 360.

Kansas. — *Carter v. Moulton*, 51 Kan. 9, 37 Am. St. Rep. 259.

Maine. — *Hubbard v. Greeley*, 84 Me. 340; *Day v. Lacasse*, 85 Me. 242.

Massachusetts. — *Fairbanks v. Metcalf*, 8 Mass. 230; *Ward v. Lewis*, 4 Pick. (Mass.) 520.

Michigan. — *Dawson v. Hall*, 2 Mich. 390; *Beers v. Beers*, 22 Mich. 42.

Mississippi. — *Graves v. Tucker*, 10 Smed. & M. (Miss.) 9; *McAllister v. Mitchner*, 68 Miss. 672.

Missouri. — *Massman v. Holscher*, 49 Mo. 87; *State v. Potter*, 63 Mo. 212, 21 Am. Rep. 440; *Jones v. Shaw*, 67 Mo. 667; *Whelan v. Tobener*, 71 Mo. App. 371.

Nebraska. — *Brittain v. Work*, 13 Neb. 347.

New Jersey. — *Black v. Shreve*, 13 N. J. Eq. 458; *Ordinary v. Thatcher*, 41 N. J. L. 403, 32 Am. Rep. 225.

New York. — *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Braman v. Bingham*, 26 N. Y. 483; *Cocks v. Barker*, 49 N. Y. 110; *Seymour v. Cowing*, 1 Keyes (N. Y.) 535; *Arnold v. Patrick*, 6 Paige (N. Y.) 310; *Lawton v. Sager*, 11 Barb. (N. Y.) 349; *Gilbert v. North American F. Ins. Co.*, 23 Wend. (N. Y.) 43, 35 Am. Dec. 543.

Delivery to One of Several Co-obligees. — It has been held also that a bond cannot be delivered as an escrow to one of several co-obligees, as a delivery to one is a delivery to all.¹

Instruments Incomplete on Their Face. — But the doctrine that a deed cannot be delivered to the grantee as an escrow is applicable only to the case of instruments which are on their face complete contracts, requiring nothing but delivery to make them perfect according to the intention of the parties.² Thus if a deed shows on its face that some other party or parties are to unite in it before it becomes completely executed, a delivery, even to the grantee, is not conclusive evidence of delivery so as to cut off inquiry.³

Instrument Left with Grantee to Be Delivered to Third Person — Where Delivery to Third Person Takes Place. — Also where a deed or bond is left by the grantor or obligor with the grantee or obligee to be by him transmitted to a third person to hold in escrow until the happening of a certain event, and it is afterwards so delivered to the third person, the delivery to the grantee is not such a delivery as to vest title in him.⁴

Failure of Grantee to Deliver to Third Person. — But it has been maintained that where a deed has been delivered to a grantee for the purpose of transmission to a third person, to be held by him in escrow, parol proof of the conditional

North Carolina. — *Gibson v. Partee*, 2 Dev. & B. L. (19 N. Car.) 530.

Ohio. — *Lloyd v. Giddings*, 7 Ohio (pt. ii.) 50; *Cincinnati, etc., R. Co. v. Iliff*, 13 Ohio St. 235; *Resor v. Ohio, etc., R. Co.*, 17 Ohio St. 139.

Oregon. — *Gaston v. Portland*, 16 Oregon 255.

Pennsylvania. — *Shoenberger v. Hackman*, 37 Pa. St. 87; *Simonton's Estate*, 4 Watts (Pa.) 180.

South Carolina. — *Hagood v. Harley*, 8 Rich. L. (S. Car.) 325.

Tennessee. — *Brown v. Reynolds*, 5 Sneed (Tenn.) 639; *Johnson v. Branch*, 11 Humph. (Tenn.) 521.

Texas. — *Lott v. Kaiser*, 61 Tex. 665; *Heffron v. Cunningham*, 76 Tex. 312; *Brown v. State*, 11 Tex. App. 451; *East Texas F. Ins. Co. v. Clarke*, 1 Tex. Civ. App. 238.

Virginia. — *Watson v. Hurt*, 6 Gratt. (Va.) 633; *Towner v. Lucas*, 13 Gratt. (Va.) 705; *Miller v. Fletcher*, 27 Gratt. (Va.) 403, 21 Am. Rep. 356; *Hicks v. Goode*, 12 Leigh (Va.) 479, 37 A. N. Dec. 677.

Washington. — *Richmond v. Morford*, 4 Wash. 337; *Glenn v. Hill*, 11 Wash. 541.

Wisconsin. — *Truman v. McCollum*, 20 Wis. 360; *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592.

Compare *Brackett v. Barney*, 28 N. Y. 333.

Where a Mortgage, perfect on its face, and bearing no evidence that the mortgagor's wife was to unite in its execution, was delivered to the mortgagee, parol evidence is not admissible to prove that it was not to become operative as a deed until it should be completed by waiver of dower interest by the mortgagor's wife. *East Texas F. Ins. Co. v. Clarke*, 1 Tex. Civ. App. 238.

If a Bond, perfect on its face, is delivered to the obligee as an escrow, to be valid upon another person's executing it, it is valid though the condition is not complied with. *Miller v. Fletcher*, 27 Gratt. (Va.) 403, 21 Am. Rep. 356; *State v. Chrisman*, 2 Ind. 126; *Easton v. Driscoll*, 18 R. I. 318.

Rule in Equity. — In *Flagg v. Mann*, 2 Sumn.

(U. S.) 510, Mr. Justice Story, in commenting upon the rule of the text, said: "A court of equity will not govern itself exclusively by technical principles of this sort, where the intentions of the parties would be thereby defeated, yet there must be the clearest evidence in such a case what that intention is, and whether it will be so defeated; otherwise the rule of law must prevail."

Person Having Equitable Interest. — It has been held that the fact that the depositary may have some equitable interest in the subject-matter of a deed, as for instance by reason of the commissions as agent of the grantor that he expected to make upon contemplated sales, or by reason of a trust which might result to him upon certain contingencies, does not render the deposit with him equivalent to a delivery to the grantee where he was not a party to the paper. *Tyler v. Cate*, 29 Oregon 515.

And in *Cotton v. Gregory*, 10 Neb. 125, it was held that a delivery in escrow might be made to the real parties in interest for delivery to the nominal parties.

1. Delivery to One of Several Co-obligees. — *Moss v. Riddle*, 5 Cranch (U. S.) 351.

2. Delivery to Grantee of Instrument Incomplete on Its Face. — *Shelby v. Tardy*, 84 Ala. 327; *Hicks v. Goode*, 12 Leigh (Va.) 479, 37 Am. Dec. 677; *Ward v. Churn*, 18 Gratt. (Va.) 801, 98 Am. Dec. 749; *Wendlinger v. Smith*, 75 Va. 309, 40 Am. Rep. 727.

3. *Shelby v. Tardy*, 84 Ala. 327.

4. *Cherry v. Herring*, 83 Ala. 458; *Fairbanks v. Metcalf*, 8 Mass. 230; *Gilbert v. North America F. Ins. Co.*, 23 Wend. (N. Y.) 43, 35 Am. Dec. 543; *Brown v. Reynolds*, 5 Sneed (Tenn.) 639. See *Dietz v. Farish*, 53 How. Pr. (N. Y. Super. Ct.) 217.

But in *Gibson v. Partee*, 2 Dev. & B. L. (19 N. Car.) 530, it was held that where an instrument purporting to convey land was signed, sealed, and delivered by the grantor to the grantee, it was a deed and not an escrow, although the parties afterwards placed it with a third person for safe keeping until they both should call for it.

delivery will be inadmissible if the grantee retains the deed, claiming that the delivery to him was absolute.¹

Application of Doctrine to Unsealed Instruments. — According to some of the authorities, this technical doctrine of escrow is not applicable to unsealed instruments. Thus it is maintained that unsealed instruments may be delivered to one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity, and the annexing of such conditions is held not to be an oral contradiction of the written obligation, though negotiable, as between the parties to the deed, or others having notice.²

d. GRANTEE'S AGENT. — It is a general rule that a delivery to the known agent of the grantee or other party who is to have the benefit of the instrument has the same effect as a delivery directly to the grantee, and cannot create an escrow.³ But an agent of the grantee is not necessarily incapacitated by force of his agency from acting as the custodian of an escrow, and he may become such custodian where, under the circumstances of the case, to do so involves no violation of duty as agent of the grantee.⁴

Delivery to Officer of Corporation. — Accordingly it has been held also that there

1. *Braman v. Bingham*, 26 N. Y. 491.

2. **Delivery to Payee or Grantee of Unsealed Instruments.** — *Pym v. Campbell*, 6 El. & Bl. 370, 88 E. C. L. 370; *Burke v. Dulaney*, 153 U. S. 228; *McFarland v. Sikes*, 54 Conn. 252, 1 Am. St. Rep. 111; *Benton v. Martin*, 52 N. Y. 570; *Seymour v. Cowing*, 4 Abb. Eq. Dec. (N. Y.) 200. Compare *Baum v. Parkhurst*, 26 Ill. App. 128.

In *Benton v. Martin*, 52 N. Y. 570, the court said: "It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which delivery is made."

Bills and Notes. — A full discussion of the conflicting views on this question as applied to bills and notes will be found discussed in the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 204.

3. **Delivery to Grantee's Agent** — *Alabama*. — *Shelby v. Tardy*, 84 Ala. 327; *Ashford v. Prewitt*, 102 Ala. 264, 48 Am. St. Rep. 37.

Georgia. — *Duncan v. Pope*, 47 Ga. 445.

Indiana. — *Madison, etc., Plankroad Co. v. Stevens*, 10 Ind. 1; *Deardorff v. Foresman*, 24 Ind. 481; *Stewart v. Anderson*, 59 Ind. 375; *Murray v. W. W. Kimball Co.*, 10 Ind. App. 184.

Maine. — *Hubbard v. Greeley*, 84 Me. 340. *New York*. — *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Adler v. Germania F. Ins. Co.*, 17 Misc. Rep. (N. Y. Supreme Ct.) 347.

Delivery of Guardian's Bond to County Surrogate. — In *Ordinary v. Thatcher*, 41 N. J. L. 403, 32 Am. Rep. 225, it was held that a county surrogate acts as the deputy or agent of the ordinary, and the delivery of a guardian's bond to the former is a delivery to the latter, and such delivery cannot be in escrow, the ordinary being the obligee in the bond. See also *State v. Peck*, 63 Me. 284.

Delivery of Note to Payee's Agent. — In *Murray v. W. W. Kimball Co.*, 10 Ind. App. 141, it was held that a mere instruction from the maker of a note to the agent of the payee as to what to do with the instrument delivered to him will not constitute the payee's agent the

agent of the maker so that such delivery will amount to an escrow.

Appointment in Writing. — Where the selection of the grantee's known agent by the grantor as the custodian of an escrow and the authority conferred upon him were fully expressed in writing, signed by the grantee, attested by her solicitor, and delivered to such agent contemporaneously with the paper with which he was intrusted and which he was to deliver on the happening of a contingent event, there was held to be a legal and valid delivery in escrow. *Ashford v. Prewitt*, 102 Ala. 264, 48 Am. St. Rep. 37.

Duplicate Deed Delivered to Grantee Subsequent to Escrow. — Where a deed to certain lands had been delivered in escrow and a subsequent duplicate deed was delivered to the grantee's agent and recorded by the instructions of the grantor, it was held competent to show that the subsequent deed was intended as an escrow. *Minah Consol. Min. Co. v. Briscoe*, 47 Fed. Rep. 276.

4. *Hansford v. Freeman*, 99 Ga. 376; *Murray v. W. W. Kimball Co.*, 10 Ind. App. 184, citing 6 AM. AND ENG. ENCYC. OF LAW (1st ed.) 861; *Fertig v. Bucher*, 3 Pa. St. 308; *McLaughlin v. Wheeler*, 1 S. Dak. 497.

Thus, the agent of a railroad company, for the purpose of procuring releases of the right of way for its road, was held to be the depository of an escrow, where a release deed was placed in his hands by the releasor, to be returned by the depository in case of the non-performance of the condition named. *Cincinnati, etc., R. Co. v. Iliff*, 13 Ohio St. 235.

In *Watkins v. Nash*, L. R. 20 Eq. 262, it was held that a delivery to the solicitor of the grantee of an instrument executed by the grantor will not convert the instrument from an escrow into a deed, provided the delivery is of a character negating its being a delivery to the grantee.

In *Fertig v. Bucher*, 3 Pa. St. 308, it was held that if a party, in executing a bond, expressly stipulates that it shall not be delivered up until twelve names are obtained to it, and the agent of the other party so promises, the

is no such personal identity between a corporation and its officers that a deed may not be placed in the hands of the latter as an escrow until the performance of some condition.¹

Effect of a Request by Grantee that Agent Hold in Escrow Deed Delivered Unconditionally. — Where a deed was executed and delivered unconditionally to the grantee's duly authorized agent, the delivery will not become an escrow by the fact that the grantee, when the agent handed him the instrument, immediately returned it to the agent with the request that he hold it in escrow until the grantee should pay the purchase money to the grantor.²

e. CO-OBLIGOR. — In some jurisdictions it is maintained that it is a good defense to an action on a bond that the defendant, who is the surety, intrusted the bond to the principal obligor as an escrow, with authority to deliver it only upon the happening of some event or the fulfilment of some condition, as that other named persons should join as sureties in its execution prior to such delivery, and that the instrument was delivered to the obligee in violation of this condition.³ But according to the prevailing authority, such a delivery will not constitute a defense where the instrument is complete on its face, and it appears that the obligee had no notice of the condition stipulated, and there were no circumstances to put him upon inquiry as to the manner of its execution; and this is on the ground that, the surety having intrusted the instrument to the principal as an agent, the obligee has the right to infer that it was for the purpose of delivery, and the surety is estopped to set up a limitation unknown to the obligee.⁴

bond is in the hands of the agent in the nature of an escrow, and until the condition be performed it cannot be legally delivered, and so cannot be the deed of the party making the stipulation.

1. Delivery to Insurance Agent. — *Price v. Home Ins. Co.*, 54 Mo. App. 119.

Cashier of Insurance Company. — *Southern L. Ins.*, etc., *Co. v. Cole*, 4 Fla. 359.

Director of Bank. — *Healdsburg Bank v. Bailhac*, 65 Cal. 327.

Director of Railroad Company. — In *Andrews v. Thayer*, 30 Wis. 228, it was held that the facts that a person was a director of a railroad company and that he had a *quasi* or limited agency in respect to soliciting mortgages will not prevent his receiving a note and mortgage as an escrow. See also *Beloit, etc., R. Co. v. Palmer*, 19 Wis. 574.

2. Parrish v. Steadham, 102 Ala. 615.

3. Jurisdictions Allowing Delivery to Co-Obligor. — *Bibb v. Reid*, 3 Ala. 88; *Smith v. Kirkland*, 81 Ala. 350; *Hoboken City Bank v. Phelps*, 34 Conn. 92; *Crawford v. Foster*, 6 Ga. 202, 50 Am. Dec. 327; *People v. Bostwick*, 32 N. Y. 445 (*distinguished and questioned* in *Russell v. Freer*, 56 N. Y. 67). See also *Huron County v. Armstrong*, 27 U. C. Q. B. 533; *Henderson v. Vermilyea*, 27 U. C. Q. B. 544. Compare *Richardson v. Rogers*, 50 How. Pr. (N. Y. Supreme Ct.) 403.

In *Smith v. Kirkland*, 81 Ala. 345, the court said: "There are two established modifications of this rule. (1) It does not apply to commercial paper which has come into the hands of a *bona fide* purchaser before maturity, who is without notice of the condition. *Marks v. Montgomery First Nat. Bank*, 79 Ala. 550, 58 Am. Rep. 620; *1 Daniell on Negotiable Instruments* (3d ed.), §§ 855, 856. (2) It does not apply where the surety, having knowledge or notice of the delivery of the bond, suffers the

principal to act under it to the prejudice of the obligee, so as to waive the condition, and thus estop the surety from insisting on the defense. *Wright v. Lang*, 66 Ala. 389."

4. Jurisdiction Forbidding Delivery to Co-obligor — *United States*. — *Dair v. U. S.*, 16 Wall. (U. S.) 1; *Butler v. U. S.*, 21 Wall. (U. S.) 272.

California. — *Thompson v. True*, 48 Cal. 601. *Illinois*. — *Smith v. Peoria County*, 59 Ill. 412; *School Trustees v. Sheik*, 119 Ill. 579.

Indiana. — *Deardorff v. Forseman*, 24 Ind. 481; *Blackwell v. State*, 26 Ind. 204; *Webb v. Baird*, 27 Ind. 368, 89 Am. Dec. 507; *State v. Pepper*, 31 Ind. 82.

Kentucky. — *Hall v. Smith*, 14 Bush (Ky. 604.

Maine. — *State v. Peck*, 53 Me. 284.

Massachusetts. — *Millett v. Parker*, 2 Metc (Ky.) 608.

Mississippi. — *Graves v. Tucker*, 10 Smed. & M. (Miss.) 9.

Missouri. — *State v. Potter*, 63 Mo. 212, 21 Am. Rep. 440.

Virginia. — *Nash v. Fugate*, 32 Gratt. (Va.) 595, 34 Am. Rep. 780.

In *Millett v. Parker*, 2 Metc. (Ky.) 608, the court said: "While the writing remains in the hands of the obligors, or either of them, it imposes upon them no obligation whatever and cannot have even the effect of an escrow. They have complete power over it, and in legal contemplation it is neither a contract nor the evidence of a contract."

But in *State v. Churchill*, 48 Ark. 446, the limitations upon this rule are thus expressed by the court: "When the condition is suggested to the obligee by the thing appearing upon the face of the bond, or is brought to his knowledge by extraneous evidence before he accepts it, the plea of conditional execution is good, otherwise not." To the same effect, see *Smith v. Peoria County*, 59 Ill. 412.

Delivery to Principal Maker of Note. — The foregoing question in its application to bills and notes will be found fully discussed in another part of this work.¹

5. The Condition — *a. NECESSITY — IN GENERAL.* — To constitute an escrow there must be a delivery upon an express condition or contingency.²

Mere Expectation of Something to Be Done Insufficient. — In the absence of such condition or contingency, a mere expectation or promise that something will be done will be insufficient.³

6. BY WHOM PERFORMANCE TO BE MADE — **By Grantee.** — The conditions upon which instruments are delivered in escrow are, ordinarily, to be performed

Official Bonds. — In *Iowa* the rule laid down in the text has been applied to official bonds. *Carroll County v. Ruggles*, 69 Iowa 274, 58 Am. Rep. 223.

In an action against a county treasurer and his sureties upon his official bond for a default, it appeared that the sureties had executed the bond, and placed it in the hands of third persons upon an agreement with the principal that it should not be delivered until other sureties should sign and qualify to a certain amount; that after this the principal persuaded the persons holding the bond to deliver it to him, and he presented it to the county supervisors, by whom it was accepted without knowledge of conditions in its execution. It was held that the sureties were liable thereon. *Taylor County v. King*, 73 Iowa 153. Compare *Daniels v. Gower*, 54 Iowa 319.

Where Obligee Has Notice of Condition. — Where, in a suit on a distiller's bond against him and his sureties, one of the sureties pleaded that he signed the bond and delivered it to the principal obligor on condition that it should not be delivered to the obligee till it was signed by one B.; that such B. never signed it; that the agent of the obligee, when he accepted and approved the bond, had notice of such conditional delivery, and that therefore the writing was not the surety's deed, it was held that as to the surety the writing was a mere escrow and that the plea was good. *U. S. v. Hammond*, 4 Biss. (U. S.) 283.

Where Additional Security to Be Obtained Is Named in Bond. — In *Pawling v. U. S.*, 4 Cranch (U. S.) 219, where it appeared that the additional securities to be procured were named on the face of the bond, a different rule from that laid down in the text was applied. To the same effect see *State Bank v. Evans*, 15 N. J. L. 155, 28 Am. Dec. 400; *Fletcher v. Austin*, 11 Vt. 447. See also *Duncan v. U. S.*, 7 Pet. (U. S.) 435; *Black v. Lamb*, 12 N. J. Eq. 108; *Blume v. Bowman*, 2 Ired. L. (24 N. Car.) 338. But see *Smith v. Peoria County*, 59 Ill. 412.

Existence of Unsigned Scrolls Immaterial. — In *Nash v. Fugate*, 32 Gratt. (Va.) 595, 34 Am. Rep. 780, it was held that the fact that there were other scrolls to the instrument to which no names were signed is not sufficient to put the obligee upon inquiry as to the authority of the obligor to deliver the bond to him.

The English Case of Johnson v. Baker, 4 B. & Ald. 449, 6 E. C. L. 551, has been cited in some cases as supporting a doctrine different from the rule laid down in the text. In this case, before the execution of a composition deed, it was agreed in the presence of the surety for the payment of the composition that it should

be void unless all the creditors executed it. The surety, at the same interview, afterwards executed the deed in the ordinary way, without saying anything at the time of the execution. The deed was then delivered to one of the creditors in order that he might get it executed by the rest of the creditors. It was held that this was to be considered as a delivery in escrow, and that all the creditors not having executed it, the surety was not bound. In *State v. Peck*, 53 Me. 294, the court, in commenting on this case, said: "Plaintiff was one of the creditors and not present at the conversation. The essential element that was wanting to estop the defendant in that case from treating the delivery as conditional and availing himself of the stipulation accordingly was that the creditor apparently was not induced to do any act prejudicial to himself in the premises. He only failed to obtain the additional security for a pre-existing debt to which he would have been entitled had the condition been performed. The surety was entirely free to rely upon the condition annexed to his act in the accompanying conversation."

A discussion of the question where the principal fraudulently fills blanks with names or amounts different from those designated by the sureties will be found discussed in the title ALTERATION OF INSTRUMENTS, vol. 2, p. 217.

1. Delivery to Principal Maker of Note. — See the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 206. See also *Jordan v. Jordan*, 10 Lea (Tenn.) 128, 43 Am. Rep. 294; *Perry v. Patterson*, 5 Humph. (Tenn.) 133, 42 Am. Dec. 424.

2. Necessity of Condition in General. — *Exton v. Scott*, 6 Sim. 31; *Graves v. Tucker*, 10 Smed. & M. (Miss.) 23.

3. Where Expectation of Something to Be Done Insufficient. — *Carr v. Hoxie*, 5 Mason (U. S.) 61; *Ordinary v. Thatcher*, 41 N. J. L. 403, 32 Am. Rep. 225; *Black v. Lamb*, 12 N. J. Eq. 108; *Adler v. Germania F. Ins. Co.*, 17 Misc. Rep. (N. Y. Supreme Ct.) 347; *Evans v. Gibbs*, 6 Humph. (Tenn.) 405; *Carrick v. French*, 7 Humph. (Tenn.) 459. See also *Cumberlege v. Lawson*, 1 C. B. N. S. 709, 87 E. C. L. 709; *Bowker v. Burdekin*, 11 M. & W. 128.

In *Evans v. Gibbs*, 6 Humph. (Tenn.) 405, the court said: "It is incumbent on him who alleges it [the deed] to be an escrow merely, and not his deed, to prove affirmatively, not that the principal promised something further should be done, by way of inducement to his execution of the instrument, but that performance of such further act was the condition upon which he was to become bound, or the instrument to be delivered as his act and deed."

by the grantee, as, for instance, where the condition is for the payment of money by him.¹

Whether Condition to Be Performed by Grantor Sufficient. — But there is conflict among the authorities on the question whether, in order to constitute an escrow, the condition must be one to be performed by the grantee. On the one hand it has been held that a deed executed by the grantor and deposited with a third person until the grantor shall have an opportunity of acknowledging it, then to be delivered to the grantee, is not an escrow.² But where the deed was deposited with a third person, with the agreement that it should be delivered back to the grantor in case he should give the grantee certain security for a debt within the time limited, otherwise to be delivered over to the grantee, it was held that this amounted to an escrow.³

c. CONTINGENCY AS SUBSTITUTE FOR CONDITION. — Many, and perhaps most, of the authorities make a distinction between cases where the future delivery is to depend upon the payment of money or the performance of some other condition, and cases where it is to await the lapse of time or the happening of some contingency, and not the performance of any condition, holding that the former is an escrow, but that the latter will be deemed the grantor's deed presently.⁴ But it has been contended that this distinction will be found

1. Condition Ordinarily to Be Performed by Grantee. — *Brown v. Gilman*, 4 Wheat. (U. S.) 255; *Ober v. Pendleton*, 30 Ark. 61; *Davis v. Clark*, 58 Kan. 100; *Burkam v. Burk*, 96 Ind. 270. See cases generally throughout the article.

2. White v. Williams, 3 N. J. Eq. 376. See also *Loubat v. Kipp*, 9 Fla. 60; *Glenn v. Hill*, 11 Wash. 541. Compare *Mayor v. Moore*, 1 Cranch (C. C.) 193.

3. Raymond v. Smith, 5 Conn. 555.

In *California* the general rule has been laid down that a deed delivered to a third person is viewed as an escrow only in case it is agreed that the deed is to be delivered to the grantee upon the performance by him of the stipulated condition. *Fitch v. Bunch*, 30 Cal. 213.

But in *Conneau v. Geis*, 73 Cal. 176, where a deed was delivered to a third person to be delivered to the grantee in case the grantor failed to make a stipulated payment it was held that there was a delivery in escrow. To the same effect see *McDonald v. Huff*, 77 Cal. 279.

In *New York* the rule has been laid down that a deed is delivered in escrow when the delivery is conditional, that is, when it is delivered to a third person to keep until something is done by the grantee. *Jackson v. Catlin*, 2 Johns. (N. Y.) 248, 3 Am. Dec. 415.

But in *Adler v. Germania F. Ins. Co.*, 17 Misc. Rep. (N. Y. Supreme Ct.) 347, the court said: "We do not decide that a delivery in escrow must always be until something is done by the grantee, for there may be exceptions to the rule." See also *Gilbert v. North American F. Ins. Co.*, 23 Wend. (N. Y.) 44, 35 Am. Dec. 543; *Payne v. Smith*, 28 Hun (N. Y.) 106.

4. Contingency as Substitute for Condition — *United States*. — *McCalla v. Bane*, 45 Fed. Rep. 828.

California. — *Wittenbrock v. Cass*, 110 Cal. 1; *Bury v. Young*, 98 Cal. 446, 35 Am. St. Rep. 186.

Connecticut. — *Stewart v. Stewart*, 5 Conn. 317; *Belden v. Carter*, 4 Day (Conn.) 66, 4 Am. Dec. 185.

Massachusetts. — *Wheelwright v. Wheelright*, 2 Mass. 454, 3 Am. Dec. 66; *Hatch v. Hatch*, 9 Mass. 310, 6 Am. Dec. 67; *Foster v. Mansfield*, 3 Met. (Mass.) 412, 37 Am. Dec. 154; *O'Kelly v. O'Kelly*, 8 Met. (Mass.) 436.

Michigan. — *Latham v. Udell*, 38 Mich. 238; *Wallace v. Harris*, 32 Mich. 380.

Minnesota. — *Haeg v. Haeg*, 53 Minn. 33.

Montana. — *Martin v. Flaharty*, 13 Mont. 96, 40 Am. St. Rep. 415.

New York. — *Hathaway v. Payne*, 34 N. Y. 105; *Tooley v. Dibble*, 2 Hill (N. Y.) 641; *Goodell v. Pierce*, 2 Hill (N. Y.) 659; *Hunter v. Hunter*, 17 Barb. (N. Y.) 25; *Ruggles v. Lawson*, 13 Johns. (N. Y.) 285, 7 Am. Dec. 375.

North Carolina. — *Hall v. Harris*, 5 Ired. Eq. (40 N. Car.) 303.

Ohio. — *Crooks v. Crooks*, 34 Ohio St. 610; *Ball v. Foreman*, 37 Ohio St. 132.

Pennsylvania. — *Stephens v. Huss*, 54 Pa. St. 20; *Stephens v. Rinehart*, 72 Pa. St. 441; *Landon v. Brown*, 160 Pa. St. 538.

Washington. — *Glenn v. Hill*, 11 Wash. 541.

Wisconsin. — *Albright v. Albright*, 70 Wis. 528.

See *Doe v. Bennett*, 8 C. & P. 124, 34 E. C. L. 322; *Hockett v. Jones*, 70 Ind. 227; *Owen v. Williams*, 114 Ind. 179; *Smiley v. Smiley*, 114 Ind. 258; *Goodpaster v. Leathers*, 123 Ind. 121; *Brown v. Stutson*, 100 Mich. 574, 43 Am. St. Rep. 462; *Williams v. Schatz*, 42 Ohio St. 47.

Redelivery to Take Place on Grantor's Death. — If a grantor, at the time of his giving directions for the making of a deed, and after the deed is drawn and presented to him, directs and intends that from and after its execution it shall be taken and retained by the scrivener until after the grantor's death, and then be delivered to the grantee; and he thereupon executes the deed, pursuant to such intent, and then, without changing his purpose, delivers it to the scrivener to be attested and acknowledged, and to be retained by him, without any further act of the grantor; and the deed is attested and acknowledged and is retained by the scrivener until after the grantor's death, and is then delivered to the grantee — the estate vests in the grantee from the time of the

not to be in all cases correct, since it will frequently happen that it will defeat the manifest intention of the parties, which it is conceded should govern.¹

d. WHETHER CONDITION MUST BE IN WRITING. — It has been said that some of the earlier authorities evidently contemplate that all escrows should be evidenced by writing.² But the rule supported by the prevailing modern authorities is to the effect that it is not necessary that the condition upon which the instrument is delivered in escrow be expressed in writing; it may rest in parol or be partly in writing and partly oral, and hence may be proved by parol.³

execution of the deed. *Foster v. Mansfield*, 3 Met. (Mass.) 412, 37 Am. Dec. 154.

1. *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592. See also *King v. Smith*, 12 Leigh (Va.) 157; *Wolcott v. Coleman*, 1 Conn. 381; *Spring Garden Bank v. Hulings Lumber Co.*, 32 W. Va. 357.

Where a deed was delivered to a third person to be delivered to the grantee in the event of the affirmance by the Supreme Court of a decree in a case involving litigation concerning the lands conveyed, the delivery was held to be a delivery in escrow. *Prewitt v. Ashford*, 90 Ala. 294.

In *Stone v. Duvall*, 77 Ill. 475, it was held that the delivery of a deed for land to a third party, to be retained until the death of the grantor and then to be delivered to the grantee, is not an absolute delivery and will not operate to vest an immediate estate in the land, but it will be good to pass the title at the grantor's death to the grantee or his heirs. The court in this case said: "Was this, then, a delivery as an escrow?" *Kent, C. J.*, in the case of *Jackson v. Catlin*, 2 Johns. (N. Y.) 248, 3 Am. Dec. 415, says: "A deed is delivered as an escrow when the delivery is conditional, that is, when it is delivered to a third person to keep until something be done by the grantee; and it is of no force until the condition be fulfilled." *Sheppard*, in his *Touchstone*, p. 58, gives substantially the same definition, except he does not limit the performance of the act to the grantee, which seems to us to be the more accurate rule. Now this deed was to be delivered on the death of Duvall. That was the express condition upon which it was placed in the hands of the justice, and, according to the authority of the case of *Jackson v. Catlin*, *supra*, it was delivered as an escrow and could not take full effect until the thing happened that was conditional to its delivery; and Duvall not having died, the deed has not yet vested the title in full, and cannot until that event shall occur." See also *Shults v. Shults*, 159 Ill. 654; *Ottawa, etc., R. Co. v. Hall*, 1 Ill. App. 612. But see cases in note immediately *supra*.

In *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235, it was held that a deed signed, sealed, and delivered to a third person as the agent of the grantor, to be recorded and kept by him till the death of the grantor, and then to be delivered to the grantees, is not the present deed of the grantor, nor is it an escrow, but a testamentary paper, and must be proved as such before title to personal property can be derived under it.

In *Millett v. Parker*, 2 Mete. (Ky.) 613, the court said: "But although an escrow may have been originally a writing which was de-

livered to a third person and was not to take effect until certain conditions were performed by the grantee, yet writings which are delivered to a third person to hold until the happening of some event, or until the writings are executed by additional obligors, are now regarded as escrows."

2. *Taft v. Taft*, 59 Mich. 198, 60 Am. Rep. 291.

3. *Condition of Escrow May Rest in Parol.* — *Dikeman v. Arnold*, 71 Mich. 656; *Gregory v. Littlejohn*, 25 Neb. 368; *Stanton v. Miller*, 58 N. Y. 203; *Gaston v. Portland*, 16 Oregon 255; *Nichols v. Oppermann*, 6 Wash. 618. See also *Ryan v. Cooke*, 172 Ill. 309.

In *Cannon v. Handley*, 72 Cal. 133, it was held that though a contract of sale of lands was oral, a deed of the land placed in escrow on a parol condition was sufficient to satisfy the statute of frauds. The court in this case said: "But it is said there was nothing in writing authorizing Cox to hold or deliver the deed. There is nothing in the statute which requires this to be in writing. The statute only requires a note or memorandum in writing as evidence of the contract. Nothing in it has reference to any arrangement for the delivery of the deed in escrow or its subsequent delivery by the party so holding it to the grantee. The contract is fully provided herein by writing."

But it has been held that if, in such case, any part of the oral contract is not contained in the subsequent deed — as, for instance, if the terms upon which the purchase money is to be paid are not stated therein — the mere placing the instrument in the hands of a third person to be delivered to the grantee on a parol condition will not take the oral contract of sale out of the statute of frauds and will not amount to an escrow. *Thomas v. Sowards*, 25 Wis. 631; *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427; *Popp v. Swanke*, 68 Wis. 364. To the same effect see *Nichols v. Oppermann*, 6 Wash. 618. In this case the court said: "The condition upon which a deed is delivered in escrow may rest in and be proved by parol. This is as far as the rule extends, and it presupposes a valid contract to convey."

In *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427. *Ryan, C. J.*, said: "I have no doubt that an escrow may be proved by parol. The difficulty here is not in the proof of the alleged escrow, but in the proof of the contract of sale and purchase itself. Where there is a valid contract under the statute, the papers constituting it, or executed in compliance with it, may be delivered in escrow and the escrow may be proved by parol. But the validity of the escrow rests in the validity of the contract,

Effect of Declaration Subsequent to Execution of Instrument. — But it has been said that an instrument cannot be made an escrow by any other declarations than those made at the time of signing and executing the instrument.¹

6. Redelivery. — To constitute an escrow it must appear that authority was given to the depositary to make a redelivery.² Furthermore, it is essential that the instrument be delivered to a third person for the purpose of being by him delivered to the obligee, grantee, or other party to be benefited by the escrow. Thus where, by agreement, a deed was to be held as an escrow until the grantee's return, "and then to be given up" to the grantor, it was held not to be an escrow, because there was no event in which the deed was to be delivered to the grantee.³

III. FORCE AND EFFECT — 1. The Obligation upon Delivery to Depositary —
a. OF DEPOSITOR. — Where an instrument has been placed in escrow, the transaction constitutes a contract between the parties, and such contract cannot be rescinded by the depositor alone. He cannot withdraw the escrow from the hands of the depositary at his will and without the consent of the other party, or without default in the performance of the conditions.⁴ Nor can he, by subsequent instructions to the depositary, change the original transaction, as where he directs the depositary to hold the instrument until conditions not mentioned in the original agreement have been performed.⁵

b. OF GRANTEE OR OBLIGEE. — Where, in the sale of land, the promises to pay the purchase money and to make a deed are mutual and dependent covenants, and where by mutual agreement a deed is placed in escrow upon the condition that it is to be delivered to the grantee upon the payment of the purchase money by him on a particular day, no formal tender of the deed is necessary in order to enable the vendor to maintain his action for the purchase money.⁶

Effect of Delay in Performance of Condition Where No Time Is Stipulated. — And where a deed was placed in escrow on a similar condition, but no time of payment was stipulated, it was intimated that, upon the omission of the grantee to make payment, the grantor might proceed in equity to have a lien declared on the land and a decree for the sale thereof for the payment of the purchase money.⁷

Where Discretion as to Performance Is Vested in Grantee. — But it has been held that where a deed has been delivered upon a condition to be performed by the grantee in his discretion, he is at liberty to abandon his contract, and the grantor cannot maintain an action against him for the nonperformance.⁸

Where a Parol Contract for the Sale of Land had been made, and a portion of the purchase money paid, and a deed delivered in escrow upon the agreement that the depositary should deliver it to the vendee when the latter paid the residue, he agreeing to pay the same, it was held that an action for the balance

and the validity of the contract rests on the statute."

1. Operation of Declarations Subsequent to Execution of Instrument. — *Blight v. Schenck*, 10 Pa. St. 285, 51 Am. Dec. 478. See also *Lloyd v. Bennett*, 8 C. & P. 124, 34 E. C. L. 322.

2. Necessity of Authority in Depositary to Redeliver. — *Wier v. Batdorf*, 24 Neb. 86.

3. *Braman v. Bingham*, 26 N. Y. 492.

4. Contract of Escrow Not to Be Rescinded by Depositor. — *Cannon v. Handley*, 72 Cal. 133; *McDonald v. Huff*, 77 Cal. 279; *Grove v. Jennings*, 46 Kan. 366; *Davis v. Clark*, 58 Kan. 100; *Millett v. Parker*, 2 Metc. (Ky.) 616; *Knopf v. Hansen*, 37 Minn. 215; *Schmidt v. Deegan*, 69 Wis. 300. See also *Wellborn v. Weaver*, 17 Ga. 275, 63 Am. Dec. 235; *Shirley v. Ayres*, 14 Ohio 308, 45 Am. Dec. 546. Compare *Stanton v. Miller*, 58 N. Y. 202.

5. Conditions of Deposit Not to Be Altered by Depositor Alone. — *Robbins v. Magee*, 76 Ind. 394; *Grove v. Jennings*, 46 Kan. 366.

6. Escrow Binding as Contract on Grantee or Obligee. — *Olmstead v. Smith*, 87 Mo. 602.

7. *Suddeth v. Knight*, (Ala. 1893) 14 So. Rep. 475.

8. *Helm v. Kleinschmidt*, 12 Mont. 586. In this case the deposit was made in pursuance of a letter by the grantee in the following language: "If you will make the deeds for the mine and placer ground only quitclaim deeds, and send them to Larrabie's Bank, at Deer Lodge, with instructions to deliver upon receipt of our contract amount, I will have title looked up at once, and, if satisfactory, will pay money into Larrabie Bros.' Bank, *i. e.*, fourteen hundred dollars, which, with the stallions, is the agreed amount, *i. e.*, two thousand dollars."

could not be maintained, as it was to enforce a parol contract for the sale of land, which was void.¹

c. REVOCATION OR ALTERATION BY BOTH PARTIES. — The contract of escrow, while it remains executory, may be rescinded, or the conditions on which it is placed in the hands of the depositary may be varied, by the subsequent agreement of the parties; and where the conditions rest in parol, they may be discharged by parol.²

2. Passing of Title — *a. IN GENERAL* — **UPON PERFORMANCE OF CONDITION.** — The depositary of an escrow is the agent of both parties thereto, and is as much bound to deliver the instrument on the performance of the condition or the happening of the contingency as he is to withhold it until such performance; and a right of action therefor immediately accrues to the grantee or obligee though the depositary refuses, by the direction of the depositor, to deliver the instrument.³ And it has been held that a bill in equity will lie to compel the delivery of a deed held in escrow where the grantee has done all in his power to fulfil the condition and has been prevented from doing so by the sole act of the grantor.⁴

b. WHETHER ACTUAL REDELIVERY NECESSARY. — The general rule has been laid down in many instances that no estate passes to the grantee until the second delivery, or redelivery as it is sometimes called, by the depositary to the grantee or obligee.⁵ But it seems to be the approved doctrine that an actual or manual delivery of an escrow is not necessary to invest the grantee or obligee with title, and that the delivery is constructively made the moment the condition has been performed, or the event has happened, upon which the

1. *Cagger v. Lansing*, 43 N. Y. 550.

2. *Revocation or Alteration of Escrow by Both Parties.* — *Raymond v. Smith*, 5 Conn. 556.

3. *Title Passes as General Rule upon Performance of Condition* — *Alabama.* — *Prewitt v. Ashford*, 90 Ala. 294.

California. — *Cannon v. Handley*, 72 Cal. 133.

Colorado. — *Henderson v. Johns*, 13 Colo. 280.

Kansas. — *Hughes v. Thistlewood*, 40 Kan. 232.

Kentucky. — *Mudd v. Green*, (Ky. 1889) 12 S. W. Rep. 139; *Millett v. Parker*, 2 Metc. (Ky.) 608.

Michigan. — *Bowman v. Gork*, 106 Mich. 163, citing 6 AM. AND ENG. ENCYC. OF LAW (1st ed.) 867, 870.

Minnesota. — *Knopf v. Hansen*, 37 Minn. 215.

Ohio. — *Shirley v. Ayres*, 14 Ohio 308, 45 Am. Dec. 546.

Wisconsin. — *Schmidt v. Deegan*, 69 Wis. 300.

See also *Atkinson v. Tabor*, 11 Colo. 277.

Where a grantor conveys real estate to the clerk of the District Court as his agent, with the understanding that if the clerk shall obtain from the plaintiff satisfaction of a judgment in that court against the grantor, then the deed shall be recorded and the land belong to the plaintiff, and subsequently the plaintiff, at the instance of the clerk, accepts the deed and delivers to the clerk a written satisfaction of the judgment and pays the costs thereof, and also the taxes on the land, it belongs to the plaintiff, notwithstanding the clerk fails to file or record the satisfaction of the judgment and the deed. *Elston v. Chamberlain*, 41 Kan. 354.

4. *Passing of Title Where Performance of Condition Has Been Prevented by Grantor.* — *Baum's*

Appeal, 113 Pa. St. 58. See also *Cannon v. Handley*, 72 Cal. 133.

A delivered a deed to B, to be by him delivered to C, on condition that C pay a note, part of the purchase money, within ten days. After the expiration of the ten days, A agreed with C to extend the time two days, and again extended the time one day, and then said: "Let it rest a few days * * * and if I need the money I will come and see you." He did not ask for the money. Five days later C tendered the amount of the note, but B refused to deliver the deed to him, stating that he had been notified by A not to deliver it. It was held that the delivery of the deed by A to B was a delivery in escrow, and that a court of equity would compel the delivery of said deed to C. *Baum's Appeal*, 113 Pa. St. 58.

5. *General Rule — Redelivery — Passing of Estate* — *California.* — *Fitch v. Bunch*, 30 Cal. 212.

Connecticut. — *Sparrow v. Smith*, 5 Conn. 113; *Wolcott v. Coleman*, 1 Conn. 381.

Georgia. — *Wellborn v. Weaver*, 17 Ga. 274, 63 Am. Dec. 235.

Maine. — *Day v. Lacasse*, 85 Me. 244.

Massachusetts. — *Wheelwright v. Wheelwright*, 2 Mass. 454, 3 Am. Dec. 66.

Minnesota. — *Lindley v. Groff*, 37 Minn. 338.

Mississippi. — *Simpson v. McGlathery*, 52 Miss. 724.

New York. — *Green v. Putnam*, 1 Barb. (N. Y.) 500.

Ohio. — *Shirley v. Ayres*, 14 Ohio 307, 45 Am. Dec. 546.

Pennsylvania. — *Levengood v. Bailey*, 1 Woodw. (Pa.) 275; *Landon v. Brown*, 160 Pa. St. 546.

Wisconsin. — *Pruitsman v. Baker*, 30 Wis. 648, 11 Am. Rep. 592.

grantee or obligee is entitled to possession.¹ Accordingly, it has been held that when a deed has been placed in the hands of a third party as an escrow, the grantor cannot, after the happening of the act on which delivery is conditional, prevent delivery taking place by getting possession of the deed or by the destruction of it.²

c. RELATION BACK TO FIRST DELIVERY — (1) *By Agreement*. — If it appears from the agreement of the parties that it was intended that an instrument deposited as an escrow should take effect by relation back to the date of delivery, the intention of the parties will control, and upon performance of the condition the instrument will so take effect.³

(2) *By Fiction of Law* — (a) *In General*. — Moreover, in certain cases, by fiction of law, the second delivery, whether actual or constructive, is made to operate retroactively, and by relation back to the first delivery is substituted for it in time and effect.⁴

(b) *To Give Effect to Instrument — Death or Disability of Depositor*. — Thus, where an instrument is delivered as an escrow, and afterwards, before the second delivery, the depositor dies,⁵ or from other cause becomes incapable of making

1. **Actual Manual Delivery Unnecessary.** — *Couch v. Meeker*, 2 Conn. 302, 7 Am. Dec. 274; *Taylor v. Thomas*, 13 Kan. 217; *Davis v. Clark*, 58 Kan. 100; *Shirley v. Ayres*, 14 Ohio 307, 45 Am. Dec. 546; *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592. See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 204. Compare *Stanton v. Miller*, 65 Barb. (N. Y.) 73, 58 N. Y. 202.

In *White Star Line Steamboat Co. v. Moragne*, 91 Ala. 610, citing 6 AM. AND ENG. ENCYC. OF LAW (1st ed.) 867, the court said: "Upon the happening of the condition upon which manual delivery should be made, a deed theretofore in escrow becomes *ipso facto* the deed of the grantee, and * * * thenceforth the depository or holder is regarded as the mere agent or trustee of the grantee."

In *State Bank v. Evans*, 15 N. J. L. 155, 28 Am. Dec. 400, the court said: "It is the performance of the condition, and not the second delivery, that gives it vitality and existence as a deed, and so are the old authorities. In *Perriman's Case*, 5 Coke 84, it is said, if a man delivers a writing as an escrow, to be his deed on certain conditions to be performed, and afterwards the obligor or obligee dies, and afterwards the condition is performed, the deed is good, for here was *traditio, inchoata* in the lifetime of the party, *sed postea consummata existens* by the performance of the condition, and it takes effect by force of the first delivery, without any new delivery. So also in *Wymarke's Case*, 5 Coke 75, a deed of release of waste had been delivered by the plaintiff to a third person, to be by him delivered to the defendant on a condition to be performed; after condition performed, the plaintiff got the deed back into his possession; but the deed was considered effectual, and the party permitted to plead the matter specially without showing the deed. So, too, in *Shep. T. S.* 59, it is said: 'Where the deed is delivered to a stranger (upon condition) and apt words are used in the delivery thereof, it is of no more force until the condition be performed than if I had made it, and had it by me, and never delivered it at all. If the party in such case get it in his possession before the condition performed, yet he can make no use of it.' The

same principle, viz., that it is the performance of a condition which gives efficacy to the deed, was fully recognized by the Supreme Court of New York in *Artcher v. Whalen*, 1 Wend. (N. Y.) 179, where the above passage from *Shep. T. S.* was quoted by the court. In *Jackson v. Catlin*, 2 Johns. (N. Y.) 248, 3 Am. Dec. 415, the deed was executed and delivered to the attorney of the purchaser, to be by him delivered to the purchaser on payment of the purchase money. Kent, Chief Justice, said: 'The deed was clearly an escrow. It was to be delivered on payment of the purchase money. This was a plain and specific condition, to be performed before the deed could operate;' and he adds: 'It is of no force until the condition be fulfilled.'

Evidence Held to Be Sufficient to Constitute Delivery. — Evidence that a grantor executed a deed and left it with the scrivener, to be delivered to the grantee upon the performance of certain conditions; that the conditions were fully performed; and that the scrivener gave the deed to the grantor upon his declaring that he took it for the purpose of delivering to the grantee, will warrant a finding that there was a sufficient delivery to vest the title in the grantee. *Regan v. Howe*, 121 Mass. 424.

2. **Detention of Instrument by Grantor Insufficient to Prevent Title Passing.** — *Regan v. Howe*, 121 Mass. 424; *Baum's Appeal*, 113 Pa. St. 65.

3. **Relation Back to First Delivery by Agreement.** — *Price v. Pittsburgh*, etc., R. Co., 34 Ill. 13.

4. **Relation by Fiction of Law in General.** — *Davis v. Clark*, 58 Kan. 100; *Foster v. Mansfield*, 3 Met. (Mass.) 415, 37 Am. Dec. 154; *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592.

5. **Relation Back by Reason of Death of Depositor.** — *Bostwick v. McEvoy*, 62 Cal. 496; *Davis v. Clark*, 58 Kan. 100; *Cook v. Hendricks*, 4 T. B. Mon. (Ky.) 500; *Wheelwright v. Wheelwright*, 2 Mass. 453, 3 Am. Dec. 66; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Lindley v. Groff*, 37 Minn. 338; *Webster v. Kings County Trust Co.*, 145 N. Y. 275, affirming 80 Hun (N. Y.) 420; *Hunter v. Hunter*, 17 Barb. (N. Y.) 25; *Stanton v. Miller*, 65 Barb. (N. Y.) 73; *Ruggles v. Lawson*, 13 Johns. (N. Y.) 285, 7

a delivery, the instrument will be considered as taking effect from the first delivery, since otherwise the instrument would be defeated by the intervening incapacity.¹

Reasons for the Fiction. — Different reasons for the adoption of this fiction are assigned by the courts. By some it is said to be equitable in its nature and intent and devised to avoid injustice.² By others it is said to be for the general purpose of effectuating the intention of the parties,³ and in case of deeds in consideration of love and affection, it has been said to be resorted to by

Am. Dec. 375. See *Wallace v. Harris*, 32 Mich. 380; *Taft v. Taft*, 59 Mich. 193, 60 Am. Rep. 291.

In *Periman's Case*, 5 Coke 84, Lord Coke said: "If a man deliver a writing as an escrow, to be his deed upon certain conditions performed, and afterwards the obligor or obligee dieth, and afterwards the condition is performed, the deed is good, for there was *traditio, inchoata* in the life of the parties, *sed postea consummata existens* by the performance of the condition taketh his effect by force of the first delivery, without any new delivery."

In *Bostwick v. McEvoy*, 62 Cal. 496, the court said: "But when the condition on which an original delivery made in the lifetime of a party transpires, the conditional delivery becomes absolute, and the absolute delivery takes effect against the contracting parties from the date of the delivery of the contracts as escrows, notwithstanding the death of one of the contractors before the happening of the condition."

Qualification of Rule. — In *Stone v. Duvall*, 77 Ill. 480, the court said: "But in such a case the delivery only relates back to the first delivery so as to carry out the intention of the grantor and to vest the title. It would not give the grantee a right to intervening rents and profits."

Where Condition Is Not Performed. — Where a father executed a deed to his son and delivered it to a third person to be held in escrow until the son should have paid the grantor's debts, and after the father's death the son obtained possession of the deed without having paid the debts, it was held that the doctrine of relation did not apply. *Landon v. Brown*, 160 Pa. St. 538.

Instance Where Doctrine of Relation Held Inapplicable to Instrument Deliverable on Grantor's Death. — Where certain deeds and a will, together with notes in blank, were deposited with a third person with instructions verbally to keep until the grantor's death and thereafter on the signing of the notes by the grantees in the deeds to deliver the conveyances, the deeds were held to be invalid. *Taft v. Taft*, 59 Mich. 196, 60 Am. Rep. 291. In this case the court said: "It remains to be seen whether there is any rule of law which will continue the authority of the depositary to act, when no claim or contract existed which the law could recognize as valid, when Aden died. In law this was purely a voluntary transaction, and when Mallory took the deed and unsigned note into his custody, defendant had no rights whatever resting in contract. The whole law as to the relation back of an escrow in case of subsequently occurring death or disability is traced back to Sheppard's Touchstone and one

or two ancient authorities which treat of it theoretically and without explanation. But so far as the authorities go, ancient or modern, they all assume that the relation back is founded on the unintended or unexpected occurrence of some disability without which the second delivery would have been the act, at its date, of the grantor, prevented without his original design. The reported cases where such a retroactive effect has been given are very rare. The case of *Graham v. Graham*, 1 Ves. Jr. 275, was the only one cited on the hearing where the grantee performed conditions after the death of the grantor. In that case there were a series of connected transactions which would have sustained the decree on other grounds besides those of escrow; but in that case, as in every one which seems to have been considered, the conditions to be performed by the grantee were contemplated as capable of performance, if not as calling for performance during the life of the grantor, so that, if performed as contemplated, the transfer of the deed by the depositary would have been the grantor's delivery as of that date. If any other doctrine exists, it is very singular that there is no trace of it in the English authorities from which the law is derived, and on which it must be based, to take it out of the statutes of frauds and of wills."

1. Application of Rule Because of Marriage of Depositor Who Is Feme Sole. — The escrow of a *feme sole* deliverable upon the conditions which remain unperformed until after coverture may be delivered upon their performance, notwithstanding the intervening disability, and in such case the second delivery is given effect as of the first. *Jennings v. Bragg*, Cro. Eliz. 447; *Butler's Case*, 3 Coke 34; *Davis v. Clark*, 58 Kan. 100. See *Graham v. Graham*, 1 Ves. Jr. 272; *Wheelwright v. Wheelwright*, 2 Mass. 454, 3 Am. Dec. 66.

Where Grantor Becomes Non Compos Mentis. — It has been said also that where a man becomes *non compos mentis* before the occurrence of the event upon which his escrow is to be determined as an absolute deed, it will, upon the performance of the condition, pass title from the time of the first delivery. *Wheelwright v. Wheelwright*, 2 Mass. 454, 3 Am. Dec. 66; *Simpson v. McGlathery*, 52 Miss. 724.

2. Reason of Fiction. — *Wheelwright v. Wheelwright*, 2 Mass. 453, 3 Am. Dec. 66; *Lindley v. Groff*, 37 Minn. 338; *Simpson v. McGlathery*, 52 Miss. 723; *Harkreader v. Clayton*, 56 Miss. 391, 31 Am. Rep. 369; *Shirley v. Ayres*, 14 Ohio 310, 45 Am. Dec. 546; *Pruttsman v. Baker*, 30 Wis. 649, 11 Am. Rep. 592.

3. Davis v. Clark, 58 Kan. 100; *Foster v. Mansfield*, 3 Met. (Mass.) 414, 37 Am. Dec. 154.

some courts for the purpose of holding the transaction as in the nature of a testamentary disposition.¹

(c) **To Ward Off Intervening Claims of Creditors.** — It has been maintained that the fiction of relation back to the first delivery may be resorted to in courts of equity to ward off intervening claims or liens of the depositor's creditors.² But it seems to be the prevailing rule that, in the interval of time between the first and second delivery, title remains in the grantor subject to the claims of his creditors, and that this doctrine of relation cannot be applied for the purpose of defeating such intervening claims.³

(d) **To Defeat Claim of Intervening Purchaser with Notice.** — But it has been held that as against an intervening purchaser with full knowledge of all the facts, an escrow must be held to take effect at the date of the contract authorizing the delivery, though it was actually delivered to the grantee at a time subsequent to the intervening purchase.⁴

d. EFFECT OF PREMATURE DELIVERY — (1) *On Grantee or Obligee.* — A deed or other instrument deposited as an escrow is nothing more than a mere scroll until the condition is fully performed or the contingency happens upon the faith of which it was deposited; and this being so, no title passes prior to that time without the grantor's consent. The grantee or other party

1. *Davis v. Clark*, 58 Kan. 100.

2. **Intervening Rights.** — *Whitfield v. Harris*, 48 Miss. 710. See also *Hooper v. Ramsbottom*, 6 Taunt. 12, 1 E. C. L. 292.

Relation Back to Defeat Judgment Creditor. — In *Whitfield v. Harris*, 48 Miss. 710, it was held that the rights of a grantee of an escrow were superior to those accruing from a judgment rendered against the grantor after the first and before the second delivery.

Application of Doctrine to Defeat Claim for Dower. — Also it has been held that where a man and his wife executed a deed to a purchaser, delivering it to an agent to hold in escrow until the balance of the purchase money should be paid according to articles of agreement, and after such delivery and before the performance of the condition the grantor's wife died and he remarried, the dower claim of the second wife was cut out by relation back of the deed to the time of its delivery in escrow. *Vorheis v. Kitch*, 8 Phila. (Pa.) 554. But see dictum in *Stephens v. Rinehart*, 72 Pa. St. 440. See also *Hooper v. Ramsbottom*, 6 Taunt. 12, 1 E. C. L. 292.

3. **Doctrine of Relation Not to Be Applied to Ward Off Intervening Claim of Creditors.** — *Wolcott v. Johns*, 7 Colo. App. 360; *Jackson v. Rowland*, 6 Wend. (N. Y.) 666; *Prutsman v. Baker*, 30 Wis. 649, 11 Am. Rep. 592; *Oliver v. Mowat*, 34 U. C. Q. B. 472. See also *Taft v. Taft*, 59 Mich. 197, 60 Am. Rep. 291; *Hoyt v. McLagan*, 87 Iowa 746.

In *Wolcott v. Johns*, 7 Colo. App. 360, it was held that the fact that the grantees of an escrow went into possession of the property with the permission of the grantor would not defeat the right of an attaching creditor levying between the first delivery and the second.

In *Jackson v. Rowland*, 6 Wend. (N. Y.) 666, it was held in an action of ejectment that where a deed of lands was delivered as an escrow and absolute delivery was subsequently made, but previous to the second delivery a judgment was obtained against the grantor under which the land was sold, the purchaser under the judgment was entitled to the land.

In this case the court said: "The general doctrine is that a deed delivered as an escrow does not take effect until the condition is performed, * * * but there are exceptions to that rule, as where the grantor dies before the condition is performed, * * * and in some other cases where the operation of the conveyance would otherwise be absolutely defeated."

In *Prutsman v. Baker*, 30 Wis. 649, 11 Am. Rep. 592, the court said: "But subject only to this fiction of relation in cases like those above supposed and others of the kind, and which is only allowed to prevail in furtherance of justice, and where no injury will arise to the rights of third persons, the instrument has no effect as a deed, and no title passes until the second delivery; and it has accordingly been held that if, in the meantime, the estate should be levied upon by a creditor of the grantor, he would hold by virtue of such levy, in preference to the grantee in the deed."

As Between Innocent Third Persons. — In *New York* it has also been held that the fiction of relation will not be applied to a controversy between innocent third persons, to help one against the other. Thus it has been held that the fiction will not be resorted to for the purpose of supporting an intermediate sale by the grantee of the escrow between the first and second delivery, so as to defeat the right of the grantor of the escrow, who had taken a mortgage on the property, which was recorded subsequent to the deed from the grantee of the escrow. *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 288. It was intimated by the court in this case, however, that if the question was between the grantee of the escrow and the persons to whom he sold, the deed ought to relate back so as to give effect to his intermediate grants and prevent him from defeating them.

4. **Application of Doctrine of Relation to Defeat Claims of Purchaser with Notice.** — *McDonald v. Huff*, 77 Cal. 279, reversing (Cal. 1888) 18 Pac. Rep. 243; *Conneau v. Geis*, 73 Cal. 176; *Cannon v. Handley*, 72 Cal. 133; *Leiter v. Pike*, 127 Ill. 288.

who is to receive the benefit of the instrument cannot acquire the title by gaining possession of it by theft, by fraud, or by the voluntary act of the depositary, but only by the performance of the condition or the happening of the contingency.¹

1. No Title Passes to Grantee until Performance of Condition — *England*. — *Watkins v. Nash*, L. R. 20 Eq. 262.

Canada. — *Reynolds v. Waddell*, 12 U. C. Q. B. 9.

United States. — *Calhoun County v. American Emigrant Co.*, 93 U. S. 127; *Carr v. Hoxie*, 5 Mason (U. S.) 60.

Alabama. — *White Star Line Steamboat Co. v. Moragne*, 91 Ala. 610.

Arkansas. — *Chandler v. Chandler*, 21 Ark. 95.

California. — *Dyson v. Bradshaw*, 23 Cal. 528; *Haskell v. Doty*, 78 Cal. 424; *Heney v. Pesoli*, 109 Cal. 53.

Connecticut. — *White v. Bailey*, 14 Conn. 271; *Coe v. Turner*, 5 Conn. 86.

Florida. — *Southern L. Ins., etc., Co. v. Cole*, 4 Fla. 359.

Illinois. — *Eichlor v. Holroyd*, 15 Ill. App. 657; *Demesev v. Gravelin*, 56 Ill. 93; *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 166; *Skinner v. Baker*, 79 Ill. 496; *Stanley v. Valentine*, 79 Ill. 544; *Chicago, etc., R. Land Co. v. Peck*, 112 Ill. 447; *Burnap v. Sharpsteen*, 149 Ill. 225; *Ottawa, etc., R. Co. v. Hall*, 1 Ill. App. 612.

Indiana. — *Peter v. Wright*, 6 Ind. 183; *Robbins v. Magee*, 76 Ind. 382; *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49; *Balue v. Taylor*, 136 Ind. 376.

Iowa. — *Haven v. Kramer*, 41 Iowa 387; *Logsdon v. Newton*, 54 Iowa 448; *Jackson v. Rowley*, 88 Iowa 184, citing 6 AM. AND ENG. ENCYC. OF LAW (1st ed.) 867.

Kansas. — *Roberts v. Mullenix*, 10 Kan. 22; *Davis v. Clark*, 58 Kan. 100.

Maine. — *Jackson v. Sheldon*, 22 Me. 570; *Day v. Lacasse*, 85 Me. 245.

Massachusetts. — *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66; *Foster v. Mansfield*, 3 Met. (Mass.) 412, 37 Am. Dec. 154; *O'Kelly v. O'Kelly*, 8 Met. (Mass.) 436.

Michigan. — *Abbott v. Alsdorf*, 19 Mich. 157; *Cressinger v. Dessenburg*, 42 Mich. 580; *Wyckoff v. Victor Sewing Mach. Co.*, 43 Mich. 309; *Taft v. Taft*, 59 Mich. 195, 60 Am. Rep. 291; *Davis v. Kneale*, 103 Mich. 323.

Mississippi. — *Harkreader v. Clayton*, 56 Miss. 383, 31 Am. Rep. 369.

Missouri. — *Greening v. Steele*, 122 Mo. 287.

Nebraska. — *Patrick v. McCormick*, 10 Neb. 1; *Whipple v. Fowler*, 41 Neb. 675.

New Hampshire. — *Bickford v. Daniels*, 2 N. H. 74.

New Jersey. — *State Bank v. Evans*, 15 N. J. L. 160, 28 Am. Dec. 400; *Titus v. Phillips*, 13 N. J. Eq. 541; *Black v. Shreve*, 13 N. J. Eq. 458.

New York. — *Green v. Putnam*, 1 Barb. (N. Y.) 500; *Artcher v. Whalen*, 1 Wend. (N. Y.) 179; *Jackson v. Catlin*, 2 Johns. (N. Y.) 248, 3 Am. Dec. 415; *Jackson v. Rowland*, 6 Wend. (N. Y.) 666; *Clark v. Gifford*, 10 Wend. (N. Y.) 310; *Beekman v. Frost*, 18 Johns. (N. Y.) 544; *Adler v. Germania F. Ins. Co.*, 17 Misc. Rep. (N. Y. Supreme Ct.) 347; *Cagger v. Lansing*,

57 Barb. (N. Y.) 421; *Pendleton v. Hughes*, 65 Barb. (N. Y.) 136, 53 N. Y. 626.

Ohio. — *Ogden v. Ogden*, 4 Ohio St. 182.

Pennsylvania. — *Landon v. Brown*, 160 Pa. St. 538.

Tennessee. — *Johnson v. Branch*, 11 Humph. (Tenn.) 522.

Texas. — *Beaumont Car Works v. Beaumont Imp. Co.*, 4 Tex. Civ. App. 257.

Vermont. — *Stiles v. Brown*, 16 Vt. 563; *Smith v. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179; *Nichols v. Nichols*, 28 Vt. 228, 67 Am. Dec. 699.

West Virginia. — *White v. Core*, 20 W. Va. 272.

Wisconsin. — *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592.

See also *Cogswell v. O'Connor*, 11 Nova Scotia 287; *Rhodes v. School Dist. No. 14*, 30 Me. 110; *Townsend v. Hawkins*, 45 Mo. 288; *Carter v. Mills*, 30 Mo. 439; *Danforth v. Paxton*, 1 Wash. 6; *Balfour v. Parkinson*, 84 Fed. Rep. 855.

Where four promissory notes and a release of dower as the consideration of the notes were executed, and the whole delivered as an escrow, to take effect on delivery of possession of the premises in which the dower was released, which was to take place on a day certain, and the widow died before the day, it was held that until the performance of the condition the notes had not a legal existence and were inoperative. *Artcher v. Whalen*, 1 Wend. (N. Y.) 179.

In an action to quiet title, it was held that where the legal title remained in the plaintiff, the mere fact that he had agreed to the execution of a deed and its delivery in escrow, to be delivered upon final payment of the purchase price, would not prevent the maintenance of the action, and such agreement was inadmissible in evidence where it did not appear that final payment had been made. *Heney v. Pesoli*, 109 Cal. 53.

In *Eichlor v. Holroyd*, 15 Ill. App. 658, it was said that the grantor of a deed delivered in escrow may recover it by action, or have it removed as a cloud upon his title, if delivered before the performance of the conditions upon which it was delivered.

And in *Daggett v. Daggett*, 143 Mass. 516, the court said: "Even if the grantee obtains possession of it [the deed] before the condition has been performed, yet it is not the grantor's deed, and he may avoid it by pleading *non est factum*." To the same effect see *Harkreader v. Clayton*, 56 Miss. 383, 31 Am. Rep. 369.

Literal Compliance with Condition Necessary. — In *Hinman v. Booth*, 21 Wend. (N. Y.) 267, a deed was left in escrow, to be delivered if the grantee should give bond to the overseers of the poor to support one J. B. The grantee did support him till he died, but did not make or tender a bond in reasonable time, or at all. It was held that no title passed to the grantee, and that a conveyance by the grantor to other parties was valid.

Effect of Subsequent Performance of Condition. — But it has been held that where a deed is deposited in escrow to be held until the grantee shall have paid a specified debt, and is delivered before the debt is fully paid, but it is subsequently paid, the delivery will be operative and the deed valid, at least from the time when the debt is fully paid.¹

(2) *On Purchasers from Grantee or Obligee — Purchaser with Notice.* — Where a grantee has come into possession of an instrument without the performance of the conditions upon which it was delivered in escrow, a purchaser from him with full knowledge of all the circumstances showing the character of the instrument takes only such title as he has.²

On Bona Fide Purchaser for Value. — And it seems to be the prevailing rule that upon a delivery without the performance of the conditions or the happening of the contingency stipulated in an escrow, even a subsequent purchaser without notice and for a valuable consideration acquires no title and will not be protected.³

Condition to Be Performed by Person Specified. — In *Jackson v. Catlin*, 2 Johns. (N. Y.) 248, 3 Am. Dec. 415 affirmed 8 Johns. (N. Y.) 406, it was held that the condition must be performed by the party specified. There a tract of forty thousand acres of land was bid off by one Jones and three others at a sheriff's sale on execution against George Croghan, and the sheriff left the deed in escrow, to be delivered, on payment of the purchase money, in July, 1774. When the Revolution shortly after broke out, Jones and his associates, although committing no overt act of treason, adhered to the enemy, and were attainted by legislative act in 1779. In 1788 an act of the legislature authorized the surveyor general to pay the purchase money and sell the lands, and the controversy arose between his grantees and Croghan's heirs. It was held that the state of New York took no right, and therefore could confer none, to stand in the place of the execution purchasers, and that their failure to pay in time avoided the sheriff's deed and left the title in Croghan or his heirs. See also *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291.

Bills and Notes. — For a discussion of this question in its application to bills and notes see the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 204.

Burden of Proof as to Compliance with Condition. — In *Hare v. Horton*, 2 N. & M. 428, 5 B. & Ad. 715, 27 E. C. L. 160, it was held that where A executes a deed and delivers it to B as an escrow to be delivered to C on a certain event, possession of the deed by C is *prima facie* evidence of the performance of the condition. Parke, J., in this case said that "although there was evidence that the deed was at first delivered as an escrow, yet its being afterwards found in the plaintiff's possession was some evidence that the condition upon which it was so delivered had been complied with, and the defendant should, if it had been in his power, have shown the contrary."

But in *Black v. Shreve*, 13 N. J. Eq. 455, the court said: "Although the custody and possession of a complete instrument under seal by the grantee, covenantee, or obligee is sufficient evidence of delivery, if not overcome by proof that the grantee came improperly into possession of it, in ordinary cases, yet where the proof is clear that the final transfer to the party was not to be made unless certain terms

or conditions were complied with, the law puts the party claiming its benefit to the proof of compliance. The power to transfer is subject to the performance of a condition precedent, which must be proved, and is not to be inferred from the unexplained possession." See also *Light v. Woodstock, etc., R., etc., Co.*, 13 U. C. Q. B. 216.

1. Effect of Performance of Condition Subsequent to Premature Delivery. — *Connell v. Connell*, 32 W. Va. 319.

2. Effect of Premature Delivery on Purchasers with Notice. — *Roberson v. Reiter*, 38 Neb. 198; *Beaumont Car Works v. Beaumont Imp. Co.*, 4 Tex. Civ. App. 257.

Effect of Recording Instrument. — Where a mortgagee executed a release of a mortgage and placed it in the hands of a third party to be delivered to the mortgagor upon his paying the mortgage debt, which condition the mortgagor never performed, and the release was placed upon record without the knowledge or consent of the mortgagee, neither the mortgagor nor one who is not a *bona fide* purchaser without notice will acquire any rights or advantage by the recording of such release. *Whipple v. Fowler*, 41 Neb. 675. To the same effect see *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 166; *Stanley v. Valentine*, 79 Ill. 544; *Beaumont Car Works v. Beaumont Imp. Co.*, 4 Tex. Civ. App. 257.

3. Effect of Premature Delivery on Bona Fide Purchaser — *Arkansas*. — *Ober v. Pendleton*, 30 Ark. 61.

Indiana. — *Berry v. Anderson*, 22 Ind. 36; *Henry v. Carson*, 96 Ind. 412; *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49.

Iowa. — *Haven v. Kramer*, 41 Iowa 387; *Jackson v. Rowley*, 88 Iowa 184; *Jackson v. Lynn*, 94 Iowa 151.

Mississippi. — *Harkreader v. Clayton*, 56 Miss. 383, 31 Am. Rep. 369.

New Jersey. — *Black v. Shreve*, 13 N. J. Eq. 458.

Oregon. — *Tyler v. Cate*, 29 Oregon 515.

Vermont. — *Smith v. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179.

Wisconsin. — *Everts v. Agnes*, 4 Wis. 356, 65 Am. Dec. 314, affirmed 6 Wis. 453.

Effect of Premature Delivery on Subsequent Mortgagee. — Where C, after procuring a deed, by unfair means, out of the hands of the person who held it as an escrow, made a mort-

(3) *Consent or Subsequent Ratification of Depositor.* — But where the depositor consents ¹ to a delivery of an instrument placed in escrow, before the performance of the condition or the happening of the contingency, or subsequently ratifies ² such delivery, title will pass to the grantee, and thence to

gage on the land to a stranger, such stranger acquired no lien on the land which could be prior to the lien for money which C was to secure by mortgage to A before he was entitled to the possession of the deed. *Ogden v. Ogden*, 4 Ohio St. 182.

Contra. — In *Blight v. Schenck*, 10 Pa. St. 285, 51 Am. Dec. 478, the court held in a full and well-reasoned opinion that the title of a *bona fide* purchaser could not be defeated by proof that one of the deeds through which he claimed title was a wrongfully obtained and a wrongfully recorded escrow. The court rested its decision on the facts that the custodian of an escrow is the agent of the grantor as well as of the grantee, and if one of two innocent persons must suffer by the wrongful act of the agent, he who employs an unfaithful agent and puts it in his power to do the act, must bear the loss; that the agent has the power to deliver the deed, and if he delivers it contrary to his instructions he will be answerable to his principal, and it is therefore reasonable that the latter and not the innocent purchaser should bear the loss.

In *Hubbard v. Greeley*, 84 Me. 340, the court, in commenting upon this case, said: "In *Everts v. Agnes*, 4 Wis. 343, 65 Am. Dec. 314, the contrary was held. But in the latter case the court appears to have acted in ignorance of the decision in the former case, and in ignorance of the equitable doctrine upon which it rests, although the former decision was made six years before the latter. This, as it seems to us, was an unfortunate oversight, for the former decision is supported by reasoning so strong, and, as it seems to us, so satisfactory, we cannot resist the conviction that if the attention of the court had been called to it, and the principles on which it rests, a different conclusion would have been reached, and the subsequent decisions which have followed the lead of that would have no existence."

Action of Damages Against Obligees Transferring Bond to Bona Fide Purchaser. — In *Winona v. Minnesota R. Constr. Co.*, 29 Minn. 68, it was held that where the obligee named in a bond delivered as an escrow fraudulently procured the delivery of the bond to himself before the performance of the condition on which it was deposited, and subsequently transferred it to a *bona fide* purchaser for value, in an action against him the measure of damages (the bond being still outstanding) was the amount of the bond at the time of the judgment, interest being added upon the principal of the bond at the rate of six per cent from the time when the last coupon matured to the date of the judgment, and upon the interest coupons maturing prior to the recovery at the rate of seven per cent, from the date of maturity to the date of judgment.

Negotiable Instruments. — The principle laid down in the text does not, according to the weight of authority, apply to negotiable instruments. *Fearing v. Clark*, 16 Gray (Mass.) 74, 77 Am. Dec. 394. See also the title **BILLS**

OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 335.

In *Fearing v. Clark*, 16 Gray (Mass.) 74, 77 Am. Dec. 394, the court said: "The rule is different in regard to a deed, bond, or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide* without notice. It therefore makes the consequences which follow from the negotiation of promissory notes and bills of exchange through the fraud, deception, or mistake of those persons to whom they are intrusted by the makers, to fall on those who enabled them to hold themselves out as owners of the paper *jure disponenti*, and not on innocent holders who have taken it for value without notice."

Where the maker of a note has had to pay the amount of the note to an innocent indorsee, on account of the wrongful delivery of the note to the payee, he may recover damages therefor in an action against the depository. *Riggs v. Trees*, 120 Ind. 402.

1. **Effect of Grantor's Consent to Premature Delivery.** — *Eggleston v. Pollock*, 38 Neb. 188.

2. **Ratification of Premature Delivery.** — *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49; *Cotton v. Gregory*, 10 Neb. 125.

Recognition of Delivery for Specific Purposes. — In *Cotton v. Gregory*, 10 Neb. 125, it was held that where a grantor had recognized the validity of the grantee's possession of the deed, by receiving and retaining the purchase money paid to the grantee by a subsequent purchaser of a portion of the estate in controversy, he could not deny the validity of such possession as to *bona fide* purchasers of other portions of the property in question. The court said: "While we recognize fully the rule that a fraudulent delivery by or procurement from the depository of a deed deposited as an escrow will not operate to pass the title even in favor of a subsequent purchaser in good faith without notice, still we cannot permit it to go to the extent of enabling the grantor to affirm or recognize the grantee's possession of the instrument as valid for some purposes and to disclaim it as being nugatory for all other, especially when to do so would result in an injury to an innocent party."

Expression of Willingness to Alter Condition. — Where a deed was fraudulently delivered by the depository to the grantee before a certain indemnifying bond had been furnished as a condition of the delivery, the mere fact that subsequently the grantor expressed a willingness to take other security, without accepting it, however, did not operate as a recognition of the delivery and hence render the deed valid in the hands of a *bona fide* purchaser for

purchasers with or without notice. But it has been held that a grantor is not estopped to set up the invalidity of a deed if, in ignorance of the fact that it had been delivered by the depositary in violation of the condition upon which it had been deposited, he acted on the belief that the condition had been complied with.¹

3. Redelivery to Depositor. — Where the grantee or obligee does not comply with the terms of the conditions upon which a deed is delivered in escrow, the depositary is justified in redelivering the deed to the depositor.² But where there is no evidence to establish the fact that a redelivery is authorized, or that the grantee has failed to comply with the conditions, the depositor will not be entitled to a redelivery.³

ESPECIAL. — See note 4.

ESPLEES. — Esplees are the products yielded by lands, as the hay of meadows, herbage of pasture land, corn of arable land, rents, services, etc.

value. *Smith v. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179.

Depositor's Delay in Notifying Purchaser. — Where a deed delivered in escrow has been fraudulently delivered to the grantee and subsequently transferred to a third person in good faith and for valuable consideration, the omission of the grantor to notify such third person of the fraudulent delivery within two months after becoming aware thereof has been held not to amount to a ratification of the delivery. *Smith v. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179.

Effect of Recording Instrument with Grantor's Consent. — It has been held that the mere fact that the grantor of a deed consented to the recording thereof by the depositary, where it appeared that the agreement was on the express condition that, after the recording, the depositary should still retain possession of the deed, and not deliver it to the grantee or to any person until the performance of the condition, would not estop him from insisting upon a want of delivery, even as against a *bona fide* purchaser for value. *Smith v. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179.

Effect of Recording Deed and Taking Possession Thereunder. — But it has been held that where, at the time when a third person purchases from the grantee of a deed in escrow, the latter is in possession of the land, and the deed has been properly placed on record, such purchaser, if *bona fide* and for valuable consideration, will be protected, although the person to whom the deed was intrusted to be delivered on the performance of a condition may have delivered the deed in violation of his duty. *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49. To the same effect see *Haven v. Kramer*, 41 Iowa 382.

Where persons exchanging lands place their deeds in escrow and transfer their possession, and the depositary records one of the deeds without the knowledge of the grantor, and the grantee procures a loan on the land, a mortgagee in good faith acquires a valid lien upon the land though the mortgagor misappropriates the money. *Bailey v. Crim*, 9 Biss. (U. S.) 95. But see *contra*, *Simson v. Bank of Commerce*, 43 Hun (N. Y.) 156, *affirmed* 120 N. Y. 623.

But where a grantor delivered a deed in es-

crow on the condition that the grantee should discharge certain incumbrances on premises conveyed by the grantee to the grantor, it was held that the recording of the deed to the depositor by him and the taking possession and keeping the property thereunder could not be considered as a ratification of the wrongful act of the grantee of the escrow in surreptitiously taking the deed from the custody of the depositary, and this even against a *bona fide* purchaser for value. *Jackson v. Lynn*, 94 Iowa 151.

1. *Robbins v. Magee*, 76 Ind. 382.

2. Right of Depositor to Redelivery upon Non-performance of Conditions. — *Hayden v. Meeks*, (Ark. 1890) 14 S. W. Rep. 864; *Bodwell v. Webster*, 13 Pick. (Mass.) 411. See *Healdsburg Bank v. Bailhache*, 65 Cal. 331.

Where, upon a loan of money, a scrivener draughted an absolute deed of land and a bond of defeasance of the same date, and the parties executed them, and the deed was delivered to the grantee, but by the agreement of the parties at the same time the bond was left in the hands of the scrivener, to be delivered to the obligee if he should within a limited time repay the money, but otherwise to the obligor, and the money was not repaid, it was held that the bond was an escrow, that it was rightfully delivered up to the obligor after the time for the repayment of the money had expired, and that the transaction did not constitute a mortgage. *Bodwell v. Webster*, 13 Pick. (Mass.) 411.

3. Unauthorized Redelivery. — *Grove v. Jennings*, 46 Kan. 366. See *supra*, this section, *The Obligation upon Delivery to Depositary—Of Depositor*.

4. Especial Privileges. — The term "*especial privileges*," in the Act of Congress of March 2, 1867, which provides that "the legislative assemblies of the several territories shall not, after the passage of this act, grant private charters or *especial privileges*," refers to the granting of monopolies, such as ferries, trademarks, the exclusive right to manufacture certain articles, or to carry on certain business in a particular locality to the exclusion of others. The granting of a charter to a municipal corporation does not confer any *especial privileges* within the meaning of the act. *Elk Point v. Vaughn*, 1 Dakota 118.

The term may also mean the lands themselves.¹

ESQUIRE. — A title applied by courtesy to officers of almost every description, to members of the bar, and others. No one is entitled to it by law, and therefore it confers no distinction in law.²

ESSENCE. — Essence is that which constitutes the particular nature of a being or substance and distinguishes it from all others; formal existence; constituent substance, as the pure essence of a spirit. Also, the predominant qualities or virtues of any plant or drug, extracted, refined, or rectified from grosser matter; or, more strictly, the solution in spirits of wine of a volatile or essential oil, as the essence of mint.³

ESSENTIAL. — See note 4.

ESTABLISH. — "To establish" is to found; to create; to regulate;⁵ to settle certainly or fix permanently what was before uncertain, doubtful, or disputed.⁶ "Establishment" is defined as the place in which one is permanently fixed for residence or business; residence with grounds, furniture, equipage, etc., with which one is fitted out; also, any office or place of business, with its fixtures.⁷

1. Jac. Law Dict.; *Fosgate v. Herkimer Mfg., etc., Co.*, 9 Barb. (N. Y.) 293, *affirmed* 12 N. Y. 580.

2. *Esquire.* — Bouv. Law Dict.

In *Com. v. Vance*, 15 S. & R. (Pa.) 36, it was held that an act requiring the occupation or profession of a possessor of a slave to be registered was complied with by the registration of such possessor as an *esquire*, if he was an associate justice, though he was also a farmer. See also *Wilson v. Belinda*, 3 S. & R. (Pa.) 396.

In an action for slander, the charge was thus laid: "You have before this taken a false oath for your father against me in a suit before Squire H., and swore me out of some money (thereby meaning, in a suit * * * before P. H., *Esquire*, he, the said J., had sworn falsely and committed perjury)." It was held that this was a sufficient averment of the magisterial character of P. H. Said the court: "The import of the word *esquire*, or 'squire,' is in popular parlance, of which the courts will take notice, precisely the same as that of 'justice.'" *Call v. Foresman*, 5 Watts (Pa.) 331.

In *Christian v. Ashley County*, 24 Ark. 151, it was said: "The transcript of the record before us shows that the 'proceedings were had before and in the County Court of the county of Ashley, the Hon. P. T. Harris, judge, etc., presiding, assisted by *Esq.'s* John Hill and Samuel H. More.' The argument is that the title *esquire* is not unfrequently applied to officers of all grades, to attorneys at law, and is bestowed upon persons at pleasure as an expression of respect; and that it may have been used in some sense in the instance in question, and not to indicate that the persons who sat in the County Court with, and assisted the presiding judge to hold the court, were justices of the peace. But looking at the expression in the connection in which it is used in the record entry, we think it will hardly be a violent presumption to conclude that it was meant to indicate that the persons to whom it was applied were the associate justices."

The fact that a man is a miller, or a farmer, or an ironmonger, does not prevent his being

an *esquire*. In *re Doughty*, 18 L. T. N. S. 188; *Perrins v. Marine, etc.*, *Traveller's Ins. Soc.*, 2 El. & El. 317, 105 E. C. L. 317. Compare *Spaddacini v. Treacy*, 21 L. R. Ir. 559.

The object of the *English Bills of Sale Act* (17 & 18 Vict., c. 36) is to give, by means of registration, information to all persons whom it may concern, that a debtor, or a person about to contract debts, has executed a bill of sale and thereby deprived himself of a portion of his property. Therefore, where at the date of the execution and registration of the bill of sale the assignor was lessee and manager of a theatre, and was described in such bill of sale simply as *Esquire*, it was held that the description was insufficient, and the bill of sale, notwithstanding registration, null and void against his assignee in bankruptcy. *Ex p. Hooman*, L. R. 10 Eq. 63.

3. Webster's Dict., *followed* in *State v. Muncey*, 28 W. Va. 495.

4. **Essential Oil.** — Nitro-benzole, a manufacture from benzole and nitric acid, is not an *essential oil* under the *Tariff Act of July 14, 1862*. *Murphy v. Arnson*, 96 U. S. 131.

Essentially in the Sense of Strictly. — See *Hoffman v. Supreme Council, etc.*, 35 Fed. Rep. 254.

5. *Seagrave's Appeal*, 125 Pa. St. 375, where it was held that the words "founded and established" did not necessarily imply completion.

6. *Smith v. Forrest*, 49 N. H. 237; *Weigel's Succession*, 18 La. Ann. 49.

7. *Richmond County Academy v. Bohler*, 80 Ga. 162.

An Established or Usual Place of Business. — Under a statute which permits actions to be brought by or against a corporation, in any county in which it has "an *established* or *usual place of business*," a turnpike company exercising its franchise in several counties, and having in one of them a toll house, where it keeps an agent to collect tolls and sell tickets, and where its treasurer sometimes pays workmen whom it employs, may there sue or be sued, although it has an office in another county, where its books are kept, and its meetings are held, and which is used by its treas-

urer and superintendent. *Rhodes v. Salem Turnpike, etc., Corp.*, 98 Mass. 95. See generally the title JURISDICTION; and see ENCYC. OF PL. AND PR., title SERVICE OF PROCESS.

Ordain, Constitute, and Establish. — In *Kepner v. Com.*, 40 Pa. St. 129, the court said: "The act says that the council may 'make, ordain, constitute, *establish*, and pass' ordinances, etc.; but all these verbs mean the same thing, and any one of them would have been sufficient."

Boundaries. (See also the title BOUNDARIES, vol. 4, p. 788.) — Where the court, on a petition for the appointment of a commission of surveyors, found that there was a dispute as to a part of a section line, and appointed surveyors, and ordered them to *establish* the line in dispute, it was held that this did not authorize the surveyors to *establish* the line arbitrarily, without regard to the line of the government survey, but they were to find and *establish* the line as run by the government. *Faucher v. Tutewiller*, 76 Ill. 195. See also *State v. Rogers*, 107 Ala. 444, set out *infra*.

Permanently Settled — Boundary. — In *Smith v. Forrest*, 49 N. H. 237, it was held that the declarations of a deceased owner of land tending to show that a corner had been *established* by him and other adjoining owners were admissible. The court said: "The word *establish* is objected to by plaintiff as being an indefinite term. The ordinary meaning of the word is to settle certainly, or fix permanently, what was before uncertain, doubtful, or disputed."

Same — Claim to Property. — In *Weigel's Succession*, 18 La. Ann. 49, it was held that the word *established*, as used in article 1099 of the Civil Code of *Louisiana*, which provided for the *establishment* of claims against the estate of a deceased person, had a well-known legal signification, and implied that the claim to property doubtful as between the third person and the succession was permanently settled and confirmed.

Same — Claims Against Railroads for Damages to Cattle. (See also the title INJURIES TO ANIMALS; and see ENCYC. OF PL. AND PR., title RAILROADS.) — A statute provided that railroad companies should be liable for damages to cattle, either by killing or maiming the animals, and that the amount of damages should be *established* by the affidavit of the owner or some other person acquainted with the stock so killed. It was held that the legislature meant that the affidavit should be conclusive evidence of the amount of damages sustained by the owner, and that such provision was void as not providing due process of law. The court said: "If it be the plain meaning of the first and second sections that the affidavit provided for is to be taken as conclusive evidence of the damage or of the amount thereof, and that upon such affidavit as an evidence of debt the action may be instituted and judgment obtained without right upon the company's part to be heard as to negligence and the amount of damages, or as to either, then they do not provide due process of law and cannot stand. *Cooley's Const. Lim.* 432. To *establish*, according to Webster, means to make stable or firm; to fix or set unalterably; to settle or confirm; to enact or decree by

authority and for permanence; to decree; to enact; to ordain; said of laws, regulations, and the like; to settle or fix, as anything wavering or doubtful or weak. Worcester's definition is not materially different. The plain meaning of the language used in the first section is that the affidavit should fix, set unalterably, settle, make stable or firm, the amount of the damages." *Savannah, etc., R. Co. v. Geiger*, 21 Fla. 698.

Establish Post Roads — In the Sense of Found. (See also the titles ELECTRIC SUBWAYS, vol. 10; p. 893; POSTAL LAWS; UNITED STATES.) — In construing the power of Congress to *establish* post roads, the court in *Dickey v. Maysville, etc., Turnpike Road Co.*, 7 Dana (Ky.) 125, said: "Whether we consider the popular use of the word *establish*, or the definition of it by the most approved lexicographers, or the admitted import of it in the preamble and in the fourth clause of the eighth section of the Federal Constitution, it must be understood to mean not merely to designate, but to create, erect, build, prepare, fix permanently. Thus, to *establish* a character, to *establish* oneself in business, to *establish* a school or manufactory or government — all common and appropriate phrases — is not to assume or adopt some pre-existing character, or business, or school, or manufactory, or government. To *establish*, in each of those uses of the phrase, clearly expresses the idea of creating, preparing, founding, or building up. In the same sense, too, it is used and understood in the Bible; thus, it is said: 'The Lord by wisdom hath founded the earth; by understanding hath he *established* [prepared] the heavens.' Proverbs iii. 19. Just so, also, it is used and understood in the Federal Constitution. Thus, we find in the preamble these words, '*establish* justice,' '*establish* this constitution;' and in the fourth clause of the eighth article, power given to Congress 'to *establish* a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States.' Thus, we might present almost endless illustrations of the fact that the popular and philological, sacred and profane, oracular and political import of *establish* is not to designate, but to found, prepare, make, institute, and confirm."

Post Offices. — In *Ware v. U. S.*, 4 Wall. (U. S.) 632, it was said: "We concur with the plaintiffs that the power to discontinue post offices is incident to the power to *establish* them." See also the title POSTAL LAWS.

Established Highway. — An allegation in an indictment that the road described was and is "a common highway in Putnam county, in this state, made and laid out for the people of this state to go, return, and pass, at their free pleasure and will, on foot, on horseback, and in vehicles," is equivalent to an allegation that the road was and is an "*established* highway" under a statute punishing the obstruction of any public road or *established* highway, and providing for the removal of the obstruction. *Palatka, etc., R. Co. v. State*, 23 Fla. 546. See generally the title HIGHWAYS.

Establish Stations. — Where a railroad company, for a consideration, agreed to *establish* stations at certain points, it was held that the word *establish* did not in itself mean "main-

tain and use forever." *Nottawasaga v. Hamilton, etc., R. Co.*, 16 Ont. App. 52, 38 Am. & Eng. R. Cas. 698, *distinguishing* *Wallace Tp. v. Great Western R. Co.*, 3 Ont. App. 44; *Jessup v. Grand Trunk R. Co.*, 7 Ont. App. 128; *Geauveau v. Great Western R. Co.*, 3 Ont. App. 412.

Banking Institution. — A statute declared by its title to be "an act to suppress private banking" made it penal to "erect, *establish*, institute, or put in operation" any banking institution. It was held that this prohibition covered not only the primary steps in *establishing* and putting into operation the bank, but also the whole range of its transactions. The court said: "What, then, is the true sense of the prohibition to erect, *establish*, institute, or put in operation any banking company, or to issue any bills or notes with intent or purpose to do so? What is meant by putting in operation or *establishing* a banking company? We think that this language has a much wider import than mere commencement of business. To *establish* a company for any business means complete and permanent provision for carrying on that business, and putting a company in operation may well include its continued as well as its first or original operation." *Davidson v. Lanier*, 4 Wall. (U. S.) 454.

Hospital. — In *Richmond v. Henrico County*, 83 Va. 204, it was held that a municipal government *establishes* a hospital by purchasing a farm and the buildings on it specially for that purpose. The court said: "Then the proper meaning of the word used in the statute, section 6, conferring the power to *establish* hospitals, is to be determined by ascertaining how a government, petty or supreme, *establishes* a public institution. The Constitution of the United States says: 'Congress shall have power to establish post-offices and post-roads.' Congress *establishes* a post-office by a law or by regulation of the post-office department, simply designating a certain place for that purpose, and the post-office is *established* at that place, whether it is administered in a public building of the United States for the purpose, or in a country store, or though no postmaster be yet appointed to conduct it. A municipal government *establishes* a hospital by purchasing a place specially for that purpose; a city council, by designating and directing the purchase of a place for a hospital, and by appropriating the money of the city to pay for it, and by the payment of the money and the reception of a deed for the property or place purchased." See also *State v. Jersey City*, 34 N. J. L. 393, and *Ketchum v. Buffalo*, 14 N. Y. 300.

Same — Completion. — A testator gave a certain sum to the trustees of a hospital, provided it should be *established* and founded within a certain time. In construing this provision, the court in *Seagrave's Appeal*, 125 Pa. St. 362, said: "But, it is said, the will requires the hospital to be *established* and founded—that is, as contended, built and completely equipped ready for immediate occupation—before the expiration of five years from the death of the surviving sister; or, if this is not the meaning, there must at least, within that period, be the actual posses-

sion of moneys sufficient to erect, equip, and endow; and as neither of these conditions exists or can exist, the estate, it is claimed, must pass to the heirs and next of kin. The words 'founded and *established*,' even when standing alone, do not necessarily imply completion. To *establish*, as defined by Bouvier, is 'to found, to create, to regulate;' and foundation, or to found, as 'the *establishment* of a charity; that upon which a charity is founded, and by which it is supported.' For this, *Sutton's Hospital Case*, 10 Coke 23a, is referred to, where it is said: 'It is to be known that in law there are two manners of foundations, one *fundatio incipiens*, the other *fundatio perficiens*, and therefore *quatenus ad capacitatem et habilitatem*, the corporation is *metaphorice* called the foundation, for that is the beginning, as a foundation *quasi fundamentum capacitatis*, or preceding the whole; and therefore, in 21 Hen. VI., 4a, a writ was brought against John Arden, Abbot of St. John Baptist of Colchester. The defendant pleaded that before time of memory foundation was made of the same place *per nomen abbot, eccl' et monast' de S. Joh' de Colchester*, etc., where foundation is taken for incorporation; 38 Edw. III., 14; 38 Edw. III., 28a; 20 Hen. VI., 27c; and 18 Hen. VI., 16a, in *Windsor's Case*, Moo. 71, and divers other books agree with the same; *sed quatenus ad dotacionem*, the first gift of the revenues is called the foundation, and he who gives it is the founder in law, for *proprie fundatio est quasi fundi datio*, and the first gift is *fundamentum dotacionis seu collationis, et appellatione fundi edificium et ager continentur*; and that is proved by the statute of Westminster, 2, c. 41."

Establishment Not Incorporation. — As used in the acts of *Massachusetts* against counterfeiting, the terms "incorporated banking company in this state" and "banking company *established* in this state" are not identical. The court said: "The former necessarily implies a bank organized under a legal charter or authority, in the form of a special act, or some general law authorizing and giving a corporate character to such association. The term *established* may imply nothing more than a voluntary association organized by its own independent agreement, and not in pursuance of any statute [of] incorporation." *Com. v. Simonds*, 11 Gray (Mass.) 306.

Counties — Organization and Establishment Distinguished. — In *State v. Parker*, 25 Minn. 219, it was said: "This court, in *State v. McFadden*, 23 Minn. 40, defines the distinction between organized and *established* counties by stating, in effect, that the *establishing* of a county is the setting apart of certain territory to be in the future organized as a political community, or *quasi* corporation for political purposes; and the organizing of a county is the vesting in the people of such territory such corporate rights and powers." See generally the title COUNTIES, vol. 7, p. 604.

Same Establish in the Sense of Create. — The Constitution of *Texas* authorized the legislature "to create counties for the convenience of the people." A former constitution had authorized the legislature to "establish new counties for the convenience of the inhabitants of such new county or counties."

It was held that the word *establish* in the one provision and the word "create" in the other had the same meaning. *State v. Cook*, 78 Tex. 417.

County-seat — Permanently Established. — By an act of the legislature of *Ohio*, passed in 1846, it was provided that upon the fulfilment of certain terms and conditions by the proprietors or citizens of the town of C., in M. county, the county-seat should be "permanently *established*" at that town. Those terms and conditions having been shortly afterwards complied with, the county-seat was established accordingly. In 1874 the legislature passed an act providing for the removal of the county-seat to Y. Certain citizens of C. thereupon filed a bill setting forth that the Act of 1846, and the proceedings under it, constituted within the meaning of the constitution an executed contract, the obligation of which was impaired by the later act, and praying for a perpetual injunction against the contemplated removal. It was held that even if a contract was created, which was denied, it was satisfied on the part of the state by *establishing* the county-seat at C., with the intent that it should remain there, but that there was no stipulation that it should remain there in perpetuity. Said the court: "Domicil is acquired by residence and the *animus manendi*, the intent to remain. A permanent residence is acquired in the same way. In neither case is the idea involved that a change of domicil or of residence may not thereafter be made. * * * So the county-seat was permanently *established* at C. when it was placed there with the intention that it should remain there. This fact, thus complete, was in no wise affected by the further fact that thirty years later the state changed its mind, and determined to remove, and did remove, the same county-seat to another locality." *Newton v. Mahoning County*, 100 U. S. 548. See also the title COUNTY-SEAT, vol. 7, p. 1043.

Reconstruction. — A statute was entitled: "An Act to *establish* a board of revenue." The act provided for the reformation and reconstruction of an already existing board. It was held that it was not void as conflicting with the constitutional provision that the subject of an act shall be clearly expressed in its title. The court said: "The insistence hinges on the use of the word *establish*, which seems to be supposed incapable of proper use when employed in this connection, or of any other signification than to found and set up. Yet it is as often employed to signify the putting or fixing on a firm basis, of putting in a settled or an efficient state or condition, an existing legal organization or institution, as it is to found or set up such organization or institution. The one meaning is as little recondite, abstruse, or obscure as the other. In *People v. Mahaney*, 13 Mich. 481, which is regarded in all courts as a leading and controlling authority in the exposition and application of the constitutional requirement, the title of the act was: 'An Act to *establish* a police government for the city of Detroit.' It was said by Cooley, J.: 'The general purpose of this act is "to *establish* a police government for the city of Detroit.'" It would be difficult to express it better or more concisely than it is

expressed by the title. To accomplish this general object, officers are authorized to be appointed, who shall take upon themselves certain duties before performed by other officers, as well as certain new duties now created, and who are authorized to appoint and govern a force. The act, with great particularity, prescribes how this police government shall be rendered effectual; but this particularity cannot possibly be objectionable so long as it introduces nothing foreign and incongruous, but is confined to the means supposed to be important to the end indicated.'" *State v. Rogers*, 107 Ala. 444. See also *Faucher v. Tutewiller*, 76 Ill. 195, set out *supra*.

Established in the Sense of Recognized, Acknowledged. — A statute providing for the marriage of persons of color was entitled "to *establish* and regulate domestic relations." It was argued from the use of the word *establish* that the legislature intended to create "new laws," and that before provisions of this statute no legal marriage could have been contracted between persons of color. The court said: "Upon few words could there be more room for argument than upon the word *establish*. It is selected (1 Story on Con., § 454, 3d ed.) to show 'that it is by no means a correct rule of interpretation to construe the same word in the same sense wherever it occurs in the same instrument. In common language the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. Chief Justice Marshall in *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1. A very easy example of this sort will be found in the use of the word *establish*, which is found in various places in the constitution.' He then proceeds to give some meanings of the word in the several positions which it occupies, as, for example, to settle firmly; to fix unalterably; to make a form and not to fix or settle unalterably or forever; to create; to found and to regulate; to settle, recognize, or support; to create; to ratify; and to confirm. We are forced, then, to look to the context and to the law as it was before the passage of the act to enable us to determine the meaning of a word possessed of such diversity of signification. * * * 'The word *establish*, as thus used, may be interpreted to signify "recognized, acknowledged, ratified and confirmed.'" Such signification of the word is supported not only by judicial construction (Story on Con., § 454, *supra*), but by common use and in the best authorities. A printed example cited occurs in two verses of the English translation of the Mosaic law concerning a married woman's vow. 'Every vow and every binding oath, to afflict the soul, her husband may *establish* it or her husband may make it void.' But if her husband altogether 'hold his peace at her from day to day, then he *establisheth* all her vows or all her bonds which are upon her; he confirmeth them, because he held his peace at her in the day that he heard them.'" Numbers, c. 30, verses 13 and 14. In the latter verse the words *establish* and 'confirm' are used to translate one and the same word in the Greek and in the Hebrew." *Davenport v. Caldwell*, 10 S. Car. 336.

Establish Charities. (See also the title CHARITY.)

TIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 893.)—In *Atty.-Gen. v. Soule*, 28 Mich. 157, the testator had directed the setting apart of a certain sum to be expended according to the direction of the executors, "for the *establishment* of a school at Montrose, * * * for the education of children." This was held to be too uncertain and indefinite. The court said: "The word *establish*, in the connection in which it is used, is quite indefinite. It is susceptible of various senses. The testator may have used it to denote the employment of a teacher or teachers, or the organization of an institution, or the erection of a building, or part, or all of them. *Atty.-Gen. v. Hull*, 15 Eng. L. & Eq. 182."

Same.—**The Establishment of a Dispensary**, as used in a will in which a bequest was made for that purpose, was held to include the procuring of a site and the erection of suitable buildings. *Beekman v. People*, 27 Barb. (N. Y.) 264, *affirmed* 23 N. Y. 298, 575.

To Establish and Regulate Markets—**Power to Purchase**. (See also the title **MARKETS**, and see **REGULATE**.)—By the charter of a city the common council was authorized to *establish* and regulate markets. It was held that under this power the council might purchase market grounds. The court said: "Were the words 'to regulate' the only words here used, it is clear that the authority to purchase the ground could not be deduced from them. Those words naturally, if not necessarily, presuppose the existence of the thing to be regulated. Not so, however, with the words 'to *establish*.' Although these words may mean simply to confirm, yet their more common import is permanently to create or found. In the connection in which they stand here, at least, this would seem to be their natural meaning, because otherwise they would add nothing to the power conferred by the words 'to regulate.'" *Ketchum v. Buffalo*, 14 N. Y. 360. See also *People v. Lowber*, 28 Barb. (N. Y.) 65; *State v. Jersey City*, 34 N. J. L. 393; *Richmond v. Henrico County*, 83 Va. 204.

A general power conferred upon cities to "*establish* and regulate markets and market places," is a continuing power; and its exercise at one period by *establishing* a market place, and erecting a market house in a particular locality, will not prevent a city from removing such building, or abandoning such locality for market purposes. *Gall v. Cincinnati*, 18 Ohio St. 563. See also *Wartman v. Philadelphia*, 33 Pa. St. 210.

Manufacturing Establishments.—The interpretation clause of the English Regulation of Labor in Print Works Act, 8 & 9 Vict., c. 29, provides that "the words 'incidental printing process' shall be taken to mean any process of preparing, dyeing, * * * incident or necessary to the completion of the chief process of printing figures, * * * carried on within buildings, sheds, fields, or portions of ground lying adjacent to each other, or forming a part or parts of the *establishment* where the chief process of printing as aforesaid is carried on." It was held that a factory where the preliminary processes of calico printing were performed, belonging to the same firm as the factory at which the principal process was performed, though situated at a distance

of seven miles from it, was a "part of the *establishment* where the chief process" was carried on. *Hoyle v. Oram*, 12 C. B. N. S. 124, 104 E. C. L. 124.

Pipes of Gas Companies.—Pipes of a gas company laid in streets of a city are part of the *establishment* of the company, and are subject to taxation, under a statute providing that certain manufacturing *establishments* should be taxable, for the apparatus for delivery is merely an extension and continuation of the apparatus for the manufacture of gas, and both belong to the *establishment*; but this does not include pipes owned by the city or by private persons, into which the company delivers gas for consumption. *Memphis Gas Light Co. v. State*, 6 Coldw. (Tenn.) 310, 98 Am. Dec. 452.

Establishment of a Town.—In an action by an incorporated town to recover possession of certain streets and alleys, the petition set forth the plat of the town, and facts to constitute a legal *establishment* of the town and the dedication of the streets and alleys in question to the public use, and also other facts pertaining to the case; and the answer admitted that the town had been laid out and *established*, but denied that the plat set forth in the petition was a correct one, and denied all the other allegations in the petition. It was held that in admitting that the town was laid out and *established*, there being no specific denials to the contrary, the answer admitted all the facts averred in the petition which were essential to the legal *establishment* of the town and the dedication of its streets to the public. The court said: "The answer admitted that the village of Leesburgh, with its streets and alleys, was 'laid out and *established*,' but denied that the plat thereof, made part of the petition, was a 'correct' plat. There being no specific denial of the averments in the petition relating to the due and legal dedication of the streets and alleys to the public use, this admission, in effect, conceded all that was essential to the legal dedication of the town of Leesburgh, including its streets and alleys; for it could not be *established* without a legal dedication. The issue taken was only as to the correctness of the plat." *Stephenson v. Leesburgh*, 33 Ohio St. 480.

Instructions. (See generally the titles **EVIDENCE**, *post*; **REASONABLE DOUBT**.)—Where the facts put in issue by the pleadings were capable of being proved by circumstantial evidence, it was held error, as tending to mislead the jury, to charge without qualification that each item of evidence or group of circumstances naturally tending to prove such facts did not *establish* the same. The court said: "The use of the word *establish* seems to have been specially unfortunate. The word ordinarily means to settle firmly—to fix unalterably, and in this sense the instruction would be equivalent to saying that the facts recited were not conclusive evidence of fraud. In this sense it was peculiarly inapplicable. It was unnecessary for the plaintiff to furnish conclusive evidence, and yet, from the instruction, the jury might well infer that it was essential for him to do so. The question is, whether these instructions, given, as they were, without qualification, did not tend to mislead the jury.

ESTATE. (See also the titles **BENEFICIARIES (IN INSURANCE)**, vol. 3, p. 928; **ESTATES**, *post*; **WILLS**; and see **PERSONAL**; **RATABLE**; **REAL**.)—An estate in lands, tenements, and hereditaments signifies such interest as the tenant has therein. It is called in Latin *status*, it signifying the condition or circumstances in which the owner stands with regard to his property.¹

We are clearly of the opinion that they did. While the collateral facts or circumstances recited in each might not, of themselves, *establish* fraud, yet it is quite evident that they tended, more or less strongly, to prove fraud; and it seems to us that the instructions should have been differently worded, or that there should have been some qualification, either as to each of such instructions or generally as to all." *Eberhardt v. Sanger*, 51 Wis. 79.

An instruction that the jury should find the facts which its members believed "to be *established* by the fair weight of all the evidence, as embodied in the special verdict submitted to you," was held not to be erroneous. The court said: "The criticism is upon the use of the word 'fair,' but the facts were 'to be *established* by the fair weight of all the evidence.' The word *establish* ordinarily means to settle firmly, to fix unalterably; and hence the facts could not be so *established* except by the greater weight or preponderance of the evidence. Manifestly, it was not misleading. *Thomas v. Paul*, 87 Wis. 607." *McKeon v. Chicago, etc., R. Co.*, 94 Wis. 477.

Jury and Jury Trial. (See also the title **JURY AND JURY TRIAL**.)—A statute provided that in order to disqualify a juror two things were necessary: first, that there was in some way *established* in the mind of the juror a conclusion as to the guilt or innocence of such party; and second, that such conclusion would influence the juror in his action in finding a verdict. In construing this provision, the court in *Suit v. State*, 30 Tex. App. 319, said: "*Established* has no statutory definition given it by our statutes, but as usually understood it means settled, fixed, confirmed. Such is the definition found in *Bouvier's Law Dictionary*, as well as in *Webster's Dictionary*. Under the statute the conclusion formed by the juror must be such as will prevent him from finding a fair and impartial verdict in the case upon the law and evidence. The ultimatum of the matter is, can the juror give a fair and impartial verdict in the case upon the law and facts? If so, he is competent; if not, he is incompetent."

Established by Law, Ex Vis Terminorum, means declared by legislative enactment. *Dane v. Smith*, 54 Ala. 49.

1. 2 Black. Com. 103, *quoted* in *Bradford v. Mogk*, 55 Hun (N. Y.) 483; *Clift v. White*, 12 N. Y. 527; *James v. Morey*, 2 Cow. (N. Y.) 301; *Backus v. Presbyterian Assoc.*, 77 Md. 57; *Beall v. Holmes*, 6 Har. & J. (Md.) 208; *Hoge v. Hollister*, 2 Tenn. Ch. 609.

Estate and Title Distinguished. (See also the article **TITLE**.)—In *Robertson v. Van Cleave*, 129 Ind. 232, it was said: "There is a very plain and marked distinction between an *estate* in lands and a title to lands. The appellants were the owners of an equitable *estate* in the land in controversy, but to entitle them to re-

deem under section 768 they were required to hold either a legal or an equitable title. An *estate* in land is the degree, quantity, nature, or extent of interest which a person has in it. *Bouvier's Law Dict.*; *Co. Litt.*, § 347; 2 Black. Com. 103; 2 Crabb on Real Prop., pt. 2, § 942; *Preston Est.* 20; *Black's Law Dict.*; 1 Washb. Real Prop., marg. p. 45 *et seq.* His title to it is the evidence of his right or of the extent of his interest; the means whereby the owner is enabled to assert or maintain his possession; the right of the owner, considered with reference either to the manner in which it has been acquired, or its capacity of being effectually transferred. *Black's Law Dict.*; *Rap. & Law. Dict.*; *Co. Litt.* 345; 2 Black. Com. 195. The distinction between the two is discussed and plainly shown in the first eight sections of chapter 3, 1 Washb. Real Prop."

Estate, Assets, and Effects. (See also **ASSETS**, vol. 2, p. 1006; **EFFECTS**, vol. 10, p. 446.)—In *In re Kahley*, 3 Biss. (U. S.) 174, it was held that the words "*estates and effects*" and "*assets*" may be used synonymously. See also *Trueman v. Tilden*, 6 N. H. 202; *Milward v. Shields*, (Ky. 1897) 43 S. W. Rep. 185.

Property and Estate. (See also **PROPERTY**.)—*Estate* and "*property*" have been held to have the same import in a will. *Marks's Succession*, 35 La. Ann. 1054; *Fogg v. Clark*, 1 N. H. 167.

Absolute Estate.—An absolute *estate* is one which cannot be defeated or changed by any condition, restriction, or limitation. *Falconer v. Buffalo, etc., R. Co.*, 69 N. Y. 498.

Landed Estate.—The term "*landed estate*," on which police juries are authorized by act of legislature to levy taxes for works of internal improvement, embraces also all houses, fixtures, and improvements thereon, and neat cattle, horses, and mules when attached to and used on a plantation. *St. Mary v. Harris*, 10 La. Ann. 676.

Interest.—In *Hurst v. Hurst*, 7 W. Va. 297, it was said: "The word 'interest' often is used to express or represent *estate*. As, for instance, an 'interest' in a tract of land is often used as meaning the same thing as an *estate* in a tract of land. These two words are not infrequently used as convertible terms."

Estate and Succession. (See also the title **SUCCESSION**.)—In *Davis v. Elkins*, 9 La. 135, it was held that the word *estate*, used in the English text of the *Louisiana Civil Code*, has the same meaning as the term "*succession*" in the French text. It is defined to be the *estate*, rights, and charges which a person leaves after his death. See also *Shane v. Withers*, 8 La. 489; *New Orleans v. Stewart*, 28 La. Ann. 180.

Policy of Insurance.—The plaintiff obtained an insurance on property mortgaged to him, the policy purporting to insure the *estate* of R. It was held that by the use of the word *estate* he intended to describe such person or persons

In Its Broadest Sense the word "estate" includes every species of property, and is applicable alike to real and personal property; and to restrict it to the latter, there should be a clear expression of intention to do so.¹

as had upon the death of R. succeeded to his title. *Weed v. London*, etc., F. Ins. Co., 116 N. Y. 106. See generally the title FIRE INSURANCE.

Succession Taxes. (See also the title SUCCESSION TAXES.) — A statute provided that a succession tax was to be paid out of the *estate* of the deceased. It was held that the word *estate* was to be understood in relation to the subject-matter, and that each devise, legacy, or distributive share was to pay its own tax. The court said: "The tax is to be paid out of the *estate* of the deceased. That this word was not used in its ordinary and largest sense is evident from the context of the act. The word *estate* means ordinarily the whole of the property owned by any one, the realty as well as the personality. Now it cannot be supposed for a moment that the law means that the tax upon a distributive share shall be paid by one heir out of the land descended, or by a devisee. That the tax is not by the act made, or intended to be made, a charge upon the *estate*, is made further manifest by the avowed object of the act. It operates on descents and devises, legacies, and distributive shares, only when the recipients are the collateral kinsmen of the deceased. If then the tax was to be paid out of the *estate*, it would, in many cases, operate to the injury of lineal descendants, and to the children of the deceased." *Hunter v. Husted*, Busb. Eq. (45 N. Car.) 141.

1. **Estate Comprehends Everything, Both Realty and Personality** — *England*. — *Hamilton v. Buckmaster*, L. R. 3 Eq. 327; *Nicholls v. Butcher*, 18 Ves. Jr. 193; *Barnes v. Patch*, 8 Ves. Jr. 604; *Doe v. Morgan*, 6 B. & C. 512, 13 E. C. L. 239; *Hawksworth v. Hawksworth*, 27 Beav. 1; *Hamilton v. Hodsdon*, 6 Moo. P. C. 76; *Hogan v. Jackson*, 1 Cowp. 306; *Stokes v. Salomons*, 9 Hare 75.

Canada. — *Cameron v. Harper*, 21 Can. Sup. Ct. Rep. 273.

United States. — *Blagge v. Miles*, 1 Story (U. S.) 426; *Archer v. Deneale*, 1 Pet. (U. S.) 585; *Stamp v. Deneale*, 2 Cranch (C. C.) 640; *In re Carrier*, 47 Fed. Rep. 438.

California. — *Mumford's Estate*, Myr. Prob. (Cal.) 133.

Indiana. — *Doe v. Kinney*, 3 Ind. 50.

Louisiana. — *Matthews v. Matthews*, 13 La. Ann. 197.

Maine. — *Palmer v. Dougherty*, 33 Me. 502.

Maryland. — *Backus v. Presbyterian Assoc.*, 77 Md. 57.

Massachusetts. — *Dewey v. Morgan*, 18 Pick. (Mass.) 295; *Dole v. Johnson*, 3 Allen (Mass.) 364; *Houghton v. Hapgood*, 13 Pick. (Mass.) 154; *Hunt v. Hunt*, 4 Gray (Mass.) 190; *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537.

Mississippi. — *Andrews v. Blumfield*, 32 Miss. 107.

Missouri. — *Shumate v. Bailey*, 110 Mo. 411.

Nebraska. — *Crawl v. Harrington*, 33 Neb. 112.

New Jersey. — *Whittaker v. Whittaker*, 40 N. J. Eq. 36; *Cook v. Lanning*, 40 N. J. Eq.

372; *Welsh v. Crater*, 32 N. J. Eq. 177; *Norris v. Clark*, 10 N. J. Eq. 51; *Den v. Snitcher*, 14 N. J. L. 53; *Den v. Drew*, 14 N. J. L. 68.

New York. — *Roman Catholic German Church v. Wachter*, 42 Barb. (N. Y.) 43; *Havens v. Havens*, 1 Sandf. Ch. (N. Y.) 329; *Jackson v. Merrill*, 6 Johns. (N. Y.) 191; *Jackson v. De Lancey*, 11 Johns. (N. Y.) 365, 13 Johns. (N. Y.) 537.

North Carolina. — *Harrell v. Hoskins*, 2 Dev. & B. L. (19 N. Car.) 481; *Doe v. Hyman*, 1 Dev. L. (12 N. Car.) 382; *Mably v. Stainback*, 1 Mart. (2 N. Car.) 75, 1 Am. Dec. 545.

Pennsylvania. — *Turbett v. Turbett*, 3 Yeates (Pa.) 187; *Com. v. Hackett*, 102 Pa. St. 505; *Hofius v. Hofius*, 92 Pa. St. 307; *Naglee's Estate*, 52 Pa. St. 154.

South Carolina. — *Blewer v. Brightman*, 4 McCord L. (S. Car.) 60.

Virginia. — *Davies v. Miller*, 1 Call (Va.) 127; *Smith v. Smith*, 17 Gratt. (Va.) 268; *Cole v. Clayborn*, 1 Wash. (Va.) 262.

Estate covers all that a man has, both real and personal. *Blewer v. Brightman*, 4 McCord L. (S. Car.) 64.

In *Roe v. Harvey*, 5 Burr. 2638, Lord Mansfield said: "The word *estate* carries everything, unless tied down by particular expressions."

In *Ayers v. Lawrence*, 59 N. Y. 198, it was said: "The word *estate* has several meanings, and in its most extreme sense signifies everything of which riches or fortune may consist."

In the case of *Bridgwater v. Bolton*, 1 Salk. 237, the court, *per* Holt, C. J., in giving construction to the language of a will, said: "The word *estate* is *genus generalissimum*, and includes all things real and personal." And again: "In a will the testator is not tied up to form; it is enough that he expresses and signifies his meaning by any words." This case was cited with approbation in *Jackson v. Robins*, 16 Johns. (N. Y.) 587. See also *Taylor v. Dodd*, 2 Thomp. & C. (N. Y.) 92.

In *Crawl v. Harrington*, 33 Neb. 107, it was said: "In its broad sense the word *estate* includes both real and personal property, but in its more limited sense it applies to land alone; and the term is used to denote the quality, quantity, and extent of the interest which the owner possesses in the land. Therefore, estates are divided into such as are freehold and those less than a freehold."

A statute provided that when a decedent's *estate* was less than three hundred dollars, it should vest absolutely in his widow or children. It was held that *estate* in this sense meant the whole mass of the decedent's property, both realty and personality. The court said: "There are no grounds for drawing a distinction between real and personal property in the construction of these acts. If there were any, the *estate* must be considered as more aptly referring to real property. But under our system of administration, which regards the whole mass of property, real and personal, as assets, for some purposes, in the hands of the administrator, the word *estate* has acquired a wider

Choses in Action. — In its broadest sense the term "estate" has been held to

application, in a popular sense, and in this sense, doubtless, the legislature meant to use it. It means the mass of property left by decedent." *Harrison v. Lamar*, 33 Ark. 827.

In *Den v. Drew*, 14 N. J. L. 72, it was held that the words "residue of my estate" carried the realty as well as the personalty. The court said: "But the words 'residue of my estate' cannot be so easily disposed of. It is true, the word *estate* is susceptible of different meanings, according to the connection in which it is used and the subject-matter to which it is applied; it may mean real or personal *estate*; or it may be descriptive of the locality, or quantity of land, only; or of the quantity of time or interest therein, or of both; and when it is descriptive of the subject or property devised, it will be considered as descriptive also of the interest in the subject, unless manifestly used in a different sense. 2 Pres. on Estates 88, 101."

Estate Is Not Confined to Fee or Freehold. — In *Sudbury v. Stow*, 13 Mass. 464, it was said: "The payment of taxes within the town is the principal cause of his settlement; and the term 'his estate' does not import that he must have a fee, or even a freehold, but any legal interest for which he is taxed, excluding such *estate* as he may hold in trust, either as guardian, administrator, or otherwise, in which he has no property." See generally the title **POOR AND POOR LAWS**.

Assignment for Benefit of Creditors. — *Estate* in an assignment for the benefit of creditors was held broad enough to carry land. *Macdonald v. Georgian Bay Lumber Co.*, 2 Ont. App. 36.

Deed. — In *O'Neil v. Carey*, 8 U. C. C. P. 339, it was held that the words, "all my right, interest, and *estate* of, in, and to the *estate* of Garrett Miller," in a conveyance, passed all the *estate* of the grantor therein.

Legacies Charged from Real Estate. (See also the title **LEGACIES AND DEVISES**.) — In *Cox v. Corkendall*, 13 N. J. Eq. 138, it was held that when legacies are directed to be paid out of the *estate* of the testator, the real *estate* is charged with the legacies. See also *Lypet v. Carter*, 1 Ves. 499; *Harris v. Fly*, 7 Paige (N. Y.) 421; *Van Winkle v. Van Houten*, 3 N. J. Eq. 172.

Charging Real Property with Debts. — But in *Archer v. Deneale*, 1 Pet. (U. S.) 585, it was held that where the testator charged his *estate* with his debts, the real property was not charged, although the court said that the term *estate* would have been sufficiently comprehensive to do so in the absence of a contrary intent. See generally the title **DEBTS OF DECEDENTS**, vol. 8, p. 1097.

In Lieu of Dower. — A testator gave his wife certain personal property and provided that "her acceptance of the above gift shall forever exclude her from any further demands on my *estate*." It was insisted that the acceptance of the gift excluded the widow from any further demand only against the personal *estate*; that the legacy was to be paid her by the executor, and therefore it was against that *estate* alone out of which the legacy was to be paid that she was excluded from any further demand. It

was held that if the other parts of the will gave no further indication of the testator's intention, this construction might prevail; but as the testator had put both real and personal *estate* in the hands of the executor for disposition, and disposed of his whole *estate*, real and personal, through the executor, the person to pay the widow the legacy, and the disposition was inconsistent with the widow's enjoyment of her legal right, it was the clear and manifest implication, from the whole will, that the testator did intend the gift to be in lieu of dower, and did not, by the use of the word *estate*, mean personal *estate* only. *Norris v. Clark*, 10 N. J. Eq. 51.

Tenancy at Will. — In speaking of a tenancy at will the court in *Stafford v. Adair*, 57 Vt. 66, said: "He has the right to the use and occupation of the premises during the pleasure of the lessor. He has an interest in the premises to that extent. His *estate* comes within the definition of the words 'land,' 'lands,' and 'real *estate*,' by sec. 9, c. 1, R. L., and which requires that they shall be treated as real *estate*."

Hereditament. — The right which one has in a hereditament is an *estate*. *Hays v. Richardson*, 1 Gill & J. (Md.) 366.

Tax Sale. — In *Clark v. Darlington*, 7 S. Dak. 148, it was held that the holder of a certificate of purchase of land at a tax sale, entitling him to a deed of such land at the maturity of such certificate, claimed an *estate* or interest in such land, within a statute authorizing an action to quiet title against such claimant.

Right to Acquire Title. — In *Wadsworth v. Buffalo Hydraulic Assoc.*, 15 Barb. (N. Y.) 91, it was held that the exclusive right to acquire title to lands from Indians did not constitute an *estate*.

Possession of Lands. — In *Jackson v. Parker*, 9 Cow. (N. Y.) 73, it was held that one who was in the possession of land under a contract of purchase had an *estate* in the land within a statute subjecting the real *estate* of every judgment debtor to a lien. The court said: "The term *estate* is very comprehensive, and signifies the quantity of interest which a person has, from absolute ownership down to naked possession. It is the possession of lands which renders them valuable, and the quantity of interest is determined by the duration and extent of the right of possession. 'Real *estate*,' therefore, includes every possible interest in lands, except a mere chattel interest."

Lease. — The California Water Lot Act provided that any *estate* held by virtue of any lease should be confirmed to the lessee. It was held that the term *estate* was not restricted to the mere term of the lease, but meant the right, title, and interest of the lessee. The court said: "We do not understand the term *estate* to have been used in the restricted sense attributed to it by the respondent's counsel. Such is not its ordinary signification, and we do not feel at liberty to adopt a definition not justified by the usual acceptation of the term. 'By the *estate* of any one,' says Preston, 'is to be understood his situation, and the circumstances of his tenancy in regard to the property in which he has the interest in question.'"

include choses in action.¹ But in a more restricted sense the term has been

1 Preston on Estates 20. 'An *estate* in land,' says Cruise, 'means such an interest as the tenant hath therein. It is called in Latin *status*, because it signifies the condition or circumstances in which the owner stands with regard to his property.' 1 Greenl. Cruise on Real Property 44. Burrill, in his Law Dictionary, gives this definition, and adds: 'In this sense *estate* is constantly used in conveyances, in connection with the words "right," "title," and "interest," and is, in a great degree, synonymous with all of them.' 1 Burr. Law Dict. 434." Friedman v. Macy, 17 Cal. 231.

Landlord and Tenant — Buildings. — Where a lease binds a landlord to pay his tenant, on the efflux of the term, for buildings erected by the tenant, or to grant him a renewal, the landlord is not bound to pay when the lease has been determined by nonpayment of rent before such efflux, and by a forfeiture and entry accordingly. This is true even though by the terms of the lease the reversion by the landlord is to be "as in his first and former *estate*," and though the erections were not on the ground at the date of the lease. The court said: "The plaintiff insists that the building is no part of such former *estate*, and defendant, therefore, does not become its owner by virtue of the re-entry. We have already shown that the building does become a part of the land as it is built. No such meaning was ever before attached to the use of the word *estate* in a legal document. It is used in reference to the nature of defendant's interest in the property, and not to the extent of improvements on the soil. As, if the lessor had a fee-simple estate, it reverted to him again as a fee simple. If he had a term for years, he was in again as part of his term. But it had no relation to the question of whether that *estate* might be more or less valuable when repossessed, or might bring to him more or less buildings." Kutter v. Smith, 2 Wall. (U. S.) 500.

Mortgages. — A statute provided that all claims not presented within eighteen months after publication of notice for that purpose should be forever barred, and the *estate* of the debtor discharged from such claim or claims. In construing this provision the court said: "The word *estate* has a technical legal sense, and denotes the quantity of interest a person has in the thing to which it is applied. The interest which a mortgagor has in the thing mortgaged is that portion of it which may remain after satisfying the debt. What *estate*, then, is discharged? In such case it is clear that the statute can only apply, if it applies at all, to the equity of redemption which remained with the intestate at the time of his decease. It does not profess to affect or discharge any *estate* which he had previously granted out of the same thing." Jefferson College v. Dickson, Freem. (Miss.) 483.

Executor of Mortgagee. — In Clift v. White, 12 N. Y. 527, it was held that the executor of a mortgagee held no *estate* in the land.

Mortgage Lien. — In Turrell v. Warren, 25 Minn. 9, 6 Cent. L. J. 414, a mortgage lien upon real property was held not to be an *estate* or interest in land. See also Bidwell v. Webb,

10 Minn. 59; Brackett v. Gilmore, 15 Minn. 245; Donohue v. Ladd, 31 Minn. 245.

Lien. — In Power v. Bowdle, 3 N. Dak. 107, it was held that liens were not *estates*.

Cemetery. — In Mount Auburn Cemetery v. Cambridge, 150 Mass. 12, it was held that a sewer assessment could not be laid upon a cemetery corporation's land. The court said: "Neither the subject-matter nor the language used indicates an intention that the statutes should apply to lands perpetually devoted by the legislature to the use of a burial place for the dead, and which cannot be sold or used for profit. The word *estates*, as commonly used, does not include such land."

Contingent Remainder. — In Young v. Young, 89 Va. 675, it was held that a contingent remainder was not within a statute allowing claims against *estates* for debts.

Executory Devise. — Where one entitled to land by executory devise made a general assignment for the benefit of creditors, by which he assigned all of his *estate*, it was held that under the word *estate* the property claimed under the devise passed. Rash's Estate, 2 Pars. Eq. Cas. (Pa.) 162.

Estate Includes Personality. — A testator provided that his widow should have her lawful right of dower out of his *estate*. It was held that under this will she was entitled to her third of the personal property. Adamson v. Ayres, 5 N. J. Eq. 351.

In Boston v. Dedham, 4 Met. (Mass.) 178, construction was given to the word *estate* in a statute defining the gaining of a settlement, as follows: "Any person of twenty-one years of age, being a citizen of this or any of the United States, having an *estate* the principal of which shall be set at sixty pounds, * * * shall thereby gain a settlement therein." The court said: "The leading and most prominent objection taken by the defendants is that the term *estate*, as used in the statute cited, means exclusively real *estate*, and that a valuation and assessment upon personal property do not bring the case within the statute. This, in our opinion, is too restricted a definition of the term *estate*. The term is of very broad and extensive application, and clearly comprehends personal as well as real *estate*."

Same. — In a Marriage Contract, in consideration of certain settlements, the wife agreed that she would desire no more of her husband's *estate*. It was held that the word *estate*, as used in the contract, was not limited to real *estate*, but included both realty and personality. Shoch v. Shoch, 19 Pa. St. 254.

Same — Bank Stock. (See generally the title STOCK.) — In State Bank v. Savannah, Dudley (Ga.) 131, it was held that the word *estate*, in a statute providing for the taxation of *estates*, included bank stock.

Alimony is not itself an *estate* within the technical legal sense of that word. Campbell v. Campbell, 37 Wis. 215. See generally the title ALIMONY, vol. 2, p. 92.

1. Choses in Action — Webb v. Bowler, 5 Jones L. (50 N. Car.) 362; Pippin v. Ellison, 12 Ired. L. (34 N. Car.) 61; Hurdle v. Outlaw, 2 Jones Eq. (55 N. Car.) 76; Williams v. Lord,

held not to include choses in action.¹

Corpus and Interest.—The word “estate,” if not controlled by some other language of the will, is construed to designate the quantity of interest, and not merely the *corpus* or the subject of the devise.²

Fee.—And accordingly it has been held that the term “estate,” in a will, carries a fee simple, if the testator has a fee in the subject-matter.³ But if it

75 Va. 398; *Sayer v. Dufaur*, 11 Q. B. 325, 63 E. C. L. 325.

Same—Breach of Contract.—A statute provided that actions for destruction of or damage to any *estate* by or of a decedent should survive against the personal representative. It was held that an action for wrongful discharge survived.

Same—Separate Property of Married Women. (See also the title SEPARATE ESTATES OF MARRIED WOMEN.)—In *Cooney v. Lincoln*, 20 R. I. (pt. i.) 185, it was held that the word *estate*, in a statute giving married women the control of their property and *estates*, included choses in action. Compare *Norfolk, etc., R. Co. v. Prindle*, 82 Va. 128.

Same—Property.—In *Pippin v. Ellison*, 12 Ired. L. (34 N. Car.) 61, Pearson, J., said: “The word *estate* has a broader signification than the word ‘property.’ The former includes choses in action. The latter does not, and in reference to personality is confined to ‘goods,’ which term embraces things inanimate—furniture, farming utensils, corn, etc.; and ‘chattels,’ which term embraces living things—slaves, horses, cattle, hogs, etc.” See also PROPERTY.

Same—Debts.—In an attachment statute, authorizing the attachment of the debtor’s *estate*, it was held that the word *estate* included debts due to the debtor. *Welch v. Alligood*, 22 Ga. 619.

1. Choses in Action Not Included.—*Bond v. Hilton*, 6 Jones L. (51 N. Car.) 181.

In *Perry v. St. Joseph, etc., R. Co.*, 29 Kan. 420, it was held that a claim for damages for causing the death of a party, prosecuted by the administrator for the benefit of the widow and children or next of kin of the deceased, was not an *estate* of the deceased.

2. Corpus and Interest.—*Godfrey v. Humphrey*, 18 Pick. (Mass.) 537; *Abbott v. Essex Co.*, 2 Curt. (U. S.) 126; *Crawl v. Harrington*, 33 Neb. 112; *Coos Bank v. Brooks*, 2 N. H. 148.

It has long been established that a devise of a testator’s *estate* includes not only the *corpus* of the property, but the whole of the *estate* therein. *Williams v. Kibler*, 10 S. Car. 428.

In *Hart v. White*, 26 Vt. 267, it was said: “The word *estate*, used in a will in its application to real property, may be used to express either the quantity of interest devised, or to designate the thing devised, or both; and the sense in which it is used must be determined from the will itself. The rule laid down in the books is that though it refer to some particular lot of land, yet it will carry a fee, unless restrained by some other expression. 4 Kent’s Com. 598, note a.”

In *Deering v. Tucker*, 55 Me. 287, it was said: “The word *estate*, as held in the American courts, is a word of the greatest extension, and comprehends every species of property,

real and personal, and will carry a fee unless restrained. It describes both the *corpus* and the extent of interest.”

In *Troth v. Robertson*, 78 Va. 55, the court said: “In its more limited sense, the word *estate* is applied to lands. It is so applied in two senses. The first describes or points out the land itself, without ascertaining the extent or nature of the interest therein; as ‘my *estate* at A.’ *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537. The second, which is the proper and technical meaning of *estate*, is the degree, quantity, nature, and extent of interest which one has in real property; as ‘an *estate* in fee,’ whether the same be a fee simple or a fee tail, or an *estate* for life or for years, etc.”

Interest, Not Corpus.—A testator by his will conveyed his *estate* in trust to his executors and trustees named therein, and conferred upon them power to convey his real *estate* in fee, and gave out of the income of his *estate* certain annuities, providing that for each and every of the foregoing annuities the reckonable year should begin at the date of his decease, and making each of said annuities a first charge upon his *estate*. It was held that the word *estate* as used in the will referred to the title, and not to the *corpus*, of the property, and that the lien of the annuities attached to the interest which the testator had in all of his property, and became a specific charge upon none. *Bradford v. Mogk*, 55 Hun (N. Y.) 482.

Estate in the Sense of Corpus.—For an example of the use of the term in this sense, see *Sellers v. Sellers*, 35 Ala. 241.

3. Estate Will Pass a Fee. (See also the title WILLS.)—*England.*—*Bridgewater v. Bolton*, 6 Mod. 107; *Grayson v. Atkinson*, 1 Wils. 333; *Ibbetson v. Beckwith*, Cas. temp. Talb. 157; *Tanner v. Wise*, 3 P. Wms. 294; *Bailis v. Gale*, 2 Ves. 48; *Bowen v. Lewis*, L. R. 9 App. 890.

United States.—*Lambert v. Paine*, 3 Cranch (U. S.) 97.

Indiana.—*Doe v. Harter*, 7 Blackf. (Ind.) 490.

Iowa.—*Thornton v. Mulquinne*, 12 Iowa 549.

Maine.—*Deering v. Tucker*, 55 Me. 287; *Josselyn v. Hutchinson*, 21 Me. 339.

Maryland.—*Beall v. Holmes*, 6 Har. & J. (Md.) 208; *Backus v. Presbyterian Assoc.*, 77 Md. 57.

Massachusetts.—*Briggs v. Shaw*, 9 Allen (Mass.) 516; *Leland v. Adams*, 9 Gray (Mass.) 171; *Godfrey v. Humphrey*, 18 Pick. (Mass.) 539; *Putnam v. Emerson*, 7 Met. (Mass.) 333.

New York.—*Jackson v. Merrill*, 6 Johns. (N. Y.) 191.

Pennsylvania.—*Harden v. Hays*, 9 Pa. St. 155.

Virginia.—*Davies v. Miller*, 1 Call (Va.) 132; *Wyatt v. Sadler*, 1 Munf. (Va.) 537.

appears that such was not the intention, the fee will not pass.¹

Restricted to Personalty. — Although the word "estate" is sufficiently comprehensive to embrace property of every description, yet sometimes it is restricted to personalty, as, for instance, where the word is enumerated with others, all descriptive of personalty or chattel interests.²

Payment of Debts. — Where a decedent's "estate" is referred to, the term is often held to mean his property remaining after the payment of his debts.³

In *Beall v. Holmes*, 6 Har. & J. (Md.) 210, it was said that the word *estate*, when applied to real property in a devise and not used as a description only of the specific land, but denoting the *quantum* of interest or property that the testator has in the land devised, is of itself sufficient to carry a fee.

A devise to a wife was in the words following: "Third. I give and bequeath to my beloved wife, Mary Arnold, all my other *estate* of which I may die possessed, both real and personal, to be by her freely possessed and enjoyed." It was held that the devisee took an *estate* in fee in the real estate referred to. *Arnold v. Lincoln*, 8 R. I. 384.

In *Den v. Bowne*, 18 N. J. L. 214, it was said: "The word *estate* will pass a freehold as well as a chattel. *Estate* implies a fee simple; for that is the general *estate* which every man is supposed to be seized of. It is true that an *estate* for life is an *estate*; but it is with an addition."

1. Fee Held Not to Pass. — *Doe v. White*, 1 Exch. 526. See also *Doe v. Allen*, 8 T. R. 497; *Beall v. Holmes*, 6 Har. & J. (Md.) 205; *Graham v. Graham*, 23 W. Va. 46.

Same — Life Estate. — In *McKeown v. Officer*, (Supreme Ct.) 25 N. Y. St. Rep. 321, *affirmed* 127 N. Y. 687, 40 N. Y. St. Rep. 223, it was said: "While it is true that the word *estate*, employed in a will in connection with a devise, ordinarily indicates an intention to impart a fee, and operates upon the title rather than the *corpus* of the property, yet such inference may be controlled and restricted by the other provisions of the will, and there is nothing in the words 'I devise all my real *estate*,' etc., necessarily incompatible with an intent to devise a life *estate*, with power to consume the whole or absorb it by contracting debts. *Terry v. Wiggins*, 47 N. Y. 515."

Where the testator gives to his wife the residue and remainder of his *estate* not bequeathed, and then proceeds to give to another what is left after paying her funeral expenses, the intention to give her an *estate* for life only is manifest, and the limitation over is not repugnant to the previous devise, but explanatory of it. *Zimmerman v. Anders*, 6 W. & S. (Pa.) 218, 40 Am. Dec. 552.

Same — Rest of My Estate. — Where a testator devised to his son B. three hundred and fifty acres of land, and by another clause devised thus: "I give and bequeath to my son B. and

my four daughters * * * all the rest of my *estate*, consisting of various articles too tedious here to mention," it was held that B. took only a life *estate* under the first clause; and that the reversion did not pass to B. and the daughters under the residuary clause, but descended to the heir at law, though there was a clause in the will giving him twelve shillings. The court said: "On the part of the defendant, many cases have been cited to prove the position that the words 'rest of my *estate*,' though coupled with words of personalty, will carry the reversion remaining undisposed of after an *estate* for life. This is perfectly correct, if understood with this qualification, that there must be an apparent intention to pass the real *estate*." *Harris v. Mills*, 1 Law Repos. (4 N. Car.) 535.

2. Restricted to Personalty. (See also the title WILLS; and see OTHER.) — *Belaney v. Belaney*, 35 Beav. 469; *Coard v. Holderness*, 20 Beav. 147; *Jones v. Robinson*, 3 C. P. Div. 344; *Woollam v. Kenworthy*, 9 Ves. Jr. 137; *Sanderson v. Dobson*, 1 Exch. 141; *Archer v. Deneale*, 1 Pet. (U. S.) 585; *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537; *Bullard v. Goffe*, 20 Pick. (Mass.) 252; *Page's Estate*, 75 Pa. St. 95; *Miars v. Bedgood*, 9 Leigh (Va.) 372; *Minor v. Dabney*, 3 Rand. (Va.) 203; *Campbell v. Campbell*, 37 Wis. 215.

Lands. — The term *estate* has been held, however, to pass land notwithstanding its connection with terms descriptive of the personal property. *McCabe v. McCabe*, 22 U. C. Q. B. 378.

3. Payment of Debts. — The following item in a will: "I give and bequeath unto my beloved daughter * * * the interest of the equal undivided one-sixth interest part or portion of my whole *estate*," was held to mean one-sixth of the amount left for distribution after the payment of the debts of the testatrix and the expenses of administration. *Smith v. Terry*, 43 N. J. Eq. 659.

The *California* Civil Code provided that one-third of all of a testator's *estate* might be devised or bequeathed to charitable uses. It was held that the word *estate* in this provision did not mean gross *estate*, and therefore one-third of the *estate* after payment of debts might be devised or bequeathed to charitable uses. *Hinckley's Estate*, 58 Cal. 514. See generally the titles CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 893; MORTMAIN.

ESTATES.

BY ALEXANDER STRONACH.

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CROSS-REFERENCES.

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I. DEFINITION. — The term "estate" in its broadest sense means the condition or circumstances in which the owner stands with reference to his property.¹ In a more limited sense it means the degree, quantity, nature, and

1. **Estate Defined** — Means an Interest in All Property. — 1 Bouv. L. Dict. (Rawle's Rev.) 692; 2 Black. Com. 103; 2 Min. Inst. 71; *Bridgewater v. Bolton*, 6 Mod. 106; *Archer v. Deneale*, 1 Pet. (U. S.) 585; *Deering v. Tucker*, 55 Me. 284; *Bates v. Sparrell*, 10 Mass. 323; *Boston v. Dedham*, 4 Met. (Mass.) 178; *Den v. Snitcher*, 14 N. J. L. 53; *Jackson v. Robins*, 16 Johns. (N. Y.) 587; *Blewer v. Brightman*, 4 McCord L. (S. Car.) 60. See also *Lambert v. Paine*, 3 Cranch (U. S.) 97.

Meaning in a Devise. — A Devise "of all my estate" will carry all the property of which

the testator died possessed, both real and personal. *Hogan v. Jackson*, 1 Cowp. 299; *Stump v. Deneale*, 2 Cranch (C. C.) 640; *Andrews v. Brumfield*, 32 Miss. 107.

A devise of the testator's estate generally, passes both real and personal estate and may include a debt and mortgage. *Jackson v. De Lancey*, 11 Johns. (N. Y.) 365. See the title *WILLS*. And see *ESTATE*, ante.

Means "Succession." — The word "estate" used in the English text of the *Louisiana Civil Code* has the same meaning as the term "succession" in the French text. It is de-

extent of interest which a person has in real property.¹ It is in this latter sense that the term will be used in this article.

II. CLASSIFICATION OF ESTATES — 1. In General. — Estates may be considered in a fourfold view: first, with regard to the quantity and interest which the tenant has in the tenement; second, with regard to the qualifications of interest which may exist in reference thereto; third, with regard to the time of enjoyment; and fourth, with regard to the number and connection of the tenants.²

2. Estates with Regard to Quantity of Interest. — Considered with reference to the quantity of interest which may be had in things real, estates are divisible into estates of freehold and estates less than freehold.³

a. ESTATES OF FREEHOLD — (1) In General. — An estate of freehold, *liberum tenementum*, or frank tenement, is defined by Blackstone to be "such an estate in lands as is conveyed by livery of seizin, or in tenements of any incorporeal nature by what is equivalent thereto."⁴ And by a more recent authority, an estate of freehold is defined to be an estate of indeterminate duration other than an estate at will or by sufferance, such as an estate in fee simple, an estate for life, an estate *durante viduitate*, or an estate during coverture.⁵ Estates of freehold are either estates of inheritance or estates not of inheritance.⁶

(2) Estates of Inheritance — (a) In General. — Estates of inheritance are of four kinds, namely, first, estates in fee simple; second, estates in fee qualified; third, estates in fee conditional; and fourth, estates in fee tail.⁷

(b) Estates in Fee Simple — aa. IN GENERAL. — An estate in fee simple is the greatest estate or interest which a person can possess in landed property.⁸ A tenant in fee simple has been defined to be "he that hath lands, tenements, or hereditaments to hold to him and his heirs forever, generally, absolutely,

finned to be "the estate, rights, and charges which a person leaves after his death." *Davis v. Elkins*, 9 La. 135.

1. Means an Interest in Real Property Only. — 1 *Bouv. L. Dict.* (Rawle's Rev.) 692; *Brainerd v. Cowdrey*, 16 Conn. 1; *Bates v. Sparrell*, 10 Mass. 323.

Coke's Definition. — "State or estate signifieth such inheritance, freehold, terme for yeares, tenancie by statute merchant, staple, elegit, or the like, as any man hath in lands or tenements, etc." *Co. Litt.*, § 650.

2. Estates Classified. — 2 *Black. Com.* 103; 2 *Min. Inst.* 71.

3. Estates According to Quantity of Interest. — 2 *Black. Com.* 103; 2 *Min. Inst.* 71.

4. Freehold Defined. — 2 *Black. Com.* 104.

5. 2 *Min. Inst.* 71.

6. Division of Freehold Estates. — 2 *Black. Com.* 104.

7. Kinds of Estates of Inheritance. — 2 *Min. Inst.* 72. See also *Co. Litt.* 1*b*.

8. Estate in Fee Simple. — *Williams on Real Property* 60; *Walsingham's Case*, *Plowd.* 557; *Bush v. Bush*, 5 *Del. Ch.* 144; *Frain v. Burgett*, (Ind. 1898) 50 *N. E. Rep.* 873. See also *Libby v. Clark*, 118 *U. S.* 255; *Indiana, etc., R. Co. v. Allen*, 113 *Ind.* 590.

In modern estates the several terms "fee," "fee simple," and "fee simple absolute" are substantially synonymous. *Jecko v. Taussig*, 45 *Mo.* 167.

Minor's Definition. — "An estate in fee simple is the entire and absolute property of the subject-matter, and, therefore, when one grants such an estate, he can make no further

disposition of the property (save by way of substitution), for he has already granted the whole and entire interest that it is possible for him to have, and consequently nothing remains in him." 2 *Min. Inst.*, p. 72.

Meaning of "Fee." — In its primary sense the meaning of the word "fee" was the same as that of feud or fief, the right which the vassal or tenant had to use the land and take the profits thereof to him and his heirs, rendering to the lord his due services, and in this sense it was used in contradistinction to *allodium*, which means every man's own land which he possesses merely in his own right, without owing any rent or service to any superior. At the common law there was no allodial property, all land being held mediately or immediately of the king. The use of the term in its original sense is rare, and it is generally used to express the continuance or quantity of estate. "A fee, therefore, in general, signifies an estate of inheritance, being the highest and most extensive interest that a man can have in a feud; and when the term is used simply, without any other adjunct, or has the adjunct of simple annexed to it (as a fee or a fee simple), it is used in contradistinction to a fee conditional at the common law, or a fee tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restriction to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the king said to be seized in fee, he being the feudatory of no man." 2 *Black. Com.* 105. See *ALLODIAL*, vol. 2, p. 150.

and simply, without mentioning what heirs, but referring that to his own pleasure or to the disposition of the law."¹

Fee in Abeyance. — The fee simple inheritance of lands and tenements is generally vested and resides in some person or other, though various inferior estates may be carved out of it.² "Yet sometimes," says Blackstone, "the fee may be in abeyance, that is (as the word signifies), in expectation, remembrance, and contemplation in law, there being no person *in esse* in whom it can vest and abide, though the law considers it as always potentially existing and ready to vest whenever a proper owner appears."³

bb. WORDS NECESSARY TO CREATE — (*aa*) *In a Deed.* — The general rule at common law was that in order to create or transfer a fee by deed it was necessary to use the word "heirs."⁴ In many jurisdictions this rule of the common law has

1. Tenant in Fee Defined. — 2 Black. Com. 104. See also Co. Litt. 16; Brown v. Freed, 43 Ind. 256.

Definition Criticised. — This definition has been criticised by Mr. Williams, who says: "Blackstone's explanation of an estate in fee simple is that a tenant in fee simple holds to him and his heirs forever, generally, absolutely, and simply, without mentioning what heirs, but referring that to his own pleasure or the disposition of the law. But the idea of nominating an heir to succeed to the inheritance has no place in the English law, however it might have obtained in the Roman jurisprudence. The heir is always appointed by the law, the maxim being *solus Deus hæredem facere potest, non homo*; and all other persons whom a tenant in fee simple may please to appoint as his successors are not his heirs, but his assigns. Thus, a purchaser from him in his lifetime and a devisee under his will are alike assigns in law, claiming in opposition to and in exclusion of the heir, who would otherwise have become entitled." Williams on Real Property 63.

2. 2 Black. Com. 107.

3. Fee in Abeyance. — 2 Black. Com. 107. See also 2 Min. Inst. 74; 4 Kent's Com. 258. And see the title REMAINDERS AND EXECUTORY INTERESTS.

Illustration. — "Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est hæres viventis*; it remains therefore in waiting or abeyance during the life of Richard. This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life, and the inheritance remains in abeyance. And not only the fee, but the freehold also, may be in abeyance, as, when a parson dies, the freehold of his glebe is in abeyance until a successor be named, and then it vests in the successor." 2 Black. Com. 107.

Fearne's View. — "As the legal seizin, property, or ownership, or, in other words, the legal freehold and inheritance, is commensurate with the duration of real hereditaments, it must be in existence at all times, either in some particular person and persons, or at least in contemplation of law. But in fact it cannot be in existence merely in contemplation of law; it can never be in abeyance, but must reside in some person, in order that there may always be some one *in esse* against whom an

action may be brought for the recovery of the land. And therefore, if a person limits a freehold interest in the land, by way of use or devise, which he may do, though he could not do so at the common law, to commence *in futuro*, without making any disposition of the intermediate legal seizin, property, or ownership, or a disposition of it which does not exhaust the whole of such intermediate legal seizin, property, or ownership, the legal seizin, property, or ownership, except such part thereof, if any, as is comprised within a prior disposition of a vested interest, of course remains in the grantor and his heirs, or the heir at law of the testator, until the arrival of the period when, according to the terms of the future limitation, it is appointed to reside in the person to whom such interest *in futuro* is limited. And if a person limits the inheritance, whether at common law or by way of use or devise, to arise on a contingency, by way of remainder immediately after the regular expiration of prior estates, of course the inheritance, until the happening of the contingency, remains in the grantor and his heirs, or the heir of the testator." 2 Fearne on Remainders 20.

Freehold in Abeyance. — In 1 Washburn on Real Property 47, it is said: "A first and immediate estate of freehold cannot be put in abeyance by the act of the owner, that is, waiting for any event, however near, or the lapse of time, however short. This embraces the proposition that a freehold cannot be created by deed to commence in future." And "the abeyance into which a glebe or parsonage land is put by the death of the incumbent is deemed to be an act of the law, and the freehold, though suspended during a vacancy in the office, revives in favor of his successor." See also 4 Kent's Com. 259; 2 Min. Inst. 75.

4. "Heirs" Necessary in a Deed. — 2 Black. Com. 107; Bridgewater v. Bolton, 6 Mod. 109; Wright v. Dowley, 2 W. Bl. 1185; Edwardsville R. Co. v. Sawyer, 92 Ill. 377; Sedgwick v. Ladin, 10 Allen (Mass.) 430; Clafling v. Boston, etc., R. Co., 157 Mass. 489; Adams v. Ross, 30 N. J. L. 505, 82 Am. Dec. 237; Sisson v. Donnelly, 36 N. J. L. 432; Melick v. Pidock, 44 N. J. Eq. 525, 6 Am. St. Rep. 901; Anderson v. Logan, 105 N. Car. 266. See also Merritt v. Disney, 48 Md. 344. And see the title TITLE TO REAL PROPERTY.

Not in Force in New Hampshire. — In Cole v. Winnipissogee Lake Cotton, etc., Mfg. Co., 54 N. H. 242, it was held that the common-law rule was not in force in New Hampshire, and that when the language used in the convey-

now been abrogated by statute.¹

(bb) *In a Devise*. — This strict rule did not apply to devises, and in a will the use of "heirs" or other express words of inheritance is not necessary even at common law to create an estate of inheritance in the devisee; but if by the terms of the devise, expounded with reference to all the other provisions in the will, it appears affirmatively that it was the intent of the testator to give an estate in fee simple, the devise will be so construed as to pass such an estate.² And in some jurisdictions it has been enacted by statute that a devise of lands shall be construed to convey a fee simple unless it appears by express words or manifest intent that a lesser estate was intended.³

cc. INCIDENTS — (aa) *Power of Alienation*. — The tenant in fee simple has, as a general rule, an unlimited power of alienation, it being against the policy of the law to allow restraints to be imposed upon the alienation of this estate.⁴

(bb) *Manner of Descent*. — A fee simple estate is descendible to the heirs general.⁵

(cc) *Curtsey and Dower*. — It is subject to both curtesy and dower.⁶

(dd) *Liability for Debts*. — It is liable for the debts of the deceased owner thereof.⁷

(ee) *Forfeiture*. — At common law it may be forfeited for treason or felony.⁸

(c) *Estates in Fee Qualified*. — "A base or qualified fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. * * * This estate is a fee, because by possibility it may endure forever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify

ance showed a clear and unmistakable intention to convey a fee the court was bound to give effect to the intention of the parties.

Conveyance to a Trustee. — "When a trust has been created it is to be held large enough to enable the trustee to accomplish the objects of its creation. If a fee-simple estate be necessary, it will be held to exist though no words of limitation be found in the instrument by which the title was passed to the trustee and the estate created. On the other hand, it is equally well settled that where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation." *Doe v. Considine*, 6 Wall. (U. S.) 458. To the same effect are *North v. Philbrook*, 34 Me. 532; *Koenig's Appeal*, 57 Pa. St. 352. And see the title TRUSTS AND TRUSTEES.

Conveyance to a Corporation — Corporation Aggregate. — A conveyance to a corporation aggregate will convey a fee simple without words of succession or limitation. Overseers of *Poor v. Sears*, 22 Pick. (Mass.) 122; *Wilcox v. Wheeler*, 47 N. H. 488; *Congregational Soc. v. Stark*, 34 Vt. 243.

Corporation Sole. — In grants of land to sole corporations and their successors, the word "successors" supplies the place of "heirs," for as heirs take from the ancestor, so does the successor from the predecessor; and in a grant to a bishop or other sole spiritual corporation in frankalmoin, the word "frankalmoin" supplies the place of successors." 2 Black. Com. 108.

1. *Montgomery v. Montgomery*, (Ky. 1889) 11 S. W. Rep. 596. And see the codes and statutes of the several states.

2. **Heirs Not Necessary in a Devise**. — 2 Black. Com. 108; *Hill v. Brown*, (1894) App. 125; *Lambert v. Paine*, 3 Cranch (U. S.) 97; *White v. Crenshaw*, 5 Mackey (D. C.) 113, 60 Am. Rep. 370; *Robinson v. Randolph*, 21 Fla. 629, 58 Am. Rep. 692; *Baker v. Bridge*, 12 Pick. (Mass.) 27; *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537, 29 Am. Dec. 621; *Kendall v. Clapp*, 163 Mass. 69; *Melick v. Pidcock*, 44 N. J. Eq. 525, 6 Am. St. Rep. 901; *Jackson v. Housel*, 17 Johns. (N. Y.) 281; *Morrison v. Semple*, 6 Binn. (Pa.) 94. And see the titles TITLE TO REAL PROPERTY; WILLS.

3. 4 Kent's Com. 8; *Little v. Giles*, 25 Neb. 313; *Ashbridge v. Ashbridge*, 22 Ont. Rep. 146. And see the statutory enactments of the several jurisdictions.

4. **Unlimited Power of Alienation**. — 2 Min. Inst. 76; *McDowell v. Brown*, 21 Mo. 57; *Lovett v. Gillender*, 35 N. Y. 617; *Latimer v. Waddell*, 119 N. Car. 370; *Pritchard v. Bailey*, 113 N. Car. 521; *Kepple's Appeal*, 53 Pa. St. 211. And see the titles CONDITIONS, vol. 6, p. 509; PERPETUITIES; TITLE TO REAL PROPERTY. For a full discussion of the origin and development of the power of alienation, see the title DEEDS, vol. 9, p. 94.

5. 1 Co. Litt. 1 b; 2 Min. Inst. 76. And see the title SUCCESSION.

6. See the titles CURTESY, vol. 8, pp. 507, 518; DOWER, vol. 10, pp. 125, 155.

7. 2 Min. Inst. 76. And see the titles DEBTS OF DECEDENTS, vol. 8, p. 1097; EXECUTORS AND ADMINISTRATORS.

8. 2 Min. Inst. 76. And see the titles CRIMINAL LAW, vol. 8, p. 280; FORFEITURE; TREASON.

and debase the purity of the donation, it is therefore a qualified or base fee." ¹ While this estate continues, and until the qualification upon which it is limited is at an end, the grantee has the same rights and privileges over his estate as

1. Base Fee Defined. — 2 Black. Com. 109. To the same effect are 4 Kent's Com. 9; Challis on Real Property 201; Walsingham's Case, Plowd. 557; Wiggins Ferry Co. v. Ohio, etc., R. Co., 94 Ill. 83; Jamaica Pond Aqueduct Corp. v. Chandler, 9 Allen (Mass.) 159; Gaven v. Allen, 100 Mo. 293; Leonard v. Burr, 18 N. Y. 96; Henderson v. Hunter, 59 Pa. St. 335. And see *Idle v. Cook*, 1 P. Wms. 75; *Wellington v. Wellington*, 1 W. Bl. 645; *Merriman v. Russell*, 2 Jones Eq. (55 N. Car.) 470.

As to whether curtesy and dower are incident to base fees, see the titles *CURTESY*, vol. 8, p. 519; *DOWER*, vol. 10, p. 160.

Illustrations. — "As in the case of a grant to A. and his heirs, tenants of the manor of Dale, in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So when Henry VI. granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle, here John Talbot had a base or qualified fee in that dignity, and the instant he or his heirs quitted the seignory of this manor the dignity was at an end." 2 Black. Com. 109. See also *Co. Litt.* 27a.

"Another fee there is, which may be called a fee simple determinable, as if land is given to a man and to his heirs as long as J. S. shall have heirs of his body, there he to whom the land is given has a fee simple, but his estate is determinable upon the death of J. S. without issue, for then the fee is ended, and the feoffor shall have the land again. So if land is given to a man and to his heirs as long as he shall pay 20s. annually to A., or as long as the church of St. Paul shall stand, his estate is a fee simple determinable, in which case he has the whole estate in him; and such perpetuity of an estate which may continue forever, though at the same time there is a contingency which when it happens will determine the estate (which contingency cannot properly be called a condition, but a limitation), may be termed a fee simple determinable." *Walsingham's Case*, Plowd. 557.

In *First Universalist Soc. v. Boland*, 155 Mass. 171, land was conveyed by a deed containing the usual covenants to the grantee "to have and to hold to the said First Universalist Society and their assigns, so long as said real estate shall by said society or its assigns be devoted to the uses, interests, and support of those doctrines of the Christian religion embraced in the confession of faith adopted by the general convention of Universalists held at Winchester, New Hampshire, in the year eighteen hundred and three. And when said real estate shall by said society or its assigns be diverted from the uses, interests, and support aforesaid to any other interests, uses, or purposes than as aforesaid, then the title of said society or its assigns in the same shall forever cease, and be forever vested in the following named persons," etc. It was held that a qualified or determinable fee only was con-

veyed to the grantee. *Allen, J.*, said: "These words do not grant an absolute fee, nor an estate on condition, but an estate which is to continue till the happening of a certain event, and then to cease. That event may happen at any time, or it may never happen. Because the estate may last forever, it is a fee. Because it may end on the happening of the event, it is what is usually called a determinable or qualified fee. The grant was not upon a condition subsequent, and no re-entry would be necessary; but by the terms of the grant the estate was to continue so long as the real estate should be devoted to the specified uses, and when it should no longer be so devoted, then the estate would cease and determine by its own limitation."

A deed was made to the Morris Canal and Banking Company, conveying all the interest and estate of the grantor in the land and appurtenances to the only proper use, benefit, and behoof of the grantee "as long as used for said canal," and it was held that the grantee took a qualified fee. *State v. Brown*, 27 N. J. L. 13.

In *Gillespie v. Broas*, 23 Barb. (N. Y.) 370, the duration of the estate in the premises was in terms specified to be as long as they "shall be used and occupied for a county site for the court house, jail, and clerk's office of said county of Schuyler," and a limitation of the estate to that period was expressly imposed by adding that "when said lot or premises shall cease to be used for the purposes aforesaid, then the same, with its appurtenances thereunto belonging, is to revert and belong to the said party of the first part, his heirs, executors, administrators, or assigns, the same as if this conveyance had not been executed;" it was held that the effect of this specification and limitation was to make the estate a qualified or determinable fee.

H. and T. entered into an agreement under seal, by which H. "consents for the said T. to back water, if necessary, up into his field, on condition that said T. will allow the said H. as much woodland along the line fence on the south of the river. Said T. is allowed to raise a dam eight or nine feet high. This agreement to remain good so long as the said T. keeps up a mill at the W. place, afterwards to be null and void." T. erected a mill and dam, in consequence of which about twelve acres of H.'s land were eventually flooded, and H. went into possession of about four or five acres of the woodland, that being about the quantity covered originally by the water of the pond. It was held that the agreement vested in T. an equitable base or qualified fee in an easement to back the water upon H.'s land so long as he or those claiming under him maintained the mill, and that upon T.'s death this estate descended to his heirs. *Shepherd, J.*, said: "Whenever a fee is so qualified as to be made to determine, or liable to be defeated, upon the happening of some contingent event or act, the fee is said to be base, qualified, or determinable." *Tiedeman on Real Prop.* 44. This

if it were a fee simple.¹ But if the owner of a base or qualified fee conveys in fee, the determinable quality of the estate follows the transfer.² The existence of this estate in the United States has been expressly recognized in several recent decisions.³

(d) **Estates in Fee Conditional.** — An estate in fee conditional at the common law was a fee restrained to some particular heirs, exclusive of others, as to the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs, or to the heirs male of his body, in exclusion both of collateral and lineal females also. It was called a conditional fee by reason of the condition expressed or implied in the donation of it, that, if the donee died without such particular heirs, the land should revert to the donor.⁴

Effect of Birth of Issue. — Since, when any condition is performed, it is thenceforth entirely gone, and the thing to which it was before annexed becomes absolute and wholly unconditional, so, as soon as the grantee had any issue born, his estate was supposed to become absolute by the performance of the condition, at least for these three purposes: 1. To enable the tenant to alien the land and thereby to bar, not only his own issue, but also the donor of his interest in the reversion. 2. To subject him to forfeit it for treason, which he could not do till issue born, longer than for his own life, lest thereby the inheritance of the issue and reversion of the donor might have been defeated. 3. To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue.⁵

definition, in a general sense, comprehends a fee upon condition, a fee upon limitation, and a fee conditional at common law. Some authors apply the term 'base fee' solely to limitations of the last-named class (Tiedeman on Real Prop., *supra*); and these having been converted into estates tail by the statute *de donis*, and these latter by our statute into fees simple, it would of course follow that if the term 'base fee' is exclusively applicable to a fee conditional, as it was technically known at common law, it no longer exists in this state. Blackstone's classification is different (vol. 2, 110), and there is some confusion in the ancient authorities upon the subject. Practically, however, in modern times, the terms 'base,' 'qualified,' or 'determinable' fees are applied to either of the estates above mentioned. Mr. Washburn (vol. 1, 77) thinks that the term 'determinable fee' is 'more generic in its meaning, embracing all fees which are liable to be determined by some act or event expressed on their limitation to circumscribe their continuance or inferred by law as bounding their extent.' See also 1 Preston Est. 466; Seymour's Case, 10 Coke 97. The term 'qualified fee' is thought to be preferable by Mr. Minor, 2 Inst. 86. By whatever name it may be called, it is plain that except in the case of technical fees conditional at common law, the limitations we have mentioned may still be made when not opposed to public policy." Hall v. Turner, 110 N. Car. 292, *disapproving* Providence Tp. v. Kesler, 67 N. Car. 443.

1. **Nature of Estate.** — State v. Brown, 27 N. J. L. 13. See also Whiting v. Whiting, 4 Conn. 179.

2. 4 Kent's Com. 10.

3. **Exists in United States.** — Wiggins Ferry Co. v. Ohio, etc., R. Co., 94 Ill. 83; First Universalist Soc. v. Boland, 155 Mass. 171; Gaven v. Allen, 100 Mo. 293; State v. Brown, 27 N. J.

L. 13; Hall v. Turner, 110 N. Car. 292, *disapproving* Providence Tp. v. Kesler, 67 N. Car. 443; Henderson v. Hunter, 59 Pa. St. 335.

4. **Conditional Fee Defined.** — 2 Black. Com. 110; Co. Litt. 19a; Willion v. Berkley, Plowd. 241; Jones v. Postell, Harp. L. (S. Car.) 92; Wright v. Herron, 5 Rich. Eq. (S. Car.) 441; Pearse v. Killian, McMull. Eq. (S. Car.) 231; Izard v. Middleton, Bailey Eq. (S. Car.) 228; Withers v. Jenkins, 14 S. Car. 597; Burnett v. Burnett, 17 S. Car. 545; Miller v. Graham, 47 S. Car. 288. See also Idle v. Coope, 2 Ld. Raym. 1148; Baltimore, etc., R. Co. v. Patterson, 68 Md. 606.

5. 2 Black. Com. 111; Co. Litt. 19a.

Distinction Between Estate in Fee Conditional and Estate in Fee Simple. — In Burnett v. Burnett, 17 S. Car. 545, Mr. Justice McIver said: "The fundamental difference between an estate in fee conditional, after the condition has been performed, and an estate in fee simple, is: 1st. That in the former the course of descent is confined to a particular class of heirs, and upon failure of such heirs the estate reverts to the donor. 2d. That the holder of such an estate can only dispose of it by some act which takes effect during his life. In all other respects their qualities and incidents are the same. In a grant of an estate in fee conditional, heirs of the body are not named on account of any benefit intended for them, or for the purpose of controlling or limiting the ancestor's power of disposition during his life, but simply for the purpose of prescribing the course of descent in case no such disposition is made. In the case of a fee-simple estate the law prescribes that the estate shall descend to the heirs generally, in case the ancestor makes no disposition of the estate, while in the case of an estate in fee conditional the instrument creating the estate confines the descent to a particular class of heirs."

Liable for Debts. — In Burnett v. Burnett, 17

Volume XI.

(e) **Estates in Fee Tail** — *aa.* DEFINITION. — An estate tail may be described to be an estate of inheritance deriving its existence from the statute *de donis conditionalibus*, which is descendible to some particular heirs only of the person to whom it is granted, and not to his heirs general.¹

bb. KINDS OF ESTATES TAIL. — Estates tail are either general or special. Tail general exists where lands and tenements are given to one and the heirs of his body begotten, and is so called because however often the donee in tail may marry, his issue in general by all and every such marriage may in successive order inherit the estate tail. Tail special exists where the gift is restricted to certain heirs of the donee's body, and does not go to all of them in general. Estates in general and special tail may both of them be either in tail male or tail female; thus, if lands be given to a man and his heirs male of his body begotten, this is an estate in tail male general, but if to a man and the heirs female of his body on his present wife begotten, this is an estate in tail female special. And in case of an entail male, the heirs female shall never inherit, nor any person derive from them, nor, *e converso*, the heirs male in case of a gift in tail female.²

cc. ORIGIN. — These estates had their origin in the statute Westminster 2 (3 Edw. I., c. 1) called the statute *de donis conditionalibus*, enacted at the instance of the nobility to enable them to perpetuate their possessions in their own families; by which, as construed by the courts, an estate which would have been before its enactment a fee simple conditional, and which would have become absolute and at the disposal of the donee the instant any issue was born, was divided into two parts, leaving in the donee a new kind of particular estate, which was denominated a fee tail, and investing in the donor the ultimate fee simple of the land expectant on the failure of issue.³

S. Car. 545, it was held that lands held in fee conditional are assets for the payment of debts even though not reduced to judgment. See also *Izard v. Middleton*, Bailey Eq. (S. Car.) 228.

Cannot Be Devised. — Though the tenant of a fee simple conditional may after the birth of issue alien the land, yet a devise is not an alienation within the meaning of the law. If such an alienation does not take effect in the lifetime of the tenant, the estate must descend to the heirs of limitation *per formam doni*. *Jones v. Postell*, Harp. L. (S. Car.) 92.

Bound by Judgment Lien. — In *Izard v. Middleton*, Bailey Eq. (S. Car.) 228, *cited with approval* in *Pearse v. Killain*, McMull. Eq. (S. Car.) 231, it was held that lands held in fee conditional are bound after the birth of issue, by the lien of a judgment or decree against the tenant in fee in bar of the right of the issue to take *per formam doni*.

1. Estates Tail Defined. — 1 Cruise Dig. 78; *McLeod v. Dell*, 9 Fla. 441; *Gray v. Gray*, 20 Ga. 817; *Jordan v. Roach*, 32 Miss. 603; *Prindle v. Beveridge*, 7 Lans. (N. Y.) 228. See also *Smith v. Greer*, 88 Ala. 414; *Fisk v. Keene*, 35 Me. 349; *Allen v. Ashley School Fund*, 102 Mass. 262.

Lineal Heirs. — "The specified heirs must be lineal heirs, as an estate tail can only be created by a gift to the donee and the heirs of his body begotten." *Jordan v. Roach*, 32 Miss. 603.

2. Estates Tail Classified. — 2 Black. Com. 113; 2 Min. Inst. 79. See also Co. Litt. 196; *Page v. Hayward*, 2 Salk. 579; *Allen v. Craft*, 109 Ind. 476; *Kirk v. Furgerson*, 6 Coldw. (Conn.) 483.

Illustrations — Tail Special. — A conveyance

"to A and the heirs of her body by B" would at common law have passed an estate tail special. *Tipton v. La Rose*, 27 Ind. 484.

Tail Male General. — Where a testator devised land to his sons named, their heirs and assigns forever, adding this limitation: "My will further is that my sons shall not, either of them, sell or dispose of the land which I have herein given to each of them from their lawful male issue; and in case either of my said sons should die without lawful male issue, in such case his land hereby given shall revert, and become the estate of my surviving sons, or their male issue," it was held that, under this devise, one of the sons named took an estate in tail male general. *Dart v. Dart*, 7 Conn. 250. See also *Sunday's Case*, 9 Coke 127; *Hulburt v. Emerson*, 16 Mass. 241; *Jeffries v. Hunt*, 2 Hayw. (2 N. Car.) 130.

Frankmarriage. — In 2 Black. Com. 115, it is said: "There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates *in libero maritagio*, or frankmarriage. These are defined to be where tenements are given by one man to another, together with a wife who is the daughter or cousin of the donor, to hold in frankmarriage. Now, by such gift, though nothing but the word 'frankmarriage' is expressed, the donees shall have the tenement to them, and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word, 'frankmarriage' does *ex vi termini* not only create an inheritance, like the word 'frankalmoign,' but likewise limits that inheritance; supplying not only words of descent, but of procreation also."

3. Origin of Estates Tail. — 2 Black. Com.

dd. WORDS NECESSARY TO CREATE — **In a Deed.** — As the word "heirs" is necessary to the creation of a fee simple by deed, so the additional word "body" or some other word of procreation was necessary at common law to create a fee tail by such an instrument.¹

In a Devise. — But in wills, where the cardinal rule of construction is that the testator's manifest intention shall prevail over all forms of expression, these correct and technical words were never considered essential, and an estate tail might be created at common law by a devise to a man and his seed, or to a man and his heirs male, or by other irregular methods of expression.² Thus if an estate is devised to A and his heirs, which would create a fee simple, and it is afterwards provided, either in the same clause or by other parts of the will, that if A dies without issue, or on failure of issue, or for want of issue, or without leaving issue, then over to B in fee, then in accordance with the well-settled rules of common-law construction the estate of the first taker is by implication a fee tail, which if he has issue passes to them *ad infinitum* by descent as tenants in tail. The estate vests in the first taker fully and to all intents and purposes as a fee tail, and any devise after the failure of such must, of course, be after an indefinite failure of issue and bad as an executory devise.³ But if the devise over is upon a failure of issue at a particular time

112; Co. Litt. 18*b*. See also *Jordan v. Roach*, 32 Miss. 481; *Gray v. Gray*, 20 Ga. 817; *Den v. Spachius*, 16 N. J. L. 172; *Doty v. Teller*, 54 N. J. L. 163, 33 Am. St. Rep. 670; *Kirk v. Furgerson*, 6 Coldw. (Tenn.) 483.

1. Proper Words in a Deed. — 2 Black. Com. 115; Co. Litt. 20*b*; *McLeod v. Dell*, 9 Fla. 441; *Kirk v. Furgerson*, 6 Coldw. (Tenn.) 483; *Doty v. Teller*, 54 N. J. L. 163, 33 Am. St. Rep. 670. And for adjudications upon the question of the words proper to create an estate tail by deed, see the following cases: *Owen v. Smyth*, 2 H. Bl. 594; *Den v. Hobson*, 2 W. Bl. 695; *Roe v. Aistrop*, 2 W. Bl. 1228; *Galley v. Barrington*, 2 Bing. 387, 9 E. C. L. 441; *Hawkins v. Hawkins*, 9 Bing. 765, 23 E. C. L. 461; *Alpass v. Watkins*, 8 T. R. 516; *Doe v. Woodroffe*, 10 M. & W. 608; *Slayton v. Blount*, 93 Ala. 575; *McMeekin v. Smith*, (Ky. 1893) 21 S. W. Rep. 353.

Statement of Rule. — "The complainant claims that the limitation created an estate tail, citing *Manchester v. Durfee*, 5 R. I. 549; *Cooper v. Cooper*, 6 R. I. 261; *Jillson v. Wilcox*, 7 R. I. 515; and *Sutton v. Miles*, 10 R. I. 348. There is a wide difference between these cases and the one at bar. In these cases the estate was conveyed by devise, and here it is by deed. To create an estate tail it is necessary, in addition to the word 'heirs,' that there should be words of procreation to indicate the body from which the heirs are to proceed. 1 Washb. Real Prop. 74, 77; 2 Black. Com. 115. In a deed these must be expressed, but in a will more latitude is allowed in getting at the testator's intent; so that, as in *Cooper v. Cooper*, *supra*, the words 'male heirs' may be taken as equivalent to 'male heirs of the body of the devisee.' There is clearly no estate tail in *John E. Smith* under this deed, since both the limitation of a fee to him and words of procreation by which a fee is cut down are wanting. Where a deed runs to a man and his heirs, male or female, it conveys an estate in fee simple, 'for there are no words to ascertain the body out of which they shall issue.' 2 Black. Com. 115." *Smith v. Collins*, 17 R. I. 432.

2. Proper Words in a Will. — 2 Black. Com. 115; *Wylde's Case*, 6 Coke 17; *Clifford v. Koe*, L. R. 5 App. 447; *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Cuffee v. Milk*, 10 Met. (Mass.) 366; *Wight v. Thayer*, 1 Gray (Mass.) 284; *Doty v. Teller*, 54 N. J. L. 163, 33 Am. St. Rep. 670; *Den v. Fogg*, 3 N. J. L. 385; *Somers v. Pierson*, 16 N. J. L. 181; *Den v. Cox*, 9 N. J. L. 10; *Den v. Fox*, 10 N. J. L. 39; *Weart v. Cruser*, 49 N. J. L. 475; *Manchester v. Durfee*, 5 R. I. 549; *Cooper v. Cooper*, 6 R. I. 261; *Jillson v. Wilcox*, 7 R. I. 515. And see the title WILLS.

Illustrations. — In *Webb v. Hearing*, Cro. Jac. 415, the testator devised thus: "To F. my son my houses in L., after the death of my wife; and if my three daughters, and either of them, do overlive their mother, and F. their brother, and his heirs, then they to enjoy the same houses for term of their lives, and the same houses then I give to my sister's sons," etc. The court resolved that he had but a fee tail; for by heirs, in this place, was intended heirs of the body.

In *Sonday's Case*, 9 Coke 127, the testator devised his house to his wife for life, and after her death his son William to have it; and if William should marry, and have issue male lawfully begotten, then his son to have it; remainder to his other sons successively, *totidem verbis*; and then added: "If any of his sons, or their heirs males, issue of their bodies, go about at any time to alienate or mortgage the house, that then the next heir to enter upon the house and enjoy it." It was resolved, by the two chief justices and the court of wards, that the sons had an estate tail to them severally and to the heirs male of their bodies.

3. Dying Without Issue — *England.* — *Porter v. Bradley*, 3 T. R. 143; *Denn v. Slater*, 5 T. R. 335; *Denn v. Shenton*, 1 Cowp. 410; *Doe v. Bannister*, 7 M. & W. 292.

Canada. — *Travers v. Gustin*, 20 Grant's Ch. (U. C.) 106.

United States. — *Barber v. Pittsburg*, etc., R. Co., 69 Fed. Rep. 501, 166 U. S. 83.

Massachusetts. — *Hall v. Priest*, 6 Gray

fixed, as at the time of the death of the first taker, the gift over is good by way of executory devise, for it is not liable to the objection of remoteness. The first devisee takes an estate in fee with an executory devise over on his death without leaving issue surviving him.¹ It has been generally adjudged,

(Mass.) 18; *Albee v. Carpenter*, 12 Cush. (Mass.) 382; *Ide v. Ide*, 5 Mass. 500; *Brown v. Addison Gilbert Hospital*, 155 Mass. 323.

New Jersey. — *Moore v. Rake*, 26 N. J. L. 574; *Morehouse v. Cotheal*, 21 N. J. L. 480; *Wilson v. Wilson*, 46 N. J. Eq. 321; *Whetwood v. Winston*, 40 N. J. L. 337.

Pennsylvania. — *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447; *Hackney v. Tracy*, 137 Pa. St. 53.

Rhode Island. — *Arnold v. Brown*, 7 R. I. 188; *Whitford v. Armstrong*, 9 R. I. 394; *Burrough v. Foster*, 6 R. I. 534; *Sutton v. Miles*, 10 R. I. 348; *Cooke v. Bucklin*, 18 R. I. 666; *Holden v. Wells*, 18 R. I. 802.

Virginia. — *Jiggetts v. Davis*, 1 Leigh (Va.) 419.

See also *Morgan v. Morgan*, L. R. 10 Eq. 99; *Jeffries v. Hunt*, 2 Hayw. (2 N. Car.) 130. And see the titles TITLE TO REAL PROPERTY; WILLS.

Illustrations. — In *Doe v. Ellis*, 9 East 382, the testator devised his estate thus: "Unto my son Joseph, his heirs and assigns: * * * but in case my said son Joseph shall die without issue, then I give and devise the same messuage unto the child or children with which my wife is now enseint, his or her heirs," etc. Lord Ellenborough said: "The estate, then, being at first given to Joseph, his heirs and assigns forever, would have given him the fee; but the premises, however large, may be restrained by the context, as premises, however narrow, may be enlarged by it. Here, then, the testator goes on to say that 'in case Joseph shall die without issue, then' he gives it over to the child which his (the testator's) wife is enseint with; which clearly gives Joseph only an estate tail." And *Grose, J.*, said: "It is impossible to read this will without seeing that the testator intended that if Joseph had issue, that issue should take; and if he died without issue, the issue of which the second wife was enseint should take the estate; and this intention can only be effectuated by giving Joseph an estate tail."

In *Brice v. Smith*, Willes 1, the testator devised his estate to his son Philip in fee, on condition that he pay thirty pounds to his son William under this limitation, viz.: "In case any of my said children unto whom I have bequeathed any of my real or copyhold estates shall die without issue, then I give the estate of him or them so dying unto his or their right heirs." "It cannot be doubted now," said the court, "after so many solemn resolutions, but that if a man devise an estate to A and his heirs, and afterwards in his will give his estate to another in case A dies without issue, the subsequent words reduce A's estate only to an estate tail, and restrain the general word 'heirs' to signify only 'heirs of the body.'"

In *Hulburt v. Emerson*, 16 Mass. 241, the testator devised part of his estate to his son John, subject to the payment of certain legacies, adding that "in case my son John aforesaid should leave no male issue, then one half of the above bequests to be equally [divided]

among his children, and the other half equally among all my surviving children." The court unanimously decided that the devise to John was an estate in tail male general.

Connecticut Doctrine. — "The old English rule was that a limitation over, if the first devisee should die without issue, created an estate tail by implication only if an indefinite failure of issue was intended. That such was the testator's intention was, however, presumed, if the first devise were made either in fee, or for life, or generally, without any particular limit as to its duration. *Machell v. Weeding*, 8 Sim. 4. The courts of this state, while adopting the same rule, have not admitted the existence of the presumption upon which it was based by English law. On the contrary, they have always construed the words 'dying without issue,' if not otherwise explained by the context, as referring to a dying without leaving issue living at the time of such death. *Hudson v. Wadsworth*, 8 Conn. 360. This difference between the views of the English courts and those of Connecticut is, no doubt, attributable to the effect of an ancient principle in our jurisprudence, confirmed by the statute of 1784 (General Statutes, § 2952), that an estate tail becomes an estate in fee simple in the issue of the first donee in tail. 1 Swift's Dig. 479. Under this rule, a strict limitation in tail, to endure from generation to generation, was impossible, and an attempt to constitute it was therefore not to be presumed." *St. John v. Dann*, 66 Conn. 401. And see *Hamilton v. Hempstead*, 3 Day (Conn.) 332; *Hudson v. Wadsworth*, 8 Conn. 348; *Williams v. McCall*, 12 Conn. 328; *Chappel v. Brewster*, Kirby (Conn.) 175; *Comstock v. Comstock*, 23 Conn. 349; *Turrill v. Northrop*, 51 Conn. 33; *Chesebro v. Palmer*, 68 Conn. 207.

English Statute. — "No implication of an estate tail can arise from words importing a failure of issue, in a will made or republished since the year 1837, unless an intention to use the phrase as denoting an indefinite failure of issue be very distinctly marked, as the statute 1 Vict., c. 26, § 29, provides that such words shall be held to mean a failure of issue in the lifetime or at the death of the person referred to, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; and it is also provided that the act shall not apply to cases where the words import, if no issue described in the preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue." 1 Jarman on Wills, 521.

1. *Burrough v. Foster*, 6 R. I. 534, *per* Bosworth, J. To the same effect are *Brightman v. Brightman*, 100 Mass. 238; *Gifford v. Choate*,

however, that the words "die without issue" or "without leaving issue" import a general failure of issue, and the limitation over after the death of a person upon a failure of issue which these words imply is usually construed as a limitation upon an indefinite failure, unless the force of these words is restricted, or their import controlled, by other expressions in the limitation or by circumstances arising on the face of the will in relation to the land or to the donee or devisee.¹

ee. INCIDENTS. — Under the statute *de donis*, the incidents to this estate were, first, that the tenant in tail was not liable for waste;² second, that an estate tail was subject to both curtesy and dower;³ and third, that such estate might be barred or destroyed.⁴ And by subsequent statutes estates tail were made forfeitable for treason⁵ and subject to the bankrupt laws.⁶

ff. SUBJECTS OF ENTAIL. — "Tenements" is the only word descriptive of the subjects of entail sued in the statute *de donis*, and by this term, Coke says, are included not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those inheritances concerning or annexed to or exercisable within the same, though they do not lie in tenure, such as rents, estovers, commons, or other profits created out of land; or uses, offices, or dignities which concern lands or certain places. But if the grant be of an inheritance merely personal, or to be exercised about chattels not issuing out of land nor concerning land, or some certain place, such inheritances cannot be entailed, because they do not savor of the realty.⁷ A limitation which would create an estate tail as to realty gives the first donee an absolute estate in personality.⁸

gg. BARRING AND DEFEATING — By Common Recovery. — In Taltarum's Case⁹ it was decided that an estate tail might be barred by a fictitious proceeding called a common recovery which was introduced to elude the statute *de donis*, and this decision having been generally acquiesced in, common recoveries became the regular mode of conveyance by which the tenant in tail might dispose of his land and tenements.¹⁰

By Lease. — By statute it was subsequently enacted that certain leases made by tenants in tail which did not prejudice the issue were good in law to bind the issue in tail.¹¹

100 Mass. 343; Whitcomb v. Taylor, 122 Mass. 243; Schmaunz v. Goss, 132 Mass. 141; Welch v. Brimm, 169 Mass. 204; Hill v. Hill, 74 Pa. St. 173, 15 Am. Rep. 545; Ashbridge v. Ashbridge, 22 Ont. Rep. 146. And see the title REMAINDERS AND EXECUTORY INTERESTS.

1. Burrough v. Foster, 6 R. I. 534, *per* Bosworth, J. To the same effect are Eichelberger v. Barnitz, 9 Watts (Pa.) 447; Taylor v. Taylor, 63 Pa. St. 481; Middleswarth v. Blackmore, 74 Pa. St. 414; Reinoehl v. Shirk, 119 Pa. St. 108; Ray v. Alexander, 146 Pa. St. 242.

2. Not Liable for Waste. — Co. Litt. 224a; 2 Black. Com. 115; Jervis v. Bruton, 2 Vern. 251. And see the title WASTE.

3. Subject to Curtesy and Dower. — Co. Litt. 224a; 2 Black. Com. 116. And see the titles CURTESY, vol. 8, pp. 507, 518; DOWER, vol. 10, pp. 125, 155.

4. Co. Litt. 224a; 2 Black. Com. 116. And see *infra*, this section, *Barring and Defeating*.

5. Forfeitable for Treason. — 26 Henry VIII., c. 13.

6. Subject to Bankrupt Laws. — 21 Jac. I., c. 19.

Massachusetts Statute. — By the Massachusetts statute of 1791, c. 60, § 2, estates tail were made "subject to the payment of the debts of the tenant in tail, in the same way

and manner as other real estates." Holland v. Cruft, 3 Gray (Mass.) 162.

7. What May Be Entailed. — Co. Litt. 19b; 2 Black. Com. 113.

8. Personality Cannot Be Entailed. — *Ex p. Sterne*, 6 Ves. Jr. 159; Albee v. Carpenter, 12 Cush. (Mass.) 382; Dott v. Willson, 1 Bay (S. Car.) 457; Stockton v. Martin, 2 Bay (S. Car.) 471. See also Campbell v. Sandys, 1 Sch. & Lef. 281; Ward v. Bevil, 1 Y. & J. 512. And see the title PERSONAL PROPERTY.

Heirlooms, being personality, are governed by the general rule. Warter v. Hutchinson, 2 Brod. & B. 349, 6 E. C. L. 177.

A Term of Years cannot be entailed. Child v. Baylie, Cro. Jac. 461. See also Atkinson v. Hutchinson, 3 P. Wms. 258.

An Estate Pur Autre Vie cannot be entailed. 2 Black. Com. 113; Low v. Burron, 3 P. Wms. 262. See *Ex p. Sterne*, 6 Ves. Jr. 156.

9. Year Book, 12 Edw. IV. 14, 19.

10. By Common Recovery. — 2 Black. Com. 116; Cholmley's Case, 2 Coke 52; Page v. Hayward, 2 Salk. 570; Adams v. Adams, 6 Q. B. 860, 51 E. C. L. 860; Richman v. Lippincott, 29 N. J. L. 44; Jiggetts v. Davis, 1 Leigh (Va.) 418. And see the titles REAL PROPERTY; TITLE TO REAL PROPERTY.

11. 32 Henry VIII., c. 28; 2 Black. Com. 118.

Volume XI.

By Fine. — By another statute it was enacted that a fine duly levied by the tenant in tail was a complete bar to him and his heirs and all persons claiming under such entail.¹

By Appointment to Charitable Use. — And in construing the statute 43 Eliz., c. 4, commonly called the statute of charitable uses, it was held by the courts that an appointment by the tenant in tail of the land entailed to a charitable use was good without fine or recovery.²

By Deed. — At common law if a tenant in tail, by bargain and sale, lease and release, covenant to stand seized, or other conveyance operating by way of grant, conveyed to another and his heirs, the grantee had a base fee simple, determinable after the death of the tenant in tail by the entry of the issue in tail.³ But in those jurisdictions where estates tail still exist it is now generally provided that the tenant in tail may bar the entail by deed in fee duly executed.⁴

1. 32 Henry VIII., c. 36; 2 Black. Com. 118; *Hume v. Burton*, 1 Ridgw. P. C. 277.

2. 2 Black. Com. 119. And see generally the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 893.

3. **Effect of Deed at Common Law.** — *Machell v. Clarke*, 2 Ld. Raym. 778 [*overruling Took v. Glascock*, 1 Saund. 260]; *Doe v. Rivers*, 7 T. R. 272; *Whiting v. Whiting*, 4 Conn. 179.

4. **Barred by Deed in Fee.** — *Richardson v. Richardson*, 80 Me. 585; *Cuffee v. Milk*, 10 Met. (Mass.) 366; *Weld v. Williams*, 13 Met. (Mass.) 486; *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Lithgow v. Kavenagh*, 9 Mass. 161; *Brown v. Addison Gilbert Hospital*, 155 Mass. 323; *Re Fraser*, 21 Ont. Rep. 455; *Williams v. Hichborn*, 4 Mass. 189. See also *Ostrom v. Palmer*, 3 Ont. App. 61.

English Statute. — The English Fines and Recoveries Act (3 & 4 Wm. IV., c. 74, § 15) provides that "Every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the king's most excellent majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made." And it is held that there is no difference between the operation of that section and the operation of fines and recoveries as they were well known and as they were worked out in the case of *Doe v. Scarborough*, 3 Ad. & El. 2, 30 E. C. L. 12. *Milbank v. Vane*, (1893) 3 Ch. 79. And see the following cases construing this statute: *Evans v. Jones*, Kay 26; *Pearcock v. Eastland*, L. R. 10 Eq. 17; *Crafton v. London, etc., R. Co.*, 5 Bing. N. Cas. 27, 35 E. C. L. 23; *Crocker v. Waine*, 5 B. & S. 697, 117 E. C. L. 697; *Powell v. Matthews*, 1 Jur. N. S. 973; *Boyd v.*

Pawle, 14 L. T. N. S. 753; *Ex p. Browne*, 14 Ir. Ch. R. 452.

Ontario Statute — *Mortgage in Fee Simple.* — Under section 10 of c. 83 of C. S. U. C., a mortgage in fee simple made by a tenant in tail bars the entail so that the equity of redemption is a fee simple. *Re Lawlor*, 7 Ont. Pr. Rep. 242; *Trust, etc., Co. v. Fraser*, 18 Grant's Ch. (U. C.) 19.

Under the Ontario statute the payment of the mortgage debt by the mortgagor in his lifetime upon a day later than the day of payment appointed in the mortgage deed, and the execution by the mortgagee of a statutory certificate of discharge and the registration of such certificate under the provision of the Ontario Registry Act, has the effect of revesting in the mortgagor the legal estate in fee simple and not in fee tail. *Lawlor v. Lawlor*, 10 Can. Sup. Ct. Rep. 194.

Massachusetts Statute — *Tenant in Remainder Cannot Bar.* — "It has been likewise decided that during the continuance of the life estate of Mrs. H., Mrs. W. could not bar this entail, because only a tenant in tail in possession, and not one in remainder, could execute a deed effectual for this purpose, under the statute of 1791, c. 60, § 1. *Holland v. Cruft*, 3 Gray (Mass.) 182." *Whittaker v. Whittaker*, 99 Mass. 304. But in *Coombs v. Anderson*, 138 Mass. 376, it was held that the deed of a tenant in tail who was entitled to possession was sufficient to bar the entail.

Pennsylvania Statute. — Before the enactment of the statute converting fee tails into fee simples, an estate tail could be barred in Pennsylvania by a deed duly executed. *Pearsol v. Maxwell*, 68 Fed. Rep. 513; *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447; *Ralston v. Truesdell*, 178 Pa. St. 429.

Rhode Island Statute. — "The third section of chapter 145 of the Revised Statutes makes a deed in fee simple, duly executed by a tenant in tail, and acknowledged before the Superior Court or Court of Common Pleas, equivalent to a common recovery; for it provides that 'such conveyance shall vest an estate in fee simple in the grantee, his heirs and assigns, and shall bar the tenant in tail, his heirs and assigns, and all others who shall claim the same in remainder or reversion except upon the determination of such estate tail.'" *Manchester v. Durfee*, 5 R. I. 549. To the same effect are *Cooper v. Cooper*, 6 R. I.

hh. ABROGATION AND MODIFICATION. — In many jurisdictions, as the result of statutory enactments, estates tail have been either entirely abolished or greatly modified.¹

261; *Jillson v. Wilcox*, 7 R. I. 515; *De Wolf v. Middleton*, 18 R. I. 810. And under the statute of this state an estate tail may be barred by will. *De Wolf v. Middleton*, 18 R. I. 810.

1. In *Mississippi* it was said: "There is nothing more certain than that the statute *de donis conditionalibus* never had existence or operation within this state; consequently, the whole system of rules in regard to estates tail which was constructed upon it by the English courts never was a part of our jurisprudence. Therefore, notwithstanding the express declaration of the statute that 'every estate in lands, etc., which now is or shall hereafter be created an estate in fee tail shall be an estate in fee simple,' the position that the legislature did not intend to strike at estates tail, which never existed here, but designed to operate upon estates known at the common law as fees conditional, taken by counsel, is, at the least, plausible." *Jordan v. Roach*, 32 Miss. 617.

In *New Hampshire* it is said that as a consequence of the implied repeal of the statute *de donis* by the New Hampshire statute of 1789, estates tail do not exist in that state. *Jewell v. Warner*, 35 N. H. 176; *Dennett v. Dennett*, 40 N. H. 498.

Converted into Fee-simple Estate. — In many jurisdictions all estates tail have been converted into fee-simple estates.

Alabama. — *Smith v. Greer*, 88 Ala. 414; *Slayton v. Blount*, 93 Ala. 575. See also *Bibb v. Bibb*, 79 Ala. 437.

Indiana. — *Allen v. Craft*, 109 Ind. 476; *Tip-ton v. La Rose*, 27 Ind. 484.

Kentucky. — *Brann v. Elzey*, 83 Ky. 440; *Short v. Terry*, (Ky. 1893) 22 S. W. Rep. 841; *McMeekin v. Smith*, (Ky. 1893) 21 S. W. Rep. 353. See also *Bodine v. Arthur*, 91 Ky. 53, 34 Am. St. Rep. 162; *Montgomery v. Montgomery*, (Ky. 1889) 11 S. W. Rep. 596.

New York. — *Nellis v. Nellis*, 99 N. Y. 505; *Rivard v. Gisenhof*, 35 Hun (N. Y.) 251.

North Carolina. — *Jeffries v. Hunt*, 2 Hayw. (2 N. Car.) 130; *Leathers v. Gray*, 101 N. Car. 162, 9 Am. St. Rep. 30; *Silliman v. Whitaker*, 119 N. Car. 89. See also *Mills v. Thorne*, 95 N. Car. 362.

Pennsylvania. — *Haldeman v. Haldeman*, 40 Pa. St. 36; *Knoderer v. Merriman*, (Pa. 1886) 7 Atl. Rep. 152; *Giffin's Estate*, 138 Pa. St. 327; *Hackney v. Tracy*, 137 Pa. St. 53; *Parkhurst v. Harrower*, 142 Pa. St. 432, 24 Am. St. Rep. 507; *Ray v. Alexander*, 146 Pa. St. 242; *Sheeley v. Neidhammer*, 182 Pa. St. 163. See also *Shutt v. Rambo*, 57 Pa. St. 149.

Nova Scotia. — *Ernst v. Zwicker*, 27 Can. Sup. Ct. Rep. 594.

See also *Barber v. Pittsburgh*, etc., R. Co., 166 U. S. 83 (upon the Pennsylvania statute).

In *Maryland* estates tail general have been converted into fee-simple estates. *Newton v. Griffith*, 1 Har. & G. (Md.) 111; *Posey v. Budd*, 21 Md. 477; *Baltimore*, etc., R. Co. v. *Patterson*, 68 Md. 606. But it has been held that other estates tail have not been so converted. *Pennington v. Pennington*, 70 Md. 418.

Nova Scotia Statute. — The provisional act of Nova Scotia (Rev. Stat., 2d ser., c. 112) is retrospective and abolishes absolutely all estates tail, even although a valid remainder be limited thereon. *In re Simpson's Estate*, 5 Nova Scotia 317; *McKenzie v. McKenzie*, 6 Nova Scotia 178, note.

Life Estate to First Donee and Fee Simple to Issue. — By statute in some jurisdictions it is provided that the first donee takes an estate for life with remainder in fee simple to the issue of such donee.

Connecticut Statute. — By the Connecticut statute of 1784 it is provided that "no estate, either in fee simple, fee tail, or any lesser estate, shall be given by deed or will to any person or persons but such as are in being or to the immediate issue or descendants of such as are in being at the time of making such deed or will; and that all estates given in tail shall be and remain an absolute estate in fee simple, to the issue of the first donee in tail." *Chappel v. Brewster*, Kirby (Conn.) 175; *Hamilton v. Hempsted*, 3 Day (Conn.) 332; *St. John v. Dann*, 66 Conn. 401.

Illinois Statute. — "The sixth section of the Conveyance Act provides that in cases where by the common law, any person or persons might, after its passage, become seized in fee tail of any lands, etc., by virtue of any gift, devise, grant, or conveyance, 'hereafter to be made,' or by any other means whatsoever, such person or persons, instead of being or becoming seized thereof in fee tail, shall be deemed and adjudged to be and become seized thereof for his natural life only, and the remainder shall pass, in fee simple absolute, to the person or persons to whom the estate tail would, on the death of the first grantee or donee, pass, according to the course of the common law, by virtue of such gift, devise, or conveyance." *Lehndorf v. Cope*, 122 Ill. 317.

Missouri Statute. — By the Missouri statute (Rev. Stat. 1889, § 8836) a fee-tail estate is reduced to a life estate in the first donee with a remainder in fee simple to the heirs of his body. *Wood v. Kice*, 103 Mo. 329.

New Jersey Statute. — "By statute of the 13th of June, 1820, (Pamph. L., p. 178), estates tail were abolished, and it was provided that a devise which, under the statute 13 Edw. I., would be held to create an estate tail should vest an estate for life only in the devisee and a fee simple in his children, equally, as tenants in common, the children of a deceased child taking their parent's interest. Rev., p. 299, § 11." *Doty v. Teller*, 54 N. J. L. 163, 33 Am. St. Rep. 670. To the same effect is *Wilson v. Wilson*, 46 N. J. Eq. 321.

It has been held that the New Jersey Decedent Act applies to all estates tail whether general or special, and all such estates become estates for life in the first donee with remainder to his children in fee simple. *Zabriskie v. Wood*, 23 N. J. Eq. 541; *Weart v. Cruser*, 49 N. J. L. 475.

Ohio Statute. — Rev. Stat. Ohio, § 4200, provides that "No estate in fee simple, fee tail, or any lesser estate in lands or tenements lying

(3) *Estates Not of Inheritance* — (a) *In General*. — Estates not of inheritance are at common law estates for life created by the act of the parties, denominated conventional life estates, estates tail after possibility of issue extinct, curtesy, and dower, which last three life estates are created by operation of law;¹ and by statute in many jurisdictions there is another life estate called homestead, which is discussed elsewhere in this work.²

(b) *Conventional Life Estates* — *aa. IN GENERAL*. — An estate for life expressly created by deed or grant, which alone is properly conventional, is a freehold estate not of inheritance, but which is held by the tenant for his own life or the life or lives of one or more other persons, or for an indefinite period which may endure for the life or lives of persons in being and not beyond the period of a life.³ Such estates were, at common law, given or conferred by the same feudal rights and solemnities, the same investiture or livery of seizin, as fees themselves.⁴

bb. ESTATES PUR AUTRE VIE. — A life estate may be either for the grantee's own life or for the life of another person, in which latter case it is termed an estate *pur autre vie*,⁵ and the person upon whose life the duration of the estate depends is called the *cestui que vie*.⁶

Occupancy. — At common law, if a tenant *pur autre vie* died in the lifetime of the *cestui que vie*, the person who first entered upon the land could lawfully retain the possession thereof so long as the *cestui que vie* lived, by right of occupancy, and was called the common occupant.⁷ When, however, the

within this state shall be given or granted by deed or will to any person or persons but such as are in being or to the immediate issue or descendants of such as are in being at the time of making such deed or will; and all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail." *Phillips v. Herron*, 55 Ohio St. 478. See also the statutory enactments of the several jurisdictions; and see *supra*, this section, *Barring and Defeating*.

1. *Kinds of Life Estates*. — 2 Black. Com. 119; 2 Min. Inst. 87; 4 Kent's Com. 24.

2. See the title *HOMESTEAD*.

3. *Definition*. — 1 Bouv. L. Dict. (Rawle's Rev.) 692; 2 Black. Com. 119; 4 Kent's Com. 24; 1 Washb. on Real Property 88.

Value of Life Estate. — In contemplation of law an estate for life is equal to seven years' purchase of the fee. To estimate the present value of an estate for life, interest must be computed on the value of the whole property for seven years; and perhaps interest on the several sums of the annual interest, from the present time to the periods at which they would respectively fall due, ought to be abated. According to this rule, the legal rate of interest being seven per cent. the present value of an estate for life is equivalent to a fraction more than thirty-five parts in a hundred of the value of the absolute estate. *Garland v. Crow*, 2 Bailey L. (S. Car.) 24.

Life Estate in Personalty. — It is well settled that a life estate in personalty may be created by grant or devise. *Phillips v. Beal*, 32 Beav. 25; *Langworthy v. Chadwick*, 13 Conn. 42; *Homer v. Shelton*, 2 Met. (Mass.) 194; *Healey v. Toppan*, 45 N. H. 243.

And when it can be shown that there is danger that the property will be either wasted, secreted, or removed by the life tenant, he may be required to give security. *Foley v. Burnell*, 1 Bro. C. C. 279; *Langworthy v.*

Chadwick, 13 Conn. 42; *Homer v. Shelton*, 2 Met. (Mass.) 194. And see the titles *PERSONAL PROPERTY*; *REMAINDERS* and *EXECUTORY INTERESTS*.

4. *Conferred by Livery of Seizin*. — 2 Black. Com. 120; 4 Kent's Com. 24.

5. *Estates Pur Autre Vie*. — Co. Litt. 41b; 2 Black. Com. 120; 4 Kent's Com. 25; 2 Min. Inst. 88. See also *Allen v. Allen*, 2 Dru. & W. 307.

6. Co. Litt. 41b; 2 Black. Com. 123.

Evidence of Death of Cestui Que Vie. — Upon the question of the death of the *cestui que vie*, "in the absence of higher evidence, resort may be had to what is commonly said and understood to be true among the immediate relatives and family connections of the party to whom the inquiry relates," as to that fact. *Clark v. Owens*, 18 N. Y. 434.

7. *Common Occupancy*. — Co. Litt. 41b; 2 Black. Com. 258; 4 Kent's Com. 26; *Northen v. Carnegie*, 4 Drew. 587.

Nature of Title by Occupancy. — In *Penny v. Allen*, 3 Jur. N. S. 273, the lord chancellor said: "Title by occupancy is a rightful title — an indefeasible title — just as much as a title by feoffment, fine, or recovery; the occupancy by occupation being *ipso facto* a tenancy *pur autre vie*, and, as a freehold *pur autre vie*, is incapable of being defeated by any one. Here the executor or administrator might defeat the title, and would then by construction of law have been in from the death of the former tenant *pur autre vie*, assuming that no valid title could be acquired to his prejudice. Supposing, since the statute, a tenant *pur autre vie* to him and his heirs, and he were to die without an heir, but leave his wife *en ventre*, who should afterwards give birth to a child, a person entering before the birth would not be a tenant *pur autre vie* by occupancy, as in the case of a stranger entering upon glebe land after the death of the incumbent, and before

estate *pur autre vie* was granted to a man and his heirs during the lifetime of the *cestui que vie*, then the heir had the special and exclusive right to enter upon and occupy the land during the residue of the special grant, and was called the special occupant.¹ Common occupancy has been abolished by statute in England,² and both in that country and in the *United States* the disposition of the residue of an estate *pur autre vie* is regulated by statute.³

cc. METHOD OF CREATION. — Life estates may be created by express terms⁴ or they may arise by construction of law, as when there is a conveyance during coverture or *durante viduitate*,⁵ or at common law when there was a conveyance to the grantee without a limitation to his heirs.⁶

dd. INCIDENTS — (*aa*) *In General.* — In the absence of special agreements or covenants to the contrary, the incidents belonging to life estates are, right to estovers; liability for waste; right to emblements; liability to forfeiture; and liability of the under tenant for rent.⁷

(*bb*) *Right to Estovers.* — Every tenant for life, unless restrained by covenant or agreement, is by common right entitled to reasonable estovers or botes.⁸

the new parson has been instituted or inducted. He is not a tenant by occupancy. He may perhaps in all these cases have acquired an estate by wrong, but an estate by wrong can never be an estate *pur autre vie*. An estate acquired by wrong is an absolute fee simple. It may be an estate by wrong, but capable of being defeated afterwards by some person who shall have a right, but an estate acquired by wrong never is an estate *pur autre vie*. Therefore I do not think the equitable question arises, because I do not think it would have been an estate by occupancy even if it had been a legal estate."

1. **Special Occupancy.** — 2 Black. Com. 259; 4 Kent's Com. 26; *Northern v. Carnegie*, 4 Drew 587; *Atkinson v. Baker*, 4 T. R. 229. See also *Mountcashell v. More-Smyth*, (1896) App. 158.

Special Occupant of an Equitable Estate. — There can be a special occupant of an equitable estate *pur autre vie* although the legal estate be in a trustee. *Reynolds v. Wright*, 7 Jur. N. S. 246.

2. **Common Occupancy Abolished.** — 29 Car. II., c. 3; 14 Geo. II., c. 20.

3. See the statutory enactments of the various jurisdictions, and see the title TITLE TO REAL PROPERTY.

4. **Created by Express Terms.** — 2 Black. Com. 120; 4 Kent's Com. 25; 2 Min. Inst. 89.

5. **Created by Construction of Law.** — Co. Litt. 42a; 2 Black. Com. 121; 2 Min. Inst. 89; *Roseboom v. Van Vechten*, 5 Den. (N. Y.) 414; *Gillespie v. Allison*, 115 N. Car. 542; *Warner v. Tanner*, 38 Ohio St. 118. See also *Hewlins v. Shippam*, 5 B. & C. 221, 11 E. C. L. 207 [citing *Brewer v. Hill*, 2 Anstr. 413]; *Loeb v. Struck*, (Ky. 1897) 42 S. W. Rep. 401.

Illustration. — An agreement, partly verbal and partly in writing, was made between T. and S., by which T. was to furnish the materials and S. the land for the erection of salt works, to be owned by them in common, three-fourths by T. and one-fourth by S., and each was to have the right of entering upon, repairing, and using the salt works whenever he should think it necessary. In pursuance of the agreement, S. procured a lease of land to himself during the term of time that salt works should be erected and used on the land. S. afterwards conveyed all his right, title, and

interest in an undivided fourth of the salt works to C. and his heirs, covenanting that he was seized in fee of the granted premises and warranting the same; and C. levied an execution on the other three-fourths as the real estate of T., S. and the lessor of the land acting as appraisers. The demandant then levied on the whole of the land and salt works as the real estate of C., entered into possession, and took the profits. Three-fourths of the salt works were afterwards taken as personal property on an execution against T. and sold to the tenant, and C. made to the tenant an assignment of the fourth part which S. had formerly conveyed to C., and the salt works were then held and occupied by S. and the tenant, pursuant to an agreement between them, until the death of S. In a writ of entry to recover the whole land, with the salt works, it was held that S. took by the lease an estate for life, determinable upon the salt works ceasing to be used. *Hurd v. Cushing*, 7 Pick. (Mass.) 169.

6. 2 Black. Com. 121; 4 Kent's Com. 25; 2 Min. Inst. 89. And see *supra*, this title, *Estates of Inheritance — Estates in Fee Simple*.

7. **Incidents to Life Estates.** — 2 Black. Com. 122; 2 Min. Inst. 90.

8. **Estovers.** — Co. Litt. 41b; 2 Black. Com. 122; *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705. See also *Cook v. Cook*, 11 Gray (Mass.) 123.

Derivation of Terms. — "'Bote' in the Saxon tongue, and 'estovers' in the French, in this case are all of one signification, that is, to have compensation or satisfaction for these purposes. 'Estovers' cometh of the French word 'estover.'" Co. Litt. 41b.

Cannot Use Soil to Make Bricks. — A tenant for life, though entitled to reasonable estovers, has no right to dig up and use soil or wood on the demised premises, with a view to the manufacture of bricks for sale; and if he does so, the landlord is entitled to an injunction restraining him from committing further mischief of the like character. *Livingston v. Reynolds*, 2 Hill (N. Y.) 157.

Fuel for Laborers. — In *Smith v. Jewett*, 40 N. H. 530, it was held that as incident to a life estate the tenant might lawfully take from the land a reasonable amount of fuel for the sup-

Estovers are of three kinds: first, house bote, which consists of wood and timber sufficient to repair the house and to supply it with firewood; second, plow bote or cart bote, which is a supply of wood for the repair and construction of agricultural implements of all kinds; and third, hay bote or hedge bote, which is a supply of wood for the construction and repair of hedges and other inclosures.¹

(cc) *Liability for Waste*. — On the other hand, the life tenant is liable for waste, unless his estate is created without impeachment of waste.²

(dd) *Right to Emblements*. — Emblements or *fructus industriales* are those crops which are produced by annual labor and cultivation,³ and the right of the tenant for life and his under tenants to emblements is discussed elsewhere in this work.⁴

(ee) *Liability to Forfeiture* — aaa. *For Alienation*. — At common law if a tenant for his own life alienated his estate by feoffment with livery, fine, or common recovery, for the life of another, or in tail, or in fee, he forfeited his own estate to him in remainder or reversion. This rule did not apply except in the cases of the tortious conveyances above named, and so was inapplicable when the conveyance was by bargain and sale, or any form of deed under the statute of uses.⁵ This doctrine of forfeiture is not now generally recognized, the effect of an attempt by the life tenant to convey a greater estate being to convey the interest of such tenant and nothing more.⁶

bbb. *For Disclaimer*. — At the common law, when the life tenant neglected to render his lord the services or rent due, and upon an action brought to recover them disclaimed in a court of record to hold of his lord, he forfeited his estate; and so likewise, if in a court of record a life tenant did any act which amounted to a virtual disclaimer, if he claimed any estate greater than his own, or if he joined the mise in a writ of right, he forfeited his estate.⁷

(ff) *Liability of Under Tenant for Rent*. — At common law, as a consequence of the determination of the estate of a life tenant at the moment of his death the under tenant could, upon the death of the life tenant occurring between two rent days, quit the premises and pay no rent to anybody for the occupation of the land since the last rent day;⁸ but this is now generally altered by

ply of herself and family upon the farm, including the persons employed to cultivate it, and that the fact that such persons were paid by the share of the crops as tenants at the half, and in cold weather kept a separate fire, did not of itself prove that the quantity used was unreasonable. But in *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601, it was held that a tenant for life of a farm of one hundred and sixty-five acres was not entitled to fire bote for the dwelling of the farmer or laborer in addition to the fire bote of dwelling house or mansion, and that a custom to that effect would be unreasonable and invalid.

1. *Kinds of Estovers*. — Co. Litt. 41*b*; 2 Min. Inst. 91. And see the title INCORPOREAL HEREDITAMENTS.

2. *Waste*. — 2 Black. Com. 122; Webster v. Webster, 33 N. H. 18, 66 Am. Dec. 705; *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601. And see the titles CURTESY, vol. 8, p. 518; DOWER, vol. 10, p. 151; WASTE.

Dependent upon Custom. — Whether the cutting of timber upon the premises by the tenant for life is waste will depend on the custom of farmers, the situation of the country, and the value of the timber. *McCullough v. Irvine*, 13 Pa. St. 438. To the same effect is *Morehouse v. Cothel*, 22 N. J. L. 521.

3. *Emblements*. — See the title CROPS, vol. 8, p. 302.

4. See the titles CROPS, vol. 8, p. 318; LANDLORD AND TENANT.

5. *Forfeiture by Alienation*. — 2 Black. Com. 274; 2 Min. Inst. 100; Co. Litt. 251*a*; *Stevens v. Winship*, 1 Pick. (Mass.) 327, 11 Am. Dec. 178; *Dennett v. Dennett*, 40 N. H. 498; *Stump v. Findlay*, 2 Rawle (Pa.) 168. See also *Jackson v. Mancius*, 2 Wend. (N. Y.) 365.

Presumption that Lease Is Lawful. — "If tenant for life make a lease generally, this shall be taken an estate for his own life that made the lease; for if it should be a lease for the life of the lessee, it would be a wrong to him in reversion. The law will intend the lease to be such an one as he may lawfully make, rather than that an injury may accrue to any one. Co. Litt. 42*b*." *Jackson v. Van Hoesen*, 4 Cow. (N. Y.) 325.

6. *Bell v. Twilight*, 22 N. H. 514; *Grout v. Townsend*, 2 Hill (N. Y.) 554. See also *McKee v. Pfout*, 3 Dall. (Pa.) 486; and the titles CURTESY, vol. 8, p. 525; DOWER, vol. 10, p. 122; FORFEITURE; TITLE TO REAL PROPERTY.

7. *Forfeiture by Disclaimer*. — 2 Black. Com. 275; 4 Kent's Com. 34; 2 Min. Inst. 100. And see the titles FORFEITURE; TITLE TO REAL PROPERTY.

8. 2 Black. Com. 124; 2 Williams on Real Prop. 28. See also *Clun's Case*, 10 Coke 127; *Ex p. Smyth*, 1 Swanst. 337.

statute, and the under tenant must pay to the personal representative of the life tenant a ratable proportion of the rent from the last day of payment to the day of the death of the life tenant.¹ It was also the common-law rule that when the life tenant had leased the land, reserving rent periodically, and died on the last day, but before midnight, his personal representative lost the quarter's rent, which went to the person next entitled, as the rent was not due until midnight of the day on which it was made payable.² But this rule has also been changed by statute.³

(c) **Estates Tail After Possibility of Issue Extinct** — *aa.* DEFINITION. — An estate tail after possibility of issue extinct arises by operation of law when one is tenant in special tail and a person from whose body the issue was to spring dies without issue, or, having left issue, that issue becomes extinct. In either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct.⁴

bb. CREATION. — This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring, for no limitation, conveyance, or other human act can make it. If land be given to a man and his wife and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, neither of them shall have this estate, but they are merely tenants for life.⁵

cc. NATURE. — This estate partakes partly of the nature of an estate tail and partly of that of an estate for life. The tenant is only a tenant for life, but with many of the privileges of a tenant in tail, such as not being punishable for waste; or he may be said to be a tenant in tail with many of the restrictions of a tenant for life, such as forfeiting his estate if he aliens it in fee simple. This estate is generally treated as equivalent to an estate for life only, and the tenant may exchange his estate with the tenant for life, which exchange can only be made of estates that are equal in their nature.⁶

(d) **Curtesy and Dower.** — A detailed discussion of those legal life estates called curtesy and dower will be found elsewhere in this work.⁷

b. **ESTATES LESS THAN FREEHOLD** — (1) *In General.* — Estates less than freehold are of three kinds: estates for years; estates at will; estates by sufferance.⁸

(2) *Estates for Years.* — An estate for years is said by Blackstone to be a contract for the possession of lands or tenements for some determinate period, and it arises when one person lets such lands or tenements to another for the term of a certain number of years agreed upon between them, and the lessee enters thereon.⁹

1. Rule Changed by Statute. — 11 Geo. II., c. 19, § 15; 4 & 5 Wm. IV., c. 22, § 1. See the codes and statutes of the several states, and see the title LANDLORD AND TENANT.

2. 2 Williams on Real Prop. 29. See also *Ex p. Smyth*, 1 Swanst. 337; *Strafford v. Wentworth*, cited in *Rockingham v. Penrice*, 1 P. Wms. 180; *Southern v. Bellasis*, 1 P. Wms. 179, note; *Norris v. Harrison*, 2 Madd. 267.

3. 4 & 5 Wm. IV., c. 22, § 2; Code of Virginia (1873), c. 136, § 1, and c. 135, § 1. See also the statutory enactments of the several states, and the title LANDLORD AND TENANT.

4. Definition. — Co. Litt. 28a; 2 Black. Com. 124; 2 Min. Inst. 102.

Illustration. — By settlement before marriage the husband's estate was conveyed to trustees to the use of the husband for life, *sans* waste; remainder to trustees to preserve contingent remainders; remainder to the use of the wife for life, for her jointure, and in bar of dower; remainder to the first and other sons of the

marriage in tail male; remainder to the first and other daughters in tail male; remainder to the heirs of the body of the husband and wife; remainder to the right heirs of the husband. The wife survived the husband and had no issue; and after possibility of issue by the husband extinct, it was held that she was tenant in tail after possibility of issue extinct; that she was unimpeachable of waste, and was entitled to the property of the timber when cut by her. *Williams v. Williams*, 12 East 209.

5. Co. Litt. 28a; 2 Black. Com. 125; *Challis on Real Prop.* 234.

6. 2 Black. Com. 125; *Challis on Real Prop.* 235.

7. See the titles CURTESY, vol. 8, p. 506; DOWER, vol. 10, p. 122.

8. **Kinds of Estates Less than Freehold.** — 2 Black. Com. 139.

9. **Estate for Years Defined.** — 2 Black. Com. 139; Co. Litt. 43b. And see generally the titles LANDLORD AND TENANT; LEASE.

The Term "Years" Is Merely Descriptive, as such estate may be for a shorter period, as a certain number of months or weeks; but the essential characteristic of the estate is that its duration must be fixed and certain.¹ And in ascertaining whether this characteristic exists or not, the maxim *id certum est quod certum reddi potest* is applicable.²

No Especial Words Are Necessary for the creation of an estate for years, but any form of words indicating an intention to transfer the possession for a certain definite time is sufficient.³

Nature of Tenant's Interest. — Since no livery of seizin is necessary to a lease for years, such lessee is not said to be seized or to have true legal seizin of the land. Nor, indeed, does the bare lease vest any estate in the lessee, but it gives him only a right of entry on the tenement, which right is called his interest in the term. But when he has actually so entered and thereby accepted the grant, the estate is then, and not before, vested in him, and he is possessed, not properly of the land, but of the term of years, the possession or seizin of the land remaining still in the person who has the freehold.⁴

May Be Created by Devise. — An estate for years may be created by devise of lands to a person to hold for a definite time after the testator's death as well as by contract.⁵

(3) *Estates at Will* — (a) *In General*. — An estate at will arises at common law when lands and tenements are let by one person to another to have and to hold at the will of the lessor, and the tenant, by force of this lease, obtains possession. Every estate at will is at the will of either of the parties, landlord and tenant, so that either of them may determine his will and quit his connection with the other at his own pleasure.⁶ If, however, the tenancy at will is terminated by the lessor, the tenant is entitled to all crops the seed of which was sown prior to the determination of the estate, and has the right of ingress, egress, and regress to cut and carry them away.⁷

(b) *Estates from Year to Year*. — Estates at will do not now arise without express grant or contract, and all general tenancies, when yearly rent, or rent measured by any aliquot part of a year, is accepted, are, if not expressed to be estates at will, constructively estates from year to year.⁸

(c) *Copyhold Estates*. — Copyhold estates were originally nothing better than mere estates at will, but the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs according to particular custom established in their respective districts, therefore, though they still are held at the will of the lord, and so are, in general, expressed in the court rolls to be, yet that will is qualified, restrained, and limited, to be exerted according to the custom of the manor or barony where such estates are situated; and this custom is evidenced by a copy of the roll or record of the court of such manor or barony. A copyhold tenant is, therefore, now as properly a tenant by the custom as a tenant at will, the custom having arisen from a series of uniform wills.⁹

(4) *Estates by Sufferance*. — A tenancy by sufferance arises when a person

1. May Be for Less than a Year. — Brown v. Bragg, 22 Ind. 122.

2. 2 Black. Com. 143. And see Horner v. Leeds, 25 N. J. L. 106; Western Transp. Co. v. Lansing, 49 N. Y. 499.

3. Form Immaterial. — Moore v. Miller, 8 Pa. St. 272. See also South Cong. Meeting-house v. Hilton, 11 Gray (Mass.) 407.

4. Character of Tenant's Interest. — 2 Black. Com. 144.

5. Created by Devise. — Hellwig v. Bachman, 26 Ill. App. 165; Jacquat v. Bachman, 26 Ill. App. 169. And see the titles TITLE TO REAL PROPERTY; WILLS.

6. Tenancy at Will. — Co. Litt. 55a; 2 Black. Com. 145; 4 Kent's Com. 111; Doe v. Garner, 1 U. C. Q. B. 39. And see generally the title LANDLORD AND TENANT.

Not Assignable. — In Murphy v. Ford, 5 Ir. C. L. Rep. 19, it was held that an estate at will was not assignable.

7. 2 Black. Com. 145. And see the title CROPS, vol. 8, p. 319.

8. 2 Black. Com. 147; 4 Kent's Com. 111; 2 Min. Inst. 173. And see the title LANDLORD AND TENANT.

9. Copyhold Estates. — 2 Black. Com. 147; Co. Litt. 58a; 2 Min. Inst. 174.

comes into possession of land by lawful title and occupies it afterwards without any title at all.¹ By the common law a tenant by sufferance was not liable for rent as such, although liable for the fair value of the premises in an action for use and occupation;² and the landlord was entitled to resume possession or the tenant to quit the premises at any time.³

3. Estates with Regard to Qualifications of Interest — *a. IN GENERAL.* — Viewed according to the qualifications of interest which may be had in real property, estates may be treated as (1) uses, (2) trusts, and (3) conditions.⁴ A full discussion of the first and second of these estates will be found elsewhere in this work.⁵

b. ESTATES UPON CONDITION — (1) *In General.* — Estates upon condition may be classified as estates upon condition implied and estates upon condition expressed, under which last may be included estates *in vadio*, in gage or pledge, estates by statute merchant or statute staple, and estates by elegit.⁶

(2) *Estates in Vadio, Gage, or Pledge.* — Estates in gage or pledge are of two kinds, *vivum vadium*, or living pledge, and *mortuum vadium*, dead pledge or mortgage.⁷ This last estate is fully treated elsewhere in this work.⁸

Estates in Vivo Vadio. — *Vivum vadium*, or living pledge, is when a man borrows a certain sum of another and grants him an estate to hold till the rent and profits shall repay the sum so borrowed, and, "as in this case," says Lord Coke, "neither money nor land dieth or is lost, * * * therefore it is called *vivum vadium*." ⁹

(3) *Estates by Elegit.* — An estate by elegit is a conditional estate created by operation of law for the security and satisfaction of debts. An elegit is the name of a writ founded on the statute of Westminster, 2, by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one-half of the defendant's lands and tenements, to be occupied and enjoyed until his debt and damages are fully paid; and during the time he so holds them he is called tenant by elegit.¹⁰ While the writ of elegit was formerly in use in several of the states of the United States, it is at this time practically obsolete.¹¹

(4) *Estates by Statute Merchant and Statute Staple.* — An estate by statute merchant is a security for money in the nature of a recognizance entered into before the chief magistrate of some trading town pursuant to the statute 13 Edw. I., *de mercatoribus*. By it the land of the debtor may be delivered to the creditor until out of the rents and profits thereof the debt shall be satisfied, and during such time as the creditor so holds the lands he is a tenant by statute merchant.¹² An estate by statute staple is a security for money entered into pursuant to the statute 27 Edw. III., c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom formerly held in certain trading towns. Under this statute the lands of the debtor may be delivered to the creditor,

1. *Tenancy by Sufferance.* — 2 Black. Com. 150; *Uridias v. Morrell*, 25 Cal. 31; *Hauxhurst v. Lobree*, 38 Cal. 563; *Godfrey v. Walker*, 42 Ga. 562; *Smith v. Singleton*, 71 Ga. 68; *Proctor v. Tows*, 115 Ill. 138; *Coomler v. Hefner*, 86 Ind. 108; *Kunzie v. Wixom*, 39 Mich. 384; *Abeel v. Hubbell*, 52 Mich. 37; *Finney v. St. Louis*, 39 Mo. 177; *Smith v. Littlefield*, 51 N. Y. 539. And for a full discussion of this estate see the title LANDLORD AND TENANT.

2. *Not Liable for Rent.* — *Emmons v. Scudder*, 115 Mass. 367.

3. *Notice Unnecessary.* — *Emmons v. Scudder*, 115 Mass. 367; *Smith v. Littlefield*, 51 N. Y. 539.

4. *Estates Classified as to Qualifications of Interest.* — 2 Min. Inst. 176.

5. See the titles CHARITIES AND TRUSTS FOR

CHARITABLE USES, vol. 5, p. 893; TRUSTS AND TRUSTEES; USES.

6. *Classification of Estates upon Condition.* — 2 Black. Com. 152. And for a detailed treatment of estates upon condition, see generally the title CONDITIONS, vol. 6, p. 499.

7. *Division of Estates in Vadio, in Gage, or in Pledge.* — 2 Black. Com. 157.

8. See the titles EQUITY OF REDEMPTION, *ante*; MORTGAGES.

9. Co. Litt. 205a; 2 Black. Com. 157.

10. *Elegit.* — 2 Black. Com. 106; Bac. Abr., tit. Execution, (C) 2.

11. See the title ELEGIT, ENCYC. OF PLEADING AND PRACTICE, vol. 7, p. 409.

12. 2 Min. Inst. 276; 2 Black. Com. 160; Bac. Abr., tit. Execution, (B) 1.

and during the time the creditor holds the lands under the security he is tenant by statute staple.¹

4. Estates with Regard to the Time of Their Enjoyment — *a.* IN GENERAL. — With respect to the time of their enjoyment, estates may be either in possession or in expectancy.²

b. ESTATES IN POSSESSION. — Estates in possession, or executed estates, are those whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates executory. Concerning these estates there is little or nothing peculiar to be observed.³

c. ESTATES IN EXPECTANCY. — Estates in expectancy are of three kinds: (1) reversions, (2) remainders, and (3) executory limitations.⁴ A full discussion of the various estates of expectancy may be found elsewhere in this work.⁵

5. Estates with Regard to the Number and Connection of the Tenants — *a.* IN GENERAL. — With reference to the number and connection of the tenants, estates are either estates in severalty or estates in plurality.⁶

b. ESTATES IN SEVERALTY. — A tenant in severalty or sole tenant is one who holds real property in his own right alone, without any other person being joined or connected with him in point of interest during his estate therein. This is the most common and usual way of holding an estate, and all estates are supposed to be of this sort unless they are expressly declared to be otherwise.⁷

c. ESTATES IN PLURALITY. — Estates in plurality are designated as estates in joint tenancy, estates in tenancy in common, and estates in coparcenary, respectively.⁸ These estates are treated in full elsewhere in this work.⁹

III. SUBJECTS OF ESTATES. — The subjects in which estates may be had are lands, tenements, and hereditaments.¹⁰

IV. METHODS OF ACQUIRING AND TRANSFERRING ESTATES. — The various ways in which estates may be acquired and transferred are treated in detail in other titles in this work.¹¹

ESTIMATE. (See the titles ARCHITECTS, vol. 2, pp. 815, 818; LOGS AND LOGGING; WORKING CONTRACTS.) — See note 12.

1. 2 Min. Inst. 277; 2 Black. Com. 160; Bac. Abr., tit. Execution, (B) 1.

2. 2 Black. Com. 163; 2 Min. Inst. 330. See also 1 Fearn on Remainders 1.

3. 2 Black. Com. 163.

4. 2 Black. Com. 163; 2 Min. Inst. 330. See also 4 Kent's Com. 197.

5. See the titles REVERSIONS; REMAINDERS AND EXECUTORY INTERESTS; SHELLEY'S CASE, RULE IN.

6. 2 Black. Com. 178; 2 Min. Inst. 399.

7. 2 Black. Com. 178.

8. Co. Litt. 163*a*, 180*a*, 189*a*; 2 Black. Com. 178; 2 Min. Inst. 399.

Tenancy by Entireties. — To this enumeration is sometimes added tenancy by entirety, which is a species of joint tenancy and occurs at common law when a gift or conveyance which, if made to two strangers, would create a joint tenancy is made to a husband and wife during the coverture. Challis on Real Prop. 303. See also Co. Litt. 326*a*, and see the title HUSBAND AND WIFE.

9. See the titles JOINT TENANTS AND TENANTS IN COMMON; PARCENARY.

10. Challis on Real Prop. 36. And see the article TITLE TO REAL PROPERTY and the cross-references there given.

11. See the title TITLE TO REAL PROPERTY, and the cross-references there given.

12. Verdict. (See also ENCYC. OF PL. AND PR., title VERDICT.) — In *Roddy v. McGetrick*, 49 Ala. 162, it was held that a verdict for the plaintiff *estimating* (instead of assessing) the damages was sufficiently formal and definite. The court said: "The objection to the verdict that the jury have used the word *estimate*, instead of the word 'assess,' in declaring the amount of the damages awarded by the finding, is not well taken. Such objections are merely formal, and should be first made in the court below, otherwise they will not be considered on error in this court. Rev. Code, § 2811. But these words are equivalent, and either may be used. They mean 'to fix' the amount of the damages, or the value of the thing to be ascertained. This is enough. Webster's Unabr., words 'Assess' and *Estimate*."

Lumber. — Where mill logs were sold for a price per thousand according to the quantity of lumber they should afterwards be *estimated* to make, and there was a table or scale of *estimation* then in such general use that the parties were found by the jury to have referred to it as the rule for computing the quantity, it was held that they were bound by

this scale, though it was proved to be in some respects erroneous. *Heald v. Cooper*, 8 Me. 32.

Measure. — A contract for the sale of lumber provided that the lumber was to be *estimated* on or near the fifteenth of each month, and twelve dollars per thousand feet to be paid to the vendors at the time of *estimate* or ten days thereafter. In construing this provision the court, in *Galloway v. Week*, 54 Wis. 606, said: "It is said by the learned counsel for the plaintiff that the word 'measure' is not used in the contract, but the word *estimate*. But we think the latter expression, in the connection in which it is used, means essentially the same thing as the former. The word *estimate* here involves the idea that there is to be a measurement of the lumber each month, of the entire cut, and the setting apart of the proper quantity to the company as a condition to the passing of the title."

Measurement. — In *Herrick v. Belknap*, 27 Vt. 673, 700, it was held that a contract providing for monthly *estimates* of the contractor's work, according to which he was to be paid, imported an accurate measurement and final *estimate* for each month, and not such as would be merely approximate or conjectural.

Estimated Cost. — The defendant agreed to pay to the plaintiff, an architect, a certain per cent upon the *estimated* cost of three houses as compensation for furnishing the plans for the houses. In construing this contract the court, in *Lambert v. Sanford*, 55 Conn. 437, said: "This *estimated* cost we understand in this case to mean the reasonable cost of buildings erected in accordance with the plans and specifications referred to, and not necessarily the amount of some actual *estimate* made by a builder, nor an *estimate* agreed upon by the parties, nor yet an *estimate* or bid accepted by the defendant."

Estimated Cost of Manufacture. — The plaintiff agreed that the defendants should be the sole manufacturers of an article, known as the "Patent Paint Filler," patented and owned by the plaintiff, the defendants to furnish all capital necessary for the business and to have a share of the profits. It was further agreed that the cost of manufacturing should be "*estimated* by the wholesale price

of the materials and packages used, and the amount of labor bestowed in its manufacture." In construing this latter provision the court said: "Whatever may have been the meaning of the parties in the use of this phraseology, we cannot think it was meant that the cost of materials and labor was to be merely a matter of *estimate*, without any reference to the actual cost. It rather seems to us that it was intended to convey the idea that the wholesale price of materials and packages was to be taken as the cost price, and not the retail price, and to that was to be added the cost of labor. If we read the word *estimated* in the sense of 'computed,' which is one of its meanings, we would, perhaps, more accurately express what was in the minds of the parties. Then the sentence would mean that, in ascertaining the cost of manufacture, the wholesale price of materials and packages used and the cost of labor should be computed." *Tully v. Felton*, 177 Pa. St. 344.

Estimated Cash Value — Insurance. (See also the title FIRE INSURANCE.) — A policy upon buildings contained a stipulation that the aggregate amount of insurance should not exceed two-thirds of the *estimated* cash value. The insurance was for one thousand three hundred dollars, and the *estimated* cash value according to the policy was one thousand nine hundred and fifty dollars. Subsequently improvements were made, and an additional insurance of one thousand dollars was effected in another company. The buildings were destroyed by fire, and their value at the time of the fire was four thousand two hundred dollars. It was held that the "*estimated* cash value" was that at the time of the first insurance, and that the first policy was void for over-insurance. The court said: "There is no authority at law or in equity to reform the contract by substituting 'actual' for *estimated*. The *estimate* was one in which the company had concurred, and by which they were therefore bound. They did not concur in any other *estimate* which the insured might put upon it, or which a jury might subsequently agree upon." *Elliott v. Lycoming County Mut. Ins. Co.*, 66 Pa. St. 22, 5 Am. Rep. 323.

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CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *AGENCY*, vol. 1, p. 930; *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65; *BOUNDARIES*, vol. 4, p. 756; *DEDICATION*, vol. 9, p. 20; *EASEMENTS*, vol. 10, p. 397; *FRAUD AND DECEIT: HUSBAND AND WIFE; IMPLIED WARRANTY; INFANCY; INSURANCE; JUDGMENTS; LANDLORD AND TENANT; LICENSE; PATENTS; RECEIPTS; RECEITALS; RES JUDICATA; SEALS; ULTRA VIRES*.

For the application of the doctrine of *Estoppel* to other particular subjects, see the titles under which such subjects are discussed in this work.

I. DEFINITION AND GENERAL NATURE. — An estoppel may be defined in a general sense to be a preclusion of a person to assert a fact which has been admitted or determined under circumstances of solemnity, such as by matter of record or by deed, or which he has, by an act *in pais*, induced another to believe and act upon to his prejudice.¹ At one time the rule was laid down

1. Estoppel Defined — *United States*. — *Sullivan v. Colby*, 71 Fed. Rep. 464.

Alabama. — *Edmondson v. Montague*, 14 Ala. 377.

California. — *Hostler v. Hays*, 3 Cal. 307; *Ferris v. Coover*, 10 Cal. 631; *Boggs v. Merced Min. Co.*, 14 Cal. 369; *McDonald v. Bear River, etc., Water, etc., Co.*, 15 Cal. 148; *Carpentier v. Thirston*, 24 Cal. 281; *Caperton v. Schmidt*, 26 Cal. 503, 85 Am. Dec. 187; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365; *Dolbeer v. Livingston*, 100 Cal. 621; *Pope v. J. K. Armsby Co.*, 111 Cal. 159.

Colorado. — *Yates v. Hurd*, 8 Colo. 349.

Florida. — *Williams v. Moscley*, 2 Fla. 349.

Georgia. — *Davis v. Collier*, 13 Ga. 491; *Grant v. Savannah, etc., R. Co.*, 51 Ga. 355.

Illinois. — *Hefner v. Vandolah*, 57 Ill. 520, 11 Am. Rep. 39.

Indiana. — *Rice v. Loomis*, 28 Ind. 406; *McCabe v. Raney*, 32 Ind. 312; *Gavin v. Graydon*, 41 Ind. 566; *Ross v. Banta*, 149 Ind. 120.

Kansas. — *Clark v. Coolidge*, 8 Kan. 189.

Maryland. — *Hardy v. Chesapeake Bank*, 51 Md. 589, 34 Am. Rep. 325.

Massachusetts. — *Owen v. Bartholomew*, 9 Pick. (Mass.) 520; *Burlen v. Shannon*, 99 Mass. 202.

Mississippi. — *Staton v. Bryant*, 55 Miss. 272.

Missouri. — *Acton v. Dooley*, 74 Mo. 67; *Blodgett v. Perry*, 97 Mo. 273, 10 Am. St. Rep. 307; *Orrick School Dist. v. Dorton*, (Mo. 1898) 46 S. W. Rep. 950.

Nebraska. — *Nash v. Baker*, 40 Neb. 297; *Meyer v. Anderson*, 33 Neb. 1.

New Hampshire. — *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111.

New Jersey. — *Martin v. Righter*, 10 N. J. Eq. 526; *Kuhl v. Jersey City*, 23 N. J. Eq. 87; *Young v. Vough*, 23 N. J. Eq. 329; *Mutual L. Ins. Co. v. Norris*, 31 N. J. Eq. 585; *Ruckelschaus v. Oehme*, 48 N. J. Eq. 448; *Phillipsburgh Bank v. Fulmer*, 31 N. J. L. 55, 86 Am. Dec. 193; *Demarest v. Hopper*, 22 N. J. L. 619.

New York. — *Martin v. Angell*, 7 Barb. (N. Y.) 410; *Ryerss v. Farwell*, 9 Barb. (N. Y.) 618; *Ruse v. Mutual Ben. L. Ins. Co.*, 26 Barb. (N. Y.) 561; *Lesley v. Johnson*, 41 Barb. (N. Y.) 361; *Rice v. Dewey*, 54 Barb. (N. Y.) 470; *Finnegan v. Carahar*, 61 Barb. (N. Y.) 258; *Reynolds v. Garner*, 66 Barb. (N. Y.) 312; *Frost v. Saratoga Mut. Ins. Co.*, 5 Den. (N. Y.) 157, 49 Am. Dec. 234; *Ludlow v. Hudson River R. Co.*, 4 Hun (N. Y.) 241; *Dater v. Willson*, 36 Hun (N. Y.) 550; *Dezell v. Odell*, 3 Hill (N. Y.) 219, 38 Am. Dec. 628; *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 483, 24 Am. Dec. 51; *Jackson v. Waldron*, 13 Wend. (N. Y.) 206; *Sparrow v. Kingman*, 1 N. Y. 256; *Burrows v. Smith*, 10 N. Y. 561; *Carpenter v. Stilwell*, 11 N. Y. 73; *Griswold v. Haven*, 25 N. Y. 608, 82 Am. Dec. 380; *Shapley v. Abbott*, 42 N. Y. 448, 1 Am. Rep. 548; *Malloney v. Horan*, 49 N. Y. 111; *McMaster v. North America Ins. Co.*, 55 N. Y. 229; *Payne v. Burnham*, 62 N. Y. 73.

North Carolina. — *Moore v. Willis*, 2 Hawks

that an estoppel may be said to exist where a person is compelled to admit to be true what is not true, and to act upon a theory which is contrary to the truth.¹

Odiousness of Estoppels. — As a result of this definition, it was said in the ancient authorities, and the expression is often met with in the modern decisions, that the doctrine is a harsh one and is not favored by the law, since its effect is to prevent the party against whom it is invoked from proving the truth of the matter, to ascertain which is often the very object of the inquiry in which the estoppel arises.² But it would seem to be the better view in modern times that, as a general rule, the doctrine is a salutary one, and is founded upon the soundest principles, and is only odious when applied without the support of a sound legal reason.³

The Doctrine Strictly Guarded. — The doctrine has, however, been guarded with great strictness, not because the party enforcing it necessarily wishes to exclude the truth, but because the estoppel may exclude the truth.⁴

Certainty Requisite as to Estoppels. — Hence the rule that estoppels must be certain to every intent, and are not to be taken by argument or inference.⁵

(9 N. Car.) 558; *Rogers v. Ratcliff*, 3 Jones L. (48 N. Car.) 236; *Estis v. Jackson*, 111 N. Car. 145, 32 Am. St. Rep. 784.

Ohio. — *Nugent v. Cincinnati, etc.*, Straight Line R. Co., 2 Disney (Ohio) 302.

Pennsylvania. — *Waters's Appeal*, 35 Pa. St. 527, 78 Am. Dec. 354; *Orr v. Mercer County Mut. F. Ins. Co.*, 114 Pa. St. 387.

Texas. — *Perrin v. Perrin*, 62 Tex. 480; *Edwards v. Dickson*, 66 Tex. 617.

Vermont. — *Halloran v. Whitcomb*, 43 Vt. 306.

Virginia. — *Baker v. Preston, Gilmer (Va.)* 300.

West Virginia. — *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 649.

Wisconsin. — *Kidder v. Knights Templars, etc.*, L. Indemnity Co., 94 Wis. 538.

1. *Simm v. Anglo-American Tel. Co.*, 5 Q. B. Div. 202.

In Co. Litt. 352a it is said: "*Estoppe* cometh of the French word *estoupe*, from whence the English word *stopped*; and it is called an estoppel or conclusion because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." See also *Needlar v. Winton*, Hob. 227.

2. **Estoppels Viewed as Odious** — *England.* — *Howard v. Hudson*, 2 El. & Bl. 10, 75 E. C. L. 10.

California. — *Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498; *Tewksbury v. Magraff*, 33 Cal. 237; *Franklin v. Merida*, 35 Cal. 566, 95 Am. Dec. 129; *Murphy v. Clayton*, 113 Cal. 160.

Connecticut. — *Wadsworth v. Marsh*, 9 Conn. 481; *Hubbard v. Norton*, 10 Conn. 422; *Johnson v. Blackman*, 11 Conn. 342; *Giddings v. Emerson*, 24 Conn. 538.

Georgia. — *Groover v. King*, 46 Ga. 101; *Barrett v. Butler*, 54 Ga. 581; *Bradford v. Water Lot Co.*, 58 Ga. 281; *Wilkins v. McGehee*, 86 Ga. 764; *Atlanta v. Hunnicutt*, 95 Ga. 138.

Illinois. — *Penn v. Heisey*, 19 Ill. 296, 68 Am. Dec. 597; *Curtis v. Root*, 20 Ill. 524.

Louisiana. — *Abbot v. Wilbur*, 22 La. Ann. 368; *Herber v. Thompson*, 46 La. Ann. 191.

Massachusetts. — *Owen v. Bartholomew*, 9 Pick. (Mass.) 520; *Bridgewater v. Dartmouth*,

4 Mass. 273; *Leicester v. Rehoboth*, 4 Mass. 180.

3. **Estoppel Viewed as Salutary Doctrine.** — *Sprigg v. Mount Pleasant Bank*, 10 Pet. (U. S.) 265; *Paxson v. Brown*, 27 U. S. App. 61; *Caldwell v. Smith*, 77 Ala. 165; *Norris v. Norton*, 19 Ark. 319; *Penn v. Heisey*, 19 Ill. 296, 68 Am. Dec. 597; *Curtis v. Root*, 20 Ill. 524; *Dean v. Doe*, 8 Ind. 475; *Bocock v. Pavey*, 8 Ohio St. 280; *Waters's Appeal*, 35 Pa. St. 526, 78 Am. Dec. 354; *Gray v. Pingry*, 17 Vt. 419, 44 Am. Dec. 345. See also *Needlar v. Winton*, Hob. 227.

4. **Estoppels Strictly Guarded.** — *Miller v. Hampton*, 37 Ala. 346.

5. **Certainty Required.** — The conditions which warrant the application of an estoppel must be clearly proved. *Giddings v. Emerson*, 24 Conn. 547; *Atlanta v. Hunnicutt*, 95 Ga. 142; *Andrews v. Lyons*, 11 Allen (Mass.) 350.

Principle Applied to Estoppel by Record. — In *De Sollar v. Hanscome*, 158 U. S. 221, the court said: "Now it is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment. 'It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined.' *Russell v. Place*, 94 U. S. 608." See also the title JUDGMENTS.

In *Sutton v. Dameron*, 100 Mo. 150, the court said: "But it must not be forgotten that it is of the very essence of all estoppels,

II. ESTOPPEL BY RECORD—1. Judicial Records—*a*. IN GENERAL.—It is a rule of the common law that the record of a court imports such absolute verity that, as a general rule, no person against whom it is producible is allowed in collateral proceedings to aver or prove as error in fact a matter contrary thereto.¹

especially where the matters relied on to estop are committed to writing in the form of a court paper, that, as they are intended to preclude a man from alleging the truth, they must be certain to every intent, and are not to be sustained by argument or inference; there must be a precise affirmation to have this effect. * * * And the reason given for the necessity of an estoppel being certain to every intent is, 'for no one shall be denied setting up the truth, unless it is in plain and clear contradiction to his former allegations and acts.' 1 Greenl. Ev., § 22."

Estoppel by Deed.—In *Jackson v. Allen*, 120 Mass. 79, the court said: "To constitute an estoppel by deed, a distinct and precise assertion or admission of a fact is necessary." To the same effect, see *Right v. Bucknell*, 2 B. & Ad. 278, 22 E. C. L. 73; *Brown v. Jackson*, 3 Wheat. (U. S.) 449; *Van Rensselaer v. Kearney*, 11 How. (U. S.) 325; *Campbell v. Knights*, 24 Me. 332; *Pike v. Galvin*, 29 Me. 183; *Wight v. Shaw*, 5 Cush. (Mass.) 64; *Miller v. Ewing*, 6 Cush. (Mass.) 34; *Pelletreau v. Jackson*, 11 Wend. (N. Y.) 117, *sub nom.* *Jackson v. Waldron*, 13 Wend. (N. Y.) 178.

For the Application of this Principle to Estoppels in Pais, see *infra*, this title. *Estoppel in Pais*.

1. Estoppel by Record in General—England.—*Rex v. Carlile*, 2 B. & Ad. 362, 22 E. C. L. 96.

United States.—*Elliott v. Peirsol*, 1 Pet. (U. S.) 340; *McGoan v. Scales*, 9 Wall. (U. S.) 23.

Alabama.—*Gray v. State*, 63 Ala. 66; *Carlisle v. Killebrew*, 89 Ala. 329.

Arkansas.—*McCoy v. State*, 22 Ark. 308.

California.—*Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491; *People v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186.

Connecticut.—*Douglass v. Wickwire*, 19 Conn. 489.

Georgia.—*Archer v. Guill*, 67 Ga. 195.

Illinois.—*Harris v. Lester*, 80 Ill. 307; *Kemper v. Waverly*, 81 Ill. 278.

Indiana.—*Sauer v. Twining*, 81 Ind. 366; *Indiana, etc., R. Co. v. Allen*, 113 Ind. 308, 3 Am. St. Rep. 650.

Iowa.—*Hampson v. Weare*, 4 Iowa 13, 66 Am. Dec. 116; *Farley v. Budd*, 14 Iowa 289; *Baxter v. Myers*, 85 Iowa 328, 39 Am. St. Rep. 298.

Kentucky.—*Paul v. Smith*, 82 Ky. 451; *Stevenson v. Flournoy*, 89 Ky. 561.

Louisiana.—*Kent v. Brown*, 38 La. Ann. 802.

Maine.—*Woodman v. Smith*, 37 Me. 21.

Maryland.—*Fridge v. State*, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463; *Barrick v. Horner*, 78 Md. 253, 44 Am. St. Rep. 283.

Massachusetts.—*Balch v. Shaw*, 7 Cush. (Mass.) 282; *Hendrick v. Whittemore*, 105 Mass. 23; *Winchester v. Thayer*, 129 Mass. 129.

Minnesota.—*State v. Macdonald*, 24 Minn. 48; *Turrell v. Warren*, 25 Minn. 9.

Mississippi.—*Moore v. Ware*, 51 Miss. 206; *Murrah v. State*, 51 Miss. 652.

Missouri.—*Weber v. Schmeisser*, 7 Mo. 600; *Yeoman v. Younger*, 83 Mo. 424; *St. Joseph v. Union R. Co.*, 116 Mo. 636, 38 Am. St. Rep. 626.

Montana.—*Kleinschmidt v. Binzel*, 14 Mont. 31, 43 Am. St. Rep. 604.

Nebraska.—*Pasewalk v. Bollman*, 29 Neb. 519, 26 Am. St. Rep. 399.

New Hampshire.—*King v. Chase*, 15 N. H. 13, 41 Am. Dec. 675.

New York.—*Smith v. Shaw*, 12 Johns. (N. Y.) 257; *Bolton v. Schriever*, 135 N. Y. 65; *Dyett v. Hyman*, 129 N. Y. 351, 26 Am. St. Rep. 533.

North Carolina.—*Jones v. Judkins*, 4 Dev. & B. L. (20 N. Car.) 454, 34 Am. Dec. 392; *Galloway v. McKeithen*, 5 Ired. L. (27 N. Car.) 12, 42 Am. Dec. 153; *Morris v. Gentry*, 89 N. Car. 248.

Ohio.—*Bigelow v. Bigelow*, 4 Ohio 138, 19 Am. Dec. 591; *Calvin v. State*, 12 Ohio St. 69.

Oregon.—*Morrill v. Morrill*, 20 Oregon 96, 23 Am. St. Rep. 95.

Pennsylvania.—*Yaple v. Titus*, 41 Pa. St. 195, 80 Am. Dec. 604; *Foss v. Bogan*, 92 Pa. St. 296.

South Carolina.—*Sullivan v. Shell*, 36 S. Car. 578, 31 Am. St. Rep. 894.

Tennessee.—*Thacker v. Chambers*, 5 Humph. (Tenn.) 313, 42 Am. Dec. 431.

Texas.—*Tadlock v. Eccles*, 20 Tex. 782, 73 Am. Dec. 213; *Wilkinson v. Schoonmaker*, 77 Tex. 615, 19 Am. St. Rep. 803.

Vermont.—*Porter v. Gile*, 47 Vt. 620; *Manning v. Leighton*, 65 Vt. 84.

Virginia.—*Lancaster v. Wilson*, 27 Gratt. (Va.) 624.

West Virginia.—*Burner v. Hevener*, 34 W. Va. 774, 26 Am. St. Rep. 948.

Wyoming.—*Graham v. Culver*, 3 Wyoming 639, 31 Am. St. Rep. 105.

In *Co. Litt. 260a*, Lord Coke said: "The rolls, being the records or memorials of the judges of the courts of record, import in them such uncontrollable credit and verity as they admit of no averment, plea, or proof to the contrary."

In *Rex v. Carlile*, 2 B. & Ad. 362, 22 E. C. L. 96, it appeared that the defendant had been convicted of a seditious libel and brought a writ of error in the King's Bench, assigning for error in fact that there was but one of the justices named in the commission present when the jury gave its verdict. On the record returned to the King's Bench (and which was made up in the ordinary way) it appeared that a sufficient number of the justices were present and the court held that it was not competent for the defendant to question the fact so stated.

All Orders and Entries made in the regular progress of the cause during term time are considered as emanating from the court, and import absolute verity and estop the parties

b. JUDGMENTS.—(1) *As Between Parties and Privies.* — The question of the conclusiveness of records most frequently arises on judgments. The doctrine is well established that a cause of action once finally determined, without appeal or some proceeding for the annulment of the judgment between the parties on the merits by any competent tribunal, cannot afterwards be litigated by a new proceeding either before the same or any other tribunal.¹

Distinction When Judgment Invoked on Same or on Different Claim. — But there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment as rendered upon the merits constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is a judgment conclusive in another action.²

from disputing their correctness. *Deslonde v. Darrington*, 29 Ala. 92; *McCoy v. State*, 22 Ark. 308.

Where the Docket Entries returned by a justice of the peace on a special appeal show jurisdiction to render the judgment, his return to the matter set up in the affidavit for such appeal cannot be taken to impeach the docket itself. *Hodges v. Bagg*, 81 Mich. 243. See also *Read v. Sutton*, 2 Cush. (Mass.) 115.

See the title **RECORDS** for a further discussion of the conclusive effect of records.

1. Estoppel by Judgment — *United States.* — *Young v. Black*, 7 Cranch (U. S.) 567; *Ramsey v. Herndon*, 1 McLean (U. S.) 450; *Hughes v. Blake*, 1 Mason (U. S.) 515.

Arkansas. — *Trammell v. Thurmond*, 17 Ark. 203.

California. — *Chase v. Swain*, 9 Cal. 130.

Florida. — *Thornton v. Eppes*, 6 Fla. 546.

Illinois. — *Gray v. Gillilan*, 15 Ill. 453, 60 Am. Dec. 761.

Indiana. — *Housemire v. Moulton*, 15 Ind. 367; *Bougher v. Scobey*, 21 Ind. 365.

Kentucky. — *Hayden v. Boothe*, 2 A. K. Marsh. (Ky.) 353.

Maryland. — *Beall v. Pearre*, 12 Md. 550.

Massachusetts. — *Smith v. Whiting*, 11 Mass. 445.

Missouri. — *McKnight v. Taylor*, 1 Mo. 282.

New York. — *Gardner v. Buckbee*, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; *Rice v. King*, 7 Johns. (N. Y.) 20; *Baker v. Rand*, 13 Barb. (N. Y.) 152; *Kent v. Hudson River R. Co.*, 22 Barb. (N. Y.) 278.

South Carolina. — *Jones v. Weathersbee*, 4 Strobb. L. (S. Car.) 50, 51 Am. Dec. 653.

2. Effect of Judgment as to Same and Different Cause of Action Distinguished — *England.* — *Aslin v. Parkin*, 2 Burr. 665; *Outram v. Morewood*, 3 East 346.

United States. — *Hopkins v. Lee*, 6 Wheat. (U. S.) 109; *Smith v. Kernochen*, 7 How. (U. S.) 198; *Parrish v. Ferris*, 2 Black (U. S.) 606; *Society, etc., v. Hartland*, 2 Paine (U. S.) 536; *Campbell v. Strong*, Hempst. (U. S.) 265.

Alabama. — *Mervine v. Parker*, 18 Ala. 241.

Arkansas. — *Peay v. Duncan*, 20 Ark. 85.

California. — *Caperton v. Schmidt*, 26 Cal. 479, 85 Am. Dec. 187; *Jackson v. Lodge*, 36 Cal. 37.

Connecticut. — *Church v. Leavenworth*, 4 Day (Conn.) 274; *Beuts v. Starr*, 5 Conn. 550, 13 Am. Dec. 94; *Dennison v. Hyde*, 6 Conn. 508; *Coit v. Tracy*, 8 Conn. 268, 20 Am. Dec. 110.

Indiana. — *Hargus v. Goodman*, 12 Ind. 629.

Iowa. — *Heichew v. Hamilton*, 4 Greene (Iowa) 317, 61 Am. Dec. 122; *Street v. Beckman*, 43 Iowa 496.

Louisiana. — *Montesquieu v. Heil*, 4 La. 51, 23 Am. Dec. 471.

Maine. — *Whitehurst v. Rogers*, 38 Md. 503.

Massachusetts. — *Sawyer v. Woodbury*, 7 Gray (Mass.) 499, 66 Am. Dec. 518.

Michigan. — *Wales v. Lyon*, 2 Mich. 276; *Barker v. Cleveland*, 19 Mich. 230.

Mississippi. — *Wall v. Wall*, 28 Miss. 409.

Missouri. — *Offutt v. John*, 8 Mo. 120, 40 Am. Dec. 125.

New Hampshire. — *Towns v. Nims*, 5 N. H.

A Full Discussion of this question will be found elsewhere in this work.¹

(2) *As Affecting Strangers.* — Where there is jurisdiction of the person and subject-matter, and the judgment is not the result of fraud and collusion between the parties to it, and the record is material only to establish the fact of such judgment and those legal consequences which result from that fact, the record must be regarded as conclusive even as to strangers. The object of this rule is to give stability and security to judgments, decrees, and sentences when made by courts having jurisdiction of the person and subject-matter, and they are, therefore, founded on and supported by a sound public policy which admits an inflexible adherence to them.²

c. JUDICIAL ADMISSIONS. — The conclusiveness of pleadings and solemn admissions made in open court is sometimes based upon the ground that they form part of the record.³ Thus, it has been held that an adjudication upon matter alleged in a proceeding or pleading in a court of record is not necessary to create an estoppel by record against a contrary or inconsistent assertion in any subsequent suit upon the same subject-matter with the same adversary or his privies in estate or in law.⁴ But in other authorities the question is viewed from a different aspect, and it has been found to be more convenient to reserve the discussion of the question for a subsequent portion of this title.⁵

2. **Legislative Records** — **Conclusiveness as to Authenticity.** — It is established by the weight of authority that a legislative record which is regular upon its face is conclusive evidence of its due passage and the terms and contents of the act, and cannot be contradicted by any manner of extrinsic evidence.⁶

Conclusiveness as to Facts Therein — **Public Acts.** — But it has been held that a party is not estopped from denying any defect which may be recited in a public legislative act, though a decent respect for a co-ordinate department of the government requires the court to treat such recitals as true until the contrary appears.⁷

259, 20 Am. Dec. 578; *Hollister v. Abbott*, 31 N. H. 442, 64 Am. Dec. 342; *Divoll v. Atwood*, 41 N. H. 443.

New York. — *Gardner v. Buckbee*, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; *Burt v. Sternburgh*, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402; *Wright v. Butler*, 6 Wend. (N. Y.) 284, 21 Am. Dec. 323; *Hyatt v. Bates*, 35 Barb. (N. Y.) 308; *Doty v. Brown*, 4 N. Y. 71, 53 Am. Dec. 350; *Burhans v. Van Zandt*, 7 N. Y. 523.

Ohio. — *Grant v. Ramsey*, 7 Ohio St. 157; *Babcock v. Camp*, 12 Ohio St. 11.

Pennsylvania. — *Lentz v. Wallace*, 17 Pa. St. 412, 55 Am. Dec. 569; *Finley v. Hanbest*, 30 Pa. St. 190.

Tennessee. — *Estill v. Taul*, 2 Yerg. (Tenn.) 467, 24 Am. Dec. 498.

Texas. — *Foster v. Wells*, 4 Tex. 101.

Vermont. — *Spencer v. Dearth*, 43 Vt. 98.

In the *Duchess of Kingston's Case*, 11 St. Tr. 262, 2 Smith L. Cas. 784, the following language was used: "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true, first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar; or, as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction

is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

1. See the titles JUDGMENTS; RES JUDICATA.

2. **Conclusiveness of Judgments as to Strangers.** — *Wildes v. Russell*, L. R. 1 C. P. 722; *Green v. New River Co.*, 4 T. R. 589; *Reed v. Jackson*, 1 East 355; *Weigley v. Matson*, 125 Ill. 64, 8 Am. St. Rep. 335; *Koren v. Roemheld*, 7 Ill. App. 646; *Richardson v. Beldam*, 18 Ill. App. 527; *Jasper v. Schlesinger*, 22 Ill. App. 637; *King v. Chase*, 15 N. H. 14, 41 Am. Dec. 675. See also *Scott v. Ware*, 64 Ala. 174; *Taylor v. Means*, 73 Ala. 468; *Central R., etc., Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353. And see the title JUDGMENTS.

3. *Com. Dig.*, A. 1.

4. *Sullivan v. Colby*, 71 Fed. Rep. 460.

5. See *infra*, this title, *Inconsistent Positions*.

6. **Conclusiveness of Legislative Records as to Their Own Authenticity.** — 3 Black. Com. 331; 1 Phillips on Evidence (3d Am. ed.) 316; *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93; *Hart v. McElroy*, 72 Mich. 446; *Pangborn v. Young*, 32 N. J. L. 40. See also the titles RECORDS; STATUTES.

7. **Conclusiveness of Public Acts as to Facts Therein.** — *Thornton v. Lane*, 11 Ga. 520. See also *Rex v. Sutton*, 4 M. & S. 542.

In *Rex v. Greene*, 6 Ad. & El. 548, 33 E. C. L. 145, it was held that the fact that G. is mentioned as a "borough," in schedule A of Stat. 5 & 6 Wm. IV., c. 76, and that in the same schedule "the borough-holders and freemen of

Private Acts. — It seems to be the rule, however, that a private act of parliament or the legislature will be conclusive as to the facts recited therein against parties to its procurement or persons in some way privies to it, but not against strangers.¹

A Further Discussion of this question will be found elsewhere in this work.²

III. BY DEED — 1. **In General.** — It is well settled as a general principle of the common law that no man shall be allowed to dispute his own solemn deed. Thus, in general, the party granting is estopped by his deed to say that he had no interest in the land at the time of conveyance.³

Unsealed Instruments. — The rule has been laid down that no instrument in writing not under seal will operate as an estoppel.⁴ But it has been held that where, by statute, a seal is unnecessary for the conveyance of the legal estate in lands, the estoppel which a sealed instrument created at common law attaches to unsealed instruments conveying legal estates in lands.⁵

Application of Rule to Conveyances of Personality. — It has been held that where the assignment of a chattel or chose in action is by deed, an estoppel arises against denying that the possession of the thing granted has been transferred.⁶

2. **Qualification of Doctrine** — *a.* **ESTOPPEL AGAINST ESTOPPEL.** — An estoppel against an estoppel, as Lord Coke says, setteth the matter at large.⁷ According to this rule, no one can set up an estoppel by deed against the estoppel arising from his own grant.⁸ In the same way, the setting up of an estoppel by deed may be prevented by an estoppel *in pais* as against the grantee.⁹

the borough of G." are mentioned in connection with it, as the "corporate body," is not conclusive of the place having been a borough, or the borough-holders and freemen a municipal corporation, before the statute.

1. **Conclusiveness of Private Legislative Acts.** — *Lucy v. Levington*, 1 Vent. 176; *Branson v. Wirth*, 17 Wall. (U. S.) 41; *Thrower v. Wood*, 53 Ga. 466. See also *Beaufort v. Smith*, 4 Exch. 450.

2. See the title **RECORDS**.

3. **Estoppel by Deed** — *England*. — *Goodtitle v. Bailey*, 2 Cowp. 597; *Fairtitle v. Gilbert*, 2 T. R. 169.

California. — *Belcher Consol. Gold Min. Co. v. DeFerrari*, 62 Cal. 160; *Emeric v. Alvarado*, 90 Cal. 444; *De Frieze v. Quint*, 94 Cal. 653, 28 Am. St. Rep. 151; *Stinchfield v. Gillis*, 96 Cal. 33.

Colorado. — *Drake v. Root*, 2 Colo. 685.

Connecticut. — *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99.

District of Columbia. — *Morris v. Wheat*, 8 App. Cas. (D. C.) 386.

Illinois. — *Needham v. Clary*, 62 Ill. 344.

Massachusetts. — *Comstock v. Smith*, 13 Pick. (Mass.) 120, 23 Am. Dec. 670.

New Hampshire. — *Foss v. Strachn*, 42 N. H. 40; *Logan v. Eaton*, 66 N. H. 575.

Pennsylvania. — *Root v. Crock*, 7 Pa. St. 378.

Texas. — *Barnard v. Blum*, 69 Tex. 608.

Virginia. — *Anderson v. Phlegar*, 93 Va. 415.

4. **Rule Held Inapplicable to Unsealed Instruments.** — *Shelton v. Alcox*, 11 Conn. 249; *Davis v. Tyler*, 18 Johns. (N. Y.) 492.

5. **Doctrine Held Applicable to Certain Unsealed Instruments.** — *Jones v. Morris*, 61 Ala. 518; *Rankin v. Warner*, 2 Lea (Tenn.) 302.

6. **Estoppel by Deed Applied to Conveyances of Personality.** — *Tarbox v. Grant*, 56 N. J. Eq. 199; *Harvey v. Harvey*, 13 R. I. 598.

But in *Geise v. Blumenthal*, 88 Ga. 285, it was held that one who has sold personal prop-

erty and made a bill of sale conveying it to the purchaser is a competent witness to prove that he had no title and that it belonged to some one else.

7. **Estoppel Against Estoppel.** — *Co. Litt.* 352*b*; *Tibbets v. Shapleigh*, 60 N. H. 487; *Page v. Smith*, 13 Oregon 410.

8. **One Cannot Set Up Estoppel Against Estoppel.** — *Branson v. Wirth*, 17 Wall. (U. S.) 32; *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 693; *Brown v. Staples*, 28 Me. 503; *Carpenter v. Thompson*, 3 N. H. 206, 14 Am. Dec. 348; *James v. McGibney*, 24 U. C. Q. B. 155. See also *Watts v. Welman*, 2 N. H. 458.

Where S. conveyed with warranty to K. land claimed by S.'s father, and after the father's death purchased the land of the heirs, one of whom was the wife of K., who, with her husband, released all her rights, it was held that the case of estoppel against estoppel arose, that K. could not set up against his own deed conveying the share of his wife the estoppel created by the warranty deed of S., and that all the residue subsequently purchased by S. inured to K. by estoppel. *Kimball v. Schoff*, 40 N. H. 190.

Where a husband and wife conveyed land to H., who subsequently reconveyed it to them, and they then conveyed it to K., all the deeds containing a covenant of general warranty, and K. was afterwards evicted, it was held that he could recover against H. upon the covenants of warranty contained in the deed of H. to K.'s vendors, on the principle that the warranty of H. to the husband and wife passed by deed to their grantee, although the conveyance from husband and wife to H. also contained warranties, a *feme covert* not being bound by the covenants in her deed. *Hobbs v. King*, 2 Metc. (Ky.) 139.

9. **Estoppel in Pais Against Estoppel by Deed.** — *Platt v. Squire*, 12 Met. (Mass.) 494; *Haney v. Roy*, 54 Mich. 635.

b. INVALID DEEDS—(1) *In General*.—No question of estoppel by deed can arise where the instrument is absolutely void.¹

Effect of Covenants.—And where the deed is invalid, the mere fact that it contains covenants of warranty will not make it operative by way of estoppel, for, to make a warranty binding, there must be some estate conveyed to which the warranty may be annexed.²

(2) *Deed in Contravention of Statute*.—A deed void as being given in contravention of a statute works no estoppel.³

Conveyance of Married Woman.—Thus, a married woman will not be estopped by a deed not executed in the mode provided by statute.⁴

Conveyance of Homestead by Husband Alone.—Also, under statutes of the various states requiring that the wife shall unite with the husband in the conveyance of the homestead estate, it is the general rule that a conveyance by the husband alone is wholly inoperative and void, and neither the husband nor wife is estopped from asserting the homestead right as against the alienee or mortgagee,⁵ and it has been held that, in such case, the rule is not affected by the

1. **No Estoppel Created by Invalid Deed**—*England*.—Fairtitle v. Gilbert, 2 T. R. 169. See also Doe v. Penfold, 3 Q. B. 757, 43 E. C. L. 960.

Alabama.—Stokes v. Jones, 18 Ala. 734; McIntosh v. Parker, 82 Ala. 238; Moses v. McClain, 82 Ala. 370.

Arkansas.—Shorman v. Eakin, 47 Ark. 351.
California.—Meley v. Collins, 41 Cal. 663, 10 Am. Rep. 279; Pekin Min., etc., Co. v. Kennedy, 81 Cal. 356; Gordon v. San Diego, 101 Cal. 522, 40 Am. St. Rep. 73; Security L. & T. Co. v. Kauffman, 108 Cal. 214.

District of Columbia.—Washington Market Co. v. District of Columbia, 6 App. Cas. (D. C.) 34.

Indiana.—Caffrey v. Dudgeon, 38 Ind. 512, 10 Am. Rep. 126.

Kentucky.—Bohannon v. Travis, 94 Ky. 59.
Massachusetts.—Merriam v. Boston, etc., R. Co., 117 Mass. 241; Conant v. Newton, 126 Mass. 105; Pells v. Webquish, 129 Mass. 469; Mason v. Mason, 140 Mass. 63.

Minnesota.—James v. Wilder, 25 Minn. 305; Conrad v. Lane, 26 Minn. 389, 37 Am. Rep. 412; Alt v. Banholzer, 39 Minn. 511.

Missouri.—Reinhard v. Virginia Lead Min. Co., 107 Mo. 627, 28 Am. St. Rep. 441; Crook v. Tull, 111 Mo. 283.

North Carolina.—Miller v. Bumgardner, 109 N. Car. 412.

Washington.—Hendricks v. Edmiston, 15 Wash. 687.

Wisconsin.—Shevlin v. Whelen, 41 Wis. 88.

In Collins v. Benbury, 3 Ired. L. (25 N. Car.) 285, 38 Am. Dec. 722, it was held that a grant of a several fishery in the ocean or other navigable water by an individual who could not acquire it from the state must be merely void, and therefore it could not estop. *Compare* Gillam v. Bird, 8 Ired. L. (30 N. Car.) 284, 49 Am. Dec. 379.

Execution of Deed in Defiance of Restraining Order.—It has been held that one who executes a deed despite a restraining order enjoining him from so doing is estopped from invalidating the deed for that cause. *Wilson v. Western North Carolina Land Co.*, 77 N. Car. 445.

2. **Effect of Covenants in Void Deeds.**—Kerchaval v. Triplett, 1 A. K. Marsh. (Ky.) 493;

Connor v. McMurray, 2 Allen (Mass.) 204; Patterson v. Pease, 5 Ohio 191; Wallace v. Miner, 6 Ohio 370. See also Dominick v. Michael, 4 Sandf. (N. Y.) 417, and the title COVENANTS, vol. 8, p. 54. But see *infra*, this title, *By Deed—Covenants—In General*.

3. **Deed in Contravention of Statute.**—Doe v. Ford, 3 Ad. & El. 649, 30 E. C. L. 173.

4. **Void Conveyance of Married Woman.**—Harden v. Darwin, 77 Ala. 472; Louisville, etc., R. Co. v. Stephens, 96 Ky. 404; Merriam v. Boston, etc., R. Co., 117 Mass. 241; Stone v. Sledge, 87 Tex. 49, 47 Am. St. Rep. 65.

5. **Conveyance of Homestead by Husband Alone**—*California*.—Revalk v. Kraemer, 8 Cal. 66; Sears v. Dixon, 33 Cal. 326; Barber v. Babel, 36 Cal. 11.

Iowa.—Alley v. Bay, 9 Iowa 509; Larson v. Reynolds, 13 Iowa 579, 81 Am. Dec. 444.

Kansas.—Morris v. Ward, 5 Kan. 239; Ayres v. Probasco, 14 Kan. 190.

Massachusetts.—Connor v. McMurray, 2 Allen (Mass.) 202; Doyle v. Coburn, 6 Allen (Mass.) 72; Richards v. Chace, 2 Gray (Mass.) 385.

Michigan.—Dye v. Mann, 10 Mich. 291; Amphlett v. Hibbard, 29 Mich. 298.

Nebraska.—Whitlock v. Gosson, 35 Neb. 829.

Tennessee.—Kennedy v. Stacey, 1 Baxt. (Tenn.) 220; Hoge v. Hollister, 2 Tenn. Ch. 606.

Texas.—Rogers v. Renshaw, 37 Tex. 625.

Wisconsin.—Williams v. Starr, 5 Wis. 534; Hait v. Houle, 19 Wis. 472.

For further discussion of this question, see the title HOMESTEAD.

Husband Not Estopped.—In Doyle v. Coburn, 6 Allen (Mass.) 71, the court said: "As to the estoppel, however reasonable this might seem to be if the homestead right was created by the statute for the exclusive benefit of the husband, yet looking at the subject in its proper light, and viewing it as a provision especially designed to secure a residence for the wife and children, exempt from any sale by the husband or a levy by his creditors, to sustain such estoppel as against the husband would be to dismember the family and exclude him from the premises, while the wife and children would be entitled to the full and exclusive possession of the homestead. The homestead

fact that the premises subsequently lose their character as a homestead.¹

(3) *Deed Affected with Fraud*—*Conveyance Obtained by Fraud*.—Under this principle, also, the rule has been laid down that a conveyance obtained by fraud will not operate by way of estoppel against the grantor.²

Conveyance in Fraud of Creditors — As Between Parties.—The rule is different where the grantor is guilty of fraud.³ Thus the doctrine that a man is estopped by his deed extends as between the parties and their privies to cases where the deed is made to defraud creditors.⁴

As Between Grantor and Defrauded Creditor.—But it has been held that where a debtor has conveyed to third persons land, including his homestead interest, to hinder, delay, and defraud his creditors, and such conveyance has been set aside and avoided at the suit of creditors, such debtor will not be estopped to assert as against such creditors the same rights for the protection of his homestead as if the alleged fraudulent deed had never been executed.⁵

Release of Dower by Fraudulent Conveyances.—In the same way, it has been held that where a wife joins with her husband in a deed conveying land, and thereby relinquishes her right of dower, and the deed is afterwards adjudged to be fraudulent and void as to creditors, the wife is not estopped as against such creditors to assert her title to dower.⁶ Moreover, it has been held that, upon the avoidance of such conveyance, it will be ineffectual as an estoppel even in favor of the grantee.⁷

3. Persons Affected by Estoppel—*a. GRANTORS AND PRIVIES*—(1) *In General*.—It may be stated as a general rule that the obligation created by an estoppel by deed binds the grantor and his privies, in estate, in blood, and in law.⁸ The term "privity" in this connection denotes mutual or successive relationship to the same rights of property.⁹

(2) *Mortgagors — When Mortgage Transfers Title*.—Under the common law, the

estate cannot be thus defeated by the sole conveyance of the husband, but for such purposes and to that extent it is wholly inoperative. This point is directly decided in the case of *Connor v. McMurray*, 2 Allen (Mass.) 202, holding such a mortgage by the husband alone wholly inoperative to defeat the homestead estate in any respect."

1. *Powell v. Patison*, 100 Cal. 236.

2. *Conveyance Procured Through Fraud*.—Bigelow on Estoppel (4th ed.) 341.

But it has been held that where, in such case, the grantor was inattentive and careless in the execution of his conveyance, an estoppel *in pais* would operate against him from setting up title as against a *bona fide* purchaser for value under such conveyance. *McNeil v. Jordan*, 28 Kan. 7.

3. *Grantor Cannot Set Up His Own Fraud*.—The grantor will be estopped from setting up his own fraud in executing an instrument. *Doe v. Roberts*, 2 B. & Ald. 367; *Bessey v. Windham*, 6 Q. B. 166, 51 E. C. L. 166; *Phillipotts v. Phillipotts*, 10 C. B. 85, 70 E. C. L. 85; *Cotten v. Williams*, 1 Fla. 62. See also the title *FRAUD AND DECEIT*.

4. *Effect by Way of Estoppel of Fraudulent Conveyance as Between Parties*.—*Glover v. Walker*, 107 Ala. 540; *Bush v. Rogan*, 65 Ga. 320; *Peterson v. Brown*, 17 Nev. 172, 45 Am. Rep. 437. See also the title *FRAUDULENT SALES AND CONVEYANCES*.

5. *Effect of Fraudulent Conveyances as Between Grantor and Defrauded Creditor*.—*Cox v. Wilder*, 2 Dill. (U. S.) 45; *Kennedy v. Tuscaloosa First Nat. Bank*, 107 Ala. 170; *Horton v. Kelly*, 40 Minn. 193; *Sears v. Hanks*, 14 Ohio St. 298, 84

Am. Dec. 378. For a full discussion of this question, see the title *HOMESTEADS*.

6. *Deed Void as to Creditors Releasing Dower*.—*Robinson v. Bates*, 3 Met. (Mass.) 42. See also the title *DOWER*, vol. 10, p. 214.

7. *Lockett v. James*, 8 Bush (Ky.) 28. See also *Robinson v. Bates*, 3 Met. (Mass.) 42. Compare *Cox v. Wilder*, 2 Dill. (U. S.) 45.

8. *Persons Affected by Estoppel by Deed in General*.—*Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Morris v. Wheat*, 8 App. Cas. (D. C.) 387; *McCleskey v. Leadbetter*, 1 Ga. 551; *Davis v. Callahan*, 78 Me. 313; *Tefft v. Munson*, 57 N. Y. 99; *Gilliam v. Bird*, 8 Ired. L. (30 N. Car.) 280, 49 Am. Dec. 379; *Douglass v. Scott*, 5 Ohio 198.

Grantor's Agent.—In an action to recover land a defendant who went into possession under the plaintiff's grantor, as his agent, is estopped to deny the plaintiff's title. *Cooper v. Axley*, 114 N. Car. 643. See also the title *RECITALS*.

9. *Meaning of Privity*.—*Greenleaf on Evidence*, § 523; *Trolan v. Rogers*, 88 Hun (N. Y.) 422.

"The Obligation Created by Estoppel not only binds the party making it, but all persons privy to him; the legal representatives of the party, those who stand in his situation by act of law, and all who take his estate by contract, stand in his stead, and are subject to all the consequences which accrue to him. It adheres to the land, is transmitted with the estate; it becomes a muniment of title, and all who afterward acquire the title take it subject to the burden which the existence of the fact imposes on it." *Douglass v. Scott*, 5 Ohio

mortgagee was regarded as the legal owner of the estate and as entitled to its possession. The mortgagor was possessed of only an equity of redemption. The possession of the mortgagor was treated as the possession in law of the mortgagee, to whom he held the relation of a *quasi* tenant. By virtue of this relation alone, it has been held that he was estopped, like any other tenant, from setting up or acquiring any title hostile to the mortgagee.¹ Moreover, it has been held that a mortgagor is, by force and effect of his deed, estopped to deny that he had a good title to the estate conveyed at the time of making the mortgage.²

Where Mortgage Merely Creates Lien. — But in those jurisdictions where the modern view obtains that the mortgagor is not divested by the mortgage of his title or estate in the mortgaged lands, but remains the owner of them, the mortgage merely creating a lien upon the interest of the mortgagor which may be enforced by legal proceedings, there can be no estoppel on the ground that the mortgagor is a *quasi* tenant of the mortgagee.³ Moreover, it seems to be the prevailing rule in such jurisdictions that no estoppel will arise by force of the mortgage deed, unless it contains a covenant for title either express or implied from the technical words importing a covenant or any assertion or allegation respecting the title possessed by the mortgagor at the time of making the deed.⁴

(3) **Married Women — At Common Law.** — In order to work an estoppel by deed, parties must be *sui juris*, competent to make it effectual as a contract; and since it is a settled principle of the common law that coverture disqualifies a *feme* from entering into a contract or covenant personally binding on her, she cannot, as a general rule, be bound at common law by way of estoppel by her deed, its covenants, or its recitals.⁵ A qualification of this doctrine, however, exists, it seems, in case the married woman has a separate equitable estate in the premises conveyed.⁶

198. See also *Morris v. Wheat*, 8 App. Cas. (D. C.) 387.

1. At Common Law, Mortgagor Estopped to Assert Title Hostile to Mortgagee. — *Doe v. Vickers*, 4 Ad. & El. 782, 31 E. C. L. 178; *Doe v. Clifton*, 4 Ad. & El. 809, 31 E. C. L. 186; *Doe v. Pegge*, 1 T. R. 758, note *a*; *Den v. Gardner*, 20 N. J. L. 556; *Wires v. Nelson*, 26 Vt. 13. See also *Den v. Vanness*, 10 N. J. L. 102. But for further discussion of this question, see *infra*, this title, *Estoppel in Pais*.

2. Operation of Estoppel by Deed Against Mortgagor. — *Mitchell v. Kinnard*, (Ky. 1895) 29 S. W. Rep. 309; *Nash v. Spofford*, 10 Met. (Mass.) 192, 43 Am. Dec. 425; *Barber v. Harris*, 15 Wend. (N. Y.) 615; *Doe v. Power*, 6 New Bruns. 271; *Doe v. McDonald*, 6 New Bruns. 673. See also *Fisher v. Milmine*, 94 Ill. 328; *Carson v. Cochran*, 52 Minn. 67; *Bailey v. Lincoln Academy*, 12 Mo. 177.

"In *Stewart v. Anderson*, 10 Ala. 508, it was said by this court that it was a principle of the common law 'that a mortgagor cannot dispute his mortgagee's title, nor can he, while in possession, bar his title by fine or recovery. In accordance with this rule, it has been held that a mortgagor shall not be heard to allege that he had no estate in the premises. By the mortgage he professes to convey, and thus declares that he had an interest coextensive with that he undertook to transfer; and he will not be heard to say, in contradiction of his own deed, or in opposition to a claim founded thereon, that he was guilty of a falsehood, and

had no estate or interest therein.' Whether this doctrine rests upon the privity of estate existing between mortgagor and mortgagee, or depends on the insertion in the mortgage of covenants of warranty, binding and estopping the mortgagor, we need not consider." *Jones v. Reese*, 65 Ala. 134.

3. Where Mortgage Creates Mere Lien, No Estoppel from Quasi Tenancy. — *McManness v. Paxson*, 37 Fed. Rep. 296; *Bush v. White*, 85 Mo. 357; *National F. Ins. Co. v. McKay*, 5 Abb. Pr. N. S. (Buffalo Super. Ct.) 453.

4. Mortgage Deed Without Covenants, where Mortgage Mere Lien, Creates No Estoppel. — *McManness v. Paxson*, 37 Fed. Rep. 296; *National F. Ins. Co. v. McKay*, 5 Abb. Pr. N. S. (Buffalo Super. Ct.) 453. See also *Trope v. Kerns*, (Cal. 1888) 20 Pac. Rep. 82. And see *infra*, this section, *Covenants*.

5. No Estoppel by Deed Against Married Women at Common Law. — *Bank of America v. Banks*, 101 U. S. 240; *Trentman v. Eldridge*, 98 Ind. 531; *Wight v. Shaw*, 5 Cush. (Mass.) 56; *Lowell v. Daniels*, 2 Gray (Mass.) 161, 61 Am. Dec. 448; *McGregor v. Wait*, 10 Gray (Mass.) 72, 69 Am. Dec. 305; *Knight v. Thayer*, 125 Mass. 27; *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378. See also the title *RECEIPTS*.

As to the operation of the covenants in connection with the title of a married woman by way of estoppel, as to after-acquired property, see *infra*, this section, *Covenants*.

6. *Jones v. Reese*, 65 Ala. 134. See also *Krauth v. Thiele*, 45 N. J. Eq. 407.

Under Statutes removing the disabilities of married women, conveyances by them of their property generally may operate against them by way of estoppel to the same extent as if they were unmarried.¹

Joinder with Husband for Purpose of Releasing Dower. — Under statute, also, a married woman who joins her husband in a conveyance of real estate by relinquishing her right of dower therein is estopped afterwards to set up a claim of dower,² provided the deed contains words indicating her intention to release her right of dower.³ But it has been held that where she joins her husband in a conveyance of his property merely for the purpose of relinquishing her inchoate right of dower, she will not be estopped by any covenants in the deed from setting up a title accruing to her other than her right of dower.⁴

A Further Discussion of this question will be found in a subsequent portion of this work.⁵

(4) *Infants.* — An infant will not be estopped by his deed or the recitals therein unless it is ratified after his attaining his majority.⁶

(5) *The State.* — In North Carolina the rule has been laid down that the doctrine of estoppel by deed does not apply as against a state, the state being a sovereign;⁷ but the prevailing rule would seem to be that estoppels may arise from the express grants of a state as well as in the case of individuals.⁸

1. Estoppel by Deed Against Married Women under Statute. — *Littell v. Hoagland*, 106 Ind. 320; *Knight v. Thayer*, 125 Mass. 25; *Sandwich Mfg. Co. v. Zellmer*, 48 Minn. 408. See the statutes of the various states.

Thus in *Indiana* it has been held that a wife who joins her husband in the execution of a warranty deed, absolute in its terms, conveying land devised to him in which, by the will, she has an inchoate interest, is estopped from asserting on the death of her husband such interest against the grantee. *Littell v. Hoagland*, 106 Ind. 320.

In *New Hampshire* it has been held that a married woman may, by joining with her husband in a deed, convey her land, and her deed thus made will estop her and her heirs from setting up against the grantee any title she may have had when the deed was made, but she will not be estopped by any covenants in such deed from setting up a subsequently acquired title. *Wadleigh v. Glines*, 6 N. H. 17, 23 Am. Dec. 705.

But for the rule under statute in other states as to the operation of covenants on subsequently acquired titles, see *infra*, this section, *Covenants*.

Operation of Covenants Against Husband Joining in Deed. — Where the wife, with the husband's concurrence, purchases and partly pays for land, and they procure a third person to advance the amount of the deferred payment, which is paid by the wife to the vendor, who conveys to her in terms creating a statutory estate, husband and wife promising at the time to execute a mortgage on such lands to secure the lender, and they afterwards execute a note and mortgage pursuant to the agreement, the instrument containing the statutory words "grant, bargain, sell, and convey," and also covenanting to "warrant and defend the title" against the "lawful claims of all persons," such mortgage is void as to the wife, and cannot prejudice her or her heirs; but its covenants estop the husband from denying its validity; and upon the wife's death intestate, the husband surviving, the mortgage will have the effect to pass his life estate. *Chapman v.*

Abrahams, 61 Ala. 108. To the same effect, see *Wellborn v. Finley*, 7 Jones L. (52 N. Car.) 228.

2. Estoppel by Deed to Claim Dower. — *Usher v. Richardson*, 29 Me. 415; *Smith v. Oglesby*, 33 S. Car. 194. See also *McLean v. Laidlaw*, 2 U. C. Q. B. 222. And see the title DOWER, vol. 10, p. 211.

In *Stearns v. Swift*, 8 Pick. (Mass.) 532, it was held that if a wife joins in a deed with her husband "in token of her relinquishment of dower," without any words of grant on her part, although the husband may have previously parted with all his right and title to the grantee named in the deed, she is, nevertheless, estopped to claim her dower.

3. Deed Must Indicate Intent to Release. — *Follansbee v. Follansbee*, 1 App. Cas. (D. C.) 326; *Lothrop v. Foster*, 51 Me. 367; *Lufkin v. Curtis*, 13 Mass. 223. See also the title DOWER, vol. 10, p. 211.

4. Joining to Release Dower Does Not Affect Independent Title. — *Trentman v. Eldridge*, 98 Ind. 531. See also the title COVENANTS, vol. 8, p. 163.

Under Statute in Iowa it has been held that a married woman who unites in a deed of her husband's land, with covenants, is not estopped by such covenants to assert against the purchaser that the premises were encumbered by an outstanding lease on a portion thereof at the time of the execution of the deed. *Thompson v. Merrill*, 58 Iowa 419. See also *infra*, this section, *Covenants*.

5. See the title HUSBAND AND WIFE.

6. Estoppel by Deed Against Infants. — *Cook v. Toumbs*, 36 Miss. 685; *Houston v. Turk*, 7 Yerg. (Tenn.) 13. See also *Mahoney v. Van Winkle*, 21 Cal. 553; *Lackman v. Wood*, 25 Cal. 147; *Clark v. Tate*, 7 Mont. 171. And see generally the title INFANCY.

7. North Carolina — State Not Subject to Estoppel. — *Doe v. Shufford*, 4 Hawks (11 N. Car.) 116; *Candler v. Lunsford*, 4 Dev. & B. L. (20 N. Car.) 407; *Wallace v. Maxwell*, 10 Ired. L. (32 N. Car.) 112, 51 Am. Dec. 380.

8. Operation of Estoppel by Deed Against the State — *United States*. — *People v. Society*, etc., 2 Paine (U. S.) 545; *Carver v. Jackson*, 4 Pet.

But such estoppels cannot arise from the unauthorized acts of the agent or officer of a state.¹

(6) *Grantor Acting in Different Characters.* — The general principle has been announced that a deed will estop a party only in the character in which he executes it.²

Deed as Individual Will Not Estop as Fiduciary. — In accordance with this rule it is established that a person who has sold real estate as an individual will not be estopped, when acting in a representative capacity, from asserting title in those whom he represents, if he is bound by virtue of his position to protect an alleged interest in them.³

Deed in Fiduciary Capacity Usually Creates Estoppel in Individual Capacity. — The converse of this proposition, however, does not hold, and a deed executed as representative or fiduciary usually estops the individual. In some cases, indeed, a person making a deed in a representative character has been held not to be estopped to set up a claim in his individual character;⁴ but it seems

(U. S.) 87; *Menard v. Massey*, 8 How. (U. S.) 313.

Alabama. — *Magee v. Hallett*, 22 Ala. 718; *State v. Brewer*, 64 Ala. 287.

California. — *Nieto v. Carpenter*, 7 Cal. 527.

Louisiana. — *State v. Taylor*, 28 La. Ann. 462; *State v. Ober*, 34 La. Ann. 359; *Folger v. Palmer*, 35 La. Ann. 743.

Massachusetts. — *Com. v. Andre*, 3 Pick. (Mass.) 224; *Com. v. Pejepsut*, 10 Mass. 155.

Minnesota. — *St. Paul, etc., R. Co. v. First Div. St. Paul, etc., R. Co.*, 26 Minn. 31.

Missouri. — Opinion in Response to Governor, 49 Mo. 216.

New York. — *Denn v. Cornell*, 3 Johns. Cas. (N. Y.) 174.

Pennsylvania. — *Penrose v. Griffith*, 4 Binn. (Pa.) 231.

It has been held that a grant from the state of land covered by tidal waters will estop the state from setting up any claim to such land, but that the principle is different when the land granted is covered by navigable waters, since a grant of land under navigable waters is not within the legislative power. *Heyward v. Farmer's Min. Co.*, 42 S. Car. 138, 46 Am. St. Rep. 702.

1. Acts of Unauthorized Agents of State. — *Salem Imp. Co. v. McCourt*, 26 Oregon 103. See also *State v. Brewer*, 64 Ala. 287; *Pulaski County v. State*, 42 Ark. 118; *Atty.-Gen. v. Marr*, 55 Mich. 445; *Day Land, etc., Co. v. State*, 68 Tex. 526.

2. Operation of Estoppel Against Grantor Acting in Different Characters. — *Wright v. De Groff*, 14 Mich. 164; *Kellerman v. Miller*, 5 Pa. Super. Ct. Rep. 443.

3. Individual Not Estopped as Representative. — *Metters v. Brown*, 111 & C. 686; *Kellerman v. Miller*, 5 Pa. Super. Ct. Rep. 443. See also *Gouldsmith v. Coleman*, 57 Ga. 425.

The Making of a Deed to Homestead Property by the head of a family as an individual did not estop him from resisting, in his representative character on behalf of the beneficiaries of the homestead, an ejectment suit founded on such deed. *Hall v. Matthews*, 68 Ga. 490. See also *Doyle v. Coburn*, 6 Allen (Mass.) 71.

4. Representative Not Estopped as Individual. — In *Carothers v. Alexander*, 74 Tex. 328, it was held that where the president of a corporation signed a deed purporting to convey an

interest of the corporation in lands, when he, and not the corporation, owned the lands, the conveyance did not operate to carry his individual interest by estoppel, where it appeared that the deed only assumed to convey the right of the corporation to an undefined and indefinite interest, and at the same time recognized an undefined interest in the same lands in the president individually which it did not convey. In this case the court said: "If it had been an absolute conveyance of the entire interest in the land by the corporation, and the deed had been executed by Johns as president of the corporation, when he himself owned the property, we think the deed would have passed his title by estoppel."

Deed of Administratrix with Covenant of Warranty Against Her Own Act. — And in *Wright v. De Groff*, 14 Mich. 164, it was held that where an administratrix sold certain lands of her late husband at probate sale, and executed a deed in the usual form with covenant of warranty against her own act, the covenant against her own act referred to her representative character, and she did not thereby preclude herself from asserting her individual rights. In this case the court said: "There is no room, we think, for putting upon Mrs. De Groff's covenant any such construction as is claimed for it. The deed was given by her in her representative character as administratrix and signed by her as such. The covenant against her own acts refers to such representative character, and we cannot suppose from the recitals or from the manner of execution that she was understood to preclude herself thereby from asserting her individual rights. It is quite true that the covenant was not essential to the validity of the deed, but it was far from being meaningless, and might, under some circumstances, if the sale had proved defective, have given the grantee a right of action."

Assertion of Title by Sheriff Who Has Made Sale on Execution. — In commenting upon the principle that a deed will estop a party only in the character in which he executes it, the court, in *Kellerman v. Miller*, 5 Pa. Super. Ct. Rep. 443, said: "Of course that proposition is true in the sense that a person who executes a deed as a mere instrument of the law for making the sale or conveying the title is not estopped from afterwards asserting title in himself, as, for instance, a sheriff who has sold and con-

to be the prevailing rule that if a trustee, executor, or administrator, or other person acting in a representative character, attempts to bind his *cestui que trust* or other person represented, by incorporating a personal covenant of title in the deed which he makes in his representative character, he will estop himself afterwards to set up individually an after-acquired title, or to insist on a title existing at the time of the execution of the deed.¹ And it has been held that, even where the deed contains no covenants whatever, if an administrator or other person acting in a representative capacity of his own volition sells and conveys property as that of another whom he represents, and conveys no notice or intimation to the purchaser that he as an individual claims title, he will be estopped to set up such claim.²

(7) *Operation of Ancestor's Covenants Against Heir.* — Where an heir represents an ancestor and continues his estate, an estoppel may arise against the heirs by reason of a deed of conveyance with covenants on the part of the ancestor.³ But as a general rule this doctrine will not apply where the heir does not hold under the ancestor, but by an independent title accruing before the deed.⁴ But on the principle of rebutter,⁵ which is said to be in the nature of an estoppel, it has been held that, while the usual covenants of warranty now in use and which have superseded the warranty of the common law are only enforceable in covenant and sound in damages for the injury done, yet such covenant not only defends the covenantee, his heirs and assigns, against the consequences of an eviction, but, in analogy to the operation of the ancient rule when applied under similar circumstances, precludes the grantor and his heirs in general holding assets equal in value by reason of the inheritance from claiming the land, even by an independent title.⁶ In *Massa-*

veyed real estate by virtue of an execution directed to him."

1. **Estoppel of Person Granting in Representative Capacity to Set up Individual Claim.** — *Morris v. Wheat*, 8 App. Cas. (D. C.) 379; *Heard v. Hall*, 16 Pick. (Mass.) 460; *Hitchcock v. Southern Iron, etc., Co.*, (Tenn. 1896) 38 S. W. Rep. 588; *Prouty v. Mather*, 49 Vt. 425. See also the title COVENANTS, vol. 8, p. 160.

A Guardian who purports to grant lands in his representative character, but covenants in his own name for further assurances and for a general warranty title in fee simple, is estopped to deny the title of the grantee. *Morris v. Wheat*, 8 App. Cas. (D. C.) 379.

Also, in *Heard v. Hall*, 16 Pick. (Mass.) 457, it was held that where a guardian of an insane person sold certain land belonging to his ward and conveyed it with a covenant that he was duly authorized to sell the premises, he was estopped from setting up a claim under a previous conveyance to him in his own right.

See also *infra*, this section, *Covenants*.

2. **Effect of Deed by Representative Without Warranty.** — *Kellerman v. Miller*, 5 Pa. Super. Ct. Rep. 443. See also *Poor v. Robinson*, 10 Mass. 131.

In *Wells v. Steckelberg*, 52 Neb. 597, it was held that one in a representative capacity who assumes to sell and convey to another the entire estate in land is estopped as against the purchaser from asserting an estate in his own right in the same land, and this although the first sale and the deed were void, and although in the deed there was no covenant of title or warranty.

3. **Estoppel by Grantor's Covenants Against His Heirs.** — *Trolan v. Rogers*, 88 Hun (N. Y.) 422. See also *infra*, this section, *Covenants—Against Whom Estoppel Operates*. And see the title COVENANTS, vol. 8, p. 161.

4. **Grantor's Covenants Inoperative Against Heir Claiming under Independent Title.** — *Ebey v. Adams*, 135 Ill. 80; *Russ v. Alpaugh*, 118 Mass. 369, 19 Am. Rep. 464; *Trolan v. Rogers*, 88 Hun (N. Y.) 422.

Where, in a will, after providing for distribution of certain property, the testator directed his executors to distribute the balance of his estate among his six living children "or their heirs," and one of the daughters of the testator, by warranty deed, conveyed her supposed interest in the estate of the testator, and died before the period of distribution arrived, it was held that the grantor had no interest to convey, and that her heirs took her share in the estate, not as heirs, but as purchasers under the will, and hence were not estopped by the covenants in her deed. *Ebey v. Adams*, 135 Ill. 80. To the same effect see *New Orleans v. Gaines*, 138 U. S. 614.

5. **Rebutter.** — The ancient warranty operated in two ways: first, it bound the warrantor and his heirs to protect the tenant from the assertion of a superior outstanding title, by giving him, in case of an eviction, other lands of equal value; and second, it operated to bar the warrantor and his heirs from ever asserting title in themselves to the lands warranted. See *Co. Litt. 365a et seq.*; 2 *Black. Com.* 300 *et seq.*; 2 *Minor's Inst.* 708 *et seq.* In reference to this second effect, warranty was said to operate by way of rebutter. "*Rebouter*," says Lord Coke, "is a French word, and is in Latin *repellere*, to repel or bar; that is, in the understanding of the common law, the action of the heir by the warranty of his ancestor; and this is called a rebut or repel." *Co. Litt. 365a*.

6. **Operation of Rebutter Against Heir Claiming under Independent Title.** — *Carson v. New Bellevue Cemetery Co.*, 104 Pa. St. 575. See also

chusetts this rule has been modified so as not to estop the heir in such case, even though he has received assets, unless administration has been taken out and a breach occurs after the estate has been settled.¹ And the rule has been denied altogether in *New York*, where, by statute, lineal and collateral warranties with all their incidents are abolished.²

b. GRANTEE — Leases. — According to the ancient common law it was a general rule that where there is a lease by indenture, the lessee is estopped from alleging that the lessor had no interest in the demised premises during the joint lives of the lessor and lessee.³ But if the lessor was only a tenant for life, the lessee was not prevented from saying so in answer to an action brought against him by the heir of the lessor after his death.⁴

Deed Poll. — The general rule is that there can be no estoppel by deed against the grantee in a deed poll, because he does not join in the execution of it and his seal is not annexed thereto.⁵ It has been held in *New York*, however, that where a deed poll contains covenants or recitals on the part of

the observation of Story, J., in *Sisson v. Seabury*, 1 Sumn. (U. S.) 263.

A, a tenant by the curtesy, conveyed lands to B, the deed purporting to convey the fee and containing the usual covenants of general warranty. Afterwards A executed an agreement to C and D, who were entitled to the fee of the aliened premises as heirs of his deceased wife, in which, after reciting a deed of release, without consideration, by C and D, for certain other lands, to which they were entitled as heirs of their mother, A covenanted that in consideration of the premises he would not, by "deed, mortgage, sale, judgment, devise, or otherwise, prejudice or interfere with the rights of" C and D, as his "heirs at law," of their free and equal share of his real estate, but that the same should "remain free and uncontrolled," to be divided among all his legal heirs, including the said C and D. Subsequently A made a will by which he directed his real estate to be divided equally among his heirs. At A's death, C and D, who, as his heirs, took assets to a greater value than the land conveyed to B, brought ejectment against B for said land. It was held that at A's death his heirs took his realty as heirs, according to the terms of the agreement, and that the lands thus taken must be regarded as assets, in the hands of said heirs, derived from their warranting ancestor by inheritance; and, therefore, that said agreement did not prevent C and D from being estopped to deny the covenant of warranty made by A in his deed to B. *Carson v. New Bellevue Cemetery Co.*, 104 Pa. St. 575.

In *Texas* it has been held that the heir is not estopped by the warranty of his father where it appears that he has received no assets from the latter's estate. *Chace v. Gregg*, 88 Tex. 552. In this case no reference was made by the court to the doctrine of rebutter.

1. Operation of Rebutter Against Heirs in Massachusetts. — *Russ v. Alpaugh*, 118 Mass. 369, 19 Am. Rep. 464. In this case the court said: "In *Bates v. Norcross*, 17 Pick. (Mass.) 14, the tenant claimed title to the demanded premises under a deed with general covenants of warranty from a father, whose only daughter and heir at law had received by descent from him assets in real estate to a greater value than the land demanded, and after his death intermar-

ried with the demandant, who now claimed the land under a paramount title. The only questions reserved were: 1st, whether the demandant, being in the right of his wife privy in estate with the grantor, was estopped to set up a title paramount against the tenant, in opposition to the grant and covenant; and 2d, whether, as the tenant, if the demandant were to recover in this action, would have his remedy by action of covenant on the warranty against the demandant and his wife, such warranty operated by way of rebutter to defeat and bar this action. The court, observing that the doctrine of collateral warranty was not applicable, held that the case was one of lineal warranty so far as the daughter of the grantor was concerned, and that, her husband being jointly liable with her to action, judgment, and execution on the covenant, the doctrine of rebutter applied, to avoid circuitry of action. It must be assumed that the estate of the grantor, who, it appears by the report, had died ten years before the trial, had been settled in due course of administration; for it is not to be supposed that the court intended to overrule the case of *Royce v. Burrell*, 12 Mass. 395, or to take a different view of the law from that which the same judges who decided *Bates v. Norcross* affirmed within a year afterwards in *Hall v. Bumstead*, 20 Pick. (Mass.) 2."

2. Principle of Rebutter Inoperative in New York under Statute. — *Trolan v. Rogers*, 88 Hun (N. Y.) 422.

3. Estoppel Against Lessees by Indenture. — An assignee of a lease by indenture is estopped by the deed which estops his assignor. *Taylor v. Needham*, 2 Taunt. 279.

By the modern authorities the tenant is not allowed to dispute the landlord's title on equitable grounds. A discussion of the question will be found in a subsequent portion of this article. See *infra*, this title, *Estoppel in Pais*.

4. Lessor Merely Tenant for Life. — *Doe v. Seaton*, 2 C. M. & R. 728; *Langford v. Selmes*, 3 Kay & J. 220; *Brudnell v. Roberts*, 2 Wils. 143; *Blake v. Foster*, 8 T. R. 487.

5. Grantee Not Estopped by Deed Poll. — *Robinson v. Pickrell*, 109 U. S. 608.

Any estoppel that arises in such a case is an estoppel *in pais*. See *infra*, this title, *Estoppel in Pais*.

the grantee, he is estopped by the acceptance of the instrument to deny that the seal attached thereto is his seal, and is consequently in the same situation with respect to such covenants and recitals as if the deed were executed under his own seal.¹

Acceptance of Deed Poll. — And it may be laid down as a general principle that the grantee in a deed of conveyance is not estopped to deny the title of his grantor.²

c. STRANGERS. — Estoppels by deed do not bind strangers, nor can they take advantage of them.³

Judgment Creditor of Vendee. — Thus, it has been held that a judgment creditor of a vendee was not in privity with the latter so as to enable him to take advantage of an estoppel against the vendor.⁴

Second Grantee of Original Grantor Connecting Himself with Paramount Title. — And it has been held that the grantee of a mortgagor is not estopped by any covenants made by the latter to the mortgagee, and may connect himself with a paramount title and set up the same to defeat the mortgagee.⁵

4. Recitals — *a. IN GENERAL.* — Where a person has made his solemn deed, he may be estopped not only from disputing the deed itself, but the facts it recites.⁶ It may be stated generally that recitals in deeds of matters which are particular and essential will bind the parties thereto, and their privies in blood, in estate, and in law.⁷ But, as a general rule, general recitals,

1. New York — Grantee in Deed Poll Estopped to Deny Seal. — *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, affirming 50 Barb. (N. Y.) 135, 13 Am. Rep. 556. See also the titles COVENANTS, vol. 8, p. 65; EASEMENTS, vol. 10, pp. 415, 417; RECITALS.

2. Grantee in Deed Poll May Deny Grantor's Title. — *Robertson v. Pickrell*, 109 U. S. 608; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556. For full discussion of this question, see *infra*, this title, *Estoppel in Pais — Acceptance of Conveyance or Possession*. And for a discussion of the operation of recitals by way of estoppel upon the grantee, see the title RECITALS.

3. Estoppels by Deed as Against Strangers. — *In re Ghost's Trusts*, 49 L. T. N. S. 588; *Franklin v. Dorland*, 28 Cal. 175, 87 Am. Dec. 111; *McKinney v. Lanning*, 139 Ind. 170; *Horton v. Kelly*, 40 Minn. 195; *Curtis v. Browne*, 63 Mo. App. 446; *Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63; *Davis v. Agnew*, 67 Tex. 215; *Rogers v. Donnellan*, 11 Utah 108.

4. No Privity Between Judgment Creditor of Grantee and Grantee. — *Waters's Appeal*, 35 Pa. St. 523, 78 Am. Dec. 354.

A vendor took from his vendee a confession of judgment for the balance of purchase money, and subsequently conveyed the legal estate to the vendee; and by his deed acknowledged the receipt of the purchase money, and released the vendee, his heirs and assigns, all his (the vendor's) "estate, right, title, interest, claim, and demand whatsoever, in law or equity," in and to the land, concluding with a covenant of general warranty. It was held that the vendor was not estopped by his deed from setting up his prior judgment against the subsequent judgment creditors of the vendee; for estoppels by deed avail only in favor of parties and privies, and a judgment creditor has no privity of estate with his debtor. *Waters's Appeal*, 35 Pa. St. 523, 78 Am. Dec. 354.

5. Operation of Grantor's Covenants Against Second Grantee. — *Preiner v. Meyer*, 67 Minn. 197.

K., defendant in a petition for dower, held the title, and that only of a purchaser at sheriff's sale, under a judgment and execution at law against the husband of the petitioner, regularly made in his lifetime. After the recovering of said judgment, but before the sale, and while such judgment was a lien on the premises in question, the petitioner joined with her husband in a duly executed deed of conveyance, containing full covenants of warranty and a release of dower, to K., who went into possession, but was afterward evicted by the superior title of K. It was held that K. could not make the conveyance and release to R. available for his protection against the claim of dower, either as a grant, an estoppel, or otherwise. *Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63.

6. Estoppel by Recitals. — *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Morris v. Wheat*, 8 App. Cas. (D. C.) 386.

7. Operation of Particular and Essential Recitals — United States. — *School Dist. v. Stone*, 106 U. S. 183.

Alabama. — *Kennedy v. Brown*, 61 Ala. 296.
California. — *Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498; *San Luis Obispo County v. Pettit*, 100 Cal. 442.

Connecticut. — *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99.

District of Columbia. — *Anderson v. Reid*, 10 App. Cas. (D. C.) 426.

Georgia. — *Usina v. Wilder*, 58 Ga. 178.

Illinois. — *Orthwein v. Thomas*, 127 Ill. 554, 11 Am. St. Rep. 159; *Cobb v. Oldfield*, 151 Ill. 540, 42 Am. St. Rep. 263.

Indiana. — *Fleming v. Reed*, 20 Ind. App. 462.

Iowa. — *Franklin v. Twogood*, 18 Iowa 515; *Floyd County v. Morrison*, 40 Iowa 188.

Kentucky. — *Brandenburgh v. Three Forks Deposit Bank*, (Ky. 1898) 45 S. W. Rep. 108.

Maine. — *Hobart v. Dodge*, 10 Me. 156, 25 Am. Dec. 214.

for want of certainty, do not so operate.¹

Operation of Recitals in Collateral Actions. — Nor do facts recited or admitted in a deed operate by way of estoppel in an action not founded on that instrument, but wholly collateral to it, though between the same parties; though such recitals may be admissible in evidence.²

Particular Recitals to Be Considered in Connection with Entire Instrument. — No estoppel arises from any particular statement if the truth appears from the whole instrument.³

Massachusetts. — *Johnson v. Thompson*, 129 Mass. 398.

Michigan. — *Smith v. Graham*, 34 Mich. 302.

Minnesota. — *Redwood County v. Tower*, 28 Minn. 45.

Mississippi. — *Stevenson v. McReary*, 12 Smed. & M. (Miss.) 9, 51 Am. Dec. 102.

Missouri. — *Dickson v. Anderson*, 9 Mo. 156; *Bailey v. Lincoln Academy*, 12 Mo. 176; *Clamorgan v. Greene*, 32 Mo. 285; *Tyler v. Hall*, 106 Mo. 313, 27 Am. St. Rep. 337.

New York. — *Parkinson v. Sherman*, 74 N. Y. 88, 30 Am. Rep. 268.

North Carolina. — *Brinegar v. Chaffin*, 3 Dev. L. (14 N. Car.) 108; *Maynard v. Moore*, 76 N. Car. 158; *Long v. Swindell*, 77 N. Car. 176; *Fort v. Allen*, 110 N. Car. 183; *Chard v. Warren*, 122 N. Car. 75.

Ohio. — *Kelly v. State*, 25 Ohio St. 567.

Pennsylvania. — *Hall v. Benner*, 1 P. & W. (Pa.) 402, 21 Am. Dec. 394.

South Dakota. — *Griswold v. Sundback*, 4 S. Dak. 441.

Virginia. — *Reynolds v. Cook*, 83 Va. 817, 5 Am. St. Rep. 317.

Wisconsin. — *Hutchinson v. Chicago, etc.*, R. Co., 37 Wis. 602; *Donohoo v. Murray*, 62 Wis. 100.

In *Fort v. Allen*, 110 N. Car. 191, the court said: "Where it is the intent of the parties to place the existence of a fact beyond question, or to make it the basis of the contract, the recital will be effectual, and neither party will be permitted to deny it."

Recital of Prior Mortgage. — A creditor who accepts a second mortgage which expressly recites that it is subject to a prior mortgage, or expressly recites the existence of a prior mortgage, is estopped from attacking such prior mortgage on the ground that it was made to defraud creditors, or from asserting that such prior mortgage in effect was an assignment for the benefit of creditors generally. *Smith v. M'Cord Dry Goods Co. v. John B. Farwell Co.*, 6 Okla. 318; *Muncie Nat. Bank v. Brown*, 112 Ind. 474; *Rennick v. Chillicothe Bank*, 8 Ohio 535; *Irvine v. Longworth*, 20 Ohio 581.

Recital of Corporate Existence. — Thus, a person claiming under a deed which recites a mortgage in favor of a party bearing a corporate name cannot dispute the corporate existence of the mortgagee. *Hasenritter v. Kirchoffer*, 79 Mo. 239.

No Estoppel as to Third Persons. — In *Lumkins v. Coates*, (Tex. Civ. App. 1897) 42 S. W. Rep. 580, it was held that the defendants were not estopped by the recitals contained in a deed under which they claimed in setting up a different title as against persons who were not parties or privies to the deed, and who had not been induced to change their position by reason of such recital.

1. General Recitals Inoperative by Way of Estoppel. — *Farrar v. Cooper*, 34 Me. 394; *Wilkinson v. Scott*, 17 Mass. 256; *Muhlenberg v. Druckenmiller*, 103 Pa. St. 631; *McDonald v. Lusk*, 9 Lea (Tenn.) 654.

Acknowledgment of Consideration. — Thus, the acknowledgment of the receipt of a certain consideration is not conclusive between the parties. *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *M'Crea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Watson v. Blaine*, 12 S. & R. (Pa.) 131, 14 Am. Dec. 669. See also the title CONSIDERATION, vol. 6, p. 767. In *Wilkinson v. Scott*, 17 Mass. 257, it was said: "A man is estopped by his deed to deny that he granted or that he had a good title to the estate conveyed, but he is not bound by the consideration expressed, because that is known to be arbitrary, and is frequently different from the real consideration of the bargain. * * * It is so, we think, also, with regard to the acknowledgment of payment. This always makes part of the premises, and is seldom true, for in most cases credit for the whole or for a part is given. And if the grantor is to be bound by this expression, no remedy would be found for cases of error and mistake, which undoubtedly often occur. A receipt is always open to explanation, and this acknowledgment, although under seal, is nothing more than a receipt, for the seal gives it no additional solemnity."

The grantor is not estopped to show the true consideration in a deed, though it may be different from that named in the instrument. *Union Mut. L. Ins. Co. v. Kirchoff*, 133 Ill. 368.

But he is estopped to deny that there was a consideration for the purpose of destroying the effective operation of the instrument as a deed of conveyance, where the deed recites a consideration. *Campbell v. Carruth*, 32 Fla. 264; *Day v. Davis*, 64 Miss. 257.

For discussion of estoppel to deny consideration without recital, see the title CONSIDERATION, vol. 6, pp. 682, 765, 798; SEALS.

2. Collateral Action Between Same Parties. — *Carpenter v. Buller*, 8 M. & W. 209; *Fraser v. Pendlebury*, 31 L. J. C. P. 1; *South Eastern R. Co. v. Warton*, 6 H. & N. 520; *Carter v. Carter*, 3 Kay & J. 617; *Young v. Raincock*, 7 C. B. 310, 62 E. C. L. 310; *Stroughill v. Buck*, 14 Q. B. 781, 68 E. C. L. 781; *Bank of America v. Banks*, 101 U. S. 247; *Curtis v. Browne*, 63 Mo. App. 446. See also the title RECITALS.

3. When the Truth Appears from the Whole Instrument. — *Co. Litt.* 352*b*; *Morton v. Woods*, L. R. 3 Q. B. 658, L. R. 4 Q. B. 293; *Pargeter v. Harris*, 7 Q. B. 708, 53 E. C. L. 708; *Cuthbertson v. Irving*, 4 H. & N. 742, 6 H. & N. 135; *Doe v. Scarborough*, 3 Ad. & El. 2, 30 E. C. L. 12; *Doe v. Lawrence*, 4 Taunt. 23; *Saun-*

A Full Discussion of the doctrine of recitals will be found in another portion of this work.¹

b. RECITAL OF EXISTENCE OF STREET OR WAY. — The doctrine seems to be well established that a grantor of land describing it by a boundary on a street or way, if he be the owner of such adjacent land, is estopped from setting up any claim or doing any acts inconsistent with the grantee's use of the street or way, and such estoppel will apply also to his heirs or those claiming under him. But this doctrine applies only when the grantor owns the street or has the right to grant a right of way in the street.²

5. Covenants — *a. IN GENERAL.* — The rule has been laid down that if a man has made a solemn deed with covenants of seizin and warranty,³ or for quiet enjoyment and for further assurance,⁴ it shall never lie in his mouth to dispute the title of the party to whom he has so undertaken, as, for instance, by setting up a prior paramount title in himself or in a third person. And it has even been held that if there are in the instrument no words which can be held to operate as a direct conveyance, and the instrument is therefore void for want of a grant, a covenant of warranty⁵ or of quiet enjoyment therein will estop the grantor and those claiming under him to set up a title to the land or to interfere with its enjoyment.⁶

Mortgages. — The rule that a grantor is estopped by his deed with covenants to dispute his grantee's title applies of course to mortgages as in case of other conveyances.⁷ But it seems to be a well-settled principle that the covenants in a mortgage given to secure purchase money will not estop the mortgagor,

ders *v. Merryweather*, 3 H. & C. 902; *Clarke v. Hall*, 24 L. R. Ir. 316; *Tait v. Frow*, 8 Ala. 543; *Wheelock v. Henshaw*, 19 Pick. (Mass.) 341; *Hannon v. Christopher*, 34 N. J. Eq. 459; *Pelletreau v. Jackson*, 11 Wend. (N. Y.) 110; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Stone v. Fitts* 38 S. Car. 393.

1. See the title RECITALS.

2. Estoppel by Recital of Existence of Street or Way — *England.* — *Roberts v. Karr*, 1 Taunt. 495; *Espley v. Wilkes*, L. R. 7 Exch. 298.

Georgia. — *Harrison v. Augusta Factory*, 73 Ga. 447.

Illinois. — *Seeger v. Mueller*, 133 Ill. 86.

Kansas. — *Riley v. Stein*, 50 Kan. 591.

Maine. — *Sutherland v. Jackson*, 32 Me. 80; *Bartlett v. Bangor*, 67 Me. 460; *Heseltun v. Harmon*, 80 Me. 326; *Dorman v. Bates Mfg. Co.*, 82 Me. 438.

Massachusetts. — *Tufts v. Charlestown*, 2 Gray (Mass.) 271; *Thomas v. Poole*, 7 Gray (Mass.) 83; *Farnsworth v. Taylor*, 9 Gray (Mass.) 162; *Rodgers v. Parker*, 9 Gray (Mass.) 445; *Stetson v. Dow*, 16 Gray (Mass.) 372; *Howe v. Alger*, 4 Allen (Mass.) 211; *Olinda v. Lothrop*, 21 Pick. (Mass.) 292, 32 Am. Dec. 261; *Parker v. Smith*, 17 Mass. 413, 9 Am. Dec. 157; *Lewis v. Beattie*, 105 Mass. 411; *Fox v. Union Sugar Refinery*, 100 Mass. 292; *Tobey v. Taunton*, 119 Mass. 404; *Franklin Ins. Co. v. Cousins*, 127 Mass. 261; *Regan v. Boston Gas Light Co.*, 137 Mass. 37; *Cole v. Hadley*, 162 Mass. 579.

Michigan. — *White v. Smith*, 37 Mich. 291.

Minnesota. — *Dawson v. St. Paul F., etc., Ins. Co.*, 15 Minn. 142, 2 Am. Rep. 109.

Nevada. — *Lindsay v. Jones*, 21 Nev. 72.

New Jersey. — *Booraem v. North Hudson County R. Co.*, 40 N. J. Eq. 557; *Lennig v. Ocean City Assoc.*, 41 N. J. Eq. 606, 56 Am. Rep. 16; *Dill v. Board of Education*, 47 N. J. Eq. 421; *Clark v. Elizabeth*, 37 N. J. L. 120.

40 N. J. L. 172; *Bayonne v. Ford*, 43 N. J. L. 292.

New York. — *De Witt v. Ithaca*, 15 Hun (N. Y.) 568; *Potter v. Iselin*, 31 Hun (N. Y.) 134.

North Carolina. — *Moose v. Carson*, 104 N. Car. 431, 17 Am. St. Rep. 681.

For Further Treatment of This Question, see the titles COVENANTS, vol. 8, p. 63; DEDICATION, vol. 9, p. 55; RECITALS.

3. Estoppel by Conveyance with Covenants in General. — *McManness v. Paxson*, 37 Fed. Rep. 296; *Drake v. Root*, 2 Colo. 685; *Cross v. Robinson*, 21 Conn. 379; *Foss v. Strachn*, 24 N. H. 40; *Fox v. Fee*, 24 N. Y. App. Div. 314; *Richardson v. Powell*, 83 Tex. 590.

4. Goodtitle v. Bailey, 2 Cowp. 597.

But this effect by way of estoppel is given to deeds in general without covenants of warranty. See *supra*, this section, *By Deed* — *In General*.

5. Effect of Covenants in Deed Without Words of Grant. — *Brown v. Manter*, 21 N. H. 528.

Conveyance Without Words of Inheritance. — Also it has been held that, while an executed conveyance without words of inheritance in the granting clause of the deed is not enlarged by a covenant of warranty in fee simple, yet such covenant will operate by way of estoppel to prevent circuitry of action as against a subsequent lessee of the grantor with notice of the deed. *Shaw v. Galbraith*, 7 Pa. St. 111.

But as to operation of estoppels in the case of void deeds in general, see *supra*, this section, *Qualification of Doctrine* — *Invalid Deeds*.

6. Long Island R. Co. v. Conklin, 29 N. Y. 587, *per Selden*, J.

7. Estoppel by Mortgage Containing Covenants in General. — *McManness v. Paxson*, 37 Fed. Rep. 296; *Jones v. Reese*, 65 Ala. 139; *Cross v. Robinson*, 21 Conn. 379; *Kerngood v. Davis*, 21 S. Car. 183; *Macloon v. Smith*, 49 Wis. 218.

where the deed and mortgage are one and the same transaction, from suing on the covenants of the deed.¹

b. OPERATION AS TO AFTER-ACQUIRED TITLE—(1) *Requisites as to Instrument of Conveyance*—(a) *Instruments Containing Covenants*—*aa. IN GENERAL.*—It may be laid down as a general proposition that where the grantor makes a conveyance, containing any of the usual covenants, of lands to which he has a defective title or no title whatever, and subsequently acquires title thereto, such after-acquired title will inure to the benefit of the grantee.²

Where Present Interest Passes by the Conveyance.—And it has been held that where a conveyance is made with covenants of warranty or for quiet enjoyment, the covenants will operate as an estoppel to avoid circuitry of action against the claim of a grantor to a subsequently acquired interest, where some present right or interest in fact passed at the time when the grant was made, as well as when nothing whatever passed.³ But a different rule seems to have been applied by the common law in regard to leasehold interests.⁴

Mortgages.—This doctrine of estoppel applies as a general rule to mortgages as in the case of other conveyances, and this even in jurisdictions where the mortgage merely creates a lien upon the interest of the mortgagor in the land.⁵

Purchase-money Mortgage.—But it has been held that where a grantor of land receives back in the same transaction a mortgage for the purchase money, the covenants in the mortgage operate only upon the estate acquired from the mortgagee, and do not operate upon an after-acquired title.⁶

1. Vendee Who Gives Purchase-money Mortgage Suing Vendor.—Hubbard v. Norton, 10 Conn. 422; Brown v. Staples, 28 Me. 502; Smith v. Cannell, 32 Me. 125; Hancock v. Carlton, 6 Gray (Mass.) 61; Pike v. Goodnow, 12 Allen (Mass.) 474; Sumner v. Barnard, 12 Met. (Mass.) 459; Brown v. Phillips, 40 Mich. 264; Geyer v. Girard, 22 Mo. 160; Connor v. Eddy, 25 Mo. 72; Haynes v. Stevens, 11 N. H. 28; Lot v. Thomas, 2 N. J. L. 386. Compare Gilman v. Haven, 11 Cush. (Mass.) 330.

Where land is conveyed with covenants of general warranty, and at the same time is reconveyed in mortgage, with like covenants of warranty, no action upon the covenants in the mortgage can be maintained by the mortgagee or his assignee. Smith v. Cannell, 32 Me. 123.

Where a vendor conveys his lands with warranty against prior incumbrances, and the vendee reconveys the lands by way of mortgage to secure the purchase money, the vendor is not estopped by his covenant to set up his mortgage against one subsequently taking a mortgage against the vendee. Younts v. Starnes, 42 S. Car. 22.

Upon an Interchange of Land, where each deed contained a stipulation that if the grantee should be ousted from possession the deed should be of no effect and he should have the right to re-enter, possess, and own the land given in exchange, but each deed also contained a covenant of general warranty, it was held that, upon an ouster of possession under a deed and a re-entry upon the original possession, the warranty deed conveying the land upon which re-entry was made would not operate as an estoppel. Pugh v. Mays, 60 Tex. 191.

2. General Rule as to Operation of Covenants upon an After-acquired Title.—Terrett v. Taylor, 9 Cranch (U. S.) 43; Irvine v. Irvine, 9 Wall. (U. S.) 625; Miller v. Texas, etc., R. Co.,

132 U. S. 662; Jenkins v. Collard, 145 U. S. 546.

As to Covenant of Seizin or Right to Convey, see however, *infra*, this section, *Covenant of Seizin or Right to Convey*.

Easements.—This doctrine has been said to apply to easements. Washburn on Easements and Servitudes 62; Rowbotham v. Wilson, 8 El. & Bl. 145, 92 E. C. L. 145.

3. Operation of Covenants upon After-acquired Title Where Present Title Passes.—House v. McCormick, 57 N. Y. 310; Wadkins v. Watson, (Tex. Civ. App. 1893) 21 S. W. Rep. 636.

4. Effect of Covenants in Lease Where an Interest Passes.—Doe v. Seaton, 2 C. M. & R. 728; People v. Richardson, 4 Cow. (N. Y.) 98.

But if a man makes a lease by indenture of D, in which he has nothing, and afterwards purchases D in fee, and suffers it to descend to his heir, or bargains and sells it to A, the heir or A shall be bound by this estoppel. Trevivan v. Lawrance, 1 Salk. 276.

5. Effect of Covenants in Mortgage upon After-acquired Title.—Sutlive v. Jones, 61 Ga. 676; Burton v. Reedes, 20 Ind. 87; Curren v. Driver, 33 Ind. 480; Shumaker v. Johnson, 35 Ind. 33; King v. Rea, 56 Ind. 1; Pancoast v. Travelers' Ins. Co., 79 Ind. 172; Boone v. Armstrong, 87 Ind. 168; Thalls v. Smith, 139 Ind. 496; Lincoln v. Emerson, 108 Mass. 87; Ayer v. Philadelphia, etc., Face Brick Co., 157 Mass. 57; Tefft v. Munson, 57 N. Y. 97; National F. Ins. Co. v. McKay, 5 Abb. Pr. N. S. (Buffalo Super. Ct.) 454; Bradford v. Burgess, 20 R. I. (pt. ii) 48. See also Ivy v. Yancey, 129 Mo. 501.

6. Operation of Covenants in Purchase-money Mortgage.—Randall v. Lower, 98 Ind. 255. In this case the court said: "The principle upon which the general rule rests is that of equitable estoppel, and such an estoppel can never exist unless good conscience and equity require it in order to promote justice." Justice

Deeds of Partition with Mutual Covenants. — It has been held that the general rule, that a party conveying land by deed containing covenants of warranty is estopped from setting up against his grantee, or those claiming under him, any after-acquired title to the same land, is applicable in the case of the partition of lands held by tenants in common by mutual conveyances expressly containing such covenants.¹ But it has been intimated that the doctrine of estoppel, as applied in this case, is very harsh in its operation where the entire title to the land which is the subject of partition afterwards fails.² And where the covenants in such case can be construed to be so qualified as to relate to the chain of title through which the parties making partition mutually claim, and not to a different and independent source of title, it has been held that the covenants will not operate by way of estoppel as to a title subsequently acquired from a stranger.³

A Full Discussion of the question of the operation of partition deeds will be

is not promoted nor good conscience obeyed by permitting a grantor who has assumed to convey land to which he has no title, to insist that his grantee, in mortgaging the land back to him for the purchase money, fastened the lien not only upon the estate conveyed by the grantor's deed, but also upon an estate subsequently acquired and from another source."

In *Brown v. Phillips*, 40 Mich. 264, it was held that one who gives a purchase-money mortgage that includes lands not granted to him is not estopped as against the grantors and mortgagees from denying that it covers those lands, if he acquired them afterwards. In this case the court said: "He [the mortgagor] acquired nothing more than the interests his grantors possessed, and his mortgages, attached to nothing which he did not then own." In this case, however, it appeared that the mortgages contained no covenant, and the principle of estoppel did not operate.

But in *Hitchcock v. Fortier*, 65 Ill. 239, it was held that where a party received a conveyance for land without covenants of title, and no fraud was practiced upon him, and gave back a mortgage containing full covenants to secure the payment of the purchase money, and it proved that he acquired no title by his purchase, but he afterwards did acquire title to a portion of the premises from another source, the subsequently acquired title inured to the benefit of the mortgagee by virtue of the covenants in his mortgage, and was subject to be sold on foreclosure.

1. Effect of Deeds of Partition with Mutual Covenants. — *Rountree v. Denson*, 59 Wis. 522. In this case a tenant in common had, previous to making partition with his cotenant, conveyed his interest to a third person, and after the execution of mutual conveyances with covenants of warranty between the cotenants there was a reconveyance to the grantor by such third person. It was held that the latter was estopped to set up the fact of such reconveyance as against his cotenant.

The Warranty Implied upon a Partition Between Coparceners and coheirs (see the title COVENANTS, vol. 8, p. 81) is implied for the attainment of justice, and the implication ceases wherever its application will work injustice. Upon this principle it has been held that such an implied warranty will not operate to estop a coparcener or coheir who has joined in such a partition, from asserting an after-acquired

title to the property partitioned. *Walker v. Hall*, 15 Ohio St. 355, 86 Am. Dec. 482, citing and explaining *Woodbridge v. Banning*, 14 Ohio St. 328. See also *Harrison v. Ray*, 108 N. Car. 215, 23 Am. St. Rep. 57; *Yancey v. Radford*, 86 Va. 628.

2. Partition — Application of Estoppel Where Entire Title Fails Criticised. — *Rector v. Waugh*, 17 Mo. 26. In this case the court said: "It cannot escape observation that the doctrine of estoppel, as applied in this case, is very harsh in its operation. A number of proprietors of a town, supposing that they have a title to the land on which the town is laid off, make an equal partition of the lots amongst themselves, and mutually convey with warranty. The entire title to the land which is the subject of partition afterward fails. If the matter ended here, it would not be maintained that any one of the proprietors had a cause of action against the others, as what he recovered on his warranty he, in turn, would be compelled to refund to him from whom he had recovered on the warranty he had given. The different warranties would compensate each other, and it would be useless to sue, as each party in the end would be in the situation in which he was before suit was brought. The parties would be all even, and there would be no obligation, in law or morality, resting on one to indemnify another. After the failure of the first title, one or more of the proprietors acquire a new and distinct title to the land on which the town was laid off, and a former proprietor, who has neither contributed nor offered to contribute anything towards the acquisition of the new title, lays claim to all the lots conveyed to him by the deed of partition. The common law implied no warranty when partition was made between joint tenants and tenants in common. Indeed, by the common law, partition was not compellable among them. The warranty was only implied on partition among coparceners, and only extended to the land which was the subject of the partition. The doctrine which makes an outstanding title, bought in by one joint tenant or tenant in common, inure to the benefit of his cotenants, it seems, is one of equitable cognizance, and courts of equity would mould and apply it so as to do justice among the tenants." See also *Illinois Land, etc., Co. v. Bonner*, 91 Ill. 114.

3. Doane v. Wilcutt, 5 Gray (Mass.) 328, 66 Am. Dec. 369.

found in a subsequent portion of this work.¹

bb. COVENANTS OF WARRANTY — General Covenants. — It is a well-settled principle of the common law that if one conveys real estate with a covenant of general warranty he cannot be allowed to set up against his grantee or those claiming under him any title subsequently acquired, either by purchase or otherwise, and that such new title will inure by way of estoppel to the use and benefit of his grantee, his heirs and his assigns,² the ground on which the doctrine is usually based being the prevention of circuity of action.³

1. See the title *PARTITION*.

2. *Effect of Covenants of General Warranty upon After-acquired Title — United States.* — *Terrett v. Taylor*, 9 Cranch (U. S.) 43; *Irvine v. Irvine*, 9 Wall. (U. S.) 625; *Miller v. Texas*, etc., R. Co., 132 U. S. 662; *Jenkins v. Collard*, 145 U. S. 546.

Alabama. — *Doolittle v. Robertson*, 109 Ala. 412.

Connecticut. — *Dudley v. Cadwell*, 19 Conn. 226.

Delaware. — *Doe v. Dowdall*, 3 Houst. (Del.) 381.

Indiana. — *Curren v. Driver*, 33 Ind. 480; *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172; *Boone v. Armstrong*, 87 Ind. 168; *Locke v. White*, 89 Ind. 492; *Randall v. Lower*, 98 Ind. 255; *Thalls v. Smith*, 139 Ind. 496; *Johnson v. Bedwell*, 15 Ind. App. 236; *Frain v. Burgett*, (Ind. 1898) 50 N. E. Rep. 876.

Iowa. — *Childs v. McChesney*, 20 Iowa 431, 89 Am. Dec. 545.

Kentucky. — *Perkins v. Coleman*, 90 Ky. 611.

Maine. — *Baxter v. Bradbury*, 20 Me. 260.

Massachusetts. — *Somes v. Skinner*, 3 Pick. (Mass.) 52; *Comstock v. Smith*, 13 Pick. (Mass.) 119, 23 Am. Dec. 670; *Knight v. Thayer*, 125 Mass. 27.

Michigan. — *Shotwell v. Harrison*, 22 Mich. 410; *Lee v. Clary*, 38 Mich. 223; *Smith v. Williams*, 44 Mich. 240; *Haney v. Roy*, 54 Mich. 635; *Brayton v. Merithew*, 56 Mich. 166; *Le Coss v. Wadsworth*, 56 Mich. 421; *People v. Miller*, 79 Mich. 93; *Pendill v. Marquette County Agricultural Soc.*, 95 Mich. 491; *Naylor v. Minock*, 96 Mich. 182, 35 Am. St. Rep. 595; *Duffy v. White*, (Mich. 1897) 73 N. W. Rep. 363.

Mississippi. — *Andrews v. Anderson*, (Miss. 1894) 16 So. Rep. 346.

New Jersey. — *Brundred v. Walker*, 12 N. J. Eq. 140; *Moore v. Rake*, 26 N. J. L. 574; *Gough v. Bell*, 21 N. J. L. 157; *Vreeland v. Beauvelt*, 23 N. J. Eq. 483; *Matthiesson, etc., Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. 247.

Ohio. — *Hart v. Gregg*, 32 Ohio St. 502.

Rhode Island. — *Hodges v. Goodspeed*, 20 R. I. (pt. iii.) 139; *Bradford v. Burgess*, 20 R. I. (pt. ii.) 48.

South Dakota. — *Johnson v. Brauch*, 9 S. Dak. 116.

Tennessee. — *Robertson v. Gaines*, 2 Humph. (Tenn.) 383; *Gookin v. Graham*, 5 Humph. (Tenn.) 480; *Henderson v. Overton*, 2 Yerg. (Tenn.) 394, 24 Am. Dec. 492; *Birdwell v. Cain*, 1 Coldw. (Tenn.) 303; *Susong v. Williams*, 1 Heisk. (Tenn.) 630; *Woods v. Bonner*, 89 Tenn. 411.

Texas. — *Lindsay v. Freeman*, 83 Tex. 259; *Barroum v. Culmell*, 90 Tex. 93; *Morris v. Housley*, (Tex. Civ. App. 1896) 34 S. W. Rep.

659; *Johnson v. Foster*, (Tex. Civ. App. 1896) 34 S. W. Rep. 821; *Burkitt v. Twyman*, (Tex. Civ. App. 1896) 35 S. W. Rep. 421; *Foster v. Johnson*, 89 Tex. 640; *Hale v. Hollon*, 14 Tex. Civ. App. 96; *Miller v. Gist*, 91 Tex. 335.

Virginia. — *Doswell v. Buchanan*, 3 Leigh (Va.) 365, 23 Am. Dec. 280; *Burtner v. Keran*, 24 Gratt. (Va.) 42; *Raines v. Walker*, 77 Va. 95. *West Virginia.* — *Buford v. Adair*, 43 W. Va. 211.

Canada. — *Robertson v. Daley*, 11 Ont. Rep. 356.

See also *McIlvain v. Porter*, (Ky. 1888) 8 S. W. Rep. 705.

In *Jenkins v. Collard*, 145 U. S. 546, it was held that where a deed was accompanied with the covenants of seizin and warranty, the warranty estopped the grantor and all persons claiming under him from asserting the title to the premises against the grantee and his heirs and assigns, or conveying it to any other party; that when subsequently, under a general amnesty and pardon proclamation, any disability that had previously rested upon the grantor against disposing of the remaining estate, which had been confiscated, was removed, he stood with reference to that estate precisely as if no confiscation proceeding had ever been had; and that the amnesty and pardon, in removing the disability resting upon him respecting that estate, inured equally in its benefits to his grantee. To the same effect see *Beard v. Lufriu*, 46 La. Ann. 875. See also *Menger v. Carruthers*, 3 Kan. App. 75.

A grantor in a deed containing a covenant of general warranty will be estopped from claiming or exercising any right of way over the lands conveyed where he subsequently acquires an adjoining lot. *Hodges v. Goodspeed*, 20 R. I. (pt. iii.) 139.

It has been held that, in *Texas*, a deed concluding with this *habendum*, to wit, "to have and to hold to him, the said D., his heirs and assigns forever, free from the just claim or claims of any and all persons whomsoever claiming or to claim the same," imports a general warranty and operates as an estoppel to the grantor to set up claim to the property conveyed by an after-acquired title. *Miller v. Texas, etc., R. Co.*, 132 U. S. 690.

Title Subsequently Acquired in Name of Third Person. — In *Quivey v. Baker*, 37 Cal. 470, it was held that the principle that if a vendor conveys in fee land to which he has no title, and to which he afterwards acquires the true title, the title thus acquired shall inure to the benefit of his vendee, cannot be defeated in equity by the device of taking the after-acquired title in the name of a stranger who has no real interest in the transaction.

3. *Rationale of Doctrine Stated.* — In *North v. Henneberry*, 44 Wis. 318, it was sought on

Special Warranty. — But it has been held that covenants of warranty in a deed are limited by the estate conveyed on the face of the deed, and, therefore, where the grantor does not undertake to convey an indefeasible estate, but only the right, title, and interest of the grantor, and agrees to warrant it against all claims derived from himself, the doctrine of estoppel will not apply so as to pass to the grantee an after-acquired estate derived from a stranger.¹

argument to base the estoppel of the grantor as to after-acquired title upon the theory that "the grantor of real estate with covenants of warranty of title could not afterward show title out of himself at the date of the deed, because it would be a contradiction of either his express or implied statement in his deed that he held the title at the time of executing the same." With reference to this the court observed: "Whilst this reason may have had weight in establishing the rule, which has existed for centuries, that the grantor of real estate who in his deed covenants to defend the title of his grantee, his heirs and assigns forever, cannot afterwards set up title in himself in hostility to his grantee and his assigns, it was not the only or most weighty reason for its establishment. Most of the early cases base the rule on the ground of preventing circuity of action; and this was the principal ground where the grantor or his heirs were the claimants. In such cases it was said to be useless and absurd to permit the plaintiff to recover that which he must either return to the defendant at once in specie, or its equivalent in value." And the following further observations upon the reason for estoppel operating with reference to after-acquired title were made: "When the grantor covenants in his deed that a particular estate shall pass to, and be defended by the grantor in, the grantee and his assigns, as a court of equity would, if the covenant were in an executory agreement, compel the covenantor to convey the after-acquired title to the covenantee in performance of his contract, so when such covenant is contained in a deed which purports to pass the title *in presenti*, a court of law will conclusively presume that every title afterwards acquired by the grantor, and which was intended to have been granted by the deed, was so acquired for the sole use and benefit of the grantee and his assigns, and that the title so acquired immediately inures to their use under and in satisfaction of his covenant."

1. Effect of Covenants of Special Warranty upon After-acquired Title — *United States*. — *Lamb v. Kamm*, 1 Sawy. (U. S.) 239; *Lewis v. Baird*, 3 McLean (U. S.) 78; *Hanrick v. Patrick*, 119 U. S. 156.

Alabama. — *Tillotson v. Kennedy*, 5 Ala. 473, 39 Am. Dec. 330.

Illinois. — *Holbrook v. Debo*, 99 Ill. 372.

Indiana. — *Stephenson v. Boody*, 139 Ind. 60.

Maine. — *Loomis v. Pingree*, 43 Me. 314; *Coe v. Persons Unknown*, 43 Me. 432.

Massachusetts. — *Wight v. Shaw*, 5 Cush. (Mass.) 56; *Miller v. Ewing*, 6 Cush. (Mass.) 34; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47; *Comstock v. Smith*, 13 Pick. (Mass.) 116, 23 Am. Dec. 670.

New Jersey. — *Adams v. Ross*, 30 N. J. L. 509, 82 Am. Dec. 237.

Ohio. — *White v. Brocaw*, 14 Ohio St. 339.

Virginia. — *Wynn v. Harman*, 5 Gratt. (Va.) 162.

West Virginia. — *Western Min., etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 449.

Canada. — *Doe v. Shea*, 2 U. C. Q. B. 483; *Todd v. Cain*, 16 U. C. Q. B. 516.

See also *Wheeler v. Aycock*, 109 Ala. 146; *Hoxie v. Finney*, 16 Gray (Mass.) 332; *Sanford v. Sanford*, 135 Mass. 314; *Valle v. Clemens*, 18 Mo. 486; *Hall v. Chaffee*, 14 N. H. 215. But see *Doe v. Dowdall*, 3 Houst. (Del.) 369.

Warranty Against Persons Claiming under Grantor. — A covenant in a deed of land that the

grantor will warrant the land against all persons claiming under him does not estop him from setting up a title subsequently acquired by him by purchase or otherwise. *Comstock v. Smith*, 13 Pick. (Mass.) 116, 23 Am. Dec. 670. In this case the court said: "It is a well settled principle of the common law that if one conveys lands or other real estate with a general covenant of warranty against all lawful claims and demands, he cannot be allowed to set up against his grantee, or those claiming under him, any title subsequently acquired either by purchase or otherwise. Such new title will inure, by way of estoppel, to the use and benefit of his grantee, his heirs and assigns. This principle is founded in equity and justice, as well as the policy of the law. It is just that a party should not be permitted to hold or recover an estate in violation of his own covenant; and it is wise policy to repress litigation and to prevent a circuity of actions, when better or equal justice may be administered in a single suit. By such a grant with general warranty nothing passes, nor indeed can possibly pass, excepting the title which the grantor has at the time of the grant; but he is estopped to set up a title subsequently obtained by him, because, if he should recover against his grantee, the grantee in his turn would be entitled to an action against the grantor, to recover the value of the land. The principle of estoppel therefore not only prevents multiplicity of suits, but is sure to administer strict and exact justice; whereas, if the grantee were driven to his action to recover the value of the land, exact justice might not be obtained, because the land might possibly not be estimated at its just value. If, however, the grantee were not entitled to recover the value of the land on the grantor's covenant of warranty, then in such a case it is obvious that this species of estoppel would not be applicable." To the same effect see *Loomis v. Pingree*, 43 Me. 314.

In *Bell v. Twilight*, 26 N. H. 401, it was held that a covenant in a quitclaim deed in common form "to warrant and defend the said granted premises against all claims or demands of all persons claiming by, from, or under me," will not estop the grantor from setting up in himself a title subsequently acquired against the

cc. COVENANT OF SEIZIN OR RIGHT TO CONVEY. — It has been held that a covenant of seizin, or, what is equivalent, that the party has good right to convey, does not operate upon an after-acquired title.¹ But by the Supreme Court of the United States it has been intimated to be the general rule that when one makes a deed of land covenanting that he is well seized in fee and has good right to sell and convey in fee, and subsequently acquires an outstanding and adverse title, his new acquisition inures to the benefit of his grantee on the principle of estoppel.²

dd. COVENANT FOR QUIET ENJOYMENT. — And it seems that, according to the prevailing authority, a covenant of quiet enjoyment will have the same effect.³

grantee, provided such title be not derived from or under the grantor.

But where A conveyed a tract of land to B, and afterwards conveyed the same tract to C with warranty against all persons claiming by, through, or under A; and B afterwards reconveyed the land to A; and D, a creditor of A, extended his execution upon the land as the land of A; it was held that the reconveyance to A inured to the benefit of C, and that D was estopped by the warranty to claim the land against C. *Kimball v. Blaisdell*, 5 N. H. 533, 22 Am. Dec. 476.

Warranty Against Specific Adverse Claim. — Where a grantor conveys land by a quitclaim deed accompanied by an independent and qualified covenant of warranty against a specified adverse claim and subsequently acquired title other than the one embraced in the covenant, such subsequently acquired title does not by operation of law inure to the benefit of the vendee. *Quivey v. Baker*, 37 Cal. 471.

Claim of Particular Person Excepted from Warranty. — In *Lamb v. Wakefield*, 1 Sawy. (U. S.) 252, it was held that a covenant to warrant and defend the bargained premises against all persons except the United States government or those deriving title therefrom does not estop the grantor or his heirs from claiming title to an interest in the premises subsequently purchased from a donee of the United States. See also *Fields v. Squires*, *Deady* (U. S.) 380.

Adverse Claim Excepted from Warranty by Parol. — A grantor is not estopped by his covenant of warranty from enforcing an existing mortgage on the property which is afterwards assigned to him, it having been expressly understood when the deed was made that the property was sold subject to such mortgage, and the consideration having been agreed on with that understanding. *Hamill v. Inventors' Mfg. Co.*, 55 N. J. Eq. 649.

Under Statute in Kansas it has been held that where the purpose of the grantor as expressed in his deed is to convey the land itself, and not merely his right, title, and interest therein, and the grant is followed by a covenant of general warranty "against the lawful claim or claims of all persons whomsoever," such grantor, his heirs and assigns, are estopped from asserting an after-acquired title against the grantee, his heirs and assigns, although the deed does not, in so many words, purport to convey to the grantee "an indefeasible estate in fee simple absolute." *Armstrong v. Portsmouth Bldg. Co.*, 57 Kan. 62.

Under the Iowa Code, providing that where a deed purports to convey a greater interest than the grantor was at the time possessed of,

any after-acquired interest of such grantor to the extent of that which the deed purports to convey, inures to the benefit of the grantee, it has been held that where the evidence established the fact that it was the intention of the parties in executing a mortgage to have it cover only four-sevenths of the land therein described, it being also the interest then in fact owned by the mortgagors, and by some oversight or mistake the mortgage was so written as to embrace a full title to the land described, rather than the four-sevenths as intended, an after-acquired three-sevenths interest in the land would not pass under the statute. *Cook v. Prindle*, 97 Iowa 464. See also *infra*, this section, *Covenant of Nonclaim*.

1. **Effect of Covenant of Seizin.** — *Allen v. Sayward*, 5 Me. 227, 17 Am. Dec. 221; *Doane v. Willcutt*, 5 Gray (Mass.) 333, 66 Am. Dec. 369.

2. *Irvine v. Irvine*, 9 Wall. (U. S.) 618. See also *Smith v. Williams*, 44 Mich. 242; *Wightman v. Reynolds*, 24 Miss. 675.

In *Canada* this doctrine seems to be established. In the case of *Upper Canada Trust, etc., Co. v. Ruttan*, 1 Can. Sup. Ct. Rep. 564, the court said: "For upwards of forty years it has been held in Upper Canada that covenants for title, especially the usual covenant that the granting party is seized in fee at the date of the deed, a covenant which this deed contains in the absolute, not in the ordinary restricted form, are as effective in working an estoppel as a recital to the same effect would have been." To the same effect see *Doe v. Webster*, 2 U. C. Q. B. 224; *McLean v. Laidlaw*, 2 U. C. Q. B. 222; *Boulter v. Hamilton*, 15 U. C. C. P. 125; *Doe v. McEwan*, 5 U. C. Q. B. (O. S.) 601; *Nevitt v. McMurray*, 14 Ont. App. 130.

3. **Effect of Covenant for Quiet Enjoyment upon Subsequently Acquired Title.** — *Smith v. Williams*, 44 Mich. 240; *Wightman v. Reynolds*, 24 Miss. 675; *Long Island R. Co. v. Conklin*, 29 N. Y. 572; *Taggart v. Risley*, 4 Oregon 235. Compare *Doane v. Willcutt*, 5 Gray (Mass.) 328, 66 Am. Dec. 369.

In *Smith v. Williams*, 44 Mich. 240, *Cooley, J.*, in delivering the opinion of the court, said: "It is not disputed that a deed with covenant of seizin and title would be effectual to give the grantee the benefit of an after-acquired title under the doctrine of estoppel, but these covenants were absent from the deeds in question, and the covenant of quiet enjoyment, it is said, will not have the like effect. No reason is given for any such distinction, and it is not recognized by the authorities. Where one assumes by his deed to convey a title, and by any form of assurance obligates himself to

cc. COVENANT FOR FURTHER ASSURANCE. — It has been held that if a grantor has acquired a further or better title to the premises after his conveyance, with covenants for further assurance, he will be compelled in equity to execute the covenant by conveying such title.¹ And under statute in *Illinois* it has been held that if a quitclaim deed contains a covenant for further assurance, a title subsequently acquired by the grantor will inure to the benefit of his grantee, the same as if the deed had contained a covenant of warranty.²

ff. COVENANT OF NONCLAIM. — It has been held that a covenant of nonclaim by which the grantor covenants that neither he nor his heirs, nor any other persons claiming from or under him, shall thereafter claim any right or title to the premises conveyed, will not operate as an estoppel against the grantor as to after-acquired title.³

gg. STATUTORY COVENANTS. — Under statute in some jurisdictions making the words "grant, bargain, and sell," in a deed or mortgage, operative as covenants, it has been held that an after-acquired title will pass by such conveyance by way of estoppel.⁴

protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a title and turn his grantee over to a suit upon his covenants for redress. The short and effectual method of redress is to deny him the liberty of setting up his after-acquired title as against his previous conveyance. This is merely refusing him the countenance and assistance of the courts in breaking the assurance which his covenants have given."

Covenant Against Incumbrances. — In *Coleman v. Bresnahan*, 54 Hun (N. Y.) 619, it was held that where a person made a conveyance with a covenant against incumbrances, and the land was at the time subject to a judgment, the grantor was estopped from asserting title in himself based upon the judgment.

1. Effect of Covenant for Further Assurance upon After-acquired Title. — *Chauvin v. Wagner*, 18 Mo. 532; *Hope v. Stone*, 10 Minn. 141. See also *Noel v. Bewley*, 3 Sim. 103; *Smith v. Baker*, 1 Y. & Coll. Ch. 223; *Heath v. Crea-lock*, L. R. 18 Eq. 215, *affirmed on appeal* L. R. 10 Ch. 30.

2. Bennett v. Waller, 23 Ill. 97. See also *Pierce v. Milwaukee, etc.*, R. Co., 24 Wis. 553, 1 Am. Rep. 203.

3. Effect of Covenant of Nonclaim on After-acquired Title. — *Harriman v. Gray*, 49 Me. 537; *Partridge v. Patten*, 33 Me. 483, 54 Am. Dec. 633; *Loomis v. Pingree*, 43 Me. 314; *Read v. Fogg*, 60 Me. 481; *Pike v. Galvin*, 29 Me. 185, *overruling Fairbanks v. Williamson*, 7 Me. 96. See also *Miller v. Ewing*, 6 Cush. (Mass.) 34.

Where two parties asserted claims to a certain section of land, and, for the purpose of compromising and adjusting the claims which they asserted, one of them gave a deed to the other with the following clause: "So that I, the said Wilfred D. Stearns, nor my heirs, nor any person or persons claiming under me, shall at any time hereafter have, claim, or demand any right or title to the aforesaid premises or appurtenances, or any part thereof," it was held that the warranty clause operated as an estoppel only as to claims theretofore existing, and the grantor was not estopped to set up the title afterwards acquired from the state. *Simon v. Stearns*, (Tex. Civ. App. 1897) 43 S. W. Rep. 50.

And this rule has been held to be true even when the covenant of nonclaim has been joined with the covenant against incumbrances. *Sweetser v. Lowell*, 33 Me. 452; *Partridge v. Patten*, 33 Me. 483, 54 Am. Dec. 633.

Conveyance of Future Interest. — But in *Massachusetts* it has been held that where the deed was a conveyance in terms from one brother to another of all the estate or interest which the grantor had, or which might come to him by will or heirship, with the clause that "neither I * * * nor my heirs, or any other person or persons claiming from or under me or them, or in the name, right, or stead of me or them, shall or will, by any way or means, have, claim, or demand any right or title to the aforesaid premises or their appurtenances, or to any part or parcel thereof, forever," this operated as an estoppel as to after-acquired property. *Trull v. Eastman*, 3 Met. (Mass.) 121, 37 Am. Dec. 126. In *Miller v. Ewing*, 6 Cush. (Mass.) 41, the court, in commenting upon this case, said: "There the premises or interest conveyed was a mere possibility, an expectancy; nothing passed by the conveyance, but it purported to convey a future interest to be acquired; and the warranty was held coextensive with the grant, and estopped the grantor, after the estate accrued, from demanding it."

4. Effect of Statutory Covenants on After-acquired Title. — *D'Wolf v. Haydn*, 24 Ill. 525; *King v. Gilson*, 32 Ill. 352, 83 Am. Dec. 269; *Pratt v. Pratt*, 96 Ill. 184.

In *Missouri* it was at one time held that the statutory covenants implied in the words "grant, bargain, and sell" do not operate as the ancient common-law warranty to transmit a subsequently acquired title. *Chauvin v. Wagner*, 18 Mo. 552; *Gibson v. Chouteau*, 39 Mo. 536; *Butcher v. Rogers*, 60 Mo. 140.

But in *Cockrill v. Bane*, 94 Mo. 444, it was held that where a person mortgaged land by the statutory covenants "grant, bargain, and sell," the title to which he did not own at the time, but subsequently acquired while the mortgage was in force, this subsequently acquired title became subject to sale under the mortgage.

And in *Boyd v. Haseltine*, 110 Mo. 203, it was held that the same effect must be given to

(b) **Instruments Without Covenants** — *aa. IN GENERAL.* — If land is conveyed without any covenants for title whatever, the grantor is not in general estopped from setting up an after-acquired title.¹

bb. QUITCLAIM DEEDS. — An ordinary quitclaim or release deed, containing no covenant whatever, vests in the grantee only such title or estate as the grantor was possessed of at the time of execution and delivery of the deed; and if a grantor in such a deed subsequently acquires the title to the real estate thereby conveyed, that title does not inure to the grantee in the quitclaim deed.²

these statutory covenants in a deed of trust as in a mortgage.

And in *Fordyce v. Rapp*, 131 Mo. 366, the rule was applied to an ordinary conveyance of land.

1. Operation of Instruments Without Covenants as to After-acquired Title. — *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449; *Edridge v. Rochester City, etc., R. Co.*, 54 Hun (N. Y.) 194; *Douglass v. Miller*, 4 Ohio Dec. 414; *Hart v. Gregg*, 32 Ohio St. 502; *Burners v. Keran*, 24 Gratt. (Va.) 42; *Reynolds v. Cook*, 83 Va. 817, 5 Am. St. Rep. 317; *Nye v. Lovitt*, 92 Va. 710. See also *Doe v. Wetmore*, 8 New Bruns. 145; *Casselman v. Casselman*, 9 Ont. Rep. 448.

Where a conveyance was made by a trustee with whom the *cestui que trust* united as a party of the third part in order that the deed might show upon its face that the trustee, in making the conveyance, was exercising the power vested in him by the deed creating the trust with her knowledge and by her direction, but it did not appear from the deed that she made any warranty or other covenant for title, or that she made any averment or affirmation that she was seized of or entitled to a particular estate in the land which the deed purported to convey, it was held that she was not estopped from relying upon her after-acquired title in an action of ejectment. *Nye v. Lovitt*, 92 Va. 710.

In *New York* a contrary rule from that declared in the text seems at one time to have prevailed. *Jackson v. Bull*, 1 Johns. Cas. (N. Y.) 90; *Jackson v. Murray*, 12 Johns. (N. Y.) 201. But in a later decision these authorities were overruled. *Jackson v. Wright*, 14 Johns. (N. Y.) 193.

In *Pennsylvania* the rule is laid down that when a vendor or mortgagor either sells or mortgages land which he does not own, and afterwards obtains title thereto, he will not be permitted to set up this after-acquired title to defeat his previous grant or mortgage, for this would be to permit him to perpetrate a fraud on his grantee or creditor. *Rauch v. Dech*, 116 Pa. St. 157, 2 Am. St. Rep. 598; *Tyler v. Moore*, (Pa. 1889) 17 Atl. Rep. 217; *Clark v. Martin*, 49 Pa. St. 303; *M'Williams v. Nisly*, 2 S. & R. (Pa.) 507, 7 Am. Dec. 654; *Chew v. Barnett*, 11 S. & R. (Pa.) 391; *Brown v. McCormick*, 6 Watts (Pa.) 60; *Collins's Appeal*, 107 Pa. St. 603; *Hirsch v. Tillman*, 2 Pa. Dist. Rep. 662; *Root v. Crook*, 7 Pa. St. 378; *Rush-ton v. Lippincott*, 119 Pa. St. 12. In these decisions the rule is not made to depend upon the existence of any covenants whatever in the deed.

Sale of Expectancy. — In *Hart v. Gregg*, 32 Ohio St. 502, it was held that the conveyance by a son of his expectancy in land owned by his father, which would descend to him if he

should survive his father and the latter should die intestate owning the land, is a conveyance of a naked possibility not coupled with an interest, and passes no estate or interest in the land; that such a conveyance does not operate to defeat the grantor's title afterwards acquired by descent, except by way of legal or equitable estoppel; and that, if such conveyance contains no covenants of warranty or recitals, and there are no acts of the grantor amounting to an equitable estoppel, he is not estopped from asserting an after-acquired title. In this case it was said by the court: "In the deed before us, as there are no covenants of warranty nor any recitals of fact that he had any title, or any right to make the conveyance, there is nothing that would estop the grantor, either at law or in equity, from setting up an after-acquired title, where, as in this case, there is no possession under the deed and no charge of fraud in the transaction." To the same effect see *McClure v. Raben*, 125 Ind. 139.

Agreement to Sell Land. — In a case where there was no conveyance and no warranty, but a simple agreement whereby a person bound himself to proceed and take measures to sell at auction certain lands owned by him, and to divide the proceeds in a certain way, it was held that there could be no estoppel as to title subsequently acquired. *Olipphant v. Burns*, 146 N. Y. 233.

2. Operation of Quitclaim Deeds as to After-acquired Title — *England.* — *Right v. Bucknell*, 2 B. & Ad. 278, 22 E. C. L. 73.

Canada. — *Casselman v. Casselman*, 9 Ont. Rep. 448.

Alabama. — *Tillotson v. Kennedy*, 5 Ala. 413, 39 Am. Dec. 330.

Connecticut. — *Dart v. Dart*, 7 Conn. 256; *Smith v. Pendell*, 19 Conn. 111, 48 Am. Dec. 146.

Illinois. — *Frink v. Darst*, 14 Ill. 308, 58 Am. Dec. 575, *overruling* *Frisby v. Ballance*, 7 Ill. 141; *Bennett v. Waller*, 23 Ill. 97; *Benneson v. Aiken*, 102 Ill. 289.

Indiana. — *Graham v. Graham*, 55 Ind. 23; *Avery v. Akins*, 74 Ind. 283; *Locke v. White*, 89 Ind. 492; *Bryan v. Uland*, 101 Ind. 477; *Habig v. Dodge*, 127 Ind. 31; *Haskett v. Maxey*, 134 Ind. 182; *Stephenson v. Boody*, 139 Ind. 60; *Graham v. Lunsford*, 149 Ind. 83.

Kansas. — *Simpson v. Greeley*, 8 Kan. 586; *Bruce v. Luke*, 9 Kan. 201; *Scoffins v. Grandstaff*, 12 Kan. 467.

Kentucky. — *Bohon v. Bohon*, 78 Ky. 408.

Maine. — *Ham v. Ham*, 14 Me. 351; *Pike v. Galvin*, 29 Me. 183; *Harriman v. Gray*, 49 Me. 537; *Fox v. Widgery*, 4 Me. 218.

Massachusetts. — *Taft v. Stevens*, 3 Gray (Mass.) 504; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47; *Comstock v. Smith*, 13 Pick. (Mass.) 116, 23 Am. Dec. 670; *White v. Patten*,

III. OPERATION OF RECITALS OR AVERMENTS. — But it seems that this principle is applicable to a deed of bargain and sale by a release or quitclaim in the strict and proper sense of that species of conveyance; and, therefore, if the deed bears on its face evidence that the grantor intended to convey and the grantee expected to become invested with an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him in respect

24 Pick. (Mass.) 324; Weed Sewing Mach. Co. v. Emerson, 115 Mass. 554.

Michigan. — Brown v. Phillips, 40 Mich. 264; Fisher v. Hallock, 50 Mich. 405.

Nebraska. — Hagensick v. Castor, (Neb. 1898) 73 N. W. Rep. 932.

Nevada. — Harden v. Cullins, 8 Nev. 49.

New Hampshire. — Bell v. Twilight, 26 N. H. 401.

New Jersey. — Howe v. Harrington, 18 N. J. Eq. 495; Smith v. De Russy, 29 N. J. Eq. 407.

New York. — Cramer v. Benton, 64 Barb.

(N. Y.) 522; Sparrow v. Kingman, 1 N. Y. 247; Jackson v. Hubble, 1 Cow. (N. Y.) 613; Jackson v. Winslow, 9 Cow. (N. Y.) 18; Varick v. Edwards, Hoffm. Ch. (N. Y.) 382; Jackson v. Wright, 14 Johns. (N. Y.) 193; Jackson v. Bradford, 4 Wend. (N. Y.) 622; Pelletreau v. Jackson, 11 Wend. (N. Y.) 119; Jackson v. Waldron, 13 Wend. (N. Y.) 178; Jackson v. Littell, 56 N. Y. 108. Compare Jackson v. Bull, 1 Johns. Cas. (N. Y.) 90; Jackson v. Murray, 12 Johns. (N. Y.) 201.

North Carolina. — McAllister v. Devane, 76 N. Car. 57; Carson v. Carson, 122 N. Car. 645.

Ohio. — Kinsman v. Loomis, 11 Ohio 475; Hart v. Gregg, 32 Ohio St. 502.

Oregon. — Dorris v. Smith, 7 Oregon 267; Burston v. Jackson, 9 Oregon 275.

Texas. — Perrin v. Perrin, 62 Tex. 477.

Virginia. — Doswell v. Buchanan, 3 Leigh (Va.) 305, 23 Am. Dec. 280.

West Virginia. — Kent v. Watson, 22 W. Va. 561.

Wisconsin. — Jourdain v. Fox, 90 Wis. 99.

In *Frost v. Methodist Episcopal Church*, 56 Mich. 69, Mr. Justice Campbell said: "But a quitclaim deed can never inure to convey any subsequently acquired title which is not actually owned in equity at the time of the deed."

A Dedication by means of a quitclaim deed to lands which the grantor does not own cannot work an estoppel against an after-acquired title. *People v. Miller*, 79 Mich. 93. Compare *Napa v. Howland*, 87 Cal. 84.

In *California* it has been held that, as a general rule, a quitclaim deed does not operate to pass an after-acquired title. *Morrison v. Wilson*, 30 Cal. 344; *Cadiz v. Majors*, 33 Cal. 288; *Quivey v. Baker*, 37 Cal. 465.

And in *Anderson v. Yoakum*, 94 Cal. 227, 28 Am. St. Rep. 121, it was held that a covenant by a grantor in a deed of quitclaim and release, that any after-acquired title shall vest in the grantee, has not the effect of itself to vest such title in the grantee upon its acquisition by the grantor.

But it has been held that where a person who holds a certificate of purchase from the

government conveys by quitclaim the lands called for by such certificate, when the title is subsequently transferred by the patent it relates back to the initiation of the proceedings to acquire the government title, and consequently inures to the benefit of the person to whom the holder of the certificate of purchase conveyed. *Wholey v. Cavanaugh*, 88 Cal. 132; *Stanway v. Rubio*, 51 Cal. 41.

In *Green v. Clark*, 31 Cal. 592, it was held that if one who has purchased land at a sheriff's sale quitclaims his interest in such land before a sheriff's deed is given, the quitclaim is equivalent to an assignment of the sheriff's certificate of sale, and if the sheriff afterwards gives a deed to the purchaser the deed is void as between the parties. To the same effect see *Ward v. Dougherty*, 75 Cal. 240, 7 Am. St. Rep. 151.

By the provision now embodied in Rev. Stat. Mo. 1889, § 8835, it is declared that in case a deed of an indefeasible estate in fee simple is made, if the grantor did not have the legal title to the land conveyed, but should afterwards acquire it, the legal estate subsequently acquired should immediately pass to the grantee. It has been held that this statute does not intend that a quitclaim deed, although it uses language to pass the fee and not any smaller estate, would, therefore, pass a new title not belonging to the grantor when he makes the deed. *Bogy v. Shoab*, 13 Mo. 365. See also *Valle v. Clemens*, 18 Mo. 486; *Rector v. Waugh*, 17 Mo. 22; *Gibson v. Chouteau*, 39 Mo. 566; *Butcher v. Rogers*, 60 Mo. 139; *Kimmel v. Benna*, 70 Mo. 52.

In *Bogy v. Shoab*, 13 Mo. 380, the court said: "It was hardly intended to apply to a deed conveying all right, title, and interest of the grantor." Such deed is not supposed to be within the contemplation of the section because it does not purport to convey an estate in fee simple absolute.

And under Rev. Stat. Mo. 1879, § 669 (Rev. Stat. 1889, § 2396), providing that the husband and wife may convey the real estate of the wife, and the wife may relinquish her dower in the real estate of the husband, by their joint deed acknowledged and certified as therein provided, but that no covenant, expressed or implied, in such deed shall bind the wife or her heirs, except so far as may be necessary effectually to convey from her and her heirs all her right, title, and interest expressed to be conveyed therein, it has been held that the wife is not bound upon her covenants contained in a deed purporting to convey an indefeasible estate in fee simple, except so far as may be necessary effectually to convey from her and her heirs all her right,

to the estate thus described as if a formal covenant to that effect had been inserted, at least so far as to estop them from ever afterwards denying that the grantor was seized of the particular estate at the time of the conveyance. Accordingly, the rule has been laid down that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument by way of recital or averment that he is seized or possessed of a particular estate in the premises, which estate the deed purports to convey, or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time when he made the conveyance; and this estoppel works upon the estate and binds an after-acquired title as between parties and privies.¹

The Reason is that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him in good faith and fair dealing should be forever thereafter precluded from gainsaying it.²

(c) **Application of Rule to Personalty.** — The doctrine of estoppel, which shuts off the vendor who has warranted a clear title from asserting a claim against the title which he conveyed and warranted, has been applied to conveyances of personalty.³ And the rule seems to be established that, in sales of personalty,

title, and interest in the land at the time when the deed was made. *Brawford v. Wolfe*, 103 Mo. 391. In this case the court said: "By the terms of the statute her deed is, in its effect, whatever its form, simply a quitclaim of all her existing right, title, and interest. Such being the effect of the deed, the rulings of the court in regard to inurement under quitclaim deeds would apply to her deed, regardless of its form or covenants, and such I understand to be the rulings of this court. *Barker v. Circle*, 60 Mo. 258; *Reese v. Smith*, 12 Mo. 348." See also *State Bank v. Robidoux*, 57 Mo. 446.

In *Mississippi* the rule of the text at one time obtained. *Mitchell v. Woodson*, 37 Miss. 578.

Under Miss. Code 1880, § 1195, a quitclaim deed of land passes all interest of the grantor and estops him from asserting an after-acquired adverse title. *Bramlett v. Roberts*, 68 Miss. 325; *Chapman v. Sims*, 53 Miss. 154; *Edwards v. Hillier*, 70 Miss. 803. See also *Kaiser v. Earhart*, 64 Miss. 492.

Under this statute it has been held that the estoppel is coextensive only with the estate, right, or interest which the conveyance purports to pass. Thus, where N. was one of several children and heirs of her father, who had died leaving certain real estate, and she conveyed to A. "all the right, title, and interest I [the grantor] have in the estate of my father," and afterwards two of N.'s coheirs died, and she inherited a one-third interest in their respective shares of her father's estate, it was held that the interest thus subsequently inherited by N. did not accrue to A. by virtue of the conveyance previously made. *McInnis v. Pickett*, 65 Miss. 354.

1. **Operation of Recitals upon After-acquired Title** — *England*. — *Lainson v. Tremere*, 1 Ad. & El. 792, 28 E. C. L. 214; *Bowman v. Taylor*, 2 Ad. & El. 278, 29 E. C. L. 90; *Right v. Bucknell*, 2 B. & Ad. 278, 22 E. C. L. 73; *Goodtitle v. Bailey*, 2 Cowp. 601; *Heath v. Crealock*, L. R. 18 Eq. 215, affirmed L. R. 10 Ch. 30; *Doe*

v. Errington, 8 Scott 210; *Rees v. Lloyd*, Wightw. 129.

Canada. — *Doe v. Myers*, 2 U. C. Jur. 458; *Featherston v. McDonell*, 15 U. C. C. P. 167.

United States. — *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297; *French v. Spencer*, 21 How. (U. S.) 228; *Irvine v. Irvine*, 9 Wall. (U. S.) 624; *Ryan v. U. S.*, 136 U. S. 68.

California. — *Clark v. Baker*, 14 Cal. 629, 76 Am. Dec. 449.

Indiana. — *Nicholson v. Caress*, 45 Ind. 479; *Habig v. Dodge*, 127 Ind. 31.

Kentucky. — *Fitzhugh v. Tyler*, 9 B. Mon. (Ky.) 561.

Michigan. — *Fisher v. Hallock*, 50 Mich. 463.

Nebraska. — *Wells v. Steckelberg*, 52 Neb. 597.

New Jersey. — *Hannon v. Christopher*, 34 N. J. Eq. 405.

Oregon. — *Bayley v. McCoy*, 8 Oregon 260.

Texas. — *Lindsay v. Freeman*, 83 Tex. 263; *Dupree v. Frank*, (Tex. Civ. App. 1897) 39 S. W. Rep. 994; *Garrett v. McClain*, (Tex. Civ. App. 1898) 44 S. W. Rep. 47.

Virginia. — *Reynolds v. Cook*, 83 Va. 821, 5 Am. St. Rep. 317; *Nye v. Lovitt*, 92 Va. 710.

See also *Carver v. Jackson*, 4 Pet. (U. S.) 1; *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Dem v. Cornell*, 3 Johns. Cas. (N. Y.) 174; *Penrose v. Griffith*, 4 Binn. (Pa.) 231.

Grant by Unauthorized Agent of State. — In *Salem Imp. Co. v. McCourt*, 26 Oregon 103, it was held that the rule of the text could not be invoked against the state in support of the unauthorized acts of its officers or agents, how long acquiesced in. See also *State v. Brewer*, 64 Ala. 287; *Pulaski County v. State*, 42 Ark. 118; *Atty.-Gen. v. Marr*, 55 Mich. 445; *Day Land, etc., Co. v. State*, 68 Tex. 526.

2. *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297.

3. **Effect of Covenants as to After-acquired Title to Personalty.** — *Kane v. Lodor*, 56 N. J. Eq. 268. In this case personal property was sold with the following warranty: "We covenant

even without any express covenant of warranty, the title afterwards acquired by a vendor in property which he has sold passes to the grantee.¹ But in *England* it has been said that it may well be doubted whether the doctrine of estoppel applies to personal chattels at all so as to bind a subsequent purchaser of them.²

(2) *Limitations of the Doctrine* — (a) **Title Subsequently Acquired from Grantee.** — The estoppel of a grantor conveying with general warranty to set up a claim to the land inimical to the rights of the grantee cannot be extended so far as to prevent the grantor's acquisition of title from the grantee, as by purchase³ or by a subsequent holding adverse to the grantee, and the title so acquired by adverse possession does not pass to the grantee by operation of the covenants of warranty in the deed.⁴

Outstanding Title in Grantee at Time of Execution of Deed. — And when, at the time of making a deed, there is an outstanding title in the grantee, and this title is subsequently acquired by the grantor, it will not inure to the benefit of the grantee.⁵

and agree to warrant and defend the sale against all and every person whatsoever."

1. **Passing of Subsequently Acquired Title to Personalty by Sale Without Covenants.** — *Littlefield v. Perry*, 21 Wall. (U. S.) 205; *Gottfried v. Miller*, 104 U. S. 521; *Curran v. Burdsall*, 20 Fed. Rep. 835; *Frazer v. Hilliard*, 2 Strobb. L. (S. Car.) 309. See also *Kane v. Lodor*, 56 N. J. Eq. 268; *Harvey v. Harvey*, 13 R. I. 598; and the title IMPLIED WARRANTY.

Where a husband sold a slave belonging to his wife, who afterwards died without issue, leaving the husband her heir, it was held that the title of the purchaser to the slave thereby became perfect. *Clark v. Slaughter*, 34 Miss. 65.

2. *Bryans v. Nix*, 4 M. & W. 794. In this case the court said: "It is proper however, to notice the very ingenious argument used on the part of the plaintiffs, founded on the doctrine of estoppel as applied to real estate. If a man, by indenture, demise a certain manor which he has not, and then purchases the manor, and afterwards sells or demises to B., the first lease operates against the purchaser or second lessee; and by analogy to this case it is contended that the first bill of lading was good for the plaintiffs by estoppel against the master and consignor, and against the defendant, who claims that cargo which was put on board under the consignor. But this analogy does not hold. In the case of real property, the lease is a conclusive admission by the lessor that he has a title to the specific estate demised which binds a subsequent purchaser of that estate; here the bill of lading is a conclusive admission only that some oats, amounting to the specified quantity, were on board. In the former case the estate is identified and ascertained at the time of the admission; in the latter, no property existed to which the admission applied, for no oats were on board; and they are no otherwise ascertained than by that statement that they were on board; and the person who afterwards purchases any oats from the consignor might as well be said to purchase those to which the estoppel relates as he who purchases those which were afterwards put on board. And besides, it may well be doubted whether the doctrine of estoppel applies to personal chattels at all, so as to bind a subsequent purchase of them."

3. **Grantor Acquiring Title from Grantee by Purchase.** — *Doolittle v. Robertson*, 109 Ala. 412; *Jones v. King*, 25 Ill. 383.

In the same way it has been held that where a person conveyed lands with covenants of warranty and seizin, and the grantee subsequently conveyed the same lands to the government, from which they passed back by conveyance to the original grantor, the original grantee was in no condition to insist on an estoppel because the covenants had thus become extinguished. *Appleton v. Barrett*, 22 Wis. 568.

Purchase by Grantor at Tax Sale. — Where land is conveyed by warranty deed and is afterwards bought by the grantor at a tax sale made for taxes accruing upon the land after the conveyance made by the grantor, such after-acquired title does not inure to the benefit of the grantee. *Foster v. Johnson*, 89 Tex. 640; *Jones v. King*, 25 Ill. 383; *Ervin v. Morris*, 26 Kan. 664.

But if the taxes accrued on the land before conveyance, and the land was, after the conveyance, purchased at a tax sale by the grantor, the rule will be otherwise. *Frank v. Caruthers*, 108 Mo. 569; *De Frieze v. Quint*, 94 Cal. 653, 28 Am. St. Rep. 151; *Hannah v. Collins*, 94 Ind. 201.

4. **Effect of Adverse Possession by Grantor Against Grantee** — *Alabama.* — *Abbett v. Page*, 92 Ala. 571; *Doolittle v. Robertson*, 109 Ala. 412.

California. — *Franklin v. Dorland*, 28 Cal. 180, 87 Am. Dec. 111.

Maine. — *Hines v. Robinson*, 57 Me. 330, 99 Am. Dec. 772.

Massachusetts. — *Stearns v. Hendersass*, 9 Cush. (Mass.) 497, 57 Am. Dec. 65.

New Hampshire. — *Tilton v. Emery*, 17 N. H. 536.

New York. — *Sherman v. Kane*, 86 N. Y. 57.

North Carolina. — *Reynolds v. Cathens*, 5 Jones L. (50 N. Car.) 437; *Eddleman v. Carpenter*, 7 Jones L. (52 N. Car.) 616; *Johnson v. Farlow*, 13 Ired. L. (35 N. Car.) 84.

Texas. — *Smith v. Montes*, 11 Tex. 24; *Harn v. Smith*, 79 Tex. 310.

See further on this question the title ADVERSE POSSESSION, vol. I, p. 818.

5. *Smiley v. Fries*, 104 Ill. 416.

(b) **Title Subsequently Acquired in Different Right.** — An estoppel arises only where the covenantor takes the new title in the same right in which he had previously conveyed it. Accordingly, where one without title has conveyed land in his own right with covenants warranting the title, and afterwards the title comes to him in the capacity of a trustee for a different person, such newly acquired title does not inure to the former grantee of the covenantor.¹ But it has been held that where an administrator attempts to bind the estate represented by an unauthorized general covenant of warranty, the covenant, though inoperative as to the estate represented, will be treated as a personal covenant of the administrator, and will estop him to set up in his own right an after-acquired estate.²

(c) **Effect of Nonliability on Covenants** — *aa. IN GENERAL.* — As a consequence of the ground on which the estoppel arising from the covenants in a deed is usually based, viz., to avoid circuitry of action, it has been held that, as a general rule, where no liability exists on the covenants, there is no foundation for an estoppel.³

bb. WHERE CONVEYANCE IS VOID — (*aa*) *In General.* — Thus the rule as to the operation of estoppel upon the after-acquired property of the grantor does not, it seems, apply where his deed is absolutely void, as where he is inhibited from selling by the letter, spirit, or policy of a legislative act.⁴ A discussion of the effect of the invalidity of the conveyance upon the operation of covenants therein by way of estoppel will be found in another portion of this article.⁵

(*bb*) *Conveyance by Married Woman* — **Separate Estate.** — It seems to be the prevailing rule that at common law a *feme covert* who has joined with her husband in a conveyance of her own land, with covenant of warranty, is not thereby estopped from setting up a subsequently acquired title.⁶ But the authorities

1. Effect of Covenants on Property Subsequently Acquired in Different Right. — *Dewhurst v. Wright*, 29 Fla. 223; *Kelley v. Jenness*, 50 Me. 455, 79 Am. Dec. 623; *Marsh v. Rice*, 1 N. H. 167; *Runlet v. Otis*, 2 N. H. 167; *Jackson v. Mills*, 13 Johns. (N. Y.) 463; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Jackson v. Hoffman*, 9 Cow. (N. Y.) 271; *Burchard v. Hubbard*, 11 Ohio 316; *Fréteville v. Hindes*, 57 Tex. 392; *Gregory v. Peoples*, 80 Va. 355. See also *Phillippi v. Leet*, 19 Colo. 246.

One Acting as the Agent of another in perfecting title to a mining lode, who paid no part of the purchase price, owned no individual interest, and conveyed with no covenant of warranty, is not estopped, after his agency ceased, from conveying any other or different title which he thereafter acquired to the premises in controversy. *Consolidated Republican Mountain Min. Co. v. Lebanon Min. Co.*, 9 Colo. 343.

2. Hitchcock v. Southern Iron, etc., Co., (Tenn. 1896) 38 S. W. Rep. 600. See also *supra*, this section, *Persons Affected by Estoppel* — *Grantor Acting in Different Characters.*

3. No Estoppel Where No Liability on Covenants. — *Smiley v. Fries*, 104 Ill. 416.

4. Conveyance Void. — *Kennedy v. McCartney*, 4 Port. (Ala.) 158.

5. See *supra*, this section, *Qualification of Doctrine* — *Invalid Deeds.*

Fraudulent Conveyance. — In *Stokes v. Jones*, 18 Ala. 734, 21 Ala. 738, it was held that where a deed made by a father to his son was fraudulent as to creditors or subsequent purchasers, it could not, by virtue of a covenant of warranty contained in it, operate against his cred-

itors or subsequent purchasers so as to protect a future acquisition of title from them.

6. Covenants in Conveyance by Married Woman Inoperative upon Subsequently Acquired Title. — *Edwards v. Davenport*, 4 McCrary (U. S.) 34; *Hobbs v. King*, 2 Metc. (Ky.) 141; *Nunnally v. White*, 3 Metc. (Ky.) 593; *Barker v. Circle*, 60 Mo. 258; *Brawford v. Wolfe*, 103 Mo. 391; *Wadleigh v. Glines*, 6 N. H. 17, 23 Am. Dec. 705; *Den v. Demarest*, 21 N. J. L. 525; *Martin v. Dwelly*, 6 Wend. (N. Y.) 14, 21 Am. Dec. 245; *Carpenter v. Schermerhorn*, 2 Barb. Ch. (N. Y.) 314; *Dominick v. Michael*, 4 Sandf. (N. Y.) 424; *Grout v. Townsend*, 2 Hill (N. Y.) 557. See also *Bank of America v. Banks*, 101 U. S. 247. Compare *Massie v. Sebastian*, 4 Bibb (Ky.) 433. By the common law of *Massachusetts* the warranty deed of a married woman, though executed in such form as to convey her title, did not operate against her by way of estoppel, because she was incapable of binding herself by a covenant of warranty or by agreement to convey her real estate. *Wight v. Shaw*, 5 Cush. (Mass.) 56; *Lowell v. Daniels*, 2 Gray (Mass.) 161, 61 Am. Dec. 448; *McGregor v. Wait*, 10 Gray (Mass.) 72, 69 Am. Dec. 305; *Knight v. Thayer*, 125 Mass. 25. Compare *Nash v. Spofford*, 10 Met. (Mass.) 192, 43 Am. Dec. 425; *Doane v. Willcutt*, 5 Gray (Mass.) 332, 66 Am. Dec. 369; *Fowler v. Shearer*, 7 Mass. 14; *Colcord v. Swan*, 7 Mass. 291.

But by Gen. Stat. Mass., c. 108, § 3, every married woman is made capable of bargaining, selling, and conveying her real and personal property, and a warranty deed executed in accordance with this statute in regard to land in

are not in harmony upon this question.¹

Joinder of Wife with Husband in Conveyance of His Estate. — When the wife unites with her husband in a warranty deed of his land merely for the purpose of releasing her inchoate right of dower, it is well settled that she will not be estopped from acquiring a subsequent title and asserting it in her own favor.²

c. GRANTOR'S DISCHARGE IN BANKRUPTCY. — It has been held that a discharge in bankruptcy, while effectual to release the covenantor from liability in an action for a breach of a covenant, does not at all affect the estoppel as to after-acquired property. This rule has been placed on the ground that, as the release is by force of the act of bankruptcy, and not by the act of the covenantor or those claiming under him, no greater effect will be given to it than is warranted by the terms of the act, and for the further reason that existing personal liability is not necessary to work an estoppel, and consequently there is no necessary connection between the personal liability of the debtor on his covenant and the estoppel which arises therefrom.³

which a third person has a life estate at the time, who afterwards transfers it to the grantor, is binding by way of estoppel upon her and her subsequent grantees. *Knight v. Thayer*, 125 Mass. 25.

1. Estoppel as to After-acquired Title by Married Woman's Conveyance of Her Own Land. — *Fletcher v. Coleman*, 2 Head (Tenn.) 384.

In Ohio it has been the rule that covenants of warranty of a *feme covert* in her deed of real estate will operate as an estoppel to her asserting any subsequently acquired title to the land. *Hill v. West*, 8 Ohio 222, 31 Am. Dec. 442. In this case the covenants were contained in the conveyance or mortgage of the wife's lands. See also *Dukes v. Spangler*, 35 Ohio St. 127.

Under Statute in Indiana the same rule prevails. *King v. Rea*, 56 Ind. 1; *Beal v. Beal*, 79 Ind. 280; *Littell v. Hoagland*, 106 Ind. 320. Compare *Shumaker v. Johnson*, 35 Ind. 36.

And So in North Carolina. — *Zimmerman v. Robinson*, 114 N. Car. 39.

Under Statute in Illinois, also, a similar rule prevails. *Guertin v. Mombteau*, 144 Ill. 32.

Under Statute in Texas it has been held that the deed of a married woman, executed in compliance with the statute providing for the conveyance of her separate property, which purports to convey the full title should operate as an estoppel by deed against an after-acquired title the same as if she were not under coverture. *Wadkins v. Watson*, (Tex. Civ. App. 1893) 21 S. W. Rep. 636; *Peterson v. McCauley*, (Tex. Civ. App. 1894) 25 S. W. Rep. 827.

Conveyance Without Covenants. — Under the Constitution of *Oregon*, giving to married women the control and disposition of their real estate, it has been held that where land is conveyed by a husband and wife without covenants of warranty, this doctrine of estoppel will apply as against the wife, where it appears that, by the deed, parties intended to deal with and convey a title in fee simple. *Graham v. Meek*, 1 Oregon 328.

2. Joining in Deed to Release Dower Merely — *Alabama*. — *Gonzales v. Hukil*, 49 Ala. 260, 20 Am. Rep. 82.

Illinois. — *Sanford v. Kane*, 133 Ill. 206.

Indiana. — *Miller v. Miller*, 140 Ind. 174.

Iowa. — *O'Neil v. Vanderburg*, 25 Iowa 104.

Mississippi. — *Griffin v. Sheffield*, 38 Miss. 359.

New York. — *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245; *Teal v. Woodworth*, 3 Paige (N. Y.) 470.

See also *Strawn v. Strawn*, 50 Ill. 33; *Schaffner v. Grutzmacher*, 6 Iowa 137; *Childs v. McChesney*, 20 Iowa 431, 89 Am. Dec. 545; *Raymond v. Holden*, 2 Cush. (Mass.) 270; *Ritt v. Dodge*, 20 R. I. (pt. ii.) 46.

Where the wife joins with her husband in a deed, not for her separate estate, but to convey lands whose title was claimed by the husband, the title being so recited in the deed, and the deed purports to contain no warranty on her part, the warranty being expressly by the husband, she is not estopped to assert against the grantee a title subsequently acquired by her. *Tyler v. Moore*, (Pa. 1889) 17 Atl. Rep. 216.

Widow Claiming Inchoate Right of Homestead. — Where a man executed a mortgage deed containing covenants of warranty, and the wife, who then had in the granted premises only an inchoate right of homestead, joined with him, it was held that she was not estopped by such covenants of warranty as to any subsequently acquired title to the premises. *Goodenough v. Fellows*, 53 Vt. 102.

Under the Minnesota Act of 1869 (Gen. Stat. 1878, c. 69), it has been held that a married woman who joined with her husband in the conveyance of lands standing in his name, with covenants, and expressly joined in and became a party to such covenants, was estopped thereby from setting up an after-acquired title. *Sandwich Mfg. Co. v. Zellmer*, 48 Minn. 408.

3. Effect of Grantor's Discharge in Bankruptcy. — *Stewart v. Anderson*, 10 Ala. 510; *Dorsey v. Gassaway*, 2 Har. & J. (Md.) 411, 3 Am. Dec. 557; *Gibbs v. Thayer*, 6 Cush. (Mass.) 30; *Russ v. Alpaugh*, 118 Mass. 376, 19 Am. Rep. 464; *Bush v. Cooper*, 26 Miss. 599, *affirmed* 18 How. (U. S.) 82; *Chamberlain v. Meeder*, 16 N. H. 384; *Gregory v. Peoples*, 80 Va. 355.

In *Bush v. Person*, 18 How. (U. S.) 82, the court said: "It must be admitted that if the covenantor or his assignee had released the covenant, it would be difficult to maintain that it could continue in existence for any purpose."

ad. ACTION ON COVENANT BARRED BY STATUTE. — In *Massachusetts* the rule has been laid down that the operation of covenants by way of estoppel as to after-acquired property will not be affected by the fact that an action on the covenant is barred by the statute of limitations.¹

(3) *Against Whom Estoppel Operates* — *In General.* — Estoppels arising from covenants as to after-acquired title bind not only the parties, but all privies in estate, in blood, and in law.²

Grantor's Heirs. — Any one claiming title by inheritance from the grantor after he has acquired the subsequent title is, of course, equally bound by the estoppel.³ But it would seem to be the general rule that an heir claiming a subsequently acquired independent title in himself is not estopped to assert it

But it must be considered that whatever discharge has taken place in this case is by force of a statute, which may have so qualified and limited its effect as still to leave the covenant in existence for one purpose, though not for others; and that the question whether it has done so can be determined only by examining the act and ascertaining the will of the legislature in this particular. The second section of the act contains this proviso: 'That nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act.' There does not appear to have been anything in this mortgage inconsistent with those sections; and it is not denied that the mortgage itself, considered simply as a conveyance of the land, remained unaffected by the act. It is therefore obvious that though the bankrupt, personally, was released by the act, the debt due from the land continued undischarged. In this particular, beyond all doubt, the discharge by the act differs from a release by the creditor; since, if the latter had released the debtor, the mortgage would thereby have been satisfied, and the charge on the land destroyed. The intention of the legislature to carry out this distinction between the personal liability of the debtor and the liability of the land, and to preserve the latter in full force, unaffected by the discharge of the debtor, is clearly declared by the act. The act says, in so many words, that a mortgage, valid by the law of the state, shall not be impaired by anything in the act. We think there is sufficient reason why this proviso should be so construed as completely to save the effect and operation of all estoppels running with the land and operating at law to pass the legal title, or in equity to conclude the grantor from asserting the existence of a title inconsistent with what he undertook to sell and convey. The purpose of the legislature to afford complete and effectual protection to mortgage titles against anything which was to be done under the act, and the broad and strong terms in which this purpose is expressed, require us to say that the debtor cannot derive from the act an enabling power to do or assert anything which will impair a mortgage otherwise valid. Nor is there any incongruity with established principles in holding that the personal discharge of the debtor does not free him from the

estoppel. If this obligation could rest solely upon a covenant effectual in law to charge the grantor in a personal action, it would follow that when such personal liability was released by the bankrupt act the estoppel would naturally fall with it; and that an intention to preserve the estoppel ought to be clearly indicated, to induce the court to say it was not destroyed; but such estoppels do not depend on personal liability for damages. This is apparent when we remember that estoppels bind not only parties, but privies in blood and estate, though not personally liable on the covenants creating the estoppel. See *Carver v. Jackson*, 4 Pet. (U. S.) 87; *White v. Patten*, 24 Pick. (Mass.) 324; *Wark v. Willard*, 13 N. H. 389; *Baxter v. Bradbury*, 20 Me. 260. Indeed, it is the settled doctrine of this court, not only that no existing personal liability is necessary to work an estoppel, but that none need have existed at any time."

1. **When Action on Covenant Barred.** — *Cole v. Raymond*, 9 Gray (Mass.) 217. In this case the court said: "It is no answer to this that an action has been brought on the covenant of warranty and held to be barred by the statute of limitations. *Holden v. Fletcher*, 6 Cush. (Mass.) 235. A covenant of warranty in a deed of conveyance of land, whilst it is a covenant real and runs with the land, and binds the grantor and his heirs by its force as a covenant real, is also a personal covenant, and if a breach occurs in the lifetime of the warrantor, an action will lie against him to recover damages; or if a breach occurs before the final settlement of the estate, an action will lie against his personal representatives. When the covenant is thus treated as a personal contract and sought to be enforced as such by personal action, it must be treated in all respects as a personal obligation; the usual incidents to the conduct of a personal action will be applied. But this will not affect the covenant real in its broader application."

2. **All Parties and Privies Bound.** — *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *Carver v. Jackson*, 4 Pet. (U. S.) 1; *Somes v. Skinner*, 3 Pick. (Mass.) 52; *Tefft v. Munson*, 57 N. Y. 99; *Philly v. Sanders*, 11 Ohio St. 496, 78 Am. Dec. 316. See also *Dudley v. Cadwell*, 19 Conn. 226; *Pike v. Galvin*, 29 Me. 185.

3. **Claim by Inheritance.** — *Carver v. Jackson*, 4 Pet. (U. S.) 1; *French v. Spencer*, 21 How. (U. S.) 228; *White v. Patten*, 24 Pick. (Mass.) 324; *Perry v. Kline*, 12 Cush. (Mass.) 118; *Wark v. Willard*, 13 N. H. 389; *Tefft v. Munson*, 57 N. Y. 97; *Trolan v. Rogers*, 88 Hun (N. Y.) 422.

by the mere force of the covenants of his ancestor.¹

Creditors and Subsequent Purchasers. — This doctrine applies so as to bind the creditors of the grantor and all subsequent purchasers from him with notice actual or constructive.²

Record as Constructive Notice. — Under the recording acts of the various states it seems that, by the prevailing authorities, the record of a conveyance of lands with covenants prior to the acquisition by the grantor of title to the lands will operate as constructive notice to one who subsequently obtains a grant of the same lands from the grantor, although such subsequent grantee is without actual notice of the prior deed. It follows that the title of the first grantee to whom the subsequently acquired title inures by virtue of the covenants in his deed is superior to that of the subsequent purchaser.³ But this rule has met with some opposition on the ground of the injustice wrought the subsequent grantee by compelling him to examine the records for conveyance by the grantor at a time anterior to the period during which he held title.⁴

1. Heir Subsequently Acquiring Independent Title. — *Russ v. Alpaugh*, 118 Mass. 376, 19 Am. Rep. 464. In this case the court said: "If it rests upon the common-law doctrine of estoppel, 'an estoppel on the part of the mother shall not bind the heir when he claimeth from the father,' Co. Litt. 365*b*; and of course, *e converso*, the estoppel of the father cannot bind the heir claiming an independent title from the mother." To the same effect see *New Orleans v. Gaines*, 138 U. S. 595, *Ebey v. Adams*, 135 Ill. 80; *Troian v. Rogers*, 88 Hun (N. Y.) 422; *Chace v. Gregg*, 88 Tex. 559. See also *supra*, this section, *Persons Affected by Estoppel — Operation of Ancestor's Covenants Against Heir*.

2. Operation of Covenants Against Grantor's Creditors and Subsequent Purchasers. — *Morris v. Wheat*, 8 App. Cas. (D. C.) 389; *Tefft v. Munson*, 57 N. Y. 99; *Douglass v. Scott*, 5 Ohio 198; *Hitchcock v. Southern Iron, etc., Co.*, (Tenn. 1896) 38 S. W. Rep. 600, *Hale v. Hollon*, 14 Tex. Civ. App. 96. See also *Guegain v. Langis*, 21 New Bruns. 549; *Doe v. Dowdall*, 3 Houst. (Del.) 369; *Burke v. Beveridge*, 15 Minn. 206; *Doe v. Wetmore*, 8 New Bruns. 145.

3. Record of Conveyance to Grantor Prevents Acquisition of Title Adverse to Grantor — Kansas. — *Letson v. Roach*, 5 Kan. App. 57.

Maine. — *Powers v. Patten*, 71 Me. 583.

Massachusetts. — *White v. Patten*, 24 Pick. (Mass.) 324; *Knight v. Thayer*, 125 Mass. 25.

New Hampshire. — *Kimball v. Blaisdell*, 5 N. H. 533, 22 Am. Dec. 476; *Wark v. Willard*, 13 N. H. 389. See also *Great Falls Co. v. Worster*, 15 N. H. 452.

New York. — *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Tefft v. Munson*, 57 N. Y. 97.

Texas. — *Morris v. Housley*, (Tex. Civ. App. 1896) 34 S. W. Rep. 659, *Johnson v. Foster*, (Tex. Civ. App. 1896) 34 S. W. Rep. 821; *Hale v. Hollon*, 14 Tex. Civ. App. 96.

Vermont. — *Jarvis v. Aikens*, 25 Vt. 635.

In *Knight v. Thayer*, 125 Mass. 25, it was said: "It has been the settled law of this commonwealth for nearly forty years that, under a deed with covenants of warranty from one capable of executing it, a title afterwards acquired by the grantor inures by way of estoppel to the grantee, not only as against the grantor, but also as against one holding

by descent or grant from him after acquiring the new title. *Somes v. Skinner*, 3 Pick. (Mass.) 52; *White v. Patten*, 24 Pick. (Mass.) 324; *Russ v. Alpaugh*, 118 Mass. 369, 19 Am. Rep. 464. We are aware that this rule, especially as applied to subsequent grantees, while followed in some states, has been criticised in others. * * * But it has been too long established and acted on in Massachusetts to be changed except by legislation."

W., who had been a member of the Kickapoo tribe of Indians, became a citizen of the United States, and thereafter executed a deed of conveyance, with the general covenants of warranty, for certain Indian lands in which he had an interest, but not the legal title, to one L., not an Indian, and to whom a conveyance of such lands was at the time not authorized by law. Subsequently the legal title to said lands becoming vested in W. with full power of conveyance, he executed another deed for the same to N., who took with notice by record of the prior deed. It was held that W. and his second grantee were estopped from setting up a title adverse to that attempted to be conveyed by the deed to L. *Letson v. Roach*, 5 Kan. App. 57.

In *Texas* it has been held that a covenant of warranty in a conveyance by one who has an expectant estate in lands binds the vendor at the time of the covenant, and neither he nor subsequent purchasers and creditors with notice can hold the after-acquired title; and that, under Rev. Stat. 1895, art. 4639, authorizing the record of all "deeds, mortgages, conveyances, deeds of trust, bonds for title, covenants, defeasances, or other instruments of writing concerning any lands or tenements, or goods and chattels, or movable property of any description," such a conveyance is an "instrument in writing concerning lands" and the statute authorized its registration, and, when recorded, it is notice to creditors of and subsequent purchasers from the vendor. *Hale v. Hollon*, 14 Tex. Civ. App. 96. To the same effect see *Johnson v. Foster*, (Tex. Civ. App. 1896) 34 S. W. Rep. 821. See also *Morris v. Housley*, (Tex. Civ. App. 1896) 34 S. W. Rep. 659.

4. Rule that Record Is Constructive Notice Criticised. — *Way v. Arnold*, 18 Ga. 181; *Faircloth v. Jordan*, 18 Ga. 352; *Dodd v. Williams*, 3

(4) *For Whose Benefit Estoppel Operates.* — A grantor who has executed a deed with the ordinary covenants that run with the land has been held to be estopped from setting up an after-acquired title, not only as against the grantee, but against any person who has succeeded to the title of his grantee, although such person has succeeded to such title in some other way than by a warranty deed.¹ Thus, for instance, such a grantor is estopped as against the heirs of his grantee.² Also, he is estopped as against a purchaser at a sheriff's sale on an execution against his grantee.³ In fact, he is estopped as against every person holding under or in privity with the grantee.⁴

(5) *Whether Title Actually Passes by Operation of Law* — **Common-law Conveyances.** — By the common law there were only two classes of conveyances which were held to operate an actual transfer of an after-acquired estate. Such an operation was given to conveyances by feoffment, by fine, or by common recovery,⁵ on account of their solemnity and publicity, and to those by indenture of lease,⁶ from the implied covenants arising from such indenture.

Conveyances Operating under Statute of Uses. — With respect to ordinary conveyances operating under the statute of uses the rule in *England*⁷ and in some jurisdictions in this country⁸ is that if a person conveys land with general

Mo. App. 278; *Calder v. Chapman*, 52 Pa. St. 359, 91 Am. Dec. 163.

In *Calder v. Chapman*, 52 Pa. St. 359, 91 Am. Dec. 163, C. purchased a tract of land, excepting out of it a described lot, and afterwards mortgaged the whole, not making any exception of the lot, and subsequently became owner of the lot. After this, a mortgage was entered against him under which the lot was sold, and after the sale the whole tract was sold under the mortgage. It was held that the purchaser under the judgment acquired the title to the lot.

In *Bingham v. Kirkland*, 34 N. J. Eq. 234, in commenting upon the doctrine announced by the cases in the preceding note, the court said: "It would involve a search against every person whom the title in its transmission had ever touched, not merely for the period during which such person held the title, but for a period anterior thereto, during which any incumbrance might have been made and still exist. Such a construction of the scope of the constructive notice imputed to a subsequent purchaser by our recording acts is opposed to the sentiment of the bar of this state as it has existed from the earliest period of their enactment. The system of searching practiced, so far as I know or have been informed, without any deviation, has been to trace the line of record title, and search against each owner during the period that he held the title. The titles to the real estate in the state rest upon searches made in conformity to this view. And it is a sensible view. No one is supposed to convey or encumber property which he does not own. *Non dat qui non habet*. A person would, therefore, naturally fail to inquire what some person had done about a property in which he had no interest."

1. *Scoffins v. Grandstaff*, 12 Kan. 473.

2. **Operation of Estoppel for Benefit of Grantee's Heirs.** — *Jones v. King*, 25 Ill. 383, *Logan v. Moore*, 7 Dana (Ky.) 74; *Lawry v. Williams*, 13 Me. 281; *Trull v. Eastman*, 3 Met. (Mass.) 121, 37 Am. Dec. 126.

3. **Purchaser from Grantee at Sheriff's Sale.** — *Dodge v. Walley*, 22 Cal. 225, 83 Am. Dec. 61; *Dickerson v. Talbot*, 14 B. Mon. (Ky.) 60;

Brundred v. Walker, 12 N. J. Eq. 140; *Kellogg v. Wood*, 4 Paige (N. Y.) 578; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.

4. See *supra*, this section, *Persons Affected by Estoppel*.

5. **Feoffment, Fine, or Recovery Transfers After-acquired Title.** — *Doe v. Oliver*, 10 B. & C. 181, 21 E. C. L. 50; *Helps v. Hereford*, 2 B. & Ald. 242; *Doe v. Jones*, 1 Crompt. & J. 528; *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449; *Doe v. Dowdall*, 3 Houst. (Del.) 377.

In *Salem Imp. Co. v. McCourt*, 26 Oregon 103, the court said: "At common law, when the mode of assurance was a feoffment, fine, or common recovery, an estate actually passed by the operation of the doctrine of estoppel, which not only divested the party of what interest he then had in the land, but of every estate which he might thereafter by any possibility acquire."

6. **Transfer of After-acquired Title by Lease by Indenture.** — *Rawlyn's Case*, 4 Coke 53; *Weale v. Lower*, Pollexf. 60; *Smith v. Low*, 1 Atk. 490; *Webb v. Austin*, 7 M. & G. 701, 49 E. C. L. 701; *Trevivan v. Lawrence*, 1 Salk. 276; *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449; *Doe v. Dowdall*, 3 Houst. (Del.) 377; *McKenzie v. Lexington v. Dana* (Ky.) 129.

7. **Doctrine that Covenants Create Estoppel as to After-acquired Title.** — *General Finance, etc., Co. v. Liberator Permanent Ben. Bldg. Soc.*, 10 Ch. Div. 15; *Heath v. Crealock*, L. R. 18 Eq. 215, *affirmed* L. R. 10 Ch. 30; *Lloyd v. Lloyd*, 4 Dr. & War. 369; *Right v. Bucknell*, 2 B. & Ad. 278, 22 E. C. L. 73 (denying the authority of *Bensley v. Burdon*, 2 Sim. & S. 524); *Taylor v. Dabar*, 1 Ch. Cas. 274. See also *Noel v. Bewley*, 3 Sim. 103, *Trust, etc., Co. v. Covert*, 32 U. C. Q. B. 222.

8. *M'Williams v. Nisly*, 2 S. & R. (Pa.) 507, 7 Am. Dec. 654; *Chew v. Barnett*, 11 S. & R. (Pa.) 389; *Clark v. Martin*, 49 Pa. St. 303; *Collins's Appeal*, 107 Pa. St. 603; *Tyler v. Moore*, (Pa. 1886) 17 Atl. Rep. 217; *Burtner v. Keran*, 24 Gratt. (Va.) 66. Compare *Brown v. McCormick*, 6 Watts (Pa.) 64.

In *Burtner v. Keran*, 24 Gratt. (Va.) 66, the court said: "The proposition here asserted is

warranty and does not own it at the time, but afterwards acquires the same land, such acquisition inures to the benefit of the grantee, because the grantor is estopped to deny against the terms of his warranty that he had the title in question, and gives a right to the warrantee to have the subsequently acquired title transferred to him, but it does not operate actually to transfer the estate subsequently acquired. The prevailing rule, however, in this country, upon this question, would seem to be that when one conveys land with warranty of title, or in such manner as to be estopped to dispute the title of his grantee, a title subsequently acquired to that land will pass *eo instanti* to his warrantee; ¹

that where a deed is executed containing a covenant of warranty, and the vendor afterwards acquires an estate which is within the scope of the covenant, such after-acquired estate inures to and is actually transferred to, the purchaser, by operation of the doctrine of estoppel. In other words, the warranty creates an estoppel which takes effect on the subsequent interest, and passes it to the vendee. Now, this proposition may be correct when applied to fines, feoffments, and other common-law recoveries. In this class of cases it seems that the warranty not only concluded the grantor or feoffor, but it possessed the high function of actually transferring the after-acquired estate or interest. But deeds of bargain and sale, and other conveyances operating under the statute of uses, have never had any such effect. They only pass such estate as the grantor has at the time; the warranty merely serving as a remedy, or operating to estop the party from denying the ownership of the estate at the time of the conveyance executed. In such cases the principle of the estoppel is that if a person conveys land with general warranty, and does not own it at the time, but afterwards acquires the same land, such acquisition inures to the benefit of the grantee; because the grantor is estopped to deny, against the terms of his warranty, that he had the title in question; but it does not operate actually to transfer the estate subsequently acquired. I admit that this view is not in accordance with a number of American decisions, which give to the estoppel the effect of passing an interest; but it is sustained by the English cases, by many well-considered decisions in the United States, and by the most approved text-writers of the present day."

1. Rule in United States as to Transfer of After-acquired Title by Operation of Covenant — *Alabama*. — Kennedy v. M'Cartney, 4 Port. (Ala.) 141; Tillotson v. Kennedy, 5 Ala. 413, 39 Am. Dec. 330; Bean v. Welch, 17 Ala. 772; Blakelee v. Mobile L. Ins. Co., 57 Ala. 205; Doolittle v. Robertson, 109 Ala. 412.

Arkansas. — Watkins v. Wassell, 15 Ark. 73.

California. — Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; Klumpke v. Baker, 68 Cal. 559.

Connecticut. — Hoyt v. Dimon, 5 Day (Conn.) 479; Dudley v. Cadwell, 19 Conn. 226; Sherwood v. Barlow, 19 Conn. 476.

Delaware. — Doe v. Dowdall, 3 Houst. (Del.) 377.

Georgia. — O'Bannon v. Paremour, 24 Ga. 493.

Illinois. — King v. Gilson, 32 Ill. 348, 83 Am. Dec. 269.

Indiana. — Hannah v. Collins, 94 Ind. 201; Randall v. Lower, 98 Ind. 255; Johnson v.

Bedwell, 15 Ind. App. 236; Frain v. Burgett, (Ind. 1898) 50 N. E. Rep. 876.

Kentucky. — Massie v. Sebastian, 4 Bibb (Ky.) 436; Logan v. Moore, 7 Dana (Ky.) 76; Logan v. Steele, 4 T. B. Mon. (Ky.) 433; Dickerson v. Talbot, 14 B. Mon. (Ky.) 49; Perkins v. Coleman, 90 Ky. 611.

Maine. — Fairbanks v. Williamson, 7 Me. 96; Lawry v. Williams, 13 Me. 281; Baxter v. Bradbury, 20 Me. 260; Pike v. Galvin, 29 Me. 183; Williams v. Thurlow, 31 Me. 395; Read v. Fogg, 60 Me. 479.

Massachusetts. — Blanchard v. Brooks, 12 Pick. (Mass.) 47; Comstock v. Smith, 13 Pick. (Mass.) 116, 23 Am. Dec. 670; White v. Patten, 24 Pick. (Mass.) 324; Trull v. Eastman, 3 Met. (Mass.) 121, 37 Am. Dec. 126; Wade v. Lindsey, 6 Met. (Mass.) 413; Gibbs v. Thayer, 6 Cush. (Mass.) 30; Ruggles v. Barton, 13 Gray (Mass.) 506; Farnum v. Peterson, 111 Mass. 148; Russ v. Alpaugh, 118 Mass. 376, 19 Am. Rep. 464; Knight v. Thayer, 125 Mass. 25.

Michigan. — Shotwell v. Harrison, 22 Mich. 410; Lee v. Clary, 38 Mich. 223; Smith v. Williams, 44 Mich. 240; Haney v. Roy, 54 Mich. 635; Brayton v. Merithew, 56 Mich. 166; La Cess v. Wadsworth, 56 Mich. 421; People v. Miller, 79 Mich. 93; Pendill v. Marquette County Agricultural Soc., 95 Mich. 491; Naylor v. Minock, 96 Mich. 182, 35 Am. St. Rep. 595; Duffy v. White, (Mich. 1897) 73 N. W. Rep. 363.

Minnesota. — Hooper v. Henry, 31 Minn. 264.

Mississippi. — Wightman v. Doe, 24 Miss. 675; Clark v. Slaughter, 34 Miss. 65; Mitchell v. Woodson, 37 Miss. 578; Kaiser v. Earhart, 64 Miss. 402; Edwards v. Hillier, 70 Miss. 803.

New Hampshire. — Thorndike v. Norris, 24 N. H. 454; Jewell v. Porter, 31 N. H. 39; Kimball v. Schoff, 4 N. H. 190; Kimball v. Blaisdell, 5 N. H. 533, 22 Am. Dec. 476; Wark v. Willard, 13 N. H. 389; Hayes v. Tabor, 41 N. H. 521.

New Jersey. — Brundred v. Walker, 12 N. J. Eq. 140; Moore v. Rake, 26 N. J. L. 574; Gough v. Bell, 21 N. J. L. 157; Vreeland v. Blauvelt, 23 N. J. Eq. 483; Matthiessen, etc., Sugar Refining Co. v. Jersey City, 26 N. J. Eq. 247.

New York. — Teft v. Munson, 57 N. Y. 99; Jackson v. Winslow, 9 Cow. (N. Y.) 18; Kellogg v. Wood, 4 Paige (N. Y.) 578; Sparrow v. Kingman, 1 N. Y. 246; Rathbun v. Rathbun, 6 Barb. (N. Y.) 107; Mickles v. Dillaye, 15 Hun (N. Y.) 296.

North Carolina. — Bell v. Adams, 81 N. Car. 118.

Ohio. — Patterson v. Pease, 5 Ohio 190; Douglass v. Scott, 5 Ohio 195; Scott v. Douglass, 7 Ohio (pt. i.) 227; Barton v. Morris,

and this effect has been given to an estoppel created by a recital or averment in a deed, though without covenants of warranty.¹ In *Canada* also this doctrine seems to obtain.²

By Statute in several of the states provision is made for the passing of an after-acquired title where the deed purports to convey an interest of which the grantor was not at the time possessed.³

15 Ohio 408; *Pollock v. Speidel*, 27 Ohio St. 86; *Broadwell v. Phillips*, 30 Ohio St. 255; *Hart v. Gregg*, 32 Ohio St. 502.

Oregon. — *Taggart v. Risley*, 3 Oregon 306; *Wilson v. McEwan*, 7 Oregon 87.

Rhode Island. — *Potter v. Potter*, 1 R. I. 44; *McCusker v. McEvey*, 9 R. I. 528, 11 Am. Rep. 295; *Bailey v. Hoppin*, 12 R. I. 560.

South Carolina. — *Starke v. Harrison*, 5 Rich. L. (S. Car.) 7; *Davis v. Keller*, 5 Rich. Eq. (S. Car.) 434; *Harvin v. Hodge*, *Dudley L.* (S. Car.) 23; *Reeder v. Craig*, 3 M'Cord L. (S. Car.) 411; *Wingo v. Parker*, 19 S. Car. 9.

South Dakota. — *Johnson v. Brauch*, 9 S. Dak. 116.

Tennessee. — *Birdwell v. Cain*, 1 Coldw. (Tenn.) 303; *Susong v. Williams*, 1 Heisk. (Tenn.) 630; *Robertson v. Gaines*, 2 Humph. (Tenn.) 383; *Gookin v. Graham*, 5 Humph. (Tenn.) 480; *Coal Creek Min., etc., Co. v. Ross*, 12 Lea (Tenn.) 1; *Henderson v. Overton*, 2 Yerg. (Tenn.) 394, 24 Am. Dec. 492; *Woods v. Bonner*, 89 Tenn. 411.

Texas. — *Gould v. West*, 32 Tex. 354; *Ackerman v. Smiley*, 37 Tex. 211; *Harrison v. Borink*, 44 Tex. 255; *Robinson v. Douthit*, 64 Tex. 101; *Paxton v. Meyer*, 67 Tex. 96; *Lindsay v. Freeman*, 83 Tex. 259; *Barroum v. Culmell*, 90 Tex. 93; *Morris v. Housley*, (Tex. Civ. App. 1896) 34 S. W. Rep. 659; *Johnson v. Foster*, (Tex. Civ. App. 1896) 34 S. W. Rep. 821; *Burkett v. Twyman*, (Tex. Civ. App. 1896) 35 S. W. Rep. 421; *Hale v. Hollon*, 14 Tex. Civ. App. 96; *Baldwin v. Root*, 90 Tex. 546; *Miller v. Gist*, 91 Tex. 335.

Vermont. — *Middlebury College v. Cheney*, 1 Vt. 349; *Blake v. Tucker*, 12 Vt. 44; *Cross v. Martin*, 46 Vt. 14; *Goodenough v. Fellows*, 53 Vt. 102.

Washington. — *Mann v. Young*, 1 Wash. Ter. 454.

West Virginia. — *Mitchell v. Petty*, 2 W. Va. 470, 98 Am. Dec. 777.

Wisconsin. — *Pierce v. Milwaukee, etc., R. Co.*, 24 Wis. 553, 1 Am. Rep. 203; *Wiesner v. Zaun*, 39 Wis. 188.

Where a grantor makes a conveyance with covenants of warranty, and afterwards acquires title to the property conveyed, the law will not only treat the after-acquired title as being in the former grantor in trust for his grantee and hold him estopped from asserting it as against the latter or others claiming through him, but it will consider and treat it as though it had actually passed at the time of the conveyance under the warranty deed. *Frain v. Burgett*, (Ind. 1898) 50 N. E. Rep. 876.

1. **Recital Operating on After-acquired Title.** — *Lindsay v. Freeman*, 83 Tex. 263; *Dupree v. Frank*, (Tex. Civ. App. 1897) 39 S. W. Rep. 994. *Compare* *Burtner v. Keran*, 24 Gratt. (Va.) 42; *Reynolds v. Cook*, 83 Va. 821, 5 Am. St. Rep. 317; *Nye v. Lovitt*, 92 Va. 710.

2. *Boulter v. Hamilton*, 15 U. C. C. P. 125.

3. **Thus under the Code of Iowa** (1897), § 2915, it is provided that where a deed purports to convey a greater interest than that of which the grantor was at the time possessed, any after-acquired interest of such grantor to the extent of that which the deed purports to convey inures to the benefit of the grantee. *Nicodemus v. Young*, 90 Iowa 423. See also *Thomas v. Stickle*, 32 Iowa 72.

By the Statute of Nebraska, 1893, c. 73, § 51, it is provided that when a deed purports to convey a greater interest than that of which the grantor was at the time possessed, any after-acquired interest of such grantor to the extent of that which the deed purports to convey shall accrue to the benefit of the grantee. *Pillsbury v. Alexander*, 40 Neb. 242.

Under the General Statutes of Colorado, 1883, c. 18, § 201, it is provided that "if any person shall sell and convey to another, by deed or conveyance purporting to convey an estate in fee simple absolute, any tract of land or real estate lying and being in this state, not being possessed of the legal estate or interest therein at the time of the sale and conveyance, and after such sale and conveyance the vendor shall become possessed of and confirmed in the legal estate of the land or real estate so sold and conveyed, it shall be taken and held to be in trust and for the use of the grantee or vendee, and the conveyance aforesaid shall be held and taken and shall be as valid as if the grantor or vendor had the legal estate or interest at the time of said sale or conveyance." *Phillippi v. Leet*, 19 Colo. 246.

In Missouri a similar statutory provision prevails, and under this statute it has been held that where a conveyance has been made by a deed of general warranty, any title to the land subsequently acquired by the grantor will, by operation of law, inure to the grantee or his assigns. *Bogy v. Shoab*, 13 Mo. 381; *Norfleet v. Russell*, 64 Mo. 176; *Fordyce v. Rapp*, 131 Mo. 366.

By Statute in California it is provided that if any person shall convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not, at the time of such conveyance, have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantee at the time of such conveyance. *Morrison v. Wilson*, 30 Cal. 344; *De Frieze v. Quint*, 94 Cal. 653, 28 Am. St. Rep. 151; *Clark v. Baker*, 14 Cal. 613, 76 Am. Dec. 349; *Dodge v. Walley*, 22 Cal. 228, 83 Am. Dec. 61; *Belcher Consol. Gold Min. Co. v. Desferrari*, 62 Cal. 160.

Under the Code of Georgia, 1895, § 3609, the maker of a deed cannot subsequently claim adversely to his deed under a title acquired since the making thereof. He is estopped

Inurement of Title at Election of Grantee. — But the doctrine that where a grantor has made a conveyance with covenants, a subsequently acquired title will inure to the benefit of the grantee has, by the prevailing authorities, been restricted to this extent; that where the conveyance has been made and the grantee has been wholly evicted from the premises by a title paramount, the grantor cannot, after such entire eviction of the grantee, purchase the title paramount and compel the grantee to take the same against his will, either in satisfaction of the covenants or in mitigation of damages for the breach thereof.¹ But it seems that this qualification of the general rule will not apply where the grantor purchased a paramount title before the grantee had been evicted or suffered any actual injury from the breach of covenants.²

IV. ESTOPPEL IN PAIS — 1. General Statement. — At the common law

from denying his right to sell and convey. *Crawford v. Mobile, etc., R. Co.*, 67 Ga. 420.

In Illinois, by statute (*Starr & Curt. Annot.*, Stat. Ill. 1896, c. 30, par. 7), it is provided that "if any person shall sell and convey to another by deed or conveyance purporting to convey an estate in fee simple absolute in any tract of land or real estate lying and being in this state, not then being possessed of the legal estate or interest therein at the time of the sale and conveyance, but after such sale and conveyance the vendor shall become possessed of and confirmed in the legal estate to the land or real estate so sold and conveyed, it shall be taken and held to be in trust and for the use of the grantee or vendee, and the conveyance aforesaid shall be held and taken and shall be as valid as if the grantor or vendor had the legal estate or interest at the time of said sale or conveyance." See *Frink v. Darst*, 14 Ill. 304, 58 Am. Dec. 575; *Hitchcock v. Fortier*, 65 Ill. 239; *Bybee v. Hageman*, 66 Ill. 519; *Wadhams v. Gay*, 73 Ill. 415; *Welch v. Dutton*, 79 Ill. 465; *Chicago, etc., R. Co. v. Chamberlain*, 84 Ill. 333; *Edwardsville R. Co. v. Sawyer*, 92 Ill. 377; *Holbrook v. Debo*, 99 Ill. 372; *Lewis v. Pleasants*, 143 Ill. 271; *Guerlin v. Mombleau*, 144 Ill. 32; *Way v. Roth*, 159 Ill. 162; *Whitson v. Grosvenor*, 170 Ill. 271.

Under the *Statutes of Arkansas* (ed. 1894, § 699) it is provided that "if any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance." *Cocke v. Brogan*, 5 Ark. 693; *Holland v. Rogers*, 33 Ark. 251; *Watkins v. Wassell*, 15 Ark. 73.

In *Kansas* the statute (*Gen. Stat.* 1897, c. 117, § 7) provides that "where a grantor by the terms of his deed undertakes to convey to the grantee an indefeasible estate in fee simple absolute, and shall not at the time of such conveyance have the legal title to the estate sought to be conveyed, but shall afterwards acquire it, the legal estate subsequently acquired by him shall immediately pass to the grantee, and such conveyance shall be as effective as though such legal estate had been in the grantor at the time of the conveyance." See *Scoffins v. Grandstaff*, 12 Kan. 467.

1. Inurement of Subsequently Acquired Title at Election of Grantee. — *Burton v. Reeds*, 20 Ind. 92; *Bethell v. Bethell*, 92 Ind. 328; *Blanchard v. Ellis*, 1 Gray (Mass.) 195; *Resser v. Carney*, 52 Minn. 397; *Bingham v. Weiderwax*, 1 N. Y. 513; *Shattuck v. Lamb*, 65 N. Y. 499, 22 Am. Rep. 656; *Nichol v. Alexander*, 28 Wis. 118.

2. Purchase of Paramount Title Before Eviction. — *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 269; *Baxter v. Bradbury*, 20 Me. 260; *Reese v. Smith*, 12 Mo. 344; *M'Carty v. Leggett*, 3 Hill (N. Y.) 134; *Noonan v. Hsley*, 21 Wis. 140. For a further discussion of this question in its application to damages, see the title *COVENANTS*, vol. 8, p. 194.

Where Grantee Has Not Been Evicted. — In *Baxter v. Bradbury*, 20 Me. 260, it was held that if a grantor by deed of warranty had nothing in the estate at the time of the conveyance, but acquires a title afterwards, this title inures to the grantee immediately by way of estoppel, and he cannot elect to reject the title and recover the consideration money paid in an action for breach of the covenant of seizin; but is entitled to merely nominal damages where no interruption of the possession has taken place.

In *Blanchard v. Ellis*, 1 Gray (Mass.) 201, the court said: "We are satisfied, upon examination of the authorities, that no case will be found which carries the doctrine of estoppel to the length claimed by the defendants, which, in fact, estops the grantee and leaves a right of election in the grantor. The case of *Baxter v. Bradbury*, 20 Me. 260, has been strongly pressed upon us as a decision of the very question at issue. * * * But though there are dicta in that case which state the doctrine very broadly, the case itself differs materially from the one at bar. That was an action for a breach of the covenant of seizin in a deed of warranty, with a mortgage back of the premises, of the same date, to the grantor. The ground taken by the counsel of the defendant, and upon which the court seem to have proceeded in their judgment, was that there never had been any interruption of the possession of the plaintiff. In seeking to deduce from that case a rule for our guidance, this circumstance must be deemed most material, as, for a breach of this covenant against incumbrances, nominal damages only could be recovered, unless the plaintiff had been evicted by title paramount or had actually discharged the incumbrance."

estoppels were confined, except in a few special cases, to those arising from deeds and records of courts. Mere acts, statements, or admissions of a party, when not performed or made under seal or of record, or in some of those ways to which peculiar authority is attached by law, were not at common law considered as estoppels, and had no other weight than that of evidence more or less important, but which might be explained or rebutted.¹ But the common-law rule was found to be inadequate for the attainment of equity, and hence the equitable estoppel or estoppel *in pais* of the present day. While this doctrine of estoppel *in pais* originated in courts of equity, it is now very generally applied in cases arising in courts of law.² And it is no longer regarded as merely a technical rule of evidence, but as a part of the substantial law which regulates rights and duties.³

2. Misrepresentation or Concealment of Facts — a. IN GENERAL. — The most usual application of the doctrine of estoppel *in pais* arises from the misrepresentation or concealment of material facts on the part of the person to be estopped. Thus, it is a well-settled rule of equity which has been adopted by the courts of law that where A has, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induced B to believe certain facts to exist, and B has rightfully acted on this belief, so that he will be prejudiced if A is permitted to deny the existence of such facts, A is conclusively estopped to interpose a denial thereof.⁴

1. Limited Use of Estoppels in Pais at Common Law. — West Winsted Sav. Bank *v.* Ford, 27 Conn. 282, 71 Am. Dec. 66.

In Co. Litt. 352*a* estoppels by matter *in pais* were enumerated as follows: By livery, by entry, by acceptance of rent, by partition, and by acceptance of an estate.

2. Estoppel in Pais Administered in Courts of Law. — Kirk *v.* Hamilton, 102 U. S. 77; Brown *v.* Cranberry Iron, etc., Co., 25 U. S. App. 679, 692; West Winsted Sav. Bank *v.* Ford, 27 Conn. 282, 71 Am. Dec. 66; Martin *v.* Maine Cent. R. Co., 83 Me. 104; Barnard *v.* German-American Seminary, 49 Mich. 444; Vermont Copper Min. Co. *v.* Ormsby, 47 Vt. 709; Sweeney *v.* Pacific Coast Elevator Co., 14 Wash. 562. Compare Mills *v.* Graves, 38 Ill. 456, 87 Am. Dec. 314. See also the title EJECTMENT, vol. 10, pp. 483, 535.

In Barnard *v.* German-American Seminary, 49 Mich. 444, Cooley, J., said: "Estoppels *in pais* are called equitable estoppels, not because their recognition is peculiar to equitable tribunals, but because they arise upon facts which render their application in the protection of rights equitable and just. Courts of equity recognize them in cases of equitable cognizance, but the courts of common law just as readily and freely, * * * and it is never necessary to go into equity for the mere purpose of obtaining the benefit of an equitable estoppel when the case is not otherwise of equitable jurisdiction."

3. Martin *v.* Maine Cent. R. Co., 83 Me. 104.

4. Estoppel by Misrepresentation or Concealment of Facts — England. — Carr *v.* London, etc., R. Co., L. R. 10 C. P. 316; Pickard *v.* Sears, 6 Ad. & El. 469, 33 E. C. L. 115.

United States. — Michigan Ins. Bank *v.* Eldred, 6 Biss. (U. S.) 373; Union Pac. R. Co. *v.* U. S., 32 U. S. App. 318; Paxson *v.* Brown, 27 U. S. App. 49; Union Pac. R. Co. *v.* U. S., 32 U. S. App. 311.

Alabama. — Strange *v.* Watson, 11 Ala. 324;

Leinkauff *v.* Munter, 76 Ala. 194; Bain *v.* Wells, 107 Ala. 562.

Arkansas. — Prater *v.* Frazier, 11 Ark. 249; Jowers *v.* Phelps, 33 Ark. 465.

California. — Hostler *v.* Hays, 3 Cal. 302; Davis *v.* Davis, 26 Cal. 23, 85 Am. Dec. 157; Bowman *v.* Cudworth, 31 Cal. 148; Lux *v.* Haggin, 69 Cal. 367; Pope *v.* J. K. Armsby Co., 111 Cal. 159.

Colorado. — Birch *v.* Steppler, 11 Colo. 407; Colorado L. & T. Co. *v.* Grand Valley Canal Co., 3 Colo. App. 63.

Connecticut. — Brown *v.* Wheeler, 17 Conn. 345, 44 Am. Dec. 550; Kinney *v.* Farnsworth, 17 Conn. 355; Roe *v.* Jerome, 18 Conn. 138; Giddings *v.* Emerson, 24 Conn. 539; Preston *v.* Mann, 25 Conn. 118.

Delaware. — Wilmington Bank *v.* Wollaston, 3 Harr. (Del.) 99; Inskeep *v.* Shields, 4 Harr. (Del.) 346; Lewis *v.* Cox, 5 Harr. (Del.) 401; Doe *v.* Dowdall, 3 Houst. (Del.) 369; Marvel *v.* Ortlip, 3 Del. Ch. 9.

Florida. — Cotten *v.* Williams, 1 Fla. 42; Coogler *v.* Rogers, 25 Fla. 853; Terrell *v.* Weymouth, 32 Fla. 255, 37 Am. St. Rep. 94.

Georgia. — Reeves *v.* Matthews, 17 Ga. 449; Parsons *v.* Atlanta University, 44 Ga. 529.

Idaho. — Leland *v.* Isenbeck, 1 Idaho 469.

Illinois. — Dinot *v.* Eilert, 13 Ill. App. 99; Curtis *v.* Root, 20 Ill. 518; Knoebel *v.* Kircher, 33 Ill. 308; Otto *v.* Jackson, 35 Ill. 349; Davidson *v.* Young, 38 Ill. 152; Mills *v.* Graves, 38 Ill. 465, 87 Am. Dec. 314; Hefner *v.* Vandolah, 57 Ill. 520, 11 Am. Rep. 39; Quincy First Nat. Bank *v.* Ricker, 71 Ill. 439; Gillett *v.* Wiley, 126 Ill. 310, 9 Am. St. Rep. 587; Casler *v.* Byers, 129 Ill. 657; Washington Home *v.* Chicago, 157 Ill. 414; Franklin *v.* McDonald, 58 Ill. App. 230.

Indiana. — Dakin *v.* Anderson, 18 Ind. 54; Fletcher *v.* Holmes, 25 Ind. 458; Greensburgh, etc., Turnpike Co. *v.* Sidener, 40 Ind. 424.

Kansas. — Doorley *v.* Farmers, etc., Lumber Co., 4 Kan. App. 99.

The Primary Ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct has denied, when others have acted on the faith of that denial. The element of fraud is essential, either in the intention of the party estopped or in the effect of the evidence which he attempts to set up.¹

Applications of the Doctrine — Owner Representing Third Person as Owner. — Where the owner or person having an interest in property represents another as the owner, or permits him to appear as such, or as having complete authority over it, he will be estopped to deny such ownership or authority against persons who, relying on his representations or silence, have purchased or acquired interests in the property.² But a party cannot be held estopped by matters

Michigan. — Meister v. Birney, 24 Mich. 435.

Minnesota. — Pence v. Arbuckle, 22 Minn. 420; Townsend v. Johnson, 34 Minn. 415; Tousley v. Board of Education, 39 Minn. 419; Nell v. Dayton, 43 Minn. 242; Norman v. Eckern, 60 Minn. 531.

Missouri. — Blodgett v. Perry, 97 Mo. 263, 10 Am. St. Rep. 307; International Bank v. German Bank, 3 Mo. App. 371; Fowler v. Carr, 63 Mo. App. 486.

Montana. — Elkhorn Trading Co. v. Tacoma Min. Co., 16 Mont. 322.

Nebraska. — Grant v. Cropsey, 8 Neb. 205; Newman v. Mueller, 16 Neb. 523; Kirkendall v. Davis, 41 Neb. 291; Cain v. Boller, 41 Neb. 721; Brown v. Eno, 48 Neb. 538.

New Hampshire. — Haynes v. Stevens, 11 N. H. 31.

New Jersey. — Demarest v. Den, 22 N. J. L. 619.

New York. — Ruse v. Mutual Ben. L. Ins. Co., 26 Barb. (N. Y.) 561; Reynolds v. Garner, 66 Barb. (N. Y.) 312; Frost v. Saratoga Mut. Ins. Co., 5 Den. (N. Y.) 157, 49 Am. Dec. 234; Dezell v. Odell, 3 Hill (N. Y.) 215, 38 Am. Dec. 628; Sparrow v. Kingman, 1 N. Y. 256; Brown v. Bowen, 30 N. Y. 540, 86 Am. Dec. 406; Shapley v. Abbott, 42 N. Y. 447, 1 Am. Rep. 548; Baker v. Union Mut. L. Ins. Co., 43 N. Y. 283; New York Rubber Co. v. Rothery, 107 N. Y. 316, 1 Am. St. Rep. 822; Harbeck v. Pupin, 145 N. Y. 79; Tompkins v. Hartford F. Ins. Co., 22 N. Y. App. Div. 386. See also Mattoon v. Young, 45 N. Y. 696.

Ohio. — Cleveland, etc., R. Co. v. Reid, 6 Ohio Dec. 285; Ensel v. Levy, 46 Ohio St. 255.

Oregon. — Snell v. Baker City Bank, 29 Oregon 250.

South Carolina. — Gaston v. Brandenburg, 42 S. Car. 348.

Tennessee. — Russell v. Colyar, 4 Heisk. (Tenn.) 192.

Texas. — Blum v. Merchant, 58 Tex. 403; New York, etc., Land Co. v. Gardner, 11 Tex. Civ. App. 404; Stratton-White Co. v. Castleberry, 15 Tex. Civ. App. 149; Watkins Land, etc., Co. v. Howeth, 1 Tex. Civ. App. 279.

Utah. — Brigham Young Trust Co. v. Wagener, 12 Utah 11.

Vermont. — Hicks v. Cram, 17 Vt. 449. See also Wheeler v. Campbell, 68 Vt. 98.

Virginia. — Rorer Iron Co. v. Trout, 83 Va. 397, 5 Am. St. Rep. 285; Anderson v. Phlegar, 93 Va. 415.

West Virginia. — Bates v. Swiger, 40 W. Va. 420; Norfolk, etc., R. Co. v. Perdue, 40 W. Va. 454.

Wisconsin. — Norton v. Kearney, 10 Wis. 453.

1. Foundation of Doctrine of Estoppel by Misrepresentation — *United States.* — John Shillito Co. v. McClung, 6 U. S. App. 128; U. S. v. Winona, etc., R. Co., 32 U. S. App. 306; Tarver v. Stevenson, 32 U. S. App. 97.

Alabama. — Leinkauff v. Munter, 76 Ala. 194.

California. — Gunn v. Bates, 6 Cal. 263; McGarrity v. Byington, 12 Cal. 426; Carpentier v. Thirston, 24 Cal. 269; Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157; Farish v. Coon, 40 Cal. 33; Watson v. Sutro, 86 Cal. 500.

Georgia. — Markham v. O'Connor, 52 Ga. 183, 21 Am. Rep. 249; Pettitt v. Macon, 95 Ga. 645.

Illinois. — Curtis v. Root, 20 Ill. 518; Dordarque v. Cress, 71 Ill. 380; Robbins v. Moore, 129 Ill. 30; Knapp v. Jones, 143 Ill. 375; Holcomb v. Boynton, 151 Ill. 294, 49 Ill. App. 503; Campbell v. Goodall, 54 Ill. App. 24; Brayton v. Harding, 56 Ill. App. 362.

Indiana. — Kiefer v. Klinsick, 144 Ind. 46; Tinsley v. Fruits, 20 Ind. App. 534.

Maine. — American Gas, etc., Mach. Co. v. Wood, 90 Me. 522.

New Jersey. — Perkins v. Moorestown, etc., Turnpike Co., 48 N. J. Eq. 499.

New York. — Thompson v. Simpson, 128 N. Y. 288.

Pennsylvania. — Hill v. Epley, 31 Pa. St. 334.

Utah. — Brigham Young Trust Co. v. Wagener, 12 Utah 1.

In East Greenwich Sav. Inst. v. Kenyon, (R. I. 1897) 37 Atl. Rep. 632, it was said: "A person is estopped to set up the truth in contradiction to his conduct so as to make the truth an instrument of fraud."

2. Owner of Property Representing Third Person as Owner — *England.* — Pickard v. Sears, 6 Ad. & El. 469, 33 E. C. L. 115.

United States. — Kirk v. Hamilton, 102 U. S. 68.

Alabama. — Hendricks v. Kelly, 64 Ala. 388;

Powers v. Harris, 68 Ala. 410.

Arkansas. — Ryburn v. Pryor, 14 Ark. 505;

Jowers v. Phelps, 33 Ark. 465.

Colorado. — Yates v. Hurd, 8 Colo. 343; Birch

v. Steppler, 11 Colo. 400.

Connecticut. — Winton v. Hart, 39 Conn. 16;

Feltz v. Walker, 49 Conn. 93.

Florida. — Levy v. Cox, 22 Fla. 546.

Georgia. — McCune v. McMichael, 29 Ga.

312; Hill v. Williams, 33 Ga. 39; Pool v.

Lewis, 41 Ga. 162, 5 Am. Rep. 526; Osborn v.

Elder, 65 Ga. 360; Roberts v. Davis, 72 Ga.

819; Veal v. Robinson, 76 Ga. 838.

Illinois. — Keys v. Test, 33 Ill. 317; Winchell

in pais to assert title, unless he held the title at the time when it is claimed the estoppel was worked.¹

Invalid Contracts Induced by Representation. — A contract which is void, as, for instance, where it is prohibited by statute, cannot, as a general rule, in the absence of fraud, be made effectual by way of estoppel merely because it has been acted upon by one party and has not been performed by the other.² But if the execution of such ineffectual contract was induced by false representation or concealment of facts, the undertaking of the contractor making the representation may be given the effect as an estoppel which it wants as a contract.³

Effect of Estoppel. — It has been laid down as a general rule that the estoppel created by false representation acted upon is commensurate with the thing represented and operates to put the party entitled to the benefit of the estoppel in the same position as if the thing represented were true. Thus, when the

v. Edwards, 57 Ill. 41; *Stewart v. Munford*, 91 Ill. 58; *Robbins v. Moore*, 129 Ill. 30; *Williams v. Fletcher*, 129 Ill. 356; *Ellsworth v. Ellsworth*, 140 Ill. 509; *Burton v. Perry*, 146 Ill. 71.

Indiana. — *Bobbitt v. Shryer*, 70 Ind. 513.

Iowa. — *Miles v. Lefi*, 60 Iowa 168, *McMurray v. Hughes*, 82 Iowa 47.

Kansas. — *Hill v. Van Sandt*, 1 Kan. App. 367.

Kentucky. — *Alexander v. Ellison*, 79 Ky. 148; *Ratcliff v. Bellfonte Iron Works Co.*, 87 Ky. 559.

Louisiana. — *Montague v. Weil*, 30 La. Ann. 50.

Maine. — *Chapman v. Pingree*, 67 Me. 198.

Michigan. — *Sebright v. Moore*, 33 Mich. 92; *Stanton v. Estey Mfg. Co.*, 90 Mich. 12.

Minnesota. — *Hawkins v. Methodist Episcopal Church*, 23 Minn. 256.

Missouri. — *Rice v. Bunce*, 49 Mo. 231, 8 Am. Rep. 129.

Nebraska. — *Blodgett v. McMurtry*, 34 Neb. 785.

New Hampshire. — *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111.

New York. — *Howland v. Woodruff*, 60 N. Y. 73.

North Carolina. — *Redman v. Graham*, 80 N. Car. 231.

Pennsylvania. — *Burton's Appeal*, 93 Pa. St. 214.

South Carolina. — *Dunlap v. Gooding*, 22 S. Car. 548.

Texas. — *Nichols-Steuart v. Crosby*, 87 Tex. 451.

West Virginia. — *Bates v. Swiger*, 40 W. Va. 420.

1. *Marquart v. Bradford*, 43 Cal. 526.

2. **Void Contract Ineffectual by Way of Estoppel in Absence of Fraud.** — *Koch v. National Union Bldg. Assoc.*, 137 Ill. 497; *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340; *Langan v. Sankey*, 55 Iowa 52; *Brightman v. Hicks*, 108 Mass. 246; *Verdin v. St. Louis*, 131 Mo. 27; *Smith v. Smith*, 62 Mo. App. 596.

Conveyance of Married Woman Not in Compliance with Statute. — It seems to be the general rule that a married woman is not ordinarily estopped *in pais*, in the absence of fraud, from asserting title to her separate property on account of an ineffectual attempt to convey it under statute by reason of noncompliance therewith. *Harden v. Darwin*, 77 Ala. 472; *Louisville, etc., R. Co. v. Stephens*, 96 Ky.

404; *Wadkins v. Watson*, (Tex. Civ. App. 1893) 21 S. W. Rep. 636.

In *Harden v. Darwin*, 77 Ala. 481, the court said: "It has been uniformly held that a married woman is not estopped from asserting the invalidity of a conveyance of her property, not executed in the mode required by the statute, though she has received a valuable consideration, and her vendee has been let into possession; and that a court of equity will not enforce it against her, as an agreement to convey; and also that the court will intervene, in the absence of fraud, duress, or imprisonment, to annul and cancel a conveyance of her statutory separate estate, by mortgage or absolute deed, in consideration of the debt of her husband." *Blythe v. Dargin*, 68 Ala. 370; *Boyleston v. Farrior*, 64 Ala. 564."

For a further discussion of this question see the title HUSBAND AND WIFE.

Operation of Cancellation of Deed as Reconveyance. — Where a deed conveying real estate is executed and delivered, but unrecorded, the voluntary destruction or cancellation of the deed, with an intent to revest the estate in the grantor, will estop the grantee to claim the land under such conveyance, if such claim would operate as a fraud on his part; but in the absence of fraud no estoppel will arise. *Dukes v. Spangler*, 35 Ohio St. 126; *Jeffers v. Philo*, 35 Ohio St. 173; *Farrar v. Farrar*, 4 N. H. 191, 17 Am. Dec. 410; *Trull v. Skinner*, 17 Pick. (Mass.) 213. See also the title REFORMATION AND CANCELLATION OF INSTRUMENTS.

3. **Void Contract Induced by Misrepresentation.** — *Williams v. Paine*, 7 App. Cas. (D. C.) 116; *White v. Walker*, 31 Ill. 437.

A deed void for want of description may, by the acts and declarations of the grantor, when acted upon by the vendee, be cured of its vice by acts of ratification and recognition which, in equity, may estop the grantor from denying that the instrument conveys title. *Coker v. Roberts*, 71 Tex. 603; *Patterson v. Patterson*, (Tex. Civ. App. 1894) 27 S. W. Rep. 837.

Where a person sold a mortgage made by his father for a certain sum of money, representing it to be a good and valid mortgage, it was held that he could not afterwards be allowed to show, whether truthfully or not, that that mortgage was not good. *East Green-wich Sav. Inst. v. Kenyon*, (R. I. 1897) 37 Atl. Rep. 632.

Where the grantor in a deed induces the

representation is made on the sale of a chattel or security, it has been held that the remedy of the purchaser is not limited to a recovery simply of the money advanced, where he would have received a benefit beyond that if the fact had been as represented.¹

b. ESSENTIAL ELEMENTS — (1) *In General*. — To constitute an estoppel by misrepresentation or concealment of facts certain prerequisite facts must be proven.

Requisite Certainty as to Evidence. — As fraud is not presumed, but, when charged, must be strictly proven, the authorities uniformly hold that the evidence, to establish the essential elements of an estoppel by conduct or misrepresentation, must be clear, precise, and unequivocal.²

Peculiar Application of Rule to Controversies Regarding Real Estate. — And it has been held that this rule should be strictly applied where the estoppel is invoked against a claim to real estate. The doctrine is opposed to the letter of the statute of frauds, and would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light and doubtful character.³

Affirmative Proof Required. — It is held that the facts necessary to work an estoppel must appear affirmatively.⁴

(2) *The Representation* — (a) *In General*. — As a general rule, to establish an estoppel of this character it must appear that the person sought to be estopped has made a representation or concealment of material facts inconsistent with the evidence he proposes to give or the title he proposes to set up.⁵

grantee to believe that a deed had been executed which made him the owner of certain premises, and afterwards permits such grantee to act under this belief in the construction of valuable improvements on the land, he cannot then be allowed to say that the deed was in fact inoperative for want of a formal delivery. *Walker v. Walker*, 42 Ill. 311, 89 Am. Dec. 445.

1. *Effect of Estoppel by Misrepresentation*. — *Grissler v. Powers*, 81 N. Y. 61.

2. *Certainty Requisite as to Evidence of Essential Elements of Estoppel*. — *Mills v. Graves*, 38 Ill. 455, 87 Am. Dec. 314; *Patterson v. Hitchcock*, 3 Colo. 535; *Martin v. Maine Cent. R. Co.*, 83 Me. 100; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Bolling v. Petersburg*, 3 Rand. (Va.) 563.

Certainty Requisite as to Representation. — Thus it is a well-settled rule that the representation or act relied on to constitute an estoppel must be certain to every intent and is not to be sustained by argument or inference; it must be clearly inconsistent with the evidence which is proposed to be given or the right or title to be set up by the party to be estopped.

United States. — *Belle of the Sea*, 20 Wall. (U. S.) 421; *Burgess v. Seligman*, 107 U. S. 20. *Alabama*. — *Miller v. Hampton*, 37 Ala. 347. *Connecticut*. — *Townsend Sav. Bank v. Todd*, 47 Conn. 190.

Illinois. — *Walker v. Carleton*, 97 Ill. 582; *Tillotson v. Mitchell*, 111 Ill. 518.

Indiana. — *Tinsley v. Fruits*, 20 Ind. App. 534.

Iowa. — *Johnson v. Owen*, 33 Iowa 512; *Davenport Cent. R. Co. v. Davenport Gas Light Co.*, 43 Iowa 301.

Massachusetts. — *Moors v. Albro*, 129 Mass. 9.

Michigan. — *Fredenburg v. Lyon Lake M. E. Church*, 37 Mich. 476; *Michigan Paneling Mach., etc., Co. v. Parsell*, 38 Mich. 475; *Rust v. Bennett*, 39 Mich. 521; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453; *Bennett v. Dean*, 41 Mich. 472.

Mississippi. — *Roach v. Brannon*, 57 Miss. 490.

Missouri. — *International Bank v. German Bank*, 3 Mo. App. 362.

New York. — *Mojarrieta v. Saenz*, 80 N. Y. 547.

Pennsylvania. — *Keating v. Orme*, 77 Pa. St. 89.

Texas. — *Grinnan v. Dean*, 62 Tex. 218.

Wisconsin. — *Lawrence University v. Smith*, 32 Wis. 587.

3. *Application as Regards Real Estate*. — *Mills v. Graves*, 38 Ill. 455, 87 Am. Dec. 314; *Patterson v. Hitchcock*, 3 Colo. 535; *Martin v. Maine Cent. R. Co.*, 83 Me. 100; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Bolling v. Petersburg*, 3 Rand. (Va.) 563.

Estoppel in Pais Not Abrogated by Fraud. — But in *Bell v. Goodnature*, 50 Minn. 417, it was held that the statute of frauds has not abrogated the doctrine of estoppel as applied to purchasers of real estate.

4. *Affirmative Proof of Essential Elements Necessary*. — *Hill v. Epley*, 31 Pa. St. 331.

5. *Necessity of False Representation in General* — *Colorado*. — *Patterson v. Hitchcock*, 3 Colo. 533; *Griffith v. Wright*, 6 Colo. 248; *Birch v. Steppler*, 11 Colo. 407.

Illinois. — *Holcomb v. Boynton*, 151 Ill. 294; *Home Ins. Co. v. Bethel*, 42 Ill. App. 475.

Indiana. — *McGirr v. Sell*, 60 Ind. 252.

Minnesota. — *Norman v. Eckern*, 60 Minn. 531.

Missouri. — *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307; *Grabill v. Bearden*, 62 Mo. App. 459.

New Hampshire. — *Pittsburg v. Danforth*, 56 N. H. 272.

New York. — *Brown v. Bowen*, 30 N. Y. 540, 86 Am. Dec. 406.

North Carolina. — *Estis v. Jackson*, 111 N. Car. 145, 32 Am. St. Rep. 784.

South Carolina. — *Gaston v. Brandenburg*, 42 S. Car. 348.

(b) **Statements of Opinion or of Law.** — As a general rule, mere expressions of opinion by interested persons cannot, though subsequently shown to be groundless or false, be regarded as misrepresentations for the purpose of creating an estoppel; there must be a material representation of a fact.¹ In the same way it has been held that a party is not estopped by a statement of a conclusion of law upon undisputed facts.² And it has even been held that a false statement of an opinion upon a question of law, made with the intention of inducing another person to act upon it, and in fact acted upon by him, would not work an estoppel when the facts were equally known to both parties.³

(c) **Representations De Futuro.** — The rule seems to be well established that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to mere disappointment of expectation, or breach of promise or covenant relating to the future.⁴ The only case in which a representation as to the

South Dakota. — *Eickelberg v. Soper*, 1 S. Dak. 563.

Tennessee. — *Taylor v. Nashville, etc.*, R. Co., 86 Tenn. 228.

Texas. — *Blum v. Merchant*, 58 Tex. 403; *Stratton-White Co. v. Castleberry*, 15 Tex. Civ. App. 149; *Watkins Land, etc., Co. v. Howeth*, 1 Tex. Civ. App. 279.

Utah. — *Brigham Young Trust Co. v. Wagener*, 12 Utah 1.

Virginia. — *Taylor v. Cussen*, 90 Va. 40.

Facts Represented Must Be Material. — In *Phelps v. Illinois Cent. R. Co.*, 94 Ill. 559, it was held that the representation must have been of some material fact. See also *McGirr v. Sell*, 60 Ind. 249; *Cleveland, etc., R. Co. v. Reid*, 6 Ohio Dec. 285.

1. Statements of Opinion Inoperative by Way of Estoppel. — *Mitchell v. Fisher*, 94 Ind. 108; *Ross v. Banta*, 140 Ind. 151; *Inderlied v. Whaley*, 65 Hun (N. Y.) 407; *Akin v. Kellogg*, 119 N. Y. 442; *Taylor v. Nashville, etc., R. Co.*, 86 Tenn. 244; *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639.

In *Hammerslough v. Kansas City Bldg., etc., Assoc.*, 79 Mo. 80, it was held that information known to the party receiving it to be nothing more than an opinion or estimate, if honestly given, will not support an estoppel.

2. Statements of Law Inoperative by Way of Estoppel. — *McKeen v. Naughton*, 88 Cal. 467; *Brewster v. Striker*, 2 N. Y. 19; *Norton v. Coons*, 6 N. Y. 33.

Where a representation was made by a person under misapprehension in law of her title, which misapprehension was common to all of the parties, it was held that the doctrine of estoppel *in pais* would not operate where it appeared that every fact which she knew concerning her title was equally well known to the purchaser. *Estis v. Jackson*, 111 N. Car. 145. 32 Am. St. Rep. 784.

In *Holcomb v. Boynton*, 151 Ill. 294, the court said: "If both parties are equally cognizant of the facts, and one has acted under a mistaken idea of the law, the other party cannot say he has been deceived thereby, and is entitled to an application of the rule, but will be considered as having acted upon his own judgment solely."

Statement as to Operation of Statute of Limitations. — A brother who was indebted to his

imbecile sister by promissory note under seal, on her request to renew the contract before it was barred, replied that "it would never run out of date." It was held that this would not estop his widow and children from pleading the statute of limitations in defense of a suit to enforce payment of the debt although the sister forbore to sue in reliance on it; because as a promise not to plead the statute, it was itself barred by the statute, and as an assertion, it was a mistake of law. *Cameron v. Cameron*, 95 Ala. 344.

3. *Whitwell v. Winslow*, 134 Mass. 343.

4. Representations De Futuro Do Not Generally Raise Estoppel. — *Maddison v. Alderson*, L. R. 8 App. 467, denying *Loffus v. Maw*, 3 Giff. 592; *Jorden v. Money*, 5 H. L. Cas. 185; *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 547; *Burgess v. Seiligman*, 107 U. S. 20; *Allen v. Rundle*, 50 Conn. 9, 47 Am. Rep. 599; *Starry v. Korab*, 65 Iowa 267; *Langdon v. Doud*, 10 Allen (Mass.) 433; *Jackson v. Allen*, 120 Mass. 79; *White v. Ashton*, 51 N. Y. 280; *Allen v. Dodge*, 51 Vt. 392. See also *Conklin v. Conklin*, 54 Ind. 289; *Botts v. Fultz*, 70 Ind. 396. Compare *Simonton v. Liverpool, etc., Ins. Co.*, 51 Ga. 76.

Where the agent of an insurance company made an agreement with the assured before the policy was executed that the latter should have notice before he should be required to pay the annual premium, the company, upon failure to give such notice, is not estopped from setting up the forfeiture stipulated by the policy for nonpayment of the premium when due. *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544. In this case the court said: "Apart from the circumstance that the policy subsequently issued alone expressed its contract, an estoppel from the representations of a party can seldom arise except where the representation relates to a matter of fact — to a present or past state of things. If the representation relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances of which neither party can have any certain knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and

future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others who have been induced to act by it.¹

(d) **Fraudulent Procurement of Representation.** — The doctrine of equitable estoppel is founded upon principles of equity and justice, and is applied to conclude a party who by his acts and admissions intended to influence the conduct of another, only when, in good conscience and honest dealing, he ought not to be permitted to gainsay them. And so conduct of one induced by the fraud of another cannot be relied upon by the latter as an estoppel.² Accordingly it has been held that where the representation relied on to create an estoppel has been induced by a previous representation by the other party or his agent, no estoppel can arise.³ Also it has been held that a party who by the

by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made. The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who had been led to rely upon them. They would have that effect if a party who, by his statements as to matters of fact or as to his intended abandonment of existing rights, has designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine carried to the extent for which the assured contends in this case would subvert the salutary rule that the written contract must prevail over previous verbal arrangements and open the door to all the evils which that rule was intended to prevent."

1. Operation of Promise to Abandon Existing Right. — *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 547; *Shields v. Smith*, 37 Ark. 52; *Crine v. Davis*, 68 Ga. 138; *Mansur v. Haughey*, 60 Ind. 368; *Stayton v. Graham*, 139 Pa. St. 1.

In *White v. Walker*, 31 Ill. 437, it was held that though a promise to forgive a debt or to forbear its collection, if either temporarily or for an indefinite period, unsupported by any consideration, is ineffectual as a defense, viewed merely as an agreement, yet if the surety has been induced by such an assurance to neglect any of the means which might have been used for his indemnity, the promise may have that effect as an estoppel which it wants as a contract, and amount to a defense against any subsequent action brought by the creditor.

Where the plaintiff, in 1847 and 1849, obtained two mortgages from a half brother (the husband of one and father of the other defendant), who died intestate in 1850, leaving a family of young children, the eldest being one of the defendants, it was held, in a suit to

foreclose the mortgages, to be a good defense that, after the mortgagor's death, when the eldest son was contemplating a removal to another region, the complainant urged and persuaded him to remain and undertake the care of the land and of the younger children, on a promise that the mortgages should never be enforced against him, and that, on this urgency, the defendant did so, and carried out all that was desired. *Faxon v. Faxon*, 28 Mich. 159. In this case the court said: "There is no rule more necessary to enforce good faith than that which compels a person to abstain from enforcing claims which he has induced others to suppose he would not rely on. The rule does not rest upon the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect. The present case is a very strong one in some respects, for a young man was induced to give up his projects for his own advancement and devote himself to the preservation of property which did not appear worth the sacrifice. The intention then entertained by complainant was kind and generous, and appealed strongly to the generous impulses of his nephew, who has done what was expected of him. The foreclosure of these mortgages now is a violation of distinct promises and assurances which were the inducement to the labor and devotion of the defendant. It would be contrary to equity to permit this to be done. A promise is not gratuitous which is made to procure such efforts and results, and the person who made the representations which led to them can receive no aid from a court of equity in evading his promises."

2. Representations Induced by Fraud of Other Party Inoperative. — *Calhoun v. Richardson*, 30 Conn. 210; *Quincy First Nat. Bank v. Ricker*, 71 Ill. 439; *Sinnett v. Moles*, 38 Iowa 25; *Gray v. Gray*, 83 Mo. 106; *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 483, 24 Am. Dec. 51; *Wilcox v. Howell*, 44 N. Y. 402.

In *Whitlock v. McClusky*, 91 Ill. 583, it was held that persons pretending to hold claims against an estate will not be allowed to take advantage of the estoppel of an order for the sale of the lands of heirs, as against such heirs, where such estoppel grows out of a mere neglect to defend, and that neglect was induced by the conduct of such claimants and their attorney acting as administrator.

3. Holden v. Putnam F. Ins. Co., 46 N. Y.

obscurity or ambiguity of his inquiries leads another to make an erroneous statement respecting his rights, or by his artful silence entraps another into an admission that he would not have made if a fair opportunity had been afforded him to declare the truth, is in no position to set up an equitable estoppel.¹

(e) **Construction of Alleged Representation.** — If the statement relied on is a clear representation of a state of facts from the natural or reasonable construction of the language used, its effect as an estoppel cannot be denied,² and this effect is not confined to the bare existence or nonexistence of the fact, but extends to the legal consequences directly and legitimately resulting from the fact.³

Statement as Qualified by Context or in Conversation. — But although a statement would, when considered by itself alone, amount to a representation which would give rise to an estoppel, this operation may be denied where it has been qualified by the context or by other language used in the conversation in which the representation was made.⁴

A Further Discussion of this question will be found elsewhere in this work.⁵

(f) **Silence or Concealment of Facts** — *aa.* **IN GENERAL.** — As a general rule, an estoppel may arise from silence as well as words; but this is only where there is a duty to speak, and the party upon whom the duty rests has an opportunity to speak, and, knowing the circumstances requiring him to speak, keeps silent; or, in other words, where his silence amounts to a fraud, actual or constructive.⁶

1. 7 Am. Rep. 287; Wyckoff v. Lagrange, 12 Misc. Rep. (N. Y. C. Pl.) 108.

2. Stanford v. Lyon, 37 N. J. Eq. 110.

3. **Alleged Representation to Be Construed According to Natural Import of Language.** — Guthrie v. Quinn, 43 Ala. 561.

Thus in *Burkinshaw v. Nicolls*, L. R. 3 App. 1021, it was held that a representation that shares are paid up must reasonably mean that the shares are paid in cash.

But such representation is not to be extended beyond the clear import of the language used. Thus it has been held that a declaration by the maker of an instrument that it was valid and binding, and had been executed and delivered to him in the ordinary course of business and for full and valuable consideration, and that it was all right and would be paid, would not estop him from averring and proving that the instrument had not matured for payment. *McAfee v. Fisher*, 64 Cal. 246.

But where, in a letter, the representation was made that there was no lien or incumbrance in favor of a certain bank on particular stock, the party to whom the representation was made had no right to rely on the statement as a representation of the rights of the bank months after the letter was written. *Planters', etc., Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585.

3. *Dodge v. Pope*, 93 Ind. 487.

4. **Qualification of Alleged Representation by Context.** — *Freeman v. Cooke*, 2 Exch. 664; *Townsend Sav. Bank v. Todd*, 47 Conn. 216; *Irvin v. Nashville, etc., R. Co.*, 92 Ill. 103, 34 Am. Rep. 116; *Pierce v. Andrews*, 6 Cush. (Mass.) 4, 52 Am. Dec. 748.

5. See the title **FRAUD AND DECEIT**.

6. **Silence or Concealment of Facts as Substitute for Misrepresentation** — *England.* — *East-India Co. v. Vincent*, 2 Atk. 83; *Stiles v. Cowper*, 3 Atk. 692; *Hunsden v. Cheyne*, 2 Vern. 150; *Jackson v. Cator*, 5 Ves. Jr. 688; *Dann v. Spurrier*, 7 Ves. Jr. 231; *Gregg v. Wells*, 10

Ad. & El. 90, 37 E. C. L. 54; *Morgan v. Evans*, 3 Cl. & F. 205.

United States. — *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. (U. S.) 604; *U. S. Bank v. Lee*, 13 Pet. (U. S.) 107; *Bright v. Boyd*, 1 Story (U. S.) 478; *St. Louis Smelting, etc., Co. v. Green*, 4 McCrary (U. S.) 232; *Morgan v. Chicago, etc., R. Co.*, 96 U. S. 720; *Kirk v. Hamilton*, 102 U. S. 68; *Wheeler v. New Brunswick, etc., R. Co.*, 115 U. S. 29.

Arkansas. — *Bramble v. Kingsbury*, 39 Ark. 131; *Rector v. Board of Improvement*, 50 Ark. 116.

California. — *Meley v. Collins*, 41 Cal. 663, 10 Am. Rep. 279.

Colorado. — *Schaefer v. Gildea*, 3 Colo. 15; *Kohn v. Kennedy*, 6 Colo. App. 388.

Connecticut. — *Taylor v. Ely*, 25 Conn. 250.

Georgia. — *Studdard v. Lemmond*, 48 Ga. 100.

Illinois. — *Higgins v. Ferguson*, 14 Ill. 269; *Baker v. Pratt*, 15 Ill. 568; *Knoebel v. Kircher*, 33 Ill. 308; *Smith v. Newton*, 38 Ill. 230; *Mills v. Graves*, 38 Ill. 465, 87 Am. Dec. 314; *Jenerson v. Jenerson*, 66 Ill. 259; *People v. Brown*, 67 Ill. 435; *International Bank v. Bowen*, 80 Ill. 541.

Indiana. — *Muncey v. Joest*, 74 Ind. 409; *Robbins v. Magee*, 76 Ind. 381; *Ross v. Thompson*, 78 Ind. 90; *Markland Min., etc., Co. v. Kimmel*, 87 Ind. 560; *Terre Haute R. Co. v. Rodel*, 89 Ind. 125; *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394.

Kentucky. — *Morford v. Bliss*, 12 B. Mon. (Ky.) 255.

Maryland. — *Diffenbach v. New York L. Ins. Co.*, 61 Md. 370.

Massachusetts. — *Preston v. American Linen Co.*, 119 Mass. 400; *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347.

Michigan. — *Michigan Paneling Mach., etc., Co. v. Parsell*, 38 Mich. 475; *Gingrass v. Iron Cliffs Co.*, 48 Mich. 413; *Griffin v. Nichols*, 51 Mich. 575.

Mississippi. — *Kelly v. Wagner*, 61 Miss. 299.

This doctrine proceeds upon the ground that he who has been silent as to his alleged rights when he ought, in good faith, to have spoken, shall not be heard to speak when he ought to be silent.¹ It is not necessary that the duty to speak in such case should arise out of any agreement or rest upon any legal obligation in the ordinary sense; it arises whenever the principles of natural justice require the disclosure.²

bb. OMISSION TO ASSERT RIGHT—(*aa General Principles.*—It may be stated as a general rule that if a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.³

Missouri.—*Raley v. Williams*, 73 Mo. 310.

Nebraska.—*Scharman v. Scharman*, 38 Neb. 40.

New Hampshire.—*Allen v. Shaw*, 61 N. H. 95.

New Jersey.—*Collier v. Pfenning*, 34 N. J. Eq. 22; *Swayze v. Carter*, 41 N. J. Eq. 231; *State v. Jersey City*, 40 N. J. L. 483.

New York.—*Hope v. Lawrence*, 50 Barb. (N. Y.) 258; *Champlin v. Stoddart*, 30 Hun (N. Y.) 300; *Dean v. Benn*, 69 Hun (N. Y.) 519; *Wendell v. Van Rensselaer*, 1 Johns. Ch. (N. Y.) 354; *Niven v. Belknap*, 2 Johns. (N. Y.) 573; *Storrs v. Barker*, 6 Johns. Ch. (N. Y.) 166, 10 Am. Dec. 316; *Erie County Sav. Bank v. Roop*, 48 N. Y. 298; *Viele v. Judson*, 82 N. Y. 32; *Hamlin v. Sears*, 82 N. Y. 327; *New York Rubber Co. v. Rothery*, 107 N. Y. 310, 1 Am. St. Rep. 822; *Thompson v. Simpson*, 128 N. Y. 270; *Collier v. Miller*, 137 N. Y. 332; *Haviland v. Willets*, 141 N. Y. 35.

Pennsylvania.—*Nass v. Vanswearingen*, 10 S. & R. (Pa.) 146; *Crest v. Jack*, 3 Watts (Pa.) 238, 27 Am. Dec. 353; *Keeler v. Vantuytle*, 6 Pa. St. 250; *Com. v. Moltz*, 10 Pa. St. 531, 51 Am. Dec. 499; *Woods v. Wilson*, 37 Pa. St. 383; *Miranville v. Silverthorn*, 48 Pa. St. 149; *Chapman v. Chapman*, 59 Pa. St. 214; *Young v. Babilon*, 91 Pa. St. 280; *Weaver v. Lutz*, 102 Pa. St. 593; *Logan v. Gardner*, 136 Pa. St. 588, 20 Am. St. Rep. 939; *Koch's Estate*, 148 Pa. St. 159.

South Carolina.—*Bull v. Rowe*, 13 S. Car. 355.

Tennessee.—*Gheen v. Osborne*, 11 Heisk. (Tenn.) 61.

Vermont.—*Cady v. Owen*, 34 Vt. 598; *McKellop v. Jackman*, 50 Vt. 57; *Boynton v. Braley*, 54 Vt. 92.

Wisconsin.—*McLean v. Dow*, 42 Wis. 610; *Kingman v. Graham*, 51 Wis. 232.

See also the title **FRAUD AND DECEIT**.

It has been held that contractors who procure a loan association to advance the full amount on a building mortgage, by presenting certificates under their contract for the erection of a building except the third story, supposed by such association to be for the whole building, and conceal the existence of a later contract for such third story, are estopped to assert a lien under such later contract in priority to the mortgage. *Commercial Loan, etc., Assoc. v. Trevette*, 160 Ill. 390.

In *Collier v. Miller*, 137 N. Y. 332, the court said: "Undoubtedly mere silence may sometimes found an estoppel, but it must be when

there is a duty and opportunity to speak, when silence either is or operates as a fraud to the consciousness of the party who does not speak, and when he knows or ought to know that some one is relying upon his silence and will be injured by that silence. *Viele v. Judson*, 82 N. Y. 40. In other words, the omission to speak must be, relatively to the party harmed, an actual or constructive fraud."

Thus it has been held that a riparian owner will not be estopped from his failure to object to the appropriation of the water of a stream by another riparian owner during a period when there was a sufficient supply of water for all. *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185. See also *Corning v. Troy Iron, etc., Factory*, 40 N. Y. 191. *Compare Slocumb v. Chicago, etc., R. Co.*, 57 Iowa 675.

1. *U. S. Bank v. Lee*, 13 Pet. (U. S.) 107; *Morgan v. Chicago, etc., R. Co.*, 96 U. S. 720. And see cases in note immediately preceding.

2. *Thompson v. Simpson*, 128 N. Y. 270.

3. *Omission to Assert Right as Cause of Estoppel.*—*De Bussche v. Alt*, 8 Ch. Div. 314; *Cheatham v. Wilber*, 1 Dakota 321; *Georgia R., etc., Co. v. Hamilton*, 59 Ga. 171; *Atlanta v. Gates City Gas Light Co.*, 71 Ga. 106; *Athens v. Georgia R. Co.*, 72 Ga. 800; *Ross v. Thompson*, 78 Ind. 90; *Angell v. Johnson*, 51 Iowa 625, 33 Am. Rep. 152; *Masterson v. West End Narrow Gauge R. Co.*, 72 Mo. 342; *State v. Jersey City*, 40 N. J. L. 483; *Boardman v. Lake Shore, etc., R. Co.*, 84 N. Y. 182. *Compare Hopper v. McWhorter*, 18 Ala. 229.

Occupation and Improvement of Lands under Mistaken Claim of Ownership.—If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right and leaves him to persevere in his error, it has been held that a court of equity will not afterwards allow the real owner to assert his title to the land. But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land with the benefit of all the expenditure upon it. *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Planet Property, etc., Co. v. St. Louis, etc., R. Co.*, 115 Mo. 613; *Goode v. St. Louis*, 113 Mo. 257; *Dodd v. St. Louis, etc., R. Co.*, 108 Mo. 581. *Compare Boggs v. Merced Min. Co.*, 14 Cal. 279; *Leonard v. Flynn*, 89 Cal. 542, 23 Am. St. Rep. 500.

This doctrine of estoppel has been said to apply with great force to the taking of prop-

This, it has been said, is the proper sense of the term "acquiescence," which, in that sense, may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct.¹

(bb) *Owner Permitting Sale of Personality by Third Person.* — Thus it has been held that if the owner of goods stands by and voluntarily allows another to treat them as his own, by which means a third person is induced to purchase them *bona fide*, the former cannot recover them from the purchaser.²

(cc) *Owner Permitting Conveyance of Realty by Third Person.* — Also it seems to be well established, as a general rule, that if a man knowingly suffers another to purchase and expend money on land under an erroneous opinion of title, though he does it passively by looking on, without making known his claim,

erty for a railway. *Dodd v. St. Louis, etc., R. Co.*, 108 Mo. 581.

Thus it has been held that where the landowner, with full knowledge of the facts and without objection, permits a railroad company to expend large sums of money in the construction of its road through his land, he cannot maintain ejectment. *Dodd v. St. Louis, etc., R. Co.*, 108 Mo. 581. See also the title EJECTMENT, vol. 10, p. 528.

And in *Planet Property, etc., Co. v. St. Louis, etc., R. Co.*, 115 Mo. 613, it was held that where the evidence showed that the plaintiff stood by and permitted the construction of a railroad on its land, without taking any steps to prevent it further than informing the defendant of its objection, an injunction will not be granted to restrain the operation of the railway.

Also it has been held that where a person who claims to be the owner of a tract of land has notice of the fact that a railroad company is excavating a tunnel through a mountain located on said land, under claim of title thereto, remains silent as to his ownership of the land, with full knowledge of his rights, and assists in the construction of said tunnel from its commencement until it is completed and the railroad is constructed through it, without asserting any claim to the land through which the tunnel passes, and then institutes an action for damages against the railroad company for taking his land, he will be estopped from recovering in said action, and may be enjoined from further prosecuting such action for damages. *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442.

For a further discussion of this question see the title RAILROADS.

Levy on Exempt Personality. — It has been held that where the owner of exempt personal property is present when a levy is made thereon, and permits the property to be taken without objection, he will be deemed to have waived his right of exemption, and will be estopped from afterwards asserting it. *Angell v. Johnson*, 51 Iowa 625, 33 Am. Rep. 152. Compare *Watson v. Knight*, 44 Ala. 352.

But it has been held that silence on the part of the owner of property seized under execution as the property of another does not estop the owner to recover for the wrongful seizure or sale. *Donnell v. Reese*, 6 Kan. App. 563. See also *Schilling v. Black*, 49 Kan. 552.

Improvements on Private Property by Municipal Corporation. — The charter of the city of New

Haven authorized the city to pave its streets and assess upon the persons whose property was especially benefited thereby a proportionate and reasonable part of the expense, which assessment should be a lien upon the property especially benefited, liable to be foreclosed in the same manner as if it were a mortgage in favor of the city; and it provided that any person aggrieved by such assessment might appeal therefrom to the Superior Court. It was held that a street-railroad corporation, having suffered the city to make the improvement and incur the expense, with full knowledge of the proceedings and without objection, was estopped from setting up the claim that its charter required it to pave the road covered by its track at its own expense. *New Haven v. Fair Haven, etc., R. Co.*, 38 Conn. 422. To the same effect see *Hembling v. Big Rapids*, 89 Mich. 1; *Collins v. Grand Rapids*, 95 Mich. 286; *Gibson v. Owens*, 115 Mo. 258; *State v. Wertzel*, 62 Wis. 184.

In *Powers v. New Haven*, 120 Ind. 185, the court said: "It is now quite well settled that if the owner of property in a city stands by and permits improvements to be made which benefit such property, and makes no objection to such improvement, he will be estopped from denying the authority of such city to make the improvements. *Taber v. Ferguson*, 109 Ind. 227; *Ross v. Stackhouse*, 114 Ind. 200; *Evansville v. Pfisterer*, 34 Ind. 36, 7 Am. Rep. 214; *Jenkins v. Stetler*, 118 Ind. 275; *Johnson v. Allen*, 62 Ind. 57. This doctrine of estoppel does not rest wholly upon the statutes, as contended by the appellants, but it rests upon the reasonable ground that it would be inequitable to permit a party to stand by and permit others to make improvements for the benefit of his property, without objecting, and hold such benefits and refuse to pay for the same. We see no reason why the doctrine should not be applied to improvements made in towns as well as cities."

See also the title MUNICIPAL CORPORATIONS.

1. *De Bussche v. Alt*, 8 Ch. Div. 314.

2. **Permitting Sale of One's Own Property by Third Person.** — *Gregg v. Wells*, 10 Ad. & El. 90, 37 E. C. L. 54; *Thompson v. Blanchard*, 4 N. Y. 309.

In *Gregg v. Wells*, 10 Ad. & El. 90, 37 E. C. L. 54, the court said: "A party who negligently and culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict cannot afterwards dispute that fact in an action

he shall not afterwards be permitted to exercise his legal right against that person.¹ This rule is especially applicable where the owner has encouraged the parties to deal with each other in such sale and purchase.²

(*dit*) *Owner Permitting Person to Give Credit on Faith of Ownership in Debtor.* — And it has been said that this principle applies to protect creditors who have given credit upon the faith of the apparent ownership of the property in the possession of the debtor against a secret unrecorded conveyance fraudulently concealed by the grantee, as where, with knowledge that the debtor is holding himself out as owner and is gaining credit upon this ground, he keeps silence and gives no warning.³

against the person whom he has himself assisted in deceiving."

But where the property of one man is wrongfully taken and sold by another in his own name and for his own benefit, the mere silence of the owner for a period short of the time prescribed in the statute of limitations will not estop him from setting up claim to the property, where it does not appear that the purchaser relied upon the owner's silence. *Hamilton v. Sears*, 82 N. Y. 327.

1. Effect of Owner Permitting Conveyance of Realty by Third Person — United States. — *Kirk v. Hamilton*, 102 U. S. 68.

California. — *McGarrity v. Byington*, 12 Cal. 426.

Georgia. — *Georgia R., etc., Co. v. Hamilton*, 59 Ga. 171; *Iverson v. Saulsbury*, 65 Ga. 724; *Georgia Pac. R. Co. v. Strickland*, 80 Ga. 776, 12 Am. St. Rep. 282.

Indiana. — *Junction R. Co. v. Harpold*, 19 Ind. 347; *Fletcher v. Holmes*, 25 Ind. 458; *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394.

Louisiana. — *Lippmins v. McCranie*, 30 La. Ann. 1251.

Maine. — *Martin v. Maine Cent. R. Co.*, 83 Me. 100.

Massachusetts. — *Snow v. Hutchins*, 160 Mass. 111.

New York. — *Town v. Needham*, 3 Paige (N. Y.) 545, 24 Am. Dec. 246; *Wendell v. Van Rensselaer*, 1 Johns. Ch. (N. Y.) 344; *Storrs v. Barker*, 6 Johns. Ch. (N. Y.) 166, 10 Am. Dec. 316; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *New York Rubber Co. v. Rothery*, 107 N. Y. 315, 1 Am. St. Rep. 822.

Pennsylvania. — *Chapman v. Chapman*, 59 Pa. St. 219; *Hill v. Epley*, 31 Pa. St. 334.

Tennessee. — *Tennessee Coal, etc., Co. v. McDowell*, (Tenn. 1898) 47 S. W. Rep. 153.

In *Steel v. St. Louis Smelting, etc., Co.*, 106 U. S. 456, the court said: "The principle invoked is that one should be estopped from asserting a right to property upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate stands by and sees another erect improvements on it in the belief that he has the title or an interest in it, and does not interfere to prevent the work or inform the party of his own title. There is in such conduct a manifest intention to deceive, or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case will not be permitted afterwards to assert his title and recover the property, at least without making compensation for the improvements."

Where a Person Who Holds a Contract of Purchase of land stands by and sees another purchase the same land from his vendor, paying his own money therefor, and fails to make known any claim in respect to the land, he will be estopped from afterwards claiming that the second purchaser bought for his benefit. *Baehr v. Wolf*, 59 Ill. 470.

Where one conveys the fee of an estate, the deed of which is recorded, and receives a bond to reconvey upon certain conditions, which is not recorded, he shall not be permitted in an action to charge the estate with a mechanic's lien, and, after standing silently by and seeing the work progress, either to defeat the lien or to diminish his grantee's estate by the production of the unrecorded bond. *Mellor v. Valentine*, 3 Colo. 255.

2. When the Owner Has Encouraged Dealings. — *Doan v. Mauzey*, 33 Ill. 227; *Bradley v. Luce*, 99 Ill. 234; *Martin v. Maine Cent. R. Co.*, 83 Me. 105; *Storrs v. Barker*, 6 Johns. Ch. (N. Y.) 166, 10 Am. Dec. 316.

A party who procures another to purchase land under a deed of trust, and is present at the trustee's sale, and makes no objection to the sale, or sets up any claim to the land, will be estopped from denying the validity of such sale. *Bradley v. Luce*, 99 Ill. 234. To the same effect see *Doan v. Mauzey*, 33 Ill. 227; *Smith v. Hutchinson*, 108 Ill. 662.

If an owner stands by, aiding as an employee in surveying and locating the route of a ditch, and accepting compensation for his labor, and making no objection and taking no steps to prevent the work or its consequences until after completion, he will be estopped from afterwards obtaining an injunction against the use of the ditch or the continuous diversion of water by means of it. *Southern Marble Co. v. Darnell*, 94 Ga. 231.

One Who Attests a Deed, knowing its contents, and afterwards stands by and sees expensive work done under it on the premises, making no objection, is estopped to assert an older adverse title in himself and recover the premises in opposition to the deed to which his attestation gave authenticity and credit. *Georgia Pac. R. Co. v. Strickland*, 80 Ga. 776, 12 Am. St. Rep. 282.

3. Permitting Person to Give Credit on Faith of Ownership in Debtor. — *Trenton Banking Co. v. Duncan*, 86 N. Y. 229.

And where a conveyance of property partially purchased with money belonging to a third person was made to a trustee, and from the date thereof to the time of the grantee's death he was in the apparent sole possession and ownership, managing and dealing with the

(3) *The Intent or Design*. — It is often laid down as a general proposition that to constitute an estoppel it must be shown that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or which he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give or the title he proposes to set up.¹ It appears, however, to be the prevailing rule that it is not essential that the conduct creating the estoppel should be characterized by an actual intention to mislead and deceive. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the act or representation to be true, and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation will be precluded from contesting its truth.²

property as his own, with the knowledge and consent of the beneficial owner, and credit was given to the trustee based in part upon the fact that the property stood in his name and without notice to the creditors of the actual owner's equity, it was held that the beneficial owner was not estopped to assert his equity, it not being shown that any of the creditors knew that the title to the property stood in the trustee's name or that means were taken by any of them to ascertain the true state of the title. *Murphy v. Clayton*, 113 Cal. 159.

1. *Intent* — *England*. — *Pickard v. Sears*, 6 Ad. & El. 469, 33 E. C. L. 115; *Arnold v. Cheque Bank*, 1 C. P. Div. 578; *Smith v. Hughes*, L. R. 6 Q. B. 597; *Carr v. London, etc.*, R. Co., L. R. 10 C. P. 316.

United States. — *Brant v. Virginia Coal, etc.*, Co., 93 U. S. 327; *Casey v. Galli*, 94 U. S. 674; *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96.

Alabama. — *Planters', etc.*, Mut. Ins. Co. v. *Selma Sav. Bank*, 63 Ala. 585.

California. — *Lux v. Haggin*, 69 Cal. 367; *Murphy v. Clayton*, 113 Cal. 160.

Colorado. — *Patterson v. Hitchcock*, 3 Colo. 533; *Griffith v. Wright*, 6 Colo. 248; *Birch v. Steppeler*, 11 Colo. 407.

Connecticut. — *Giddings v. Emerson*, 24 Conn. 547; *Preston v. Mann*, 25 Conn. 128; *Danforth v. Adams*, 29 Conn. 107; *Walker v. Vaughn*, 33 Conn. 577; *Farist's Appeal*, 39 Conn. 150; *Kinney v. Whiton*, 44 Conn. 262, 26 Am. Rep. 462; *Fawcett v. New Haven Organ Co.*, 47 Conn. 224.

Illinois. — *Smith v. Newton*, 38 Ill. 230; *Leeper v. Hersman*, 58 Ill. 218; *Kinnear v. Mackey*, 85 Ill. 96; *Tillotson v. Mitchell*, 111 Ill. 518.

Indiana. — *Ross v. Banta*, 140 Ind. 150.

Iowa. — *Tiffany v. Anderson*, 55 Iowa 405; *Sessions v. Rice*, 70 Iowa 306.

Kansas. — *Chellis v. Coble*, 37 Kan. 558.

Kentucky. — *McAdams v. Hawes*, 9 Bush (Ky.) 15.

Maine. — *Allum v. Perry*, 68 Me. 232; *Fountain v. Whelpley*, 77 Me. 132.

Maryland. — *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325.

Massachusetts. — *Pierce v. Andrews*, 6 Cush. (Mass.) 4, 52 Am. Dec. 748; *Plumer v. Lord*, 9 Allen (Mass.) 455, 85 Am. Dec. 773; *Andrews v. Lyons*, 11 Allen (Mass.) 349; *Zuchtmann v. Roberts*, 109 Mass. 53, 12 Am. Rep. 663; *Tracy v. Lincoln*, 145 Mass. 357.

Michigan. — *Peake v. Thomas*, 39 Mich. 584;

Vanneter v. Crossman, 42 Mich. 465; *Robb v. Shephard*, 50 Mich. 189.

Minnesota. — *Pence v. Arbuckle*, 22 Minn. 417; *Stevens v. Ludlum*, 46 Minn. 160, 24 Am. St. Rep. 210; *Fitzpatrick v. Hanson*, 55 Minn. 195; *Norman v. Eckern*, 60 Minn. 531.

Mississippi. — *Staton v. Bryant*, 55 Miss. 261; *Davis v. Bowmar*, 55 Miss. 671.

Missouri. — *Blotgett v. Perry*, 97 Mo. 263; *Baker v. McInturff*, 49 Mo. App. 505.

New Hampshire. — *Parker v. Moore*, 59 N. H. 454; *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111.

New Jersey. — *Kuhl v. Jersey City*, 23 N. J. Eq. 84; *Mutual L. Ins. Co. v. Norris*, 31 N. J. Eq. 583.

New York. — *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *McMaster v. Insurance Co. of North America*, 55 N. Y. 222, 14 Am. Rep. 239; *Muller v. Pondir*, 55 N. Y. 325, 14 Am. Rep. 259; *Phillip v. Gallant*, 62 N. Y. 256; *Blair v. Wait*, 69 N. Y. 113.

Ohio. — *Cleveland, etc.*, R. Co. v. *Reid*, 6 Ohio Dec. 285; *Rosenthal v. Mayhugh*, 33 Ohio St. 155.

Pennsylvania. — *Hill v. Epley*, 31 Pa. St. 334.

South Carolina. — *Gaston v. Brandenburg*, 42 S. Car. 348.

South Dakota. — *Eickelberg v. Soper*, 1 S. Dak. 563.

Tennessee. — *Askins v. Coe*, 12 Lea (Tenn.) 672; *Taylor v. Nashville, etc.*, R. Co., 86 Tenn. 228.

Texas. — *Blum v. Merchant*, 58 Tex. 403; *Stratton-White Co. v. Castleberry*, 15 Tex. Civ. App. 149; *Watkins Land, etc., Co. v. Howeth*, 1 Tex. Civ. App. 279.

Utah. — *Brigham Young Trust Co. v. Wagener*, 12 Utah 1.

Vermont. — *Hicks v. Cram*, 17 Vt. 449; *Durant v. Pratt*, 55 Vt. 270.

Virginia. — *Taylor v. Cussen*, 90 Va. 40.

2. *Actual Intention to Mislead Not Necessary* — *Alabama*. — *Knowles v. Street*, 87 Ala. 357.

Connecticut. — *Preston v. Mann*, 25 Conn. 118.

Illinois. — *Hefner v. Vandolah*, 57 Ill. 520, 11 Am. Rep. 39; *Hill v. Blackwelder*, 113 Ill. 283; *Heidenbluth v. Rudolph*, 152 Ill. 316; *Commercial Loan, etc., Assoc. v. Trevette*, 160 Ill. 392.

Indiana. — *Anderson v. Hubble*, 93 Ind. 576, 47 Am. Rep. 394; *Potter v. Dove*, 99 Ind. 175.

Iowa. — *Tiffany v. Anderson*, 55 Iowa 405.

Maine. — *Martin v. Maine Cent. R. Co.*, 83 Me. 105.

Thus Negligence, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may supply the place of intent, where the effect of such negligence is to work a fraud on the party setting up the estoppel.¹

Application of Rule to Estoppel by Silence. — The rules laid down above apply where the estoppel arises from silence as well as where it arises from positive conduct or representation. Thus, in order that the owner of property which another has assumed to convey without authority may be precluded by silence from

Michigan. — *Vanneterr v. Cossman*, 42 Mich. 465.

Minnesota. — *Beebe v. Wilkinson*, 30 Minn. 548.

Missouri. — *Raley v. Williams*, 73 Mo. 310.

New Hampshire. — *Stevens v. Dennett*, 51 N. H. 324.

New Jersey. — *Kuhl v. Jersey City*, 23 N. J. Eq. 85.

New York. — *Storrs v. Barker*, 6 Johns. Ch. (N. Y.) 166, 10 Am. Dec. 316; *Continental Nat. Bank v. National Bank*, 50 N. Y. 576; *Blair v. Wait*, 69 N. Y. 113; *Howe Mach. Co. v. Farlington*, 82 N. Y. 121; *Thompson v. Simpson*, 128 N. Y. 288.

Pennsylvania. — *Hill v. Epley*, 31 Pa. St. 334. *Texas.* — *Westbrook v. Guderian*, 3 Tex. Civ. App. 406.

In *Pichard v. Sears*, 6 Ad. & El. 469, 33 E. C. L. 115, the rule was laid down that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things and induces him to act on that belief or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. But in *Freeman v. Cooke*, 2 Exch. 662, this rule was qualified and the rule as laid down in the text was asserted. To the same effect see *M'Kenzie v. British Linen Co.*, L. R. 6 App. 82.

In *Preston v. Mann*, 25 Conn. 128, the court, in commenting upon this rule, said: "The word 'wilfully,' as used in this connection, is not to be taken in the limited sense of the term 'maliciously,' or of the term 'fraudulently,' nor does it of necessity imply an active desire to produce a particular impression or to induce a particular line of conduct. Whatever the motive may be, if one so acts or speaks that the natural consequence of his words and conduct will be to influence another to change his condition, he is legally chargeable with an intent, a wilful design, to induce the other to believe him and to act upon that belief, if such proves to be the actual result. It is enough that a 'reasonable man in the situation of that other would believe that it was meant that he should act upon it.'"

In *Kuhl v. Jersey City*, 23 N. J. Eq. 84, the court said: "There is a seeming conflict among the numerous decisions on the doctrine of estoppels *in pais*, sometimes called equitable estoppels, whether any one will be estopped by a representation made which turns out not to be true, where there was no intention to influence the conduct of any one by it, and where it was not apparent that the representation would have that effect. I take the doctrine established, by the decided weight of authority, that there must be such intention,

or that it must be so apparent that the representation will have that effect that the intention must be presumed."

1. Negligence as Substitute for Intention — *England.* — *Arnold v. Cheque Bank*, 1 C. P. Div. 578; *Carr v. London, etc., R. Co.*, L. R. 10 C. P. 316; *Vagliano v. Bank of England*, 23 Q. B. Div. 243; *Cornish v. Abington*, 4 H. & N. 549; *Swan v. North British Australasian Co.*, 7 H. & N. 603.

United States. — *Brant v. Virginia Coal etc., Co.*, 93 U. S. 326; *Morgan v. Chicago, etc., R. Co.*, 96 U. S. 720.

Arkansas. — *Rector v. Board of Improvement*, 50 Ark. 116.

California. — *Montgomery v. Keppel*, 75 Cal. 128, 7 Am. St. Rep. 125; *Griffith v. Brown*, 76 Cal. 260.

Colorado. — *Patterson v. Hitchcock*, 3 Colo. 533; *Griffith v. Wright*, 6 Colo. 248; *Birch v. Steppler*, 11 Colo. 407.

Maryland. — *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325.

Massachusetts. — *Tracy v. Lincoln*, 145 Mass. 357.

Minnesota. — *Pence v. Arbuckle*, 22 Minn. 417.

New Hampshire. — *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111.

New York. — *Manufacturers', etc., Bank v. Hazard*, 30 N. Y. 226; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Thompson v. Simpson*, 128 N. Y. 291.

Ohio. — *Cleveland, etc., R. Co. v. Reid*, 6 Ohio Dec. 285; *Bridenbaugh v. King*, 42 Ohio St. 410.

Vermont. — *Greene v. Smith*, 57 Vt. 268.

Wisconsin. — *Kingman v. Graham*, 51 Wis. 232.

In *Coventry v. Great Eastern R. Co.*, 11 Q. B. Div. 776, the defendants received a consignment of wheat and issued a delivery order for it, which came into the hands of B. Upon this delivery order B. obtained advances from the plaintiffs. Shortly afterwards the defendants issued a second delivery order in respect of the same consignment of wheat. The two delivery orders were different, and such as might be reasonably supposed to relate to distinct consignments of wheat. Upon this second delivery order B. obtained further advances from the plaintiffs, who were under the belief that the delivery orders related to distinct consignments of wheat. B. having afterwards become insolvent, it was held that the defendants were estopped by their negligence from showing that the two delivery orders related only to one consignment of wheat, and that they were liable to compensate the plaintiffs for the loss sustained by them through the advances to B.

subsequently claiming it, it must appear that there were both an occasion and a duty to speak, and, in addition to this, that the omission to speak upon opportunity being presented was intentional or in negligent disregard of the plain dictates of conscience and justice.¹

(4) *Knowledge of Facts by Party to Be Estopped* — (a) *In General*. — It may be stated, as a general rule, that the representation or concealment relied on to sustain an estoppel must have been made with full knowledge of the facts by the party to be estopped,² unless his ignorance was the result of gross negligence³ or otherwise involves gross culpability, as where he is consciously

1. Estoppel by Silence — Silence Intentional or Negligent. — *Gregg v. Wells*, 10 Ad. & El. 90, 37 E. C. L. 54; *Morgan v. Chicago*, etc., R. Co., 96 U. S. 720; *Rector v. Board of Improvement*, 50 Ark. 116; *Anderson v. Hubble*, 93 Ind. 576, 47 Am. Rep. 394; *Martin v. Maine Cent. R. Co.*, 83 Me. 100; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Thompson v. Simpson*, 128 N. Y. 291.

Where a party to a stated account, who is under a duty from the usages of business or otherwise to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects to make such examination himself or have it made in good faith by another for him, by reason of which negligence the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection which he could and would have taken had such notice been given, the former is estopped by his conduct from questioning the conclusiveness of such account. *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 107. See also the title ACCOUNTS, vol. 1, p. 448.

2. Knowledge of Facts on Part of Person to Be Estopped — United States. — *Farmers', etc., Bank v. Farwell*, 19 U. S. App. 256.

Alabama. — *Colbert v. Daniel*, 32 Ala. 314.

Colorado. — *Patterson v. Hitchcock*, 3 Colo. 533; *Griffith v. Wright*, 6 Colo. 248; *Birch v. Stepler*, 11 Colo. 407.

Connecticut. — *Welch v. Seymour*, 28 Conn. 387; *Clinton v. Haddam*, 50 Conn. 84.

Georgia. — *Davis v. Bagley*, 40 Ga. 181, 2 Am. Rep. 570; *Allen v. Solomon*, 54 Ga. 483; *Jenkins v. Means*, 59 Ga. 55; *Raspberry v. Harville*, 90 Ga. 530.

Idaho. — *Houser v. Austin*, 2 Idaho 188.

Illinois. — *Gray v. Agnew*, 95 Ill. 315; *Halloran v. Halloran*, 137 Ill. 100; *Reiss v. Hanchett*, 141 Ill. 419; *Gillespie v. Gillespie*, 159 Ill. 84; *Weaver v. Peasley*, 163 Ill. 251.

Indiana. — *Lee v. Templeton*, 73 Ind. 315; *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394.

Iowa. — *Watters v. Connelly*, 59 Iowa 217; *Van Horn v. Overman*, 75 Iowa 421; *Carnes v. Mitchell*, 82 Iowa 601.

Kansas. — *Clark v. Coolidge*, 8 Kan. 189.

Kentucky. — *Ford v. Mayo*, 91 Ky. 83.

Massachusetts. — *Andrews v. Lyons*, 11 Allen (Mass.) 349; *Charlestown v. Middlesex County*, 109 Mass. 270; *Proctor v. Putnam Mach. Co.*, 137 Mass. 159.

Michigan. — *Chicago*, etc., R. Co. v. Auditor-Gen., 53 Mich. 79; *Van Ness v. Hadsell*, 54 Mich. 560; *Tinsman v. Monroe County*, 90 Mich. 382.

Minnesota. — *Norman v. Eckern*, 60 Minn. 531.

Mississippi. — *Houston v. Witherspoon*, 68 Miss. 190.

Missouri. — *Frederick v. Missouri River*, etc., R. Co., 82 Mo. 402; *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307; *Longworth v. Aslin*, 106 Mo. 155; *St. Joseph v. Dillon*, 61 Mo. App. 317; *Grabill v. Bearden*, 62 Mo. App. 459.

Montana. — *Rausch v. Rausch*, 14 Mont. 325.

Nebraska. — *Nash v. Baker*, 40 Neb. 294.

New York. — *Bowditch v. Ayrault*, 63 Hun (N. Y.) 23; *Adams v. Albert*, 87 Hun (N. Y.) 471.

North Carolina. — *Estis v. Jackson*, 111 N. Car. 145, 32 Am. St. Rep. 784.

Pennsylvania. — *Wright's Appeal*, 99 Pa. St. 425.

South Carolina. — *Bull v. Rowe*, 13 S. Car. 355; *Gaston v. Brandenburg*, 42 S. Car. 348.

South Dakota. — *Eickelberg v. Soper*, 1 S. Dak. 563.

Tennessee. — *Taylor v. Nashville*, etc., R. Co., 86 Tenn. 228; *Simpson v. Moore*, 5 Lea (Tenn.) 372.

Texas. — *Turner v. Ferguson*, 58 Tex. 9; *Smith v. Huckaby*, 4 Tex. Civ. App. 80.

Utah. — *Brigham Young Trust Co. v. Wagener*, 12 Utah 1.

Virginia. — *Taylor v. Cussen*, 90 Va. 40; *Hale v. Hale*, 90 Va. 728.

Washington. — *Girault v. A. P. Hoteling Co.*, 7 Wash. 90.

Wisconsin. — *Fay v. Tower*, 58 Wis. 286; *Long v. Davidson*, 77 Wis. 509; *Bachmeyer v. Mutual Reserve Fund L. Assoc.*, 87 Wis. 325.

See also the title BOUNDARIES, vol. 4, p. 866.

3. Effect of Ignorance of Party to Be Estopped Resulting from Gross Negligence. — *Patterson v. Hitchcock*, 3 Colo. 533; *Griffith v. Wright*, 6 Colo. 248; *Birch v. Stepler*, 11 Colo. 407; *Wright v. Stice*, 173 Ill. 580.

Where Facts Are Forgotten. — It has been held that if a man makes a misrepresentation as to what he ought to have known, and what he did at one time know, although he alleges that at the particular moment he had forgotten it, and injury ensues, the maker of the misrepresentation is equally estopped from asserting the contrary of his misrepresentation as if he knew when uttering it that it was false. *Raley v. Williams*, 73 Mo. 310; *Bullis v. Noble*, 36 Iowa 618. See also *Slim v. Croucher*, 1 De G. F. & J. 518.

But in *Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 112, it was held that where an infant sixteen years old signed her mother's name to a deed of property at her request, she is not estopped thereby from afterwards claiming the property by virtue of the conveyance to herself

ignorant of the facts at the very time of professing full knowledge of them.¹

(b) **Distinction Between Silence and Positive Act of Party to Be Estopped.** — The rule has been laid down unqualifiedly that silence, in the absence of knowledge of one's rights, will not work an estoppel.² Thus, the omission to assert title to land against persons dealing with it as their own, in the absence of knowledge of such title, will not estop the owner to set up his claim thereto.³ On the other hand, it has been held that positive acts tending to mislead one ignorant of the truth, which do mislead him to his injury, are a good ground of estoppel, and ignorance of title or right on the part of him who is estopped will not excuse his act.⁴ Thus, where an owner positively encourages another to purchase land from a third person, on the faith that such third person is the owner, ignorance of the facts of the case on the part of the true owner will not, as a general rule, prevent the operation of an estoppel against him.⁵

(5) **Knowledge of Facts by Person Setting Up Estoppel** — (a) **In General.** — It may be stated as a general rule that it is essential to the application of the principle of equitable estoppel that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of the facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that, where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.⁶

ten or eleven years previous to the execution of such deed, she having forgotten the first conveyance at the time.

1. **Party to Be Estopped Consciously Ignorant of Facts at Time of Professing Full Knowledge.** — *Evans v. Edmonds*, 13 C. B. 777, 76 E. C. L. 777; *Preston v. Mann*, 25 Conn. 118; *Beebe v. Knapp*, 28 Mich. 53; *Stone v. Covell*, 29 Mich. 359; *Merriwether v. Larmon*, 3 Sneed (Tenn.) 448; *Deaderick v. Mitchell*, 6 Baxt. (Tenn.) 35; *Twitchell v. Bridge*, 42 Vt. 68.

2. **Silence Without Knowledge of Right, Inoperative by Way of Estoppel.** — *Hays v. Reger*, 102 Ind. 524; *Bringard v. Stellwagen*, 41 Mich. 54; *Frederick v. Missouri River, etc.*, R. Co., 82 Mo. 402; *Nash v. Baker*, 40 Neb. 296.

Wantonness Unnecessary. — In *Harward v. Davenport*, 105 Iowa 592, it was held that an instruction authorizing a jury to find an estoppel in case the plaintiff "knowingly and wantonly suffered and permitted the said M. E. Harwood to hold himself out to the world as the owner of the hogs," was erroneous in that the word "wantonly" would be objectionable in requiring too great a degree of culpability on the part of the plaintiff to constitute an estoppel.

3. **Omission to Assert Title to Land.** — *Fredrick v. Missouri River, etc.*, R. Co., 82 Mo. 402. See also *Hill v. Epley*, 31 Pa. St. 334.

4. **Positive Act in Ignorance of Rights Operative by Way of Estoppel.** — *Martin v. Maine Cent. R. Co.*, 83 Me. 105; *Longworth v. Aslin*, 106 Mo. 155; *Storrs v. Barker*, 6 Johns. Ch. (N. Y.) 168, 10 Am. Dec. 316; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Hill v. Epley*, 31 Pa. St. 334; *Chapman v. Chapman*, 59 Pa. St. 214.

5. **Encouraging Another to Purchase Land in Ignorance of Title.** — *Martin v. Maine Cent. R. Co.*, 83 Me. 105; *Storrs v. Barker*, 6 Johns. Ch. (N. Y.) 168, 10 Am. Dec. 316; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Hill v. Epley*, 31 Pa. St. 334; *Chapman v. Chapman*, 59 Pa. St. 214.

6. **Knowledge of Facts by Person Setting Up Estoppel** — *United States*. — *Brant v. Virginia Coal, etc., Co.*, 93 U. S. 326; *Steel v. St. Louis Smelting, etc., Co.*, 106 U. S. 447; *Fitzpatrick v. Flannagan*, 106 U. S. 648; *Sturm v. Boker*, 150 U. S. 312.

Arkansas. — *Pettit v. Johnson*, 15 Ark. 55.

California. — *Ferris v. Coover*, 10 Cal. 589; *Stockman v. Riverside Land, etc., Co.*, 64 Cal. 57; *Raynor v. Dree*, 72 Cal. 307; *Boggs v. Merced Min. Co.*, 14 Cal. 368; *Kelly v. Taylor*, 23 Cal. 15; *Carpentier v. Thirston*, 24 Cal. 281; *Maine Boys' Tunnel Co. v. Boston Tunnel Co.*, 37 Cal. 50; *Huse v. Den*, 85 Cal. 390; *Murphy v. Clayton*, 113 Cal. 160; *Lux v. Haggins*, 69 Cal. 266.

Colorado. — *Patterson v. Hitchcock*, 3 Colo. 533; *Griffith v. Wright*, 6 Colo. 248; *Birch v. Stepler*, 11 Colo. 407; *Rockwell v. Coffey*, 20 Colo. 397.

Connecticut. — *Williams v. Wadsworth*, 51 Conn. 277.

Georgia. — *Carroll v. Turner*, 54 Ga. 177; *Wilkins v. McGehee*, 86 Ga. 764.

Illinois. — *Davidson v. Young*, 38 Ill. 145; *Mills v. Graves*, 38 Ill. 455, 87 Am. Dec. 314; *Smith v. Cremer*, 71 Ill. 185; *People v. Brown*, 67 Ill. 437; *Powell v. Rogers*, 105 Ill. 318; *Scates v. King*, 110 Ill. 456; *Mullaney v. Duffy*, 145 Ill. 559; *Holcomb v. Boynton*, 151 Ill. 294; *Home Ins. Co. v. Bethel*, 42 Ill. App. 475.

Indiana. — *Lash v. Rendell*, 72 Ind. 475; *Buck v. Milford*, 90 Ind. 291; *Logansport v. La Rose*, 99 Ind. 117; *Moon v. Martin*, 122 Ind. 211; *Wolfe v. Sullivan*, 133 Ind. 331; *Sohn v. Gantner*, 134 Ind. 31; *Ross v. Banta*, 140 Ind. 120; *Kiefer v. Klinsick*, 144 Ind. 46; *Kain v. Bare*, 4 Ind. App. 440; *Cleveland, etc., R. Co. v. Moline Plow Co.*, 13 Ind. App. 225.

Kansas. — *Clark v. Coolidge*, 8 Kan. 189.

Maryland. — *Schaidt v. Blaul*, 66 Md. 141; *Shiple v. Fox*, 69 Md. 572; *Mountain Lake Park Assoc. v. Shartzler*, 83 Md. 10.

(b) **Knowledge Implied from Occupancy of Land.** — Thus it has been said that a person in the actual occupancy of his land gives thereby all the information of his claim which is required, unless specially interrogated, and his mere failure to assert title under such circumstances cannot operate as an estoppel.¹

(c) **Record as Notice of Title.** — It may be stated as a general proposition also that where the instrument under which a person claims title is of record, mere silence on his part as to his title will work no estoppel, since the record is all

Massachusetts. — *Robbins v. Potter*, 98 Mass. 532.

Minnesota. — *Plummer v. Mold*, 22 Minn. 15; *Shillock v. Gilbert*, 23 Minn. 386; *Norman v. Eckern*, 60 Minn. 531; *Grabill v. Bearden*, 62 Mo. App. 459.

Missouri. — *Bales v. Perry*, 51 Mo. 449; *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307; *St. Louis v. St. Louis Gas-Light Co.*, 5 Mo. App. 484.

Nebraska. — *Nash v. Baker*, 40 Neb. 294; *Chamberlain v. Grimes*, 42 Neb. 701; *Foley v. Holtry*, 41 Neb. 563.

New Hampshire. — *Moore v. Bowman*, 47 N. H. 499; *Stevens v. Dennett*, 51 N. H. 334; *Pittsburgh v. Danforth*, 56 N. H. 278; *Jones v. Portsmouth Aqueduct*, 62 N. H. 488.

New Jersey. — *Perkins v. Moorestown, etc.*, *Turnpike Co.*, 48 N. J. Eq. 499.

New York. — *Baker v. Union Mut. L. Ins. Co.*, 43 N. Y. 283.

North Carolina. — *Holmes v. Crowell*, 73 N. Car. 613; *Exum v. Cogdell*, 74 N. Car. 139; *Loftin v. Crossland*, 94 N. Car. 76; *Mayo v. Leggett*, 96 N. Car. 237; *Dameron v. Eskridge*, 104 N. Car. 621; *Estis v. Jackson*, 111 N. Car. 145, 32 Am. St. Rep. 784.

Pennsylvania. — *Hepburn v. McDowell*, 17 S. & R. (Pa.) 383, 17 Am. Dec. 677; *Crest v. Jack*, 3 Watts (Pa.) 240, 27 Am. Dec. 353; *Knouff v. Thompson*, 16 Pa. St. 357.

South Carolina. — *Phinney v. Johnson*, 13 S. Car. 25; *Gaston v. Brandenburg*, 42 S. Car. 348.

South Dakota. — *Eickelberg v. Soper*, 1 S. Dak. 563.

Tennessee. — *Taylor v. Nashville, etc.*, R. Co., 86 Tenn. 228.

Texas. — *Mayer v. Ramsey*, 46 Tex. 371; *Wortham v. Thompson*, 81 Tex. 348.

Utah. — *Poynter v. Chipman*, 8 Utah 442; *Brigham Young Trust Co. v. Wagener*, 12 Utah 11.

Vermont. — *Kendall v. Tracy*, 64 Vt. 522.

Virginia. — *Taylor v. Cussen*, 90 Va. 43.

Wisconsin. — *Kingman v. Graham*, 51 Wis. 232; *Brothers v. Kaukauna Bank*, 84 Wis. 381, 36 Am. St. Rep. 932.

If a person positively encouraged another to purchase either land or chattels, he cannot afterwards assert any title to the premises known to him, or which should have been known to him, at the time of the purchase, unless the party making the purchase had knowledge of the true condition of the title to the premises, or the same means for ascertaining the true state of the title that the party to be estopped had. *Birch v. Steppler*, 11 Colo. 409.

Permission of Expensive Structures for Diversion of Water. — Where a person built a mill-race upon his own land and erected a factory also upon such land, which factory was to be supplied with water from the stream carried to

this mill-race, it was held that the fact that a riparian owner on the opposite bank of the stream saw him and his men at work on the mill-race and the factory and understood that the race was being built to take water from the stream to the shop, and during all the time it was in course of construction never objected to it in any way or authorized any one to object to it for her, and did not at any time object to the defendant's carrying the water down the race, did not operate against her as an estoppel against an action to recover for the diversion of the water. The court in this case said: "There is no pretense that the defendants did not know their title and rights quite as well as Mrs. Smith, and none that she in any way induced the expenditure." *New York Rubber Co. v. Rothery*, 107 N. Y. 315, 1 Am. St. Rep. 822. To the same effect see *Lux v. Haggin*, 69 Cal. 255; *Viele v. Judson*, 82 N. Y. 32; *Corning v. Troy Iron, etc., Factory*, 40 N. Y. 191. See also *Morrill v. Saint Anthony Falls Water-Power Co.*, 26 Minn. 222; *Giddings v. Emerson*, 24 Conn. 546.

Qualification of Rule. — But cases may arise where the representation will operate as an estoppel, although the party seeking to set up the estoppel might have discovered, upon inquiry, the falsity of such representation. Thus, where, in a suit upon a promissory note given for the purchase of certain stock, it appeared that the defendant purchased the same from the president of the company who represented that the stock was at par, that the business was of great value, and that the corporation was solvent, and all of these representations were untrue, and it further appeared that the defendant, before his purchase, had ample opportunities to learn the state of affairs, it was held that the defendant had a right to presume that the vendor, as president of the company, was fully informed as to its financial condition, and the failure of the vendee to make inquiries relating thereto in other quarters was no proof of negligence such as would estop him from pleading the false representations as a bar to recovery on the note. *Wanell v. Kem*, 57 Mo. 478.

1. Knowledge Implied from Occupancy of Land by Person to Be Estopped. — *Mills v. Graves*, 38 Ill. 456, 87 Am. Dec. 314. See also *Scates v. King*, 110 Ill. 456; *Howland v. Woodruff*, 60 N. Y. 73.

Personal Property in Possession. — In *Cunningham v. Millner*, 56 Ala. 522, it was held that the failure or refusal of a person having possession of personal property to disclose the nature of his claim on the demand of a party asserting an adverse right, could not estop him from asserting his claim against the person making such demand.

the notice he is bound to give, so long as he remains passive.¹ And it has been held that he will not be estopped by his silence, though he may know or be informed that others are negotiating for rights and interests in property bound by his title of record, as he is under no obligation to warn or apprise them of that which the record discloses,² though the authorities are not harmonious upon this question, and the contrary has been held.³ But where a person, though holding under a recorded instrument, does not remain merely passive, but does some affirmative act to mislead or deceive, he may be estopped to assert title as against persons dealing with his property as their own.⁴

(6) *Reliance upon Act or Representation.* — Another essential element of estoppel by misrepresentation or concealment is that one party should have relied upon the conduct of the other and been induced by it to act or to refrain from acting⁵ so that he will be substantially injured if the other party

1. Record as Notice of Title in Favor of Person Silent as to Title — *Alabama.* — *Steele v. Adams*, 21 Ala. 534; *Porter v. Wheeler*, 105 Ala. 451.

Arkansas. — *Mayo v. Cartwright*, 30 Ark. 407.

Florida. — *Neal v. Gregory*, 19 Fla. 356.

Illinois. — *Campbell v. Jacobson*, 145 Ill. 389.

Indiana. — *Dodge v. Pope*, 93 Ind. 480; *Killian v. Andrews*, 130 Ind. 579.

Maine. — *Mason v. Philbrook*, 69 Me. 57.

Maryland. — *Frazee v. Frazee*, 79 Md. 27.

Minnesota. — *Ogden v. Ball*, 40 Minn. 94.

Mississippi. — *Sulphine v. Dunbar*, 55 Miss. 255; *Murphy v. Jackson*, 69 Miss. 403.

Missouri. — *Bales v. Perry*, 51 Mo. 453; *Throckmorton v. Pence*, 121 Mo. 50.

New York. — *Rice v. Dewey*, 54 Barb. (N. Y.) 455; *Brinckerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 65.

North Carolina. — *Morris v. Herndon*, 113 N. Car. 237.

Pennsylvania. — *Knouff v. Thompson*, 16 Pa. St. 357; *Hill v. Epley*, 31 Pa. St. 331.

In *Frazee v. Frazee*, 79 Md. 30, the court said: "It is well established that where a party's rights in property sufficiently appear of record, mere silence upon his part is no violation of duty, and he is not estopped to assert his rights against others dealing with the property as another's."

2. *Porter v. Wheeler*, 105 Ala. 458.

3. *Markham v. O'Connor*, 52 Ga. 183, 21 Am. Rep. 249; *Sumner v. Seaton*, 47 N. J. Eq. 103; *Kingman v. Graham*, 51 Wis. 232.

4. Record Inoperative as Notice in Favor of Person Making Positive Misrepresentations. — *Birch v. Stepieler*, 11 Colo. 400; *Robbins v. Moore*, 129 Ill. 30; *Kiefer v. Rogers*, 19 Minn. 32; *Staton v. Bryant*, 55 Miss. 261; *Wynne v. Mason*, 72 Miss. 424; *Olden v. Hendrick*, 100 Mo. 533; *Blakeslee v. Sincepaugh*, 71 Hun (N. Y.) 412; *Morris v. Herndon*, 113 N. Car. 237; *Eickelberg v. Soper*, 1 S. Dak. 563. See also *Davis v. Park*, 103 Mass. 501; *Parham v. Randolph*, 4 How. (Miss.) 435, 35 Am. Dec. 403; *Evans v. Forstall*, 58 Miss. 30; *Holland v. Anderson*, 38 Mo. 55; *Mead v. Bunn*, 32 N. Y. 275.

In *Knouff v. Thompson*, 16 Pa. St. 364, the court said: "The party who has placed his written title on record has given the notice which every person is bound to know and respect. The law does not require him to go further. But if he speaks or acts, it must be consistent with his recorded title. The law

distinguishes between silence and encouragement. Whilst silence may be innocent and lawful, to encourage and mislead another into expenditures on a bad or doubtful title would be a positive fraud that should bar and estop the party, the author of that encouragement and deception, from disturbing the title of the person whom he misled, by any claim of title in himself."

Where B, the owner of a second mortgage, induced A, the first mortgagee, to take another mortgage on the same property to secure the same indebtedness, thereby giving to the second mortgage a legal priority over the new mortgage, A having no actual notice of B's lien, it was held that B was not a mere silent bystander, but a participant in the transaction, and he was estopped to retain the advantage obtained under such circumstances. *Morris v. Herndon*, 113 N. Car. 236.

5. Reliance upon Act or Representation Necessary — *England.* — *Cropper v. Smith*, 26 Ch. Div. 700; *Howard v. Hudson*, 2 El. & Bl. 1, 75 E. C. L. 1; *M'Cance v. London, etc., R. Co.*, 7 H. & N. 477; *Swan v. North British Australasian Co.*, 7 H. & N. 603; *Stimson v. Farnham*, L. R. 7 Q. B. 175; *Carr v. London, etc., R. Co.*, L. R. 10 C. P. 318.

United States. — *Ketchum v. Duncan*, 96 U. S. 659; *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433; *Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231; *Schroeder v. Young*, 161 U. S. 334; *Paxson v. Brown*, 61 Fed. Rep. 874, 27 U. S. App. 49; *The Howard Carroll*, 14 U. S. App. 506; *Comer v. Felton*, 22 U. S. App. 313; *Bonsack Mach. Co. v. Hess*, 25 U. S. App. 315; *Dodsworth v. Hercules Iron Works*, 31 U. S. App. 292.

Alabama. — *Gamble v. Gamble*, 11 Ala. 966; *Hunley v. Hunley*, 15 Ala. 91; *Brewer v. Brewer*, 19 Ala. 481; *Pounds v. Richards*, 21 Ala. 424; *Ware v. Cowles*, 24 Ala. 446, 60 Am. Dec. 482; *Prickett v. Sibert*, 75 Ala. 315; *Myers v. Byars*, 99 Ala. 484.

Arkansas. — *Prater v. Frazier*, 11 Ark. 249; *Franklin v. Meyer*, 36 Ark. 96; *Cope Lumber Co. v. Foster, etc., Hardware Co.*, 53 Ark. 196; *Miller Lumber Co. v. Wilson*, 56 Ark. 380.

California. — *Duell v. Bear River, etc., Min. Co.*, 5 Cal. 85; *Goodale v. Scannell*, 8 Cal. 28; *Mitchell v. Reed*, 9 Cal. 204, 70 Am. Dec. 647; *Stanley v. Green*, 12 Cal. 148; *Boggs v. Merced Min. Co.*, 14 Cal. 279 (followed in *McCracken v. San Francisco*, 16 Cal. 591; *Green v. Pretty-*

man, 17 Cal. 401; *Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157; *Love v. Shartzer*, 31 Cal. 488; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365; *Carpentier v. Thirston*, 24 Cal. 269; *Franklin v. Dorland*, 28 Cal. 175, 87 Am. Dec. 111; *Davenport v. Turpin*, 43 Cal. 597; *Lux v. Haggin*, 69 Cal. 367; *McCormick v. Orient Ins. Co.*, 86 Cal. 260; *Scott v. Jackson*, 89 Cal. 258; *Barnhart v. Fulkerth*, 93 Cal. 497; *Gerlach v. Turner*, 89 Cal. 446; *Leedom v. Ham*, (Cal. 1897) 48 Pac. Rep. 222.

Colorado. — *Patterson v. Hitchcock*, 3 Colo. 533; *Griffith v. Wright*, 6 Colo. 248; *Birch v. Stepler*, 11 Colo. 407; *Colorado Fuel, etc., Co. v. Lenhart*, 6 Colo. App. 511.

Connecticut. — *Bushnell v. Church*, 15 Conn. 406; *Whitaker v. Williams*, 20 Conn. 98; *Townsend Sav. Bank v. Todd*, 47 Conn. 190; *Daniels v. Equitable F. Ins. Co.*, 48 Conn. 105; *Hull v. Hull*, 48 Conn. 250, 40 Am. Rep. 165.

Delaware. — *Marvel v. Ortilip*, 3 Del. Ch. 9.

District of Columbia. — *Sanche v. Electro-lybration Co.*, 4 App. Cas. (D. C.) 453.

Georgia. — *Jones v. Morgan*, 13 Ga. 515; *McCune v. McMichael*, 29 Ga. 312; *Roberts v. Davis*, 72 Ga. 819; *Rives v. Lamar*, 94 Ga. 186.

Illinois. — *Davidson v. Young*, 38 Ill. 145; *Mills v. Graves*, 38 Ill. 465, 87 Am. Dec. 314; *Fetrow v. Merriwether*, 53 Ill. 275; *Hefner v. Vandolah*, 57 Ill. 520, 11 Am. Rep. 39; *Rockford, etc., R. Co. v. Shunick*, 65 Ill. 223; *Flower v. Elwood*, 65 Ill. 438; *People v. Brown*, 67 Ill. 435; *Dorlarque v. Cress*, 71 Ill. 380; *Ball v. Hooten*, 85 Ill. 159; *Illinois Masons' Benev. Soc. v. Baldwin*, 86 Ill. 479; *Hall v. Jackson County*, 95 Ill. 353; *Powell v. Rogers*, 105 Ill. 318; *Golconda v. Field*, 108 Ill. 419; *Union Mut. L. Ins. Co. v. Slee*, 123 Ill. 57; *Worrell v. Forsyth*, 141 Ill. 22; *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 33 Am. St. Rep. 273; *Holcomb v. Boynton*, 151 Ill. 294; *Washingtonian Home v. Chicago*, 157 Ill. 414; *Gillespie v. Gillespie*, 159 Ill. 84; *Salem Nat. Bank v. White*, 159 Ill. 136; *Weaver v. Peasley*, 163 Ill. 251; *Boynton v. Holcomb*, 49 Ill. App. 503; *Brayton v. Harding*, 56 Ill. App. 362.

Indiana. — *Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577; *McCabe v. Raney*, 32 Ind. 309; *Colter v. Calloway*, 68 Ind. 219; *Stringer v. North Western Mut. L. Ins. Co.*, 82 Ind. 100; *Chaplin v. Baker*, 124 Ind. 385; *Ross v. Banta*, 140 Ind. 150; *Lewis v. Hodapp*, 14 Ind. App. 111.

Iowa. — *Eikenberry v. Edward*, 67 Iowa 14; *Laub v. Trowbridge*, 71 Iowa 396; *Guest v. Burlington Opera-House Co.*, 74 Iowa 457; *Van Horn v. Overman*, 75 Iowa 421; *Dohms v. Mann*, 76 Iowa 723; *Anchamphugh v. Schmidt*, 77 Iowa 13.

Kansas. — *Clark v. Coolidge*, 8 Kan. 189; *Palmer v. Meiners*, 17 Kan. 478; *Coffelt v. Holton First Nat. Bank*, 52 Kan. 600; *Neve v. Allen*, 55 Kan. 638.

Kentucky. — *Ratcliff v. Bellfonte Iron Works Co.*, 87 Ky. 559.

Louisiana. — *Marqueze v. Fernandez*, 30 La. Ann. 195; *Chaffe v. Morgan*, 30 La. Ann. 1307.

Maine. — *Copeland v. Copeland*, 28 Me. 525; *Graves v. Blondell*, 70 Me. 190; *McClure v. Livermore*, 78 Me. 391; *Tower v. Haslam*, 84 Me. 86.

Massachusetts. — *Murphy v. People's Equi-*

table Mut. F. Ins. Co., 7 Allen (Mass.) 239; *Butchers' Slaughtering, etc., Assoc. v. Boston*, 139 Mass. 290; *Birch v. Hutchings*, 144 Mass. 561; *Tyler v. Odd Fellows' Mut. Relief Assoc.*, 145 Mass. 134; *Lincoln v. Gay*, 164 Mass. 537.

Michigan. — *Michigan Paneling Mach., etc., Co. v. Parsell*, 38 Mich. 475; *Potter v. Brown*, 50 Mich. 436; *Wright v. Weimeister*, 87 Mich. 594; *Gooding v. Underwood*, 89 Mich. 187; *Stanton v. Estey Mfg. Co.*, 90 Mich. 12; *Anderson v. Crowley*, 96 Mich. 457; *Dean v. Crall*, 98 Mich. 591, 39 Am. St. Rep. 571; *Gooding v. Underwood*, 89 Mich. 187.

Minnesota. — *Whitacre v. Culver*, 8 Minn. 133; *Northern Line Packet Co. v. Platt*, 22 Minn. 413; *McAbe v. Thompson*, 27 Minn. 134; *Brown v. Grant*, 39 Minn. 404; *Hopkins v. Swensen*, 41 Minn. 292; *Stuart v. Lowry*, 42 Minn. 473; *Welsh v. Cooley*, 44 Minn. 446; *Fitzpatrick v. Hanson*, 55 Minn. 195; *Norman v. Eckern*, 60 Minn. 531; *Stevens v. Ludlum*, 46 Minn. 160, 24 Am. St. Rep. 210.

Mississippi. — *Sulphine v. Dunbar*, 55 Miss. 255; *Davis v. Bowmar*, 55 Miss. 671; *Hart v. Livermore Foundry, etc., Co.*, 72 Miss. 809.

Missouri. — *Taylor v. Zepp*, 14 Mo. 482; *Bales v. Perry*, 51 Mo. 449; *Eitelgeorge v. Mutual House Bldg. Assoc.*, 69 Mo. 52; *Wright v. McPike*, 70 Mo. 175; *Spurlock v. Sproule*, 72 Mo. 503; *Rogers v. Marsh*, 73 Mo. 64; *Acton v. Dooley*, 74 Mo. 63; *Burke v. Adams*, 80 Mo. 504; *Monks v. Belden*, 80 Mo. 639; *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307; *State Bank v. Frame*, 112 Mo. 502; *Scrutchfield v. Sauter*, 119 Mo. 615; *Snodgrass v. Emery*, 2 Mo. App. Rep. 1352, 66 Mo. App. 462; *Ford v. Fellows*, 34 Mo. App. 630; *Smith v. Roach*, 59 Mo. App. 115; *Rosenthal v. Jenkins*, 67 Mo. App. 295.

Nebraska. — *Lingonner v. Ambler*, 44 Neb. 316.

New Hampshire. — *Barney v. Keniston*, 58 N. H. 168; *Lawrence v. Towle*, 59 N. H. 28.

New Jersey. — *Harris v. Kirkpatrick*, 35 N. J. L. 392; *Martin v. Righter*, 10 N. J. Eq. 510; *Woodruff v. Lounsberry*, 40 N. J. Eq. 545; *Van Syckel v. O'Hearn*, 50 N. J. Eq. 173; *Robeson v. Robeson*, 50 N. J. Eq. 465; *Ruckelshaus v. Borchering*, 54 N. J. Eq. 344; *Mott v. Newark German Hospital*, 55 N. J. Eq. 722.

New York. — *Jones v. Merchants' Nat. Bank*, 55 Hun (N. Y.) 290; *Bean v. Pettengill*, 7 Robt. (N. Y.) 7; *Jones v. Merchants' Nat. Bank*, 55 Hun (N. Y.) 290; *Moore v. Nye*, 66 Hun (N. Y.) 628, 49 N. Y. St. Rep. 168; *McGowan v. Supreme Council, etc.*, 76 Hun (N. Y.) 534; *Brown v. Bowen*, 30 N. Y. 540, 86 Am. Dec. 406; *McMaster v. Insurance Co. of North America*, 55 N. Y. 222, 14 Am. Rep. 230; *Winegar v. Fowler*, 82 N. Y. 315; *Andrews v. Aetna L. Ins. Co.*, 85 N. Y. 334; *Welsh v. Taylor*, 134 N. Y. 450.

North Carolina. — *Dameron v. Eskridge*, 104 N. Car. 621.

Ohio. — *Cleveland, etc., R. Co. v. Reid*, 6 Ohio Dec. 285.

Pennsylvania. — *Com. v. Moltz*, 10 Pa. St. 527, 51 Am. Dec. 499; *Eldred v. Hazlett*, 33 Pa. St. 307; *Waters's Appeal*, 35 Pa. St. 523, 78 Am. Dec. 354; *Eifert v. Lytle*, 172 Pa. St. 356; *McKnight v. Bell*, 135 Pa. St. 358.

South Carolina. — *Gaston v. Brandenburg*, 42 S. Car. 348.

should be allowed to repudiate his action.¹ And this rule applies as well where the conduct of the party to be estopped consists of silence² as where it consists of positive acts.

South Dakota. — Eickelberg v. Soper, 1 S. Dak. 563; Gleckler v. Slavens, 5 S. Dak. 365.

Tennessee. — Askins v. Coe, 12 Lea (Tenn.) 672; Taylor v. Nashville, etc., R. Co., 86 Tenn. 228.

Texas. — Love v. Barber, 17 Tex. 312; Watson v. Hewitt, 45 Tex. 475; Grigsby v. Caruth, 57 Tex. 269; Irvin v. Ellis, 76 Tex. 164; Wortham v. Thompson, 81 Tex. 348; McGregor v. Sima, 12 Tex. Civ. App. 105; Daugherty v. Yeates, 13 Tex. Civ. App. 646; Lumkins v. Coates, (Tex. Civ. App. 1897) 42 S. W. Rep. 580.

Utah. — Poynter v. Chipman, 8 Utah 442.

Vermont. — Hicks v. Cram, 17 Vt. 449; Clark v. Hayward, 51 Vt. 14; Probate Ct. v. St. Clair, 52 Vt. 24; Earl v. Stevens, 57 Vt. 474; Clement v. Gould, 61 Vt. 573; Robinson v. Morgan, 65 Vt. 37; Holman v. Boyce, 65 Vt. 318, 36 Am. St. Rep. 861.

Virginia. — Taylor v. Cussen, 90 Va. 40.

Washington. — Shoufe v. Griffiths, 4 Wash. 161.

West Virginia. — Lorentz v. Lorentz, 14 W. Va. 809.

Wisconsin. — Guichard v. Brande, 57 Wis. 534; Conkey v. Hawthorne, 69 Wis. 199; Simonsen v. Stachlewicz, 82 Wis. 338; O'Donnell v. Brand, 85 Wis. 97; Murray v. Kluck, 87 Wis. 566; Shakman v. U. S. Credit System Co., 92 Wis. 366.

No Estoppel Where Act Not Relied On. — Where one is advised by his counsel that a bank, at whose instance a sale of land is being made, will be estopped from asserting title under any former deed to the land, and relying upon this advice and not upon the act of the bank in having the sale made, buys thereat, the bank is not estopped from claiming title to the land sold. Blodgett v. Perry, 97 Mo. 263, 10 Am. St. Rep. 307. See also Mott v. Newark German Hospital, 55 N. J. Eq. 722.

Prompt Acts of Reliance Necessary. — It has been said that, to constitute an estoppel, the party setting up the estoppel must have acted promptly on the representation. Andrews v. Aetna L. Ins. Co., 85 N. Y. 343.

1. Damage to Party Setting Up Estoppel Necessary — *England*. — Knights v. Wiffen, L. R. 5 Q. B. 660.

United States. — Dodsworth v. Hercules Iron Works, 31 U. S. App. 292.

Alabama. — Strange v. Watson, 11 Ala. 324; Hunley v. Hunley, 15 Ala. 91.

California. — Lux v. Haggin, 69 Cal. 367; Scott v. Jackson, 89 Cal. 258.

Colorado. — Yates v. Hurd, 8 Colo. 343.

Connecticut. — Townsend Sav. Bank v. Todd, 47 Conn. 190; Whittemore v. Hamilton, 51 Conn. 153; Aetna Nat. Bank v. Hollister, 55 Conn. 188.

Georgia. — Reeves v. Matthews, 17 Ga. 449; Goodwyn v. Goodwyn, 20 Ga. 600; Watertown Steam Engine Co. v. Palmer, 84 Ga. 368, 20 Am. St. Rep. 368; McCalla v. American Freehold, etc., Co., 90 Ga. 113; Rives v. Lamar, 94 Ga. 186.

Idaho. — Leland v. Isenbeck, 1 Idaho 469.

Illinois. — Davidson v. Young, 38 Ill. 145;

Ward v. Ward, 134 Ill. 417; Goldsborough v. Gable, 140 Ill. 269; Penn Mut. L. Ins. Co. v. Heiss, 141 Ill. 35, 33 Am. St. Rep. 273.

Indiana. — State v. Pepper, 31 Ind. 76; Stringer v. North Western Mut. L. Ins. Co., 82 Ind. 100; Anderson v. Hubble, 93 Ind. 570, 47 Am. Rep. 394; Chaplin v. Baker, 124 Ind. 385; Barden v. Overmeyer, 134 Ind. 660.

Iowa. — Jamison v. Miller, 64 Iowa 402; Guest v. Burlington Opera-House Co., 74 Iowa 457; King v. Gustafson, 80 Iowa 207; Larson v. Fitzgerald, 87 Iowa 402.

Kansas. — Clark v. Coolidge, 8 Kan. 189.

Maine. — Piper v. Gilmore, 49 Me. 149; McClure v. Livermore, 78 Me. 390.

Maryland. — McClellan v. Kennedy, 8 Md. 230.

Massachusetts. — Hammond v. Abbott, 166 Mass. 517.

Michigan. — De Mill v. Moffat, 49 Mich. 125; Michigan State Ins. Co. v. Soule, 51 Mich. 312; Gooding v. Underwood, 89 Mich. 187.

Mississippi. — Hart v. Livermore Foundry, etc., Co., 72 Miss. 809.

Missouri. — Rosenthal v. Jenkins, 67 Mo. App. 295.

New Hampshire. — Fitts v. Brown, 20 N. H. 393.

New Jersey. — Hart v. Kennedy, 47 N. J. Eq. 51.

New York. — Martin v. Angell, 7 Barb. (N. Y.) 407; Otis v. Sill, 8 Barb. (N. Y.) 102; Champlain, etc., R. Co. v. Valentine, 19 Barb. (N. Y.) 484; Ackley v. Dygert, 33 Barb. (N. Y.) 176; American Exch. Bank v. Webb, 36 Barb. (N. Y.) 291; Saxton v. Dodge, 57 Barb. (N. Y.) 84; Sparrow v. Kingman, 1 N. Y. 242; New York Third Nat. Bank v. Merchants' Nat. Bank, 76 Hun (N. Y.) 475; Smith v. Weston, 81 Hun (N. Y.) 87; Lawrence v. Brown, 5 N. Y. 394; Jewett v. Miller, 10 N. Y. 402, 61 Am. Dec. 751; Carpenter v. Stilwell, 11 N. Y. 61; Boerum v. Schenck, 41 N. Y. 182; Shapley v. Abbott, 42 N. Y. 443, 1 Am. Rep. 548; Malloney v. Horan, 49 N. Y. 112, 10 Am. Rep. 335; McMaster v. Insurance Co. of North America, 55 N. Y. 222, 14 Am. Rep. 329; Voorhis v. Olmstead, 66 N. Y. 113; Andrews v. Aetna L. Ins. Co., 85 N. Y. 334; Commercial Bank v. MacDougall, etc., Co., 8 N. Y. App. Div. 1.

North Carolina. — Devries v. Haywood, 64 N. Car. 83; East v. Dolihite, 72 N. Car. 562; Horne v. People's Bank, 108 N. Car. 109.

Ohio. — McKinzie v. Steele, 18 Ohio St. 38.

Pennsylvania. — Mecouch v. Loughery, 12 Phila. (Pa.) 416, 35 Leg. Int. (Pa.) 222; Diller v. Brubaker, 52 La. St. 498, 91 Am. Dec. 177; Zell's Appeal, 103 Pa. St. 344; Stewart v. Parnell, 147 Pa. St. 523.

Texas. — Watson v. Hewitt, 45 Tex. 472; Robertson v. Gourley, 84 Tex. 575.

Vermont. — Goodell v. Brandon Nat. Bank, 63 Vt. 303.

Wisconsin. — Warder v. Baldwin, 51 Wis. 450; Devine v. Baldwin Bank, 91 Wis. 68.

2. Reliance upon Silence — *Alabama*. — Traun v. Keiffer, 31 Ala. 136.

Representations Made After Change in Position. — According to this rule, representations made or acts done subsequent to the change of position by the other party, which they do not invite or influence, will not operate as an estoppel.¹

Thus, Silence or Acquiescence on the part of an owner, after knowledge that third persons have already taken his property and dealt with it as their own, will not, as a general rule, work an estoppel.²

Misleading Acquiescence. — But the doctrine has been laid down that, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license.³

Acts Done in Partial Reliance on Representation. — It has been held that if, notwithstanding the representation of a fact relied on to sustain an estoppel, the person setting up the estoppel has still been obliged to inquire for the existence of other facts and to rely upon them also to sustain the course of action adopted by him, no estoppel can arise from such representation.⁴

Inducement of Act Enforceable by Law. — The doctrine has no application if the party claiming the benefit of the estoppel has been induced to do only that which he might by law have been compelled to do.⁵

(7) *Against Whom and for Whose Benefit Estoppel Operates.* — It may be laid down as a general rule that, as in the case of other estoppels, only parties and their privies to the act or representation relied on to estop are affected by an estoppel *in pais*. Strangers can neither be bound by nor take advantage of an estoppel.⁶ Thus, ordinarily, only the person to whom a representation was made, or for whom it was intended, can claim it as an estoppel.⁷ But there

Colorado. — *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46.

Florida. — *Neal v. Gregory*, 19 Fla. 356.

Illinois. — *Davidson v. Young*, 38 Ill. 145; *Mullaney v. Duffy*, 145 Ill. 559.

Iowa. — *Durlam v. Steele*, 88 Iowa 498.

Michigan. — *Burdick v. Michael*, 32 Mich. 246; *Maxwell v. Bay City Bridge Co.*, 46 Mich. 278; *Canning v. Harlan*, 50 Mich. 320.

Minnesota. — *O'Mulcahy v. Holley*, 28 Minn. 31; *Hopkins v. Swensen*, 41 Minn. 292.

Nebraska. — *Scharman v. Scharman*, 38 Neb. 40.

New Jersey. — *Ruckelshaus v. Borchering*, 54 N. J. Eq. 344.

New York. — *Dezell v. Odell*, 3 Hill (N. Y.) 215, 38 Am. Dec. 628.

North Carolina. — *Patterson v. Lytle*, 11 Pa. St. 53.

Pennsylvania. — *Hill v. Epley*, 31 Pa. St. 334.

1. Effect of Representations Made After Change in Position. — *McCall v. Powell*, 64 Ala. 254; *Townsend Sav. Bank v. Todd*, 47 Conn. 190; *Straus v. Minzesheimer*, 78 Ill. 492; *Jones v. Dorr*, 19 Ind. 384, 81 Am. Dec. 406; *Ray v. McMurtry*, 20 Ind. 307, 83 Am. Dec. 322; *Stutsman v. Thomas*, 39 Ind. 384; *Reagan v. Hadley*, 57 Ind. 509; *Crossan v. May*, 68 Ind. 242; *Hoover v. Kilander*, 83 Ind. 420; *Behrens v. Germania F. Ins. Co.*, 64 Iowa 19; *Garlinghouse v. Whitwell*, 51 Barb. (N. Y.) 208.

Performance of Contract Previously Made Induced by Representation. — But it has been held that, though a contract had been entered into before a representation was made, an estoppel arises if the performance of the contract was induced by such representation. *Goeing v. Outhouse*, 95 Ill. 346.

2. Silence of Owner After Stranger Has Taken Property. — *Hamlin v. Sears*, 82 N. Y. 330.

3. Where Others Have Acted on Subsequent Acquiescence. — *Caircross v. Lorimer*, 3 Macq. H. L. Cas. 827; *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 113. See also *Truesdail v. Ward*, 24 Mich. 134.

4. Acts Done in Partial Reliance on Representation. — *McMaster v. Insurance Co. of North America*, 55 N. Y. 222, 14 Am. Rep. 239.

5. Inducement of Act Enforceable by Law. — *Organ v. Stewart*, 60 N. Y. 420.

6. Estoppel Inoperative For or Against Strangers. — *Reg. v. Ambergate, etc.*, 1 El. & Bl. 372, 72 E. C. L. 372; *Walker v. Walker*, 9 Wall. (U. S.) 743; *John Shillito Co. v. McClung*, 51 Fed. Rep. 876; *Sanders v. Robertson*, 57 Ala. 465; *Kinney v. Whiton*, 44 Conn. 262, 26 Am. Rep. 462; *Townsend Sav. Bank v. Todd*, 47 Conn. 190; *Caldwell v. Hart*, 57 Miss. 123; *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307; *Mayenborg v. Haynes*, 50 N. Y. 675; *Marine Bank v. Fiske*, 71 N. Y. 353; *Morgan v. Spangler*, 14 Ohio St. 102; *Hopple v. Hipple*, 33 Ohio St. 116.

7. Estoppel Operative Only in Behalf of Person to or for Whom Representation Was Made. — *Peck v. Gurney*, L. R. 6 H. L. 377; *Swift v. Jewsbury*, L. R. 8 Q. B. 244; *Moore v. Boyd*, 74 Cal. 167; *Kinney v. Whiton*, 44 Conn. 262, 26 Am. Rep. 462; *Townsend Sav. Bank v. Todd*, 47 Conn. 190; *Brickley v. Edwards*, 131 Ind. 3; *Irish-American Bank v. Ludlum*, 49 Minn. 344; *Kuhl v. Jersey City*, 23 N. J. Eq. 84; *Mayenborg v. Haynes*, 50 N. Y. 675; *Durant v. Pratt*, 55 Vt. 270. See also *Alexander v. Beresford*, 27 Miss. 747, 61 Am. Dec. 538. Compare *Mitchell v. Reed*, 9 Cal. 204, 70

is a class of acts or representations that may be considered as addressed generally to all who may have occasion to act on them, and in such cases any one who may have occasion to act on them may claim them as an estoppel.¹

Married Women and Infants. — The rule has been laid down by some of the authorities that the doctrine of estoppel *in pais* is not applicable to the case of a party incapable in law of making a contract, and hence that, at common law, it cannot be binding upon married women and infants.² But the authorities upon this question are conflicting.³ A full discussion of estoppel *in pais* as applied to married women and infants will be found elsewhere in this work.⁴

3. Acceptance of Conveyance or Possession — *a. GRANTOR AND GRANTEE.* — It may be laid down as a general principle that the grantee is not estopped to deny the title of his grantor merely by the acceptance of a conveyance and possession thereunder, and that an estoppel *in pais* as between grantor and grantee can arise only where, from the relation of the parties, there is implied in the acceptance of possession under the deed an obligation to restore the possession on the happening of certain events, or to hold the property for the grantor's benefit or persons designated by him, such as exists from the relation of landlord and tenant, or of mortgagor and mortgagee.⁵ No such rela-

Am. Dec. 647; *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111.

An admission made to a third party not connected with the plaintiff does not operate as an estoppel in favor of the plaintiff. *Moore v. Boyd*, 74 Cal. 167.

Admissions against one's title to land and in favor of the title of a third person will be no estoppel in behalf of one to whom they were not made, and who has merely heard of them, it not appearing that they were made for the purpose of being acted upon, or with any design or intention that they should be acted upon. *Harvey v. West*, 87 Ga. 553.

A Mere Bystander who overhears a representation and acts upon it cannot set up an estoppel against the party making it. *Kinney v. Whiton*, 44 Conn. 262, 26 Am. Rep. 462. To the same effect see *Harvey v. West*, 87 Ga. 553.

Representations to Commercial Agency. — Where a person makes a representation to a commercial agency relating to his business or to his pecuniary responsibility, he may be estopped thereby as against the patrons of such agency to whom such information has been communicated. *Stevens v. Ludlum*, 46 Minn. 160, 24 Am. St. Rep. 210. The court in this case said: "If one act on a representation not made to nor intended for him, he will do so at his own risk. An instance of a right to act on a representation not made directly to the person acting on it, but intended for him if he had occasion to act on it, is furnished by *Pence v. Arbuckle*, 22 Minn. 417. The representations a business man makes to a bank or commercial agency, especially to the latter, relating to his business or to his pecuniary responsibility, are among those expected to be communicated to others for them to act on. The business of a commercial agency is to get such information as it can relative to the business and pecuniary ability of business men and business concerns, and communicate it to such of its patrons as may have occasion to apply for it. Any one making representations to such an agency, relating to his business or the business of any concern with which he is connected, must

know, must be held to intend, that whatever he so represents will be communicated by the agency to any patron who may have occasion to inquire. His representations are intended as much for the patrons of the agency, and for them to act on as for the agency itself. When the representations so made are communicated, as those of the person making them, to a patron of the agency, and he relies and acts on them, he is in position to claim an estoppel." See also the title **MERCANTILE AGENCY**.

1. Operation of Representations Addressed to the Public in General. — *Kinney v. Whiton*, 44 Conn. 262, 26 Am. Rep. 462; *Quirk v. Thomas*, 6 Mich. 78; *Pence v. Arbuckle*, 22 Minn. 417.

Thus, in *Board of Education v. Richfield Springs First Nat. Bank*, 70 Hun (N. Y.) 520, the court said: "When the declaration or statement is not made to the person directly, it must have been made under such circumstances as to indicate that it was intended to reach third persons or the community at large."

2. Operation of Estoppel Against Married Women and Infants. — *Lowell v. Daniels*, 2 Gray (Mass.) 161, 61 Am. Dec. 448; *Bemis v. Call*, 10 Allen (Mass.) 512; *Merriam v. Boston, etc., R. Co.*, 117 Mass. 241; *Powell's Appeal*, 98 Pa. St. 403; *Grim's Appeal*, 105 Pa. St. 375.

3. Cupp v. Campbell, 103 Ind. 213; *Carpenter v. Carpenter*, 25 N. J. Eq. 194.

4. See the titles HUSBAND AND WIFE and INFANCY.

5. Estoppel by Acceptance of Possession by Grantee — *United States*. — *Merryman v. Bourne*, 9 Wall. (U. S.) 592; *Grosholz v. Newman*, 21 Wall. (U. S.) 481; *Blight v. Rochester*, 7 Wheat. (U. S.) 535; *Robertson v. Pickrell*, 109 U. S. 615; *Bybee v. Oregon, etc., R. Co.*, 139 U. S. 663; *Elder v. McClaskey*, 37 U. S. App. 1. *Alabama*. — *McKleroy v. Tulane*, 34 Ala. 78; *Cooper v. Watson*, 73 Ala. 252.

California. — *Schuhman v. Garratt*, 16 Cal. 100; *San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187; *Collins v. Bartlett*, 44 Cal. 371; *Wenzel v. Schultz*, 100 Cal. 250; *Robinson v. Thornton*, 102 Cal. 675.

Connecticut. — *Hubbard v. Norton*, 10 Conn. 422.

tion exists between grantor and grantee in an absolute conveyance as a general rule, whether it be of the fee or of an estate for life.¹

Denial of Title to Avoid Payment of Purchase-money. — To this general statement of the law there is this qualification, that a grantee cannot, while continuing in undisturbed possession under the deed, dispute his grantor's title so as to avoid payment of the purchase price of the property, the grantee in such case standing to the vendor in the relation of tenant.²

Title from Common Source. — Nor can the grantee, in a contest with another, whilst relying solely upon the title conveyed to him, question its validity when set up by the latter; in other words, he cannot assert that the title obtained from his grantor or through him is sufficient for his protection and

Illinois. — *Owen v. Robbins*, 19 Ill. 545; *Graves v. Colwell*, 90 Ill. 612; *Patterson v. Johnson*, 113 Ill. 570; *Cobb v. Oldfield*, 151 Ill. 540, 42 Am. St. Rep. 263.

Kansas. — *Kansas Pac. R. Co. v. Dunmeyer*, 24 Kan. 725.

Kentucky. — *Winlock v. Hardy*, 4 Litt. (Ky.) 272.

Maine. — *Brown v. Staples*, 28 Me. 497, 48 Am. Dec. 504; *Kidder v. Blaisdell*, 45 Me. 461.

Massachusetts. — *Norton v. Norton*, 5 Cush. (Mass.) 524; *Small v. Procter*, 15 Mass. 495. See also *Porter v. Sullivan*, 7 Gray (Mass.) 447.

Michigan. — *Sands v. Davis*, 40 Mich. 14.

Mississippi. — *Huntington v. Pritchard*, 11 Smed. & M. (Miss.) 327.

Missouri. — *Macklot v. Dubreuil*, 9 Mo. 483, 43 Am. Dec. 550; *Joeckel v. Easton*, 11 Mo. 118, 47 Am. Dec. 142; *Landes v. Perkins*, 12 Mo. 238; *Blair v. Smith*, 16 Mo. 273; *Cutter v. Waddingham*, 33 Mo. 282; *Mattison v. Ausmuss*, 50 Mo. 551; *Wilcoxon v. Osborn*, 77 Mo. 621.

New Hampshire. — *Haynes v. Stevens*, 11 N. H. 28; *Great Falls Co. v. Worster*, 15 N. H. 414.

New York. — *Averill v. Wilson*, 4 Barb. (N. Y.) 180; *Kingman v. Sparrow*, 12 Barb. (N. Y.) 208, 1 N. Y. 245; *Greene v. Couse*, 127 N. Y. 386, 24 Am. St. Rep. 458. See also *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 518. *Compare* *Sherwood v. Vandenburgh*, 2 Hill (N. Y.) 307; *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229; *Collins v. Torry*, 7 Johns. (N. Y.) 278, 5 Am. Dec. 273; *Davis v. Darrow*, 12 Wend. (N. Y.) 65; *Bowne v. Potter*, 17 Wend. (N. Y.) 164.

North Carolina. — *Gaylord v. Respass*, 92 N. Car. 553.

Pennsylvania. — *Riddle v. Murphy*, 7 S. & R. (Pa.) 235.

Rhode Island. — See also *Gardner v. Greene*, 5 R. I. 104. *Compare* *McCusker v. McEvey*, 9 R. I. 528, 11 Am. Rep. 295.

South Carolina. — *Whitmire v. Wright*, 22 S. Car. 446, 53 Am. Rep. 725.

Tennessee. — *Kerbough v. Vance*, 6 Baxt. (Tenn.) 110.

Wisconsin. — *Green Bay, etc., Canal Co. v. Hewitt*, 62 Wis. 316; *Moore v. Smead*, 89 Wis. 558.

Canada. — *Dittrick v. O'Connor*, 7 U. C. Q. B. 448. See also *Wilkinson v. Conklin*, 10 U. C. C. P. 211; *Gordon v. Proctor*, 20 Ont. Rep. 53. *Compare* *Sydney, etc., Coal, etc., Co. v. Sword*, 21 Can. Sup. Ct. Rep. 152.

Tenant Not Estopped as to Landlord's Widow's Dower Right. — Thus it has been held that where a tenant holds under a conveyance from a husband, whatever its form, he is not estopped from controverting the seizin of the husband and from showing that it was not such as to entitle his landlord's wife to dower. *Foster v. Dwinel*, 49 Me. 44; *McLeery v. McLeery*, 65 Me. 173, 20 Am. Rep. 683. *Compare* *Hains v. Gardner*, 10 Me. 383; *Hamblin v. Cumberland Bank*, 19 Me. 69; *Stimpson v. Thomaston Bank*, 28 Me. 259; *Sydney, etc., Coal, etc., Co. v. Sword*, 21 Can. Sup. Ct. Rep. 152.

In *Gaunt v. Wainman*, 3 Bing. N. Cas. 69, 32 E. C. L. 42, it was held that where a tenant took lands from the assignees of the demandant's husband by deed which described them as freehold, he was not estopped by that deed as against demandant in dower to prove them to be leaseholds.

Conveyance of Right to Remove Timber from Land. — In *Lacy v. Johnson*, 58 Wis. 422, it was held that where a defendant has entered upon the land in controversy for the purpose of cutting and removing the growing timber therefrom, under a contract with plaintiff which gave him the right to do so, having made such entry under and by virtue of the authority of such contract, and having cut and removed the timber solely under that authority, he is in no position to dispute the title or ownership of the plaintiff or to refuse to respond to him for the contract price agreed to be paid therefor, unless he can show that some other person has a better title than the plaintiff, and that, by virtue of such better title, he has been ousted from the possession of the timber cut, or been compelled to respond for its value to the person having such better title.

1. *Robertson v. Pickrell*, 109 U. S. 616.

2. **Denial of Grantor's Title to Avoid Payment of Purchase-money.** — *Galloway v. Finley*, 12 Pet. (U. S.) 295; *Bush v. Marshall*, 6 How. (U. S.) 288; *Strong v. Waddell*, 56 Ala. 472; *Bramble v. Beidler*, 38 Ark. 200; *Marsh v. Thompson*, 102 Ind. 272; *Crumb v. Wright*, 97 Mo. 13; *Smith v. Loanman*, 145 Pa. St. 628; *Spinning v. Drake*, 4 Wash. 285; *Lacy v. Johnson*, 58 Wis. 414. See also *Bowers v. Keesecker*, 14 Iowa 301.

In *Marsh v. Thompson*, 102 Ind. 276, the court said: "It may be said generally that the relation which the purchaser of land not fully paid for bears to the vendor is the same in equity as that between landlord and tenant so far as the doctrine of estoppel is involved."

not available to his contestant. Accordingly, where both parties assert title from a common grantor and no other source, neither can deny that such grantor had a valid title when he executed his conveyance.¹ But in this case, either party may show that the true title paramount to the title of the person under whom they both claim was in a third person, and that he has acquired this paramount title through such third person, or he can connect himself with such person by showing that he held possession for or under him.²

Lands Purchased Subject to Condition. — It has been held also that where a purchaser holds lands under the express condition that no intoxicating liquors shall ever be sold upon the premises and is to forfeit the premises back to the vendor whenever such condition shall be broken, he is estopped when sued by the vendor for the recovery of the premises on the ground of such forfeiture from denying that the title conveyed to him was a good title.³

Effect of Covenants in Deeds to Be Performed by Grantee. — It has been held that a grantor in a deed poll is estopped by acceptance of the deed from denying covenants therein mentioned to be performed by him.⁴

Effect of Seizin of Grantee at Time of Conveyance on Grantor's Covenants. — Also, it seems to be the rule that a person who has accepted a deed containing a covenant on the part of the grantor, cannot turn round upon the grantor and allege that the covenant is broken by reason of the fact that at the time of the acceptance of the deed the grantee himself was seized of the premises.⁵

b. **LANDLORD AND TENANT.** — Lord Coke says that if a lease be made by deed poll, the lessee is not estopped to say that the lessor had nothing at the time of the lease made, and it would accordingly appear to be the rule at the common law that the lessee could be estopped to deny his landlord's title only by an instrument under his own seal.⁶ But the general rule to be

1. Estoppel to Deny Title from Common Source — *United States.* — *Robertson v. Pickrell*, 109 U. S. 615; *Bybee v. Oregon, etc.*, 139 U. S. 665.

Alabama. — *Brock v. Yongue*, 4 Ala. 584; *Pollard v. Cocke*, 19 Ala. 188; *Lang v. Wilkinson*, 57 Ala. 259; *Cooper v. Watson*, 73 Ala. 252; *Pendley v. Madison*, 83 Ala. 484; *Foster v. Winchester*, 92 Ala. 502; *Feagin v. Jones*, 94 Ala. 597; *Sullivan v. McLaughlin*, 99 Ala. 60; *Bernheim v. Horton*, 103 Ala. 380.

California. — *Ellis v. Jeans*, 7 Cal. 409.
Delaware. — *Doe v. Dowdall*, 3 Houst. (Del.) 369.

Florida. — *Doyle v. Wade*, 23 Fla. 90.
Illinois. — *Keith v. Keith*, 104 Ill. 397; *Grand Tower Min., etc., Co. v. Gill*, 111 Ill. 541.

Indiana. — *Ketchum v. Schicketanz*, 73 Ind. 137; *Hasselman v. U. S. Mortgage Co.*, 97 Ind. 365.

Louisiana. — *Clemens v. Meyer*, 44 La. Ann. 390.

Maryland. — *Kelso v. Stigar*, 75 Md. 376.
Massachusetts. — *Woburn v. Henshaw*, 101 Mass. 193, 3 Am. Rep. 333.

Mississippi. — *Huntington v. Pritchard*, 11 Smed. & M. (Miss.) 327.

Missouri. — *Brown v. Brown*, 45 Mo. 412; *Wilcox v. Osborn*, 77 Mo. 621; *Cummings v. Powell*, 97 Mo. 524.

North Carolina. — *Ives v. Sawyer*, 4 Dev. & B. L. (20 N. Car.) 51; *Love v. Gates*, 4 Dev. & B. L. (20 N. Car.) 363; *Gilliam v. Bird*, 8 Ired. L. (30 N. Car.) 280, 49 Am. Dec. 379; *Caldwell v. Neely*, 81 N. Car. 114; *Curlee v. Smith*, 91 N. Car. 172; *Staton v. Mullis*, 92 N. Car. 623; *Fisher v. Cid Copper Min. Co.*, 94

N. Car. 397; *Bickett v. Nash*, 101 N. Car. 579.

Ohio. — *Kinsman v. Loomis*, 11 Ohio 475.
Pennsylvania. — *Riddle v. Murphy*, 7 S. & R. (Pa.) 235.

Rhode Island. — *McCusker v. McEvey*, 9 R. I. 528, 11 Am. Rep. 295.

Tennessee. — *Wilkins v. May*, 3 Head (Tenn.) 173.

Texas. — *Evans v. Foster*, 79 Tex. 48; *Dycus v. Hart*, 2 Tex. Civ. App. 354.

Virginia. — *Bolling v. Teel*, 76 Va. 487.

Wisconsin. — *Schwallback v. Chicago, etc., R. Co.*, 69 Wis. 292, 2 Am. St. Rep. 740; *Wisconsin Cent. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94; *Tucker v. Whittlesey*, 74 Wis. 74.

See also the title **EJECTMENT**, vol. 10, p. 491.

2. See the title **EJECTMENT**, vol. 10, p. 493.

As to the estoppel against cotenants to deny the common title, see the title **JOINT TENANTS AND TENANTS IN COMMON**.

3. *O'Brien v. Wetherell*, 101 Kan. 617. See also *Woburn v. Henshaw*, 101 Mass. 193, 3 Am. Rep. 333.

4. Estoppel to Deny Covenants to Be Performed by Grantee. — *Fort v. Allen*, 110 N. Car. 191; *Raby v. Reeves*, 112 N. Car. 688. See also *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556. And see the titles **COVENANTS**, vol. 8, p. 65; **EASEMENTS**, vol. 10, p. 415; **RE-CITALS**.

5. Effect of Seizin of Grantee at Time of Conveyance on Grantor's Covenants. — *Beebe v. Swartwout*, 8 Ill. 179; *Furness v. Williams*, 11 Ill. 229; *Fitch v. Baldwin*, 17 Johns. (N. Y.) 166.

6. Common-law Rule as to Estoppel Against Tenant to Deny Landlord's Title. — *Co. Litt.* 47*b*.

deduced from the modern authorities is, that a tenant cannot deny his landlord's title nor set up an outstanding paramount title in himself or in a third person during the continuance of the tenancy.¹

The Principle upon which this doctrine is based is, that the title of the lessee is in fact the title of the lessor. He comes in and holds by virtue of it and rests upon it to maintain and justify his position. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession

1. Modern Rule as to Estoppel Against Tenant
— *England*. — Doe v. Barton, 11 Ad. & El. 307, 39 E. C. L. 97; Rennie v. Robinson, 1 Bing. 147, 8 E. C. L. 446; Alchorne v. Gomme, 2 Bing. 54, 9 E. C. L. 313; Fleming v. Gooding, 10 Bing. 549, 25 E. C. L. 239; Wilson v. Butler, 4 Bing. N. Cas. 748, 33 E. C. L. 518; Gravenor v. Woodhouse, 7 Moo. 289; Doe v. Wiggins, 4 Q. B. 367, 45 E. C. L. 367; Morton v. Woods, L. R. 3 Q. B. 658; Taylor v. Needham, 2 Taunt. 279; Doe v. Williams, 6 B. & C. 41, 13 E. C. L. 105; Doe v. Whitroe, D. & R. N. P. 1, 16 E. C. L. 409.

United States. — Willison v. Watkins, 3 Pet. (U. S.) 47; Standley v. Roberts, 19 U. S. App. 407.

Alabama. — Smith v. Mundy, 18 Ala. 182, 52 Am. Dec. 221; Pope v. Harkins, 16 Ala. 321; Rogers v. Boynton, 57 Ala. 501; Bishop v. Lalouette, 67 Ala. 197; Cooper v. Watson, 73 Ala. 252; Nicrosi v. Phillipi, 91 Ala. 299; Anderson v. Anderson, 104 Ala. 428.

Arkansas. — Burke v. Hale, 9 Ark. 328; Helena v. Turner, 36 Ark. 577; Hoskins v. Byler, 53 Ark. 533.

California. — Pierce v. Minturn, 1 Cal. 470; Tewksbury v. Magraff, 33 Cal. 237; Lataillade v. Santa Barbara Gas Co., 58 Cal. 4; Reynolds v. Lewis, 59 Cal. 20; Burgess v. Rice, 74 Cal. 590.

Colorado. — Milsap v. Stone, 2 Colo. 137; Lyon v. Washburn, 3 Colo. 201; Arnold v. Woodard, 4 Colo. 249.

Connecticut. — Holmes v. Kennedy, 1 Root (Conn.) 77.

Delaware. — Reed v. Todd, 1 Harr. (Del.) 138.

District of Columbia. — District of Columbia v. Johnson, 3 Mackey (D. C.) 120.

Florida. — McLean v. Spratt, 20 Fla. 515.

Georgia. — Cody v. Quartermaster, 12 Ga. 386; Newton v. Beckom, 33 Ga. 163; Ronaldson v. Tabor, 43 Ga. 230; Chisolm v. Cluttennden, 45 Ga. 213; Lewis v. Adams, 61 Ga. 559; Imboden v. Etowah, etc., Min. Co., 70 Ga. 86; White v. Barlow, 72 Ga. 887; Mitchell v. White, 74 Ga. 327; Smith v. Sutton, 74 Ga. 528; Palmer v. Melson, 76 Ga. 803.

Illinois. — Dunbar v. Bonesteel, 4 Ill. 32; Fusselman v. Worthington, 14 Ill. 135; Alwood v. Mansfield, 33 Ill. 452; Ball v. Chadwick, 46 Ill. 28; Kane County v. Herrington, 50 Ill. 232; St. John v. Quitzow, 72 Ill. 334; Heisen v. Heisen, 145 Ill. 658.

Indiana. — Epstein v. Greer, 85 Ind. 372; Reese v. Caffee, 133 Ind. 14; Pence v. Williams, 14 Ind. App. 86.

Kentucky. — Ogden v. Walker, 6 Dana (Ky.) 420; Beckwith v. Bent, 10 B. Mon. (Ky.) 95.

Maryland. — Giles v. Ebsworth, 10 Md. 333; Estep v. Weems, 6 Gill & J. (Md.) 303; Miles v. Knott, 12 Gill & J. (Md.) 454; Fenwick v. Floyd, 1 Har. & G. (Md.) 174.

Massachusetts. — Cobb v. Arnold, 8 Met. (Mass.) 398; George v. Putney, 4 Cush. (Mass.) 351, 50 Am. Dec. 788; Coburn v. Palmer, 8 Cush. (Mass.) 124; Binney v. Chapman, 5 Pick. (Mass.) 124; Hawes v. Shaw, 100 Mass. 187; Gage v. Campbell, 131 Mass. 566; Granger v. Parker, 137 Mass. 228.

Michigan. — Campau v. Lafferty, 43 Mich. 429; Nims v. Sherman, 43 Mich. 45.

Mississippi. — Winston v. Franklin Academy, 28 Miss. 118, 61 Am. Dec. 540; Rhyne v. Guevara, 67 Miss. 139; Jones v. Madison County, 72 Miss. 777.

Missouri. — Suddarth v. Robertson, 118 Mo. 286.

Montana. — Boardman v. Thompson, 3 Mont. 387.

Nebraska. — Parker v. Nanson, 12 Neb. 419.
New Hampshire. — Plumer v. Plumer, 30 N. H. 558; Hatch v. Bullock, 57 N. H. 15; Killoren v. Murtaugh, 64 N. H. 51.

New Jersey. — Betts v. Wurth, 32 N. J. Eq. 82.

New York. — Jackson v. Whedon, 1 E. D. Smith (N. Y.) 141; Jackson v. Harper, 5 Wend. (N. Y.) 246; Phelan v. Kelley, 25 Wend. (N. Y.) 389; Jackson v. Stewart, 6 Johns. (N. Y.) 34; Jackson v. Stiles, 1 Cow. (N. Y.) 575; Sharpe v. Kelley, 5 Den. (N. Y.) 431; Hardy v. Akerly, 57 Barb. (N. Y.) 148; People v. Angel, 61 How. Pr. (N. Y. Supreme Ct.) 159; Lane v. Young, 66 Hun (N. Y.) 563; Ingraham v. Baldwin, 9 N. Y. 45; Territt v. Cowenhoven, 79 N. Y. 400.

North Carolina. — Love v. Edmonston, 1 Ired. L. (23 N. Car.) 152; Callender v. Sherman, 5 Ired. L. (27 N. Car.) 711; Freeman v. Heath, 13 Ired. L. (35 N. Car.) 498; Lunsford v. Alexander, 4 Dev. & B. L. (20 N. Car.) 40; James v. Russell, 92 N. Car. 194; Bonds v. Smith, 106 N. Car. 553; Dixon v. Stewart, 113 N. Car. 410; Alexander v. Gibbon, 118 N. Car. 796.

Oklahoma. — Hamill v. Jalonic, 3 Okla. 223; Pape v. Front, 3 Okla. 260.

Pennsylvania. — Galloway v. Ogle, 2 Binn. (Pa.) 468; Cauffman v. Presbyterian Congregation, 6 Binn. (Pa.) 62; Stewart v. Roderick, 4 W. & S. (Pa.) 188, 39 Am. Dec. 71; Cooper v. Smith, 8 Watts (Pa.) 536.

South Carolina. — Syme v. Sanders, 4 Strobb. L. (S. Car.) 196.

Tennessee. — Winnard v. Robbins, 3 Humph. (Tenn.) 614; McIntire v. Patton, 9 Humph. (Tenn.) 447; Campbell v. Hampton, 11 Lea (Tenn.) 440.

shall be surrendered at its expiration; and hence he cannot deny the lessor's title without breach of good faith and common honesty.¹

A Full Discussion of this question will be found in a subsequent title.²

c. **MORTGAGOR AND MORTGAGEE.** — The same principle which governs landlord and tenant has been held to apply to mortgagor and mortgagee.³

d. **TRUSTEE AND CESTUI QUE TRUST.** — A trustee who has accepted a trust will be estopped to set up title adversely to his *cestui que trust*.⁴

Application of Rule to Executors and Administrators. — And it has been held that no distinction in this respect exists between a personal representative and other trustees.⁵ Thus, it has been held that an administrator who finds property among the assets of the estate and takes possession of it as the property of the estate and sells it, having no claim to it himself, and having no claims made by any other person, is estopped from setting up a claim adverse to the estate.⁶

e. **EXECUTORY CONTRACT OF PURCHASE.** — Where a vendee goes into possession under a contract of purchase with the consent of the vendor, it is the general rule that, while he remains in peaceable and undisturbed possession under the contract, he is estopped from disputing the title of the vendor or setting up an outstanding title in a third party or an adverse title in himself to defeat the same,⁷ unless he can show that, in some way, he was

Virginia. — *Jordan v. Katz*, 89 Va. 628.

West Virginia. — *Voss v. King*, 38 W. Va. 607.

Wisconsin. — *Tondro v. Cushman*, 5 Wis. 279.

1. *Robertson v. Pickrell*, 109 U. S. 608; *Bybee v. Oregon, etc.*, R. Co., 139 U. S. 663.

2. See the title **LANDLORD AND TENANT**. See also the title **EJECTMENT**, vol. 10, p. 511.

3. **Estoppel Against Mortgagee.** — *Willison v. Watkins*, 3 Pet. (U. S.) 48; *Strong v. Waddell*, 56 Ala. 471; *Farris v. Houston*, 74 Ala. 169; *Scobey v. Kinningham*, 131 Ind. 557; *Carson v. Cochran*, 52 Minn. 67. See the title **MORTGAGES**.

4. **Estoppel Against Trustee.** — *Willison v. Watkins*, 3 Pet. (U. S.) 48; *Irby v. Kitchell*, 42 Ala. 438; *Benjamin v. Gill*, 45 Ga. 110; *Smith v. Sutton*, 74 Ga. 528; *Dawson v. Mayall*, 45 Minn. 408. See also the title **TRUSTS AND TRUSTEES**.

Creator of Trust and Trustee. — It has been said that the same rule applies as between the creator of a trust and the trustee. *Bybee v. Oregon, etc.*, R. Co., 139 U. S. 665; *Vance v. Johnson*, 10 Humph. (Tenn.) 221.

5. **Estoppel Against Personal Representative.** — *Irby v. Kitchell*, 42 Ala. 438; *White v. Swain*, 3 Pick. (Mass.) 365.

Guardian and Ward. — The same principle has been applied to the relation of guardian and ward. *Burke v. Turner*, 90 N. Car. 588.

6. **Administrator Selling Property as Property of Estate Cannot Claim It Adversely.** — *Irby v. Kitchell*, 42 Ala. 438; *Benjamin v. Gill*, 45 Ga. 110; *Smith v. Sutton*, 74 Ga. 528.

7. **Estoppel of Vendee to Dispute Title of Vendor** — *Alabama.* — *Potts v. Coleman*, 67 Ala. 221; *Munford v. Pearce*, 70 Ala. 452.

Arkansas. — *Lewis v. Boskin*, 27 Ark. 64.

Florida. — *Sanford v. Cloud*, 17 Fla. 557.

Georgia. — *Beall v. Davenport*, 48 Ga. 165, 15 Am. Rep. 656.

Kentucky. — *Harle v. McCoy*, 7 J. J. Marsh. (Ky.) 318, 23 Am. Dec. 407.

Massachusetts. — *Towne v. Butterfield*, 97 Mass. 105.

Missouri. — *Smith v. Busby*, 15 Mo. 387, 57 Am. Dec. 207; *Harvey v. Morris*, 63 Mo. 475; *Pershing v. Canfield*, 70 Mo. 140.

New York. — *Sayles v. Smith*, 12 Wend. (N. Y.) 57, 27 Am. Dec. 117; *Jackson v. Walker*, 7 Cow. (N. Y.) 637; *Ingraham v. Baldwin*, 9 N. Y. 45.

North Carolina. — *Love v. Edmonston*, 1 Ired. L. (23 N. Car.) 152; *Wilkins v. Suttles*, 114 N. Car. 550.

Wisconsin. — *McIndoe v. Morman*, 26 Wis. 588, 7 Am. Rep. 95; *Lacey v. Johnson*, 58 Wis. 414.

In Tennessee the rule seems otherwise. *Corder v. Dolin*, 4 Baxt. (Tenn.) 238; *Baker v. Hale*, 6 Baxt. (Tenn.) 46; *James v. Patterson*, 1 Swan (Tenn.) 312, 55 Am. Dec. 737; *Gudger v. Barnes*, 4 Heisk. (Tenn.) 570; *Vance v. Johnson*, 10 Humph. (Tenn.) 218. But see *Winnard v. Robbins*, 3 Humph. (Tenn.) 614.

In Illinois it has been held that the vendee is under no obligation to maintain his vendor's title, and there is no policy of the law that forbids a vendee in possession to buy in an outstanding title to the premises and assert it against his vendor; otherwise it might be asserted by the owner, or a stranger might buy it, and it would be lost to both. *Green v. Dietrich*, 114 Ill. 643. Compare *Tilghman v. Little*, 13 Ill. 239.

Outstanding Title in United States. — In *Shorman v. Eakin*, 47 Ark. 351, it was held that while, as a general rule, a purchaser receiving possession under his contract cannot deny his vendor's title so long as he remains in possession, yet where it turns out that the land was public land of the United States, the purchaser is not estopped to deny the title and refuse payment, though he has perfected his title by entering the lands as a homestead under the laws of the United States.

Where Grantor Parts with Title to Third Person After Contract to Sell. — Whilst, as a general rule, it is true that one who goes into posses-

deceived or imposed on in making the agreement,¹ the vendee being regarded by some of the authorities as standing in the relation of tenant to the vendor, and by other authorities as being a mere licensee. But it has been held that a vendee who has surrendered the possession taken under an executory contract of sale is not estopped from denying the title of his vendor.² Nor, it has been held, does the general rule apply in a case where, at the time of the contract to purchase, the vendee is already in possession as owner claiming title, and his entry was not made under the vendor,³ though the authorities are divided on this point.⁴

A Full Discussion of this question will be found elsewhere in this work.⁵

f. **DEVISEES.** — In analogy to the rule laid down as to landlord and tenant, it has been held to be contrary to the law of estoppel that he who has obtained possession under and in furtherance of the title of a deviser should say that such title is defective.⁶

g. **BAILEES, RECEIPTORS FOR GOODS, AND WAREHOUSEMEN — Bailees.** — It is a general rule that, by the acceptance of a bailment, the bailee impliedly admits the title of his bailor and is estopped thereafter from disputing it.⁷

Receiptors for Goods Attached by Officer. — On the same principle, it has been held that one who, with knowledge of all the facts and circumstances surrounding the transaction, gives to an officer an accountable receipt for property attached or levied upon as property of another, is estopped from afterwards asserting ownership in himself, unless at or before the giving of the receipt he made known his claim to the officer.⁸

Warehousemen. — A similar effect has been given to the receipt of a warehouseman.⁹

h. **BANK AND DEPOSITORS.** — Also, it has been held that where a bank has received money from a depositor, credited him therewith upon its books, and thereby entered into an implied contract to honor his check, it is estopped to allege that the money deposited belongs to some one else.¹⁰

4. Application of Doctrine to Contracts of Corporations, Agents and Partners. — A discussion of the doctrine of estoppel *in pais* arising out of contracts of corporations, agents and partners will be found elsewhere in this work.¹¹

sion of land under a contract of purchase, cannot, at law, dispute the title of his vendor, so long as his possession is undisturbed, yet if the vendor himself parts with the title, or if it be sold under execution against him, the vendee may, in good faith, attorn to the purchaser, and in an action of ejectment by the vendor against the vendee, the vendee may, though the purchase money is still unpaid, show such sale and attornment as a defense to the action. *Beall v. Davenport*, 48 Ga. 165, 15 Am. Rep. 656.

Contract for Quit-claim. — It has been held that the vendee in a contract for the quit-claim of all the right, title, and interest of the vendor in a parcel of land — the contract not asserting any possession on the part of the vendor, and it not appearing that any actual possession was transferred by the vendor to the vendee — will not be estopped in an action of ejectment by the vendor to deny the title of the plaintiff. *Clee v. Seaman*, 21 Mich. 287. See also the title **EJECTMENT**, vol. 10, p. 501.

1. *Ingraham v. Baldwin*, 9 N. Y. 45. See also the title **EJECTMENT**, vol. 10, p. 501.

2. **No Estoppel Against Vendor After Surrender of Possession.** — *Smith v. Babcock*, 36 N. Y. 167, 93 Am. Dec. 498.

3. **Vendee Already in Possession Claiming Title.** — *Donahue v. Klassner*, 22 Mich. 252; *Greene v. Couse*, 127 N. Y. 386, 24 Am. St. Rep. 458.

4. *McMath v. Teel*, 64 Ga. 595; *Pershing v. Canfield*, 70 Mo. 140.

5. See the title **VENDOR AND PURCHASER**.

6. **Estoppel Against Devisee to Deny Devisor's Title.** — *Board v. Board*, L. R. 9 Q. B. 48. See also the title **LEGACIES AND DEVISES**.

7. **Estoppel Against Bailee.** — See the title **BAILEMENT**, vol. 3, p. 758.

8. **Estoppel Against Receiptor for Goods.** — *Dresbach v. Minnis*, 45 Cal. 223; *Staples v. Fillmore*, 43 Conn. 510; *Case v. Shultz*, 31 Kan. 96; *Dewey v. Field*, 4 Met. (Mass.) 381, 38 Am. Dec. 376; *Bursley v. Hamilton*, 15 Pick. (Mass.) 40, 25 Am. Dec. 423; *Lindner v. Brock*, 40 Mich. 618; *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111; *Bell v. Shafer*, 58 Wis. 223. See also the title **SHERIFFS**.

9. **Estoppel Against Warehouseman.** — *Stonard v. Dunkin*, 2 Campb. 344. See also the title **WAREHOUSE AND WAREHOUSEMEN**.

A Wharfinger who has agreed to hold goods under a delivery order cannot resist an action of trover for the conversion of those goods on the ground that they had not been separated from the bulk, and that no property passed to the person who lodged the order. *Woodley v. Coventry*, 9 Jur. N. S. 548.

10. **Estoppel of Bank to Deny Title of Depositor.** — *Lock Haven First Nat. Bank v. Mason*, 95 Pa. St. 113, 40 Am. Rep. 632.

11. See the titles **AGENCY**, vol. 1, pp. 990,

5. Application of Doctrine to Negotiable Instruments. — A discussion of the doctrine of estoppel *in pais* in its peculiar application to commercial paper will be found elsewhere in this work.¹

V. WAIVER AND RATIFICATION — Waiver as Distinguished from Estoppel in Pais. — It has been said that in strictness the term "waiver" is used to designate the act or the consequences of the act of one party only, while the term "estoppel *in pais*" is applicable where the conduct of one party has induced another to take such a position that he will be injured if the first be permitted to repudiate his act.² A familiar case of waiver which has been sometimes spoken of as an estoppel is said to exist where, by the course of conduct of one party to a contract entitled to the performance of certain terms or conditions thereof, the other party as a man of average intelligence has been led to believe that such performance will not be required until it has become too late to perform, or until to insist upon performance would work material injustice.³ This question, however, will be treated in full elsewhere in this work.⁴

Ratification. — The terms "ratification" and "estoppel *in pais*" are sometimes used in a way which seems to ignore any distinction between them.⁵ The two terms should not, however, be confused. It has been said that an estoppel is a legal consequence — a right — arising from act or conduct, while acquiescence and ratification are but facts presupposing a situation incomplete in its legal aspect, *i. e.*, not as yet attended with full legal consequences.⁶

VI. INCONSISTENT POSITIONS — 1. **Generally.** — Under the head of estoppel is often discussed also, though with questionable propriety,⁷ the doctrine of inconsistent positions whereby a person is precluded from taking, merely because his interests have changed, a position inconsistent with one previously assumed by him, and to the prejudice of a third person.⁸

2. In Court — *a.* **IN GENERAL.** — It has been laid down as a general propo-

1091; DE FACTO CORPORATIONS, vol. 8, p. 747; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PARTNERSHIP; STOCK AND STOCKHOLDERS; and ULTRA VIRES.

1. **Application of Estoppel in Pais to Negotiable Instruments.** — See the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 65, and the cross-references there given, especially the title CHECKS, vol. 5, p. 1053.

2. **Waiver Distinguished from Estoppel in Pais.** — McCormick v. Orient Ins. Co., 86 Cal. 262.

3. Bigelow on Estoppel (4th ed.), p. 633.

4. See the title WAIVER.

5. Blood v. La Serena Land, etc., Co., 113 Cal. 226; Vallette v. Bennett, 69 Ill. 632; McCreary v. Parsons, 31 Kan. 447; Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co., 90 N. Y. 607; Aldrich v. Billings, 14 R. I. 233.

6. **Ratification Distinguished from Estoppel in Pais.** — Bigelow on Estoppel (4th ed.), p. 447. See also Blood v. La Serena Land, etc., Co., 113 Cal. 227.

7. Bigelow on Estoppel (4th ed.), p. 642. See also Eng. Rul. Cas., vol. 3, p. 326.

8. **Inconsistent Positions in General.** — Daniels v. Tearney, 102 U. S. 415; Davis v. Wakelee, 156 U. S. 689; Moshier v. Frost, 110 Ill. 206; Strosser v. Fort Wayne, 100 Ind. 443.

It has been held that an owner of property who joins in a petition to the common council asking for a change of grade of a street is estopped from setting up a claim for damages resulting from the grading as asked for, on the ground that the petition was not signed by property owners owning a majority of the

front feet of property on the part of the street to be improved. Cross v. Kansas City, 90 Mo. 13, 59 Am. Rep. 1. To the same effect see Burlington v. Gilbert, 31 Iowa 366, 7 Am. Rep. 143.

Acceptance of Benefit under an Instrument. — It seems to be a well-established proposition in law as well as in equity, that he who accepts and retains a benefit under an instrument, whether a deed, will, or other writing, is held to have adopted the whole and to have renounced every right inconsistent therewith. Matter of Peaslee, 73 Hun (N. Y.) 113.

Thus one taking a beneficial interest under a will is estopped to set up any right or claim of his own, even though otherwise well founded, which will operate to defeat the effect and operation of any part of such will. Fry v. Morrison, 159 Ill. 244; Keller v. Stanley, 86 Ky. 240; Hainer v. Iowa Legion of Honor, 78 Iowa 252; Smith v. Guild, 34 Me. 443; Martin v. Ives, 17 S. & R. (Pa.) 364. For a full discussion of this question see the title EQUITABLE ELECTION, *ante*, p. 57.

Accepting Benefits under Unconstitutional Statute. — Also it has been laid down as a general proposition that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another state. Ferguson v. Landram, 5 Bush (Ky.) 230, 96 Am. Dec. 350; Daniels v. Tearney, 102 U. S. 421. See also the title STATUTES.

sition, that where a party assumes a position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.¹

b. JUDICIAL ADMISSIONS — (1) *Effect in Proceedings Where Made* — (a) *Admissions in Pleading or in Open Court.* — It seems to be a general rule that an admission made in open court or in the course of pleading, whether in express terms or by omitting to traverse what has been before alleged, must be taken as conclusive for all purposes of the cause, whether the facts relate to the parties or to third persons.²

1. Inconsistent Positions in Court. — Philadelphia, etc., R. Co. v. Howard, 13 How. (U. S.) 307; Ohio, etc., R. Co. v. McCarthy, 96 U. S. 258; Davis v. Wakelee, 156 U. S. 689; Hodges v. Winston, 95 Ala. 514, 36 Am. St. Rep. 241; Abbot v. Wilbur, 22 La. Ann. 368.

Thus in Davis v. Wakelee, 156 U. S. 691, it was held that a man cannot obtain an advantage over his adversary by asserting and relying on the validity of a judgment against himself, and in a subsequent proceeding upon such judgment claim that it was rendered without personal service upon him.

Also it has been held that where, in a suit, a substantial advantage has been obtained by taking and successfully maintaining the position that certain lands constitute a homestead, it could not be claimed in the same suit, on the same state of evidence, that they were not a homestead. Hodges v. Winston, 95 Ala. 514, 36 Am. St. Rep. 241.

2. Effect of Judicial Admissions in Proceedings Where Made — *England.* — Boileau v. Rutlin, 2 Exch. 665; Bingham v. Stanley, 2 Q. B. 127, 42 E. C. L. 602; Bonzi v. Stewart, 4 M. & G. 295, 43 E. C. L. 158; Bennion v. Davison, 3 M. & W. 179; Dunford v. Trattles, 12 M. & W. 534; King v. Norman, 4 C. B. 884, 56 E. C. L. 884.

United States. — Kansas, etc., R. Co. v. Morton, 61 Fed. Rep. 814; California Electrical Works v. Finck, 47 Fed. Rep. 583; Wade v. Chicago, etc., R. Co., 149 U. S. 327.

California. — John Hendy Mach. Works v. Pacific Cable Constr. Co., 99 Cal. 421.

District of Columbia. — Bradley v. Fisher, 7 D. C. 32, affirmed 13 Wall (U. S.) 335.

Illinois. — Jeffers v. Jeffers, 139 Ill. 368.

Iowa. — Hewitt v. Morgan, 88 Iowa 468.

Kentucky. — People's Mut. Assur. Fund v. Boesse, 92 Ky. 290.

Louisiana. — Gridley v. Conner, 4 La. Ann. 416; Denton v. Erwin, 5 La. Ann. 18.

Minnesota. — Bean v. Schmidt, 43 Minn. 505; Reilly v. Bader, 46 Minn. 212.

Missouri. — Sheehan, etc., Transp. Co. v. Sims, 36 Mo. App. 229; Hach v. Hill, (Mo. 1890) 14 S. W. Rep. 739, 106 Mo. 18.

Montana. — Newell v. Meyendorff, 9 Mont. 254, 18 Am. St. Rep. 738; Wulf v. Manuel, 9 Mont. 276, 279, 286; Cunningham v. Quirk, 10 Mont. 462.

Nebraska. — Foley v. Holtry, 41 Neb. 563.

New York. — Simis v. Davidson, 54 N. Y. Super. Ct. 235; Robertson v. Sayre, 134 N. Y. 97, 30 Am. St. Rep. 627.

North Carolina. — Henning v. Warner, 109 N. Car. 406.

Pennsylvania. — Stayton v. Graham, 139 Pa. St. 1.

Virginia. — Simpson v. Dugger, 88 Va. 963; Stearns v. Richmond, 88 Va. 992, 29 Am. St. Rep. 758.

Wyoming. — Nugent v. Powell, 4 Wyoming 173.

But in Robins v. Maidstone, 4 Q. B. 815, 45 E. C. L. 815, the court said: "The expression in Bingham v. Stanley, 2 Q. B. 117, 42 E. C. L. 598 [cited above], 'for all purposes of the cause,' is not strictly correct; for, as it stands, it might be supposed that it extended to other issues joined in the cause as well as that which arises out of the particular pleading, one allegation of which is traversed. It would have been more correct to have said, 'for all purposes regarding the issue arising from that pleading.'"

In Boileau v. Rutlin, 2 Exch. 681, the court said: "The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different principle and for the purpose of terminating litigation; and so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it."

Where a person who has arrived at majority appears in court, and disclaims any title to or interest in property which it is alleged was transferred without divesting his interest when a minor, he will afterwards be estopped from setting up title to said property. Hansell v. Hansell, 44 La. Ann. 548.

Where, during the course of legal proceedings, the defendant admitted that the plaintiff's ancestor had died seized in fee simple of land, that the property was devised to his daughter, one of the plaintiffs, for life, and that the other plaintiffs were her children, the defendant was estopped to deny that the title to the land was in the plaintiffs or some of them. Miller v. Asheville, 112 N. Car. 759.

Under statute in Georgia a solemn admission made in *judicio* operates as an estoppel. Cheney v. Selman, 71 Ga. 387.

By statute in Massachusetts it is provided that neither the declaration, answer, nor any subsequent allegation shall be deemed evidence on the trial, but allegations only whereby the party making them is bound. Walcott v. Kimball, 13 Allen (Mass.) 460; Phillips v. Smith, 110 Mass. 61.

In New York before the code, it was held that admissions in pleading are conclusive for the purposes of the suit in which they are made, even though evidence is admitted and the court, jury, or referee find otherwise. Van

(b) **Agreed Facts.** — And the same rule has been applied in case of facts expressly agreed upon in the case.¹

(c) **Admissions of Counsel.** — In the same way, it has been held that express admissions *in judicio* by counsel stand as conclusive presumptions of law or fact and cannot be disputed, unless it is first shown that they were made by mistake.²

(d) **Payment of Money into Court.** — The rule has been laid down that where money is tendered and paid into court upon a declaration which contains but one cause of action specifically set forth, it operates as a conclusive admission of every fact which the plaintiff would be bound to prove in order to maintain his action.³ But where the declaration contains more than one count, and a portion of one of the sums demanded is paid into court without specifications as to which of the counts it is to be applied upon, such payment is an admission only that the defendant owes the plaintiff the sum so paid on some one or several of the counts, but it does not admit an indebtedness under any one count or a liability on all of them.⁴

(2) **Effect upon Appeal or Second Trial.** — The rule giving to admissions made in a pleading the effect of an estoppel for the purposes of the cause, operates upon an appeal⁵ or second trial.⁶ But it has been held that an

Dyke v. Maguire, 57 N. Y. 431; Paige v. Willet, 38 N. Y. 28; Robbins v. Codman, 4 E. D. Smith (N. Y.) 325; Cook v. Barr, 44 N. Y. 156.

And under the code it has been held that where an answer admits the allegation in a complaint, the admission must be taken as true for all the purposes of the action. Dunham v. Cudlipp, 94 N. Y. 130; Central R. Co. v. Stoermer, 51 Fed. Rep. 518.

Estoppel by Failure to Deny. — By accepting a corporation as the real defendant in a suit, when it expressly declares itself to be such defendant and files a plea in that name and character, the plaintiff not only recognizes it as the true defendant, but also recognizes the legality of its existence as a corporation, and is estopped to deny it. Lester v. Georgia, etc., R. Co., 90 Ga. 802.

Where a plaintiff in a declaration declared against the administrator of a deceased person without sufficiently averring the death of the deceased, and the defendant pleaded the general issue and statute of limitation, it was held that, by pleading the general issue, he admitted the character in which he was sued and conceded the death in question, and he was afterwards estopped from denying a fact which he had conceded on the record. Walker v. Wooster, 61 Vt. 403.

Operation of Answer as Estoppel After Amendment of Original Complaint. — In McDonald v. Humphries, 56 Ark. 63, it was held that where, after the defendants had answered admitting the allegations in the complaint, the complaint was amended so as to demand a larger amount than was demanded in the original complaint, the answer could have no force as an estoppel that must not also be given to the admission made in the original complaint.

Original Answer as Evidence After Amendment. — Matters charged in a complaint were admitted in the answer. Afterwards, an amended answer, denying these matters, was substituted by order of court. It was held that the original answer was no longer a pleading in the case, but was admissible in evidence as an admission by the defendant,

though not conclusive. Hall v. Woodward, 30 S. Car. 564.

Effect of Verdict Negating Admission in Pleading. — It has been held that a defendant is not estopped by his pleading alleging property in another from claiming his exemption in such property after the verdict of a jury negating such averment. Etheridge v. Davis, 111 N. Car. 293.

1. Operation of Agreed Facts as Estoppel. — Fleming v. Strohecker, 117 N. Car. 366; National Mut. Bldg., etc., Assoc. v. Ashworth, 91 Va. 706. See also Strong v. Stevens Point, 62 Wis. 255.

2. Admissions of Counsel as Estoppel. — Marsh v. Mitchell, 26 N. J. Eq. 500. See also Strong v. Stevens Point, 62 Wis. 255.

3. Payment of Money into Court as Estoppel. — Bacon v. Charlton, 7 Cush. (Mass.) 582. See also Dyer v. Ashton, 1 B. & C. 3, 8 E. C. L. 2.

4. Hubbard v. Knous, 7 Cush. (Mass.) 556; Stapleton v. Nowell, 6 M. & W. 9; Archer v. English, 1 M. & G. 873, 39 E. C. L. 691; Kingham v. Robins, 5 M. & W. 94.

5. Effect of Admissions as Estoppel upon Appeal. — Blake v. Krom, 128 N. Y. 64. See also Strong v. Stevens Point, 62 Wis. 255.

Where the defendant claimed under his first counterclaim a liability to himself from the plaintiffs at a certain time under the contract, and did not move to amend or increase the claim, he cannot be heard upon appeal to claim that his demand was larger than stated in the pleading. Blake v. Krom, 128 N. Y. 64. See also Miller v. James, 86 Iowa 242. Compare McCormick v. Blum, 4 Tex. Civ. App. 9.

In Russel v. Rosenbaum, 24 Neb. 769, it was held that where an intervener in an action between a shipper and a railroad company by his answer raised no question as to the legality of the contract between the parties, but, upon the contrary, sought to obtain the benefit of the contract, and obtained a judgment in his favor, he could not afterwards upon appeal be heard to insist upon the illegality of the contract.

6. Effect of Admissions as Estoppel upon Second Trial. — Where a plaintiff has claimed a recov-

admission of a fact made on and for the purposes of one trial only does not bind the party thus making it so as to prevent him from disputing the truth of that fact at another trial.¹

(3) *Effect in Another Suit.* — While the allegations in the pleadings in one suit are receivable against the party in a subsequent suit between him and a stranger as his solemn admission of the truth of the facts recited, yet the pleading is not admitted as conclusively establishing the facts alleged therein, but is open to explanation or rebuttal, or may be shown to have been made by mistake.² Thus, while a plea of guilty in a criminal prosecution is admissi-

ery in one trial upon one express contract, he is estopped from seeking a recovery in another trial upon any other contract under the same item. *Hamilton v. Frothingham*, 71 Mich. 616.

Where a defendant in a garnishment proceeding waived the right to make payment in hay, and elected to treat it as a money demand by swearing to it as such in his answer to the garnishee suit, it was held that he could not be allowed, in the face of his solemn admission that it was due in money, to insist on the contrary in a subsequent action. *Wilson v. Groelle*, 83 Wis. 530.

Case Removed from One Jurisdiction to Another. — In *Lumley v. Wabash R. Co.*, 71 Fed. Rep. 21, it was held that the fact that the defendant obtained a removal from the state court of an action at law brought by the plaintiff, on the ground that the complainant was "an alien and citizen of Great Britain," was sufficient to estop him from denying the jurisdiction of the federal courts.

But in *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171, it was held that where the defendant alleged in its petition for removal of the cause from the state court to the Circuit Court of the United States that the defendant was a citizen and resident of another state, it could not be conclusively presumed that it was a foreign corporation so as to bring it within the provisions of the state constitution declaring that a railroad company not incorporated under the laws of the state cannot exercise the right of eminent domain.

1. *Perry v. Simpson Waterproof Mfg. Co.*, 40 Conn. 133.

2. **Operation of Admission Made in Another Suit** — *England.* — *Boileau v. Rutlin*, 2 Exch. 665; *Hutt v. Morrell*, 3 Exch. 241; *Buckmaster v. Meiklejohn*, 8 Exch. 637; *Kidderminster v. Hardwick*, 43 L. J. Exch. 9; *Copper Miners' Co. v. Fox*, 16 Q. B. 229, 71 E. C. L. 229; *Fishmongers' Co. v. Robertson*, 5 M. & G. 192, 44 E. C. L. 109; *Carter v. James*, 13 M. & W. 137; *Rigge v. Burbidge*, 15 M. & W. 598.

United States. — *Blanks v. Klein*, 53 Fed. Rep. 436; *Schindelholz v. Cullum*, 55 Fed. Rep. 885.

California. — *Hunter v. Hunter*, 111 Cal. 261.

Delaware. — *Sharp v. Swayne*, (Del. 1898) 40 Atl. Rep. 115.

Massachusetts. — *Beatty v. Randall*, 5 Allen (Mass.) 441.

Missouri. — *Nichols v. Jones*, 32 Mo. App. 664.

New York. — *Bowers v. Smith*, (Supreme Ct.) 8 N. Y. Supp. 226; *Quinby v. Carhart*, 133 N. Y. 579, 44 N. Y. St. Rep. 666.

Texas. — *Buzard v. McNulty*, 77 Tex. 438.

Virginia. — *Tabb v. Cabell*, 17 Gratt. (Va.) 160; *Penn v. Penn*, 88 Va. 361.

See also *Imhof v. Imhof*, 45 La. Ann. 706.

In an action to recover upon a promissory note, the defendant alleged that she had assigned the amount due upon a contract for the purchase of land to the plaintiff in satisfaction of the note. The plaintiff replied that in a suit by defendant against the purchaser to recover the amount due, defendant had alleged that she was the owner of the contract, and had, with her co-contractors therein, recovered judgment on the contract. It was held that the defendant was not estopped from showing how she became a party to the former suit, and that the suit was really brought in the interest and at the instigation of the plaintiff. *Grippen v. Benham*, 5 Wash. 589.

Under Statute in Georgia, it has been held that estoppels are not favored and should not be resorted to, except in cases "where it would be more unjust and productive of more evil to hear the truth than to forbear the investigation," and that they apply only as between partners and privies to the suit or litigation in which the admissions relied on as an estoppel were made. *Wilkinson v. Thigpen*, 71 Ga. 497. To the same effect see *Harris v. Amoskeag Lumber Co.*, 101 Ga. 641, citing 7 AM. AND ENG. ENCYC. OF LAW, p. 23.

Thus it has been held under the Georgia statute that admissions made in one suit do not estop a witness from testifying differently in a case between other parties. *Wilkinson v. Thigpen*, 71 Ga. 497.

In *Tennessee*, a contrary view to that expressed in the text has been declared. Thus, in *Chilton v. Scruggs*, 5 Lea (Tenn.) 308, it was held that an admission made in a deposition and answer in a judicial proceeding will be conclusive against the party in a subsequent suit between him and a stranger, unless he shows that it was made inconsiderately or without full knowledge of the facts. To the same effect see *Watterson v. Lyons*, 9 Lea (Tenn.) 566; *Stillman v. Stillman*, 7 Baxt. (Tenn.) 174; *Stephenson v. Walker*, 8 Baxt. (Tenn.) 289; *Cooley v. Steele*, 2 Head. (Tenn.) 605.

And in *McEwen v. Jenks*, 6 Lea (Tenn.) 289, it was held that a solemn admission under oath made in a deposition in a suit where the deponent was not a party may operate as an estoppel in a subsequent suit.

Admissions Made in Representative Capacity. — In *Folger v. Palmer*, 35 La. Ann. 743, it was held that a party is bound in a suit in his individual capacity by declarations made in his

ble, it is not conclusive against the defendant in a subsequent civil action.¹ Nor, it has been held, will an admission in one action operate as an estoppel in other proceedings between the same parties but on a different issue.²

Nor Will Verbal Admissions of Counsel made in the trial of another cause operate by way of estoppel.³

Different Suit Involving Same Cause of Action. — It has been held that an exception to the rule disallowing an admission to have the effect of an estoppel in a subsequent suit exists where the subsequent suit is brought on a judgment recovered in the first.⁴

(4) *Immaterial Admissions.* — Estoppel as to statements in a pleading does not arise except as to those matters which are necessarily alleged as the basis of the cause of action or the defense, and which, if put at issue and proved or disproved, would be decisive of the action.⁵

(5) *Admissions Made through Mistake.* — The court may, in the exercise of its discretion, relieve a party from the consequences of a judicial admission where it satisfactorily appears that it was made inconsiderately or by mistake.⁶

Withdrawal of Admission. — Thus, it has been held that where a party to a suit pending makes an admission for the purpose of saving the other party the expense and trouble of getting up the evidence on certain points, and afterwards discovers that he has, by inadvertence or mistake, admitted facts which are not true, or which it is proper for him to controvert, he may, by notice to the other party, withdraw the admission and put his adversary on proof of the facts, provided there is sufficient time after the withdrawal of the admission for the preparation of the case and the other party has not been injured thereby, as by the death of a witness whose testimony would have been taken but for the admission or other like cause.⁷

pleadings in a suit in his representative capacity.

In *Farrar v. Stacy*, 2 La. Ann. 211, it was held that allegations in a petition signed by one as the attorney of a third person inconsistent with claims set up by him in an action in his own name commenced on the same day, will estop him from recovering.

Where a mother acts as next friend for her children in an action by them for the death of their father, the fact that the petition alleges that the mother has failed to sue within the period of six months, to which her right of action is limited, has been held not to estop the mother from denying the truth of that allegation in proceedings on her part against the same defendant, if the defendant has not acted upon the allegation to his prejudice, as where there has been neither compromise of the action of the children, nor a judgment therein against the defendant. *Reichla v. Gruensfelder*, 52 Mo. App. 43.

Where attorneys, owning a half interest in real estate in litigation by virtue of an agreement and assignment for a contingent fee, presented the client's petition, averring ownership of said real estate in him, and thereby induced the adverse party to believe that he might deal and settle with their client, it has been held that they are estopped from using their assignment to set aside a conveyance of said real estate and settlement made with their client in disregard of their conveyance. *Murray's Estate*, 2 Pa. Dist. Rep. 681.

1. Effect of Plea of Guilty in Subsequent Civil Action for Same Cause. — *Rudolph v. Landwerlen*, 92 Ind. 37; *Corwin v. Walton*, 18 Mo. 71,

59 Am. Dec. 285; *Green v. Bedell*, 48 N. H. 546; *Clark v. Ervin*, 9 Ohio 131.

2. In re Walters, 61 L. T. 872.

3. Effect of Admissions of Counsel in Another Suit. — *Keyser v. Pickrell*, 4 App. Cas. (D. C.) 198.

4. Second Suit Brought on Judgment in That Wherein Commission Made. — *Skelton v. Hawling*, 1 Wils. 258.

Thus, it has been held that if an executor or administrator confesses judgment or suffers it to go against him by default, he thereby admits assets in his hands and is estopped to say the contrary in an action on such judgment suggesting a *devastavit*. *Skelton v. Hawlings*, 1 Wils. 258.

5. Effect of Immaterial Admissions. — *In re Kitzinger*, 14 Fed. Cas. No. 7,861; *Boileau v. Rutlin*, 2 Exch. 665; *Bingham v. Stanley*, 2 Q. B. 127, 42 E. C. L. 602.

6. Effect as Estoppels of Admissions Made Through Mistake. — *Holley v. Young*, 68 Me. 215, 28 Am. Rep. 40; *Smith v. Fowler*, 12 Lea (Tenn.) 171; *Hamilton v. Zimmerman*, 5 Sneed (Tenn.) 39; *Seay v. Ferguson*, 1 Tenn. Ch. 287.

7. Withdrawal of Admissions. — *Wallace v. Matthews*, 39 Ga. 617, 99 Am. Dec. 473; *Perry v. Simpson Waterproof Mfg. Co.*, 40 Conn. 313.

In *Elton v. Larkins*, 5 C. & P. 385, 24 E. C. L. 372, it was held that if a party desires that admissions made on a former trial should not be used on a new trial, he should take out a summons before a judge to obtain permission to withdraw them, for the former trial is deemed as no trial, and the new trial being of the same cause, is thereafter, unless such

ESTOVERS, OR BOTES. (See the titles LANDLORD AND TENANT; PROFITS À PRENDRE; and see COMMON, vol. 6, p. 232.)—An allowance of wood for fuel, repairs, and the like; the term “estovers” being derived from the French word *estoffer*, to furnish, and “bote,” which is of Saxon derivation, being used by us as synonymous with “estovers.” When the allowance is for fuel, it is called house-bote, and sometimes fire-bote; when for making and repairing the instruments of husbandry, plough-bote and cart-bote; when for repairing hedges and fences, it is termed hay-bote or hedge-bote. However, the term “bote” and its compounds, though technically proper, have in modern times somewhat fallen out of use.¹

ESTRAYS.—See the titles ANIMALS, vol. 2, p. 378; FENCES; IMPOUNDING; and see LARGE.

ESTREAT. (See also the title BAIL AND RECOGNIZANCE, vol. 3, p. 651.)—If the condition of a recognizance is broken, the recognizance is forfeited, and on its being “estreated,” the cognizors become debtors to the crown for the sums in which they are bound. A recognizance is “estreated” (that is, extracted) by a copy made from the original and sent to the proper authority to be enforced; thus, in England, “estreated” recognizances in the superior courts and courts of assize are sent into the exchequer, while those before justices of the peace are sent to the sheriff, with writs of execution to enable him to levy the amounts.²

ESTREPEMENT, WRIT OF. (See also the title WASTE.)—A common-law writ for the prevention of waste.³

course is pursued, subject to the same admissions.

When Withdrawal Not Allowed.—In *Hargroves v. Redd*, 43 Ga. 142, it was held that an admission in writing of certain material facts for the purpose of being used in the trial of a cause, cannot be recalled after the trial has commenced. The court in this case said: “It appears, by the record, that the admission sought to be withdrawn was first made in previous trials of this case. It may fairly be presumed that the propounder has rested on this admission, and has not at hand the proof necessary to supply it. We will not say such an admission may not be withdrawn, but full and timely notice ought to be given—such notice as would give a reasonable time to the other side to supply the gap its withdrawal makes in his case. This withdrawal was proposed to be made during the trial. We agree with the judge that this was too late—the notice too short. True, the court might have continued the case, but both the other side and the public have a right that a speedy trial shall be had, and that the time and expense already devoted to the case shall not be lost.”

Admissions agreed upon by counsel as to facts in the case will not be allowed to be withdrawn after the position of parties has been substantially changed by the death of one or more parties or witnesses. *Wilson v. Louisiana Bank*, 55 Ga. 98.

In *Kohn v. Marsh*, 3 Rob. (La.) 48, it was held that any consent given or admission made on record by a party in the progress of a suit from which his adversary may derive any legal right, cannot be withdrawn without the consent of the latter, who is entitled to the benefit of its full legal effect, but that it is otherwise where such consent or admission confers no right, as where experts have been appointed by consent to ascertain a fact, in which case either party may move to rescind

the order, or it may be done by the court *ex officio*.

1. 1 Steph. Com. 256.

As used by Bracton the word *estovers* signifies any kind of aliment. The statute 6 Edw. I., c. 3, puts it as an allowance for meat or cloth. The modern acceptance of the word, if one it have, refers to house-bote, hay-bote, and plough-bote. Chitty's note, 1 Black. Com. 441.

The Alimony allowed by the common law to the wife in the case of divorce *a mensa et thoro* is sometimes called her *estovers*, for which, if the husband refuses payment, there is, besides the ordinary process of excommunication, a writ at common law *de estoveriis habendis*, in order to recover it. 1 Black. Com. 441. See also the title ALIMONY, vol. 2, p. 91.

Every Tenant for Life or Years, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable *estovers*, or *botes*. 2 Black. Com. 122, 144.

Common of Estovers is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. 2 Black. Com. 35. The liberty which every tenant for life or years has, of common right, to take necessary *estovers* in the lands which he holds for such estate seems to be confounded, in most of the text-books, with right of common of *estovers*. Yet they appear to be essentially different. The privilege of the tenant for life or years is an exclusive privilege, not a commonable one. Right of common of *estovers* seems properly to mean a right appendant or appurtenant to a messuage or tenement, to be exercised in lands not occupied by the holder of the tenement. Chitty's note, 2 Black. Com. 35. See also the title PROFITS À PRENDRE.

2. Sweet's Law Dict.

3. Bouv. Law Dict.

ET AL. (See also the title ABBREVIATIONS, vol. 1, p. 97.)—*Et al.* is in everyday use in writs, pleadings, styles of cases, and entries on minutes and dockets, and means "and another" or "and others," as the case may be.¹

ET CETERA — ETC. — &C. (See also the title ABBREVIATIONS, vol. 1, p. 97; and see ENCYC. OF PL. AND PR., title SIMILITER.)—The phrase *et cetera*, and also the contraction "etc.," or "&c.," denote "and others of the like kind;" "and the rest;" "and so forth;" "and so on."²

1. Renkert v. Elliott, 11 Lea (Tenn.) 242.

Bond.—If on an appeal from a judgment in favor of two or more parties, the bond required to be given by the appellants be made payable to one of the appellees *et al.*, the expression *et al.* will be considered as referring to all the other appellees, and the bond will be available to all of them. *Bacchus v. Moreau*, 4 La. Ann. 313; *Conery v. Webb*, 12 La. Ann. 282. Compare "Etc." as descriptive of the obligees in a bond, under ET CETERA.

Verdict. (See also the title VERDICT.)—A verdict of a jury entitled in the name of the plaintiff against one of the defendants by name, and designating numerous other defendants as *et al.*, is good against all those shown by the record to be the codefendants of the one specifically named in the verdict. *Knox v. Gregorious*, 43 Kan. 26.

In a Decree of Foreclosure of a mortgage, the two defendants, A and B, were described in the caption as "A *et al.*" In the body of the decree it was stated that "the foregoing defendants" were duly served with notice. B was not expressly named as a defendant in any portion of the decree preceding these words, but he was so named in the latter part of the decree. The court said: "We take notice that it [*et al.*] means the other defendants in the case as shown by the petition. This, together with the fact that B is expressly named later in the decree as defendant, and that the decree purports to bar him, leaves no doubt that the court regarded him as one of the defendants referred to by the abbreviation, and intended to be understood as finding that he had been duly served with notice." *Toliver v. Morgan*, 75 Iowa 619.

Summons.—In *Lyman v. Milton*, 44 Cal. 630, a summons was issued, entitled: "W. Lyman, plaintiff, v. M. E. Milton (administratrix, etc.) *et al.*, defendants." Upon the sufficiency of this summons, the court said: "It is manifest that the summons in this case did not state the parties to the action. M. E. Milton, in her representative capacity of administratrix, was but one of three parties defendant. The words *et al.*, in the connection in which they are used, are of no significance. They indicate, at most, that there are still other parties who are not named. Without them, so far as a compliance with the statute is concerned, the summons would have been as complete as with them."

Memoranda of Clerk.—In *Breidenthal v. McKenna*, 14 Pa. St. 161, it was said: "To prove this, he refers us, not to the record, but to some loose memoranda kept by the clerk of the court, and denominated 'minutes.' These show an entry: 'McKenna v. Breidenthal *et al.*, January 31, 1850, jury sworn to try the issue.' etc. This, however, cannot be treated as part of the record, nor accepted as showing

anything inconsistent with it; and if it could, it would be asking entirely too much to propose that the abbreviation *et al.*, in stating the title of the action, should be accepted as indicating that the jury were sworn as against all the defendants. The presumption is that the trying court directed the jury to be properly sworn; a presumption not to be overcome by the loose entry referred to, though that had place among the regular docket entries."

2. **Et Cetera, Etc., &c.**—*Worcester's Dict.*, followed in *Agate v. Lowenbein*, 4 Daly (N. Y.) 62; *Lathers v. Keogh*, 39 Hun (N. Y.) 576, affirmed 109 N. Y. 583.

"&c.' and 'Etc.,' respectively, stand for 'and so forth.'" *Hunt v. Smith*, 9 Kan. 153.

In *Sayer v. Pocock*, 1 Cowp. 408, Lord Mansfield said: "I will in this case adopt the reasoning of Lord Coke, and construe &c. to mean every necessary matter that ought to be expressed." See also *Cooke v. Beale*, 1 Wash. (Va.) 313, 318.

And So Forth.—A demise was of the whole of one building and the three upper floors of the adjoining building, with the privilege of using the stairway of the latter building "for the purpose of carrying in or out ashes, coal, and so forth." There was free access to and from the three floors of the latter building through the first building. It was held that the use of the phrase "and so forth," which means the same as *et cetera*, gave the lessee no right to use the stairway of the latter building as the principal entrance to the floors above. *Agate v. Lowenbein*, 4 Daly (N. Y.) 62.

Action for Assault and Battery.—In an action for assault, battery, and imprisonment, if the plea to it professes to answer the assault, *etc.*, and imprisonment, the *etc.* will make the plea broad enough to answer the battery complained of. *Bryan v. Bates*, 15 Ill. 88.

Life Insurance. (See also the title LIFE INSURANCE.)—An applicant for insurance stated, as to his employment, that he was "managing a restaurant, *etc.*" On the trial it appeared that he was not the manager of the restaurant, but a barkeeper in it. It was held that the keeping of a restaurant is so commonly connected with the selling of liquors and the keeping of a bar that the statement "managing a restaurant, *etc.*," would convey to the ordinary mind that the applicant, among other things, sold liquors or tended bar. *High Ct. Independent Order, etc., v. Schweitzer*, 70 Ill. App. 139, affirmed 171 Ill. 325.

"Livery Stock, Horse, Buggies, Etc."—The defendant sold to the plaintiff his undivided interest in the "livery stock, horse, buggies, *etc.*, of Dutton & Yatter." In construing this provision the court said: "What was meant by the term '*etc.*, of Dutton & Yatter'? It certainly refers to something owned by the partnership. The 'livery stock' is sufficiently

Ejusdem Generis. (See generally the title INTERPRETATION; and see OTHER.)
— The phrase *et cetera*, for which *etc.* is an abbreviation, imports other pur-

expressive to include all the property used in that business. It is difficult to conceive from the writing alone that it means anything less than the interest of the defendant in the partnership property. Upon looking into the evidence, whatever doubt there may be on this subject is dispelled. We think the parties so intended and understood, and that, when the written contract is read in the light of the surrounding circumstances and the subject-matter, there is no doubt that the plaintiff purchased, and the defendant sold, all the interest of the latter in the partnership property of Dutton & Yatter." *Shuler v. Dutton*, 75 Iowa 155.

Railroad Mortgage. — A resolution of the directors of a railroad authorized a mortgage of "the road and its property, *etc.*" It was contended that this did not authorize the mortgage of the "railroad with all its rights and privileges." The court refused to sustain this contention, saying: "Lord Coke, in speaking of *etc.*, as used by Littleton, says that 'it doth imply some other necessary matter.' (Com. 17a.) In our opinion, the directors must be regarded as having used it for some purpose. Perhaps no effect could have been given to it if there had been several matters, to either one of which it might possibly have been designed to apply. But the appellant held nothing except its road and other property and its franchises. There was nothing to which the phrase *etc.* could have been designed to apply except the franchises, and we therefore regard it as having been used to embrace them." *Bardtown, etc., R. Co. v. Metcalfe*, 4 Metc. (Ky.) 211.

Contract of Sale. — In an action to recover damages for the breach of a contract by which B and C agreed to purchase a steamboat from A, provided, upon trial, they were "satisfied with the soundness of the machinery, boilers, *etc.*," it was held that the term *etc.* meant "other material parts of the boat," and that "the defendants had a right to refuse to be satisfied if the boat was unsound in any material and substantial portion of her hull or machinery." *Gray v. New Jersey Cent. R. Co.*, 11 Hun (N. Y.) 70.

Working Contract. — In *Hayes v. Wilson*, 105 Mass. 21, it was held that in an action for work done for the defendant, the plaintiff, to support an item in his bill of particulars for "sixty-one days' work on house, *etc.*," may prove day's work done in grading the ground about the house, the defendant not having moved for a more definite specification.

Lease. — In *Parker v. Taswell*, 2 De G. & J. 559, it was held that the insertion of *&c.* in some of the terms of an agreement for a lease did not produce such uncertainty as to render the agreement incapable of specific performance, if the material points were sufficiently stated.

Goodwill. — On the sale of "goodwill, *&c.*," the *&c.* was held to carry the belongings of the goodwill, such, for example, as trademarks. *Cooper v. Hood*, 28 L. J. Ch. 215.

A Recognizance was conditioned "for the defendant's appearance, *&c.*" In construing

this undertaking, Tilghman, C. J., said: "By the words 'defendant's appearance, *&c.*,' I understand defendant's appearance and not departing without leave; there is nothing else to which the *&c.* can reasonably be applied, and that is the usual form of recognizance. When the recognizance is taken, the condition is verbally repeated to the recognizers, by the alderman at large, and they are asked if they are content. The memorandum is but a short statement of what was done. When the *&c.* is inserted it serves for a memorandum of the usual words 'and not depart without leave;' to understand it so is not to attribute to it more virtue than has been done in many other cases. Lord Coke's authority may be vouched in support of the meaning ascribed to *&c.* I have no doubt that, in the present instance, it may fairly extend to not departing without leave." *Com. v. Ross*, 6 S. & R. (Pa.) 427.

Indefiniteness. — A bond was executed "to Robert Tinchener, *&c.*," and all the officers of the Madison Circuit Court." This was held too vague. The court said: "To enable a person to take as a grantee or obligee in a deed or bond, it is not, indeed, indispensable that he should be named. Names are only necessary for the purpose of distinction, and may be supplied in contracts and deeds by a description indicating with sufficient certainty the person or persons intended to take by the contract or deed. But the *&c.* in the bond in this case is too vague and indefinite to answer the purpose of discrimination. Being in its import equally applicable to all or to any persons or things, it cannot be taken as descriptive in itself of any individual or class of individual persons or things, and cannot, therefore, supply the names of such individuals." *Ham v. Tinchener*, 3 T. B. Mon. (Ky.) 196. Compare *Bacchus v. Moreau*, 4 La. Ann. 313, set out under *ET AL.*

Same — Sheriffs' Fees. — In *State v. Wallichs*, 12 Neb. 407, it was held that an appropriation for objects described thus: "Fugitives from justice, rewards for escaped convicts, sheriffs' fees for conveying convicts to penitentiary, *etc.*," could not be drawn against in payment of sheriffs' fees for conveying juvenile offenders to the state reform school. The court said: "It is not really insisted by counsel for the relator that the service performed by him related either to 'fugitives from justice,' to 'escaped convicts,' or to the 'conveying of convicts to the penitentiary.' It is very clear that it belongs to neither of these. But it is said that in character it is like unto the latter, and therefore is fairly covered by the abbreviation *etc.* which follows it, and by which the legislature must have intended any and all other objects similar to those specially mentioned. That such may have been, and probably was, the design of the legislature, we admit, but that *etc.* designates any object, or number of objects, in particular, we deny. It is equivalent to saying 'and others,' or 'and so forth,' which cannot properly be said to be a 'specific' designation of anything."

Same — Statutes. — A statute provided for cer-

poses of a like character to those which have been named; *noscitur a sociis*.¹

EVEN.—See note 2.

EVENT—EVENTUAL. (See also FORTUITOUS EVENT; and see the title ABIDING THE EVENT, 1 ENCYC. OF PL. AND PR. 53.)—The consequence of anything; the issue; conclusion; end; that in which an action, operation, or series of operations terminates.³

tain procedure where any real estate was to be sold under a lien for labor, "such as ditching, building levees, etc." This was held not to extend to railroads. The court said: "A railroad is neither a drain nor a levee, in the common acceptation of the word. There is nothing in this act which intimates that the legislature intended it to be extended to railroads, unless it is in the abbreviation *etc.*, which is used after the words 'ditching' and 'building levees.' The abbreviation *etc.* is sometimes used in pleadings to avoid repetitions, and when so used usually relates to things unnecessary to be stated; but we have never before heard of it being incorporated in a statute, and are, therefore, at some loss to determine just exactly what the legislature intended by its use." *Dano v. Mississippi*, etc., R. Co., 27 Ark. 564.

But in *Garvin v. State*, 13 Lea (Tenn.) 162, it was held that *etc.*, at the end of and as part of the title of an act, means "and others" and "and so forth," and is not to be rejected.

Same—Reservation of Right of Way.—A conveyance reserved a right of way over the land "for the purpose of carting wood, &c." In construing this the court said: "The reserved right to cross the Carpenter lot is limited to the single purpose of carting wood. The addition of the abbreviation &c. in the reservation of a way for a particular and specified use over land conveyed is, by reason of its vagueness and uncertainty, without meaning or effect." *Myers v. Dunn*, 49 Conn. 76.

Same—Land Warrant.—It was shown that a land warrant was paid for "on behalf of Ingersoll, &c." The court said: "Again, the letters &c., without explanation, mean nothing, and may be disregarded." *Smith v. Walker*, 98 Pa. St. 140.

1. *Schouler*, Petitioner, 134 Mass. 427; *Hayes v. Wilson*, 105 Mass. 21; *Gray v. New Jersey Cent. R. Co.*, 11 Hun (N. Y.) 70. See also High Court Independent Order, etc., *v. Schweitzer*, 70 Ill. App. 143; *Dickerson v. Stoll*, 24 N. J. L. 553; *Whitaker v. Old Dominion Guano Co.*, 123 N. Car. 368.

Ejusdem Generis.—The plaintiff and the defendant entered into a contract for the sale of certain real estate to the plaintiff, which provided, among other things, that "the calculations and adjustments of the exact amounts to be paid as to rents, interest, etc., shall be made the same as if this contract were actually carried out and performed on September 1." It was held that the taxes were not covered by the agreement as to the adjustment of "rents, interest, etc.," as they were not expressly specified therein, and were not included under the character *etc.*, as that included only things of the same kind as those before set out. *Lathers v. Keogh*, 39 Hun (N. Y.) 576.

Same—Wills.—In *Newman v. Newman*, 26 Beav. 220, a bequest of "all my household

furniture and effects, plate, linen, china, glass, books, wearing apparel, &c.," was held to pass articles enumerated and others *ejusdem generis*, but not the general residue.

So in *Tefft v. Tillinghast*, 7 R. I. 434, it was held that a legacy of "all the balance of my books, furniture, &c.," was to be confined to things *ejusdem generis* with books and furniture; so that, although the &c. carried a piece of statuary, photograph views, drawings, and portfolios, it did not include articles of wearing apparel, and of personal ornament and use.

A testator bequeathed "all my furniture, &c.," to his wife. It was held that shares of stock did not pass under the expression &c. *Barnaby v. Tassell*, L. R. 11 Eq. 363.

But in *Chapman v. Chapman*, 4 Ch. Div. 800, it was held that a bequest of "all my money, cattle, farming implements, &c.," carried the whole of the testator's property, although it was contended that the &c. should be confined to property *ejusdem generis*. See also *Gover v. Davis*, 29 Beav. 222.

2. **"Even If" in the Sense of "Although."**—The trial court instructed that if the defendant, after discovering the danger of the plaintiff, could, by the exercise of reasonable care, have averted the injury complained of, "the negligence of plaintiff (even if the jury find he was negligent) will not in itself defeat a recovery by him in this case." This was held not to be error. The court said: "We do not see in instruction number 4 any ground for the contention of appellant, that a controverted fact was therein assumed. We are also satisfied that terms 'even if,' as used in this instruction, signify 'although,' and were not intended to be used in a different sense." *Burnstein v. Cass Ave.*, etc., R. Co., 56 Mo. App. 54.

3. *Webster's Dict.*, adopted in *Fitch v. Bates*, 11 Barb. (N. Y.) 473.

Event and Result.—An indictment for betting on an election alleged that the bet was dependent upon the event of the contest. It was argued that this was bad because it did not allege that the bet was upon the result of the election. The court said: "We think the allegation is sufficient; the word event is as expressive as the word result." It means issue, hap, chance, success, that follows doing anything, and is appropriately used to express the idea upon which the bet depended." *State v. Cross*, 2 Humph. (Tenn.) 302.

Costs. (See also ENCYC. OF PL. AND PR., vol. 5, p. 100.)—A statute provided that costs should abide the event of an action. In *Myers v. Defries*, 5 Exch. Div. 15, it was held that when in the same action the plaintiff obtained a verdict and judgment as to one cause of action, and the defendant obtained a verdict and judgment as to other and distinct causes of action, the word event was to be read distributively, and the defendant was entitled to tax his costs of the issues found for him.

EVER.—See note 1.

EVERY—EVERYTHING—EVERYWHERE. (See also ALL, vol. 2, p. 141; ANY, vol. 2, p. 414; OTHER.)—“Every” means each one of all.² The word

Eventual Condemnation Money.—Where a counter-affidavit was filed to a distress warrant, the sureties on the bond given were held, in obligating themselves to pay the *eventual* condemnation money, to bind themselves to pay whatever amount might be found against their principal by the jury, upon the trial of the issue made by the counter-affidavit, and it was held that in order to bind them the issue should have been submitted to a jury. *Willis v. Bivins*, 76 Ga. 745.

1. **Ever.**—A statute prohibited any one from practicing medicine who had *ever* been convicted of a felony. In construing this provision, the court, in *People v. Hawker*, 152 N. Y. 234, said: “The word *ever*, to our minds, clearly indicates the legislative intention to prohibit the practice of medicine on the part of any person who has been convicted of a felony, either before or after the passage of the law.” See generally the title **PHYSICIANS AND SURGEONS**.

2. *Purdy v. People*, 4 Hill (N. Y.) 413; *Brown v. Jarvis*, 2 De G. F. & J. 168. See also *Surtees v. Surtees*, L. R. 12 Eq. 400.

In *State v. Penny*, 19 S. Car. 221, it was said: “*Every* includes all the separate individuals which constitute the whole, regarded one by one; there can be no exception.”

Every Copy.—A statute gave the secretary of state a certain fee for *every* copy of a paper on file in his office. It was held that under this statute he was entitled to such fee from the state when a copy of a paper on file had been ordered by the legislature. The court said: “He is to have a fixed sum for ‘*every* copy’ of a paper in his office. The phraseology, intrinsically considered, will not bear the interpretation that he is to have this fee only when he furnishes a copy of a paper of this sort for an individual, and not when he furnishes it on the demand of the legislature. If he is to provide gratuitously a copy for the use of the public, then it is clear he is not to have his fee for ‘*every* copy,’ and to throw into the terms of the statute the limitation contended for, such terms must be qualified by some extraneous consideration.” *State v. Kelsey*, 44 N. J. L. 16.

Every Action. (See generally the titles **LIBEL AND SLANDER**; **LIMITATION OF ACTIONS**.)—A statute providing that *every* action upon the case for words should be commenced and sued within one year next after the words spoken was held to embrace written words as well as spoken words. *Menter v. Stewart*, 2 How. (Miss.) 698.

Every Person. (See also the title **JURY AND JURY TRIAL**.)—Under a statute which gives to “*every* person indicted” for offenses of a certain sort a right to challenge peremptorily four of the jurors impaneled for his trial, where several persons are jointly indicted each is entitled to four peremptory challenges. *Washington v. State*, 17 Wis. 147.

In *Rex v. Pierce*, 3 M. & S. 62, it was held that a statute which provided that *every* person committed for any offense or misdemeanor

should bear certain charges included deserters as well as other criminals.

A statute provided that *every* person who should be concerned in the unshipping of goods, the duties for which had not been paid, should be liable to a penalty. It was held that where the defendant and his partner were separately convicted of the same offense, each was liable for the penalties imposed by the act. *Reg. v. Dean*, 12 M. & W. 39. In this case Abinger, C. B., said: “But the words of the statute appear to me to be decisive of the question. They are, that ‘*every* person’ who shall be concerned in the unshipping of any goods, the duties for which have not been paid, or shall be guilty of any of the other offenses mentioned in the section, shall be liable to the penalties there inflicted. Then all persons who are concerned in the illegal transaction are subject to the penalties; and here the jury have said, by their finding, that each of these persons was concerned in it.”

Limitations in Wills.—A testator directed his trustees to purchase lands to be settled, on the death of the eldest son of J. S. without issue (which happened), “to the use of *every* son” of J. S. then living, or who should be born in the testator’s lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son and his assigns to receive the rents during his life, and after his decease to the use of such son’s first and *every* other son successively in tail male, and, on failure of such issue, to the use of the testator’s right heirs. It was held that the younger sons of J. S. took as tenants in common for life, with remainder as to each son’s share to his first and other sons in tail male, with cross-remainders over. See also *Surtees v. Surtees*, L. R. 12 Eq. 400; *Allgood v. Blake*, L. R. 7 Exch. 339.

Same—Every of Them.—A testator gave his residuary estate upon trust, in case he left no child him surviving, for his wife for life, if she should so long continue his widow; but if she should marry again, upon trust to pay one-half of the dividends, and after her death to pay the whole thereof, to the testator’s brother and sister during their joint lives, equally to be divided; and after the death of either of them, the said brother and sister, to pay the same wholly to the survivor for life; and after the decease of “*every* of them, his said wife, brother, and sister,” the testator declared that the trust fund and the dividends thereof were to be held in trust for the children of his brother. It was held that a moiety of the income that accrued after the second marriage of the widow, and between the death of the survivor of the brother and sister and that of the widow (who survived them), neither belonged to the widow, nor was undisposed of, but belonged to the brother’s only child. The court said: “Dr. Johnson tells us in his dictionary that *every* was formerly spelt ‘*everich*’; that is, ‘*ever each*,’ and that the true meaning is ‘*each one of all*.’ The word may be used in this sense, although other lexicographers may

is, however, sometimes given a more limited construction, owing to the subject or context.¹

give another meaning to it; and the testator certainly did not intend to die intestate as to any particle of his property." *Brown v. Jarvis*, 2 De G. F. & J. 168.

Joint and Several.—By indenture tripartite between A 1, B 2, C 3, A, a tenant for life, demised to C; and C covenanted with B (a receiver) and other the receiver or receivers for the time being, and to and with such other person who, for the time being, should be entitled to the freehold, and "to and with every of them." A died. It was held that A's executrix could not maintain covenant for breach in her testator's lifetime, but that the action was joint, and survived to B. *Mansfield, C. J.*, said: "It is urged for the plaintiff that 'to and with every of them' means 'with each of the two separately,' but it would be very strange if it were so; it means 'with every of the receivers, and with the person entitled, jointly.'" *Southcote v. Hoare*, 3 Taunt. 87.

Bonds—Joint or Several. (See also the title BONDS, vol. 4, p. 638.)—A bond executed by two obligors, containing the following clause: "For the true payment whereof we do bind ourselves, our heirs, executors, administrators, and every of them," is joint and several. *Besore v. Potter*, 12 S. & R. (Pa.) 154; *Wood v. Hummel*, 4 Watts (Pa.) 50. See also *Klapp v. Kleckner*, 3 W. & S. (Pa.) 519. But if the obligors expressly declare themselves jointly bound, the clause above quoted is not sufficient to convert the bond into a joint and several obligation. *Moser v. Libenguth*, 1 Rawle (Pa.) 255.

"Everything" in a Will.—A bequest to the testator's widow of *everything* remaining was held to carry certain vessels belonging to the testator. *Lee v. Babcock*, 45 N. J. Eq. 359. And money and stock have been held to pass under a bequest of *everything* in a house. *Popham v. Aylesbury*, Amb. 68; *Stuart v. Bute*, 11 Ves. Jr. 662.

Same—Realty.—The words, "*everything* I am possessed of I leave to my * * * sister * * * for her life," used in a will, are sufficient to give the sister a life estate in real estate acquired after the date of the will. *In re Methuen's Contract*, 16 Ch. Div. 696. And in *Wilce v. Wilce*, 5 M. & P. 682, 7 Bing. 664, 20 E. C. L. 280, the words "*everything* else" were held to carry a fee not otherwise disposed of.

1. *Locke v. Dunlop*, 39 Ch. Div. 392; *Wilde v. Bowen*, 37 U. C. Q. B. 504; *Peters v. Cowie*, 2 Q. B. Div. 131; *Rex v. Gwenop*, 3 T. R. 135.

Limited Sense.—In *State v. McKenney*, 18 Nev. 200, it was said that "the words 'all' and *every* are often restrained in meaning by their context, or by the general object of the provision," and in that case it was held that "*every* person," as used in the General Crimes statute, did not include Indians living in tribes.

Where a constitutional provision declares that "*every* person" shall be entitled to a certain remedy, *every* is not to be taken in its widest sense, *i. e.*, as including alien enemies. *Davis v. Pierse*, 7 Minn. 13.

A statute provided that each allegation of the complaint should be controverted by the defendant, and that *every* material allegation not specifically controverted should, for the purposes of the action, be taken as true. In construing this provision the court, in *Spaulding v. Harvey*, 7 Ind. 432, said: "There is great plausibility in the argument that the words 'each,' *every*, 'specifically,' as used in the statutes quoted, require a distinct and separate answer to each allegation. This is certainly the plain and usual sense of those words. '*Every* allegation' means clearly 'each allegation,' specifically and separately considered." Nevertheless the court came to the conclusion, from other considerations, that a general denial of all the material allegations of a complaint was sufficient.

A statute provided that *every* person who should impound any animal, or cause it to be impounded, should provide it with a sufficient quantity of food and water during its confinement. It was held that the statute did not apply to the keeper of the pound. *Dargan v. Davies*, 2 Q. B. Div. 118.

A statute provided a penalty for *every* person found drunk on licensed premises. It was held that this did not apply to a licensed innkeeper who was found drunk on his own premises after license hours. *Lester v. Torrens*, 2 Q. B. Div. 403; *Warden v. Tye*, 2 C. P. Div. 74.

Same—Every Railroad Company.—In *Com. v. Richmond, etc.*, R. Co., 81 Va. 367, it was said: "It is admitted that in 1860 there were railway companies in Virginia liable to taxation, and others exempt by irrevocable contracts contained in their charters. This being so, to construe the words '*every* railroad company' so as to embrace necessarily all companies would be to render the act plainly unconstitutional, a construction that will never be adopted when any other, consistent with the constitution, can be given."

"Everywhere" in a Limited Sense.—In *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 899, it is said: "Again, the complainant is charged with fraud in saying that its thread is '*sold everywhere*.' No sane man would understand this literally. If *everywhere* when so used is synonymous with 'the earth,' the complainant can be convicted of falsehood by proof that Clark's thread is unknown in Tasmania or Siam. The statement is on a par with the equally modest suggestion of the defendant that his thread is 'the latest and the best.' This harmless exaggeration is understood and discounted by all. It is not fraud, but merely 'trade talk.' No one is deceived. No one is injured."

EVICITION.

BY JOSEPH WALKER MAGRATH.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the title LANDLORD AND TENANT, 12 ENCYC. OF PL. AND PR. 842.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: COVENANTS, vol. 8, p. 103; DISTRESS, vol. 9, p. 617; LANDLORD AND TENANT.

I. INTRODUCTORY — SCOPE OF ARTICLE. — This article will be confined to a treatment of what constitutes an eviction as between a landlord and his tenant. The questions as to eviction as a breach of covenant of warranty or for quiet

enjoyment, and of the effect of an eviction as between landlord and tenant, are treated in other portions of this work.¹

II. DEFINITION AND CLASSIFICATION — 1. Definition. — It is difficult at the present time to define with technical accuracy what is an eviction, for the word is now used to denote that which it was formerly not intended to express. The term "eviction" was formerly used to denote an expulsion by the assertion of a paramount title and by process of law,² but it is now popularly applied to every class of expulsion or amotion.³ The old notion of eviction being thus disposed of, it may now be taken to mean anything of a grave and permanent character⁴ done by the landlord or those acting under his authority with the intention and effect of depriving the tenant of the use, occupation, and enjoyment of the demised premises,⁵ or the establishment or assertion against the tenant of a title paramount to that of the landlord.⁶ Cases containing other definitions which have been given by the courts from time to time are cited in the note.⁷

1. Eviction as a Breach of Covenant of Warranty or for Quiet Enjoyment. — See the title COVENANTS, vol. 8, p. 103.

Effect of Eviction as Between Landlord and Tenant. — See the title LANDLORD AND TENANT.

2. Former Meaning of Term. — Jervis, C. J., in *Upton v. Townend*, 17 C. B. 30, 84 E. C. L. 30, 25 L. J. C. P. 44, 1 Jur. N. S. 1089; *Ferguson v. Troop*, 25 New Bruns. 440, 7 Can. L. T. 351; *Corse v. Moon*, 22 Nova Scotia 191; *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Edmison v. Lowry*, 3 S. Dak. 77, 44 Am. St. Rep. 774.

In *Keating v. Springer*, 146 Ill. 481, 37 Am. St. Rep. 175, the court, *per* Magruder, J., said: "To evict a tenant, according to the original signification of the word, is to deprive him of the possession of the land."

In *Thomas v. Stickle*, 32 Iowa 71, Miller, J., said: "Technically, an eviction is a lawful disturbance of possession or dispossession by judgment of law."

The term "eviction" is still occasionally applied to an expulsion or amotion by process of law. See *Porter v. Johnson*, 96 Ga. 145; *Watson v. Toliver*, (Ga. 1897) 29 S. E. Rep. 614; *Wacholz v. Griesgraber*, (Minn. 1897) 73 N. W. Rep. 7; *Cassel v. Seibert*, 1 Dauph. Co. Rep. (Pa.) 16.

3. Present Use of Term. — Jervis, C. J., in *Upton v. Townend*, 17 C. B. 30, 84 E. C. L. 30, 25 L. J. C. P. 44, 1 Jur. N. S. 1089.

In *Moffat v. Strong*, 9 Bosw. (N. Y.) 57, the court, *per* Woodruff, J., said: "The definition of the term 'eviction' given by Jacobs, it is true, declares it to be 'a recovery of land, etc., by form of law.' But conceding that to be the original and technical meaning of the term, it is used, nevertheless, in a modified and more general sense when applied to eviction by the landlord himself, and also to a breach of the covenant for quiet enjoyment and of the covenant of warranty."

Latterly the term "eviction" has been more generally used to signify ejection and expulsion from the occupation and use by any means, against the will of the person ejected. *Ferguson v. Troop*, 25 New Bruns. 440, 7 Can. L. T. 351.

4. A Wrongful Act. — An eviction is in its nature wrongful. *Cook v. Anderson*, 85 Ala. 99.

5. Definition — *England*. — Jervis, C. J., in

Upton v. Townend, 17 C. B. 30, 84 E. C. L. 30, 25 L. J. C. P. 44, 1 Jur. N. S. 1089.

Canada. — *Boulton v. Blake*, 12 Ont. Rep. 532; *Corse v. Moon*, 22 Nova Scotia 191; *Oliver v. Mowat*, 34 U. C. Q. B. 472; *Ferguson v. Troop*, 17 Can. Sup. Ct. Rep. 527, 10 Can. L. T. 290, *per* Patterson, J.

Alabama. — *Rice v. Dudley*, 65 Ala. 68.

Georgia. — *Fleming v. King*, 100 Ga. 449.

Illinois. — *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Lynch v. Baldwin*, 69 Ill. 210; *Walker v. Tucker*, 70 Ill. 527; *Patterson v. Graham*, 40 Ill. App. 399, *affirmed* 140 Ill. 531.

Massachusetts. — *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322.

Rhode Island. — *Miller v. Maguire*, 18 R. I. 770.

South Dakota. — See *Edmison v. Lowry*, 3 S. Dak. 77, 44 Am. St. Rep. 774.

6. A very concise and comprehensive definition of eviction is that given by Barnard, P. J., in *Blauvelt v. Powell*, 59 Hun (N. Y.) 179, substantially as follows: To constitute an eviction, there must be dispossession by a paramount title or by the act of the landlord, or he or his servants must make the occupancy so annoying and uncomfortable as to justify the tenant in removing from the demised premises.

In *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446, the court, *per* Brickell, C. J., said: "The eviction of a tenant consists in the disturbance of his possession, his expulsion or amotion depriving him of the enjoyment of the premises demised, or any portion thereof, by title paramount, or by the entry and act of the landlord."

7. For Other Definitions of the Term, see:

England. — *Upton v. Townend*, 17 C. B. 30, 84 E. C. L. 30, 25 L. J. C. P. 44, 1 Jur. N. S. 1089.

Colorado. — *Hyman v. Jockey Club Wine, etc., Co.*, 9 Colo. App. 299.

Delaware. — *State v. M'Clay*, 1 Harr. (Del.) 521.

Illinois. — *Walker v. Tucker*, 70 Ill. 527; *Barrett v. Boddie*, 158 Ill. 479, *affirming* 57 Ill. App. 226.

Indiana. — *Reasoner v. Edmundson*, 5 Ind. 393; *Marvin v. Applegate*, 18 Ind. 425.

Massachusetts. — *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *De Witt v. Pier-*

2. Classification. — Evictions are usually classified in different ways according to the phase of the question which is under consideration. When the question is as to the nature of the deprivation, an eviction is called either actual or constructive; in respect to its extent, it may be either total or partial;¹ while, opposed to eviction by the landlord or those acting under his authority, is eviction by "title paramount."

An Actual Eviction is an actual expulsion of the tenant out of all or some part of the demised premises, a physical ouster or dispossession from the very thing granted or some substantial part thereof.²

A Constructive Eviction is an act which, though not amounting to an actual eviction, is done with the intention and has the effect of essentially interfering with the tenant's beneficial enjoyment of the demised premises, such as building a fence in front of the premises so as to cut off the tenant's access thereto, or creating a nuisance adjacent to the premises. But in order that such an act shall operate as an eviction, it must be of such a character as to warrant, and must be followed by, the tenant's giving up the possession.³

The Term "Moral Eviction" has also been applied to those acts of the landlord which render the demised premises unfit for the tenant to occupy.⁴

Partial Eviction. — It is not necessary that the tenant should be deprived of the whole of the demised premises, for it is a well-settled principle that there may be an eviction of a part only.⁵

Eviction by Title Paramount. — An eviction may also result from the act of a third person who gains possession of the demised premises by establishing a title thereto superior to that of the landlord, in which case the tenant is said to be evicted by title paramount.⁶

III. GENERAL PRINCIPLES — 1. Interest on Which Eviction May Be Predicated.

— To constitute an eviction it is necessary that the tenant should have been deprived of the use of something to which he had a right under his lease.⁷ Thus a tenant is not evicted by being deprived, by the landlord, of the use of

son, 112 Mass. 8; *Mirick v. Hoppin*, 118 Mass. 582; *Bartlett v. Farrington*, 120 Mass. 284.

New York. — *Ogilvie v. Hull*, 5 Hill (N. Y.) 52; *Tallman v. Murphy*, 120 N. Y. 345; *Ogden v. Sanderson*, 3 E. D. Smith (N. Y.) 166.

Rhode Island. — *Miller v. Maguire*, 18 R. I. 770.

South Dakota. — *Edmison v. Lowry*, 3 S. Dak. 77, 44 Am. St. Rep. 774.

1. An Eviction May Be Either Total or Partial. — *Cook v. Anderson*, 85 Ala. 99.

2. Actual Eviction. — *Moran, P. J.*, in *Patterson v. Graham*, 40 Ill. App. 399, *affirmed* 140 Ill. 531. See also *infra*, this title, *What Circumstances Amount to Eviction—Actual Eviction*.

3. Constructive Eviction. — *Moran, P. J.*, in *Patterson v. Graham*, 40 Ill. App. 399, *affirmed* 140 Ill. 531.

In *Bradley v. De Goicouria*, 12 Daly (N. Y.) 393, 67 How. Pr. (N. Y.) 76, *Daly, C. J.*, said: "If a tenant is deprived, by the wrongful act of the landlord, of the beneficial use of the premises, and is compelled thereby to quit and abandon them, it amounts to what has been called a constructive eviction." See also *infra*, this title, *What Circumstances Amount to Eviction—Constructive Eviction*.

4. Moral Eviction. — *Campbell v. Shields*, 11 How. Pr. (N. Y. Supreme Ct.) 565. The illustration given by *Mitchell, J.*, in this case, of what may constitute a "moral eviction," *i. e.*, introducing women of ill fame into other parts of the house, gives some ground for the view that the justice may have meant to apply

this term only to such acts of the landlord as were in themselves immoral.

5. Partial Eviction. — *Paxson, J.*, in *Pfund v. Herlinger*, 10 Phila. (Pa.) 13, 30 Leg. Int. (Pa.) 84. See also *Upton v. Townend*, 17 C. B. 30, 84 E. C. L. 30, 25 L. J. C. P. 44, 1 Jur. N. S. 1089; *Patterson v. Graham*, 40 Ill. App. 399, *affirmed* 140 Ill. 531; *Mirick v. Hoppin*, 118 Mass. 582; *Bartlett v. Farrington*, 120 Mass. 284; *Jackson v. Eddy*, 12 Mo. 209.

The general principles applicable to total and partial eviction are practically the same, the only distinction between the two kinds of eviction being as to the consequences flowing therefrom. A general treatment of such consequences is not within the scope of this article (see *supra*, this title, *Introductory—Scope of Article*), and for that reason there will be no separate treatment of partial eviction beyond that contained in the subdivision *Effect of Partial Eviction, infra*, which will contain the decisions as to how far a partial eviction authorizes an abandonment of the demised premises.

6. Eviction by Title Paramount. — *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *Blauvelt v. Powell*, 59 Hun (N. Y.) 179; *Johnson v. Oppenheim*, 12 Abb. Pr. N. S. (N. Y. Super. Ct.) 454, 43 How. Pr. (N. Y.) 433. See also *infra*, this title, *What Circumstances Amount to Eviction—Eviction by Title Paramount*.

7. Tenant Must Have Right to Use under His Lease. — A tenant is not evicted by being deprived of the use of a well and water closet on

a road or way adjacent to the demised premises, but not a part of nor appurtenant to them;¹ nor of a way included in the lease, but in respect to which the lease was void in its inception.² Similarly, there can be no eviction from that in which, for any reason, the tenant's interest has ceased.³

Failure to Deliver Possession. — It would seem to be the rule that there can be no eviction without an antecedent possession by the tenant, and therefore a failure or refusal of the landlord to deliver possession of all or a part of the premises leased, while a wrong for which the tenant has his remedy at law, does not amount to a technical eviction.⁴

adjoining premises, through the failure of the landlord to pay for their use, where their use was not embraced in the lease, but grew out of a mere verbal agreement. *Lynch v. Baldwin*, 69 Ill. 210.

In an action for rent, the tenant set up as a defense that he had been evicted from part of the demised premises by the action of the department of docks of the city, in destroying his approach from the premises to the river. The evidence showed that the premises were not at any time bounded by the river, and that the only communication between the premises and the river was over certain other lots which did not abut thereon, and which were in the possession of the tenant under another lease. It was held that, the right of way depending upon the lease of the other lots, which were held under another landlord, there was no eviction as to the premises in question. *Baylies v. Philadelphia, etc., Coal, etc., Co.*, (C. Pl.) 10 N. Y. Supp. 316.

In *Williams v. Hayward*, 1 El. & El. 1040, 102 E. C. L. 1040, it was held that a tenant was not evicted by the act of the landlord in preventing him from using, or obstructing him in the enjoyment of, a railway, the use of which he had enjoyed during the lease, in common with others, the court considering that the right to use the railway was not a part of the demise and that no rent issued out of the easement of use thereof.

Deprivation of Privilege Held at Sufferance of Municipal Authorities. — In *McLarren v. Spalding*, 2 Cal. 510, the defendant had leased of the plaintiff a store and certain stands for the sale of goods, which stands were erected in a public street of a city. It appeared from the evidence that the stands were of greater value than the store, and were the main inducement to the lease. Shortly after the lease, the stands were removed by order of the municipal authorities. It was held that this did not constitute an eviction, the court, *per* Heydenfeldt, J., saying: "The right which the defendant purchased or leased was a mere privilege, or franchise, held by his lessor, and afterwards by him, at the sufferance of the city. As it was a public street, and the stand was an obstruction to the street, the defendant was fully chargeable with notice of its character, and took it subject to be removed at any moment by the action of the city. He therefore took it with that risk, and as he might have largely profited by its continuance, so he must suffer the loss of its removal."

1. Deprivation of Use of Way. — *Shuttleworth v. Shaw*, 6 U. C. Q. B. 517.

2. Lease Void in Inception. — A lease to C. included a certain passageway, which was leased to another tenant of the same landlord

for a term not then expired. Subsequently this tenant began to put up a building which covered the passageway, and C. claimed to be evicted therefrom. It was held that there was no eviction, but the lease to C. of that portion of the premises which was already leased to another was void in its inception. *Carey v. Bestwick*, 10 U. C. Q. B. 156.

A Contrary Doctrine prevails in California. In that state it has been held that a tenant was constructively evicted where a former tenant of the land, whose lease had not expired when the later tenant went into possession, recovered judgment against him in an action of trespass for using the land, even though the action was not commenced until after the expiration of the former lease, and the judgment was not rendered until after the expiration of the later tenant's lease. *McAlester v. Landers*, 70 Cal. 79.

3. Termination of Tenant's Interest. — *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Ramsay v. Wilkie*, (C. Pl.) 13 N. Y. Supp. 554. To the same effect is *Alexander v. Dorsey*, 12 Ga. 12.

4. Failure or Refusal to Deliver Possession. — *Etheridge v. Osborn*, 12 Wend. (N. Y.) 399. See also *Vanderpool v. Smith*, 4 Abb. App. Dec. (N. Y.) 461, *affirming* 1 Daly (N. Y.) 311.

Where a landlord leased his warehouse to tenants, and delivered to them possession of the three lower stories upon the making of the contract, and agreed to give them possession of the cellar and of the fourth and fifth stories on demand, but refused to deliver possession thereof, although repeatedly requested to do so, whereby the tenants were compelled for want of room to abandon the premises and rent another house for the transaction of their business, it was held that there was no eviction. *McClurg v. Price*, 59 Pa. St. 420, 98 Am. Dec. 356.

Where the landlord, without intending to keep the tenant out of possession, retains a small portion of the demised premises, this is not an eviction. *Doolittle v. Selkirk*, 7 Misc. Rep. (N. Y. C. Pl.) 722.

See also *Dunn v. Di Nuovo*, 3 M. & G. 105, 42 E. C. L. 63, in which case it was held that in an action of debt, upon a parol demise, a plea that, during the term, it was agreed that the tenant should relinquish possession to the landlord for a month, after which possession should be resumed by the tenant, and that the tenant did relinquish possession, but the landlord would not restore the possession, was bad, as not showing a surrender or an eviction.

Failure to Remove Property. — A person leased a building in which were an engine and boiler belonging to the landlord. This engine and boiler the tenant verbally arranged to use,

2. Intent of Landlord. — When a question of eviction arises, the intention of the landlord in doing the acts complained of is material. It is laid down as a general rule that in order for acts of a landlord, in interference with his tenant's possession, to constitute an eviction, they must clearly indicate an intention on his part that the tenant shall no longer continue to hold the demised premises.¹ Thus, a mere trespass of the landlord, not intended by him as a

paying a certain sum therefor, but after a short while found that they did not operate to suit, and the lease of them was canceled. The landlord, however, failed to remove the engine and boiler from the demised premises. It was held that such failure to remove, after a request of the tenant that they should be removed, did not constitute an eviction of the tenant, either actual or constructive. *Baumgardner v. Consolidated Copying Co.*, 44 Ill. App. 74.

Cases Holding the Contrary Doctrine. — In *Lawrence v. French*, 25 Wend. (N. Y.) 443, affirmed 7 Hill (N. Y.) 519, a tenant leased an entire building, but one room therein continued to be occupied by another person, who held it under a prior lease from the landlord. This seems to have been considered an eviction from that part of the demised premises.

The case of *Tomlinson v. Day*, 2 Brod. & B. 680, 6 E. C. L. 327, seems also to be in conflict with the rule set out in the text. In that case the plaintiff had agreed to demise to the defendant a mansion house and farm, with the exclusive right of sporting over the manor within which the farm lay, and the occupation of the glebe land of the parish. It turned out that the plaintiff had no right to grant the exclusive right of sporting; and he also failed in procuring the glebe land for the defendant. The court held that "an eviction of part of the subject-matter of the demise" (namely, of the exclusive privilege of sporting) was clearly proved. But Lord Denman, commenting upon this case in *Neale v. Mackenzie*, 1 M. & W. 747, 2 C. M. & R. 84, said: "If it was an eviction, it was clearly an eviction by title paramount. The agreement for exclusive sporting was not void on account of the landlord having made a prior agreement to let it to some other person."

1. Acts Must Clearly Show Intention to Deprive Tenant of Possession. — *England.* — *Upton v. Greenlees*, 17 C. B. 64, 84 E. C. L. 64.

Canada. — *Nixon v. Maltby*, 7 Ont. App. 371; *Oliver v. Mowat*, 34 U. C. Q. B. 472; *Boulton v. Blake*, 12 Ont. Rep. 532. See also *Corse v. Moon*, 22 Nova Scotia 191.

Colorado. — *Eisenhart v. Ordean*, 3 Colo. App. 162; *Hyman v. Jockey Club Wine, etc., Co.*, 9 Colo. App. 299.

Delaware. — See *State v. M'Clay*, 1 Harr. (Del.) 521.

Illinois. — *Morris v. Tillson*, 81 Ill. 607; *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Lynch v. Baldwin*, 69 Ill. 210; *Walker v. Tucker*, 70 Ill. 528; *Barrett v. Boddie*, 158 Ill. 479, affirming 57 Ill. App. 226; *Keating v. Springer*, 146 Ill. 481, 37 Am. St. Rep. 175.

Iowa. — See *Daniels v. Logan*, 47 Iowa 395.

Massachusetts. — *Bartlett v. Farrington*, 120 Mass. 284; *De Witt v. Pierson*, 112 Mass. 8; *Mirick v. Hoppin*, 118 Mass. 582.

Nebraska. — *Hayward v. Ramge*, 33 Neb. 836.

New York. — *Peck v. Hiler*, 31 Barb. (N. Y.) 117; *New York v. Price*, 5 Sandf. (N. Y.) 542. See also *McKenzie v. Hatton*, 141 N. Y. 6, affirming 70 Hun (N. Y.) 142.

Rhode Island. — See *Miller v. Maguire*, 18 R. I. 770.

Illustrations. — A person who has leased land from the crown is not evicted by an agreement between the crown and the directors of a park that certain lands, including the demised premises, are to be used as a public park "subject until their determination of [to] existing leases of portions of said lands." *Reg v. Miller*, 16 Nova Scotia 361.

A tenant of part of a building is not evicted because the landlord subsequently lets another part to persons who occupy and use it as a house of prostitution and ill fame, unless the letting was for the purpose of its being put to an improper use, or with the knowledge of the landlord that it would be used for such improper purpose. *Townsend v. Gilsey*, 1 Sweeny (N. Y.) 155.

A lessee of a coal bank, with the rights of way over and timber on the tract of land on which it is situated, at a rent of a certain amount per bushel of coal mined, is not evicted, either in whole or in part, where the lessors enter and take coal from other parts of the tract without interfering with his operations. *Tiley v. Moyers*, 43 Pa. St. 404.

Certain persons had leased a part of the basement of a building. The building having been damaged by fire, and repairs being in progress, some of the tenants' goods were removed from the basement to the first floor of the building, but some remained in the basement. During the progress of the repairs, some one representing the landlords or the builders stated that the goods in the basement were in the way and requested the tenants to remove them. They did not do so at once, being busy, but some time afterwards they took the goods away. It was held that there was no eviction, as nothing done or said by the landlords indicated an intent that the tenants should no longer occupy the premises, and the removal of the goods was merely for the purpose of facilitating the repairs. *Smith v. McLean*, 22 Ill. App. 451.

In *Bartlett v. Farrington*, 120 Mass. 284, the landlords from time to time entered upon the demised premises and gathered the flowers and the annual crops. They also cut down a partly decayed apple tree, and on the day when the tenant vacated the house they removed a cooking stove from the kitchen. It was held that these acts did not amount to an eviction, as they were not done with the purpose and effect of permanently depriving the tenant of the use and enjoyment of the premises, but, even if not justifiable under any agreement with him, were merely trespasses.

Where a tenant abandons the demised prem-

permanent expulsion or amotion of the tenant, nor to deprive him of the use and enjoyment of the premises, while it may entitle the tenant to recover damages, does not amount to an eviction.¹

ises, though he leaves some of his goods thereon, the landlord may enter, and take proper care of the property, without being guilty of an eviction. *State v. M'Clay*, 1 Harr. (Del.) 520.

A tenant of a hotel who had given his landlord a chattel mortgage of his hotel furniture to secure rent due and to become due was not evicted when the landlord, as he was authorized under the terms of the mortgage to do, proceeded by writ of replevin to possess himself of the furniture. The service of the writ did not operate as an eviction, nor did any delay in executing the writ, unauthorized by the landlord, have that effect. Nor could any delay in moving the property or any other act which might otherwise be regarded as an eviction have such effect if it was sanctioned by the tenant. *Morris v. Tillson*, 81 Ill. 607.

A landlord built a fence on what both he and the tenant supposed to be the true line between the demised premises and those which the landlord intended to inclose; but the fence, in fact, inclosed a part of the demised premises. As soon as the landlord discovered the mistake, he proposed and attempted to correct it, but was prevented by the tenant from doing so. It was held that there was no eviction. *Mirick v. Hoppin*, 118 Mass. 582.

Circumstances Showing Intention to Deprive Tenant of Possession.—A landlord leased a farm to two tenants for a term of five years. Before the end of the first year he put another person into a house on the farm, and such person began to plow for wheat, having rented the farm from the landlord for a term of five years. It was held that these circumstances were of such a serious and permanent character as to indicate an intention upon the part of the landlord to deprive the original tenants of the enjoyment of the farm, and amounted to an eviction from the part leased to such other person, authorizing the original tenants to abandon the entire farm. *Miller v. Michel*, 13 Ind. App. 190.

1. Trespass of Landlord Not an Eviction.—*England.*—*Newby v. Sharpe*, 8 Ch. Div. 39; *Upton v. Townend*, 17 C. B. 30, 84 E. C. L. 30, 25 L. J. C. P. 44, 1 Jur. N. S. 1089; *Hunt v. Cope*, 1 Cowp. 242. See also *Lloyd v. Tomkies*, 1 T. R. 671.

Canada.—*Ferguson v. Troop*, 25 New Bruns. 440, 7 Can. L. T. 351; *Nixon v. Maltby*, 7 Ont. App. 371.

Alabama.—*Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446.

Arkansas.—See *Collins v. Karatopsky*, 36 Ark. 316.

Colorado.—*Hyman v. Jockey Club Wine, etc., Co.*, 9 Colo. App. 299.

Georgia.—*Way v. Myers*, 64 Ga. 760; *Fleming v. King*, 100 Ga. 449.

Illinois.—*Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Lynch v. Baldwin*, 69 Ill. 210; *Barrett v. Boddie*, 158 Ill. 479, *affirming* 57 Ill. App. 226. See also *Chicago Legal News Co. v. Browne*, 103 Ill. 317.

Indiana.—See *Avery v. Dougherty*, 102 Ind. 443.

Massachusetts.—*Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Fuller v. Ruby*, 10 Gray (Mass.) 285; *Skally v. Shute*, 132 Mass. 367. See also *Kimball v. Grand Lodge*, 131 Mass. 59.

Michigan.—*Day v. Watson*, 8 Mich. 535.

Missouri.—*McFaddin v. Rippey*, 8 Mo. 738.

New Hampshire.—See *Elliott v. Aiken*, 45 N. H. 30.

New York.—*Peck v. Hiler*, 31 Barb. (N. Y.) 117; *Barnum v. Fitzpatrick*, 27 Abb. N. Cas. (N. Y. Fifth Civil Dist. Ct.) 334; *Gallup v. Albany R. Co.*, 7 Lans. (N. Y.) 471; *Campbell v. Shields*, 11 How. Pr. (N. Y. Supreme Ct.) 565; *Vatel v. Herner*, 1 Hilt. (N. Y.) 149; *Edgerton v. Page*, 1 Hilt. (N. Y.) 320; *Randall v. Alburtis*, 1 Hilt. (N. Y.) 285.

See also *Lawrence v. French*, 25 Wend. (N. Y.) 443, *affirmed* 7 Hill (N. Y.) 519; *Walker v. Shoemaker*, 4 Hun (N. Y.) 579; *Edwards v. Candy*, 14 Hun (N. Y.) 596; *Truesdell v. Booth*, 4 Hun (N. Y.) 100, 6 Thomp. & C. (N. Y.) 379.

Pennsylvania.—*Bennett v. Bittle*, 4 Rawle (Pa.) 339; *Pfund v. Herlinger*, 10 Phila. (Pa.) 13, 30 Leg. Int. (Pa.) 84; *Tiley v. Moyers*, 43 Pa. St. 404.

Tennessee.—See *Wilson v. Smith*, 5 Yerg. (Tenn.) 379.

In *Edgerton v. Page*, 1 Hilt. (N. Y.) 320, the court, *per* Daly, J., said: "It is well settled that something more than a mere trespass is essential to an eviction, however much the act of trespass, or successive acts of trespass, may obstruct the tenant in the beneficial enjoyment, or diminish the consideration of the contract."

Filling up Cellar with Dirt.—A tenant is not evicted where the landlord has filled up the cellar of the demised premises with dirt, contrary to the agreement between the parties, and thus deprived him of the use of it, as this is a mere trespass or an illegal ouster. *McFaddin v. Rippey*, 8 Mo. 738.

Pulling Down Summer House.—In replevin upon a distress for rent, a plea that the landlord pulled down a summer house on the demised premises, whereby the tenant was deprived of the use thereof, without saying that he was expelled or put out of it, is insufficient as showing no eviction, but a mere trespass. *Hunt v. Cope*, 1 Cowp. 242.

Landlord Entering and Taking Coal.—A tenant of a tract of coal lands at a rent of a fixed amount for each bushel of coal mined is not evicted by the act of the landlord in entering and taking coal from the tract, where such taking in no way interferes with the actual mining operations of the tenant, and the lease shows that the exhaustion of the coal veins in the tract, during the term thereof, was not anticipated, though the lease expressly stipulates that no other person is to have the privilege of taking coal during its continuance. *Tiley v. Moyers*, 43 Pa. St. 404.

The Exercise, by a Landlord, of a Privilege of Piling His Firewood on a Part of a Lot demised to a tenant, after notice to discontinue the

Presumption as to Intent. — It is not necessary that there should be an express intention of the landlord to compel the tenant to leave the demised premises or to deprive him of the beneficial enjoyment thereof. A man is presumed, in law, to intend the natural and probable consequences of his acts; and, therefore, acts or omissions of the landlord which are calculated to, and do, make it necessary for the tenant to remove from the demised premises, as the assertion of a title in himself, or a failure to perform duties which he owes to the tenant, and without the performance of which the demised premises are not tenanted, will constitute an eviction.¹

3. Rule as to Acts of Third Persons. — An eviction may undoubtedly result from the acts of the servants or agents of the landlord,² within the scope of

practice, does not amount to an eviction. *Lounsbury v. Snyder*, 31 N. Y. 514.

Taking Fruit. — A tenant is not evicted by the act of the landlord in entering upon the demised premises and taking fruit therefrom. *Harris v. Watson*, 1 Leg. Int. (Pa.), May 8, 1844.

Removing Property of Tenant Unlawfully Stored on Premises. — A person leased, with the express right of storing cartridges therein, the basement of a store, other parts of which were used for storing gunpowder. Shortly afterwards the Explosives Act, 38 Vict., c. 17, was passed, making it illegal to store cartridges in the same building with gunpowder. The landlord, against the wishes of the tenant, removed the cartridges stored in the basement to another building. It was held that this act could not amount to anything more than a trespass, and was not an eviction. *Newby v. Sharpe*, 8 Ch. Div. 39.

Entry Without Permission. — A tenant is not evicted by the act of the landlord in entering on the demised premises after the building has been burned, and having the brick cleaned, without the tenant's express permission. *Fleming v. King*, 100 Ga. 449.

Claim of Landlord to Occupy Jointly with Tenant. — A tenant is not evicted by the claim of the landlord of the right to occupy with him the demised premises, where the landlord has not excluded or attempted to exclude him. *Randall v. Alburdis*, 1 Hilt. (N. Y.) 285.

Use During Absence of Tenant. — Where a contract of rent provided that if the tenant should be in any way ousted from the possession of certain rooms the tenancy and rent should cease, the fact that the landlord entered and used or allowed others to enter and use the room temporarily, on one or more occasions, during the absence of the tenant, does not constitute such an ouster as to relieve the latter from the payment of rent. *Way v. Myers*, 64 Ga. 760.

Interference with Person — Assault. — Any interference by a landlord with the person of his tenant, such as an assault, is not an eviction, but merely a trespass. *Vatel v. Herner*, 1 Hilt. (N. Y.) 149.

Distress — Arrest of Tenant. — Tenants are not evicted where the landlords enter on the demised premises and seize personal property as a distress for rent then due, after an affidavit that the tenants are fraudulently removing their goods, and the tenants are arrested for interfering with the distress. *Noble v. Warren*, 38 Pa. St. 340.

Cases Holding Trespass to Amount to Eviction. — The landlord of a farm entered upon a

meadow which formed a part and parcel thereof, mowed the hay growing upon such meadow, and carried it away. All this was done against the objection and express prohibition of the tenant, but there was no other interruption or disturbance of the tenant by the landlord, and the tenant continued to occupy the farm for the remainder of the term of his lease. It was held, nevertheless, that the acts of the landlord amounted to an eviction. *Briggs v. Hall*, 4 Leigh (Va.) 484. See also *Vaughan v. Blanchard*, 1 Yeates (Pa.) 175, in which case it was held that where a landlord claimed and used a privilege of passage through the cellar of the demised premises, against the will and consent of the tenant, this would suspend the rent, unless the landlord could show a reservation of this privilege.

1. Presumption of Intention to Evict. — *Skally v. Shute*, 132 Mass. 367. See also *Tallman v. Murphy*, 120 N. Y. 345.

In *Waite v. O'Neil*, 76 Fed. Rep. 408, 47 U. S. App. 19, the court, *per* Lurton, J., said: "When the wrongful acts of a lessor upon or in regard to the leased premises are such as to deprive the lessee of the beneficial enjoyment of them, and the lessee in consequence abandons the premises, it amounts in law to an eviction, without other evidence that the landlord intended to deprive the tenant of the possession."

In *Barrett v. Boddie*, 158 Ill. 479, *affirming* 57 Ill. App. 226, the court, *per* Phillips, J., said: "Eviction necessarily being the result of an intended, wilful, wrongful act, it must be by a wilful omission of duty or a commission of a wrongful act."

2. Act of Servants or Agents. — *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Hyman v. Jockey Club Wine, etc., Co.*, 9 Colo. App. 299.

Evidence of Assent of Landlord. — "Direct or positive evidence that the wrongful act, whether it be of eviction or of trespass, was done under the authority or by the consent of the landlord is not necessary. Such evidence is not often attainable, and the fact, like any other controverted fact, is capable of proof by circumstances. The nature and character of the act, taken in connection with the relation of the landlord to the actor, his employment or agency in the business of the landlord, and the acquiescence of the latter in former acts, accompanied by circumstances indicative of his knowledge that the act was done, or continued, and the absence of objection upon his part, are facts which must be considered by the jury, whose business it is to determine the

their authority,¹ but it cannot result from the act of a stranger who acts independently of and without authority from the landlord,² though a landlord's consent to such acts, or his failure in a duty incumbent upon him to protect his tenant from them, or from their consequences, may amount to an eviction.³

inquiry whether he authorized or assented to the act complained of as wrongful." *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446.

1. **Excess of Authority by Agent.** — A tenant of crown lands is not evicted where a colonel of engineers, whose authority is limited to superintending the property, goes beyond his authority and gives to a cable company permission to erect a building on part of the demised premises, which is accordingly done. *Reg. v. Miller*, 16 Nova Scotia 361.

2. **Acts of Strangers.** — *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Eisenhart v. Ordean*, 3 Colo. App. 162; *Billany v. Smith*, 4 Houst. (Del.) 113; *Baylies v. Philadelphia, etc., Coal, etc., Co.*, (C. Pl.) 10 N. Y. Supp. 316; *Meeks v. Bowerman*, 1 Daly (N. Y.) 99; *Ramsay v. Wilkie*, (C. Pl.) 13 N. Y. Supp. 554. See also *Miller v. Maguire*, 18 R. I. 770.

Sheriff — Attachment. — A tenant is not evicted because of the fact that the landlord sues out an attachment against his goods, and the sheriff attaches all his personal property on the demised premises and shuts up and locks the room for the purpose of holding possession of the attached goods, the landlord having nothing to do with these proceedings on the writ, and having refused, afterwards, two offers to rent to other persons, and the tenant having never surrendered possession of the premises. *Daniels v. Logan*, 47 Iowa 395.

A Lessee of a Wharf extending into a navigable stream between high and low water marks is not evicted by the temporary occupancy of the wharf by a vessel belonging to a third person, because the owner of any vessel may use such a wharf, without previous permission, for mooring purposes, at such rate of wharfage to be paid to the proprietor as may, in the absence of a special agreement with him, be fixed by the port wardens or other authorities appointed by law for that purpose. *Cone's Estate*, 27 W. N. C. (Pa.) 494, 9 Pa. Co. Ct. Rep. 257, 47 Leg. Int. (Pa.) 505.

Shutting off Light and Air. — A tenant is not evicted where a third person, the owner of adjoining property, builds on his own premises a structure which obstructs, darkens, or shuts up windows on the demised premises, there being no provision in the lease against such a contingency. *Johnson v. Oppenheim*, 12 Abb. Pr. N. S. (N. Y. Super. Ct.) 454, 43 How. Pr. (N. Y.) 433; *Hazlett v. Powell*, 30 Pa. St. 293. See also *Hilliard v. New York, etc., Gas Coal Co.*, 41 Ohio St. 662.

Premises Rendered Uninhabitable. — There is no eviction for which a landlord is liable where the owner of property adjoining the demised premises removes a party wall, and proceeds to erect a new one, though the effect of this is to make the demised premises unfit for the use for which they were leased, and the tenant is obliged to remove therefrom. *Barns v. Wilson*, 116 Pa. St. 303.

Acts of Landlord in Character of Adjoining Owner. — A tenant is not evicted by the fact that upon excavations being made upon ad-

joining premises, his premises are entered and needles or sticks of timber are inserted through his wall for the purpose of holding it up, and a part of the wall is cut away, and the floor and doors are blocked, in consequence of which his subtenant abandons the premises, when both he and the subtenant consented to the acts complained of. And even though the adjoining owner be the landlord, he has, under the circumstances, a right to enter so much of the demised premises as is necessary to build up the new wall to sustain that in which the needles are inserted before removing them. *Wetterer v. Soubirous*, 22 Misc. Rep. (N. Y. Supreme Ct.) 739.

3. **Consent of Landlord.** — A tenant is evicted where, with the consent of the landlord, his possession of the demised premises is interfered with so that he is deprived of the use thereof without his consent. *Ogden v. Sanderson*, 3 E. D. Smith (N. Y.) 166.

Where a railroad company enters upon and takes a part of the demised premises with the landlord's authority and consent, he will be responsible for the act, and it will operate as an eviction of the tenant from the portion so taken. *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108.

As to the general effect of an appropriation of the demised premises under the right of eminent domain, see *infra*, this title, *Effect of Appropriation under Right of Eminent Domain*.

A tenant is evicted where an adjoining owner builds a permanent brick wall which encroaches on the demised premises from nine inches to two feet, according to the different estimates, for a distance of thirty-four feet, such wall being built with the landlord's assent and with knowledge of the encroachment, even though the wall does not render the premises "uninhabitable for the purpose for which they were hired, materially changing the character and beneficial enjoyment thereof." *Smith v. McEnany*, 170 Mass. 26. In this case the court, *per* Holmes, J., said: "An eviction like the present does not necessarily end the lease." See also *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522.

Failure of Landlord in Duty to Protest. — At the time of the demise of a building for sleeping rooms, it had, apparently, four walls; but one of these walls, which formed one side of the chimney, and into which the studding supporting the roof was spiked, belonged to a person other than the landlord. This person, after the tenant had gone into possession, raised his entire building, thereby lifting up what was one of the walls of the demised building about six feet; and in doing this the roof was necessarily broken in, and the use of the chimney destroyed, and the building was thereby rendered unfit for the purpose for which the tenant had leased it. It was held that this disturbance amounted to an eviction, as the tenant had a right to suppose when he leased the building that the landlord was the owner of the four walls, or, if not, that he had

Trespasses by Strangers. — Trespasses or other unauthorized acts of strangers to which the landlord has not contributed cannot amount to eviction,¹ even though the demised premises become uninhabitable in consequence thereof.²

Acts of Other Tenants of Same Landlord. — A tenant is not evicted because his occupancy of the demised premises is interfered with and rendered unpleasant or uncomfortable by the acts of another tenant of the same landlord, where the landlord is in no way connected with such acts.³

Acts of Public Authorities. — Acts of the public authorities which decrease the value and utility to the tenant of the demised premises, or utterly destroy them, will not amount to an eviction,⁴ even though the landlord has acquiesced in such acts.⁵ But the rule is otherwise if the landlord has procured the

an easement in all of them. The landlord having no such easement, the tenant was so disturbed in the enjoyment of the building by the lawful act of the owner of the wall as to be obliged to abandon it. The court said that it was the landlord's duty, when the adjoining building was raised, to meet the exigency and protect his tenant. *Bentley v. Sill*, 35 Ill. 414.

1. Trespass by Strangers Not an Eviction. — *Kimball v. Grand Lodge*, 131 Mass. 59; *Sullivan v. Beardsley*, 55 Cal. 608; *McKenzie v. Hatton*, 141 N. Y. 6, *affirming* 70 Hun (N. Y.) 142.

A tenant of apartments in a house is not evicted where third persons and their workmen make noises and commit trespasses while erecting houses on either side of that in which the demised apartments are situated. *Blauvelt v. Powell*, 59 Hun (N. Y.) 179.

Act of Superior Landlord. — There is no eviction as between a lessee of property and his subtenant where the owner of the property, without the assent of the lessee, consents to the removal of a wall standing upon the land and essential to the use of a part of the demised premises. Such interference by the owner is merely a trespass. *Luckey v. Frantzke*, 1 E. D. Smith (N. Y.) 47.

2. Premises Rendered Uninhabitable by Acts of Strangers. — *Eisenhart v. Ordean*, 3 Colo. App. 162.

3. Acts of Other Tenants. — *De Witt v. Pierson*, 112 Mass. 8.

Acts of one tenant which interfere with the enjoyment by another tenant of the same landlord of the premises demised to him, such as shutting off light and obstructing ventilation, cannot be treated by the latter as an eviction by the landlord, where the respective tenancies are of entirely distinct properties, and the landlord in no way consents to or connives at such acts. *Conrad Seipp Brewing Co. v. Hart*, 62 Ill. App. 212.

A tenant quitted the demised premises because the basement of the house in which they were situated was used as a place of prostitution and ill fame by another tenant of the same landlord. It was not shown, however, that the landlord had any connection whatever with the nuisance, or even that he knew of it until the tenant gave him notice thereof, about a month before abandoning the premises. It was held that there was no eviction. *Gilhooley v. Washington*, 4 N. Y. 217, *affirming* 3 Sandf. (N. Y.) 330.

4. Diminution of Value to Tenant Through Act of Public Authorities. — To constitute an eviction some act must have been done by the

landlord or by his permission with the intention and effect of depriving the tenant of the use and enjoyment of the demised premises in whole or in part. Therefore the inability of a tenant to obtain a renewal of his license for the sale of intoxicating liquors on the demised premises, because the power of the license commissioners to grant such license had been taken away by the erection of a public school by the city within four hundred feet of the premises (the law providing that no such license shall be granted for such sale in any place within four hundred feet of any public school), is not an eviction. *Miller v. Maguire*, 18 R. I. 770.

Abandonment by Tenant Without Contest. — The tenant of a stable, leased "to be occupied as a stable and not otherwise," was notified by the board of health to remove all horses from the premises and discontinue stabling horses there, and that any application for an extension of time or a suspension of this requirement must be made within a certain time. The tenant made no such application and moved out without any further order from the board of health. It was not shown that the stable was kept in such a manner as to violate the sanitary code or authorize the interference of the board of health. It was held that there was no eviction, as the tenant voluntarily abandoned the premises without any contest. *Forster v. Eberle*, 7 Misc. Rep. (N. Y. C. Pl.) 490.

5. Acquiescence of Landlord in Acts of Municipal Authorities. — Where a demised building is torn down by the municipal authorities because it is in a dangerously dilapidated condition, in pursuance of a city ordinance authorizing the removal of buildings in such cases, acquiescence of the landlord, without any effort to resist the action of the municipal authorities, will not make him liable to the tenant as for a forcible eviction actually made by himself. *Hitchcock v. Bacon*, 118 Pa. St. 272. In this case the court, *per* Green, J., said: "Granting that the eviction was desirable to the defendants; that it accomplished their wishes and gave them an important advantage over the plaintiff in the matter of getting rid of him as a tenant, still it was not their act. On the contrary, it was the undoubted act of the city officials."

Acts of Landlord under Directions of Municipal Authorities. — A street-railway company leased certain premises from which it had laid tracks communicating with its railway on the street, such tracks having been laid during a prior occupancy of the premises by it. After it

action of the public authorities by which his tenant is injured.¹

4. A Question for the Jury. — The question as to whether or not a tenant has been evicted, depending, as it does, upon the intention of the landlord and the circumstances of the particular case, is always to be decided by the jury, under proper directions from the court.²

5. Restoration Need Not Be Demanded or Refused. — Where a tenant has been deprived of the demised premises by the landlord, there is no duty resting upon him to demand restoration, and therefore there is no necessity for a refusal to restore, as an element of eviction.³

6. Effect of Partial Eviction. — In some jurisdictions it is considered that an eviction from any material part of the demised premises may be treated as an eviction of the whole, and authorize an abandonment by the tenant,⁴ but the opposite view is maintained in several cases.⁵

IV. WHAT CIRCUMSTANCES AMOUNT TO EVICTION — 1. Actual Eviction —

a. EXPULSION OF TENANT AND TAKING POSSESSION. — Forcible expulsion of the tenant from the demised premises by the landlord is, of course, an eviction, and terminates the tenancy,⁶ but actual physical force is not neces-

went into possession under the lease, the common council of the city took action for the grading of the streets, and the landlord undertook to do the work in front of the demised premises. In doing this work it was found necessary to lower the grade of the street, and the tenant's communication therewith was cut off thereby. It was held that there was no eviction, the tenant not having been expelled from any portion of the demised premises, either actually or constructively. *Gallup v. Albany R. Co.*, 7 Lans. (N. Y.) 471.

1. Action Procured by Landlord. — A landlord tore down buildings which he owned adjacent to that occupied by his tenant, and one of which was actually connected with the building so occupied. The leased property was so injured by this proceeding as to be rendered unsafe for occupancy, and the landlord procured the public authorities of the city to condemn the building as unsafe and order it to be torn down, pursuant to which order the tenant's goods were removed and the building was torn down. The object of the landlord in this proceeding was to erect a new building on the property. It was held that the tenant was evicted, and that the landlord was liable therefor, even though the tearing down of the building was done by order of the city authorities. *Silber v. Larkin*, 94 Wis. 9.

2. A Question for the Jury — England. — *Upton v. Townsend*, 17 C. B. 30, 84 E. C. L. 30; *Upton v. Greenlees*, 17 C. B. 64, 84 E. C. L. 64; *Henderson v. Mears*, 28 L. J. Q. B. 305, 5 Jur. N. S. 709, 7 W. R. 554, 1 F. & F. 636.

Canada. — *Nixon v. Malby*, 7 Ont. App. 371; *Boulton v. Blake*, 12 Ont. Rep. 532; *Oliver v. Mowat*, 34 U. C. Q. B. 472; *Ferguson v. Troop*, 17 Can. Sup. Ct. Rep. 527, 10 Can. L. T. 290; *Ferguson v. Troop*, 25 New Bruns. 440, 7 Can. L. T. 351.

Alabama. — *Rice v. Dudley*, 65 Ala. 68.

Arkansas. — *Collins v. Karatopsky*, 36 Ark. 316.

Colorado. — *Hyman v. Jockey Club Wine, etc., Co.*, 9 Colo. App. 299.

Illinois. — *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Lynch v. Baldwin*, 69 Ill. 210; *Patterson v. Graham*, 140 Ill. 531, *affirming* 40 Ill. App. 399; *Barrett v. Boddie*, 158 Ill. 479, *affirming* 57 Ill. App. 226.

Massachusetts. — *Skally v. Shute*, 132 Mass. 367.

Missouri. — *Jackson v. Eddy*, 12 Mo. 209.

New York. — *Peck v. Hiler*, 31 Barb. (N. Y.) 117.

Case Tried Without Jury — Question for Trial Judge. — In *Corse v. Moon*, 22 Nova Scotia 191, the court, *per* Ritchie, J., said: "In order to ascertain whether the acts complained of amount to an eviction, the intent of the landlord must be ascertained, and that is a question for the judge below to decide, there being no jury."

3. Restoration Need Not Be Demanded or Refused. — *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446.

4. Eviction from Material Part May Be Treated as Eviction from Whole. — *Graham v. Anderson*, 3 Harr. (Del.) 364; *Miller v. Michel*, 13 Ind. App. 190; *Rice v. Dudley*, 65 Ala. 68.

5. Contrary Rule in England and Canada. — In *Coleman v. Reddick*, 25 U. C. C. P. 579, the court, *per* Wilson, J., said: "An eviction by the landlord of part of the demised property confers no right on the tenant to abandon the residue of the premises; and notwithstanding such partial eviction, the tenant is still liable for all breaches of covenant, excepting for the nonpayment of rent. The tenancy still continues. Such is the rule at law." *Citing Morrison v. Chadwick*, 7 C. B. 266, 62 E. C. L. 266, in which case it was held that a partial eviction suspends the entire rent during its continuance, but does not terminate the lease. For a full treatment of the effect of partial eviction upon the rent, see the title LANDLORD AND TENANT.

6. Forceful Expulsion. — *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Skally v. Shute*, 132 Mass. 367; *Koehler v. Scheider*, 15 Daly (N. Y.) 198; *Edgerton v. Page*, 1 Hilt. (N. Y.) 320.

A tenant is evicted when the sheriff takes forcible possession of the demised premises under the order of the landlord, and after retaining possession for some days delivers the keys to the landlord, who keeps them and retains possession of the demised premises, and places upon the premises a notice that they are for rent, application to be made to him. *Hyman v. Jockey Club Wine, etc., Co.*, 9 Colo. App. 299.

sary to constitute an eviction.¹ The general doctrine is that a tenant is evicted where a landlord enters and takes possession of the demised premises, or any part thereof, during the continuance of the lease, without the consent of the tenant, and uses the same for his own purposes,² or keeps the tenant out.³

Where a tenant is actually and physically ousted and kept expelled from one of the appurtenances of the leased property, the case is not one of constructive eviction from the whole property, but an actual eviction from a part of the premises. In such case it is not necessary, in order to suspend rent for such part, that the tenant should abandon the remainder. *Hamilton v. Graybill*, 19 Misc. Rep. (N. Y. Supreme Ct.) 521, in which case a tenant rented office rooms so situated that he had two entrances to his private office, and the landlord afterwards closed up one of such entrances without the tenant's consent.

1. Implied Force.—In *Billany v. Smith*, 4 Houst. (Del.) 113, Houston, J., charging the jury, said: "In general, an eviction can only be proved by an actual entry of the landlord with what is implied in law as force, upon the possession of the tenant, and putting him against his will out of the possession, or depriving him of the use and occupation of the premises, when the eviction is alleged to be from the entire premises, or of such part of them, when a partial eviction only is asserted."

Abandonment of Tenant Pursuant to Judgment of Amotion.—A final order for the removal of a tenant for nonpayment of rent having been rendered in favor of the landlord, the tenant vacated the demised premises before any warrant was issued for his removal. It was held that this was tantamount to an eviction of the tenant under such a warrant, and terminated the landlord's right to recover rent for any time thereafter. *Riglander v. Nile Tobacco Works*, 21 Misc. Rep. (N. Y. Supreme Ct.) 339.

2. Entry and Taking Possession.—See *Billany v. Smith*, 4 Houst. (Del.) 113; *Witte v. Quinn*, 38 Mo. App. 681; *Tiley v. Moyers*, 43 Pa. St. 404.

During a continuance of a lease, and while the demised premises were in the possession of and occupied by the tenant, although he was not personally present, the landlord broke, removed, or opened the tenant's lock on the door of the premises, took down the tenant's signs, re-entered and took possession, and thereafter until the expiration of the lease used the premises for storing trunks, during which time the tenant was not in possession. It was held that the tenant was evicted. *Burr v. Cattnach*, (Pa. 1886) 4 Cent. Rep. 701.

Where premises leased, or a part of them, are inclosed by a fence and have on them a building, and the landlord takes possession of such building and uses it as a stable, and takes possession of the yard and uses it as a cattle yard, without the consent of the tenant, there is in law an eviction. *Smith v. Wise*, 58 Ill. 141.

A tenant had gone into possession of premises at an entire rent. Afterwards the landlord railed off a part of the garden and built upon such part an outbuilding for the use of a number of his other tenants, whereupon the tenant returned the keys to the landlord. It was held that this amounted to an eviction from part of the demised premises, which, the tak-

ing being single and the rent entire, was a complete answer to an action for the rent. *Smith v. Raleigh*, 3 Campb. 513. This case was recognized in *Stokes v. Cooper*, Worcester Lent Assizes 1814, 3 Campb. 514, note.

A tenant is evicted where the landlord, before the expiration of the term, and without any lack of ability on the part of the tenant to comply with the lease, causes him to be served with a notice to quit, and before he leaves moves grain and other articles into the barn and outbuildings on the demised premises, against his protest. *Tarpy v. Blume*, 101 Iowa 469.

3. Keeping Tenant Out.—A lessee of mining property having mortgaged his leasehold interest, the mortgagees obtained possession. Subsequently the owners entered on the premises, placed new locks upon the engine house and other buildings, locked them up, and placed a man on the premises to see that they were not opened, thus excluding the mortgagees from using the mine and obtaining the benefits of the lease. It was held that this amounted in law to a substantial eviction of the mortgagees from the leasehold. *Pendill v. Eells*, 67 Mich. 657.

There is a breach of a covenant for quiet enjoyment in a lease, where the landlord locks up a church pew which is appurtenant to the demised premises and so keeps the tenant out of the enjoyment thereof. *Lloyd v. Tomkies*, 1 T. R. 671.

A lease contained a provision that it was to be forfeited on nonpayment of rent. On the day when the rent became due, but before midnight, the landlords directed their agent to close the demised building, a theatre, and to permit no one to enter without an order from them. The agent accordingly locked the doors, and did not allow any one to enter. It was held that the tenant was evicted, as the taking possession of the premises was a deliberate interference with his possession, by which he was deprived of the premises. *New York Academy of Music v. Hackett*, 2 Hilt. (N. Y.) 217.

Circumstances Not Amounting to Eviction.—In a lease of a farm, the landlord reserved a large part of the house, an acre of land, the privilege of removing his hen house, stable room for a horse, and other matters. The landlord put doors and windows in a shed attached to the barn, and kept his hens there for considerable time until he built a new hen house. He also put a lock on the door for the avowed purpose of preventing the stealing of his chickens at night. The tenant made no objection to this. It was held that there was no eviction of the tenant from any part of the premises. *McNutt v. Shafer*, 58 Hun (N. Y.) 605, mem., 12 N. Y. Supp. 27. The two results of this case agree that such was the holding, though the body of the case as reported in full in 12 N. Y. Supp. 27, indicates that what both call the dissenting opinion of Mayham, J., is the judgment of the court.

Even if the tenant has voluntarily left the premises, an entry by the landlord without his consent and not under any arrangement with him, followed by a continuous possession which is inconsistent with the possessory title assured to the tenant under the lease, amounts to an eviction.¹ But it is otherwise if the landlord does nothing inconsistent with the right of the tenant to return.²

Materiality of the Deprivation. — It has been said that an eviction depends on the materiality of the deprivation. If trifling and producing no inconvenience, it should not be regarded.³

When Landlord's Resumption of Possession Is Authorized. — A tenant is not evicted when the landlord resumes possession of the demised premises upon the happening of an event which, by the terms of the lease, gives him a right to terminate the tenancy.⁴ And it would probably not be considered an eviction if a landlord should expel a tenant who was conducting himself in such a

1. Taking Possession After Tenant Has Left. — *Day v. Watson*, 8 Mich. 535. In this case the tenants being in arrears for rent and having left the demised premises, the landlord gave the key to a person who was employed to take care of the place and occupy it until the landlord could rent it.

An entry by a landlord on the demised premises after they have been left by the tenant, but before the expiration of the term, and his putting another person in possession, and refusing to permit a person to whom the tenants had assigned the remainder of the lease to occupy the premises during such time, will constitute an eviction of the tenant. *Briggs v. Thompson*, 9 Pa. St. 338.

Where a tenant gives up possession of the demised premises and sends the key to the landlord, but there is no agreement or understanding between the parties, the landlord has no right to reassume possession or permit another person to use and occupy the premises if he designs to regard the lease as continuing; and it amounts to an eviction where he delivers the key to another person and gives him direct permission to enter, use, and occupy the premises, without any privity or consent of the tenant. *Matthews v. Tobener*, 39 Mo. 115.

A tenant having determined to leave the demised premises in consequence of certain disturbances, sent the key of the premises to the landlord. The landlord received the key, declared himself not dissatisfied, and entered into possession for the purpose of reletting. It was held that this, being a voluntary expulsion of the tenant from any possession or control of the premises, constituted such an eviction as would relieve him of the payment of rent. *Hegeman v. McArthur*, 1 E. D. Smith (N. Y.) 147.

If a landlord accept the demised premises from the tenant, rent or offer to rent them to another tenant, and himself till the ground and take the crop, this will amount to either a waiver of any written notice of intention to quit or an eviction. *Graham v. Anderson*, 3 Harr. (Del.) 364.

Taking Possession After Desertion by Tenant Held No Eviction. — By a certain lease four houses were demised. At a time during the continuance of the lease when a year's rent was due and when two of the houses were deserted, a police constable entered in order to prevent any nuisance which might arise by

reason of their unoccupied and deserted state, and for some time kept possession of them, but afterwards, by direction of the landlord's agent, gave possession to a certain person to take care of them for the landlord. There was an agreement that if the landlord could get possession of the other two houses, all four should be let to such person. It was held that there was no evidence on which the jury should have found an eviction. *Wheeler v. Stevenson*, 6 H. & N. 155.

2. Acts Not Inconsistent with Tenant's Right to Return. — A tenant's goods were levied upon for taxes, and before the sale, and also before the expiration of the lease, he voluntarily left the demised premises. The landlord took care of the key, put up a notice that the house was for rent, and put workmen in the house for the purpose of repairing the floor. It was held that these acts of the landlord did not constitute an eviction, as he neither put out nor sold out the tenant, but the latter was entitled to enter if he had returned, though he did not return. *Pier v. Carr*, 69 Pa. St. 326.

3. Materiality of the Deprivation. — *Collins v. Karatopsky*, 36 Ark. 316. In this case it was held that it was error to instruct a jury, as matter of law, that the building by the landlord, of a house which encroached on the demised premises for twenty or thirty inches, was no bar to a recovery of rent. The court, *per* Eakin, J., said: "An eviction depends on the materiality of the deprivation. If trifling and producing no inconvenience, it should not be regarded. It depends on circumstances. Twenty inches might be a great deal in the crowded streets of a city, but wholly insignificant in the boundary of a Texas ranch. It should have been left to the jury, on the evidence, to say whether there had been a wilful eviction."

4. Circumstances Authorizing Landlord to Terminate Lease. — It is a good defense to an action for eviction of a tenant, that before the landlord resumed possession of the demised building it was so destroyed or damaged by fire as to be rendered unfit for use and habitation, where the lease provided that "in case the premises or any part thereof shall, during said term, be destroyed or damaged by fire or other unavoidable casualty, * * * then the lessor, his heirs or assigns, may terminate this lease." *Hunnewell v. Bangs*, 161 Mass. 132.

By the terms of a lease of farming land, the

manner, and damaging the property to such an extent, that his expulsion was necessary for the preservation of the landlord's estate.¹

6. LEASING TO ANOTHER PERSON. — A tenant is evicted where, before the expiration of his lease, the landlord rents the demised premises to another person, who takes possession of them without the tenant's consent;² and this even although the tenant has previously abandoned the premises,³ unless at the time of such abandonment it was agreed between the landlord and the tenant that the former should rent the premises for the benefit of the latter.⁴

tenant was to farm the land and pay to the landlord, as rent, two-fifths of the crops raised, and the tenant had no right to sublet. It was further provided that if the tenant defaulted in any covenants of the lease, the landlord might re-enter and the tenant should surrender possession. The tenant having failed to cultivate the land for the first year of the running of the lease, and being without the means of doing so for the following year, the landlord entered, after serving him with notice to quit, and proceeded to cultivate the land. The tenant made no objection to this, and some time afterwards moved off without being forcibly ejected. It was held that there was nothing to show that the landlord had taken possession wrongfully. *Wright v. Everett*, 87 Iowa 697. See also *Hayward v. Ramage*, 33 Neb. 836; *Ladomus v. McCormick*, 5 Del. Co. Rep. (Pa.) 147.

1. Expulsion of Tenant Necessary to Preserve Landlord's Estate. — *Smith v. Thurston*, 19 Mo. App. 48.

2. Leasing to Another Person. — *Rice v. Dudley*, 65 Ala. 68; *Graham v. Anderson*, 3 Harr. (Del.) 364; *Smith v. Wise*, 58 Ill. 141; *Miller v. Michel*, 13 Ind. App. 190.

Lease of Privilege to Post Bills on Demised Premises — Nonuser — No Eviction. — A tenant was not evicted where the landlord rented to another person the fence around the demised premises, on which to post bills, but when such person went to the tenant the latter claimed the fence as his, and the person never used the fence, but put up a notice forbidding any other person to post bills without leave from his office, which notice was pulled down. *Oliver v. Mowat*, 34 U. C. Q. B. 472. In this case the court said: "The plaintiff really was not deprived of any right which he had, nor does it appear that defendant wished or intended to deprive him of any right."

Voluntary Yielding of Possession by Tenant. — A tenant is not evicted where, before the termination of the lease, another person moves in with his consent and approval, and he voluntarily gives up to him some of the rooms in the leased house, and soon after leaves the premises. *Lettick v. Honnold*, 63 Ill. 335.

3. Abandonment by Tenant. — *Rice v. Dudley*, 65 Ala. 68.

In *Hall v. Burgess*, 5 B. & C. 332, 11 E. C. L. 246, 8 D. & R. 67, a tenant, without giving any previous notice, quitted the demised premises and sent the key to the landlord's agent. The latter at first refused to take possession, but before the expiration of the next half year, without any express communication with either party, he let the premises to another tenant, who entered and took possession thereof. The landlord having brought suit for use and occupation, *Holroyd, J.*, said: "The

tenant's endeavor to give up the premises in this case was unavailing, and the possession was not altered until the subsequent letting by the landlord. That letting was therefore an eviction of the tenant, and had this action for rent been brought upon the demise, the defendant might have pleaded the eviction as a bar."

Agreement to Lease to Another — Failure of Agreement. — The facts that a house leased by a tenant has been advertised for sale or rent by the landlord, and he has agreed to rent it to another, which agreement has failed, and that he has had the key of it, and was in possession of it and exercising acts of ownership on the day after the tenant had vacated and left it, but before the expiration of the term for which he had rented it, are not of themselves any evidence of an eviction. *Billany v. Smith*, 4 Iloust. (Del.) 113.

Temporary Occupation by Third Person While Tenant Has Left to Allow Repairs. — Where a tenant left the demised premises in the middle of a quarter, to allow the repair of damages caused by fire, the lease providing that in such case the rent should cease until the reparation was completed, it was held that a subsequent occupation of the premises by a third person as tenant, with the landlord's consent, such occupation terminating before the completion of the repairs, could not be deemed an eviction of the original tenant, he having been present at a negotiation between the landlord and such third person for reletting to the latter, and at the same time proposing to surrender his lease. *Ogden v. Sanderson*, 3 E. D. Smith (N. Y.) 166.

4. Agreement to Rent for Tenant's Benefit. — The tenants of a store became insolvent and assigned. The assignee took possession of the store, but soon tendered the keys to the landlord's agent, who accepted them upon the condition of holding the tenants under the lease. The landlord refused to accept the keys upon any other theory or condition than that the tenants should be holden under the lease, and that the landlord should do the best he could to procure another tenant, and hold the tenants liable for any deficiency in the rent. He did procure other tenants at a rent lower than that which the original tenants had agreed to pay. It was held that the tenants were not evicted. *Stewart v. Sprague*, 71 Mich. 50; *Stewart v. Sprague*, 76 Mich. 184.

Renting to Partnership of Which the Landlord Is a Member. — Tenants who had leased premises for a term of years moved out before the end of the term and ceased to pay rent. An agreement was entered into between the landlord and the tenants that the premises might be again rented without prejudice to either party, the object of this being to lessen the

c. **DEPRIVATION OF USE OF PROPERTY.** — An interference by the landlord with the tenant's beneficial use of the property is usually considered a constructive eviction,¹ but there are some cases in which a deprivation of the use has been considered an actual eviction from the demised premises,² or from that part thereof of which the tenant is deprived.³

Restriction of Use by Terms of Lease — Prevention of Other Use. — Where, by the terms of a lease, the demised premises are to be used for a specified purpose only, a tenant is not evicted by the act of the landlord in preventing other uses.⁴

d. **ACTS AGAINST SUBTENANTS.** — A tenant whose right to sublet is not restricted by the terms of his lease is evicted where the landlord refuses to allow a subtenant to enter and occupy the premises,⁵ forces a subtenant to quit⁶ or to pay the rent directly to him,⁷ or distrains the goods of the subtenant.⁸

damage to whichever party should prove to be in the wrong in the contention which had arisen between them. The premises were accordingly rented for a year, to a company, acting through its general manager; but the lease not proving satisfactory to the company, it never went into possession, but sublet, for its term, to a partnership of which the landlord was a member. In this subletting there was no fraud or collusion. It was held that there was no eviction of the tenants by reason thereof. *Thomas v. Drennen*, 112 Ala. 670.

1. Interference with Use Usually Considered a Constructive Eviction. — See *infra*, this section, *Constructive Eviction*.

2. Deprivation of Use an Actual Eviction. — Certain premises were leased for use as a store, without any limitation as to the nature of the business. The landlord obtained the issuance of an *ex parte* injunction enjoining the tenant from using the premises as a flour and feed store, which was dissolved on a hearing. It was held that there was an actual eviction of the tenant for the time during which the injunction remained in force, he having been deprived of all beneficial use of the property. *Pfund v. Herlinger*, 10 Phila. (Pa.) 13, 30 Leg. Int. (Pa.) 84.

In *Pidgeon v. Excelsior Boat Club*, 66 Mich. 326, a boat club leased for a boat house premises fronting on a river, and by the terms of the lease the lot extended to the channel bank of the river, and included "all and singular the benefits, liberties, and privileges to the said premises belonging." The landlord moored his propeller in front of the demised premises, cutting them off from all access to the river. This was held to be an eviction. *Approved in Edmison v. Lowry*, 3 S. Dak. 77, 44 Am. St. Rep. 774.

Where tenants leased "the farming lands described, * * * together with the right to mine, dig, extract, and carry away coal from the said premises, * * * together with use, enjoyment, and occupation of so much of the surface of said lands as may be necessary to carry on or conduct the mining for coal on said premises," it was held that they were entitled to the possession and use of the farming lands, in addition to the right to mine for coal, and that they were evicted where the landlord prevented them from using such farming lands. *Walker v. Tucker*, 70 Ill. 527.

3. Partial Eviction. — *Edmison v. Lowry*, 3 S. Dak. 77, 44 Am. St. Rep. 774; *Brown v. Holyoke Water Power Co.*, 152 Mass. 463, 23

Am. St. Rep. 844; *Witte v. Quinn*, 38 Mo. App 681.

4. Use of Premises Restricted by Lease — Prevention of Other Use — No Eviction. — A written lease contained a provision to the effect that the tenants should not use the premises for any other purpose than a boot and shoe store, and that upon the breach of any condition of the lease on their part, the landlord, at his option, was authorized to declare the lease at an end, retake possession of the premises, and remove all persons therefrom. The tenants, desiring to use the premises as a hay and feed store, started to put hay therein. The landlord objected and forbade the putting of any hay in the premises, and removed what had already been placed therein, whereupon the tenants gave up possession. It was held that the acts of the landlord did not constitute an eviction. *Hayward v. Ramage*, 33 Neb. 836.

5. Refusal to Allow Subtenant to Enter and Occupy Premises. — *Rowbotham v. Pearce*, 5 Houst. (Del.) 135.

Where a landlord occupies the premises jointly with his tenant, a refusal by him to permit an under tenant to occupy the premises after the tenant has left, but before the expiration of the lease, is a resumption of possession, and amounts to an eviction of the tenant. *Randall v. Alburdis*, 1 Hilt. (N. Y.) 285.

In *Doran v. Chase*, 2 W. N. C. (Pa.) 609, the Supreme Court affirmed a ruling of the court below that "a landlord's refusal to allow an under tenant to enter the premises, under threats of suit, whereby the lessee is deprived of underletting, is such an interruption of the latter's rights as amounts to an eviction." *Cited with approval in Hoeveler v. Fleming*, 91 Pa. St. 322. See also *Edmison v. Lowry*, 3 S. Dak. 77, 44 Am. St. Rep. 774.

6. Forcing Subtenant to Quit. — *Burn v. Phelps*, 1 Stark. 94, 2 E. C. L. 44. See also *Luckey v. Frantzke*, 1 E. D. Smith (N. Y.) 47.

7. Collecting Rent from Subtenant. — A landlord forbade the under tenant of the lessee to pay any more rent to his landlord, and collected the rent himself. It was held that this amounted to a virtual eviction of the lessee. *Leadbeater v. Roth*, 25 Ill. 587.

8. Distraining Goods of Subtenants. — The owner of a farm, having leased several portions thereof, executed a lease in fee of the whole farm, with the reversion of the portions leased, to other tenants, reserving an annual rent from them, and thus conveying to them all his interest in the former leases. Subse-

c. **TURNING OUT SERVANT OR AGENT.** — The act of a landlord in turning the servant or agent of the tenant out of possession of the demised premises, while improper, and evidence of eviction, does not necessarily and of itself constitute an eviction of the tenant.¹

2. Constructive Eviction — *a.* **THE DOCTRINE — IN GENERAL.** — An eviction is not necessarily an actual forcible taking possession of the demised premises by the landlord,² nor does it necessarily consist in the expulsion of the tenant³ or a physical interference with the demised premises;⁴ nor need it be attended with a denial or refusal to permit the tenant longer to occupy the premises under the lease.⁵ Any intentional and injurious interference by the landlord or those acting under his authority which deprives the tenant of the means or the power of beneficial enjoyment of the demised premises or any part thereof, or materially impairs such beneficial enjoyment, is a constructive eviction.⁶

quently, the landlord distrained the goods of the subtenants for rent accruing after the lease of the whole farm. It was held that this was an actual eviction of the principal tenants. *Lewis v. Payn*, 4 Wend. (N. Y.) 423.

1. Turning Out Servant or Agent. — *Henderson v. Mears*, 28 L. J. Q. B. 305, 5 Jur. N. S. 709, 7 W. R. 554, 1 F. & F. 636. In this case the tenant of apartments in a house, being desirous of underletting the same, applied to a house agent, who put in a man to show the rooms, and put a sign in the window showing that they were to be let. The landlord, being annoyed by this and by the conduct of the man put in, turned him out of the house and took down the sign in the window, but left the keys in the rooms. It was held that the question was properly left to the jury whether this was done for the purpose of evicting the tenant or simply for the purpose of expelling the man whom the landlord found objectionable; and the jury having found that there was no eviction, a new trial was refused.

2. Forcible Taking Possession Not Necessary. — *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Smith v. Wise*, 58 Ill. 141.

Suit for Possession by Landlord. — A landlord having brought an action of ejectment against his tenant and a subtenant, the subtenant vacated the premises and the tenant moved his property out, whereupon the landlord dismissed the action. Subsequently the tenant tendered to the landlord the keys of the demised premises, and offered to surrender possession to him, but the landlord refused to take the keys or accept the surrender. It was held, nevertheless, that the tenant was evicted. *Jennings v. Bond*, 14 Ind. App. 282. In this case the court, *per* Reinhard, J., said: "The moment that summons in that action was served upon the appellee, it became a demand by the appellant for the possession of the premises, and the appellee had a clear right in response to such demand to yield the possession, and no act of the appellant thereafter without the appellee's consent could restore between the parties their former relation of landlord and tenant."

3. Tenant Need Not Be Actually Expelled — England. — *Upton v. Townend*, 17 C. B. 30, 84 E. C. L. 30.

Canada. — *Nixon v. Maltby*, 7 Ont. App. 371.

Alabama. — *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446.

California. — *McAlester v. Landers*, 70 Cal. 79.

Colorado. — *Lay v. Bennett*, 4 Colo. App. 252.

Illinois. — *Smith v. Wise*, 58 Ill. 141; *Keating v. Springer*, 146 Ill. 481, 37 Am. St. Rep. 175.

Massachusetts. — *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322.

New York. — *Tallman v. Murphy*, 120 N. Y. 345; *Cohen v. Dupont*, 1 Sandf. (N. Y.) 260; *Ogilvie v. Hull*, 5 Hill (N. Y.) 52; *Peck v. Hiler*, 24 Barb. (N. Y.) 178; *Lounsbery v. Snyder*, 31 N. Y. 514.

Pennsylvania. — *McClurg v. Price*, 59 Pa. St. 420, 98 Am. Dec. 356.

Wisconsin. — *Silber v. Larkin*, 94 Wis. 9.

4. Physical Interference with Demised Premises Not Necessary. — *Cohen v. Dupont*, 1 Sandf. (N. Y.) 260; *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727; *Edgerton v. Page*, 1 Hilt. (N. Y.) 320; *Denison v. Ford*, 7 Daly (N. Y.) 384; *Boreel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170.

5. Refusal to Permit Tenant to Continue Occupation Not Necessary. — *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446.

6. Interference with Beneficial Enjoyment a Constructive Eviction — England. — *Upton v. Townend*, 17 C. B. 30, 84 E. C. L. 30.

Canada. — *Nixon v. Maltby*, 7 Ont. App. 371.

United States. — *Waite v. O'Neil*, 76 Fed. Rep. 408, 47 U. S. App. 19.

Colorado. — *Lay v. Bennett*, 4 Colo. App. 252.

Delaware. — *Billany v. Smith*, 4 Houst. (Del.) 113.

Massachusetts. — *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Skally v. Shute*, 132 Mass. 367.

Michigan. — *Coulter v. Norton*, 100 Mich. 389, 43 Am. St. Rep. 458.

Missouri. — *Witte v. Quinn*, 38 Mo. App. 681; *O'Neill v. Manget*, 44 Mo. App. 279.

New Hampshire. — *Scott v. Simons*, 54 N. H. 426.

New York. — *Peck v. Hiler*, 24 Barb. (N. Y.) 178; *Home L. Ins. Co. v. Sherman*, 46 N. Y. 370; *Denison v. Ford*, 7 Daly (N. Y.) 384; *Cohen v. Dupont*, 1 Sandf. (N. Y.) 260; *Ogilvie v. Hull*, 5 Hill (N. Y.) 52; *Koehler v. Scheider*, 15 Daly (N. Y.) 198; *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727, *reversing* 4 Cow. (N. Y.) 581; *Edgerton v. Page*, 20 N. Y. 281, *affirming* 1 Hilt. (N. Y.) 320; *Tallman v. Murphy*, 120 N. Y. 345.

Pennsylvania. — *Hoever v. Fleming*, 91 Pa. St. 322; *Doran v. Chase*, 2 W. N. C. (Pa.) 609.

Reason of the Rule. — It has been said that the reason of the rule in regard to constructive eviction is that the tenant having been deprived of the beneficial enjoyment of the demised premises by the wrongful act of the landlord, the consideration of his agreement to pay rent has failed.¹

b. RENDERING PREMISES UNSAFE OR UNFIT FOR OCCUPATION. — A tenant is evicted where the landlord does any act or is guilty of any neglect which renders the demised premises unsafe,² or unfit for the purpose for which

South Dakota. — *Edmison v. Lowry*, 3 S. Dak. 77, 44 Am. St. Rep. 774.

A substantial deprivation of the beneficial use of the demised premises or a part thereof is essential to constitute an eviction. *Edwards v. Candy*, 14 Hun (N. Y.) 596.

Any act done in violation of the rights of the tenant without his consent will amount to an eviction. *Smith v. Wise*, 58 Ill. 141.

In *Wright v. Lattin*, 38 Ill. 293, the court, *per Walker, C. J.*, said: "If the landlord does any act which renders the lease unavailing to the tenant, he is thereby discharged from the terms and conditions of the lease, and may abandon it." In *Leadbeater v. Roth*, 25 Ill. 587, the same judge used language almost identical.

If the lessor, by any wrongful act, disturbs the tenant's quiet and peaceful possession of the demised premises, the lessee may abandon the premises and thereby exonerate himself from liability to pay the rent. *Jackson v. Eddy*, 12 Mo. 209.

Any act done or caused by a landlord which drives a tenant out of his possession of the demised premises is an eviction. *Snow v. Pulitzer*, 66 Hun (N. Y.) 329.

In *Edgerton v. Page*, 1 Hilt. (N. Y.) 320, *Daly, J.*, commented on the case of *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727, *reversing* 4 Cow. (N. Y.) 581, in the following language: "That judgment of reversal determined merely that proof of an actual entry was not essential to establish an eviction, but that, without an actual entry upon the premises, the landlord might be guilty of acts which, by compelling the tenant to quit the premises, would amount to an eviction, and that, upon the evidence excluded at the trial, the jury could have found that the defendant was justified in quitting the premises, and having done so, that he was released thereafter from any further liability under the covenant in the lease for the payment of rent. This is all that I understand to have been decided by that case, though it has been supposed to have gone much further. Thus *Savage, C. J.*, in *Lewis v. Payn*, 4 Wend. (N. Y.) 428, said: 'In *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727, it seems to have been held that any obstruction by the landlord to the beneficial enjoyment of the demised premises, or a diminution of the consideration of the contract by the act of the landlord, amounts to a constructive eviction.' The only foundation for this opinion is to be found in one of the reasons assigned by Senator Spencer, who delivered an opinion for reversal, to show that actual entry was not essential to an eviction. * * *

But the ground here taken, that any obstruction by the landlord to the beneficial enjoyment of the premises demised, or diminution of the consideration of the contract, amounts to an eviction, was not essential to

the decision of *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727. It is not and never was the law, nor is the case an authority for any such proposition or principle."

In *Ogilvie v. Hull*, 5 Hill (N. Y.) 52, the court, *per Nelson, C. J.*, said that the case of *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727, was not to be regarded as introducing a new principle, nor as establishing an exception to the general rule, as in that case there was such a disturbance and destruction of the tenant's reasonable use and occupation of the demised premises as amounted to a virtual expulsion.

In *Rice v. Dudley*, 65 Ala. 68, the court, *per Somerville, J.*, said: "It is always to be implied, in the absence of a stipulation to the contrary, that the tenant shall have the uninterrupted occupancy and use of the whole of the premises; and if he be ousted from any material part thereof, he may treat such interference of the landlord as an eviction, and abandon the lease." To the same effect is *Gray v. Gaff*, 8 Mo. App. 329.

Act of God or Public Enemies. — Where there is a substantial destruction of the subject-matter out of which rent is reserved by a lease for years, by an act of God or of the public enemies, the tenant may elect to rescind the lease, and on surrendering all benefit thereunder may be discharged from the payment of rent. And the destruction of the possibility of a usufruct, such as was contemplated by the parties to the lease, is sufficient ground for such rescission; it is not necessary that there should be an actual physical destruction of the property. *Coogan v. Parker*, 2 S. Car. 255, 16 Am. Rep. 659.

Under the Internal Revenue Acts of Congress (U. S. Rev. Stat., tit. 35, § 3262), the bond of a distiller renting and not owning the property in which he proposes to carry on the business cannot be approved, and he cannot lawfully carry on the business, unless he files with the collector the written consent of the owners of the property to such use. Therefore, where, by the terms of a lease, the property is rented to be used as a distillery, there is a constructive eviction of the tenant if the landlords refuse to give their consent in writing to such use, as it is not to be intended that the landlords designed that the tenant should make use of the distillery in violation of law. *Grabenhorst v. Nicodemus*, 42 Md. 236.

1. Reason of the Rule. — *Edgerton v. Page*, 20 N. Y. 281, *affirming* 1 Hilt. (N. Y.) 320, *per Grover, J.*

2. Rendering Premises Unsafe. — There is an eviction where the landlords wrongfully enter upon the demised premises, and, by digging up the soil under the building, render it permanently unsafe and unfit for occupancy, so that the tenant is unable to occupy it, and he loses the enjoyment of the premises, and

they were leased by the tenant.¹

Where Use of Demised Premises Is Restricted by Terms of Lease. — A tenant of part of a building who is by his lease restricted to a particular use thereof is evicted where that use is prevented by the leasing of another part of the building for the express purpose of its being employed in a business necessarily incompatible with such use.² But where such business is not in itself incompatible with the tenant's use of his part of the building, he is not evicted because his use is prevented by the manner in which such business is conducted.³

abandons them. *Skally v. Shute*, 132 Mass. 367.

A person leased a store in a four-story building, the walls of which were dependent for support on the wall of an adjoining seven-story building belonging to the same landlord. Subsequently the landlord conveyed the two pieces of property, as a whole, to another person, subject to the lease. The new landlord commenced pulling down the seven-story building, and when this was partially done the walls of the four-story building began to crack and break and became in imminent danger of falling. Thereafter proceedings were taken by the fire department of the city, by which the four-story building was condemned as unsafe, and there was a judgment directing the superintendent of buildings to remove the structure, in obedience to which the landlord tore it down, and the tenant was deprived of the benefit of his lease, and ousted from his store, and his business was broken up. The court considered this to be an eviction for which the landlord was answerable in damages. *Snow v. Pulitzer*, 142 N. Y. 263, affirming 66 Hun (N. Y.) 329.

1. Rendering Premises Unfit for Purpose for Which They Were Leased. — *Tallman v. Murphy*, 120 N. Y. 345; *Vann v. Rouse*, 94 N. Y. 401; *Silber v. Larkin*, 94 Wis. 9. See also *White v. Walker*, 31 Ill. 422, in which case the court, per Breese, J., said: "The premises were leased for a boarding house, and if they became uninhabitable for such purpose, by reason of occurrences subsequent to the leasing, over which the lessee had no control, and which in some degree were instigated by the lessor, the tenant might have had the legal right to quit the premises. * * * It might amount to an eviction."

A landlord leased premises for fair grounds, he to have the use thereof except when wanted by the tenants for exhibitions or fairs. He afterwards leased the premises to another person, subject to the first lease, tore down the fences erected by the tenant and carried them away, damaged and spoiled a portion of the buildings erected for the purpose of holding fairs and exhibitions, and turned into the grounds large numbers of cattle and hogs, which so befouled, trod up, and rooted over the grounds as to render them unfit for use by the first lessee. These acts were held to amount to an eviction. *Wright v. Lattin*, 38 Ill. 293.

A store on the first floor of a two-story building was occupied by tenants. On one side of the demised premises was a smaller store, a part of the same building, and on the other, the stairway leading to the second story. The landlord removed the doors and windows of

the smaller store, the door leading to the second story, and the brick front of the second story, and the tenants' store was thereby rendered practically unfit for their use. It was held that this amounted to an eviction. *Conlon v. McGraw*, 66 Mich. 104.

A landlord occupied a floor above the demised premises as a grocery store. The drippings of salt, tar, etc., from his store passed through the floor and upon the sugar hogsheds, brooms, etc., of the tenant in the demised premises, which were also occupied as a store. Upon complaint of the tenant, the landlord endeavored to stop the leakage by sprinkling sawdust on the floor, but the leakage was only stopped temporarily. The tenant thereupon left the premises and sent the key to the landlord, but he refused to receive it, whereupon the tenant endeavored to let the store. The jury having found that the leakage rendered the demised premises unfit for use as a store, and that the tenant abandoned the premises to prevent injury to his goods, it was held that he was not liable for rent. *Jackson v. Eddy*, 12 Mo. 209.

Where a landlord, without the consent of his tenant, erected in the back yard, against the house leased, a new building, whereby two of the rooms in such leased building, previously used as a kitchen and bedroom, were made entirely unfit for these purposes, and because of such unfitness were abandoned, there was an eviction of the tenant. *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322.

2. Leasing Portion of Building for Purpose Which Necessarily Prevents Use by Tenant. — *Duff v. Hart*, (C. Pl.) 16 N. Y. Supp. 163.

3. When Injury Results from Manner in Which Other Tenant Conducts His Business. — In *Gray v. Gaff*, 8 Mo. App. 329, the defendant had rented the rear of certain premises for a stable, their front part being occupied at the time partly as a storeroom and partly as a shop. The plaintiff subsequently let the front part of the premises for a restaurant, against the protest of the defendant, who claimed that such use would be injurious to his horses. The use becoming injurious to the defendant's horses, and the plaintiff declining to interfere for the defendant's protection, the latter vacated the stable and refused to pay rent. The court held that the landlord's conduct was in no sense an eviction, as the letting of the premises for use as a restaurant was not necessarily injurious to the defendant, but the injury was the result of the manner in which they were used. In *O'Neill v. Manget*, 44 Mo. App. 279, the court distinguished this case from the case of *Jackson v. Eddy*, 12 Mo. 212 (*supra*, this section), on the ground that in the latter case the interference was by the landlord's direct act.

c. CREATION OR EXISTENCE OF NUISANCES. — A tenant may be evicted by the conduct of the landlord in creating or permitting the existence of nuisances in or about the demised premises.¹ But the nuisance must be of a serious character. Thus it is generally considered that a tenant is not evicted because of the presence of noxious smells or vermin in and about the demised premises,² unless their condition is rendered so intolerable that it is dangerous

1. **Nuisances May Constitute Eviction.** — *Home L. Ins. Co. v. Sherman*, 46 N. Y. 370; *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727, *reversing* 4 Cow. (N. Y.) 581.

A tenant of a portion of a house is evicted where he and his family and persons visiting them are so much annoyed and disturbed by gaming, unseemly sports and uncouth noises, and profane and obscene expressions, in the portion of the house reserved and occupied by the landlord, often continued and kept up until a late hour of the night, that he is obliged to remove with his family. *Rowbotham v. Pearce*, 5 Houst. (Del.) 135.

Immoral Conduct of Landlord. — In *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727, *reversing* 4 Cow. (N. Y.) 581, it was held that the fact that the landlord created a nuisance in another tenement under the same roof as the demised premises, by bringing into it lewd women, who were guilty of such riotous and improper conduct that it was intolerable for a decent family to reside or remain in the portion rented by the tenant, in consequence of which he and his family left the demised premises, was evidence which should have been submitted to the jury under a plea of eviction, as it tended to support such a plea. This case may be regarded as establishing the doctrine of constructive eviction in *New York*. Though the decision seems most reasonable, it has been the subject of considerable adverse criticism, and considered to be an extreme case. Thus, in *Vanderbilt v. Persse*, 3 E. D. Smith (N. Y.) 428, the court, *per* Ingraham, First Judge, said: "No case in this state has ever extended the rule of *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727, but in several the propriety of that rule has been doubted."

In *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322, Gray, J., commented on the case as follows: "Upon that case it is to be observed: 1st, the act of the landlord was an unlawful act, and not a lawful use of his other tenement; 2d, the decision of the Court of Errors was not that the facts in law amounted to an eviction, but only that they should have been submitted to the jury; 3d, that decision reversed the unanimous judgment of the Supreme Court, as reported in *Pendleton v. Dyett*, 4 Cow. (N. Y.) 581; 4th, it has since been considered, even in *New York*, an extreme case. *Savage, C. J.*, in *Etheridge v. Osborn*, 12 Wend. (N. Y.) 532; *Nelson, C. J.*, in *Ogilvie v. Hull*, 5 Hill (N. Y.) 54; *Bronson, C. J.*, in *Gilhooley v. Washington*, 4 N. Y. 219."

Approval of the case under discussion may, however, be gleaned from the following language of *Houston, J.*, charging the jury in *Billany v. Smith*, 4 Houst. (Del.) 113, which evidently refers to the case of *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727, though no case is cited: "It has been held in one case, at least,

that there may be in law what is termed a constructive eviction; as where the landlord rented a portion of his house to a respectable family, retaining the other portion in his own possession, and afterward received visits in it from disreputable and profligate women in such a manner, and who were guilty of such riotous and outrageous disturbances, as to render it intolerable for a decent family to reside or remain in the portion rented by the tenant, and who for that reason left the premises, it was held to be equivalent to, and to constitute in effect, an eviction of the tenant under such circumstances, and that it was, therefore, a good legal defense from that time to the action of the landlord for rent."

Immoral Conduct of Other Tenants. — A tenant of rooms in a house is constructively evicted where he abandons his rooms because the landlord, after complaints from him, permits other rooms in the same house to be occupied by lewd women who are in the habit of receiving male visitors, with whom they indulge in boisterous conduct and profane and obscene language until a late hour of the night, thus disturbing the sleep of the tenant and his family, and depriving them of the beneficial enjoyment of the demised premises, and giving the building an unsavory reputation. *Lay v. Bennett*, 4 Colo. App. 252.

Landlord Must Be Responsible. — But the landlord must be in some way responsible for such nuisance. Thus, in *Townsend v. Gilsey*, 1 Sweeny (N. Y.) 155, it was held that a tenant of part of a building was not evicted because the landlord subsequently let another part to persons who occupied and used it as a house of prostitution and ill fame, unless the letting was for the purpose of its being put to improper use, or with the knowledge of the landlord that it would be used for such improper purpose.

2. **Presence of Vermin or Noxious Smells Not an Eviction.** — "Vermin or noxious smells in and about the house do not constitute eviction, so as to justify abandonment of the premises by the tenant." *Truesdell v. Booth*, 4 Hun (N. Y.) 100, 6 Thomp. & C. (N. Y.) 379.

A tenant is not evicted by reason of such matters as bad smells in and about the premises, a stagnant pond near the place, the kitchen being too hot with the stove in it, and vermin in the bedrooms. *Vanderbilt v. Persse*, 3 E. D. Smith (N. Y.) 428.

A tenant is not justified in abandoning the demised premises on account of a noxious smell, afterwards discovered to proceed from dead rats under the steps of the house, where he not only failed to discover the cause by his lack of ordinary vigilance, but refused to allow a mechanic, sent by the landlord, to take the necessary steps to detect and remove the cause of the nuisance. *Westlake v. De Graw*, 25 Wend. (N. Y.) 669.

to life or health to continue the occupation.¹

d. DEPRIVATION OF EASEMENTS. — It is generally considered that a tenant is not evicted where he is deprived, by the act of the landlord, of mere easements which had attached to the demised premises.²

e. THREATS OF EXPULSION, UNREASONABLE DEMANDS, ASSAULTS, ETC. — A constructive eviction may arise from the improper conduct of the landlord, such as threats of expulsion, attempts to lease to others, unreasonable demands, or assaults.³

f. ACTS PRODUCING DISCOMFORT OR ANNOYANCE. — Whether or not acts or neglect which cause discomfort or annoyance to the tenant will amount to a constructive eviction must depend upon the nature of the acts and the degree of the injury, and upon the circumstances of the case. The rule to be gathered from the various decisions is that such matters will not amount to an eviction⁴ unless there is a serious interference with the tenant's beneficial

1. Nuisance Dangerous to Life or Health. — *Sully v. Schmitt*, 147 N. Y. 248; *Wallace v. Lent*, 1 Daly (N. Y.) 481. See *St. Michael's Protestant Episcopal Church v. Behrens*, 13 Daly (N. Y.) 548.

Nuisance Preventing Reasonable Comfort in Occupation. — In *Smith v. Marrable*, 11 M. & W. 5, it was held that a person who had leased a furnished house was justified in abandoning it where it was so infested with bugs that it was impossible to live in it with any reasonable comfort.

2. Deprivation of Easement Not an Eviction. — *Williams v. Hayward*, 1 El. & El. 1040, 102 E. C. L. 1040; *Coleman v. Reddick*, 25 U. C. C. P. 579. In the case last cited the easement of which the tenant was deprived was a supply of water to run his water wheel to operate some machinery.

A landlord who owns land adjoining the demised premises has a right to build on such land, though he may thereby obstruct and darken the windows in the tenement demised. Such an exercise of his rights on land not embraced in the demise cannot operate as an eviction, even though it may be a ground for damages. *Palmer v. Wetmore*, 2 Sandf. (N. Y.) 316; *Johnson v. Oppenheim*, 12 Abb. Pr. N. S. (N. Y. Super. Ct.) 454, 43 How. Pr. (N. Y.) 433.

The act of a landlord in piling bricks in an alley behind the house in which the demised premises are situated, and over the cellar grating, so as to stop the ventilation of the cellar and render it damp and unwholesome, does not constitute an eviction of the tenant. *Dimmock v. Daly*, 9 Mo. App. 354.

A Contrary Opinion Is Intimated in Hazlett v. Powell, 30 Pa. St. 293. In that case it was held that there was no eviction of the tenant of a hotel, for which the landlord was answerable, where the owner of adjoining property erected a party-wall which obstructed and darkened some of the windows of the demised premises, there being in the lease no undertaking on the subject of the enjoyment of light and air through such windows. But the court said that if the vacant lot had belonged to the lessor at the time of leasing, then an easement by implication in the passage of light and air would have followed.

3. Improper Conduct of Landlord. — *Cohen v. Dupont*, 1 Sandf. (N. Y.) 260.

Where a landlord threatens to expel his ten-

ants by physical force, assumes to rescind a contract of lease which under the circumstances the law would imply in his favor, and resumes possession of the demised premises by posting advertisements on the door and negotiating with third persons for a lease thereof, the tenants are at liberty to abandon their occupation without awaiting actual physical expulsion, and to treat the conduct of the landlord as an eviction from the premises. *Gretton v. Smith*, 33 N. Y. 245, affirming *Gretton v. Smith*, 1 Daly (N. Y.) 380.

Tenants of rooms in a house were constructively evicted where the landlord, who resided continuously on the premises, was of a hasty temper, prying, and officious, and rendered the tenancy undesirable by unreasonable demands and repeated discourtesy, and finally made a violent verbal and physical attack upon one of the tenants, and when they thereupon expressed their intention of leaving, said that they "must go," in consequence of which they abandoned the premises. *Wyse v. Russell*, 16 Misc. Rep. (N. Y. Supreme Ct.) 53.

As to Immoral Conduct of the Landlord in other parts of the building in which the demised premises are situated, see *supra*, this section, *Creation or Existence of Nuisances*.

Conduct of Landlord Not Amounting to Eviction.

— Before the expiration of a lease, the landlord, at the usual time for leasing in the city, entered into negotiations for further leasing the premises to a subtenant of his lessees. Failing to agree with him, the landlord posted a bill on the premises, which continued until a short time before the lease of the subtenant expired, when he abandoned all further interference. There was no interference by the landlord, or any one claiming under him, with the actual use and occupation of the premises, but the lessees had undisturbed possession, by their subtenant, until his term expired, and might have had until the expiration of their lease, their failure to relet to their subtenant not being due to any act of the landlord. It was held that there was no constructive eviction of the lessees. *Ogilvie v. Hull*, 5 Hill (N. Y.) 52.

4. Discomforts and Annoyances Not Amounting to Eviction. — The fact that water pipes running between the bricks and plaster of the walls and floor and ceiling of the demised premises, for the convenience of other tenants of the same

enjoyment of the premises.¹

g. FAILURE OF LANDLORD TO PERFORM COVENANTS. — A failure of the landlord to perform his covenants with respect to the demised premises is not necessarily an eviction.²

h. PREVENTING INGRESS AND EGRESS. — There might be a legal eviction by confining a tenant to the demised premises, as by closing up a way which is the only means of egress and ingress.³

i. REMOVAL OF CHATTELS. — The removal of mere chattels or articles of

landlord, burst and rendered the demised premises unwholesome, and damaged the tenant's business and his stock of goods, does not constitute an eviction. *Dimmock v. Daly*, 9 Mo. App. 354.

A tenant cannot leave the demised apartments and consider himself evicted because the janitor of the house is negligent and inattentive in the performance of his duties, and annoying in many small ways, and on some occasions the water supply has been insufficient, and on one occasion there was a dangerous escape of gas into the tenant's apartments, owing to the want of proper precautions by plumbers working in the cellar. *Humes v. Gardner*, 22 Misc. Rep. (N. Y. Supreme Ct.) 333.

The use by a landlord of a water closet which was in the passageway to the demised premises at the time of the hiring, though not then in use, does not constitute an eviction, as the tenant is not deprived of any part of the demised premises, and if the use be such as to be offensive the tenant has a remedy therefor. *Vatel v. Herner*, 1 Hilt. (N. Y.) 149.

A landlord agreed to put a new furnace in the demised premises, but made no stipulation as to the amount of heat it should give. The furnace was put in, but there was a defect in the pipe connections which caused a loss of two-thirds of the hot air, but of this the landlord was not notified. It was held that there was no eviction. *Doolittle v. Selkirk*, 7 Misc. Rep. (N. Y. C. Pl.) 722.

Discomfort Not Resulting from Act or Neglect of Landlord. — A tenant is not evicted from a part of the demised premises by a failure of the water supply to a wash basin and water closet on the demised premises, whereby he is forced to abandon such basin and closet, where it is not shown that there was any interference by the landlords with the water supply, nor that they were under any obligation to insure a continuous and uninterrupted supply of water. *Coddington v. Dunham*, 35 N. Y. Super. Ct. 412.

1. Acts or Omissions Which Amount to Eviction. — A tenant of apartments in a building is constructively evicted and may abandon the demised premises where the landlord shuts off the water supply on account of derangements in the water pipes of the building which the tenant is under no duty to repair. *West Side Sav. Bank v. Newton*, 57 How. Pr. (N. Y. Ct. App.) 152.

There was such an obstruction of the beneficial enjoyment of the apartments in an apartment house as constituted a constructive eviction and authorized the tenant to abandon the demised premises where the steam heat, which the landlord agreed to supply, was insufficient, and additional heat became essential

to a proper enjoyment of the demised premises; the flues and chimneys were defective or improperly constructed; the demised apartments were often filled with a dense smoke; and the elevator service was insufficient. *Lawrence v. Burrell*, 17 Abb. N. Cas. (N. Y. City Ct.) 312.

Persons hired a second floor and office of a store, such premises having a separate entrance. The store or room upon the first floor was used as a barroom or tippling shop of a low character. After the tenants had gone into possession the landlord removed the partition which separated the barroom from their entrance way, and thus made it necessary that the tenants and those doing business with them should go through the barroom in order to reach their place of business. In an action for rent, the referee found that this amounted to a constructive eviction. On appeal to the Supreme Court, the judgment given on the findings of the referee was affirmed, though the court expressed a doubt whether the referee was technically accurate in saying that the acts amounted to an eviction. *Rogers v. Ostrom*, 35 Barb. (N. Y.) 523.

2. Failure to Perform Covenants Not Necessarily an Eviction. — *Keating v. Springer*, 146 Ill. 481, 37 Am. St. Rep. 175.

The omission of a landlord to perform a covenant to build a raceway of specified dimensions to contain a given quantity of water, which the tenant was to have the privilege of using in the working of a sawmill, does not amount to an eviction. *Etheridge v. Osborn*, 12 Wend. (N. Y.) 399. See also *Nichols v. Dusenbury*, 2 N. Y. 283.

Distinction Between Eviction and Breach of Covenant to Repair. — In *Wright v. Latin*, 38 Ill. 293, the court, *per* Walker, C. J., said: "There seems to be no analogy between an eviction, or an act of the landlord which amounts to an eviction, and the breach of a covenant of the landlord to repair the premises. If he covenant to repair before the term commences, it may be the tenant might refuse to enter upon the term until the repairs were made; but having entered upon the term, and received possession, he cannot abandon the lease and refuse to pay rent for the breach of any other covenant except for quiet enjoyment. * * * In that case his possession remains undisturbed, the breach of covenant only hindering the more commodious enjoyment of the term, whilst in case of an eviction the term is gone, or the property so situated that it ceases to be useful for the purpose for which the term was obtained."

As to the general effect of a failure to repair, see *infra*, this section, *Failure to Repair*.

3. Preventing Egress and Ingress. — *Paxson, J.*, in *Hoever v. Fleming*, 91 Pa. St. 322.

furniture from the demised premises does not constitute an eviction.¹

j. CONVEYANCE OF DEMISED PREMISES WITHOUT RESERVATION AS TO LEASE. — A lessee of premises for a purpose which does not give him a right to the entire possession is constructively evicted where the lessor makes an absolute conveyance of the property without any reservation of the lessee's right to enter for the purposes of his lease.²

k. ASSIGNMENT OF DOWER IN DEMISED PREMISES. — Where, after the death of a landlord, his widow obtains an assignment of dower out of the rents, issues, and profits of the demised premises, there is, as between the tenant and the personal representatives of the landlord, a constructive eviction from a part of the premises.³

l. REPAIRING OR REBUILDING. — As a general rule, the act of a landlord in entering the demised premises for the purpose of making necessary repairs or rebuilding, being for the benefit of the tenant and not indicating any intention to deprive him of the use of the premises, is not considered to amount to an eviction.⁴ Nor is there an eviction because of delay in completing the work,⁵ nor because the demised premises are necessarily rendered

1. Removal of Chattels. — *Kimball v. Grand Lodge*, 131 Mass. 59. In this case the former tenants of the defendant had placed in the demised premises, at their own expense, two large showcases. These stood upon the marble floor, and formed no part of the permanent furniture of the room, but were fastened to the wall by nails, and the wall behind them and concealed by them was not painted or finished. The tenants failed, and an agreement was drawn up between their trustees and the defendant, wherein the latter made no claim to the showcases, which were sold at auction. After the surrender of the premises, the defendant leased them to the plaintiffs, who had no notice of the agreement above referred to, and nothing was said upon the question whether the showcases were a part of the premises. The purchasers demanded the showcases of the plaintiffs, and, upon their refusal to deliver them, entered without their consent and removed them. It was held that there was no eviction of the plaintiffs.

2. Conveyance Without Reservation as to Lease. — *Mathews v. People's Natural Gas Co.*, 179 Pa. St. 105, 39 W. N. C. (Pa.) 544. In this case the premises had been leased for oil and gas purposes.

3. Assignment of Dower. — *McAlpin v. Woodruff*, 11 Ohio St. 120. In this case the tenant had a lease of real estate for ninety-nine years, renewable forever, at an annual rent. It was held that after the assignment of dower the administrators of the landlord could not collect more than two-thirds of the rent originally reserved.

4. Entry to Repair or Rebuild Not an Eviction. — *Izon v. Gorton*, 5 Bing. N. Cas. 501, 35 E. C. L. 198; *Connecticut Mut. L. Ins. Co. v. U. S.*, 21 Ct. of Cl. 195; *Cook v. Anderson*, 85 Ala. 99; *Peterson v. Edmonson*, 5 Harr. (Del.) 378; *Smith v. McLean*, 22 Ill. App. 451; *Nonotuck Silk Co. v. Shay*, 37 Ill. App. 542; *Barnum v. Fitzpatrick*, 27 Abb. N. Cas. (N. Y. Fifth Civil Dist. Ct.) 334; *Barnum v. Fitzpatrick*, (C. Pl.) 19 N. Y. Supp. 385; *Campbell v. Shields*, 11 How. Pr. (N. Y. Supreme Ct.) 565.

Acts Done under Order of Municipal Authorities. — A tenant of a house is not evicted where,

after the house has been burned, the landlord erects an inclosure around the rented premises and pulls down the walls of the building, these acts being done under the orders of the municipal authorities, for the purpose of insuring safety to the public. *Fleming v. King*, 100 Ga. 449.

Refusal of Tenant to Re-enter After Repairs Are Completed. — Where a tenant voluntarily vacates the rented premises at the request of the landlord, to enable the latter to make repairs, and, upon the completion of the proposed repairs, the landlord offers to permit the tenant to re-enter, which offer is declined by the tenant, except upon certain conditions, to which the landlord is not bound to assent, an action against the landlord for an alleged unlawful exclusion of the tenant from the premises cannot be maintained. *Days v. Doyle*, 99 Ga. 62.

5. Delay in Completing Work. — A tenant was not evicted where, after the landlord had been forced by the city authorities to undertake repairs in the plumbing on the demised premises, the plumber, after making some excavations, stopped work for eight days, the tenant making no complaint. *Dexter v. King*, (Brooklyn City Ct.) 28 N. Y. St. Rep. 750.

A lease of certain premises provided that for two months after it went into effect the landlord might enter for the purpose of making alterations and repairs, but that he could not enter after that time without the assent of the tenant. The landlord commenced the repairs within the required time, but continued work long after the two months had expired. The tenant never expressly assented to such continued occupation, but he raised no objections save a complaint that the work was progressing slowly; and he pressed the landlord to have the work completed by a certain time, several months after the expiration of the two months, requested other improvements than those contemplated at the time of the lease, and made other improvements on the property himself. The tenant afterwards claiming to have been evicted, the court held that there had been no eviction, as the tenant's consent to the continued occupation could be inferred from his conduct. *Ferguson v. Troop*, 17

somewhat smaller by reason of the repairs.¹ But there is an eviction where the alleged repairs are not shown to be necessary, and effect such changes in the demised premises as materially to diminish their value to the tenant,² or where a landlord who is bound to rebuild after a destruction of the demised premises by fire does so on a plan entirely different from the original one, and the area of the tenant's premises is materially affected thereby.³

The Doctrine in Pennsylvania is that a tenant is evicted by an entry of the landlord for the purpose of rebuilding, where the work to be done is of such a character as to deprive the tenant of all beneficial enjoyment of the premises,⁴ unless the tenant consents thereto,⁵ or the landlord has, by the terms of the lease, the right to enter and make repairs.⁶

iii. FAILURE TO REPAIR. — The general doctrine of eviction as arising from the failure of a landlord to make necessary repairs on the demised premises may be succinctly stated as follows: When the premises become untenable by reason of the failure of the landlord to do what is lawfully required of him, the effect is eviction, which permits the tenant to abandon the premises;⁷ but when the necessary repairs are such as it is the duty of the

Can. Sup. Ct. Rep. 527, 10 Can. L. T. 290, reversing 28 New Bruns. 301, and overruling 25 New Bruns. 440, 7 Can. L. T. 351. In this case it was further considered by Gwynne and Taschereau, JJ., that the tenant's permission having been once granted, the landlord's right of entry continued until it was expressly revoked, which was never done; and that, by the terms of the lease, if the landlord entered and began the repairs before the two months expired, he had a right to complete them after that time.

1. Necessary Changes in Repairing. — A tenant is not evicted because the demised premises are made somewhat smaller by the necessary repairing and rebuilding of a wall, when the new wall is made thicker than the old one for greater strength and security, and to comply with the fire laws, and such new wall is built inside of the old boundary, on account of the allegation of the adjoining landowner that the old wall encroached on his line, the landlord yielding to such claim. *Campbell v. Shields*, 11 How. Pr. (N. Y. Supreme Ct.) 565.

2. Where Repairs Are Not Necessary and Diminish Value of Demised Premises to Tenant. — *Brown v. Wakeman*, (City Ct.) 42 N. Y. St. Rep. 677.

A tenant of a landing is constructively evicted where diking which is done with the consent of the landlord, and legally by and through his procurement, in co-operation with others, operates to destroy the landing, though by the lease the landlord has reserved the right to make such "repairs" as should be "necessary to the security or preservation of said premises." This does not authorize the construction of works which make the use of the landing perilous and useless to the tenant. *Waite v. O'Neil*, 76 Fed. Rep. 408, 47 U. S. App. 19.

3. Rebuilding on Different Plan. — A demised two separate tenements to B, under separate leases, with a covenant on the part of A to insure the premises, and to rebuild in case of their destruction by fire. B demised one of the tenements to C and the other to D, and during their respective tenancies the whole premises were destroyed by fire. The premises were afterwards rebuilt by A pursuant to

a new plan submitted to B, and approved of and signed by him. B, before the rebuilding, agreed to surrender the premises and take a new lease of them in their altered state, which he afterwards did. The new building varied from the old one, inasmuch as the area of C's premises was thereby decreased, and that of D's increased. It was held that the alteration of the subject-matter of the demises amounted to an eviction of the subtenants, to which B was a party; and that therefore he could not recover rent accruing after the rebuilding had arrived at such a stage as permanently to alter the character of the respective demises. *Upton v. Townend*, 17 C. B. 30, 84 E. C. L. 30.

4. Pennsylvania Doctrine — Entry to Rebuild an Eviction. — *Magaw v. Lambert*, 3 Pa. St. 444; *Hoeverler v. Fleming*, 91 Pa. St. 322.

5. Consent of Tenant. — A tenant is not evicted where, the demised premises having been destroyed by fire, he agrees with the landlord that the latter may enter and rebuild, and that such rebuilding shall not be considered an eviction or a rescission of the lease. *Heller v. Royal Ins. Co.*, 151 Pa. St. 101, 30 W. N. C. (Pa.) 545.

6. Right of Entry to Repair Reserved by Terms of Lease. — *Maberry v. Dudley*, 2 Penny. (Pa.) 367.

7. Tenant May Be Evicted by Landlord's Neglect of Duty to Repair. — *Edwards v. Etherington*, R. & M. 268, 21 E. C. L. 435; *Harthill v. Cooke*, (Ky. 1897) 43 S. W. Rep. 705; *Young v. Collett*, (Mich. 1886) 6 West. Rep. 115; *Tallman v. Murphy*, 120 N. Y. 345; *Thalheimer v. Lempert*, (Supreme Ct.) 1 N. Y. Supp. 470; *Bradley v. De Goicouria*, 12 Daly (N. Y.) 393, 67 How. Pr. (N. Y.) 76; *Brolaskey v. Loth*, 5 Phila. (Pa.) 81, 19 Leg. Int. (Pa.) 117; *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117.

In a case where a loft had been leased, the landlord retained charge and control of the elevator in the building, but its use by the tenant was part and parcel of the estate demised, and indispensable to its beneficial enjoyment. The tenant was deprived of the use of the elevator by the landlord's persistent mismanagement thereof, and neglect to repair it, and for that reason abandoned the premises. It was held that the tenant was evicted. *Lawrence v.*

tenant to make, either by the terms of the lease or by operation of law, he cannot be held to be evicted because the landlord neglects or refuses to make them, even though the premises become uninhabitable in consequence of the need of repairs.¹ There are cases, however, which hold that a failure of the landlord to repair does not of itself amount to an eviction, even though by the terms of the lease he is bound to make such repairs.²

u. NECESSITY FOR ABANDONMENT BY TENANT. — It is well settled, as a general rule, that there can be no constructive eviction unless the tenant abandons the premises on account of the acts or circumstances claimed to operate as an eviction.³ It is not sufficient that there are circumstances which would justify the tenant in abandoning the property, and that he does in

Mycenian Marble Co., 1 Misc. Rep. (N. Y. C. Pl.) 105.

1. *Where Tenant Is Bound to Repair.* — Eisenhart v. Ordean, 3 Colo. App. 162; Barrett v. Boddie, 158 Ill. 479, *affirming* 57 Ill. App. 226; Crawford v. Redding, 8 Misc. Rep. (N. Y. C. Pl.) 306; Truesdell v. Booth, 4 Hun (N. Y.) 100; McMann v. Autenreith, 17 Hun (N. Y.) 163; Barnum v. Fitzpatrick, 27 Abb. N. Cas. (N. Y. Fifth Civil Dist. Ct.) 334; Alger v. Kennedy, 49 Vt. 109, 24 Am. Rep. 117. See also Kramer v. Cook, 7 Gray (Mass.) 550; Nichols v. Dusenbury, 2 N. Y. 283; Tallman v. Murphy, 120 N. Y. 345.

In Barrett v. Boddie, 158 Ill. 479, *affirming* 57 Ill. App. 226, the court, *per* Phillips, J., said: "Eviction necessarily being the result of an intended, wilful, wrongful act, it must be by a wilful omission of duty or a commission of a wrongful act. Where there is no duty not complied with, and no wrongful act committed by the landlord towards the tenant, no eviction occurs."

2. *Failure of Landlord to Make Repairs Stipulated For in Lease Not an Eviction.* — Lewis v. Chisholm, 68 Ga. 40; Biggs v. McCurley, 76 Md. 409. See also Tibbitts v. Percy, 24 Barb. (N. Y.) 39; Wright v. Latin, 38 Ill. 293.

The repairs stipulated for in Biggs v. McCurley, 76 Md. 409, were the inclosing of the premises with new fencing, the building of another fence, the painting of the dwelling house, and the making of any other repairs which might be necessary. The failure of the landlord to make these repairs might have been regarded as a breach of covenant, as to the effect of which see *supra*, this section, *Failure of Landlord to Perform Covenants*.

In Louisiana it has been held that a lessee could not set up as a defense to a claim for rent that the demised building was uninhabitable, and that his furniture was damaged in consequence of the want of repairs, because he was authorized, if the lessor failed or refused to make the necessary repairs, to have them made himself, and deduct the cost from the rent. Diggs v. Maury, 23 La. Ann. 59.

3. *Tenant Must Abandon Premises* — *England*. — Upton v. Townend, 17 C. B. 30, 84 E. C. L. 30.

United States. — Connecticut Mut. L. Ins. Co. v. U. S., 21 Ct. of Cl. 195.

Alabama. — Crommelin v. Thiess, 31 Ala. 472, 70 Am. Dec. 499.

Colorado. — Eisenhart v. Ordean, 3 Colo. App. 162.

Illinois. — Barrett v. Boddie, 158 Ill. 479, *affirming* 57 Ill. App. 226; Keating v. Springer,

146 Ill. 481, 37 Am. St. Rep. 175; Patterson v. Graham, 140 Ill. 531, *affirming* 40 Ill. App. 399. See also Chicago Legal News Co. v. Browne, 103 Ill. 317; Nonotuck Silk Co. v. Shay, 37 Ill. App. 542.

Iowa. — See Daniels v. Logan, 47 Iowa 395. *Massachusetts.* — Boston, etc., R. Corp. v. Ripley, 13 Allen (Mass.) 421; De Witt v. Piereson, 112 Mass. 8; Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322.

Missouri. — Witte v. Quinn, 38 Mo. App. 681. See also Jackson v. Eddy, 12 Mo. 209.

New Hampshire. — Scott v. Simons, 54 N. H. 426. See also Elliott v. Aiken, 45 N. H. 30.

New York. — Wyckoff v. Frommer, 12 Misc. Rep. (N. Y. C. Pl.) 149; Edwards v. Candy, 14 Hun (N. Y.) 596; Edgerton v. Page, 20 N. Y. 281, *affirming* 1 Hilt. (N. Y.) 320; Mortimer v. Brunner, 6 Bosw. (N. Y.) 653; Home L. Ins. Co. v. Sherman, 46 N. Y. 370; Boreel v. Lawton, 90 N. Y. 293, 43 Am. Rep. 170; Koehler v. Scheider, 15 Daly (N. Y.) 198; Cram v. Dresser, 2 Sandf. (N. Y.) 120; Stein v. Rice, 23 Misc. Rep. (N. Y. Supreme Ct.) 348. See also Campbell v. Shields, 11 How. Pr. (N. Y. Supreme Ct.) 565; Burckle v. Shannon, 7 Misc. Rep. (N. Y. C. Pl.) 309; Allen v. Pell, 4 Wend. (N. Y.) 505; Willard v. Tillman, 19 Wend. (N. Y.) 358; Dyett v. Pendleton, 8 Cow. (N. Y.) 727; West Side Sav. Bank v. Newton, 57 How. Pr. (N. Y. Ct. App.) 152; Ryan v. Jones, 2 Misc. Rep. (N. Y. C. Pl.) 65.

Pennsylvania. — Horberg v. May, 153 Pa. St. 216. See also Allegaert v. Smart, 2 Penny. (Pa.) 320.

South Carolina. — See Coogan v. Parker, 2 S. Car. 255, 16 Am. Rep. 659.

In Boreel v. Lawton, 90 N. Y. 293, 43 Am. Rep. 170, the court, *per* Andrews, C. J., said: "It would be manifestly unjust to permit the tenant to remain in possession, and, when sued for the rent, to sustain the plea of eviction by proof that there were circumstances which would have justified him in leaving the premises."

In Mortimer v. Brunner, 6 Bosw. (N. Y.) 653, the court, *per* Hoffman, J., said: "The proposition that there can be retention of demised premises and an eviction are logically and legally contradictory. The position has not the slightest warrant in law, principle, sense, or decisions. There are cases in which it has been deemed that there was an eviction without a forcible ouster. But in such cases the tenant abandoned, and the court held that acts of the landlord were so illegal and monstrous as to be equivalent to absolute physical ouster."

fact leave, but it is necessary that he should abandon the premises because of such circumstances,¹ and for no other reasons, for if other considerations have a part in inducing him to leave there is no eviction.²

Tenant Must Abandon Within Reasonable Time.—The tenant must abandon the premises within a reasonable time after the circumstances arise which give him the right to abandon, and if he fails to do so he loses the right,³ especially if in the meantime the cause for abandonment has ceased to exist.⁴

3. Eviction by Title Paramount.—As has been seen,⁵ an eviction by title

What Amounts to Retaining Possession.—A tenant retains possession of the demised premises where he keeps his goods thereupon. See *Burckle v. Shannon*, 7 Misc. Rep. (N. Y. C. Pl.) 309.

Cases Where Tenant Has Retained Possession.—In *Cram v. Dresser*, 2 Sandf. (N. Y.) 120, it was held that a wrongful act of the landlord, causing great inconvenience and trouble to the tenant's family, and keeping the demised tenement in confusion and disorder for a long period, could not be set up as an eviction, where the tenant had continued in possession for a year after the injury ceased.

In *Boston, etc., R. Corp. v. Ripley*, 13 Allen (Mass.) 421, the landlord built a board fence in such a manner that the tenant could not gain access to the demised premises except by going over the land of a third person, but the tenant, nevertheless, continued to occupy the premises. It was held that there was no eviction.

In *Edgerton v. Page*, 1 Hilt. (N. Y.) 320, affirmed 20 N. Y. 281, the landlord allowed large quantities of waste water to come down into the demised premises, greatly injuring the tenant's goods, and compelling him to leave at the end of the term of his lease, whereby he lost the privilege of renewal. It was held that there was no eviction, the tenant not having abandoned the premises before the expiration of his lease.

In *Horberg v. May*, 153 Pa. St. 216, the plaintiff had leased from the defendant a farm, which the latter had some time before leased to another person for oil and gas purposes. A conflict arose between the two lessees, which resulted in the lessee for oil and gas purposes paying to the plaintiff one thousand dollars on account of damages, with an agreement for compensation for future damages, and the plaintiff giving him the right of entry on the land to operate it for oil and gas, but remaining in possession. It was held, the action being replevin, that the plaintiff had not been evicted.

A tenant who has abandoned the demised premises is not estopped to plead a constructive eviction by the fact that a judgment had been obtained against him for rent for the month preceding his abandonment, and that some of the facts on which the plea of constructive eviction is based existed during such month; for, not having abandoned the premises at the time, he could not plead a constructive eviction to the former action. *Koehler v. Scheider*, 15 Daly (N. Y.) 198.

Cases Holding Tenant Evicted Though He Retained Possession.—In *Briggs v. Hall*, 4 Leigh (Va.) 484, the landlord of a farm entered upon a meadow which formed part and parcel thereof, mowed the hay growing thereon, and car-

ried it away, all this being done against the objection and express prohibition of the tenant. There was no other interference or disturbance of the tenant by the landlord, and the tenant continued to occupy the farm for the remainder of the term of his lease. Nevertheless, it was held that the acts of the landlord amounted to an eviction.

In *Conlon v. McGraw*, 66 Mich. 194, a store on the first floor of a two-story building was occupied by tenants. On one side of the demised premises was a smaller store, a part of the same building, and on the other the stairway leading to the second story. The landlord removed the doors and windows of the smaller store, and the brick front of the second story, thereby rendering the tenants' store practically unfit for their use. It was held that this amounted to an eviction, even though the tenants did not vacate the store for several months thereafter. See also *Pridgeon v. Excelsior Boat Club*, 66 Mich. 326.

1. Abandonment Must Be Because of Circumstances Claimed to Amount to Eviction.—*Connecticut Mut. L. Ins. Co. v. U. S.*, 21 Ct. of Cl. 195.

2. Other Considerations Must Not Contribute to Abandonment.—*Eisenhart v. Ordean*, 3 Colo. App. 162.

3. Tenant Must Abandon Within Reasonable Time.—*Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499.

Under What Circumstances Retaining Possession Will Not Forfeit Right to Abandon.—In *Wallace v. Lent*, 1 Daly (N. Y.) 481, where a tenant who had discovered the existence of a nuisance in the demised premises of such a character as to warrant his abandoning them continued in occupation for about a month upon the assurance of the landlord that the cause of complaint should be removed, it was held that such continuance was not of such a nature as to amount to an adoption of the contract of lease, or even make him liable for the payment of rent for the period while he was in actual occupation.

4. Tenant Cannot Abandon After Cause Therefor Has Ceased to Exist.—In *Stein v. Rice*, 23 Misc. Rep. (N. Y. Supreme Ct.) 348, it was held that a tenant was not justified in abandoning a house because of a lack of water supply, six weeks after the fault had been remedied.

In *Ryan v. Jones*, 2 Misc. Rep. (N. Y. C. Pl.) 65, it was held that a tenant of apartments who had remained in possession throughout the winter was not justified in abandoning the demised premises on the first of April on account of the landlord's neglect or refusal to furnish an adequate supply of heat during the colder season.

5. Eviction by Title Paramount.—See *supra*, this title, *Definition and Classification*.

paramount arises where a third person establishes a title to the demised premises superior to that of the landlord, and gains possession by virtue of that title.¹ It is not necessary that the tenant should be forcibly ejected or dispossessed of the demised premises by process of law, but he may peaceably yield possession to the person who has the superior title or who has been adjudged to be entitled to the possession, and treat himself as having been evicted.² The person to whom he yields possession must, however, have a

1. Taking Possession of Demised Premises by Holder of Paramount Title Constitutes Eviction. — *Tomlinson v. Day*, 2 B. & B. 680; *Neale v. Mackenzie*, 1 M. & W. 747, 2 C. M. & R. 84; *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *Marsh v. Butterworth*, 4 Mich. 575; *Blauvelt v. Powell*, 59 Hun (N. Y.) 179; *Johnson v. Oppenheim*, 12 Abb. Pr. N. S. (N. Y. Super. Ct.) 454, 43 How. Pr. (N. Y.) 433; *Moffat v. Strong*, 9 Bosw. (N. Y.) 57.

A tenant is evicted where he is ousted from the demised premises by virtue of a writ of habere facias issued in an action of ejectment for such premises by a third person, against himself and the landlord. *Lanigan v. Kille*, 13 Phila. (Pa.) 49, 36 Leg. Int. (Pa.) 136.

Forcible Removal — When Complete. — To make an eviction by title paramount complete, where the tenant is forcibly removed, it is not necessary that the evictor should carry him beyond the highway, though the highway be owned by the holder of the paramount title to the demised premises. *Lawrence v. Mead*, 5 Hun (N. Y.) 179.

Effect of Partial Eviction. — Where a person who has leased mill buildings with the machinery and tools therein is evicted from the buildings under a mortgage covering them only, it seems that he is evicted from the tools and machinery likewise, though these are not included in the mortgage, as they are of no use to him unless in connection with the buildings. *Fitchburg Cotton Mfg. Corp. v. Melven*, 15 Mass. 268.

Facts Not Constituting Eviction. — In an action to recover ground rent, the tenant set up as a defense that before he took his ground-rent deed, the Delaware and Schuylkill Canal Company had entered upon the premises and dug a canal there, for which injury to the property it was compelled to pay to the then owners certain damages assessed under a provision in its charter; that the canal was, however, abandoned and never used; and that the land over which the excavation had been made was seized and sold under execution against the canal company. It was held that the defendant had not been evicted, as the canal company had acquired no title to the soil, but only an easement, which could be claimed and used by the company alone, and such title could not be levied on and sold under execution, wherefore the sheriff's vendee was a mere trespasser. *Spear v. Allison*, 20 Pa. St. 200.

2. Tenant May Peaceably Yield Possession and Treat Himself as Evicted — *Connecticut*. — *Camp v. Scott*, 47 Conn. 366.

Kentucky. — *Lunsford v. Turner*, 5 J. J. Marsh. (Ky.) 104, 20 Am. Dec. 248.

Massachusetts. — *Hamilton v. Cutts*, 4 Mass. 349, 3 Am. Dec. 222.

Michigan. — *Marsh v. Butterworth*, 4 Mich. 575.

Nebraska. — *Mattis v. Robinson*, 1 Neb. 3.

New York. — *Barnum v. Fitzpatrick*, 27 Abb. N. Cas. (N. Y. Fifth Civil Dist. Ct.) 334; *Home L. Ins. Co. v. Sherman*, 46 N. Y. 370; *Hyman v. Boston Chair Mfg. Co.*, 58 N. Y. Super. Ct. 282, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 36; *Conley v. Schiller*, (Ulster County Ct.) 24 N. Y. Supp. 473.

The tenant is not bound to subject himself to the trouble and expense of a lawsuit. *Marsh v. Butterworth*, 4 Mich. 575.

It is equivalent to an actual eviction of a tenant where, upon being requested by a purchaser of the demised premises at a foreclosure sale to attorn, he yields up possession of the premises. *Simers v. Saltus*, 3 Den. (N. Y.) 214.

In *Carey v. Bostwick*, 10 U. C. Q. B. 156, Burns, J., said: "The legal meaning of an expulsion is not that it requires an ouster or act of force to be done, but it is enough that the quiet enjoyment is invaded or prevented, contrary to the will of the tenant. If a tenant gives up that which he is in no way bound to do, but it proceeds from himself to do it or not, then consent must bind him; but I do not see that such is the fact in law, where the consent is given, no matter how willingly, in a case where the tenant cannot prevent the consequences if he should withhold his consent."

Contrary Doctrine. — In *Matter of Emery*, 4 C. B. N. S. 423, 93 E. C. L. 423, it was held that to constitute an eviction by title paramount the party evicting must have had good title and the tenant must have been turned out against his will, as there could be no such eviction if he left voluntarily.

In *Perry v. Wall*, 68 Ga. 70, the court, *per* Speer, J., said: "We think if a tenant suffers a third party to come in and oust him, unless he can show he dissented therefrom, and that the landlord procured the ouster, or was in some manner responsible for it, then an ouster, under such circumstances, would not defeat the landlord's right to recover his rent."

Covenant Against Eviction Broken Where Tenant Forced to Yield Possession to Mortgagee. — The owner of certain property was a party to the creation of a term of one thousand years which was to be used by the trustees for raising a sum of money to pay his debts. The trustees assigned the term by way of mortgage. Subsequently the owner granted a lease of part of the lands. The principal and interest on the mortgage being in arrears, the surviving mortgagee gave notice to the tenant to pay the rents to him instead of to the lessor. It then turned out that the lease had been executed without the assent of the mortgagees, whereas, by the deed of assignment, it was expressly provided that the power to lease should be exercised only with their assent and concurrence. The tenant, finding that he

present right of entry,¹ and the tenant must act in good faith and without fraud or collusion.² It has been said that by so yielding possession, or by making no resistance to the entry, the tenant takes upon himself the burden of proving that such entry was under and by virtue of a paramount title.³

Attornment by Tenant. — It is not necessary that the tenant should be actually and physically removed from, or should leave, the demised premises, for, in the absence of fraud or collusion on his part, he is evicted where he attorns to the holder of the paramount title and takes a new lease from him under pressure of a possessory writ or threats of expulsion.⁴ But in the case of attornment, as in that of yielding possession, it is incumbent on the tenant, if he makes no resistance, and upon those who have profited by his submission, to show the existence and superiority of the title in question.⁵

Buying In Paramount Title. — A tenant is also considered as being evicted where, acting in good faith and under pressure of a possessory writ or a threat of expulsion, he buys in the paramount title.⁶

4. Effect of Appropriation under Right of Eminent Domain. — It is generally considered that an appropriation of the demised premises in whole or in part, in the exercise of the right of eminent domain, does not amount to a technical eviction of the tenant.⁷

could not retain possession of the premises as against the mortgagee, consented to give up possession to him. It was held that the tenant was evicted by a person claiming by, from, or under the lessor, and that there was a breach of a covenant in the lease against such eviction. *Carpenter v. Parker*, 3 C. B. N. S. 206, 91 E. C. L. 206.

1. There Must Be a Present Right of Entry. — *Camp v. Scott*, 47 Conn. 366.

An icehouse, dock, and appurtenances, which had been leased for a certain term, were sold on foreclosure of a mortgage a little over a month before the lease expired. A few days after the sale, the purchaser asked the agent of the tenant if he had the keys of the premises, and was done with them; he replied that he was, and gave the keys to the purchaser. This occurred before the purchaser had received his deed for the premises, and the sale was not confirmed until after the lease had expired. It was held that the tenant was not evicted. *Peck v. Knickerbocker Ice Co.*, 18 Hun (N. Y.) 183.

In an action between a landlord and third persons, to which the tenants were not parties, an interlocutory decree was rendered directing the sheriff to rent out the demised premises to the highest bidder. The sheriff let the premises, and upon his asking the tenants if they would give up possession to his lessee, they replied that they could not resist the decree of the court, and surrendered possession. It was held that they were not evicted, as the decree gave the sheriff no authority to put them out, and there was no paramount title under which they could be evicted, the interlocutory decree having been rendered without the consent, and to the prejudice, of the landlord, and having been palpably erroneous as to the renting out of the premises, for which cause it was at a subsequent term set aside. *Caldwell v. Pennington*, 3 Gratt. (Va.) 87.

2. Tenant Must Act in Good Faith. — *Camp v. Scott*, 47 Conn. 366; *Mattis v. Robinson*, 1 Neb. 3.

3. Tenant Not Opposing Entry Must Prove It to Have Been under a Paramount Title. — *Hamilton*

v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; *Marsh v. Butterworth*, 4 Mich. 575.

4. Attornment to Holder of Paramount Title. — *Poole v. Whitt*, 15 M. & W. 571; *Carey v. Bostwick*, 10 U. C. Q. B. 176; *Merryman v. Bourne*, 9 Wall. (U. S.) 592; *Montanye v. Wallahan*, 84 Ill. 355; *Lunsford v. Turner*, 5 J. J. Marsh. (Ky.) 104, 20 Am. Dec. 248; *Morse v. Goddard*, 13 Met. (Mass.) 177, 46 Am. Dec. 728; *Smith v. Shepard*, 15 Pick. (Mass.) 147, 25 Am. Dec. 432; *Foss v. Van Driele*, 47 Mich. 201; *Mattis v. Robinson*, 1 Neb. 3; *Ross v. Dysart*, 33 Pa. St. 452.

A subtenant is evicted by paramount title as against his lessor, a tenant of the owner, where the owner enters the premises and requires the subtenant to attorn to him or vacate, whereupon he takes a lease directly from the owner. *Holbrook v. Young*, 108 Mass. 83.

Where a mortgagee, under a mortgage made previously to the lease, enters upon the demised premises and orders the rent to be paid to him, this is equivalent to an actual and complete eviction of the tenant as against the landlord. *Stone v. Patterson*, 19 Pick. (Mass.) 476, 31 Am. Dec. 156.

In *George v. Putney*, 4 Cush. (Mass.) 351, a judgment creditor of the landlord levied his execution upon the demised property, and before the rent became due entered upon the premises, claiming title, and threatened to put the tenant out unless he would yield possession and attorn to him, whereupon the tenant agreed in writing to hold the premises under him. It was held that these facts, while they did not constitute an eviction in its technical sense, "proved an ouster, or that which is equivalent thereto, and to an eviction under judgment."

5. Superiority of Adverse Title Must Be Shown. — *Merryman v. Bourne*, 9 Wall. (U. S.) 592.

6. Buying in Paramount Title. — *Ross v. Dysart*, 33 Pa. St. 452; *Hulseman v. Griffiths*, 10 Phila. (Pa.) 350, 32 Leg. Int. (Pa.) 208.

7. Appropriation under Right of Eminent Domain Not an Eviction. — *Corrigan v. Chicago*, 144 Ill. 537; *Stubbings v. Evanston*, 136 Ill.

37, 29 Am. St. Rep. 300; *Patterson v. Boston*, 20 Pick. (Mass.) 159; *Folts v. Huntley*, 7 Wend. N. Y.) 211; *Foote v. Cincinnati*, 11 Ohio 408, 38 Am. Dec. 737; *Workman v. Mifflin*, 30 Pa. St. 362; *Dyer v. Wightman*, 66 Pa. St. 425. See also *Chicago v. Garrity*, 7 Ill. App. 474; *Ellis v. Welch*, 6 Mass. 246, 4 Am. Dec. 122; *Parks v. Boston*, 15 Pick. (Mass.) 198; *Schuylkill, etc., Imp., etc., Co. v. Schmoele*, 57 Pa. St. 271; *Frost v. Earnest*, 4 Whart. (Pa.) 86; *Ake v. Mason*, 101 Pa. St. 21, 12 W. N. C. (Pa.) 210.

An appropriation of part of the demised premises for a public highway is not an eviction by the landlord or by one holding paramount title, but an exercise of the right of eminent domain, which does not divest the tenant of his seizin, and but partially disturbs his possession. *Workman v. Mifflin*, 30 Pa. St. 362.

In *Patterson v. Boston*, 20 Pick. (Mass.) 159, the complainant took a lease of a store in the city of Boston, for three years, covenanting to pay rent and to leave the premises in good repair at the end of the term, and the lessor reserving a right to enter and make improvements. The front part of the land was taken

and the front wall of the building was cut off by the city, for the purpose of widening the street. It was held that this act of the city did not put an end to the term, nor release the lessee from his covenants to pay rent and make repairs.

Effect of Appropriation. — An appropriation of the demised premises under the right of eminent domain does not technically amount to an eviction, because the tenant holds and enjoys the estate granted to him subject to that right. But it is in effect an eviction by paramount title, and has all the force and effect of such an eviction. *Corrigan v. Chicago*, 144 Ill. 537.

Contrary Doctrine. — In *Mississippi*, however, it is held that the taking of part of the demised premises under the right of eminent domain amounts to an eviction *pro tanto*. *Levee Com'rs v. Johnson*, 66 Miss. 248.

And the *Missouri* doctrine is that a condemnation of part of the leased premises for public use will extinguish a proportionate part of the rent. *Biddle v. Hussman*, 23 Mo. 597; *Biddle v. Hussman*, 23 Mo. 602; *Kingsland v. Clark*, 24 Mo. 24.

EVIDENCE.

BY HENRY H. WILSON, PH.B., A.M., LL.M., AND ELMER W. BROWN, LL.B.

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CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ACCOMPLICES*, vol. 1, p. 389; *ADMISSIONS*, vol. 1, p. 670; *AMBIGUITY*, vol. 2, p. 287; *ANCIENT DOCUMENTS*, vol. 2, p. 322; *BLOOD STAINS*, vol. 4, p. 587; *BURDEN OF PROOF*, vol. 5, p. 21; *CHARACTER (IN EVIDENCE)*, vol. 5, p. 850; *CONFESSIONS*, vol. 6, p. 520; *CORROBORATIVE EVIDENCE*, vol. 7, p. 866; *CUMULATIVE EVIDENCE*, vol. 8, p. 462; *DECLARATIONS (IN EVIDENCE)*, vol. 9, p. 5; *DEPOSITIONS*, vol. 9, p. 295; *DOCUMENTARY EVIDENCE*, vol. 9, p. 877; *DYING DECLARATIONS*, vol. 10, p. 359; *ESTOPPEL*, *ante*, p. 385; *EXPERIMENTS (IN EVIDENCE)*; *EXPERT AND OPINION EVIDENCE*; *FOREIGN LAWS*; *FRAUDS, STATUTE OF*; *HANDWRITING*; *HEARSAY EVIDENCE*; *IDENTITY*; *INSPECTION AND PHYSICAL EXAMINATION*; *INTERPRETER*; *JUDGMENTS AND DECREES*; *JUDICIAL NOTICE*; *PAROL EVIDENCE*; *PEDIGREE*; *PHOTOGRAPHS*; *PRESUMPTIONS*; *PRIVILEGED COMMUNICATIONS*; *REASONABLE DOUBT*; *RECORD*; *RES GESTÆ*; *SECONDARY EVIDENCE*; *SUPPRESSION OF EVIDENCE*; *WITNESSES*.

And for matters of *Evidence* connected with particular topics, see the articles dealing with such topics.

I. SCOPE OF TITLE.—No attempt is here made to discuss minutely the several departments of the law of evidence. Elsewhere in this work, under appropriate titles, which are given in the table above, will be found detailed expositions. The purpose of this article is to present in concise form a general view of the whole field of evidence, with a statement of the leading principles. For instance, under the division *Relevancy*, the general rule concerning hearsay evidence, among other things, is stated, and the exceptions are enumerated and classified; but what has been held to be, and what not to be, hearsay, and the like, are matters reserved for the article *HEARSAY EVIDENCE*; and a full treatment of the exceptions, for such titles as *ADMISSIONS*, *ANCIENT DOCUMENTS*, *CONFESSIONS*, *DYING DECLARATIONS*, *PEDIGREE*, *RES GESTÆ*, etc. Further, throughout the work will be found under each title the particular matters of evidence arising in connection with the topic treated.

II. DEFINITION.—The word "evidence," as used in judicial language, signifies all the means, except mere argument or comment, by which the existence or nonexistence of disputed facts is established.¹

1. Definition.—"The word 'evidence,' in legal acceptance, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." 1 Greenleaf on Evidence (15th ed.), § 1.

"That which is legally offered by the litigant parties to induce a jury to decide for or against the party alleging such facts, as contradistinguished from all comment and argument on the subject, fall within the description of evidence." Starkie on Evidence (10th Am. ed.) 12.

"The word 'evidence' signifies, in its original sense, the state of being evident, *i. e.*, plain, apparent, or notorious. But by an almost peculiar inflection of our language it is applied to that which tends to render evident or to generate proof. This is the sense in which it is commonly used in our law books, and will be used throughout this work. Evidence, thus understood, has been well defined—any

matter of fact the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact." Best on Evidence (Chamberlayne's ed.), § 11.

"'Judicial evidence' may be defined the evidence received by courts of justice in proof or disproof of facts the existence of which comes in question before them." Best on Evidence (Chamberlayne's ed.), § 33.

"'Evidence' means: (1) Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry; such statements are called oral evidence. (2) Documents produced for the inspection of the court or judge; such documents are called documentary evidence." Stephen's Digest of Evidence, art. 1.

"By the term 'evidence,' considered according to the most extended application that is ever given to it, may be, and seems in general to be, understood any matter of fact the effect,

III. USE OF EVIDENCE. — The only use of evidence being to ascertain the truth of disputed facts, it follows that none is required in support of those allegations which are not denied; and the admission of any fact on the record, or by any other formal act in the course of the cause, not only prevents the necessity of proof of its existence, but precludes the party making such admission from introducing any evidence to the contrary.¹

IV. THINGS THAT NEED NOT BE PROVED — **1. Facts Admitted** — *a. FACTS ADMITTED BY THE PLEADINGS* — (1) *Expressly Admitted.* — When any fact is alleged in the pleading of one party to the action, and such fact is expressly admitted by the adverse party in his pleading, both parties are conclusively bound by the fact so alleged and admitted, and of course no evidence is necessary to prove it and none will be received to contradict it.²

(2) *Admitted by Failure to Deny.* — Whenever an allegation appears in the pleading of one party to which, by the practice of the court, the adverse party is required to respond, a failure to deny such allegation, if it be material and well pleaded, will be taken as an admission of its truth, and dispenses with proof of its existence and excludes proof of its nonexistence. The maxim of the courts is that every fact well pleaded, if material to the issue, stands admitted by a failure to deny it; and this is the rule adopted by the codes.³

tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact — a persuasion either affirmative or disaffirmative of its existence." Bentham's *Rationale of Judicial Evidence* 208.

1. Peake's *Evidence* (Am. ed.) 7.

2. Facts Expressly Admitted by the Pleadings. — *Crater v. McCormick*, 4 Colo. 196; *Fergus v. Tinkham*, 38 Ill. 409; *Hambell v. O'Neal*, 39 Iowa 562; *Leffel v. Schermerhorn*, 13 Neb. 344; *White v. Smith*, 46 N. Y. 418; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Quinby v. Carhart*, 133 N. Y. 579, 44 N. Y. St. Rep. 666; *Oliver v. Moore*, 23 Ohio St. 473.

A Finding by Court or Jury Contrary to Such Admission Set Aside. — Should the court or jury find contrary to the facts admitted in the pleadings, such finding would be erroneous and would be set aside. *Oliver v. Moore*, 23 Ohio St. 473; *Crater v. McCormick*, 4 Colo. 196; *Lettick v. Honnold*, 63 Ill. 335.

"The findings ignore the existence of the watercourse admitted by the pleading and proved by the evidence, and of an embankment in the channel of the stream. A finding which negatives the existence of a fact admitted by the pleadings is a finding against evidence, and the judgment rendered thereon is erroneous." *Silvey v. Neary*, 59 Cal. 97.

Part of Admission May Be Used Against Party Making It. — An admission in a pleading may be used by the adverse party as far as it makes in his favor, and he may deny the rest. By using the favorable part he is not estopped to deny the unfavorable part. *Mott v. Consumers' Ice Co.*, 73 N. Y. 543.

Where the complaint was for work and materials, and set forth the items specifically, both of labor and material, amounting to \$541.90, and it then claimed a balance due therefor "after deducting all payments made by defendant to the plaintiffs thereon, of \$175.75," and the defendant pleaded a general denial, the court held that the plaintiff, by the above language, admitted the payment of a

sum equal to the difference between the total amount alleged and the amount still alleged to be due. *White v. Smith*, 46 N. Y. 418.

3. Effect of Failure to Deny. — *Andrews' Stephen's Pleading* 276; *De Putron v. Young*, 134 U. S. 241; *Silvey v. Neary*, 59 Cal. 97; *Cunningham v. Norton*, (Cal. 1895) 40 Pac. Rep. 491; *Wilson v. Hawthorne*, 14 Colo. 530, 20 Am. St. Rep. 290; *Teller v. Hartman*, 16 Colo. 447; *Fergus v. Tinkham*, 38 Ill. 409; *McNeal v. Calkins*, 50 Ill. App. 17; *McMillan v. Gambill*, 115 N. Car. 352; *Calkins v. Seabury-Calkins Consol. Min. Co.*, 5 S. Dak. 299.

Miscellaneous Cases. — Where the defendant in a plea in abatement made an admission, and upon such plea being overruled he answered a general denial, it was held that he was not bound by his former admission. *Watters v. Parker*, (Tex. 1892) 19 S. W. Rep. 1022.

Where amended pleadings have been filed, an admission contained in the original pleading may be considered by the court without its being formally read in evidence. *Smith v. Pelott*, (Supreme Ct.) 18 N. Y. Supp. 301, 63 Hun (N. Y.) 632.

In *Beard v. Tilghman*, 66 Hun (N. Y.) 12, the plaintiff alleged that the deposit of certain bonds in controversy with the defendant was made in October, 1886, to secure an antecedent debt. This allegation was not denied in the answer, but an affirmative defense was pleaded inconsistent with it and depending on the fact that the deposit was made in February, 1882. It was held that evidence was inadmissible to prove the defense, as the defense was inconsistent with the allegation made in the complaint and not denied in the answer. See also *Fleischmann v. Stern*, 90 N. Y. 110.

A denial of any knowledge or information sufficient to form a belief as to a specified paragraph of a complaint is not a denial of the allegations in such paragraph. *Bidwell v. Overton*, 26 Abb. N. Cas. (N. Y. C. Pl.) 402; *Maxwell v. Higgins*, 38 Neb. 671.

b. FACTS ADMITTED IN OPEN COURT. — It frequently occurs that, notwithstanding facts are put in issue by the pleadings, the parties are ready to concede them upon the trial. This is done by making an admission of such facts in open court, and such admission is noted by the judge or official reporter, and thus becomes a part of the record.¹ Admissions thus made during the trial in any court will bind the party making them in any other court to which the case may be carried on appeal.² Such admissions may be made by the parties themselves or by counsel on behalf of their clients.³

2. Things of Which the Court Will Take Judicial Notice — *a. IN THE COURT OF FIRST INSTANCE.* — Facts of which the court will take judicial notice need not be alleged in the pleadings or proved at the trial.⁴

b. WHEN APPELLATE COURT WILL JUDICIALLY NOTICE. — An appellate court will judicially notice all facts of which the court of first instance could take judicial notice.⁵

c. WHEN APPELLATE COURT WILL NOT JUDICIALLY NOTICE. — Where the court of first instance cannot properly take judicial notice of facts, such facts will not be judicially noticed in the appellate court.⁶

d. WHAT WILL BE JUDICIALLY NOTICED. — A full treatment of the matters of which courts will take judicial notice is reserved for a subsequent title to which reference is here made.⁷

3. Things Presumed — *a. THINGS PRESUMED IN LAW.* — Whenever as a

Where a suit was brought on a written guaranty which was set out at length in the complaint and which guaranty recited that it was given "for value received," and the answer admitted the truth of the matters contained in the plaintiff's complaint, a further and separate defense that the guaranty was given without consideration was held bad for repugnance, as the admission was inconsistent with the defense. *Gulliver v. Fowler*, 64 Conn. 556.

An admission that a city made a contract is an admission that the city had the power to make it. *Plankinton v. Gray*, 63 Fed. Rep. 415, 27 U. S. App. 321.

Where the deed is pleaded in the petition and there is no denial of its execution in the answer, but on the contrary an averment that the defendants, not knowing the facts, neither admit nor deny the allegations of the petition in regard to the conveyance therein alleged, the deed must be taken as admitted. *Maxwell v. Higgins*, 38 Neb. 671.

In an action on a promissory note for one thousand dollars, payable to the order of the defendant, and indorsed by him, the complaint, after setting forth the note, alleged that it was indorsed to the plaintiffs, before maturity, by the defendant, in payment of an indebtedness of about one thousand dollars for goods theretofore purchased by him. The answer did not deny any of the allegations of the complaint; it alleged the note was made for the defendant's accommodation, and was indorsed to the plaintiffs upon a usurious agreement, whereby they were to give him for the note \$941.92, and credit for \$35.83 more, thus taking \$7.10 more than lawful interest. The answer demanded a dismissal with costs and disbursements. It was held that the answer did not put the averments of the complaint in issue, and as by the Code of Civil Procedure, § 522, "each material allegation of the complaint not controverted by the answer * * * must, for the purposes of the action,

be taken as true," the defendant was not at liberty to deny the existence of the facts constituting the cause of action stated in the complaint, or to prove any state of facts inconsistent therewith; that the omission to deny was equivalent to a formal admission of the truth of the averments, and was conclusive as such. *Fleischmann v. Stern*, 90 N. Y. 110.

1. Facts Admitted in Open Court. — *McKelvey on Evidence* 16; *The Steam Tug Harry*, 9 Ben. (U. S.) 524, 11 Fed. Cas. No. 6,147; *Haas v. Chicago Bldg. Soc.*, 80 Ill. 248; *Marsh v. Mitchell*, 26 N. J. Eq. 497.

2. See the title **ADMISSIONS**, vol. 1, p. 698, for a full discussion of this subject.

3. See the titles **ADMISSIONS**, vol. 1, p. 698; **ATTORNEY AND CLIENT**, vol. 3, p. 353, where the question is fully discussed and the authorities are collected.

4. Judicial Notice — Trial Court. — *Cooke v. Tallman*, 40 Iowa 133; *Shaw v. Tobias*, 3 N. Y. 188.

In many states this rule has found place in the codes of procedure. Code Iowa 1873, § 2722; Code Civ. Pro. Neb., § 136; Dig. Ark. 1874, § 4598; Code Civ. Pro. Kan., § 130; Code Civ. Pro. Ohio, § 129; Code Ind. (Revision of 1884), § 377; Bullitt's Code Ky., § 119; Wagn. Stat. Mo. 1920, § 39.

If a fact of which the court will take judicial notice be erroneously pleaded, a demurrer does not admit such erroneous statement of fact, but the party filing the demurrer will be entitled to the advantage of the fact, as the court will judicially notice it. It was so held where the pleadings misstated the relative location of certain counties. The court took judicial notice of their true location with reference to each other, notwithstanding it was incorrectly alleged in the pleading. *Cooke v. Tallman*, 40 Iowa 133.

5. Appellate Court. — *Hanley v. Donoghue*, 116 U. S. 1; *Downing v. Miltonvale*, 36 Kan. 740.

6. *Hanley v. Donoghue*, 116 U. S. 1.

7. See the title **JUDICIAL NOTICE**.

matter of law the court will presume the existence of a fact, such fact need not be pleaded, and no proof of its existence is necessary or admissible.⁴

b. THINGS PRESUMED AS FACTS. — Presumptions of fact as distinguished from presumptions of law will not relieve a party from the necessity of pleading the fact so presumed.²

c. WHAT WILL BE PRESUMED. — The whole subject of presumptions will be found treated under a separate title.³

V. DEGREES OF PROOF — **1. Evidence and Proof Distinguished.** — When accurately used, evidence and proof are not synonymous. Proof is rather the effect or result of evidence, and evidence is the means or medium by which proof is produced.⁴

2. Demonstration. — Demonstration is that high degree of evidence that is found only in the exact sciences and which excludes all possibility of error.⁵

3. Moral Evidence. — All evidence not obtained either from demonstration or from intuition is called moral evidence.⁶ It is therefore moral evidence by which the existence or nonexistence of disputed facts is ordinarily established in courts of justice. A greater or less degree of probability is all that can be reasonably required to establish controverted facts.⁷

1. Things Presumed in Law. — *Farmers', etc., Bank v. Wadsworth*, 24 N. Y. 547; *Steamboat Northern Indiana v. Milliken*, 7 Ohio St. 383; *Sheehan v. Davis*, 17 Ohio St. 571.

2. Things Presumed as Facts. — "Presumptions of law need not be stated in the pleading; * * * but this is not the rule as to presumptions of fact. As a general rule, all the facts which are ingredients in the cause of action must be specifically alleged in the petition, even though upon the trial proof of certain of those facts will raise a presumption and be therefore *prima facie* evidence of the existence of other facts. Thus, for instance, the possession of recently stolen property is evidence from which presumption of fact arises that the possessor is a thief. But it would not do in charging the offense to simply allege that the defendant was in possession of property recently stolen. The fact that he stole it must be distinctly charged. So here the fact that the paper was illegally or fraudulently put in circulation does not of itself give a right of action against any party it is found in possession of. A further fact must exist, and that is that he does not occupy the position of an innocent purchaser for value. Now, this fact must be alleged in the petition, although it may be that, upon the trial, proof that the paper was illegally or fraudulently put in circulation in the first instance will raise a presumption of fact that the holder is not an innocent holder, and cast upon him the burden of proving the *bona fides* of his possession." *Draper v. Cowles*, 27 Kan. 488 [citing *Gregory v. McFarland*, 1 Duv. (Ky.) 59; *Meriden Britannia Co. v. Whedon*, 31 Conn. 118; *Van De Sande v. Hall*, 13 How. Pr. (N. Y. Supreme Ct.) 458].

In *Van De Sande v. Hall*, 13 How. Pr. (N. Y. Supreme Ct.) 458, the defendant alleged fraud and misrepresentation on the part of the plaintiff, but failed to allege that he was misled by such representations or that his belief in the truth of the representations induced him to enter into the contract. It was held that the defendant must allege in his answer every fact relied on as a defense, and that an averment of a fact cannot be dispensed with because it

may be presumed from the existence of other facts.

3. See the title PRESUMPTIONS.

4. Distinction Between Evidence and Proof. — 1 *Greenl. Ev.*, § 1; *Schloss v. His Creditors*, 31 Cal. 203; *Tift v. Jones*, 77 Ga. 190; *Perry v. Dubuque, etc., R. Co.*, 36 Iowa 106; *Glenn v. State*, 64 Miss. 726.

Proof a Question for Jury. — In *Glenn v. State*, 64 Miss. 726, the trial court instructed that in determining the credibility of any witness the jury might take into consideration, among other things, "proof of his having made statements which he denies under oath." It was held that the trial court confounded the word "proof" with that of "evidence." Whether such fact had been proved was a question for the jury, and not for the court.

"Should a judge declare what has been proved, he would violate a statute of this state and usurp the functions of the jury, but there are many purposes for which he may rightly state matters which are in evidence." *Tift v. Jones*, 77 Ga. 190.

"In a legal sense, proof signifies the effect of evidence, as contradistinguished from evidence which implies the medium or means of proof. But in ordinary language the terms are used interchangeably, and the word 'proof' is used when evidence only is meant. Now, while it is true that the facts stated in the instruction may not be proof of the defendant's negligence, yet it may well be considered as evidence tending to establish that fact. Inasmuch as the instruction might have been misunderstood by the jury, it was properly refused." *Perry v. Dubuque, etc., R. Co.*, 36 Iowa 106.

5. 1 Greenl. Ev., § 1.

6. Moral Evidence. — 1 *Greenl. Ev.*, § 1; *Bradner on Ev.*, § 15; *Gambier's Moral Ev.* 121; *Hopper v. Ashley*, 15 Ala. 467; *Morrison v. State*, 13 Neb. 528.

7. 1 Greenl. Ev., § 1; *Bradner on Ev.*, § 15; *Gambier's Moral Ev.* 121; *Reg. v. White*, 4 F. & F. 383; *Hopper v. Ashley*, 15 Ala. 467; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Com. v. Tuttle*, 12 Cush. (Mass.) 502; *Com. v. Cobb*, 14 Gray (Mass.) 57; *Com. v.*

4. Satisfactory Evidence. — By satisfactory evidence is meant that degree of evidence that satisfies the unprejudiced mind to that degree of certainty required in the particular case under consideration.¹ Hence evidence that might be entirely satisfactory to sustain a verdict for damages in a civil case might be quite unsatisfactory and entirely insufficient to sustain a verdict of guilty in a criminal case based on the same allegations of fact. Things are said to be proved when by competent evidence they are established to that degree of certainty required in the particular case.²

5. Competent Evidence. — Competent evidence is that kind of evidence which the facts in issue require as the fit and appropriate means for their establishment in the particular case.³

6. Conclusive Proof. — Conclusive proof means evidence upon the production of which, or a fact upon the proof of which, the judge is bound by law to regard some fact as proved, and to exclude evidence intended to disprove it.⁴

7. Partial Evidence. — Partial evidence is evidence of one or more of a series of facts which tend to prove or disprove a fact in issue.⁵

8. Corroborative Evidence. — Corroborative evidence is additional evidence tending to prove similar facts, or facts tending to produce the same result as facts already given in evidence.⁶

9. Cumulative Evidence. — Cumulative evidence is additional evidence of the same kind tending to prove the same point as other evidence already given.⁷ Evidence of other and different circumstances tending to establish or disprove the same fact is not cumulative.⁸

10. Preponderance of Evidence — *a. CIVIL CASES.* — In all civil cases the issues are determined by a preponderance of the evidence.⁹

Costley, 118 Mass. 1; *Kenney v. Hannibal*, etc., R. Co., 70 Mo. 248; *Morrison v. State*, 13 Neb. 528.

1. Satisfactory Evidence. — *Bradner on Ev.*, § 16; 1 *Jones on Ev.*, § 6; *Thayer v. Boyle*, 30 Me. 481; *Kenney v. Hannibal*, etc., R. Co., 70 Mo. 248; *Missouri Pac. R. Co. v. Bartlett*, 81 Tex. 44.

2. Snodgrass v. Clark, 44 Ala. 203; *People v. Brotherton*, 47 Cal. 406; *Morrison v. State*, 13 Neb. 528; *Daly v. Byrne*, 77 N. Y. 188; *Irvin v. State*, 7 Tex. App. 109; *Jackson v. State*, 9 Tex. App. 124.

Measure of Proof. — The measure of proof sufficient to warrant the verdict of a jury varies much according to the nature of the case. Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact. *Thayer v. Boyle*, 30 Me. 481.

3. Competent Evidence. — *Bradner on Ev.*, § 13; *Shea v. Mabry*, 1 Lea (Tenn.) 319.

4. Conclusive Proof. — *Stephen's Dig. of Ev.*, art. 1.

5. Underhill on Ev., § 2.

6. Underhill on Ev., § 2. See the title CORROBORATIVE EVIDENCE, vol. 7, p. 866.

7. Cumulative Evidence. — *Olmstead v. Hill*, 2 Ark. 352; *Waller v. Graves*, 20 Conn. 310; *Zouker v. Wiest*, 42 Ind. 170; *German v. Maquoketa Sav. Bank*, 38 Iowa 370; *Glidden v. Dunlap*, 28 Me. 383; *Parker v. Hardy*, 24 Pick. (Mass.) 246; *Fleming v. Hollenback*, 7 Barb. (N. Y.) 278; *Parshall v. Klinck*, 43 Barb. (N. Y.) 212; *Guyot v. Butts*, 4 Wend. (N. Y.) 582; *People v. Superior Ct.*, 10 Wend. (N. Y.) 293.

Cumulative evidence is evidence of the same

kind, to the same point. 1 *Greenl. Ev.*, § 2; *Bradner on Ev.*, § 12.

Admissions Cumulative. — After one admission has been introduced to prove a fact in issue, the other admissions tending to prove the same fact would be cumulative. *Hines v. Driver*, 100 Ind. 327. See the title CUMULATIVE EVIDENCE, vol. 8, p. 462.

8. Houston v. Bruner, 39 Ind. 384; *Kochel v. Bartlett*, 88 Ind. 241; *Hines v. Driver*, 100 Ind. 327; *Parker v. Hardy*, 24 Pick. (Mass.) 246; *Halstead v. Horton*, 38 W. Va. 733. See the title CUMULATIVE EVIDENCE, vol. 8, p. 462.

Adverse Evidence Not Cumulative. — Evidence of the same kind and to the same point must be additional in order to be cumulative, if it is antagonistic, although of the same kind and to the same point, it is not cumulative. *Halstead v. Horton*, 38 W. Va. 733. See the title CUMULATIVE EVIDENCE, vol. 8, p. 462.

9. Preponderance of Evidence — *Civil Cases* — *United States*. — *Scott v. Home Ins. Co.*, 1 Dill. (U. S.) 105; *U. S. v. Shapleigh*, 12 U. S. App. 26; *New York Acc. Ins. Co. v. Clayton*, 19 U. S. App. 304.

Arkansas. — *Yarbrough v. Arnold*, 20 Ark. 598.

Connecticut. — *Munson v. Atwood*, 30 Conn. 102; *Mead v. Husted*, 52 Conn. 56, 52 Am. Rep. 554.

Illinois. — *Robinson v. Randall*, 82 Ill. 521; *Taylor v. Pegram*, 151 Ill. 118.

Indiana. — *Bissell v. Wert*, 35 Ind. 54.

Iowa. — *Welch v. Jugenheimer*, 56 Iowa 11, 41 Am. Rep. 77; *Coit v. Churchill*, 61 Iowa 206.

Maine. — *Knowles v. Scribner*, 57 Me. 495; *Ellis v. Buzzell*, 60 Me. 209, 11 Am. Rep. 204.

Massachusetts. — *Schmidt v. New York Union*

b. QUASI-CRIMINAL CASES. — In cases criminal merely in form, but prosecuted to enforce a civil liability, a mere preponderance of the evidence is sufficient to sustain a verdict.¹

c. CIVIL CASES BASED ON CRIMINAL ACT. — While there is some conflict of authority, the general rule is that in civil cases where the action or defense is based on a criminal act such criminal act may be established by a mere preponderance of the evidence.²

Mut. F. Ins. Co., 1 Gray (Mass.) 529; Gordon v. Parmelee, 15 Gray (Mass.) 413.

Michigan. — *Hough v. Dickinson, 58 Mich. 89.*
Minnesota. — *Burr v. Willson, 22 Minn. 206; Thoreson v. Northwestern Nat. Ins. Co., 29 Minn. 107.*

Missouri. — *Rothschild v. American Cent. Ins. Co., 62 Mo. 356; Chaney v. Phoenix Ins. Co., 62 Mo. App. 45.*

Nebraska. — *Union Stock Yards Co. v. Conoyer, 41 Neb. 629.*

New Hampshire. — *Folsom v. Brawn, 25 N. H. 114.*

New York. — *Seybolt v. New York, etc., R. Co., 95 N. Y. 562, 47 Am. Rep. 75.*

Ohio. — *Jones v. Greaves, 26 Ohio St. 2, 20 Am. Rep. 752.*

1. Rule in Quasi-criminal Cases. — *U. S. v. Shapleigh, 12 U. S. App. 26; Mann v. People, 35 Ill. 467; Maloney v. People, 38 Ill. 62; Allison v. People, 45 Ill. 37; People v. Christman, 66 Ill. 162; Knowles v. Scribner, 57 Me. 495; Young v. Makepeace, 103 Mass. 50; Roberge v. Burnham, 124 Mass. 277; O'Connell v. O'Leary, 145 Mass. 311; Richardson v. Burleigh, 3 Allen (Mass.) 479; Semon v. People, 42 Mich. 141; State v. Nichols, 29 Minn. 357.*

Cases of Moral Dereliction. — In a case of a quasi-criminal nature when the issue involved a charge of moral dereliction, it was held that a preponderance of evidence was all that was necessary to sustain a verdict. *McBee v. Bowman, 89 Tenn. 138.*

Bastardy Cases. — See the title **BASTARDY**, vol. 3, p. 871.

Action for Penalty. — Where an action is brought to recover a penalty it is regarded as a civil action, and a mere preponderance of the evidence is sufficient to sustain a recovery. *Roberge v. Burnham, 124 Mass. 277; O'Connell v. O'Leary, 145 Mass. 311.*

2. Civil Cases Based on Criminal Act — *Connecticut.* — *Munson v. Atwood, 30 Conn. 102; Mead v. Husted, 52 Conn. 57, 52 Am. Rep. 554.*

Indiana. — *Bissell v. Wert, 35 Ind. 54.*

Iowa. — *Welch v. Jugenheimer, 56 Iowa 11, 41 Am. Rep. 77; Behrens v. Germania Ins. Co., 58 Iowa 26.*

Maine. — *Ellis v. Buzzell, 60 Me. 209, 11 Am. Rep. 204.*

Massachusetts. — *Schmidt v. New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529; Gordon v. Parmelee, 15 Gray (Mass.) 413; Roberge v. Burnham, 124 Mass. 277.*

Michigan. — *Peoples v. Evening News Assoc., 51 Mich. 11; Knop v. National F. Ins. Co., 107 Mich. 323.*

Minnesota. — *Burr v. Willson, 22 Minn. 206; Thoreson v. Northwestern Nat. Ins. Co., 29 Minn. 107.*

Missouri. — *Rothschild v. American Cent. Ins. Co., 62 Mo. 356.*

New Hampshire. — *Folsom v. Brawn, 25 N. H. 114.*

New Jersey. — *Kane v. Hibernia Ins. Co., 39 N. J. L. 697, 23 Am. Rep. 239.*

New York. — *Seybolt v. New York, etc., R. Co., 95 N. Y. 562, 47 Am. Rep. 75.*

Ohio. — *Bell v. McGinness, 40 Ohio St. 204, 48 Am. Rep. 673.*

Texas. — *Heiligmann v. Rose, 81 Tex. 222, 26 Am. St. Rep. 804.*

Vermont. — *Weston v. Gravlin, 49 Vt. 507.*

Wisconsin. — *Blaeser v. Milwaukee Mechanics' Mut. Ins. Co., 37 Wis. 31, 19 Am. Rep. 747.*

The English Rule. — Where a criminal act is directly in issue in a civil case it must be proved beyond a reasonable doubt the same as in a criminal case. *Taylor on Ev., § 112; Stephen's Digest of Ev., art. 94; Wilmet v. Harmer, 8 C. & P. 695, 34 E. C. L. 589; Thurtell v. Beaumont, 1 Bing. 339, 8 E. C. L. 538; Chalmers v. Shackell, 6 C. & P. 475, 25 E. C. L. 496.*

The English Rule Followed in Some Jurisdictions. — In a few cases decided by the courts in the United States the English rule has been followed. *Merk v. Gelzhauser, 50 Cal. 631; Schultz v. Pacific Ins. Co., 14 Fla. 73; Williams v. Gunnels, 66 Ga. 521; Sprague v. Dodge, 48 Ill. 142, 95 Am. Dec. 523; Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98; Lanter v. McEwen, 8 Blackf. (Ind.) 495; Tucker v. Call, 45 Ind. 31; Barton v. Thompson, 46 Iowa 30, 26 Am. Rep. 131; Mott v. Dawson, 46 Iowa 533; Polston v. See, 54 Mo. 291; Steinman v. McWilliams, 6 Pa. St. 170.*

English Rule Abandoned. — In some of the states the English rule, after having prevailed for a time, has been abandoned, and the rule approved by the great weight of American authority has been adopted. *Kane v. Hibernia Ins. Co., 39 N. J. L. 697, 23 Am. Rep. 239; Adams v. Thornton, 78 Ala. 489, 56 Am. Rep. 49; Ellis v. Buzzell, 60 Me. 209, 11 Am. Rep. 204.*

In Libel and Slander. — See the title **LIBEL AND SLANDER**.

False Representations. — See the title **FRAUD AND DECEIT**.

Malicious Mischief. — See the title **MALICIOUS MISCHIEF**.

Larceny. — See the title **LARCENY**.

In Cases of Adultery. — See the title **DIVORCE**, vol. 9, p. 723.

Insurance Cases. — The rule that a preponderance of the evidence is sufficient has been applied in a large number of cases to the wilful burning of property covered by insurance. *Continental Ins. Co. v. Jachnichen, 110 Ind. 59, 59 Am. Rep. 194; Behrens v. Germania Ins. Co., 58 Iowa 26; Aetna Ins. Co. v. Johnson, 11 Bush (Ky.) 587, 21 Am. Rep. 223; Wightman v. Western M. & F. Ins. Co., 8 Rob.*

11. Proof Beyond a Reasonable Doubt. — In all criminal prosecutions the guilt of the accused must be established beyond a reasonable doubt. The proof must not only be consistent with his guilt, but must exclude every reasonable hypothesis of his innocence.¹

(La.) 442; *Decker v. Somerset Mut. F. Ins. Co.*, 66 Me. 406; *Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray (Mass.) 529; *Rothschild v. American Cent. Ins. Co.*, 62 Mo. 356; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697, 23 Am. Rep. 239; *Somerset County Mut. F. Ins. Co. v. Usaw*, 112 Pa. St. 89, 56 Am. Rep. 307; *Blaeser v. Milwaukee Mechanics' Mut. Ins. Co.*, 37 Wis. 31, 19 Am. Rep. 747. *Contra*, *Schultz v. Pacific Ins. Co.*, 14 Fla. 73; *McConnell v. Delaware Mut. Safety Ins. Co.*, 18 Ill. 228; *Germania F. Ins. Co. v. Klewer*, 129 Ill. 599; *Barton v. Thompson*, 46 Iowa 30, 26 Am. Rep. 131. See the title REASONABLE DOUBT.

Form of Issue. — Some courts have attempted to draw a distinction between cases where the criminal act is pleaded as the basis of an action or a defense and cases in which the criminal act is only incidentally drawn in controversy. *Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray (Mass.) 529; *Hahnemannian L. Ins. Co. v. Beebe*, 48 Ill. 87, 95 Am. Dec. 519; *Kane v. Hibernia Mut. F. Ins. Co.*, 38 N. J. L. 441, 20 Am. Rep. 409.

Presumption of Innocence. — Where the criminal act charged is one involving a criminal intent, the presumption of innocence will avail in a civil as well as a criminal case, and the evidence of the adverse party must be strong enough to overcome this presumption, but need not exclude every reasonable doubt as in a criminal case. *Bradish v. Bliss*, 35 Vt. 326; *Decker v. Somerset Mut. F. Ins. Co.*, 66 Me. 406; *Hills v. Goodyear*, 4 Lea (Tenn.) 233, 40 Am. Rep. 5; *Jones v. Greaves*, 26 Ohio St. 2, 20 Am. Rep. 752.

1. Criminal Cases — Degree of Proof — England. — *Reg. v. White*, 4 F. & F. 383.

United States. — *U. S. v. McKenzic*, 35 Fed. Rep. 826; *U. S. v. Meagher*, 37 Fed. Rep. 875; *Miles v. U. S.*, 103 U. S. 304; *Hopt v. Utah*, 120 U. S. 430.

Alabama. — *Mickle v. State*, 27 Ala. 20; *Faulk v. State*, 52 Ala. 415; *West v. State*, 76 Ala. 98; *McKee v. State*, 82 Ala. 32; *Perry v. State*, 87 Ala. 30.

California. — *People v. Flynn*, 73 Cal. 511; *People v. Dilwood*, 94 Cal. 89.

Colorado. — *Kelly v. People*, 17 Colo. 130; *Graves v. People*, 18 Colo. 170.

Florida. — *Hunter v. State*, 29 Fla. 486; *Woodruff v. State*, 31 Fla. 320; *Kennedy v. State*, 31 Fla. 428.

Georgia. — *Orr v. State*, 34 Ga. 345; *Davis v. State*, 74 Ga. 869; *McDuffie v. State*, 90 Ga. 786.

Illinois. — *Weaver v. People*, 132 Ill. 536.

Indiana. — *Beavers v. State*, 58 Ind. 530; *Coleman v. State*, 111 Ind. 563; *Cross v. State*, 132 Ind. 65.

Iowa. — *State v. Porter*, 34 Iowa 135; *State v. Maxwell*, 42 Iowa 209; *State v. Grant*, 80 Iowa 216.

Kansas. — *State v. Hunter*, 50 Kan. 302.

Maine. — *Knowles v. Scribner*, 57 Me. 497.

Massachusetts. — *Com. v. Webster*, 5 Cush.

(Mass.) 295, 52 Am. Dec. 711; *Com. v. Costley*, 118 Mass. 1; *Com. v. Robinson*, 146 Mass. 571.

Minnesota. — *State v. Johnson*, 37 Minn. 493.

Mississippi. — *Algheri v. State*, 25 Miss. 584; *Browning v. State*, 33 Miss. 47; *James v. State*, 45 Miss. 572.

Missouri. — *State v. Blunt*, 91 Mo. 503; *State v. Moxley*, 102 Mo. 375; *State v. Turner*, 110 Mo. 196; *State v. Woolard*, 111 Mo. 248; *State v. Avery*, 113 Mo. 475.

Montana. — *Territory v. Owings*, 3 Mont. 137.

Nebraska. — *Walbridge v. State*, 13 Neb. 236; *Bradshaw v. State*, 17 Neb. 147; *Kaiser v. State*, 35 Neb. 704.

New Jersey. — *Gardner v. State*, 55 N. J. L. 17.

New York. — *People v. Kerr*, (Oyer & T. Ct.) 6 N. Y. Crim. Rep. 406.

North Carolina. — *State v. Brewer*, 98 N. Car. 607; *State v. Whitson*, 111 N. Car. 695.

Oregon. — *State v. Anderson*, 10 Oregon 448.

Pennsylvania. — *Com. v. Harman*, 4 Pa. St. 274; *Somerset County Mut. F. Ins. Co. v. Usaw*, 112 Pa. St. 89, 56 Am. Rep. 307; *McMeen v. Com.*, 114 Pa. St. 300.

South Carolina. — *State v. Milling*, 35 S. Car. 16; *State v. Davenport*, 38 S. Car. 348.

Tennessee. — *McBee v. Bowman*, 89 Tenn. 138.

Texas. — *Williamson v. State*, 30 Tex. App. 330; *Black v. State*, 1 Tex. App. 368; *Bramlette v. State*, 21 Tex. App. 611, 57 Am. Rep. 622; *Gentry v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 551; *Pierce v. State*, (Tex. Crim. App. 1893) 22 S. W. Rep. 587.

Virginia. — *Dean v. Com.*, 32 Gratt. (Va.) 912; *Taylor v. Com.*, 90 Va. 109.

Washington. — *Leonard v. Territory*, 2 Wash. Ter. 381.

Wyoming. — *Palmerston v. Territory*, 3 Wyoming 333.

See the title REASONABLE DOUBT.

Circumstances Not Sufficient. — The evidence in criminal cases must exclude every other hypothesis but that of the guilt of the party. Circumstances satisfactorily proven which point to the guilt of the party and which are irreconcilable with the hypothesis of his innocence are not sufficient to warrant a conviction. *Orr v. State*, 34 Ga. 345.

Mere Doubt Will Not Justify Acquittal. — A mere doubt of a prisoner's guilt is not sufficient to warrant acquittal; but a doubt, to work an acquittal, must be serious and substantial, not the mere possibility of a doubt. If the evidence causes a conviction in the minds of the jurors beyond a reasonable doubt they are bound to convict. *Com. v. Harman*, 4 Pa. St. 269.

The Doubt Must Arise from the Evidence. — The rule that in a criminal prosecution the state must, in order to convict the prisoner, establish his guilt beyond a reasonable doubt, or to the exclusion of every other hypothesis, is limited to cases where the doubt or hypothesis arises out of the evidence introduced, and does

VI. FUNCTIONS OF JUDGE AND JURY — 1. Questions of Law for the Judge. —

The presiding judge is charged with the general conduct of jury trials, and as such decides all questions of law and practice arising in the progress of the proceedings.¹

not extend to facts which may possibly exist, and of which there is no proof. *State v. Porter*, 34 Iowa 135.

In a criminal case the jurors, in order to convict, ought to be satisfied by the evidence, affirmatively, as a conviction created in their minds beyond all reasonable doubt, that the guilt of the prisoner is established. And if there is only an impression of probability, they ought to acquit him. *Reg. v. White*, 4 F. & F. 383.

The evidence in criminal cases must, in order to convict, convince beyond a reasonable doubt, which is not proof beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof "to a moral certainty," as distinguished from an absolute certainty. *Com. v. Costley*, 118 Mass. 1.

Where there is no hypothesis by which, in the order of natural causes and effects, the facts proved can be explained consistently with the innocence of the prisoner, they will warrant a conviction. This is the true test of the weight of circumstantial evidence. It excludes all reasonable doubt of the prisoner's guilt. *Beavers v. State*, 58 Ind. 530.

It is not sufficient, in a case of circumstantial evidence, that the circumstances proved coincide with the hypothesis sought to be established by the prosecution; but they must exclude to a moral certainty every other hypothesis, or the jury must find the defendant not guilty. *Black v. State*, 1 Tex. App. 368.

Where the evidence leaves it indifferent which of several hypotheses is true, or established only some finite probability in favor of one hypothesis, such evidence cannot amount to proof sufficient to convict. *Algeri v. State*, 25 Miss. 584.

When Circumstantial Evidence Is Sufficient. — Circumstantial evidence must always be scanned with great caution, and can never justify a verdict of guilty, especially of murder in the first degree, the penalty of which is death, unless the circumstances proved are of such a character and tendency as to produce upon a fair and unprejudiced mind a moral conviction of the guilt of the accused beyond all reasonable doubt. *Dean v. Com.*, 32 Gratt. (Va) 912.

Reasonable Doubt Applies Only to Whole Case. — Where, in a criminal trial, the judge fully and fairly charged the jury concerning the law of reasonable doubt, he was not bound to give an instruction requested, in effect that if the jurors had a reasonable doubt as to the existence of some particular and specially enumerated fact, or what should be the proper inference therefrom, it would be their duty to give the accused the benefit of their doubt. *McDuffie v. State*, 90 Ga. 786.

"The law does not require that the jury shall believe that every fact in a criminal case has been proved beyond a reasonable doubt,

before they can find accused guilty. The reasonable doubt the jury is permitted to entertain must be as to the guilt of the accused on the whole of the evidence, and not as to any particular fact in the case." *Weaver v. People*, 132 Ill. 536.

Every Fact Essential to Guilt Must Be Established Beyond Reasonable Doubt. — In order to warrant a conviction on circumstantial evidence, each fact necessary to the conclusion sought to be proved must be established by competent evidence beyond a reasonable doubt; all the facts must be consistent with each other and with the main fact sought to be proved; and the circumstances taken together must be of a conclusive nature, leading as a whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused and no other person committed the offense charged. *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

An instruction that the jury must be satisfied beyond a reasonable doubt "and believe as reasonable men" that the evidence is sufficient cannot be construed as prejudicial to the defendants, since technically it adds a further requirement to that legally necessary to find them guilty. *State v. Grant*, 86 Iowa 216.

Each Link in the Chain. — The following instruction was given: "The rule requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony all together, the jury are satisfied beyond a reasonable doubt that the defendant is guilty." It was held that this instruction was erroneous because the use of the words "each link" was misleading. *Leonard v. Territory*, 2 Wash. Ter. 381.

In *People v. Dilwood*, 94 Cal. 89, an instruction was as follows: "As mathematical or absolute certainty is seldom to be obtained in human affairs, reason and public utility require that jurors, as well as all mankind, in forming their opinion of facts, should be regulated by the superior number of probabilities on the one side or the other, whether the amount of those probabilities be expressed in words, or arguments, or by figures and numbers." This instruction was held prejudicial error, and was not cured by an instruction correctly stating the law.

1. Questions of Law for Judge — United States. — *Chicago Cheese Co. v. Fogg*, 53 Fed. Rep. 72. *California.* — *People v. Lem You*, 97 Cal. 224.

Iowa. — *Chandler v. Knott*, 86 Iowa 113.

Maryland. — *Ricards v. Wedemeyer*, 75 Md. 10.

Massachusetts. — *Com. v. Abbott*, 13 Met. (Mass.) 123.

Michigan. — *Sherwood v. Chicago, etc., R. Co.*, 88 Mich. 108.

Construction of Pleadings. — It is the duty of the court to construe the pleadings in the case and instruct the jury what issues of fact are raised by them.¹

Construction of Contracts. — It is the duty of the court to construe written contracts,² and this is true even though the contract is evidenced by voluminous mutual correspondence of the parties. Whether such correspondence makes a contract, and its proper construction, are questions for the court.³

Missouri. — *Wright v. Fonda*, 44 Mo. App. 634; *Willard v. A. Seigel Gas-Fixture Co.*, 47 Mo. App. 1.

New Hampshire. — *Pierce v. State*, 13 N. H. 536; *State v. Hodge*, 50 N. H. 510.

New York. — *People v. Pine*, 2 Barb. (N. Y.) 566; *Campbell v. Jimenes*, 3 Misc. Rep. (N. Y. C. Pl.) 516.

North Carolina. — *Simpson v. Pegram*, 112 N. Car. 541.

Pennsylvania. — *Com. v. McManus*, 143 Pa. St. 64; *Elliott v. Wanamaker*, 155 Pa. St. 67.

Texas. — *Kidwell v. Carson*, 3 Tex. Civ. App. 327.

Virginia. — *Brown v. Com.*, 86 Va. 466.

See the title **QUESTIONS OF LAW AND FACT.**

Court Instructs Jury on Law. — It is the duty of the judge to instruct the jury as to the law, and it is the duty of the jury to follow the law as laid down by the court. *Brown v. Com.*, 86 Va. 466; *People v. Pine*, 2 Barb. (N. Y.) 566; *Com. v. McManus*, 143 Pa. St. 64; *State v. Hodge*, 50 N. H. 510; *Pierce v. State*, 13 N. H. 536. See the title **QUESTIONS OF LAW AND FACT.**

1. Pleadings to Be Construed by Court. — *Alexander v. Wheeler*, 69 Ala. 332; *Taylor v. Middleton*, 67 Cal. 656; *Glide v. Dwyer*, 83 Cal. 479; *De Graffenried v. Menard*, (Ga. 1898) 30 S. E. Rep. 560; *Smith v. Jackson*, 97 Iowa 112; *Earle v. Westchester F. Ins. Co.*, 29 Mich. 414; *Heller v. Chicago, etc., R. Co.*, 109 Mich. 53. See the title **QUESTIONS OF LAW AND FACT.**

2. Contracts to Be Construed by Court. — *England.* — *Neilson v. Harford*, 8 M. & W. 822; *Begg v. Forbes*, 30 Eng. L. & Eq. 508.

United States. — *Levy v. Gadsby*, 3 Cranch (U. S.) 180; *Goddard v. Foster*, 17 Wall. (U. S.) 123; *West v. Smith*, 101 U. S. 263; *Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 255; *U. S. v. Shaw*, 1 Cliff. (U. S.) 317; *Scanlan v. Hodges*, 52 Fed. Rep. 354, 10 U. S. App. 352.

California. — *Luckhart v. Ogden*, 30 Cal. 547.

Connecticut. — *Jennings v. Sherwood*, 8 Conn. 127; *Wooster v. Butler*, 13 Conn. 318; *School Dist. No. 8 v. Lynch*, 33 Conn. 333; *Auffmordt v. Stevens*, 46 Conn. 411.

District of Columbia. — *Payne v. Pomeroy*, 21 D. C. 243.

Illinois. — *Illinois Cent. R. Co. v. Cassell*, 17 Ill. 389.

Indiana. — *Reissner v. Oxley*, 80 Ind. 580; *Spence v. Owen County*, 117 Ind. 573.

Iowa. — *Snyder v. Kurtz*, 61 Iowa 593.

Kansas. — *Bell v. Keepers*, 37 Kan. 64; *Cosper v. Nesbit*, 45 Kan. 457.

Maine. — *Randall v. Thornton*, 43 Me. 226, 69 Am. Dec. 56.

Maryland. — *Warner v. Miltenberger*, 21 Md. 264, 83 Am. Dec. 573; *New York, etc., R. Co. v. Bates*, 68 Md. 184.

Massachusetts. — *Globe Works v. Wright*,

106 Mass. 216; *Nashua Iron, etc., Foundry Co. v. Chandler Adjustable Chair, etc., Co.*, 166 Mass. 419.

Michigan. — *Thompson v. Richards*, 14 Mich. 172; *McKenzie v. Sykes*, 47 Mich. 294; *Hayes v. Cummings*, 99 Mich. 206; *Brigham v. Martin*, 103 Mich. 150.

Missouri. — *Enterprise Soap Works v. Sayers*, 55 Mo. App. 15.

Nebraska. — *Coquillard v. Hovey*, 23 Neb. 627, 8 Am. St. Rep. 134; *Simms v. Summers*, 39 Neb. 781.

New Hampshire. — *Drew v. Towle*, 30 N. H. 531, 64 Am. Dec. 309.

New Jersey. — *Smith v. Clayton*, 29 N. J. L. 357.

New York. — *Campbell v. Jimenes*, 3 Misc. Rep. (N. Y. C. Pl.) 516; *Hassett v. McArdle*, 7 Misc. Rep. (N. Y. C. Pl.) 710.

North Carolina. — *Simpson v. Pegram*, 112 N. Car. 541; *Lindsay v. Hamburg Bremen Ins. Co.*, 115 N. Car. 212; *Millhiser v. Pleasants*, 118 N. Car. 257.

Ohio. — *Monnett v. Monnett*, 46 Ohio St. 30.

Pennsylvania. — *Welsh v. Dusai*, 3 Binn. (Pa.) 329; *Sidwell v. Evans*, 1 P. & W. (Pa.) 383, 21 Am. Dec. 387; *Folsom v. Cook*, 115 Pa. St. 539; *Harris v. Kelly*, (Pa. 1888) 13 Atl. Rep. 523; *Fidelity Title, etc., Co. v. Peoples Natural Gas Co.*, 150 Pa. St. 8; *Fisher v. South Williamsport*, 1 Pa. Super. Ct. Rep. 386.

South Carolina. — *Russell v. Arthur*, 17 S. Car. 477.

Tennessee. — *Louisville, etc., R. Co. v. Wynn*, 88 Tenn. 320.

Texas. — *Linch v. Paris Lumber, etc., Co.*, (Tex. 1890) 14 S. W. Rep. 701; *Gulf, etc., R. Co. v. Malone*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1077; *Tinsley v. Penniman*, 12 Tex. Civ. App. 591.

Vermont. — *Woodbury Granite Co. v. Mulliken*, 66 Vt. 465; *Cutler v. Dix*, 67 Vt. 347.

Wisconsin. — *Bedard v. Bonville*, 57 Wis. 270.

A Full Discussion of this subject will be found under the title **QUESTIONS OF LAW AND FACT.**

3. Lindsay v. Hamburg Bremen Ins. Co., 115 N. Car. 212.

Contract by Letters. — Where letters between the parties constitute a written contract, it is the duty of the court to ascertain the intention of the parties and to declare their rights thereunder. *Lindsay v. Hamburg Bremen Ins. Co.*, 115 N. Car. 212.

The rule that it is the duty of the court to construe a written contract exists in as full force when the contract rests in a number of letters and answers as when it is embodied in a single instrument. *Russell v. Arthur*, 17 S. Car. 480; *Begg v. Forbes*, 30 Eng. L. & Eq. 508; *U. S. v. Shaw*, 1 Cliff. (U. S.) 321; *Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 255; *Smith v. Faulkner*, 12 Gray (Mass.) 251; *Goddard v. Foster*, 17 Wall. (U. S.) 123.

Construction of Statutes. — It is the duty of the court to construe statutes, city ordinances, and by-laws, and to instruct the jury as to their meaning and effect.¹

Admissibility of Evidence. — As a general rule, all questions of the admissibility of evidence are deemed to be questions of law, and are therefore to be decided by the court.² Even when the admissibility of evidence depends upon the existence or non-existence of disputed facts it is still deemed to be a question of law for the court.³

How Far Reviewable on Appeal. — A wide discretion is allowed to the trial court in passing on the admissibility of evidence when such admissibility depends upon disputed facts, and an appellate court will not reverse the decision of the trial court unless there has been an abuse of discretion.⁴

Parol Contract. — When the terms of a parol contract are given or agreed upon, and they are unambiguous, the interpretation of such contract is as much a question of law for the court as the interpretation of an unambiguous written instrument. *Short v. Woodward*, 13 Gray (Mass.) 86; *Pratt v. Langdon*, 12 Allen (Mass.) 544; *Elliott v. Wanamaker*, 155 Pa. St. 67; *Willard v. A. Siegel Gas-Fixture Co.*, 47 Mo. App. 1; *Norton v. Higbee*, 38 Mo. App. 467. See the title **QUESTIONS OF LAW AND FACT**.

1. Statutes. — *Berwick v. Horsfall*, 4 C. B. N. S. 450, 93 E. C. L. 450; *Barnes v. Mobile*, 19 Ala. 707; *Fairbanks v. Woodhouse*, 6 Cal. 433; *Denver, etc., R. Co. v. Olsen*, 4 Colo. 239; *Peoria v. Calhoun*, 29 Ill. 317; *Maltus v. Shields*, 2 Metc. (Ky.) 553; *Bonine v. Richmond*, 75 Mo. 437.

Validity of Statute. — Where the material facts are not controverted, the question whether upon these facts the act incorporating a town and the assessment of taxes under it are constitutional and valid is a conclusion of law which may be pronounced at once by the court in its instructions to the jury. *Maltus v. Shields*, 2 Metc. (Ky.) 553.

City Ordinance. — It is the duty of the court to construe an ordinance. *Barnes v. Mobile*, 19 Ala. 707; *Denver, etc., R. Co. v. Olsen*, 4 Colo. 239; *Bonine v. Richmond*, 75 Mo. 437.

Validity of Ordinance. — The validity of a city ordinance is a question for the court. *Peoria v. Calhoun*, 29 Ill. 317.

Duty of City Under Charter. — It is the province of the court, and not the jury, to determine whether or not under its charter it is the duty of a city to keep its sidewalks and streets in repair. *Bonine v. Richmond*, 75 Mo. 437.

For a Full Discussion of these matters, see the title QUESTIONS OF LAW AND FACT.

2. Admissibility of Evidence. — *Bartlett v. Smith*, 11 M. & W. 483; *Chandler v. Von Roeder*, 24 How. (U. S.) 224; *People v. Lem You*, 97 Cal. 224; *Gorton v. Hadsell*, 9 Cush. (Mass.) 511; *Clough v. State*, 7 Neb. 320; *Fitzgerald v. Fitzgerald*, 16 Neb. 414; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533.

3. England. — *Doe v. Keeling*, 11 Q. B. 889, 63 E. C. L. 889; *Froude v. Hobbs*, 1 F. & F. 612; *Rex v. Hucks*, 1 Stark. 523, 2 E. C. L. 199; *Bartlett v. Smith*, 11 M. & W. 483; *Beaufort v. Crawshay*, L. R. 1 C. P. 699; *Eagan v. Larkin*, 1 Arms. M. & O. 403.

Massachusetts. — *Gorton v. Hadsell*, 9 Cush. (Mass.) 511; *Com. v. Williams*, 105 Mass. 62; *Com. v. Coe*, 115 Mass. 481.

New Hampshire. — *Jones v. Tucker*, 41 N. H. 546; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *State v. Hodge*, 50 N. H. 510; *State v. Pike*, 51 N. H. 105.

North Carolina. — *State v. Tilghman*, 11 Ired. L. (33 N. Car.) 513.

Virginia. — *Coleman v. Com.*, 25 Gratt. (Va.) 865, 18 Am. Rep. 711.

See the title **QUESTIONS OF LAW AND FACT**.

Complicated Facts. — No matter how complicated the preliminary question may be, or how numerous the facts upon which its solution depends, it is still deemed a question of law for the courts. *Gorton v. Hadsell*, 9 Cush. (Mass.) 511; *Com. v. Coe*, 115 Mass. 481.

Preliminary Facts for the Court. — Where the admissibility of evidence depends upon the existence of some preliminary fact the existence of such fact is a question for the court. It has been so held in the following instances:

The capacity of a witness to testify. *Coleman v. Com.*, 25 Gratt. (Va.) 865, 18 Am. Rep. 711; *Jones v. Tucker*, 41 N. H. 546.

Whether a witness is an expert. *Com. v. Williams*, 105 Mass. 62.

The subjects on which an expert may be examined. *Jones v. Tucker*, 41 N. H. 546.

Whether a declarant was under the sense of impending death. *State v. Tilghman*, 11 Ired. L. (33 N. Car.) 513; *Rex v. Hucks*, 1 Stark. 523, 2 E. C. L. 199.

Whether the genuineness of writing to be used in comparison has been proved. *Com. v. Coe*, 115 Mass. 481.

Preliminary questions of fact which involve the inspection of a record are for the court. *Rex v. Hucks*, 1 Stark. 523, 2 E. C. L. 199.

Whether declarations are a part of *res gesta*. *State v. Pike*, 51 N. H. 105.

Whether possession of property is recent enough to raise a presumption of theft. *State v. Hodge*, 50 N. H. 510.

Whether a document comes from proper custody. *Doe v. Keeling*, 11 Q. B. 889, 63 E. C. L. 889.

Whether sufficient search has been made to establish loss of a document. *Bartlett v. Smith*, 11 M. & W. 483.

4. Discretion of Trial Court. — *Walker v. Curtis*, 116 Mass. 98; *Com. v. Gray*, 129 Mass. 474, 37 Am. Rep. 378.

Ruling of Trial Court Usually Conclusive. — The ruling of the trial court on a preliminary question of fact upon which the admissibility of evidence depends is ordinarily conclusive, unless the judge sees fit to reserve or report the question for future revision. *Com. v.*

When Court May Submit Admissibility to Jury. — Where the voluntary character of a confession is disputed and the evidence on that issue is conflicting the court may submit the question of its voluntary or involuntary character to the jury, and under proper instructions leave them to consider or reject it as they may find it voluntary or involuntary.¹

Disputed Document the Basis of Suit. — Where the genuineness of the instrument sued on is the fact in issue such instrument will be admitted in evidence when a *prima facie* case in favor of its genuineness has been made. If the judge should finally determine its genuineness, he would necessarily decide the merits of the case. In such case, therefore, the court, upon a *prima facie* showing, admits the instrument in evidence and then submits the final determination of its genuineness to the jury upon all the evidence in the case.²

2. Questions of Fact for the Jury. — The determination of the facts in issue is the peculiar function of the jury.³

Mullins, 2 Allen (Mass.) 295; Gorton v. Hadsell, 9 Cush. (Mass.) 508; Com. v. Hills, 10 Cush. (Mass.) 530; Dole v. Thurlow, 12 Met. (Mass.) 157; Com. v. Morrell, 99 Mass. 542; O'Connor v. Hallinan, 103 Mass. 547; Walker v. Curtis, 116 Mass. 98; Com. v. Culver, 126 Mass. 464; Com. v. Gray, 129 Mass. 474, 37 Am. Rep. 378; Com. v. Robinson, 146 Mass. 571.

1. When Question of Admissibility May Be Submitted to Jury — *United States*. — Wilson v. U. S., 162 U. S. 613.

Alabama. — Lang v. State, 97 Ala. 41.

District of Columbia. — Hardy v. U. S., 3 App. Cas. (D. C.) 35.

Georgia. — Carr v. State, 84 Ga. 250; Thomas v. State, 84 Ga. 613.

Massachusetts. — Com. v. Cullen, 111 Mass. 436; Com. v. Smith, 119 Mass. 305; Com. v. Piper, 120 Mass. 185; Com. v. Preece, 140 Mass. 276; Com. v. Burrough, 162 Mass. 513.

Michigan. — People v. Howes, 81 Mich. 396; People v. Flynn, 96 Mich. 276.

Nebraska. — Furst v. State, 31 Neb. 403.

New York. — People v. Cassidy, 133 N. Y. 612, 30 N. E. Rep. 1003, (Supreme Ct.) 14 N. Y. Supp. 349; People v. Cassidy, (Supreme Ct.) 14 N. Y. Supp. 349.

Ohio. — Burdge v. State, 53 Ohio St. 512.

See the title CONFESSIONS, vol. 6, p. 520.

The Early Massachusetts Cases held that the admissibility of the confession was for the judge alone. Com. v. Chabcock, 1 Mass. 144; Com. v. Taylor, 5 Cush. 606; Com. v. Morey, 1 Gray (Mass.) 461.

In Later Cases these early cases were overruled, and it was held proper to submit the question, when complicated, to the jury. Com. v. Piper, 120 Mass. 185; Com. v. Cullen, 111 Mass. 436; Com. v. Smith, 119 Mass. 305; Com. v. Cuffee, 108 Mass. 285.

In a still later case the court returned to the early doctrine that the question of the admissibility of a confession was solely for the court. Com. v. Culver, 126 Mass. 464.

In a still more recent case the early doctrine is again abandoned, and it is held proper to submit the voluntary character of the confession to the jury. Com. v. Preece, 140 Mass. 276.

In Com. v. Culver, 126 Mass. 164, it was said that the admission of the confession is a question of law for the judge, and that when the question has been submitted to the jury it was

rather by consent, and not as a matter of right; that after the court has ruled that the confession is admissible the defendant may ask to have the jury disregard it if they believe it not voluntary.

Burden of Proof. — For a statement of the law as to the burden of proof as to the character of confessions, whether voluntary or involuntary, see the title CONFESSIONS, vol. 6, p. 520.

2. Where Disputed Document the Basis of Suit. — Ross v. Gould, 5 Me. 204; 1 Greenl. Ev., § 49.

Secondary Evidence. — Questions as to the existence of facts rendering secondary evidence of the contents of documents admissible are to be decided by the judge, unless in deciding such a question the judge would, in effect, decide the matter in issue. Steph. Ev., art. 71.

3. Province of Jury — *United States*. — Hickman v. Jones, 9 Wall. (U. S.) 197.

Alabama. — White v. Hass, 32 Ala. 430, 70 Am. Dec. 548; American Oak Extract Co. v. Ryan, 104 Ala. 267.

Florida. — Garner v. State, 28 Fla. 113, 29 Am. St. Rep. 232.

Illinois. — Louisville, etc., R. Co. v. Patchen, 167 Ill. 204.

Minnesota. — Young v. Ege, 63 Minn. 219.

Missouri. — Wilson v. Huston, 13 Mo. 146, 53 Am. Dec. 138; Houghtaling v. Ball, 19 Mo. 84, 59 Am. Dec. 331; Claflin v. Rosenberg, 42 Mo. 439, 97 Am. Dec. 336; Fullerton v. Fordyce, 121 Mo. 1, 42 Am. St. Rep. 516.

Nebraska. — Van Etten v. Edwards, 48 Neb. 25; Thompson v. Shelton, 49 Neb. 644.

New Jersey. — Consolidated Traction Co. v. Chenoweth, (N. J. 1896) 35 Atl. Rep. 1067.

North Carolina. — Young v. Alford, 118 N. Car. 215.

Pennsylvania. — Trovillo v. Tilford, 6 Watts (Pa.) 468, 31 Am. Dec. 484.

South Dakota. — Sweet v. Chicago, etc., R. Co., 6 S. Dak. 281.

See the title QUESTIONS OF LAW AND FACT.

Slight Evidence. — Even where the evidence in support of an issue is slight, it should be submitted to the jury. Heatherly v. Little, (Tex. Civ. App. 1897) 40 S. W. Rep. 445.

Substantial Conflict. — Wherever there is a substantial conflict in the evidence upon an issue of fact it must go to the jury. Morris v. Winn, 98 Ga. 482; Hall v. Worley, 99 Ga. 310;

All Disputed Facts Must Be Submitted to Jury. — All material facts put in issue by the pleadings, of the existence or nonexistence of which there is such evidence as might lead reasonable men to draw different conclusions concerning them, must be submitted to the jury for their determination.¹

Credibility of Witnesses for Jury. — The credibility of witnesses is a matter lying peculiarly within the province of the jury.²

Probative Effect of Evidence. — The weight or probative effect of evidence is to be determined by the jury.³

McRea v. Hillsboro Nat. Bank, 6 N. Dak. 353;
Anderson v. Wedeking, 102 Iowa 446.

Mere Scintilla of Evidence. — Where the contention of a party is supported by a mere scintilla of evidence it does not entitle him to a submission of it to the jury. *McNaul v. Arnold*, 177 Pa. St. 433.

Exclusively a Question of Fact. — Where a case involves nothing but a question of fact it is error to withhold it from the jury. *Rosevere v. Osceola Mills*, 169 Pa. St. 555.

1. Disputed Questions for Jury — England. — *Ryder v. Wombwell*, L. R. 4 Exch. 39; *Toomey v. London, etc.*, R. Co., 3 C. B. N. S. 146, 91 E. C. L. 146.

United States. — *Parks v. Ross*, 11 How. (U. S.) 362; *Schuyllkill, etc., Imp. Co. v. Munson*, 14 Wall. (U. S.) 442; *Pleasants v. Fant*, 22 Wall. (U. S.) 120; *Sioux City, etc., R. Co. v. Stout*, 17 Wall. (U. S.) 657; *Marion County v. Clark*, 94 U. S. 278; *Griggs v. Houston*, 104 U. S. 553; *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159.

Michigan. — *Mynning v. Detroit, etc.*, R. Co., 64 Mich. 93, 8 Am. St. Rep. 804.

New York. — *Baulec v. New York, etc.*, R. Co., 59 N. Y. 356, 17 Am. Rep. 325; *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 358; *Linkauf v. Lombard*, 137 N. Y. 417.

North Carolina. — *Witkowsky v. Wasson*, 71 N. Car. 458.

Pennsylvania. — *Hyatt v. Johnson*, 91 Pa. St. 200; *Sidney School Furniture Co. v. Warsaw School Dist.*, 122 Pa. St. 494, 9 Am. St. Rep. 124.

South Carolina. — *Carter v. Oliver Oil Co.*, 34 S. Car. 211, 27 Am. St. Rep. 815.

West Virginia. — *Woolwine v. Chesapeake, etc.*, R. Co., 36 W. Va. 329, 32 Am. St. Rep. 859.

Wisconsin. — *Langhoff v. Milwaukee, etc.*, R. Co., 19 Wis. 489; *Fitts v. Cream City R. Co.*, 59 Wis. 323.

See the title **QUESTIONS OF LAW AND FACT**.

2. Credibility of Testimony — Alabama. — *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *Childs v. State*, 76 Ala. 93.

California. — *Wing Chung v. Los Angeles*, 47 Cal. 531.

Colorado. — *Finerty v. Fritz*, 6 Colo. 137.

Georgia. — *Walker v. State*, 72 Ga. 200.

Illinois. — *Henderson v. Miller*, 36 Ill. App. 232; *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85; *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89; *Baker v. Young*, 44 Ill. 42, 92 Am. Dec. 149; *Rider v. People*, 110 Ill. 11; *Schimmelfenig v. Donovan*, 13 Ill. App. 47.

Indiana. — *Nelson v. Vorce*, 55 Ind. 455.

Massachusetts. — *Wait v. M'Neil*, 7 Mass. 261.

Michigan. — *People v. Wallin*, 55 Mich. 497.

Pennsylvania. — *Fleming v. Marine Ins. Co.*, 4 Whart. (Pa.) 59, 33 Am. Dec. 33.

Rhode Island. — *State v. Hoxsie*, 15 R. I. 1, 2 Am. St. Rep. 838.

Tennessee. — *Frierson v. Galbraith*, 12 Lea (Tenn.) 131.

Texas. — *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550.

Wisconsin. — *Mechelke v. Bramer*, 59 Wis. 57.

See the title **QUESTIONS OF LAW AND FACT**.

Cautionary Instructions. — The court may, in proper cases, instruct the jury to scrutinize closely the evidence of certain classes of witnesses. *Paulette v. Brown*, 40 Mo. 52; *Underwood v. McVeigh*, 23 Gratt. (Va.) 409; *Callanan v. Shaw*, 24 Iowa 447; *Mead v. McGraw*, 10 Ohio St. 55; *Blanchard v. Pratt*, 37 Ill. 243.

Such instructions must be general in their character, and must not in terms refer to the testimony of any particular witness. *State v. Cushing*, 29 Mo. 215; *State v. Stout*, 31 Mo. 406.

Witness Turning State's Evidence. — The credibility of a witness who has turned state's evidence is for the jury like that of any other witness, and they cannot be instructed that it is worthless. *People v. Wallin*, 55 Mich. 497.

Falsus in Uno, Falsus in Omnibus. — It is proper to instruct a jury that if a witness has wilfully and knowingly sworn falsely to any material matter in the case, then the jury are authorized to discredit the whole of the testimony of such witness. *Paulette v. Brown*, 40 Mo. 52; *Atkins v. Gladwish*, 27 Neb. 841.

In some courts it has been held to be error to give such an instruction without further qualifying it by the statement that the jury are warranted in discrediting the whole testimony of such witness, unless corroborated by other evidence. *Blanchard v. Pratt*, 37 Ill. 243; *Crabtree v. Hagenbaugh*, 25 Ill. 233.

By the better reasoning this qualification is held not to be necessary. *Atkins v. Gladwish*, 27 Neb. 841.

3. Weight of Evidence — Alabama. — *Davis v. Hays*, 89 Ala. 563.

Arkansas. — *Blankenship v. State*, 55 Ark. 244.

California. — *People v. Cowgill*, 93 Cal. 596.

Florida. — *Newberry v. State*, 26 Fla. 334; *Williams v. Dickenson*, 28 Fla. 90.

Georgia. — *Higginbotham v. Campbell*, 85 Ga. 638; *East Tennessee, etc., R. Co. v. Markens*, 88 Ga. 60.

Illinois. — *Johnson v. People*, 140 Ill. 350, 40 Ill. App. 382; *Chicago, etc., R. Co. v. Fisher*, 141 Ill. 614; *Westbrook v. Howell*, 34 Ill. App. 571; *Henderson v. Miller*, 36 Ill. App. 232.

Indiana. — *Stanley v. Montgomery*, 102 Ind. 102; *Louisville, etc., R. Co. v. Stommel*, 126 Ind. 35.

When Court May Direct a Verdict. — Whenever the evidence is such that reasonable men cannot reach different conclusions from it, then any verdict contrary to such evidence would have to be set aside, and the court may direct a verdict in accordance with the evidence.¹

Iowa. — *Leiber v. Chicago, etc.*, R. Co., 84 Iowa 97.

Kansas. — *Kansas City, etc.*, R. Co. v. Ryan, 49 Kan. 1; *State v. Plum*, 49 Kan. 679.

Louisiana. — *State v. Jones*, 44 La. Ann. 1120.

Michigan. — *Wessels v. Beeman*, 87 Mich. 481; *Webster v. Fowler*, 89 Mich. 303.

Missouri. — *Paulette v. Brown*, 40 Mo. 52; *State v. Mounce*, 106 Mo. 226; *State v. Moxley*, 115 Mo. 644.

Nebraska. — *Weston v. Brown*, 30 Neb. 609.

New York. — *People v. Zounek*, 66 Hun (N. Y.) 626, 20 N. Y. Supp. 755; *People v. Minnaugh*, 131 N. Y. 563; *Conde v. Wiltsie*, 131 N. Y. 647.

North Carolina. — *Albertson v. Terry*, 109 N. Car. 8.

Pennsylvania. — *Didier v. Pennsylvania Co.*, 146 Pa. St. 582; *Jackson v. Pittsburgh Times*, 152 Pa. St. 406, 34 Am. St. Rep. 659; *Yost v. Mensch*, 27 W. N. C. (Pa.) 562.

South Dakota. — *Sweet v. Chicago, etc.*, R. Co., 6 S. Dak. 281.

Texas. — *White v. State*, 21 Tex. App. 339; *Campbell v. State*, 30 Tex. App. 645.

Vermont. — *State v. Kibling*, 63 Vt. 636.

Virginia. — *Underwood v. McVeigh*, 23 Gratt. (Va.) 409.

See the title **QUESTIONS OF LAW AND FACT.**

Judge May Express Opinion. — It is held by some courts that an expression of opinion by the court, so long as the jurors are left free to arrive at a different conclusion, is not error. *Didier v. Pennsylvania Co.*, 146 Pa. St. 582.

Judge May Not Express Opinion. — By other courts it is held error for the judge to add the weight of his opinion as to what the evidence tends to prove, when there is a dispute in the testimony upon a point. *Wessels v. Beeman*, 87 Mich. 481; *Perrott v. Shearer*, 17 Mich. 48.

1. Court Directing Verdict — *England.* — *Carpenter's, etc.*, Co. v. Hayward, 1 Doug. 374; *Jewell v. Parr*, 13 C. B. 909, 76 E. C. L. 909; *Ryder v. Wombwell*, L. R. 4 Exch. 39; *Metroplitan R. Co. v. Jackson*, L. R. 3 App. 193; *Dublin, etc.*, R. Co. v. Slattery, L. R. 3 App. 1155.

United States. — *Hickman v. Jones*, 9 Wall. (U. S.) 201; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. (U. S.) 637; *Schuykill, etc.*, Imp. Co. v. Munson, 14 Wall. (U. S.) 442; *Pleasants v. Fant*, 22 Wall. (U. S.) 116; *Parks v. Ross*, 11 How. (U. S.) 373; *Chandler v. Von Roeder*, 24 How. (U. S.) 224; *Marion County v. Clark*, 94 U. S. 278; *Herbert v. Butler*, 97 U. S. 319; *Bowditch v. Boston*, 101 U. S. 16; *Griggs v. Houston*, 104 U. S. 553; *Randall v. Baltimore, etc.*, R. Co., 109 U. S. 478; *Anderson County v. Beal*, 113 U. S. 227; *Baylis v. Travellers' Ins. Co.*, 113 U. S. 316; *Higgins v. McCrea*, 116 U. S. 683; *Goodlett v. Louisville, etc.*, R. Co., 122 U. S. 411; *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 733; *Kane v. Northern Cent. R. Co.*, 128 U. S. 94.

Maine. — *Heath v. Jaquith*, 68 Me. 433.

Massachusetts. — *Denny v. Williams*, 5 Allen (Mass.) 1.

New Hampshire. — *Dame v. Dame*, 20 N. H. 28.

New York. — *Crawford v. Wilson*, 4 Barb. (N. Y.) 504; *Rich v. Rich*, 16 Wend. (N. Y.) 676; *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 358.

May Recall and Direct Verdict. — If a judge improperly submits a case to the jury and they deliberate upon it and report that they cannot agree, he still has the same power to direct a verdict that he had before the submission. *Heath v. Jaquith*, 68 Me. 433.

Duty to Direct Verdict. — It is the duty of the court, at the close of the evidence, to direct a verdict for the party who is clearly entitled to prevail, whenever it would be its duty to set aside a verdict in favor of his opponent if one were rendered. *Motey v. Pickle Marble, etc.*, Co., 74 Fed. Rep. 155; *Meyer v. Houck*, 85 Iowa 319; *Reeder v. Dupuy*, 96 Iowa 729; *Barnhart v. Chicago, etc.*, R. Co., 97 Iowa 654; *Moore v. McKenney*, 83 Me. 80, 23 Am. St. Rep. 753; *Weaver v. Benton-Belle Fontaine R. Co.*, 1 Mo. App. Rep. 118; *Gildersleeve v. Atkinson*, 6 N. Mex. 250; *Lutz v. Atlantic, etc.*, R. Co., 6 N. Mex. 496; *Howe v. Schweinberg*, 4 Misc. Rep. (N. Y. C. Pl.) 73; *Hawke v. Hawke*, 82 Hun (N. Y.) 439; *Longley v. Daly*, 1 S. Dak. 257; *Yankton F. Ins. Co. v. Fremont, etc.*, R. Co., 7 S. Dak. 428; *Washington v. Missouri, etc.*, R. Co. (Tex. Civ. App. 1896) 36 S. W. Rep. 778.

Not a Denial of Jury Trial. — The Supreme Court of *Iowa*, in discussing the right to direct a verdict, says: "Our conclusion is that when a motion is made to direct a verdict the trial judge should sustain the motion when, considering all of the evidence, it clearly appears to him that it would be his duty to set aside a verdict if found in favor of the party upon whom the burden of proof rests. The adoption of this rule is no abridgment of the right of trial by jury. A party against whom a verdict has been directed by the court can have the ruling of the court reviewed by exception and appeal just as well as he can if the rule were otherwise, and he takes an appeal to this court from an order granting a new trial after verdict. He has no right to insist that the trial of his cause be continued as a mere idle form, or a mere experiment, that he may have the gratification of securing a verdict which must be set aside. As we have seen, courts very generally now designate such a proceeding as absurd. Probably this court has too long followed the rule to be in a position to denounce it in that way; but we think that, as the question involves no more than the change of a mere rule of practice, which will be of material advantage in the trial of cases in the saving of the time of the trial courts — time which ought to be devoted to the transaction of legitimate business — and the saving of court expenses to the counties, with no detriment to the rights of any one, it is high time that this

Directing Verdict for Plaintiff. — Where the plaintiff makes a *prima facie* case on every fact necessary to his recovery, and the defendant fails to meet such *prima facie* case with any proof whatever, and where only one inference can, by reasonable men, be drawn from the plaintiff's evidence, then the court should direct a verdict for the plaintiff.¹

Directing Verdict for Defendant. — Whenever all the evidence before the jury, with all the inferences that they may reasonably draw from it, is not sufficient to sustain a verdict for the plaintiff, and such verdict if returned would have to be set aside, then the court should direct the jury to return a verdict for the defendant.²

state should adopt the more consistent and logical practice which now generally prevails elsewhere." Meyer v. Houck, 85 Iowa 319.

1. For the Plaintiff — *Illinois*. — Piano Mfg. Co. v. Parmenter, 39 Ill. App. 270; Sauber v. Collins, 40 Ill. App. 426.

Iowa. — Meyer v. Houck, 85 Iowa 319.

Kansas. — McMullen v. Carson, 48 Kan. 263.

Michigan. — Fox v. Spring Lake Iron Co., 89 Mich. 387.

Missouri. — Wolff v. Campbell, 110 Mo. 114.

Nebraska. — Mosher v. Farmers, etc., Nat. Bank, 51 Neb. 55.

New Mexico. — Gildersleeve v. Atkinson, 6 N. Mex. 250.

New York. — Crawford v. Wilson, 4 Barb. (N. Y.) 504; Rich v. Rich, 16 Wend. (N. Y.) 676; Schmidt v. Garfield Nat. Bank, 64 Hun (N. Y.) 298; Eisenlord v. Clum, 67 Hun (N. Y.) 518.

South Dakota. — Haugen v. Chicago, etc., R. Co., 3 S. Dak. 394; Yankton F. Ins. Co. v. Fremont, etc., R. Co., 7 S. Dak. 428.

Texas. — Fitzgerald v. Hart, (Tex. 1891) 17 S. W. Rep. 369.

Where the plaintiff's evidence is sufficient to support every material allegation of his petition, and the defendant introduces no evidence, it is proper to instruct the jury to find for the plaintiff although there is an issue of fact made by the pleadings. Faircloth v. Fulghum, 97 Ga. 357; Hasselman Printing Co. v. Fry, 9 Ind. App. 393; McCormick v. Holmes, 41 Kan. 265; Hillis v. Clyde First Nat. Bank, 54 Kan. 421; Schmidt v. Garfield Nat. Bank, 64 Hun (N. Y.) 298; Peet v. Dakota F. & M. Ins. Co., 1 S. Dak. 462; Clancy v. Reis, 5 Wash. 371; Clancy v. Williams, 5 Wash. 492.

2. For the Defendant — *United States*. — Griggs v. Houston, 104 U. S. 553; Baylis v. Travellers' Ins. Co., 113 U. S. 316; Metropolitan R. Co. v. Moore, 121 U. S. 558; Phoenix Assur. Co. v. Lucker, 77 Fed. Rep. 243.

Arizona. — Root v. Fay, (Arizona 1896) 43 Pac. Rep. 527.

District of Columbia. — Howes v. District of Columbia, 2 App. Cas. (D. C.) 188.

Illinois. — Anthony v. Wheeler, 130 Ill. 128, 17 Am. St. Rep. 281; Edwards v. Hushing, 31 Ill. App. 223; Huschle v. Morris, 31 Ill. App. 545, 131 Ill. 587; Duggan v. Peoria, etc., R. Co., 42 Ill. App. 536; Milburn Wagon Co. v. Stevens, 43 Ill. App. 508.

Iowa. — Beard v. Illinois Cent. R. Co., 79 Iowa 518; Meka v. Brown, 84 Iowa 711.

Kansas. — Barr v. Irey, 3 Kan. App. 240.

Maryland. — Riffin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279, 16 Am. Dec. 302; Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1, 66

Am. Dec. 30; Sprigg v. Moale, 28 Md. 497, 92 Am. Dec. 698.

Michigan. — Hunt v. Supreme Council, etc., 64 Mich. 671, 8 Am. St. Rep. 855.

Missouri. — Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431; Weaver v. Benton-Belle-Fontaine R. Co., 1 Mo. App. Rep. 118.

New Mexico. — Candelaria v. Atchison, etc., R. Co., 6 N. Mex. 266.

New York. — Tanenbaum v. Feist, (City Ct.) 23 N. Y. Supp. 319, 3 Misc. Rep. (N. Y.) 631; Deyo v. New York Cent. R. Co., 34 N. Y. 9.

North Carolina. — Satterwhite v. Hicks, Busb. L. (44 N. Car.) 105, 57 Am. Dec. 577.

Ohio. — Ellis v. Ohio L. Ins., etc., Co., 4 Ohio St. 628; Ferguson v. Miami Powder Co., 9 Ohio Cir. Ct. Rep. 445, 6 Ohio Cir. Dec. 408.

Pennsylvania. — Simrell v. Miller, 169 Pa. St. 326.

Texas. — Washington v. Missouri, etc., R. Co., (Tex. Civ. App. 1896) 36 S. W. Rep. 778.

West Virginia. — Knight v. Cooper, 36 W. Va. 232.

Wisconsin. — Achtenhagen v. Watertown, 18 Wis. 331, 86 Am. Dec. 769.

Plaintiff Entitled to Legitimate Inferences. — But a court is not justified in directing a verdict for the defendant unless the evidence, with all fair and legitimate inferences, is so far insufficient to sustain a verdict for the plaintiff that if rendered it must be set aside. Godfrey v. Streater R. Co., 56 Ill. App. 378; Fellows v. St. Louis Bridge Co., 45 Ill. App. 589; Dwyer v. St. Louis, etc., R. Co., 52 Fed. Rep. 87.

Variance. — Where there is a variance between the plaintiff's petition and his proof, and the evidence does not show a cause of action, it is not error for the court to refuse leave to amend and to direct a verdict for the defendant. Ferguson v. Miami Powder Co., 9 Ohio Cir. Ct. Rep. 445, 6 Ohio Cir. Dec. 408, 3 Ohio Dec. 65.

Conflicting Evidence. — Whenever the evidence of the plaintiff tends to support his contention, and is sufficient to sustain a verdict in his favor, except for the conflicting evidence of the defendant, it is error to direct a verdict for the defendant. Hanlen v. Baden, 6 Kan. App. 635; Marx v. Hess, (Ky. 1897) 39 S. W. Rep. 249; Ballard v. Louisville, etc., R. Co., (Ky. 1897) 41 S. W. Rep. 299; Swanson v. Menominee Electric Light, etc., Co., (Mich. 1897) 71 N. W. Rep. 1098; State v. Spengler, 74 Miss. 129; Rogers v. Kansas City, etc., R. Co., 52 Neb. 86; Hughes v. Lehan, 1 Ohio Cir. Dec. 5.

Failure of Proof. — Where the proof on a question of fact would not support a verdict

VII. RELEVANCY — 1. Definition and General Rule. — By relevancy is meant the logical relation between an evidentiary fact and the fact in issue.¹ All evidence, to be admissible, must be logically relevant; but not all evidence that is logically relevant is necessarily admissible. Facts that may tend to prove or disprove the fact in issue may still be rejected if, in the opinion of the presiding judge, such facts are essentially misleading or too remote.²

for the plaintiff, the court may direct a verdict for the defendant. *McPeck v. Central Vermont R. Co.*, 79 Fed. Rep. 590; *Knapp v. Jones*, 50 Neb. 490; *Meyers v. Birch*, 59 N. J. L. 238.

1. Relevancy Defined. — "The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or nonexistence of the other." *Stephen's Dig. of Ev.*, art. 1, quoted in *Cole v. Boardman*, 63 N. H. 580.

"The meaning of the word 'relevant,' as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it. It comes from the French *relevé*, which means to assist." *Platner v. Platner*, 78 N. Y. 95.

2. Reynolds's Theory of Ev., § 5; *Rex v. Cokin*, 2 Lew. C. C. 235; *U. S. v. Ross*, 92 U. S. 281; *Sloan v. People*, 47 Ill. 76; *White v. Graves*, 107 Mass. 325, 9 Am. Rep. 38; *Morrissey v. Ingham*, 111 Mass. 63; *Jones v. State*, 26 Miss. 247; *Hawkins v. James*, 69 Miss. 274; *State v. Hodge*, 50 N. H. 510; *Day v. Sharp*, 4 Whart. (Pa.) 339, 34 Am. Dec. 509; *State v. Brewster*, 7 Vt. 122.

Relevant, but Too Remote. — In an action for carnally knowing the plaintiff by force, and giving her a venereal disease, evidence that some months before the alleged assault the defendant slept one night in a house of ill fame, may properly be excluded as immaterial. *Morrissey v. Ingham*, 111 Mass. 63.

So where a man was indicted for murdering his wife it was held that evidence that the accused had visited a house of ill fame at some time in the past, and that his wife had been informed of that fact on the day of the killing, was irrelevant and had no tendency to show that any one else committed the crime. *Patrick v. State*, 16 Neb. 331.

On the trial of an action to avoid a deed upon the ground of mental incapacity of the grantor at the time of its execution, evidence of the condition of his mind a year afterwards may be excluded, in the discretion of the judge, as too remote. *White v. Graves*, 107 Mass. 325, 9 Am. Rep. 38.

Must Sometimes Be Left to Jury. — The court cannot reject evidence of a fact as immaterial if the question as to whether or not it is immaterial depends upon proof of another fact. The proper course in such a case is to submit the evidence of both facts to the jury. *Day v. Sharp*, 4 Whart. (Pa.) 339, 34 Am. Dec. 509.

Must Have Visible Connection with Facts in Issue. — Although, as a rule, testimony should not be excluded as irrelevant on the ground that it may have but little weight, yet the law requires an open and visible connection be-

tween the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. 1 *Jones on Ev.*, § 137; *Thompson v. Bowie*, 4 Wall. (U. S.) 463; *U. S. v. Ross*, 92 U. S. 281; *Xenia First Nat. Bank v. Stewart*, 114 U. S. 224; *Durkee v. India Mut. Ins. Co.*, 159 Mass. 514; *Baird v. Gillett*, 47 N. Y. 186.

Relevancy May Be Shown After Admission. — The relevancy of evidence may be established after its admission, and evidence irrelevant when admitted may be made relevant by evidence subsequently introduced. *U. S. v. Flowery*, 1 Sprague (U. S.) 109; *Crenshaw v. Davenport*, 6 Ala. 390, 41 Am. Dec. 56; *Abney v. Kingsland*, 10 Ala. 355, 44 Am. Dec. 491; *Moppin v. Aetna Axle, etc.*, Co., 41 Conn. 27; *Van Buren v. Wells*, 19 Wend. (N. Y.) 203; *Yeatman v. Hart*, 6 Humph. (Tenn.) 375; *Harris v. Holmes*, 30 Vt. 352.

Order of Introduction in Discretion of Court. — This question of relevancy is always more or less intimately associated with every trial, and its improper reception frequently supports the main argument for reversal. The court should reach some positive convictions regarding the relevancy of proposed evidence, before admitting it; but where the admissibility of evidence depends upon several facts, to some extent independent of each other, and where each fact must be proved to complete the chain of evidence, the exercise of a sound judicial discretion does not require the court, uniformly, to interfere in the order of the testimony. A beginning must be made somewhere; and when the court is satisfied that the counsel is acting in good faith, and intends fairly to supply each particular link till the chain of testimony is perfect, the evidence, as offered, may come in, subject to objection, to be stricken out and go for nothing if the necessary connecting portion be not supplied. *Rex v. Fursey*, 6 C. & P. 81, 25 E. C. L. 293; *Abney v. Kingsland*, 10 Ala. 355, 44 Am. Dec. 491; *Clark v. Beach*, 6 Conn. 142; *Moppin v. Aetna Axle, etc.*, Co., 41 Conn. 27; *Winlock v. Hardy*, 4 Litt. (Ky.) 272; *Harris v. Paynes*, 5 Litt. (Ky.) 105; *Davis v. Calvert*, 5 Gill & J. (Md.) 260; *Com. v. Dam*, 107 Mass. 210; *Lake v. Munford*, 4 Smed. & M. (Miss.) 312; *People v. Genung*, 11 Wend. (N. Y.) 18, 25 Am. Dec. 594; *Weidler v. Farmers' Bank*, 11 S. & R. (Pa.) 134; *Harwood v. Ramsey*, 15 S. & R. (Pa.) 31; *Harris v. Holmes*, 30 Vt. 352; *Rowt v. Kile*, 1 Leigh (Va.) 216.

Need Not Be Direct Evidence. — It is not necessary that the evidence bear directly upon the point in issue. If it constitutes a link in the chain of record, or tends to prove the issue, it is sufficient, although considered alone it might not justify a verdict. *Schuchardt v. Allen*, 1 Wall. (U. S.) 359; *Sanders v. Stokes*, 30 Ala. 432; *Belden v. Lamb*, 17 Conn. 441; *Columbus Omnibus Co. v. Semmes*, 27 Ga. 283; *Wil-*

While courts may require that the connection between the evidentiary fact and the fact in issue shall be open and visible, yet it is seldom that facts are excluded as irrelevant merely because they may have but little weight. It may be stated as a general rule of relevancy that all facts are admissible in evidence which logically tend to prove or disprove the fact in issue, unless excluded on some other ground.¹

2. Evidence Bearing Directly on Facts in Issue.—Where the fact in issue, *factum probandum*, is directly attested by witnesses, things, or documents, the evidence is called direct; and such evidence is always relevant, and is always admissible unless excluded on other grounds.²

3. Evidence Tending to Render More or Less Probable the Facts in Issue.—Where the evidence tends to prove facts other than those in issue, which by experience have been found to be so associated with the facts in issue as to render the existence of the latter more or less probable, such evidence is said to be indirect or circumstantial.³

loughby v. Dewey, 54 Ill. 266; *Farwell v. Tyler*, 5 Iowa 535; *State v. McAllister*, 24 Me. 139; *Comstock v. Smith*, 20 Mich. 338; *Tucker v. Peaslee*, 36 N. H. 167; *Haughey v. Strickler*, 2 W. & S. (Pa.) 411; *Tams v. Bullitt*, 35 Pa. St. 308.

1. General Rule as to Relevancy—*England*.—*Rex v. Ellis*, 6 B. & C. 148, 13 E. C. L. 125; *Reg. v. Murphy*, 8 C. & P. 297, 34 E. C. L. 397; *Furneau v. Hutchins*, 2 Cowp. 807; *Doe v. Sisson*, 12 East 62; *Rex v. Egerton*, R. & R. C. C. 376; *Rex v. Watson*, 2 Stark. 155, 3 E. C. L. 356.

United States.—*Thompson v. Bowie*, 4 Wall. (U. S.) 463; *Home Ins. Co. v. Weide*, 11 Wall. (U. S.) 438; *Butler v. Watkins*, 13 Wall. (U. S.) 457; *Standard Oil Co. v. Van Eiten*, 107 U. S. 325.

Alabama.—*Ashley v. Martin*, 50 Ala. 537; *Shealy v. Edwards*, 75 Ala. 411.

Connecticut.—*Belden v. Lamb*, 17 Conn. 441. *Georgia*.—*Selma, etc., R. Co. v. Keith*, 53 Ga. 178; *Baker v. Lyman*, 53 Ga. 339.

Illinois.—*Willoughby v. Dewey*, 54 Ill. 266; *Hough v. Cook*, 69 Ill. 581.

Indiana.—*Hall v. Stanley*, 86 Ind. 219; *Ogle v. Brooks*, 87 Ind. 600, 44 Am. Rep. 778. *Iowa*.—*Hancock v. Wilson*, 39 Iowa 47; *Mann v. Sioux City, etc., Co.*, 46 Iowa 637.

Maine.—*Trull v. True*, 33 Me. 367; *Eaton v. New England Tel. Co.*, 68 Me. 63; *Nickerson v. Gould*, 82 Me. 512.

Maryland.—*Brooke v. Winters*, 39 Md. 505. *Massachusetts*.—*Marcy v. Barnes*, 16 Gray (Mass.) 161, 77 Am. Dec. 405; *Fitzgerald v. Pendergast*, 114 Mass. 368; *Raynes v. Bennett*, 114 Mass. 424; *Huntsman v. Nichols*, 116 Mass. 521; *Hill v. Crompton*, 119 Mass. 376; *Brierly v. Davol Mills*, 128 Mass. 291.

Michigan.—*Comstock v. Smith*, 20 Mich. 338; *Welch v. Ware*, 32 Mich. 77; *Turnbull v. Richardson*, 69 Mich. 400.

Missouri.—*Ferguson v. Thacher*, 79 Mo. 511.

New Hampshire.—*Wiggin v. Scammon*, 27 N. H. 360; *Tucker v. Peaslee*, 36 N. H. 168; *Hovey v. Grant*, 52 N. H. 569; *Amoskeag Mfg. Co. v. Head*, 59 N. H. 332; *Green v. Gilbert*, 60 N. H. 146.

New York.—*People v. Horton*, 64 N. Y. 610; *Read v. Decker*, 67 N. Y. 182; *Platner v. Platner*, 78 N. Y. 90; *Hagerty v. Andrews*, 94 N. Y. 195.

North Carolina.—*Hart v. Newland*, 3 Hawks (10 N. Car.) 122.

Ohio.—*Tompkins v. Starr*, 41 Ohio St. 305.

Pennsylvania.—*Fitzwater v. Stout*, 16 Pa. St. 22; *Pratt v. H. M. Richards Jewelry Co.*, 69 Pa. St. 53; *Arnold v. Macungie Sav. Bank*, 71 Pa. St. 287.

South Carolina.—*Blakely v. Frazier*, 20 S. Car. 144.

Vermont.—*Bedell v. Foss*, 50 Vt. 94; *Luce v. Hoisington*, 56 Vt. 436.

Wisconsin.—*Johnson v. Filkington*, 39 Wis. 62.

Relevancy of Rebuttal.—The relevancy of rebutting evidence is to be tested, not by its convincing or persuasive character, but the point is whether it tends to cut down, limit, explain, or obviate the defense, or to illustrate some legitimate answer to the defense. *Comstock v. Smith*, 20 Mich. 338.

2. Evidence Bearing Directly on Facts in Issue.—1 Jones on Ev., § 5; *Chamberlayne's Best on Ev.*, § 27; 1 Greenl. Ev., § 13; *Schuchardt v. Allen*, 1 Wall. (U. S.) 359; *Jones v. Vanzant*, 2 McLean (U. S.) 596; *Moline Plow Co. v. Braden*, 71 Iowa 141; *Lightfoot v. People*, 16 Mich. 507; *Tucker v. Peaslee*, 36 N. H. 167; *Haughey v. Strickler*, 2 W. & S. (Pa.) 411; *Hudson v. State*, 3 Coldw. (Tenn.) 355.

3. Circumstantial Evidence.—*Chamberlayne's Best on Ev.*, § 27; 1 Greenl. Ev., § 13; *People v. Phipps*, 39 Cal. 326; *State v. Coleman*, 22 La. Ann. 455; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Pitts v. State*, 43 Miss. 472; *State v. Avery*, 113 Mo. 475; *State v. Van Winkle*, 6 Nev. 340; *People v. Hamilton*, 137 N. Y. 531, 50 N. Y. St. Rep. 22; *Ripley v. Miller*, 1 Jones L. (46 N. Car.) 479, 62 Am. Dec. 179, note; *Moreno v. State*, (Tex. Crim. App. 1893) 21 S. W. Rep. 924. See the title PRESUMPTIONS.

Definition.—"Circumstantial evidence is the proof of certain facts and circumstances in a given case, from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind." *State v. Avery*, 113 Mo. 475.

The Advantage of Circumstantial Evidence is that, as it commonly comes from different sources, a chain of circumstances is less likely to be falsely prepared, and falsehood is more likely to be detected. The disadvantage is

4. Collateral Facts—*a. GENERAL RULE.*—As a general rule collateral facts or those having no connection with the facts in issue are not admissible in evidence, because they afford no reasonable presumption or inference as to the latter and because they would tend to raise immaterial issues.¹

b. CONDUCT OF PARTIES—(1) *In General.*—An exception to the rule excluding evidence of collateral facts is found in the admissibility of evidence of the conduct of the parties in the prosecution of the suit or in the defense of it.²

(2) *Failure to Call Certain Witnesses.*—The failure of a party to call a witness who has knowledge of important facts would raise a presumption

that the jury have not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which they may be led to make hasty and false deductions—a source of error not existing in the consideration of positive evidence. Hence, each fact necessary to the inference must be distinctly and independently proved by competent evidence, and the inference must be fair and natural, not forced or artificial. Com. v. Webster, 5 Cush. (Mass.) 311, 52 Am. Dec. 711. See also Com. v. Howe, 132 Mass. 259.

1. Collateral Facts.—1 Greenl. Ev., § 52; 1 Tayl. Ev., § 317.

United States.—Odiorne v. Winkley, 2 Gall. (U. S.) 51.

Alabama.—Bunzel v. Maas, (Ala. 1897) 22 So. Rep. 568.

Colorado.—Denver, etc., R. Co. v. Glasscott, 4 Colo. 270.

Georgia.—Newsom v. Georgia R. Co., 62 Ga. 339.

Maine.—Nickerson v. Gould, 82 Me. 512.

Massachusetts.—Lincoln v. Taunton Copper Mfg. Co., 9 Allen (Mass.) 181; Lewis v. Smith, 107 Mass. 334; Hawks v. Charlemont, 110 Mass. 110; Cutter v. Howe, 122 Mass. 541; Peverly v. Boston, 136 Mass. 366, 49 Am. Rep. 37.

Nebraska.—Blomgren v. Anderson, 48 Neb. 240.

New Hampshire.—Wentworth v. Smith, 44 N. H. 419, 82 Am. Dec. 228; Amoskeag Mfg. Co. v. Head, 59 N. H. 332.

New York.—Jackson v. Smith, 7 Cow. (N. Y.) 717; Durbrow v. McDonald, 5 Bosw. (N. Y.) 130; Hill v. Syracuse, etc., R. Co., 63 N. Y. 101.

Ohio.—Findlay Brewing Co. v. Bauer, 50 Ohio St. 560.

2. General Rule—Conduct of Parties—England.—Atty.-Gen. v. Queen's Free Chapel, 24 Beav. 679; Leeds v. Cook, 4 Esp. N. P. 256; Barker v. Ray, 2 Russ. 72; White v. Lincoln, 8 Ves. Jr. 363; Armory v. Delamirie, 1 Stra. 505; Dalston v. Coatsworth, 1 P. Wms. 731; Sutton v. Devonport, 27 L. J. C. P. 54; Lowell v. Todd, 15 U. C. C. P. 306; Atty.-Gen. v. Halliday, 26 U. C. Q. B. 397.

United States.—Holmes v. Goldsmith, 147 U. S. 150; Riggs v. Pennsylvania, etc., R. Co., 16 Fed. Rep. 804; The Joseph B. Thomas, 81 Fed. Rep. 578.

Alabama.—Nelms v. Steiner, 113 Ala. 562.

Arkansas.—Miller v. Jones, 32 Ark. 337.

California.—Shiels v. West, 17 Cal. 324.

Connecticut.—Merwin v. Ward, 15 Conn.

377.

Illinois.—Rector v. Rector, 8 Ill. 105; Winchell v. Edwards, 57 Ill. 41; Chicago City R. Co. v. McMahon, 103 Ill. 485, 42 Am. Rep. 29.

Indiana.—Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Iowa.—McCabe v. Franks, 44 Iowa 208.

Kentucky.—Moon v. Story, 8 Dana (Ky.) 226.

Louisiana.—Bush v. Guion, 6 La. Ann. 797; State v. Rohfrischt, 12 La. Ann. 382.

Maryland.—Hall v. Clagett, 48 Md. 223.

Massachusetts.—Com. v. Goodwin, 14 Gray (Mass.) 55; McDonough v. O'Neil, 113 Mass. 92; Com. v. Tolliver, 119 Mass. 312; Hastings v. Stetson, 130 Mass. 76; Murray v. Chase, 134 Mass. 92.

Michigan.—Dillin v. People, 8 Mich. 357; Wallace v. Harris, 32 Mich. 380.

Missouri.—Pomeroy v. Benton, 77 Mo. 64.

New Hampshire.—Bailey v. Shaw, 24 N. H. 297, 55 Am. Dec. 241; State v. Knapp, 45 N. H. 148; State v. Staples, 47 N. H. 113, 90 Am. Dec. 565.

New Jersey.—Jones v. Knauss, 31 N. J. Eq. 609; Van Ness v. Van Ness, 32 N. J. Eq. 669.

New York.—Adams v. People, 9 Hun (N. Y.) 89; Donohue v. People, 56 N. Y. 208; Ryan v. People, 79 N. Y. 593; Cruikshank v. Gordon, 118 N. Y. 178.

North Carolina.—State v. Nat, 6 Jones L. (51 N. Car.) 114.

Pennsylvania.—Stevenson v. Stewart, 11 Pa. St. 307; Bryant v. Stilwell, 24 Pa. St. 314; Frick v. Barbour, 64 Pa. St. 120; Brown v. Schock, 77 Pa. St. 471.

Vermont.—Durgin v. Danville, 47 Vt. 95.

Wisconsin.—Dimond v. Henderson, 47 Wis. 172.

See the title PRESUMPTIONS.

Procuring Absence of Witness.—In an action for damages, evidence that the defendant attempted to hire one of the plaintiff's witnesses to leave the country is relevant. Cruikshank v. Gordon, 118 N. Y. 178; Chicago City R. Co. v. McMahon, 103 Ill. 485, 42 Am. Rep. 29.

Repetition of Slander.—In an action for slander, evidence of a repetition of the slander by the defendant is relevant and admissible. Cruikshank v. Gordon, 118 N. Y. 178; Hastings v. Stetson, 130 Mass. 76.

Unnatural Means.—In the trial of a criminal case, evidence that the defendant, several hours before his arrest, assumed a disguised gait and manner was held relevant. Com. v. Tolliver, 119 Mass. 312.

against such party, and hence the fact of such failure would be relevant and admissible.¹

(3) *Fabrication of Evidence*. — A presumption is raised against one who tries to strengthen his cause by the fabrication of evidence, and therefore the fabrication becomes relevant although it is a collateral fact and not connected with the fact in issue.²

(4) *Attempts to Prevent Investigation*. — Any attempt to prevent an investigation of the matter in controversy will raise a presumption against the party making the attempt, and such attempt is deemed relevant to the issue and evidence thereof becomes admissible.³

(5) *Escape, Concealment, or Disguise*. — Where one charged with crime escapes, or conceals or disguises himself, evidence thereof is admissible, not only to rebut the presumption of innocence, but as affirmative evidence of guilt of the crime with which he was charged.⁴

(6) *Destruction or Concealment of Evidence*. — *Omnia præsumuntur contra spoliatores*. Where a party destroys or conceals evidence a presumption arises that if such evidence had been produced it would have been against the interest of the party destroying or concealing it, and such destruction or concealment becomes relevant.⁵

1. *Failure to Call Certain Witnesses* — *England*. — Atty.-Gen. *v.* Queen's Free Chapel, 24 Beav. 679; Lowell *v.* Todd, 15 U. C. C. P. 306; Atty.-Gen. *v.* Halliday, 26 U. C. Q. B. 397.

Arkansas. — Miller *v.* Jones, 32 Ark. 337.
Connecticut. — Merwin *v.* Ward, 15 Conn. 377.

Indiana. — Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Massachusetts. — McDonough *v.* O'Neil, 113 Mass. 92.

Michigan. — Wallace *v.* Harris, 32 Mich. 380; Cole *v.* Lake Shore, etc., R. Co., 81 Mich. 156; Coley *v.* Foltz, 85 Mich. 47; Cole *v.* Lake Shore, etc., R. Co., 95 Mich. 77.

New Jersey. — Jones *v.* Knauss, 31 N. J. Eq. 609.

New York. — Bleecker *v.* Johnston, 69 N. Y. 309; People *v.* Hovey, 92 N. Y. 554.

Pennsylvania. — Frick *v.* Barbour, 64 Pa. St. 120; Brown *v.* Schock, 77 Pa. St. 471.

South Carolina. — Danner *v.* South Carolina R. Co., 4 Rich. L. (S. Car.) 329, 55 Am. Dec. 678.

Vermont. — Durgin *v.* Danville, 47 Vt. 95.
See the title PRESUMPTIONS.

Where the witness may be called equally well by either party, then no unfavorable presumption can arise from the failure of either party to call him. Cramer *v.* Burlington, 49 Iowa 213; Scovill *v.* Baldwin, 27 Conn. 316.

2. *Fabrication of Evidence*. — Briggs *v.* McBride, 17 New Bruns. 663; Hunter *v.* Lauder, 8 U. C. L. J. N. S. 17; The Steam Propeller Tillie, 7 Ben. (U. S.) 382; Phoenix Ins. Co. *v.* Moog, 78 Ala. 284, 56 Am. Rep. 31; Savannah, etc., R. Co. *v.* Gray, 77 Ga. 440; Winchell *v.* Edwards, 57 Ill. 41; Benjamin *v.* Ellinger, 80 Ky. 472; Crescent City Ice Co. *v.* Ermann, 36 La. Ann. 841; Com. *v.* Webster, 5 Cush. (Mass.) 316, 52 Am. Dec. 711; State *v.* Chamberlain, 89 Mo. 129; State *v.* Knapp, 45 N. H. 148; Gardiner *v.* People, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 155. See the title PRESUMPTIONS.

3. *Attempts to Prevent Investigation*. — Bradner on Ev. 469; Jones on Ev., § 138; Moriarty *v.* London, etc., R. Co., L. R. 5 Q. B. 314;

Chicago City R. Co. *v.* McMahon, 103 Ill. 485, 42 Am. Rep. 29; Hastings *v.* Stetson, 130 Mass. 76; Bailey *v.* Shaw, 24 N. H. 297, 55 Am. Dec. 241; Donohue *v.* People, 56 N. Y. 208; Cruikshank *v.* Gordon, 118 N. Y. 178.

4. *Attempt by Accused to Escape or to Conceal or Disguise Himself*. — Bradner on Ev. 469; Lyons *v.* Lawrence, 12 Ill. App. 531; Chicago City R. Co. *v.* McMahon, 103 Ill. 485, 42 Am. Rep. 29; Baker *v.* Com., (Ky. 1891) 17 S. W. Rep. 625; Com. *v.* Tolliver, 119 Mass. 312; State *v.* Duncan, 116 Mo. 288; State *v.* Palmer, 65 N. H. 216; Ryan *v.* People, 79 N. Y. 593; State *v.* Whitson, 111 N. Car. 695; Com. *v.* McMahon, 145 Pa. St. 413; Ryan *v.* State, 83 Wis. 486. See the title PRESUMPTIONS.

What Cannot Be Shown. — The mere fact that after a crime was committed the accused left the county is irrelevant and not admissible unless it appears that he did so to avoid arrest. State *v.* Marshall, 115 Mo. 383.

It is not relevant to prove that the accused voluntarily surrendered himself to the authorities when charged with a crime. Johnson *v.* State, 94 Ala. 35. Nor can it be shown that the accused had opportunity to escape and refused to do so. People *v.* Rathbun, 21 Wend. (N. Y.) 518.

5. *Destruction or Concealment of Evidence* — *England*. — Briggs *v.* McBride, 17 New Bruns. 663; Atty.-Gen. *v.* Queen's Free Chapel, 24 Beav. 679; Hunter *v.* Lauder, 8 U. C. L. J. N. S. 17.

United States. — Clifton *v.* U. S., 4 How. (U. S.) 242.

Alabama. — Phoenix Ins. Co. *v.* Moog, 78 Ala. 284, 56 Am. Rep. 31.

Illinois. — Lyons *v.* Lawrence, 12 Ill. App. 531; Chicago City R. Co. *v.* McMahon, 103 Ill. 485, 42 Am. Rep. 29.

Indiana. — Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Kentucky. — Moon *v.* Story, 8 Dana (Ky.) 226; Benjamin *v.* Ellinger, 80 Ky. 472.

Louisiana. — Crescent City Ice Co. *v.* Ermann, 36 La. Ann. 841.

Missouri. — State *v.* Chamberlain, 89 Mo. 129.

(7) *Threats of the Person Assailed.* — In prosecutions for homicide where the accused claims to have slain the deceased in self-defense, the threats of the deceased against the accused become relevant and are admissible in evidence.¹

Communicated Threats. — Where such threats had been communicated to the accused before the homicide was committed, they are relevant, because the accused, knowing that the threats had been made, had the right to view the acts of the deceased in the light of his previous threats, and would be justified in acting with greater promptness for that reason.²

Uncommunicated Threats. — Threats that had not been communicated to the accused are, under ordinary circumstances, not relevant, and are usually held to be inadmissible.³

(8) *Threats Made by the Accused.* — The threats made by the accused against the person assailed are always relevant, whether they have or have not been communicated to the person assailed.⁴

New Jersey. — *Jones v. Knauss*, 31 N. J. Eq. 609; *Van Ness v. Van Ness*, 32 N. J. Eq. 669.

Wisconsin. — *Dimond v. Henderson*, 47 Wis. 172.

1. **Threats** — *United States.* — U. S. v. Rice, 1 Hughes (U. S.) 560; *Wiggins v. People*, 93 U. S. 465.

Alabama. — *Powell v. State*, 19 Ala. 577; *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422; *Kelso v. State*, 47 Ala. 573; *Powell v. State*, 52 Ala. 1.

Arkansas. — *Pittman v. State*, 22 Ark. 354. *California.* — *People v. Arnold*, 15 Cal. 476; *People v. Scoggins*, 37 Cal. 676; *People v. Travis*, 56 Cal. 251.

Florida. — *Ballard v. State*, 31 Fla. 266.

Georgia. — *Hudgins v. State*, 2 Ga. 173; *Howell v. State*, 5 Ga. 48; *Monroe v. State*, 5 Ga. 85.

Illinois. — *Campbell v. People*, 16 Ill. 17, 61 Am. Dec. 49; *Williams v. People*, 54 Ill. 422.

Indiana. — *Fahnestock v. State*, 23 Ind. 231; *Holler v. State*, 37 Ind. 57, 10 Am. Rep. 74; *Wood v. State*, 92 Ind. 269.

Kentucky. — *Holloway v. Com.*, 11 Bush (Ky.) 344.

Louisiana. — *State v. Spell*, 38 La. Ann. 20.

Michigan. — *People v. Cook*, 39 Mich. 236, 33 Am. Rep. 380.

Mississippi. — *Hawthorne v. State*, 61 Miss. 749.

Missouri. — *State v. Harrod*, 102 Mo. 590; *State v. Lee*, 66 Mo. 165.

New York. — *People v. Rector*, 19 Wend. (N. Y.) 569; *Stokes v. People*, 53 N. Y. 164.

Oregon. — *State v. Dodson*, 4 Oregon 64.

South Carolina. — *State v. Smith*, 12 Rich. L. (S. Car.) 430.

Texas. — *Nash v. State*, 2 Tex. App. 362; *Peck v. State*, 5 Tex. App. 611; *King v. State*, 9 Tex. App. 515; *Allen v. State*, 17 Tex. App. 637; *Alexander v. State*, 25 Tex. App. 260, 8 Am. St. Rep. 438.

Washington. — *State v. Coella*, 3 Wash. 99.

West Virginia. — *State v. Abbott*, 8 W. Va. 741.

See the title HOMICIDE.

2. **When Threats Communicated.** — U. S. v. Rice, 1 Hughes (U. S.) 560; *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *People v. Arnold*, 15 Cal. 476; *Campbell v. People*, 16 Ill. 17, 61 Am. Dec. 49; *Holloway v. Com.*, 11 Bush (Ky.) 344; *Peck v. State*, 5 Tex. App. 611; *Alexan-*

der v. State, 25 Tex. App. 260, 8 Am. St. Rep. 438. See the title HOMICIDE.

3. **Uncommunicated Threats** — *Alabama.* — *Powell v. State*, 19 Ala. 577; *Edgar v. State*, 43 Ala. 45.

Arkansas. — *Atkins v. State*, 16 Ark. 568; *Coker v. State*, 20 Ark. 53.

California. — *People v. Arnold*, 15 Cal. 476; *People v. Henderson*, 28 Cal. 465.

Georgia. — *Hudgins v. State*, 2 Ga. 173; *Carr v. State*, 14 Ga. 358; *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *Lingo v. State*, 29 Ga. 470; *Peterson v. State*, 50 Ga. 142.

Iowa. — *State v. Maloy*, 44 Iowa 104.

Louisiana. — *State v. Gregor*, 21 La. Ann. 473; *State v. McCoy*, 29 La. Ann. 593; *State v. Ryan*, 30 La. Ann. 1176.

Maryland. — *State v. Ridgely*, 2 Har. & M. (Md.) 120, 1 Am. Dec. 372.

Michigan. — *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162.

Mississippi. — *Newcomb v. State*, 37 Miss. 383.

Missouri. — *State v. Jackson*, 17 Mo. 544, 59 Am. Dec. 281.

Texas. — *Fuller v. State*, 30 Tex. App. 559. See the title HOMICIDE.

Uncommunicated threats have sometimes been held admissible. *Stokes v. People*, 53 N. Y. 164; *People v. Scoggins*, 37 Cal. 676; *Wiggins v. People*, 93 U. S. 465.

4. **Threats by Accused.** — Chamberlayne's Best on Ev., §§ 452-458.

Alabama. — *McLean v. State*, 16 Ala. 672; *Gray v. State*, 63 Ala. 66; *Jones v. State*, 76 Ala. 8; *Stitt v. State*, 91 Ala. 10, 24 Am. St. Rep. 853.

Arkansas. — *Casat v. State*, 40 Ark. 511.

California. — *Smith v. Whittier*, 95 Cal. 279.

Florida. — *Jones v. Townsend*, 21 Fla. 431, 58 Am. Rep. 676.

Georgia. — *McPherson v. State*, 22 Ga. 478.

Illinois. — *Gardner v. People*, 4 Ill. 83; *Sharp v. People*, 29 Ill. 464; *Schoolcraft v. People*, 117 Ill. 271.

Indiana. — *Cluck v. State*, 40 Ind. 263.

Kentucky. — *Johnson v. Com.*, 9 Bush (Ky.) 224; *Morgan v. Com.*, 14 Bush (Ky.) 106; *Com. v. Matthews*, 89 Ky. 287; *Sparks v. Com.*, 89 Ky. 644.

Louisiana. — *State v. Birdwell*, 36 La. Ann. 859; *State v. Oliver*, 43 La. Ann. 1003.

Maine. — *State v. Fenlason*, 78 Me. 495; *State v. Day*, 79 Me. 120.

c. FACTS SHOWING MOTIVE OR INTENT — (1) *In Criminal Cases.* — In prosecutions for certain crimes, such as passing counterfeit bills or coins, or uttering forged paper, or knowingly receiving stolen goods, criminal motive may be shown by proof of other crimes of the same nature.¹ In prosecutions for obtaining goods or money on false pretenses, it has generally been held that evidence of other false pretenses, made under similar circumstances and at about the same time, is relevant,² yet by other courts such evidence has been held irrelevant and not admissible.³ Generally, in criminal prosecutions, evidence of a motive for the commission of the alleged crime is relevant against the accused and is admissible.⁴ So the want of any apparent

Massachusetts. — *Com. v. Crowninshield*, 10 Pick. (Mass.) 497; *Com. v. Madan*, 102 Mass. 1. *Michigan.* — *People v. Curtis*, 52 Mich. 616; *People v. Miller*, 91 Mich. 639.

Mississippi. — *Jones v. State*, 57 Miss. 684; *Cheatham v. State*, 67 Miss. 335, 19 Am. St. Rep. 310.

Missouri. — *State v. Brown*, 63 Mo. 439; *State v. Guy*, 69 Mo. 430; *State v. Nugent*, 71 Mo. 136; *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218.

Nevada. — *State v. Walsh*, 5 Nev. 315.

New York. — *People v. Jones*, 99 N. Y. 667; *People v. O'Sullivan*, 104 N. Y. 483, 58 Am. Rep. 530; *People v. Wood*, 126 N. Y. 249.

Ohio. — *Stewart v. State*, 1 Ohio St. 66.

South Carolina. — *State v. Belton*, 24 S. Car. 185, 58 Am. Rep. 245.

Texas. — *Aycock v. State*, 2 Tex. App. 381; *Thrasher v. State*, 3 Tex. App. 281; *Vincent v. State*, 3 Tex. App. 678; *Anderson v. State*, 15 Tex. App. 447; *Miller v. State*, 31 Tex. Crim. Rep. 609, 37 Am. St. Rep. 836.

See the title HOMICIDE.

1. *Motive or Intent — Criminal Cases — England.* — *Rex v. Ellis*, 6 B. & C. 145, 13 E. C. L. 123; *Rex v. Winkworth*, 4 C. & P. 444, 19 E. C. L. 465; *Rex v. Long*, 6 C. & P. 179, 25 E. C. L. 343; *Reg. v. Cobden*, 3 F. & F. 833; *Dunn's Case*, 1 Moo. C. C. 146; *Reg. v. Geering*, 18 L. J. M. C. 215.

United States. — *Bottomley v. U. S.*, 1 Story (U. S.) 135; *U. S. v. Burns*, 5 McLean (U. S.) 23.

California. — *People v. Farrell*, 30 Cal. 316; *People v. Kern*, 61 Cal. 244.

Connecticut. — *State v. Ward*, 49 Conn. 429.

Georgia. — *Coxwell v. State*, 66 Ga. 309.

Kentucky. — *Devoto v. Com.*, 3 Metc. (Ky.) 417.

Massachusetts. — *Com. v. Shepard*, 1 Allen (Mass.) 575; *Com. v. Hall*, 4 Allen (Mass.) 305; *Com. v. Stone*, 4 Met. (Mass.) 43; *Com. v. Bigelow*, 8 Met. (Mass.) 235; *Com. v. Tucker*, 10 Gray (Mass.) 173; *Com. v. Jenkins*, 10 Gray (Mass.) 485; *Com. v. Merriam*, 14 Pick. (Mass.) 518, 25 Am. Dec. 420; *Com. v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *Com. v. McCarthy*, 119 Mass. 354; *Com. v. Bradford*, 126 Mass. 42.

New York. — *People v. Kemmler*, 19 N. Y. 580; *Copperman v. People*, 56 N. Y. 591; *Coleman v. People*, 58 N. Y. 555.

Ohio. — *Mimms v. State*, 16 Ohio St. 222; *Shriedley v. State*, 23 Ohio St. 130.

Pennsylvania. — *Kilroy v. Com.*, 89 Pa. St. 480; *McMeen v. Com.*, 114 Pa. St. 300.

Texas. — *Aycock v. State*, 2 Tex. App. 381.

Wisconsin. — *Zoldoske v. State*, 82 Wis. 580.

See the various criminal titles, such as COUNTERFEITING, vol. 7, p. 875; EMBEZZLEMENT, vol. 10, p. 976; FORGERY.

2. *False Pretenses.* — *State v. Rivers*, 58 Iowa 102, 43 Am. Rep. 112; *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389; *State v. Bayne*, 88 Mo. 604; *State v. Beauchleigh*, 92 Mo. 490; *Mayer v. People*, 80 N. Y. 364; *Trogon v. Com.*, 31 Gratt. (Va.) 862. See the title FALSE PRETENSES.

3. *Reg. v. Holt*, Bell C. C. 280; *Strong v. State*, 86 Ind. 208, 44 Am. Rep. 292; *Com. v. Jackson*, 132 Mass. 16.

4. *Evidence of Motive — Against Accused — England.* — *Rex v. Clewes*, 4 C. & P. 221, 19 E. C. L. 354.

United States. — *Pointer v. U. S.*, 151 U. S. 396.

Alabama. — *Baalam v. State*, 17 Ala. 451; *Johnson v. State*, 17 Ala. 618; *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711; *Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95, 68 Ala. 580; *Morrison v. State*, 84 Ala. 405.

Arkansas. — *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54.

Connecticut. — *State v. Green*, 35 Conn. 203.

Florida. — *Johnson v. State*, 24 Fla. 162.

Georgia. — *Fraser v. State*, 55 Ga. 325; *Turner v. State*, 70 Ga. 765.

Illinois. — *Siebert v. People*, 143 Ill. 571.

Indiana. — *Binns v. State*, 57 Ind. 46, 26 Am. Rep. 48.

Iowa. — *State v. Hinkle*, 6 Iowa 380; *State v. Kline*, 54 Iowa 183; *State v. Cole*, 63 Iowa 695; *State v. Cross*, 68 Iowa 180.

Kansas. — *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322.

Kentucky. — *Stricklin v. Com.*, 83 Ky. 566.

Louisiana. — *State v. Johnson*, 30 La. Ann. 921.

Massachusetts. — *Com. v. Merriam*, 14 Pick. (Mass.) 518, 25 Am. Dec. 420.

Michigan. — *Templeton v. People*, 27 Mich. 501.

Minnesota. — *State v. Lawlor*, 28 Minn. 216.

Nebraska. — *St. Louis v. State*, 8 Neb. 405.

New York. — *Stout v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 71; *Kennedy v. People*, 39 N. Y. 245; *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524; *People v. Harris*, 136 N. Y. 423.

North Carolina. — *State v. Morris*, 84 N. Car. 756.

Pennsylvania. — *Howser v. Com.*, 51 Pa. St. 332; *Carroll v. Com.*, 84 Pa. St. 107; *Campbell v. Com.*, 84 Pa. St. 187; *Hester v. Com.*, 85 Pa. St. 139; *McManus v. Com.*, 91 Pa. St. 57; *Ettinger v. Com.*, 98 Pa. St. 338.

motive is a relevant fact in favor of the accused and is admissible.¹ When evidence of motive is relevant the accused may testify what his motive was in doing the alleged criminal act.²

(2) *In Civil Cases.* — While in civil cases one's liability rests upon the act, and the motive or intent of the act is usually immaterial and irrelevant, there are, however, many important exceptions to this rule, and in a great variety of cases evidence of the motive or intent with which an act is done is relevant and admissible.³ Whenever evidence of the motive or intent with which an act was done is relevant, the direct testimony of the actors is admissible, although of course not conclusive evidence of such motive or intent.⁴ But

Texas. — *Harris v. State*, 31 Tex. Crim. Rep. 411; *Coward v. State*, 6 Tex. App. 59.

Wisconsin. — *Mack v. State*, 48 Wis. 271; *Boyle v. State*, 61 Wis. 440.

See the various criminal titles.

Proof of Other Crimes. — Before proof of an independent crime is admissible it must be shown that there is some logical connection between such crime sought to be proved and the one under investigation. Evidence of such independent crime will not be admitted for the mere purpose of showing a disposition to commit the crime. *State v. Lapage*, 57 N. H. 295, 24 Am. Rep. 69; *Mayer v. People*, 80 N. Y. 364.

1. Lack of Motive. — *Chamberlayne's Best on Ev.*, § 453; *White v. State*, 53 Ind. 595; *Greer v. State*, 53 Ind. 420; *State v. Harrington*, 12 Nev. 126.

2. Testimony of Accused. — *People v. Morton*, 72 Cal. 62; *Greer v. State*, 53 Ind. 420; *White v. State*, 53 Ind. 595; *Ross v. State*, 116 Ind. 495; *Fenwick v. State*, 63 Md. 239; *Com. v. Woodward*, 102 Mass. 155; *Cummings v. State*, 50 Neb. 274; *State v. Harrington*, 12 Nev. 126; *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158; *People v. Baker*, 96 N. Y. 340; *Bolen v. State*, 26 Ohio St. 371; *Berry v. State*, 30 Tex. App. 423. *Contra*, *Stewart v. State*, 78 Ala. 436; *Brown v. State*, 79 Ala. 51.

Where intent is not material, it is not error to exclude the defendant's own testimony on that point. *Ross v. State*, 116 Ind. 495.

3. Motive — Civil Cases — United States. — *Castle v. Bullard*, 23 How. (U. S.) 172; *Butler v. Watkins*, 13 Wall. (U. S.) 456; *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591; *Mud-sill Min. Co. v. Watrous*, 61 Fed. Rep. 163.

Alabama. — *Hawes v. State*, 88 Ala. 37.

California. — *Bancroft v. Heringhi*, 54 Cal. 120.

Illinois. — *Lockwood v. Doane*, 107 Ill. 235.

Iowa. — *Porter v. Stone*, 62 Iowa 442.

Maine. — *McKenney v. Dingley*, 4 Me. 172.

Maryland. — *Friend v. Hamill*, 34 Md. 298.

Massachusetts. — *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731.

Michigan. — *Cook v. Perry*, 43 Mich. 623.

Minnesota. — *Moline-Milburn Co. v. Franklin*, 37 Minn. 137.

Mississippi. — *Bernheim v. Dibrell*, 66 Miss. 199.

New Hampshire. — *Bradley v. Obeare*, 10 N. H. 477; *Adams v. Kenney*, 59 N. H. 133.

New York. — *Olmsted v. Hotailing*, 1 Hill (N. Y.) 317; *Allison v. Matthieu*, 3 Johns. (N. Y.) 235; *French v. White*, 5 Duer (N. Y.) 254; *Murfey v. Brace*, 23 Barb. (N. Y.) 561; *Smith*

v. National Ben. Soc., 123 N. Y. 85; *Baldwin v. Short*, 125 N. Y. 553.

Vermont. — *Pierce v. Hoffman*, 24 Vt. 525.

Wisconsin. — *Grace v. McArthur*, 76 Wis. 641.

Canada. — *Hamel v. Amyot*, 14 Quebec L. Rep. 56.

4. Direct Testimony of the Actors — Not Conclusive — *California.* — *Mowry v. Raabe*, 89 Cal. 606.

Georgia. — *Georgia, etc., Co. v. Eskew*, 86 Ga. 641, 22 Am. St. Rep. 490; *Atlanta Consol. St. R. Co. v. Beauchamp*, 93 Ga. 6.

Illinois. — *Flower v. Brumbach*, 30 Ill. App. 296.

Indiana. — *Over v. Schiffing*, 102 Ind. 191; *Heap v. Parrish*, 104 Ind. 36; *Wilson v. Clark*, 1 Ind. App. 182; *Stratton v. Lockhart*, 1 Ind. App. 380.

Iowa. — *Frost v. Rosecrans*, 66 Iowa 405; *Mann v. Taylor*, 78 Iowa 355.

Kansas. — *Gardom v. Woodward*, 44 Kan. 758, 21 Am. St. Rep. 314; *Gentry v. Kelley*, 49 Kan. 82.

Maryland. — *Phelps v. George's Creek, etc., R. Co.*, 60 Md. 536.

Massachusetts. — *Thacher v. Phinney*, 7 Allen (Mass.) 146; *Lombard v. Oliver*, 7 Allen (Mass.) 155; *Fisk v. Chester*, 8 Gray (Mass.) 506; *Snow v. Paine*, 114 Mass. 520; *Perry v. Porter*, 121 Mass. 522; *Stevens v. Stevens*, 150 Mass. 557; *Brown v. Massachusetts Title Ins. Co.*, 151 Mass. 127; *Tasker v. Stanley*, 153 Mass. 148.

Michigan. — *Watkins v. Wallace*, 19 Mich. 57; *Angell v. Pickard*, 61 Mich. 561; *Hay v. Reid*, 85 Mich. 296.

Minnesota. — *Garrett v. Mannheimer*, 24 Minn. 193.

Missouri. — *State v. Mason*, 24 Mo. App. 321.

New Hampshire. — *Norris v. Morrill*, 40 N. H. 395; *Delano v. Goodwin*, 48 N. H. 203, 97 Am. Dec. 601; *Clark v. Marshall*, 62 N. H. 498.

New York. — *McCormack v. Perry*, 47 Hun (N. Y.) 71; *Lally v. Emery*, 54 Hun (N. Y.) 517; *Kenyon v. Luther*, (Supreme Ct.) 4 N. Y. Supp. 498, 10 N. Y. Supp. 951; *Seymour v. Wilson*, 14 N. Y. 567; *Griffin v. Marquardt*, 21 N. Y. 121; *Forbes v. Waller*, 25 N. Y. 430; *McKown v. Hunter*, 30 N. Y. 625; *Thurston v. Cornell*, 38 N. Y. 281; *Ryall v. Kennedy*, 67 N. Y. 379.

North Carolina. — *Nixon v. McKinney*, 105 N. Car. 23.

Texas. — *Pridham v. Weddington*, 74 Tex. 354; *Baldrige, etc., Bridge Co. v. Cartrett*,

a witness will not be permitted to testify as to the motive or intent of another.¹ And in some cases it has been held that motive or intent must be shown by surrounding circumstances, and cannot be proved by the direct testimony of the actors themselves, on the ground that such testimony cannot be directly contradicted.²

d. FACTS SHOWING PREPARATION. — Facts tending to show preparation on the part of the accused to commit a criminal act are relevant and admissible to prove the commission of the crime.³

c. FACTS SHOWING CAPACITY AND OPPORTUNITY. — So facts showing capacity or opportunity to commit the alleged crime are admissible as tending to render guilt probable.⁴

f. STATEMENTS OF PARTIES MADE OUT OF COURT — (1) *Contradictory Statements.* — Statements of a party to an action, made out of court, or on a former trial in court, if inconsistent with his present contention, are relevant and admissible against him.⁵ While such evidence is impeaching in its nature, yet it is not strictly so, as it is admissible whether such party testifies on the trial or not; and if he does testify it is not necessary that any foundation for his impeachment should be laid as in the case of witnesses who are not parties.⁶

(2) *Corroborative Statements.* — Ordinarily a party cannot introduce in evidence his extra-judicial statements to corroborate his testimony or support his contention.⁷ To this general rule there are, however, some important excep-

75 Tex. 628; *Cochran v. State*, 28 Tex. App. 422.

Vermont. — *Stearns v. Gosselin*, 58 Vt. 38.

West Virginia. — *Thomas v. Hukill*, 34 W. Va. 385.

Wisconsin. — *Wilson v. Noonan*, 35 Wis. 355; *Plank v. Grimm*, 62 Wis. 251; *Anderson v. Wehe*, 62 Wis. 402.

1. *Cihak v. Klekr*, 117 Ill. 643; *Manufacturers', etc., Bank v. Koch*, 105 N. Y. 630, 12 N. E. Rep. 9; *Drake v. State*, 29 Tex. App. 265; *Rindskopf v. Myers*, 77 Wis. 649.

2. *Wheless v. Rhodes*, 70 Ala. 419; *Whizenant v. State*, 71 Ala. 383; *Burke v. State*, 71 Ala. 377; *McCormick v. Joseph*, 77 Ala. 236; *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497; *Haywood v. Foster*, 16 Ohio 88; *Bolen v. State*, 26 Ohio St. 371.

3. *Facts Showing Preparation.* — *Chamberlayne's Best on Ev.*, § 454; *Whart. Crim. Ev.* (9th ed.), § 753; *People v. Winters*, 29 Cal. 658; *Com. v. Wilson*, 2 Cush. (Mass.) 590; *Com. v. Costley*, 118 Mass. 1; *Com. v. McCarthy*, 119 Mass. 354; *Com. v. Bradford*, 126 Mass. 42; *Com. v. Robinson*, 146 Mass. 571; *Long v. State*, 52 Miss. 23; *People v. Larned*, 7 N. Y. 445; *Howard v. State*, 8 Tex. App. 53.

Antecedent acts rendering the commission of a crime easier, safer, more certain, and more effective to accomplish an object, if done with that intention and purpose, are so connected with the crime as to be admissible at the trial of an indictment therefor, although themselves criminal. *Com. v. Robinson*, 146 Mass. 571.

4. *Evidence of Capacity and Opportunity.* — *Chamberlayne's Best on Ev.*, § 453; *Southern Ins. Co. v. White*, 58 Ark. 277; *Fleming v. Springfield*, 154 Mass. 520, 26 Am. St. Rep. 268; *Gartner v. Beller*, 54 Mich. 333; *Kinney v. Folkerts*, 78 Mich. 687; *German Nat. Bank v. Leonard*, 40 Neb. 676; *Larrison v. Payne*, 52 Hun (N. Y.) 612, 5 N. Y. Supp. 221; *Potter*

v. Ogden, 136 N. Y. 384; *Druck v. Nicolai*, 16 Oregon 512; *Riha v. Pelnar*, 86 Wis. 408.

5. *Contradictory Statements.* — 1 Jones on Ev., § 854; 24 Cent. L. J. 227; *Collins v. Mack*, 31 Ark. 684; *Cravens v. Bennett*, 17 Colo. 419; *Rose v. Otis*, 18 Colo. 59; *Klug v. State*, 77 Ga. 734; *Lucas v. Flinn*, 35 Iowa 9; *Kreiter v. Bomberger*, 82 Pa. St. 59, 22 Am. Rep. 750; *State v. Freeman*, 43 S. Car. 105; *Martineau v. May*, 18 Wis. 59. See the title WITNESSES.

6. *Arkansas.* — *Collins v. Mack*, 31 Ark. 684.

Colorado. — *Cravens v. Bennett*, 17 Colo. 419; *Rose v. Otis*, 18 Colo. 59.

Georgia. — *Klug v. State*, 77 Ga. 734; *Lewis v. State*, 91 Ga. 168.

Illinois. — *Craig v. Rohrer*, 63 Ill. 325; *McCoy v. People*, 71 Ill. 111; *Brown v. Calumet River R. Co.*, 125 Ill. 600.

Iowa. — *Lucas v. Flinn*, 35 Iowa 9.

Nebraska. — *Milligan v. Butcher*, 23 Neb. 683.

New York. — *Meyer v. Campbell*, 1 Misc. Rep. (N. Y. C. Pl.) 283.

Pennsylvania. — *Kreiter v. Bomberger*, 82 Pa. St. 59, 22 Am. Rep. 750.

South Carolina. — *State v. Freeman*, 43 S. Car. 105.

Wisconsin. — *Martin v. Barnes*, 7 Wis. 239; *Martineau v. May*, 18 Wis. 59; *Wisconsin Planing Mill Co. v. Schuda*, 72 Wis. 277.

Contra. — *Young v. Brady*, 94 Cal. 128; *Kelsey v. Layne*, 28 Kan. 218; *Bartlett v. Cheesebrough*, 32 Neb. 339; *Varona v. Socarras*, 8 Abb. Pr. (N. Y. C. Pl.) 302; *Keesey v. Old*, 82 Tex. 25; *Simpson v. Edens*, 14 Tex. Civ. App. 235; *Davis v. Franke*, 33 Gratt. (Va.) 413. See the title WITNESSES.

7. *Corroborative Statements — General Rule.* — *United States.* — *Saenger v. Nightingale*, 48 Fed. Rep. 708.

Alabama. — *Gordon v. Clapp*, 38 Ala. 357; *Downing v. Woodstock Iron Co.*, 93 Ala. 262.

tions.¹ The exception admitting corroborative statements is sometimes and under some circumstances extended to the extra-judicial statements of witnesses who are not parties to the action.²

g. RES INTER ALIOS ACTA — (1) *General Rule*. — It is a general rule, of great antiquity, in the common law, that no litigant shall be affected by the words or acts of others with whom he is in no way connected; *res inter alios acta alteri nocere non debet*.³

Alexander v. Handley, 96 Ala. 220; H. B. Claflin Co. v. Rodenberg, 101 Ala. 213.

Arkansas. — Hazen v. Henry, 6 Ark. 86.

California. — Rice v. Cunningham, 29 Cal. 492; Frank v. Pennie, 117 Cal. 254.

District of Columbia. — Richardson v. Van Auken, 5 App. Cas. (D. C.) 209.

Connecticut. — North Stonington v. Stonington, 31 Conn. 412.

Georgia. — Heard v. McKee, 26 Ga. 332; Harrison v. Richardson, 99 Ga. 763.

Illinois. — Bailey v. Pardridge, 134 Ill. 188; Steel v. Shafer, 39 Ill. App. 185; Meyer v. Meyer, 64 Ill. App. 175.

Indiana. — Scobey v. Armington, 5 Ind. 514; Schmidt v. Packard, 132 Ind. 398; Bement v. May, 135 Ind. 664.

Iowa. — Murray v. Cone, 26 Iowa 276.

Kentucky. — Tipper v. Com., 1 Metc. (Ky.) 6; Dixon v. Labry, (Ky. 1895) 29 S. W. Rep. 21.

Maine. — Handly v. Call, 30 Me. 9.

Maryland. — Hagan v. Hendry, 18 Md. 177.

Massachusetts. — Carter v. Gregory, 8 Pick. (Mass.) 168; Whitney v. Houghton, 125 Mass. 451; Farrell v. Weitz, 160 Mass. 288; Burns v. Stuart, 168 Mass. 19.

Michigan. — Hogsett v. Ellis, 17 Mich. 351; Ward v. Ward, 37 Mich. 253; Welch v. Palmer, 85 Mich. 310; Mead v. Randall, 111 Mich. 268.

Mississippi. — Baker v. Kelly, 41 Miss. 696, 93 Am. Dec. 274.

Missouri. — Moore v. Sauborin, 42 Mo. 490; Hammond v. Beeson, 112 Mo. 190; Sira v. Wabash R. Co., 115 Mo. 127, 37 Am. St. Rep. 386; Blount v. Hamey, 43 Mo. App. 644; Melcher v. Derkum, 44 Mo. App. 650.

New Hampshire. — Judd v. Brentwood, 46 N. H. 430.

New York. — Smith v. Kerr, 1 Barb. (N. Y.) 155; Schwab v. Heindel, 16 Daly (N. Y.) 164; Matter of Bronson, 67 Hun (N. Y.) 237.

North Carolina. — State v. Jefferson, 6 Ired. L. (28 N. Car.) 305.

Pennsylvania. — Cain v. Cain, 140 Pa. St. 144; Graham v. Hollinger, 46 Pa. St. 55; Tisch v. Utz, 142 Pa. St. 186; Dempsey v. Dobson, 174 Pa. St. 122.

Texas. — Shiner v. Abbey, 77 Tex. 1; Taliaferro v. Goudelock, 82 Tex. 521; Cherry v. Butler, 4 Tex. App. Civ. Cas., § 271; Smith v. Merchants', etc., Nat. Bank. (Tex. Civ. App. 1897) 40 S. W. Rep. 1038.

Utah. — White v. Pease, 15 Utah 170.

Vermont. — Barber v. Bennett, 62 Vt. 50; Swerdfeger v. Hopkins, 67 Vt. 136.

West Virginia. — Deck v. Tabler, 41 W. Va. 332.

Wisconsin. — Cohn v. Heimbauch, 86 Wis. 176.

1. Made in Presence of Adverse Party and Acquiesced in by Him. — Where self-serving statements are made in the presence and hearing of the party against whom it is sought to use

them, and are acquiesced in by him, they become relevant and admissible. See the titles ADMISSIONS, vol. 1, p. 670; DECLARATIONS (IN EVIDENCE), vol. 9, p. 5.

2. Exceptions. — See the title DECLARATIONS, vol. 9, p. 5.

3. Res Inter Alios Acta — General Rule. — Chamberlayne's Best on Ev., § 506.

England. — Hollingham v. Head, 4 C. B. N. S. 391, 93 E. C. L. 391; Carter v. Pryke, 1 Peake N. P. (ed. 1795) 96; Holcombe v. Hewson, 2 Campb. 391; Hunter v. Britts, 3 Campb. 455; Bullen v. Michel, 4 Dow. 297; Denn v. White, 7 T. R. 108.

United States. — Cohen v. Cohen, 2 Mackey (D. C.) 227; Boyd v. U. S., 142 U. S. 450.

Connecticut. — Bailey v. Trumbull, 31 Conn. 582.

Indiana. — Ogle v. Brooks, 87 Ind. 600, 44 Am. Rep. 778.

Kentucky. — Eskridge v. Cincinnati, etc., R. Co., 89 Ky. 367.

Maine. — Hubbard v. Androscoggin, etc., R. Co., 39 Me. 506.

Massachusetts. — Aldrich v. Pelham, 1 Gray (Mass.) 510; Kidder v. Dunstable, 11 Gray (Mass.) 342; Emerson v. Lowell Gas Light Co., 3 Allen (Mass.) 410; Collins v. Dorchester, 6 Cush. (Mass.) 396; Jordan v. Osgood, 109 Mass. 457, 12 Am. Rep. 731; Maguire v. Middlesex R. Co., 115 Mass. 239; Com. v. Kennon, 130 Mass. 39; Com. v. Jackson, 132 Mass. 16; Campbell v. Russell, 139 Mass. 278; Costelo v. Crowell, 139 Mass. 588; Sullivan v. O'Leary, 146 Mass. 322; Hathaway v. Tinkham, 148 Mass. 85; Tuttle v. Fitchburg R. Co., 152 Mass. 42.

Michigan. — Altman v. Fowler, 70 Mich. 57.

Missouri. — Iron Mountain Bank v. Murdock, 62 Mo. 70; State v. Parker, 96 Mo. 382.

New Jersey. — Temperance Hall Assoc. v. Giles, 33 N. J. L. 260.

New York. — Jackson v. Smith, 7 Cow. (N. Y.) 718; Ross v. Ackerman, 46 N. Y. 210; Mailler v. Express Propeller Line, 61 N. Y. 312; People v. Gibbs, 93 N. Y. 470; Newhall v. Appleton, 102 N. Y. 133; Matter of Thompson, 127 N. Y. 463.

North Carolina. — State v. Shuford, 69 N. Car. 486; State v. Alston, 94 N. Car. 930.

South Carolina. — Benedict v. Rose, 24 S. Car. 297.

Tennessee. — Franklin v. Franklin, 90 Tenn. 44.

Vermont. — Walworth v. Barron, 54 Vt. 677; Harris v. Howard, 56 Vt. 695; Aiken v. Kenison, 58 Vt. 665.

Virginia. — Cole v. Com., 5 Gratt. (Va.) 606.

West Virginia. — Hartman v. Evans, 38 W. Va. 669.

Wisconsin. — Schaser v. State, 36 Wis. 429; Kelley v. Schupp, 60 Wis. 76.

"The Reason for excluding all evidence of

(2) *Facts Similar to Those in Issue.* — To the general rule excluding *res inter alios acta* there are many important exceptions.

(a) **In Civil Cases** — *aa.* IN PROOF OF FRAUD. — In actions based upon fraud and deceit, where it is necessary to prove *scienter*, fraudulent acts similar to those charged and done at or near the same time are relevant.¹

bb. IN PROOF OF NEGLIGENCE. — In actions for injuries resulting from negligence other injuries resulting from the same or similar acts of negligence are sometimes held irrelevant and inadmissible,² although a larger number of cases to the contrary is to be found.³

this character is that it would lead to the trial of a multitude of distinct issues, involving a profitless waste of the time of the court, and tending to distract the attention of the jury from the real point in issue, without possessing the slightest force as proof of the matters of fact involved." *Temperance Hall Assoc. v. Giles*, 33 N. J. L. 260.

1. Exceptions — In Proof of Fraud — England. — *Gibson v. Hunter*, 2 H. Bl. 288.

United States. — *Butler v. Watkins*, 13 Wall. (U. S.) 456; *Castle v. Bullard*, 23 How. (U. S.) 172; *Wood v. U. S.*, 16 Pet. (U. S.) 342; *Mud-sill Min. Co. v. Watrous*, 61 Fed. Rep. 163.

California. — *Bancroft v. Heringhi*, 54 Cal. 120; *Turner v. Luning*, 105 Cal. 124.

Illinois. — *Lockwood v. Doane*, 107 Ill. 235.

Indiana. — *Strong v. State*, 86 Ind. 208, 44 Am. Rep. 299, note.

Iowa. — *Porter v. Stone*, 62 Iowa 442.

Maine. — *McKenney v. Dingley*, 4 Me. 172.

Massachusetts. — *Com. v. Tuckerman*, 10 Gray (Mass.) 173; *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731; *Reeve v. Dennett*, 145 Mass. 23.

Michigan. — *Cook v. Perry*, 43 Mich. 623; *French v. Ryan*, 104 Mich. 625.

Mississippi. — *Bernheim v. Dibrell*, 66 Miss. 199.

Missouri. — *State v. Tabor*, 95 Mo. 585.

New Hampshire. — *Whittier v. Varney*, 10 N. H. 291; *Bradley v. Obear*, 10 N. H. 477; *Adams v. Kenney*, 59 N. H. 133.

New York. — *Olmsted v. Hotaling*, 1 Hill (N. Y.) 317; *Allison v. Matthieu*, 3 Johns. (N. Y.) 235; *Murfey v. Brace*, 23 Barb. (N. Y.) 561; *Phillips v. People*, 57 Barb. (N. Y.) 353; *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721; *Hennequin v. Naylor*, 24 N. Y. 139; *Baldwin v. Short*, 125 N. Y. 553.

Ohio. — *Tarbox v. State*, 38 Ohio St. 581.

Vermont. — *Pierce v. Hoffman*, 24 Vt. 525.

Virginia. — *Wilson v. Carpenter*, 91 Va. 183.

See also the titles FRAUD AND DECEIT; FRAUDULENT SALES AND CONVEYANCES.

2. In Proof of Negligence. — *Hudson v. Chicago*, etc., R. Co., 59 Iowa 581, 44 Am. Rep. 692; *Mathews v. Cedar Rapids*, 80 Iowa 459, 20 Am. St. Rep. 436; *Hubbard v. Androscoggin*, etc., R. Co., 39 Me. 506; *Parker v. Portland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262; *Collins v. Dorchester*, 6 Cush. (Mass.) 396; *Kidder v. Dunstable*, 11 Gray (Mass.) 342; *Dye v. Delaware*, etc., R. Co., 130 N. Y. 671, 29 N. E. Rep. 320; *Phillips v. Willow*, 70 Wis. 6, 5 Am. St. Rep. 114; *Richards v. Oshkosh*, 81 Wis. 226. See also the cases cited *supra*, this section, to the general rule.

Accident on Railroad Crossing. — In an action for damages for injuries to a horse by reason

of a defective crossing on a railroad, it was held that evidence of other accidents occurring at the same place was irrelevant and inadmissible. *Hudson v. Chicago*, etc., R. Co., 59 Iowa 581, 44 Am. Rep. 692.

Elevator Left Open. — So in an action for damages from an injury sustained by an elevator door being left open along a passageway, it was held incompetent to show similar accidents at the same place. *Parker v. Portland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262.

Defective Highways. — Where the action is based on negligence in permitting a defective highway, evidence of other accidents has been held irrelevant. *Hubbard v. Androscoggin*, etc., R. Co., 39 Me. 506; *Branch v. Libbey*, 78 Me. 321, 57 Am. Rep. 810; *Collins v. Dorchester*, 6 Cush. (Mass.) 396; *Kidder v. Dunstable*, 11 Gray (Mass.) 342; *Blair v. Pelham*, 118 Mass. 421; *Langworthy v. Green Tp.*, 88 Mich. 207; *Phillips v. Willow*, 70 Wis. 6, 5 Am. St. Rep. 114.

Defective Sidewalks. — So evidence of other accidents occurring on the same defective sidewalk is irrelevant. *Mathews v. Cedar Rapids*, 80 Iowa 459, 20 Am. St. Rep. 436; *Richards v. Oshkosh*, 81 Wis. 226; *Moore v. Richmond*, 85 Va. 538; *Brenner v. Newcastle*, 83 Me. 415, 23 Am. Rep. 782.

Evidence of Absence of Accidents. — In an action on the case to recover damages for injuries received by falling into an area opening into a sidewalk in a city it was held that it was incompetent on the part of the defendant to show that such areas were common in the city and that it was customary in the city to protect areas as the one in question was protected when the plaintiff received her injury, and that over ten thousand people had passed and repassed the area without accident every year since it had been built. *Temperance Hall Assoc. v. Giles*, 33 N. J. L. 260. See also *Kidder v. Dunstable*, 11 Gray (Mass.) 342; *Hodges v. Bearse*, 129 Ill. 87; *Langworthy v. Green Tp.*, 88 Mich. 207; *Branch v. Libbey*, 78 Me. 321, 57 Am. Rep. 810.

Unskilful Work. — Where the defense in an action brought to recover for labor was that the plaintiff had unskilfully performed such labor, evidence that he had unskilfully performed other labor was held irrelevant. *Campbell v. Russell*, 139 Mass. 278; *Maguire v. Middlesex R. Co.*, 115 Mass. 239.

3. United States. — *District of Columbia v. Armes*, 107 U. S. 519; *Osborne v. Detroit*, 32 Fed. Rep. 36.

Alabama. — *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133.

Connecticut. — *House v. Metcalf*, 27 Conn. 631.

cc. IN PROOF OF MALICE. — Where the existence or nonexistence of malice is

Georgia. — *Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95.

Illinois. — *Fraser v. Schroeder*, 163 Ill. 459; *Rowlands v. Elgin*, 66 Ill. App. 66.

Indiana. — *Pittsburgh, etc., R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111.

Iowa. — *Smith v. Des Moines*, 84 Iowa 685.

Kansas. — *Topeka v. Sherwood*, 39 Kan. 690.

Maine. — *Hill v. Portland, etc., R. Co.*, 55 Me. 438, 92 Am. Dec. 601.

Michigan. — *Smith v. Sherwood Tp.*, 62 Mich. 159; *Lombar v. East Tawas*, 86 Mich. 14.

Minnesota. — *Phelps v. Winona, etc., R. Co.*, 37 Minn. 485, 5 Am. St. Rep. 867.

Missouri. — *Golden v. Clinton*, 54 Mo. App. 100.

New Hampshire. — *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55; *Cook v. New Durham*, 64 N. H. 419.

New York. — *Quinlan v. Utica*, 11 Hun (N. Y.) 217, 74 N. Y. 603; *Magee v. Troy*, 48 Hun (N. Y.) 383, 119 N. Y. 640, 23 N. E. Rep. 1148; *Brady v. Manhattan R. Co.*, 127 N. Y. 46.

Vermont. — *Kent v. Lincoln*, 32 Vt. 591.

Defective Sidewalk. — In an action for damages against a municipal corporation for injuries received from a fall caused by a defective sidewalk left in an unguarded condition, it is competent for the plaintiff to show that while it was in that condition other similar accidents had occurred at the same place.

United States. — *District of Columbia v. Armes*, 107 U. S. 519; *Osborne v. Detroit*, 32 Fed. Rep. 36.

Alabama. — *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133.

Georgia. — *Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95.

Illinois. — *Fraser v. Schroeder*, 163 Ill. 459; *Rowlands v. Elgin*, 66 Ill. App. 66.

Indiana. — *Goshen v. England*, 119 Ind. 368.

Kansas. — *Topeka v. Sherwood*, 39 Kan. 690.

Michigan. — *Lombar v. East Tawas*, 86 Mich. 14.

Minnesota. — *Phelps v. Winona, etc., R. Co.*, 37 Minn. 485, 5 Am. St. Rep. 867.

Missouri. — *Golden v. Clinton*, 54 Mo. App. 100.

New Hampshire. — *Cook v. New Durham*, 64 N. H. 419.

New York. — *Quinlan v. Utica*, 11 Hun (N. Y.) 217, 74 N. Y. 603; *Magee v. Troy*, 48 Hun (N. Y.) 383, 119 N. Y. 640, 23 N. E. Rep. 1148.

Vermont. — *Kent v. Lincoln*, 32 Vt. 591.

Defective Highway. — Where recovery is sought on the ground of negligently permitting a highway to become and remain in an unsafe and defective condition, evidence of similar accidents at the same place near the same time and while the conditions were the same has been held relevant. *Kent v. Lincoln*, 32 Vt. 591; *Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98.

Defective Bridge. — Where a recovery was sought for injuries caused by the plaintiff's horse taking fright at a defect in the defendant's bridge, evidence that other horses had taken fright at the same defect was held relevant. *Smith v. Sherwood Tp.*, 62 Mich. 159. See also *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418.

Defective Machinery. — When the negligence alleged consists of using defective machinery or appliances, evidence of prior accidents occurring from its use is relevant as tending to show that it was unfit for use and was defective, or not adapted to the purposes for which it was used. *Morse v. Minneapolis, etc., R. Co.*, 30 Minn. 465.

Unguarded Cellars. — In *Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95, the question being as to whether the system adopted by a city in regard to allowing cellars with covered doors in its sidewalks was reasonably calculated to insure the safety of those who traveled on the sidewalks, evidence that children on different occasions had previously fallen into such openings was held relevant and admissible.

Frightening Horses. — Where horses become frightened at a certain object or by a certain noise, in an action for damages for injuries caused by such fright of the horses it is relevant to show that other horses became frightened from the same cause. *House v. Metcalf*, 27 Conn. 631; *Hill v. Portland, etc., R. Co.*, 55 Me. 438, 92 Am. Dec. 601.

In Proof of Notice. — Evidence that other persons had been injured at the same place prior to the time in question has been held relevant to show that the defendant had notice of the defect. *Goshen v. England*, 119 Ind. 368; *Ashtabula v. Bartram*, 3 Ohio Cir. Ct. Rep. 640, 2 Ohio Cir. Dec. 372; *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418; *Alberts v. Vernon*, 96 Mich. 549.

Evidence of Subsequent Repair Not Admissible. — It has generally been held that evidence is not admissible to show that the owner of property has, since the accident, repaired the alleged defect. This would put him to the hazard of either taking the risk of another accident or making evidence against himself by repairing. Again, the happening of an accident may well induce one to take extra precautions against its recurrence, when he is not legally bound to do so.

England. — *Hart v. Lancashire, etc., R. Co.*, 21 L. T. N. S. 261.

United States. — *Columbia, etc., R. Co. v. Hawthorne*, 144 U. S. 202.

Colorado. — *Colorado Electric Co. v. Lubbers*, 11 Colo. 505, 7 Am. St. Rep. 255.

Connecticut. — *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47.

Illinois. — *Hodges v. Percival*, 132 Ill. 53.

Indiana. — *Terre Haute, etc., R. Co. v. Clem*, 123 Ind. 15, 18 Am. St. Rep. 303.

Iowa. — *Cramer v. Burlington*, 45 Iowa 627; *Hudson v. Chicago, etc., R. Co.*, 59 Iowa 581, 44 Am. Rep. 692.

Massachusetts. — *Shinners v. Merrimac River Locks, etc.*, 154 Mass. 168.

Michigan. — *Woodbury v. Owosso*, 64 Mich. 239; *Lombar v. East Tawas*, 86 Mich. 14.

Minnesota. — *Morse v. Minneapolis, etc., R. Co.*, 30 Minn. 465.

Missouri. — *Ely v. St. Louis, etc., R. Co.*, 77 Mo. 34.

New York. — *Salters v. Delaware, etc., Canal Co.*, 3 Hun (N. Y.) 338; *Payne v. Troy, etc., R. Co.*, 9 Hun (N. Y.) 526; *Reed v. New York Cent. R. Co.*, 45 N. Y. 574; *Dougan v. Cham-*

in issue other acts of like character may sometimes be shown to prove malice or malicious intent.¹

dd. TO SHOW HABIT OR SYSTEM IN BUSINESS. — Evidence of facts *inter alios* is sometimes relevant when it tends to show a habit or system in business transactions.²

cc. TO SHOW VALUE. — Collateral facts are often deemed relevant and therefore admissible in proof of value.³

plain Transp. Co., 56 N. Y. 1; Baird v. Daly, 57 N. Y. 236, 15 Am. Rep. 488; Dale v. Delaware, etc., R. Co., 73 N. Y. 468; Corcoran v. Peekskill, 108 N. Y. 151; Getty v. Hamlin, 127 N. Y. 636, 27 N. E. Rep. 399; Clapper v. Waterford, 131 N. Y. 382.

Texas. — Gulf, etc., R. Co. v. McGowan, 73 Tex. 355; Missouri Pac. R. Co. v. Hennessey, 75 Tex. 155.

Wisconsin. — Lang v. Sanger, 76 Wis. 71; Jennings v. Albion, 90 Wis. 22.

Evidence of Subsequent Repair Admissible. — By some courts it has been held that evidence of subsequent repair is admissible as in the nature of an admission that the alleged defect existed before the repair was made. St. Louis, etc., R. Co. v. Weaver, 35 Kan. 412, 57 Am. Rep. 176; O'Leary v. Mankato, 21 Minn. 65; Phelps v. Mankato, 23 Minn. 276; Kelly v. Southern Minnesota R. Co., 28 Minn. 98; Shaber v. St. Paul, etc., R. Co., 28 Minn. 103; Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; West Chester, etc., R. Co. v. McElwee, 67 Pa. St. 311; McKee v. Bidwell, 74 Pa. St. 218.

Fires Set by Locomotives. — Where the fact in issue is whether or not a certain engine set fire by emitting coals or sparks, evidence that the same or other engines of similar construction, used on the same road, had shortly before or after the occurrence in question thrown out sparks or coals at or near the same place, is relevant and admissible. Piggot v. Eastern Counties R. Co., 3 C. B. 230, 54 E. C. L. 230; Robinson v. New Brunswick R. Co., 23 New Bruns. 323; Grand Trunk R. Co. v. Richardson, 91 U. S. 454; Henry v. Southern Pac. R. Co., 50 Cal. 176; Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co., 27 Fla. 1; Gandy v. Chicago, etc., R. Co., 30 Iowa 420, 6 Am. Rep. 682; St. Joseph, etc., R. Co. v. Chase, 11 Kan. 47; Annapolis, etc., R. Co. v. Gantt, 39 Md. 115; Ross v. Boston, etc., R. Co., 6 Allen (Mass.) 87; Diamond v. Northern Pac. R. Co., 6 Mont. 580; Longabaugh v. Virginia City, etc., R. Co., 9 Nev. 271; Boyce v. Cheshire R. Co., 43 N. H. 627; Haseltine v. Concord R. Co., 64 N. H. 545; Field v. New York Cent. R. Co., 32 N. Y. 339; Webb v. Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389; Koontz v. Oregon R., etc., Co., 20 Oregon 3; Pennsylvania R. Co. v. Stranahan, 79 Pa. St. 405; Philadelphia, etc., R. Co. v. Schultz, 93 Pa. St. 341, 38 Am. Dec. 73, note; Smith v. Old Colony, etc., R. Co., 10 R. I. 22; Cleaveland v. Grand Trunk R. Co., 42 Vt. 449; Stertz v. Stewart, 74 Wis. 160.

Contra. — The rule above stated has not always met with approval, and cases to the contrary may be found. Coale v. Hannibal, etc., R. Co., 60 Mo. 227; Baltimore, etc., R. Co. v. Woodruff, 4 Md. 242. See also Edwards v. Ottawa River Nav. Co., 39 U. C. Q. B. 264.

1. In Proof of Malice. — Hamel v. Amyot, 14 Quebec L. Rep. 56; Castle v. Bullard, 23 How. (U. S.) 172; Butler v. Watkins, 13 Wall. (U. S.) 456; Lunsford v. Dietrich, 93 Ala. 565, 30 Am. St. Rep. 79; Friend v. Hamill, 34 Md. 298; Smith v. National Ben. Soc., 123 N. Y. 85; Grace v. McArthur, 76 Wis. 641.

2. Habit or System in Business. — New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591; Alabama G. S. R. Co. v. Sellers, 93 Ala. 9, 30 Am. St. Rep. 17; Kentucky Cent. R. Co. v. Barrow, 89 Ky. 638; Moline-Milburn Co. v. Franklin, 37 Minn. 137; Bernheim v. Dibrell, 66 Miss. 199; Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450; State v. Boston, etc., R. Co., 58 N. H. 410; Adams v. Kenney, 59 N. H. 133; Amoskeag Mfg. Co. v. Head, 59 N. H. 332; Parkinson v. Nashua, etc., R. Co., 61 N. H. 416; Faucett v. Nichols, 64 N. Y. 377; Baldwin v. Short, 125 N. Y. 558; Pierce v. Hoffman, 24 Vt. 525.

3. To Show Value — *United States.* — Kerr v. South Park Com'rs, 117 U. S. 379.

Illinois. — Culbertson, etc., Packing, etc., Co. v. Chicago, 111 Ill. 651; Elmore v. Johnson, 143 Ill. 513, 36 Am. St. Rep. 401.

Iowa. — Cherokee v. Sioux City, etc., Town Lot, etc., Co., 52 Iowa 279.

Maryland. — Baltimore v. Smith, etc., Brick Co., 80 Md. 458.

Massachusetts. — Paine v. Boston, 4 Allen (Mass.) 168; Davis v. Charles River Branch, R. Co., 11 Cush. (Mass.) 506; Wyman v. Lexington, etc., R. Co., 13 Mett. (Mass.) 316; Chandler v. Jamaica Pond Aqueduct Corp., 122 Mass. 305; Gardner v. Brookline, 127 Mass. 358.

Missouri. — St. Louis, etc., R. Co. v. Clark, 121 Mo. 169.

New Hampshire. — Concord R. Co. v. Greely, 23 N. H. 242.

New Jersey. — Laing v. United New Jersey R., etc., Co., 54 N. J. L. 576, 33 Am. St. Rep. 682.

New York. — Gouge v. Roberts, 53 N. Y. 619; Blanchard v. New Jersey Steamboat Co., 59 N. Y. 292; Huntington v. Attrill, 118 N. Y. 365; Matter of Thompson, 127 N. Y. 463; Witmark v. New York El. R. Co., 149 N. Y. 393.

Pennsylvania. — Becker v. Philadelphia, etc., Terminal R. Co., 177 Pa. St. 252.

Wisconsin. — Washburn v. Milwaukee, etc., R. Co., 59 Wis. 364.

Cost Evidence of Value. — In some cases it has been held that the price at which property was bought is relevant as being some evidence of its value. Matter of Johnston, 144 N. Y. 563; Kendrick v. Beard, 90 Mich. 589.

The Contrary Rule. — In many states it is held that value cannot be shown by proof of independent sales, but after a witness has shown himself competent to speak as to value he may give his opinion as to values, and then, upon

(b) **In Criminal Cases** — *aa.* **IN PROOF OF CRIMINAL INTENT.** — In criminal prosecutions, to rebut the possible inference of accident, evidence of similar criminal acts is relevant and will not be excluded even though it tends to prove an independent crime.¹

bb. **IN PROOF OF MALICE OR MALICIOUS INTENT.** — Where malice or malicious intent is of the gist of the crime, evidence of collateral acts which tend to show the existence of malice, intent, or bad faith is sometimes admitted.²

cross-examination, he may be asked as to his knowledge of particular sales in the neighborhood. *Kerr v. South Park Com'rs*, 117 U. S. 379; *Central Pac. R. Co. v. Pearson*, 35 Cal. 247; *Selma, etc., R. Co. v. Keith*, 53 Ga. 178; *Haven v. Essex County*, 155 Mass. 467; *St. Louis, etc., R. Co. v. Clark*, 121 Mo. 169; *Montclair R. Co. v. Benson*, 36 N. J. L. 557; *Matter of Thompson*, 127 N. Y. 463; *Witmark v. New York El. R. Co.*, 149 N. Y. 393; *East Pennsylvania R. Co. v. Hiester*, 40 Pa. St. 53; *Pennsylvania, etc., R., etc., Co. v. Bunnell*, 81 Pa. St. 414; *Pennsylvania Schuylkill Valley R. Co. v. Ziemer*, 124 Pa. St. 560.

1. In Proof of Criminal Intent — *England.* — *Reg. v. Geering*, 18 L. J. M. C. 215; *Reg. v. Francis*, 12 Cox C. C. 612.

United States. — *Bottomley v. U. S.*, 1 Story (U. S.) 135.

Alabama. — *Hall v. State*, 40 Ala. 698; *Gassenheimer v. State*, 52 Ala. 314.

Connecticut. — *State v. Ward*, 49 Conn. 429.

Indiana. — *Bersch v. State*, 13 Ind. 434, 74 Am. Dec. 263; *Card v. State*, 109 Ind. 420.

Louisiana. — *State v. Thomas*, 30 La. Ann. 600.

Massachusetts. — *Com. v. Hall*, 4 Allen (Mass.) 305; *Com. v. Jenkins*, 10 Gray (Mass.) 485; *Com. v. Merriam*, 14 Pick. (Mass.) 518, 25 Am. Dec. 420; *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110; *Com. v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *Com. v. Coe*, 115 Mass. 481; *Com. v. McCarthy*, 119 Mass. 354; *Com. v. Cotton*, 138 Mass. 500.

Michigan. — *Lightfoot v. People*, 16 Mich. 507.

New Hampshire. — *State v. Wentworth*, 37 N. H. 196.

New York. — *Copperman v. People*, 56 N. Y. 591; *Coleman v. People*, 58 N. Y. 555; *People v. Dimick*, 107 N. Y. 31.

Ohio. — *Shriedley v. State*, 23 Ohio St. 130; *Brown v. State*, 26 Ohio St. 176.

Pennsylvania. — *Kramer v. Com.*, 87 Pa. St. 299; *Kilrow v. Com.*, 89 Pa. St. 480.

Tennessee. — *Wiley v. State*, 3 Coldw. (Tenn.) 362.

See also the various criminal titles.

Other Crimes Cannot Be Shown. — In a criminal trial it is not relevant to show that the defendant has committed other similar crimes which are not connected in any way with the one in question. *Boyd v. U. S.*, 142 U. S. 450; *Ogle v. Brooks*, 87 Ind. 600, 44 Am. Rep. 778; *Com. v. Jackson*, 132 Mass. 16; *State v. Parker*, 96 Mo. 382; *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69; *People v. Gibbs*, 93 N. Y. 470; *State v. Shuford*, 69 N. Car. 486; *State v. Alston*, 94 N. Car. 930; *Cole v. Com.*, 5 Gratt. (Va.) 606; *Schaser v. State*, 36 Wis. 429.

A party sued for slander who denies the charge on the witness stand, cannot be asked on cross-examination if he had not slandered

another person two or three years before. *Sullivan v. O'Leary*, 146 Mass. 322.

As a general rule, a distinct crime unconnected with the one in the indictment cannot be given in evidence. *Schaffner v. Com.*, 72 Pa. St. 60, 13 Am. Rep. 649; *Schaser v. State*, 36 Wis. 429; *Lightfoot v. People*, 16 Mich. 507.

Incidental Proof of Other Crimes. — Testimony otherwise competent and relevant as tending to prove the offense charged in the indictment is not rendered inadmissible by reason of the fact that it also tends to prove a separate and distinct offense. *Brown v. State*, 26 Ohio St. 176; *Reg. v. Geering*, 18 L. J. M. C. 215; *People v. Dimick*, 107 N. Y. 31.

2. In Proof of Malice. — *Stephen's Dig. Ev.*, art. 11; *Bottomley v. U. S.*, 1 Story (U. S.) 135; *Castle v. Bullard*, 23 How. (U. S.) 172; *Lincoln v. Clafin*, 7 Wall. (U. S.) 132; *Butler v. Watkins*, 13 Wall. (U. S.) 456; *Ross v. State*, 62 Ala. 224; *McKenney v. Dingley*, 4 Me. 172; *Cary v. Hotailing*, 1 Hill (N. Y.) 311, 37 Am. Dec. 323; *Allison v. Matthieu*, 3 Johns. (N. Y.) 235; *Hall v. Naylor*, 18 N. Y. 588, 75 Am. Dec. 269; *Street v. State*, 7 Tex. App. 5.

Fraud of Vendee of Goods. — In order to rescind a sale of goods on the ground of false and fraudulent conduct in the vendee, in representing himself to be a man of good property and credit when he was not so, it is relevant for the vendor, in addition to direct proof of the case, to give evidence of similar false pretenses in addition to the direct proof of the fraud, and evidence of similar false pretenses successfully used upon other persons in the same town at about the same time, to show a general plan to amass property by fraud. *McKinney v. Dingley*, 4 Me. 172. To the same effect see *Cary v. Hotailing*, 1 Hill (N. Y.) 311, 37 Am. Dec. 323; *Hall v. Naylor*, 18 N. Y. 588, 75 Am. Dec. 269; *Lincoln v. Clafin*, 7 Wall. (U. S.) 132; *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731.

Fraud in Vendor. — The same rule prevails where it is sought to show that the vendor fraudulently sold property. *Castle v. Bullard*, 23 How. (U. S.) 172; *Lincoln v. Clafin*, 7 Wall. (U. S.) 132.

Fraudulent Collusion. — In *Allison v. Matthieu*, 3 Johns. (N. Y.) 235, A and B applied to C to purchase goods for A, who was recommended by B, and by their direction the goods were sent to B's house. B afterwards wrote a bill of sale of them from A, and A then absconded without paying C for the goods. In an action of trover by C against B it was held that it was relevant to show that the goods had been obtained fraudulently and by collusion between A and B, under a pretense of purchase, and that the plaintiff might introduce evidence of subsequent acts of collusion and fraud between A and B to obtain goods from others, in order to show the previous intention

cc. IN PROOF OF A SYSTEM OF CRIME. — Evidence of other facts than those in issue may sometimes be admitted in proof of a system of crime pursued by the accused or of fraudulent schemes practiced by one charged with fraud.¹

h. FACTS FORMING PART OF THE SAME TRANSACTION AS THE FACTS IN ISSUE. — Facts that are collateral to the facts in issue are sometimes deemed relevant and admissible because they form a part of the same transaction as the facts in issue.²

i. ACTS AND DECLARATIONS OF CONSPIRATORS. — After a *prima facie* case has been made of a conspiracy to commit a crime or an actionable wrong, the acts and declarations of each conspirator are relevant and admissible against all if such act or declaration was in furtherance of the common purpose.³

j. FACTS EXPLANATORY OR INTRODUCTORY OF RELEVANT FACTS. — Facts that would otherwise be irrelevant are often relevant and admissible because they are necessary to introduce or explain facts which are relevant.⁴

of A and B, which the jury might infer from the circumstances.

1. In Proof of a System of Crimes or Fraudulent Schemes — *England*. — *Rex v. Ellis*, 6 B. & C. 145, 13 E. C. L. 123; *Rex v. Roberts*, 1 Campb. 399; *Rex v. Davis*, 6 C. & P. 177, 25 E. C. L. 341; *Reg. v. Dossett*, 2 C. & K. 306, 61 E. C. L. 306; *Huntingford v. Massey*, 1 F. & F. 690; *Reg. v. Geering*, 18 L. J. M. C. 215; *Reg. v. Richardson*, 8 Cox C. C. 448; *Dunn's Case*, 1 Moo. C. C. 146.

United States. — *Wood v. U. S.*, 16 Pet. (U. S.) 360; *Castle v. Bullard*, 23 How. (U. S.) 172; *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591.

California. — *Butler v. Collins*, 12 Cal. 457.

Massachusetts. — *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *Com. v. Campbell*, 7 Allen (Mass.) 541, 83 Am. Dec. 705; *Com. v. Tuckerman*, 10 Gray (Mass.) 179; *Com. v. Choate*, 105 Mass. 451; *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731; *Com. v. Coe*, 115 Mass. 481; *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81; *Com. v. Corkin*, 136 Mass. 429.

Michigan. — *People v. Wright*, 89 Mich. 70.

Minnesota. — *Moline-Milburn Co. v. Franklin*, 37 Minn. 137.

Mississippi. — *Bernheim v. Dibrell*, 66 Miss. 199.

Missouri. — *State v. Tabor*, 95 Mo. 585.

New Hampshire. — *Adams v. Kenney*, 59 N. H. 133.

New York. — *Phillips v. People*, 57 Barb. (N. Y.) 353; *French v. White*, 5 Duer (N. Y.) 254; *Weyman v. People*, 4 Hun (N. Y.) 511; *People v. Wood*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 681; *Stout v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 71; *Copperman v. People*, 56 N. Y. 591; *Baldwin v. Short*, 125 N. Y. 553.

Ohio. — *Tarbox v. State*, 38 Ohio St. 581.

Pennsylvania. — *Com. v. Ferrigan*, 44 Pa. St. 386; *Shaffner v. Com.*, 72 Pa. St. 60, 13 Am. Rep. 649.

South Carolina. — *State v. Williams*, 2 Rich. L. (S. Car.) 418, 45 Am. Dec. 741.

Vermont. — *Pierce v. Hoffman*, 24 Vt. 525.

2. Facts Forming Part of Same Transaction. — *Stephen's Dig. Ev.*, art. 3; *Travellers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397; *Vicksburg, etc., R. Co. v. O'Brien*, 119 U. S. 105; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49, note;

Augusta Factory v. Barnes, 72 Ga. 217, 53 Am. Rep. 838. See the title *RES GESTÆ*.

Declarations Springing Out of Main Fact. — Declarations springing out of the principal transaction are to be regarded as contemporaneous with it and are admissible in evidence as a part of the *res gestæ*, if they tend to explain the principal transaction, and were voluntarily made at a time so near to it, although not precisely connected with it, as to preclude the idea of deliberate design. *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49, note; *Travellers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397.

3. For a Full Discussion of this subject, see the titles *CONFESSIONS*, vol. 6, p. 520; *CONSPIRACY*, vol. 6, p. 830.

4. Explanatory of Relevant Facts. — *Stephen's Dig.*, art. 9.

England. — *Rex v. Rooney*, 7 C. & P. 517, 32 E. C. L. 608; *Boye v. Rossborough*, 6 H. L. Cas. 58; *Rex v. Pearce*, 1 Peake N. P. (ed. 1795) 75; *Rex v. Egerton*, R. & R. C. C. 278; *Reg. v. Briggs*, 2 M. & Rob. 199; *Woodward v. Buchanan*, L. R. 5 Q. B. 285; *Dowling v. Dowling*, 10 Ir. C. L. 241.

Alabama. — *Mason v. State*, 42 Ala. 532.

Connecticut. — *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89.

Georgia. — *Richmond, etc., R. Co. v. Garner*, 91 Ga. 27.

Indiana. — *Stinehouse v. State*, 47 Ind. 17.

Louisiana. — *Moniotte v. Lieux*, 41 La. Ann. 528.

Massachusetts. — *Ross v. Boston, etc., R. Co.*, 6 Allen (Mass.) 87; *Com. v. Annis*, 15 Gray (Mass.) 197; *Com. v. Williams*, 105 Mass. 62; *Raynes v. Bennett*, 114 Mass. 424; *Norris v. Spofford*, 127 Mass. 85; *Lynch v. Coffin*, 131 Mass. 311; *Loring v. Worcester, etc., R. Co.*, 131 Mass. 469; *Wentworth v. Eastern R. Co.*, 143 Mass. 248; *Merritt v. New York, etc., R. Co.*, 162 Mass. 326.

Michigan. — *Edgell v. Francis*, 86 Mich. 232.

New York. — *Rouse v. Whited*, 25 N. Y. 170, 82 Am. Dec. 337; *Bronner v. Frauenthal*, 37 N. Y. 166; *Quincey v. White*, 63 N. Y. 370; *Miller v. Irish*, 63 N. Y. 652; *Ryall v. Kennedy*, 67 N. Y. 379; *Pontius v. People*, 82 N. Y. 339.

Pennsylvania. — *Wagenseller v. Simmers*, 97 Pa. St. 465.

Vermont. — *Foster v. Dickerson*, 64 Vt. 233.

Wisconsin. — *Mack v. State*, 48 Wis. 271;

As to the effect of the introduction of irrelevant evidence and as to

Gage v. Chesebro, 49 Wis. 486; *Smith v. State*, 51 Wis. 615, 37 Am. Rep. 845.

Words Explanatory of Acts.—In *Rouse v. Whited*, 25 N. Y. 178, 82 Am. Dec. 337, the plaintiff, to show that his property had been applied to the defendant's use in payment of a note made by the defendant and indorsed by the plaintiff, proved that the defendant pointed out the property to the sheriff and declared that it was the plaintiff's. It was held that the defendant was entitled to prove his statement in the same conversation that the note was the plaintiff's debt and he was to pay it.

Explanation of Conduct.—If, at the trial of an action, the plaintiff introduces evidence which if material tends to show an improper advance made by the defendant to a witness for the plaintiff, it is within the discretion of the presiding judge to allow the defendant to testify in explanation of his conduct. *Lynch v. Coffin*, 131 Mass. 311; *Edgell v. Francis*, 86 Mich. 232.

Where it appeared in the examination in chief of a witness for the plaintiffs that the account books of a principal debtor were destroyed before the trial, the garnishee defendant was entitled to show, on cross-examination, the reason for such destruction, in order to repel an inference of an improper motive. *Gage v. Chesebro*, 49 Wis. 486.

Where, on the trial of an information, the state introduced evidence to show, as a motive for the murder, that the accused, being the wife of the deceased, had a criminal intimacy with one X, who was in the employ of the deceased, and such evidence tended to show that X had been discharged by the deceased, and after being re-employed had again been discharged by him after one day's service, it was held error to reject evidence for the defense to show why X left such employment, offered to repel the inferences unfavorable to the accused which it was sought to derive from the state's evidence. *Mack v. State*, 48 Wis. 271.

The Whole of a Record.—Where a part of a record in a suit which was compromised is offered to prove the judicial admission of one of the parties to the suit, it is competent for the other party to offer the compromise in evidence to show the final disposition of the suit and the matters settled by the compromise and which were at issue in the litigation. *Monjotte v. Lieux*, 41 La. Ann. 528.

Reasons for Suing in Another State.—In an action against a railroad company for personal injuries received by the plaintiff in alighting from the defendant's train in another state, the plaintiff being a resident of still another state where the defendant had attachable property, evidence of the law of the last state, under which the plaintiff may in a case of this kind be deprived of the right of trial by jury on the question of damages, and, upon the hearing before the judge, other matters in bar of the action may be presented to reduce the damages, was held admissible to explain the plaintiff's conduct in bringing the action where he did instead of in the state of his residence. *Merritt v. New York, etc., R. Co.*, 162 Mass. 326.

Facts Showing Ground of Accusation.—For the

purpose of proving want of mental capacity the contestants introduced evidence tending to show that the testatrix had many insane delusions, and among other things she continually accused her husband of improper conduct with other women. It was held that the proponents might show in rebuttal what the conduct and reputation of the husband in this respect were, so far as known to the testatrix. *Foster v. Dickerson*, 64 Vt. 233.

Sale of Goods.—Upon the issue whether the goods were sold to the defendants or to a third party, it is competent for the plaintiff to prove that immediately prior to the sale he had been directed not to trust such third party, because he was not responsible; and he may prove it by the party giving him the information. *Bronner v. Frauenthal*, 37 N. Y. 166.

In Proof of Employment.—On an issue whether A was employed by B it is competent for B to show conduct of A during the alleged term of employment inconsistent with the theory of such employment. *Miller v. Irish*, 63 N. Y. 652.

In Proof of Nature of Account.—In an action against several persons upon an account arising from stock transactions claimed by the plaintiff to have been joint transactions on the part of the defendants, but claimed by one of the defendants to have been several, it was held that evidence that said defendant had a private account running at the same time was competent as a circumstance tending to show that the other account was joint and several. *Quincey v. White*, 63 N. Y. 370.

Link in Chain of Evidence.—Where the defendant is on trial for burglary or other criminal act evidence of other criminal acts than those charged in the indictment may be received, where it is necessary to prove guilty knowledge, to establish identity, to make out the *res gestæ*, or to make out a chain of circumstantial evidence of guilt in respect to the act charged. *Rex v. Pearce*, 1 Peake N. P. (ed. 1795) 75; *Mason v. State*, 42 Ala. 532.

Other Orders for Material.—On the trial of an action by the plaintiff against the defendant for work done and materials supplied to certain houses on the orders of a third person, the defendant denying that he was the owner of the houses or the real principal, evidence that other persons had received orders from the defendant to do work at the same houses was held admissible without showing that the plaintiff knew of these other orders at the time when he did the work. *Woodward v. Buchanan*, L. R. 5 Q. B. 285.

Instances Where Such Facts Were Held Not Relevant.—*United States*.—*Thompson v. Bowie*, 4 Wall. (U. S.) 463.

Alabama.—*Swann v. Kidd*, 78 Ala. 173.

Indiana.—*Carroll County v. O'Connor*, 137 Ind. 622.

Iowa.—*Campbell v. Chicago, etc., R. Co.*, 45 Iowa 76.

Massachusetts.—*Graves v. Jacobs*, 8 Allen (Mass.) 141; *Abercrombie v. Sheldon*, 8 Allen (Mass.) 532; *Burke v. Kaley*, 138 Mass. 464; *Ockershausen v. Durant*, 141 Mass. 338; *Kellogg v. Tompson*, 142 Mass. 76; *Hathaway v. Tinkham*, 148 Mass. 85.

whether or not it can be contradicted or explained the decisions of the

Michigan. — Patrick v. Howard, 47 Mich. 40; Hamilton v. Frothingham, 59 Mich. 253.

Missouri. — Bates v. Forcht, 89 Mo. 121.

Nebraska. — Houston v. Gran, 38 Neb. 687; Gran v. Houston, 45 Neb. 813.

New York. — Gibson v. American Mut. L. Ins. Co., 37 N. Y. 580; Reed v. New York Cent. R. Co., 45 N. Y. 574; Baird v. Gillett, 47 N. Y. 186; Green v. Disbrow, 56 N. Y. 334; Eggler v. People, 56 N. Y. 642.

North Carolina. — Rowland v. Dowe, 2 Murph. (6 N. Car.) 347.

Pennsylvania. — Philadelphia City Pass. R. Co. v. Henrice, 92 Pa. St. 431, 37 Am. Rep. 699.

Vermont. — Noyes v. Fitzgerald, 55 Vt. 49; Harris v. Howard, 56 Vt. 695.

Wisconsin. — Kvammen v. Meridean Mill Co., 58 Wis. 399.

Financial Condition of One Claiming to Have Loaned Money. — "It was relevant to inquire upon cross-examination as to this money, where it was procured by him, at what place kept, from whence taken to make the loan; and it was also relevant and pertinent to give in evidence any fact which would tend to show the improbability of his narrative. His conduct in regard to necessary expenses, his pecuniary necessities, the borrowing of money by himself at or about the time when he claimed to have advanced the complainant money, would all bear upon the question. So would the fact that small debts were contracted by him, and not paid when due or after frequent request, indicate something in regard to his pecuniary ability, and might well be submitted to the consideration of the jury, with other circumstances. A man may, indeed, be willing to lend to his neighbor in time of need, and yet be unwilling to pay his debts in due season, although fully able to do both; but whether, in any given case, either one or both of these facts existed would have to be determined from a variety of circumstances, and their force could properly be estimated by the jury. The inquiry, therefore, in regard to the undertaker's bill, and other debts contracted by the defendant, and not paid, and his omission to pay them after frequent request, was properly allowed. It was all part of a legitimate cross-examination to which the defendant offered himself, and in a measure demanded, when, as a witness, he testified to the fact of a large loan of money." Pontius v. People, 82 N. Y. 339; Dowling v. Dowling, 10 Ir. C. L. 241; Beckley v. Jarvis, 55 Vt. 348.

Evidence is admissible to show that a person has for several years been living at a rate of expenditure far beyond his apparent means, as tending to confirm other evidence of dishonesty in appropriating the property of his employer. Hackett v. King, 8 Allen (Mass.) 144, 85 Am. Dec. 695.

Value Irrelevant in Action on Contract. — Evidence of the value of goods or services is irrelevant in an action on contract for the agreed price of such goods or services. Carroll County v. O'Connor, 137 Ind. 622; Hamilton v. Frothingham, 59 Mich. 253; Bright v. Metairie Cemetery Assoc., 33 La. Ann. 58; Kvammen v. Meridean Mill Co., 58 Wis. 399.

Otherwise When Evidence Is Conflicting. — But where there is a conflict of evidence as to the contract price, the actual value may be shown as bearing on the question of whose contention is probably true. Saunders v. Gallagher, 53 Min. 422; Fry v. Tilton, 11 Neb. 459; Allison v. Horning, 22 Ohio St. 138; Kidder v. Smith, 34 Vt. 294.

Evidence of Money in Bank. — In an action for money loaned at different times by the plaintiff to the defendant's intestate, who was shown to have been seriously ill for several months before the alleged first loan, and to have continued in such ill health as to be unable to engage in any business to the time of his death, no exception lies to the exclusion of evidence that, at the date of the alleged loans, he had a sum of money in a savings bank, and that, from the time of his sickness, he drew from the bank sufficient money to pay all his expenses. Burke v. Kaley, 138 Mass. 464.

Contract Cannot Be Proved by Evidence of Value. — When the fact of an alleged agency was in dispute, and the testimony showed that if such relation existed the agent's compensation was a fixed sum, and the agency limited to the sale of specified property, it was held that the opinions of witnesses as to what compensation and commission would be proper, in such a case, to allow a land broker, were irrelevant; and as such testimony showed that the price which the agent claimed he was to receive was very much in excess of any usual commission, such price must be based on an express contract for the breach of which damages could not be recovered under the common counts. Hamilton v. Frothingham, 59 Mich. 253. See also Kvammen v. Meridean Mill Co., 58 Wis. 399.

Cost No Evidence of Quality Contracted For. — Evidence of the cost of material used by a contractor is not admissible for the purpose of showing the quality of the material, or the suitability of the material for the purpose for which it was used. Carroll County v. O'Connor, 137 Ind. 622.

Custom in Proof of Wages. — The contention being as to what wages a carpenter was to receive per day, it was held that evidence of what other carpenters received at other towns in another state was too remote. Noyes v. Fitzgerald, 55 Vt. 49.

Price No Evidence of Warranty. — If the evidence in an action is conflicting upon the question whether goods were sold with a warranty of quality, evidence offered as bearing upon that question alone, that the goods were bought by the vendor for so low a price as to raise the presumption that they were not of the quality alleged to have been warranted, is too remote and is properly excluded. Ockershausen v. Durant, 141 Mass. 338.

Contract to Do, No Evidence of What Was Done. — In an action by the indorsee of a promissory note made by a firm, upon the question whether or not the signature to the note was in the handwriting of a member of the firm, an article of the copartnership agreement forbidding its members to sign any bond or indorse any note of hand, or to "accept, sign, or indorse any draft or bill of exchange or assume any other liability, verbal or written,

courts are not in harmony.¹

k. CHARACTER OR REPUTATION OF PARTIES — In Civil Cases. — It is a gen-

either in his own name or the name of the firm, for the accommodation of any other person or persons whatsoever," without the consent, in writing, of the other partners, where it is not pretended that the plaintiff had any notice of the stipulations of the partnership contract, is not admissible in evidence. Also evidence that the partner who it is claimed signed the note was communicative with his partners and family as to his business affairs, and at no time prior to his death had mentioned the note sued on, is not competent to prove that he did not sign the note. *Bates v. Forcht*, 89 Mo. 121.

Improbability Not Evidence. — Where the issue was whether the defendant ever promised to pay rent to the plaintiff, and the evidence was conflicting, it was held that the defendant could not introduce evidence of circumstances tending to show that it was neither reasonable nor probable that he would make such promise; consequently a charge requested by him, asserting that if he had been in open and uninterrupted possession of the premises for more than ten years, claiming them as his own under a verbal gift, and paying rent to no one, the jury might "look to such fact, in connection with all the other evidence in the case, in order to determine whether defendant agreed to pay rent to plaintiff," was erroneous. *Swann v. Kidd*, 78 Ala. 173.

Evidence Held Too Remote. — In an action for the conversion of a promissory note, several months before its maturity, evidence of the financial condition of the maker of the note at the time of its maturity is inadmissible upon the question of damages. *Kellogg v. Tompson*, 142 Mass. 76.

Upon the issue whether the plaintiff could recover for the use of his horse, it was held that evidence that he allowed other parties to use the same horse about the same time, and charged them nothing, was inadmissible. *Harris v. Howard*, 56 Vt. 695.

In Proof of Payment. — In an action against an executor to recover on a note of long standing, signed by his testator, payment of the note cannot be proved by evidence that it was the testator's habit to pay his debts promptly, or that another person had agreed to pay them for him, or that he had made a list of his debts in which the note in question was not included. *Abercrombie v. Sheldon*, 8 Allen (Mass.) 532.

In Proof of Consideration. — On an issue as to whether certain promissory notes, dated on a particular day, were given for money lost at play, and were therefore void, it is not allowable to prove that the party giving them was intoxicated on the day of the date of the notes, and that when intoxicated he had a propensity for gaming. *Thompson v. Bowie*, 4 Wall. (U. S.) 463.

To Whom Credit Was Given. — In an action where the question at issue was whether credit was given to the defendant or his son, evidence on the part of the plaintiff of the pecuniary inability of the son was received over the defendant's objection. It was held that its reception was erroneous, as was also the

reception of evidence that the defendant had paid debts due to other persons from the son. *Green v. Disbrow*, 56 N. Y. 334.

Physical Condition of Employees. — A child of tender years was injured by a railway passenger car. The court permitted the plaintiff, for the purpose of showing that the driver of the car which injured the child was physically unable to discharge his duty at the time of the accident, to ask a witness how many hours the drivers and conductors were employed each day. It was held that this was error. *Philadelphia City Pass. R. Co. v. Henrice*, 92 Pa. St. 431, 37 Am. Rep. 699.

Ability to Do Work Sued For. — If, in an action to recover the value of the labor of the plaintiff's intestate for several years before his death, the defendant has introduced evidence to show that by reason of confirmed intemperance and a chronic bodily disease his labor was not worth more than his board and clothing and such small sums of money as were furnished to him for holidays, evidence is inadmissible in reply to show the amount and value of his labor the year before he commenced working for the defendant, and that there was no visible change for the worse in his health and habits thereafter. *Graves v. Jacobs*, 8 Allen (Mass.) 141.

Ungovernable Temper. — Upon the trial of an indictment for murder, evidence on behalf of the accused of particular instances of exhibitions of violent and ungovernable temper by the person killed is not competent. *Eggler v. People*, 56 N. Y. 642.

Presentation of Bill for Services. — In an action against a physician for malpractice and neglect, it was held that the admission of evidence that the defendant had not presented any bill for services was error. *Baird v. Gillett*, 47 N. Y. 186.

Religious Opinion and Suicide. — In an action upon a life-insurance policy, where the question in issue is whether the death of the deceased was accidental or suicidal, it is not competent to show that the deceased was an infidel or an atheist, for the purpose of showing that he would therefore have been more likely to commit suicide. *Gibson v. American Mut. L. Ins. Co.*, 37 N. Y. 580.

Collateral Agreements or Instructions Irrelevant. — In an action by an indorsee of a note against partners as indorsers it is not relevant to show in defense that the partners had previously agreed among themselves that neither partner should sign or indorse such a note, the plaintiff having no knowledge of any such agreement. *Bates v. Forcht*, 89 Mo. 121.

So in an action by a widow and her minor children against a saloon keeper and his bondsmen for loss of support resulting from the death of the husband and father, caused by the sale of liquors to him by the defendants, it was held that the fact that the proprietor of the saloon had given his bartender instruction not to sell liquors to the deceased was irrelevant. *Houston v. Gran*, 38 Neb. 687; *Gran v. Houston*, 45 Neb. 813.

1. *United States*. — *Bogk v. Gassert*, 149 U. S. 17.

eral rule, subject to many and important exceptions, that in civil cases the character or reputation of the parties to the action is irrelevant, and evidence of it is inadmissible.¹

In Criminal Cases. — One charged with crime is always entitled, if he chooses to do so, to offer evidence of his good character (general reputation), whether

Alabama. — *Havis v. Taylor*, 13 Ala. 324.

California. — *San Diego Land, etc., Co. v. Neale*, 88 Cal. 50.

Indiana. — *Sherfey v. Evansville, etc., R. Co.*, 121 Ind. 427.

Iowa. — *Manning v. Burlington, etc., R. Co.*, 64 Iowa 240; *Ingram v. Wackernagel*, 83 Iowa 82.

Maryland. — *Gorsuch v. Rutledge*, 70 Md. 272.

Massachusetts. — *Brown v. Perkins*, 1 Allen (Mass.) 89; *Davis v. Keyes*, 112 Mass. 436; *Treat v. Curtis*, 124 Mass. 348.

Nebraska. — *McCartny v. Territory*, 1 Neb. 121; *Dodge v. Kiene*, 28 Neb. 216.

New Hampshire. — *Furbush v. Goodwin*, 25 N. H. 425.

New York. — *Farmers', etc., Bank v. Whinfield*, 24 Wend. (N. Y.) 421; *Scattergood v. Wood*, 79 N. Y. 263, 35 Am. Rep. 515; *People v. Dowling*, 84 N. Y. 478.

Vermont. — *Stevenson v. Gunning*, 64 Vt. 601.

Party Cannot Complain When He Offers Like Evidence. — The question at issue was whether a certain deed, absolute on its face, was given for the security of a loan or whether it was an absolute conveyance. The defendant had testified as to the transaction and as to conversations that had taken place between the parties. In rebuttal witnesses were put upon the stand and asked as to the conversation which took place at the attorney's office at the time when the deeds and contract to reconvey were made. Mr. Justice Brown, delivering the opinion of the Supreme Court of the United States, said: "Now, while this might have been improper as original testimony, it would have been manifestly unfair to permit Bogk to give his version of the transaction gathered from conversation between the parties, and to deny the plaintiffs the privilege of giving their version of it. The defendant himself, having thrown the bars down, has evidently no right to object to the plaintiffs having taken advantage of the license thereby given to submit to the jury their understanding of the agreement." *Bogk v. Gassert*, 149 U. S. 17.

Incompetent Evidence May Be Rebutted. — Where a party, upon the trial of a case, claims the right and is permitted to introduce evidence that is incompetent, he cannot be heard to complain of the introduction of evidence in rebuttal thereof. *Bogk v. Gassert*, 149 U. S. 17; *Havis v. Taylor*, 13 Ala. 324; *Sherfey v. Evansville, etc., R. Co.*, 121 Ind. 427; *Ingram v. Wackernagel*, 83 Iowa 82; *Furbush v. Goodwin*, 25 N. H. 425; *Stevenson v. Gunning*, 64 Vt. 610.

Failure to Object Confers No Right. — A party cannot, by failing to object to improper evidence, secure the right to introduce similar evidence himself. *Manning v. Burlington, etc., R. Co.*, 64 Iowa 240.

How Incompetent Evidence May Be Rebutted.

— Competent evidence may be received on behalf of one party to rebut incompetent evidence introduced by the other without objection. But incompetent evidence cannot be received to rebut incompetent evidence so received. *San Diego Land, etc., Co. v. Neale*, 88 Cal. 50; *Manning v. Burlington, etc., R. Co.*, 64 Iowa 240; *Gorsuch v. Rutledge*, 70 Md. 272; *Davis v. Keyes*, 112 Mass. 436; *McCartny v. Territory*, 1 Neb. 121; *Dodge v. Kiene*, 28 Neb. 216; *Farmers', etc., Bank v. Whinfield*, 24 Wend. (N. Y.) 421.

Cannot Contradict Immaterial Testimony. — In an action for a breach of warranty in the sale of a horse where it was claimed that the defendant warranted the horse not to be over eight years old, the defendant testified that he did not know the horse's age, and that he never had warranted and never would warrant a horse. In reply the plaintiff offered to prove that the defendant, while previously endeavoring to sell the horse to others, had offered to warrant that he was not more than eight years old. It was held that this evidence, being to contradict immaterial testimony, was rightly rejected. *Davis v. Keyes*, 112 Mass. 436.

To Explain Possession. — The prosecution proved the finding at the house of the prisoner of other goods than those named in the indictment, and there was testimony tending to prove that those other goods had been stolen and received with guilty knowledge. The prisoner then offered to show, by his own testimony, that he purchased a part of these goods at L., and that he asked the persons of whom he bought them to go and look at and identify them. This was objected to and rejected. It was held that if the proof given by the prosecution was competent, such testimony was erroneously rejected, and that the prisoner had the right to meet the evidence against him by testimony tending to show that he came by the property honestly. *People v. Dowling*, 84 N. Y. 478.

Voluntary Statement May Be Contradicted. — In an action for breaking and entering a shop and destroying articles therein, if the plaintiff, while testifying in his own behalf, has volunteered the statement that no liquors were in the shop at the time, it is competent for the defendant to introduce evidence in reply that liquors were found in the shop at the time of the alleged trespass, although the plaintiff disclaims seeking any damages for their destruction. *Brown v. Perkins*, 1 Allen (Mass.) 89.

On Warranty of Machinery. — In an action for breach of warranty in the sale of a cotton gin, the plaintiff having given evidence of the comparative merits of this and other machines, it was held that he could not object to the introduction of similar evidence on behalf of the defendant. *Scattergood v. Wood*, 79 N. Y. 263, 35 Am. Rep. 515.

1. See the title CHARACTER (IN EVIDENCE), vol. 5, p. 850.

the case be a doubtful or a plain one;¹ but the initiative is with the accused, and the prosecution is limited to rebuttal evidence as to character, and if none is offered by the accused the prosecutor can offer none.²

7. FINANCIAL STANDING OF PARTIES — In Criminal Cases. — In prosecutions for crime the financial standing of the parties is generally immaterial, and evidence thereof is irrelevant.³

In Civil Cases. — In certain civil actions, the financial or social standing of the parties is, under some circumstances, relevant, and evidence thereof admissible.⁴

Methods of Proving Financial Standing. — In Cases for Compensatory Damages the injury inflicted is to some extent dependent upon the supposed or reputed wealth of the defendant, and hence evidence of reputation for wealth is relevant.⁵

1. See the title CHARACTER (IN EVIDENCE), vol. 5, p. 850.

2. *Alabama*. — *Harrison v. State*, 37 Ala. 154. *California*. — *People v. Fair*, 43 Cal. 137.

Connecticut. — *Thompson v. Church*, 1 Root (Conn.) 312.

Delaware. — *State v. Carter*, 1 *Houst. Cr. Cas.* (Del.) 402.

Kentucky. — *Young v. Com.*, 6 Bush (Ky.) 312.

Michigan. — *People v. Evans*, 72 Mich. 367. *Mississippi*. — *Dowling v. State*, 5 Smed. & M. (Miss.) 664.

Missouri. — *State v. Jackson*, 17 Mo. 544. 59 Am. Dec. 281; *State v. Creson*, 38 Mo. 372.

Nebraska. — *Olive v. State*, 11 Neb. 4. *New Hampshire*. — *State v. Lapage*, 57 N. H. 245. 24 Am. Rep. 69.

New York. — *People v. White*, 14 Wend. (N. Y.) 111; *People v. Greenwall*, 108 N. Y. 296. 2 Am. St. Rep. 415.

North Carolina. — *State v. Merrill*, 2 Dev. L. (13 N. Car.) 269; *State v. Hare*, 74 N. Car. 591.

Ohio. — *Cheney v. State*, 7 Ohio (pt. i.) 222. *Rhode Island*. — *State v. Ellwood*, 17 R. I. 763; *State v. Hull*, 18 R. I. 207.

Texas. — *Gibson v. State*, 23 Tex. App. 414.

3. Financial Standing of Parties — Criminal Cases. — 2 Bish. N. Crim. Pro., § 748. See the various criminal titles.

In *Com. v. Stebbins*, 8 Gray (Mass.) 492, the defendant was indicted for the larceny of bank bills, and defended on the ground that she supposed she was entitled to take them under the circumstances shown; and she offered evidence of her reputed wealth to refute the evidence of felonious intent. The court said:

"Nor can there be any doubt that evidence of the defendant's being reputed, at the time when she took the money, to be a person of property was rightly excluded. It would have had no legal tendency to prove that the taking of the money was not felonious."

When the accused in a prosecution for larceny or robbery has come suddenly in possession of money, his former poverty may be shown. *Perrin v. State*, 81 Wis. 135; *Com. v. Montgomery*, 11 Met. (Mass.) 534, 45 Am. Dec. 227; *State v. Grebe*, 17 Kan. 458; *State v. Cameron*, 40 Vt. 555; *Com. v. Grose*, 99 Mass. 423.

Where a bookkeeper was charged with larceny it was held that evidence was relevant to show his financial condition before the alleged larceny; that he was then in poor cir-

cumstances, and that afterwards he had money to spend. *Perrin v. State*, 81 Wis. 135.

In an opinion sustaining the relevancy of evidence of a change in financial condition the Supreme Court of Kansas, by Brewer, J., said: "True, the testimony was not direct proof of Grebe's guilt. And indeed there was no direct testimony as to who committed the crime. But there were circumstances which might well tend, in connection with other facts, to induce a belief in his guilt. A change in one's pecuniary condition may often be very significant. At least, it is a circumstance which the jury have a right to consider." *State v. Grebe*, 17 Kan. 458.

Where the defendant claimed to have killed and sold six oxen on account of a third person, and turned the proceeds over to him, it was relevant to show that the defendant was without available means or credit and that at about the time of the sale he paid for other cattle about the sum received for those killed. *Com. v. Grose*, 99 Mass. 423.

Upon the trial of an indictment for larceny of bank bills the court, holding that evidence of a change in the defendant's financial condition was relevant, said: "The possession of a large sum of money with strong accompanying circumstances of guilt, of an independent character, accompanied with evidence of entire destitution of money before the time of the larceny, may properly be submitted to the jury to be considered with all the evidence in the case." *Com. v. Montgomery*, 11 Met. (Mass.) 534, 45 Am. Dec. 227.

4. This Subject Is Fully Discussed elsewhere in this work. See the titles ASSAULT AND BATTERY, vol. 2, p. 952; BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 882; CRIMINAL CONVERSATION, vol. 8, p. 260; LIBEL AND SLANDER; MALICIOUS PROSECUTION; SEDUCTION.

5. How Financial Standing Shown. — *Stanwood v. Whitmore*, 63 Me. 209; *Johnson v. Smith*, 64 Me. 555; *Kniffen v. McConnell*, 30 N. Y. 285.

Reputation for Wealth. — "We think, however, that the wealth of a defendant should be proved by general evidence rather than by particular facts. It is the defendant's position in society which gives his slanderous statements character and weight. Reputation for wealth, rather than its possession, generally confers position. Therefore, the more proper inquiry is as to the reputation of a defendant for wealth." *Stanwood v. Whitmore*, 63 Me. 209.

In Cases Where Exemplary Damages Are Allowed by way of punishment it is relevant to show the wealth of the defendant, that the jury may assess a sum in proportion to his ability to pay, as what would be a severe punishment to one of small means would be none at all to one of great wealth; hence actual wealth must be shown, and reputation is irrelevant.¹

5. Hearsay Evidence — *a.* DEFINITION AND GENERAL RULE. — Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it.² It is a general rule, subject to

In an action for a breach of promise to marry the court said: "It may be objectionable to particularize the defendant's property, and such evidence should be confined to general reputation as to the circumstances of the defendant. To that extent I think it admissible." *Kniffen v. McConnell*, 30 N. Y. 289.

"It does not clearly appear whether the testimony offered would have tended to show defendant's general reputation as to property or his actual condition in that respect. In either event it should have been received, as it was pertinent to the issue. So far as the cause of action rests upon an injury to the character, or an insult to the person, compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from his wrongful acts the greater. * * * But in such cases, as it is rather the reputation for, than the possession of, wealth which is the cause of this increased rank, the testimony must correspond, and only the general question as to his circumstances can be asked, and not the detail. * * * But when exemplary damages are claimed a different question is presented. The defendant's pecuniary ability is then a matter for the consideration of the jury, on the ground that a given sum would be a much greater punishment to a man of small means than to one of larger. * * * Upon this point actual wealth could only be material. As bearing upon this point the testimony was offered and excluded. This took from the jury an element proper for their consideration." *Johnson v. Smith*, 64 Me. 555.

1. *Johnson v. Smith*, 64 Me. 555; *Sloan v. Edwards*, 61 Md. 101.

Contra. — Contrary to the reason of the rule, the Supreme Court of *Wisconsin* holds that even when the damages to be proved are punitive the financial condition of the defendant may be shown by evidence of his reputed wealth. *Draper v. Baker*, 61 Wis. 450, 50 Am. Rep. 143.

2. Hearsay Evidence Defined — *England.* — *Stapylton v. Clough*, 22 Eng. L. & Eq. 276, 2 El. & Bl. 933, 75 E. C. L. 933; *Sussex Peerage Case*, 11 Cl. & F. 113.

United States. — *Davis v. Wood*, 1 Wheat. (U. S.) 6; *Queen v. Hepburn*, 7 Cranch (U. S.) 290.

Alabama. — *Scales v. Desha*, 16 Ala. 308.

California. — *Bornheimer v. Baldwin*, 42 Cal. 27.

Illinois. — *Kent v. Mason*, 79 Ill. 540.

Indiana. — *Schooler v. State*, 57 Ind. 127;

Salem Gravel Road Co. v. Pennington, 62 Ind. 175.

Iowa. — *Ashcraft v. De Armond*, 44 Iowa 229; *Cobleigh v. McBride*, 45 Iowa 116.

Maine. — *Hunter v. Randall*, 69 Me. 183.

Maryland. — *Forrester v. State*, 46 Md. 154.

Massachusetts. — *Filley v. Angell*, 102 Mass. 67; *Brooks v. Acton*, 117 Mass. 204; *Hathaway v. Tinkham*, 148 Mass. 87; *Silverstein v. O'Brien*, 165 Mass. 512.

Mississippi. — *Melius v. Houston*, 41 Miss. 59.

Missouri. — *Fougue v. Burgess*, 71 Mo. 389.

Nebraska. — *Ponca v. Crawford*, 18 Neb. 551.

New Hampshire. — *Page v. Parker*, 40 N. H. 47.

New Jersey. — *Demoney v. Walker*, 1 N. J. L. 37.

New York. — *Coleman v. Southwick*, 9 Johns. (N. Y.) 45, 6 Am. Dec. 253; *People v. Cox*, 21 Hun (N. Y.) 47.

North Carolina. — *State v. Haynes*, 71 N. Car. 79.

Oregon. — *State v. Ah Lee*, 18 Oregon 540.

Texas. — *Campbell v. State*, 8 Tex. App. 84.

Wisconsin. — *Anderson v. Fetzer*, 75 Wis. 562.

See the title HEARSAY EVIDENCE.

Public Rumor. — Rumors in the neighborhood of a person alleged to be insane, respecting his mental condition, are not admissible in evidence, but are hearsay. *Ashcraft v. De Armond*, 44 Iowa 229.

Testimony that it was a matter of common report and public notoriety that intoxicating liquors were sold by the defendant is hearsay and inadmissible. *Cobleigh v. McBride*, 45 Iowa 116.

Hearsay evidence is incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge. *Page v. Parker*, 40 N. H. 47.

Statements of Third Persons. — Statements of a third person, not made in the presence of a party to the suit, are not admissible in evidence against him, but are hearsay. *Fougue v. Burgess*, 71 Mo. 389; *Melius v. Houston*, 41 Miss. 59; *Forrester v. State*, 46 Md. 154.

Hearsay May Be in Writing. — In an action against a town to recover for personal injuries caused by an alleged defect in a highway, the defense was that the accident was caused by the fault of the horse driven by the plaintiff. The plaintiff offered in evidence a letter he had received from the person who sold him the horse a week before, which stated that the horse was "all gentle." It was held that the letter was hearsay and was rightly excluded.

many important exceptions, that hearsay evidence is totally inadmissible.¹

b. GROUNDS OF EXCLUSION. — Hearsay evidence is excluded because the person upon whose credibility it rests cannot be sworn or cross-examined, because of the facility it would give to practicing fraud, and because of the unreasonable time that trials might consume if it were admitted.²

c. GROUNDS OF EXCEPTIONS TO GENERAL RULE. — The exceptions to the general rule excluding hearsay are based upon circumstances which add peculiar weight to this otherwise inadmissible evidence and dispense with the ordinary tests of credibility.³

Brooks v. Acton, 117 Mass. 204. See also *Hunter v. Randall*, 69 Me. 183.

Results of Consultation. — Where, in an action for damages resulting from personal injuries, a physician, who was a son of the plaintiff, was permitted to testify, over the objections of the defendant, to the opinion expressed by the consulting physicians who were called to examine the plaintiff as to the results of his injury, it was held to be error, the testimony being incompetent and hearsay. *Ponca v. Crawford*, 18 Neb. 551.

Letter of an Attorney. — A letter written by an attorney, not of record, to the plaintiff, and received by him, which subsequently came into possession of the defendant, is at best the declaration of a third party, and is not admissible in behalf of the defendant, in the absence of any evidence *dehors* the letter that it was written in response to any communication from the plaintiff. *Hunter v. Randall*, 69 Me. 183.

Death of Declarant Does Not Change the Rule. — The declaration of a deceased third person, not made by him as a witness at a former trial, is hearsay and inadmissible. *Salem Gravel Road Co. v. Pennington*, 62 Ind. 175.

Free Birth Cannot Be Proved by Reputation. — Evidence by hearsay and general reputation is admissible only as to pedigree, but not to establish the freedom of the petitioner's ancestors, and thence to deduce his or her own. *Davis v. Wood*, 1 Wheat. (U. S.) 6; *Queen v. Hepburn*, 7 Cranch (U. S.) 290.

Ownership of Gambling Tools Cannot Be Proved by Reputation. — Upon the trial of a defendant indicted for being "unlawfully the keeper of a certain faro bank," the court, over the objection of the defendant, permitted a witness on behalf of the state to testify that he had understood from others that the defendant and another were the owners of the faro bank. It was held that such testimony was hearsay and its admission erroneous. *Schooler v. State*, 57 Ind. 127.

Error Not Cured by Instruction. — The admission of hearsay evidence is error, though the judge direct the jury to pay no regard to it. *Demoney v. Walker*, 1 N. J. L. 37.

1. General Rule — Inadmissible. — *Rex v. Eriswell*, 3 T. R. 707; *Davis v. Wood*, 1 Wheat. (U. S.) 6; *Queen v. Hepburn*, 7 Cranch (U. S.) 296; *Snodgrass v. Caldwell*, 90 Ala. 319; *Abel v. State*, 90 Ala. 631; *Sturla v. Freccia*, L. R. 5 App. 623; *Com. v. Felch*, 132 Mass. 22; *Whitney v. Houghton*, 125 Mass. 451; *Silverstein v. O'Brien*, 165 Mass. 512; *Reed v. New York Cent. R. Co.*, 45 N. Y. 575; *Titterton v. Trees*, 78 Tex. 567; *Dr. Harter Medicine Co. v. Hopkins*, 83 Wis. 309. See the title HEARSAY EVIDENCE.

"Hearsay evidence, as a rule, is excluded, and the declarations and statements of the parties, or of third persons, are not received except under peculiar circumstances and as a necessity. Statements made out of court, and without the sanction of an oath, are dangerous as evidence, and the rights of suitors ought not to be put in peril by them." *Reed v. New York Cent. R. Co.*, 45 N. Y. 574.

"The rule is that hearsay evidence (and such is the evidence of reputation) is inadmissible to establish any specific fact capable of direct proof by witnesses, speaking from their own knowledge; and when the rule is relaxed, it is from necessity alone." *Abel v. State*, 90 Ala. 631.

2. Grounds of Exclusion. — 1 Greenl. Ev., § 99; 1 Phil. Ev., c. 7, § 1; *Queen v. Hepburn*, 7 Cranch (U. S.) 296. See the title HEARSAY EVIDENCE.

"That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay is totally inadmissible." *Marshall, C. J.*, in *Queen v. Hepburn*, 7 Cranch (U. S.) 290.

3. Reason of Exceptions. — *Higham v. Ridgway*, 10 East 109; *Price v. Torrington*, 1 Salk. 285; *Whitelocke v. Baker*, 13 Ves. Jr. 514; *Haines v. Guthrie*, 13 Q. B. Div. 818; *Ruch v. Rock Island*, 97 U. S. 693; *Sturla v. Freccia*, L. R. 5 App. 623; *Costigan v. Lunt*, 127 Mass. 355; *People v. Olmstead*, 30 Mich. 435; *Lewis v. Roulo*, 93 Mich. 475; *Donohue v. Whitney*, (Supreme Ct.) 15 N. Y. Supp. 622; *Hodges v. Hodges*, 106 N. Car. 374; *Bird v. Hueston*, 10 Ohio St. 418.

Witness at Former Trial. — Thus where a witness has testified at a former trial of the same issue and has since died, his evidence may be reproduced by those who heard it, because the witness at such former trial was under oath, was subject to cross-examination, and, if in a criminal trial, once confronted the accused. *Ruch v. Rock Island*, 97 U. S. 693; *Lewis v. Roulo*, 93 Mich. 475.

Dying Declarations. — "Dying declarations, as is well settled, are neither more nor less than statements of material facts concerning the cause and circumstances of homicide, made by the victim under the solemn belief of impending death, the effect of which on the mind is regarded as equivalent to the sanctity of an oath. They are substitutes for sworn testimony, and must be such narrative statements as a witness might properly give on the stand

d. EXCEPTIONS TO GENERAL RULE — (1) *Admissions* — **Definition.** — An admission is a statement, oral or written, made by a party or one who stands in privity with him concerning a fact in issue or relevant to the issue.¹

When Admissible. — For a discussion of admissions and their admissibility, reference is made to another title in this work.²

(2) *Confessions* — **Definition.** — A confession is a declaration that the declarant committed or participated in the commission of a crime.³

When Admissible. — For a discussion of confessions and under what circumstances they are admissible, reference is made to a former article in this work.⁴

(3) *Dying Declarations* — **Definition.** — A dying declaration is a statement made, under the sense of impending death, by the victim of a homicide, concerning the cause and circumstances of such homicide.⁵

When Admissible. — For a discussion of dying declarations and their admissibility, see the article on that subject in a preceding volume.⁶

(4) *Declarations Against Interest* — **Definition.** — A declaration against interest is a statement made by a stranger to the record, which at the time of making it was against the pecuniary or proprietary interest of the declarant.⁷

When Admissible. — For a discussion of declarations against interest and their admissibility, reference is made to a former volume of this work.⁸

(5) *Ancient Documents.* — The admission of ancient documents, of the age of thirty years or more, coming from proper custody, when possession under them is shown, or there is other corroborative evidence of their authenticity, is a well-recognized exception to the rule excluding hearsay.⁹

(6) *Declarations Concerning Matters of Public or General Interest.* — As an exception to the rule excluding hearsay, declarations are admitted when made *ante litem motam*, by those since deceased, where the declarant is shown to have had means of knowledge, in case of general interest, or to have been a member of the community, in case of public interest.¹⁰

(7) *Declarations Concerning Matters of Pedigree.* — The birth, age, relationship, marriage, death, or legitimacy of a person, when involved in a question of pedigree, may be shown by declarations made, *ante litem motam*, by legal relatives since deceased.¹¹

if living." *People v. Olmstead*, 30 Mich. 435.

1. See the title ADMISSIONS, vol. 1, p. 670.

2. See the title ADMISSIONS, vol. 1, p. 670.

3. See the title CONFESSIONS, vol. 6, p. 520.

4. See the title CONFESSIONS, vol. 6, p. 520.

5. See the title DYING DECLARATIONS, vol. 10, p. 359.

6. See the title DYING DECLARATIONS, vol. 10, p. 359.

7. See the title DECLARATIONS (IN EVIDENCE), vol. 9, p. 5.

8. See the title DECLARATIONS (IN EVIDENCE), vol. 9, p. 5.

9. See the title ANCIENT DOCUMENTS, vol. 2, p. 322.

10. See the title DECLARATION (IN EVIDENCE), vol. 9, p. 5.

11. *England.* — *Berkeley Peerage Case*, 4 Campb. 401; *Goodright v. Moss*, 2 Cowp. 594; *Hubbard v. Lees*, L. R. 1 Exch. 255; *Campbell v. Campbell*, L. R. 1 H. L. Sc. 182; *Murray v. Milner*, 12 Ch. Div. 845; *Butler v. Mountgarret*, 7 H. L. Cas. 633; *Haines v. Guthrie*, 13 Q. B. Div. 818; *Shields v. Boucher*, 1 De G. & Sm. 40; *Shedden v. Patrick*, 2 Sw. & Tr. 170; *Alexander v. Chamberlin*, 1 Thomp. & C. (N. Y.) 600; *Vowles v. Young*, 13 Ves. Jr. 140; *Whitelocke v. Baker*, 13 Ves. Jr. 514; *Hill v.*

Hibbit, 19 W. R. 250; *Betty v. Nail*, 6 Ir. L. R. N. S. 17.

United States. — *Stein v. Bowman*, 13 Pet. (U. S.) 209; *Blackburn v. Crawford*, 3 Wall. (U. S.) 185; *Fulkerson v. Holmes*, 117 U. S. 389.

California. — *Anderson v. Parker*, 6 Cal. 197; *Pearson v. Pearson*, 46 Cal. 609.

Illinois. — *Cuddy v. Brown*, 78 Ill. 415.

Maine. — *Northrop v. Hale*, 76 Me. 306.

Maryland. — *Pancoast v. Addison*, 1 Har. & J. (Md.) 350, 2 Am. Dec. 520; *Jackson v. Jackson*, 80 Md. 176.

Massachusetts. — *Butrick v. Tilton*, 155 Mass. 461; *Com. v. Phillips*, 162 Mass. 504.

Minnesota. — *Dawson v. Mayall*, 45 Minn. 408; *Backdahl v. Grand Lodge*, etc., 46 Minn. 61.

New Hampshire. — *Morrill v. Foster*, 33 N. H. 379.

New York. — *Jackson v. King*, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468; *People v. Fulton F. Ins. Co.*, 25 Wend. (N. Y.) 222; *Clark v. Owens*, 18 N. Y. 434; *Eisenlord v. Clum*, 126 N. Y. 552.

Pennsylvania. — *Scharff v. Keener*, 64 Pa. St. 376; *Pickens's Estate*, 163 Pa. St. 14.

Texas. — *Boone v. Miller*, 73 Tex. 564.

Vermont. — *Webb v. Richardson*, 42 Vt. 465; *Mason v. Fuller*, 45 Vt. 29.

See the title PEDIGREE.

(8) *Res Gestæ*. — Declarations or acts accompanying any act or transaction in controversy and tending to explain or illustrate it are received in evidence as a part of the *res gestæ*.¹

(9) *Evidence in a Former Proceeding* — **When Witness Is Dead.** — Evidence given on a former trial of the same action, or in a former action involving the same issues and between the same parties, is admissible where it is shown that the witness giving such evidence is dead.²

1. *England*. — *Doorman v. Jenkins*, 2 Ad. & El. 250, 29 E. C. L. 80; *Aveson v. Kinnaird*, 6 East 188; *Ridley v. Gyde*, 9 Bing. 349, 23 E. C. L. 304.

United States. — *Travellers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397; *Brockett v. New Jersey Steam-Boat Co.*, 18 Fed. Rep. 156.

Alabama. — *Bragg v. Massie*, 38 Ala. 89, 79 Am. Dec. 82; *Mobile, etc., R. Co. v. Ashcraft*, 48 Ala. 15.

Arkansas. — *Little Rock, etc., R. Co. v. Leverett*, 48 Ark. 333, 3 Am. St. Rep. 230.

Connecticut. — *Enos v. Tuttle*, 3 Conn. 250; *Russell v. Frisbie*, 19 Conn. 209; *Spencer v. New York, etc., R. Co.*, 62 Conn. 242.

Georgia. — *Carter v. Buchanan*, 3 Ga. 513; *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751.

Illinois. — *Galena, etc., R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323.

Indiana. — *Indianapolis, etc., R. Co. v. Anthony*, 43 Ind. 183; *Louisville, etc., R. Co. v. Buck*, 116 Ind. 566, 9 Am. St. Rep. 883.

Iowa. — *Frink v. Coe*, 4 Greene (Iowa) 556, 61 Am. Dec. 141; *State v. Middleham*, 62 Iowa 150.

Massachusetts. — *Nutting v. Page*, 4 Gray (Mass.) 584; *Com. v. M'Pike*, 3 Cush. (Mass.) 181, 50 Am. Dec. 727; *Lund v. Tyngsborough*, 9 Cush. (Mass.) 41; *Earle v. Earle*, 11 Allen (Mass.) 1.

Michigan. — *Stewart v. Brown*, 48 Mich. 383; *Chick v. Sisson*, 95 Mich. 412.

Mississippi. — *Meek v. Perry*, 36 Miss. 261.

Missouri. — *Brownell v. Pacific R. Co.*, 47 Mo. 239; *Harriman v. Stowe*, 57 Mo. 93; *Entwhistle v. Feighner*, 60 Mo. 214; *State v. Walker*, 78 Mo. 380; *Leahey v. Cass Ave., etc., R. Co.*, 97 Mo. 165, 10 Am. St. Rep. 300; *State v. Mason*, 112 Mo. 374, 34 Am. St. Rep. 390.

New Hampshire. — *Sessions v. Little*, 9 N. H. 271; *Carter v. Beals*, 44 N. H. 412.

New York. — *Matter of Taylor*, 9 Paige (N. Y.) 617; *Price v. Powell*, 3 N. Y. 322; *Waldele v. New York Cent., etc., R. Co.*, 95 N. Y. 274.

Ohio. — *Lake Shore, etc., R. Co. v. Herrick*, 49 Ohio St. 25.

Pennsylvania. — *Tompkins v. Saltmarsh*, 14 S. & R. (Pa.) 275; *Elkins v. McKean*, 70 Pa. St. 493; *Weir v. Plymouth*, 148 Pa. St. 566.

Texas. — *Missouri Pac. R. Co. v. Collier*, 62 Tex. 318; *International, etc., R. Co. v. Anderson*, 82 Tex. 516, 27 Am. St. Rep. 902.

Wisconsin. — *Mack v. State*, 48 Wis. 271; *Hall v. American Masonic Acc. Assoc.*, 86 Wis. 518.

See the title *RES GESTÆ*.

2. **When Witness in Former Proceeding Dead.** — *Starkie on Ev.* (10th ed.) 433; *Chamberlayne's Best on Ev.* 438; *Stephen's Dig. Ev.*, art. 32.

England. — *Doncaster v. Day*, 3 Taunt. 262; *Todd v. Winchelsea*, 3 C. & P. 387, 14 E. C. L. 363.

Canada. — *Walkerton Corp. v. Erdman*, 23 Can. Sup. Ct. Rep. 352.

United States. — *Ruch v. Rock Island*, 97 U. S. 693; *Reynolds v. U. S.*, 98 U. S. 145; *U. S. v. Maccomb*, 5 McLean (U. S.) 286; *U. S. v. Wood*, 3 Wash. (U. S.) 440.

Alabama. — *Long v. Davis*, 18 Ala. 801; *Clealand v. Huey*, 18 Ala. 343; *Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95; *Goodlett v. Kelly*, 74 Ala. 213; *Jeffries v. Castleman*, 75 Ala. 262; *Lowe v. State*, 86 Ala. 52; *South v. State*, 86 Ala. 617; *Perry v. State*, 87 Ala. 30; *Pruitt v. State*, 92 Ala. 41; *Lucas v. State*, 96 Ala. 51.

Arkansas. — *St. Louis, etc., R. Co. v. Sweet*, 60 Ark. 550.

California. — *People v. Devine*, 46 Cal. 45; *Fredericks v. Judah*, (Cal. 1886) 11 Pac. Rep. 133; *Marshall v. Hancock*, 80 Cal. 82.

Colorado. — *Jerome v. Bohm*, 21 Colo. 322.

Connecticut. — *Lane v. Brainerd*, 30 Conn. 565.

Georgia. — *Eagle, etc., Mfg. Co. v. Welch*, 61 Ga. 448; *McElmurray v. Turner*, 86 Ga. 215; *Lathrop v. Adkisson*, 87 Ga. 339; *Atlanta, etc., R. Co. v. Gravitt*, 93 Ga. 369, 44 Am. St. Rep. 145.

Illinois. — *Hutchings v. Corgan*, 59 Ill. 70; *Loughry v. Mail*, 34 Ill. App. 523.

Indiana. — *Ephraims v. Murdock*, 7 Blackf. (Ind.) 10; *Indianapolis, etc., R. Co. v. Stout*, 53 Ind. 143.

Iowa. — *Slusser v. Burlington*, 47 Iowa 300.

Kansas. — *Solomon R. Co. v. Jones*, 34 Kan. 443.

Kentucky. — *O'Brian v. Com.*, 6 Bush (Ky.) 563; *Reynolds v. Powers*, 96 Ky. 481.

Louisiana. — *Conway v. Erwin*, 1 La. Ann. 391.

Maine. — *Watson v. Lisbon Bridge*, 14 Me. 201.

Maryland. — *Calvert v. Coxe*, 1 Gill (Md.) 95; *Price v. Lawson*, 74 Md. 499.

Massachusetts. — *Woods v. Keyes*, 14 Allen (Mass.) 238, 92 Am. Dec. 766; *Corey v. Janes*, 15 Gray (Mass.) 543; *Com. v. Richards*, 18 Pick. (Mass.) 434, 29 Am. Dec. 608; *Warren v. Nichols*, 6 Met. (Mass.) 261; *Yale v. Comstock*, 112 Mass. 267; *Costigan v. Lunt*, 127 Mass. 355; *Radclyffe v. Barton*, 161 Mass. 327.

Michigan. — *Lewis v. Roulo*, 93 Mich. 475.

Minnesota. — *Slingerland v. Slingerland*, 46 Minn. 100.

Missouri. — *State v. Able*, 65 Mo. 357; *Breedon v. Feurt*, 70 Mo. 624; *Davis v. Kline*, 96 Mo. 401.

Nevada. — *State v. Johnson*, 12 Nev. 121.

New Hampshire. — *Orr v. Hadley*, 36 N. H. 575.

New Jersey. — *Wanner v. Sisson*, 29 N. J. Eq. 141.

New York. — *Jackson v. Lawson*, 15 Johns. (N. Y.) 539; *Osborn v. Bell*, 5 Den. (N. Y.) 370, 49 Am. Dec. 275; *Wilbur v. Selden*, 6 Cow. (N.

When Witness Has Since Become Incompetent — By Acquiring an Interest. — If when the former evidence was given the witness had no interest in the controversy, it has been held that such evidence cannot be reproduced though the witness has since become incompetent by acquiring an interest.¹

By the Death of the Other Party to the Transaction. — Where since the giving of the former evidence the witness has been rendered incompetent to testify because of the death of the other party to the transaction, such former evidence may be reproduced.²

By Conviction of Crime. — If since the giving of the former evidence the witness has been convicted of an infamous crime, it would seem that such former evidence is admissible.³

By Becoming Insane. — Evidence given in a former proceeding is admissible where the witness has become insane since giving it.⁴

By Age or Sickness. — Where the witness who testified at a former trial is unable by reason of old age or sickness to attend, his former evidence may be received.⁵

When Witness Has Forgotten the Facts. — It has generally been held that the mere fact that a witness has, since the former trial, forgotten the facts does not render his evidence at such prior trial admissible.⁶ But the contrary has also

Y.) 162; *Mutual L. Ins. Co. v. Anthony*, 50 Hun (N. Y.) 101; *Jackson v. Crissey*, 3 Wend. (N. Y.) 251; *Crary v. Sprague*, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110.

North Carolina. — *Harper v. Burrow*, 6 Ired. L. (28 N. Car.) 30.

Ohio. — *Summons v. State*, 5 Ohio St. 325; *Bonnet v. Dickson*, 14 Ohio St. 434; *Wagers v. Dickey*, 17 Ohio 439, 49 Am. Dec. 467.

Pennsylvania. — *Lightner v. Wike*, 4 S. & R. (Pa.) 203; *Pratt v. Patterson*, 81 Pa. St. 114; *Patterson v. Dushane*, 137 Pa. St. 23; *Thornton v. Britton*, 144 Pa. St. 126; *Berg v. McLafferty*, (Pa. 1888) 12 Atl. Rep. 460.

South Carolina. — *Parker v. Leggett*, 12 Rich. L. (S. Car.) 198.

Texas. — *Dwyer v. Rippetoe*, 72 Tex. 522; *Stewart v. State*, (Tex. Crim. App. 1894) 26 S. W. Rep. 203; *Sullivan v. State*, 6 Tex. App. 319, 32 Am. Rep. 580.

Vermont. — *Glass v. Beach*, 5 Vt. 172; *Mathewson v. Sargeant*, 36 Vt. 142; *Johnson v. Powers*, 40 Vt. 611; *Earl v. Tupper*, 45 Vt. 275.

Virginia. — *Crawford v. Morris*, 5 Gratt. (Va.) 90; *Brogy v. Com.*, 10 Gratt. (Va.) 722; *Clements v. Kyles*, 13 Gratt. (Va.) 468.

See the titles DEPOSITIONS, vol. 9, p. 295; HEARSAY EVIDENCE.

1. Acquisition of Interest in the Controversy. — *Chess v. Chess*, 17 S. & R. (Pa.) 409; *Irwin v. Reed*, 4 Yeates (Pa.) 512. See the titles DEPOSITIONS, vol. 9, p. 295; HEARSAY EVIDENCE.

2. Death of Other Party. — *Pratt v. Patterson*, 81 Pa. St. 114; *Lawson v. Jones*, 61 How. Pr. (N. Y. C. Pl.) 424; *Lee v. Hill*, 87 Va. 497, 24 Am. St. Rep. 666. See the titles DEPOSITIONS, vol. 9, p. 295; HEARSAY EVIDENCE.

3. Conviction of Crime. — *Jones v. Mason*, 2 Stra. 833.

Mr. Starkie says: "The deposition of a witness may be read, not only where it appears that the witness is actually dead, but in all cases where he is dead for all purposes of evidence; as where diligent search has been made for him and he cannot be found, where he resides in a place beyond the jurisdiction of

the court, or where he has become lunatic or attainted." 1 Starkie on Ev. (10th ed.) 409.

See the titles DEPOSITIONS, vol. 9, p. 295; HEARSAY EVIDENCE.

4. Insanity. — *Harrison v. Blades*, 3 Campb. 458; *Rex v. Eriswell*, 3 T. R. 720; *Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95; *Stout v. Cook*, 47 Ill. 530; *Stein v. Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234; *Whitaker v. Marsh*, 62 N. H. 477; *State v. King*, 86 N. Car. 603; *Emig v. Diehl*, 76 Pa. St. 373; *Walbridge v. Knipper*, 96 Pa. St. 48; *Drayton v. Wells*, 1 Nott & M. (S. Car.) 409, 9 Am. Dec. 718. See the titles DEPOSITIONS, vol. 9, p. 295; HEARSAY EVIDENCE.

5. Age or Sickness — England. — *Rex v. Hogg*, 6 C. & P. 176, 25 E. C. L. 341; *Harrison v. Blades*, 3 Campb. 458.

Georgia. — *Central R., etc., Co. v. Murray*, 97 Ga. 326.

Illinois. — *Stout v. Cook*, 47 Ill. 530.

Iowa. — *Edwards v. Edwards*, 93 Iowa 127.

Louisiana. — *Miller v. Russell*, 7 Martin N. S. (La.) 266.

Maine. — *Chase v. Springvale Mills Co.*, 75 Me. 156.

Michigan. — *Howard v. Patrick*, 38 Mich. 795.

Minnesota. — *Stein v. Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234.

Missouri. — *Scoville v. Hannibal, etc., R. Co.*, 94 Mo. 84.

New Hampshire. — *Whitaker v. Marsh*, 62 N. H. 477.

North Carolina. — *State v. King*, 86 N. Car. 603.

Pennsylvania. — *Emig v. Diehl*, 76 Pa. St. 359; *Walbridge v. Knipper*, 96 Pa. St. 48; *Thornton v. Britton*, 144 Pa. St. 126; *Perrin v. Wells*, 155 Pa. St. 299.

See the titles DEPOSITIONS, vol. 9, p. 295; HEARSAY EVIDENCE.

6. Failure to Recall Facts. — *Stein v. Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234; *Robinson v. Gilman*, 43 N. H. 295; *Drayton v. Wells*, 1 Nott & M. (S. Car.) 409, 9 Am. Dec. 718. See

been held in some jurisdictions.¹

When Witness Is Concealed by Adverse Party. — Where it is shown that the adverse party has induced the witness to conceal himself or absent himself from the trial his evidence on a former trial will be admitted.²

When Witness Is Out of Jurisdiction of Court. — In some cases where it was shown that the witness had gone permanently beyond the jurisdiction of the court, his evidence given on a former trial of the case has been admitted.³

the titles DEPOSITIONS, vol. 9, p. 295; HEARSAY EVIDENCE.

While failure of memory amounting to mental imbecility, like insanity or death, would admit testimony given on former trial, yet a failure to recollect particular facts will not render such former testimony competent. *Stein v. Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234.

The circumstance that the witness has forgotten the facts to which he had formerly testified in the cause does not render evidence of his former testimony competent. Where one testified that he was a witness on a former trial of the same question, between the same parties, before a commissioner; that the facts to which he then testified were fresh in his memory, and that the account that he then gave of the transaction was true, but that he did not now recollect certain matters to which he then testified, it was held that the notes of his former evidence, taken by the commissioner, verified by the oath of the latter that they contained the evidence of the witness with substantial accuracy, when offered to prove such matters, were properly rejected. *Robinson v. Gilman*, 43 N. H. 295.

1. *Rothrock v. Gallaher*, 91 Pa. St. 108; *Jack v. Woods*, 29 Pa. St. 375.

The testimony of a witness once duly taken in a pending cause may afterwards be read in evidence in another cause between the same parties in regard to the same subject-matter, when in the interval the witness has lost his memory by reason of old age and ill health. *Rothrock v. Gallaher*, 91 Pa. St. 109.

Where a witness has given his deposition, and afterwards, upon being called to the stand to testify, his memory of the transaction fails, his deposition may be read in evidence by the party calling him. *Jack v. Woods*, 29 Pa. St. 375.

2. **Witness Concealed by Adverse Party.** — *Reg. v. Scaife*, 17 Q. B. 238, 79 E. C. L. 238; *Walker-ton Corp. v. Erdman*, 23 Can. Sup. Ct. Rep. 352; *Reynolds v. U. S.*, 98 U. S. 158; *Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95; *St. Louis, etc., R. Co. v. Sweet*, 60 Ark. 550; *Williams v. State*, 19 Ga. 402; *Stout v. Cook*, 47 Ill. 530; *Radclyffe v. Barton*, 161 Mass. 327; *Howard v. Patrick*, 38 Mich. 795; *Whitaker v. Marsh*, 62 N. H. 477; *Rothrock v. Gallaher*, 91 Pa. St. 108; *Drayton v. Wells*, 1 Nott & M. (S. Car.) 409, 9 Am. Dec. 718; *U. S. v. Reynolds*, 1 Utah 319. See the title HEARSAY EVIDENCE.

3. **Witness Out of Jurisdiction** — *England*. — *Fry v. Wood*, 1 Atk. 445; *Reg. v. Scaife*, 17 Q. B. 243, 79 E. C. L. 243.

Alabama. — *Long v. Davis*, 18 Ala. 801; *Mims v. Sturdevant*, 36 Ala. 636.

Arkansas. — *Clinton v. Estes*, 20 Ark. 235; *Shackelford v. State*, 33 Ark. 539; *Dolan v. State*, 40 Ark. 454; *McTighe v. Herrman*, 42 Ark. 285.

California. — *People v. Devine*, 46 Cal. 45; *Meyer v. Roth*, 51 Cal. 582; *Benson v. Shotwell*, 103 Cal. 163.

Georgia. — *Atlanta, etc., R. Co. v. Gravitt*, 93 Ga. 369, 44 Am. St. Rep. 145.

Indiana. — *Scheerer v. Harber*, 36 Ind. 536.

Iowa. — *Monroe Bank v. Gifford*, 79 Iowa 300.

Kentucky. — *Reynolds v. Powers*, 96 Ky. 481; *Louisville Water Co. v. Upton*, (Ky. 1896) 36 S. W. Rep. 520.

Michigan. — *Howard v. Patrick*, 38 Mich. 795; *Labar v. Crane*, 56 Mich. 585; *Schindler v. Milwaukee, etc., R. Co.*, 87 Mich. 400.

Minnesota. — *Wilder v. St. Paul*, 12 Minn. 192; *Minneapolis Mill Co. v. Minneapolis, etc., R. Co.*, 51 Minn. 304.

Nebraska. — *Omaha v. Jensen*, 35 Neb. 68, 37 Am. St. Rep. 432; *Omaha St. R. Co. v. Elkins*, 39 Neb. 480; *Young v. Sage*, 42 Neb. 37.

Ohio. — *Summons v. State*, 5 Ohio St. 325.

Pennsylvania. — *Magill v. Kauffman*, 4 S. & R. (Pa.) 317, 8 Am. Dec. 713; *Rothrock v. Gallaher*, 91 Pa. St. 108; *Ballman v. Heron*, 169 Pa. St. 510.

Virginia. — *Brogy v. Com.*, 10 Gratt. (Va.) 722.

See the titles DEPOSITIONS, vol. 9, p. 295; HEARSAY EVIDENCE.

Absence Alone Held Not Sufficient — *Alabama*. — *Harris v. State*, 73 Ala. 495; *Thompson v. State*, 106 Ala. 67.

California. — *People v. Chung Ah Chue*, 57 Cal. 567; *People v. Qurise*, 59 Cal. 343; *People v. Gardner*, 98 Cal. 127; *People v. Gordon*, 99 Cal. 227.

Iowa. — *Slusser v. Burlington*, 47 Iowa 300.

Kentucky. — *Collins v. Com.*, 12 Bush (Ky.) 271.

Louisiana. — *State v. Oliver*, 43 La. Ann. 1005.

Michigan. — *Kellogg v. Secord*, 42 Mich. 318.

Minnesota. — *Stein v. Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234.

Mississippi. — *Gastrell v. Phillips*, 64 Miss. 473.

Nevada. — *Gerhauser v. North British, etc., Ins. Co.*, 7 Nev. 174.

New Jersey. — *Berney v. Mitchell*, 34 N. J. L. 341.

New York. — *Crary v. Sprague*, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110; *Mutual L. Ins. Co. v. Anthony*, 50 Hun (N. Y.) 101.

South Carolina. — *Drayton v. Wells*, 1 Nott & M. (S. Car.) 409, 9 Am. Dec. 718.

"We are of the opinion that neither legal principle nor sound policy will justify the admission of the evidence given on a former trial, between the same parties and about the same subject-matter, except in case of the death or insanity of the witness, or where it appears at

Identity of Parties to Action. — The parties to the action in which the evidence was first given and to that in which it is again offered must be substantially the same or be in privity.¹

Identity of Issues. — In order to render such former evidence admissible on a subsequent trial the issues must be substantially the same as on the trial where the evidence was first given.²

Evidence Taken in Preliminary Investigation. — Evidence taken in a preliminary examination or hearing, if the party against whom it is offered was present, may be admitted.³

Adverse Party Must Have Opportunity to Cross-examine. — The admissibility of such evidence given on a former trial seems to depend largely upon whether the

the time of the trial that, by reason of physical disability of a permanent character, he is unable to be examined, and that, by the exercise of due diligence, his deposition could not have been taken, or where the witness is beyond the seas, or where the witness is absent from the territory and his whereabouts cannot by due diligence be ascertained, or where, by the procurement of the opposite party, the witness absents himself from the jurisdiction of the court, after having been duly summoned to the trial." *Kirchner v. Laughlin*, 5 N. Mex. 365.

1. **Identity of Parties** — *England*. — *Wright v. Doe*, 1 Ad. & El. 3, 28 E. C. L. 11; *Doe v. Derby*, 1 Ad. & El. 783, 28 E. C. L. 209; *Morgan v. Nicholl*, L. R. 2 C. P. 117.

United States. — *U. S. v. Macomb*, 5 McLean (U. S.) 286; *Philadelphia, etc., R. Co. v. Howard*, 13 How. (U. S.) 307; *Boudereau v. Montgomery*, 4 Wash. (U. S.) 186.

Alabama. — *Clealand v. Huey*, 18 Ala. 343; *Goodlett v. Kelly*, 74 Ala. 213; *Jeffries v. Castlemann*, 75 Ala. 262.

California. — *People v. Devine*, 46 Cal. 45; *Marshall v. Hancock*, 80 Cal. 82.

Colorado. — *Tourtellotte v. Brown*, 4 Colo. App. 377.

Connecticut. — *Lane v. Brainerd*, 30 Conn. 565.

Georgia. — *Hughes v. Clark*, 67 Ga. 19; *Atlanta, etc., R. Co. v. Venable*, 67 Ga. 697.

Illinois. — *Hutchings v. Corgan*, 59 Ill. 70; *Loughry v. Mail*, 34 Ill. App. 523.

Indiana. — *Ephraims v. Murdock*, 7 Blackf. (Ind.) 10; *Indianapolis, etc., R. Co. v. Stout*, 53 Ind. 143.

Iowa. — *Southern White Lead Co. v. Haas*, 73 Iowa 399.

Kansas. — *Solomon R. Co. v. Jones*, 34 Kan. 443.

Maine. — *Frye v. Gragg*, 35 Me. 29.

Massachusetts. — *Yale v. Comstock*, 112 Mass. 267.

Michigan. — *Hudson v. Roos*, 76 Mich. 173; *Schindler v. Milwaukee, etc., R. Co.*, 87 Mich. 400.

Minnesota. — *Slingerland v. Slingerland*, 46 Minn. 100.

Missouri. — *State v. Able*, 65 Mo. 357; *Davis v. Kline*, 96 Mo. 401.

Nevada. — *State v. Johnson*, 12 Nev. 121.

New Hampshire. — *Orr v. Hadley*, 36 N. H. 575.

New York. — *Wilbur v. Selden*, 5 Cow. (N. Y.) 162; *Jackson v. Lawson*, 15 Johns. (N. Y.) 539.

Pennsylvania. — *Norris v. Monen*, 3 Watts (Pa.) 465; *Pratt v. Patterson*, 81 Pa. St. 114; *Patterson v. Dushane*, 137 Pa. St. 23; *Thornton v. Britton*, 144 Pa. St. 126.

South Carolina. — *Fellers v. Davis*, 22 S. Car. 425.

Vermont. — *Johnson v. Powers*, 40 Vt. 611; *Earl v. Tupper*, 45 Vt. 275.

Virginia. — *Ritchie v. Lyne*, 1 Call (Va.) 489.

West Virginia. — *Robrecht v. Marling*, 29 W. Va. 765.

Wisconsin. — *Nelson v. Harrington*, 72 Wis. 591, 7 Am. St. Rep. 900.

See the titles DEPOSITIONS, vol. 9, p. 295; HEARSAY EVIDENCE.

2. **Identity of Issues.** — *Jackson v. Winchester*, 4 Dall. (Pa.) 206; *Daly v. Brady*, 69 Fed. Rep. 285; *Marshall v. Hancock*, 80 Cal. 82; *Hughes v. Clark*, 67 Ga. 19; *Loughry v. Mail*, 34 Ill. App. 523; *Ephraims v. Murdock*, 7 Blackf. (Ind.) 10; *Godwin v. Neustadt*, 47 La. Ann. 841; *Melvin v. Whiting*, 7 Pick. (Mass.) 79; *Schindler v. Milwaukee, etc., R. Co.*, 87 Mich. 400; *Allen v. Chouteau*, 102 Mo. 309; *Fisher v. Monroe*, 2 Misc. Rep. (N. Y. C. Pl.) 326; *Lafferty's Estate*, 17 Pa. Co. Ct. Rep. 401, 5 Pa. Dist. Rep. 75.

A witness's deposition taken in a former case is admissible in evidence, after his removal from the state, in a subsequent suit between the same parties or their privies touching the same subject-matter, although the issues involved in the two suits may not be identical. *Long v. Davis*, 18 Ala. 801.

The rule is the same whether the former evidence was given by deposition or in open court. *Radcliffe v. Barton*, 161 Mass. 327; *Berg v. McLafferty*, (Pa. 1888) 12 Atl. Rep. 460; *Patterson v. Dushane*, 137 Pa. St. 23. See the titles DEPOSITIONS, vol. 9, p. 295; HEARSAY EVIDENCE.

3. **Preliminary Investigation.** — *U. S. v. Macomb*, 5 McLean (U. S.) 286; *Davis v. State*, 17 Ala. 354; *Thompson v. State*, 106 Ala. 67; *Jackson v. Crilly*, 16 Colo. 103; *Rex v. Barber*, 1 Root (Conn.) 76; *Williams v. State*, 19 Ga. 402; *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257; *State v. Stewart*, 34 La. Ann. 1037; *Com. v. Richards*, 18 Pick. (Mass.) 434, 29 Am. Dec. 608; *U. S. v. Penn*, 13 Nat. Bank Rep. 464, 27 Fed. Cas. No. 16,025; *Brown v. Com.*, 73 Pa. St. 321, 13 Am. Rep. 740; *Kendrick v. State*, 10 Humph. (Tenn.) 479; *State v. Hooker*, 17 Vt. 658. See the titles DEPOSITIONS, vol. 9, p. 295; HEARSAY EVIDENCE.

adverse party cross-examined the witness or had an opportunity to do so; and such opportunity must be shown to render the evidence admissible.¹

Sufficient to Prove Substance. — It is now generally held that it is sufficient if the witness produced can remember and testify to the substance of the evidence given on the former trial.² But some courts hold that the whole of such former testimony must be proved, and in the words of the former witness.³

Evidence So Reproduced May Be Impeached — By Showing Bad Reputation of Witness. — When such former evidence is reproduced the adverse party may impeach it by showing that the reputation of the absent witness was, when the evidence was given, bad.⁴

By Showing Contradictory Statements. — It has generally been held that such former evidence, when admitted, cannot be impeached by showing contradictory statements made by such former witness.⁵

1. Opportunity to Cross-examine. — *Wright v. Doe, 1 Ad. & El. 3, 28 E. C. L. 11; Philadelphia, etc., R. Co. v. Howard, 13 How. (U. S.) 307; Jackson v. Crilly, 16 Colo. 103; Gavan v. Ellsworth, 45 Ga. 283; State v. Wilson, 24 Kan. 189, 36 Am. Rep. 257; O'Brian v. Com., 6 Bush (Ky.) 563; Twohig v. Leamer, 48 Neb. 247; State v. Johnson, 12 Nev. 121; Bradley v. Mirick, 91 N. Y. 293; State v. Campbell, 1 Rich. L. (S. Car.) 124; Louisville, etc., R. Co. v. Atkins, 2 Lea (Tenn.) 248; Scott v. Wilson, Cooke (Tenn.) 315; Charlesworth v. Tinker, 18 Wis. 633. See the titles DEPOSITIONS, vol. 9, p. 295; HEARSAY EVIDENCE.*

2. Substance Only Need Be Proved — *United States.* — *U. S. v. Macomb, 5 McLean (U. S.) 286; Ruch v. Rock Island, 97 U. S. 693.*

Alabama. — *Gildersleeve v. Caraway, 10 Ala. 260, 44 Am. Dec. 485; Davis v. State, 17 Ala. 354; Clealand v. Huey, 18 Ala. 343; Thompson v. State, 106 Ala. 67.*

California. — *People v. Murphy, 45 Cal. 137.*

Georgia. — *Riggins v. Brown, 12 Ga. 271; Mitchell v. State, 71 Ga. 128; Trammell v. Hemphill, 27 Ga. 525.*

Illinois. — *Iglehart v. Jernegan, 16 Ill. 520; Luetgert v. Volker, 153 Ill. 385.*

Indiana. — *Horne v. Williams, 23 Ind. 37.*

Iowa. — *Rivereau v. St. Ament, 3 Greene (Iowa) 119; Harrison v. Charlton, 42 Iowa 573; Fell v. Burlington, etc., R. Co., 43 Iowa 177; State v. Fitzgerald, 63 Iowa 268; State v. O'Brien, 81 Iowa 85.*

Kansas. — *Gannon v. Stevens, 13 Kan. 447.*

Kentucky. — *Thompson v. Blackwell, 17 B. Mon. (Ky.) 609.*

Maine. — *Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627; Lime Rock Bank v. Hewett, 52 Me. 531.*

Maryland. — *Garrott v. Johnson, 11 Gill & J. (Md.) 173; Black v. Woodrow, 39 Md. 221.*

Nebraska. — *Twohig v. Leamer, 48 Neb. 247.*

New Hampshire. — *Young v. Dearborn, 22 N. H. 372.*

New Jersey. — *Sloan v. Somers, 20 N. J. L. 66.*

New York. — *Van Buren v. Cockburn, 14 Barb. (N. Y.) 118; Martin v. Cope, 3 Abb. App. Dec. (N. Y.) 182.*

Ohio. — *Wagers v. Dickey, 17 Ohio 439, 49 Am. Dec. 467.*

Pennsylvania. — *Jones v. Wood, 16 Pa. St. 25; Brown v. Com., 73 Pa. St. 321, 13 Am. Rep. 740; Hepler v. Mt. Carmel Sav. Bank, 97 Pa. St. 420, 39 Am. Rep. 813.*

Tennessee. — *Wade v. State, 7 Baxt. (Tenn.) 80; Kendrick v. State, 10 Humph. (Tenn.) 479.*

Texas. — *Thurmond v. Trammell, 28 Tex. 372, 91 Am. Dec. 321; Bennett v. State, 32 Tex. Crim. Rep. 216.*

Vermont. — *Williams v. Willard, 23 Vt. 369; Johnson v. Powers, 40 Vt. 611.*

See the title HEARSAY EVIDENCE.

3. A Stricter Rule — England. — *Rex v. Jolliffe, 4 T. R. 290; Rex v. Radbourne, 1 Leach C. C. 457.*

United States. — *U. S. v. Wood, 3 Wash. (U. S.) 440.*

Indiana. — *Ephraims v. Murdock, 7 Blackf. (Ind.) 10.*

Massachusetts. — *Woods v. Keyes, 14 Allen (Mass.) 238, 92 Am. Dec. 766; Warren v. Nichols, 6 Met. (Mass.) 267; Corey v. Janes, 15 Gray (Mass.) 545; Com. v. Richards, 18 Pick. (Mass.) 434, 29 Am. Dec. 608; Yale v. Comstock, 112 Mass. 267; Costigan v. Lunt, 127 Mass. 354.*

Minnesota. — *Stein v. Swensen, 46 Minn. 360, 24 Am. St. Rep. 234.*

New York. — *Wilbur v. Selden, 6 Cow. (N. Y.) 162.*

North Carolina. — *Buie v. Carver, 73 N. Car. 264.*

Ohio. — *Bliss v. Long, Wright (Ohio) 351.*

Pennsylvania. — *Foster v. Shaw, 7 S. & R. (Pa.) 156.*

Vermont. — *Marsh v. Jones, 21 Vt. 378, 52 Am. Dec. 67.*

The Supreme Court of *Massachusetts* has held that a witness, in order to testify to what a former witness testified, must be able to give the exact language of such former witness. *Warren v. Nichols, 6 Met. (Mass.) 261; Com. v. Richards, 18 Pick. (Mass.) 434, 29 Am. Dec. 608; Woods v. Keyes, 14 Allen (Mass.) 238, 92 Am. Dec. 766.*

4. Impeaching Testimony. — *Losee v. Losee, 2 Hill (N. Y.) 609; Runyan v. Price, 15 Ohio St. 9, 86 Am. Dec. 459.*

5. United States. — *Ayers v. Watson, 132 U. S. 404; Mattox v. U. S., 156 U. S. 237.*

Alabama. — *Lowe v. State, 86 Ala. 52; Perry v. State, 87 Ala. 30; Pruitt v. State, 92 Ala. 41; Lucas v. State, 96 Ala. 51.*

Arkansas. — *Griffith v. State, 37 Ark. 324.*

California. — *People v. Devine, 46 Cal. 45.*

Georgia. — *Atlanta, etc., R. Co. v. Gravitt, 93 Ga. 369, 44 Am. St. Rep. 145.*

Indiana. — *Eppert v. Hall, 133 Ind. 417.*

VIII. JUDGMENTS. — For a discussion of the method of proving judgments and their effect as evidence, reference is made to another title in this work.¹

IX. SUBSTANCE ONLY OF ISSUE NEED BE PROVED — 1. **General Rule.** — It is a general rule in the law of evidence that only the substance of the matters in issue need be proved.²

2. **Matters of Description** — *a.* **GENERAL RULE.** — Matters of description are generally deemed material and must therefore be proved as alleged.³

Kentucky. — *Craft v. Com.*, 81 Ky. 250, 50 Am. Rep. 160.

Louisiana. — *State v. Johnson*, 35 La. Ann. 871.

New York. — *Kimball v. Davis*, 19 Wend. (N. Y.) 437; *Brown v. Kimball*, 25 Wend. (N. Y.) 259; *Hubbard v. Briggs*, 31 N. Y. 536.

Ohio. — *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459.

Texas. — *Stewart v. State*, (Tex. Crim. App. 1894) 26 S. W. Rep. 203.

Virginia. — *Unis v. Charlton*, 12 Gratt. (Va.) 484.

Contra. — Dissenting opinion in *Mattox v. U. S.*, 156 U. S. 237; *Tucker v. Welsh*, 17 Mass. 160, 9 Am. Dec. 137; *Roberts v. Collins*, 6 Ired. L. (28 N. Car.) 223; *Hooper v. Moore*, 3 Jones L. (48 N. Car.) 428; *Morelock v. State*, 90 Tenn. 528; *Downer v. Dana*, 19 Vt. 344.

Foundation Must Be Laid. — "If the case where the contradictory statements are discovered after the examination of the witness, and so late as to place his recall beyond the power of the party, does not form an exception, no good reason is perceived why the case should where his testimony, taken in any other legal form, is used, and the opportunity of cross-examination has been lost by his death. It cannot depend upon the diligence of the party, for no laches would exist in the former case, and might not in the latter; nor upon mere convenience, otherwise, when, at the trial, the discovery came too late for the recall of the witness, the impeaching testimony would be admitted." *Runyan v. Price*, 15 Ohio St. 11, 86 Am. Dec. 459.

1. See the title JUDGMENTS AND DECREES.

2. **Only Substance of Issue Need Be Proved** — *United States.* — *U. S. v. Howard*, 3 Sumn. (U. S.) 12; *Scanlan v. Hodges*, 52 Fed. Rep. 354; *Hopkins v. Orr*, 124 U. S. 510.

Alabama. — *Olds v. Marshall*, 93 Ala. 138.

California. — *Tomlinson v. Monroe*, 41 Cal. 94; *Sommer v. Smith*, 90 Cal. 260; *Cahill v. Colgan*, (Cal. 1892) 31 Pac. Rep. 614.

Dakota. — *Bruguier v. U. S.*, 1 Dakota 5.

Indiana. — *Singleton v. O'Brien*, 125 Ind. 151; *Wellington v. Howard*, 5 Ind. App. 539; *Perry County v. Lomax*, 5 Ind. App. 567.

Iowa. — *Baxter v. Chicago, etc.*, R. Co., 87 Iowa 488.

Maryland. — *Hartsock v. Mort*, 76 Md. 281.

Michigan. — *Lull v. Davis*, 1 Mich. 77; *McDonough v. Heyman*, 38 Mich. 334; *Buhl v. Trowbridge*, 42 Mich. 44; *Patterson v. Detroit, etc.*, R. Co., 56 Mich. 173.

Missouri. — *Vette v. Leonori*, 42 Mo. App. 217.

New York. — *Ross v. Mather*, 51 N. Y. 108, 10 Am. Rep. 562; *Arnold v. Angell*, 62 N. Y. 508.

Ohio. — *Dean v. Yates*, 22 Ohio St. 388.

Oregon. — *Ahern v. Oregon Telephone Co.*, 24 Oregon 276.

Texas. — *Francis v. State*, 7 Tex. App. 501.

Wisconsin. — *Fisk v. Tauk*, 12 Wis. 306, 78 Am. Dec. 737; *Harper v. Milwaukee*, 30 Wis. 365.

The Proof Need Go Only to the Gravamen of the Action. — In *Baxter v. Chicago, etc.*, R. Co., 87 Iowa 488, the petition alleged that the defendants "killed and crippled a large white steer, which they * * * hauled out from the track onto the edge of this narrow passage," where the plaintiff's horse took fright thereat. Judge Granger, in passing upon the amount of proof required, said: "The charge upon which the plaintiff seeks to recover is negligence, and it is nowhere said in the petition that the killing or crippling of the steer was negligently done. The gravamen — the substantial cause — of the action is the negligent act of the defendant charged by the plaintiff as the cause of his injury. * * * The allegation as to the steer being killed or crippled was only to show a necessity for the company to act in its removal. Even though alleged, it was not necessary for the plaintiff to prove how the steer became injured in the cattle guard. If he proved that the steer was there, and the defendant negligently moved it onto the highway, so as to cause the injury to him, he proved the cause of action substantially as charged."

Judge Story, in *U. S. v. Howard*, 3 Sumn. (U. S.) 12, remarked: "In regard to the other question, what is sufficient proof of allegation, which cannot be disregarded as evidence, or, in other words, what constitutes a material variance in proof from the charge in the indictment, the general rule is that a variance between the indictment and the evidence is not material, provided the substance of the matter be found. Hence it is that even in capital offenses it is not necessary to prove more than the substance of the averments in the indictment. Thus, for example, in an indictment for murder, if it appear that the party was killed by a different weapon from that described in the indictment, it will still maintain the indictment; as, for example, if the wound or killing be alleged to be by a sword, and it be proved to be by an axe or staff; or is alleged to be by a wooden staff, and it be proved to be with a stone. For in all these cases the substance is the same, the wounding or killing with a weapon."

3. **Matters of Description.** — *Purcell v. Macnamara*, 9 East 160; *Stoddart v. Palmer*, 3 B. & C. 3, 10 E. C. L. 4; *Turner v. Eyles*, 3 B. & P. 456; *Rex v. St. Weonard*, 6 C. & P. 582, 25 E. C. L. 551; *U. S. v. Howard*, 3 Sumn. (U. S.) 12; *Barclay v. State*, 55 Ga. 179; *Berrien v. State*, 83 Ga. 381; *Com. v. Pope*, 12 Cush. (Mass.) 272; *Com. v. Pierce*, 130 Mass. 31; *State v. Langley*, 34 N. H. 529; *Vail v. Lewis*, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300; *Gates v. Bowker*, 18 Vt. 23.

b. WRITTEN INSTRUMENTS — (1) Writings Obligatory. — Where a written contract is pleaded *in hæc verba* it must be proved precisely as alleged, as every part is descriptive of the instrument as a whole.¹

Distinction Between Mere Allegation and Description. — In *Gates v. Bowker*, 18 Vt. 23, Judge Royce observed: "The declaration alleges the publication of the libel on the 16th day of February, A. D. 1838, when the proof showed it to have been a year afterwards. This is urged as a fatal variance. The distinction is between matter of mere allegation and matter of description. In the former case a variance as to time, number, or quantity, does not affect the legal right of recovery; whilst in the latter a variance in time, as in other parts of the description, goes to disprove the identity of the subject-matter, and is therefore fatal. As in the case of a deed or other written instrument, if it be simply alleged that it was made or delivered on such a day, it is no material variance to prove the making or delivery on a different day. It is otherwise where the date is given in connection with the making and delivery. In the one case an act only is alleged; in the other an instrument is also described. There can be no doubt that, in this instance, the fact of publication was rightly treated by the court below as matter of allegation merely, and not of description."

Purcell v. Macnamara, 9 East 157, was an action on the case for malicious prosecution. The declaration alleged an acquittal "on Tuesday next after the end of the [Easter] term." Lord Ellenborough held that since the day of acquittal was not alleged with a *prout patet per recordum*, any day prior to the action could be proved. The allegation was one of substance, and not one of description. Yet in *Stoddart v. Palmer*, 3 B. & C. 3, 10 E. C. L. 4, a judgment described "as appears by the record" was held to not require strict proof.

In *Turner v. Eyles*, 3 B. & P. 456, the declaration alleged that the prisoner was committed "as by the said writ of habeas corpus, and the said commitment thereon, now remaining in the said court, more fully appears." A united court held that the commitment was described as appearing of record, and that none other could be proved.

In *Vail v. Lewis*, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300, the court held that time, when material, must be proved as alleged, even when laid under a *scilicet*.

Reason of the Rule. — An indictment for fraudulently mortgaging a "dark bay mare mule" is not supported by proof of mortgaging a "mouse-colored mare mule named Mag." Judge Simmons, in writing the opinion, said: "It is clear that this proof did not correspond with the description of the mule set out in the indictment. * * * A conviction for mortgaging a dark bay mare mule would not protect the defendant in a future indictment for having mortgaged a mouse-colored mare mule named Mag." *Berrien v. State*, 83 Ga. 381.

Parol Evidence to Show Mistake in Description. — Where indictment is for illegally disposing of one "bay horse mule" that was mortgaged, and the mortgage describes one "bay mare mule," parol evidence will not be ad-

mitted to show that the description in the mortgage was by mistake. *Barclay v. State*, 55 Ga. 179.

1. Written Contracts. — *Sands v. Ledger*, 2 Ld. Raym. 792; *Reg. v. Drake*, 2 Salk. 660; *Swallow v. Beaumont*, 2 B. & Ald. 765; *Gwinnet v. Phillips*, 3 T. R. 643; *Parker v. Palmer*, 4 B. & Ald. 387, 6 E. C. L. 529; *Thornton v. Jones*, 2 Marsh. 287; *U. S. v. Le Baron*, 4 Wall. (U. S.) 642; *Zellers v. State*, 7 Ind. 660; *Com. v. Stow*, 1 Mass. 54; *Bristow v. Wright*, 2 Doug. 665, 1 Smith L. Cas. 1417; *Saxton v. Johnson*, 10 Johns. (N. Y.) 418; *State v. Caffey*, 2 Murph. (6 N. Car.) 320; *Olin v. Chipman*, 2 Tyler (Vt.) 148.

Written Contracts in Hæc Verbis. — Lord Mansfield, in *Bristow v. Wright*, 2 Doug. 665, the leading case, has stated the law lucidly. He said: "When I say that the plaintiff needs only set forth that part of a deed on which his action is founded, I do not mean to say that even that is necessary. He is not bound to set forth the material parts in letters and words. It will be sufficient to state the substance and legal effect. That is shorter, and not liable to misrecitals and literal mistakes. Here that method might have been followed. It certainly was not necessary to allege this part of the lease that relates to the time of payment, in order to maintain the action. But, since it has been alleged, it was necessary to prove it. The distinction is between that which may be rejected as surplusage (which might have been struck out on motion) and what cannot. Where the declaration contains impertinent matter, foreign to the cause, and which the master, on a reference to him, would strike out (irrelevant covenants, for instance), that will be rejected by the court and need not be proved. But if the very ground of the action is misstated, as where you undertake to recite that part of a deed on which the action is founded, and it is misrecited, that will be fatal. For then the case declared on is different from that which is proved, and you must recover *secundum allegata et probata*. This will reconcile all the cases."

This strictness of proof is confined to contracts. *Gwinnet v. Phillips*, 3 T. R. 643.

To omit the words "value received" from the note set out in the declaration is fatal to recovery on the note containing those words. *Saxton v. Johnson*, 10 Johns. (N. Y.) 418. So a note alleged to have been dated at London cannot be shown to have been dated at another place. *Roberts v. Harnage*, 2 Salk. 660.

In *Olin v. Chipman*, 2 Tyler (Vt.) 148, where the declaration was upon a libel, "of the meaning and purport following, to wit," the court held that "the," in the phrase "in the words," confined the plaintiff to the precise words, and that "of the meaning and purport following" was merely the plaintiff's interpretation of the libel. The court further held that the substitution of "our" for "the" in the phrase "the national government" was fatal.

In *State v. Caffey*, 2 Murph. (6 N. Car.) 320,

(2) *Specialties*. — Where specialties are pleaded according to their tenor every part so pleaded is deemed essentially descriptive, and therefore the proof must agree literally with the allegation.¹

(3) *Records*. — If the record is the foundation of the action every part of it is deemed descriptive and hence must be proved strictly as alleged.² But if the record is not the foundation of the action, and is pleaded only by way of inducement, it will be sufficient to prove it substantially as alleged.³

c. FORMAL MATTERS — (1) *Matters Naturally Immaterial*. — Whenever any matter alleged is from the nature of the case immaterial, when the cause of action or defense is perfect without it, then such matter need not be proved.⁴

(2) *Matters Declared Immaterial by Law*. — Certain formal allegations are by law deemed immaterial, and therefore need not be proved, which upon general principles might seem material.⁵

(3) *Where Materiality Depends on Form of Pleading*. — Certain matters may or may not be descriptive, and therefore material, according to the form in which they are pleaded.⁶

3. *Allegations of Value, Place, Time, Amount, etc.* — Allegations of value, place, time, amount, etc., when not essentially descriptive, are usually immaterial and hence need not be strictly proved.⁷

it was held that where the declaration does not purport to give the tenor of the writing, the exact words need not be set out.

In *Sands v. Ledger*, 2 Ld. Raym. 792, the declaration was of a lease rendering fifteen pounds per annum rent. The court held that this allegation could not be proved by introducing in evidence a lease rendering fifteen pounds per annum rent and three fowls. See also *Swallow v. Beaumont*, 2 B. & Ald. 765.

Where an instrument is declared on "in the words and figures following," it must be accurately recited. *Com. v. Stow*, 1 Mass. 54.

What Is Not a Violation of the Rule. — In *Thornton v. Jones*, 2 Marsh. 287, the words "from ship or warehouse" were omitted from the contract set out, yet the court unanimously held the words immaterial, and the omission, in consequence, not fatal. To the same effect is the holding in *Parker v. Palmer*, 4 B. & Ald. 387, 6 E. C. L. 529. There the words omitted were "per sample."

So in *U. S. v. Le Baron*, 4 Wall. (U. S.) 642, it was held by Miller, J., that a bond dated July 1, and taking effect July 15, could be introduced to prove a bond declared on as having been entered into on July 1. The date is not descriptive, but is a mere formal allegation of time of making the contract.

See also *Wiebusch v. Taylor*, 64 Tex. 53, where Willie, C. J., held that even where the plaintiff assumes to give an exact copy of the note, there is no variance unless the defendant is misled thereby.

1. *Specialties*. — *Bowditch v. Mawley*, 1 Campb. 195; *Dundass v. Weymouth*, 2 Cowp. 665; *Waugh v. Bussell*, 5 Taunt. 707, 1 E. C. L. 241; *People v. Warner*, 5 Wend. (N. Y.) 271; *Jansen v. Ostrander*, 1 Cow. (N. Y.) 670; *James v. Walruth*, 8 Johns. (N. Y.) 410; *Henry v. Cleland*, 14 Johns. (N. Y.) 400; *Henry v. Brown*, 19 Johns. (N. Y.) 49.

What Offends the Rule. — In *Bowditch v. Mawley*, 1 Campb. 195, the indenture read "Saul," while in the declaration it appeared as "Samuel." This was held fatal to the plaintiff's case.

Again in *Waugh v. Bussell*, 5 Taunt. 707, 1 E. C. L. 241, the bond was conditioned to pay £100 by six equal payments of £16. 13s. 4d. on the 3d of October in every year "until the full sum of one pounds should be paid." Before the commencement of the action a stranger wrote the word "hundred" between "one" and "pounds." The plaintiff, on oyer craved, set the condition out as "until the full sum of £100 was paid." *Gibbs, C. J.*, held that the variance was fatal.

What Does Not Offend. — Where the bond appeared "without any fraud or delay," and the declaration read, "without any fraud or other delay," Judge Woodworth found the variance immaterial and permitted the introduction of the bond in evidence to prove the allegation. *Henry v. Brown*, 19 Johns. (N. Y.) 49.

2. *Records*. — *Burnett v. Phillip*, 6 Eng. L. & Eq. 467, 20 L. J. Exch. 337; *Black v. Braybrook*, 2 Stark. 7, 3 E. C. L. 294; *Rastall v. Straton*, 1 H. Bl. 49; *Baynes v. Forrest*, 2 Stra. 892; *Woodford v. Ashley*, 11 East 508; *Whitaker v. Bramson*, 2 Paine (U. S.) 209; *U. S. v. McNeal*, 1 Gall. (U. S.) 387.

3. *Gwinnet v. Phillips*, 3 T. R. 643.

4. *Immaterial Matters*. — *Minton's Case*, 2 East P. C. 1021; *Turner v. State*, 97 Ala. 57; *Thomas v. Com.*, (Ky. 1892) 20 S. W. Rep. 226; *Hernandez v. State*, 32 Tex. Crim. Rep. 271.

5. 1 Greenl. Ev., § 59.

6. *Form of Pleading*. — *Andrews's Stephen's Pleading* 332; *Gwinnet v. Phillips*, 3 T. R. 643; *Purcell v. Macnamara*, 9 East 160; *Gleason v. M'Vickar*, 7 Cow. (N. Y.) 42; *Vail v. Lewis*, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300.

7. *Time, Amount, Place, and Value* — *Arkansas*. — *Chamblee v. McKenzie*, 31 Ark. 155.

Dakota. — *Bruguier v. U. S.*, 1 Dakota 5.

Georgia. — *Georgia R., etc., Co. v. Miller*, 90 Ga. 571; *Hudson v. Hudson*, 90 Ga. 581.

Illinois. — *Lake Shore, etc., R. Co. v. Hundt*, 140 Ill. 525; *Rockford v. Hollenbeck*, 34 Ill. App. 40.

Kansas. — *Russell v. Bradley*, 47 Kan. 438.

4. Variance — a. DEFINITION. — A variance is a disagreement between the allegations and the evidence on a matter that is essential to the charge or claim.¹

Michigan. — *McCaslin v. Lake Shore, etc.*, R. Co., 93 Mich. 553.

Minnesota. — *Erickson v. Schuster*, 44 Minn. 441.

New York. — *Devlin v. Boyd*, 69 Hun (N. Y.) 328.

Texas. — *May v. Pollard*, 28 Tex. 677; *Brown v. Sullivan*, 71 Tex. 470; *Lasater v. Van Hook*, 77 Tex. 650; *St. Louis, etc., R. Co. v. Evans*, 78 Tex. 369; *Rockwall First Nat. Bank v. Stephenson*, 82 Tex. 435; *Halfin v. Winkleman*, 83 Tex. 165.

Utah. — *Holman v. Pleasant Grove City*, 8 Utah 78.

When Time Becomes Descriptive. — Judge Zane, in *Holman v. Pleasant Grove City*, 8 Utah 81, states the distinction with great clearness, as follows: "An averment that a written instrument was made on a certain day does not make the date descriptive of the instrument, but an allegation that the instrument bears a certain date makes the date descriptive of the paper; and so as to an act raising a legal right, or that amounts to a legal wrong, or imposes a legal duty, or constitutes a tort or a crime, it is not necessary to prove the date alleged." See also *Devlin v. Boyd*, 69 Hun (N. Y.) 328.

Disagreement Must Not Mislead. — Judge Garrett, discussing this proposition in *Rockwall First Nat. Bank v. Stephenson*, 82 Tex. 435, said: "There was no material variance between the note described in the petition and the one offered in evidence. The allegation is that 'on or about the 11th day of October, 1888, the defendant made, executed, and delivered,' etc., and not that the note was executed on that day. * * * A variance between the allegation and proof which ought not to have misled the adverse party to his prejudice is not material. It must be such as to mislead or surprise the opposite party." See also *May v. Pollard*, 28 Tex. 677; *Smith v. Shinn*, 58 Tex. 3; *McClelland v. Smith*, 3 Tex. 210; *Hays v. Samuels*, 55 Tex. 563.

In *Texas* this rule is followed where the instrument is set out *in hæc verbis*. *Halfin v. Winkleman*, 83 Tex. 165; *Wiebusch v. Taylor*, 64 Tex. 53.

Time Not Material. — *Lake Shore, etc., R. Co. v. Hundt*, 140 Ill. 525.

An averment that a jennet was killed April 29, 1886, was sustained by proof that the jennet was killed April 29, 1889. *St. Louis, etc., R. Co. v. Evans*, 78 Tex. 369.

So an allegation that "on the 1st day of June, 1882, the defendants * * * entered upon the premises herein sued for as tenants for the plaintiffs under written agreement of lease," was sustained by introducing in evidence an instrument that read: "This indenture, made the first day of June, 1882, witnesseth," etc., and dated at its close June 1, 1883. *Lasater v. Van Hook*, 77 Tex. 650; *Erickson v. Schuster*, 44 Minn. 441.

In an allegation of title a prior beginning can be shown. *Russell v. Bradley*, 47 Kan. 438.

Place Immaterial. — Justice Gaines, in *Brown*

v. Sullivan, 71 Tex. 470, used the following language: "The accident is alleged in the petition to have occurred at Provencal, Louisiana. The proof showed that it took place at Robeline, in that state. The defendant asked the court to charge the jury that if the injury was inflicted at Robeline, and not at Provencal as alleged, they should find for the defendant, and this was refused. This is a transitory action. The rule at common law is that in such actions the allegation of place is immaterial, and that it need not be proved as alleged."

The plaintiff may recover for personal injury under an allegation that she stood on the lower step of a passenger coach, when in fact she stood near the car door. *McCaslin v. Lake Shore, etc., R. Co.*, 93 Mich. 553. In this case Grant, J., observed: "It was unnecessary to aver the exact place, nor does its averment preclude proof that she in fact stood two or three feet from the place alleged." To the same effect is *Rockford v. Hollenbeck*, 34 Ill. App. 40.

Nor Is the Manner Usually Material. — In *Georgia R., etc., Co. v. Miller*, 90 Ga. 571, the injury to the plaintiff's hand was alleged to have been caused by the falling of an eccentric upon it. Judge Simmons held that this averment was proved by evidence that the eccentric knocked the hand up and crushed it against another piece of iron. The learned judge remarked, however, that he thought it the better practice to amend.

1. Variance Defined. — Andrews's *Stephen's Pleading* 176; *Pomeroy's Code Rev.*, § 552; 1 *Greenl. Ev.*, § 63.

England. — *Mersey, etc., Nav. Co. v. Douglas*, 2 East 497; *Reg. v. Cranage*, 1 Salk. 385; *Vowles v. Miller*, 3 Taunt. 130.

Alabama. — *Mobile, etc., R. Co. v. George*, 94 Ala. 199.

Arizona. — *Richards v. Green*, (Arizona 1890) 32 Pac. Rep. 266.

Connecticut. — *House v. Metcalf*, 27 Conn. 638.

Georgia. — *Central R. Co. v. Hubbard*, 86 Ga. 623.

Illinois. — *Toledo, etc., R. Co. v. Harnsberger*, 41 Ill. App. 494.

Indiana. — *Goodhub v. Scheller*, 3 Ind. App. 318; *Becker v. Baumgartner*, 5 Ind. App. 576.

Minnesota. — *Dennis v. Spencer*, 45 Minn. 250.

Missouri. — *Haughey Livery, etc., Co. v. Joyce*, 41 Mo. App. 564.

Nebraska. — *State Ins. Co. v. Schreck*, 27 Neb. 527, 20 Am. St. Rep. 696.

New York. — *Cooperstown Bank v. Woods*, 28 N. Y. 545.

Texas. — *Smith v. State*, 7 Tex. App. 382.

Statutory Distinction Between Variance and Failure of Proof. — For the distinction that some statutes make between variance and failure of proof, and its effects, see *Dennis v. Spencer*, 45 Minn. 250; *Haughey Livery, etc., Co. v. Joyce*, 41 Mo. App. 564.

Cannot Recover on Different Set of Facts. — In *Montezuma v. Wilson*, 82 Ga. 206, the court

6. REDUNDANCY OF ALLEGATION. — Where an unnecessary fact has been alleged it need not be proved.¹ But where the unnecessary allegation limits or qualifies that which is material, then it becomes material also and must be proved as alleged.²

said: "In that declaration he alleged that he fell through a bridge across the sidewalk. * * * The evidence in the case shows that the place where the plaintiff was injured was not a bridge, but a sewer a foot and a half under the ground. * * * When a plaintiff brings a case into court and makes certain allegations on which he seeks to recover against the defendant, he must abide by those allegations. He cannot set up one state of facts in his declaration and recover upon an entirely different set of facts in the evidence."

Proof in Addition to the Allegation. — The following instruction, though criticised, was upheld by Judge Simmons in *Central R., etc., Co. v. Nash*, 81 Ga. 580: "The plaintiff is limited to the proof of the particular acts of negligence on the part of the defendant as to the cause of the homicide, which are set out in the declaration. Proof of other acts of negligence will not authorize a recovery, unless the jury be satisfied from the evidence that the negligence charged has been proved; or if several acts of negligence be charged, that one or more of them has been proved, and shown to have occasioned the disaster."

Rule Seems Sometimes to Depend Somewhat on the Facts. — In *Port Royal, etc., R. Co. v. Tompkins*, 83 Ga. 759, Judge Blandford held that an allegation that the railroad company was negligent in not having a key placed in the bolt which fastened the tender to the engine was not supported by proof that the bolt was not long enough to go through so as to be keyed, and thereby prevented from coming out. On principle it is difficult to harmonize this view with other cases. Doubtless the facts moved the court to make an extreme application of the rule. See also *State Ins. Co. v. Schreck*, 27 Neb. 527, 20 Am. St. Rep. 696.

In case an averment that the plaintiff's close at the time of the injury was, and still was, in the occupation of J. V. and H. V., is sufficiently proved if at the time of the injury it was in their occupation, though the tenant be since changed, before action brought. *Vowles v. Miller*, 3 Taunt. 137. See also, for an interesting state of facts, *Toledo, etc., R. Co. v. Harnsberger*, 41 Ill. App. 494; *Goodbub v. Scheller*, 3 Ind. App. 318.

Declaration on Quantum Meruit; Proof of a Specific Agreement. — Under a complaint on a *quantum meruit* for services rendered, where a specific contract is proved fixing the price for the services, the stipulated price becomes the *quantum meruit* in the case. It is not a question of variance, but only of the mode of proof of the allegations of the pleadings. *Fells v. Vestvali*, 2 Keyes (N. Y.) 152; *Ludlow v. Dole*, 62 N. Y. 617.

Firm Name That of Individual. — Where a complaint describes a note as made by "Orrin North," and the note offered in evidence is made by a firm doing business under the name of "Orrin North," there is no variance. *Cooperstown Bank v. Woods*, 28 N. Y. 545.

1. Allegation of Unnecessary Fact. — *Gabe v. State*, 6 Ark. 540; *Reg. v. Jennings*, 7 Cox C. C. 397; *Dugger v. Oglesby*, 3 Ill. App. 94; *Northrop v. McGee*, 20 Ill. App. 108; *Hull v. State*, 120 Ind. 153; *Rollet v. Heiman*, 120 Ind. 511, 16 Am. St. Rep. 340; *Robbins v. Diggins*, 78 Iowa 521; *Dunford v. Weaver*, 84 N. Y. 445; *Peter v. State*, 5 Humph. (Tenn.) 436; *State v. Brown*, 8 Humph. (Tenn.) 89.

2. Where Unnecessary Allegation Qualifies That Which Is Material. — *England.* — *Walters v. Mace*, 2 B. & Ald. 756; *Rex v. St. Weonard*, 6 C. & P. 582, 25 E. C. L. 551; *Jones v. Mars*, 2 Campb. 305; *Williamson v. Allison*, 2 East 446; *Rex v. Lee*, 1 Leach C. C. 416; *Rex v. Owen*, 1 Moo. C. C. 118; *Rex v. Deeley*, 1 Moo. C. C. 303; *Rex v. Schoole*, 1 Peake N. P. (ed. 1795) 112; *Reg. v. Drake*, 2 Salk. 660; *Leke's Case*, 3 Dyer 365a, 2 Saund. 206a; *Rex v. Craven, R. & R. C. C. 11*; *Rex v. Edwards, R. & R. C. C. 370*.

United States. — *U. S. v. Keen*, 1 McLean (U. S.) 429; *U. S. v. Brown*, 3 McLean (U. S.) 233; *U. S. v. Foye*, 1 Curt. (U. S.) 364; *U. S. v. Howard*, 3 Sumn. (U. S.) 12.

Alabama. — *Mobile, etc., R. Co. v. George*, 94 Ala. 199.

Arkansas. — *Hany v. State*, 9 Ark. 193; *Shover v. State*, 10 Ark. 259; *Dudney v. State*, 22 Ark. 251.

Connecticut. — *U. S. v. Porter*, 3 Day (Conn.) 283.

Illinois. — *Gridley v. Bloomington*, 68 Ill. 47; *Katz v. Moessinger*, 7 Ill. App. 536.

Indiana. — *Dickensheets v. Kaufman*, 28 Ind. 251.

Kentucky. — *Com. v. Magowan*, 1 Metc. (Ky.) 368, 71 Am. Dec. 480; *Com. v. Garland*, 3 Metc. (Ky.) 478; *Clark v. Com.*, 16 B. Mon. (Ky.) 206.

Maine. — *State v. Noble*, 15 Me. 476; *State v. Jackson*, 30 Me. 29.

Massachusetts. — *Com. v. Wellington*, 7 Allen (Mass.) 299; *Com. v. Shearman*, 11 Cush. (Mass.) 546; *Com. v. McAvoy*, 16 Gray (Mass.) 235; *Com. v. Pierce*, 130 Mass. 31; *Com. v. Luscomb*, 130 Mass. 42; *Com. v. Stone*, 152 Mass. 498.

Michigan. — *Lull v. Davis*, 1 Mich. 77; *People v. Marion*, 28 Mich. 255.

Mississippi. — *John v. State*, 24 Miss. 569; *Dick v. State*, 30 Miss. 631.

Missouri. — *King v. Clark*, 7 Mo. 269; *State v. Smith*, 31 Mo. 120.

New Hampshire. — *State v. Copp*, 15 N. H. 212; *State v. Langley*, 34 N. H. 529; *State v. Sherburne*, 59 N. H. 99.

New York. — *Jerome v. Whitney*, 7 Johns. (N. Y.) 321.

North Carolina. — *State v. Martin*, 3 Murph. (7 N. Car.) 533.

Tennessee. — *Turner v. State*, 3 Heisk. (Tenn.) 452.

Texas. — *Hill v. State*, 41 Tex. 253; *Warrington v. State*, 1 Tex. App. 168; *Rose v. State*, 1 Tex. App. 400; *Ranjel v. State*, 1 Tex. App. 461; *Soria v. State*, 2 Tex. App. 297;

c. TEST OF SURPLUSAGE. — The final test whether or not an allegation is surplusage is whether the cause of action or defense will remain perfect after the allegation is stricken out.¹

d. REDUNDANCY OF PROOF. — If there be proof of all material allegations, then no harm results from proof of other matters, unless such other matters tend to defeat the cause of action or defense.²

e. FATAL VARIANCE. — Any disagreement between a material allegation and the evidence adduced in support of it is as fatal as a total failure of proof.³

f. VARIANCES NOT FATAL. — Where the disagreement between the allegation and the evidence in support of it is upon a matter not essential to the charge or claim, it is not fatal.⁴

Courtney v. State, 3 Tex. App. 257; *Meuly v. State*, 3 Tex. App. 382; *Sweat v. State*, 4 Tex. App. 617; *McGee v. State*, 4 Tex. App. 625; *Watson v. State*, 5 Tex. App. 11; *Hampton v. State*, 5 Tex. App. 463; *Allen v. State*, 8 Tex. App. 360; *Cameron v. State*, 9 Tex. App. 332; *Simpson v. State*, 10 Tex. App. 681; *Gray v. State*, 11 Tex. App. 411; *McLaurine v. State*, 28 Tex. App. 530.

Virginia. — *Com. v. Butcher*, 4 Gratt. (Va.) 544.

Allegation of Title and Ownership Are Descriptive. — *Leke's Case*, 3 Dyer 365 *a*; *People v. Hughes*, 41 Cal. 234; *Lull v. Davis*, 1 Mich. 77; *John v. State*, 24 Miss. 569; *State v. Martin*, 3 Murph. (7 N. Car.) 533; *McLaurine v. State*, 28 Tex. App. 530.

Place, Not Stated as Venue, Is Descriptive. — "All the authorities affirm that where place is stated, not as venue but as matter of local description, the slightest variance between the description of it in the indictment and the evidence offered concerning it will be fatal. And in illustration of this rule it is said that the slightest variance between the indictment and the evidence in the name of the place where the house is situate, or in any other description of it, will be fatal, in indictments for stealing in a dwelling house, or burglary, or arson, or for entering a close by night, being armed, for the purpose of taking game." *Merrick, J.*, in *Com. v. Wellington*, 7 Allen (Mass.) 299. See also *Com. v. Stone*, 152 Mass. 498.

Venue or Description. — Where it is not clear whether the place laid was intended as venue or as description the doubt will be resolved in favor of the venue. *Mersey, etc.*, *Nav. Co. v. Douglas*, 2 East 497.

1. Test of Surplusage. — *Williamson v. Allison*, 2 East 446; *Peppin v. Solomons*, 5 T. R. 496; *Bromfield v. Jones*, 4 B. & C. 380, 10 E. C. L. 362; *Livingston v. Swanwick*, 2 Dall. (U. S.) 300; *Twiss v. Baldwin*, 9 Conn. 291; *Dickensheets v. Kaufman*, 28 Ind. 251; *Robbins v. Diggins*, 78 Iowa 521; *Panton v. Holcomb*, 17 Johns. (N. Y.) 62, 8 Am. Dec. 369; *Gibbs v. Cannon*, 9 S. & R. (Pa.) 198, 11 Am. Dec. 699.

2. 1 Greenl. Ev., § 67; 1 Starkie on Ev. 401.

3. Fatal Variance. — *Andrews's Pleading*, § 90; *Underhill on Ev.*, § 24; 1 Greenl. Ev., § 63; 1 Jones on Ev., § 233.

England. — *Walters v. Mace*, 2 B. & Ald. 756; *Jones v. Mars*, 2 Campb. 305; *Wilson v. Gilbert*, 2 B. & P. 281; *Penny v. Porter*, 2 East 2; *Fells v. Vestvali*, 2 Keyes (N. Y.) 152; *Rex v. Cook*, 1 Leach C. C. 105; *Rex v. Owen*,

1 Moo. C. C. 118; *Rex v. Loom*, 1 Moo. C. C. 160; *Rex v. Puddifoot*, 1 Moo. C. C. 247; *Rex v. Deeley*, 1 Moo. C. C. 303; *Sands v. Ledger*, 2 Ld. Raym. 792; *Reg. v. Cranage*, 1 Salk. 385; *Reg. v. Drake*, 2 Salk. 660.

United States. — *Sheehy v. Mandeville*, 7 Cranch (U. S.) 208.

Alabama. — *Mobile, etc., R. Co. v. George*, 94 Ala. 199.

California. — *Cotes v. Campbell*, 3 Cal. 191; *Morrison v. Bradley*, 5 Cal. 503; *Tomlinson v. Monroe*, 41 Cal. 94; *Christian College v. Hendley*, 49 Cal. 349; *McCord v. Seale*, 56 Cal. 262.

Georgia. — *Central R. Co. v. Hubbard*, 86 Ga. 623.

Indiana. — *Becker v. Baumgartner*, 5 Ind. App. 576.

Maine. — *State v. Jackson*, 30 Me. 29.

Massachusetts. — *Com. v. Stone*, 1 Mass. 54; *Com. v. Trimmer*, 1 Mass. 476.

Michigan. — *Bristow v. Wright*, 2 Doug. 665, 1 Smith L. Cas. 1417.

Minnesota. — *Dennis v. Spencer*, 45 Minn. 250.

Missouri. — *Haughey Livery, etc., Co. v. Joyce*, 41 Mo. App. 564; *Gurley v. Missouri Pac. R. Co.*, 93 Mo. 445.

New York. — *Saxton v. Johnson*, 10 Johns. (N. Y.) 418; *Sussdorff v. Schmidt*, 55 N. Y. 319.

North Carolina. — *State v. Martin*, 3 Murph. (7 N. Car.) 533.

Texas. — *Gorman v. State*, 42 Tex. 221; *Collins v. State*, 43 Tex. 577.

Vermont. — *Olin v. Chipman*, 2 Tyler (Vt.) 148.

Statutory Definition of Failure of Proof and Immaterial Variance. — In some states statutes have been passed defining what variance shall be considered as immaterial and what shall amount to failure of proof. See *Huntington v. Mendenhall*, 73 Ind. 460; *Miller v. Kendig*, 55 Iowa 174; *Dennis v. Spencer*, 45 Minn. 250; *Haughey Livery, etc., Co. v. Joyce*, 41 Mo. App. 564; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Dean v. Yates*, 22 Ohio St. 388; *Sibila v. Bahney*, 34 Ohio St. 399; *Gaines v. Union Transp., etc., Co.*, 28 Ohio St. 418; *Dodd v. Denny*, 6 Oregon 156.

4. Variances Not Fatal — *Arkansas*. — *State v. Smith*, 12 Ark. 622, 56 Am. Dec. 287; *Chamblee v. McKenzie*, 31 Ark. 155.

California. — *People v. Tonielli*, 81 Cal. 275.

Dakota. — *Bruguier v. U. S.*, 1 Dakota 5.

Indiana. — *Galloway v. Stewart*, 49 Ind. 156, 19 Am. Rep. 677; *Wright v. Johnson*, 50 Ind. 454; *Glasgow v. Hobbs*, 52 Ind. 239; *Stroup v. State*, 70 Ind. 495; *Huntington v. Mendenhall*, 73 Ind. 460.

g. **VARIANCES CURED BY STATUTE.** — Many variances that at common law were fatal have been rendered immaterial by statute.¹

h. **VARIANCES CURED BY AMENDMENT.** — Variances that would otherwise be fatal can now usually be cured by so amending the pleadings as to make them correspond to the evidence.²

Iowa. — *Miller v. Kendig*, 55 Iowa 174.

Michigan. — *Lull v. Davis*, 1 Mich. 77; *McDonough v. Heyman*, 38 Mich. 334; *Buhl v. Trowbridge*, 42 Mich. 44; *Patterson v. Detroit*, etc., R. Co., 56 Mich. 172.

New York. — *Clayes v. Hooker*, 4 Hun (N. Y.) 231; *Lefler v. Sherwood*, 21 Hun (N. Y.) 573; *Hart v. Hudson*, 6 Duer (N. Y.) 294; *Scott v. Lillenthal*, 9 Bosw. (N. Y.) 224; *Byxhie v. Wood*, 24 N. Y. 607; *Ross v. Mather*, 51 N. Y. 108, 10 Am. Rep. 562; *Arnold v. Angell*, 62 N. Y. 508; *Thomas v. Nelson*, 69 N. Y. 118; *Dunford v. Weaver*, 84 N. Y. 445; *Peck v. New York*, etc., R. Co., 85 N. Y. 246.

North Carolina. — *McMahan v. Miller*, 82 N. Car. 317.

Ohio. — *Dean v. Yates*, 22 Ohio St. 388; *Speer v. Bishop*, 24 Ohio St. 598; *Gaines v. Union Transp.*, etc., Co., 28 Ohio St. 418; *Sibila v. Bahney*, 34 Ohio St. 399.

Oregon. — *Dodd v. Denny*, 6 Oregon 156.

Texas. — *Houston*, etc., R. Co. v. *Blagge*, 73 Tex. 24.

Wisconsin. — *Fisk v. Tauk*, 12 Wis. 276, 78 Am. Dec. 737; *Harper v. Milwaukee*, 30 Wis. 365; *Cody v. Bemis*, 40 Wis. 666; *Giffert v. West*, 37 Wis. 115; *Chunot v. Larson*, 43 Wis. 536, 28 Am. Rep. 567; *Russell v. Loomis*, 43 Wis. 545; *Delaplaine v. Turnley*, 44 Wis. 31; *Union Nat. Bank v. Roberts*, 45 Wis. 375; *Ryan v. Springfield F. & M. Ins. Co.*, 46 Wis. 671; *Willer v. Bergenthal*, 50 Wis. 474.

Generic Term Supported by Proof of Species. — "An indictment describing a thing by its generic term is supported by proof of a species which is clearly comprehended within such description." *Bruguier v. U. S.*, 1 Dakota 5.

Scienter. — When scienter is not a necessary element of the offense or charge, it need not be proved even when alleged. *Chunot v. Larson*, 43 Wis. 536, 28 Am. Rep. 567; *Dunford v. Weaver*, 84 N. Y. 445.

Conditional Promise Fulfilled Declared on as Absolute. — "It is true that the agreement found by the referee varies from that set forth in the complaint, but it does not follow that the variance was such as to render a dismissal of the complaint necessary or proper. The promise of the defendants as set forth in the complaint was absolute; as found by the referee, conditional; but it must be remembered that the condition was shown to have been fulfilled, and the liability of the defendants to be exactly the same as if the allegation in the complaint had been literally proved." *Hart v. Hudson*, 6 Duer (N. Y.) 294.

Spoliated Instrument. — A note that has been changed or altered by a stranger should be set out as before the act of spoliation. But if declared on as altered, there is no objection on the ground of variance, since the disagreement is immaterial. *Union Nat. Bank v. Roberts*, 45 Wis. 375.

Anticipating Matter. — Matter in anticipation of the defense is not essential to the mainte-

nance of an action and consequently does not require proof. *Stroup v. State*, 70 Ind. 495; *Byxhie v. Wood*, 24 N. Y. 607.

Sense of Writing Must Not Be Changed. — In a threatening letter set out in the information a dash appeared before the word "detective," where in the original letter was the word "another." The court held the variance immaterial, since it did not change the sense of the letter. *People v. Tonielli*, 81 Cal. 275.

1. Variance Cured by Statute. — 1 *Smith's Lead. Cas.* 1420.

Alabama. — *Thompson v. State*, 25 Ala. 41.

California. — *People v. Mariposa Co.*, 31 Cal. 106.

Iowa. — *Doniphan v. Street*, 17 Iowa 317.

Massachusetts. — *Com. v. Hall*, 97 Mass. 570.

Michigan. — *Merkle v. Bennington Tp.*, 68 Mich. 133.

New Hampshire. — *Stevenson v. Mudgett*, 10 N. H. 338, 34 Am. Dec. 158, note.

New York. — *Clayes v. Hooker*, 4 Hun (N. Y.) 231; *Hart v. Hudson*, 6 Duer (N. Y.) 294; *Scott v. Lillenthal*, 9 Bosw. (N. Y.) 224; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Place v. Minster*, 65 N. Y. 89.

North Carolina. — *McMahan v. Miller*, 82 N. Car. 317.

Ohio. — *Foster v. State*, 19 Ohio St. 415.

Tennessee. — *State v. Quartemus*, 3 Heisk. (Tenn.) 65.

Wisconsin. — *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737.

See the title **AMENDMENTS**, 1 **ENCYC. OF PL. AND PR.** 458.

2. Variance Cured by Amendment. — *United States.* — *Tiernan v. Woodruff*, 5 McLean (U. S.) 135.

Alabama. — *South*, etc., *Alabama R. Co. v. Small*, 70 Ala. 499.

Arkansas. — *Chamblee v. McKenzie*, 31 Ark. 155; *Atkinson v. Cox*, 54 Ark. 444.

California. — *Hayden v. Hayden*, 46 Cal. 332; *Burns v. Scoffy*, 98 Cal. 271.

Colorado. — *Saint v. Guerrero*, 17 Colo. 448, 31 Am. St. Rep. 320.

Connecticut. — *Phelps Mfg. Co. v. Enz*, 19 Conn. 58.

Illinois. — *Chicago*, etc., *R. Co. v. Stein*, 75 Ill. 41; *Drake v. Drake*, 83 Ill. 526; *Meyer v. Wiltshire*, 92 Ill. 395; *Citizens' Gaslight*, etc., *Co. v. Granger*, 118 Ill. 266.

Indiana. — *Wright v. Johnson*, 50 Ind. 454; *Glasgow v. Hobbs*, 52 Ind. 239; *Goodbub v. Scheller*, 3 Ind. App. 318.

Maine. — *Solon v. Perry*, 54 Me. 493; *Wentworth v. Sawyer*, 76 Me. 434.

Massachusetts. — *Com. v. Trimmer*, 1 Mass. 476; *Cain v. Rockwell*, 132 Mass. 194; *Dietrich v. Wolfsohn*, 136 Mass. 335; *Wight v. Hale*, 2 Cush. (Mass.) 486, 48 Am. Dec. 677; *Dorr v. Fenno*, 12 Pick. (Mass.) 521.

Michigan. — *Merkle v. Bennington Tp.*, 68 Mich. 133; *Beecher v. Wayne Circuit Judges*, 70 Mich. 363.

X. BURDEN OF PROOF. — As a general rule the burden of proof rests upon that party who would be defeated if no evidence at all were offered.¹

XI. BEST AND SECONDARY EVIDENCE. — By the best evidence is meant that evidence which does not in its nature suggest that better evidence of the same fact is withheld.² And all evidence falling short of this standard and which

Missouri. — *Reyburn v. Mitchell*, 106 Mo. 365, 27 Am. St. Rep. 350.

Neb.aska. — *McKeighan v. Hopkins*, 14 Neb. 361, 19 Neb. 33.

New Hampshire. — *Elliott v. Clark*, 18 N. H. 421.

New York. — *Place v. Minster*, 65 N. Y. 89; *Thomas v. Nelson*, 69 N. Y. 118; *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567; *Peck v. New York, etc., R. Co.*, 85 N. Y. 246; *Hart v. Hudson*, 6 Duer (N. Y.) 294; *Scott v. Lilienthal*, 9 Bosw. (N. Y.) 224; *Clayes v. Hooker*, 4 Hun (N. Y.) 231; *Lefler v. Sherwood*, 21 Hun (N. Y.) 573.

Ohio. — *Sibila v. Bahney*, 34 Ohio St. 399.

Oregon. — *Dodd v. Denny*, 6 Oregon 156; *Baldock v. Atwood*, 21 Oregon 73.

Pennsylvania. — *Ward v. Stevenson*, 15 Pa. St. 21; *Miller v. Pollock*, 99 Pa. St. 202.

Vermont. — *Olin v. Chipman*, 2 Tyler (Vt.) 148.

Wisconsin. — *Fisk v. Tauk*, 12 Wis. 276, 78 Am. Dec. 737; *Delaplaine v. Turnley*, 44 Wis. 31; *Willer v. Bergenthal*, 50 Wis. 474; *Brown v. Bosworth*, 62 Wis. 542.

See the title AMENDMENTS, 1 ENCYC. OF PL. AND PR. 458.

1. This whole subject has already been treated elsewhere in this work. See the title BURDEN OF PROOF, vol. 5, p. 21.

2. **Best Evidence** — *United States.* — *Tayloe v. Riggs*, 1 Pet. (U. S.) 591; *U. S. v. Reyburn*, 6 Pet. (U. S.) 352; *Minor v. Tillotson*, 7 Pet. (U. S.) 100; *Winn v. Patterson*, 9 Pet. (U. S.) 677; *Anglo-American Packing, etc., Co. v. Cannon*, 31 Fed. Rep. 313.

California. — *Grant v. Oliver*, 91 Cal. 158.

Georgia. — *Watkins v. Paine*, 57 Ga. 50; *Blalock v. Miland*, 87 Ga. 573.

Illinois. — *King v. Worthington*, 73 Ill. 161; *Reich v. Berdel*, 120 Ill. 499.

Iowa. — *District Tp. v. Morehead*, 51 Iowa 99.

Maryland. — *Marsh v. Hand*, 35 Md. 123; *Richardson v. Milburn*, 17 Md. 67.

Massachusetts. — *Goodrich v. Weston*, 102 Mass. 362, 3 Am. Rep. 469; *Com. v. Pope*, 103 Mass. 440; *Smith v. Brown*, 151 Mass. 339.

Nebraska. — *Buchanan v. Wise*, 34 Neb. 695.

New Mexico. — *Daly v. Bernstein*, 6 N. Mex. 380.

North Carolina. — *Isley v. Boon*, 109 N. Car. 555.

Texas. — *Henry v. Whitaker*, 82 Tex. 5; *Trimble v. Edwards*, 84 Tex. 497.

See the title SECONDARY EVIDENCE.

Reason for Rule Requiring Best Evidence. —

The rule requiring the production of the best evidence of which the case in its nature is susceptible is adopted for the prevention of fraud, and is declared to be essential to the pure administration of justice. * * * By requiring the production of the best evidence, the law denies the admissibility of that evidence which is merely substitutionary in its nature, when the original evidence can be had." *Anglo-*

American Packing, etc., Co. v. Cannon, 31 Fed. Rep. 313.

Extent of the Rule. — "The rule of evidence does not require the strongest possible evidence of the matter in dispute, but only that no evidence shall be given which, from the nature of the transaction, supposes there is better evidence of the fact attainable by the party. It is said in the books that the ground of the rule is a suspicion of fraud, and if there is better evidence of the fact, which is withheld, a presumption arises that the party has some secret or sinister motive in not producing it. Rules of evidence are adopted for practical purposes in the administration of justice, and must be so applied as to promote the ends for which they are designed." *U. S. v. Reyburn*, 6 Pet. (U. S.) 352.

Best Evidence Must Be Accessible. — "The rule of law is that the best evidence must be given of which the nature of the thing is capable; that is, that no evidence shall be received which presupposes greater evidence behind, in the party's possession or power. The withholding of that better evidence raises a presumption that, if produced, it might not operate in his favor. For this reason a party who is in possession of an original paper, or who has it in his power, is not permitted to give a copy in evidence, or to prove its contents." *Marshall, C. J.*, in *Tayloe v. Riggs*, 1 Pet. (U. S.) 591.

Application of Rule. — "The rules of evidence are adopted for practical purposes in the administration of justice; and although it is laid down in the books as a general rule that the best evidence the nature of the case will admit of must be given, yet it is not understood that this rule requires the strongest possible assurance of the matter in question. The extent to which the rule is to be pushed, in a case like the present, is governed in some measure by circumstances. If any suspicion hangs over the instrument, or that it is designedly withheld, a more rigid inquiry should be made into the reasons for its nonproduction. But when there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original." *Minor v. Tillotson*, 7 Pet. (U. S.) 99.

Rule More Stringent When Paper Is Denied. — "We think that when the very existence of the instrument is denied, and the law, in the first place, requires the instrument to be in writing, the diligence shown ought to be of the highest character, before secondary evidence of the contents of the lost instrument should be allowed. The danger of the introduction of manufactured evidence is extremely great in such a case, and hence the party seeking to build up a defense upon such an instrument as in this case must use the utmost diligence." *Daly v. Bernstein*, 6 N. Mex. 380. See also *Isley v. Boon*, 109 N. Car. 555.

Rule Relates to Quality, Not Quantity. — "The rule which requires that the best evidence

in its nature does suggest that there is better evidence of the same fact withheld is secondary evidence.¹

XII. EXPERIMENTAL EVIDENCE. — Where the fact in issue is whether or not a certain thing occurred in a certain manner, experiments under like conditions are relevant as tending to show the probability or improbability, possibility or impossibility, of the occurrence having taken place in the manner alleged; and such experiments may be called experimental evidence.²

XIII. REAL EVIDENCE — 1. **Definition.** — Real evidence is such evidence as is addressed directly to the senses of the court or jury without the intervention of the testimony of witnesses, as where various things are exhibited in open court.³

must be adduced to prove the fact sought to be established, and which excludes secondary evidence, is often misunderstood. * * * 'The rule relates not to the measure and quantity of evidence, but to the quality. It is not necessary to give the fullest proof of which a fact may admit. Powell on Ev. 40. The rule does not operate in any case to exclude evidence merely because it is not all, nor the most satisfactory, which might be adduced, when the evidence which is offered and that which is withheld is all of the same quality or grade.' See 1 Phil. Ev. 568, note, and the authorities there referred to. On page 570 the author says: 'Where there is no substitution of evidence, but only a selection of weaker for stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed.' " Richardson v. Milburn, 17 Md. 67. See also Goodrich v. Weston, 102 Mass. 362, 3 Am. Rep. 469; Smith v. Brown, 151 Mass. 339.

1. **Secondary Evidence** — *United States*. — Dwyer v. Dunbar, 5 Wall. (U. S.) 318; McPhaul v. Lapsley, 20 Wall. (U. S.) 264; Clifton v. U. S., 4 How. (U. S.) 242; De Lane v. Moore, 14 How. (U. S.) 253; Tayloe v. Riggs, 1 Pet. (U. S.) 591; U. S. v. Reyburn, 6 Pet. (U. S.) 352; Fresh v. Gilson, 16 Pet. (U. S.) 327; Cooke v. Woodrow, 5 Cranch (U. S.) 13; Comstock v. Carney, 4 Blatchf. (U. S.) 58; Boucicault v. Fox, 5 Blatchf. (U. S.) 87; Taussig v. Glenn, 51 Fed. Rep. 409.

Alabama. — Cloud v. Patterson, 1 Stew. (Ala.) 394; Louisville, etc., R. Co. v. Orr, 94 Ala. 602; Fitzgerald v. Adams, 9 Ga. 471.

Illinois. — Chicago v. McGraw, 75 Ill. 566; Anheuser-Busch Brewing Assoc. v. Hutmacher, 127 Ill. 652.

Indiana. — Gimbel v. Hufford, 46 Ind. 126.

Iowa. — Conger v. Converse, 9 Iowa 554; Wallace v. Wallace, 62 Iowa 651; State v. Thompson, 79 Iowa 703; Deere v. Bagley, 80 Iowa 197.

Kansas. — Bemis v. Becker, 1 Kan. 226; Coder v. Stotts, 51 Kan. 382.

Louisiana. — Isabella v. Pecot, 2 La. Ann. 387; Hall v. Acklen, 9 La. Ann. 219; Pendery v. Crescent Mut. Ins. Co., 21 La. Ann. 410.

Maine. — Morton v. White, 16 Me. 53.

Maryland. — Beall v. Poole, 27 Md. 645.

Massachusetts. — Com. v. Kinison, 4 Mass. 646; Bassett v. Marshall, 9 Mass. 312; Smith v. Brown, 151 Mass. 338.

Michigan. — Mason v. Fractional School Dist. No. 1, 34 Mich. 228.

Minnesota. — Steele v. Etheridge, 15 Minn. 501; Nichols v. Howe, 43 Minn. 181.

Missouri. — State v. Rosenfeld, 35 Mo. 472; Ritchie v. Kinney, 46 Mo. 298.

New Hampshire. — Greeley v. Quimby, 22 N. H. 335; Putnam v. Goodall, 31 N. H. 419; Wells v. Jackson Iron Mfg. Co., 48 N. H. 491.

Ohio. — Southern Ohio R. Co. v. Morey, 47 Ohio St. 207.

Texas. — Cotton v. Campbell, 3 Tex. 493; Holliday v. Harvey, 39 Tex. 670; Mugge v. Adams, 76 Tex. 448.

Wisconsin. — Bovee v. McLean, 24 Wis. 225; Teegarden v. Caledonia, 50 Wis. 292.

See the title **SECONDARY EVIDENCE**.

2. **Experimental Evidence** — *United States*. — Osborne v. Detroit, 32 Fed. Rep. 36.

Alabama. — Tesney v. State, 77 Ala. 33; Birmingham Nat. Bank v. Bradley, 108 Ala. 205; Evans v. State, 109 Ala. 11; Alabama G. S. R. Co. v. Collier, 112 Ala. 681.

California. — People v. Levine, 85 Cal. 39.

Connecticut. — State v. Smith, 49 Conn. 376.

Georgia. — Heath v. State, 93 Ga. 446.

Illinois. — Pennsylvania Coal Co. v. Kelly, 156 Ill. 9, 54 Ill. App. 622; Illinois Cent. R. Co. v. Burns, 32 Ill. App. 196; Chicago, etc., R. Co. v. Legg, 32 Ill. App. 218.

Iowa. — Stockwell v. Chicago, etc., R. Co., 43 Iowa 470; State v. Lindoen, 87 Iowa 702; Homan v. Franklin County, 98 Iowa 692.

Kansas. — Ort v. Fowler, 31 Kan. 478, 47 Am. Rep. 501.

Massachusetts. — Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463; Eidt v. Cutter, 127 Mass. 522; Com. v. Brelsford, 161 Mass. 61.

Michigan. — Kinney v. Folkerts, 84 Mich. 616.

Minnesota. — Smith v. St. Paul City R. Co., 32 Minn. 1, 50 Am. Rep. 550.

Mississippi. — Dillard v. State, 58 Miss. 368.

Oregon. — Leonard v. Southern Pac. Co., 21 Oregon 555.

Tennessee. — Moore v. State, 96 Tenn. 209.

Washington. — State v. Nordstrom, 7 Wash. 506.

See the title **EXPERIMENTS (IN EVIDENCE)**.

3. **Real Evidence** — *United States*. — Osborne v. Detroit, 32 Fed. Rep. 36.

California. — People v. Hope, 62 Cal. 291; Thomas Fruit Co. v. Start, 107 Cal. 206.

Connecticut. — State v. Smith, 49 Conn. 376.

Georgia. — Innis v. State, 42 Ga. 477; Franklin v. State, 69 Ga. 36, 47 Am. Rep. 748.

Illinois. — Jupitz v. People, 34 Ill. 516; American Express Co. v. Spellman, 90 Ill. 455; Tudor Iron Works v. Weber, 129 Ill. 535.

Indiana. — McDonel v. State, 90 Ind. 320; Story v. State, 99 Ind. 413.

Iowa. — Stockwell v. Chicago, etc., R. Co., 43 Iowa 470; Reddin v. Gates, 52 Iowa 210.

2. Wounds and Injuries. — Wounds and injuries, when their character and extent are relevant, may be exhibited in open court to the jury and considered by them as evidence.¹

Kansas. — *Ort v. Fowler*, 31 Kan. 478, 47 Am. Rep. 501.

Massachusetts. — *Morton v. Fairbanks*, 11 Pick. (Mass.) 368; *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463; *Com. v. Brown*, 121 Mass. 69; *Com. v. Allen*, 128 Mass. 46, 35 Am. Rep. 356.

Michigan. — *Hudson v. Roos*, 76 Mich. 173; *National Cash Register Co. v. Blumenthal*, 85 Mich. 464; *Stevenson v. Michigan Log Towing Co.*, 103 Mich. 412.

Minnesota. — *Smith v. St. Paul City R. Co.*, 32 Minn. 1, 50 Am. Rep. 550; *Hatfield v. St. Paul, etc., R. Co.*, 33 Minn. 130, 53 Am. Rep. 14.

Mississippi. — *Garvin v. State*, 52 Miss. 207; *Dillard v. State*, 58 Miss. 368.

Missouri. — *State v. Wieners*, 66 Mo. 13; *State v. Crow*, 107 Mo. 341.

New Jersey. — *Gaunt v. State*, 50 N. J. L. 490.

New York. — *Gardiner v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 157; *People v. Larned*, 7 N. Y. 445; *People v. Fernandez*, 35 N. Y. 49; *King v. New York Cent., etc., R. Co.*, 72 N. Y. 607; *People v. Buddensieck*, 103 N. Y. 487, 57 Am. Rep. 766; *McKay v. Lasher*, 121 N. Y. 477.

North Carolina. — *State v. Mordecai*, 68 N. Car. 207; *State v. Graham*, 74 N. Car. 646, 21 Am. Rep. 493.

Oregon. — *Leonard v. Southern Pac. Co.*, 21 Oregon 555.

Rhode Island. — *State v. Ellwood*, 17 R. I. 763.

Vermont. — *Evarts v. Middlebury*, 53 Vt. 626, 38 Am. Rep. 707.

West Virginia. — *State v. Henderson*, 29 W. Va. 147.

Wisconsin. — *Disotell v. Henry Luther Co.*, 90 Wis. 635.

Real Evidence for the Jury. — In *Morton v. Fairbanks*, 11 Pick. (Mass.) 368, the trial judge had decided that certain articles that purported to be shingles were not shingles, but chips. This decision was reversed upon review in the court above, on the ground that the question decided was one of fact and therefore one for the jury.

In the Discretion of the Court. — "The court allowed the plaintiff to produce before the jury a part of the torn clothing which he had on when injured. * * * We think the admission of such evidence rests in the sound discretion of the court. If the manner in which the plaintiff was injured, or the nature or character of the injury, could be better explained by the production of the torn clothing which the plaintiff was wearing at the time the injury was received, we perceive no reason why such evidence may not be resorted to." *Tudor Iron Works v. Weber*, 129 Ill. 535. See also *Jupitz v. People*, 34 Ill. 516; *American Express Co. v. Spellman*, 90 Ill. 455; *Smith v. St. Paul City R. Co.*, 32 Minn. 1, 50 Am. Rep. 550; *McKay v. Lasher*, 121 N. Y. 477; *Hatfield v. St. Paul, etc., R. Co.*, 33 Minn. 130, 53 Am. Rep. 14.

Article in Court. — Where the object is produced in court by the plaintiff, and its con-

dition is in issue, and testimony has been given by the plaintiff on this point, it is error for the court to refuse the defendant's request to give the object to the jury. *Hudson v. Roos*, 76 Mich. 173.

Oath. — "The doctor, who had not been sworn, exhibited the plaintiff to the jury, and thrust a pin into the right side of her face, her right arm and leg, and, from the witness's failing to wince, the jury were asked to infer that there was a complete paralysis of her right side. Objection was made to this upon the ground that the doctor was not sworn as to the instrument he was using, nor was the plaintiff sworn to behave naturally while she was being experimented upon. It is argued that both the doctor and plaintiff might have wholly deceived the court and jury without laying themselves open to a charge of perjury, and that plaintiff was not even asked to swear whether the instrument hurt her when it was used on the left side, or did not hurt her when used on the right side; in short, that there was no sworn testimony or evidence in the whole performance, and no practical way of detecting any trickery which might have been practiced. We know, however, of no oath which could be administered to the doctor or the witness touching this exhibition. So far as we are aware, the law recognizes no oaths to be administered upon the witness stand except the ordinary oath to tell the truth or to interpret correctly from one language to another. * * * Counsel were certainly at liberty to examine the pin, and to ascertain whether in fact it was inserted in the flesh, and having failed to exercise this privilege, it is now too late to raise the objection that the exhibition was incompetent." *Brown, J., in Osborne v. Detroit*, 32 Fed. Rep. 36.

1. Wounds and Injuries. — *Richmond, etc., R. Co. v. Childress*, 82 Ga. 719; *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544; *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375; *Reddin v. Gates*, 52 Iowa 210; *Barker v. Perry*, 67 Iowa 146; *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370; *Cunningham v. Union Pac. R. Co.*, 4 Utah 206; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582.

Such Exhibition Ordinarily Unobjectionable. — Judge Davies, in *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370, remarked: "There is no force in the exception that the physician called to describe the injury to the plaintiff's arm should not have exhibited to him, in the presence of the jury, the arm so injured. Such exhibition certainly tended to make the description of the injury more intelligible, and it cannot be supposed that it could have had any undue influence upon the feelings or sympathies of the jury. As well might it be contended that a man who had lost an arm or a leg by a similar injury, should not be permitted to appear before a jury to testify in relation to it, lest thereby their feelings might be influenced, and, under the undue excitement created thereby, they might do injustice. We cannot assume that any such consequences

3. Weapons and Missiles. — In criminal prosecution and cases of tort the weapon or missile with which the injury was committed may be brought into court and used as evidence, when properly identified.¹

4. Marks of Identity. — In cases involving questions of personal identity natural or artificial marks may be exhibited to the tribunal for inspection, and such inspection becomes evidence.²

5. Race, Color, Age, Sex, etc. — It has been held in some cases that where the race, color, age, or sex of a person is relevant to the issue, such person's presence before the court and jury may be considered as evidence of the fact.³

6. Personal Resemblance. — In cases involving blood relationship, as parentage, the personal resemblance of the parties, when brought into court, becomes real evidence as to the fact of relationship. In some cases such evidence has been excluded, where, on account of the extreme youth of the child, the peculiar immaturity of its features rendered any resemblance too unreliable to be considered as evidence.⁴

will follow such a course of examination; and we cannot perceive that it was objectionable in the present instance."

It Must Not Be Indecent. — On this point Chief Justice Ryan has stated the rule with much vigor in *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582. He said: "During his examination as a witness the respondent was permitted, without apparent objection of court or counsel, to uncover and exhibit to the jury his organs of generation. No such indecency is ever necessary, or should be tolerated in court. If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony be given of it. Such an exposure as was made in this case, if made without leave of the court, might well be punished as a contempt; made with the sanction of the court, it is none the less improper and indecent, well calculated to disgrace the administration of justice, and to bring it into ridicule, if not into contempt."

1. Weapons and Missiles. — *Hornsby v. State*, 94 Ala. 55; *Wynne v. State*, 56 Ga. 113; *Moon v. State*, 68 Ga. 687; *McDonel v. State*, 90 Ind. 320; *Siberry v. State*, 133 Ind. 677; *Com. v. Brown*, 14 Gray (Mass.) 419; *Gardiner v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 157; *State v. Mordecai*, 68 N. Car. 207; *Rodriguez v. State*, 32 Tex. Crim. Rep. 259; *State v. Roberts*, 63 Vt. 139.

Similar Weapon. — Where the injury was alleged to have been caused by a broken spoke with a sharp end, and there is evidence to show that subsequent to the injury rats gnawed the sharp end and blunted it, another piece of wood, patterned after the spoke before the rats gnawed it, is not admissible in evidence. *Hornsby v. State*, 94 Ala. 55.

Instruments. — In a trial for causing an abortion, instruments may be given in evidence, if they are well calculated for use in such cases, although it appears that they are also adapted for use in legitimate surgery. *Com. v. Brown*, 121 Mass. 69.

Condition. — In general, weapons introduced in evidence must be shown to be in the same condition as when first found after the injury. Yet a pistol may be given in evidence, that has been discharged since it was found, if there be evidence showing this fact and the purpose for it. *Wynne v. State*, 56 Ga. 113.

2. State v. Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530; *Dixon v. State*, 19 Tex. 134. See the title *IDENTITY*.

3. Race, Color, Age, and Sex. — *Gentry v. Mc-Minnis*, 3 Dana (Ky.) 382; *Com. v. Emmons*, 98 Mass. 6; *Keith v. New Haven, etc., Co.*, 140 Mass. 175; *Garvin v. State*, 52 Miss. 207; *State v. Jacobs*, 5 Jones L. (50 N. Car.) 259; *State v. Arnold*, 13 Ired. L. (35 N. Car.) 184; *Warlick v. White*, 76 N. Car. 175; *Hermann v. State*, 73 Wis. 248, 9 Am. St. Rep. 789. See the title *BASTARDY*, vol. 3, p. 885.

Contra — Indiana. — On the other hand, it has been held that age must be proved by sworn testimony. *Stephenson v. State*, 28 Ind. 272; *Ihinger v. State*, 53 Ind. 251; *Bird v. State*, 104 Ind. 384; *Swigart v. State*, 64 Ind. 598; *Robinius v. State*, 63 Ind. 235.

Reasoning of Indiana Court. — "Our statute gives the defendant in a criminal case, upon conviction, the right to present, by bill of exception, all the evidence given in the cause for review in this court. If the judge or jury trying a criminal cause may determine from the personal appearance of the defendant whether or not he be over a certain age, without hearing evidence either as to the age or its indications, it will, so far as that issuable fact is involved, deprive the defendant of this right of review. * * * Again, if it were sufficient that the judge, when trying the cause, should be satisfied by the personal appearance of the defendant that his age brought him within the penalty of the statute, and that his certificate of such conviction would avail in this court, it would follow that the same appearance would equally justify a jury, when trying a cause, to reach the same result, and yet we know of no method by which we could receive information as to the reasonableness of the impression made upon their minds by their observation of the personal appearance of the defendant. The statute, indeed, authorizes the court to permit the jury to inspect a place where any material fact occurred, but this only indicates the necessity of legislative action before the court can depart from the long-settled method of discovering material facts." *Ray, J.*, in *Stephenson v. State*, 28 Ind. 272.

4. Such Evidence Admitted. — *State v. Smith*, 54 Iowa 104, 37 Am. Rep. 192; *Finnegan v. Dugan*, 14 Allen (Mass.) 197; *Scott v. Donovan*, 153 Mass. 378; *Hutchinson v. State*, 19

7. Models, Diagrams, and Maps. — In cases where the things they represent are relevant, models, diagrams, and maps, when properly identified and authenticated, are admissible as a species of real evidence of the things they represent.¹

8. Photographs. — Wherever the person or thing would, under the foregoing rules, be relevant if produced in court, or the jury would be permitted to view it if convenient, a photograph thereof, duly authenticated, is admissible when the original cannot be seen.²

Neb. 263; *Gilmanton v. Ham*, 38 N. H. 108; *Gaunt v. State*, 50 N. J. L. 490; *State v. Woodruff*, 67 N. Car. 89; *Warlick v. White*, 76 N. Car. 175; *State v. Horton*, 100 N. Car. 443, 6 Am. St. Rep. 613; *Crow v. Jordon*, 49 Ohio St. 655.

Contra. — On the contrary it has been held that evidence of relationship drawn from resemblance is too fanciful and unreliable to be received. *Risk v. State*, 19 Ind. 152; *State v. Danforth*, 48 Iowa 43, 30 Am. Rep. 387; *Keniston v. Rowe*, 16 Me. 38; *Clark v. Bradstreet*, 80 Me. 456, 6 Am. St. Rep. 221; *Overlock v. Hall*, 81 Me. 348; *Jones v. Jones*, 45 Md. 144; *Eddy v. Gray*, 4 Allen (Mass.) 435; *Ingram v. State*, 24 Neb. 33; *People v. Carney*, 29 Hun (N. Y.) 47; *Petrie v. Howe*, 4 Thomp. & C. (N. Y.) 85; *Hanawalt v. State*, 64 Wis. 84, 54 Am. Rep. 588.

Age. — Whether the parties can be exhibited for the purpose of establishing a family resemblance has often turned on the point of age. Judge Foster had this to say in *Clark v. Bradstreet*, 80 Me. 454, 6 Am. St. Rep. 221: "The only object for which it is claimed that the child was introduced in evidence and viewed by the jury was to enable them to judge, from a comparison of its appearance, complexion, and features with those of the defendant, whether any inference could legitimately be drawn therefrom as to its paternity. In a case like this, where the child was a mere infant [six weeks old], such evidence is too vague, uncertain, and fanciful, and if allowed would establish not only an unwise, but dangerous and uncertain rule of evidence. While it may be a well-known physiological fact that peculiarities of form, feature, and personal traits are oftentimes transmitted from parent to child, yet it is equally true as a matter of common knowledge that during the first few weeks, or even months, of a child's existence it has that peculiar immaturity of features which characterize it as an infant, and that it changes often and very much in looks and appearance during that period. Resemblance can then be readily imagined."

So in *Iowa* it was held that a child of two years and one month can be exhibited to the jury on the question of paternity, *State v. Smith*, 54 Iowa 104, 37 Am. Rep. 192; while a child of three months cannot, *State v. Danforth*, 48 Iowa 43, 30 Am. Rep. 387. Yet in *Scott v. Donovan*, 153 Mass. 378, Judge Holmes held that the age of the child went merely to the weight of the evidence, and not to its admissibility.

Testimony. — No testimony, even of resemblance, can be given. *Keniston v. Rowe*, 16 Me. 38; *Eddy v. Gray*, 4 Allen (Mass.) 435.

Resemblance Must Be Clear. — An instruction was upheld in *State v. Smith*, 54 Iowa 104, 37

Am. Rep. 192, that the jury must disregard all claim of resemblance unless the resemblance was clear.

See Further such titles as *BASTARDY*, vol. 3, p. 871; *SEDUCTION*.

1. Models, Diagrams, and Maps — *United States*. — *M'Iver v. Walker*, 9 Cranch (U. S.) 173.

Alabama. — *Kansas City, etc., R. Co. v. Smith*, 90 Ala. 25, 24 Am. St. Rep. 753.

California. — *Vance v. Fore*, 24 Cal. 435.

Florida. — *Ortiz v. State*, 30 Fla. 256.

Georgia. — *Moon v. State*, 68 Ga. 687; *Polhill v. Brown*, 84 Ga. 338.

Illinois. — *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9, 54 Ill. App. 622.

Iowa. — *Locke v. Sioux City, etc., R. Co.*, 46 Iowa 109.

Kansas. — *Holliday v. Maddox*, 39 Kan. 359.

Massachusetts. — *Blair v. Pelham*, 118 Mass. 420; *Weld v. Brooks*, 152 Mass. 297.

Missouri. — *Whitehead v. Ragan*, 106 Mo. 231.

New Jersey. — *State v. Fox*, 25 N. J. L. 566; *Curtis v. Aaronson*, 49 N. J. L. 68.

New York. — *Earl v. Lefler*, 46 Hun (N. Y.) 9; *Donohue v. Whitney*, 133 N. Y. 178.

North Carolina. — *Davidson v. Arledge*, 97 N. Car. 172; *Dugger v. McKesson*, 100 N. Car. 1; *Dobson v. Whisenant*, 101 N. Car. 645; *Burwell v. Sneed*, 104 N. Car. 118.

Ohio. — *Wolfe v. Scarborough*, 2 Ohio St. 361.

Oregon. — *Rowland v. McCown*, 20 Oregon 538.

Pennsylvania. — *Com. v. Switzer*, 134 Pa. St. 383; *McVey v. Durkin*, 136 Pa. St. 418.

Texas. — *Griffith v. Rife*, 72 Tex. 185; *Ewing v. State*, 81 Tex. 172.

Canada. — *Badgeley v. Bender*, 3 U. C. Q. B. O. S. 221.

See the titles *DOCUMENTARY EVIDENCE*, vol. 9, p. 877; *EXPERIMENTS (IN EVIDENCE)*.

2. England. — *Re Stephens*, L. R. 9 C. P. 187.

United States. — *Luco v. U. S.*, 23 How. (U. S.) 541; *Daly v. Maguire*, 6 Blatchf. (U. S.) 137; *Leathers v. Salvor Wrecking, etc., Co.*, 2 Woods (U. S.) 682.

Alabama. — *Luke v. Calhoun County*, 52 Ala. 118; *Kansas City, etc., R. Co. v. Smith*, 90 Ala. 25, 24 Am. St. Rep. 753.

California. — *Bliss v. Johnson*, 76 Cal. 507.

Connecticut. — *Dyson v. New York, etc., R. Co.*, 57 Conn. 9, 14 Am. St. Rep. 82.

Florida. — *Ortiz v. State*, 30 Fla. 256.

Georgia. — *Franklin v. State*, 69 Ga. 36, 47 Am. Rep. 748.

Illinois. — *Duffin v. People*, 107 Ill. 115; *Cleveland, etc., R. Co. v. Monaghan*, 140 Ill. 474.

Indiana. — *Beavers v. State*, 58 Ind. 530; *Keyes v. State*, 122 Ind. 527.

For a Full Discussion of photographs as evidence, reference is made to another title in this work.¹

9. View of Premises by Jury. — Whether the view of the *locus in quo* by the jury is to be deemed evidence or is only to enable the jury to construe and apply the evidence offered in court remains an unsettled question. By some courts it seems to be treated as evidence,² while by others it is denied any independent probative force, but is allowed merely to enable the jury better to understand and apply the sworn testimony in the case.³

10. Physical Examination of Parties. — Under proper restrictions courts will usually order parties to a suit to submit to a reasonable examination of the person where it can be shown that such a course is necessary to the administration of justice.⁴

Iowa. — Locke *v.* Sioux City, etc., R. Co., 46 Iowa 109; Reddin *v.* Gates, 52 Iowa 210; German Theological School *v.* Dubuque, 64 Iowa 736.

Maryland. — Tome *v.* Parkersburg Branch R. Co., 39 Md. 36.

Massachusetts. — Marcy *v.* Barnes, 16 Gray (Mass.) 163, 77 Am. Dec. 405; Blair *v.* Pelham, 118 Mass. 420; Verran *v.* Baird, 150 Mass. 141; Turner *v.* Boston, etc., R. Co., 158 Mass. 261; Com. *v.* Morgan, 159 Mass. 375; Gilbert *v.* West End St. R. Co., 160 Mass. 403.

Michigan. — Matter of Foster, 34 Mich. 21; Maclean *v.* Scripps, 52 Mich. 214; Leidlein *v.* Meyer, 95 Mich. 586.

Minnesota. — State *v.* Holden, 42 Minn. 350; Cooper *v.* St. Paul City R. Co., 54 Minn. 379.

Nebraska. — Omaha Southern R. Co. *v.* Beeson, 36 Neb. 361.

New York. — Wilcox *v.* Wilcox, 46 Hun (N. Y.) 32; Roosevelt Hospital *v.* New York El. R. Co., 66 Hun (N. Y.) 633, 21 N. Y. Supp. 205; Cozens *v.* Higgins, 33 How. Pr. (N. Y. Ct. App.) 436; Stott *v.* New York, etc., R. Co., (Supreme Ct.) 21 N. Y. Supp. 353; Parshell *v.* New York, etc., R. Co., 66 Hun (N. Y.) 633, 21 N. Y. Supp. 354; Nies *v.* Broadhead, 75 Hun (N. Y.) 255; Ruloff *v.* People, 45 N. Y. 224; Cowley *v.* People, 83 N. Y. 464, 38 Am. Rep. 464; Walsh *v.* People, 88 N. Y. 458; People *v.* Buddensieck, 103 N. Y. 506, 57 Am. Rep. 766; Archer *v.* New York, etc., R. Co., 106 N. Y. 603; Alberti *v.* New York, etc., R. Co., 118 N. Y. 77; People *v.* Smith, 121 N. Y. 578; People *v.* Fish, 125 N. Y. 136; People *v.* Johnson, 140 N. Y. 350.

Pennsylvania. — Udderzook *v.* Com., 76 Pa. St. 340; Com. *v.* Connors, 156 Pa. St. 147.

Rhode Island. — State *v.* Ellwood, 17 R. I. 763.

Texas. — Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315; Ayers *v.* Harris, 77 Tex. 108; Buzard *v.* McNulty, 77 Tex. 438; Missouri, etc., Co. *v.* Moore, (Tex. App. 1891) 15 S. W. Rep. 714.

Vermont. — Rowell *v.* Fuller, 59 Vt. 688.

Wisconsin. — Church *v.* Milwaukee, 31 Wis. 512.

1. See the title PHOTOGRAPHS.

2. View by Jury — *Arkansas.* — Benton *v.* State, 30 Ark. 328.

California. — Preston *v.* Culbertson, 58 Cal. 198; People *v.* Bush, 68 Cal. 623; People *v.* Lowrey, 70 Cal. 193.

Illinois. — Springfield *v.* Dalby, 139 Ill. 34.

Kentucky. — Harper *v.* Lexington, etc., R. Co., 2 Dana (Ky.) 227.

Louisiana. — Remy *v.* Municipality No. 2, 12 La. Ann. 500; State *v.* Bertin, 24 La. Ann. 46. *Massachusetts.* — Parks *v.* Boston, 15 Pick. (Mass.) 198.

Michigan. — Michigan Air Line R. Co. *v.* Barnes, 44 Mich. 222; Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456.

Mississippi. — Foster *v.* State, 70 Miss. 755.

Nebraska. — Carroll *v.* State, 5 Neb. 31.

New York. — People *v.* Buddensieck, 103 N. Y. 487, 57 Am. Rep. 766.

Pennsylvania. — Hartman *v.* Reading, etc., R. Co., (Pa. 1888) 13 Atl. Rep. 774.

See the title JURY AND JURY TRIAL.

3. Heady *v.* Vevay, etc., Turnpike Co., 52 Ind. 117; Close *v.* Samm, 27 Iowa 503; Morrison *v.* Burlington, etc., R. Co., 84 Iowa 663; State *v.* Adams, 20 Kan. 311; Chute *v.* State, 19 Minn. 271; Brakken *v.* Minneapolis, etc., R. Co., 29 Minn. 41; Blythe *v.* State, 4 Ohio Cir. Ct. Rep. 435, 2 Ohio Cir. Dec. 636; Columbus *v.* Bidlingmeier, 7 Ohio Cir. Ct. Rep. 136, 3 Ohio Cir. Dec. 698; State *v.* Ah Lee, 8 Oregon 214; Machader *v.* Williams, 54 Ohio St. 344; Neilson *v.* Chicago, etc., R. Co., 58 Wis. 517; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364; State *v.* Sasse, 72 Wis. 3.

See the title JURY AND JURY TRIAL.

4. Physical Examination — *Georgia.* — Richmond, etc., R. Co. *v.* Childress, 82 Ga. 721.

Illinois. — Parker *v.* Enslow, 102 Ill. 272, 40 Am. Rep. 588; Peoria, etc., R. Co. *v.* Rice, 144 Ill. 227.

Indiana. — Terre Haute, etc., R. Co. *v.* Brunker, 128 Ind. 542; Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401.

Iowa. — Schroeder *v.* Chicago, etc., R. Co., 47 Iowa 375.

Michigan. — Page *v.* Page, 51 Mich. 88; Graves *v.* Battle Creek, 95 Mich. 266, 35 Am. St. Rep. 561.

Missouri. — Loyd *v.* Hannibal, etc., R. Co., 53 Mo. 509; Sidekum *v.* Wabash, etc., R. Co., 93 Mo. 400, 3 Am. St. Rep. 549, and note.

Nebraska. — Stuart *v.* Havens, 17 Neb. 211.

New York. — Roberts *v.* Ogdensburgh, etc., R. Co., 29 Hun (N. Y.) 154; McQuigan *v.* Delaware, etc., R. Co., 129 N. Y. 50, 26 Am. St. Rep. 507.

Ohio. — Miami, etc., Turnpike Co. *v.* Bailly, 37 Ohio St. 104.

Wisconsin. — White *v.* Milwaukee City R. Co., 61 Wis. 536, 50 Am. Rep. 154.

United States Courts. — Neither at common law nor under the act of Congress have the federal courts any power to compel a party to submit to such an examination. State statutes

XIV. EVIDENCE EXCLUDED BY PUBLIC POLICY — 1. Privileged Communications.

— There are many matters of a political, professional, judicial, or social nature which are excluded from evidence on grounds of public policy. This subject will be discussed in a separate article.¹

2. Self-incriminating Evidence — a. BY PARTY TO THE ACTION — (1) In Criminal Cases. — It is a fundamental principle of the common law that one accused of crime shall not be compelled to give evidence against himself.²

(2) *In Civil Cases.* — While ordinarily in civil cases a party can now be compelled to give evidence against himself,³ he will not be compelled to do so if such evidence might expose him to a criminal prosecution.⁴

b. BY WITNESSES WHO ARE NOT PARTIES. — Strangers to the record, when called as witnesses, are not compelled to answer questions when such answers would tend to incriminate them.⁵

c. PRIVILEGE — HOW CLAIMED. — The right to refuse to answer incriminating questions is a personal privilege of the witness, and can be claimed by him only, and not by either party.⁶

conferring the power on state courts do not apply to the federal courts sitting in such states. Union Pac. R. Co. v. Botsford, 141 U. S. 250; Illinois Cent. R. Co. v. Griffin, 80 Fed. Rep. 278.

For a Full Discussion see the title INSPECTION AND PHYSICAL EXAMINATION.

1. See the title PRIVILEGED COMMUNICATIONS.

2. Self-incrimination — Common Law. — State v. Crittenden, 38 La. Ann. 448; Wynehamer v. People, 13 N. Y. 392; Ruloff v. People, 45 N. Y. 221; Connors v. People, 50 N. Y. 242; People v. Courtney, 94 N. Y. 490. See the title WITNESSES.

3. In Civil Cases. — *In re* Chiles, 22 Wall. (U. S.) 157; *In re* Strouse, 1 Sawy. (U. S.) 605; Matter of Meador, 1 Abb. (U. S.) 317; Devoll v. Brownell, 5 Pick. (Mass.) 448; Keith v. Woombell, 8 Pick. (Mass.) 217; Dogge v. State, 21 Neb. 272. See the title WITNESSES.

4. England. — Fisher v. Ronalds, 16 Eng. L. & Eq. 417.

United States. — Counselman v. Hitchcock, 142 U. S. 547; Brown v. Walker, 161 U. S. 591. *Alabama.* — *Ex p.* Boscowitz, 84 Ala. 463, 5 Am. St. Rep. 384.

California. — *Ex p.* Clarke, 103 Cal. 352. *Illinois.* — Hayes v. Caldwell, 10 Ill. 33; Taylor v. McIrvin, 94 Ill. 488.

Iowa. — Clifton v. Granger, 86 Iowa 573.

Massachusetts. — Worthington v. Scribner, 109 Mass. 487, 12 Am. Rep. 736.

New York. — Salina Bank v. Henry, 2 Den. (N. Y.) 155; Henry v. Salina Bank, 3 Den. (N. Y.) 593; Fellows v. Wilson, 31 Barb. (N. Y.) 162; Friess v. New York Cent., etc., R. Co., 67 Hun (N. Y.) 205; People v. Forbes, 143 N. Y. 219.

North Carolina. — Smith v. Smith, 116 N. Car. 386.

Pennsylvania. — Yard's Appeal, 148 Pa. St. 509.

Tennessee. — Reed v. Williams, 5 Sneed (Tenn.) 580, 73 Am. Dec. 157.

See the title WITNESSES.

5. Strangers to the Record — England. — Rex v. Slaney, 5 C. & P. 213, 24 E. C. L. 285; Rex v. Pegler, 5 C. & P. 521, 24 E. C. L. 436; Fisher v. Ronalds, 16 Eng. L. & Eq. 417.

United States. — U. S. v. Moses, 1 Cranch (C. C.) 170; Brown v. Walker, 161 U. S. 591.

Alabama. — *Ex p.* Boscowitz, 84 Ala. 463, 5 Am. St. Rep. 384.

Arkansas. — Pleasant v. State, 15 Ark. 624.

California. — *Ex p.* Clarke, 103 Cal. 352; *Ex p.* Cohen, 104 Cal. 524, 43 Am. St. Rep. 127.

Connecticut. — Grannis v. Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143.

Illinois. — Hayes v. Caldwell, 10 Ill. 33; Taylor v. McIrvin, 94 Ill. 488; Minters v. People, 139 Ill. 363, 39 Ill. App. 438.

Iowa. — Printz v. Cheeney, 11 Iowa 469; Clifton v. Granger, 86 Iowa 573.

Massachusetts. — Com. v. Kimball, 24 Pick. (Mass.) 359, 35 Am. Dec. 326; Worthington v. Scribner, 109 Mass. 487, 12 Am. Rep. 736; Com. v. Trider, 143 Mass. 180.

Minnesota. — Simmons v. Holster, 13 Minn. 249.

Missouri. — State v. Simmons Hardware Co., 109 Mo. 118.

New Hampshire. — Eaton v. Farmer, 46 N. H. 200.

New Jersey. — Fries v. Brugler, 12 N. J. L. 79, 21 Am. Dec. 55, note.

New York. — Fellows v. Wilson, 31 Barb. (N. Y.) 162; Salina Bank v. Henry, 2 Den. (N. Y.) 155; Henry v. Salina Bank, 3 Den. (N. Y.) 593; Friess v. New York Cent., etc., R. Co., 67 Hun (N. Y.) 205; Matter of Tappan, 9 How. Pr. (N. Y. Supreme Ct.) 394; People v. Mather, 4 Wend. (N. Y.) 236, 21 Am. Dec. 122; People v. Forbes, 143 N. Y. 219.

North Carolina. — Smith v. Smith, 116 N. Car. 386.

Ohio. — Warner v. Lucas, 10 Ohio 336.

Pennsylvania. — Yard's Appeal, 148 Pa. St. 509.

Tennessee. — Reed v. Williams, 5 Sneed (Tenn.) 580, 73 Am. Dec. 157.

Virginia. — Howel v. Com., 5 Gratt. (Va.) 664; Temple v. Com., 75 Va. 892.

Washington. — State v. Coella, 3 Wash. 99; State v. Duncan, 7 Wash. 336, 38 Am. St. Rep. 897, note.

Wisconsin. — State v. Olin, 23 Wis. 309.

See the title WITNESSES.

6. Privilege Personal to Witness — England. — Reg. v. Kinglake, 11 Cox C. C. 499; Thomas v. Newton, 1 M. & M. 46, note a, 22 E. C. L. 244, note a; Rex v. Adey, 1 M. & Rob. 94.

d. DETERMINATION OF PRIVILEGE.—While there is some conflict of authority, the better rule is that the witness is not the sole judge as to whether or not the answer will incriminate him, but the presiding judge must be satisfied that it may do so.¹

e. CONSTITUTIONAL PROTECTION.—The common-law privilege of a witness to refuse to answer incriminating questions has sometimes been guaranteed by constitutional provision.²

Statutory Exemption from Prosecution.—Where this protection is guaranteed by the constitution no statute can render the evidence admissible unless such statute extends to the witness a protection as broad and complete as that provided by the constitution.³

3. Testimony of Husband and Wife—*a.* AT COMMON LAW.—The rule of the common law, based upon the legal identity of husband and wife, as well as upon reasons of public policy, was that husband and wife could not testify for or against each other in any case.⁴

United States.—*Morgan v. Halberstadt*, 60 Fed. Rep. 592.

California.—*Clark v. Reese*, 35 Cal. 89.

Colorado.—*Lothrop v. Roberts*, 16 Colo. 250.

Florida.—*Williams v. Dickenson*, 28 Fla. 90.

Georgia.—*Taylor v. State*, 83 Ga. 647.

Iowa.—*State v. Van Winkle*, 80 Iowa 15; *Clifton v. Granger*, 86 Iowa 573.

Maine.—*State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688.

Massachusetts.—*Com. v. Shaw*, 4 Cush. (Mass.) 594, 50 Am. Dec. 813; *Com. v. Gould*, 158 Mass. 499.

Michigan.—*People v. Gosch*, 82 Mich. 22.

New York.—*Ward v. People*, 6 Hill (N. Y.) 144; *Pickard v. Collins*, 23 Barb. (N. Y.) 444.

North Carolina.—*Boyer v. Teague*, 106 N. Car. 576, 19 Am. St. Rep. 547.

Pennsylvania.—*Com. v. Bell*, 145 Pa. St. 374.

Texas.—*Brown v. State*, (Tex. Crim. App. 1893) 20 S. W. Rep. 924; *Day v. State*, 27 Tex. App. 143; *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443.

Wisconsin.—*Kraus v. Sentinel Co.*, 62 Wis. 660; *Ingalls v. State*, 48 Wis. 647, 10 Cent. L. J. 317.

See the title WITNESSES.

1. How Privilege Determined.—1 *Burr's Trial* 244.

England.—*Reg. v. Boyes*, 30 L. J. Q. B. 301; *Sidebottom v. Adkins*, 3 Jur. N. S. 631; *Reg. v. Boyes*, 1 B. & S. 311, 101 E. C. L. 311; *Reg. v. Garbett*, 1 Den. C. C. 236.

California.—*Ex p. Cohen*, 104 Cal. 524, 43 Am. St. Rep. 127.

Iowa.—*Richman v. State*, 2 Greene (Iowa) 532; *State v. Duffy*, 15 Iowa 425; *Mahanke v. Cleland*, 76 Iowa 401.

Kansas.—*Stevens v. State*, 50 Kan. 712.

Massachusetts.—*Com. v. Braynard*, Thach. Cr. Cas. (Mass.) 146.

Minnesota.—*State v. Thaden*, 43 Minn. 253; *State v. Tall*, 43 Minn. 273.

New Hampshire.—*Janvrin v. Scammon*, 29 N. H. 280.

New York.—*Southard v. Rexford*, 6 Cow. (N. Y.) 254; *People v. Mather*, 4 Wend. (N. Y.) 220, 21 Am. Dec. 122.

Pennsylvania.—*Com. v. Bell*, 145 Pa. St. 374.

Vermont.—*Chamberlain v. Willson*, 12 Vt. 491, 36 Am. Dec. 356.

Wisconsin.—*Kirschner v. State*, 9 Wis. 140; *State v. Lonsdale*, 48 Wis. 348.

See the title WITNESSES.

Duty of Presiding Judge.—It is the duty of the court to determine whether a witness should answer a question propounded, but if reasonable grounds exist for believing that the answer would tend to render him criminally liable it should not be required. *Mahanke v. Cleland*, 76 Iowa 401.

2. Constitutional Guaranty.—Const. U. S., Fifth Amendment; *Counselman v. Hitchcock*, 142 U. S. 547; *Brown v. Walker*, 161 U. S. 591; *People v. O'Brien*, 66 Cal. 602; *People v. Forbes*, 143 N. Y. 219. See the title WITNESSES.

3. Counselman v. Hitchcock, 142 U. S. 547; *Brown v. Walker*, 161 U. S. 591; *State v. Enochs*, 69 Ind. 314; *People v. Kelly*, 24 N. Y. 74; *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 32 Cent. L. J. 386; *People v. Forbes*, 143 N. Y. 219. See the title WITNESSES.

4. Husband and Wife—At Common Law.—1 *Black. Com.* 443; 2 *Hawk. P. C.* 431.

England.—*Rex v. Locker*, 5 Esp. N. P. 107; *Monroe v. Twistleton*, Peake Add. Cas. 219, 221; *Rex v. Cliviger*, 2 T. R. 263; *Stapleton v. Crofts*, 18 Q. B. 367, 83 E. C. L. 367; *Alcock v. Alcock*, 12 Eng. L. & Eq. 354.

United States.—*Stein v. Bowman*, 13 Pet. (U. S.) 221; *Lucas v. Brooks*, 18 Wall. (U. S.) 436; *Gilleland v. Martin*, 3 McLean (U. S.) 490; *Stickney v. Stickney*, 131 U. S. 227; *Bowman v. Patrick*, 32 Fed. Rep. 368.

Alabama.—*Wilson v. Sheppard*, 28 Ala. 623.

Arkansas.—*Pryor v. Ryburn*, 16 Ark. 671.

California.—*Dawley v. Ayers*, 23 Cal. 108.

Connecticut.—*Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354, 52 Am. Dec. 344.

Delaware.—*Kemp v. Downham*, 5 Harr. (Del.) 417.

Georgia.—*Keaton v. McGwier*, 24 Ga. 217; *Barclay v. Waring*, 58 Ga. 86.

Illinois.—*Waddams v. Humphrey*, 22 Ill. 661; *Mitchinson v. Cross*, 58 Ill. 366.

Indiana.—*Kyle v. Frost*, 29 Ind. 382; *Taulman v. State*, 37 Ind. 353.

Iowa.—*Karney v. Paisley*, 13 Iowa 89; *Blake v. Graves*, 18 Iowa 312.

Kentucky.—*Smead v. Williamson*, 16 B. Mon. (Ky.) 492; *Higdon v. Higdon*, 6 J. J. Marsh. (Ky.) 48.

b. UNDER STATUTORY PROVISIONS. — Under statutory provisions husband and wife can now generally testify, but the common-law disability or privilege still prevails except in the particular cases covered by such statutes.¹

4. Transactions with Deceased Persons — *a. AT COMMON LAW.* — As the common law disqualified all persons from testifying in any suit in which they had an interest, it follows that at common law a person would be incompetent to testify against a representative of a deceased person if the witness were interested in the result.²

b. UNDER STATUTORY PROVISIONS. — Generally by statute those interested are incompetent to testify to any transaction or communication with a deceased person, or one rendered incompetent by reason of any mental disability, where the adverse party is a representative of such deceased or incompetent person.³

Louisiana. — *Tulley v. Alexander*, 11 La. Ann. 628.

Maine. — *Dwelly v. Dwelly*, 46 Me. 377.

Maryland. — *Bradford v. Williams*, 2 Md. Ch. 1.

Massachusetts. — *Griffin v. Brown*, 2 Pick. (Mass.) 304.

Minnesota. — *State v. Armstrong*, 4 Minn. 335.

Mississippi. — *Moore v. McKie*, 5 Smed. & M. (Miss.) 238; *Dunlap v. Hearn*, 37 Miss. 471.

Missouri. — *Tomlinson v. Lynch*, 32 Mo. 160; *Haerle v. Kreihn*, 65 Mo. 202.

New Hampshire. — *Craig v. Kittredge*, 20 N. H. 169; *Kelley v. Proctor*, 41 N. H. 139.

New Jersey. — *Den v. Johnson*, 18 N. J. L. 87.

New York. — *Marsh v. Potter*, 30 Barb. (N. Y.) 506; *White v. Stafford*, 38 Barb. (N. Y.) 419; *Ratcliff v. Wales*, 1 Hill (N. Y.) 63; *Hassbrouck v. Vandervoort*, 9 N. Y. 153.

North Carolina. — *Rice v. Keith*, 63 N. Car. 319.

Ohio. — *Bird v. Hueston*, 10 Ohio St. 418.

Pennsylvania. — *Gross v. Reddig*, 45 Pa. St. 406; *Pringle v. Pringle*, 59 Pa. St. 281; *Gibson v. Com.*, 87 Pa. St. 253.

Rhode Island. — *Donnelly v. Smith*, 7 R. I. 12.

South Carolina. — *Footman v. Pendergrass*, 2 Strobb. Eq. (S. Car.) 317; *State v. Workman*, 15 S. Car. 540.

Tennessee. — *Kimbrough v. Mitchell*, 1 Head (Tenn.) 539.

Texas. — *Gee v. Scott*, 48 Tex. 510, 26 Am. Rep. 331; *Cameron v. Fay*, 55 Tex. 58.

Vermont. — *Manchester v. Manchester*, 24 Vt. 649; *Seargent v. Seward*, 31 Vt. 509; *Cram v. Cram*, 33 Vt. 15.

Virginia. — *Baring v. Reeder*, 1 Hen. & M. (Va.) 154.

West Virginia. — *Rose v. Brown*, 11 W. Va. 122; *Zane v. Fink*, 18 W. Va. 693.

Wisconsin. — *Farrell v. Ledwell*, 21 Wis. 182.

See the title WITNESSES.

Reasons of Common-law Rule. — "But in trials of any sort they are not allowed to be witnesses for or against each other; partly because it is impossible their testimony should be indifferent, but principally because of the union of person; and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, *nemo in propria causa testis esse debet*; and if against each other, they would contradict another maxim, *nemo tenetur seipsum accusare*." 1 Black. Com. 443.

General Rule of Evidence. — "It is a general rule of evidence, universally recognized and admitted, that neither a husband nor a wife is admissible as a witness in any cause, civil or criminal, to which the other is a party. This rule is founded upon principles of public policy which lie at the basis of civil society, and therefore is never to be relaxed, unless in those peculiar cases of legal necessity which constitute exceptions to it." *Com. v. Sparks*, 7 Allen (Mass.) 534.

1. Statutes. — *Beale v. Brown*, 6 Mackey (D. C.) 574; *Collins v. Mack*, 31 Ark. 684; *Watkins v. Turner*, 34 Ark. 663; *Spitz's Appeal*, 56 Conn. 185, 7 Am. St. Rep. 303; *Beitman v. Hopkins*, 109 Ind. 178; *Niland v. Kalish*, 37 Neb. 47; *Parkhurst v. Berdell*, 110 N. Y. 386, 6 Am. St. Rep. 384; *Warner v. Press Pub. Co.*, 132 N. Y. 181; *Briggs v. Briggs*, (R. I. 1893) 26 Atl. Rep. 198. See the title WITNESSES.

2. Transactions with Deceased Persons — Common Law. — 1 Stark. on Ev. 102; 1 Greenl. Ev., § 386; *Bent v. Baker*, 3 T. R. 27; *Smith v. Prager*, 7 T. R. 56; *Doe v. Tyler*, 6 Bing. 390, 19 E. C. L. 111; *Wilcox v. Farrell*, 1 H. L. Cas. 93; *Bailey v. Lumpkin*, 1 Ga. 392.

3. Statutes — *Alabama.* — *Louis v. Easton*, 50 Ala. 470; *Drew v. Simmons*, 58 Ala. 463; *Goodlett v. Kelly*, 74 Ala. 213; *Mobile Sav. Bank v. McDonnell*, 87 Ala. 736; *Sublett v. Hodges*, 88 Ala. 493.

Arkansas. — *Giles v. Wright*, 26 Ark. 476; *Gist v. Gans*, 30 Ark. 285; *Miller v. Jones*, 32 Ark. 337; *Wassell v. Armstrong*, 35 Ark. 247; *Bird v. Jones*, 37 Ark. 195; *McDeamon v. Maxfield*, 38 Ark. 631; *Rainwater v. Harris*, 51 Ark. 401; *Nunnally v. Becker*, 52 Ark. 550.

California. — *Blood v. Fairbanks*, 50 Cal. 420; *Chase v. Evoy*, 51 Cal. 618; *Sedgwick v. Sedgwick*, 52 Cal. 336; *Matter of McCausland*, 52 Cal. 568; *Roche v. Ware*, 71 Cal. 375, 60 Am. Rep. 539.

Colorado. — *Levy v. Dwight*, 12 Colo. 101; *Butler v. Rockwell*, 14 Colo. 138.

Florida. — *Croom v. Noll*, 6 Fla. 52; *Tunno v. Robert*, 16 Fla. 738; *Stewart v. Stewart*, 19 Fla. 846; *Belote v. O'Brian*, 20 Fla. 126; *Eppinger v. Caneka*, 20 Fla. 262; *Ley v. Edwards*, 21 Fla. 333; *Holliday v. McKinne*, 22 Fla. 153; *Harris v. Jacksonville Bank*, 22 Fla. 501, 1 Am. St. Rep. 201.

Georgia. — *Johnson v. Champion*, 88 Ga. 527; *Rudolph v. Underwood*, 88 Ga. 664; *New Ebenezer Assoc. v. Gress Lumber Co.*, 89 Ga. 126; *Purveyor v. Foster*, 91 Ga. 444; *Flowers v. Flowers*, 92 Ga. 688; *Gainesville First Nat. Bank v. Cody*, 93 Ga. 127; *Gunn v. Pettygrewe*,

5. Proceedings of Grand Juries. — As a general rule, subject, however, to

93 Ga. 327; *Phillips v. Cooper*, 93 Ga. 644; *Medlock v. Miller*, 94 Ga. 652.

Illinois. — *Wickliffe v. Lynch*, 36 Ill. 209; *Mitchinson v. Cross*, 58 Ill. 366; *Marshall v. Karl*, 60 Ill. 208; *Stevens v. Hay*, 61 Ill. 399; *Stonecipher v. Hall*, 64 Ill. 121; *Chicago v. O'Brennan*, 65 Ill. 160; *Richerson v. Sternburg*, 65 Ill. 272; *In re Steele*, 65 Ill. 322; *Donlevy v. Montgomery*, 66 Ill. 227; *Stewart v. Kirk*, 69 Ill. 509; *Whitmer v. Rucker*, 71 Ill. 410; *Boester v. Byrne*, 72 Ill. 466; *Lowman v. Aubery*, 72 Ill. 619; *Straubher v. Mohler*, 80 Ill. 21; *Crane v. Crane*, 81 Ill. 166; *Branger v. Lucy*, 82 Ill. 91; *Penn v. Oglesby*, 89 Ill. 210; *Moore v. Wright*, 90 Ill. 470; *Marshall v. Peck*, 91 Ill. 187; *Bragg v. Geddes*, 93 Ill. 39; *Warrick v. Hull*, 102 Ill. 280; *Bradshaw v. Combs*, 102 Ill. 428; *Hurlbut v. Meeker*, 104 Ill. 542; *McCann v. Atherton*, 106 Ill. 31; *Richardson v. Hadsall*, 106 Ill. 476; *Ferbrache v. Ferbrache*, 110 Ill. 210; *Robbins v. Moore*, 129 Ill. 57; *Campbell v. Potter*, 147 Ill. 576; *Richardson v. Richardson*, 148 Ill. 563; *Guild v. Warne*, 149 Ill. 105; *Miller v. Meers*, 155 Ill. 284; *Goelz v. Goelz*, 157 Ill. 33; *Pyle v. Pyle*, 158 Ill. 290; *Lyon v. Lyon*, 3 Ill. App. 434; *Treadway v. Treadway*, 5 Ill. App. 478; *Redden v. Inman*, 6 Ill. App. 55; *Douglass v. Fullerton*, 7 Ill. App. 104; *Strong v. Lord*, 8 Ill. App. 539; *Morrison First Nat. Bank v. Bressler*, 38 Ill. App. 499; *Bressler v. Baum*, 42 Ill. App. 190; *Murray v. Smith*, 42 Ill. App. 548; *Giffert v. McGuern*, 51 Ill. App. 387; *Mitchell v. Goodell*, 56 Ill. App. 280.

Indiana. — *Starret v. Burkhalter*, 86 Ind. 439; *Lamb v. Lamb*, 105 Ind. 456; *Spencer v. Robbins*, 106 Ind. 580; *Taylor v. Duesterberg*, 109 Ind. 170; *Scherer v. Ingerman*, 110 Ind. 442; *Durham v. Shannon*, 116 Ind. 405, 9 Am. St. Rep. 860; *Martin v. Martin*, 118 Ind. 233; *Piper v. Foshier*, 121 Ind. 472.

Iowa. — *Kingsbury v. Buchanan*, 11 Iowa 387; *Stiles v. Botkin*, 30 Iowa 60; *Burroughs v. McLain*, 37 Iowa 189; *Sypher v. Savery*, 39 Iowa 258; *Goddard v. Leffingwell*, 40 Iowa 249; *Burlington First Nat. Bank v. Owen*, 52 Iowa 107; *Williams v. Barrett*, 52 Iowa 637; *Fuller v. Lendrum*, 58 Iowa 353; *Burton v. Baldwin*, 61 Iowa 283; *Ivers v. Ivers*, 61 Iowa 721; *Samson v. Samson*, 67 Iowa 253; *Donnell v. Braden*, 70 Iowa 551; *Baker v. Jamison*, 73 Iowa 698.

Kansas. — *Galbraith v. Galbraith*, 5 Kan. 402; *McKean v. Massey*, 9 Kan. 600; *Hook v. Bixby*, 13 Kan. 170; *Niccolls v. Esterly*, 16 Kan. 33; *Clary v. Smith*, 20 Kan. 87; *Rich v. Bowker*, 25 Kan. 11; *Ellicott v. Barnes*, 31 Kan. 172; *Osborne v. Osborne*, 33 Kan. 257; *Caeman v. Van Harke*, 33 Kan. 339; *Hafer v. Hafer*, 33 Kan. 463; *Bryant v. Stainbrook*, 40 Kan. 356; *Shorten v. Judd*, 56 Kan. 43.

Maine. — *Knight v. Brown*, 47 Me. 468; *Beach v. Pennell*, 50 Me. 587; *Kelton v. Hill*, 59 Me. 259; *Wing v. Andrews*, 59 Me. 505; *Brooks v. Goss*, 61 Me. 307; *Berry v. Stevens*, 69 Me. 290; *Rawson v. Knight*, 73 Me. 340; *Alden v. Goddard*, 73 Me. 346; *Preble v. Preble*, 73 Me. 362; *Haskell v. Hervey*, 74 Me. 197; *Hall v. Otis*, 77 Me. 125; *Hubbard v. Johnson*, 77 Me. 139; *Segar v. Lufkin*, 77 Me. 143; *Higgins v. Butler*, 78 Me. 520; *Hinckley*

v. Hinckley, 79 Me. 322; *Swasey v. Ames*, 79 Me. 483; *Johnson v. Merithew*, 80 Me. 113, 6 Am. St. Rep. 162.

Maryland. — *City Bank v. Bateman*, 7 Har. & J. (Md.) 104; *Schull v. Murray*, 32 Md. 9; *Cannon v. Crook*, 32 Md. 482; *Denison v. Denison*, 35 Md. 361; *Miller v. Motter*, 35 Md. 428; *Jones v. Jones*, 36 Md. 447, 11 Am. Rep. 505; *Redgrave v. Redgrave*, 38 Md. 93; *Harris v. Pue*, 39 Md. 535; *Mason v. Poulson*, 40 Md. 355; *Spencer v. Trafford*, 42 Md. 17; *Mason v. Poulson*, 43 Md. 161; *Graves v. Spedden*, 46 Md. 538; *Hardy v. Chesapeake Bank*, 51 Md. 596, 34 Am. Rep. 325; *Dodge v. Stanhope*, 55 Md. 121; *Dilley v. Love*, 61 Md. 607; *Trahern v. Colburn*, 63 Md. 104; *South Baltimore Co. v. Muhlbach*, 69 Md. 401.

Michigan. — *Bassett v. Shepardson*, 52 Mich. 3; *Matter of Bennett*, 52 Mich. 415; *Foster v. Hill*, 55 Mich. 546; *Rayburn v. Mason Lumber Co.*, 57 Mich. 273; *Brown v. Bell*, 58 Mich. 58; *Schofield v. Walker*, 58 Mich. 98; *McMillan v. Bissell*, 63 Mich. 75; *Wallace v. Wallace*, 63 Mich. 331; *Hood v. Olin*, 68 Mich. 175; *Taylor v. Bunker*, 68 Mich. 258; *Buffum v. Porter*, 70 Mich. 623; *Buck v. Haynes*, 75 Mich. 399.

Minnesota. — *Rhodes v. Pray*, 36 Minn. 395; *Beard v. Minneapolis First Nat. Bank*, 39 Minn. 547; *Parker v. Maxwell*, 45 Minn. 1.

Mississippi. — *Rev. Code 1892, § 1840*; *Otey v. McAfee*, 38 Miss. 348; *Lamar v. Williams*, 39 Miss. 342; *Faler v. Jordan*, 44 Miss. 283; *Boylan v. Holt*, 45 Miss. 277; *Hedges v. Aydelott*, 46 Miss. 99; *Witherspoon v. Blewett*, 47 Miss. 570; *Reinhardt v. Evans*, 48 Miss. 230; *Buckingham v. Walker*, 48 Miss. 609; *Sweatman v. Parker*, 49 Miss. 19; *Wood v. Stafford*, 50 Miss. 370; *Rothschild v. Hatch*, 54 Miss. 554; *Jones v. Sherman*, 56 Miss. 559; *Gordon v. McEachin*, 57 Miss. 834; *Snell v. Fewell*, 64 Miss. 655; *McDonald v. McDonald*, 68 Miss. 689.

Missouri. — *Angell v. Hester*, 64 Mo. 142; *Fulkerson v. Thornton*, 68 Mo. 468; *Williams v. Perkins*, 83 Mo. 379; *Bates v. Forcht*, 89 Mo. 121; *Allen v. Carter*, 8 Mo. App. 585; *Dolan v. Kehr*, 9 Mo. App. 351; *Fyke v. Lewis*, 15 Mo. App. 588; *Pritchett v. Reynolds*, 21 Mo. App. 674; *Wallace v. Jacko*, 25 Mo. App. 313; *Wiley v. Morse*, 30 Mo. App. 266.

Nebraska. — *Wamsley v. Crook*, 3 Neb. 344; *Ransom v. Schmela*, 13 Neb. 77; *Housel v. Cremer*, 13 Neb. 300; *Bartlett v. Bartlett*, 15 Neb. 595; *Rakes v. Brown*, 34 Neb. 304; *American Sav. Bank v. Harrington*, 34 Neb. 597; *Parrish v. McNeal*, 36 Neb. 727; *Sharmer v. McIntosh*, 43 Neb. 509; *Wylie v. Charlton*, 43 Neb. 840.

Nevada. — *Roney v. Buckland*, 4 Nev. 45; *Crane v. Gloster*, 13 Nev. 279; *Vesey v. Benton*, 13 Nev. 284; *Higgs v. Hanson*, 13 Nev. 356.

New Hampshire. — *Perkins v. Perkins*, 46 N. H. 110; *Harvey v. Hilliard*, 47 N. H. 553; *Clements v. Marston*, 52 N. H. 36; *Hoit v. Russell*, 56 N. H. 563; *Page v. Whidden*, 59 N. H. 511; *Snell v. Parsons*, 59 N. H. 521; *Burns v. Madigan*, 60 N. H. 197; *Drew v. McDaniel*, 60 N. H. 482; *Cochran v. Langmeid*, 60 N. H. 571; *Marcy v. Amazen*, 61 N. H. 133, 60 Am. Rep. 320; *Wilson v. Russell*, 61 N. H.

important exceptions, the proceedings of grand juries are privileged, and

355; *Harrington v. Tremblay*, 61 N. H. 413; *English v. Porter*, 63 N. H. 213.

New Jersey. — *Hodge v. Coriell*, 44 N. J. L. 456; *Lanning v. Lanning*, 17 N. J. Eq. 228; *Marlatt v. Warwick*, 18 N. J. Eq. 108; *Force v. Dutcher*, 18 N. J. Eq. 401; *Harrison v. Johnson*, 18 N. J. Eq. 420; *Sweet v. Parker*, 22 N. J. Eq. 455; *Halsted v. Tyng*, 29 N. J. Eq. 86; *Smith v. Burnet*, 34 N. J. Eq. 210; *Ellicott v. Chamberlin*, 37 N. J. Eq. 473; *Cuming v. Robins*, 39 N. J. Eq. 48; *Sherman v. Lanier*, 39 N. J. Eq. 253; *Rowland v. Rowland*, 40 N. J. Eq. 281; *Palmateer v. Tilton*, 40 N. J. Eq. 555; *Lehigh Coal, etc., Co. v. Central R. Co.*, 41 N. J. Eq. 167; *Crimmins v. Crimmins*, 43 N. J. Eq. 87; *McCartin v. Traphagen*, 43 N. J. Eq. 327; *McCartin v. McCartin*, 45 N. J. Eq. 265.

New York. — *Hier v. Grant*, 47 N. Y. 278; *Cary v. White*, 59 N. Y. 336; *Hildebrand v. Crawford*, 65 N. Y. 107; *Miller v. Montgomery*, 78 N. Y. 282; *Church v. Howard*, 79 N. Y. 420; *Pratt v. Elkins*, 80 N. Y. 198; *Potts v. Mayer*, 86 N. Y. 302; *Pinney v. Orth*, 88 N. Y. 447; *Badger v. Badger*, 88 N. Y. 559, 42 Am. Rep. 263; *Pope v. Allen*, 90 N. Y. 298; *Maverick v. Marvel*, 90 N. Y. 656; *Koehler v. Adler*, 91 N. Y. 657; *Corning v. Walker*, 100 N. Y. 550; *Nearkass v. Gilman*, 104 N. Y. 510; *Witthaus v. Schack*, 105 N. Y. 335; *Redfield v. Redfield*, 110 N. Y. 674, 18 N. E. Rep. 373; *Lewis v. Merritt*, 113 N. Y. 388; *Nay v. Curley*, 113 N. Y. 578.

North Carolina. — *Murphy v. Ray*, 73 N. Car. 588; *Peebles v. Stanley*, 77 N. Car. 243; *Mason v. McCormick*, 80 N. Car. 244; *Pepper v. Broughton*, 80 N. Car. 251; *Williams v. Johnston*, 82 N. Car. 288; *Hampton v. Hardin*, 88 N. Car. 592; *Forsyth County v. Lash*, 89 N. Car. 159; *Cade v. Davis*, 96 N. Car. 139.

Ohio. — *Rankin v. Hannan*, 38 Ohio St. 438; *Cochran v. Almack*, 39 Ohio St. 314; *Harrison v. Neely*, 41 Ohio St. 334; *First Nat. Bank v. Cornell*, 41 Ohio St. 401; *Roberts v. Briscoe*, 44 Ohio St. 600.

Pennsylvania. — *Rothrock v. Gallaher*, 91 Pa. St. 108; *Stephens v. Cotterell*, 99 Pa. St. 188; *Foster v. Coliner*, 107 Pa. St. 310; *Adams v. Edwards*, 115 Pa. St. 211; *Porter v. Nelson*, 121 Pa. St. 628.

Rhode Island. — *Brown v. Lewis*, 9 R. I. 498; *Hamilton v. Hamilton*, 10 R. I. 540; *Hopkins v. Manchester*, 16 R. I. 664.

South Carolina. — *Guery v. Kinsler*, 3 S. Car. 423; *Bollmann v. Bollmann*, 6 S. Car. 29; *Twitty v. Houser*, 7 S. Car. 153; *Roe v. Harrison*, 9 S. Car. 279; *Jones v. Plunkett*, 9 S. Car. 392; *Blakely v. Frazier*, 11 S. Car. 122; *Shaw v. Cunningham*, 16 S. Car. 631; *Moffatt v. Hardin*, 22 S. Car. 9; *Colvin v. Phillips*, 25 S. Car. 228; *Brown v. Moore*, 26 S. Car. 160; *Martin v. Adams*, 29 S. Car. 597, 6 S. E. Rep. 860; *Huff v. Latimer*, 33 S. Car. 255; *Foggette v. Gaffney*, 33 S. Car. 303; *Griffin v. Earle*, 34 S. Car. 246; *Brice v. Miller*, 35 S. Car. 537.

Tennessee. — *Taylor v. Mayhew*, 11 Heisk. (Tenn.) 596; *Jones v. Waddell*, 12 Heisk. (Tenn.) 338; *Alexander v. Kelso*, 1 Baxt. (Tenn.) 5; *Kelton v. Jacobs*, 5 Baxt. (Tenn.) 574; *Key v. Holloway*, 7 Baxt. (Tenn.) 575; *McDonald v. Allen*, 8 Baxt. (Tenn.) 446; *Scruggs v. Murray*, 2 Lea (Tenn.) 44.

Texas. — *Garner v. Cleveland*, 35 Tex. 74; *Garrison v. King*, 35 Tex. 183; *Roberts v. Yarboro*, 41 Tex. 449; *Alexander v. Lewis*, 47 Tex. 481; *Potter v. Wheat*, 53 Tex. 401; *Bennett v. Frary*, 55 Tex. 145; *Eastham v. Roundtree*, 56 Tex. 110; *Parks v. Caudle*, 58 Tex. 216; *Mast v. Tibbles*, 60 Tex. 301; *O'Neill v. Brown*, 61 Tex. 34; *Simpson v. Brotherton*, 62 Tex. 170; *Reddin v. Smith*, 65 Tex. 26.

Utah. — *Ewing v. White*, 8 Utah 250; *In re Atwood*, 14 Utah 1; *Hennefer v. Hays*, 14 Utah 324.

Vermont. — *Johnson v. Dexter*, 37 Vt. 641; *Thrall v. Seward*, 37 Vt. 573; *Ford v. Cheney*, 40 Vt. 153; *Read v. Sturtevant*, 40 Vt. 521; *Cole v. Shurtleff*, 41 Vt. 311, 98 Am. Dec. 587; *Dawson v. Wait*, 41 Vt. 626; *Walker v. Taylor*, 43 Vt. 612; *Morse v. Low*, 44 Vt. 561; *Lytle v. Bond*, 40 Vt. 618; *Hunter v. Kittredge*, 41 Vt. 359; *Hollister v. Young*, 42 Vt. 403; *Poquet v. North Hero*, 44 Vt. 91; *Roberts v. Lund*, 45 Vt. 82; *Woodbury v. Woodbury*, 48 Vt. 94; *Pember v. Congdon*, 55 Vt. 59; *Blair v. Ellsworth*, 55 Vt. 417; *Kittell v. Missisquoi R. Co.*, 56 Vt. 106; *Wiley v. Hunter*, 57 Vt. 489; *Richardson v. Wright*, 58 Vt. 370; *Stowe v. Bishop*, 58 Vt. 500, 56 Am. Rep. 569; *Barnes v. Dow*, 59 Vt. 545.

Virginia. — *Field v. Brown*, 24 Gratt. (Va.) 74; *Martz v. Martz*, 25 Gratt. (Va.) 361; *Huffmans v. Walker*, 26 Gratt. (Va.) 314; *Brown v. Dickenson*, 27 Gratt. (Va.) 690; *Mason v. Wood*, 27 Gratt. (Va.) 783; *Hord v. Colbert*, 28 Gratt. (Va.) 49; *Grigsby v. Simpson*, 28 Gratt. (Va.) 549; *Neilson v. Bowman*, 29 Gratt. (Va.) 732; *Burkholder v. Ludlam*, 30 Gratt. (Va.) 255, 32 Am. Rep. 668; *Morris v. Grubb*, 30 Gratt. (Va.) 286; *Parent v. Spittler*, 30 Gratt. (Va.) 819; *Carter v. Hale*, 32 Gratt. (Va.) 115; *Ellis v. Harris*, 32 Gratt. (Va.) 684; *Terry v. Ragsdale*, 33 Gratt. (Va.) 342; *Simmons v. Simmons*, 33 Gratt. (Va.) 457, *Knick v. Knick*, 75 Va. 12.

Washington. — *Smith v. Taylor*, 2 Wash. 422; *Wolferman v. Bell*, 6 Wash. 84, 36 Am. St. Rep. 126; *Neis v. Farquharson*, 9 Wash. 508; *Gilmore v. H. W. Baker Co.*, 14 Wash. 52, 12 Wash. 468.

West Virginia. — *Middleton v. White*, 5 W. Va. 572; *White v. Heavner*, 7 W. Va. 324; *Carlton v. Mays*, 8 W. Va. 245; *Metz v. Snodgrass*, 9 W. Va. 190; *Calwell v. Prindle*, 11 W. Va. 307; *Owens v. Owens*, 14 W. Va. 88; *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682; *Carskadon v. Minke*, 26 W. Va. 729; *Heffebower v. Detrick*, 27 W. Va. 16; *Seabright v. Seabright*, 28 W. Va. 412; *Kimmel v. Shroyer*, 28 W. Va. 505; *Robinson v. James*, 29 W. Va. 224; *Coffman v. Hedrick*, 32 W. Va. 119; *Voss v. King*, 33 W. Va. 236; *Patterson v. Martin*, 33 W. Va. 494.

Wisconsin. — *Rogers v. Brightman*, 10 Wis. 55; *Knox v. Bigelow*, 15 Wis. 415; *Daniels v. Foster*, 26 Wis. 686; *Burnham v. Mitchell*, 34 Wis. 117; *Stewart v. Stewart*, 41 Wis. 624; *Page v. Danaher*, 43 Wis. 221; *Adams v. Allen*, 44 Wis. 93; *Phillips v. McGrath*, 62 Wis. 124; *Crowe v. Colbeth*, 63 Wis. 643; *Bellden v. Scott*, 65 Wis. 426; *McCormick v. Hernndon*, 67 Wis. 648; *Union Nat. Bank v. Hicks*,

members of grand juries cannot testify as to what took place before them.¹

6. Proceedings of Petit Juries — Matters Inhering in Their Verdict. — Petit jurors

67 Wis. 189; *Pritchard v. Pritchard*, 69 Wis. 373; *Whitney v. Traynor*, 74 Wis. 293.

England. — Such interested witnesses may testify in English courts, and their interest only goes to their credibility. *In re Garnett*, 31 Ch. Div. 1; *In re Hodgson*, 31 Ch. Div. 177.

In the Federal Courts. — Rev. Stat. U. S. (1878), § 858; *Green v. U. S.*, 9 Wall. (U. S.) 655; *Rhode Island Hospital Trust Co. v. Hazard*, 6 Fed. Rep. 119; *Berry v. Sawyer*, 19 Fed. Rep. 286; *Crawford v. Moore*, 28 Fed. Rep. 830; *Mutual L. Ins. Co. v. Watson*, 30 Fed. Rep. 653 (see also the note to this citation); *Potter v. Chicago Third Nat. Bank*, 102 U. S. 163; *King v. Worthington*, 104 U. S. 50; *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275.

Section 858 of the Revised Statutes of the United States, which provides that in actions in the courts of the United States by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called by the opposite party or the court, is applicable only to cases in which the executor, administrator, or guardian is a party to the record. *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275.

For a Full Discussion see the title WITNESSES.

1. Proceedings of Grand Juries — Connecticut.

— *State v. Fasset*, 16 Conn. 457; *State v. Hamlin*, 47 Conn. 114, 36 Am. Rep. 54.

Indiana. — *Creek v. State*, 24 Ind. 151.

Maine. — *McLellan v. Richardson*, 13 Me. 82.

Maryland. — *Owens v. Owens*, 81 Md. 518.

Minnesota. — *Matter of Pinney*, 27 Minn. 283; *Loveland v. Cooley*, 59 Minn. 259.

Missouri. — *Tindle v. Nichols*, 20 Mo. 326; *State v. Baker*, 20 Mo. 338; *Beam v. Link*, 27 Mo. 261; *State v. Thomas*, 99 Mo. 235; *Kennedy v. Holladay*, 105 Mo. 24.

New York. — *People v. Hulbut*, 4 Den. (N. Y.) 133, 47 Am. Dec. 244.

North Carolina. — *State v. Broughton*, 7 Ired. L. (29 N. Car.) 96, 45 Am. Dec. 507.

Pennsylvania. — *Gordon v. Com.*, 92 Pa. St. 216, 37 Am. Rep. 672.

Tennessee. — *Jones v. Turpin*, 6 Heisk. (Tenn.) 181.

Texas. — *State v. Oxford*, 30 Tex. 428.

Washington. — *Watts v. Territory*, 1 Wash. Ter. 409.

West Virginia. — *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803.

See the title GRAND JURIES.

Extent of Secrecy. — "The extent of the limitation upon the testimony of grand jurors is best defined by the terms of their oath of office, by which 'the commonwealth's counsel, their fellows,' and their own, they are to keep secret.' They cannot, therefore, be permitted to state how any member of the jury voted, or the opinion expressed by their fellows or themselves upon any question before them, nor to disclose the fact that an indictment for a felony has been found against any

person not in custody or under recognizance, nor to state in detail the evidence on which the indictment is founded." *Com. v. Hill*, 11 Cush. (Mass.) 140. See also *Freeman v. Arkell*, 1 C. & P. 137; *Huidekoper v. Cotton*, 3 Watts (Pa.) 56.

"All the authorities concur in saying that the juror will not be permitted to state how any member voted, or the opinion expressed by his fellows or himself, or the individual action of any juror in regard to the subject-matter before them." *Elbin v. Wilson*, 33 Md. 144. See also *Owens v. Owens*, 81 Md. 518.

Reasons for Secrecy. — "The reasons on which the sanction of secrecy which the common law gives to proceedings before grand juries is founded are said in the books to be threefold. One is that the utmost freedom of disclosure of alleged crimes and offenses by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which, if known, it would be for the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it, before the presentment is made. To accomplish these purposes, the rule excluding evidence, to the extent stated in *Com. v. Hill*, 11 Cush. (Mass.) 140, seems to be well established, and it is embodied substantially in the words of the oath of office which each grand juror takes on entering on the discharge of his duties. But when these purposes are accomplished, the necessity and expediency of retaining the seal of secrecy are at an end. *Cessante ratione, cessat regula*. After the indictment is found and presented, and the accused is held to answer, and the trial before the traverse jury is begun, all the facts relative to the crime charged and its prosecution are necessarily opened, and no harm can arise to the cause of public justice by no longer withholding facts material and relevant to the issue, merely because their disclosure may lead to the development of some part of the proceedings before the grand jury. On the contrary, great hardship and injustice might often be occasioned by depriving a party of important evidence, essential to his defense, by enforcing a rule of exclusion, having its origin and foundation in public policy, after the reasons on which this rule is based have ceased to exist." *Com. v. Mead*, 12 Gray (Mass.) 170, citing *Com. v. Hill*, 11 Cush. (Mass.) 140. See also *Jones v. Turpin*, 6 Heisk. (Tenn.) 181.

For Purpose of Impeachment. — Where a proper foundation has been laid, a witness may be impeached by calling a grand juror to show that his present evidence differs from that given before the grand jury. *U. S. v. Reed*, 2 Blatchf. (U. S.) 435; *State v. Fasset*, 16 Conn. 468; *State v. Offutt*, 4 Blackf. (Ind.) 355; *Com. v. Hill*, 11 Cush. (Mass.) 137; *Com. v. Mead*, 12 Gray (Mass.) 167, 71 Am. Dec. 741; *Way v. Butterworth*, 106 Mass. 75; *State v. Wood*, 53 N. H. 484; *People v. Hulbut*, 4

are incompetent to testify to anything that occurred in the jury room which from its nature inheres in their verdict.¹

Matters Not Inhering in Their Verdict. — Jurors may testify to any matters occurring during the trial, or in their jury room, which do not inhere in their verdict, but go to show fraud or misconduct for the jurors, parties, or counsel.²

Den. (N. Y.) 133, 47 Am. Dec. 244; *Gordon v. Com.*, 92 Pa. St. 216, 37 Am. Rep. 672; *Jones v. Turpin*, 6 Heisk. (Tenn.) 181; *Little v. Com.*, 25 Gratt. (Va.) 921; *Thomas v. Com.*, 2 Rob. (Va.) 795.

"It must be conceded that the rule shall not be carried so far as to conflict with the juror's oath. He shall not testify how he or any member of the jury voted, nor what opinion any of them expressed in relation thereto, nor to the act of either which might invalidate the finding of the jury. His action, and the action of his fellow jurors, must be shown only by the returns which they make to the court. What a witness has testified to before them is quite another matter." *Gordon v. Com.*, 92 Pa. St. 216, 37 Am. Rep. 672.

To Show Who Were Witnesses. — A grand juror is a competent witness to show that a certain witness did not testify before the grand jury. *Com. v. Hill*, 11 Cush. (Mass.) 140.

To Support a Witness. — So where an attempt has been made to impeach a witness a grand juror may be called to confirm his testimony by stating what his testimony was before the grand jury. *People v. Hurlbut*, 4 Den. (N. Y.) 133, 47 Am. Dec. 244; *Perkins v. State*, 4 Ind. 222.

May Testify that No Bill Was Found. — In a case of malicious prosecution a grand juror was permitted, for the purpose of showing a termination of the prosecution, to testify that no bill had been found by the grand jury. *Owens v. Owens*, 81 Md. 518.

Secrecy for Public Good. — A grand juror's obligation of secrecy is due to the public and not to the witnesses who testified before the grand jury. *People v. Young*, 31 Cal. 563.

Witnesses Not Privileged. — The privilege of secrecy as to the transactions of the grand-jury room does not extend to witnesses who testify before that body. *People v. Young*, 31 Cal. 563.

Person Indicted Not Privileged. — The person who has been indicted by a grand jury is not privileged from testifying to its transactions. *People v. Reggel*, 8 Utah 21.

1. Petit Juries — England. — *Raphael v. Bank of England*, 17 C. B. 161, 84 E. C. L. 101; *Jackson v. Williamson*, 2 T. R. 281; *Straker v. Graham*, 7 Dowl. P. C. 223; *Robert v. Hughes*, 7 M. & W. 399; *Standewick v. Hopkins*, 14 L. J. Q. B. 16.

United States. — *U. S. v. Reid*, 12 How. (U. S.) 361.

California. — *People v. Doyell*, 48 Cal. 85; *Steward v. Hinkel*, 72 Cal. 187.

Georgia. — *Hester v. State*, 17 Ga. 130.

Illinois. — *Allison v. People*, 45 Ill. 37; *Nicolls v. Foster*, 89 Ill. 386.

Indiana. — *Taylor v. Garnett*, 110 Ind. 287.

Iowa. — *Darrance v. Preston*, 18 Iowa 396; *Cowles v. Chicago, etc.*, R. Co., 32 Iowa 515; *Garretty v. Brazell*, 34 Iowa 100; *Bingham v. Foster*, 37 Iowa 339; *Bryson v. Chicago, etc.*, R. Co., 89 Iowa 677.

Kansas. — *Perry v. Bailey*, 12 Kan. 539; *Gottlieb v. Jasper*, 27 Kan. 775.

Kentucky. — *Johnson v. Davenport*, 3 J. J. Marsh. (Ky.) 390.

Louisiana. — *Cire v. Rightor*, 11 La. 140; *State v. Millican*, 15 La. Ann. 557.

Maine. — *Purinton v. Humphreys*, 6 Me. 379; *Heffron v. Gallupe*, 55 Me. 563.

Massachusetts. — *Chadbourn v. Franklin*, 5 Gray (Mass.) 312; *Folsom v. Manchester*, 11 Cush. (Mass.) 334; *Whitney v. Whitman*, 5 Mass. 405; *Bridge v. Eggleston*, 14 Mass. 245, 7 Am. Dec. 209; *Woodward v. Leavitt*, 107 Mass. 453, 9 Am. Rep. 49; *Rowe v. Canney*, 139 Mass. 41.

Minnesota. — *Knowlton v. McMahon*, 13 Minn. 386, 97 Am. Dec. 236.

Missouri. — *Sawyer v. Hannibal, etc.*, R. Co., 37 Mo. 240.

Nebraska. — *Harris v. State*, 24 Neb. 803; *Johnson v. Parrotte*, 34 Neb. 26; *Gran v. Houston*, 45 Neb. 831.

New Hampshire. — *State v. Hascall*, 6 N. H. 352; *Folsom v. Brawn*, 25 N. H. 114.

New Jersey. — *Den v. M'Allister*, 7 N. J. L. 46.

New York. — *Clum v. Smith*, 5 Hill (N. Y.) 560.

Rhode Island. — *Tucker v. South Kingstown*, 5 R. I. 558; *Luft v. Lingane*, 17 R. I. 420.

South Carolina. — *Reaves v. Moody*, 15 Rich. L. (S. Car.) 312.

Tennessee. — *Crawford v. State*, 2 Yerg. (Tenn.) 60, 24 Am. Dec. 478, note; *Saunders v. Fuller*, 4 Humph. (Tenn.) 516; *Scott v. State*, 7 Lea (Tenn.) 232.

Texas. — *Boetge v. Landa*, 22 Tex. 105.

Virginia. — *Thomas v. Jones*, 28 Gratt. (Va.) 383; *Price v. Warren*, 1 Hen. & M. (Va.) 385; *Cochran v. Street*, 1 Wash. (Va.) 79.

Wisconsin. — *Shaw v. Fisk*, 21 Wis. 368, 94 Am. Dec. 547.

See the title JURY AND JURY TRIAL.

2. Qualification of Rule as to Petit Juries —

England. — *Cogan v. Ebdon*, 1 Burr. 383; *Roberts v. Hughes*, 7 M. & W. 399.

Iowa. — *Wright v. Illinois, etc.*, Tel. Co., 20 Iowa 195; *Cowles v. Chicago, etc.*, R. Co., 32 Iowa 515; *Kruidenier v. Shields*, 70 Iowa 428.

Kansas. — *Perry v. Bailey*, 12 Kan. 539; *Gottlieb v. Jasper*, 27 Kan. 775.

Kentucky. — *Doran v. Shaw*, 3 T. B. Mon. (Ky.) 411.

Massachusetts. — *Hix v. Drury*, 5 Pick. (Mass.) 296; *Capen v. Stoughton*, 16 Gray (Mass.) 367; *Woodward v. Leavitt*, 107 Mass. 453, 9 Am. Rep. 49; *Rowe v. Canney*, 139 Mass. 41.

Mississippi. — *Prussel v. Knowles*, 4 How. (Miss.) 90; *Nelms v. State*, 13 Smed. & M. (Miss.) 500, 53 Am. Dec. 94.

Nebraska. — *Harris v. State*, 24 Neb. 803; *Johnson v. Parrotte*, 34 Neb. 26.

New Jersey. — *Den v. Driver*, 1 N. J. L. 193.

New York. — *Jackson v. Dickenson*, 15

7. Evidence Illegally Obtained. — If evidence is otherwise admissible it will not be excluded because it was illegally or fraudulently obtained.¹

XV. OPINION EVIDENCE. — It is a general rule, subject to many and important exceptions, that a witness must confine himself to a statement of facts, and his opinions are not admissible.²

XVI. EXPERT EVIDENCE. — Expert evidence is evidence given upon matters that are not within the range of men of ordinary knowledge and observation, by persons who possess peculiar skill and knowledge thereon.³

XVII. PAROL EVIDENCE TO VARY WRITTEN CONTRACTS — **General Rule.** — It is a general rule of the law of evidence that a written contract, unambiguous in its terms, cannot be varied, contradicted, or modified by parol evidence of anything that occurred at or prior to the time when such written contract was executed.⁴

Johns. (N. Y.) 309, 8 Am. Dec. 236; *Reynolds v. Champlain Transp. Co.*, 9 How. Pr. (N. Y. Supreme Ct.) 7; *Wiggins v. Downer*, 67 How. Pr. (N. Y. Supreme Ct.) 65; *Dalrymple v. Williams*, 63 N. Y. 361, 20 Am. Rep. 544.

Pennsylvania. — *Ritchie v. Holbrooke*, 7 S. & R. (Pa.) 458.

Tennessee. — *Elledge v. Todd*, 1 Humph. (Tenn.) 43; *Norris v. State*, 3 Humph. (Tenn.) 333, 39 Am. Dec. 175; *Crawford v. State*, 2 Yerg. (Tenn.) 60, 24 Am. Dec. 467; *Hudson v. State*, 9 Yerg. (Tenn.) 408.

See the title **JURY AND JURY TRIAL**.

1. Evidence Illegally Obtained. — *Legatt v. Tollervey*, 14 East 302; *Jordan v. Lewis*, 14 East 306, note *a*; *U. S. v. Whittier*, 5 Dill. (U. S.) 39; *U. S. v. Cottingham*, 2 Blatchf. (U. S.) 470; *U. S. v. Rapp*, 30 Fed. Rep. 818; *U. S. v. Slenker*, 32 Fed. Rep. 694; *Gindrat v. People*, 138 Ill. 103; *Siebert v. People*, 143 Ill. 571; *State v. Jansen*, 22 Kan. 498; *Com. v. Dana*, 2 Met. (Mass.) 329; *Com. v. Cohen*, 127 Mass. 282; *Com. v. Tibbetts*, 157 Mass. 519; *Geiger v. State*, 6 Neb. 545; *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126.

2. Opinion Evidence — *Alabama.* — *Richardson v. Stringfellow*, 100 Ala. 416.

California. — *Tait v. Hall*, 71 Cal. 149.

Illinois. — *Johnson v. Glover*, 121 Ill. 283; *Frezinski v. Newborg*, 43 Ill. App. 506.

Massachusetts. — *Connelly v. Hamilton Woolen Co.*, 163 Mass. 156.

Michigan. — *Dove v. Royal Ins. Co.*, 98 Mich. 122.

Minnesota. — *Larson v. Lombard Invest. Co.*, 51 Minn. 141; *Lovejoy v. Howe*, 55 Minn. 353.

Nebraska. — *Atchison, etc., R. Co. v. Lawler*, 40 Neb. 356.

New Jersey. — *Koccis v. State*, 56 N. J. L. 44.

New York. — *Reynolds v. Van Beuren*, 10 Misc. Rep. (N. Y. C. Pl.) 703.

Pennsylvania. — *Barre v. Reading City Pass. R. Co.*, 155 Pa. St. 170.

Texas. — *Shifflet v. Morelle*, 68 Tex. 382; *Half v. Curtis*, 68 Tex. 640.

See the title **EXPERT AND OPINION EVIDENCE**.

3. Expert Evidence — *United States.* — *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469; *Congress, etc., Spring Co. v. Edgar*, 99 U. S. 657; *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945.

Alabama. — *Mobile L. Ins. Co. v. Walker*, 58 Ala. 290; *Brinkley v. State*, 89 Ala. 34, 18 Am. St. Rep. 87.

Arkansas. — *St. Louis, etc., R. Co. v. Yarrowborough*, 56 Ark. 612.

California. — *Toomes's Estate*, 54 Cal. 514, 35 Am. Rep. 83; *Sappenfield v. Main St., etc., R. Co.*, 91 Cal. 48; *Kauffman v. Maier*, 94 Cal. 269.

Illinois. — *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Illinois Cent. R. Co. v. People*, 143 Ill. 434.

Indiana. — *Fort Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82; *Toledo, etc., R. Co. v. Jackson*, 5 Ind. App. 547.

Kansas. — *Broquet v. Tripp*, 36 Kan. 700; *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550.

Maine. — *Heald v. Thing*, 45 Me. 392.

Massachusetts. — *Dickenson v. Fitchburg*, 13 Gray (Mass.) 546.

Michigan. — *Wickes v. Swift Electric Light Co.*, 70 Mich. 322.

Minnesota. — *Bergquist v. Chandler Iron Co.*, 49 Minn. 511.

New Hampshire. — *Doie v. Johnson*, 50 N. H. 454.

New York. — *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453; *Avery v. New York Cent., etc., R. Co.*, 121 N. Y. 31.

Pennsylvania. — *Travis v. Brown*, 43 Pa. St. 12, 82 Am. Dec. 540; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Hass v. Marshall*, (Pa. 1888) 14 Atl. Rep. 421.

Rhode Island. — *Buffum v. Harris*, 5 R. I. 250.

Texas. — *Fordyce v. Moore*, (Tex. Civ. App. 1893) 22 S. W. Rep. 235; *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126.

Vermont. — *State v. Phair*, 48 Vt. 366; *Stowe v. Bishop*, 58 Vt. 498, 56 Am. Rep. 569.

Virginia. — *Bird v. Com.*, 21 Gratt. (Va.) 800.

West Virginia. — *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524.

For a Full Discussion of this subject see the title **EXPERT AND OPINION EVIDENCE**.

4. Parol Evidence — *United States.* — *Shankland v. Washington*, 5 Pet. (U. S.) 390; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 231; *U. S. v. Thompson*, 1 Gall. (U. S.) 388; *Hancock v. Cossett*, 45 Fed. Rep. 754.

Alabama. — *Mead v. Steger*, 5 Port. (Ala.) 498; *Whitman v. Revels*, 39 Ala. 121; *Moody v. McCown*, 39 Ala. 586; *Boon v. Steamboat Belfast*, 40 Ala. 184; *Phillips v. Costley*, 40 Ala. 486; *Winston v. Browning*, 61 Ala. 80.

Arkansas. — *Featherstone v. Wilson*, 4 Ark. 154.

XVIII. DOCUMENTARY EVIDENCE. — A complete treatment of the subject

Connecticut. — Jones v. Warner, 11 Conn. 40; Beckley v. Munson, 22 Conn. 299.

Georgia. — Freeman v. Bass, 34 Ga. 355, 89 Am. Dec. 255; Sawyer v. Vories, 44 Ga. 662; Whitehead v. Park, 53 Ga. 575; Ellis v. Darden, 86 Ga. 368.

Illinois. — McCloskey v. McCormick, 37 Ill. 66; Snyder v. Griswold, 37 Ill. 216; Smith v. Price, 39 Ill. 28, 89 Am. Dec. 284; Marshall v. Gridley, 46 Ill. 247; Robinson v. McNeill, 51 Ill. 225; Conwell v. Springfield, etc., R. Co., 81 Ill. 232; Hair v. Johnson, 35 Ill. App. 562.

Indiana. — Cincinnati, etc., R. Co. v. Pearce, 28 Ind. 502; Davis v. Stout, 126 Ind. 12, 22 Am. St. Rep. 565.

Iowa. — Warren v. Crew, 22 Iowa 315; Atkinson v. Blair, 38 Iowa 156.

Louisiana. — Shreveport v. Le Rosen, 18 La. Ann. 577; Bogan v. Calhoun, 19 La. Ann. 472; Selby v. Friedlander, 22 La. Ann. 381.

Maryland. — Annapolis v. Harwood, 32 Md. 471; Hough v. People's F. Ins. Co., 36 Md. 398.

Massachusetts. — Doyle v. Dixon, 12 Allen (Mass.) 576; Rice v. Woods, 21 Pick. (Mass.) 30; Perkins v. Young, 16 Gray (Mass.) 389; Cook v. Shearman, 103 Mass. 21; Fay v. Gray, 124 Mass. 500.

Michigan. — Stange v. Wilson, 17 Mich. 342; Beers v. Beers, 22 Mich. 42.

Minnesota. — Lowry v. Harris, 12 Minn. 255; Wemple v. Knopf, 15 Minn. 440, 2 Am. Rep. 147.

Mississippi. — Cole v. Hundley, 8 Smed. & M. (Miss.) 473; Wren v. Hoffman, 41 Miss. 616; Cocke v. Bailey, 42 Miss. 81; McGuire v. Stevens, 42 Miss. 724, 2 Am. Rep. 649; Kerr v. Kuykendall, 44 Miss. 137; Herndon v. Henderson, 41 Miss. 584.

Missouri. — Koehring v. Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402; Singleton v. Fore, 7 Mo. 515.

Nebraska. — Waddle v. Owen, 43 Neb. 489.

Nevada. — Feusier v. Sneath, 3 Nev. 120.

New Hampshire. — Proctor v. Gilson, 49 N. H. 62.

New Jersey. — State v. Stites, 13 N. J. L. 172; Huffman v. Hummer, 17 N. J. Eq. 269; Whyte v. Arthur, 17 N. J. Eq. 521; Perrine v. Cheeseman, 11 N. J. L. 174, 19 Am. Dec. 388.

New York. — Spencer v. Tilden, 5 Cow. (N. Y.) 144; Wintermute v. Light, 46 Barb. (N. Y.) 278; Buckley v. Bentley, 48 Barb. (N. Y.) 283; Babbett v. Young, 51 Barb. (N. Y.) 466; Hull v. Adams, 1 Hill (N. Y.) 601; Creery v. Holly, 14 Wend. (N. Y.) 26; Van Bokkelen v. Taylor, 62 N. Y. 105; Matter of Keleman, 126 N. Y. 73.

Ohio. — Serviss v. Stockstill, 30 Ohio St. 418.

Oregon. — Meier v. Kelly, 20 Oregon 86.

Pennsylvania. — Collins v. Baumgardner, 52 Pa. St. 461; McMicken v. Com., 58 Pa. St. 213; Kirk v. Hartman, 63 Pa. St. 97.

Tennessee. — Mayse v. Biggs, 3 Head (Tenn.) 36.

Texas. — Trammell v. Pilgrim, 20 Tex. 158. *Vermont.* — Fuller v. Hapgood, 39 Vt. 617; St. Martin v. Thrasher, 40 Vt. 460; Brandon Mfg. Co. v. Morse, 48 Vt. 322.

Virginia. — Bowyer v. Martin, 6 Rand. (Va.) 525.

Wisconsin. — Irish v. Dean, 39 Wis. 562.

See the title PAROL EVIDENCE.

Applications of the Rule. — The rule rejecting parol evidence when offered to modify, vary, or contradict written contracts has been applied to the following classes of writings:

Negotiable Instruments. — Burnes v. Scott, 117 U. S. 582; Clark v. Hart, 49 Ala. 86, McPherson v. Weston, 85 Cal. 90; Foy v. Blackstone, 31 Ill. 538, 83 Am. Dec. 246; Bogan v. Calhoun, 19 La. Ann. 472; Goddard v. Hill, 33 Me. 582; Pembroke Second Precinct Church v. Stetson, 5 Pick. (Mass.) 506; Youngberg v. Nelson, 51 Minn. 172; Koehring v. Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402; Lang v. Johnson, 24 N. H. 302; Babbett v. Young, 51 Barb. (N. Y.) 466; Anspach v. Bast, 52 Pa. St. 356; Campbell v. Upshaw, 7 Humph. (Tenn.) 185, 46 Am. Dec. 75; Trammell v. Pilgrim, 20 Tex. 158.

Awards of Arbitrators. — Jones v. Perkins, 54 Me. 393.

Mortgages. — Van Evera v. Davis, 51 Iowa 637; Union Nat. Bank v. International Bank, 22 Ill. App. 652; Whitney v. Lowell, 33 Me. 318; Lindsay v. Garvin, 31 S. Car. 259.

Deeds of Conveyance. — Beall v. Fisher, 95 Cal. 568; Sawyer v. Vories, 44 Ga. 662; Ritchie v. Pease, 114 Ill. 353; Sage v. Jones, 47 Ind. 122; Warren v. Miller, 38 Me. 108; Miller v. Washburn, 117 Mass. 371; Kelley v. Saltmarsh, 146 Mass. 585; Beers v. Beers, 22 Mich. 42; Lear v. Durgin, 64 N. H. 618; Richards v. Crocker, 66 Hun (N. Y.) 629, 20 N. Y. Supp. 954; Hancock v. McAvoy, 151 Pa. St. 439; Miller v. Fletcher, 27 Gratt. (Va.) 403, 21 Am. Rep. 356.

Leases. — Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Welch v. Horton, 73 Iowa 250; Tracy v. Union Iron Works, 29 Mo. App. 342; Howard v. Thomas, 12 Ohio St. 201; Knapp v. Marlboro, 29 Vt. 282.

Guaranties. — Lazear v. National Union Bank, 52 Md. 78, 36 Am. Rep. 355.

Releases of Damages. — Leddy v. Barney, 139 Mass. 394.

Warranties. — Robinson v. McNeill, 51 Ill. 225; Watson v. Roode, 43 Neo. 348.

Insurance Policies. — Russell v. Russell, 64 Ala. 500; Mutual Ben. L. Ins. Co. v. Ruse, 8 Ga. 536; Higgins v. Livermore, 14 Mass. 106; Lewis v. Thatcher, 15 Mass. 431; New York v. Brooklyn F. Ins. Co., 3 Abb. App. Dec. (N. Y.) 251.

Indorsement of Negotiable Instruments. — McPherson v. Weston, 85 Cal. 90; Bartlett v. Lee, 33 Ga. 491; Kern v. Von Phul, 7 Minn. 426; Youngberg v. Nelson, 51 Minn. 172; Buckley v. Bentley, 48 Barb. (N. Y.) 283; Halliday v. Hart, 30 N. Y. 474.

Bonds. — American Surety Co. v. Thurber, 121 N. Y. 655, 23 N. E. Rep. 1129; McGovney v. State, 20 Ohio 93; Barnett v. Barnett, 83 Va. 504.

Assignments. — Moore v. Voss, 1 Cranch (C. C.) 179; Gilmore v. Bangs, 55 Ga. 403; Osgood v. Davis, 18 Me. 146, 36 Am. Dec. 708; Taylor v. Sayre, 24 N. J. L. 647.

Public Records. — Volger v. Spaulgh, 4 Biss (U. S.) 288; Carroll County v. O'Connor, 137 Ind. 622; Crommett v. Pearson, 18 Me. 344;

documentary evidence will be found in a preceding volume of this work.¹

XIX. DEPOSITIONS. — The law pertaining to the subject depositions has already been set forth elsewhere in this work.²

XX. WITNESSES. — The whole subject of witnesses will be found treated in another portion of this work, to which reference is here made.³

XXI. LEGISLATIVE POWER OVER RULES OF EVIDENCE — 1. **In General.** — The legislature has general control over the rules of evidence and may change them at pleasure.⁴

Williams v. Ingell, 21 Pick. (Mass.) 288; *McMicken v. Com.*, 58 Pa. St. 213.

Judicial Records. — *Dugger v. Tayloe*, 46 Ala. 320; *Roche v. Beldam*, 119 Ill. 320; *Ney v. Dubuque*, etc., R. Co., 20 Iowa 347; *Cartwright v. McFadden*, 24 Kan. 662; *Armstrong v. St. Louis*, 69 Mo. 309, 33 Am. Rep. 499; *Royce v. Burt*, 42 Barb. (N. Y.) 339; *Bays v. Trulson*, 25 Oregon 109.

Records of Private Corporations. — *San Joaquin Land, etc., Co. v. Beecher*, 101 Cal. 70.

Licenses. — *Ives v. Williams*, 50 Mich. 100.

Bills of Sale. — *Herndon v. Henderson*, 41 Miss. 584.

Contracts by Letter. — *Selby v. Friedlander*, 22 La. Ann. 381.

Bills of Lading. — *Jones v. Warner*, 11 Conn. 40; *Creery v. Holly*, 14 Wend. (N. Y.) 26.

Contracts for Sale of Personalty. — *Union Stock-Yards, etc., Co. v. Western Land, etc., Co.*, 59 Fed. Rep. 49; *Davis v. Moody*, 15 Ga. 175; *Epping v. Mockler*, 55 Ga. 376; *Proctor v. Cole*, 66 Ind. 576; *Cushing v. Rice*, 46 Me. 303, 71 Am. Dec. 579; *Belcher v. Mulhall*, 57 Tex. 17.

Charter-parties. — *The Augustine Kobbe*, 37 Fed. Rep. 696; *The Delaware*, 14 Wall. (U. S.) 579.

Contracts for Sale of Realty. — *Smith v. Taylor*, 82 Cal. 533; *Nickelson v. Reves*, 94 N. Car. 559; *Lloyd v. Farrell*, 48 Pa. St. 73, 86 Am. Dec. 563; *Ripley v. Paige*, 12 Vt. 353; *Hubbard v. Marshall*, 50 Wis. 322.

Miscellaneous Contracts. — *Bast v. Ashland First Nat. Bank*, 101 U. S. 93; *Van Vleet v. Sledge*, 45 Fed. Rep. 743; *Dexter v. Ohlander*, 93 Ala. 441; *Chase v. Jewett*, 37 Me. 351; *Atkins v. Thompson*, 155 Mass. 326; *Jennings v. Moore*, 83 Mich. 231, 21 Am. St. Rep. 601; *Tarbell v. Farmers' Mut. Elevator Co.*, 44 Minn. 471; *Van Horn v. Van Horn*, 49 N. J. Eq. 327; *Mittnacht v. Slevin*, 67 Hun (N. Y.) 315; *American Surety Co. v. Thurber*, 121 N. Y. 655, 23 N. E. Rep. 1129; *Vance v. Wood*, 22 Oregon 77; *Lyon v. Miller*, 24 Pa. St. 392; *Watson v. Miller*, 82 Tex. 279.

The Rule Applies Only Between the Parties to the Contract and Their Privies. — Where the controversy is between a party to a written contract and one who is neither a party to it nor a privy to one who is, the rule excluding parol evidence to explain, vary, modify, or contradict the writing does not apply. In such case neither the party nor the stranger to the contract is bound by the rule excluding parol evidence.

England. — *Wilson v. Hart*, 7 Taunt. 295, 2 E. C. L. 295; *Rex v. Cheadle*, 3 B. & Ad. 833, 23 E. C. L. 192.

United States. — *Barreda v. Silsbee*, 21 How. (U. S.) 146.

Alabama. — *Venable v. Thompson*, 11 Ala. 147; *Cunningham v. Milner*, 56 Ala. 522.

Arkansas. — *Talbot v. Wilkins*, 31 Ark. 411.

California. — *Hussman v. Wilke*, 50 Cal. 250.

Georgia. — *Russell v. Carr*, 38 Ga. 459.

Indiana. — *Burns v. Thompson*, 91 Ind. 146.

Louisiana. — *Finley v. Bogan*, 20 La. Ann. 443.

Maine. — *Bell v. Woodman*, 60 Me. 465.

Maryland. — *Fant v. Sprigg*, 50 Md. 551.

Massachusetts. — *Badger v. Jones*, 12 Pick. (Mass.) 371; *Kellogg v. Tompson*, 142 Mass. 76.

Nebraska. — *Sheehy v. Fulton*, 38 Neb. 691.

New Hampshire. — *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207; *Furbush v. Goodwin*, 25 N. H. 425.

New York. — *Thomas v. Truscott*, 53 Barb. (N. Y.) 200; *Fox v. McComb*, 63 Hun (N. Y.) 633, 45 N. Y. St. Rep. 754; *Overseers of Poor v. Overseers of Poor*, 10 Johns. (N. Y.) 229; *Barry v. Ransom*, 12 N. Y. 462; *McMaster v. Insurance Co of North America*, 55 N. Y. 222, 14 Am. Rep. 239.

North Carolina. — *Reynolds v. Magness*, 2 Ired. L. (24 N. Car.) 26.

Pennsylvania. — *Krider v. Lafferty*, 1 Whart. (Pa.) 314.

Texas. — *Hughes v. Sandal*, 25 Tex. 163; *Randolph v. Junker*, 1 Tex. Civ. App. 517.

Vermont. — *Fonda v. Burton*, 63 Vt. 355.

Virginia. — *Bruce v. John L. Roper Lumber Co.*, 87 Va. 381, 24 Am. St. Rep. 657.

1. See the title DOCUMENTARY EVIDENCE, vol. 9, p. 877.

2. See the title DEPOSITIONS, vol. 9, p. 295.

3. See the title WITNESSES.

4. **Power of Legislature over Rules of Evidence.** — *Cooley Const. Lim.* 272.

United States. — *Ogden v. Saunders*, 12 Wheat. (U. S.) 273; *Webb v. Weatherhead*, 17 How. (U. S.) 516.

Alabama. — *Kirtland v. Molton*, 41 Ala. 548; *Herbert v. Easton*, 43 Ala. 547.

California. — *Nims v. Palmer*, 6 Cal. 8; *Nims v. Johnson*, 7 Cal. 111; *People v. Mortimer*, 46 Cal. 114.

Connecticut. — *State v. Cunningham*, 25 Conn. 195.

District of Columbia. — *U. S. v. Harrill, McAll.* (U. S.) 243.

Kentucky. — *Bowlin v. Com.* 2 Bush (Ky.) 5, 92 Am. Dec. 468.

Massachusetts. — *Andrews v. Worcester County Mut. F. Ins. Co.*, 5 Allen (Mass.) 65; *Com. v. Williams*, 6 Gray (Mass.) 1; *Com. v. Curran*, 119 Mass. 206.

Minnesota. — *State v. Ryan*, 13 Minn. 370.

Mississippi. — *Thigpen v. Mississippi Cent. R. Co.*, 32 Miss. 347; *Lindzey v. State*, 65 Miss. 542, 7 Am. St. Rep. 674.

Missouri. — *Ex p. Bethurum*, 66 Mo. 545.

New Hampshire. — *Rich v. Flanders*, 39 N. H. 304.

New York. — *Hickox v. Tallman*, 38 Barb.

2. Power to Determine Burden of Proof. — The legislature may determine which party shall have the burden of proof, and that any evidence, however slight, shall make a *prima facie* case.¹

3. Power to Make Presumptions Conclusive. — So the legislature may make presumptions conclusive and determine what evidence shall raise such presumptions.²

4. Changes as to Existing Causes of Action. — The rules of evidence may be changed so as to affect existing causes of action, so long as an adequate remedy remains.³

(N. Y.) 608; *People v. Mitchell*, 45 Barb. (N. Y.) 208; *Hand v. Ballou*, 12 N. Y. 541; *Howard v. Moot*, 64 N. Y. 262.

Wisconsin. — *Delaplaine v. Cook*, 7 Wis. 44.

Wyoming. — *In re Wright*, 3 Wyoming 478.

Congress Has No Power over State Courts. — Each state has the unquestioned right to regulate her own domestic concerns and prescribe remedies, including rules of evidence, in her own courts. Congress has no power to modify the rules of evidence in *Kentucky* as to the incompetency of a negro to testify against a white man. *Bowlin v. Com.*, 2 Bush (Ky.) 5, 92 Am. Dec. 468.

1. Burden of Proof. — *State v. Cunningham*, 25 Conn. 197; *State v. Morgan*, 40 Conn. 44; *Wooten v. State*, 24 Fla. 335; *Edwards v. State*, 121 Ind. 450; *State v. Hurley*, 54 Me. 562; *Com. v. Rowe*, 14 Gray (Mass.) 47; *Com. v. Curran*, 119 Mass. 206; *Hand v. Ballou*, 12 N. Y. 541; *Howard v. Moot*, 64 N. Y. 262; *Auburn v. Merchant*, 103 N. Y. 143, 57 Am. Rep. 705; *State v. Mellor*, 13 R. I. 666; *Lincoln v. Smith*, 27 Vt. 328; *Delaplaine v. Cook*, 7 Wis. 44.

The legislature of a state has the power by statute to provide that certain circumstances shall constitute *prima facie* evidence of the facts in issue. The law of evidence, being a part of the remedy, is within legislative control. *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Mason v. Haile*, 12 Wheat. (U. S.) 370; *Rathbone v. Bradford*, 1 Ala. 312; *Richmond, etc., Co. v. Mitchell*, 92 Ga. 77; *Holland v. Dickerson*, 41 Iowa 367; *Howard v. Moot*, 64 N. Y. 262; *Hays v. Armstrong*, 7 Ohio (pt. i.) 248; *Parker v. Sterling*, 10 Ohio 357; *Lewis v. McElvain*, 16 Ohio 347; *Goshorn v. Purcell*, 11 Ohio St. 641; *Pennsylvania Co. v. McCann*, 54 Ohio St. 10; *Long's Appeal*, 87 Pa. St. 114; *Vanzant v. Waddell*, 2 Yerg. (Tenn.) 260.

Thus it was held competent for the legislature to provide that, in an action by an employee against a railroad company, when certain defects "shall be made to appear in the trial of any action in the courts of this state brought by such employee or his legal representatives against any railroad corporation for damages on account of such injuries so received, the same shall be *prima facie* evidence of negligence on the part of such corporation." *Pennsylvania Co. v. McCann*, 54 Ohio St. 10.

It has been held that such legislative rule of evidence applies to all cases against corporations whose line of railroad extends into the state where suit is brought, although the cause of action arose in another state. *Pennsylvania Co. v. McCann*, 54 Ohio St. 10; *Richmond, etc., R. Co. v. Mitchell*, 92 Ga. 97.

Vested Rights. — A party cannot, by legislation which in effect impairs the obligation

of his adversary, be divested of a right once vested, simply because such legislation assumes the form of changing the rules of evidence. *Little Rock, etc., R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55; *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26.

Possession of Gambling Devices. — Statutes providing that the possession of gambling implements and devices in any house shall be deemed *prima facie* evidence that such house is used or kept for gambling purposes have been held valid. *Morgan v. State*, 117 Ind. 569; *Wooten v. State*, 24 Fla. 335.

Intoxicating Liquors. — It has been held competent for the legislature to provide that the possession of intoxicating liquors shall in certain case be taken as *prima facie* evidence of intent to sell or of illegal sales. *State v. Cunningham*, 25 Conn. 195; *State v. Morgan*, 40 Conn. 44; *Edwards v. State*, 121 Ind. 450; *State v. Hurley*, 54 Me. 562; *Com. v. Wallace*, 7 Gray (Mass.) 222; *Com. v. Rowe*, 14 Gray (Mass.) 47; *Auburn v. Merchant*, 103 N. Y. 143, 57 Am. Rep. 705; *State v. Mellor*, 13 R. I. 666; *Lincoln v. Smith*, 27 Vt. 328.

Right to Rebut. — Some cases hold that such evidence, to be *prima facie*, must be logically connected with the crime charged and have some tendency to prove it, and that the accused must have an opportunity to overcome such *prima facie* case. *Com. v. Wallace*, 7 Gray (Mass.) 222.

2. Presumptions. — *De Treville v. Smalls*, 98 U. S. 517; *Marx v. Hanthorn*, 30 Fed. Rep. 579; *Rollins v. Wright*, 93 Cal. 397; *Phelps v. Meade*, 41 Iowa 470; *Matter of Lake*, 40 La. Ann. 142; *Abbott v. Lindbower*, 42 Mo. 162; *Ensign v. Barse*, 107 N. Y. 329.

3. Tennessee v. Sneed, 96 U. S. 69.

Impairing Contracts. — But if, under the guise of changing the remedy, the rules of evidence are so changed as to destroy the force of a contract existing before the enactment of such law, it will be void as to such past transactions. *Rich v. Flanders*, 39 N. H. 304; *Tennessee v. Sneed*, 96 U. S. 69.

Power of Legislature to Qualify or Disqualify on Account of Interest. — "There is nothing in the section of the constitution referred to that takes from the General Assembly the power to declare that interest in the event of a suit shall disqualify or shall not disqualify a witness, according as it shall in its wisdom think best. If, in the exercise of this power, it is competent for the legislature to declare that interest in the result of a suit shall not disqualify, we suppose it falls equally within the scope of its powers to restrict, if it thinks proper, a general enactment of this kind, and to say that while interest generally shall not disqualify, a special or peculiar interest, that which, for instance,

In Civil Cases. — Changes in the rules of evidence may be made to apply to past transactions involved in civil cases unless they impair the obligation of a contract.¹

In Criminal Prosecutions. — Changes in the rules of evidence as applied to offenses already committed are valid if they do not alter the degree or lessen the amount or measure of proof necessary to a conviction.²

EVIDENCE OF A CONTRACT. — See note 3.

EVIDENCES OF DEBT. — See the title LIMITATIONS OF ACTIONS.

EVIDENT. — “Evident” is defined to be clear to the mind; obvious; plain; apparent; manifest; notorious; palpable.⁴

EVIL LIVER. — See note 5.

EVINCE. — See note 6.

results from the intimate relations of husband and wife, shall have that effect.” *Karney v. Paisley*, 13 Iowa 91.

1. **In Civil Cases.** — *Webb v. Weatherhead*, 17 How. (U. S.) 576; *Ogden v. Saunders*, 12 Wheat. (U. S.) 349; *Society, etc., v. Wheeler*, 2 Gall. (U. S.) 105; *Tennessee v. Sneed*, 96 U. S. 69; *Wilkins v. Malone*, 14 Ind. 153; *Thayer v. Seavey*, 11 Me. 292; *Oriental Bank v. Freese*, 18 Me. 109, 36 Am. Dec. 701; *Fales v. Wadsworth*, 23 Me. 553; *Kendall v. Kingston*, 5 Mass. 533; *Foster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135; *Thigpen v. Mississippi Cent. R. Co.*, 32 Miss. 347; *Dunbarton v. Franklin*, 19 N. H. 257; *Willard v. Harvey*, 24 N. H. 351; *Rich v. Flanders*, 39 N. H. 315.

Effect of Registration. — In *Webb v. Weatherhead*, 17 How. (U. S.) 576, a law providing that any deed that had been of record for twenty years should be deemed properly recorded was held valid as to past transactions.

Witnesses Made Competent. — A party has no vested right in the competency or incompetency of any particular witness, and therefore a statute removing incompetency is valid as to past as well as future transactions. *Rich v. Flanders*, 39 N. H. 304.

2. **Criminal Cases.** — *Hopt v. Utah*, 110 U. S. 574; *State v. Cunningham*, 25 Conn. 195; *U. S. v. Harrill, McAll.* (U. S.) 243; *Com. v. Williams*, 6 Gray (Mass.) 1; *Com. v. Curran*, 119 Mass. 206; *State v. Ryan*, 13 Minn. 370; *State v. Arlin*, 39 N. H. 179; *People v. Mitchell*, 45 Barb. (N. Y.) 208.

Removing Technical Objections to Testimony. — A statute which simply enlarges the class of persons who may be competent to testify is not *ex post facto* in its application to offenses previously committed; for it does not attach criminality to any act which was innocent when done, nor aggravate past crimes, nor increase the punishment therefor; nor does it alter the degree or lessen the amount or measure of the proof made necessary to conviction for past offenses. Such alterations relate to the mode of procedure only, which the state may regulate at pleasure, and in which no one can be said to have a vested right. *Hopt v. Utah*, 110 U. S. 574.

So where at the time when a crime was committed a convict was incompetent to testify, but before the trial the law was so changed as to render a convict competent, it was held that the evidence was properly received. *Hopt v. Utah*, 110 U. S. 574.

Implements of Crime. — A statute providing what effect should be given to evidence of implements of crime has been held valid. *State v. Cunningham*, 25 Conn. 195.

Compulsory Process for Witnesses. — Where the law in force when a crime was committed gave the accused a right to compulsory process to enforce the attendance of his witnesses, the repeal of the law before trial was valid and the accused could not claim the benefit of such process. *State v. Arlin*, 39 N. H. 179.

Conviction on Less Evidence. — A statute providing that it shall require less evidence to sustain a conviction for crime is *ex post facto* and void as to offenses committed before its enactment. Story on the Const., § 1345; *Cooley Const. Lim.* 265; *Cummings v. Missouri*, 4 Wall. (U. S.) 277; *Calder v. Bull*, 3 Dall. (U. S.) 386; *U. S. v. Hughes*, 8 Ben. (U. S.) 29; *Kring v. Missouri*, 107 U. S. 221; *Hopt v. Utah*, 110 U. S. 574; *Strong v. State*, 1 Blackf. (Ind.) 193; *Calloway v. State*, 7 Tex. App. 585; *Valesco v. State*, 9 Tex. App. 76.

Documentary Evidence. — A statute determining the competency and effect of documentary evidence is valid as to past offenses. *U. S. v. Harrill, McAll.* (U. S.) 243; *State v. Cunningham*, 25 Conn. 195.

3. **Evidence of a Contract.** — A document not intended to operate as a contract, but only used as proof of the existence of a previous contract, is not evidence of a contract and chargeable as an agreement, within the Stamp Act. *Beeching v. Westbrook*, 10 L. J. Exch. 464, 8 M. & W. 411. See generally the title STAMPS.

4. *Ex p.* *Foster*, 5 Tex. App. 647.

Proof Is Evident or Presumption Strong. — See the title BAIL AND RECOGNIZANCE, vol. 3, p. 668.

5. **Evil Liver.** — An open and notorious evil liver who may be rejected from communion (Rubric to Communion Office) is limited to one whose moral conduct, as distinguished from religious belief, is bad (*Jenkins v. Cook*, 45 L. J. P. C. 1, 1 Prob. Div. 80), and *semble*, such bad moral conduct must be open and notorious. Stroud's Judicial Dict.

6. **Evince.** — The trial court instructed that if the conduct of the contractor evinced an intention to abandon the contract, the other party might treat it as abandoned. Of this instruction the Supreme Court said: “The Court of Civil Appeals attaches to the word *evinced*, as used in the charge, the force of ‘proof beyond a reasonable doubt,’ that is,

EX. — See note i.

EXACTION. — See the title EXTORTION.

EXAMINE — EXAMINATION. (As to examination of parties before trial, see ENCYC. OF PL. AND PR., vol. 8, p. 35; as to examination of witnesses, see ENCYC. OF PL. AND PR., vol. 8, p. 70, and in this work the title WITNESSES; as to preliminary examination, see ENCYC. OF PL. AND PR., title PRELIMINARY EXAMINATION.) — See note 2.

the court construed the charge to mean that, if it appeared beyond a reasonable doubt that Kilgore intended in the future to abandon the contract, then the corporation might treat it as abandoned, and take charge of the property. We do not think that jurymen engaged in the trial of cases ordinarily would so understand the language, but rather that it was by them interpreted to mean that the declarations and acts of Kilgore must be such as would authorize them to find that he intended at some future time to abandon the contract." *Kilgore v. Northwest Texas Baptist Educational Assoc.*, 90 Tex. 139.

Evince No Intention — Conditions. — A statute provided that "when any conditions annexed to a grant or conveyance of lands are merely nominal, and *evince* no intention of actual or substantial benefit," they may be disregarded. In considering this provision the court in *Sioux City, etc., R. Co. v. Singer*, 49 Minn. 301, said: "The words '*evince* no intention' mean '*evince* an absence of intention.' It may be apparent, from the very nature of the condition, that it was not intended to confer or reserve any real benefit to the grantor or to any other person. Such, for instance, would be a condition, annexed to the granting of a fee, that the grantee should yearly deliver an ear of corn to the grantor, or render any specified but unsubstantial service. To such a case the statute would apply."

1. **Ex. A.** — In *Dugan v. Trisler, Ex. A and Ex. B* were recognized respectively as abbreviations of "Exhibit A" and "Exhibit B." *Dugan v. Trisler*, 69 Ind. 555.

Ex Quay or Warehouse. — In a contract for the sale of goods *ex* quay or warehouse there is an implied condition that the vendor shall give notice to the purchaser of the place of storage; and until such notice has been given, the purchaser is not in default for nonacceptance. *Benjamin on Sales* 671, *citing Davies v. McLean*, 21 W. R. 264, 28 L. T. N. S. 113.

Ex July Coupons. — In *Porter v. Wormser*, 94 N. Y. 445, it is said: "A sale of bonds '*ex* July coupons' means a sale reserving the coupons, that is, a sale in which the seller reserves, in addition to the purchase price, the benefit of the coupons, which benefit he may realize either by detaching them or receiving from the buyer an equivalent consideration. In this case, the bonds not having been sold until after July 1, the plaintiff presumably had the benefit of the coupons falling due on that day, and they were credited to him in his account."

2. **Examine — Recount.** (See also the title ELECTIONS, vol. 10, pp. 552, 750, 830.) — A statute provided that the governor, with at least five others of the council, should *examine* the returns of votes made by the city and town clerks. It was held that the governor had no

power to recount the votes. *Opinion of Justices*, 136 Mass. 583.

Examination in the Sense of Written Examination. — See *Clapp v. Sherman*, 16 R. I. 370.

Privy Examination. — See the title ACKNOWLEDGMENTS, vol. 1, p. 514.

Re-examinations. (See also the titles SCHOOLS; UNIVERSITIES AND COLLEGES.) — A statute made it the duty of the county superintendent of schools to keep a record of all *examinations* in books provided for that purpose by the county. It was held that *examinations* might well include *re-examinations*, and that it was the duty of the superintendent to keep a record of *re-examinations* and revocations of licenses to teach. *School Dist. No. 10 v. Thelander*, 32 Minn. 476.

Personal Examination — Expert Testimony. (See also the title EXPERT AND OPINION EVIDENCE.) — In *Atchison, etc., R. Co. v. Frazier*, 27 Kan. 465, it was said that the testimony of a physician, so far as it is expert testimony, in an action for personal injuries, must be based upon personal *examination*, or upon the facts as proved before the jury, or else upon a hypothetical statement, and that within what is meant by the phrase "*personal examination*" is properly included information derived from statements by the patient of present feelings and pain.

Examined Copy. (See also COPY, vol. 7, p. 506, and the references there given.) — An *examined* copy is a copy sworn to by the officer in person who made it from the original. *Cogswell v. Burtis, Hoffm. Ch. (N. Y.)* 201.

Stockholders. — A stockholder, under a power to *examine* the books of transfer, and those containing the names of the stockholders, has the right not only to inspect the books, but to take memoranda or copies of the names. *Brouwer v. Cotheal*, 10 Barb. (N. Y.) 216, *affirmed* 5 N. Y. 562. The court, *per* Mitchell, J., said: "It was supposed that the etymological meaning of the words 'exhibit' and *examine* limited their meaning to the construction contended for by the defendant. If the derivation be from *examen*, a swarm of bees, it may be supposed to imply the industry and perseverance of the bee, and would then authorize a search as thorough as the most earnest could desire; and not only a search, but that the best part of that which is searched should be also carried off to be converted to a good and useful purpose."

Reject. — The power to supervisors of a county to "*examine*, settle, and allow" all accounts chargeable against a county involves also the power to reject. *People v. Dutchess County*, 9 Wend. (N. Y.) 508.

Judicial Power. — Power to "*examine*, hear, and punish" is a judicial power. *Greenvelt v. Burwell*, 1 Salk. 200.

EXCAVATE — EXCAVATION. — See note 1.

EXCEED. — See note 2.

EXCEPT — EXCEPTION. (See also the titles CONDITIONS, vol. 6, p. 515; COVENANTS, vol. 8, pp. 66, 68; DEEDS, vol. 9, p. 142; EASEMENTS, vol. 10, p. 415; INTERPRETATION; LANDLORD AND TENANT; PROFITS À PRENDRE. In practice, see 8 ENCYC. OF PL. AND PR., 153, title EXCEPTIONS AND OBJECTIONS. As to bills of exceptions, see in this work, BILL OF EXCEPTIONS, vol. 4, p. 57; and see for a full treatment, 3 ENCYC. OF PL. AND PR., 374.) — “Excepted” means not included.³

Conveyances. — “An exception is defined to be a clause in a deed whereby the

1. **Excavation.** (See also the title WORKING CONTRACTS.) — Where a contract for the grading of a railroad stipulated the price to be paid for the *excavation* and embankment of earth, including all materials except hardpan, but fixed no prices for other kinds of *excavation*, upon a suit to recover the value of work done in *excavating* indurate earth the plaintiff may show by evidence that the words “earth *excavation*” did not include indurated earth, for the purpose of showing that the price to be paid for such *excavation* was not fixed by the contract. *Blair v. Corby*, 37 Mo. 313.

Excavated and Prepared. — A contract for the construction of an electric railway required the plaintiff to furnish the materials and build the railroad, “complete and ready for operation,” on a roadbed “*excavated and prepared*” by the defendant, and also required the defendant to furnish the cross-ties. It was held that expert testimony as to the meaning of the phrase “*excavated and prepared*” was admissible to show on whom was thrown the duty of ballasting the road. *Miller v. McKeesport, etc., R. Co.*, 179 Pa. St. 350.

Excavating. — Blasting rock is not so clearly included in the term *excavating*, in a building contract, as to create a suspicion of the contractor's good faith in raising the question, and where the parties agree that each shall pay one-half of such blasting, such settlement of the question of interpretation will be sustained. *Stokes v. Amerman*, (Supreme Ct.) 28 N. Y. St. Rep. 77.

2. **Homestead.** (See generally the title HOMESTEAD.) — A constitutional provision exempting from sale on execution every homestead “not *exceeding* eighty acres” is a limitation upon the power of the legislature to reduce the exemption below that quantity but not upon the power to increase it. *David v. David*, 56 Ala. 49.

Appropriation Not to Exceed. — Where a city was authorized to “appropriate money for suitable buildings or rooms,” and for “the foundation of a library a sum not *exceeding* one dollar for each of its ratable polls,” it was held that the words “not *exceeding*” restricted only the latter provision. *Dearborn v. Brookline*, 97 Mass. 466.

Jurisdiction — Costs. — A debt which originally *exceeded* five pounds, but had been reduced below that amount by payments from time to time before action brought, was held to be “a demand originally *exceeding* five pounds.” *Elsley v. Kirby*, 9 M. & W. 536. Otherwise, where an account containing items amounting to upwards of five pounds was reduced by payments so that at no one time so

much as five pounds was due. *Pope v. Ban-yard*, 3 M. & W. 424.

3. **Accepted.** — *Austin v. Willis*, 90 Ala. 424.

Excepted Held Equivalent to Accepted. — See the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 216.

But Not. — In a covenant to plough the demised premises “*except* the rabbit warren,” etc., *except* was held tantamount to “but not,” and covenant to lie for ploughing the rabbit warren. *St. Albans v. Ellis*, 16 East 352.

Except a Factory. — Where land was conveyed with all the buildings standing “*except* the brick factory,” it was held that the grantor's title to the land on which the factory stood, and the water privilege appurtenant thereto, did not pass by the deed. *Allen v. Scott*, 21 Pick. (Mass.) 25, 32 Am. Dec. 238.

Until. — In a covenant to the effect that a certain gate was to be kept up “*except* by the consent of the parties,” *except* was held to have properly the sense of “until,” and the intent of the parties to be that the gate should be upheld until by agreement it should be taken down, and then that it was to remain down forever. *Fowle v. Bigelow*, 10 Mass. 379.

Except the Widow's Dower. — An administrator's deed conveying by metes and bounds all the real estate of which the intestate husband died seized, *except* the widow's dower, was held to convey the reversion of dower. *Starr v. Brewer*, 58 Vt. 24. See also *Austin v. Willis*, 90 Ala. 421 citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 113. See also the title EXECUTORS AND ADMINISTRATORS, *post*.

Exception — Fire Insurance. — In *Western Assur. Co. v. J. H. Mohlman Co.*, 83 Fed. Rep. 815, it was said: “A clause to the effect that the insurer should not be answerable for loss by fire which should happen by any explosion is referred to in two cases cited by defendant (*Hayward v. Liverpool, etc., F. Ins. Co.*, 7 Bosw. (N. Y.) 385, 2 Abb. App. Dec. (N. Y.) 349, and *St. John v. American Mut. F., etc., Co.*, 1 Duer (N. Y.) 371, 11 N. Y. 516), as ‘an *exception* to the general language of the previous clause, by which they promise to make good such loss or damage as shall be occasioned by fire.’ But the point here raised was not before the court. It was conceded in both cases that the fire was the result of an explosion, and the word *exception* is used in the opinions, evidently, not in its technical sense, as contrasted with ‘conditions,’ but as a convenient way of expressing the fact that the insured under such a policy would not be liable for all losses by fire.” See also the title FIRE INSURANCE.

feoffer, donor, lessor, etc., doth 'except' somewhat out of that which he had granted before by his deed." ¹ The distinction between an exception and a reservation is well established. It may be said in general terms that by a reservation a grantor reserves some new thing to himself, not in existence before, out of the granted premises, such as rent or an easement; by an exception some part of the thing granted is taken out of the premises conveyed, as where a certain parcel of land or building, or certain rights and privileges belonging to the grantor or to others, are "excepted" out of the general words and description of the grant. ² Frequently, however, the words "exception and reservation," "excepting and reserving," are used synonymously, and the term "exception" will be held to mean reservation whenever it appears necessary to effectuate the intention of the parties to the instrument. The court will always determine from the nature and effect of the provision itself whether it is an exception or a reservation. ³

Proviso and Exception. — The difference between an exception and a proviso in a statute is that the first exempts absolutely from the operation of the enact-

1. *Darling v. Crowell*, 6 N. H. 423.

"In 1 Shep. Touch. 77, * * * it is said every *exception* must be of part of the thing granted, capable of being severed from it, and not an inseparable incident; and 'such that he that doth *except* may have, and doth properly belong to him.'" Goodrich v. Eastern R. Co., 37 N. H. 167. And see *Case v. Haight*, 3 Wend. (N. Y.) 635.

Parol Evidence. (See generally the title PAROL EVIDENCE.) — In *Loveland v. Clark*, 11 Colo. 271, it was said: "An *exception* in a deed is the taking of something out of the thing granted which would otherwise pass by the deed; and, in general terms, it is said that it ought to be stated and described as fully and accurately as if the grantee were the grantor of the thing *excepted*, and the grantor in the deed were made the grantee in the *exception*. Whatever may pass by words of grant may be *excepted* by like words, and the same consequences attach to such an exception as would attach had it been a grant." 3 Washb. Real Prop. 431, 435. Having reference to the character of an *exception* in a conveyance, the same general rule as to the admissibility of parol evidence must apply. Where the subject-matter of the *exception* is described in general terms, parol evidence is admissible to give it effect as if it had been a grant."

2. **Reservation and Exception Distinguished** — *England*. — *Doe v. Lock*, 2 Ad. & El. 724, 29 E. C. L. 199; *Cardigan v. Armitage*, 2 B. & C. 197, 206, 9 E. C. L. 60, Co. Litt. 47a.

United States. — *Bowman v. Wathen*, 2 McLean (U. S.) 391.

Alabama. — *Frank v. Myers*, 97 Ala. 440.

Connecticut. — *Bryan v. Bradley*, 16 Conn. 482.

Georgia. — *McAfee v. Arline*, 83 Ga. 646.

Illinois. — *Gould v. Howe*, 131 Ill. 490.

Kentucky. — *Brown v. Anderson*, 88 Ky. 579.

Maine. — *Morrison v. Skowhegan First Nat. Bank*, 88 Me. 155; *Gay v. Walker*, 36 Me. 54; *State v. Wilson*, 42 Me. 21; *Adams v. Morse*, 51 Me. 498; *Winthrop v. Fairbanks*, 41 Me. 311.

Minnesota. — *Winston v. Johnson*, 42 Minn. 398; *Elliot v. Small*, 35 Minn. 396.

Missouri. — *Swoddy v. Bolen*, 122 Mo. 486.

Nebraska. — *Eiseley v. Spooner*, 23 Neb. 470, 8 Am. St. Rep. 128.

New Hampshire. — *Cocheco Mfg. Co. v. Whittier*, 10 N. H. 310.

New York. — *Mitchell v. Thorne*, 134 N. Y. 540; *Cunningham v. Knight*, 1 Barb. (N. Y.) 407; *Gould v. Glass*, 19 Barb. (N. Y.) 192; *Blackman v. Striker*, 142 N. Y. 561; *Craig v. Wells*, 11 N. Y. 315, 321.

Pennsylvania. — *Whitaker v. Brown*, 46 Pa. St. 199.

Tennessee. — *Coal Creek Min. Co. v. Heck*, 15 Lea (Tenn.) 504.

Washington. — *Biles v. Tacoma, etc., R. Co.*, 5 Wash. 512, citing 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 455.

Wisconsin. — *Rich v. Zeilsdorff*, 22 Wis. 544; *Fischer v. Laack*, 76 Wis. 319.

In *Winston v. Johnson*, 42 Minn. 401, it was said: "Strictly speaking, a reservation is something merely created or reserved out of the thing granted, that was not in existence before — to illustrate, an easement; while an *exception* is of a part of the thing granted and of something *in esse* at the time. The intent of the parties to the Cleator deed, in which both words were used, must be gathered from an inspection of the entire instrument, having also in mind that a deed is to be construed most strongly against the grantor."

3. *Fischer v. Laack*, 76 Wis. 319, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 113; *Hurd v. Curtis*, 7 Met. (Mass.) 94; *Gale v. Coburn*, 18 Pick. (Mass.) 397, 400; *Stockwell v. Couillard*, 129 Mass. 231; *Winthrop v. Fairbanks*, 41 Me. 307; *Ring v. Walker*, 87 Me. 550; *Whitaker v. Brown*, 46 Pa. St. 199; *Biles v. Tacoma, etc., R. Co.*, 5 Wash. 509; *Bornes v. Burt*, 38 Conn. 542; *Winston v. Johnson*, 42 Minn. 401; *McAfee v. Arline*, 83 Ga. 646. See also the title COVENANTS, vol. 8, p. 68.

The words "reserving and *excepting*," in a deed of real estate, are not conclusive in determining whether an *exception* or a reservation is intended. The character and effect of the provision itself, in which such words occur, must determine what is intended. *Gould v. Howe*, 131 Ill. 490.

ment, whereas the latter only defeats the operation of the enactment conditionally.¹

Practice. — An exception, of itself, signifies an objection to or a protest against any ruling or decision of the court upon a question of law.²

In Equity Practice. — A formal written statement of objections to a pleading or master's report.³

EXCESSIVE — EXCESSIVELY. — See note 4.

1. **Proviso and Exception Distinguished.** (See also the title **STATUTES**, and see **PROVISO**; and the **ENCYC. OF PL. AND PR.**, title **STATUTES**.) — *Waffle v. Goble*, 53 Barb. (N. Y.) 522, where it is further said: "A proviso in a statute always implies a condition, unless modified by subsequent words." See also *U. S. v. Cook*, 17 Wall. (U. S.) 177.

In *Western Assur. Co. v. J. H. Mohlman Co.*, 83 Fed. Rep. 815, it was said: "The academic distinction between an *exception* and a proviso is thus stated in *Bouvier's Law Dictionary*: 'An *exception* exempts absolutely from the operation of an engagement or an enactment; a proviso defeats their operation conditionally. An *exception* takes out of an engagement or enactment something which would otherwise be part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse.'"

In *Simpson v. Ready*, 12 M. & W. 736, 740, *Alderson, B.*, said: "There is a manifest distinction between a proviso and an *exception*. If an *exception* occurs in the description of the offense in the statute, the *exception* must be negatived, or the party will not be brought within the description. But if the *exception* comes by way of proviso, and does not alter the offense, but merely states what persons are to take advantage of it, then the defense must be specially pleaded, or may be given in evidence under the general issue, according to circumstances."

Covenants. (See also the title **COVENANTS**, vol. 8, p. 55.) — The distinction between a proviso and an *exception* is that a proviso is properly the statement of something extrinsic of the subject-matter of the covenant which is to go in discharge of the covenant by way of defeasance, while an *exception* is the taking out of a covenant of some part of the subject-matter of it. *La Point v. Cady*, 2 Pin. (Wis.) 515.

2. **Practice.** (See also 8 **ENCYC. OF PL. AND PR.** 153.) — *Southern Pac. Co. v. Rauh*, 7 U. S. App. 88; *Quivey v. Gambert*, 32 Cal. 307; *St. John v. Kidd*, 26 Cal. 267; *State v. Leach*, 71 Iowa 54; *Emporia v. Haussler*, 6 Kan. App. 747; *Poston v. Smith*, 8 Bush (Ky.) 592; *Loving v. Warren County*, 14 Bush (Ky.) 320; *Mills v. Miller*, 2 Neb. 299; *Norton v. Livingston*, 14 S. Car. 178.

In *Peck v. Osteen*, 37 Fla. 427, it was said: "*Exceptions* are allegations in writing stating the particular point or matters with respect to which the complainant considers an answer insufficient, scandalous, or impertinent."

Objected and Excepted. — In *Elsner v. Supreme Lodge*, etc., 98 Mo. 640, it was held that a recital in the record that a party "objected" to an instruction, instead of *excepted*, was sufficient. The court said: "Plaintiff's counsel, to destroy the force of this error, contend that

no *exception* to it was saved. On this point the recital in the bill of *exceptions* is this: 'To which action of the court, in giving said instruction, defendant then and there objected.' Here the objection was made immediately after the ruling, and evidently for the purpose of review. Although the word *excepted*, in that connection, would more fully meet the requirements of technical nicety, we are not prepared to say that it is essential. The law dictionaries of *Bouvier* and *Burrill* mention an 'objection' made to the decision of a judge in the course of a trial as one of the definitions of the word *exception*, and in *Webster's Dictionary* the latter word is given as a synonym for 'objection.'"

3. **Burr. Law Dict.**

Equity Practice. (See also the title **ANSWERS IN EQUITY PLEADING**, 1 **ENCYC. OF PL. AND PR.** 895.) — In *Richardson v. Donehoo*, 16 W. Va. 703, it was said: "*Exceptions* are allegations in writing, stating the particular points or matters in respect to which complainant considers the answer insufficient as a response to the bill, or scandalous, or impertinent. The object of *exceptions* is to direct the attention of the court to the points excepted to, and to take its opinion thereon, before further proceedings are had, to the end that, if the answer is insufficient, a better answer may be compelled, or if scandalous or impertinent, that the scandalous or impertinent matter may be expunged." See also *Arnold v. Slaughter*, 36 W. Va. 596.

4. **Excessively Burdened.** — In *Weybridge v. Addison*, 57 Vt. 569, in construing an act regulating the apportionment of expenses in repairing a highway and bridge among the towns to be benefited, the court said: "When is a town *excessively* burdened, and what shall be considered in determining it? The term '*excessively* burdened' is a relative one, covering a consideration of the complainant town's burdens in connection with the burdens of the other towns benefited by such highway. A town is not *excessively* burdened by being required to build and maintain a highway within its limits, within the spirit and intent of the statute, unless its municipal burdens and taxation for necessary purposes would be increased thereby beyond its due measure and proportion, in comparison with the municipal burdens and taxation for necessary purposes of such other towns as are deemed to be especially benefited by such highway. * * * In determining, then, whether the complainant town is or would be *excessively* burdened by being required to build and maintain a highway or bridge within its limits, and whether other towns deemed to be especially benefited thereby ought to bear any portion of the expense of the same, the ability of the towns so deemed to be benefited thereby to

EXCESSIVE BAIL. — See the title BAIL AND RECOGNIZANCE, vol. 3, p. 680.

EXCESSIVE FINES AND PENALTIES. — See the title FINES AND PENALTIES.

EXCESSIVE TAXATION. — See the titles TAXATION; TAXATION (CORPORATE).

EXCHANGE. (See also the titles EXCHANGE AND RE-EXCHANGE, *post*; EXCHANGE OF PROPERTY, *post*; STOCK AND PRODUCE EXCHANGE; STOCK BROKERS.) — See note 1.

bear any portion of such expense, as well as the ability of the complainant town, must be considered together with the benefits derived therefrom."

A town is not entitled to state assistance under such an act where the commissioners fail to find and report that the town, independent of its indebtedness voluntarily incurred in aid of a railroad, would be "*excessively* burdened" by being required to build the bridge. *Sheldon v. State*, 59 Vt. 36, wherein the court said: "It is indeed somewhat difficult to see why any indebtedness, except when incurred to meet an unusual and extraordinary emergency, should be taken into account on this point, because the burdens imposed by statute upon towns for the ordinary and necessary purposes are common, and many, probably most, towns pay as they go. Why should others that do not, but borrow money and run in debt, have that indebtedness considered on the question of *excessive* burden?" See generally the titles HIGHWAYS; TOWNS AND TOWNSHIPS.

Excessive Weight. — In construing a statute allowing special damages to be recovered by one who has undertaken to repair a highway, from any one by whose order "*excessive weight*" has passed along the same, or "*extraordinary traffic*" has been conducted there-

on, having regard to the average expense of repairing highways in the neighborhood, it was held that "*excessive weight*" and "*extraordinary traffic*" mean *excessive* and *extraordinary* with reference to the road itself and the ordinary user of the road, and not with reference to the weight which by the statute may lawfully be imposed upon it. *Aveland v. Lucas*, 5 C. P. Div. 211, *affirmed* 49 L. J. R. Q. B. 643. And see *Wallington v. Hoskins*, 6 Q. B. Div. 206; *Reg. v. Ellis*, 8 Q. B. Div. 466.

1. Exchangeable Value. (See also the title EMINENT DOMAIN, vol. 10, p. 1043; and see VALUE.) — In *Little Rock Junction R. Co. v. Woodruff*, 49 Ark. 381, it was said: "A frequent source of confusion in cases of condemnation is that property sometimes seems to have a value other than, and different from, its market value. Bouvier, in his definition of 'value,' says: 'This term has two different meanings. It sometimes expresses the utility of an object, and sometimes the power of purchasing other goods with it. The first may be called the value in use; the latter, value in *exchange*.' Webster recognizes a difference between intrinsic and *exchangeable* value. Webster's Dict., 'Value.'"

Exchanged in the Sense of Substituted. — *Merriwether v. Saline County*, 5 Dill. (U. S.) 273.

Volume XI.

EXCHANGE AND RE-EXCHANGE.

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For matters of PROCEDURE, see the title NEGOTIABLE INSTRUMENTS in the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 14, p. 347.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 65; *INTEREST; PAYMENT; USURY.*

I. DEFINITIONS — 1. Exchange. — Exchange is a negotiation by which one person transfers to another funds which he has in a certain place, either at a price agreed upon or which is fixed by commercial usage.¹

2. Rate of Exchange. — By the rate or course of exchange between two places is meant that amount of premium which it will require to replace a certain sum of money in the one place with that of the other; or which the right to a certain sum in one country will produce in another country. Or, putting it briefly, it is the difference in value of the same amount of money in different countries.² There is no rule of law fixing the rate which may be lawfully charged for exchange. Though the price is influenced by the cost of the transportation of specie from one place to another, yet it is also materially affected by the state of the trade, by the urgency of the demand for remittances, and by the quantity brought into the market for sale. And sometimes material changes take place in a single day, although no alteration has taken place in the expense of transporting specie.³

1. Exchange Defined. — 1 Bouv. L. Dict. (Rawle's Rev.) 713.

Computation of Exchange between England and the United States. — By the uniform course of business among merchants and bankers the value of exchange between England and the United States at any given rate is ascertained by estimating the par value of exchange at four and four hundred and forty-four one-thousandths dollars for the pound sterling and multiplying that sum by the given rate. This

is the method to ascertain the amount to be paid for the pound sterling whatever the rate of exchange on purchasing a bill or taking it up when protested. *De Rham v. Grove*, 18 Abb. Pr. (N. Y. Supreme Ct.) 43. See also *Otis v. Coffin*, 7 Gray (Mass.) 511.

2. Rate of Exchange. — 2 Dan. Neg. Instr., § 1440a. See also *Story on Bills*, § 30.

3. Rule as to Rate of Exchange. — *Andrews v. Pond*, 13 Pet. (U. S.) 65; *Balch v. Colman*, 2 McLean (U. S.) 85. See also *M'Lean v.*

3. Par of Exchange. — The par of exchange is the value of the money of one country in that of another, and is either real or nominal. The nominal par is that which has been fixed by law or usage, and for the sake of uniformity is not altered, the rate of exchange alone fluctuating. The real par is that based on the weight and fineness of the coins of the two countries, and fluctuates with changes in the coinage.¹

4. Re-exchange. — Re-exchange is the expense incurred by a bill's being dishonored in a foreign country in which it is made payable, and returned to the country in which it was made or indorsed, and there taken up.²

II. UPON WHAT RE-EXCHANGE RECOVERABLE — 1. Bills of Exchange — a. INLAND BILLS. — By the law merchant no re-exchange is allowed upon dishonored inland bills,³ but by statute in some jurisdictions damages may be recovered when such bills are dishonored.⁴

b. FOREIGN BILLS. — Re-exchange is, of course, recoverable upon a dishonored foreign bill,⁵ and it is well settled that bills drawn in one state of the Union and payable in another are foreign bills.⁶

2. Promissory Notes and Foreign Debts. — It seems that as a general rule the

Lafayette Bank, 3 McLean (U. S.) 587; Warder v. Arell, 2 Wash. (Va.) 282, 1 Am. Dec. 488.

1. Par of Exchange. — 1 Bouv. L. Dict. (Rawle's Rev.) 713. See also 2 Dan. on Neg. Instr., § 1442.

2. Re-exchange Defined. — 2 Bouv. L. Dict. 857; Chitty on Bills 684; Bangor Bank v. Hook, 5 Me. 174.

Other Definitions. — "Re-exchange," says Mr. Daniel, "may be defined to be the amount for which a bill may be purchased in the country where the original bill is payable, drawn upon the drawer in the country where he resides, which will give the holder a sum exactly equal to the amount of the original bill at the time when it ought to be paid, or when he is able to draw the re-exchange bill, together with expenses and interest; for that is precisely the sum which the holder is entitled to receive, and which will indemnify him for its nonpayment." 2 Dan. on Neg. Instr., § 1445.

In *Willans v. Ayers*, L. R. 3 App. 133, Lord Colville defines re-exchange in this wise: "If an ordinary bill of exchange is drawn in one country upon persons in another and distant country, the holder who has contracted for the transfer of funds from the one country to the other almost necessarily sustains damage by the dishonor of the bill. He must take other means to put himself in funds in the country where the bill was payable. Hence the right to 're-exchange,' which is the measure of those damages."

Signification of "Re-exchange." — This term is used to signify, (1) the amount of a re-draft, (2) the loss on a particular transaction occasioned by the exchange being adverse, (3) the course of exchange itself, or (4) the right to the sum which would be secured by a re-draft. *Chalmers Bills of Ex.* (5th ed.) 194.

3. No Re-exchange upon Inland Bills. — *Bangor Bank v. Hook*, 5 Me. 175; *Buck v. Little*, 24 Miss. 463; *Oliver Lee & Co.'s Bank v. Walbridge*, 19 N. Y. 137.

For the definition of an inland bill see the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 78.

4. Damages by Statute. — *Evans v. Gee*, 11 Pet. (U. S.) 80 (upon *Alabama* statute), *Ham-*

rick v. Farmers' Bank, 8 Port. (Ala.) 539; *Bangor Bank v. Hook*, 5 Me. 175; *Buck v. Little*, 24 Miss. 463.

Protest Necessary. — Under the statutes of *Alabama*, *Mississippi*, and *Kentucky*, giving damages on dishonored inland bills, protest is necessary to entitle the holder of such a bill to recover these damages, though no protest is necessary to fix the liability of the drawer or indorser for the principal of the bill and interest. *Bailey v. Dozier*, 6 How. (U. S.) 23 (upon Miss. statute); *Wanzer v. Tupper*, 8 How. (U. S.) 234 (upon Miss. statute); *Jordan v. Bell*, 8 Port. (Ala.) 53; *Murry v. Clayborn*, 2 Bibb (Ky.) 300; *Buck v. Little*, 24 Miss. 463. And see the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 379.

5. Re-exchange upon Foreign Bills. — *Grimshaw v. Bender*, 6 Mass. 157; *Barclay v. Minchin*, 6 Mass. 162; *New Orleans Bank v. Stagg*, 1 Handy (Ohio) 382. See *supra*, this title, *Definitions*; and *infra*, this title, *Liability of Parties to a Bill of Exchange*.

Bill Must Be Used for the Actual Purpose of Transmitting Money. — Several bills of exchange, drawn by P. L. & Co. of London, on P. L. & Co. of Australia, a branch of the London firm, were sent by the holders to the latter country, not with any design of utilizing the money in Australia, but that it might be remitted back to themselves in London. It was held, upon the dishonor of the bills, that re-exchange was not recoverable. *Willans v. Ayers*, L. R. 3 App. 133, 24 Moak 82.

6. U. S. Bank v. Daniel, 12 Pet. (U. S.) 32; *Wood v. Farmers', etc., Bank*, 7 T. B. Mon. (Ky.) 281, *distinguishing* *Clay v. Hopkins*, 3 A. K. Marsh. (Ky.) 485. And see the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, pp. 78, 379, 388.

In Ohio it has been held that under the statute of that state protest is necessary to entitle the holder of a dishonored bill, which was drawn in one state of the Union and payable in another, to recover statutory damages, though no protest is necessary to fix the liability of the drawer or indorser of such a bill for the principal thereof and interest. *Case v. Heffner*, 10 Ohio 180; *McMurchey v. Robinson*, 10 Ohio 496; *Estep v. Cecil*, 6 Ohio St. 537.

holder of a dishonored promissory note is not by the law merchant entitled to re-exchange.¹ If, however, a promissory note made payable in a different country from that in which it was executed, expressly provides that it is payable with exchange, the difference of exchange between the two countries may be recovered by the holder.² It has been decided that where a promissory note is made expressly payable at a particular place, and is dishonored there, so that the holder is compelled to seek payment elsewhere, he is entitled to the difference of exchange, if there is any.³ And according to the weight of authority, where money due, by promissory note or otherwise, is properly payable in one state or country, and the creditor is under the necessity of resorting to another state or country to collect it, he is entitled to have the debt due first ascertained at the par of exchange between the two states or countries and then have the rate of exchange added to or subtracted from that amount, as the case may require, in order to replace the money in the state or country where it had to be paid.⁴ But in some states it has been held in

1. No Re-exchange upon a Promissory Note. — 2 Dan. on Negotiable Instr., § 1453. See also *Willans v. Ayers*, L. R. 3 App. 133; *Weed v. Miller*, 1 McLean (U. S.) 423.

Damage upon an Indorsed Note. — A firm in Georgia made their promissory note for two thousand dollars payable in New York city, which was transferred by indorsement to the Central Bank of Georgia. On presentation at maturity, the note was dishonored and returned protested. The bank then agreed to accept another note from the plaintiff, for the principal, interest, and one hundred dollars damages for the difference in exchange, and upon this note an action was brought. The plaintiff contended that no difference in exchange could be allowed upon a promissory note, but the court held that the charge was properly made. *Warner, J.*, delivering the opinion, said: "The Central Bank wanted funds in the city of New York, and purchased the note in question, payable there; and it was returned protested for nonpayment. If it had been a bill of exchange instead of a promissory note, it is admitted that the holder would have been entitled to charge the indorser, under the statute, the five per cent. damages, which would have made the one hundred dollars included in the note alleged to be usurious. What is the difference in principle, so far as the rights of the defendants in error are concerned, between a purchase of a bill of exchange payable in New York, for two thousand dollars, and a purchase of an indorsed promissory note * * * for the same amount? The presumption is that the bank needed that amount of funds in the city of New York, and had a right to expect that it would be paid there, which not having been done either by the makers or the indorsers of the paper, the same was returned protested, and the bank was damaged, just to the same extent as contemplated by the statute in case a bill of exchange had been so returned protested for nonpayment." *Howard v. Central Bank*, 3 Ga. 375.

In *Missouri* under the statute of that state, the indorsee of a negotiable promissory note, protested for nonpayment, is entitled to damages as upon an inland bill of exchange. *Missouri Bank v. Wright*, 10 Mo. 719; *Clark v. Schneider*, 17 Mo. 295.

2. Express Provision for Re-exchange. — *Pollard v. Herries*, 3 B. & P. 335; *Grutacap v. Woul-luise*, 2 McLean (U. S.) 581. See also *Leggett v. Jones*, 10 Wis. 34.

As to whether a note drawn in one country and payable in another with exchange is negotiable, see the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 96.

Rate at Maturity. — When a note is given in Indiana payable in New York with interest and the rate of exchange, the exchange should be calculated at the rate current at the maturity of the note, and not at the rate at the time of the trial. *Price v. Teal*, 4 McLean (U. S.) 201.

3. Wood v. Kelso, 27 Pa. St. 241. Compare *Chumassero v. Gilbert*, 24 Ill. 651.

4. Rate of Exchange Included in Recovery. — *Delegat v. Naylor*, 7 Bing. 460, 20 E. C. L. 199; *Scott v. Bevan*, 2 B. & Ad. 78, 22 E. C. L. 28; *Grant v. Healey*, 3 Sumn. (U. S.) 523; *Smith v. Shaw*, 2 Wash. (U. S.) 167; *Cropper v. Nelson*, 3 Wash. (U. S.) 125; *Mygatt v. Green Bay*, 1 Biss. (U. S.) 292; *Marburg v. Marburg*, 26 Md. 8, 90 Am. Dec. 84; *Lee v. Wilcocks*, 5 S. & R. (Pa.) 48; *Pfeil v. Higby*, 21 Wis. 250; *Hawes v. Woolcock*, 26 Wis. 629. See also *Cash v. Kennion*, 11 Ves. Jr. 314; *Elkins v. East India Co.*, 1 P. Wms. 395; *Weed v. Miller*, 1 McLean (U. S.) 423; *Woodhull v. Wagner*, 1 Baldw. (U. S.) 296; *Sheehan v. Dalrymple*, 19 Mich. 239; *Wood v. Kelso*, 27 Pa. St. 241. *Quare* in *Reiser v. Parker*, 1 Lowell (U. S.) 262. Compare *Cockerell v. Barber*, 16 Ves. Jr. 461, commented upon in *Story on Conflict of Laws*, § 312.

Rate at Date of Judgment. — Where a promissory note was made payable in Canadian currency, which, as compared with money of the United States, was at the time the note was made at a premium of thirty-seven and one-half per cent., and at the time the action was brought had fallen to nineteen per cent. premium, it was held that the latter rate only was recoverable. *Paine, J.*, in delivering the opinion of the court, said: "In view of the uncertainties and fluctuations in the rate, upon grounds of policy as well as for its tendency to do as complete justice between the parties as is possible, we have come to the conclusion that the true rule in such cases is to give judgment for such an amount as will, at the time

a number of cases that the amount of such debts is to be ascertained according to par of exchange without any allowance for the difference in the rate of exchange between the country where the suit is brought and the country where the debt is payable.¹ In these jurisdictions, however, it seems from the later cases that when there is both a real and nominal par the amount of recovery should be based upon the real and not the nominal par.²

Debt Payable in Foreign Currency. — When the debt, which is the foundation of an action, is payable in the currency of a country differing in value from the currency of the country where the action is brought, the judgment should be for the value of the foreign currency in the currency of the country in which the action was maintained.³

III. LIABILITY OF PARTIES TO A BILL OF EXCHANGE — 1. **Drawer and Indorser.** — The holder of a foreign bill, as soon as it is dishonored, has a right by the law merchant to draw, at the place where it ought to have been paid, a new bill upon the original drawer or indorser in the country where the first bill originated, and the re-draft may be for such an amount as will afford a perfect

of the judgment, purchase the amount due on the note in the funds or currency in which it is payable. To accomplish this, of course, the premium should be estimated at the rate prevailing at the time of trial. By this rule the holder would neither gain nor lose by the fluctuations in the rate, but whenever he obtained a judgment would obtain it for a sum which would then procure him the exact amount to which he was entitled in the proper currency. This does complete justice between the parties, and seems, therefore, to indicate the true extent to which the difference of exchange in such cases should affect the amount of recovery." *Hawes v. Woolcock*, 26 Wis. 629.

Municipal Bonds and Coupons. — When municipal bonds and coupons payable to bearer are made payable in a state or country other than that in which they were executed, and the holder thereof has to bring his action to recover thereon in the place of the execution, he is entitled to the difference in exchange between the place of suit and the designated place of payment. *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 176. See also *Koshkonong v. Burton*, 104 U. S. 668; *Jeffersonville v. Patterson*, 26 Ind. 15. Unless such bonds and coupons were made payable outside of the state in which they were executed without due authority of law. *Mygatt v. Green Bay*, 1 Biss. (U. S.) 292. See the title **MUNICIPAL SECURITIES; RAILROAD SECURITIES.**

No Exchange When Debt Paid at Proper Place. — Where a bottomry bond was given, payable within five days after the arrival of the vessel at Boston, and a bill of exchange was drawn for the amount loaned, at the same time, payable in London, and the agreement was, that if the bill was paid, the bottomry bond should be void, at the election of the borrower, and the borrower does not elect to pay the bill, the lender cannot, in a suit on the bottomry bond, recover the exchange between Boston and London, but must receive the amount of his bottomry bond. *The Schooner Zephyr*, 3 Mason (U. S.) 341.

1. Rate Not Included. — *Adams v. Cordis*, 8 Pick. (Mass.) 269; *Alcock v. Hopkins*, 6 Cush. (Mass.) 484; *Hussey v. Farlow*, 9 Allen (Mass.) 263; *Com. v. Haupt*, 10 Allen (Mass.) 38;

Burgess v. Alliance Ins. Co., 10 Allen (Mass.) 221; *Bush v. Baldrey*, 11 Allen (Mass.) 369; *Martin v. Franklin*, 4 Johns. (N. Y.) 124; *Ladd v. Arkell*, 40 N. Y. Super. Ct. 150, *disapproving* *Guiteman v. Davis*, 3 Daly (N. Y.) 120; *Schermerhorn v. American L. Ins., etc., Co.*, 14 Barb. (N. Y.) 131. See also *Chumaseo v. Gilbert*, 24 Ill. 651; *Oliver Lee & Co.'s Bank v. Walbridge*, 19 N. Y. 134; *Wilson v. Morgan*, 4 Robt. (N. Y.) 73; *Scofield v. Day*, 20 Johns. (N. Y.) 102; *Swanson v. Cooke*, 45 Barb. (N. Y.) 576; *Rice v. Ontario Steamboat Co.*, 56 Barb. (N. Y.) 388. Compare *Robinson v. Hall*, 28 How. Pr. (N. Y. Sixth Dist. Ct.) 342.

Where No Tribunals Exist for Foreigners. — The plaintiff agreed to transport the family of the defendant from Boston to China for the sum of one thousand eight hundred dollars and interest; which sum was payable in China, and there demanded, but not paid. It was claimed, there being no tribunals in China in which foreigners may sue each other, that the defendant was indebted to the plaintiff, besides the original sum with interest, an additional sum for the rate of exchange between this country and China. But the court, *following* *Adams v. Cordis*, 8 Pick. (Mass.) 269, and *Alcock v. Hopkins*, 6 Cush. (Mass.) 484, held it to be not recoverable. *Lodge v. Spooner*, 8 Gray (Mass.) 166.

Breach of Contract by Foreign Agent — Measure of Damages. — In *Nickerson v. Soesman*, 98 Mass. 364, which was an action against a foreign agent, not for debt, but for damages for breach of contract, *Bigelow, C. J.*, delivering the opinion, said: "The only just rule is, that in such cases the party who has suffered a loss or injury through the fault of another shall be allowed such sum in the currency of the place where a suit is brought, as most nearly approximates to that which he would be entitled to recover in the country where the injury or loss happened and the damage was sustained."

2. Based upon Real Par. — *Hussey v. Farlow*, 9 Allen (Mass.) 263; *Bush v. Baldrey*, 11 Allen (Mass.) 369; *Swanson v. Cooke*, 45 Barb. (N. Y.) 574. See also *Reiser v. Parker*, 1 Lowell (U. S.) 262.

3. Pollock v. Colglazure, Sneed (Ky.) 2.

indemnity. If the rate of exchange is against the place where the first bill was drawn, the re-draft, drawn at the place where it was payable, will, of course, be at a discount, and the exchange must, therefore, be included in order that the re-draft may produce by immediate negotiation at the current rate the sum required to make the indemnity complete.¹ It is not essential that the holder of the protested bill should actually re-draw upon the parties residing in the country from which it came. He has a right to do so, including the re-exchange, and this determines the measure of damages due to him.²

Where Drawer and Drawee the Same Person. — Although there is some conflict of authority as to whether a bill drawn by a person upon himself is a bill of exchange or a promissory note, it seems that the holder of such a bill, if it is dishonored, can recover re-exchange.³

Limitation of Drawer's Liability. — It has been said by an eminent authority on the subject that the drawer of a bill, in order to avoid litigation respecting the amount of re-exchange and expenses in the event of the bill's being returned protested, may anticipate and define what shall be the extent of the claim upon him by providing in the bill that in case of nonacceptance or nonpayment re-exchange shall not exceed a specified sum.⁴

Liability when Bill Drawn by Agent. — When one person, acting as the agent of another, draws or indorses a bill of exchange, the principal becomes responsible to the agent to protect him, as the drawer or indorser of the bill for him, from all losses by reason of so drawing or indorsing, not proceeding

1. Liability of Drawer and Indorser. — *Oliver Lee & Co.'s Bank v. Walbridge*, 19 N. Y. 134, *per* Comstock, J. See also *Chalmers on Bills of Exchange*, § 57; *De Tastet v. Baring*, 11 East 265; *Mellish v. Simeon*, 2 H. Bl. 378; *Suse v. Pompe*, 8 C. B. N. S. 538, 98 E. C. L. 538; *Bangor Bank v. Hook*, 5 Me. 174.

In an action against the indorser and payee of an inland bill of exchange, duly protested for nonpayment, the mere fact that the bill was addressed to and accepted by the defendant does not relieve him from the payment of damages. *McKenzie v. Clanton*, 33 Ala. 528.

Government the Drawer. — It has been held that a bill of exchange drawn by one government on another cannot be governed by the law merchant, and, therefore, is not subject to protest or consequential damages. *U. S. v. U. S. Bank*, 5 How. (U. S.) 382, *reversing* 2 How. (U. S.) 711.

Bill Remitted in Payment of Antecedent Debt. — The person to whom a bill is remitted to pay an antecedent debt cannot recover against the remitted re-exchange or damages in lieu thereof, as the creditor really stands on the footing of an agent only of the debtor. *Kenworthy v. Hopkins*, 1 Johns. Cas. (N. Y.) 107; *Thompson v. Robertson*, 4 Johns. (N. Y.) 27; *Chapman v. Steinmetz*, 1 Dall. (Pa.) 261; *Keppel v. Carr*, 4 Dall. (Pa.) 155. See also *Watts v. Willing*, 2 Dall. (Pa.) 100. But the remitter, who is exposed to all the hazard and inconvenience of the remittance, is entitled to recover re-exchange or damages from a prior indorser or the drawer. *Keppel v. Carr*, 4 Dall. (Pa.) 155.

Bill as Additional Security. — Where a bill was drawn as additional security for a bottomry bond previously given by the drawer, the captain of a vessel of which the drawee was owner, it was held that the drawer was not liable to damages on the dishonor of the bill. *Hazelhurst v. Kean*, 4 Yeates (Pa.) 19.

Drawer Not Liable to Bank Acting as Agent. — Where a bank receives a bill of exchange from the drawer for collection, it acts as the agent of the drawer, and is entitled to no damages if the bill be protested; it can only claim expenses. *Runyon v. Latham*, 5 Ired. L. (27 N. Car.) 551.

A national bank in New Orleans, which had a running account with a banking firm in London, was in the habit of drawing upon the latter from time to time as occasion required, and of remitting to cover these drafts. The bank became the owner of certain bills drawn on Paris, amounting in United States currency to ninety-three thousand one hundred and twenty-one dollars, which bills the bank sent to its correspondents in London for credit. Before the bills became due, the bank, drawers, and drawees all failed, and the bank was found to be indebted to its correspondents in the sum of eighty-nine thousand seven hundred and ninety-eight dollars and thirty cents. In an action by the latter against the bank's receiver to recover damages upon these bills, it was held that the protested bills were the property of the bank, and that the law did not require the latter to pay damages, when the payment, if made, must be placed to its own credit on the books of its correspondents, and that the latter were entitled to no damages. *Hambro v. Casey*, 110 U. S. 216.

2. Re-draft Unnecessary. — *Oliver Lee & Co.'s Bank v. Walbridge*, 19 N. Y. 134. To the same effect are 3 Kent Com. 115; *Suse v. Pompe*, 8 C. B. N. S. 562, 98 E. C. L. 562; *Scudder v. Weeks*, 1 Hawaiian 207.

3. Drawer and Drawee the Same Person. — *Randolph v. Parish*, 9 Port. (Ala.) 76. See also *Willans v. Ayers*, L. R. 3 App. 133. But see *M'Candlish v. Cruiger*, 2 Bay (S. Car.) 377. And see the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 119.

4. Chitty on Bills (13th Am. ed.) 165.

from the negligence or default of such agent. To the parties who take the bill the principal becomes responsible, as the drawer or indorser, if the drawee should fail to accept or refuse to pay it, not only for the face of the bill but for the damages arising from his nonacceptance or nonpayment, and if, upon the failure or refusal of the drawee to accept or pay the bill, the agent pays the damages occasioned by its dishonor, he is entitled to recover them from his principal.¹

Indorser's Rights as Against Drawer and Prior Indorsers. — The indorser of a bill of exchange occupies the position of a new drawer, and the holder is therefore entitled to re-draw upon any indorser as well as upon the drawer for the re-exchange current between the country in which the bill was drawn and that in which it was indorsed. The indorser, upon paying the bill, becomes immediately entitled to draw upon any antecedent indorser for the entire amount which he has been compelled to pay, including the re-exchange between the place of dishonor and of indorsement, and in addition the re-exchange between the place of his payment and the place upon which his re-draft is drawn.² The indorsee, as against prior parties, can, however, avail himself of but one satisfaction by re-exchange, and is not entitled to any accumulation of re-exchange against several distinct indorsers or against both the drawer and an indorser.³

Law Determining Liability. — The drawer of a foreign bill is liable according to the laws of the country where the bill was drawn and not of the country upon which the bill was drawn.⁴ The indorser of such a bill is liable according to the laws of the country where he indorsed it.⁵

2. Acceptor. — According to many authorities, the acceptor of a bill of exchange is not generally liable for re-exchange or statutory damages in lieu thereof in the event of its dishonor.⁶ It has been held, however, that if the drawee of a bill has promised to accept and pay it upon a sufficient consideration, he is bound to indemnify the drawer against all losses, including re-exchange, which have been the natural and necessary consequence of the refusal of the drawee to perform his contract with the drawer.⁷ And in *Eng-*

1. **Bill Drawn by Agent.** — *Greene v. Goddard*, 9 Met. (Mass.) 212. To the same effect are *Riggs v. Lindsay*, 7 Cranch (U. S.) 501; *Ramsay v. Gardner*, 11 Johns. (N. Y.) 439.

2. *2 Daniel on Negotiable Instruments*, § 1448.

Indorser Must Be Liable. — The indorser of a bill of exchange is not entitled to recover of the drawer the damages incurred by the non-acceptance of the bill, unless he has been obliged to pay them or is liable to pay them. *Kingston v. Wilson*, 4 Wash. (U. S.) 310.

3. *Story on Bills of Exchange*, § 403.

4. **Lex Loci Contractus Governs.** — *Allen v. Kemble*, 13 Jur. 287. To the same effect are *Ex p. Heidelback*, 2 Lowell (U. S.) 526; *Crawford v. Branch Bank*, 6 Ala. 12, 41 Am. Dec. 33; *Kuenzi v. Elvers*, 14 La. Ann. 392, 74 Am. Dec. 434; *Price v. Page*, 24 Mo. 65; *Page v. Page*, 24 Mo. 595; *Case v. Heffner*, 10 Ohio 180; *Hazelhurst v. Kean*, 4 Yeates (Pa.) 20; *Lennig v. Ralston*, 23 Pa. St. 137; *Winthrop v. Pepon*, 1 Bay (S. Car.) 468; *Bailey v. Heald*, 17 Tex. 102, *overruling Able v. McMurray*, 10 Tex. 350. See also *Gibbs v. Fremont*, 20 Eng. L. & Eq. 555; *De Rham v. Grove*, 18 Abb. Pr. (N. Y. Supreme Ct.) 43. And see the title PRIVATE INTERNATIONAL LAW.

5. *Potter v. Brown*, 5 East 124; *Rothschild v. Currie*, 1 Q. B. 43, 41 E. C. L. 428; *Gibbs v. Fremont*, 9 Exch. 25; *Lenox v. Wilson*, 1

Cranch (C. C.) 170; *Slacum v. Pomery*, 6 Cranch (U. S.) 221; *Depau v. Humphreys*, 8 Martin N. S. (La.) 1; *Powers v. Lynch*, 3 Mass. 77; *Prentiss v. Savage*, 13 Mass. 20; *Hicks v. Brown*, 12 Johns. (N. Y.) 143; *Aymar v. Sheldon*, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137; *Case v. Heffner*, 10 Ohio 180. See also *Bailey v. Heald*, 17 Tex. 102. Compare *Schermerhorn v. Pelham*, Conf. Rep. (3 N. Car.) 452. And see the title PRIVATE INTERNATIONAL LAW.

6. **Acceptor Not Liable.** — *Chitty on Bills* 686; *Story on Bills of Exchange*, § 398; 3 Kent's Com. 116; *Napier v. Schneider*, 12 East 420; *Dawson v. Morgan*, 9 B. & C. 618, 17 E. C. L. 457; *Woolsey v. Crawford*, 2 Campb. 445; *Hanrick v. Farmers' Bank*, 8 Port. (Ala.) 539; *Dickinson v. Branch Bank*, 12 Ala. 54; *Manning v. Kohn*, 44 Ala. 343; *Trammell v. Hudson*, 56 Ala. 235; *Bowen v. Stoddard*, 10 Met. (Mass.) 379 [citing *Bain v. Ackworth*, 1 Treadw. (S. Car.) 107]; *Fiske v. Foster*, 10 Met. (Mass.) 597; *Van Arsdale v. Boardman*, 3 How. Pr. (N. Y. Supreme Ct.) 61; *Watt v. Riddle*, 8 Watts (Pa.) 545.

In *Missouri* it has been held that under the statute of that state the acceptor is liable to the drawer for damages even though the bill has not been protested. *Phillips v. Evans*, 64 Mo. 17.

7. *Russell v. Wiggin*, 2 Story (U. S.) 214, *per* Story, J. To the same effect are *City Bank v. Girard Bank*, 10 La. 567; *Bowen v. Stoddard*,

land it is now well settled that where a bill is dishonored the drawer is entitled to recover from the acceptor, not only the amount of the bill and interest, but also all such reasonable expenses as may have been caused by the dishonor, including the expenses of re-exchange.¹

IV. AMOUNT OF HOLDER'S RECOVERY—1. By Law Merchant.—According to the law merchant, uncontrolled by local usage or statutory regulation, when a foreign bill of exchange is dishonored the holder is entitled to recover, in addition to the face of the bill and interest, the actual price of re-exchange together with the expenses consequent upon the dishonor of the bill.² The

10 Met. (Mass.) 379. See also *Riggs v. Lind-sav*, 7 Cranch (U. S.) 500.

Bill Paid Supra Protest.—Although the drawee of a bill has promised to accept and pay it upon a sufficient consideration, if, upon his refusal to accept it, it is paid *supra protest* for the honor of the drawer by a third person, the drawer can recover no damages except the costs of the protest for nonacceptance. *City Bank v. Girard Bank*, 10 La. 562.

Daniel's View.—"If the drawee authorizes the bill to be drawn (which is a virtual acceptance as to the drawer who draws the bill, or the holder who takes it, on the faith of the authority), or if there is an acceptance when the bill is presented for acceptance, the acceptor is bound for all damages, including re-exchange, which may result to the drawer immediately from the dishonor of the bill. If the holder sues the drawer and recovers re-exchange, the acceptor should reimburse him, as his own default occasioned the liability. If the holder sues drawer and acceptor together, the acceptor would likewise be liable, because the drawer on paying the amount would immediately have a claim over against him. And even if the acceptor was sued alone, he should be held bound for the re-exchange." 2 Dan. Neg. Instr., § 1450.

1. English Doctrine—Acceptor Liable to Drawer.—*In re General South American Co.*, 7 Ch. Div. 637, *per Malins*. To the same effect are *Francis v. Rucker*, Amb. 672; *In re Gillespie*, 16 Q. B. Div. 702, *affirmed* in 18 Q. B. Div. 286; *Walker v. Hamilton*, 1 De G. F. & J. 602, *explaining Woolsey v. Crawford*, 2 Campb. 445; *Napier v. Schneider*, 12 East 420. See also *Chalmers on Bills of Exchange*, § 57.

Liable for Notarial and Telegraphic Expenses.—*In Prehn v. Royal Bank of Liverpool*, L. R. 5 Exch. 92, the defendants, who were bankers in Liverpool, undertook to accept the drafts of the plaintiffs who were merchants at Alexandria and Liverpool, the plaintiffs undertaking to put the defendants in funds to meet the bills at maturity, and the defendants receiving one-half per cent. for the accommodation. Bills were accordingly accepted by the defendants, and the plaintiffs duly provided the defendants with funds exceeding the amount of the acceptances. Before the bills became due the defendants' bank had stopped payment, and they gave notice to the plaintiffs that they would be unable to meet the bill. The plaintiffs arranged with another house in Liverpool to take up the bills, paying two and one-half per cent. commission, and they were also obliged to pay the bankers the expense of protesting the bills at Liverpool and Alexandria; and the defendants also incurred expenses in telegraphic communication to Liverpool and

Alexandria. It was held that the acceptors of the bills were liable for the commissions and the notarial and telegraphic expenses which the drawers had incurred.

2. Re-exchange Recoverable as Damages.—Story on Bills of Exchange, § 402; *Suse v. Pompe*, 8 C. B. N. S. 538, 98 E. C. L. 538; *U. S. Bank v. U. S.*, 2 How. (U. S.) 711; *Bangor Bank v. Hook*, 5 Me. 174; *Snow v. Goodrich*, 14 Me. 235; *Grimshaw v. Bender*, 6 Mass. 157; *Cowperthwaite v. Sheffield*, 1 Sandf. (N. Y.) 416; *West v. Valley Bank*, 6 Ohio St. 169; *Scudder v. Weeks*, 1 Hawaiian 207.

No Course of Exchange Existing Between Countries.—Where a bill drawn in Philadelphia on Paris was returned protested for non-acceptance, a difficulty arising in regard to the rate of exchange between those two cities, it developed upon inquiry that there was no settled rate between them; and the court said: "The plaintiffs are entitled to recover such a sum in damages as would now purchase a bill of exchange for 600 livres tournois at the current rate of exchange, which may turn out to be either greater or less than the sum paid to the drawer, according to the rise or fall of exchange; but if there is no current exchange, the jury can pursue no other safer rule than by giving damages adequate to the rate of exchange at par." *Taan v. Le Gaux*, 1 Yeates (Pa.) 204.

Customary Exchange.—In *England* a usage to allow a certain sum as liquidated damages in lieu of re-exchange in regard to bills drawn on certain countries has been held valid. *Auriol v. Thomas*, 2 T. R. 52; *Willans v. Ayers*, L. R. 3 App. 133. See also *Gantt v. Mackenzie*, 3 Campb. 51; *Laing v. Barclay*, 3 Stark. 38, 14 E. C. L. 154.

In *Maine* and *Massachusetts*, before the enactment of statutes upon the subject, the rule of damages under the law merchant was superseded by a custom of allowing a certain per cent. in lieu of re-exchange. *Snow v. Goodrich*, 14 Me. 235; *Wood v. Watson*, 53 Me. 300; *Grimshaw v. Bender*, 6 Mass. 157; *Barclay v. Minchin*, 6 Mass. 162. See also *Adams v. Cordis*, 8 Pick. (Mass.) 260.

In *New York* it was held that the holder of a dishonored bill could recover the contents of such bill, at the rate of exchange or price of bills on the country upon which it was drawn at the time of the dishonor of the bill and notice thereof to the drawer, and interest, together with twenty per cent. customary damages. *Graves v. Dash*, 12 Johns. (N. Y.) 17, *overruling Hendricks v. Franklin*, 4 Johns. (N. Y.) 119; *Denston v. Henderson*, 13 Johns. (N. Y.) 322; *Van Arsdale v. Boardman*, 3 How. Pr. (N. Y. Supreme Ct.) 60.

In *Weldon v. Buck*, 4 Johns. (N. Y.) 144, it

expenses consequent upon the dishonor of a bill are the expenses of protest, postage, customary commissions, and brokerage.¹

Time at Which Recovery to Be Computed. — As the rate of exchange is constantly fluctuating from day to day, it is important to determine the time at which the holder's recovery shall be computed. It has been decided in several cases that, in the absence of statutory regulation, the holder of a dishonored bill is entitled to recover at the rate of exchange current at the time when notice of protest is given to the party liable.²

2. By Statute. — In all the states of the American Union statutes have now been enacted providing that the holder of a dishonored bill shall recover a certain per cent. of the face thereof as damages, and in some of these statutes it is provided that such specified per cent. shall be in lieu of all the charges consequent upon the dishonor of a bill, while in others it is provided that certain charges in addition to such specified per cent. may be recovered.³

was held that the holder of a bill protested for nonacceptance was as much entitled to such damages as the holder of a bill protested for nonpayment. *Quare* in *U. S. v. Barker*, 1 Paine (U. S.) 156 (upon New York statute).

Invalid Custom. — In *Suse v. Pompe*, 8 C. B. N. S. 538, 98 E. C. L. 538, it was held that evidence was inadmissible to prove that by custom among the merchants in London the holder of a dishonored bill is entitled at his election to recover either the amount of the re-exchange or the sum which he gave for the bill.

Circuitous Re-exchange. — When it becomes necessary to adopt a circuitous mode of returning a dishonored bill, the holder of such bill is entitled to recover the whole amount of exchange occasioned by such circuitous mode of return. Story on Bills of Exchange, § 402; *Pollard v. Herries*, 3 B. & P. 335. See also *U. S. Bank v. U. S.*, 2 How. (U. S.) 711.

Illustration. — A bill of exchange was drawn by S. in London upon B. of Paris. England and France being at the time engaged in war with each other, there was no direct course of exchange between the two countries; hence the bill was negotiated through Holland, and presented to B. in Paris, who refused payment, saying the law of France prohibited the payment of debts to an enemy. It was then sent back to the indorser in Holland, who in turn forwarded it to the drawer in England, and requested payment, together with £300 for re-exchanges which had accumulated. It was held that the drawer was liable for the entire accumulation of exchange between the different countries through which the bill had passed; *Eyre, C. J.*, saying "I see no distinction between this case and the common one of a bill being refused payment. The drawer must pay for all the consequences of the nonpayment, and the loss on the re-exchange seems to me to be part of the damages arising from the contract not being performed." *Mellish v. Simeon*, 2 H. Bl. 378.

1. Expenses Incident to Dishonor. — *Chalmers on Bills of Exchange*, § 57.

2. Rate at Time of Notice of Protest. — *U. S. v. Barker*, 1 Paine (U. S.) 156; *Denston v. Henderson*, 13 Johns (N. Y.) 322; *Cowperthwaite v. Sheffield*, 1 Sandf. (N. Y.) 416.

Time of Bill's Return and Notice to Drawer. — The holder of a bill of exchange, drawn in New York on England, and returned protested, is entitled to recover the contents of the

bill, at the rate of exchange or price of bills on England at the time of the return of the dishonored bill and notice thereof to the drawer, together with twenty per cent. damages and interest. *Graves v. Dash*, 12 Johns. (N. Y.) 17, *overruling Hendricks v. Franklin*, 4 Johns. (N. Y.) 119.

Maryland Statute — Time of the Verdict. — In assumpsit on a foreign bill of exchange the plaintiff is to recover under the Maryland statute of 1785, c. 38, as much money as will, at the time of the verdict, purchase a similar bill. *Bryden v. Taylor*, 2 Har. & J. (Md.) 396.

Pennsylvania Statute — Time When Bill Presented. — Damages on a foreign bill of exchange, protested for nonpayment, are recoverable against the drawer, under the Pennsylvania Act of 30th March, 1821, at the rate of exchange at the time of the presentment of the bill for payment accompanied with notice of protest, and not at the rate at the time when a notice of protest was received by the drawer, without a presentment of the bill. *Stuart v. Ralston*, 2 Miles (Pa.) 257.

New York Statute — Time of Demand. — "This subject is now regulated in this state by statute, which enacts, with reference to bills of exchange drawn or negotiated within this state, that 'if the contents of such bill be expressed in the money of account or currency of any foreign country, then the amount due, exclusive of the damages payable thereon, shall be ascertained and determined by the rate of exchange, or the value of such foreign currency, at the time of the demand of payment.' (1 Rev. Stat. 770, § 21; same stat., 5th ed., vol. 3, p. 70)." *De Rham v. Grove*, 18 Abb. Pr. (N. Y. Supreme Ct.) 45. See also *Butt v. Hoge*, 2 Hilt. (N. Y.) 81.

3. Statutory Damages. — For cases construing such statutes see the following:

England. — *Francis v. Rucker*, Amb. 672 (upon Pa. Stat.).

United States. — *U. S. Bank v. U. S.*, 2 How. (U. S.) 711, 5 How. (U. S.) 382 (upon Md. Stat.); *Puckett v. Redman*, 2 How. (Miss.) 688 (upon Miss. Stat.); *Sadler v. Murrah*, 3 How. (Miss.) 195 (upon Miss. Stat.); *Scudder v. Union Nat. Bank*, 91 U. S. 406 (upon Ill. Stat.); *Bull v. Kasson Bank*, 123 U. S. 105 (upon Ill. Stat.); *Hall v. Cordell*, 142 U. S. 116 (upon Ill. Stat.); *Lacon First Nat. Bank v. Bensley*, 2 Fed. Rep. 609 (upon Ill. Stat.); *Brown v. Van Braam*, 3 Dall. (U. S.) 344 (upon R. I. Stat.).

Recoverable in an Action on the Bill. — The damages given by such statutes are as much a part of the contract as the interest,¹ and, therefore, they are properly recoverable in an action brought to recover the principal of the bill,² and when the principal cannot be recovered there can be no claim for damages.³

Object of Statutes. — It has been held that such statutes are not penal, but on the contrary are remedial; that the damages given are not for punishment,

Alabama. — Leigh v. Lightfoot, 11 Ala. 935; McKenzie v. Clanton, 33 Ala. 528; Knott v. Venable, 42 Ala. 186; Trammell v. Hudmon, 56 Ala. 235.

Arkansas. — Pryor v. Watson, 8 Ark. 112; Craig v. Price, 23 Ark. 633.

California. — Page v. Warner, 4 Cal. 395; Pratalongo v. Larco, 47 Cal. 378.

Illinois. — Bradley v. Morris, 4 Ill. 182; Peoria, etc., R. Co. v. Neill, 16 Ill. 269; Wine-man v. Oberne, 40 Ill. App. 269; Hall v. Cox, 44 Ill. App. 382; Strawbridge v. Robinson, 10 Ill. 470, 50 Am. Dec. 420; Skelton v. Dustin, 92 Ill. 49; Wooley v. Lyon, 117 Ill. 244, 57 Am. Rep. 867; Merchants' Nat. Bank v. Ritzinger, 118 Ill. 484; Abt v. American Trust, etc., Bank, 159 Ill. 467; Myers v. Union Nat. Bank, 27 Ill. App. 254.

Indiana. — State Bank v. Bowers, 8 Blackf. (Ind.) 72; May v. State Bank, 9 Ind. 233; State Bank v. Rodgers, 3 Ind. 53; Campbell v. Swasey, 12 Ind. 70.

Iowa. — Marshalltown First Nat. Bank v. Owen, 23 Iowa 185.

Kansas. — German v. Ritchie, 9 Kan. 106; Noyes v. White, 9 Kan. 640; Knowles v. Armstrong, 15 Kan. 371; Woolley v. Van Volkenburgh, 16 Kan. 20; Cramer v. Eagle Mfg. Co., 23 Kan. 390.

Kentucky. — Wood v. Farmers', etc., Bank, 7 T. B. Mon. (Ky.) 281.

Maine. — Bangor Bank v. Hook, 5 Me. 174; Orono Bank v. Wood, 49 Me. 26.

Maryland. — Bryden v. Taylor, 2 Har. & J. (Md.) 396.

Missouri. — State Bank v. Wright, 10 Mo. 719; Phillips v. Evans, 64 Mo. 17; Hallowell v. Page, 24 Mo. 590; Kennerly v. Bragg, 1 Mo. App. 574; Riggs v. St. Louis, 7 Mo. 438; Lowenstein v. Knopf, 2 Mo. App. 159; Taylor v. Newman, 77 Mo. 263.

New Mexico. — Orr v. Hopkins, 3 N. Mex. 45.

New York. — Hargous v. Lahens, 3 Sandf. (N. Y.) 213; Van Arsdale v. Boardman, 3 How. Pr. (N. Y. Supreme Ct.) 60; De Rham v. Grove, 18 Abb. Pr. (N. Y. Supreme Ct.) 45; Butt v. Hoge, 2 Hilt. (N. Y.) 81.

North Carolina. — Runyon v. Latham, 5 Ired. L. (27 N. Car.) 551.

Ohio. — Farmers' Bank v. Brainerd, 8 Ohio 292; New Orleans Bank v. Stagg, 1 Handy (Ohio) 382; West v. Valley Bank, 6 Ohio St. 169.

Pennsylvania. — Lennig v. Ralston, 23 Pa. St. 137.

Tennessee. — Cox v. State Bank, 3 Sneed (Tenn.) 140.

California Statute — Bill Paid Supra Protest. — A merchant in Peru drew a bill of exchange in favor of another merchant in California on a house in London. Upon the bill being protested for nonacceptance in London, it was taken up *supra protest* for the honor of the

payee, an indorser, by the drawee and returned to the payee in California without claim for damages. Subsequently the drawer in Peru paid the bill, but refused to pay the twenty per cent. damages allowed by the California statute. It was held that the payee, when the bill was protested, was not a holder of it in the sense of the California statute, which provided that "the damages allowed by this act shall be recovered only by the holder of a bill who shall have purchased the same or some interest therein for a valuable consideration," and, therefore, was not entitled to damages in that capacity nor in the capacity of an indorser, as he had not paid them to the holder and was no longer liable for them, but that the drawee, on the payment *supra protest* for the honor of the payee, thereby became the holder of the bill within the meaning of the statute, and could have recovered damages. Pratalongo v. Larco, 47 Cal. 378.

Louisiana Statute — In Lieu of All Charges. — "Although contrary decisions may be found on this subject in the courts of the Atlantic states, the better opinion seems to be there, that the damages allowed on the return of protested bills are inclusive of all charges, and that the plaintiff is entitled to interest on those damages, but can claim nothing for the difference of exchange. However this may be, the rights of the plaintiffs do not rest with us upon immemorial custom; they are defined and fixed by a statute which provides that the drawer of an inland bill, returned unpaid, shall pay and discharge the contents of the bill, together with ten per cent. for the damage thereof. It is evident that the premium paid, the costs of protest, and all other charges form a part of the damages fixed by law. The statute will bear no other construction; and the rule which it establishes appears to us simple and certain in its application, and well adapted to the interests of commerce." Robert v. Commercial Bank, 13 La. 533.

In Missouri and North Carolina it has been decided that without the words "for value received" the statutory damages for dishonor cannot be recovered. Riggs v. St. Louis, 7 Mo. 438; Hallowell v. Page, 24 Mo. 590; Phillips v. Evans, 64 Mo. 17; Taylor v. Newman, 77 Mo. 263; Anonymous, Tayl. (3 N. Car.) 118. See also Sawyer v. Page, 24 Mo. 595. And see the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 135.

Ohio Statute — Jury Must Find Damages. — Where statutory damages are claimed upon a protested bill, it is for the jury to find those damages, and not for the court to assess them or add them to the verdict. Crawford v. Wolcott, 11 Ohio 145.

1. U. S. Bank v. U. S., 2 How. (U. S.) 711.

2. Skelton v. Dustin, 92 Ill. 49; Kenner v. Kennedy, 4 Har. & J. (Md.) 240.

3. Page v. Warner, 4 Cal. 395.

but are intended as compensation; and that their provisions are just, equitable, and essential in a commercial community to guard the interests of innocent individuals and to secure good faith in business transactions.¹

V. WAIVER OF RIGHT TO RE-EXCHANGE.—In several cases it has been decided that, under certain circumstances, the holder waives his right to recover re-exchange or statutory damages in lieu thereof by receiving payment of the bill after its dishonor,² and where the holder accepted another bill in

1. **Statutes Are Remedial.**—Lennig v. Ralston, 23 Pa. St. 137. To the same effect are U. S. Bank v. U. S., 2 How. (U. S.) 711; Bangor Bank v. Hook, 5 Me. 174; Allen v. Union Bank, 5 Whart. (Pa.) 420; McGarr v. Lloyd, 3 Pa. St. 474.

2. **Payment After Dishonor but Before the Return of the Bill.**—"The law of Pennsylvania regulating bills of exchange was well understood. If those drawn on any part of Europe are returned back unpaid with a legal protest, the drawers and indorsers are subjected to damages at the rate of twenty per centum. But the right to these damages is not complete until the bill be returned back under protest. Till then they are not demandable. Consequently payment before the bill returns does away the right to demand them. By receiving payment the holder waives his right to damages." U. S. v. Gurney, 4 Cranch (U. S.) 345.

Payment of One of a Set of Bills After Dishonor of Another Set.—In Page v. Warner, 4 Cal. 395, the second of exchange drawn in San Francisco on a banking house in Ohio was presented for payment, refused, and protested, and before action was begun the first of exchange was presented and paid with interest and the cost of protesting the second of exchange and the bill surrendered. It was held that no damages were recoverable for the dishonor of the second of exchange; the court saying: "Damages on foreign bills of exchange do not accrue from any stipulation in the contract, but are recoverable by operation of law. They are, therefore, a mere incident to the principal sued for, and where the latter cannot be recovered, there can be no claim for the former. It is said that where the principal sum is paid by the drawee, as he is not liable for the damages, the liability of the drawer remains notwithstanding, because the drawee has the right to pay what he is liable to pay; but the drawee, without acceptance (as in this case), is not liable to the holder of the bill for any part of it; nor does it appear that the payment here was made by the drawee. The acceptance of payment of one of the set of bills was a waiver of all claim for damages, and this because the evidence of debt was surrendered and canceled. Each part of a set of bills of exchange constitutes the whole of the bill."

Part Payment Reduces Damages Pro Rata.—It has been decided that if, after the dishonor of a bill, the holder thereof receives part of the money due thereon from the acceptor, the damages are thereby reduced *pro rata*. Bangor Bank v. Hook, 5 Me. 174. In this case Weston, J., delivering the opinion of the court, said: "Now, if a bill made payable in a foreign country, protested for nonpayment or nonacceptance, is afterwards there paid

and received, there arises no claim for re-exchange, or that which is substituted here, the ten per cent. damages. So if it be partially paid and received abroad, at the place where made payable, this claim is reduced *pro tanto*. It is only where the bill is returned home, and there taken up, that this allowance can be demanded. The damages are incident to the principal. If that be paid, or as far as paid at the place appointed, the incident or accretion which would otherwise attach to it ceases. For the injury occasioned by the delay of payment, the law deems the interest an equivalent." Quoted with approval in Warren v. Coombs, 20 Me. 142. See also Bayley on Bills, 387; Laing v. Barclay, 3 Stark. 38, 14 E. C. L. 154. But this doctrine has been expressly denied, Hargous v. Lahens, 3 Sandf. (N. Y.) 213, disapproving Bangor Bank v. Hook, 5 Me. 174, and distinguishing Laing v. Barclay, 3 Stark. 38, 14 E. C. L. 154, on the ground that it is evident from the report of the case that the partial payment was made either before or at the time the bill was presented for payment.

Agreement Between Holder and Indorser's Agent Nudum Pactum.—A bill was drawn in New York by W. on X. of London, in favor of Y., upon which bill the defendants were indorsers. A. of Birmingham, England, agent of the defendants, had standing instructions from the latter to pay all bills upon X. of which they were drawers or indorsers, and which were dishonored. Accordingly, A. requested H., the holder, to let him have the bill, in the event of its dishonor, that he might pay it for the honor of the defendants, to which H. agreed. The bill being dishonored, H. declined to allow payment by A., saying the bill had been sent to America. It was held that the agent should have stood ready to pay the bill in London at its maturity; that he had done so neither there nor at Birmingham; that the agreement with H., the holder, was *nudum pactum*, and that the latter was entitled to the value of the bill at the rate of exchange prevailing when notice of dishonor was given, with twenty per cent. damages, and interest on both sums from the same time. Denston v. Henderson, 13 Johns. (N. Y.) 322.

Missouri Statute.—Damages cannot be recovered on a dishonored promissory note under the Missouri statute if payment of the principal sum, with interest and charges of protest, be made within twenty days after demand or notice of dishonor. Farrell v. Fritschle, 30 Mo. 100. But the receipt of the principal and interest of a negotiable and negotiated note after the expiration of twenty days from the time of dishonor does not constitute a waiver of the claim for damages. Kennerly v. Bragg, 1 Mo. App. 574, distinguished in Page v. Warner, 4 Cal. 395.

renewal of the dishonored one it was held that he lost his claim for damages,¹ and where the holder accepted security for the payment at its maturity of a bill protested for nonacceptance he was not allowed to recover damages for such nonacceptance.²

EXCHANGE BROKERS. (See also the titles *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65; *BROKERS*, vol. 4, p. 959; *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*.) — An exchange broker is one who negotiates bills of exchange, foreign or domestic.³

1. Another Bill Taken in Renewal. — After a bill of exchange became due, and while it was in London, where it had been sent for presentment for payment, the person who had indorsed it to the plaintiff came to him with another bill for the same amount, and prevailed on him to take it for and on account of and in renewal of the first bill. Before the second bill became due, and without delivering it back, the plaintiff brought an action on the first bill against the acceptor. It was held that he could not recover even the expenses of noting and postage. *Kendrick v. Lomax*, 2 Crompt. & J. 405.

2. Damages Waived by Accepting Security. — A bill of exchange for £3,000 drawn upon Liverpool was returned protested for nonacceptance. The drawer was then requested to "retire the bill or give security for its payment at maturity." He gave his check for \$2,000 to the holder as security, it having been agreed that the bill should be sent back to Liverpool for acceptance, and it being promised by the drawer that it would be accepted as of the original date of presentation and would be paid at maturity. The evidence tended in some degree to show that the arrangement involved a waiver of the holder's claim for damages on the protest for nonacceptance in case the bill was accepted and paid. An action was brought by the drawer to recover the \$2,000. The holder claimed to be entitled to

retain the ten per cent. statutory damages given upon protest for nonacceptance, and offered to return merely the balance. It was held that the acceptance of the check by the holder was a relinquishment of all claims for damages for nonacceptance. *Pesant v. Pickersgill*, 56 N. Y. 650.

3. License Tax. — A statute provided that the mayor and common council of a city should have power to license, tax, and regulate brokers, pawnbrokers, and money changers. It was held that this did not authorize the municipality to regulate or license the sales of bills of exchange, when the business was transacted by persons on their own account and with their own funds. The court said: "Now, unless the business of defendant is that of a broker, it is not pretended that the city authorities, under the charter, have any power to prohibit or license it. Webster defines a broker to be 'an agent or negotiator, who is employed by merchants to make and conclude bargains for them for a fee or rate per cent.' *Exchange brokers*, he further says, are those 'who make and conclude bargains for others in matters of money or merchandise; learn the rate of exchange, and notify their employers.' Defendant, then, is not a broker according to this authority, for he does not make bargains for 'others,' but buys and sells on his own account and with his own funds." *Portland v. O'Neill*, 1 Oregon 219.

EXCHANGE OF PROPERTY.

BY WALTER CARRINGTON.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject see the following titles: AGENCY, vol. 1, p. 1004; BARTER, vol. 3, p. 869; CONTRACTS, vol. 7, p. 88; COVENANTS, vol. 8, p. 43; DAMAGES, vol. 8, p. 537; DEEDS, vol. 9, p. 87; DOWER, vol. 10, p. 122; FRAUDS, STATUTE OF; GIFTS; IMPLIED WARRANTY; INFANTS; INTOXICATING LIQUORS; PARTITION; PAYMENT; REAL ESTATE BROKERS; REAL PROPERTY; RESCISSION; SALES; SEPARATE PROPERTY (OF MARRIED WOMEN); VENDOR AND PURCHASER; VENDOR'S LIEN; WARRANTY.

I. DEFINITION. — An exchange has been defined as a reciprocal contract for the interchange of property, each of the parties to it being individually considered in the dual capacity of vendor and vendee of the things which form the subjects of exchange.¹

1. Exchange Defined. — *Preston v. Keene*, 14 Pet. (U. S.) 133; *Bixby v. Bent*, 59 Cal. 522; *Martin v. Ashland Mill Co.*, 49 Mo. App. 23. In this last case the plaintiff left with the defendant a quantity of wheat, it being agreed that on demand he should receive a certain number of pounds of flour per bushel. This transaction was adjudged to be neither a bailment nor a sale, but an exchange.

In the Civil Law exchange is a covenant by which the contractors give to one another one thing for another, whatever it be, except

money; for in that case it would be a sale. 1 Domat's Civil Law 254.

An Exchange of Personalty is a commutation of goods for goods. 2 Black. Com. 446; *Anderson's L. Dict.* See *infra*, this title, *Exchange of Goods*.

An Exchange of Realty is a mutual grant of equal interests, the one in consideration of the other. 2 Black. Com. 323; *Windsor v. Collinson* (Oregon 1898) 52 Pac. Rep. 26. See *infra*, this title, *Exchange of Interests in Lands*.

Barter and exchange of goods are of about
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II. EXCHANGE AND SALE DISTINGUISHED. — There is very eminent authority for the proposition that by the term "sale" is intended only a transfer for money, and that any other transfer is a barter or exchange.¹ But this is hardly the correct view — certainly not the prevailing view. Upon the authorities it may be stated that a price in money, paid or promised, is not essential to a sale, but that any transaction whereby property is parted with for a valuable consideration, whether there be a money payment or not, provided the bargain be made and the value measured in money terms, and paid or agreed to be paid in something which the parties agree to treat as a specified amount of money, is a sale. Where property is transferred for property, no price being set upon either piece, the transaction is an exchange.² There is,

the same meaning. See *BARTER*, vol. 3, p. 869.

A barter is a transaction where goods are exchanged for goods, and it is immaterial whether the goods exchanged are of the same kind and quality or of an entirely different species, or whether mutual delivery is had contemporaneously with the making of the contract, or delivery by one is made then and delivery by the other is to occur afterwards. *Jenkins v. Mapes*, 53 Ohio St. 110, citing 2 AM. AND ENG. ENCYC. OF LAW (1st ed.) 128.

The Term "Swap" means an exchange or barter. *Mosely v. Gordon*, 16 Ga. 394.

1. See *Benjamin on Sales* (6th Am. ed.) 8; *Williamson v. Berry*, 8 How. (U. S.) 544; *Edwards v. Cottrell*, 43 Iowa 204; *Bigley v. Risher*, 63 Pa. St. 155.

2. **Test Whether Transaction Sale or Exchange** — *England*. — *Forsyth v. Jervis*, 1 Stark. 437, 2 E. C. L. 169. See also *Turner v. Edgell*, 1 Keen 503.

Alabama. — *Gunter v. Leckey*, 30 Ala. 591; *Fuller v. Duren*, 36 Ala. 73, 76 Am. Dec. 318.

Arkansas. — *Gillan v. State*, 47 Ark. 555.

Georgia. — *Mosely v. Gordon*, 16 Ga. 394.

Maine. — *Slayton v. McDonald*, 73 Me. 50.

Michigan. — *Picard v. McCormick*, 11 Mich. 69.

Minnesota. — *Reynolds v. Franklin*, 41 Minn. 279.

New Hampshire. — *Mitchell v. Gile*, 12 N. H. 390.

New York. — *Porter v. Talcott*, 1 Cow. (N. Y.) 359; *Clark v. Fairchild*, 22 Wend. (N. Y.) 576.

Vermont. — *Loomis v. Wainwright*, 21 Vt. 520; *Vail v. Strong*, 10 Vt. 465; *Way v. Wakefield*, 7 Vt. 228.

See also the title SALES.

"If property is taken at a fixed money price the transfer amounts to a sale whether the price is paid in cash or in goods." *Picard v. McCormick*, 11 Mich. 69.

But in *Lingeman v. Shirk*, 15 Ind. App. 432, a contract whereby A agreed to pay to B a certain sum of money and to convey to him a specified amount of land, to be selected by him, in consideration of which B agreed to convey to A certain lands, the price at which the lands were to be taken on each side being specified, was held not to be an absolute sale of B's land with an option or privilege on A's part to pay therefor in either money or land, but simply a contract for the exchange of lands, with certain prices affixed to each, the difference to be paid in money.

When two owners enter into an agreement

to exchange several tracts of land, and nothing is said therein about any money valuation of the lands, either by the acre or otherwise, the contract will be presumed to be for an exchange in gross. *Atkinson v. Beckett*, 34 W. Va. 584.

Where there is a mutual transfer of land, the price of each piece being definitely fixed and the difference in values paid in money, the transaction is a sale. *Thornton v. Moody*, (Tex. Civ. App. 1893) 24 S. W. Rep. 331.

An Agent Empowered to Sell Land and make title is not authorized to exchange the land for a stock of merchandise. *Lumpkin v. Wilson*, 5 Heisk. (Tenn.) 555. See also *Williamson v. Berry*, 8 How. (U. S.) 495; *Long v. Fuller*, 21 Wis. 121. And see the title AGENCY, vol. 1, p. 1004.

A Mortgage of a Chattel with Power of Sale confers no right to exchange the mortgaged property for other property. *Edwards v. Cottrell*, 43 Iowa 194.

A Factor has no authority to exchange goods consigned to him for other goods, but only to sell them for money; therefore where a factor exchanges the goods of his principal for other goods no property passes. *Guerreiro v. Peile*, 3 B. & Ald. 616, 5 E. C. L. 399. See the title FACTORS.

A Power of Attorney to sell lands does not authorize an exchange. *Hampton v. Moorhead*, 62 Iowa 91; *McMichael v. Wilkie*, 18 Ont. App. 464, reversing 19 Ont. Rep. 739.

Under the Arkansas Statute (Mansf. Dig., § 3509) which authorizes a guardian to sell the real estate of his ward upon obtaining an order for such sale from the Probate Court, the Probate Court has no power to order a guardian to exchange his ward's lands for other lands. *Meyer v. Rousseau*, 47 Ark. 460.

A Power "to Sell and Absolutely Dispose of" Lands includes the right to exchange. *Smith v. Spears*, 22 Ont. Rep. 286.

A Power to "Sell and Exchange" Lands includes the power to make partition of them. *Abell v. Heathcote*, 4 Bro. C. C. 278, 2 Ves. Jr. 98; *Phelps v. Harris*, 101 U. S. 370; *In re Frith*, 3 Ch. Div. 618. See also 2 Sugden on Powers 479; *Smith v. Spears*, 22 Ont. Rep. 286. But see *M'Queen v. Farquhar*, 11 Ves. Jr. 467; *Atty.-Gen. v. Hamilton*, 1 Madd. 213; *Bradshaw v. Fane*, 2 Jur. N. S. 247.

On this subject see the title POWERS.

Two Tenants in Common may exchange with each other their respective moieties of different parts of land held in common; and where the moiety of an estate is settled to uses, with a power of exchange in the trustees, such a

however, no substantial difference between a sale and an exchange. In both cases the title is absolutely transferred, and the same rules of law control.¹

III. EXCHANGE OF INTERESTS IN LANDS — 1. Requisites of a Valid Exchange — *a.* EACH PARTY MUST HAVE A TITLE TO TRANSFER. — Each of the parties to an exchange must have a proprietary title which he can transfer to the other.²

b. ESTATES EXCHANGED MUST BE EQUAL. — The estates exchanged must be equal in quantity, not of value, for that is immaterial, but of interest; as fee simple for fee simple, a lease for twenty years for a lease for twenty years, and the like.³

Equality in the Quality or Manner of the Estates Exchanged is not essential to a valid exchange; thus a joint estate may be exchanged for a sole estate, or a joint estate for an estate in common, and the like.⁴

c. THE WORD "EXCHANGE" MUST BE USED. — The word "exchange" is so individually requisite and appropriated by law to this case that it cannot be supplied by any other word, or expressed by any circumlocution.⁵

d. MUST BE IN WRITING. — A contract for an exchange of lands is as much within the statute of frauds as a contract for the sale of lands.⁶ But it has been held in *Pennsylvania* that a parol agreement for the exchange of lands established by clear, precise, and indubitable evidence, and consummated by actual possession, is not within the statute of frauds.⁷

power may be well executed by dividing the land into two portions to be held in severalty, one to the uses of the settlement, the other by the party entitled to the other moiety. *Doe v. Spencer*, 2 Exch. 752; *In re Frith*, 3 Ch. Div. 618. But see *Sheppard's Touchstone* 292; *Atty.-Gen. v. Hamilton*, 1 Madd. 213. See also the title PARTITION.

1. *Com. v. Clark*, 14 Gray (Mass.) 367; *Dowling v. McKenney*, 124 Mass. 478; *Kennery v. Somerville*, 68 Mo. App. 222; *Martin v. Ashland Mill Co.*, 49 Mo. App. 23; *Redfield v. Tegg*, 38 N. Y. 212. See *infra*, this title, *Exchange of Interests in Lands*; *Exchange of Goods*; and see the title SALES.

The Civil Code of California, § 1804, provides as follows: "Exchange is a contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only." By section 1806 it is provided: "The provisions of the title on sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives and of a buyer as to that which he takes." It was held that under these sections a contract for the exchange of land is a contract of sale, which, as in other cases of contracts for the sale of lands, may be enforced in a court of equity by a decree of specific performance. *Gilbert v. Sleeper*, 71 Cal. 290.

2. Title to Transfer Requisite. — *Bixby v. Bent*, 59 Cal. 522.

3. Requisite that the Estates Exchanged Be Equal. — *Co. Litt.* 506; 2 Black. Com. 323; 1 Bouv. Law Dict. 621; 1 Bouv. Inst., § 2054; Anonymous, 3 Salk. 157; *Eton College v. Winchester*, 3 Wils. 468; *Bixby v. Bent*, 59 Cal. 522; *Cass v. Thompson*, 1 N. H. 65, 8 Am. Dec. 36; *Wilcox v. Randall*, 7 Barb. (N. Y.) 633; *Windsor v. Collinson*, (Oregon 1898) 52 Pac. Rep. 26; *Long v. Fuller*, 21 Wis. 121.

4. Estates Exchanged May Be of Different Quality. — *Co. Litt.* 517.

5. The Word "Exchange" Requisite. — *Co.*

Litt. 506; *Shep. Touch.* 294; 2 Black. Com. 323; 1 Bouv. Law Dict. 621; 1 Bouv. Inst., § 2054; Anonymous, 3 Salk. 157; *Eton College v. Winchester*, 3 Wils. 468; *Stafford v. Trueman*, 7 U. C. C. P. 41; *Towsley v. Smith*, 12 U. C. Q. B. 555; *Leach v. Dennis*, 24 U. C. Q. B. 129; *Cass v. Thompson*, 1 N. H. 65, 8 Am. Dec. 36; *Windsor v. Collinson*, (Oregon 1898) 52 Pac. Rep. 26; *Dean v. Shelly*, 57 Pa. St. 426, 98 Am. Dec. 235; *Bixler v. Saylor*, 68 Pa. St. 146; *Gamble v. McClure*, 69 Pa. St. 282; *Long v. Fuller*, 21 Wis. 121.

An act of parliament which does not contain the word "exchange" cannot be construed to operate as a deed of exchange. *Eton College v. Winchester*, 3 Wils. 468.

6. Contract Must Be in Writing. — *Towsley v. Smith*, 12 U. C. Q. B. 555; *Purcell v. Miner*, 4 Wall. (U. S.) 513; *Lowe v. Turpie*, 147 Ind. 652; *Maydwell v. Carroll*, 3 Har. & J. (Md.) 361; *Dowling v. McKenney*, 124 Mass. 478; *Cass v. Thompson*, 1 N. H. 65, 8 Am. Dec. 36; *Rice v. Peet*, 15 Johns. (N. Y.) 503; *Vanscoy v. Stinchcomb*, 29 W. Va. 263. See also *Warnes v. Brubaker*, 107 Mich. 140.

For a Full Treatment see the title FRAUDS, STATUTE OF.

7. Parol Agreement Consummated by Possession — *Pennsylvania*. — *Johnston v. Johnson*, 6 Watts (Pa.) 370; *Reynolds v. Hewett*, 27 Pa. St. 176; *Brown v. Bailey*, 159 Pa. St. 121; *Moss v. Culver*, 64 Pa. St. 414, 3 Am. Rep. 601; *Miles v. Miles*, 8 W. & S. (Pa.) 135. See the title FRAUDS, STATUTE OF, for a full discussion.

Formerly an Exchange Could Be Made Orally, when the subject of it was not an estate lying in grant, and it was all in one county, but where the thing was lying in grant, or the lands were in different counties, it required a deed. 1 Bouv. Inst., § 2058; *Shep. Touch.* 294; *Co. Litt.* 506, 516; *Eton College v. Winchester*, 3 Wils. 468; *Cass v. Thompson*, 1 N. H. 65, 8 Am. Dec. 36. Compare *Lindsley v. Coats*, 1 Ohio 243.

When Deed Indented Essential. — At common law it was requisite to a valid exchange, if the lands lie in several counties, or if the things lie in grant, though they be in one county, that it be by deed indented.¹

c. ENTRY MUST BE MADE ON BOTH SIDES. — At common law entry must be made on both sides; for if either party die before entry the exchange is void, for want of sufficient notoriety.²

2. Number of Parties. — An exchange can only be between two parties; but there may be any number of persons, so they constitute only two parties in interest.³

3. When Right of Possession Accrues under Contract. — A mere contract to exchange lands gives no right to possession before its completion by the delivery of the deeds, without an express agreement to that effect, either in the contract itself or out of it.⁴

4. Right of Dower in Lands Exchanged. — At the common law the widow was not entitled to dower in both parcels of land exchanged, but she might elect to take it in either one.⁵ This rule is applicable only to an exchange properly so called.⁶

No Livery of Seizin Necessary at Common Law. — At common law no livery of seizin, even in exchanges of freehold, was necessary to the perfect conveyance; for each party stood in the place of the other and occupied his right, and each of them had already had corporal possession of his own land. 2 Black. Com. 323; Litt., § 62; Co. Litt. 50a; Eton College v. Winchester, 3 Wils. 468.

1. When Deed Indented Essential to Valid Exchange. — 1 Bouv. Law Dict. 621; 1 Bouv. Inst. 2054; Co. Litt. 50b, 51b; 2 Min. Inst. 782.

2. Entry Essential. — 2 Black. Com. 323; Co. Litt. 50b; Bixby v. Bent, 59 Cal. 522.

3. Exchange Can Only Be Between Two Parties. — Doe v. Spencer, 2 Exch. 752; Eton College v. Winchester, 3 Wils. 468; 2 W. Bl. 936; 2 Min. Inst. 782.

In Eton College v. Winchester, 3 Wils. 496, the court said: "There is no case to be found of an exchange in the legal sense and meaning of that conveyance between more than two parties. For if A gives land to B, and B gives lands to C, and C gives lands to A; if C be evicted of the land given to him by B, C cannot enter upon A, because A gave nothing in exchange to C; so A is not bound to warrant the land to C which was given to him by B."

4. When Right of Possession Accrues. — Brennan v. Chapin (C. Pl.) 19 N. Y. Supp. 237.

5. Dower in Lands Exchanged. — F. N. B. 149, note; Perkins, § 319; Co. Litt. 31b; Towsley v. Smith, 12 U. C. Q. B. 555; McLellan v. Meggatt, 7 U. C. Q. B. 554; White v. Laing, 2 U. C. C. P. 186; Stafford v. Trueman, 7 U. C. C. P. 41; Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205; Cass v. Thompson, 1 N. H. 65, 8 Am. Dec. 36.

Statutes. — There are statutes in some jurisdictions regulating this matter. See Wilcox v. Randall, 7 Barb. (N. Y.) 633; Hartwell v. De Vault, 159 Ill. 325.

Reason for Rule as to Dower in Lands Exchanged. — In Towsley v. Smith, 12 U. C. Q. B. 555, Draper, J., said: "Mr. Crabbe, in his treatise on the law of real property, p. 379, thus explains the rule why the widow shall not be endowed both of the lands taken and those given in exchange: 'If she were allowed dower out of both estates, and endowed of

them accordingly, then so soon as her dower was assigned out of her husband's land given in exchange, her endowment of those which were accepted by him in that transaction would be defeated by the entry of the owner of them previously to the exchange, under the implied condition annexed to exchanges by the law; so that the widow could not possibly enjoy permanent dower in both estates. See Bustard's Case, 4 Coke 121. The law, therefore, in order to protect her against improvident exchanges by her husband of his lands, which might be injurious to the right of dower, permits her election to endowment out of either of the estates given or accepted in exchange, but does not allow her dower out of both.'"

6. Rule Applicable Only to Exchange Properly So Called. — Hartwell v. De Vault, 159 Ill. 325; Leach v. Dennis, 24 U. C. Q. B. 129; Cass v. Thompson, 1 N. H. 65, 8 Am. Dec. 36.

Therefore, where A and B entered into a parol agreement to exchange farms, in pursuance of which A conveyed his farm to B by a deed in the common form, and B conveyed his farm to A in the same manner, neither of the deeds containing the word "exchange," it was held that this was not an exchange properly so called, and that the widow of A was entitled to be endowed in both farms. Cass v. Thompson, 1 N. H. 65, 8 Am. Dec. 36.

Where in an action of dower the defense rested on an alleged exchange by the husband for other lands out of which the widow had been satisfied her dower, and no deeds were produced, and the only evidence for the defense consisted of parol statements that the husband had "traded" certain lands, it was held there was not evidence to warrant a jury in finding for the defendant. Stafford v. Trueman, 7 U. C. C. P. 41.

In interpreting a New York statute which provides that if a husband seized of an estate of inheritance in lands exchange them for other lands, his widow shall not have dower in both, but shall make her election within a year, etc., it was held that the word "exchange," as used in the statute, is to receive the same interpretation which is applied to it when used at common law in reference to conveyances of land; and that, therefore, in order to deprive

5. Exchange of Lands by Infant. — An exchange of lands by an infant is not void, but voidable only, and as such may be rendered valid by acts of confirmation.¹

6. Liability to Pay Incumbrances on Lands Exchanged. — Where lands exchanged are subject to a mortgage or other incumbrance, the party receiving them in the exchange is bound to pay such mortgage or incumbrance and to protect the other party from liability thereon.²

7. Implied Warranty and Condition of Re-entry. — Every exchange implies a warranty of title, with a right to re-enter one's original possession if evicted from the later acquisition,³ and also a right to vouch and recover over in value.⁴

The Warranty Runs Only in Privity, and none can re-enter or vouch by force of it but the parties to the exchange or their heirs. But an assignee may rebut by force of it.⁵

Right to Recover from Alienee. — Where the title of one of the parties to an

the wife of her dower in lands conveyed by her husband, or to put her to an election, under the provisions of the statute, there must be a mutual grant of equal interests in the respective parcels of land, the one in consideration of the other, for otherwise the transaction is not an exchange in the strict technical sense of the term. *Wilcox v. Randall*, 7 Barb. (N. Y.) 633.

1. Exchange of Lands by Infant Not Void. — Co. Litt. 516; *Miller v. Ostrander*, 12 Grant's Ch. (U. C.) 349.

Where a party, said to have been under age and intoxicated when he made an exchange of lands, continued, after coming of age, in possession of the property received in exchange, and afterwards sold or exchanged it for other property, it was considered such a confirmation as barred those claiming under him from impeaching the transaction. *Miller v. Ostrander*, 12 Grant's Ch. (U. C.) 349.

2. Where Lands Exchanged Are Subject to Incumbrances. — *Boyd v. Johnston*, 19 Ont. Rep. 598.

Where Parties Agree to Remove Incumbrances on Their Own Land. — The plaintiff was a party to a contract for the exchange of lands, under which each party was to make good and sufficient title to the other to the lands exchanged, and each to remove all incumbrances from his own property. Under this contract each party went into possession of the other's land. The plaintiff received deeds from the other party, but did not himself give a deed for the land he had agreed to convey. The plaintiff paid certain incumbrances on the land conveyed to him. It was held that as the plaintiff still held the legal title to the land which he had agreed to convey, he was entitled to have a lien for the amount of the incumbrances paid by him declared on such land. *Rainey v. Hines*, 121 N. Car. 318.

Upon an agreement for an exchange of lands, the defendant, having accepted and retained a conveyance (with covenant against incumbrances) of the plaintiff's land, and having paid certain taxes charged thereon, has no right to withhold the delivery of a conveyance of his land to the plaintiff, merely upon the ground that he has not been reimbursed for such taxes paid. Neither does the existence of incumbrances upon the plaintiff's land, undis-

charged, justify the defendant's refusal to convey. *Greenwood v. Hoyt*, 41 Minn. 381.

3. Warranty and Right of Re-entry. — 2 Black. Com. 323; *Eton College v. Winchester*, 3 Wils. 468; *Bustard's Case*, 4 Coke 121; *Towsley v. Smith*, 12 U. C. Q. B. 555; *Parks v. Walden*, (Ky. 1897) 39 S. W. Rep. 52; *Grimes v. Redmon*, 14 B. Mon. (Ky.) 189; *Windsor v. Collinson*, (Oregon 1898) 52 Pac. Rep. 26; *Dean v. Shelly*, 57 Pa. St. 426, 98 Am. Dec. 235; *Moss v. Culver*, 64 Pa. St. 414, 3 Am. Rep. 601; *Gamble v. McClure*, 69 Pa. St. 282; *Bixler v. Saylor*, 68 Pa. St. 146. See also *Thacker v. Belcher*, (Ky. 1889) 11 S. W. Rep. 3; *Walker v. Renfro*, 26 Tex. 142. And see the title VENDOR AND PURCHASER.

Eviction from Portion of Land Exchanged. — The implied warranty is broken and the right to re-enter accrues upon an eviction from any portion of the land exchanged. *Bustard's Case*, 4 Coke 121.

If G. D. exchange five acres with W. N., and afterwards W. N. be evicted of one of those five acres which he had in exchange, the whole is defeated, and W. N. may enter on his own again; and *e converso* if G. D. be evicted of one of his five acres. Anonymous, 3 Salk. 157.

When Notice of Rescission Required. — Where there is a contract for the exchange of lands, and one of the parties thereto has no title whatever to the property he assumes to exchange when he enters into the agreement, the other party may rescind the contract without giving reasonable notice of his intention to do so. But if the title of the former party is merely imperfect, he is entitled to reasonable notice of rescission, provided he proceeds without unreasonable delay to perfect his title. *Harris v. Robinson*, 21 Can. Sup. Ct. Rep. 390.

4. Recovery of Value. — *Bustard's Case*, 4 Coke 121; *Dean v. Shelly*, 57 Pa. St. 426, 98 Am. Dec. 235; *Bixler v. Saylor*, 68 Pa. St. 146. Where there was an exchange of land and a total failure of title on one side, it was held that the party receiving the land to which the title failed was entitled to recover the reasonable market value of such land at the time of the failure of title. *Stewart v. Jack*, 78 Iowa 154.

5. Who Can Take Advantage of the Implied Warranty. — *Bustard's Case*, 4 Coke 121.

exchange fails, the other party may recover his original possession, not only from the party whose title has failed, but from any one claiming under or through him; for although an assignee cannot re-enter nor vouch, but only use the warranty to rebut, yet the exchangee may re-enter upon an alienee.¹

8. Remedies — *a.* FOR BREACH OF CONTRACT OF EXCHANGE. — Where one of the parties to a contract for the exchange of lands fails to perform his part of the contract, the other party may, if there is no default on his part, recover damages² or obtain a decree for specific performance.³

b. WHERE CONTRACT INDUCED BY FRAUD OR MISTAKE. — Where a person is induced through fraud or mistake to enter into a contract for the exchange of lands, he may rescind the contract and recover back the lands transferred by him.⁴

All Lands Received Must Be Returned Before Rescission. — He must, before he can rescind, return all the lands received.⁵ A party to a contract for the exchange of lands who was induced to enter into it by fraud or mistake may maintain an action to recover compensation for the loss caused by such fraud or mistake.⁶ In such a case the measure of damages is the difference between

1. Exchangee May Recover from Alienee. — *Dean v. Shelly*, 57 Pa. St. 426, 98 Am. Dec. 235; *Bustard's Case*, 4 Coke 121.

2. Damages for Breach of Contract. — *Warren v. Chandler*, 98 Iowa 237; *Mealey v. Finnegan*, 46 Minn. 507.

Where Party Puts It Out of His Power to Perform. — Where one of the parties to a contract for the exchange of lands puts it out of his power to perform, by conveying to a third person the property he agreed to exchange, the other party may, if there be no default on his part, recover substantial damages. *Warren v. Chandler*, 98 Iowa 237.

Offer to Perform, Coupled with Unauthorized Condition, Gives No Right of Action. — Where the conditions to be performed under the contract for exchange are mutual and concurrent, neither party can be put in default except by a *bona fide* offer to perform on the part of the other; and an offer to perform by one of the parties, but coupled with a condition which he had no right to impose, is insufficient to give him a right of action. *Royal v. Dennison*, 109 Cal. 558.

Measure of Damages. — Where a party to a contract for the exchange of lands, having performed on his part, brings an action against the other party for failure to perform, the measure of damages is the value of the lands which ought to have been conveyed. *Lowe v. Turpie*, 147 Ind. 652; *Warren v. Chandler*, 98 Iowa 237; *Devin v. Himer*, 29 Iowa 297; *Mealey v. Finnegan*, 46 Minn. 507; *Greenwood v. Hoyt*, 41 Minn. 381.

But where such a contract remains wholly executory, the measure of damages for a breach of it is the difference in the value of the lands agreed to be exchanged. *Warren v. Chandler*, 98 Iowa 237.

In an action for breach of a contract to exchange land, expenses incurred by the plaintiff in endeavoring to perform his part of the contract, before knowledge that the defendant has put it out of his power to perform, by conveying to another, may be recovered as damages. *Warren v. Chandler*, 98 Iowa 237.

3. Specific Performance. — *Mealey v. Finnegan*, 46 Minn. 507; *Gray v. Reesor*, 15 Grant's Ch. (U. C.) 205, 16 Grant's Ch. (U. C.) 614; *St.*

Denis v. Higgins, 24 Ont. Rep. 230. See also *Calloway v. Hamby*, 65 N. Car. 631.

Where, under a contract of exchange, deeds are executed and deposited in escrow, and the conditions upon which they were deposited have been performed, equity will decree specific performance at the instance of the party who has performed such conditions. *Bowman v. Gork*, 106 Mich. 163, *citing* 6 AM. AND ENG. ENCYC. OF LAW (1st ed.) 867, 870.

Laches. — The right to maintain the action may be barred by laches. *Harris v. Robinson*, 21 Can. Sup. Ct. Rep. 390, *reversing* 19 Ont. App. 134, 21 Ont. Rep. 43.

What Essential to Right to Recover Back Land Given in Exchange. — Two persons, each possessed of a lot of land, agreed to exchange lands, that each should have possession of the other's lot from a day named, and that they should exchange good and sufficient deeds in one year from the date of the bond; and each gave the other a bond with a penalty conditioned to perform the conditions above. The year elapsed without either giving a deed. Upon ejectment brought for the lot which the plaintiff was to convey to the defendant, it was held that the plaintiff was not entitled to a conveyance of the defendant's land without making one of his own to the defendant; nor had he a right to get back possession of his own land without a demand for possession at least, if not an actual giving up of the possession of the defendant's land. *Perritt v. Arnold*, 11 U. C. C. P. 413.

4. Contract May Be Rescinded for Fraud or Mistake. — *Trowbridge v. Addoms*, 23 Colo. 518; *Baker v. Rockabrand*, 118 Ill. 365; *Stroff v. Swafford*, 79 Iowa 135; *Hood v. Smith*, 79 Iowa 621; *Armstrong v. Helfrich*, 34 Neb. 358. See also *Roche v. Norfleet*, 63 Ill. App. 612. Compare *McGregor v. Johnston*, (Tex. Civ. App. 1896) 34 S. W. Rep. 407. See generally the title RESCISSION. For a case where the circumstance were held not to constitute fraud, see *Crist v. Dice*, 18 Ohio St. 536.

5. Party Seeking Rescission Must Return All Lands Received by Him. — *Johnson v. Cookerly*, 33 Ind. 151. See also *Stroff v. Swafford*, 79 Iowa 135.

6. Damages Resulting from Fraud or Mistake

the actual and the represented value of the land.¹

Vendor's Lien for Damages Resulting from Fraud. — It has been held that one who is induced by the false and fraudulent representations of another concerning the value of his land, to make an exchange of lands, is entitled to a vendor's lien on the land transferred by him for the difference between the actual and the represented value of the land which he receives.²

IV. EXCHANGE OF GOODS — 1. In General. — Exchange of goods has already been defined³ and distinguished from a sale.⁴ Whatever distinction there may be between an exchange and a sale is "rather one of shadow than of substance," and they are governed by the same rules of law practically.⁵

Delivery. — Thus it has been said that "an exchange has all the qualities of a sale, to which payment or delivery is essential, and which, without it, is but an executory agreement to sell, that binds not the property."⁶

When Conditional Exchange Becomes Absolute. — And if two persons exchange personal property, with the privilege of one of the parties to return, within a given time, the property received by him in exchange, and such party fails, within the time, to return the property so received, the contract becomes absolute.⁷

Recoverable. — *Williamson v. Woten*, 132 Ind. 202; *Augur v. Smith*, 90 Tenn. 729; *Atkinson v. Beckett*, 34 W. Va. 584. See also *Nysewander v. Lowman*, 124 Ind. 584.

1. Measure of Damages. — *Augur v. Smith*, 90 Tenn. 729. See also *Nysewander v. Lowman*, 124 Ind. 584.

2. Vendor's Lien. — *McDole v. Purdy*, 23 Iowa 277; *Williamson v. Woten*, 132 Ind. 202. See also *Florida v. Morrison*, 44 Mo. App. 529; *Nysewander v. Lowman*, 124 Ind. 584. And see the title **VENDOR'S LIEN**.

3. See *supra*, Definition.

4. See *supra*, Exchange and Sale Distinguished.

5. Law of Exchange Similar to That of Sale. — 2 Black. Com. 446; *Chitty on Contracts* 518; *Buffum v. Merry*, 3 Mason (U. S.) 479; *Howard v. Harris*, 8 Allen (Mass.) 297; *Dowling v. McKenney*, 124 Mass. 478; *Martin v. Ashland Mill Co.*, 49 Mo. App. 23; *Mullin, J.*, in *Elwell v. Chamberlin*, 31 N. Y. 624; *Hazard v. Hamlin*, 5 Watts (Pa.) 201. See also *supra*, *Exchange and Sale Distinguished*; *Exchange of Interests in Land*.

In *Com. v. Clark*, 14 Gray (Mass.) 367, *Bigelow, J.*, who delivered the opinion of the court, said: "The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases the title to property is absolutely transferred, and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter. It can make no essential difference in the rights and obligations of parties that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money, which is but the representative of value or property."

Under the Georgia Code contracts of barter and exchange stand on the same footing with private sales, so far as the same principles can be applied to them. *Cohen v. Ward*, 42 Ga. 337; *Straus v. Herman*, 45 Ga. 222; Code 1895, § 3501.

6. Delivery. — *Hazard v. Hamlin*, 5 Watts (Pa.) 201.

A, through his agent, exchanged with B a

mule for a horse. After delivery on both sides, B, without A's consent, repossessed himself of the horse and sold it to C. It was held that by the exchange and delivery A acquired title to the horse; that the title having passed out of B, the retaking of the animal by him was merely tortious, and no title passed from him to C; and consequently that A was entitled to recover the horse from C. *Cook v. Pinkerton*, 81 Ga. 89, 12 Am. St. Rep. 297.

Tender and Acceptance. — Where there is a contract for the exchange of goods and a delivery by one of the parties thereto, and it is agreed that the other party shall deliver in the future, and the latter tenders goods in discharge of his obligation, payment is not completed and the obligation discharged until the title to the goods tendered passes to the creditor or obligee; nor will the title pass to the latter until he has expressly or impliedly accepted the goods; and in such case the party bound to pay by a future delivery of goods must, when he tenders them, notify the creditor and afford him an opportunity to inspect the goods tendered, before the latter will be held to an implied acceptance of them. *Jenkins v. Mapes*, 53 Ohio St. 110, citing 18 AM. AND ENG. ENCYC. OF LAW (1st ed.) 150.

In *Eames v. Haver*, 111 Cal. 401, there was a contract for the exchange of stock between the plaintiff and the defendant, on the demand of the former. The plaintiff's stock was pledged as security, but the pledgee was anxious and willing to have the exchange made, and offered to permit it to be made. When the plaintiff made demand and offered to produce the stock — his ability to do so being established — the defendant denied any agreement or obligation on his part to exchange — and positively refused to do so. It was held that the plaintiff had made a sufficient tender of performance, and that under the circumstances there was no necessity for the plaintiff's producing and exhibiting to view the stock.

7. Conditional Exchange. — *Johnson v. McLane*, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102.

Implied Warranty of Title. — In an exchange of personal property in the possession of the parties to the exchange, as in a sale, there is an implied warranty of title, and that the property is free from incumbrances.¹

No Implied Warranty of Quality. — As in sales, so upon an exchange of goods the law does not imply a warranty as to their goodness or quality.²

Express Warranty of Quality. — There is no legal distinction between the sale of a chattel for money, with warranty of soundness, and an exchange of similar property with like warranty; and where the privilege of returning is super-added, the right of rescission is unquestionable.³

Intoxicating Liquors. — In *Massachusetts* there are several adjudications to the effect that an exchange of liquor for goods or services is a "sale" within the statute prohibiting such sales;⁴ but the contrary is held in other states.⁵

2. Remedies — *a.* **FOR BREACH OF WARRANTY** — **Damages.** — For a breach of a warranty of title or of quality in an exchange of goods the party injured is entitled to recover damages.⁶

1. Implied Warranty of Title and Against Incumbrances. — *Gaylor v. Copes*, 16 Fed. Rep. 49; *Hunt v. Sackett*, 31 Mich. 18; *Close v. Crossland*, 47 Minn. 500; *Bixler v. Saylor*, 68 Pa. St. 146; *Patee v. Pelton*, 48 Vt. 182. See the title IMPLIED WARRANTY.

Under the Georgia Code. — In Georgia, in a case where A exchanged with B Confederate States bonds for one hundred shares of railroad stock, and it transpired that B had no title to fifty shares of the railroad stock, it was held that under the provisions of the code (Code 1895, § 3561), there was an implied warranty by B that he had title to the railroad stock. *Cohen v. Ward*, 42 Ga. 337.

2. Law Does Not Imply a Warranty of Quality. — *Chitty on Contracts* 631. See the title IMPLIED WARRANTY.

A customer who had bought a quantity of Burgundy of excellent quality from a wine merchant, some time after procured him to exchange a portion of it for a wine of a different description. It was held that there was no implied warranty on the part of the customer as to the state of the wine at the time of the exchange, and although it had then become quite sour, yet, in the absence of an express warranty or fraud, the wine merchant was without remedy. *La Neuville v. Nourse*, 3 Campb. 351.

3. Express Warranty. — *Miller v. Grove*, 18 Md. 242. In this case there was an exchange of horses with warranty of soundness and privilege of returning after trial. The plaintiff found that the horse he had received was unsound, and in a few days returned it to the defendant and demanded his original horse. It was held that the defendant's refusal to restore on such demand the horse received from the plaintiff was a conversion of the property and rendered him liable to an action by the plaintiff for the value thereof.

4. Intoxicating Liquors — **Rule in Massachusetts.** — In construing the Massachusetts statute (Stat. 1855, c. 215, §§ 15 and 17), which provides that if any person "shall, directly or indirectly, on any pretense or by any device, sell, or in consideration of the purchase of any other property give, to any person any spirituous or intoxicating liquor," he shall be subject to certain prescribed penalties, it was held that the intention of the legislature was manifestly to cover every case of the transfer of intoxi-

cating liquors for value, in whatever form the consideration for such transfer might be given or paid, and consequently that an exchange of intoxicating liquor by a distiller, for grain from which to distill such liquor, was a sale within the meaning of the statute. *Com. v. Clark*, 14 Gray (Mass.) 367.

In *Mason v. Lothrop*, 7 Gray (Mass.) 354, it was held that a delivery and receipt of intoxicating liquors as payment for a service performed was a sale within the meaning of this statute. See the title INTOXICATING LIQUORS.

In a later case in the same state it was held that an exchange of spirituous liquors for a horse was a sale of such liquors, within the meaning of a statute prohibiting such sales. *Howard v. Harris*, 8 Allen (Mass.) 297.

5. Exchange of Liquor for Liquor or Other Goods Held Not a Sale. — *Coker v. State*, 91 Ala. 92; *Gillan v. State*, 47 Ark. 555; *Stevenson v. State*, 65 Ind. 409. Compare *Massey v. State*, 74 Ind. 368. And see the title INTOXICATING LIQUORS.

Local Option — **Form of Submission of Question.** — It has been held that where a statute authorized the Commissioners' Court of a county to order an election to determine whether or not the "sale" of intoxicating liquors should be prohibited in such county, the court was not authorized to order an election to determine whether or not the "sale, exchange, or barter" of intoxicating liquors should be prohibited in said county. *Ex p. Beaty*, 21 Tex. App. 426.

6. Damages for Breach of Warranty. — *Emanuel v. Dane*, 3 Campb. 299; *Mercer v. Cosman*, 13 New Bruns. 240; *Cohen v. Ward*, 42 Ga. 337; *Hunt v. Sackett*, 31 Mich. 18; *Close v. Crossland*, 47 Minn. 500; *Bixler v. Saylor*, 68 Pa. St. 146. See the titles IMPLIED WARRANTY; WARRANTY.

Measure of Damages. — Where the plaintiff exchanged wagons with the defendant, giving boot money, the latter representing that he had the wagon he was exchanging built expressly for himself, and subsequently it turned out that the wagon was not his, and it was replenished and taken from the plaintiff by the real owner, it was held that such representation formed part of the contract, and that the plaintiff could recover from the defendant the value of his wagon and the boot money, but not the cost of defending his title to the wagon re-

Rescission — Where the Breach Is of a Warranty of Title. — The taking from one's possession by virtue of a valid chattel mortgage, of property received in exchange, will, though the exchange has been executed, authorize a rescission of the contract.¹

Where the Breach Is of a Warranty of Quality. — No difference in principle exists between an exchange and a sale as to the right to rescind for the breach of a warranty of quality and the consequences following the exercise of such right;² but there is a conflict of authorities upon the question whether, in either case, after the contract has been executed and the goods warranted completely accepted, the exchangee or vendee can, in the absence of fraud, or an express agreement to that effect, rescind the contract and recover back the consideration moving from him. In several states it has been held that he can.³ But in *England* it has been held that he cannot.⁴

ceived from the defendant. *Mercer v. Cosman*, 13 New Bruns. 240.

Where the defect of title in property received in exchange, upon which a right of recovery is based, consists of a chattel mortgage upon that and other chattels, in the absence of any showing that such property had any of it been sold under the mortgage, or of the value of such other chattels, the proper measure of damages could in no form of action be the value of the property given in exchange. *Hunt v. Sackett*, 31 Mich. 18.

1. Rescission for Breach of Warranty of Title. — *Hunt v. Sackett*, 31 Mich. 18.

But in *Close v. Crossland*, 47 Minn. 500, it was held that where the exchangee of mortgaged property does not surrender the same upon the demand of the mortgagee, but defends an action brought by him for the recovery thereof, an action by him against the exchangee, for damages or to rescind the contract and recover back the consideration, is premature while the suit of the mortgagee is still pending, and the provisional taking of the property in claim and delivery before the determination of the principal action decides nothing as to the title, and is not an eviction warranting an action by the exchangee before the decision of the principal suit.

When one of the parties to an exchange acts *mala fide*, knowing that he has no title to the article which he gives in exchange, it is a false and fraudulent affirmation on his part which taints the transaction and puts it in the power of the other party to avoid it and reclaim his property. *Bixler v. Saylor*, 68 Pa. St. 146.

Party Cannot Rescind While He Retains Boot Money. — One who has received money to boot on a trade of horses cannot, on failure of title to the horse he received in exchange, recover back the consideration, or the value of the horse he traded, on the ground of a total failure of consideration, so long as he retains the boot money; but the real nature of his right of action is the recovery of damages for a breach of the agreement implied in the trade, to be indemnified against failure or defect of title. *Hunt v. Sackett*, 31 Mich. 18.

In Pari Delicto. — A exchanged horses with B, knowing that B had stolen the horse. C, with the same knowledge, bought A's horse from B. The owner of the stolen horse took it from A. It was held that A, being *in pari delicto* with C, could not recover from him. *Bixler v. Saylor*, 68 Pa. St. 146.

2. Right of Rescission Same as in Case of Sale. — *Marston v. Knight*, 29 Me. 341. See the titles IMPLIED WARRANTY; WARRANTY.

3. Rescission of Executed Contract. — *Thompson v. Harvey*, 86 Ala. 519; *Marston v. Knight*, 29 Me. 341; *Smith v. Hale*, 158 Mass. 178, 35 Am. St. Rep. 485. See the titles IMPLIED WARRANTY; WARRANTY.

Rescission Allowed Though Defects in Things Warranted Perceptible. — In such a case the exchangee may rescind and recover his property, though the defects in the things warranted were plain and perceptible. *Thompson v. Harvey*, 86 Ala. 519.

Condition in Which Property Must Be Returned — Entry upon Premises. — In *Smith v. Hale*, 158 Mass. 178, 35 Am. St. Rep. 485, on an exchange of goods the defendant received a buggy and the plaintiff warranted the springs of the same. Shortly thereafter, without the defendant's fault, one of the springs broke. It was held that, this being a breach of the warranty and the breaking of the spring being just what the plaintiff had warranted against, the defendant might rescind the contract by returning the buggy to the plaintiff in its broken condition, and was not bound to return it in the condition in which it was when he received it. It was further held that after the defendant had returned the buggy to its original owner and demanded the restoration of his original chattel, and the plaintiff had refused, the defendant might enter upon the plaintiff's land and take away his property, provided this could be done peaceably.

4. English Rule. — In *Emanuel v. Dane*, 3 Campb. 209, the plaintiff exchanged a watch with the defendant for a pair of candlesticks which the latter warranted to be silver. The candlesticks were not silver, but were of a base metal. The defendant, on the candlesticks being returned to him, refused to deliver up the watch. Lord Ellenborough decided that the contract might be rescinded for fraud in the defendant, but if there was no fraud the watch remained the property of the defendant, though the plaintiff might recover damages for a breach of the warranty.

In *Power v. Wells*, 1 Doug. 24, note 8 2 Cowp. 818, the plaintiff gave a horse and twenty guineas to the defendant for another horse which was warranted to be sound, but which the plaintiff, after accepting and using, discovered not to be sound. The plaintiff made an offer to return the horse, which the defendant

b. FOR FRAUD — Rescission. — A party to a contract of exchange who is induced to enter into it by the false representations, knowingly made, of the other party, may, upon returning or tendering back the property received by him in the exchange, rescind the contract and recover the property given by him.¹ But the rescission must be made within a reasonable time,² and cannot be made without tendering a return of the property received,³ unless such property is absolutely worthless.⁴

The Contract Cannot Be Rescinded in Part. — If the party injured by the false representations elects to rescind the contract, he must rescind it altogether.⁵

Damages. — A party to a contract of exchange who has been induced to enter into it by the fraudulent representations of the other party may, if he so elects, affirm the contract and bring an action for the damages caused him by the fraud.⁶

Choice of One Remedy Rejects the Other. — Necessarily, a party cannot affirm the contract and sue for his damages, and at the same time rescind it and sue for the property he has exchanged. The former remedy counts upon and affirms the validity of the transaction; the latter repudiates the transaction, and counts upon its invalidity. The two remedies are utterly inconsistent, and the choice of one rejects the other, because an exchange cannot be valid and void at the same time.⁷

refused. It was held that the plaintiff could not maintain an action for money had and received, as that action could be brought only upon the rescinding of the contract, which the plaintiff had no right to do, there being no special agreement to that effect.

Burden of Proof. — In an action to recover possession of a pony, it appeared that the defendant exchanged with the plaintiff a horse for a mare. The defendant alleged that the plaintiff agreed that if the mare was not as he had represented her to be the defendant should have the pony in controversy, and that the mare not being as represented, he had taken possession of the pony. Upon this state of facts it was held that the burden of proving that the mare was not as represented was upon the defendant. *Fulliam v. Hagens*, 83 Iowa 763.

What Held Not an Affirmance of Exchange. — Where one of the parties to an exchange of horses returned the horse received by him, on the ground that it was not as represented, and received another horse in its stead which he also returned for the same reason, it was held that it could not be said, as a matter of law, that the party affirmed the first exchange by receiving the second horse. *Whiteside v. Brawley*, 152 Mass. 133.

1. Rescission for Fraud. — *Stuart v. Hayden*, 36 U. S. App. 462, 72 Fed. Rep. 402, *affirmed* 169 U. S. 1; *Whitworth v. Thomas*, 83 Ala. 308, 3 Am. St. Rep. 725; *Whiteside v. Brawley*, 152 Mass. 133. See the title RESCISSION.

2. Rescission Must Be Made Within a Reasonable Time. — *Whitworth v. Thomas*, 83 Ala. 308, 3 Am. St. Rep. 725; *Johnson v. McLane*, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102. See the title RESCISSION.

In *Stuart v. Hayden*, 36 U. S. App. 462, the court said: "If one who is induced to make a trade or sale by fraud would rescind it, he must immediately upon his discovery of the

fraud announce his intention so to do, and return all the consideration he has received, to the end that the parties may be put *in statu quo* before subsequent transactions have made such action impossible. Silence, delay, vacillation, acquiescence, or the retention and use of any of the fruits of the sale or trade that are capable of restoration, for any considerable length of time after the discovery of the fraud, constitute a complete and irrevocable ratification of the transaction. *Rugan v. Sabin*, 10 U. S. App. 531, 53 Fed. Rep. 418; *Kinne v. Webb*, 12 U. S. App. 144, 54 Fed. Rep. 38; *Scheffel v. Hays*, 19 U. S. App. 226, 58 Fed. Rep. 460; *McLean v. Clapp*, 141 U. S. 429; *Grymes v. Sanders*, 93 U. S. 62." This case was *affirmed* in the Supreme Court. *Stuart v. Hayden*, 169 U. S. 1.

3. Property Received Must Be Tendered Back. — *Johnson v. McLane*, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102; *Johnson v. Flynn*, 97 Mich. 581; *Hemstreet v. Hurley*, 21 Misc. Rep. (Oneida County Ct.) 420. See the title RESCISSION.

4. Worthless Property Need Not Be Returned. — *Johnson v. Flynn*, 97 Mich. 581. See also *Sheldon Axle Co. v. Scofield*, 85 Mich. 177.

5. Partial Rescission Not Allowed. — *Stuart v. Hayden*, 36 U. S. App. 462, 72 Fed. Rep. 402, *affirmed* 169 U. S. 1. See the title RESCISSION.

6. Damages for Fraud. — *Stuart v. Hayden*, 36 U. S. App. 462, 72 Fed. Rep. 402, *affirmed* 169 U. S. 1; *Whiteside v. Brawley*, 152 Mass. 133.

While a party cannot sue for the rescission of a contract of exchange while retaining the goods received under it, he may retain the goods and maintain an action for damages for fraudulent representations. *Nysewander v. Lowman*, 124 Ind. 584.

7. Two Remedies Inconsistent. — *Stuart v. Hayden*, 36 U. S. App. 462, *affirmed* 169 U. S. 1.

EXCISE. (See the titles INTOXICATING LIQUORS; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES; REVENUE LAWS; TAXATION.)—Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor.¹

EXCLUDE. (See also the title MARINE INSURANCE.)—To shut out; to except.²

EXCLUSION ACT.—See the title CHINESE EXCLUSION ACTS, vol. 5, p. 1101.

EXCLUSIVE — EXCLUSIVELY. (See also the title TIME, COMPUTATION OF.)—"Exclusive" means shutting out; debarring from participation;³

1. *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 445. See also *Union Bank v. Hill*, 3 Coldw. (Tenn.) 328.

Excise—Origin of the Term.—In *Nevin v. Ladue*, 3 Den. (N. Y.) 444, it was said: "In 1643 a tax was laid for one year upon ale and beer brewed by a common brewer, or by any private person who should sell or tap out such ale or beer, either publicly or privately; which tax upon home-manufactured articles was called by the new name of *excise*, as the duty upon the importation of articles from abroad was called an impost."

Tax and Excise Distinguished.—In *Oliver v. Washington Mills*, 11 Allen (Mass.) 274, it was said: "As has already been intimated, the words 'tax' and *excise*, although often used as synonymous, are to be considered as having entirely distinct and separate significations, under the provisions of the Constitution of Massachusetts, c. 1, § 1, art. 4. The former is a charge apportioned either among the whole people of the state, or those residing within certain districts, municipalities, or sections. It is required to be imposed, as we shall more fully explain hereafter, so that, if levied for the public charges of government, it shall be shared according to the estate, real and personal, which each person may possess; or, if raised to defray the cost of some local improvement of a public nature, it shall be borne by those who will receive some special and peculiar benefit or advantage which an expenditure of money for a public object may cause to those on whom the tax is assessed. An *excise*, on the other hand, is of a different character. It is based on no rule of apportionment or equality whatever. It is a fixed, absolute, and direct charge laid on merchandise, products, or commodities, without any regard to the amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those by whom the charge is to be paid." See also *Portland Bank v. Apthorp*, 12 Mass. 252, 255; *Com. v. People's Five Cent Sav. Bank*, 5 Allen (Mass.) 431; *Tax on Capital of Banks*, 15 Op. Atty.-Gen. 219.

2. **Exclusion and Exception.**—A policy of marine insurance was upon a vessel for a year, *excluding* during the term all ports and places in Mexico and Texas, also the West Indies. It was held that although the vessel touched at one of the *excluded* ports within the *excluded* period, the underwriters were liable when the loss happened after the excepted

period, the clause in the policy not being an exception or *exclusion* of voyages, but only a suspension of the risk during such time as the vessel should be at the excepted ports. The court said: "It is said by the counsel on behalf of the plaintiff that the clause in question is to be construed as an exception, and, therefore, equivalent to 'excepted risks.' This is met, on the other side, by the remark that the word used is *excluding*, and not 'excepting,' and that, in a grammatical sense, to *exclude* means to shut out, and not to except; and, therefore, *excluding* is rather prohibiting. It is certainly true that in lexicographies the word *exclude* has not ordinarily given to it, as one of its meanings, to 'except.' But nevertheless we shall find that one of the senses given to the word 'except' is to *exclude*. And in common parlance the words are often used as equivalents." *Palmer v. Warren Ins. Co.*, 1 Story (U. S.) 365.

Excluding in the Sense of Prohibiting.—A policy of insurance contained a printed clause in which the vessel was prohibited from certain rivers, gulfs, etc., including the Gulf of Campeachy. The words "*excluding* Gulf of Campeachy" were written in the policy also. It was held that the writing was not for the purpose of qualifying the printed clause. The court said: "So far as we are aware, there is no technical meaning given to the word *excluding* in marine insurance, and the customary meaning of the word does not differ greatly from that of the words 'prohibiting' or 'prohibited from.' The plaintiff relies upon the decision in *Palmer v. Warren Ins. Co.*, 1 Story (U. S.) 360, 18 Fed. Cas. No. 10698, but Mr. Justice Story reached his conclusion in that case with some hesitation, relying upon the particular words of the policy, and not upon any technical signification of the word *excluding*, which had become established in marine insurance. We are unable to see any such contradiction between the written and the printed words concerning the Gulf of Campeachy, in the present policy, as to make it necessary to reject the printed words." *Parker v. China Mut. Ins. Co.*, 164 Mass. 237.

3. **Exclusive Privileges.** (See also the title MONOPOLIES, and such titles as FERRIES, STREET RAILWAYS, etc.)—In *Matter of Union Ferry Co.*, 98 N. Y. 139, it was said: "A special privilege or franchise is not necessarily *exclusive*. The right of the patentee of an invention is *exclusive*. So would be an act of the legislature which should attempt to confer upon a private corporation or individual the

exclusive right to manufacture or vend any article of trade, and prohibit all other persons from competing in such business. * * * But the grant of a particular power to a private corporation is not *exclusive* simply because the same power is not possessed by other corporations, so long as there is nothing to prevent the granting of such power to any other corporation. * * * The word *exclusive* is derived from *ex*, out, and *cludere*, to shut. An act does not grant an *exclusive* privilege or franchise unless it shuts out or excludes others from enjoying a similar privilege or franchise." Accordingly, an act authorizing the lessees of certain ferries to acquire the right to use a pier and adjoining land is not in violation of a constitutional prohibition against the passage of any private or local bill "granting * * * any *exclusive* privilege, immunity, or franchise whatever." See also *Trustees, etc. v. Roome*, 93 N. Y. 313.

"**Sole and Exclusive Fishery**" having been used in a declaration instead of "several fishery," the expressions were regarded as equivalent, and the declaration not defective, at least after verdict. *Holford v. Bailey*, 13 Q. B. 426, 16 E. C. L. 426, *reversing* 8 Q. B. 1000, 55 E. C. L. 1000. See generally the title FISH AND FISHERIES.

Exclusive Right. — A grant "of all the rights and privileges to use my name" has been held to be the grant of an *exclusive* right. *Filkins v. Blackman*, 13 Blatchf. (U. S.) 445. See also the titles GOOD WILL; TRADE-MARKS.

That a municipality has, by its charter, the *exclusive* right to fix the rates of all licenses to retailers of spirituous liquors, and to prohibit their sale, is not a defense to an indictment under a state law for selling without a license. *Sloan v. State*, 8 Blackf. (Ind.) 361. See generally the title INTOXICATING LIQUORS.

Same — Patents. (See also the title PATENT LAW.) — In *Washburn v. Gould*, 3 Story (U. S.) 131, it is said: "The language of the Patent Act of 1836, § 11, refers to the grant of an *exclusive* right in a patent, and the term *exclusive* comprehends not only an *exclusive* right to the whole patent, but an *exclusive* right to the patent in a particular section of country."

Exemptions. (See also the title EXEMPTION FROM TAXATION.) — Land not in use at all is not "used *exclusively*" for the benefit of an institution of learning to which it belongs, within the meaning of a statute exempting from taxation lands so used. *Presbyterian Theological Seminary v. People*, 101 Ill. 578.

Same — Land Belonging Exclusively to the State. — A statute exempted land belonging *exclusively* to the state from taxation. It was held under this statute that lands belonging to the Agricultural College of the state, which had been sold under a time contract, and part of the purchase money being paid, were subject to taxation. *Dickinson County v. Baldwin*, 29 Kan. 538, *distinguishing* *Parker v. Winsor*, 5 Kan. 362; *Douglas County v. Union Pac. R.*, 5 Kan. 615. See also *Oswalt v. Hallowell*, 15 Kan. 154. The court in *Dickinson County v. Baldwin*, 29 Kan. 541, said: "Take an extreme case: Suppose a time contract, every payment but the last made by the purchaser, and he with the money in his pocket ready to make that when it becomes due; al-

though if he fails to make that payment he forfeits the land, does it not seem very like trifling with language to say that prior to such forfeiture, or any right to forfeiture, the land not only belongs, but *exclusively* belongs, to the state? It seems to us that a good deal of force must be given to the word *exclusively*, when used in this connection in the exemption statute, and that by its use the legislature intended to exempt only that property which belongs to the state, and belongs to it free from any contract or interest on the part of an individual; that it intended that, at the moment any property or any interest in property of the state was transferred to an individual, such an interest as the state of its own volition could not destroy or take away, that moment the property or interest transferred should become subject to taxation; and this notwithstanding any provisions which it established for the protection of its own interest in the property."

Same — Organized Exclusively for Manufacturing Purposes. — A statute exempted from taxation corporations "organized *exclusively* for manufacturing purposes." It was held that a corporation which carried on the business of mining coal and manufacturing coke therefrom, and which had invested a portion of its capital in mining coal, was liable to taxation on such portion of its capital so invested. *Com. v. Juniata Coke Co.*, 157 Pa. St. 507. See also *Com. v. National Oil Co.*, 157 Pa. St. 516; *Com. v. Keystone Bridge Co.*, 156 Pa. St. 500; *Com. v. Pittsburgh Bridge Co.*, 156 Pa. St. 507.

Exclusively Used in Operating Railroad. — A statute provided that the board of equalization should assess against a railway company the property *exclusively* used in operating the railroad. It was held that this did not limit the action of the board to such "rolling stock" as always remained upon the company's line and under its immediate control; and that the authority of the board included cars which in performing their regular journeys passed out of the state and became temporarily useful in operating other roads. *Denver, etc., R. Co. v. Church*, 17 Colo. 1.

Exclusive Jurisdiction. (See also the titles JURISDICTION; UNITED STATES COURTS.) — An act establishing the police court of a city conferred upon it "*exclusive* jurisdiction over all such criminal offenses committed within the limits of said city as are cognizable by justices of the peace or trial justices." It was held that this meant *exclusive*, not as against all courts, but only as against courts of the same grade, as against justices of the peace and trial justices. *State v. Jones*, 73 Me. 280.

Exclusive and Original Jurisdiction. — In *Com. v. O'Connell*, 8 Gray (Mass.) 464, it was said: "This depends on the legal meaning and effect of the two words '*exclusive* jurisdiction'; for the word 'original' adds nothing to the word 'exclusive'; inasmuch as *exclusive* jurisdiction is necessarily original, although original jurisdiction is not necessarily *exclusive*."

Exclusive Control of Schools. (See also the title SCHOOLS.) — A statute provided that when a city assumed the control of the public school, the council should have *exclusive* powers to regulate the schools. A later statute provided

besides; over and above; not taking into account; not computing.¹

EXCURSION TICKETS.—See the title TICKETS AND FARES.

EXCUSABLE HOMICIDE.—See the titles ARREST, vol. 2, p. 832; HOMICIDE; SELF-DEFENSE.

EXCUSABLE NEGLIGENCE. (See also the title JUDGMENTS; and see ENCYC. OF PL. AND PR., title OPENING, VACATING, AND SETTING ASIDE JUDGMENTS.)—See note 2.

EXCUSE.—See note 3.

that cities or towns of a certain size might appoint trustees who should have the same control as the council. It was held that the trustees when appointed should have *exclusive* control. The court said: "The construction we have given said provisions avoids the conclusion that the legislature intended to create the confusion that would result from attempting to vest *exclusive* (not 'paramount' or 'supervisory') power of control in the council, and general control in the board of trustees. It appears to us that the word *exclusive*, in said article 3783, was inserted solely for the purpose of conferring upon the council or board of aldermen of any city that assumed control of its public free schools the full powers specified in said article, as against any state or county officials, and that it cannot properly be held to have been directed against the powers of the board of trustees for such city, for such boards were unknown when said article became the law." *School Trustees v. Sherman*, 91 Tex. 188.

Exclusive Possession.—See the title ADVERSE POSSESSION, vol. 1, p. 834.

1. **Exclusive in the Sense of Over and Above.**—In *Walker v. Gibbs*, 1 Yeates (Pa.) 259, the word *exclusive* in the verdict of the jury was construed to mean "over and above," to effectuate their plain intention.

Will. (See also the title WILLS.)—A testator bequeathed property in the following words: "I also give and bequeath to my said daughter Lydia two thousand six hundred and fifty dollars, *exclusive* of what I have already advanced to her shortly after her marriage." It was held that *exclusive* in this connection meant "not to be taken into account." The court said: "That is, in estimating the value of this legacy, the amount advanced is not to be taken into the account, or, what is the same thing, I give it her besides what I before advanced to her." *Coale v. Smith*, 4 Pa. St. 376.

Same—Separate Estate. (See also the title SEPARATE PROPERTY OF MARRIED WOMEN.)—In *Gould v. Hill*, 18 Ala. 84, it was held that the words "*exclusively* to her and the heirs of her body forever," when used in a bequest of slaves by a father to his daughter, then a married woman, were sufficient to exclude the marital rights of the husband.

Exclusive of Water.—A deed conveyed a portion of a lot and enough of the end of another lot to make, together with adjoining property already owned by the grantee, fifty acres *exclusive* of water. The court said: "The qualifying phrase '*exclusive of water*' does not signify a boundary, or a limitation of the quantity of territory taken from lot thirteen by the deed, but the *exclusion* of that part of the land so taken which is flowed with water from the computation in making up the

fifty acres necessary to answer the call in the deed. The meaning is the same as if that clause read 'besides,' or 'not computing,' instead of '*exclusive of*,' the water." *Bartlett v. Corliss*, 63 Me. 287. It was held accordingly that where water receded from part of the latter lot the land uncovered belonged to the grantee.

Exclusive of Interest or Costs. (See also the title AMOUNT IN CONTROVERSY, 1 ENCYC. OF PL. AND PR. 702.)—A statute regulating appeals provided that the amount in controversy was to be determined *exclusive* of interest and costs. It was held that, on appeal from a decree enforcing a judgment, the interest and costs included in such judgment constitute a part of the amount in controversy. The court said: "The term '*exclusive of interest and cost*,' as used in the statute, means the costs incurred in the suit, and embraced in the judgment from which the appeal is taken. In the case at bar the amount in controversy is not only ninety-five dollars, with several years' interest, but also eighteen dollars and thirty cents, for which sum judgment has been heretofore rendered." *Nashville, etc., R. Co. v. Mattingly*, (Ky. 1897) 40 S. W. Rep. 673.

"*Exclusive of costs*" in a statute defining the jurisdiction of a court by a fixed amount, has reference to costs in the court referred to, and not those which have been incurred in another court, and have become a part of the debt. *Van Tyne v. Bunce*, 1 Edw. Ch. (N. Y.) 583.

A statute conferred jurisdiction upon city courts in causes in which the amount in controversy did not exceed a certain amount "*exclusive of interest*." It was held that the words "*exclusive of interest*" meant that the jurisdiction must be determined without any regard to the interest on the property accruing or accrued. *State v. Fernandez*, 49 La. Ann. 249.

2. **Excusable Neglect.**—In *Davis v. Steuben School Tp.*, 19 Ind. App. 694, it was said: "*Excusable neglect* is a compound term. *Excusable* is where an act is done, or omitted, admitting of an excuse. *Neglect* is the omission or forbearance to do a thing that can be done, or that is required to be done."

In *City Block Directory Co. v. App*, 4 Colo. App. 350, it was held that where a party places reliance upon erroneous statements and assurances made to him by his adversary's counsel, it is *excusable neglect*.

3. **Excuse.**—Under an act that "whosoever without lawful authority or *excuse*" shall make, mend, etc., any die impressed with the resemblance of either side of any current coin shall be guilty of felony, an indictment is sufficient which uses the word *excuse* alone, as that word includes "authority." *Reg. v. Harvey*, L. R. 1 C. C. 284.

EXEAT. — See the title NE EXEAT.

EXECUTE. (See also the title EXECUTION AND PROOF OF DOCUMENTS, *post*, and the references there given.) — See note 1.

EXECUTED CONTRACTS. (See also the titles CONTRACTS, vol. 7, p. 95; ILLEGAL CONTRACTS; and see EXECUTORY.) — An executed contract is one in which the object of the contract is performed. A debt paid is a contract executed.²

EXECUTED TRUSTS. — See EXECUTORY, and the title TRUSTS AND TRUSTEES.

1. **Executes the Functions of a Public Officer.** — Section 72 of the *New York* Penal Code, which prescribes the offense of receiving bribes, embraces all persons who *execute* the functions of a public office. In construing this section the court in *People v. Jaehne*, 103 N. Y. 191, said: "It is plain that a member of a com-

mon council or other municipal officer is a person 'who *executes* the functions of a public office,' and we cannot doubt that municipal officers are within the purview of section 72."

2. *Washington v. Burnett*, 4 W. Va. 84; *Brown v. Wylie*, 2 W. Va. 503; *Fletcher v. Peck*, 6 Cranch (U. S.) 136.

EXECUTION AND PROOF OF DOCUMENTS.

BY ALEXANDER STRONACH.

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I. SCOPE OF THE TITLE. — In this article will be found a discussion of the necessity of proving the execution of private documents other than letters and

wills, and the admissibility and sufficiency of the evidence offered for that purpose. The discussion of these questions when arising in connection with documents other than of a strictly private character, wills, and letters, may be found elsewhere in this work.¹

II. MEANING OF EXECUTION. — The execution of a document means completing it in accordance with the various formalities required by law, such as signing, sealing, stamping, and acknowledging it, and having it properly attested.² This term also generally includes the delivery of the document.³

Manner of Execution by Particular Persons. — A full discussion of the manner in which documents must be executed by particular persons, such as agents or attorneys, partners, officers of corporations, and married women, will be found elsewhere in this work.⁴

III. PROOF OF EXECUTION — 1. **Necessity for Proof** — *a.* **GENERAL RULE.** — Under the rule requiring the production of the best evidence of which the

1. See the titles LETTERS; RECORDS; WILLS.

2. What "Execution" Means. — *Le Mesnager v. Hamilton*, 101 Cal. 532, 40 Am. St. Rep. 81. And see generally the titles BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 200; DEEDS, vol. 9, p. 142. As to acknowledging a document, see the title ACKNOWLEDGMENTS, vol. 1, p. 483. As to sealing a document, see the title SEALS. As to attesting a document, see ATTEST — ATTESTATION, vol. 3, p. 273.

3. Includes Delivery. — *Churchill v. Gardner*, 7 T. R. 592; *Kusler v. Crofoot*, 78 Ind. 597; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Binney v. Plumley*, 5 Vt. 500, 26 Am. Dec. 313. And see the titles BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 200; DEEDS, vol. 9, p. 150.

In *Le Mesnager v. Hamilton*, 101 Cal. 532, 40 Am. St. Rep. 81, *De Haven, J.*, delivering the opinion of the majority of the court, said: "The word 'execute,' when applied to a written instrument, unless the context indicates that it was used in a narrower sense, * * * imports the delivery of such instrument." But in the opinion delivered by *McFarland, J.*, in the same case, and concurred in by *Beatty, C. J.*, it was said: "It is true that, in a general sense, 'execution' may be said to include 'delivery;' but it is quite frequently used in the limited sense of signing, and, where the law requires it, sealing, stamping, acknowledging, etc., a written instrument, so as to make it complete on its face and ready for delivery."

Presumption as to Delivery. — The possession of a document by the person for whose benefit it was made is *prima facie* evidence of delivery. *Hatch v. Haskins*, 17 Me. 391; *Glenn v. Grover*, 3 Md. 212. See also *Patterson v. Snell*, 67 Me. 559; *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 418. And see the titles BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 200, 318; DEEDS, vol. 9, p. 159; ESCROW, *ante*.

Proof of Handwriting and Acknowledgment Evidence of Delivery. — "To render an instrument in writing competent evidence, it is necessary that some proof should be given from which the jury can legally infer that it was executed by the party. In this case, the handwriting and the acknowledgment of the handwriting are amply proven. This was *prima facie* evidence of everything which ap-

peared upon the face of the instrument, justified its admission, and authorized the jury to find the sealing and delivery, unless contradicted by some other fact which appeared before them." *Curtis v. Hall*, 4 N. J. L. 167.

When one of the parties to an action has in possession the instrument which it is sought to introduce in evidence, and the signature of the maker thereof has been admitted or proved, he has a right to introduce such instrument in evidence and to make his proof as to the delivery thereafter. *Brooks v. Allen*, 62 Ind. 401; *Kusler v. Crofoot*, 78 Ind. 597; *Green v. Beckner*, 3 Ind. App. 39.

Delivery Inferred from Circumstances. — "As to proof of delivery as well as execution, we have examined the authorities and find the great weight of authority to be that when a deed is shown to have been properly executed, acknowledged, and recorded, that is *prima facie* evidence of its delivery; but that this *prima facie* case may be rebutted by proof. Some of the authorities go so far as to hold that the simple record of a deed is such *prima facie* evidence of delivery, but we think that would be too loose a doctrine to be applied with safety. We think the principle is correctly stated in *Rigler v. Cloud*, 14 Pa. St. 361, where the court say (*Coulter, J.*): 'The crowning act in the execution of a deed is its delivery. But it is not necessary to prove the actual manual investiture. The delivery may be inferred or presumed from circumstances. Thus, the signing, the attesting by witnesses, the acknowledgment by the grantor, and the recording of the deed have been considered full *prima facie* evidence of delivery.' But the evidence is not conclusive." *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 537.

Proof of Seal Is Not Evidence of Delivery. — A bond for payment of money without a subscribing witness can be declared upon only as a sealed instrument; and proof of the obligor's handwriting will be admitted as proof of the seal; but proof of the seal is not evidence of delivery, which is to be inferred from other circumstances. *Ingram v. Hall*, 1 Hayw. (1 N. Car.) 193.

4. See the titles ACKNOWLEDGMENTS, vol. 1, p. 507; AGENCY, vol. 1, p. 1035; BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 163; DEEDS, vol. 9, p. 144; HUSBAND AND WIFE; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PARTNERSHIP; POWERS OF ATTORNEY.

nature of the case will admit, the contents of a document must usually be proved by the production of the document itself;¹ and in the absence of some statutory enactment to the contrary, the general rule is that before a document is admissible in evidence it is necessary to prove its execution.²

1. For a discussion of this rule, see the title EVIDENCE, *ante*. As to the cases in which secondary evidence of the contents of a document is admissible, and as to what constitutes such evidence, see the title SECONDARY EVIDENCE.

2. **Proof of Execution Necessary** — *Alabama*. — *Johnson v. Alabama Gas, etc., Co.*, 90 Ala. 505.

Georgia. — *Long v. Georgia Land, etc., Co.*, 82 Ga. 628.

Illinois. — *Williams v. Miami Powder Co.*, 36 Ill. App. 107.

Kentucky. — *Francis v. Hazlerig*, 1 A. K. Marsh. (Ky.) 93. See also *Dodge v. State Bank*, 2 A. K. Marsh. (Ky.) 610.

Louisiana. — *Miller v. Wisner*, 22 La. Ann. 457; *Leibe v. Hebersmith*, 39 La. Ann. 1050.

Maine. — *Kent v. Weld*, 11 Me. 459; *Hutchinson v. Chadbourne*, 35 Me. 189; *Webber v. Stratton*, 89 Me. 379.

Missouri. — *Tittman v. Thornton*, 107 Mo. 500.

Nebraska. — *Sloan v. Fist*, (Neb. 1898) 74 N. W. Rep. 45.

New Jersey. — *Curtis v. Hall*, 4 N. J. L. 167; *Linn v. Ross*, 16 N. J. L. 55.

New York. — *Wheeler, etc., Mfg. Co. v. McLaughlin*, (Supreme Ct.) 8 N. Y. Supp. 95.

North Carolina. — *Shaffer v. Bledsoe*, 118 N. Car. 279.

Texas. — *Hander v. Baade*, (Tex. Civ. App. 1897) 40 S. W. Rep. 422; *Watson v. Winston*, (Tex. Civ. App. 1897) 43 S. W. Rep. 852.

Canada. — *Lovejoy v. McDiarmid*, 17 New Bruns. 275.

See also *Grandmange v. Schell*, 32 Fed. Rep. 655; *Cawley v. Bohan*, 120 Pa. St. 295.

And see *infra*, this section, *Method of Proof*.

Lost Documents. — The execution of a lost document must be proved before parol evidence of its contents can be introduced. *Felton v. Pitman*, 14 Ga. 530; *Mariner v. Saunders*, 10 Ill. 113; *Kimball v. Morrell*, 4 Me. 368; *Hewes v. Wiswell*, 8 Me. 94; *Dunlap v. Glidden*, 31 Me. 510; *Peck v. Clark*, 18 Tex. 239.

Proof of Execution Necessitated by Denial in Verified Answer. — When the answer denying the allegations of corporate existence and the execution of written instruments contained in the petition is verified, they must be proved upon the trial; and it is error, with such an answer in the case, to render judgment against a corporation without any proof of its corporate existence; and it is also error, with a verified answer on file, to receive in evidence written instruments without any proof of their execution. *Jones v. Ross*, 48 Kan. 474.

Effect of Not Proving Execution by All the Makers. — A written instrument executed by three grantors is admissible in evidence if the execution of only two of the grantors is proved. If the execution of the third grantor is not proved, the failure to make this proof should be taken advantage of by asking the court to instruct the jury to disregard it so far

as it purports to convey the interest of the person whose signature is not proved. *St. John v. Kidd*, 26 Cal. 264. See also *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 451.

Production Necessary Before Proving Execution. — It is an elementary rule that evidence of the execution or contents of a deed cannot be admitted without the production of the deed itself, unless it can be shown that it is in the possession of the opposite party, and he refuses to produce it after regular notice, or that it is lost or destroyed. *Jackson v. Frier*, 16 Johns. (N. Y.) 193. See the title EVIDENCE, *ante*.

Burden of Proving Genuine upon Party Producing. — Though a deed may be read in evidence to the jury after the preliminary proof by the subscribing witnesses, yet if the genuineness of the instrument is in controversy the burden of proof is still on the party producing it, to satisfy the jury beyond a reasonable doubt that it is genuine. *Ross v. Gould*, 5 Me. 204.

Execution a Question for Jury. — "Where evidence addressed to the court is adduced, making out a *prima facie* case of the authenticity of such note or other instrument, or reasonably tending, even slightly, to prove the formal execution of it, such evidence is sufficient to entitle such note or other instrument to go to the jury." *Pate v. Aurora First Nat. Bank*, 63 Ind. 254, quoted with approval in *Talbott v. Hledge*, 5 Ind. App. 555.

"When there is any fact or circumstance tending to prove the authenticity of the instrument, from which it might be presumed, then the instrument is to be read to the jury, and the question, like other matters of fact, is for their decision; and when a *prima facie* case of execution has once been made, the court is not to allow the other party to produce counter proof before the instrument is read, and then assume to take the question from the jury." *Flournoy v. Warden*, 17 Mo. 435.

Proof of Agent's Authority Necessary. — In *Darst v. Doom*, 38 Ill. App. 397, it was held that it was error to admit in evidence against the principal a contract, without proof of the agent's authority, express or implied, to execute the same, or a ratification thereof by the principal subsequent to its execution. To the same effect are *Grandmange v. Schell*, 32 Fed. Rep. 655; *Fadner v. Hibler*, 26 Ill. App. 639. See also the title AGENCY, vol. 1, pp. 967, 1035.

Power of Attorney Must Be Produced. — Where a deed purports on its face to be executed by an attorney in fact, and the execution of the deed is put in issue, the power under which it was executed must be produced. *Elliott v. Pearce*, 20 Ark. 511. To the same effect is *Hughes v. Holliday*, 3 Greene (Iowa) 30. See also *James v. Gordon*, 1 Wash. (U. S.) 333; *Carnall v. Duval*, 22 Ark. 136. And see the title POWERS OF ATTORNEY.

Proof of Authority from a Corporation Necessary. — Where a paper writing is offered to prove a contract made by a corporation, it is necessary to prove not only the execution of

b. EXCEPTIONS—(1) *Adverse Party Claiming under Document*.—An exception to the rule requiring proof of execution is that when a document is produced upon notice by an adverse party who claims an interest in the cause under such document, then the party calling for its production is not bound to prove its execution.¹ But, according to the weight of authority, the fact that the document comes from the possession of the adverse party will not dispense with the necessity of proving the execution thereof when such adverse party does not claim any interest thereunder.² This exception does not authorize a party to call for the production of, and to put in evidence, a paper

such writing, but also that it was authorized by the corporation. *Equitable Endowment Assoc. v. Fisher*, 71 Md. 430. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Presumption from Proof of Corporate Seal.—“If the seal itself of a corporation is proved by satisfactory legal evidence, and it appears appended to a document which is within the scope of its powers, be executed by the corporation, and appears on the face of it to be properly executed, the legal presumption is that it is properly executed until the contrary is shown.” *Woodhill v. Sullivan*, 14 U. C. C. P. 265. See the titles CORPORATIONS (PRIVATE), vol. 7, p. 693; SEALS.

Proof of Execution of Instruments Referred to Not Necessary.—Where a verbal contract refers to a written instrument not as a contract, but as containing some of the terms of the parol contract, it is not necessary, in order to admit the writing in evidence in establishing the verbal contract, to prove the execution of the writing, but identifying it is enough. *Smith v. New York Cent. R. Co.*, 4 Abb. App. Dec. (N. Y.) 262.

In *Lombard v. Mayberry*, 24 Neb. 674, it was held that negotiable instruments referred to in a bond on which an action had been brought were admissible in evidence for the purpose of fixing the amount of the plaintiff's recovery, without proof of their execution, although such execution was denied in the answer.

1. Interest Claimed by Adverse Party.—*Pearce v. Hooper*, 3 Taunt. 60; *Roe v. Wilkins*, 4 Ad. & El. 86, 31 E. C. L. 35, citing *Knight v. Martin*, Gow N. P. 26; *Orr v. Morice*, 3 Brod. & B. 139, 7 E. C. L. 382; *Chisholm v. Sheldon*, 2 Grant's Ch. (U. C.) 178; *Rhoades v. Selin*, 4 Wash. (U. S.) 719; *Williams v. Keyser*, 11 Fla. 234, 89 Am. Dec. 243; *Herring v. Rogers*, 30 Ga. 615; *McGee v. Guthry*, 32 Ga. 307; *McGregor v. Wait*, 10 Gray (Mass.) 72, 69 Am. Dec. 305; *Jackson v. Kingsley*, 17 Johns. (N. Y.) 158; *Balliet v. Fink*, 28 Pa. St. 266. See also *Scott v. Waithman*, 3 Stark. 168, 14 E. C. L. 176; *Bradshaw v. Bennett*, 1 M. & Rob. 143.

Where the Defendants Claimed Title to Certain Goods under an Assignment, and in pursuance of notice produced it at the trial when called for by the plaintiffs, it was held that the plaintiffs were entitled to read it in evidence without calling the attesting witness to prove the execution, although they impugned the validity of the assignment on the ground of fraud. *Carr v. Burdiss*, 1 C. M. & R. 782.

Proof of Execution Dispensed With by Failure to Produce.—Where a party refuses to produce a deed, he cannot, after proof of notice and

after proof of his possession of the deed, and after proof also of an examined copy, by producing the deed, insist upon its proof by the attesting witness. *Jackson v. Allen*, 3 Stark. 74, 14 E. C. L. 165.

Where it was alleged on the record that the deed was in the hands of the defendant, and the allegation was admitted, and the defendant, being called on to produce the deed, refused to do so, it was held that it was not necessary for the plaintiff to call the subscribing witness to the deed before giving evidence of its contents. *Cooke v. Tanswell*, 8 Taunt. 450, 4 E. C. L. 163, followed in *Poole v. Warren*, 8 Ad. & El. 582, 35 E. C. L. 463.

2. No Interest Claimed by Adverse Party.—*Doe v. Cleveland*, 9 B. & C. 864, 17 E. C. L. 512; *Rhoades v. Selin*, 4 Wash. (U. S.) 715; *Jackson v. Kingsley*, 17 Johns. (N. Y.) 158. See also *Wetherston v. Edgington*, 2 Campb. 94. *Compare Rex v. Middlezoy*, 2 T. R. 41; *Bowles v. Langworthy*, 5 T. R. 366; *Betts v. Badger*, 12 Johns. (N. Y.) 223, 7 Am. Dec. 309.

Illustrations.—The defendant, to prove that he had been in partnership with the plaintiff, offered in evidence a written contract purporting to be made by the plaintiff and the defendant, as partners, with K., a builder, for work to be done by K. upon the premises where the plaintiff carried on the business in which the defendant alleged himself to have been partner. The document was in the plaintiff's custody, and produced by him on notice. It was held that the contract was not admissible without proof of the execution, as an instrument under which the plaintiff claimed an interest. *Collins v. Bayntun*, 1 Q. B. 117, 41 E. C. L. 463.

In an action by A against B for commission due to A as agent for B in procuring him an apprentice, B produced the deed of apprenticeship under notice; and there being an attesting witness to it who was not called, A was nonsuited. It was held that as B did not claim under the deed any interest in the subject-matter of the cause, the case did not fall within the exception to the rule requiring proof of the execution of an instrument. *Rear-den v. Minter*, 5 M. & G. 204, 44 E. C. L. 115. Where an instrument is produced at the trial by one of the parties, in consequence of notice from the other, which when produced appeared to have been executed by the party producing it and third persons, and to be attested by a subscribing witness, the production of it in that manner does not dispense with the necessity of proving the instrument by means of the subscribing witness, though unknown before to the party calling for it. *Gordon v. Secretan*, 8 East 548, *disapproving* *Rex v. Middlezoy*, 2 T. R. 41.

that has of itself no connection with or relevancy to the issue, for the sole purpose of laying a foundation to get in evidence, without proof of execution, another paper that is pertinent to the issue.¹

(2) *Ancient Documents.*—Another exception to the general rule is that an ancient document proves itself and is admissible in evidence without proof of its authenticity or execution, by calling the attesting witnesses, or by proving their handwriting, or otherwise, provided there is an absence of all *indicia* of fraud or invalidity on the face of the instrument and that it comes from the proper custody.²

c. EFFECT OF ADMISSIONS IN PLEADINGS.—The necessity of proving the execution of a document may be dispensed with by admissions made in the pleadings in an action.³

d. STATUTES DISPENSING WITH PROOF OF EXECUTION.—In several jurisdictions it is provided by statute or by rule of court that when the execution of a document which is the basis of a suit is not denied under oath, proof of the execution of such document is unnecessary.⁴

1. *McGee v. Guthry*, 32 Ga. 307.

2. *Ancient Documents Prove Themselves.*—See the title ANCIENT DOCUMENTS, vol. 2, p. 324.

3. *Execution Admitted in Plea.*—*Smith v. Gale*, 144 U. S. 509; *Burtles v. State*, 4 Md. 278; *Zihlman v. Cumberland Glass Co.*, 74 Md. 303; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *New Brunswick, etc., Land Co. v. Kirk*, 6 New Brunswick. 443. See also *Savery v. Brown*, 18 Iowa 246.

Allegation Not Denied.—"The allegation in the complaint that the undertaking was executed by the defendants is a sufficient allegation, and, there being no denial in the answer, sufficient proof of the complete execution, including the delivery, of the instrument, and no other proof of its execution and delivery was necessary." *Robert v. Good*, 36 N. Y. 408.

If a Defendant by Exception Admits His Signature to a Note of hand and pleads a term for payment, it is not necessary for the plaintiff to prove the signature, even though the exception be dismissed and there is a defense en fait. *Vallieres v. Roy*, 2 Rev. de Lég. 335.

4. *Proof Unnecessary When Execution Not Denied—Statutes.*—*United States.*—*Pollak v. Brush-Electric Assoc.*, 128 U. S. 446 (Alabama statute); *Moline Plow Co. v. Webb*, 141 U. S. 616 (Texas statute).

Alabama.—*Coleman v. Pike County*, 83 Ala. 328, 3 Am. St. Rep. 746; *Tuskaloosa Cotton Seed Oil Co. v. Perry*, 85 Ala. 158; *Mobile, etc., R. Co. v. Gilmer*, 85 Ala. 422; *Capehart v. Granite Mills*, 97 Ala. 353.

Indiana.—*Belton v. Smith*, 45 Ind. 291.

Iowa.—*Smith v. King*, 38 Iowa 105.

Michigan.—*Conrad Seipp Brewing Co. v. McKittrick*, 86 Mich. 191; *Hemminger v. Western Assur. Co.*, 95 Mich. 355.

Minnesota.—*Massillon Engine, etc., Co. v. Holdridge*, 68 Minn. 393; *In re O'Neil's Estate*, (Minn. 1898) 76 N. W. Rep. 27.

Mississippi.—*Wanita Woolen Mills v. Rollins*, 75 Miss. 253.

New Mexico.—*Coler v. Santa Fe County*, 6 N. Mex. 88.

Texas.—*Cox v. Cock*, 59 Tex. 524; *Chator v. Brunswick Balke-Collender Co.*, 71 Tex. 588; *Fine v. Freeman*, 83 Tex. 529; *Bosley v. Pease*, (Tex. Civ. App. 1893) 22 S. W. Rep. 516.

Rule of Court Dispensing with Proof.—It is not incompetent for a court to make a rule allowing a written instrument on which a suit is brought to be admitted in evidence without proof of execution when the execution has not been denied or notice given that such proof would be required. *Reese v. Reese*, 90 Pa. St. 89, 35 Am. Rep. 634; *McGovern v. Hoesback*, 53 Pa. St. 176; *Medary v. Cathers*, 161 Pa. St. 87.

Under the Illinois Practice Act, § 34, when there is no plea verified by affidavit denying the execution of a document which is the basis of the suit, proof of the execution of such document is unnecessary. *Shufeldt v. Henderson*, 26 Ill. App. 593; *Aultman v. Henderson*, 32 Ill. App. 331.

But when the document is not the basis of the suit, proof of its execution is necessary before it can be admitted in evidence if objected to on that account. *Western Mut. L. Assoc. v. People*, 73 Ill. App. 496.

Indiana Statute—No Right to Offer Instrument in Evidence and Prove Execution Afterwards.—

"There was no error in refusing to permit the appellant to read in evidence the note described in the complaint, for, as its execution was denied under oath, it was proper to exclude it from the jury until some evidence of its execution had been given. It is true that courts ordinarily allow parties to introduce their evidence in the order they desire, but this is a matter of favor, and not of right, for the court may, in its discretion, require evidence of the execution of an instrument before admitting it, although counsel may promise to offer such evidence at a later period in the case." *Woollen v. Wire*, 110 Ind. 251.

Revised Statutes of Wisconsin, § 4192, provides that "every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed, until the person by whom it purports to have been so signed or executed shall specifically deny the signature or execution of the same by his oath or affidavit, or by his pleading duly verified; but this section shall not extend to instruments purporting to have been signed or executed by any person who shall have died previous to the requirement of such proof." *Construed in Shattuck v. Bates*,

Acknowledged and Recorded Documents.—A discussion of the admissibility in evidence of documents which have been acknowledged and recorded in accordance with certain prescribed statutory requirements will be found elsewhere in this work.¹ By statutory enactments in some jurisdictions, deeds and certain other instruments which have been duly acknowledged are admissible in evidence without further proof of execution.²

2. Method of Proof—*a.* **UNATTESTED DOCUMENTS.**—The execution of a document which is not attested by a subscribing witness is sufficiently proved

92 Wis. 633; Wallis *v.* White, 58 Wis. 26; Parroski *v.* Goldberg, 80 Wis. 339.

Canada Statute.—No proof of the signature of a note is necessary unless such signature is denied by affidavit, except when such note is set up against the heir or representative of the signer. Martin *v.* Gault, 15 L. C. Jur. 237.

1. See the titles **ACKNOWLEDGMENTS**, vol. 1, pp. 484, 555; **RECORDING ACTS**.

2. Proof of Execution of Acknowledged Instruments Unnecessary—*Alabama.*—Jordan *v.* Mead, 12 Ala. 247.

Colorado.—Chivington *v.* Colorado Springs Co., 9 Colo. 597.

Indiana.—Davidson *v.* State, 135 Ind. 254.

Kansas.—Stinson *v.* Geer, 42 Kan. 520; Anglo-American Land, etc., Co. *v.* Hegwer, (Kan. App. 1898) 51 Pac. Rep. 915.

Michigan.—Webb *v.* Holt, (Mich. 1897) 71 N. W. Rep. 637.

Nebraska.—Linton *v.* Cooper, (Neb. 1898) 73 N. W. Rep. 731.

New York.—Simmons *v.* Havens, 101 N. Y. 427; McKay *v.* Lasher, 121 N. Y. 477.

Pennsylvania.—Keichline *v.* Keichline, 54 Pa. St. 75.

Washington.—Gardner *v.* Port Blakeley Mill Co., 8 Wash. 1.

Wisconsin.—Hinchliff *v.* Hinman, 18 Wis. 139.

See also Carpenter *v.* Dexter, 8 Wall. (U. S.) 513 (Illinois statute); Tittman *v.* Thornton, 107 Mo. 500; Deans *v.* Pate, 114 N. Car. 194; Joplin *v.* Johnston, 4 New Bruns. 541; Canada Permanent Loan, etc., Co. *v.* Page, 30 U. C. C. P. 1. And see the title **ACKNOWLEDGMENTS**, vol. 1, p. 485.

Acknowledged After Suit Brought.—To render an instrument properly acknowledged admissible in evidence, it is not necessary that the acknowledgment or proof should be taken before the commencement of the action. It is sufficient if the certificate of the officer be indorsed on the instrument when it is offered in evidence. Sheldon *v.* Stryker, 42 Barb. (N. Y.) 284. See also Lanning *v.* Dolph, 4 Wash. (U. S.) 624.

May Be Proved as at Common Law.—In Borst *v.* Empie, 5 N. Y. 33, it was held that a deed may be proved by evidence of the handwriting of a deceased subscribing witness, though there be indorsed thereon a certificate of acknowledgment, made before such witness, as a commissioner, which is duly authenticated. The court said: "There is nothing to render it compulsory, nor has the statute declared, that an acknowledgment shall be deemed the best evidence of its due execution; it has only made it the most convenient evidence, for the sake of grantees or purchasers. If a deed has not been acknowledged and certified, to entitle it to be recorded or used as

evidence, under the statute, it may still be proved in the common-law method, by calling the subscribing witness to the stand, or by any secondary evidence which the rules of law admit of; none of which rules have been abrogated or entirely superseded."

North Carolina Statute—**Registered Deed.**—In the trial of an action to recover land, the defendant introduced a duly registered deed from the plaintiff to himself for the land in controversy. It was held that under the North Carolina statute the due registration of the deed created a presumption of its execution which cast the burden of rebuttal on the plaintiff. Mabe *v.* Mabe, 122 N. Car. 552.

Texas Statutes—**Mortgages Recorded but Unacknowledged.**—Under the Texas Act of April 22, 1879, permitting the registration of chattel mortgages without acknowledgment or proof of their execution, it is necessary that the execution of such mortgages should be proved as at common law before they can be admitted in evidence under any circumstances. Bettertton *v.* Echols, 85 Tex. 212.

Recording Necessary.—It has been decided that under the statute now embodied in Rev. Stat. Texas, 1895, § 2312, dispensing with the proof of the execution of deeds and making them admissible in evidence without such proof when they have been proved or acknowledged in the manner required by law and also duly recorded unless an affidavit of forgery is filed, the proper recording is indispensable to their admissibility without proof of execution. Gaines *v.* Ann, 26 Tex. 340; Hancock *v.* Tram Lumber Co., 65 Tex. 225; Falls Land, etc., Co. *v.* Chisholm, 71 Tex. 523; Dennis *v.* Sanger, 15 Tex. Civ. App. 411. See also Emanuel *v.* Gates, 53 Fed. Rep. 772; Stooksberry *v.* Swann, 12 Tex. Civ. App. 66.

In Maine it has been held that the acknowledgment and registration of a deed are not *prima facie* proof of its execution, such a rule not having been established either by legislation or by judicial custom. Webber *v.* Stratton, 89 Me. 379.

In Maine it was provided by a rule of court established at the April term, 1822, that "in all actions touching the realty, office copies of deeds, pertinent to the issue, from the registry of deeds, may be read in evidence without proof of their execution, where the party offering such office copy in evidence is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs." And it has been held that an original deed may be received as evidence without proof of its execution, in cases where, under the above rule, an office copy may be received. Knox *v.* Sil-loway, 10 Me. 201. See also Dunlap *v.* Glidden, 31 Me. 510; Hutchinson *v.* Chadbourne, 35 Me. 189; Bird *v.* Bird, 40 Me. 392.

to authorize its introduction in evidence by proof of the handwriting of the maker thereof.¹ The signature of the maker of an unattested document may be proved by any competent witness who saw him sign such document,² or who is familiar enough with his handwriting to testify to the genuineness of the signature;³ and an unattested document may be admitted in evidence upon proof that the person alleged to have executed it has admitted that fact.⁴

b. ATTESTED DOCUMENTS — (1) *By Subscribing Witness* — (a) **General Rule.** — The general rule is well settled that where there is a subscribing witness to a document, he must first be produced to prove its execution as furnishing the best evidence of that fact, or his absence must be satisfactorily accounted for.⁵

1. Proof of Handwriting of Maker. — Seibold v. Rogers, 110 Ala. 438; Williams v. Keyser, 11 Fla. 234, 89 Am. Dec. 243; Williams v. Miami Powder Co., 36 Ill. App. 107; Pullen v. Hutchinson, 25 Me. 249; Curtis v. Hall, 4 N. J. L. 167; Singleton v. Bremar, Harp. L. (S. Car.) 201. See also St. John v. Kidd, 26 Cal. 264; Miller v. Wisner, 22 La. Ann. 457; Leibe v. Hebersmith, 39 La. Ann. 1050; Linn v. Ross, 16 N. J. L. 55.

Proof when Maker Cannot Write. — "The usual method of proving an instrument of writing, where there is no subscribing witness, is by proof of handwriting. But that could not be expected in this case, as the party cannot write. Even if her name had been subscribed to the letters, the difficulty would not have been lessened. Some other method must, therefore, be resorted to, and why may not the letters be looked into? If they furnish internal evidence of the source from whence they were derived, I can see no reason why we may not avail ourselves of that evidence. Thus, for instance, if they relate to facts which cannot be known to any other person, it will be presumed that they were written by her authority. If they embrace a number of facts which relate to her and her situation, and which cannot apply to any other person, each of those facts constitutes a link in the chain of circumstances which go to strengthen the presumption. In ordinary cases, such evidence will not be allowed, because the writing is always presumed to be by the person by whom it purports to be written, and proof of the handwriting, therefore, is higher evidence. But in the present case, the evidence offered was the best which the nature of the case could afford. Whether it would have been sufficient to establish the fact is another question, but I think it ought to have been submitted to the jury." Singleton v. Bremar, Harp. L. (S. Car.) 201.

Presumption from Proof of Handwriting. — Proof of the handwriting is sufficient to enable the jury to presume, in such case, that sealing and delivery took place; although the handwriting does not import sealing and delivery, it is not only proof of the obligor's signature, but it is presumption that it is a deed executed. Sigfried v. Levan, 6 S. & R. (Pa.) 308, 9 Am. Dec. 427.

2. Proved by an Eyewitness. — Jones v. Hough, 77 Ala. 437; Seibold v. Rogers, 110 Ala. 438; Stoddard v. Hill, 38 S. Car. 385.

Grantee a Competent Witness. — In Lang v. Dougherty, 74 Tex. 226, it was held that the grantee of a bill of sale was a competent witness to prove its execution, there being no sub-

scribing witnesses thereto. To the same effect are Jones v. Hough, 77 Ala. 437; Abrigo v. State, 29 Tex. App. 143. See also Meuley v. Zeigler, 23 Tex. 88.

In Bohn v. Davis, 75 Tex. 24, it was held where there was a deed from D. as trustee to himself as an individual, that D. was a competent witness to testify to the fact of its execution, there being no subscribing witnesses thereto.

3. Seibold v. Rogers, 110 Ala. 438. And see the title HANDWRITING.

Illustration. — "The first specification of error is that the court erred in admitting in evidence the notes executed by Brice as cashier of the City Bank to the Chemical Bank, without proof of execution, notwithstanding the plea of *non est factum*. They were admitted on an admission by defendant that Brice, who signed them, was the cashier of the defendant bank, that the same were in his handwriting, and that the seal affixed was the genuine seal of the bank. There was no error in this." City Nat. Bank v. Chemical Nat. Bank, 80 Fed. Rep. 859.

4. Proved by Admissions — Illustrations. — Where A had pleaded *non est factum* to a bond for the delivery of the property of B, purporting to be executed by A as security of B, it was held that the admission or acknowledgment of A that he was security for the delivery of B's property, made to the constable who held the bond, there being no subscribing witnesses, was evidence from which the execution of the bond might be implied, as well as evidence that the party acknowledged the bond as his own, though it might have been signed by some other person. Hill v. Scales, 7 Verg. (Tenn.) 410.

In an action upon an assigned note it is only necessary for the plaintiff to offer *prima facie* evidence of the assignment to entitle him to read the assignment in evidence to the jury, and proof that the maker had admitted the assignment is sufficient evidence to authorize the plaintiff to read the assignment in evidence. Powell v. Adams, 9 Mo. 766.

Document Must Be Identified. — Evidence that the defendant in an action upon a promissory note has admitted the execution of a note is not sufficient to allow the admission of the note produced upon the trial, when such note is not identified with that to which the admission referred. Glazier v. Streaner, 57 Ill. 91; Mann v. Forein, 166 Ill. 446; Palmer v. Manning, 4 Den. (N. Y.) 131.

5. Proved by Subscribing Witness — England. — Abbot v. Plumbie, 1 Doug. 216; Barnes v. Trompowsky, 7 T. R. 261; Manners v. Postan,

This rule has been applied to instruments not evidencing contracts, such as

4 Esp. N. P. 239; *Rex v. Harringworth*, 4 M. & S. 350; *Pytt v. Griffith*, 6 Moo. 538, 17 E. C. L. 56.

Canada. — *Tylden v. Bullen*, 3 U. C. Q. B. 10; *Doe v. Twigg*, 5 U. C. Q. B. 167; *Crane v. Ayre*, 7 New Bruns. 577; *Clark v. Stevenson*, 23 U. C. Q. B. 525.

United States. — *Leonard v. Neale*, 1 Cranch (C. C.) 493; *Turner v. Green*, 2 Cranch (C. C.) 202; *Cooke v. Woodrow*, 5 Cranch (U. S.) 13; *Clarke v. Courtney*, 5 Pet. (U. S.) 319; *Winn v. Patterson*, 9 Pet. (U. S.) 674.

Alabama. — *Cox v. Davis*, 17 Ala. 714, 52 Am. Dec. 109; *Ellerson v. State*, 69 Ala. 1; *Russell v. Walker*, 73 Ala. 315; *Coleman v. State*, 79 Ala. 49; *Martin v. Mayer*, 112 Ala. 620; *Collins v. Sherbet*, 114 Ala. 480; *Bennet v. Robinson*, 3 Stew. & P. (Ala.) 227; *Richmond, etc., R. Co. v. Jones*, 92 Ala. 218; *Jones v. State*, 113 Ala. 95; *Houston v. State*, 114 Ala. 15.

Arkansas. — *Brown v. Hicks*, 1 Ark. 232; *Wilson v. Royston*, 2 Ark. 315; *Brock v. Saxton*, 5 Ark. 708.

California. — *Stevens v. Irwin*, 12 Cal. 306.

Connecticut. — *Kelsey v. Hanmer*, 18 Conn. 311.

Georgia. — *Ellis v. Smith*, 10 Ga. 253; *Stamper v. Griffin*, 20 Ga. 312, 65 Am. Dec. 628; *Davis v. Alston*, 61 Ga. 225; *Barron v. Walker*, 80 Ga. 121; *Coody v. Gress Lumber Co.*, 82 Ga. 793; *Baker v. Massengale*, 83 Ga. 137; *Fletcher v. Perry*, 97 Ga. 368; *Hudson v. Peuett*, 86 Ga. 341.

Illinois. — *Job v. Tebbetts*, 9 Ill. 143.

Iowa. — *Ballinger v. Davis*, 29 Iowa 512.

Kentucky. — *M'Murtry v. Frank*, 4 T. B. Mon. (Ky.) 39.

Maryland. — *Handy v. State*, 7 Har. & J. (Md.) 42.

Massachusetts. — *Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 109; *Barry v. Ryan*, 4 Gray (Mass.) 523; *Gelott v. Goodspeed*, 8 Cush. (Mass.) 411; *Whitaker v. Salisbury*, 15 Pick. (Mass.) 534.

Missouri. — *Glasgow v. Ridgeley*, 11 Mo. 34.

Nebraska. — *Buchanan v. Wise*, 34 Neb. 695.

New Hampshire. — *Farnsworth v. Briggs*, 6 N. H. 561; *Dunbar v. Marden*, 13 N. H. 311; *Foye v. Leighton*, 24 N. H. 29.

New Jersey. — *Servis v. Nelson*, 14 N. J. Eq. 94; *Corlies v. Van Note*, 16 N. J. L. 324.

New York. — *Willson v. Betts*, 4 Den. (N. Y.) 201; *Jackson v. Gager*, 5 Cow. (N. Y.) 383; *Hollenback v. Fleming*, 6 Hill (N. Y.) 303; *Willoughby v. Carleton*, 9 Johns. (N. Y.) 136; *Henry v. Bishop*, 2 Wend. (N. Y.) 576; *M'Pherson v. Rathbone*, 11 Wend. (N. Y.) 97; *Jackson v. Waldron*, 13 Wend. (N. Y.) 178; *King v. Smith*, 21 Barb. (N. Y.) 158.

North Carolina. — *Johnson v. Knight*, 2 Murph. (6 N. Car.) 237.

North Dakota. — *Brynjolfson v. Northwestern Elevator Co.*, 6 N. Dak. 450.

Ohio. — *Zerby v. Wilson*, 3 Ohio 43, 17 Am. Dec. 577; *Gaines v. Scott*, 4 Ohio Cir. Dec. 673, 7 Ohio Cir. Ct. Rep. 447; *Warner v. Baltimore, etc., R. Co.*, 31 Ohio St. 265.

Pennsylvania. — *January v. Goodman*, 1 Dall. (Pa.) 208; *Taylor v. Meekly*, 4 Yeates (Pa.) 79; *Hautz v. Rough*, 2 S. & R. (Pa.) 349; *Petit v.*

M'Adam, 2 S. & R. (Pa.) 420; *Sigfried v. Levan*, 6 S. & R. (Pa.) 308, 9 Am. Dec. 427.

Rhode Island. — *Kinney v. Flynn*, 2 R. I. 319.

South Carolina. — *Tammell v. Roberts*, 1 McMull. L. (S. Car.) 305; *Barry v. Wilbourne*, 2 Bailey L. (S. Car.) 91.

Texas. — *Lewis v. Bell*, (Tex. Civ. App. 1897) 40 S. W. Rep. 747.

Vermont. — *Sherman v. Champlain Transp. Co.*, 31 Vt. 162.

Virginia. — *Gilliam v. Perkinson*, 4 Rand. (Va.) 325.

Who Is a Subscribing Witness — In General. —

"A subscribing witness is one who was present when the instrument was executed, and who at that time, at the request or with the assent of the party, subscribed his name to it as a witness of the execution. If his name is signed, not by himself, but by the party, it is no attestation. Neither is it such if, though present at the execution, he did not subscribe the instrument at that time, but did it afterwards and without request, or by the fraudulent procurement of the other party. But it is not necessary that he should have actually seen the other party sign, nor have been present at the very moment of signing; for, if he is called in immediately afterwards, and the party acknowledges his signature to the witness, and requests him to attest it, this will be deemed part of the transaction, and, therefore, a sufficient attestation." *Huston v. Ticknor*, 99 Pa. St. 231, quoting with approval *Greenleaf on Ev.*, § 569. See also *Powell v. Blackett*, 1 Esp. N. P. 97; *Park v. Mears*, 3 Esp. N. P. 171; *Whitney v. Clary*, 145 Mass. 156; *Hollinbach v. Fleming*, 6 Hill (N. Y.) 303; *Leshner v. Levan*, 2 Dall. (Pa.) 96.

A Person Present at the Execution of the Instrument who does not then affix his name as a witness, but subsequently does so, is not a subscribing witness within the reason of the rule; and his testimony cannot be received, it appearing that there were witnesses who did subscribe their names at the time of the execution. *Henry v. Bishop*, 2 Wend. (N. Y.) 575.

An Attorney who, in compliance with a rule of the Court of Bankruptcy, has attested an insolvent's petition for protection, under the statute 5 and 6 Vict., c. 116, is not an attesting witness, such as to render it necessary that he should be called to prove the petition. *Bailey v. Bidwell*, 13 M. & W. 73.

Names Signed in Usual Place. — Where names of persons are found on a deed in the usual place for subscribing witnesses, and they are not parties to the deed, they will be presumed to be witnesses to the instrument, though they are not stated to be such; and, therefore, where such a deed is to be proved, they must be produced, or their absence legally accounted for. *Chaplain v. Briscoe*, 11 Smed. & M. (Miss.) 372.

Name Signed by Party to the Instrument. — Where an agreement contained an attestation clause, and subjoined to it the name of a person as an attesting witness, but the name was written in pencil, and not by the supposed witness, but by one of the parties to the instrument, it was held that there was no *prima facie*

notices to quit, receipts, and like papers.¹

Lost Document. — To prove the execution of a lost document attested by a subscribing witness, such witness must himself be produced if he is known.²

Several Subscribing Witnesses. — Where there is more than one subscribing witness to a document, all the witnesses must be satisfactorily accounted for before other evidence of the execution of the document is admissible.³

evidence of there being an attesting witness, so as to render it necessary to call the supposed witness, and that the signatures of the parties might be proved by other evidence. *Cussons v. Skinner*, 11 M. & W. 161.

Person Attesting Without Request. — "An instrument purporting to be attested by a subscribing witness may be proved as if there were no subscribing witness, where the person who has put his name as attesting witness did so without the knowledge or consent of the parties." *Sherwood v. Pratt*, 63 Barb. (N. Y.) 137; *M'Craw v. Gentry*, 3 Campb. 232; *Holloway v. Lawrence*, 1 Hawks (8 N. Car.) 49. See also *Huston v. Ticknor*, 99 Pa. St. 231.

And it may be shown by parol that the witness did so subscribe, "since the object of the proof is not to contradict or vary the written agreement, but merely to show that its execution was not attested in a particular way." *Sherwood v. Pratt*, 63 Barb. (N. Y.) 137.

Person Making Mark. — A person who cannot write, but who makes his mark or uses any other device by which he or others may identify him with the transaction, is a competent attesting witness to the execution of a written instrument. *Pridgen v. Pridgen*, 13 Ired. L. (35 N. Car.) 259; *Devereux v. McMahon*, 102 N. Car. 284; *State v. Byrd*, 93 N. Car. 628; *Tatom v. White*, 95 N. Car. 453.

Person Made a Witness Without His Consent. — "Where it can be proved that the name of a person appearing as a subscribing witness to an instrument of writing was written by another, without his knowledge or assent, the party may be permitted to prove it, and in such case he is not to be considered as an attesting witness." *Handy v. State*, 7 Har. & J. (Md.) 42.

Burnt Bonds. — In order to prove payment of the intestate's debts upon bond, which bonds are stated to have been burnt on payment of the debt, the existence of the bonds must be proved by means of the attesting witnesses. *Gillies v. Smither*, 2 Stark. 528, 3 E. C. L. 517.

Canceled Instrument. — An instrument executed in the presence of a subscribing witness cannot be proved by any other person, even after it is canceled. *Breton v. Cope*, Peake N. P. (ed. 1795) 30.

Witness May Be Contradicted as to Other Facts. — In *Brown v. Bellows*, 4 Pick. (Mass.) 179, it was held that the plaintiff, being under the necessity of calling the subscribing witness to prove the execution of the agreement, was not precluded from contradicting his testimony given upon cross-examination in relation to other facts.

The Admission of Other Proof of the Execution of a Deed is no ground of exception by a party who subsequently calls and examines the subscribing witness. *Com. v. Castles*, 9 Gray (Mass.) 121, 69 Am. Dec. 278.

Relaxation of the Rule. — In *New York* a

distinction was taken between negotiable paper and other documents, and the rule requiring the production of the subscribing witness was relaxed in regard to the former and the admission of secondary evidence permitted. *Henry v. Bishop*, 2 Wend. (N. Y.) 575; *Jones v. Underwood*, 28 Barb. (N. Y.) 481; *Fox v. Reil*, 3 Johns. (N. Y.) 477; *Shaver v. Ehle*, 16 Johns. (N. Y.) 201. But this distinction is now of little importance since the enactment of the statute dispensing with the production of the subscribing witness in case of documents not required by law to be attested. See *infra*, this section, the paragraph *Documents Not Required to Be Attested*.

In *Williams v. Floyd*, 11 Pa. St. 499, the distinction made in New York was approved.

1. *Doe v. Durnford*, 2 M. & S. 62; *McMahan v. McGrady*, 5 S. & R. (Pa.) 314; *Heckert v. Haine*, 6 Binn. (Pa.) 16; *International, etc., R. Co. v. McRae*, 82 Tex. 614, 27 Am. St. Rep. 926.

2. **Lost Documents.** — *Felton v. Pitman*, 14 Ga. 530; *Mariner v. Saunders*, 10 Ill. 113; *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 536; *Hewitt v. Morris*, 37 N. Y. Super. Ct. 18; *Moore v. Livingston*, 28 Barb. (N. Y.) 543; *McMahan v. McGrady*, 5 S. & R. (Pa.) 314.

Witness Unknown. — "There was another objection to the evidence given of the contents of the deed, which was that, there being subscribing witnesses to the deed, they should have been called. If this objection would have been valid in another case, it cannot be sustained here. The witness who testifies concerning the deed, and proves that there were subscribing witnesses, could not tell who they were; as their names could not be ascertained, it would have been impossible for the defendant to comply with what this objection seems to require of him. The loss of the deed put it as much beyond his power to call upon the subscribing witnesses as to read the deed itself." *Jackson v. Vail*, 7 Wend. (N. Y.) 125.

3. **Necessary to Account for All Witnesses.** — *Wallis v. Delancey*, 7 T. R. 262, note c; *Doe v. Twigg*, 5 U. C. Q. B. 167; *Kelsey v. Hammer*, 18 Conn. 311; *Gelott v. Goodspeed*, 8 Cush. (Mass.) 411; *Jackson v. Gager*, 5 Cow. (N. Y.) 383; *Shepherd v. Goss*, 1 Overt. (Tenn.) 487. See also *Cunliff v. Sefton*, 2 East 183; *McVicker v. Conkle*, 96 Ga. 584; *Jackson v. Burton*, 11 Johns. (N. Y.) 64.

Illustration. — In *Davison v. Bloomer*, 1 Dall. (Pa.) 123, a deed attested by two witnesses, one of whom had married the lessor of the plaintiff, the other residing within the county and not produced, was offered in evidence, upon proof of the handwriting of the witnesses. It was held that the evidence offered was inadmissible. The court said: "There is a case in *Strange* where a party who was a witness to a bond afterwards became interested, and, although the proof of his hand-

Testimony and Admissions of Maker Generally Inadmissible.—So stringent and universal is the common-law rule that the execution of a document cannot be proved by the person who executed it, if it is possible to produce the subscribing witness;¹ and the express admissions of the person executing the document, even though a party to the action,² or his answer under oath in chancery,³ cannot be given in evidence until it is first shown that the witness cannot be had, unless such admissions are made in open court or in writing for the purpose of an action to which the person making the admissions is a party litigant.⁴

Admissible When Primary Evidence Unattainable.—Where, however, primary evidence of the execution of a document is shown by the nature of the case to be unattainable and impossible, and an acknowledgment of the instrument by him who made it becomes the best that the nature of the case admits of, it is not only competent, but very persuasive, evidence of the genuineness of the document, and it has never been rejected in any case under these limitations.⁵

writing was admitted, yet there must likewise have been proof that the other witness could not be found. The best evidence of which the case reasonably admits has not been offered, and therefore we cannot allow the deed to be read on this occasion."

1. Person Executing Cannot Prove.—Johnson v. Mason, 1 Esp. N. P. 89; Davis v. Alston, 61 Ga. 225; Fletcher v. Perry, 97 Ga. 368; M'Murtry v. Frank, 4 T. B. Mon. (Ky.) 39; Glasgow v. Ridgeley, 11 Mo. 34; Hollenback v. Fleming, 6 Hill (N. Y.) 303; Barry v. Wilbourne, 2 Bailey L. (S. Car.) 91. See also McVicker v. Conkle, 96 Ga. 584.

Maker Competent in a Criminal Prosecution.—In Simmons v. State, 7 Ohio (pt. i.) 116, it was held that the rule as to subscribing witnesses did not apply in a prosecution for forgery, wherein the signer of the forged instrument was a competent witness. Wood, J., said: "In a case arising between the parties to such an instrument, having a subscribing witness, and where the obligor, being interested, is excluded from testifying, the rule is a good one which requires such witness to prove its execution. * * * When the obligor is competent, he must be the best witness of which the case will admit; and the subscribing witness need not, in such case, be called."

2. Admissions Inadmissible—*England.*—Abbot v. Plumbe, 1 Doug. 216; Cunliff v. Sef-ton, 2 East 183; Manners v. Postan, 4 Esp. N. P. 239; Jones v. Brewer, 4 Taunt. 46; Barnes v. Trompowsky, 7 T. R. 261.

United States.—Smith v. Carolin, 1 Cranch (C. C.) 99; Turner v. Green, 2 Cranch (C. C.) 202.

Alabama.—Coleman v. State, 79 Ala. 49; Richmond, etc., R. Co. v. Jones, 92 Ala. 218.

Arkansas.—Brock v. Saxton, 5 Ark. 708.

New York.—Fox v. Reil, 3 Johns. (N. Y.) 477; Hollenback v. Fleming, 6 Hill (N. Y.) 303.

Ohio.—Zerby v. Wilson, 3 Ohio 42, 17 Am. Dec. 577; Gaines v. Scott, 4 Ohio Cir. Dec. 673, 7 Ohio Cir. Ct. Rep. 447; Warner v. Baltimore, etc., R. Co., 31 Chic St. 265.

Rhode Island.—Kinney v. Flynn, 2 R. I. 319.

3. Answer in Chancery Inadmissible.—Call v. Dunning, 4 East 53. See also Davis v. Alston, 61 Ga. 225; Hollenback v. Fleming, 6 Hill (N. Y.) 303; Kinney v. Flynn, 2 R. I. 319.

4. Exception as to Admissibility of Admissions.—1 Greenleaf on Ev., § 572; Chase's Steph.

Dig. of Law of Ev. (2d ed.) 183. And see Russell v. Walker, 73 Ala. 315; Coleman v. State, 79 Ala. 49; Richmond, etc., R. Co. v. Jones, 92 Ala. 218.

Illustrations.—If A agree to acknowledge an old warrant of attorney given by him "so as to enable the deponent, if it should become necessary, to enter up judgment thereon," judgment may be entered up under a judge's order, without an affidavit of the subscribing witness. Laing v. Raine, 2 B. & P. 85.

In an action by the assignees of one Sawin against his wife to recover a house and lot in order to prevent a delay for the purpose of procuring the attendance of the subscribing witnesses to a deed of the premises to said Sawin, which the tenant had previously agreed to produce at the trial, the tenant admitted the execution of it, but asked the court to rule that nevertheless the demandants must call the attesting witnesses; but the judge ruled otherwise. The court, in sustaining this ruling, said: "After the tenant had admitted the execution of the deed from Poole to Sawin, it was not necessary for the demandants to offer proof of its execution. The effect of an admission is to avoid the necessity of proving the fact admitted; and the fact that the admission was made to prevent the demandants from obtaining a postponement of the case does not alter its effect in this respect." Blake v. Sawin, 10 Allen (Mass.) 340.

In a suit on a bond it is competent to show by a memorandum on the docket of the court that the defendant admitted its execution, even though there be a subscribing witness. Jones v. Henry, 84 N. Car. 320.

In Randall v. Lynch, 2 Campb. 357, Lord Ellenborough held that the rule to pay money into court was a sufficient admission of the execution of a charter-party to dispense with the production of the attesting witness.

5. Wells v. Jackson Iron Mfg. Co., 48 N. H. 536; **Overseers of Poor v. Overseers of Poor,** 13 N. J. L. 221.

Illustrations.—"The deed being executed in Georgia, the presumption, in the absence of all testimony on the subject, is that the subscribing witnesses had their domicile in that state. The defendants were not called upon to account for their absence, but were rightly permitted to prove the execution of the deed by other testimony. If the deed had been de-

Effect of Statutes Making Parties Competent Witnesses. — In some jurisdictions it is held that the common-law rule requiring the production of the subscribing witness is not changed by statutes making the parties to an action competent witnesses.¹ But in other jurisdictions it has been decided that, as a result of such statutes, the person executing a document may testify as to its execution without the production of the subscribing witness.²

Documents Not Required to Be Attested. — If there is a subscribing witness to a document, he must at common law be called and examined before other proof can be let in, even though the law does not require the attestation of the document.³ But the necessity of producing the subscribing witness in such cases has been dispensed with by statute in some jurisdictions.⁴

stroyed, the handwriting of the witnesses could not be proved, and defendants were forced to other sources for proof of execution. The court did not err in permitting the proof to be made by the witness Cadow, nor by other witnesses who testified to Elliott's admissions, and to his acts indicating that he set up no claim to the land." *Elliott v. Dycke*, 78 Ala. 150.

"The first and best evidence is the instrumental witnesses, but the not calling them was excused by the nature of the case, for the knowledge of them had been lost with the indenture itself. The next best evidence was proof of the handwritings of the witnesses and parties, but these were utterly excluded by the nature of the case, for the instrument was lost and the handwritings could not be shown. The next best evidence was the acknowledgment of the parties of its being their deed, and David Butler sufficiently proved the acknowledgment of the apprentice, who, on seeing the instrument and hearing it read, declared it to be a good indenture and that he was serving under it." *Overseers of Poor v. Overseers of Poor*, 13 N. J. L. 221.

1. View That Rule Is Not Changed. — *Whyman v. Garth*, 8 Exch. 803; *Brigham v. Palmer*, 3 Allen (Mass.) 450; *Hess v. Griggs*, 43 Mich. 397; *Jones v. Underwood*, 28 Barb. (N. Y.) 481; *Weigand v. Sichel*, 4 Abb. App. Dec. (N. Y.) 592; *Story v. Lovett*, 1 E. D. Smith (N. Y.) 153; *Hodnett v. Smith*, 2 Sweeny (N. Y.) 401.

Party Voluntarily Called by Adverse Party. — "We think that it was too late to raise the objection after the paper had been proved by Rayburn and read without objection. But we further think that where one of the parties in interest chooses to allow or to call the other party to prove an instrument, he may do so without calling the subscribing witness. Although there has been no entire agreement of courts on this subject where parties can be witnesses, the necessity of calling subscribing witnesses has not always been put upon tangible grounds. Where parties could not be sworn, it was reasonable to hold that the subscribing witness was a person who became so by agreement for their protection, who could not be dispensed with. It may be very proper to allow a party to decline calling his adversary, and to insist that this witness shall, if practicable, be produced. But where one party is willing to call the other, the latter can usually have no reason to complain, and we think that to this extent the reason of the rule has very little force to prevent it, and should

not preclude such proof." *Rayburn v. Mason Lumber Co.*, 57 Mich. 273.

2. View That Rule Is Changed. — *Bowling v. Hax*, 55 Mo. 446.

In *Garrett v. Hanshue*, 53 Ohio St. 482, *distinguishing* *Warner v. Baltimore*, etc., R. Co., 31 Ohio St. 269, and *disapproving* *Hodnett v. Smith*, 2 Sweeny (N. Y.) 401, the court said: "We think that the statutes requiring deeds to be acknowledged before an officer, and permitting parties to testify, have so enlarged the rules as to the manner of proving the execution of a written instrument having subscribing witnesses, as to abrogate the old rule, and to permit such execution to be proven alike by the grantor, the subscribing witnesses, or the officer before whom the acknowledgment was taken."

3. Sigfried v. Levan, 6 S. & R. (Pa.) 308, 9 Am. Dec. 427. And see *supra*, this section.

4. 17 & 18 Vict., c. 125, § 26; 28 & 29 Vict., c. 18, §§ 1, 7; *Emerson v. Bannerman*, 19 Can. Sup. Ct. Rep. 1. And see generally the codes and statutes of the several jurisdictions.

Canada Statute. — Under 18 Vict., c. 9, § 26, the subscribing witness to a deed need not be produced if the handwriting of the maker can be proved otherwise. *Woods v. Fraser*, 3 Nova Scotia 184. See also *Worthington v. Moore*, 64 L. T. N. S. 338.

It Is Provided by Statute in Illinois that whenever any instrument in writing not required by law to be attested by a subscribing witness is offered in evidence in any civil cause, and the same appears to have been attested by a subscribing witness, it is not necessary to prove the execution of the same by a subscribing witness to the exclusion of other evidence, but the execution of such instrument may be proved by secondary evidence without producing or accounting for the absence of the subscribing witness or witnesses. 2 Starr & Curt. Annot. Stat. Ill. 1896, c. 51, par. 49, *construed* in *Snyder v. Travers*, 45 Ill. App. 253.

The Michigan Statute provides that except in cases of written instruments to the validity of which one or more subscribing witnesses are requisite by law, it shall not be necessary to call a subscribing witness, but the instrument may be proved in the same manner as if there was no subscribing witness. 3 How. Annot. Stat. Mich. 1890, § 7531a.

New York Statute. — "Except in the case of written instruments to the validity of which a subscribing witness or subscribing witnesses is or are necessary, whenever, upon the trial of any action, civil or criminal, or upon the

(b) **Reason of the Rule.** — The reason assigned for observing this strictness in relation to a subscribing witness is that the parties, by selecting him as a witness, have agreed to rely upon his testimony in relation to the execution of the instrument and the circumstances attending it, and because he is supposed to have a knowledge of facts and circumstances which are unknown to others, many of which may not be in the recollection of the parties or are not provable in any other way.¹

(c) **Exceptions** — *aa. WITNESS DEAD.* — The general rule, however, has its exceptions, founded usually upon the inability of the party, without any fault of his, to produce the witness upon the stand,² as if the witness be dead or may be presumed to be so.³ But it is not sufficient ground for receiving evidence of

hearing of any judicial proceeding, a written instrument is offered in evidence, to which there is a subscribing witness, it shall not be necessary to call such subscribing witness, but such instrument may be proved in the same manner as it might be proved if there were no subscribing witness thereto." 1 Birdseye's Rev. Stat. N. Y. (2d ed.) 1115.

Rhode Island Statute. — "It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto." Gen. Stat. R. I. 1896, c. 244, § 43.

1. **Why Production of Witness Necessary.** — Russell v. Walker, 73 Ala. 315; Brock v. Saxton, 5 Ark. 708; M'Murtry v. Frank, 4 T. B. Mon. (Ky.) 39; Handy v. State, 7 Har. & J. (Md.) 42; Glasgow v. Ridgeley, 11 Mo. 34; Hollenback v. Fleming, 6 Hill (N. Y.) 303; Kinney v. Flynn, 2 R. I. 319. See also Richmond, etc., R. Co. v. Jones, 92 Ala. 218; McVicker v. Conkle, 96 Ga. 584, in which latter case the rule was recognized, but criticised adversely.

2. **Impossible to Produce Witness.** — Handy v. State, 7 Har. & J. (Md.) 42; Sigfried v. Levan, 6 S. & R. (Pa.) 308, 9 Am. Dec. 427; Kinney v. Flynn, 2 R. I. 319.

Witness Fictitious. — "It appears to be now settled that when the name of the subscribing witness is fictitious, or when after diligent inquiry nothing can be heard of him, so that he can neither be produced nor his handwriting proved, or when he is dead, or out of the jurisdiction of the court, and no proof of his handwriting can be obtained; in all these cases it is competent to prove the handwriting of the party himself." Jackson v. Waldron, 13 Wend. (N. Y.) 178. See also Fasset v. Brown, Peake N. P. (ed. 1795) 23.

3. **Witness Dead** — *England.* — Adam v. Kers, 1 B. & P. 360; Banks v. Farquharson, Dick. 167; Anonymous, 12 Mod. 607; Whitelocke v. Musgrove, 1 Crompt. & M. 511.

Canada. — Doe v. Hatheway, 7 New Bruns. 69; Crane v. Ayre, 7 New Bruns. 577; Doe v. Nevers, 16 New Bruns. 614.

United States. — Stebbins v. Duncan, 108 U. S. 32.

Alabama. — Lazarus v. Lewis, 5 Ala. 457.

District of Columbia. — U. S. v. Boyd, 8 App. Cas. (D. C.) 440, 24 Wash. L. Rep. 298.

Georgia. — Howard v. Snelling, 32 Ga. 195.

Kentucky. — Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139; M'Cord v.

Johnson, 4 Bibb (Ky.) 531; Vocum v. Barnes, 8 B. Mon. (Ky.) 496.

Massachusetts. — Dudley v. Sumner, 5 Mass. 438.

Missouri. — Waldo v. Russell, 5 Mo. 387.

New Hampshire. — Foye v. Leighton, 24 N. H. 29.

New Jersey. — Armstrong v. Glover, 15 N. J. L. 186.

New York. — Mott v. Doughty, 1 Johns. Cas. (N. Y.) 230; Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643; Fox v. Reil, 3 Johns. (N. Y.) 477; Sluby v. Champlin, 4 Johns. (N. Y.) 461; Jackson v. Burton, 11 Johns. (N. Y.) 64; Jackson v. Cody, 9 Cow. (N. Y.) 140; Lush v. Druse, 4 Wend. (N. Y.) 315. See also Brown v. Kimball, 25 Wend. (N. Y.) 259, reversing 19 Wend. (N. Y.) 437.

Rhode Island. — Kinney v. Flynn, 2 R. I. 319.

South Carolina. — Martin v. Bowie, 37 S. Car. 102; Hopkins v. DeGraffenreid, 2 Bay (S. Car.) 187.

Texas. — Baldwin v. Goldfrank, 9 Tex. Civ. App. 269; Timmony v. Burns, (Tex. Civ. App. 1897) 42 S. W. Rep. 133; Sloan v. Thompson, 4 Tex. Civ. App. 419.

Vermont. — Sanborn v. Cole, 63 Vt. 590.

Virginia. — Bogle v. Sullivan, 1 Call (Va.) 561; Raines v. Phillips, 1 Leigh (Va.) 483.

West Virginia. — Thompson v. Halstead, 44 W. Va. 390.

Witness Unheard of for Four Years. — When it was proved upon the trial that the witness had gone four years before from Arkansas to Kentucky, that nothing more had been heard of him, and that he was supposed to be dead, and this proof was uncontradicted by any opposing evidence, it was held that the handwriting of such witness might be proved. Nicks v. Rector, 4 Ark. 251.

Death of Witness Proved by Party. — A party to an action is a good witness to prove the death of the subscribing witness, in order to let in evidence of his handwriting. Jackson v. Frier, 16 Johns. (N. Y.) 193; Douglass v. Sanderson, 2 Dall. (Pa.) 116.

Presumption that Preliminary Proof Made. — Proof that the grantor in a deed and the subscribing witnesses are deceased, or cannot be had, must be made preliminary to the examination of a witness to prove their handwriting. In the absence of anything to the contrary it will be presumed that such proof was made. Job v. Tebbetts, 9 Ill. 143.

Massachusetts Statute. — "If all the subscribing witnesses to the deed are * * *

the handwriting of a subscribing witness that he is unable to attend the trial because of sickness, even though it is thought that he cannot recover therefrom.¹

bb. WITNESS ABROAD OR NOT TO BE FOUND.—The fact that the subscribing witness is out of the state, or beyond the jurisdiction of the court, so as not to be amenable to its process,² or that he cannot be found after due

dead or out of the commonwealth, the due execution thereof may be proved * * * by proving the handwriting of the grantor and of a subscribing witness." Pub. Stat. Mass. 1882, c. 120, § 8.

Maine Statute.—"When the witnesses are dead or out of the state, the handwriting of the grantor and subscribing witness may be proved by other testimony." Rev. Stat. Me. 1883, c. 73, § 19.

1. Witness Sick.—In *Harrison v. Blades*, 3 Campb. 457, Lord Ellenborough said: "I cannot dispense with the attendance of a witness who is still alive and within the jurisdiction of the court, so as to admit evidence of his handwriting in the same manner as if he were actually dead. No case has yet gone so far, and I am afraid to establish a precedent. It is difficult to determine when a patient is past all hope of cure. If such a relaxation of the rules of evidence were permitted, there would be very sudden indispositions and recoveries. Where a witness is taken ill, the party who would avail himself of his testimony must move to put off the trial. If he be in a very dangerous condition, he will probably be dead before the ensuing sittings, and then evidence of his handwriting may be received without any risk of collusion."

2. Witness Out of Court's Jurisdiction.—*England.*—*Adams v. Kers*, 1 B. & P. 360; *Wardell v. Fermor*, 2 Campb. 282; *Prince v. Blackburn*, 2 East 250; *Barnes v. Trompowsky*, 7 T. R. 261; *Anonymous*, 12 Mod. 607. See also *Glubb v. Edwards*, 2 M. & Rob. 300.

Canada.—*Doe v. Hatheway*, 7 New Bruns. 69; *Crane v. Ayre*, 7 New Bruns. 577; *Cuvillier v. Fraser*, 2 Rev. de Lég. 279.

United States.—*Hanrick v. Patrick*, 119 U. S. 156; *Wellford v. Eakin*, 1 Cranch (C. C.) 264.

Alabama.—*Lazarus v. Lewis*, 5 Ala. 457; *Foote v. Cobb*, 18 Ala. 585; *Holman v. Norfolk Bank*, 12 Ala. 369; *Caldwell v. Pollak*, 91 Ala. 353; *Smith v. Keyser*, 115 Ala. 455.

Arkansas.—*Tatum v. Mohr*, 21 Ark. 349.

California.—*McMinn v. Whelan*, 27 Cal. 300.

Illinois.—*Mariner v. Saunders*, 10 Ill. 113.

Indiana.—*Gordon v. Miller*, 1 Ind. 531; *Jones v. Coopridge*, 1 Blackf. (Ind.) 46.

Iowa.—*Ballinger v. Davis*, 29 Iowa 512.

Kentucky.—*M'Cord v. Johnson*, 4 Bibb (Ky.) 531; *Yocum v. Barnes*, 8 B. Mon. (Ky.) 496.

Maryland.—*Dorsey v. Smith*, 7 Har. & J. (Md.) 345.

Massachusetts.—*Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169; *Troeder v. Hyams*, 153 Mass. 536; *Smith Charities v. Connolly*, 157 Mass. 272; *Gelott v. Goodspeed*, 8 Cush. (Mass.) 411; *Clark v. Houghton*, 12 Gray (Mass.) 38; *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715.

Nebraska.—*Buchanan v. Wise*, 34 Neb. 695.

New Jersey.—*Den v. Van Houten*, 10 N. J. L. 270; *New Jersey Zinc, etc., Co. v. Lehigh Zinc, etc., Co.*, 59 N. J. L. 189.

New York.—*Fox v. Reil*, 3 Johns. (N. Y.) 477.

North Carolina.—*Selby v. Clark*, 4 Hawks (11 N. Car.) 265.

Ohio.—*Clark v. Boyd*, 2 Ohio 56; *Richards v. Skiff*, 8 Ohio St. 586.

Pennsylvania.—*Otto v. Trump*, 115 Pa. St. 425; *Gallagher v. London Assur. Corp.*, 149 Pa. St. 255; *Clark v. Sanderson*, 3 Binn. (Pa.) 192, 5 Am. Dec. 368.

Texas.—*Chator v. Brunswick Balke-Colender Co.*, 71 Tex. 588; *Smith v. Gillum*, 80 Tex. 120; *Lapowski v. Taylor*, 13 Tex. Civ. App. 624.

See also *Beattie v. Hilliard*, 55 N. H. 428.

Evidence Tending to Show Witness Out of Jurisdiction.—In *Grogan v. U. S. Industrial Ins. Co.*, 90 Hun (N. Y.) 521, it was held that where there was some evidence tending to show that the subscribing witness was not at the time of the trial within the jurisdiction of the state, it was competent for the trial judge to receive secondary proof of the execution of the instrument.

Witness in Navy.—If an attesting witness appears, upon search made at the admiralty, to be serving in the navy, his absence is sufficiently accounted for to render secondary evidence admissible. *Parker v. Hoskins*, 2 Taunt. 223.

Absence on Official Business.—Proof of the handwriting of a subscribing witness, under a temporary absence of the witness without a change of domicile, shall not be received, for it might lead to great abuses. But where a witness leaves the state in the exercise of a public duty (as in the case of a member of Congress) all presumption of collusion is repelled, and his handwriting may be proved. *Selby v. Clark*, 4 Hawks (11 N. Car.) 265.

Presumption from Execution Abroad.—In *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715, it was held that where the instrument was apparently executed in a foreign country, that fact raised a sufficient presumption that the subscribing witnesses were not within the jurisdiction of the court to let in other evidence of the execution. To the same effect are *Elliott v. Dyce*, 78 Ala. 150; *Clardy v. Richardson*, 24 Mo. 295; *Sherman v. Champlain Transp. Co.*, 31 Vt. 162.

Witness Out of County.—When the existence of a landlord's lien for supplies is directly in issue, a writing attested by a subscribing witness and purporting to create such a lien is not admissible in evidence without proof by such witness of its execution, or duly accounting for his nonproduction. That the witness is not in the county, and the maker of the instrument knows not where he is, will not (without more) lay the foundation for receiving the evi-

diligence,¹ is a sufficient reason for dispensing with the evidence of such witness. What is due diligence in seeking for an attesting witness depends upon the facts and circumstances of the case.²

dence of the maker himself to the fact of execution. *Baker v. Massengale*, 83 Ga. 137. See also *Hautz v. Rough*, 2 S. & R. (Pa.) 349.

Nebraska Statute. — It is provided by section 343 of the Code of Nebraska that "when a subscribing witness is absent from the county in which the action is pending, denies, or does not recall the execution of the instrument to which his name is subscribed as such witness, its execution may be proved by other evidence." *Buchanan v. Wise*, 34 Neb. 695.

1. Witness Not to Be Found. — *Coghan v. Williamson*, 1 Doug. 93; *Crosby v. Percy*, 1 Taunt. 364; *Cunliff v. Sefton*, 2 East 186; *Burt v. Walker*, 4 B. & Ald. 697; *Morgan v. Morgan*, 9 Bing. 359, 23 E. C. L. 306; *Pelletreau v. Jackson*, 11 Wend. (N. Y.) 110; *Jones v. Brinkley*, 1 Hayw. (1 N. Car.) 20; *Gallagher v. London Assur. Corp.*, 149 Pa. St. 25; *Conrad v. Farrow*, 5 Watts (Pa.) 536; *Teal v. Sevier*, 26 Tex. 516; *Sloan v. Thompson*, 4 Tex. Civ. App. 419; *Smith v. Gillum*, 80 Tex. 120.

Witness Long Absent. — Proof that one of two subscribing witnesses to a deed removed from the state thirty years before the trial, and that the other had not been heard from for thirty-seven years, was held to account sufficiently for the absence of such witnesses; and on proof of the handwriting of one of the witnesses and of the grantor, the deed was read in evidence. *Jackson v. Chamberlain*, 8 Wend. (N. Y.) 620.

Witness Fugitive from Justice. — To dispense with the necessity of calling the subscribing witness to a deed, it is sufficient to show that he expressed an intention of leaving the country, that he had reason for doing so to avoid a criminal charge, and that his relatives have not seen him since he expressed his intention of going. *Kay v. Brookman*, 3 C. & P. 555, 14 E. C. L. 446.

Witness an Absconding Debtor. — If, on inquiry for an attesting witness, it appears that he has absconded to avoid his creditors, secondary evidence is admissible. *Crosby v. Percy*, 1 Taunt. 364.

Every Reasonable Inquiry must be made for the subscribing witness in the most likely place. *Tylden v. Bullen*, 3 U. C. Q. B. 10.

2. What Is Due Diligence. — *Crane v. Ayre*, 7 New Bruns. 577; *Gallagher v. London Assur. Corp.*, 149 Pa. St. 25.

Reasonable Diligence Required. — "As regards endeavors to procure the subscribing witnesses, the rule is not to be strained beyond the requirements of convenience. When a party finds names subscribed to the attestation, without a visible ligament of connection with anything in the known world, what is he to do? Certainly not to inquire of every one in the world. In the investigation of old transactions, the witnesses sometimes seem to have dropped, for the occasion, from the clouds; and where no particular avenue to a knowledge of them promises to be more productive than another, it is hard for a party to determine

what to do. We certainly would not expect him to stand at the wayside, inquiring of every one who passed. The research here, however, was not entirely fruitless. The agent learned that a person bearing the name of one of the witnesses had gone down the river, and that another had gone over the mountains. Was he to follow them to the verge of the state? Such a pursuit would have been idle. Under these circumstances, the confession that the defendant had executed the bill of sale ought to have been received." *Conrad v. Farrow*, 5 Watts (Pa.) 536.

Illustrations. — In *Burt v. Walker*, 4 B. & Ald. 697, the clerk of the defendant was the subscribing witness to a bond, and when he was subpoenaed said that he would not attend; and the trial had been put off twice in consequence of his absence. Search had also been made at the defendant's house, and in the neighborhood; and upon receiving information at the defendant's that the witness was gone to M., inquiry was there made without success. It was held that, under these circumstances, evidence of his handwriting was admissible.

In assumption on a written agreement, where the attesting witness to the execution was not produced at the trial, it was held sufficient in order to let in evidence of his handwriting to prove by a person who knew him, but had not seen him for eighteen months, that at the request of the plaintiff's attorney he had made inquiry for him at coffee houses and other places where he thought he might hear of him, but without success; and that it was not necessary to show that inquiry had been made of both the parties who had executed the agreement. *Evans v. Curtis*, 2 C. & P. 296, 12 E. C. L. 133.

Evidence that a subscribing witness to a deed had been diligently inquired after, having gone to sea and been absent for four years without having been heard from, is sufficient to let in secondary proof of his handwriting. *Spring v. South Carolina Ins. Co.*, 3 Wheat. (U. S.) 268.

Where the witnesses to a written contract were the sons of the defendant, who executed the contract, and the plaintiff, the day before the sitting of the circuit, inquired of the defendant for the witnesses, in order to subpoena them, and was falsely told by the defendant that they were gone on a journey, this was held not to be a sufficient reason for admitting other testimony of the handwriting, the plaintiff not having used sufficient diligence to procure the witnesses. *Mills v. Twist*, 8 Johns. (N. Y.) 121.

Where a subscribing witness, three weeks before inquiry for him, was shown to have been at his mother's residence within the state, and about twenty miles distant, failure to make inquiry for him there is a want of due diligence to find him which will exclude proof of his signature. Nor can the handwriting of a deceased subscribing witness be proved, in order to admit a deed, where there is an-

cc. DISQUALIFIED WITNESS — (aa) *Disqualified Both at Time of Attestation and of Trial.* — If the subscribing witness to a document is, at the time when he affixed his name to it, and also at the time of the trial, incompetent because of interest, or for any other reason, to testify to its execution, proof of his handwriting is inadmissible, but proof of the handwriting of the person executing such document is admissible as if there had been no attesting witness.¹ But it has been held that if the party whose interest is adverse to the party seeking to prove the execution of a document, knowing a person to be interested at the time of its execution, requested him to become a subscribing witness thereto, such person is competent to prove its execution.²

(bb) *Subsequent Disqualification.* — If a person who was competent to act as a subscribing witness at the time of the attestation subsequently becomes insane³ or infamous,⁴ the execution of the document must be proved by other evidence. But it seems that he must be produced notwithstanding he becomes blind.⁵

Interested Witness. — When the subscribing witness has become, by reason of interest, incompetent to prove the execution of a document, if his interest was acquired without the fault or agency of the party who wishes to establish the execution of the document it has been held that secondary evidence of such execution is admissible.⁶ But it has been held that when the party seeking to prove the execution of the document has himself been the cause of the subscribing witness's disqualification, evidence of the handwriting of such witness is inadmissible.⁷ When the subscribing witness to a document subsequently

other witness of whom no account is given. *Tams v. Hitner*, 9 Pa. St. 441.

Witness Without Fixed Residence. — "What is sufficient proof of the search for an absent witness, in order to admit secondary evidence of the signature, depends somewhat upon circumstances. Where the witness has a fixed residence within the county, the rule should be more strict than where, as here, the defendant had no known fixed residence, and was a laboring man, working about from place to place, as he could obtain employment." *Galagher v. London Assur. Corp.*, 149 Pa. St. 25.

1. Incompetent Witness Is No Witness. — *Swire v. Bell*, 5 T. R. 371; *Amherst Bank v. Root*, 2 Met. (Mass.) 522; *Packard v. Dunsmore*, 11 Cush. (Mass.) 282; *Nelius v. Brickell*, 1 Hayw. (1 N. Car.) 19.

Illustrations. — If the subscribing witness to a bond be interested therein as well at the time of the attestation as at the trial, he cannot be examined as a witness to prove the execution, nor is proof of his handwriting sufficient for that purpose. *Swire v. Bell*, 5 T. R. 371, *distinguishing* *Goss v. Tracy*, 1 P. Wms. 289, and *Golfrey v. Norris*, 1 Stra. 34.

Proof of the handwriting of the wife of the obligor is not admissible to prove the execution of an instrument, though she signed the same as a subscribing witness, being incompetent from the beginning. *Nelius v. Brickell*, 1 Hayw. (1 N. Car.) 19.

Party Not a Competent Witness. — "No party to an instrument is a competent attesting witness to it, unless made so by statute; and this rule is not affected by the alteration of the former law made by section 3058 of the [Alabama] Code of 1876, which rendered parties and interested persons competent witnesses in certain cases." *Coleman v. State*, 79 Ala. 49. See also *Seibold v. Rogers*, 110 Ala. 438.

2. In an Action by the Sheriff on a Bail Bond, the

bound bailiff who made the caption is a competent witness to prove the execution of the bond, if the defendant, knowing his situation, asked him to become attesting witness. *Honeywood v. Peacock*, 3 Campb. 196.

3. Insane Witness. — *Currie v. Child*, 3 Campb. 283. See also *Bernett v. Taylor*, 9 Ves. Jr. 381; *Coleman v. State*, 79 Ala. 49; *Kinney v. Flynn*, 2 R. I. 319.

Declaration Made in a Lucid Interval. — A subscribing witness to a note being insane at the time of the trial, proof was given of her handwriting. Evidence was afterwards given that the witness, in a lucid interval, declared that she had not signed her name to the note. It was held that the testimony was properly received. *Neely v. Neely*, 17 Pa. St. 227.

4. Infamous Witness. — *Jones v. Mason*, 2 Stra. 833.

5. Blind Witness. — If, since the execution of a deed, the subscribing witness to it has become blind, a party suing on the deed must, if *non est factum* is pleaded, call the subscribing witness, and it is not enough to prove the handwriting of the parties executing the deed and of the subscribing witness. *Cronk v. Frith*, 9 C. & P. 197, 38 E. C. L. 76. Compare *Wood v. Drury*, 1 Ld. Raym. 734; *Pedler v. Paige*, 1 M. & Rob. 258.

6. Party Not Responsible for Interest. — *Robertson v. Allen*, 16 Ala. 106; *Haynes v. Rutter*, 24 Pick. (Mass.) 242. See also *Tinnin v. Price*, 31 Miss. 422.

7. Interest by Fault of Party. — *Hovill v. Stephenson*, 5 Bing. 493, 15 E. C. L. 515; *Forster v. Pigou*, 1 M. & S. 9.

Illustration. — In *Jones v. Phelps*, 5 Mich. 219, it was held that where the only subscribing witness to a mortgage was the justice before whom the suit was brought, this was not a sufficient reason for not proving the execution of the mortgage by him, since the disability

becomes a party to an action in which it is necessary to prove the execution of such document, evidence of his handwriting is, as a general rule, inadmissible.¹ And it has been held that evidence of the handwriting of the subscribing witness to a promissory note, or the signature of the maker and his admission of its execution, is not admissible in an action against the maker where such subscribing witness after attesting the note becomes the assignee thereof and sues as plaintiff.² But where the surviving witness to a bond was made the executor of the obligee of the bond in an action brought by such executor, it was held that evidence was admissible to prove the handwriting of such executor, as he himself was as much disabled to give evidence as if he were dead.³ And where the subscribing witness to a promissory note afterwards married the payee, evidence of the handwriting of the maker was held admissible.⁴

Id. WITNESS DENYING OR FORGETTING. — If the subscribing witness denies the attestation, or is unwilling or unable from want of recollection to prove the execution of a document, other evidence, such as proof of handwriting, or the acknowledgment of the person executing such document, is admissible.⁵ When, as it often happens in practice, an attesting witness to a document executed long before he testifies is unable to recollect the fact or the circumstances of his attestation, and can only swear that in his judgment his signature is genuine and that he saw the maker execute the document, such document is admissible in evidence.⁶

ity of the justice to be sworn as a witness in the cause was the act of the plaintiffs themselves in bringing the case before him.

1. **Attesting Witness a Party to the Action.** — *Clark v. Stevenson*, 23 U. C. Q. B. 525. Compare *Hamilton v. Marsden*, 6 Binn. (Pa.) 45.

2. *Bennet v. Robinson*, 3 Stew. & P. (Ala.) 227, commenting upon *Hamilton v. Marsden*, 6 Binn. (Pa.) 45; *Johnson v. Knight*, 2 Murph. (6 N. Car.) 237. See also *Hamilton v. Williams*, 1 Hayw. (1 N. Car.) 139; *Hall v. Bynum*, 2 Hayw. (2 N. Car.) 328.

3. *Goss v. Tracy*, 1 P. Wms. 287; *Godfrey v. Norris*, 1 Stra. 34; *Cunliff v. Sefton*, 2 East 183; *Keefer v. Zimmerman*, 22 Md. 274. See also *Davison v. Bloomer*, 1 Dall. (Pa.) 123.

4. *Buckley v. Smith*, 2 Esp. N. P. 697.

5. **Other Evidence Admissible When Witness Denies or Forgets** — *England*. — *Fitzgerald v. Elsee*, 2 Campb. 635; *Ley v. Ballard*, 3 Esp. N. P. 173, note; *Talbot v. Hodson*, 7 Taunt. 251, 2 E. C. L. 251; *Stobart v. Dryden*, 1 M. & W. 615.

Alabama. — *Lazarus v. Lewis*, 5 Ala. 457.

Indiana. — *Booker v. Bowles*, 2 Blackf. (Ind.) 90.

Maine. — *Frost v. Deering*, 21 Me. 156.

Massachusetts. — *Thomas v. Le Baron*, 8 Met. (Mass.) 355; *Whitaker v. Salisbury*, 15 Pick. (Mass.) 534.

New Jersey. — *Patterson v. Tucker*, 9 N. J. L. 322, 17 Am. Dec. 472.

North Carolina. — *Holloway v. Laurence*, 1 Hawks (8 N. Car.) 49.

Pennsylvania. — *Sigfried v. Levan*, 6 S. & R. (Pa.) 308, 9 Am. Dec. 427; *Taylor v. Meekly*, 4 Yeates (Pa.) 79; *Harrington v. Gable*, 81 Pa. St. 406.

See also *Abbot v. Plumble*, 1 Doug. 216; *Handy v. State*, 7 Har. & J. (Md.) 42.

Admissions of Maker. — Where, in an action of dower, the subscribing witnesses to the deed have been called, and have failed to prove the

execution of the deed by the demandant, relinquishing her dower rights, the admissions of the demandant, made during her widowhood, that she had executed the deed, are admissible as the next best evidence of such execution. *Frost v. Deering*, 21 Me. 156.

Proof of Witness's Handwriting. — Where the subscribing witness to an instrument denies his handwriting or attestation, other evidence of the execution of the instrument may be received; and proof of the handwriting of the subscribing witness by other persons acquainted therewith will, in such case, be sufficient to authorize the reading of the instrument to the jury. *Patterson v. Tucker*, 9 N. J. L. 322, 17 Am. Dec. 472.

Georgia Statute. — "The court erred in excluding the testimony of the maker of the deed, when he was offered to testify to the fact of its execution. Even prior to the passage of the act approved December 16, 1895 (Acts 1895, p. 30), the fate of the deed was not made dependent upon the memory of the subscribing witnesses; for while under section 3837 of the code the subscribing witnesses were required to be produced, if accessible, section 3838 of the code provides that 'if the witness is not produced, or, being produced, cannot recollect the transaction, the court may hear any other evidence to prove its execution.' In the present case, the subscribing witnesses were produced. One of them had no recollection of the transaction; the other could swear to the fact of execution only inferentially. Under that state of facts, the maker of the deed, being a competent witness, was entitled to be heard upon the question of its execution." *Kelly v. William Sharp Saddlery Co.*, 99 Ga. 393. See also *Gillis v. Gillis*, 96 Ga. 1.

6. **Imperfect Recollection as to Attestation.** — *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Tompson v. Fisher*, 123 Mass. 559.

Illustrations. — Evidence of a subscribing

et. DOCUMENTS INTRODUCED COLLATERALLY. — The rule of law that instruments in writing purporting to be witnessed by a subscribing witness are not allowed to go in evidence until the execution of them has been proved by such witness does not extend so far as to require such proof of every instrument which may incidentally and collaterally be introduced.¹

witness that though he does not remember attesting the paper, it is done in his handwriting, that the name of the party is not in his (the party's) handwriting, but that it had been the invariable practice of the witness never to attest a paper, unless he saw the party sign or heard him acknowledge it, and that he is confident the case in question is not an exception, is sufficient to admit the paper on a trial at law or hearing in chancery. *Brown v. Anderson*, 1 T. B. Mon. (Ky.) 198.

A subscribing witness to a warrant of attorney swore that from his minutes he found that he was present at a certain place on a certain day, being the day the warrant bore date, and that upon reference to the warrant he found his name in his own handwriting, as an attesting witness, and that the seal appeared to have been taken from an engraving which he then and still had; and from all these circumstances he was convinced that he was present and witnessed the execution of the instrument. This was held sufficient proof of the warrant to go to the jury. *Pigott v. Holloway*, 1 Binn. (Pa.) 436.

Where the attestation of a deed is in the usual form, and the attesting witness recollects seeing the party sign the deed, but does not recollect any other form being gone through, it will be for the jury to say on this evidence whether the deed was not duly signed, sealed, and delivered, as all that is very likely to have occurred, though the witness did not remember it. *Burling v. Paterson*, 9 C. & P. 570, 38 E. C. L. 233.

In *Hamsher v. Kline*, 57 Pa. St. 397, there was a subscribing witness who was examined and said, on being shown the paper: "This is my signature as a witness;" but on cross-examination he added: "I do not know whether the plaintiff is the person who signed the writing in my presence." It was held that the instrument was properly admitted in evidence. The court said: "It is well settled that if there is any evidence, however slight, tending to prove the formal execution of a deed, it is sufficient to entitle it to go to the jury."

The execution of an instrument was sufficiently proved when a subscribing witness testified that his signature was genuine, that he was informed that the other attesting witness was dead, and that he was frequently called by the maker of the instrument to witness deeds, but did not recollect whether he was requested to witness the one in question or not. *Tevis v. Collier*, 84 Tex. 638.

Execution Not Sufficiently Proved. — In *Duffy v. Smith*, 26 Grant's Ch. (U. C.) 428, it was held that when the signature to a deed was spelled in a different way from that in which the alleged grantor was accustomed to spell his name, when the deed presented a mutilated and suspicious appearance, when a letter was produced the signature to which was very unlike that appended to the alleged deed, when

the sister of the grantor swore that the signature was not that of her brother, and when the only evidence to support the due execution of the conveyance was that of the solicitor who prepared the deed, whose name appeared as a witness, and who said that he had not the slightest recollection of the instructions given or of the circumstances connected with the signing of the deed, but at the same time stated that he must have been at the time satisfied with the identity of the grantor or he would not have allowed it to be executed, the execution of the deed was not proved.

1. Collateral Introduction of Documents. — *Grey v. Smithyes*, 4 Burr. 2273; *Collins v. Sherbet*, 114 Ala. 480; *Ayers v. Hewett*, 19 Me. 281; *Com. v. Castles*, 9 Gray (Mass.) 121, 60 Am. Dec. 278; *Rand v. Dodge*, 17 N. H. 343; *Kitchen v. Smith*, 101 Pa. St. 452; *Means v. Means*, 7 Rich. L. (S. Car.) 533; *Curtis v. Belknap*, 21 Vt. 433. See also *Territory v. Ely*, 6 Dakota 128; *Pullen v. Hutchinson*, 25 Me. 249; *Pancoast v. Coon*, (Pa. 1887) 9 Atl. Rep. 156. Compare *Manners v. Postan*, 4 Esp. N. P. 239.

Statement of Rule. — "It is undoubtedly a general rule of law that instruments in writing, introduced by a party, purporting to be witnessed by a subscribing witness, are not allowed to go in evidence till the execution of them has been proved by such witness, if to be found within the jurisdiction of the court. But it is believed that this rule does not extend so far as to require every such instrument which may incidentally and collaterally be introduced, to be so proved. If it be the foundation of a party's claim, or if he be privy to it, or if it purport to be executed by his adversary, there may be good reason for holding him to strict proof of its execution. But if it be wholly *inter alios*, under whom neither party can claim to deduce any right, title, or interest to himself, it would be carrying the rule to a more rigorous and inconvenient extent than the reason and spirit of it would seem to warrant. In this instance the writing was produced by the witness, at the suggestion of the defendant, as corroborative of his testimony, or to enable the adverse party to determine whether it was in conformity to the evidence contained in the writing. The introduction of it was merely collateral and incidental, and cannot therefore be considered as within the reason of the rule requiring proof of its execution by the subscribing witness." *Ayers v. Hewett*, 19 Me. 281.

Illustrations. — "The defendants objected to the introduction of the note because its execution was not proved by the subscribing witness, that proof being made by the testimony of Mrs. Russell and the plaintiff. The plaintiff alleged purchase and acquisition of title from Mrs. Russell rested in parol. The note he executed to her was not a muniment of his title, but was a mere circumstance of the purchase, showing, in connection with the other

(d) **Rule Waived.** — The rule which requires that the attesting witness to a written instrument shall be called to prove its execution if his attendance can be procured has no application to a case where both parties to the instrument are in court and waive their right to insist on producing such witness.¹

(2) *By Other Evidence* — (a) **Handwriting of Witness or Maker.** — When for any reason it is not necessary to produce the subscribing witness it is well settled that proof of the handwriting of such witness is admissible in evidence to prove the execution of the document,² and it has been held that the handwriting of the subscribing witness must be proved in the first instance, if possible.³ But, on the other hand, the position has been taken that upon a

evidence, the consideration of the purchase and how it was evidenced or paid. The note was incidental merely to the main issue, and it was not necessary to call the subscribing witness to prove its execution." *Steiner v. Tranum*, 98 Ala. 315.

"The power of attorney from Squires to Anson was properly admitted without proof of its execution by the subscribing witnesses. It was not the instrument upon which the suit was founded, and Wright, the defendant below, was in no wise connected with it. It was offered solely for the purpose of showing that the possession of Anson was under Wood, and having been proved by one of the parties to it, the rule which requires proof by subscribing witnesses was inapplicable. A grantor is a competent witness to prove that he had executed a particular deed, and it is not necessary to call the subscribing witness." *Wright v. Wood*, 23 Pa. St. 120.

Where, in answer to a cross-interrogatory, proposed by counsel in a deposition, as to whether the witness had received a release from all liabilities, the witness produced the release from his own possession, as a part of his testimony, it was held that he need not prove the execution of the release by the subscribing witness. And the question having been asked by the respondents, in order to establish the competency of the party as their own witness, they were estopped from denying it. But in the case of a release, produced by a party to a suit, to establish his own title he must prove its due execution by the subscribing witness. *Citizens Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.) 16.

A promissory note given for the purchase money of land, payable in instalments, but stipulating that in a certain event, at the option of the payee, the contract should be rescinded, and the maker be due a certain amount as rent, is, on the trial of an issue formed on a distress warrant for rent of the land, not a paper collaterally material to the case so as to be admissible as evidence without proof of execution; and where the instrument has been attested by a witness, it is error to admit it, over the objection of the defendant, without proof of its execution by the subscribing witness, or legally accounting for his nonproduction, or else proving its execution by the testimony of the maker. *Summerour v. Felker*, 102 Ga. 254.

1. **Parties May Waive Attendance of Witness.** — *Forsythe v. Hardin*, 62 Ill. 206.

2. **Handwriting of the Witness** — *England*, — *Prince v. Blackburn*, 2 East 250; *Wardell v. Fermor*, 2 Campb. 282; *Burt v. Walker*, 4 B.

& Ald. 698; *Morgan v. Morgan*, 9 Bing. 359, 23 E. C. L. 306; *Cunliff v. Sefton*, 2 East 183; *Adam v. Kers*, 1 B. & P. 360; *Currie v. Child*, 3 Campb. 283. See also *Bernett v. Taylor*, 9 Ves. Jr. 381.

Canada. — *Doe v. Hatheway*, 7 New Bruns. 69.

United States. — *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268; *Stebbins v. Duncan*, 108 U. S. 32; *Cooke v. Woodrow*, 5 Cranch (U. S.) 13.

Alabama. — *Smith v. Keyser*, 115 Ala. 455; *Mardis v. Shackelford*, 4 Ala. 493.

Arkansas. — *Wilson v. Royston*, 2 Ark. 315.

District of Columbia. — U. S. v. *Boyd*, 8 App. Cas. (D. C.) 440, 24 Wash. L. Rep. 298.

Georgia. — *Watts v. Kilburn*, 7 Ga. 358; *Settle v. Alison*, 8 Ga. 206, 52 Am. Dec. 393; *Howard v. Snelling*, 32 Ga. 195; *McVicker v. Conkle*, 96 Ga. 584.

Kentucky. — *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139.

Massachusetts. — *Dudley v. Sumner*, 5 Mass. 438.

Missouri. — *Waldo v. Russell*, 5 Mo. 387.

New Hampshire. — *Farnsworth v. Briggs*, 6 N. H. 561; *Gould v. Kelley*, 16 N. H. 551.

New Jersey. — *Armstrong v. Glover*, 15 N. J. L. 186.

New York. — *Jackson v. Chamberlain*, 8 Wend. (N. Y.) 620; *Fox v. Reil*, 3 Johns. (N. Y.) 477; *Jackson v. Clark*, 1 Cow. (N. Y.) 140; *Mott v. Doughy*, 1 Johns. Cas. (N. Y.) 230.

North Carolina. — *Selby v. Clark*, 4 Hawks. (11 N. Car.) 265.

Pennsylvania. — *Gallagher v. London Assur. Corp.*, 149 Pa. St. 25; *Hamilton v. Marsden*, 6 Binn. (Pa.) 45.

Texas. — *Timmony v. Burns*, (Tex. Civ. App. 1897) 42 S. W. Rep. 133; *Teal v. Sevier*, 26 Tex. 516.

Virginia. — *Bogle v. Sullivan*, 1 Call (Va.) 561.

3. **View that Proof of Handwriting of Witness Is Necessary** — *England*. — *Barnes v. Trompowsky*, 7 T. R. 261.

United States. — *Clarke v. Courtney*, 5 Pet. (U. S.) 319.

Arkansas. — *Wilson v. Royston*, 2 Ark. 315.

New Hampshire. — *Gould v. Kelley*, 16 N. H. 551; *Farnsworth v. Briggs*, 6 N. H. 561.

New York. — *Pelletreau v. Jackson*, 11 Wend. (N. Y.) 110; *Willson v. Betts*, 4 Den. (N. Y.) 201.

Virginia. — *Raines v. Philips*, 1 Leigh (Va.) 483.

See also *Morgan v. Curtenius*, 4 McLean (U. S.) 366; *Clark v. Sanderson*, 3 Binn. (Pa.) 192, 5 Am. Dec. 368.

case shown for the admission of secondary evidence, when an attesting witness is not required to the operative effect of the document, it is competent in the first instance to offer proof of the handwriting of the person executing such document.¹ There is no doubt that if upon due search and inquiry no one can be found who can prove the handwriting of the subscribing witness, resort may be then had to proof of the handwriting of the party who executed the document. Indeed, such proof may always be produced as corroborative evidence of its due and valid execution.²

(b) **Admissions.**—As has been heretofore stated, the execution of an attested document may be sometimes proved by the admissions of the person who executed it, though the general rule is otherwise.³

(c) **Circumstances.**—And it has been said that “when no direct testimony on the point of execution or former existence of an instrument appears to be attainable, the fact may be proved by circumstances.”⁴

Statement of Rule.—The order of proof of a sealed instrument to which there is a subscribing witness is as follows: 1. The witness must be produced, if practicable. 2. If he cannot be found, or his testimony cannot be used, his handwriting must be proved. 3. If his handwriting cannot be proved, after diligent exertions for that purpose, proof of the handwriting of the party executing the instrument is admissible. But evidence that a subscribing witness cannot be found will not warrant the inference that his handwriting cannot be proved; the party seeking to avail himself of such testimony must show due diligence to obtain as well proof of the handwriting as the attendance of the witness. It seems, where a sealed instrument is proved by showing the handwriting of the witness, that it is proper to superadd proof of the handwriting of the party. *Jackson v. Waldron*, 13 Wend. (N. Y.) 178.

When Witness Makes His Mark.—It is a general rule that the evidence of a subscribing witness to an instrument is the best, and must be adduced if it can be had; and if it cannot, proof of his handwriting will be required. But if the subscribing witness merely made his mark, and if he is dead, proof of the handwriting of the party executing the instrument will be proper. *Gilliam v. Perkinson*, 4 Rand. (Va.) 325.

The mark of a subscribing witness who is dead may be proved to let in testimony of the obligor's handwriting. *Nelius v. Brickell*, 1 Hayw. (1 N. Car.) 19.

Satisfaction as to Signature of Maker Sufficient.—If the testimony of the subscribing witness cannot be had, evidence may be given of his handwriting, and of that of the maker of the instrument; and it is not necessary that the jury should be satisfied by the evidence of the handwriting of the subscribing witness, if they are satisfied as to that of the maker. *Leonard v. Neale*, 1 Cranch (C. C.) 493.

1. View that Proof of Handwriting of Maker Is Proper—*United States*.—*Wellford v. Eakin*, 1 Cranch (C. C.) 264.

Alabama.—*Cox v. Davis*, 17 Ala. 714, 52 Am. Dec. 199.

Kentucky.—*Yocum v. Barnes*, 8 B. Mon. (Ky.) 496.

Maine.—*Jones v. Roberts*, 65 Me. 273.

Massachusetts.—*Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; *Gelott v. Goodspeed*, 8 Cush. (Mass.) 411.

Texas.—*Sloan v. Thompson*, 4 Tex. Civ. App. 419; *Lapowski v. Taylor*, 13 Tex. Civ. App. 624.

Vermont.—*Sherman v. Champlain Transp. Co.*, 31 Vt. 162; *Sanborn v. Cole*, 63 Vt. 590.

See also *Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169; *Conrad v. Farrow*, 5 Watts (Pa.) 536.

Prima Facie Sufficient.—“There are many adjudicated cases which maintain that where the subscribing witness to a bond is dead, proof of his handwriting is evidence of its execution; but it is quite as regular, according to the course of decision at this day, to admit the bond upon proof of the handwriting of the obligor. Such evidence has been repeatedly recognized to be admissible and *prima facie* sufficient.” *Mardis v. Shackleford*, 4 Ala. 493.

Hawaiian Doctrine.—“In all cases where the instrument in question is a negotiable note, the execution of which is attested by witnesses who are without the jurisdiction of the court, we think it is sufficient for the plaintiff to prove the handwriting of the party, together with a distinct admission on his part that he owes the debt.” *Bullions v. Loring*, 1 Hawaiian 209.

2. When Proof of Handwriting of Maker Is Admissible.—*Clarke v. Courtney*, 5 Pet. (U. S.) 319; *Morgan v. Curtenius*, 4 McLean (U. S.) 366; *Wilson v. Royston*, 2 Ark. 315; *Willson v. Betts*, 4 Den. (N. Y.) 201; *Jackson v. Waldron*, 13 Wend. (N. Y.) 178; *M'Pherson v. Rathbone*, 11 Wend. (N. Y.) 97; *Clark v. Sanderson*, 3 Binn. (Pa.) 192, 5 Am. Dec. 368; *Raines v. Phillips*, 1 Leigh (Va.) 483. See also *Barnes v. Trompowsky*, 7 T. R. 261.

Illustration.—“The testimony of Faxon, one of the mortgagors, to the genuineness of his own signature and those of the other mortgagors was, under the circumstances proved at the trial, clearly competent. One of the subscribing witnesses had already been called and testified. It was proved that the other was absent from the commonwealth. This fact was sufficient reason for not producing his testimony, and rendered other evidence of the execution of the mortgage admissible. This point was distinctly adjudicated in *Valentine v. Piper*, 22 Pick. (Mass.) 90, 33 Am. Dec. 715.” *Clark v. Houghton*, 12 Gray (Mass.) 38.

3. See *supra*, this section, *By Subscribing Witness—General Rule*.

4. *Per Sargent, J.*, in *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 536.

IV. SUFFICIENCY OF EVIDENCE — 1. Production of One Witness Sufficient. —

In ordinary cases where a mere formal execution of the document is the subject of inquiry it is quite sufficient to produce one of several subscribing witnesses.¹ Where, however, the law requires more than one attesting witness to make the document valid, and there is a real contest over its proper execution, all the attesting witnesses should be produced, if alive and within the reach of the court.² And it has been said that there may be cases "where, on account of the failure of the recollection of one of the subscribing witnesses, or the appearance of fraud or forgery in the execution of the instrument, the court, in the exercise of its discretion, may hold the party to produce both the witnesses or give satisfactory reasons for the absence of one of them; but whether this shall be done or not depends on the circumstances of each particular case, and must be decided by the judge at the trial, in the exercise of a sound discretion to which no exception can be taken."³

2. Proof of Handwriting of Attesting Witness Sufficient. — When the absence of the subscribing witness has been satisfactorily accounted for, according to the weight of authority, proof of the handwriting of such witness is *prima facie* sufficient evidence of the execution of the document without proof of the handwriting of the person who is alleged to have executed it.⁴ But such

1. One of Several Witnesses Sufficient — Connecticut. — O'Sullivan v. Overton, 56 Conn. 102.

Georgia. — Cooper v. O'Brien, 98 Ga. 773.

Maine. — Jackson v. Sheldon, 22 Me. 569.

Massachusetts. — Gelott v. Goodspeed, 8 Cush. (Mass.) 411; Burke v. Miller, 7 Cush. (Mass.) 547; Russell v. Coffin, 8 Pick. (Mass.) 143.

New Hampshire. — Melcher v. Flanders, 40 N. H. 139.

New York. — Jackson v. Burton, 11 Johns. (N. Y.) 64; Jackson v. Gager, 5 Cow. (N. Y.) 383.

North Carolina. — Bennett v. Thompson, 13 Ired. L. (35 N. Car.) 379.

Pennsylvania. — McAdams v. Stilwell, 13 Pa. St. 90.

South Carolina. — McGowan v. Reid, 27 S. Car. 262.

See also Tevis v. Collier, 84 Tex. 638.

Other Evidence Besides Evidence of Witness. — In Holloway v. Laurence, 1 Hawks (8 N. Car.) 49, Henderson, J., said that after the testimony of the subscribing witness has been produced, either party is at liberty to give evidence as to the handwriting of the obligor. A bond is not absolutely proved because the subscribing witness swears to its execution, for the jury may not believe him; nor is it destroyed by his denying his handwriting, or by his saying he did not see it executed. Other testimony may be given to prove that it is or is not the bond of the defendant; nor, indeed, are the parties confined to evidence of the obligor's handwriting, but may give any other testimony tending to establish that it is the parties' bond.

2. McGowan v. Reid, 27 S. Car. 262.

Illustration. — "The witness does not say that he saw the paper executed by the person who seemed to be the grantor, nor that it was executed in the presence of the two subscribing witnesses; and he does not even prove the handwriting of the alleged grantor; for while he does say that 'it seems to be a deed from J. F. C. DuPre,' etc., that is saying no more

than what an entire stranger to DuPre might say from looking at the paper, and is very far from saying that it was executed by DuPre. While it may be quite true, as intimated in Little v. White, 29 S. Car. 173, that the execution of a deed may be proved by one of the subscribing witnesses, where such witness can prove all the facts essential to the legal execution of the deed, yet where such witness simply proves his own signature and that of the other subscribing witness, it cannot be said that such proof is sufficient. This exception must, therefore, be sustained." Martin v. Bowie, 37 S. Car. 102.

3. Per Bigelow, J., in Burke v. Miller, 7 Cush. (Mass.) 547. To the same effect is Russell v. Coffin, 8 Pick. (Mass.) 143. See also Norris v. Freeman, 3 Wils. 38.

4. Sufficiency of Proof of Handwriting of Witness — England. — Mitchell v. Johnson, M. & M. 176, 22 E. C. L. 283; Page v. Mann, M. & M. 79, 22 E. C. L. 256; Kay v. Brookman, 3 C. & P. 555, 14 E. C. L. 446; Adam v. Kers, 1 B. & P. 360.

Canada. — Rogers v. Shortis, 10 Grant's Ch. (U. C.) 243; Crane v. Ayre, 7 New Bruns. 577.

United States. — Stebbins v. Duncan, 108 U. S. 32; Hanrick v. Patrick, 119 U. S. 156.

Alabama. — Caldwell v. Pollak, 91 Ala. 353.

Arkansas. — Wilson v. Royston, 2 Ark. 315.

Georgia. — McVicker v. Conkle, 96 Ga. 584.

New Jersey. — Armstrong v. Glover, 15 N. J. L. 186.

New York. — Mott v. Doughty, 1 Johns. Cas. (N. Y.) 230; Brown v. Kimball, 25 Wend. (N. Y.) 259; Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643; Sluby v. Champlin, 4 Johns. (N. Y.) 461; Jackson v. Cody, 9 Cow. (N. Y.) 140; Lush v. Druse, 4 Wend. (N. Y.) 313; M'Pherson v. Rathbone, 11 Wend. (N. Y.) 97.

Pennsylvania. — Hamilton v. Marsden, 6 Binn. (Pa.) 45; Clark v. Sanderson, 3 Binn. (Pa.) 192, 5 Am. Dec. 368.

Texas. — Smith v. Gillum, 80 Tex. 120.

Virginia. — Bogle v. Sullivant, 1 Call (Va.) 561.

evidence is not conclusive, and under suspicious circumstances further proof is necessary.¹ Where there are several attesting witnesses it is usually sufficient to prove the handwriting of only one of them.²

EXECUTION OF WILLS. — See the title **WILLS**.

EXECUTION SALE. — See the titles **JUDICIAL SALES**; **SHERIFFS' SALES**.

West Virginia. — *Thompson v. Halstead*, 44 W. Va. 390.

See also *Doe v. Paul*, 3 C. & P. 613, 14 E. C. L. 483; *Servis v. Nelson*, 14 N. J. Eq. 94. Compare *Cuvillier v. Fraser*, 2 Rev. de Lég. 279. But see *Chase's Steph. Dig. of Law of Evidence* (2d ed.) 181; *Wallis v. Delaney*, 7 T. R. 262, note c; *Nelson v. Whittall*, 1 B. & Ald. 19, *disapproved* in *Kay v. Brookman*, 3 C. & P. 555, 14 E. C. L. 446, and *Rogers v. Shortis*, 10 Grant's Ch. (U. C.) 243.

When Signature of Maker Is by Mark. — Where the signature to a promissory note is by the mark of the maker, which is attested by a subscribing witness, evidence that the name of the witness is in his handwriting, and that such witness is deceased, is competent to prove the execution of the note. *Sanborn v. Cole*, 63 Vt. 590.

1. Such Evidence Rebuttable. — *Hamilton v. Marsden*, 6 Binn. (Pa.) 45; *Thompson v. Halstead*, 44 W. Va. 390. See also *Servis v. Nelson*, 14 N. J. Eq. 94.

Must Explain Suspicious Circumstances. — Proof of the "handwriting of deceased subscribing

witnesses" to a deed is not sufficient evidence of its execution to "entitle it to be read to the jury," where the deed on its face excites suspicion of fraud. The party producing it must, in such case, in addition to proving the handwriting of the subscribing witnesses, give evidence explaining the suspicious circumstances or proving the identity of the grantor. *Brown v. Kimball*, 25 Wend. (N. Y.) 259, *reversing* 19 Wend. (N. Y.) 437.

2. Necessary to Prove Handwriting of Only One Witness. — *United States.* — *Stebbins v. Duncan*, 108 U. S. 32.

Alabama. — *Smith v. Keyser*, 115 Ala. 455; *Caldwell v. Pollak*, 91 Ala. 354.

Georgia. — *McVicker v. Conkle*, 96 Ga. 584. *Massachusetts.* — *Gelott v. Goodspeed*, 8 Cush. (Mass.) 411.

New York. — *Sluby v. Champlin*, 4 Johns. (N. Y.) 461; *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 643; *Jackson v. Burton*, 11 Johns. (N. Y.) 64.

North Carolina. — *Bernett v. Thompson*, 13 Ired. L. (35 N. Car.) 379.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, title *EXECUTIONS AGAINST PROPERTY*, vol. 8, p. 303, and the cross-references there given.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ATTACHMENT*, vol. 3, p. 181; *DEBTS OF DECEDENTS*, vol. 8, p. 1003; *EXEMPTIONS FROM EXECUTION*; *GARNISHMENT*; *HOMESTEAD*; *IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS*; *JUDGMENTS AND DECREES*; *JUDICIAL SALES*; *SHERIFFS, CONSTABLES, AND MARSHALS*; *SHERIFFS' SALES*.

I. DEFINITION. — A writ of execution is a process by which a final judgment of a court is carried into effect.¹

Particular Executions Distinguished. — An *Elegit* is a writ of execution directed to the sheriff commanding him to make delivery of a moiety of the party's land and all his goods, beasts of the plow only excepted.²

A *Capias ad Satisfaciendum* is a writ authorizing the arrest of the defendant and his imprisonment until the satisfaction of the demand against him.³

An *Extendi Facias* is a process by which the body, goods and lands of a debtor may all be taken at once in execution to compel the payment of the debt.⁴

A *Levari Facias* is used to enforce a claim upon the goods of a debtor and the profits of his land.⁵

A *Fieri Facias* is the ordinary writ commanding the sheriff to seize the goods and chattels of the defendant.⁶

A *Venditioni Exponas* is a writ of execution directed to the sheriff, commanding him to sell goods or chattels, and, in some states, lands which he has taken in execution by virtue of a *fieri facias*, and which remain unsold.⁷

1. Other Definitions. — An execution is the end of the law; it gives the successful party the fruits of his judgment. *U. S. v. Nourse*, 9 Pet. (U. S.) 8.

An execution in civil actions is the process by which the debt or damages or other thing recorded, and the costs adjudged, are obtained. *Steele v. Thompson*, 62 Ala. 323.

An execution is the result of a judgment which has been recovered in some court of law. *Ex p. Dingman*, L. R. 11 Eq. 604.

An execution is the execution of the law according to the judgment. 3 Coke Inst. 212.

An execution is the obtaining of actual possession of anything acquired by judgment of law and necessarily goes on all final judgments. *Darby v. Carson*, 9 Ohio 149.

It is the final process to enforce payment of a judgment. *Reid v. North Western R. Co.*, 32 Pa. St. 257.

It is the process by which the sentence of the law is put in force; it is a general term which applies to all writs the object of which is to enforce the judgment of a court. *Piereson v. Hammond*, 22 Tex. 585.

2. Elegit Defined. — Bouv. Law Dict. See also *Morris v. Ellis*, 3 Ala. 560; *McCance v. Taylor*, 10 Gratt. (Va.) 586. And see *ELEGIT*, vol. 10, p. 895.

In *Porter v. Cocke*, Peck (Tenn.) 30, the court said: "By the common law, lands and tenements were not subject to be taken in execution at the suit of a common person, except in the case of an heir; to remedy this obvious defect came the 13th Edw. I., c. 18, by which it is provided that when a debt is recovered or

acknowledged in the King's Court, or damages awarded, it shall be from thenceforth in the election of him to have a writ that the sheriff *fieri facias* of the lands and goods, or that the sheriff shall deliver to him all the chattels of the debtor, etc., and the one-half of his land, until the debt be levied upon a reasonable price in extent. Upon this is founded the writ of *elegit*, by which all the goods of the debtor are delivered at their approved value into the hands of the creditor, and the one-half of his lands are extended." See also 3 Bl. Com. 418, wherein the writ of *elegit* is said to extend to the use of a moiety of the debtor's land until the debt is paid, in the event that his goods did not satisfy the claim.

3. Capias Ad Satisfaciendum Defined. — 3 Bl. Com. 417.

4. Extendi Facias Defined. — 3 Bl. Com. 420; Bouv. Law Dict.

5. Definition of Levari Facias. — 3 Bl. Com. 417.

In *Pennsylvania* it has been held that *levari facias* is made by law the ordinary writ for collecting charges upon land, as in the cases of mortgages, mechanics' liens, and municipal charges. *Pentland v. Kelly*, 6 W. & S. (Pa.) 483; *Hart v. Homiller*, 23 Pa. St. 39.

6. Fieri Facias Defined. — 3 Bl. Com. 417. See also *United Lines Tel. Co. v. Stevens*, 67 Md. 156; *Nelson v. Guffey*, 131 Pa. St. 273.

7. Venditioni Exponas Defined. — Bouv. Law Dict.; *Borden v. Tillman*, 39 Tex. 262. See also *Doe v. Cunningham*, 6 Blackf. (Ind.) 430.

Under Statute. — The forms of execution are now largely regulated by statute.¹

II. ISSUANCE OF THE WRIT — 1. Prerequisites — a. STATUTORY REQUIREMENTS. — Where there are terms prescribed by statute upon which an execution may be issued, and such terms cannot be dispensed with, a substantial compliance therewith is a condition precedent to the issuance of the writ.²

b. THE JUDGMENT OR DECREE — (1) In General. — There must be a valid subsisting judgment, order, or decree to support the execution; otherwise, the execution will be null and void, and will confer no authority upon the officer to whom it is directed.³

(2) Necessity of Entry. — At common law, an execution was issuable upon the signing of a final judgment and before its entry of record, "providing there was no writ of error depending or agreement to the contrary."⁴ But in some states it has been held irregular to issue an execution before the judgment has been entered.⁵ And in other states there have been express statutory provisions by which the entry of the judgment is made a prerequisite, especially where the judgment is by confession.⁶

(3) Effect of Loss of Record. — The loss or destruction of the record of a judgment does not interfere with a right to issue an execution or render a scire

1. Forms of Execution Regulated by Statute. — See *Southern California Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 28 Am. St. Rep. 115; *Ex p. Voltz*, 37 Ind. 237; *Gruner v. Westin*, 66 Tex. 209.

2. Statutory Requirements as to Issuance of Writ. — *Johnson v. Harvey*, 4 Mass. 483; *Coonce v. Munday*, 3 Mo. 373; *Mausel v. New York, etc., R. Co.*, 171 Pa. St. 606.

3. The Judgment as Prerequisite to Issue of Writ — United States. — *Morton v. Root*, 2 Dill. (U. S.) 312.

Florida. — *Davidson v. Seegar*, 15 Fla. 671.
Illinois. — *Campbell v. McCahan*, 41 Ill. 45; *Huls v. Buntin*, 47 Ill. 396; *Meyer v. Mintonye*, 106 Ill. 414.

Indiana. — *Dawson v. Wells*, 3 Ind. 399; *Myers v. Cochran*, 29 Ind. 256.

Iowa. — *Campbell v. Williams*, 39 Iowa 646; *Armell v. Lendrum*, 47 Iowa 535; *Balm v. Nunn*, 63 Iowa 641.

Kansas. — *Hargis v. Morse*, 7 Kan. 415; *Darrow v. Scullin*, 19 Kan. 57.

Kentucky. — *Roberts v. Stowers*, 7 Bush (Ky.) 295.

Missouri. — *Weston v. Clark*, 37 Mo. 568.

New York. — *Roberge v. Winne*, 75 Hun (N. Y.) 597; *McGuinty v. Herrick*, 5 Wend. (N. Y.) 241; *Cornell v. Barnes*, 7 Hill (N. Y.) 35; *Jackson v. Hasbrouck*, 12 Johns. (N. Y.) 214; *Townshend v. Wesson*, 4 Duer (N. Y.) 342; *Field v. Paulding*, 3 Abb. Pr. (N. Y. C. Pl.) 139; *Ruckman v. Cowell*, 1 N. Y. 505.

Pennsylvania. — *Hoffman v. Strohecker*, 7 Watts (Pa.) 86, 32 Am. Dec. 740.

Tennessee. — *Keeling v. Heard*, 3 Head (Tenn.) 592; *Sherrell v. Goodrum*, 3 Humph. (Tenn.) 419.

Texas. — *Bailey v. Knight*, 8 Tex. 61; *Criswell v. Ragsdale*, 18 Tex. 443; *Walker v. Emerson*, 20 Tex. 710, 73 Am. Dec. 207; *Hollingsworth v. Bagley*, 35 Tex. 345; *Allison v. Brookshire*, 38 Tex. 199.

Verdict Insufficient to Support Execution. — Before a judgment has been entered on a verdict, an execution cannot be issued. *Truett v. Legg*, 32 Md. 147; *Lowther v. Davis*, 33 W. Va. 132.

A Finding by a Justice of the peace in favor of the plaintiff upon which no judgment has been rendered, is insufficient as the basis of an execution. *Sare v. Butcher*, 141 Ind. 146. See also *Dailey v. State*, 56 Miss. 475.

Order for Payment of Money into Court. — An order directing the payment of money into court which does not require the amount to be paid directly to a party, is not sufficient as the basis of an execution. *United Lines Tel. Co. v. Stevens*, 67 Md. 156. See also *In re Leeds Banking Co.*, L. R. 1 Ch. 150.

A Judgment Rendered Subsequently to the issuance of the execution will not have a retrospective effect so as to give force to the execution. *Campbell v. Williams*, 39 Iowa 646.

4. Necessity of Entry of Judgment Prior to Issuance of Writ at Common Law. — *Tidd's Practice*, 994; *Sheridan's Practice*, 299. See also *Lynch v. Kelly*, 41 Cal. 232; *Los Angeles County Bank v. Raynor*, 61 Cal. 145; *Stevens v. Manson*, 87 Me. 436.

5. Page v. Coleman, 9 Port. (Ala.) 275; *Graham v. Lynn*, 4 B. Mon. (Ky.) 17, 39 Am. Dec. 493. See also *Balm v. Nunn*, 63 Iowa 645; *Barrie v. Dana*, 20 Johns. (N. Y.) 307.

6. Entry of Judgment as Prerequisite to Issuance of Writ Under Statute — California. — *Wells v. Stout*, 9 Cal. 479.

Colorado. — *Schuster v. Rader*, 13 Colo. 329.
Illinois. — *Ling v. King*, 91 Ill. 571; *Cummins v. Holmes*, 109 Ill. 15; *Knights v. Martin*, 155 Ill. 486; *Baker v. Barber*, 16 Ill. App. 621; *Humphreys v. Swain*, 21 Ill. App. 232; *Poppers v. Meager*, 33 Ill. App. 19.

Indiana. — *Jones v. Carnahan*, 63 Ind. 229.
Iowa. — *Wright v. Howell*, 35 Iowa 288.

Missouri. — *Huffman v. Sisk*, 62 Mo. App. 398.

New Jersey. — *Smith v. Trenton-Delaware Falls Co.*, 20 N. J. L. 116.

New York. — *Marvin v. Herrick*, 5 Wend. (N. Y.) 109; *Walters v. Sykes*, 22 Wend. (N. Y.) 566; *Small v. M'Chesney*, 3 Cow. (N. Y.) 19; *Blashfield v. Smith*, 27 Hun (N. Y.) 114; *Hathaway v. Howell*, 54 N. Y. 97.

South Carolina. — *Mason, etc., Co. v. Kilbough Music Co.*, 45 S. Car. 11.

facias necessary.¹ And the court will, on motion, supply the lost record and order an execution to be issued.²

(4) *Effect of Payment or Tender* — **Payment.** — After a judgment has been paid or satisfied, an execution cannot be regularly issued thereon.³

Tender. — In the same way, the writ should not be issued after a tender of the amount of the judgment and all proper costs and fees.⁴

(5) *Necessity of Revivor* — (a) **Upon Death of Plaintiff.** — Apart from statute, an execution cannot be regularly issued and tested after the death of the plaintiff until his personal representatives have revived the judgment by a writ of scire facias.⁵ But in some states, under statute, it is not necessary to sue out a writ

1. **Effect of Loss of Record upon Right to Issue Execution.** — *Childress v. Marks*, 2 Baxt. (Tenn.) 12; *Faust v. Echols*, 4 Coldw. (Tenn.) 397; *Boyers v. Webb*, 1 Lea (Tenn.) 700; *Whitworth v. Thompson*, 8 Lea (Tenn.) 480; *Randall v. Payne*, 1 Tenn. Ch. 145. See also *White v. Clark*, 8 Cal. 512; *Strain v. Murphy*, 49 Mo. 337.

2. *Fleece v. Goodrum*, 1 Duv. (Ky.) 307.

3. **Effect of Payment of Judgment upon Right to Issue Execution** — *Alabama.* — *Abercrombie v. Chandler*, 9 Ala. 625.

California. — *Reynolds v. Lincoln*, 71 Cal. 183.

Florida. — *Mathews v. Hillyer*, 17 Fla. 498; *Griffin v. Lacourse*, 31 Fla. 125.

Illinois. — *Russell v. Hugunin*, 2 Ill. 562, 33 Am. Dec. 423; *McHenry v. Watkins*, 12 Ill. 233; *Tompkins v. Chicago Fifth Nat. Bank*, 53 Ill. 57; *Logan v. Lucas*, 59 Ill. 237.

Indiana. — *Glover v. Horton*, 7 Blackf. (Ind.) 295; *Laval v. Rowley*, 17 Ind. 36; *State v. Salyers*, 19 Ind. 432.

Iowa. — *Drefahl v. Tuttle*, 42 Iowa 177.

Kansas. — *Walrath v. Walrath*, 27 Kan. 395; *Worden v. Jones*, 1 Kan. App. 501.

Louisiana. — *Brooks v. Hardwick*, 5 La. Ann. 675; *New Orleans v. Smith*, 24 La. Ann. 405.

Massachusetts. — *Kennedy v. Duncklee*, 1 Gray (Mass.) 65. See also *Kellogg v. Underwood*, 163 Mass. 214.

Missouri. — *Reed v. Austin*, 9 Mo. 722, 45 Am. Dec. 336; *Weston v. Clark*, 37 Mo. 568; *Durette v. Briggs*, 47 Mo. 356; *Durfee v. Moran*, 57 Mo. 374; *Hull v. Sherwood*, 59 Mo. 172; *McClure v. Logan*, 59 Mo. 234; *Nesbit v. Neill*, 67 Mo. 275; *St. Francis Mill Co. v. Sugg*, 83 Mo. 476.

Nebraska. — *Pope v. Benster*, 42 Neb. 304.

New York. — *Wood v. Colvin*, 2 Hill (N. Y.) 566, 38 Am. Dec. 598; *McGuinty v. Herrick*, 5 Wend. (N. Y.) 240; *Lewis v. Palmer*, 6 Wend. (N. Y.) 367; *Brown v. Feeter*, 7 Wend. (N. Y.) 301; *Swan v. Saddlemire*, 8 Wend. (N. Y.) 676; *Ruckman v. Cowell*, 1 N. Y. 505; *Craft v. Merrill*, 14 N. Y. 456; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553, 26 Am. Rep. 627; *Benton v. Hatch*, 122 N. Y. 322.

Ohio. — *Patterson v. Wilkins*, *Wright* (Ohio) 501.

Oregon. — *Snipes v. Beezley*, 5 Oregon 420.

Pennsylvania. — *Hoffman v. Strohecker*, 7 Watts (Pa.) 86, 32 Am. Dec. 740.

Tennessee. — *Finley v. King*, 1 Head (Tenn.) 123; *Lintz v. Thompson*, 1 Head (Tenn.) 456, 73 Am. Dec. 182; *Keeling v. Heard*, 3 Head (Tenn.) 592.

Texas. — *Terry v. O'Neal*, 71 Tex. 592; *Wil-*

lis v. Hudson, 72 Tex. 598; *Hardin v. Clark*, 1 Tex. Civ. App. 565; *Singer Mfg. Co. v. Herman Herschlerode Mfg. Co.*, 1 Tex. App. Civ. Cas., § 741.

Vermont. — *Pierson v. Gale*, 8 Vt. 509, 30 Am. Dec. 487.

Execution upon Satisfied Judgment a Tort. — It seems to be the rule that where a person causes an execution to be issued upon a judgment after it has been satisfied, and causes the debtor's property to be taken and sold thereunder, he is guilty of a tort. *Wood v. Currey*, 57 Cal. 208; *Ruckman v. Cowell*, 1 N. Y. 505; *Pope v. Benster*, 42 Neb. 304. See also *Glover v. Horton*, 7 Blackf. (Ind.) 295; *McGuinty v. Herrick*, 5 Wend. (N. Y.) 240.

Effect of Partial Payment. — Partial payment of a judgment will not deprive the plaintiff of the right to have an execution issued for the balance due on the judgment. *Harper v. Terry*, 16 La. Ann. 216.

4. **Effect of Tender of Payment on Right to Issue Execution.** — *Rogers v. McDermid*, 7 N. H. 506; *Tiffany v. St. John*, 5 Lans. (N. Y.) 153.

5. **Necessity of Revivor of Judgment at Common Law upon Plaintiff's Death** — *England.* — *Earl v. Brown*, 1 Wils. 302.

Alabama. — *Moore v. Bell*, 13 Ala. 469.

Illinois. — *Brown v. Parker*, 15 Ill. 307; *Meyer v. Mintonye*, 106 Ill. 414.

Kentucky. — *Breckinridge v. Taylor*, 1 B. Mon. (Ky.) 263.

Maryland. — *Trail v. Snouffer*, 6 Md. 308.

Michigan. — *Jenness v. Lapeer Circuit Judge*, 42 Mich. 460.

Mississippi. — *Hughes v. Wilkinson*, 37 Miss. 482.

New Jersey. — *Harwood v. Murphy*, 13 N. J. L. 193; *Watwick v. —*, 20 N. J. L. 116.

New York. — *Thurston v. King*, 1 Abb. Pr. (N. Y. Supreme Ct.) 126.

North Carolina. — *Wingate v. Gibson*, 1 Murph. (5 N. Car.) 492; *Ellison v. Andrews*, 12 Ired. L. (34 N. Car.) 188; *Aycock v. Harrison*, 65 N. Car. 8.

Tennessee. — *Gregory v. Chadwell*, 3 Coldw. (Tenn.) 390.

Texas. — *Bennett v. Gamble*, 1 Tex. 124. See also *Scott v. Lyons*, 59 Tex. 593.

Virginia. — *May v. North Carolina State Bank*, 2 Rob. (Va.) 60, 40 Am. Dec. 720.

Where Writ Is Tested Prior to the Plaintiff's Death. — But it was permissible at common law to issue an execution after the plaintiff's death, provided such execution bore teste as of a day prior to his death. *Bellingier v. Ford*, 14 Barb. (N. Y.) 250; *Jones v. Newman*, 36 Hun (N. Y.) 634; *Neil v. Gaut*, 1 Coldw. (Tenn.) 396; *Gregory v. Chadwell*, 3 Coldw. (Tenn.) 390.

of scire facias, and other methods have been introduced by which execution may be had on a judgment after the plaintiff's death.¹

(b) **Upon Death of Defendant.** — It is a rule at common law also that where there is but one defendant, and he dies after judgment, an execution cannot be issued without first reviving such judgment by a writ of scire facias,² unless

Death of One of Two or More Plaintiffs. — Also, where there are joint plaintiffs, and one or more die after judgment, the survivors may, unless the rule of the common law has been changed by statute, have an execution without a scire facias. *Withers v. Harris*, 2 Ld. Raym. 808; *Pennoir v. Brace*, 1 Salk. 319; *Cushman v. Carpenter*, 8 Cush. (Mass.) 388; *Hamilton v. Lyman*, 9 Mass. 14; *Howell v. Eldridge*, 21 Wend. (N. Y.) 678; *Ellison v. Andrews*, 12 Ired. L. (34 N. Car.) 188; *Dickinson v. Bowers*, 7 Baxt. (Tenn.) 307. See also *Berryhill v. Wells*, 5 Binn. (Pa.) 56.

1. Necessity Under Statute of Revivor of Judgment upon Plaintiff's Death. — *Fitts v. Davis*, 42 Ill. 391; *Armstrong v. McLaughlin*, 49 Ind. 370; *Mavity v. Eastridge*, 67 Ind. 211; *White v. Secor*, 58 Iowa 533; *Freeman v. Dutcher*, 15 Abb. N. Cas. (N. Y. Supreme Ct.) 431; *Scott v. Lyons*, 59 Tex. 593; *Holmes v. McIndoe*, 20 Wis. 657. See also *Meek v. Bunker*, 33 Iowa 169; *Morgan v. Winn*, 17 B. Mon. (Ky.) 233; *Venable v. Smith*, 1 Duv. (Ky.) 196.

2. Necessity of Revivor of Judgment at Common Law upon Defendant's Death. — *England.* — *Heapy v. Parris*, 6 T. R. 368; *Bragner v. Langmead*, 7 T. R. 24; *Jeffreson v. Morton*, 2 Saund. 6; *Pennoir v. Brace*, 1 Salk. 319.

United States. — *Ransom v. Williams*, 2 Wall. (U. S.) 313; *Mitchell v. St. Maxent*, 4 Wall. (U. S.) 237; *Erwin v. Dundas*, 4 How. (U. S.) 76; *Wilson v. Hurst*, Pet. (C. C.) 140.

Alabama. — *Collingsworth v. Horn*, 4 Stew. & P. (Ala.) 237, 24 Am. Dec. 753; *Fryer v. Dennis*, 3 Ala. 254; *Mansony v. U. S. Bank*, 4 Ala. 735; *Abercrombie v. Hall*, 6 Ala. 657; *Holloway v. Johnson*, 7 Ala. 660; *Henderson v. Gandv*, 11 Ala. 431; *Cawthorn v. Knight*, 11 Ala. 579; *Jones v. Swift*, 12 Ala. 144; *Burk v. Jones*, 13 Ala. 167; *Moore v. Bell*, 13 Ala. 469; *Graham v. Chandler*, 15 Ala. 342; *Hurst v. Weathers*, 15 Ala. 417; *Martin v. Branch Bank*, 15 Ala. 587, 50 Am. Dec. 147; *Whitlock v. Whitlock*, 25 Ala. 543; *Hurt v. Nave*, 49 Ala. 459; *Hendon v. White*, 52 Ala. 597; *Brown v. Newman*, 66 Ala. 275; *Sims v. Eslava*, 74 Ala. 594.

Arkansas. — *Bently v. Cummins*, 9 Ark. 487; *Davis v. Oswalt*, 18 Ark. 414, 68 Am. Dec. 182; *Blanks v. Rector*, 24 Ark. 496, 88 Am. Dec. 780. See also *Adamson v. Cummins*, 10 Ark. 541; *James v. Marcus*, 18 Ark. 421; *Hornor v. Hanks*, 22 Ark. 572.

California. — *Smith v. Reed*, 52 Cal. 345.

Delaware. — *Cooper v. May*, 1 Harr. (Del.) 18. See also *Farmers' Bank v. Reynolds*, 1 Harr. (Del.) 513.

Georgia. — *Smith v. Lockett*, 73 Ga. 104.

Illinois. — *Brown v. Parker*, 15 Ill. 307.

Indiana. — *State v. Michaels*, 8 Blackf. (Ind.) 436; *Whitehead v. Cummins*, 2 Ind. 58; *Faulkner v. Larrabee*, 76 Ind. 154.

Iowa. — *Welch v. Battern*, 47 Iowa 147; *Boyle v. Maroney*, 73 Iowa 70, 5 Am. St. Rep. 657; *Bull v. Gilbert*, 79 Iowa 547.

Kansas. — *Halsey v. Van Vliet*, 27 Kan. 474.

Kentucky. — *Calloway v. Eubank*, 4 J. J. Marsh. (Ky.) 280; *Handley v. Fitzhugh*, 3 A. K. Marsh. (Ky.) 561; *Bristow v. Payton*, 2 T. B. Mon. (Ky.) 91, 15 Am. Dec. 134; *Davis v. Young*, 2 T. B. Mon. (Ky.) 60; *Wagnon v. M'Coy*, 2 Bibb (Ky.) 198.

Massachusetts. — *Hildreth v. Thompson*, 16 Mass. 191.

Mississippi. — *Davis v. Helm*, 3 Smed. & M. (Miss.) 17; *Harrington v. O'Reilly*, 9 Smed. & M. (Miss.) 216, 48 Am. Dec. 704; *Hicks v. Murphy*, Walk. (Miss.) 66; *Wilson v. Kirkland*, Walk. (Miss.) 155; *Hubert v. Williams*, Walk. (Miss.) 175; *Hughes v. Wilkinson*, 37 Miss. 482.

Missouri. — *Miller v. Doan*, 19 Mo. 650; *Hardin v. McCanse*, 53 Mo. 255.

New Hampshire. — *Butler v. Haynes*, 3 N. H. 21.

New York. — *Woodcock v. Bennet*, 1 Cow. (N. Y.) 740, 13 Am. Dec. 568; *Stymets v. Brooks*, 10 Wend. (N. Y.) 207; *Morton v. Croghan*, 20 Johns. (N. Y.) 106. See also *Alden v. Clark*, 11 How. Pr. (N. Y. Supreme Ct.) 209; *Wood v. Morehouse*, 45 N. Y. 368; *Marine Bank v. Van Brunt*, 49 N. Y. 160; *Wallace v. Swinton*, 64 N. Y. 188.

North Carolina. — *Wood v. Harrison*, 1 Dev. & B. L. (18 N. Car.) 356; *M'Carson v. Richardson*, 1 Dev. & B. L. (18 N. Car.) 561; *State v. Pool*, 6 Ired. L. (28 N. Car.) 288; *Aycock v. Harrison*, 65 N. Car. 8; *Halso v. Cole*, 82 N. Car. 161; *Sawyers v. Sawyers*, 93 N. Car. 321; *Williams v. Weaver*, 94 N. Car. 134. See also *Samuel v. Zachery*, 4 Ired. L. (26 N. Car.) 377; *Bowen v. McCullough*, Term (4 N. Car.) 261; *Barfield v. Barfield*, 113 N. Car. 230.

Ohio. — *Massie v. Long*, 2 Ohio 287, 15 Am. Dec. 547; *Cartney v. Reed*, 5 Ohio 221.

Oregon. — *Bower v. Holladay*, 18 Oregon 491.

Pennsylvania. — *Speer v. Sample*, 4 Watts (Pa.) 367; *Springer v. Brown*, 9 Pa. St. 305.

Tennessee. — *Boyd v. Armstrong*, 1 Yerg. (Tenn.) 40. See also *Neil v. Gaut*, 1 Coldw. (Tenn.) 306; *Preston v. Surgoine*, Peck (Tenn.) 72; *Gwin v. Latimer*, 4 Yerg. (Tenn.) 22; *M'Mahon v. Glasscock*, 5 Yerg. (Tenn.) 304; *Puckett v. Richardson*, 6 Lea (Tenn.) 49.

Texas. — *Bennett v. Gamble*, 1 Tex. 124; *Turner v. Smith*, 9 Tex. 626; *Conkrite v. Hart*, 10 Tex. 140; *McMiller v. Butler*, 20 Tex. 402; *Chandler v. Burdett*, 20 Tex. 42; *Taylor v. Snow*, 47 Tex. 462, 26 Am. Rep. 311. See also *Bynum v. Govan*, 9 Tex. Civ. App. 559; *Hooper v. Caruthers*, 78 Tex. 432.

Utah. — *Weaver v. Pickard*, 7 Utah 296.

Virginia. — *May v. North Carolina State Bank*, 2 Rob. (Va.) 60, 40 Am. Dec. 726.

Wisconsin. — *Harteaux v. Eastman*, 6 Wis. 410.

Death of One of Two or More Defendants. — But if a judgment is rendered against two or more, and one defendant dies before the issuance

the writ is tested as of a day before his death.¹

Under Statute. — But in many states, the rule of the common law respecting the issuance of an execution after the death of a judgment debtor has been radically changed by statutes.² In some states, the proceeding by writ of scire facias to summon personal representatives, heirs, devisees, etc., has been abolished, and in lieu of this proceeding, the creditor is required to obtain leave of court to issue an execution, which leave may be granted upon sufficient cause shown.³ In other jurisdictions, statutes have been enacted classifying the different species of claims against decedents' estates according to their dignity, and providing for the distribution of the assets belonging to such estates, under which statutes it has been held that ordinarily no execution is issuable at all after the death of the debtor.⁴

c. DEMAND AND NOTICE — Demand. — The objection that a demand was not made upon the defendant before issuing the writ goes only to costs, and then only when the money has been tendered.⁵

of an execution, the writ may, nevertheless, be issued, and should be issued against all the defendants, but it can be levied on the property of the survivors only, and is, in fact, an execution against them alone.

England. — Pennoir v. Brace, 1 Salk. 319, 1 Ld. Raym. 245. See also Withers v. Harris, 2 Ld. Raym. 808.

United States. — Ransom v. Williams, 2 Wall. (U. S.) 313; Duquesne Nat. Bank v. Mills, 22 Fed. Rep. 611.

Alabama. — Jones v. Swift, 12 Ala. 144; Thompson v. Bondurant, 15 Ala. 346, 50 Am. Dec. 136; Martin v. Branch Bank, 15 Ala. 587, 50 Am. Dec. 147.

Arkansas. — Blanks v. Rector, 24 Ark. 496, 88 Am. Dec. 780, citing Erwin v. Dundas, 4 How. (U. S.) 58.

Illinois. — Reed v. Garfield, 15 Ill. App. 290.

Iowa. — Welch v. Batter, 47 Iowa 147. See also Malony v. Bourne, 3 Greene (Iowa) 330.

Kentucky. — Daviess v. Womack, 8 B. Mon. (Ky.) 383; Calloway v. Eubank, 4 J. J. Marsh. (Ky.) 280; Johnston v. Lynch, 3 Bibb (Ky.) 334; Fleece v. Goodrum, 1 Duv. (Ky.) 307. See also Mitchell v. Smith, 1 Litt. (Ky.) 243.

Massachusetts. — Hildreth v. Thompson, 16 Mass. 193, note 2.

Mississippi. — Davis v. Helm, 3 Smed. & M. (Miss.) 17; Bowen v. Bonner, 45 Miss. 10.

New York. — Woodcock v. Bennet, 1 Cow. (N. Y.) 711, 13 Am. Dec. 568; Lucas v. Johnson, 6 How. Pr. (N. Y. Supreme Ct.) 121; Howell v. Eldridge, 21 Wend. (N. Y.) 678.

Pennsylvania. — Sheetz v. Wynkoop, 74 Pa. St. 198.

Tennessee. — Cheatham v. Brien, 3 Head (Tenn.) 552; Reams v. McNail, 9 Humph. (Tenn.) 542; Cabiness v. Garrett, 1 Yerg. (Tenn.) 491.

Texas. — Chandler v. Hudson, 11 Tex. 32.

West Virginia. — Holt v. Lynch, 18 W. Va. 567.

1. No Necessity of Revivor When Writ Is Tested as of Day Before Defendant's Death. — *England.* — Bragner v. Langmead, 7 T. R. 24. See also Wagborne v. Langmead, 1 B. & P. 571; Cleve v. Veer, Cro. Car. 459.

United States. — Kane v. Love, 2 Cranch (C. C.) 429.

Arkansas. — Hanly v. Carneal, 14 Ark. 524; Davis v. Oswalt, 18 Ark. 414, 68 Am. Dec. 182.

Delaware. — Cooper v. May, 1 Harr. (Del.) 18; Farmers' Bank v. Reynolds, 1 Harr. (Del.) 513; Graham v. Wilson, 5 Harr. (Del.) 435.

Mississippi. — Davis v. Helm, 3 Smed. & M. (Miss.) 17.

New Jersey. — Den v. Hillman, 7 N. J. L. 180.

New York. — Center v. Billingham, 1 Cow. (N. Y.) 33; Woodcock v. Bennet, 1 Cow. (N. Y.) 711, 13 Am. Dec. 568; Hay v. Fowler, 1 How. Pr. (N. Y. Supreme Ct.) 127; Wood v. Morehouse, 45 N. Y. 368. See also Nichols v. Chapman, 9 Wend. (N. Y.) 452; Day v. Rice, 19 Wend. (N. Y.) 644.

North Carolina. — Farley v. Lea, 4 Dev. & B. L. (20 N. Car.) 169, 32 Am. Dec. 680; Sawyers v. Sawyers, 93 N. Car. 321.

Pennsylvania. — Leiper v. Levis, 15 S. & R. (Pa.) 108.

South Carolina. — Dibble v. Taylor, 2 Spears L. (S. Car.) 308, 42 Am. Dec. 368.

Tennessee. — Johnson v. Ball, 1 Yerg. (Tenn.) 291, 24 Am. Dec. 451; Battle v. Bering, 7 Yerg. (Tenn.) 529, 27 Am. Dec. 526; Daley v. Perry, 9 Yerg. (Tenn.) 442; Preston v. Surgoine, Peck (Tenn.) 80; Black v. Planters' Bank, 4 Humph. (Tenn.) 367; Montgomery v. Realhafer, 85 Tenn. 668, 4 Am. St. Rep. 780.

Virginia. — May v. North Carolina State Bank, 2 Rob. (Va.) 60, 40 Am. Dec. 726.

Alias Execution. — But although an execution has been issued and tested during the lifetime of the judgment debtor, an *alias* cannot be issued after his death without a scire facias. Farmers' Bank v. Reynolds, 1 Harr. (Del.) 513; Davis v. Helm, 3 Smed. & M. (Miss.) 17; Wingate v. Gibson, 1 Murph. (5 N. Car.) 492; Boyd v. Armstrong, 1 Yerg. (Tenn.) 40; Trevillian v. Guerrant, 31 Gratt. (Va.) 525.

2. See the statutes of the various states.

3. Statutes Requiring Leave to Issue Execution. — Alsop v. Cowan, 66 Miss. 451; Kerr v. Kreuder, 28 Hun (N. Y.) 452; Eaton v. Youngs, 41 Wis. 507.

4. Statutes Classifying Debts of Decedents Inconsistent with Issue of Execution. — Powell v. Macon, 40 Ark. 541; Byrnes v. Sexton, 62 Minn. 135; Brown v. Woody, 64 Mo. 547; Cowles v. Hall, 113 N. Car. 359. See also Barrett v. Furnish, 21 Oregon 17. Compare Bower v. Holladay, 18 Oregon 491.

5. Demand as Prerequisite to Issue of Writ. — Adams v. Tracy, 13 Mo. App. 578.

Notice. — Notice is not necessary before issuing an execution, as it is assumed that the defendant will take notice of what will follow the judgment.¹

d. LEAVE OF COURT. — Apart from statute,² leave of court is not necessary to obtain an issuance of an execution, unless a year and a day have elapsed after the rendition of the judgment, in which case, at common law, a scire facias is necessary.³

Notice of Motion for Leave of Court. — It seems to be the rule that, in those cases where leave of court is necessary, it is proper and regular for the court to require the defendant to be given an opportunity to be heard in answer to a motion for leave to issue execution, either by giving him notice or by an order to show cause.⁴

2. Courts out of Which the Writ May Issue — *a. IN GENERAL.* — The writ of execution must be issued out of the court which rendered the judgment, unless some other court is authorized by statute to issue it,⁵ or unless the

1. Notice as Prerequisite to Issuance. — *Ayres v. Campbell*, 9 Iowa 213, 74 Am. Dec. 346; *Reid v. North-Western R. Co.*, 32 Pa. St. 257. See also *Lucas v. Johnson*, 6 How. Pr. (N. Y. Supreme Ct.) 121; *McAaaw v. Matthis*, 129 Mo. 142; *Huhn v. Lang*, 122 Mo. 600. Compare *Davis v. Bell*, 57 Miss. 320; *Hall v. Moore*, 70 Miss. 75.

2. Shackelford v. Apperson, 6 Gratt. (Va.) 451. See also *Badham v. Jones*, 64 N. Car. 655.

3. Leave of Court to Issue Writ Unnecessary at Common Law — *Alabama.* — *Dryer v. Graham*, 58 Ala. 623.

California. — *Dorn v. Howe*, 59 Cal. 129. See also *Van Cleave v. Bucher*, 79 Cal. 600.

Georgia. — *Coulter v. Lumpkin*, 94 Ga. 225.

Indiana. — *Ensley v. McCorkle*, 74 Ind. 240; *Carpenter v. Vanscoten*, 20 Ind. 50.

Kentucky. — *Pollard v. Pollard*, 4 T. B. Mon. (Ky.) 359; *Young v. Davis*, 1 T. B. Mon. (Ky.) 152.

New York. — *Otis v. Forman*, 1 Barb. Ch. (N. Y.) 30; *Field v. Paulding*, 3 Abb. Pr. (N. Y. C. Pl.) 130; *Flanagan v. Tinin*, 37 How. Pr. (N. Y. Supreme Ct.) 130.

North Carolina. — *McKethan v. McNeill*, 74 N. Car. 663; *Hester v. Burton*, 2 Hay. (2 N. Car.) 136. See also *Ellison v. Andrews*, 12 Ired. L. (34 N. Car.) 188.

Pennsylvania. — *Irons v. McQuewan*, 27 Pa. St. 196, 67 Am. Dec. 456; *Miller v. Milford*, 2 S. & R. (Pa.) 35. See also *Young v. Taylor*, 2 Binn. (Pa.) 218.

South Dakota. — *Hormann v. Sherin*, 8 S. Dak. 36.

Tennessee. — *Union Bank v. McClung*, 9 Humph. (Tenn.) 91. See also *Johnson v. Ball*, 1 Yerg. (Tenn.) 291, 24 Am. Dec. 451.

In *Missouri* an execution is issuable under Rev. Stat. (1889), § 4895, as a matter of course. *Maloney v. Real Estate Bldg., etc., Assoc.*, 57 Mo. App. 384; *Ex p. Craig*, 130 Mo. 590; *Fontaine v. Hudson*, 93 Mo. 62, 3 Am. St. Rep. 515; *Bush v. White*, 85 Mo. 339.

Necessity of Leave of Court after Dissolution of Injunction. — It seems to be the rule that where the plaintiff is enjoined by an order of the Court of Chancery from proceeding upon his judgment, he may sue out an execution upon the judgment immediately after the dissolution of the injunction, without further application to the court for that purpose. *Young v.*

Davis, 1 T. B. Mon. (Ky.) 152. See also *Hester v. Burton*, 2 Hayw. (2 N. Car.) 136.

Necessity of Leave after a Judgment Affirmed. — It is also the rule that when a judgment upon which an appeal has been taken is affirmed and the mandate is filed with the inferior court, the execution may be issued without any leave first obtained from the inferior court. *State v. Sheldon*, 26 Neb. 151; *Lovelace v. Taylor*, 6 Rob. (La.) 92; *Stafford v. Renshaw*, 33 La. Ann. 443; *Lyon v. Burtis*, 2 Cow. (N. Y.) 510; *Wilburn v. Hall*, 17 Mo. 471; *Lemmel v. Pauska*, 54 Tex. 505.

4. Notice of Applying for Leave of Court. — *McAuliffe v. Coughlin*, 105 Cal. 268. See also *Newcomb v. Newcomb*, 12 Gray (Mass.) 28. Compare *Com. v. Hewitt*, 2 Hen. & M. (Va.) 181; *Bell v. Walsh*, 130 Mass. 163.

5. Out of What Court Writ May Issue in General. — *Chandler v. Colcord*, 1 Okla. 260; *Willamette Real Estate Co. v. Hendrix*, 28 Oregon 485; *Gibbs v. Bourland*, 6 Yerg. (Tenn.) 481; *Colville v. Neal*, 2 Swan (Tenn.) 89.

Under statute in *Louisiana*, a similar rule has been laid down. *State v. Livaudais*, 39 La. Ann. 984. See also *Langridge v. Judge*, 46 La. Ann. 29.

Courts of Concurrent Jurisdiction. — It is immaterial that the court which rendered the judgment and another court are courts of concurrent jurisdiction, both sitting in the same county; each must enforce its own judgments and decrees. *Chandler v. Colcord*, 1 Okla. 260.

Execution on Foreign Judgment. — An execution is not issuable on a judgment rendered in one state out of a court of another state. *Jones v. Murphy*, 18 La. Ann. 634; *Needles v. Frost*, 2 Okla. 19. See also *Kelley v. Kelley*, 161 Mass. 111, 42 Am. St. Rep. 389.

Statutory Provisions for Filing Transcripts in Other Counties. — It has been held that statutes authorizing the filing of transcripts of judgments in the offices of the clerks of the courts of other counties and providing that, from the time of filing such transcripts, the creditors shall have a lien upon their debtors' real estate in the counties in which such transcripts are filed, do not authorize executions to be issued by the clerks of the courts in which such transcripts are filed, and that an execution, to reach land in a county in which a transcript has been so filed, should be issued by the clerk

record has been removed into another court, in which case the court having the record may issue the writ.¹ Writs issued out of a court other than that which rendered the judgment are void.² Provisions of statutes authorizing the issuance of an execution by one court on another's judgments are mandatory and must be complied with.³

Where Court Rendering Judgment Has Been Abolished. — But where the court, after having rendered judgment, has been abolished, and its business has been transferred to another court, the execution should be issued out of such other court.⁴

Issuance in Case of Appeal. — The rule adopted from the common law,⁵ and prevailing in most jurisdictions in the United States,⁶ is, that when a case is taken to a Supreme Court by appeal or writ of error by sending up a transcript of the record, and the judgment has been affirmed, and the mandate showing such affirmance has been duly filed in the office of the clerk of the lower court, the prevailing party is entitled to have execution issue upon such judgment from the court thus re-invested with the custody of the record, and in some states statutes have been enacted declaring this rule.

Issuance out of Court of Record on Justice's Judgments. — In many states, the plaintiff is authorized by statute to procure the issuance of an execution out of the office of the clerk of the Circuit or District Court on a judgment rendered by a justice of the peace, the usual provisions of the statute being that the plaintiff shall file a transcript of the judgment in the office of a clerk, and that he shall, either before or after filing the transcript, have an execution issued by the justice and returned *nulla bona*.⁷ But under statute in some states, the

of the court which rendered the judgment. *Shattuck v. Cox*, 97 Ind. 242; *Seaton v. Hamilton*, 10 Iowa 394; *Furman v. Dewell*, 35 Iowa 170; *Bostwick v. Benedict*, 4 S. Dak. 414. See also *Lorick v. McCreery*, 20 S. Car. 424.

1. **When Record Has Been Removed to Another Court.** — *Altman v. Johnson*, 2 Mich. N. P. 41.

2. **Invalidity of Writ Issued by Court Not Rendering Judgment.** — *Clarke v. Miller*, 18 Barb. (N. Y.) 269; *Bingham v. Burlingame*, 33 Hun (N. Y.) 211; *Chandler v. Colcord*, 1 Okla. 260; *Richards v. Belcher*, 6 Tex. Civ. App. 284.

Amendment. — An execution which has issued out of the wrong court cannot, after a sale, be amended by the court out of which it should have issued, and adopted as the writ of such court. *Clarke v. Miller*, 18 Barb. (N. Y.) 269.

3. **Statutes Authorizing Issuance Out of Another Court.** — *Wooters v. Pinkel*, (Ill. 1890) 25 N. E. Rep. 791; *Colville v. Neal*, 2 Swan (Tenn.) 89; *Richards v. Belcher*, 6 Tex. Civ. App. 284. See also *Eason v. Cummins*, 11 Humph. (Tenn.) 210.

4. **Effect of Abolition of Court Rendering Judgment.** — *Harris v. Cornell*, 80 Ill. 54; *Lee v. Newkirk*, 18 Ill. 550; *Mavity v. Eastridge*, 67 Ind. 211. See also *Newkirk v. Chapron*, 17 Ill. 344.

5. **At Common Law, the Original Record Was Removed into the King's Bench from the Common Pleas or Inferior Court by writ of error, and when the judgment was affirmed, the writ was issuable out of King's Bench, and likewise the writ was issuable out of that court when a judgment was affirmed in an Exchequer Chamber or House of Lords, to which only a transcript of the record was removed.** 2 *Tidd's Practice* 994. See also *Vicars v. Haydon*, 2 Cowp. 843; *Altman v. Johnson*, 2 Mich. N. P. 41.

6. **Issuance of Writ in Appeal Cases.** — *Rockwell v. District Ct.*, 17 Colo. 118, 31 Am. St. Rep. 265; *Hawkins v. Craig*, Sneed (Ky.) 191; *Wells v. Merz*, 23 La. Ann. 392; *Evans v. Wilder*, 5 Mo. 314; *Wilburn v. Hall*, 17 Mo. 471; *Walter v. Tabor*, 21 Mo. 75; *Slagel v. Murdock*, 65 Mo. 522; *Block v. Morrison*, 112 Mo. 343; *Martin v. Rice*, 16 Tex. 157; *Cook v. Sparks*, 47 Tex. 28; *Irvin v. Ferguson*, 83 Tex. 491. See also U. S. v. Hoyt, 1 Blatchf. (U. S.) 326; *Meyer v. Campbell*, 12 Mo. 603; *Chipman v. Martin*, 13 Johns. (N. Y.) 240; *Chenango Bank v. Hyde*, 4 Cow. (N. Y.) 567; *White v. Smith*, 33 Pa. St. 186, 75 Am. Dec. 589.

Where Damages Are Allowed for Vexatious Appeal. — It seems to be the rule that where damages are allowed on affirmance, the cause is to be remitted to the trial court and execution is to be taken out of that court. *Harkins v. Craig*, Sneed (Ky.) 191. See also *Talbott v. McQuies*, 7 J. J. Marsh. (Ky.) 321.

Appeal from Justice's Court. — It has been held that after there has been a trial *de novo* on appeal from a judgment rendered by a justice of the peace, the execution is issuable on the new judgment, and not on the justice's judgment. *McKay v. Irion*, (Tex. App. 1890) 15 S. W. Rep. 123. See also *Pringle v. Lansdale*, 3 McCord L. (S. Car.) 489.

7. **Issuance Out of Court of Record on Justices' Judgments — Arkansas.** — *Jordan v. Bradshaw*, 17 Ark. 106, 65 Am. Dec. 419; *Webster v. Daniel*, 47 Ark. 131.

Illinois. — *Hobson v. McCambridge*, 130 Ill. 367; *Wooters v. Joseph*, 137 Ill. 113, 31 Am. St. Rep. 355.

Missouri. — *Burke v. Flournoy*, 4 Mo. 116; *Montgomery v. Farley*, 5 Mo. 233; *Wineland v. Coonce*, 5 Mo. 296, 32 Am. Dec. 320; *Carr v. Youse*, 39 Mo. 353, 90 Am. Dec. 470; *Ruby v. Hannibal*, etc., R. Co., 39 Mo. 480; *Car-*

rule is to make an affidavit that the judgment has not been paid, instead of issuing an execution out of the justice's court and having it returned *nulla bona*.¹

b. SOURCE OF AUTHORITY. — The power of the state courts in general to issue executions is derived from statutory enactments in most of the states,² and, in the absence of statute, is conferred by the common law.³ The common law, as modified by the acts of Congress, governs the federal courts in the issuance of executions and in the proceedings thereunder.⁴

Chancery Courts. — In *England*, under statute 1 and 2 Vict., c. 110, § 18, power is given to the courts of chancery, under certain circumstances, of issuing executions.⁵ And a similar practice prevails in many jurisdictions of the United States,⁶ authority in most instances being expressly given by statute.⁷

3. Who May Sue Out the Writ — *a. IN GENERAL.* — As a general rule, the plaintiff only has a right to sue out and control an execution.⁸

penter v. King, 42 Mo. 224; *Harrington v. Fortner*, 58 Mo. 468; *Perkins v. Quigley*, 62 Mo. 498; *Johnson v. Latta*, 84 Mo. 139; *Sachse v. Clingingsmith*, 97 Mo. 406; *Bauer v. Miller*, 16 Mo. App. 252; *Tracy v. Whitsett*, 51 Mo. App. 149.

New Jersey. — *Matthews v. Miller*, 47 N. J. L. 414.

Pennsylvania. — *Drexel v. Man*, 6 W. & S. (Pa.) 343; *Frankem v. Trimble*, 5 Pa. St. 520.

Requisites of Transcript. — The transcript must show on its face that the statute has been complied with. *Hobson v. McCambridge*, 130 Ill. 367.

But where a transcript of the judgment is all that is required, a full and perfect record of the proceedings in the justice's court need not be filed. *Franse v. Owens*, 25 Mo. 329. It has been held, however, that a justice's transcript must be signed by him, and it is not sufficient that his name appears in the body of the certificate. *Bigelow v. Booth*, 39 Mich. 622.

Requisites of Execution Issued by Justice. — Where it is required by statute that an execution shall have been issued by the justice and returned *nulla bona*, the statute must be substantially complied with, and both the execution and the return must be regular; otherwise they will not support the issuance of an execution by a clerk of the court. *Hobson v. McCambridge*, 130 Ill. 367. See also *Matthews v. Miller*, 47 N. J. L. 414; *Linderman v. Edson*, 25 Mo. 105.

On collateral attack, it will be presumed that the clerk did not issue an execution until after one had been issued by the justice and returned *nulla bona*, pursuant to statute, or until such other steps as may be prescribed by statute have been taken. *Perkins v. Quigley*, 62 Mo. 498; *Sachse v. Clingingsmith*, 97 Mo. 406. See also *Martin v. Prather*, 82 Ind. 535.

The writ issued by the clerk need contain no recital as to the previous issuance of an execution by the justice. *Massey v. Gardenhire*, 12 Ark. 638; *Jordan v. Bradshaw*, 17 Ark. 106, 65 Am. Dec. 419.

The justice cannot issue an execution after an abstract of the judgment rendered by him has been filed with the clerk of the court. *Rahm v. Soper*, 28 Kan. 529.

1. *Dehority v. Wright*, 101 Ind. 382. See also the statutes of the states.

2. **Issuance by State Courts Under Authority of Statute.** — *Bouslough v. Bouslough*, 68 Pa. St.

495; *Coleman v. Cocke*, 6 Rand. (Va.) 618, 18 Am. Dec. 757.

3. *Coleman v. Cocke*, 6 Rand. (Va.) 618, 18 Am. Dec. 757.

4. **Authority of Federal Courts to Issue Writ.** — *Wayman v. Southard*, 10 Wheat. (U. S.) 1; *Toland v. Sprague*, 12 Pet. (U. S.) 300; *U. S. v. Drennen*, Hempst. (U. S.) 320.

5. **English Statute Authorizing Chancery Courts to Issue Writ.** — *Garner v. Briggs*, 4 Jur. N. S. 230; *Mansfield v. Ogle*, 4 De G. & J. 38; *Shaw v. Neale*, 20 Beav. 157; *Chadwick v. Holt*, 8 De G. M. & G. 584.

6. *Orchard v. Hughes*, 1 Wall. (U. S.) 73.

7. *Otis v. Forman*, 1 Barb. Ch. (N. Y.) 30; *Battle v. Bering*, 7 Yerg. (Tenn.) 529, 27 Am. Dec. 526; *Hall v. Dana*, 2 Aik. (Vt.) 382.

In *Virginia*, it has been held that it is only by force of statute that process of execution can be sued out upon decrees in chancery. *Shackelford v. Apperson*, 6 Gratt. (Va.) 453.

8. **Who May Procure the Writ in General** — *United States.* — *Wills v. Chandler*, 2 Fed. Rep. 273.

Alabama. — *Thomason v. Gray*, 84 Ala. 559.

California. — *Fulton v. Hanna*, 40 Cal. 278; *Lerch v. Gallup*, 67 Cal. 595.

Florida. — *Davidson v. Seegar*, 15 Fla. 671.

Illinois. — *Morgan v. People*, 59 Ill. 58.

Indiana. — *Watt v. Alvord*, 25 Ind. 533.

Iowa. — *Ex p. Hampton*, 2 Greene (Iowa) 137.

Kentucky. — *Pollard v. Pollard*, 4 T. B. Mon. (Ky.) 359.

Louisiana. — *Fluker v. Turner*, 5 Martin N. S. (La.) 707; *State v. Pilsbury*, 35 La. Ann. 408.

Mississippi. — *Osgood v. Brown*, Freem. (Miss.) 392; *Jackson v. Scanland*, 65 Miss. 481.

Missouri. — *Davis v. McCann*, 143 Mo. 172.

New Jersey. — *Terhune v. Barcalow*, 11 N. J. L. 38.

New York. — *People v. Gale*, 22 Barb. (N. Y.) 502; *McDonald v. O'Flynn*, 2 Daly (N. Y.) 42.

Ohio. — *Gaylord v. Hunt*, 23 Ohio St. 255.

Pennsylvania. — *Milliken v. Brown*, 10 S. & R. (Pa.) 188.

In *Osgood v. Brown*, Freem. (Miss.) 392, the court said: "It may be of the utmost importance to the plaintiff to know when his execution is in the hands of an officer, that he may give such instructions as are consistent with his rights. He may desire to bid for property levied on, so as to realize his judgment and

b. ATTORNEY. — The rule is well settled that the plaintiff may direct the issuance of the execution through the attorney of record.¹ But the issuance of an execution is not such an act as requires the direct agency of the attorney of record, and the plaintiff may himself order the clerk to issue an execution.² Or the application may be made through any attorney or agent.³

c. ASSIGNEE OF JUDGMENT. — It is the duty of the clerk to issue an execution upon a demand of the assignee of a judgment upon the production by such assignee of sufficient evidence of his ownership.⁴

d. RATIFICATION OF UNAUTHORIZED ISSUANCE. — The issuance of an execution without the order of the party entitled thereto may be ratified by him, and if he acquiesces in the issuance of the writ, the irregularity will be deemed to have been waived.⁵

e. DUTY OF CLERK OR OTHER OFFICER AS TO ISSUANCE — Without Application. — In the absence of statutory regulation, the clerk has no authority to issue an execution without the direction of the plaintiff or his attorney, because the clerk is not a party to the judgment and has no control over it.⁶

Upon Application of Plaintiff — In General. — The issuance of an execution is a ministerial duty,⁷ and if the application for the writ proceed from a proper

prevent the property from being bought in at a sacrifice and his judgment left unpaid. To give to the defendant or any third person the right of controlling an execution without the privity of the plaintiff would establish a rule full of mischief which might lead to the practice of the grossest fraud."

1. Procurement of Writ by Attorney. — *Aspen Min., etc., Co. v. Wood*, 84 Fed. Rep. 48; *Wills v. Chandler*, 2 Fed. Rep. 273; *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *Blount v. Wells*, 55 Ga. 282; *Morgan v. People*, 59 Ill. 58; *Wickliff v. Robinson*, 18 Ill. 145; *Splahn v. Gillespie*, 48 Ind. 397; *Gray v. Wass*, 1 Me. 257; *Doty v. Dexter*, 61 Mich. 348; *Osgood v. Brown, Freem. (Miss.)* 392; *Davis v. McCann*, 143 Mo. 172; *Brush v. Lee*, 36 N. Y. 49.

Authority of Attorney to Issue Execution. — As to the authority of an attorney to issue execution in an action, see the title ATTORNEY AND CLIENT, vol. 3, pp. 330, 371.

2. Procurement of Writ by Plaintiff Without Aid of Attorney. — *Jones v. Spears*, 56 Cal. 163.

3. Application by Plaintiff Through Agent. — *Tipping v. Johnson*, 2 B. & P. 357; *Steele v. Thompson*, 62 Ala. 323; *Thorp v. Fowler*, 5 Cow. (N. Y.) 446.

4. Procurement of Writ by Assignee of Judgment. — *Haden v. Walker*, 5 Ala. 86; *Steele v. Thompson*, 62 Ala. 323; *Weir v. Pennington*, 11 Ark. 745; *Christ v. Flannagan*, 23 Colo. 140; *Reid v. Ross*, 15 Ind. 265; *Corriell v. Doolittle*, 2 Greene (Iowa) 385; *State v. Pillsbury*, 35 La. Ann. 408; *Fiske v. Lamoreaux*, 48 Mo. 523; *Owens v. Clark*, 78 Tex. 547; *Wallop v. Scarborough*, 5 Gratt. (Va.) 1.

5. Ratification of Unauthorized Issuance. — *Lerch v. Gallup*, 67 Cal. 595; *Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457; *Johnson v. Murray*, 112 Ind. 154, 2 Am. St. Rep. 174; *Wells v. Bower*, 126 Ind. 115, 22 Am. St. Rep. 570; *Clarkson v. White*, 4 J. J. Marsh. (Ky.) 529, 20 Am. Dec. 229.

6. Issuance by Clerk Suo Motu — United States. — *Wills v. Chandler*, 2 Fed. Rep. 273.

Illinois. — *Wickliff v. Robinson*, 18 Ill. 145; *Niantic Bank v. Dennis*, 37 Ill. 381.

Indiana. — *Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457; *Nunemacher v. Ingle*, 20 Ind.

135; *Sowles v. Harvey*, 20 Ind. 217, 83 Am. Dec. 315; *State v. Wilkins*, 21 Ind. 216; *Johnson v. Murray*, 112 Ind. 154, 2 Am. St. Rep. 174.

Iowa. — *Ex p. Hampton*, 2 Greene (Iowa) 137.

Kentucky. — *Clarkson v. White*, 4 J. J. Marsh. (Ky.) 529, 20 Am. Dec. 229.

Massachusetts. — *Briggs v. Wardwell*, 10 Mass. 356.

Mississippi. — *Buick v. Watson*, 72 Miss. 244.

Missouri. — *Davis v. McCann*, 143 Mo. 172.

New York. — *McDonald v. O'Flynn*, 2 Daly (N. Y.) 42.

Ohio. — *Knight v. Vincent, Wright (Ohio)* 748; *Seymour v. Milford, etc., Turnpike Co.*, 10 Ohio 476; *Elliott v. Ellery*, 11 Ohio 306.

Tennessee. — *Frierson v. Harris*, 5 Coldw. (Tenn.) 146, 94 Am. Dec. 220.

Vermont. — *Smith v. Howard*, 41 Vt. 74.

Virginia. — *Shackelford v. Apperson*, 6 Gratt. (Va.) 451.

Presumption of Authority. — It has been held that, on collateral attack, it will be presumed, in the absence of any showing to the contrary, that the clerk was directed to issue a writ, and the title of the purchaser at a sale thereunder will be upheld. *Sowles v. Harvey*, 20 Ind. 217, 83 Am. Dec. 315; *Johnson v. Murray*, 112 Ind. 154, 2 Am. St. Rep. 174. See also *Niantic Bank v. Dennis*, 37 Ill. 381; *Smith v. Perkins*, 81 Tex. 152, 26 Am. St. Rep. 794. Compare *Osgood v. Brown, Freem. (Miss.)* 392.

7. Issuance by Clerk upon Application a Ministerial Duty. — *Blount v. Wells*, 55 Ga. 282; *Hughes v. Streeter*, 24 Ill. 647, 76 Am. Dec. 777; *State v. Fleming*, 124 Ind. 97.

Delegation of Authority. — It is not indispensable to the regularity of an execution that the ministerial acts of issuing it should be performed by the justice of the peace who rendered the judgment, or by the clerk of the court or his duly qualified deputy, as the officer may delegate his authority. *Kyle v. Evans*, 3 Ala. 481, 37 Am. Dec. 705; *Sandlin v. Anderson*, 82 Ala. 330; *McMahan v. Colclough*, 2 Ala. 68; *Hudson v. Modawell*, 64 Ala. 481.

But it has been held that where the clerk of

party, the clerk has no judicial discretion to exercise, and the only inquiry he can make is whether the record of the court shows a judgment or decree authorizing the issuance of the writ.¹

Remedy Against Officer for Refusal or Failure to Issue — Mandamus. — The issuance of an execution by a justice of the peace or a clerk calls only for the exercise of a ministerial function especially enjoined on him by law as a duty resulting from his office, and if he refuses to issue the writ the creditor is entitled to a writ of mandamus to compel him to perform his duty.²

Action for Damages. — Also, it has been held that the failure of a justice or clerk to issue an execution upon the order of the plaintiff or in compliance with his statutory duty, is a breach of his official bond, and he is liable for any loss occasioned by his neglect.³ The officer is likewise liable for such injury as may result from the nonconformity of the execution to the judgment or from other formal defects or irregularities in the execution.⁴

4. Against Whom Writ May Issue — a. IN GENERAL. — As a general rule, an execution may be issued against any party against whom a judgment may be rendered.⁵

b. MARRIED WOMEN. — Under statute in some of the states, authority is given for the issue of an execution against a married woman to be levied out of her separate estate, the same as against a *feme sole*.⁶ And even apart from statute expressly giving such authority, it has been held that the real estate of a *feme covert* can be extended and set off on execution in satisfaction of her debts contracted before marriage.⁷ But it has been held that, at common law, an execution cannot issue against a wife's separate personal estate in equity, either on a judgment obtained before or after marriage.⁸

c. LUNATICS. — Execution may issue upon a valid judgment against a lunatic.⁹

d. PUBLIC CORPORATIONS — (1) The State. — The property of a state is not subject to an execution, except by the consent of the state given by some statutory or constitutional provision.¹⁰ It has even been held that an act of

the court is the only person authorized to issue an execution, one issued by an attorney is invalid. *Thompson v. Jenks*, 2 Abb. Pr. N. S. (N. Y. Supreme Ct.) 229.

1. When Proper Party Applies, Clerk Has No Discretion. — *Hudson v. Modawell*, 64 Ala. 481; *Briggs v. Wardwell*, 10 Mass. 356; *Jenness v. Lapeer Circuit Judge*, 42 Mich. 469. See also *Patterson v. Wilkins*, *Wright* (Ohio) 501. But see *Frankfort Bank v. Markley*, 1 Dana (Ky.) 374.

2. Mandamus Against Clerk to Compel Issuance of Writ. — *Hamilton v. Tutt*, 65 Cal. 57; *Hayward v. Pimental*, 107 Cal. 386; *State v. Vogel*, 6 Mo. App. 526; *Terhune v. Barcalow*, 11 N. J. L. 38; *Laird v. Abrahams*, 15 N. J. L. 22; *People v. Gale*, 22 Barb. (N. Y.) 502. See also *Garoutte v. Haley*, 104 Cal. 497; *State v. Berning*, 8 Mo. App. 600; *Stafford v. Union Bank*, 17 How. (U. S.) 275. Compare *Goodwin v. Glazer*, 10 Cal. 333; *Fulton v. Hanna*, 40 Cal. 278.

3. Action for Damages Against Clerk for Refusal to Issue Writ. — *Steele v. Thompson*, 62 Ala. 323; *McFarland v. Burton*, 89 Ky. 294; *Briggs v. Wardwell*, 10 Mass. 356. See also *Gaylor v. Hunt*, 23 Ohio St. 255.

4. Wilson v. Arnold, 172 Pa. St. 264. See also *Cape Fear Bank v. Stafford*, 2 Jones L. (47 N. Car.) 98; *Coltraine v. McCain*, 3 Dev. L. (14 N. Car.) 308, 24 Am. Dec. 256.

5. Against Whom Writ May Issue in General. — *Terrail v. Tinney*, 20 La. Ann. 444; *Flem-*

ming v. Dayton, 8 Ired. L. (30 N. Car.) 454; *Penoyer v. Brace*, 1 Ld. Raym. 244.

6. Issuance of Writ Against Married Women Under Statute. — *Baldwin v. Kimmel*, 16 Abb. Pr. (N. Y. Super. Ct.) 358; *Clinkscales v. Hall*, 15 S. Car. 602. See also *Moncrief v. Ward*, 16 Abb. Pr. (N. Y. C. Pl.) 354, note.

7. Levy on Real Estate for Ante-nuptial Debt. — *Fox v. Hatch*, 14 Vt. 340, 39 Am. Dec. 226. See also *Smith v. Taylor*, 11 Ga. 22; *Merrill v. St. Louis*, 83 Mo. 244, 53 Am. Rep. 576.

8. No Execution at Common Law Against Wife's Equitable Personalty. — *Haygood v. Harris*, 10 Ala. 291.

In *Baldwin v. Kimmel*, 16 Abb. Pr. (N. Y. Super. Ct.) 359, the court said: "At common law, a married woman could have no personal property except choses in action not reduced to possession which could not be levied on, and her separate personal estate in equity could not be reached on a mere judgment; on such judgment, therefore, against her personally, only her real estate while her husband lived, or her personal estate acquired or reduced to possession after his death, could have been reached by execution."

9. Execution Against Lunatic. — *Noel v. Modern Woodmen of America*, 61 Ill. App. 597; *Jones v. Crowell*, 143 Ind. 218; *Ex p. Leighton*, 14 Mass. 207; *Thacher v. Dinsmore*, 5 Mass. 300; *Pollock v. Horn*, 13 Wash. 626.

10. Issuance of Writ Against State. — *Carter v. State*, 42 La. Ann. 927, 21 Am. St. Rep. 404.

the legislature authorizing a suit by an individual against the state does not authorize the issuance of a writ of execution commanding the seizure and sale of the property of the state to satisfy the judgment rendered in such suit.¹

(2) *Municipal Corporations.* — It seems to be well settled that if lands are held by a municipal corporation for public purposes, they cannot be, apart from statute, levied on or sold under execution. Such corporations are the local agencies of the government creating them, and their powers are such as belong to sovereignty. Property and revenue necessary for the exercise of these powers become part of the machinery of government, and to permit a creditor to seize and sell them to collect his debt would be in some degree to destroy the government itself.² In some jurisdictions the rule is, that property belonging to municipal corporations not held or used for governmental purposes, the seizure of which would not suspend or impair the exercise of the governmental functions delegated to such corporations is subject to execution.³ But in *Illinois* the rule exempting property belonging to a municipal corporation from execution seems to be without limitation.⁴

Seizure of Private Property for Municipal Debt. — It seems to be the better rule, though some conflict exists upon the question, that private property is not subject to seizure for the debts of a municipality.⁵

(3) *Counties.* — A full discussion of the right to issue execution against counties will be found elsewhere in this work.⁶

(4) *Boards of Education.* — It has been held that a board of education is a public corporation, and it is against the policy of the law to permit property held by it for public school purposes to be taken in execution at the suit of a creditor.⁷

1. *Carter v. State*, 42 La. Ann. 927, 21 Am. St. Rep. 404. See also the title STATES.

2. *Property of Municipality for Public Purposes Not Subject to Execution.* — *New Orleans v. Morris*, 3 Woods (U. S.) 103; *Klein v. New Orleans*, 99 U. S. 149; *Meriwether v. Garrett*, 102 U. S. 472; *New Orleans v. Louisiana Constr. Co.*, 140 U. S. 654; *Hart v. Burnett*, 15 Cal. 530; *Wheeler v. Miller*, 16 Cal. 125; *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa 276; *Lyon v. Elizabeth*, 43 N. J. L. 158; *Rochester v. Rush*, 80 N. Y. 302; *Darlington v. New York*, 31 N. Y. 163, 88 Am. Dec. 248; *Leonard v. Brooklyn*, 71 N. Y. 498, 27 Am. Rep. 80. See also *Indianapolis, etc., R. Co. v. Indianapolis*, 12 Ind. 620; *Brinckerhoff v. Board of Education*, 37 How. Pr. (N. Y. C. Pl.) 499, affirmed in 6 Abb. Pr. N. S. (N. Y.) 428; *Clarissy v. Metropolitan F. Department*, 7 Abb. Pr. N. S. (N. Y. Super. Ct.) 352; *Laredo v. Benavides*, (Tex. Civ. App. 1894) 25 S. W. Rep. 482; *Brown v. Gates*, 15 W. Va. 131.

In *Curry v. Savannah*, 64 Ga. 290, 37 Am. Rep. 74, the court said: "We think that all property held by the city authorities for the public use, health, or enjoyment of the people of the city, is not so liable to levy and sale. Further, we are of the opinion that all property of every kind held by the municipality is presumptively for the public use, and whilst, perhaps, the presumption may be overcome on proof that the corporation is holding it for other purposes as a mere investment to reap profits and save taxes, and with no ulterior purpose, to apply the investment to the use or enjoyment of the public thereafter, yet the onus would be upon the plaintiff in execution to make that proof. If made, then the property so held, with no purpose to use it

for the public at the time of the levy or thereafter, might be subjected to pay the debt by that process."

Ground Rents arising from lands held by a city for public purposes, and forming part of its public revenues, are not subject to seizure and sale on execution. *Klein v. New Orleans*, 99 U. S. 149.

3. *Execution Against Private Property of Municipality.* — *Birmingham v. Rumsey*, 63 Ala. 352; *Murphree v. Mobile*, 108 Ala. 663; *Wheeler v. Miller*, 16 Cal. 124; *New Orleans, etc., Co. v. Home Mut. Ins. Co.*, 23 La. Ann. 61; *Lyon v. Elizabeth*, 43 N. J. L. 158; *Darlington v. New York*, 31 N. Y. 192; *Leonard v. Brooklyn*, 71 N. Y. 498, 27 Am. Rep. 80; *Laredo v. Benavides*, (Tex. Civ. App. 1894) 25 S. W. Rep. 482. See also *Egerton v. Third Municipality*, 1 La. Ann. 435; *Municipality No. 3 v. Hart*, 6 La. Ann. 570; *New Orleans v. Municipality No. 1*, 7 La. Ann. 148; *Brown v. Gates*, 15 W. Va. 131.

4. *General Exemption in Favor of Municipality.* — *Chicago v. Hasley*, 25 Ill. 595; *Bloomington v. Brokaw*, 77 Ill. 194; *Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77; *Flora v. Nancy*, 136 Ill. 45; *Pekin v. McMahon*, 154 Ill. 141; *Virden v. Fishback*, 9 Ill. App. 82.

5. *Seizure of Private Property for Municipal Debt.* — *Meriwether v. Garrett*, 102 U. S. 472; *Horner v. Coffey*, 25 Miss. 434; *Lyon v. Elizabeth*, 43 N. J. L. 158. Compare *Beardsley v. Smith*, 16 Conn. 368, 41 Am. Dec. 148.

6. *Issuance of Executions Against Counties.* — See the title COUNTIES, vol. 7, p. 664.

7. *Executions Against Boards of Education.* — *State v. Tiedemann*, 69 Mo. 306, 33 Am. Rep. 498. See also *Fleishel v. Hightower*, 62 Ga. 324.

c. **QUASI-PUBLIC CORPORATIONS.** — In the case of corporations such as railroads or bridge companies, which, though not strictly public corporations, are created to serve public purposes, and are charged with public duties, such property as is necessary to enable them to discharge their duties to the public and effectuate the objects of their incorporation, is not, according to the weight of authority, apart from statutory provision, subject to execution at law.¹ But the property of a quasi-public corporation not necessary or not used for the purposes which called the corporation into being is not exempt from seizure and sale under execution.²

Abandonment of Franchise. — Nor will the exemption of property of a quasi-public corporation essential to the exercise of its franchises and to effectuate the public purposes contemplated in its creation, continue after the franchises have been abandoned.³

f. **PRIVATE CORPORATIONS.** — As a general rule, the property of all private corporations is as much subject to execution as is the property of natural persons.⁴

g. **EXECUTORS AND ADMINISTRATORS — In Representative Capacity.** — At the common law, executions may issue against an executor or administrator in his

1. Writ Not Issuable Against Property Used by Quasi-public Corporation for Public Purposes — *England.* — *Great Northern R. Co. v. Tahourdin*, 13 Q. B. Div. 320.

United States. — *Covington Drawbridge Co. v. Shepherd*, 21 How. (U. S.) 112; *Gue v. Tide Water Canal Co.*, 24 How. (U. S.) 257; *Long v. Rosedale Cemetery*, 84 Fed. Rep. 135; *New Orleans v. Morris*, 105 U. S. 600; *East Alabama R. Co. v. Doe*, 114 U. S. 340.

Alabama. — *Gardner v. Mobile, etc., R. Co.*, 102 Ala. 635, 48 Am. St. Rep. 84.

California. — *Wood v. Truckee Turnpike Co.*, 24 Cal. 474.

Kentucky. — *Louisville Water Co. v. Hamilton*, 81 Ky. 517.

Massachusetts. — *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

Mississippi. — *Arthur v. Commercial, etc., Bank*, 9 Smed. & M. (Miss.) 394.

Nebraska. — *Overton Bridge Co. v. Means*, 33 Neb. 857, 29 Am. St. Rep. 514.

New Jersey. — *Randolph v. Larned*, 27 N. J. Eq. 557.

North Carolina. — *Gooch v. McGee*, 83 N. Car. 59, 35 Am. Rep. 558.

Pennsylvania. — *Susquehanna Canal Co. v. Bonham*, 9 W. & S. (Pa.) 27, 42 Am. Dec. 315; *Ammant v. New Alexandria, etc., Turnpike Road Co.*, 13 S. & R. (Pa.) 210; *Foster v. Fowler*, 60 Pa. St. 27; *Youngman v. Elmira, etc., R. Co.*, 65 Pa. St. 278.

Tennessee. — *Baxter v. Nashville, etc., Turnpike Co.*, 10 Lea (Tenn.) 488.

Texas. — *Palestine v. Barnes*, 50 Tex. 538.

See also the title **CORPORATIONS**, vol. 7, p. 854.

2. Property Not Necessary for Public Uses. — *Gardner v. Mobile, etc., R. Co.*, 102 Ala. 635, 48 Am. St. Rep. 84; *Lathrop v. Middleton*, 23 Cal. 257; *Hauns v. Central Kentucky Lunatic Asylum*, (Ky. 1898) 45 S. W. Rep. 890; *Boston, etc., R. Co. v. Gilmore*, 37 N. H. 410, 72 Am. Dec. 336; *Coe v. Knox County Bank*, 10 Ohio St. 413; *Coe v. Peacock*, 14 Ohio St. 187; *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337, 80 Am. Dec. 526; *Reynolds v. Reynolds Lumber Co.*, 169 Pa. St. 626; *East Side Bank v. Columbus Tanning Co.*, 170 Pa. St. 1.

3. Abandonment of Franchise Terminates Exemption. — *Gardner v. Mobile, etc., R. Co.*, 102 Ala. 635, 48 Am. St. Rep. 84; *Benedict v. Heinberg*, 43 Vt. 231.

4. Issue of Writ Against Private Corporation. — *Gardner v. Mobile, etc., R. Co.*, 102 Ala. 635, 48 Am. St. Rep. 84; *Overton Bridge Co. v. Means*, 33 Neb. 857, 29 Am. St. Rep. 514. See also the title **CORPORATIONS**, vol. 7, p. 854.

In *Overton Bridge Co. v. Means*, 33 Neb. 857, 29 Am. St. Rep. 514, the court said: "The property of strictly private corporations, such, for instance, as manufacturing, mining, and trading companies, and perhaps those in which the public is indirectly interested, as libraries, hospitals, and the like, is liable to be taken on execution precisely as the property of an individual debtor."

Distinction Depending on Direct or Indirect Character of Public's Interest. — In *Girard Point Storage Co. v. Southwark Foundry Co.*, 105 Pa. St. 248, it was held that a general storage and elevator business is not a public corporation in the sense of exempting its property from execution process. In this case the court said: "Mr. Chief Justice Thompson, in the case of *Foster v. Fowler*, 60 Pa. St. 27, has shown very clearly the distinction between those corporations in which the public is directly interested, and those in which it has only an indirect interest; among the latter he mentions manufacturing, coal and iron companies, and he adds that, as against such as these, liens are enforceable. But we cannot understand why a company organized for the shifting and storage of grain should occupy in this respect a position superior to those thus mentioned. All are alike established for private purposes, and by them the public is at best but incidentally benefited. If, however, the property and buildings of every person and association whose trade or business in any degree advanced the common welfare were exempt from the ordinary forms of lien and execution, the collection of debts would soon become so tedious and expensive that, in most instances, their abandonment would be the better policy."

representative character upon judgments *de bonis testatoris*.¹ But where a judgment or decree is recovered against an executor or administrator fixing a personal liability upon him, the execution should be issued against his individual property, and not against the goods and chattels, lands and tenements of the estate of the decedent.²

By Statute in many states giving jurisdiction over the estates of deceased persons to the Probate or Surrogate Courts, the rule is established that, while the jurisdiction of courts of law to entertain actions against an executor or administrator is not disturbed, the judgment recovered only establishes the existence of a valid claim against the estate, which must be paid in the due course of administration, and no execution can be issued thereon.³

In Individual Capacity. — Where a judgment or decree *de bonis testatoris* is rendered, a writ of execution cannot, as a general rule, be issued against the individual property of the executor or administrator.⁴

Where There Is Proof of Devastavit. — But an execution may issue against an executor or administrator in his individual capacity upon a judgment authorizing it, where it is found that the estate has been wasted by the representative or that he has not properly fulfilled his trust.⁵

III. PROPERTY SUBJECT TO EXECUTION — 1. Personal Property — a. MONEY. — The authorities are united that money in the hands of a judgment debtor is subject to execution.⁶ And special statutes have been enacted declaring this rule,⁷ and further providing that money taken in execution need not be

1. Writ Against Personal Representative in Representative Character at Common Law. — *Horne v. Spivey*, 44 Ga. 616; *Horn v. Bird*, 45 Ga. 610; *Forrester v. Tift*, 84 Ga. 595; *Jones v. Parker*, 60 Ga. 500; *Keniston v. Little*, 30 N. H. 318, 64 Am. Dec. 297; *Coltraine v. McCain*, 3 Dev. L. (14 N. Car.) 308, 24 Am. Dec. 256; *Small v. Small*, 16 S. Car. 64; *Beale v. Botetourt*, 10 Gratt. (Va.) 278.

As to necessity of revivor by scire facias, see *supra*, this section, *Prerequisites — The Judgment or Decree*.

2. Execution Against Individual Property of Representative. — *Farr v. Newman*, 4 T. R. 621; *Daniel v. Hollingshead*, 16 Ga. 190; *Freeman v. Binswanger*, 57 Ga. 159; *Greenwood v. Speller*, 3 Ill. 502; *McDowell v. Wight*, 5 Ill. 402; *Peck v. Stevens*, 10 Ill. 127; *Peckham v. O'Hara*, 74 Mich. 287; *Lessing v. Vertrees*, 32 Mo. 431; *Keniston v. Little*, 30 N. H. 318, 64 Am. Dec. 297; *Lynch v. Webster*, 17 R. I. 513; *Small v. Small*, 16 S. Car. 64; *Barr v. Barr*, 2 Hen. & M. (Va.) 26; *Moore v. Ferguson*, 2 Munf. (Va.) 421.

3. Statutes Prohibiting Execution Against Personal Representative. — *Meredith v. Scallion*, 51 Ark. 361; *Bull v. Harris*, 31 Ill. 487; *Albee v. Wachter*, 74 Ill. 173; *Fisher v. Hopkins*, 4 Wyoming 394.

By the New York Code of Civil Procedure, § 1825, it is provided that an execution shall not be issued upon a judgment for a sum of money against an executor or administrator in his representative capacity until an order permitting it to be issued has been made by the surrogate from whose court the letters were issued. *Columbus Watch Co. v. Hodenpyl*, 135 N. Y. 430; *Steinau v. Scheuer*, 23 N. Y. App. Div. 550.

4. Writ Not Issuable Against Administrator Individually upon a Judgment De Bonis Testatoris. — *Horne v. Spivey*, 44 Ga. 616; *Horn v. Bird*, 45 Ga. 610; *Jones v. Parker*, 60 Ga. 500; *Forrester v. Tift*, 84 Ga. 595; *Keniston v. Little*,

30 N. H. 318, 64 Am. Dec. 297; *Coltraine v. McCain*, 3 Dev. L. (14 N. Car.) 308, 24 Am. Dec. 256; *Small v. Small*, 16 S. Car. 64; *Beale v. Botetourt*, 10 Gratt. (Va.) 278.

5. Smith v. Chapman, 93 U. S. 41; *Moore v. Trimmier*, 32 S. Car. 511; *Fisher v. Hopkins*, 4 Wyoming 394. See also *Senescal v. Bolton*, 7 N. Mex. 351; *Beall v. Osbourn*, 30 Md. 8.

6. Money — England. — *Rex v. Webb*, 2 Show. 166.

United States. — *Reno v. Wilson*, Hempst. (U. S.) 91; *Turner v. Fendall*, 1 Cranch (U. S.) 117. **California.** — In *Green v. Palmer*, 15 Cal. 412, 76 Am. Dec. 492, a seizure in execution of coin in the hands of the defendant was sustained, the court holding that it was similar to the case of a horse held by the bridle.

Connecticut. — *Brooks v. Thompson*, 1 Root (Conn.) 216.

Kentucky. — *Doyle v. Sleeper*, 1 Dana (Ky.) 531.

Maryland. — *Harding v. Stevenson*, 6 Har. & J. (Md.) 264.

Missouri. — *State v. Taylor*, 56 Mo. 492.

New Hampshire. — *Spencer v. Blaisdell*, 4 N. H. 198, 17 Am. Dec. 412.

New York. — *Noble v. Kelly*, 40 N. Y. 415; *Holmes v. Nuncaster*, 12 Johns. (N. Y.) 395; *Handy v. Dobbin*, 12 Johns. (N. Y.) 220.

Pennsylvania. — *Rudy v. Com.*, 35 Pa. St. 166, 78 Am. Dec. 330.

South Carolina. — *Summers v. Caldwell*, 2 Nott & M. (S. Car.) 341.

Tennessee. — *Dolby v. Mullins*, 3 Humph. (Tenn.) 437, 39 Am. Dec. 180.

Vermont. — In *Prentiss v. Bliss*, 4 Vt. 513, 24 Am. Dec. 631, a suggestion is made that the personal security of the debtor must be preserved in the seizure of money in his possession.

Wisconsin. — *Russell v. Lawton*, 14 Wis. 202.

7. Statutes Making Money Subject to Execution. — *Noble v. Kelly*, 40 N. Y. 415; *Wood v.*

sold, but may be placed as payment on the execution.¹ These rules, of course, presuppose that the money taken in execution is isolated, and it therefore follows that money in which the debtor has no special property interest cannot be seized in execution.²

b. CROPS, PLANTS, AND TREES — Fructus Industriales. — The authorities are practically agreed that under the common law growing crops which are the product of the annual industry and care of man are subject to execution.³

Fructus Naturales. — Perennial plants and their ungathered produce, such as trees, bushes, grasses, peaches, timber, fruit, etc., are incident to the soil and not subject to execution.⁴

c. FIXTURES. — Chattels annexed to realty in such a manner that the tenant who annexed them retains the power of removing them, may be taken as personal property under an execution against the property of such tenant.⁵

Wood, 3 Gale & D. 532. See also the codes and statutes of the several states.

As to Banknotes, see the title BANKNOTES, vol. 3, p. 775.

1. Money Taken Applied in Satisfaction, Not Sold. — *Brooks v. Thompson*, 1 Root (Conn.) 216; *Sheldon v. Root*, 16 Pick. (Mass.) 567, 28 Am. Dec. 266; *Noble v. Kelly*, 40 N. Y. 415. See also the various statutes.

2. Special Ownership Necessary. — In *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655, it is held that where money is deposited in a bank and negotiable certificates of deposit issued thereon, it merely creates an indebtedness on the part of the bank, and no specific fund amounting to the sum of such certificates can be levied upon in the hands of the bank.

In *Scott v. Smith*, 2 Kan. 438, a seizure in execution upon a balance due the judgment debtor upon a general deposit in a bank was held erroneous. See also *Moorman v. Quick*, 20 Ind. 67.

In *Carroll v. Cone*, 40 Barb. (N. Y.) 220, a banker voluntarily separated the amount due a judgment debtor and suffered the sheriff to levy an execution upon the same. It was held that money so separated was the property of the banker, and was not liable to execution, as the property of the judgment debtor.

3. Crops Subject to Execution — England. — *Peacock v. Purvis*, 2 B. & B. 262.

Alabama. — *McKenzie v. Lampley*, 31 Ala. 526. See also *Evans v. Lamar*, 21 Ala. 333; *Adams v. Tanner*, 5 Ala. 740, cases decided under a repealed statute.

Georgia. — *Crine v. Tifts*, 65 Ga. 644.

Indiana. — *Northern v. State*, 1 Ind. 113; *Lindley v. Kelley*, 42 Ind. 294; *Matlock v. Fry*, 15 Ind. 483.

Kansas. — *Polley v. Johnson*, 52 Kan. 478.

Kentucky. — *Parham v. Thompson*, 2 J. J. Marsh. (Ky.) 159; *Thompson v. Craigmyle*, 4 B. Mon. (Ky.) 391.

Louisiana. — *Pickens v. Webster*, 31 La. Ann. 870; *Citizens' Bank v. Wiltz*, 31 La. Ann. 244.

Maryland. — *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236.

Michigan. — *Preston v. Ryan*, 45 Mich. 174.

Missouri. — *Selecman v. Kinnard*, 55 Mo. App. 635; *Smock v. Smock*, 37 Mo. App. 56.

Nebraska. — *Johnson v. Walker*, 23 Neb. 736. See also *Foss v. Marr*, 40 Neb. 559; *Yeagel v. White*, 40 Neb. 432.

New Jersey. — *Bloom v. Welsh*, 27 N. J. L. 177; *Westbrook v. Eager*, 16 N. J. L. 81.

New York. — *Wintermute v. Light*, 46 Barb. (N. Y.) 278; *Frank v. Harrington*, 36 Barb. (N. Y.) 415; *Shepard v. Philbrick*, 2 Den. (N. Y.) 174; *Mumford v. Whitney*, 15 Wend. (N. Y.) 381, 30 Am. Dec. 60.

North Carolina. — *Rich v. Hobson*, 112 N. Car. 79.

See also the title CROPS, vol. 8, pp. 301, 308.

In a Few Jurisdictions it is held that crops do not become personalty until fully matured, and that until that time there can be no valid levy and sale. See the title CROPS, vol. 8, p. 309.

Statutes in Some States Protect Growing Crops Not Matured. — See *Kesler v. Cornelison*, 98 N. Car. 383; *Shannon v. Jones*, 12 Ired. L. (34 N. Car.) 206; *Edwards v. Thompson*, 85 Tenn. 720, 4 Am. St. Rep. 807.

After Being Harvested crops are subject to execution. *State v. Gemmill*, 1 Houst. (Del.) 9; *Pacheco v. Hunsacker*, 14 Cal. 120; *Bernal v. Hovious*, 17 Cal. 542, 79 Am. Dec. 147; *King v. Skellie*, 79 Ga. 147; *Yeazel v. White*, 40 Neb. 432.

In *Foss v. Marr*, 40 Neb. 559, a matured crop of corn, though not gathered, is held to be subject to execution.

4. Perennials Protected. — *State v. Gemmill*, 1 Houst. (Del.) 9; *Craddock v. Riddlesbarger*, 2 Dana (Ky.) 205; *Sparrow v. Pond*, 49 Minn. 412, 32 Am. St. Rep. 571; *Rogers v. Elliott*, 59 N. H. 201, 47 Am. Rep. 192; *Norris v. Watson*, 22 N. H. 364, 55 Am. Dec. 160; *Slocum v. Seymour*, 36 N. J. L. 138; *Caldwell v. Fifield*, 24 N. J. L. 150; *Lansingburgh Bank v. Crary*, 1 Barb. (N. Y.) 542; *Smith v. Jenks*, 1 Den. (N. Y.) 580.

5. Chattels Annexed to Realty. — *Dumergue v. Rumsey*, 2 H. & C. 777; *Farrant v. Thompson*, 5 B. & Ald. 826, 7 E. C. L. 272, 24 Rev. Rep. 571; *Taffe v. Warnick*, 3 Blackf. (Ind.) 111, 23 Am. Dec. 383; *Cresson v. Stout*, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373. See also *Gale v. Ward*, 14 Mass. 352, 7 Am. Dec. 223; *Tobias v. Francis*, 3 Vt. 425; *Sturgis v. Warren*, 11 Vt. 433.

Where fixtures of such a character that they go to the heir, not to the executor, are upon land which is the freehold property of the debtor, they cannot be taken in execution against him. *Winn v. Ingilby*, 5 B. & Ald. 625, 7 E. C. L. 214, 24 Rev. Rep. 503.

d. CHOSSES IN ACTION — (1) *In General*. — In the absence of a permissive statute choses in action are not subject to process in execution,¹ nor will a court of equity enforce an appropriation of choses in action to the payment of a judgment.² This rule has been applied to bonds, bills of exchange, and promissory notes,³ book accounts, and credits generally⁴ and county warrants.⁵

By Statute in a number of jurisdictions promissory notes, accounts and other tangible choses in action are subject to execution.⁶

(2) *Shares of Stock*. — When so provided by statute shares of stock are subject to execution in the manner laid down in such statute, but in the absence of legislative enactment pertaining thereto it is established that shares of stock being mere choses in action are not subject to execution.⁷

(3) *Seat in Stock Exchange*. — Owing to the many limitations and restrictions contained in the charters, rules, and regulations of the various stock exchanges, a certificate of membership therein is not easily classified as respects its nature as property and consequently its liability to execution. In spite of some wavering decisions the law would seem, however, to be practically settled to the extent at least of holding, that while a seat in a stock exchange is not subject to the ordinary processes of execution, yet it may be

As to When Fixtures May Be Taken in Execution. see the title **FIXTURES**.

1. Choses in Action Not Subject to Execution at Common Law — *England*. — *Leg v. Evans*, 6 M. & W. 36; *Grogan v. Cooke*, 2 B. & B. 230.

Alabama. — *Wier v. Davis*, 4 Ala. 442; *Carlos v. Ansley*, 8 Ala. 900; *Horton v. Smith*, 8 Ala. 73, 42 Am. Dec. 628.

Arkansas. — *Field v. Lawson*, 5 Ark. 376.

Georgia. — *McGehee v. Cherry*, 6 Ga. 550.

Illinois. — *Crawford v. Schmitz*, 139 Ill. 564; *Greenwood v. Spiller*, 3 Ill. 503.

Indiana. — *Brisco v. Askey*, 12 Ind. 666; *Chandler v. Keaton*, 17 Ind. 215; *Chandler v. Davis*, 17 Ind. 262; *Stewart v. English*, 6 Ind. 176; *Johnson v. Crawford*, 6 Blackf. (Ind.) 377; *Williams v. Reynolds*, 7 Ind. 622; *Totten v. McManus*, 5 Ind. 408.

Kentucky. — *Thomas v. Thomas*, 2 A. K. Marsh. (Ky.) 430; *M'Ferran v. Jones*, 2 Litt. (Ky.) 220.

Maine. — *Smith v. Kennebec, etc.*, R. Co., 45 Me. 547.

Maryland. — *Watkins v. Dorsett*, 1 Bland (Md.) 530; *Harding v. Stevenson*, 6 Har. & J. (Md.) 264.

Michigan. — *People v. Wayne County*, 5 Mich. 223.

New Hampshire. — *Lovett v. Brown*, 40 N. H. 511.

New York. — *Clarke v. Goodridge*, 41 N. Y. 210; *Clark v. Warren*, 7 Lans. (N. Y.) 180; *Orser v. Grossman*, 11 How. Pr. (N. Y. C. Pl.) 520; *Ransom v. Miner*, 3 Sandf. (N. Y.) 692; *Denton v. Livingston*, 9 Johns. (N. Y.) 96, 6 Am. Dec. 264; *Handy v. Dobbin*, 12 Johns. (N. Y.) 220; *Ingalls v. Lord*, 1 Cow. (N. Y.) 240.

North Carolina. — *Pool v. Glover*, 2 Ired. L. (24 N. Car.) 129.

Pennsylvania. — *Rhoads v. Megonigal*, 2 Pa. St. 39.

Tennessee. — *Moore v. Pillow*, 3 Humph. (Tenn.) 448.

Texas. — *Taylor v. Gillean*, 23 Tex. 508; *Price v. Brady*, 21 Tex. 614; *Ellison v. Tuttle*, 26 Tex. 283.

Wisconsin. — *Brower v. Smith*, 17 Wis. 410; *Brower v. Haight*, 18 Wis. 102.

2. Equity Will Not Appropriate Choses in Action to Payment of Judgment. — *Stewart v. English*, 6 Ind. 176; *Williams v. Reynolds*, 7 Ind. 622; *Totten v. McManus*, 5 Ind. 408.

3. Bonds, Bills and Notes. — *Edwards v. Cooper*, 11 Q. B. 33, 63 E. C. L. 33; *Field v. Lawson*, 5 Ark. 376; *McGehee v. Cherry*, 6 Ga. 550; *Johnson v. Crawford*, 6 Blackf. (Ind.) 377; *Smith v. Kennebec, etc.*, R. Co., 45 Me. 547; *Ingalls v. Lord*, 1 Cow. (N. Y.) 240; *Rhoads v. Megonigal*, 2 Pa. St. 39; *Price v. Brady*, 21 Tex. 614; *Ellison v. Tuttle*, 26 Tex. 283.

In *Louisiana* promissory notes and drafts may be seized on execution. *State v. Judge*, 28 La. Ann. 884; *Scott v. Niblett*, 6 La. Ann. 182; *Stockton v. Stanbrough*, 3 La. Ann. 390; *Fluker v. Bullard*, 2 La. Ann. 338. See La. Code of Pr., §§ 643, 644, 647.

4. Book Accounts. — *Crawford v. Schmitz*, 139 Ill. 564; *Greenwood v. Spiller*, 3 Ill. 503; *Brisco v. Askey*, 12 Ind. 666; *Ransom v. Miner*, 3 Sandf. (N. Y.) 692; *Taylor v. Gillean*, 23 Tex. 508; *Brower v. Smith*, 17 Wis. 410.

5. County Warrants. — *People v. Wayne County*, 5 Mich. 223.

6. Statutes Making Securities Subject to Execution — *England*. — See *Edwards v. Cooper*, 11 Q. B. 33, 63 E. C. L. 33.

California. — *Davis v. Mitchell*, 34 Cal. 81; *Crandall v. Blen*, 13 Cal. 22.

Indiana. — *Bay v. Saulspough*, 74 Ind. 397.

Kentucky. — *M'Ferran v. Jones*, 2 Litt. (Ky.) 220.

New York. — *Clarke v. Goodridge*, 41 N. Y. 210; *Orser v. Grossman*, 11 How. Pr. (N. Y. C. Pl.) 520; *Clark v. Warren*, 7 Lans. (N. Y.) 180.

Tennessee. — *Moore v. Pillow*, 3 Humph. (Tenn.) 448.

See also the codes and statutes of the several states.

7. See this question fully discussed under the title *Stock*.

reached by the extraordinary processes of the court and applied as assets to the claims of creditors of the holder thereof.¹

c. EQUITABLE INTERESTS. — A mere equitable interest in personal property is not subject to execution at law.² And when a judgment and process is made by statute a lien upon personal property both legal and equitable it can only be enforced by a proceeding in chancery,³ in the same way that a judgment upon equitable interests was enforceable at common law.⁴

f. INTERESTS OF MORTGAGOR AND MORTGAGEE IN CHATTELS — *Interest of Mortgagor.* — At common law, mortgaged personal property could not be taken on an execution against the mortgagor because the legal title was not in him.⁵ If, however, the mortgage was fraudulent and void as to creditors, a creditor could levy an execution against the property as if the mortgage had no existence.⁶ Execution may also be levied against mortgaged chattels the possession of which is retained by the mortgagor.⁷ But where property sub-

forceable upon equitable interests only in a court of chancery.

4. How Judgment Against Equitable Interests Enforced at Common Law. — *Mayer v. Wilkins*, 37 Fla. 244; *Rose v. Bevan*, 10 Md. 466, 69 Am. Dec. 170; *Harris v. Alcock*, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158; *Wylie v. White*, 10 Rich. Eq. (S. Car.) 294.

5. At Common Law Mortgagor's Interest Not Subject to Levy — *England.* — *Lyster v. Doland*, 1 Ves. Jr. 431, 3 Bro. C. C. 480; *Scott v. Scholey*, 8 East 467; *Metcalfe v. Scholey*, 2 B. & P. N. R. 461.

California. — *Moore v. Murdock*, 26 Cal. 515.

Colorado. — *Metzler v. James*, 12 Colo. 322.

Iowa. — *Vanslyck v. Mills*, 34 Iowa 375.

Maine. — *Thompson v. Stevens*, 10 Me. 27; *Holbrook v. Baker*, 5 Me. 309, 17 Am. Dec. 236.

Maryland. — *Myers v. Amey*, 21 Md. 302.

Massachusetts. — *Sherman v. Davis*, 137 Mass. 132; *Lamb v. Johnson*, 10 Cush. (Mass.) 126; *Badlam v. Tucker*, 1 Pick. (Mass.) 389, 11 Am. Dec. 202.

Mississippi. — *Commercial Bank v. Waters*, 10 Smed. & M. (Miss.) 559; *Thornhill v. Gilmer*, 4 Smed. & M. (Miss.) 153. But see *Hunter v. Hunter*, Walk. (Miss.) 194.

Nebraska. — *Chicago Lumber Co. v. Fisher*, 18 Neb. 354.

New Hampshire. — *Haven v. Low*, 2 N. H. 13, 9 Am. Dec. 25.

New York. — *Mattison v. Baucus*, 1 N. Y. 295; *Redman v. Hendricks*, 1 Sandf. (N. Y.) 32; *Randall v. Cook*, 17 Wend. (N. Y.) 53.

North Carolina. — *Whitesides v. Williams*, 2 Dev. & B. Eq. (22 N. Car.) 153.

See also the title EQUITY OF REDEMPTION, *ante*, p. 211.

6. Mortgage Fraudulent as to Creditors. — *McWhorter v. Huling*, 3 Dana (Ky.) 349; *Sherman v. Davis*, 137 Mass. 132; *Mueller v. Provo*, 80 Mich. 475; *Randall v. Cook*, 17 Wend. (N. Y.) 53.

7. When Mortgagor Retains Possession the Property May Be Levied On. — *McGregor v. Hall*, 3 Stew. & P. (Ala.) 397; *Harbinson v. Harrell*, 19 Ala. 753; *Merritt v. Niles*, 25 Ill. 282; *Gould v. Armagost*, 46 Neb. 897; *Mattison v. Baucus*, 1 N. Y. 295; *Hall v. Sampson*, 35 N. Y. 274, 91 Am. Dec. 56; *Bailey v. Burton*, 8 Wend. (N. Y.) 339; *Redman v. Hen-*

1. *Lowenberg v. Greenebaum*, 99 Cal. 162; *Eliot v. Merchants' Exchange*, 14 Mo. App. 234; *Londheim v. White*, 67 How. Pr. (N. Y. City Ct.) 467; *Pancoast v. Gowen*, 93 Pa. St. 66.

For a Full Discussion of this question see the title STOCK EXCHANGE.

2. Common-law Rule as to Equitable Interests. — *Scott v. Scholey*, 8 East 467; *Mayer v. Wilkins*, 37 Fla. 244; *Martin v. Jewell*, 37 Md. 530; *Rose v. Bevan*, 10 Md. 466, 69 Am. Dec. 170; *Harris v. Alcock*, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158; *Boyce v. Smith*, 16 Mo. 317; *Yeldell v. Stemmons*, 15 Mo. 444; *Hendricks v. Robinson*, 2 Johns. Ch. (N. Y.) 284; *Wylie v. White*, 10 Rich. Eq. (S. Car.) 294; *Brown v. Wood*, 6 Rich. Eq. (S. Car.) 359; *Dargan v. Richardson*, *Dudley L.* (S. Car.) 62; *Benton v. Pope*, 5 Humph. (Tenn.) 392.

In *Badlam v. Tucker*, 1 Pick. (Mass.) 389, 11 Am. Dec. 202, the court says: "A mere equitable interest cannot be taken and sold on execution; for where there is no legal right there is no legal remedy. This was settled on great deliberation by the Court of King's Bench in the case of *Scott v. Scholey*, 8 East 467; and the reasons there given are entirely satisfactory. The judgment of the court in that case was sanctioned by the Court of Common Pleas, in the case of *Metcalfe v. Scholey*, 2 B. & P. N. R. 461, and is supported by all the authorities. It is only by statute that equities, or rights to redeem, are subject to attachment by ordinary process, and no statute has authorized the attachment of such interest in personal property. A creditor can reach such an interest of his debtor only by resorting to a court of equity, where he may be let in to redeem incumbrances, *Shirley v. Watts*, 3 Atk. 200; unless, perhaps, he may first remove the incumbrance, and then lay an attachment on the property, as to which, however, we give no opinion. But until payment, or tender of payment, of the money due to the mortgagee or pawnee of goods and chattels, it is very clear that the creditor of the mortgagor or pawner has no remedy against them by attachment and execution."

3. Enforcing Judgment Lien against Equitable Property in Chancery. — In *Doheny v. Atlantic Dynamite Co.*, 41 W. Va. 1, § 2, c. 141, of the W. Va. Code, providing for the lien of a *fiery facias* on all personal property of the judgment debtor is construed and held to be en-

ject to a valid chattel mortgage is in the hands of the mortgagee, it is not subject to levy and sale upon an execution issued against the mortgagor.¹

Statutes Allowing Levy on Equity of Redemption. — By statutory provisions or by an extension of equitable doctrines, however, the equity of redemption in chattels is subject to execution as personal property belonging to the mortgagor.²

Interest of Mortgagee. — The interest of a mortgagee is not subject to levy or sale under execution, before foreclosure,³ or at least before entry, even though there has been a default and the condition of the mortgage is forfeited.⁴ Some authorities have held, however, that the mortgagee's title becomes absolute upon the arrival of the law day and breach of condition, and that thereafter his interest may be levied upon and sold under execution.⁵

g. PROPERTY HELD ON BAILMENT OR BY AGENTS. — Where a bailee or agent is in the possession of property without any title thereto, such property is not subject to levy and sale on an execution against the bailee or agent,⁶ for the passive possession of property, unaccompanied by any interest therein, is not sufficient to render the property subject to an execution against him in whose possession it is.⁷ Where, however, under a contract of bailment, an

dricks, 1 Sandf. (N. Y.) 32; Saxton v. Williams, 15 Wis. 292.

In *Harbinson v. Harrell*, 19 Ala. 753, the court, after laying down the rule stated in the text, observed that the quantum of interest to be sold under such circumstances was not the mere usufruct until the law day, but the entire interest of the mortgagor.

If After Condition Broken the Mortgagor Retains Possession it has been held that the mortgaged property is not subject to levy and sale under executions against the mortgagor obtained subsequent to the mortgage. *Exp. Lorenz*, 32 S. Car. 365, 17 Am. St. Rep. 862.

1. When Mortgagee in Possession Not Subject as Mortgagor's Property. — *Moore v. Murdock*, 26 Cal. 515; *Metzler v. James*, 12 Colo. 322; *Chicago Lumber Co. v. Fisher*, 18 Neb. 334.

2. Statutory Enactments, Changing the Common-law Rule — Indiana. — *Syfers v. Bradley*, 115 Ind. 345; *Hackleman v. Goodman*, 75 Ind. 202; *Sparks v. Compton*, 70 Ind. 393; *Schrader v. Wolflein*, 21 Ind. 238; *Heimberger v. Boyd*, 18 Ind. 420.

Massachusetts. — *Sherman v. Davis*, 137 Mass. 132; *Folsom v. Clemence*, 111 Mass. 273; *Lyon v. Coburn*, 1 Cush. (Mass.) 278.

Michigan. — *Nelson v. Ferris*, 30 Mich. 497. *Ohio.* — *Carty v. Fenstermaker*, 14 Ohio St. 457.

Oregon. — *Williams v. Gallick*, 11 Oregon 337.

Pennsylvania. — *Waverly Coal, etc., Co. v. McKennan*, 110 Pa. St. 599.

Rhode Island. — *Anthony v. Shaw*, 7 R. I. 275.

Texas. — *Sayles's Tex. Civ. Stat.*, 1889, art. 2296; *Tex. Rev. Stat.*, 1895, art. 2353; *Wright v. Henderson*, 12 Tex. 43; *Gillian v. Henderson*, 12 Tex. 47; *Wootton v. Wheeler*, 22 Tex. 338; *Raysor v. Reid*, 55 Tex. 266; *Willis v. Thompson*, 85 Tex. 301.

See also the titles **CHATTEL MORTGAGES**, vol. 5, p. 1017; **EQUITY OF REDEMPTION**, *ante*, p. 211.

3. Mortgagee's Interest Subject to Levy After Foreclosure. — In *Prout v. Root*, 116 Mass. 410, it was held that the interest of a mortgagee of personal property in his possession, after breach of condition and before foreclosure,

was not liable to be taken on execution or attachment. The court, by Colt, J., arrived at the conclusion that "under our laws, so long at least as the mortgagee's interest in personal property is held by him in good faith only as security — before it has been, in fact, applied to the satisfaction of his debt by foreclosure or otherwise — it cannot be attached as his property." See also *Murphy v. Galloppe*, 143 Mass. 123; *Knowles v. Herbert*, 11 Oregon 54.

The interest of the mortgagee in personal property, where the possession remains with the mortgagor, and before condition broken, cannot be taken in execution as the property of the mortgagee. *Chapman v. Hunt*, 13 N. J. Eq. 370; *Doughten v. Gray*, 10 N. J. Eq. 323.

4. Morris v. Barker, 82 Ala. 272; *Trapnall v. State Bank*, 18 Ark. 53. These are cases of real property mortgages, but the doctrines are similar with respect to personal property. See *Prout v. Root*, 116 Mass. 410.

The legal title to mortgaged property does not vest in the mortgagee from the fact that he holds possession after the maturity of his debt. *Voorhies v. Hennessy*, 7 Wash. 243.

5. Mortgagee's Title Held Absolute on Default. — *Phillips v. Hawkins*, 1 Fla. 301.

In *Ferguson v. Lee*, 9 Wend. (N. Y.) 259, it is held that personal property pledged by way of mortgage may after forfeiture be levied upon by virtue of an execution against the mortgagee, although it remains in the hands of the mortgagor.

6. Hatch v. Heim, 86 Fed. Rep. 436; *McClelland v. Scroggin*, 35 Neb. 536; *Hamilton v. Billington*, 163 Pa. St. 76.

Property in the Possession of a Factor, to be sold for the benefit of his principal, is not liable to execution or attachment in satisfaction of the debts of the factor. *National Cordage Co. v. Sims*, 44 Neb. 148.

Where One Holds Property as an Agent, he has no interest therein subject to execution or attachment. *Shaughnessey v. Lininger, etc., Co.*, 34 Neb. 747.

7. Heberling v. Jaggar, 47 Minn. 70, 28 Am. St. Rep. 331; *Hall's Self-Feeding Cotton Gin Co. v. Berg*, 65 Miss. 184; *Cros Bay, etc., R.*,

interest or special property in the thing bailed passes to the bailee, such interest is liable to execution for the debts of the bailee.¹

Levy on Property Bailed Under Execution Against Bailor. — Property in the hands of a bailee who holds the same without claim of title is liable to execution for the debts of the bailor.²

Goods Pledged or Pawned are not liable at common law to be taken in execution in an action against the pawnor or pledgor, at least not unless the bailment is terminated by payment of the debt, or by some other extinguishment of the pawnee's or pledgee's title. This rule has, however, been extensively changed by statute so as to render the interest of the pawnor or pledgor in such property subject to execution.³

h. REMAINDERS AND FUTURE INTERESTS IN CHATTELS. — The remainder after a life estate in chattels, or other future interest therein, is not, at common law, subject to execution for the debts of the remainderman during the continuance of the particular estate therein.⁴

Future Interests to Vest on Performance of Contract. — When a person is to acquire an interest in, or a certain part of, personal property at some future time upon the performance of an executory contract, he has not, until performance, such an interest therein as will render it liable to levy and sale upon an execution against him.⁵ Nor is a sum of money which is to become due to one upon

etc., *Co. v. Siglin*, (Oregon 1898) 53 Pac. Rep. 504.

One in Possession of Cattle under a contract by which he is to feed and care for them until they are ready for market, and is to receive a certain part of the market price for his labor, has no such interest in the cattle as to render them liable to an execution upon a judgment against him. *McNamara v. Godair*, 161 Ill. 228, *affirming* 59 Ill. App. 184.

In Mississippi, by statute, stock or property "used or acquired" by a trader in carrying on his business is, as to the creditors of the person carrying on the business, to be treated as his property and liable for his debts. Miss. Code (1892), § 4234; *Hall's Self-Feeding Cotton Gin Co. v. Berg*, 65 Miss. 184; *Citizens' Bank v. Studebaker Bros. Mfg. Co.*, 71 Miss. 544; *Burwell v. Herron*, (Miss. 1894) 16 So. Rep. 356; *Head v. Haydock Carriage Co.*, (Miss. 1894) 16 So. Rep. 420.

1. Thus, Where Cattle Are Hired for a Specified Time, the hirer's interest in them may be sold on execution. *Houston v. Simpson*, 1 Jones L. (46 N. Car.) 513; *Beale v. Digges*, 6 Gratt. (Va.) 582. See also *Saul v. Kruger*, 9 How. Pr. (N. Y. Super Ct.) 569.

A Loan of Slaves, the borrower to have the use and labor of the slaves during his natural life, gives an interest to the borrower which is liable to execution. *Allen v. Russell*, 19 Tex. 87.

2. Thomas v. Thomas, 2 A. K. Marsh. (Ky.) 433.

Where Bailee Has an Interest in the Property. — Where the bailee is a hirer of property for a specified time, a creditor of the bailor cannot attach the property and take it from the bailee's custody during the term of bailment. *Hartford v. Jackson*, 11 N. H. 145; *Smith v. Niles*, 20 Vt. 315, 49 Am. Dec. 782; 1 Dyer 676, note. See also *Goode v. Longmire*, 35 Ala. 668.

Goods Levied On in Carrier's Hands. — Where goods are levied on in the hands of a common carrier under attachment or execution, and

possession is taken under a writ by the officer, the carrier is not liable for non-delivery. *Indiana*, etc., *R. Co. v. Doremeyer*, 20 Ind. App. 605; *Thomas v. Northern Pac. Express Co.*, (Minn. 1898) 75 N. W. Rep. 1120. See the title *CARRIERS OF GOODS*, vol. 5, p. 237.

3. For a full discussion of this subject, see the title *PLEDGE AND COLLATERAL SECURITY*.

4. Vested Remainder in Chattels. — Thus, a vested remainder after a life estate in slaves has been held not liable to seizure under execution or attachment against the remainderman during the continuance of the life estate, for the levy of execution requires the sheriff to take possession of the property, and this would be a trespass against the life tenant not permitted by the law. *Goode v. Longmire*, 35 Ala. 668; *Allen v. Scurry*, 1 Verg. (Tenn.) 36, 24 Am. Dec. 436. See also *Sale v. Saunders*, 24 Miss. 24, 57 Am. Dec. 157; *Dargan v. Richardson*, *Dudley L. (S. Car.)* 62; *McGee v. Currie*, 4 Tex. 217. But compare *Carter v. Spencer*, 7 Ired. L. (29 N. Car.) 14; *Blanton v. Morrow*, 7 Ired. Eq. (42 N. Car.) 47, 53 Am. Dec. 391; *Knight v. Leak*, 2 Dev. & B. L. (19 N. Car.) 133; *Myers v. Daviess*, 10 B. Mon. (Ky.) 394.

Beasts Let for Years cannot be taken in execution for a debt of the lessor. 1 Dyer 676, note; *Smith v. Niles*, 20 Vt. 315, 49 Am. Dec. 782.

Attachable under Statute. — In *Tennessee* it was held that while a future interest in personal property could not be reached by execution at law, yet it was liable to attachment under a statute allowing a creditor to file a bill to have personal property of certain kinds attached. *Lockwood v. Nye*, 2 Swan (Tenn.) 515, 58 Am. Dec. 73.

5. Right to Arise on Performance of Executory Contract. — Where a tenant was to pay to his landlord one-third of the crop raised upon the leased premises "in kind, payable in the half bushel," it was held that wheat raised upon the premises remained the property of the tenant until it was threshed, measured, and

the completion of an executory contract subject to levy.¹ If, however, one performs labor upon chattels under a contract by which he acquires a special property in such chattels pending the completion of his labor thereon, such special property is subject to execution against him.²

i. **PROPERTY SOLD CONDITIONALLY.** — The liability to execution against the vendor of property which has been sold, the vendor retaining the title until payment of the price, has been treated in another title.³

j. **CORPORATE FRANCHISES.** — According to the doctrine of the common law, the franchises of a corporation could not be seized and sold upon execution.⁴ A corporate franchise, it is said, "is intangible and vested in the artificial being of a particular organization suited, in the view of the legislature, to the most proper and beneficial use of the franchise, and therefore it cannot be assigned to a person, natural or artificial, to which the legislature has not committed its exercise and emolument."⁵ The protection given to corporate franchises is confined principally, if not wholly, to the franchises of quasi-public corporations, bodies created to serve public purposes and charged with corresponding public duties.⁶

one-third of it set apart to the landlord, and that at least until that was done, it was not subject to execution against the landlord. *Williams v. Smith*, 7 Ind. 559.

One who is in possession of a flock of sheep under a contract by virtue of which he is to keep the sheep until shearing time, in consideration of receiving the wool when the sheep are sheared, has no title to the wool until the contract has been completely performed by him, and in the meantime has no interest therein which is liable to levy and sale on execution against him. *Hasbrouck v. Bouton*, 60 Barb. (N. Y.) 413. See also *Smith v. Meech*, 26 Vt. 233.

1. **Money to Become Due on Completion of Contract.** — *Paine v. Gunniss*, 60 Minn. 257, where it was held that money to become due to a builder upon the completion of a contract was not subject to levy.

2. **Where Special Property Pending Completion of Contract Is Acquired.** — A purchased from B the right to quarry and remove stone for the construction of canal locks, the amount to be estimated in the locks and paid for at an agreed rate when the canal contractors should be paid. A has a property in the stone quarried by him for the purpose of delivery under his agreement with the canal contractors, which may be sold by the sheriff. *Watts v. Tibbals*, 6 Pa. St. 447.

Under a contract A was to furnish money to B to buy timber. The timber was to be bought in A's name, and B was to fell it and transport it to the city of Troy, for which he was to receive an agreed sum per foot. It was held that under this contract B had a special property in timber which had been cut and was being conveyed to Troy (like that which bailees for hire of labor and services have in the thing about which the labor and services are performed) so as to render it liable to seizure and sale under an execution against him. *Weaver v. Darby*, 42 Barb. (N. Y.) 411.

More Right to Cut Timber Does Not Give Special Property. — One who occupied a farm with the right to cut timber thereon under a contract by which he was to reimburse himself for the expenses of cutting the timber out of the pro-

ceeds of its sale, and to pay over the residue to the owners of the farm, was held to have no such property in the timber as to render it liable to attachment against him. *Provis v. Cheves*, 9 K. I. 53, 98 Am. Dec. 367.

3. See the title **CONDITIONAL SALES**, vol. 6, p. 490.

4. **Franchises Not Subject to Execution at Common Law.** — *Gue v. Tide-Water Canal Co.*, 24 How. (U. S.) 257; *Brady v. Johnson*, 75 Md. 445; *Arthur v. Commercial, etc., Bank*, 9 Smed. & M. (Miss.) 431; *Stewart v. Jones*, 40 Mo. 140; *State v. Rives*, 5 Ired. L. (27 N. Car.) 297; *Ludlow v. Hurd*, (Cinc. Super. Ct.) 6 Am. L. Reg. 493; *Seymour v. Milford, etc., Turnpike Co.*, 10 Ohio 477; *Ammant v. New Alexandria, etc., Turnpike Road Co.*, 13 S. & R. (Pa.) 210; *Susquehanna Canal Co. v. Bonham*, 9 W. & S. (Pa.) 27, 42 Am. Dec. 315; *Smith v. Altoona, etc., Connecting R. Co.*, 182 Pa. St. 139.

5. **Why Franchises Cannot Be Levied On.** — *State v. Rives*, 5 Ired. L. (27 N. Car.) 306, by Ruffin, C. J.

In *Stewart v. Jones*, 40 Mo. 140, the franchise which it was sought to sell was that of a body incorporated under the name of "Jones's Commercial College," for the purpose of teaching the elementary and practical parts of mercantile and commercial education. The court said: "The act of incorporation does not authorize a sale of the franchise on execution, and as the franchise has no tangible or corporate existence, we do not see upon what principle it could be levied upon. It is not among the enumerated interests which are the subject of levy and sale in the statutes under the title of 'Execution,' and as it is an entirely artificial being, created solely for certain purposes, it cannot be seized, transferred, and used by others without express proviso to that effect."

In *Gue v. Tide-Water Canal Co.*, 24 How. (U. S.) 257, Chief Justice Taney said: "The franchise, being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a fieri facias."

6. See *supra*, this title, *Issuance of the Writ*, subd. 4, *c. Quasi-public Corporations*. See also the title **CORPORATIONS**, vol. 7, p. 854.

By Statute a method is frequently provided for subjecting corporate franchises of certain kinds to execution and sale.¹ Where such a provision exists, the statute must be looked to, to determine the extent of the power to levy upon such interests and also the mode of such levy and sale.²

k. **PATENT RIGHTS AND COPYRIGHTS.** — Patent rights and copyrights are not subject to execution at law,³ but may be subjected to the payment of judgment debts in equity.⁴ The material thing itself upon which the incorporeal right has been obtained, that is, the patented or copyrighted article, is, however, subject to execution,⁵ and a sale thereof passes the right of use.⁶

Statutory Provision. — Patent rights may be sold under execution in the manner provided by statute.⁷

Extent of Rule Protecting Franchises — Private Business Corporations. — In *East Side Bank v. Columbus Tanning Co.*, 170 Pa. St. 1, Judge Noyes, in an opinion delivered in the Court of Common Pleas, which was approved by the Supreme Court, after considering the early Pennsylvania cases laying down the rule exempting corporate franchises from execution, said: "In considering these cases, * * * it must be borne in mind that a private business corporation is a recent invention, and such a thing was rarely known prior to our Civil War." And he continued: "In the light of these cases it seems quite clear that all the property of a corporation which can be properly considered to be goods, chattels, lands or tenements, is subject to execution in the ordinary way. That such of its property, real or personal, as is necessary to the exercise of some public franchise, is to be regarded as forming a part of that franchise and is not subject to execution in the ordinary way, but can only be taken in the lump under the special writ provided by the Act of 1870, and sold together to a purchaser or purchasers, whom the law now at least authorizes to exercise the franchises possessed by the corporation. The purpose appears to be to subserve the public convenience by preventing the extinguishment of a public franchise. * * * The cases show that it is not property essential to the business, but property essential to the exercise of the franchises of a corporation which is exempt from execution. There is some looseness in the popular idea of a franchise. Whether exercised by individuals or by corporations, franchises are such rights, privileges and powers as are specially granted by the sovereignty and exercisable only by virtue of such grant. Anderson's Law Dictionary, 'Franchises,' 8 AM. & ENG. ENCYC. OF LAW [1st ed.], 585. Unless the right of perpetual succession be such, a private business corporation possesses no franchises whatever. Certainly the public had no interest in the continuance of its business, nor is there any good reason why any of its property may not be taken upon execution, as it certainly may be taxed or subjected to liens."

1. **Statute Providing for Levy on Franchises — United States.** — *Memphis, etc., R. Co. v. Railroad Com'rs*, 112 U. S. 609; *Covington Drawbridge Co. v. Shepherd*, 21 How. (U. S.) 112.

California. — *Gregory v. Blanchard*, 98 Cal. 311; *People v. Duncan*, 41 Cal. 507; *Wood v. Truckee Turnpike Co.*, 24 Cal. 474.

Iowa. — Code Iowa 1897, § 1634, p. 600. See *Farmers' L. & T. Co. v. Iowa Water Co.*,

78 Fed. Rep. 881, and *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77.

Massachusetts. — *Simmons v. Worthington*, 170 Mass. 203; *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672; *Commonwealth v. Tenth Massachusetts Turnpike Corp.*, 5 Cush. (Mass.) 509; *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

Michigan. — *Ripley v. Evans*, 87 Mich. 217; *James v. Pontiac, etc., Plank Road Co.*, 8 Mich. 91.

New Jersey. — *Randolph v. Larned*, 27 N. J. Eq. 557.

Ohio. — *Salt Creek Valley Turnpike Co. v. Parks*, 50 Ohio St. 575.

Pennsylvania. — *Greensburg Fuel Co. v. Irwin Natural Gas Co.*, 162 Pa. St. 78.

Vermont. — *Eldridge v. Smith*, 34 Vt. 484.

2. **Strict Construction of Statutes.** — *Gregory v. Blanchard*, 98 Cal. 311; *James v. Pontiac, etc., Plank Road Co.*, 8 Mich. 91.

For the construction of particular statutes, see *Wood v. Truckee Turnpike Co.*, 24 Cal. 474; *Simmons v. Worthington*, 170 Mass. 203; *Ripley v. Evans*, 87 Mich. 217; *Greensburg Fuel Co. v. Irwin Natural Gas Co.*, 162 Pa. St. 78.

3. **Copyrights and Patent Rights Not Liable to Executions at Law.** — *Stephens v. Cady*, 14 How. (U. S.) 528; *Stevens v. Gladding*, 17 How. (U. S.) 447; *Ager v. Murray*, 105 U. S. 126, *affirming Murray v. Ager*, 1 Mackey (D. C.) 87; *Newton v. Buck*, 72 Fed. Rep. 780; *Carver v. Peck*, 131 Mass. 291; *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544; *Barnes v. Morgan*, 3 Hun (N. Y.) 703.

4. **Patent Rights May Be Reached in Equity.** — *Ager v. Murray*, 105 U. S. 126, *affirming Murray v. Ager*, 1 Mackey (D. C.) 87; *Newton v. Buck*, 72 Fed. Rep. 780; *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120; *Barnes v. Morgan*, 3 Hun (N. Y.) 703.

5. **Patented or Copyrighted Articles Subject to Execution.** — *Stevens v. Gladding*, 17 How. (U. S.) 448; *Cooper v. Gunn*, 4 B. Mon. (Ky.) 594.

6. **Sale Carries Right to Use.** — In *Wilder v. Kent*, 15 Fed. Rep. 217, the court says: "A patented machine is susceptible of manual seizure, and the unrestricted sale thereof does not involve the transfer of any interest in the patent. The conclusion, therefore, is that whatever right to use the patented machine a defendant in an execution may have, passes with the machine when sold by the sheriff to his vendee; hence it follows that the plaintiff has no just cause of complaint against these defendants."

7. **Pennsylvania Statute.** — In *Erie Wringer Mfg. Co. v. National Wringer Co.*, 63 Fed.

Manuscript. — The rules respecting patents and copyrights are more rigidly enforced in favor of unpublished manuscripts, which are held not subject to levy under execution.¹

7. **JUDGMENTS.** — Under statute in some of the states, judgments may be levied on and sold under execution.² But in other jurisdictions, sale of judgments under execution is not allowed, and resort must be had to the remedy of garnishment.³

III. **LEASEHOLD INTERESTS** — **In Real Property.** — It may be stated as a general rule that leasehold interests in real property are subject to seizure and sale under execution.⁴ But under statute in *Texas* providing that, in the absence of a contract permitting the assignment or subletting of leased premises, a lessee cannot pass to another the right to occupy the premises for a whole or a part of the year, it has been held that, in the absence of an agreement permitting an assignment or subletting, the tenant has no such interest as is subject to execution.⁵

Whether Interest to Be Taken as Realty or Personalty. — Under statute in some jurisdictions, leasehold interests are to be seized and levied upon as realty.⁶ But it seems to be the prevailing rule that, apart from statute, such interest should be levied upon as personalty.⁷

Rep. 248, the court says: "In case of *Flagg v. Farnsworth*, 12 W. N. C. (Pa.) 500, Judge Mitchell, now of the state supreme court, expressed the opinion that a valid sale of a patent right belonging to an insolvent corporation can be made under the Act of 1870. In this I concur. True, patent rights are not specially mentioned in the act, but the words, 'any personal, mixed or real property, franchises, and rights,' are certainly broad enough to cover patent rights; and to hold otherwise would defeat the legislative intention, which, I think, clearly was thus to subject all the property and rights of every description, belonging to an insolvent corporation, to the discharge of its debts. Nothing to the contrary of this view is to be inferred from the provisions of the later act of 9th May, 1889 (P. L. 172), which gives to the courts of Pennsylvania (what, it seems, they did not theretofore have) complete equity jurisdiction to charge patent rights with the payment of the owner's debts."

1. **Protection of Manuscript.** — *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544. See also the title **COPYRIGHT**, vol. 7, p. 515.

But see *Banker v. Caldwell*, 3 Minn. 94, wherein the seizure and right of sale under execution of an unpublished manuscript is recognized, but holds that the author has the exclusive right to make copies, and publish.

2. **Sale of Judgments Under Execution Permitted by Statute.** — *Henry v. Traynor*, 42 Minn. 234; *McLaughlin v. Alexander*, 2 S. Dak. 226.

Under Louisiana Code of Practice, providing that the sheriff may seize the rights and credits which belong to the debtor and all sums of money which may be due him in whatever right, unless it be for alimony or salaries of office, it has been held that a seizure of a judgment may be made by the sheriff under a writ of fieri facias without resorting to the circuitous process of garnishment, which is merely a cumulative remedy provided by statute in that state. *Safford v. Maxwell*, 23 La. Ann. 345. See also *Rightor v. Slidell*, 9 La. Ann. 605; *Hanna v. Bry*, 5 La. Ann. 651, 52 Am. Dec. 606.

3. **Jurisdictions Not Allowing Sale of Judgments Under Execution.** — In *California*, after some doubts expressed on the subject, it has finally been decided that a judgment is not subject to levy under execution, for the reason that it is but the evidence of a debt, and the statutes in that state, while making provision for levying upon debts, have not done so as to evidences of debt. *Latham v. Blake*, 77 Cal. 646; *Dore v. Dougherty*, 72 Cal. 232, 1 Am. St. Rep. 48; *McBride v. Fallon*, 65 Cal. 301. See also *Southard v. McBrown*, 63 Cal. 545; *Fore v. Manlove*, 18 Cal. 437; *Adams v. Hackett*, 7 Cal. 187.

In *Iowa* it was the rule at one time that judgments could not be levied on and sold as property, but garnishment of the judgment debtor would be the proper remedy. *Osborn v. Cloud*, 23 Iowa 104, 92 Am. Dec. 413.

But under section 3971, Code of Iowa (1897), judgments are subject to seizure and sale under execution.

See also the title **GARNISHMENT**.

4. **Leasehold Interests in Realty Subject to Execution.** — *McLean v. Rockey*, 3 McLean (U. S.) 235; *Barr v. Doe*, 6 Blackf. (Ind.) 335, 38 Am. Dec. 146; *Chapman v. Gray*, 15 Mass. 439; *Shelton v. Codman*, 3 Cush. (Mass.) 318; *Buhl v. Kenyon*, 11 Mich. 249, 83 Am. Dec. 738; *Bigelow v. Finch*, 17 Barb. (N. Y.) 394.

5. *Moser v. Tucker*, 87 Tex. 94.

6. **Leasehold Interests in Realty to Be Levied upon as Realty Under Statute.** — *McLean v. Rockey*, 3 McLean (U. S.) 235; *Northern Bank v. Roosa*, 13 Ohio 334; *Loring v. Melendy*, 11 Ohio 355. Compare *Bisbee v. Hall*, 3 Ohio 449; *Reynolds v. Stark County*, 5 Ohio 204.

7. **Leasehold Interests in Realty to Be Levied upon as Personalty at Common Law.** — *McLean v. Rockey*, 3 McLean (U. S.) 235; *Barr v. Doe*, 6 Blackf. (Ind.) 335, 38 Am. Dec. 146; *Chapman v. Gray*, 15 Mass. 439; *Shelton v. Codman*, 3 Cush. (Mass.) 318; *Buhl v. Kenyon*, 11 Mich. 249, 83 Am. Dec. 738; *Bigelow v. Finch*, 17 Barb. (N. Y.) 394; *Sowers v. Vic*, 14 Pa. St. 99; *Williams v. Downing*, 18 Pa. St. 60; *Kile v. Giebner*, 114 Pa. St. 381; *Sterling v. Com.*, Volume XI.

In Personal Property. — Also, it seems to be well settled that the lessee of goods and chattels for a term has an interest which is the subject of seizure and sale on execution.¹

n. PARTNERSHIP PROPERTY. — The liability of partnership property to execution for the debts of the firm and for the individual debts of the members of the firm, is treated in another title.²

o. PROPERTY OF WIFE FOR DEBTS OF HUSBAND. — Under the common law the personal property in possession of a *feme sole* upon her marriage became that of her husband and was subject to execution for his debts.³

Choses in Action. — The wife's choses in action also become her husband's,⁴ with the qualification that such choses in action must have been reduced to possession by the husband during his lifetime.⁵ A court of equity will neither assist nor compel the husband at the behest of a creditor to reduce such choses in action to possession unless he agrees to make a suitable provision for his wife out of such property.⁶

Modern Statutes have created great changes in the common-law rules with regard to the rights of a married woman to acquire and hold property free from the control of her husband and not liable for his debts.⁷

p. PROPERTY CONVEYED IN FRAUD OF CREDITORS. — The levy of execution against property conveyed in fraud of creditors is discussed elsewhere in this work.⁸

2. Real Property — **a. IN GENERAL.** — At the common law land was not subject to execution at the suit of a private individual, but of the king only;⁹

2 Grant's Cas. (Pa.) 162; Thomas v. Blackmore, 5 Yerg. (Tenn.) 113. Compare Mun v. Carrington, 2 Root (Conn.) 15; Titusville Novelty Iron Works' Appeal, 77 Pa. St. 103.

It has been held that a leasehold interest in realty is properly sold as real estate under a statutory provision in *Indiana* making chattels real subject to such execution. Hyatt v. Vincennes Nat. Bank, 113 U. S. 416.

1. Leasehold Interest in Personalty Subject to Execution. — Dean v. Whittaker, 1 C. & P. 347, 11 E. C. L. 411; Ward v. Macauley, 4 T. R. 489; Gordon v. Harper, 7 T. R. 11; Van Antwerp v. Newman, 2 Cow. (N. Y.) 543. See also Duffill v. Spottiswoode, 3 C. & P. 435, 14 E. C. L. 382; and *supra*, this section, *Property Held on Bailment or by Agents*.

License to Use Chattel. — But where a wagon was hired and the instrument of hiring provided that "the use of the said wagon" should be "only for his baker business, and not for any other use," and prohibited a sale or loan on the wagon, it was held that the legal effect of the instrument was to confer upon the person hiring the wagon merely a personal license to use the wagon, and did not amount to a lease, and that his interest could not be the subject of sale under an execution. Reinmiller v. Skidmore, 7 Lans. (N. Y.) 164.

2. See the title PARTNERSHIP.

3. Wife's Chattels in Possession Pass to Husband by Marriage. — Fayette v. Buckner, 1 Litt. (Ky.) 126; Slocumb v. Breedlove, 8 La. 143; State v. Krebs, 6 Har. & J. (Md.) 31; Alexander v. Crittenden, 4 Allen (Mass.) 342; Holbrook v. Waters, 19 Pick. (Mass.) 354; Wheeler v. Bowen, 20 Pick. (Mass.) 563; Hockaday v. Sallee, 26 Mo. 219; Daniel v. Daniel, 2 Rich. Eq. (S. Car.) 115, 44 Am. Dec. 244; Vance v. McLaughlin, 8 Gratt. (Va.) 289; Hill v. Wynn, 4 W. Va. 453.

See also the title HUSBAND AND WIFE.

4. Choses in Action. — Babb v. Elliott, 4 Harr. (Del.) 466; Johnson v. Fleetwood, 1 Harr. (Del.) 442; Bell v. Bell, 1 Ga. 637; Peacock v. Pembroke, 4 Md. 280; Strong v. Smith, 1 Met. (Mass.) 476; Marston v. Carter, 12 N. H. 159; Dold v. Geiger, 2 Gratt. (Va.) 98.

5. Husband May Reduce to Possession Wife's Choses in Action — *England.* — Widgery v. Tepper, 5 Ch. Div. 516; Scrutton v. Pattillo, L. R. 19 Eq. 369.

United States. — Gallego v. Chevallie, 2 Brock. (U. S.) 285.

Georgia. — Sayre v. Flournoy, 3 Ga. 541.

Kentucky. — Bennett v. Dillingham, 2 Dana (Ky.) 437; Miller v. Miller, 1 J. J. Marsh. (Ky.) 169, 19 Am. Dec. 59.

Maryland. — Brown v. Bokee, 53 Md. 155.

New Hampshire. — Wheeler v. Moore, 13 N. H. 478; Marston v. Carter, 12 N. H. 159; Poor v. Hazleton, 15 N. H. 564.

Pennsylvania. — Skinner's Appeal, 5 Pa. St. 262; Flory v. Becker, 2 Pa. St. 470, 45 Am. Dec. 610; Dennison v. Nigh, 2 Watts (Pa.) 90; Hinds's Estate, 5 Whart. (Pa.) 138, 34 Am. Dec. 542; Robinson v. Woelpper, 1 Whart. (Pa.) 179, 29 Am. Dec. 44.

North Carolina. — Arrington v. Screws, 9 Ired. L. (31 N. Car.) 42, 49 Am. Dec. 408.

South Carolina. — Jackson v. McAliley, Spears Eq. (S. Car.) 303, 40 Am. Dec. 620.

Vermont. — Short v. Moore, 10 Vt. 446.

See also the title HUSBAND AND WIFE.

6. Wife's Equity for a Settlement. — Bennett v. Dillingham, 2 Dana (Ky.) 437; Sayre v. Flournoy, 3 Ga. 541.

7. See the titles HUSBAND AND WIFE; SEPARATE ESTATES OF MARRIED WOMEN.

8. See the title FRAUDULENT SALES AND CONVEYANCES.

9. Real Property — Rule at Common Law. — See Jones v. Jones, 1 Bland (Md.) 443; Coombs v. Jordan, 3 Bland (Md.) 284; Lyon v. Eliza-

but by virtue of statutory enactment at an early date the rule was changed in *England*.¹ And at the present time in the *United States* land is generally subject to execution, but under some of the statutes it is not primarily liable, as in such cases it is provided that the personalty of the debtor shall be first exhausted.²

b. LIFE ESTATES. — Under most, if not all, of the statutes in the *United States*, life estates are made subject to execution.³ But formerly in *Pennsylvania* there was a statutory prohibition of the sale of life estates under execution.⁴

c. CONDITIONAL ESTATES. — An Offer for the Sale of Land, made upon specified conditions, does not confer an interest in the land which is subject to execution, in the absence of compliance with the conditions and acceptance of the offer.⁵

Where in a Deed on Condition the grantor has re-entered for a breach thereof, for the purpose of revesting the estate in himself, and there was no collusion between the parties to the deed, an execution creditor of the grantee will acquire no title to the premises by a levy thereon.⁶

An Estate in Fee, or in Tail, Defeasible upon a Contingency, is liable to be taken in execution by a creditor of the tenant, and held until the happening of the contingency.⁷

d. DOWER, CURTESY, AND ENTIRETIES. — The rules in reference to dower⁸ and curtesy⁹ in this connection have already been treated in this work. The principles governing estates by entireties will be discussed in a subsequent article.¹⁰

e. REVERSIONS AND REMAINDERS. — A reversionary interest is subject to execution at law,¹¹ and the same is true of a vested remainder,¹² but it would

beth, 43 N. J. L. 158; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.

1. *English Statutes.* — Statute of Westm. 2, 12 Edw. I., c. 18; 5 Geo. II., c. 7. See *Hanson v. Barnes*, 3 Gill & J. (Md.) 359, 22 Am. Dec. 322.

2. See the succeeding subdivisions of this title.

3. *Life Estates.* — *Mendenhall v. Randon*, 3 Stew. & P. (Ala.) 251; *Hitchcock v. Hotchkiss*, 1 Conn. 470; *American Mortg. Co. v. Hill*, 92 Ga. 297; *Bozeman v. Bishop*, 94 Ga. 459; *Thompson v. Murphy*, 10 Ind. App. 464; *Boyce v. Waller*, 2 B. Mon. (Ky.) 91.

4. *Com. v. Allen*, 30 Pa. St. 49; *Eyrick v. Hetrick*, 13 Pa. St. 488; *Snively v. Wagner*, 3 Pa. St. 275, 45 Am. Dec. 640; *Dennison's Appeal*, 1 Pa. St. 201; *Howell v. Woolfort*, 2 Dall. (Pa.) 75; *Near v. Watts*, 8 Watts (Pa.) 319.

In *Henry v. McClellan*, 146 Pa. St. 34, it was held that a sale of land wherein the defendant has only a life estate, on a fi. fa. from a judgment confessed on a bond waiving inquisition accompanying a mortgage for the same debt, without the notice and leave of court required by § 4 of the Act of January 24, 1849 (P. L. 676) will convey no title. *Distinguish*: *Datesman's Appeal*, 127 Pa. St. 348.

5. *Chadbourne v. Stockton Sav., etc., Soc.*, (Cal. 1894) 36 Pac. Rep. 127.

6. *Thomas v. Record*, 47 Me. 500. But an estate forfeited for breach of condition subsequent is not re-vested in the grantor until after entry or action brought by him or his heirs, before such entry or action, therefore the land

is not subject to levy and sale as the grantor's property under a judgment later than the conveyance. *Edmondson v. Leach*, 56 Ga. 461. In *Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 657, it was held that the right of re-entry for the breach of condition in a conveyance of land, pertains only to the grantor and his legal representatives, and is not included among the rights mentioned in Rev. Stat., c. 94, § 1, and cannot be taken on execution.

7. *Phillips v. Rogers*, 12 Met. (Mass.) 405.

8. See the title DOWER, vol. 10, p. 141 *et seq.*

9. See the title CURTESY, vol. 8, pp. 516 and 518.

10. See the title HUSBAND AND WIFE.

11. *Reversion.* — *Burton v. Smith*, 13 Pet. (U. S.) 464; *Wilkinson v. Chew*, 54 Ga. 602; *Wilkins v. Amory*, 14 Mass. 20; *Penniman v. Hollis*, 13 Mass. 429; *Woodgate v. Fleet*, 44 N. Y. 1; *Murrell v. Roberts*, 11 Ired. L. (33 N. Car.) 424, 53 Am. Dec. 419; *Wiley v. Bridgman*, 1 Head (Tenn.) 68. See also the title REMAINDERS AND EXECUTORY INTERESTS.

12. *Vested Remainder.* — *Jones v. Crawley*, 68 Ga. 175; *Shipp v. Gibbs*, 88 Ga. 184; *Wilkinson v. Chew*, 54 Ga. 602; *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135; *Atkins v. Bean*, 14 Mass. 405; *White v. McPheeters*, 75 Mo. 286; *Brown v. Gale*, 5 N. H. 416; *Den v. Hillman*, 7 N. J. L. 180; *Harrison v. Maxwell*, 2 Nott & M. (S. Car.) 347, 10 Am. Dec. 611; *Kelly v. Morgan*, 3 Yerg. (Tenn.) 437; *Wiley v. Bridgman*, 1 Head (Tenn.) 68; *Lockwood v. Nye*, 2 Swan (Tenn.) 516; *Davis v. Goforth*, 1 Lea (Tenn.) 31; *Humphreys v. Humphreys*, 1 Yeates (Pa.) 427. See also the title REMAINDERS AND EXECUTORY INTERESTS.

seem that a contingent remainder is not subject,¹ although this latter rule is questioned.²

f. EQUITABLE INTERESTS. — At common law, merely equitable interests in lands were not liable to be taken and sold on execution. They were considered only as creatures of equity, and were only to be reached by resorting to a court of equity.³ But this rule has been variously modified by the statutes of the different states.⁴

g. TRUST ESTATES — (1) *Interest of Cestui Que Trust.* — The interest of a *cestui que trust* in lands was not, at common law, liable to seizure or sale under execution.⁵ But, by the 10th section of the English Statute of Frauds (29 Car. II., c. 3), trust estates were made liable to execution for the debts of the *cestui que trust*.⁶ Re-enactments of this statute or similar enactments

1. **Contingent Remainder.** — *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135; *Haward v. Peavey*, 128 Ill. 431, 15 Am. St. Rep. 120; *Jackson v. Middleton*, 52 Barb. (N. Y.) 9; *Watson v. Dodd*, 68 N. Car. 528; *Roundtree v. Roundtree*, 26 S. Car. 450; *Penn v. Spencer*, 17 Gratt. (Va.) 85, 91 Am. Dec. 375. See also the title REMAINDERS AND EXECUTORY INTERESTS.

2. See *White v. McPheeters*, 75 Mo. 286; *Humphreys v. Humphreys*, 1 Yeates (Pa.) 427.

3. **Execution Against Equitable Estates Not Allowed at Common Law.** — *Smith v. Cockrell*, 66 Ala. 64; *Wilson v. Beard*, 19 Ala. 631; *National Bank v. Danforth*, 80 Ga. 55; *Russell v. Lewis*, 2 Pick. (Mass.) 511; *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364; *Baird v. Kirtland*, 8 Ohio 24; *Loring v. Melendy*, 11 Ohio 355; *Roads v. Symmes*, 1 Ohio 313, 13 Am. Dec. 621; *Morris v. Way*, 16 Ohio 469; *Kemper v. Campbell*, 44 Ohio St. 210; *Pratt v. Phillips*, 1 Sneed (Tenn.) 543, 60 Am. Dec. 162; *Shute v. Harder*, 1 Yerg. (Tenn.) 3; *M'Nairy v. Eastland*, 10 Yerg. (Tenn.) 310; *Springer v. Smith*, 3 Lea (Tenn.) 738; *Henderson v. Hill*, 9 Lea (Tenn.) 25. See also *Greenway v. Cannon*, 3 Humph. (Tenn.) 177.

In *Pennsylvania* it is the rule, apart from statute, that an equitable estate may be taken and sold under execution. *Drake v. Brown*, 68 Pa. St. 223; *Auwerter v. Mathiot*, 9 S. & R. (Pa.) 397; *Stephens's Appeal*, 8 W. & S. (Pa.) 186; *Humphreys v. Humphreys*, 1 Yeates (Pa.) 427; *Hurst v. Lithgow*, 2 Yeates (Pa.) 25, 1 Am. Dec. 326; *Burd v. Dansdale*, 2 Binn. (Pa.) 91; *German v. Gabbald*, 3 Binn. (Pa.) 302, 5 Am. Dec. 372.

In *Minnesota* a similar rule has been laid down. — *Atwater v. Manchester Sav. Bank*, 45 Minn. 341.

4. **Rule Under Statute as to Executions Against Equitable Estates.** — *Kennedy v. Nunan*, 52 Cal. 326; *Davenport v. Lacon*, 17 Conn. 278; *State Bank v. Macy*, 4 Ind. 362; *Hutchins v. Hanna*, 8 Ind. 533; *Pennington v. Clifton*, 11 Ind. 162; *Harrison v. Kramer*, 3 Iowa 543; *Crosby v. Elkader Lodge No. 72*, 16 Iowa 399; *Kiser v. Sawyer*, 4 Kan. 503; *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431; *Upham v. Varney*, 15 N. H. 462; *Garro v. Thompson*, 7 Watts (Pa.) 416; *Drake v. Brown*, 68 Pa. St. 223.

Under statute in *Maryland*, an equitable, as well as a legal, interest in land may be taken in execution and sold for debt. *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236; *Miller v. Allison*, 8 Gill & J. (Md.) 35; *Mc-*

Mechen v. Marman, 8 Gill & J. (Md.) 57; *Hopkins v. Stump*, 2 Har. & J. (Md.) 301; *Rowland v. Crawford*, 7 Har. & J. (Md.) 52.

Also under statute in *Missouri*, it has been held that an equitable interest in real estate may be seized and sold on execution. *Hammond v. Johnston*, 93 Mo. 198.

Under statute in *Nebraska*, it has been held that a levy of an ordinary execution upon an equitable interest in real estate, unless the debtor is in possession, will not pass the title of such real estate, as such execution can be levied only on a legal interest. *Dworak v. More*, 25 Neb. 735; *Plattsmouth First Nat. Bank v. Tighe*, 49 Neb. 302.

In *Alabama*, it has been held that the perfect equity which, by statute, is subject to levy and sale under execution at law, is that of a purchaser who has made full payment of the purchase-money, but who has not received a conveyance, and that the statute does not extend to the interest of a purchaser who, having paid the purchase-money, takes a conveyance of the title to his wife. *Smith v. Cockrell*, 66 Ala. 64. See also *Doe v. McKinney*, 5 Ala. 719.

In *Shaw v. Lindsey*, 60 Ala. 344, the court said: "The perfect equity which the statute subjects to levy and sale under execution at law is of one class only — that of a vendee who has paid the purchase-money."

5. **Estate of Cestui Que Trust Not Subject to Execution at Common Law.** — *Russell v. Lewis*, 2 Pick. (Mass.) 508; *Gorham v. Wing*, 10 Mich. 486; *Trask v. Green*, 9 Mich. 358; *Gorham v. Arnold*, 22 Mich. 247; *Hogan v. Jaques*, 19 N. J. Eq. 123, 97 Am. Dec. 644; *Vancleve v. Groves*, 4 N. J. Eq. 330.

In *Russell v. Lewis*, 2 Pick. (Mass.) 511, the court said: "By the 10th section of the English Statute of Frauds (29 Car. II., c. 3), trust estates were made liable to execution for the debts of the *cestui que trust*, but this statute did not extend to the provinces, nor was it ever adopted in this state."

In *Pennsylvania*, where they have no court of chancery, it has been held that, apart from statute, a trust estate may be seized and sold under execution. *Drake v. Brown*, 68 Pa. St. 223; *Auwerter v. Mathiot*, 9 S. & R. (Pa.) 397.

And in *Minnesota*, a similar rule prevails. *Atwater v. Manchester Sav. Bank*, 45 Minn. 341.

6. **Trust Estates Subject to Execution by English Statute of Frauds.** — *King v. Ballett*, 2 Vern. 248; *Russell v. Lewis*, 2 Pick. (Mass.) 508.

have been made in many of the United States.¹ Under most of the statutes, the rule is laid down that, where the legal title is vested in the trustee under a passive, simple or dry trust, with no duty except to convey to the person ultimately entitled, the interest of the *cestui que trust* is subject to seizure and sale under execution. But where the land is held by the trustee under an active trust, requiring the continuance of the legal title in him to enable him to perform his duties, the equitable estate is not subject to execution.²

Beneficial Interest under Resulting Trust. — Under the statutes in some of these states, it is held that the rule subjecting the interest of *cestuis que trust* to execution applies in case of resulting trusts.³ But in other jurisdictions the statutes have been held not to extend to this class of trusts.⁴

Trust of Term for Years. — Under this statute it has been held that the trust of an inheritance is made assets at law, but the trust of a term is not. *King v. Ballett*, 2 Vern. 248.

Execution Against One of Several Cestuis Que Trust. — It has been held also that an execution will not issue against a *cestui que trust*, where the sole equitable estate is not in him at the time of the execution. *Harris v. Pugh*, 4 Bing. 335, 13 E. C. L. 459; *Doe v. Greenhill*, 4 B. & Ald. 690, 6 E. C. L. 656. In this case the court said: "The words of the statute are, 'seized or possessed in trust for him against whom execution is sued like as the sheriff might and ought to do if that person were seized.' This statute made a change in the common law, and up to a certain extent, at least, made a trust the subject of inquiry and cognizance in a legal proceeding. We think the trust that is to be thus treated must be a clear and simple trust for the benefit of the debtor, the object of the statute appearing to us to be merely to remove the technical objection arising from the interest in land being legally vested in another person, where it is so vested for the benefit of the debtor."

1. Trust Estates Subject to Execution Under Statute in United States — *Arkansas*. — *Pettit v. Johnson*, 15 Ark. 55; *Biscoe v. Royston*, 18 Ark. 508; *Pope v. Boyd*, 22 Ark. 535.

California. — *Kennedy v. Nunan*, 52 Cal. 326.

Connecticut. — *Davenport v. Lacon*, 17 Conn. 278.

Delaware. — *Flanagin v. Daws*, 2 Houst. (Del.) 476; *Doe v. Lank*, 4 Houst. (Del.) 648.

Georgia. — *Pitts v. McWhorter*, 3 Ga. 5, 46 Am. Dec. 405.

Illinois. — *Thomas v. Eckard*, 88 Ill. 593; *Potter v. Couch*, 141 U. S. 319, *construing* Illinois statute.

Indiana. — *State Bank v. Macy*, 4 Ind. 362.

Kentucky. — *Allen v. Sanders*, 2 Bibb (Ky.) 94; *Eastland v. Jordan*, 3 Bibb (Ky.) 186; *Tyree v. Williams*, 3 Bibb (Ky.) 305; *Jones v. Langhorne*, 3 Bibb (Ky.) 453; *January v. Bradford*, 4 Bibb (Ky.) 566; *Ormsby v. Tarascon*, 3 Litt. (Ky.) 412.

Mississippi. — *Boarman v. Catlett*, 13 Smed. & M. (Miss.) 149; *Hopkins v. Carey*, 23 Miss. 54; *Presley v. Rodgers*, 24 Miss. 520.

Missouri. — *Broadwell v. Yantis*, 10 Mo. 403; *Brant v. Robertson*, 16 Mo. 129; *Anthony v. Rogers*, 17 Mo. 294; *McIlvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295; *Morgan v. Bouse*, 53 Mo. 219.

New Hampshire. — *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431; *Upham v. Varney*, 15 N. H. 462.

New York. — *Kellogg v. Wood*, 4 Paige (N. Y.) 578; *Brewster v. Power*, 10 Paige (N. Y.) 562; *Garfield v. Hatmaker*, 15 N. Y. 475. See also *Jackson v. Bateman*, 2 Wend. (N. Y.) 570; *Lynch v. Utica Ins. Co.*, 18 Wend. (N. Y.) 237; *Guthrie v. Gardner*, 19 Wend. (N. Y.) 414; *Bogert v. Perry*, 17 Johns. (N. Y.) 352, 8 Am. Dec. 411.

North Carolina. — *Moore v. M'Duffy*, 3 Hawks (10 N. Car.) 578; *Brown v. Graves*, 4 Hawks (11 N. Car.) 342; *Melton v. Davidson*, 6 Ired. Eq. (41 N. Car.) 194; *Love v. Smathers*, 82 N. Car. 369.

South Carolina. — *Bristow v. McCall*, 16 S. Car. 545.

Tennessee. — *Henderson v. Hill*, 9 Lea (Tenn.) 25; *Shute v. Harder*, 1 Yerg. (Tenn.) 4. See also *Smitheal v. Gray*, 1 Humph. (Tenn.) 492; *Bunch v. Hardy*, 3 Lea (Tenn.) 543.

Virginia. — *Claytor v. Anthony*, 6 Rand. (Va.) 285.

Washington. — *Calhoun v. Leary*, 6 Wash. 17.

2. Distinction Between Active and Passive Trusts. — *Doe v. Greenhill*, 4 B. & Ald. 690, 6 E. C. L. 656; *Potter v. Couch*, 141 U. S. 319, *construing* statute in *Illinois*; *Pettit v. Johnson*, 15 Ark. 55; *Biscoe v. Royston*, 18 Ark. 508; *Pope v. Boyd*, 22 Ark. 538; *Doe v. Lank*, 4 Houst. (Del.) 648; *Pitts v. McWhorter*, 3 Ga. 5, 46 Am. Dec. 405; *Thomas v. Eckard*, 88 Ill. 593; *Presley v. Rodgers*, 24 Miss. 520; *Garfield v. Hatmaker*, 15 N. Y. 475; *Tally v. Reed*, 72 N. Car. 336; *Love v. Smathers*, 82 N. Car. 369; *Bristow v. McCall*, 16 S. Car. 545; *Shute v. Harder*, 1 Yerg. (Tenn.) 4.

3. Statutes Allowing Execution Against Beneficial Interest under Resulting Trust. — *Tevis v. Doe*, 3 Ind. 129; *Bobbs v. Woodward*, 50 Mo. 95; *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431. See also *Low v. Marco*, 53 Me. 45; *Thomas v. Walker*, 6 Humph. (Tenn.) 93.

4. Statutes Not Allowing Execution Against Beneficial Interest under Resulting Trust. — *Mitchell v. Robertson*, 15 Ala. 412; *Wilson v. Beard*, 19 Ala. 629; *Maynard v. Hoskins*, 9 Mich. 485; *Garfield v. Hatmaker*, 15 N. Y. 475; *Gowing v. Rich*, 1 Ired. L. (23 N. Car.) 553; *Gentry v. Harper*, 2 Jones Eq. (55 N. Car.) 177; *Jimmerson v. Duncan*, 3 Jones L. (48 N. Car.) 537; *Harrison v. Hollis*, 2 Nutt & M. (S. Car.) 578; *Bauskett v. Holsonback*, 2 Rich. L. (S. Car.) 624. Compare *Fonte v. Colvin*, 3

(2) *Naked Title of Trustee.* — It is well settled that a trustee who simply holds a legal title to land without having any beneficial interest therein has no such title as is subject to execution for his debts.¹

h. INTERESTS OF HEIR AND DEVISEE. — The interest of one among several heirs of land is liable to levy and sale under execution against him.² And it has been held that the distributive share of one of the heirs in the reversion of land devised to a tenant for life is subject to levy and sale as the property of the heir, though the life estate be not terminated.³

Real Estate to Be Converted into Money. — It has been held that in case of a devise of real estate which by the will is to be converted into money and the money to be distributed among the devisees, the interest of one of the devisees cannot be sold on execution; that the devise must be treated as a devise of money and not of land, and the character of the devise cannot be changed without the concurrence of all the devisees.⁴

Legacy Charged on Land. — Where the intention of the testator was to charge certain legacies upon his real estate, but such intention was not expressed in the will, it was held that until the legacies were decreed to be charged upon the realty there was no interest in the realty in favor of the legatees salable on execution.⁵

Devise — Option to Purchase. — Where a testator devised certain property to his children to be divided into shares, at a certain valuation, with the option to one to purchase the interests of the others, which option was exercised and

Johns. (N. Y.) 216, 3 Am. Dec. 478; *Guthrie v. Gardner*, 19 Wend. (N. Y.) 414; *Wait v. Day*, 4 Den. (N. Y.) 439; *Ontario Bank v. Root*, 3 Paige (N. Y.) 479.

1. Naked Title of Trustee Not Subject to Execution — *Georgia.* — *Scott v. Warren*, 21 Ga. 408.

Illinois. — *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 601.

Indiana. — *Elliott v. Armstrong*, 2 Blackf. (Ind.) 198.

Iowa. — *Thomas v. Kennedy*, 24 Iowa 397, 95 Am. Dec. 740.

Kansas. — *Harrison v. Andrews*, 18 Kan. 535; *Ransom v. Sargent*, 22 Kan. 517; *English v. Law*, 27 Kan. 242.

Maryland. — *Hunt v. Townshend*, 31 Md. 336; *Houston v. Nowland*, 7 Gill & J. (Md.) 480.

Massachusetts. — *Chickering v. Lovejoy*, 13 Mass. 51; *Haynes v. Jones*, 5 Met. (Mass.) 292; *Webster v. Campbell*, 1 Allen (Mass.) 313.

Missouri. — *Morrison v. Herrington*, 120 Mo. 665.

New Jersey. — *Campfield v. Johnson*, 5 N. J. Eq. 245.

New York. — *Mallory v. Clark*, 9 Abb. Pr. (N. Y. Supreme Ct.) 358; *Lounsbury v. Purdy*, 11 Barb. (N. Y.) 490.

Ohio. — *Manley v. Hunt*, 1 Ohio 258.

Pennsylvania. — *Drysdale's Appeal*, 15 Pa. St. 457.

But the rule is different where the trustee has a beneficial interest of his own. *Drysdale's Appeal*, 15 Pa. St. 461.

2. Heirs and Devisees. — *Deamond v. Courtney*, 12 La. Ann. 251; *Noble v. Nettles*, 3 Rob. (La.) 152; *Mayo v. Stroud*, 12 Rob. (La.) 105; *Procter v. Newhall*, 17 Mass. 81; *Black v. Steel*, 1 Bailey L. (S. Car.) 307. See also *Douglass v. Massie*, 16 Ohio 271, 47 Am. Dec. 375; *Hyde v. Barney*, 17 Vt. 280, 44 Am. Dec. 335; *McClellan v. Solomon*, 23 Fla. 437, 11 Am. St. Rep. 381; *Morgan v. Lalanne*, 32 La.

Ann. 1300. Compare *Rabb v. Aiken*, 2 McCord Eq. (S. Car.) 118.

Where the testator directed that the residue of his estate, except a house devised to his wife in addition to her dower, should descend in the manner directed by the law where no will is made, the interest of the widow, whether under the intestate laws or as devisee, is the subject of levy and judicial sale under proceedings against her. *Thomas v. Simpson*, 3 Pa. St. 60.

In *State v. Huxley*, 4 Harr. (Del.) 343, it was held that under the statute of *Delaware* the interest of an heir in intestate lands could not be attached so as to prevent an assignment, and that by assignment in the Orphans' Court all liens created by an heir are removed.

And in *Virginia* it has been held that a sale by the sheriff of the interest of an execution debtor in an estate before it is ascertained, is void; and that the purchaser, if he took possession of the property, would be liable for the rents, profits, etc., and for the value of such as he has sold or otherwise converted to his own use, but would be entitled to be reimbursed for the amount paid by him to the sheriff for the property. *Penn v. Spencer*, 17 Gratt. (Va.) 85, 91 Am. Dec. 375.

3. Wilkinson v. Chew, 54 Ga. 602. See also *Humphreys v. Humphreys*, 1 Yeates (Pa.) 427; *Woodgate v. Fleet*, 44 N. Y. 1. Compare *Clarke v. Harker*, 48 Ga. 596; *Mayo v. Stroud*, 12 Rob. (La.) 105.

4. Baker v. Copenbarger, 15 Ill. 103, 58 Am. Dec. 600. See also *Hess v. Shorb*, 7 Pa. St. 231; *Wilkinson v. Severance*, 80 Iowa 436; *Ricketson v. Merrill*, 148 Mass. 76; *Eneberg v. Carter*, 98 Mo. 647, 41 Am. St. Rep. 664; *Morrow v. Brenizer*, 2 Rawle (Pa.) 195. Compare *Brett v. Williamson*, 12 Lea (Tenn.) 659. See the title CONVERSION AND RECONVERSION, vol. 7, p. 463.

5. Hiscock v. Fulton, (Supreme Ct.) 17 N. Y.

fully complied with before a levy upon the interest so purchased, it was held that the purchaser at the execution sale took no title.¹

i. ESTATE OF COTENANT. — A cotenant's interest in an estate is subject to execution,² and the fact that partition proceedings are pending does not prevent execution.³

j. INTERESTS OF MORTGAGOR AND MORTGAGEE — At Common Law. — A mere equity redemption at common law cannot be sold on execution.⁴

Under Modern Law. — But the common-law rule has not generally been adopted in the *United States*, inasmuch as the interest of the mortgagor has not been confined to a mere equity of redemption, but has included possession, control, power of alienation, encumbering and in general all of the incidents of a legal estate, and the law is therefore now practically uniform that the interest of a mortgagor is subject to execution, whether so provided by statute or in the absence of specific statutory enactment.⁵

Supp. 408. See also *Taylor v. Woodward*, 9 N. J. L. 145.

1. *Bayer v. Walsh*, 166 Pa. St. 38.

2. *Interest of Cotenant — Alabama*. — *Thompson v. Mawhinney*, 17 Ala. 362, 52 Am. Dec. 176.

Georgia. — *Baker v. Shepherd*, 37 Ga. 12.

Michigan. — *Midgley v. Walker*, 101 Mich. 583; *Butler v. Roys*, 25 Mich. 53, 12 Am. Rep. 218.

Missouri. — *Lloyd v. Tracy*, 53 Mo. App. 175.

North Carolina. — *Blevins v. Baker*, 11 Ired. L. (33 N. Car.) 291.

Ohio. — *Treon v. Emerick*, 6 Ohio 391.

Rhode Island. — *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466.

Texas. — *Brown v. Renfro*, 63 Tex. 600; *Aycock v. Kimbrough*, 61 Tex. 543.

Vermont. — *Bigelow v. Topliff*, 25 Vt. 274, 60 Am. Dec. 264; *Galusha v. Sinclair*, 3 Vt. 395.

3. *Brown v. Renfro*, 63 Tex. 600.

4. *Equity of Redemption — Common-law Rule*.

— *Plunket v. Penson*, 2 Atk. 291; *Hill v. Smith*, 2 McLean (U. S.) 446; *Van Ness v. Hyatt*, 13 Pet. (U. S.) 294; *Bernstein v. Humes*, 60 Ala. 582, 31 Am. Rep. 52; *Cantzon v. Dorr*, 27 Miss. 245; *Thornhill v. Gilmer*, 4 Smed. & M. (Miss.) 153; *Wolfe v. Doc*, 13 Smed. & M. (Miss.) 103, 51 Am. Dec. 147; *Allison v. Gregory*, 1 Murph. (5 N. Car.) 333.

In *Combs v. Young*, 4 Yerg. (Tenn.) 218, 26 Am. Dec. 225, the common-law rule is applied under a code provision in a case of an equity of redemption after the death of an ancestor. See the title EQUITY OF REDEMPTION, *ante*, p. 211.

5. *Modern Rule — Alabama*. — *Gassenheimer v. Molton*, 80 Ala. 521; *Kelly v. Longshore*, 78 Ala. 203; *Bernstein v. Humes*, 60 Ala. 582, 31 Am. Rep. 52.

Arkansas. — *State v. Lawson*, 6 Ark. 269.

Connecticut. — *Hobart v. Frisbie*, 5 Conn. 592; *Allyn v. Burbank*, 9 Conn. 152; *Punderston v. Brown*, 1 Day (Conn.) 93, 2 Am. Dec. 53.

Georgia. — *Bell v. McDuffie*, 71 Ga. 264; *Hardec v. McMichael*, 68 Ga. 678; *Harwell v. Fitts*, 20 Ga. 723.

Illinois. — *Finley v. Thayer*, 42 Ill. 350; *Fitch v. Pinkard*, 5 Ill. 70.

Indiana. — In *Heimberger v. Boyd*, 18 Ind. 420, an equity of redemption is held subject

to execution, but it is held as provided in section 436, 2 Revised Statutes 135, that the purchaser cannot go into possession until he has complied with the conditions of the mortgage.

In *Watkins v. Gregory*, 6 Blackf. (Ind.) 113, the rule of the text is maintained whether the mortgagor be in possession or not, but the proviso is added that there be no adverse possession.

Louisiana. — *Frank v. Magee*, (La. 1898) 23 So. Rep. 939.

Maine. — *Crooker v. Frazier*, 52 Me. 405; *Stewart v. Crosby*, 50 Me. 130; *Brown v. Snell*, 46 Me. 490.

Maryland. — *Ford v. Philpot*, 5 Har. & J. (Md.) 312.

Massachusetts. — *Cowles v. Dickinson*, 140 Mass. 373; *Capen v. Doty*, 13 Allen (Mass.) 262; *Livermore v. Boutelle*, 11 Gray (Mass.) 217, 71 Am. Dec. 708; *Johnson v. Stevens*, 7 Cush. (Mass.) 431; *Cushing v. Hurd*, 4 Pick. (Mass.) 253, 16 Am. Dec. 335.

Mississippi. — In *Huntington v. Cotton*, 31 Miss. 253, the rule is stated to be that if a mortgage reserves the right of possession in the mortgagor execution will lie, but if not, the common-law rule applies.

New Hampshire. — *Kimball v. Morrison*, 40 N. H. 117.

New York. — *Trimm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623, 3 Lans. (N. Y.) 509; *Waters v. Stewart*, 1 Cal. Cas. (N. Y.) 47.

Ohio. — *Farmers' Bank v. Commercial Bank*, 10 Ohio 71.

In *Phelps v. Butler*, 2 Ohio 224, it is held that a mortgagor defendant in ejectment brought by a purchaser at execution sale cannot set up an outstanding mortgage given by himself.

Pennsylvania. — *Taylor v. Cornelius*, 60 Pa. St. 187; *Garro v. Thompson*, 7 Watts (Pa.) 416.

Texas. — *Baker v. Clepper*, 26 Tex. 629, 84 Am. Dec. 591.

In *Wootton v. Wheeler*, 22 Tex. 338, it is held that a mortgagor's interest may be sold under execution, although the mortgage covering the property contains a provision for a sale by a trustee upon default.

Vermont. — *Hulett v. Soullard*, 26 Vt. 296; *Collins v. Gibson*, 5 Vt. 243.

Virginia. — *Tiffany v. Kent*, 2 Gratt. (Va.) 231.

See also the title EQUITY OF REDEMPTION, *ante*, p. 211.

Interest of Mortgagee. — Prior to foreclosure a mortgagee has no interest in the mortgaged property which can be sold in execution.¹

K. INTEREST OF PURCHASER AT JUDICIAL OR EXECUTION SALE. — In some states the purchaser of land at an execution or judicial sale is considered to have acquired, before the expiration of the period of redemption, no interest which is liable to execution;² but according to other authorities the interest of such purchaser before the period of redemption has expired may be reached on execution.³

L. RIGHT OF REDEMPTION FROM JUDICIAL OR EXECUTION SALE. — In some cases it is held that where a judgment debtor's interest in lands is sold under a valid levy, under a valid judgment and execution, his right to redeem from such sale is not subject to levy and sale under another execution,⁴ but there are also authorities maintaining the opposite view.⁵

1. Mortgagee's Interest — *Alabama*. — *Morris v. Barker*, 82 Ala. 272.

Arkansas. — *Harman v. May*, 40 Ark. 146; *State v. Lawson*, 6 Ark. 269.

In *Trapnall v. State Bank*, 18 Ark. 53, it is held that the mortgagee's interest is not subject to execution although the conditions of the mortgage may have been forfeited.

Connecticut. — In *Huntington v. Smith*, 4 Conn. 235, it is held that the property of the mortgagee cannot be taken in execution after the expiration of the law day and before foreclosure.

Kentucky. — *Cooper v. Martin*, 1 Dana (Ky.) 23.

In *Buck v. Sanders*, 1 Dana (Ky.) 187, the rule is maintained in a case where both the mortgagor and mortgagee are made defendants, the court holding that in such case the interest of the mortgagee cannot be sold.

Maine. — *Brown v. Bates*, 55 Me. 520, 92 Am. Dec. 613; *Thornton v. Wood*, 42 Me. 282.

In *Randall v. Farnham*, 36 Me. 86, it is held that a levy made within the rule of the text is void.

In *Smith v. People's Bank*, 24 Me. 185, the text is sustained even after entry for the purpose of foreclosure, but before foreclosure has taken place.

Massachusetts. — *Marsh v. Austin*, 1 Allen (Mass.) 235; *Eaton v. Whiting*, 3 Pick. (Mass.) 484.

In *Clark v. Watson*, 141 Mass. 248, the rule is applied in the case of a deed absolute in form, but in fact a mortgage.

In *Blanchard v. Colburn*, 16 Mass. 345, entry by the mortgagee is made a condition precedent to execution against his interest.

New York. — *Morris v. Mowatt*, 2 Paige (N. Y.) 586, 22 Am. Dec. 661; *Jackson v. Willard*, 4 Johns. (N. Y.) 41.

New Hampshire. — *Glass v. Ellison*, 9 N. H. 69.

Pennsylvania. — In *Rickert v. Madeira*, 1 Rawle (Pa.) 325, the rule is applied to both equitable and legal mortgages.

See the title MORTGAGES.

2. Execution Sale — Purchaser's Interest. — *Bowman v. People*, 82 Ill. 246, 25 Am. Rep. 316; *Kidder v. Orcutt*, 40 Me. 589; *Den v. Steelman*, 10 N. J. L. 193; *Gorrell v. Kelsey*, 40 Ohio St. 117. See also the titles JUDICIAL SALES; SHERIFF'S SALES.

3. Page v. Rogers, 31 Cal. 294. See also *Wright v. Douglass*, 2 N. Y. 373; *Whiting v. Butler*, 29 Mich. 122; *Morrison v. Wurtz*, 7

Watts (Pa.) 437; *Slater's Appeal*, 28 Pa. St. 169; *Stephens's Appeal*, 8 W. & S. (Pa.) 186. And see the titles JUDICIAL SALES; SHERIFF'S SALES.

4. Right of Redemption from Execution Sale. — *Hill v. Blackwelder*, 113 Ill. 283; *Kell v. Worden*, 110 Ill. 310. See also *Peebles v. Pate*, 90 N. Car. 348.

See the titles JUDICIAL SALES; SHERIFF'S SALES.

And in *Watson v. Reissig*, 24 Ill. 282, 76 Am. Dec. 746, it was held further that where such right of redemption has been so sold and satisfaction entered, the court should vacate the entry and issue another execution.

5. Herndon v. Pickard, 5 Lea (Tenn.) 702; *Russell v. Fabyan*, 34 N. H. 218. See also *Curtis v. Millard*, 14 Iowa 128, 81 Am. Dec. 460.

In *Bethel v. Smith*, 83 Ky. 84, it was held that where the equity of redemption in land sold under execution has been levied on and sold, neither the execution defendant nor the purchaser of the equity can redeem after the expiration of a year from the date of the first sale; therefore, where, at the expiration of a year, the equity has been levied on, but has not been sold, a court of equity cannot thereafter subject the property because of the inability of the sheriff to sell, the subject of the levy being no longer in existence.

In *Barnes v. Cavanagh*, 53 Iowa 27, the facts were these: The plaintiff was surety upon a bond for stay of execution. The stay having expired, execution was issued, which the plaintiff directed to be levied upon the interest of the judgment defendant in certain land which had been sold under a foreclosure against him, but to which his right of redemption had expired. The sheriff having refused to levy on such property, and proceeding to levy on property of the plaintiff, and it being shown that the interest of the defendant in such land could be sold for the amount of the execution, it was held that the plaintiff was entitled to an injunction restraining the sale of his property until that of his principal had been exhausted.

But in *Hardin v. White*, 63 Iowa 633, it was held that where a judgment creditor causes land to be sold upon execution issued for a part only of his judgment, he cannot afterwards sell the debtor's right to redeem upon another execution issued upon the remainder of his judgment. And it is immaterial that

m. LAND CONTRACTS — INTERESTS OF VENDOR AND VENDEE. — As to whether a vendor who sells land and executes a bond for title to his vendee, receiving a part of the purchase money, has such an interest left in the land sold as to be the subject matter of levy and sale against him, is a question upon which the authorities are by no means harmonious. It would seem that the apparent current of decision is that the interest of a vendor in such case is not subject to sale under execution, although there are many well considered cases to the contrary.¹ That the vendee with bond for title has an interest

the second execution is issued under a decree in another action, where it appears that the debt in both actions is the same, and that the execution plaintiff is entitled to but one satisfaction. The court said: "We do not say that a statutory right of redemption may not be sold upon execution. It has been held that it may be. *Barnes v. Cavanagh*, 53 Iowa 27. But the judgment under which it was held that it might be sold was not a part of the judgment under which the first sale was made, nor so embraced in the same decree (as in the case at bar) that one execution could and should have been issued for the whole."

1. Vendor and Vendee — Colorado. — A vendor who enters into a subsequent contract with his vendee, whereby the trust deed given to secure instalments of purchase money is released, a lien merely being reserved, has only a chose in action, and no interest in the land that can be subjected to execution sale. *Fallon v. Worthington*, 13 Colo. 559, 16 Am. St. Rep. 231.

Georgia. — Land held under bond for title is not subject to levy and sale as the property of the holder unless some of the purchase price has been paid, and the payment of interest on the purchase money notes is not payment on the purchase price. *McEntire v. Berry*, 85 Ga. 474. See also *Green v. Hill*, 101 Ga. 258; *Bradwell v. Bainbridge Bank*, (Ga. 1898) 29 S. E. Rep. 756; *Goldman v. Dent*, 102 Ga. 9.

But land held under bond for title and partially paid for by the purchaser is subject to levy and sale as his property. And rescission by vendor and vendee after a judgment against the latter, but before levy, will not defeat the lien of the judgment. *Stewart v. Berry*, 84 Ga. 177.

Where land was sold, a part of the purchase money paid, a bond for title given, and the note of the purchaser held for the balance, the title remaining in the vendor was subject to levy and sale under a *feri facias* against him. The purchaser would obtain only such interest as the vendor retained, and be subrogated to his rights. *Hardee v. McMichael*, 68 Ga. 678.

In *Neal v. Murphey*, 60 Ga. 388, it was held that where the vendor sells land and gives bond for title, and the notes given for the purchase money are transferred without indorsement or guaranty, the vendor has no such interest left in the land sold to which a lien of a judgment rendered after the sale would attach.

In *Leitch v. May*, 98 Ga. 714, the court said: "When land is sold, and a bond for title given by the vendor, and a promissory note of the purchaser is held by him for an unpaid balance of the purchase money, the title remaining in the vendor is subject to levy and

sale under an execution against him; but the purchaser at the sale under the execution would obtain only such interest as the vendor retained, and be subrogated to his rights. He would succeed only to the right to call for the purchase money due him at the time the lien attached. *Hardee v. McMichael*, 68 Ga. 678, and cases cited; *Parrott v. Baker*, 82 Ga. 368." See also *Ramspeck v. Healey*, 102 Ga. 583.

Kentucky. — In *Cooper v. Arnett*, 95 Ky. 603, the vendee paid part of the purchase price and received a bond for title, but before he had paid the balance and received a deed the land was levied upon by virtue of an execution against his vendor. It was held that the levy created no lien on the land.

Michigan. — A levy upon the interests of the owner who was under contract to convey upon future payments would take the legal title in full and a beneficiary interest subject to the liability of conveying on complete performance by the vendee. *Doak v. Runyan*, 33 Mich. 75. See also *Corey v. Smalley*, 106 Mich. 257.

Mississippi. — In *Money v. Dorsey*, 7 Smed. & M. (Miss.) 15, it was said: "If any portion of the purchase money be paid before the judgment, the land can no longer be the subject of execution sale, as the property of the vendor, whatever might be the rule, upon a naked contract of sale, without any payment." *Approved* in *Taylor v. Lowenstein*, 50 Miss. 278, wherein it was said: "If the entire purchase money has been paid, then the vendee becomes in equity the complete owner of the estate."

In *Chisholm v. Andrews*, 57 Miss. 636, it was held that the interest in land which the vendor by title bond has, where part of the purchase money has been paid by the vendee in possession, is not salable under execution, and the purchaser from the sheriff cannot by bill in equity ascertain and subject such interest. In this case the court said: "It seems to have been intimated in *Bell v. Flaherty*, 35 Miss. 694, that the execution purchaser under such circumstances, while he did not acquire the legal title to the land, might, by bill in equity, reach and subject the money due by the vendee. The decisions of this court lend no sanction to this view."

Missouri. — Where a vendor sells land by a contract in writing, and receives a part of the purchase money, and the vendee takes and holds exclusive possession, there is no beneficial interest remaining in the vendor except the incidental right to a lien for the balance of the purchase money. Accordingly a sale under an execution against the vendor, issued and levied thereafter under a judgment more than three years old when the vendor acquired

which may be reached by execution is well settled,¹ and the same is true where the vendee has entered under a contract of sale and paid part of the purchase money and made improvements.²

II. LANDS IN ADVERSE POSSESSION. — By the early English common law lands were not subject to sale under writs of execution at the suit of private citizens.³ And the early statutes of *Kentucky* were construed as not subjecting to execution the interest of the debtor in lands in the adverse possession of another.⁴ Later decisions in that jurisdiction have, however, established the contrary rule,⁵ and now it may be stated as a rule that obtains generally that lands so held are subject to execution.⁶

the property, carries no title when the purchaser at the sheriff's sale has both actual and constructive notice of the deed of the vendee. *Jones v. Howard*, 142 Mo. 117. In this case it was said: "We do not find that the precise question here involved has ever been decided by this court. It has been held, however, that when parties have bound themselves by agreement to convey land and to pay for it, equity recognized an interest in the land as already in the purchaser, which is subject to sale under execution, 'upon the principle that the vendor is to be regarded as seized in equity to the use of the purchaser.' But it is said, 'If no money has been paid, and if the person who may become the purchaser is not actually under any obligation to pay, then there is no seizin in the seller, even in equity, to the purchaser's use, and there is no interest in the land in him, which is liable to sale or execution.' *Brant v. Robertson*, 16 Mo. 149; *Quell v. Hanlin*, 81 Mo. 441; *Block v. Morrison*, 112 Mo. 351."

In *Black v. Long*, 60 Mo. 182, it was held that in case the vendee has paid the purchase money, is put in possession of the land, and has made valuable improvements thereon, the vendor retains no interest in the land which is subject to sale under execution. This decision was approved in *Parks v. People's Bank*, 97 Mo. 133. See also *Davis v. Owenby*, 14 Mo. 170, 55 Am. Dec. 105.

In *Anthony v. Rogers*, 17 Mo. 394, the vendee, under a title bond, tendered the amount due and demanded a deed, which was refused. It was held that the vendee acquired an interest which was subject to sale under execution upon a judgment rendered against him, subsequent to the tender, and that the purchaser was entitled to a conveyance from the vendor upon payment of the purchase price.

North Carolina. — A vendor, who has sold land and given a bond to make title when the price is paid, and who has been paid a part of such price, has no interest in the land which can be sold under execution. *Folger v. Bowles*, 72 N. Car. 603; *Tally v. Reed*, 72 N. Car. 336.

Pennsylvania. — In *Patterson's Estate*, 25 Pa. St. 71, the court said: "After a man has contracted to sell his land, he holds a very different title to it from that which he held before; for, after that, he holds the legal title in trust to convey it to the purchaser on his performance of the contract. Judgments obtained after such a contract are therefore liens upon a different estate in the land from those obtained before it; and a sale on them cannot have the same effect as a sale on the prior

judgments, else they would sweep away the title created by the contract. A sale on them affects only the estate left in the debtor after his contract of sale, which may be very small, depending upon the amount of the purchase money remaining unpaid — it conveys a right to receive this so far as the judgment debtor himself could demand it. But he could not demand it without paying off the liens that were prior to the contract of sale, or suffering the purchaser thus to apply so much of it as might be necessary. It is very plain, therefore, that a sale on the judgments subsequent to the contract of sale cannot discharge the lien of those that were prior, and these are not entitled to share in the distribution of the proceeds."

South Carolina. — Land in possession of the vendee, under a valid contract of purchase, cannot be sold as the property of the vendor under a judgment which did not obtain a lien until after the contract was made. *Adickes v. Lowry*, 15 S. Car. 128, 12 S. Car. 97. See also *Massey v. M'Ilwain*, 2 Hill Eq. (S. Car.) 421.

Texas. — In *Catlin v. Bennett*, 47 Tex. 165, it was held that the vendor who has executed his bond for title, on payment of the purchase money, has placed the purchaser in possession, and has transferred or collected the notes for the purchase money, retains the legal title simply as trustee, and has no interest in the land subject to execution. His creditor, who attaches land in this condition, in which the debtor has no interest in fact, acquires no lien, unless it be by virtue of the registration laws.

See the title **VENDOR AND PURCHASER**.

1. In *Block v. Morrison*, 112 Mo. 351, it is said: "The principle of law is well settled that, where there has been a contract for the sale of land, the vendor becomes the trustee of the land for the vendee, and that the vendee has an interest in the land which may be sold under execution. *Papin v. Massey*, 27 Mo. 445; *Hart v. Logan*, 49 Mo. 47; *Morgan v. Bouse*, 53 Mo. 219."

2. *Reynolds v. Fleming*, 43 Minn. 513. See also the cases in the two preceding notes.

3. **Lands Held in Adverse Possession.** — See *supra*, this section, *In General*.

4. *M'Connell v. Brown*, 5 T. B. Mon. (Ky.) 478; *Shepard v. McIntire*, 4 J. J. Marsh. (Ky.) 110; *Griffith v. Huston*, 7 J. J. Marsh. (Ky.) 385.

5. *Blanchard v. Taylor*, 7 B. Mon. (Ky.) 645; *Frizzle v. Veach*, 1 Dana (Ky.) 211; *Ring v. Gray*, 6 B. Mon. (Ky.) 368.

6. *Jarrett v. Tomlinson*, 3 W. & S. (Pa.) 114; *Woodman v. Bodfish*, 25 Me. 317.

o. MERE POSSESSION WITHOUT TITLE OR MERE CLAIM WITHOUT POSSESSION. — The weight of authority favors the view that the naked possession of land is such an interest as may be the subject of execution;¹ but there are decisions to the contrary.² It has been held that a naked claim to be the owner of land, unaccompanied by possession, does not constitute a right that can be sold on execution.³

p. PROPERTY CONVEYED IN FRAUD OF CREDITORS. — The statutes generally render void conveyances made with intent to hinder, delay or defraud creditors. And creditors may sell under execution the property so conveyed, just as if there had been no conveyance.⁴ They may also come into equity to have such conveyances set aside.⁵

q. INTERESTS IN PUBLIC LANDS — *Time Purchase.* — The interest which a person has under a time purchase from the state, while the contract remains in force, is property subject to sale on execution.⁶

Payment of Grant Fees. — Where lands have been purchased from the state and the price paid, and the purchaser entitled to a conveyance upon payment of the grant fees, both he and his vendee have an estate subject to execution.⁷

Improvements or Rights of Pre-emption upon the public lands which the parties cultivate or on which they reside, at the time of the issuance of execution

In *State v. Judge*, 48 La. Ann. 667, it was held that the defendant in execution would not be permitted to interpose the adverse possession to defeat the seizure.

The doctrine of adverse possession does not apply to judicial sales. *High v. Nelms*, 14 Ala. 350, 48 Am. Dec. 103; *McGill v. Doe*, 9 Ind. 306; *Vannoy v. Blessing*, 36 Ind. 349. See also the title CHAMPERTY AND MAINTENANCE, vol. 5, p. 815.

1. *Mere Possession — Alabama.* — In *McCaskle v. Amarine*, 12 Ala. 17, the rule of the text is not fully supported; it is, however, held that possession under a claim of right is *prima facie* an interest subject to execution.

Illinois. — *Thomas v. Bowman*, 30 Ill. 84, 29 Ill. 426.

Nebraska. — *Rosenfield v. Chada*, 12 Neb. 25.

New York. — *Talbot v. Chamberlin*, 3 Paige (N. Y.) 219; *Kellogg v. Kellogg*, 6 Barb. (N. Y.) 116; *Jackson v. Town*, 4 Cow. (N. Y.) 599, 15 Am. Dec. 405; *Dickinson v. Smith*, 25 Barb. (N. Y.) 102.

Ohio. — *Scott v. Douglass*, 7 Ohio (pt. i.) 228.

Pennsylvania. — *Scheetz v. Fitzwater*, 5 Pa. St. 126.

Wisconsin. — *Swift v. Agnes*, 33 Wis. 228; *Bunker v. Rand*, 19 Wis. 254, 88 Am. Dec. 684.

2. *Crutsinger v. Catron*, 10 Humph. (Tenn.) 24. See also *Daugherty v. Marcum*, 3 Head (Tenn.) 323; *Harvey v. West*, 87 Ga. 553. Compare *Hoge v. Hollister*, 2 Tenn. Ch. 606; *Marr v. Gilliam*, 1 Coldw. (Tenn.) 488.

3. *Hagaman v. Jackson*, 1 Wend. (N. Y.) 502.

4. *Property Conveyed in Fraud of Creditors — Alabama.* — *High v. Nelms*, 14 Ala. 350.

Connecticut. — *Staples v. Bradley*, 23 Conn. 167.

Illinois. — *Willard v. Masterson*, 160 Ill. 443; *Gay v. Gay*, 123 Ill. 221.

Indiana. — *Holman v. Elliott*, 65 Ind. 78; *Johnston v. Field*, 62 Ind. 377; *Pennington v. Clifton*, 11 Ind. 162.

Kentucky. — *Scott v. Scott*, 85 Ky. 385; *Howard v. Duke*, (Ky. 1898) 45 S. W. Rep. 69.

Louisiana. — *Payne v. Graham*, 23 La. Ann. 771; *Collins v. Shaffer*, 20 La. Ann. 41.

Maine. — *Hall v. Sands*, 52 Me. 355.

Maryland. — *Foley v. Bitter*, 34 Md. 646; *Duvall v. Water*, 1 Bland (Md.) 569, 18 Am. Dec. 350.

Massachusetts. — *Pratt v. Wheeler*, 6 Gray (Mass.) 520.

Missouri. — *Woodard v. Mastin*, 106 Mo. 324; *Ryland v. Callison*, 54 Mo. 513; *Street v. Goss*, 62 Mo. 226; *Allen v. Berry*, 50 Mo. 90; *Dunnica v. Coy*, 24 Mo. 167, 69 Am. Dec. 420.

Nebraska. — *Hawthorne v. State*, 45 Neb. 871.

New Hampshire. — *Russell v. Dyer*, 33 N. H. 186.

New York. — *Matter of Holmes*, 131 N. Y. 80, affirming *Matter of Holmes*, 59 Hun (N. Y.) 369; *Manhattan Co. v. Evertson*, 6 Paige (N. Y.) 457.

North Carolina. — *Everett v. Raby*, 104 N. Car. 479, 17 Am. St. Rep. 685.

Ohio. — *Fowler v. Trebein*, 16 Ohio St. 493, 91 Am. Dec. 95.

Pennsylvania. — *Hoffman's Appeal*, 44 Pa. St. 95; *Jacoby's Appeal*, 67 Pa. St. 434; *Johnson v. Harvey*, 2 P. & W. (Pa.) 82.

Tennessee. — *Smith v. Gray*, 1 Humph. (Tenn.) 492.

Wisconsin. — *Eastman v. Schettler*, 13 Wis. 325.

See the title FRAUDULENT SALES AND CONVEYANCES.

5. *Equity Proceedings.* — *Payne v. Graham*, 23 La. Ann. 771, *Collins v. Shaffer*, 20 La. Ann. 41; *Duvall v. Waters*, 1 Bland (Md.) 569, 18 Am. Dec. 350; *Hawthorne v. State*, 45 Neb. 871; *Matter of Holmes*, 131 N. Y. 80; *Everett v. Raby*, 104 N. Car. 479, 17 Am. St. Rep. 685; *Eastman v. Schettler*, 13 Wis. 325. See the title FRAUDULENT SALES AND CONVEYANCES.

6. *Public Lands.* — *McWilliams v. Withington*, 7 Fed. Rep. 326. See also the title STATE LANDS.

7. *Wilson v. Deweese*, 114 N. Car. 653. See also *Goodlet v. Smithson*, 5 Port. (Ala.) 245. And see the title STATE LANDS.

against them, are not subject to execution.¹

Mining Claims. — The interest of a miner in his mining claims upon public lands is property and may be sold on execution.²

Survey Not Patented. — It has been held that the interest of a person in possession claiming title derived with warranty from an entry and survey not patented is an estate that may be sold on execution.³

A Full Treatment of interests in public lands that may or may not be reached by execution is reserved for subsequent titles in this work.⁴

r. CHURCH PROPERTY. — In *Pennsylvania* it is held that a church and the land upon which it stands are private property and subject to levy and sale in the same manner as other private property,⁵ but the contrary has been held in *Vermont*.⁶

IV. PROPERTY EXEMPT FROM EXECUTION — 1. Under Homestead and Exemption Laws. — Elsewhere in this work will be found a full discussion as to property which, under homestead and exemption laws, is not subject to execution.⁷

2. Property in Custodia Legis — a. IN GENERAL. — It is well settled that property in the custody of the law is not subject to execution.⁸

b. ATTACHED PROPERTY. — Property which is held under attachment process cannot be taken in execution.⁹

c. PROPERTY HELD UNDER PRIOR EXECUTION. — As will be seen elsewhere in this title, personal property levied upon under execution is not subject to levy under execution by another officer holding process from the same or another court, but a second execution may be levied by the same officer who levied the first.¹⁰

d. SURPLUS AFTER SATISFYING EXECUTION. — It has been decided in a number of cases that when, after satisfying the execution, there remains in the hands of the officer a surplus belonging to the debtor, such surplus is not in the custody of the law, and it would seem, therefore, that it is subject to execution.¹¹

1. *Doe v. McKinney*, 5 Ala. 730; *Healy v. Conner*, 40 Ark. 352; *Moore v. Besse*, 43 Cal. 511; *Garlick v. Robinson*, 12 Ga. 340; *Cravens v. Moore*, 61 Mo. 178; *Hatfield v. Wallace*, 7 Mo. 112; *Brown v. Massey*, 3 Humph. (Tenn.) 470; *Scott v. Price*, 2 Head (Tenn.) 538. And see *Rhea v. Hughes*, 1 Ala. 219, 34 Am. Dec. 772. See also the titles PUBLIC LANDS; STATE LANDS.

2. *McKeon v. Bisbee*, 9 Cal. 137, 70 Am. Dec. 642; *State v. Moore*, 12 Cal. 56. See also *Hughes v. Devlin*, 23 Cal. 502. And see the title MINES AND MINING CLAIMS.

3. *Jackson v. Williams*, 10 Ohio 70.

4. See the titles PUBLIC LANDS; STATE LANDS.

5. *Presbyterian Cong. v. Colt*, 2 Grant's Cas. (Pa.) 75.

6. *Bigelow v. Congregational Soc.*, 11 Vt. 283. See also *Revere v. Gannett*, 1 Pick. (Mass.) 169, wherein it is held that the pulpit of a church could not be sold when the pews had been sold to individuals, such pulpit being considered an incident of the pews. And *Arbuckle v. Cowtan*, 3 B. & P. 321, wherein it is held that the profits of a benefice do not pass to an assignee under an insolvent act though included in the schedule. See also the title CEMETERIES, vol. 5, p. 781; PEWS; RELIGIOUS SOCIETIES.

7. See the titles EXEMPTIONS (FROM EXECUTION); HOMESTEAD.

8. **Cannot Levy upon Property in Custody of the Law.** — *Kewen v. Johnson*, 11 Cal. 260; *Brady v. Johnson*, 75 Md. 445. And see the authori-

ties cited *infra*, this section. See also the title ATTACHMENT, vol. 3, p. 212.

Garnishment of Property in Hands of Mortgagee. — When personal property in the possession of a mortgagee has been garnished, such property is in the custody of the law, and cannot be levied upon. *Grand Island Banking Co. v. Costello*, 45 Neb. 119.

9. **Property Held by Attachment.** — *Hackley v. Swigert*, 5 B. Mon. (Ky.) 86, 41 Am. Dec. 256.

10. *Winegardner v. Hafer*, 15 Pa. St. 144. See also *West River Bank v. Gorham*, 38 Vt. 649. And see *infra*, this title, *Levy — When There Are Several Executions*.

Conflicting Process from State and Federal Courts. — The possession of goods held under a writ issued out of a United States court cannot be disturbed by an officer armed with a writ emanating from a state court, and *vice versa*. *Covell v. Heyman*, 111 U. S. 176 (*distinguishing* *Buck v. Colbath*, 3 Wall. (U. S.) 334); *Hagan v. Lucas*, 10 Pet. (U. S.) 400; *Krippendorf v. Hyde*, 110 U. S. 276; *Buck v. Colbath*, 3 Wall. (U. S.) 334 (*affirming* 7 Minn. 310); *Taylor v. Carryl*, 20 How. (U. S.) 583; *U. S. v. Dantzler*, 3 Woods (U. S.) 719; *Beckett v. Harford County*, 21 Fed. Rep. 32; *Keating v. Spink*, 3 Ohio St. 105, 62 Am. Dec. 214.

11. **Surplus May Be Levied Upon.** — *King v. Moore*, 6 Ala. 160, 41 Am. Dec. 44; *Lightner v. Steinagel*, 33 Ill. 513; *Pierce v. Carleton*, 12 Ill. 358, 54 Am. Dec. 405; *Dickison v. Pinckney*, 2 Rich. Eq. (S. Car.) 407; *Tucker v. Atkinson*, 1 Humph. (Tenn.) 300, 34 Am. Dec. 650; *Walton v. Compton*, 28 Tex. 569. See

e. MONEY COLLECTED BY EXECUTION. — According to the great weight of authority, money in the hands of an officer collected by him by virtue of an execution is in the custody of the law, and therefore cannot be taken under an execution against the person for whom it was collected.¹

f. PROPERTY IN HANDS OF ASSIGNEE. — In construing statutes regulating assignments for the benefit of creditors, it has been decided in several jurisdictions that property which is in the possession of the assignee of an insolvent creditor, under a valid assignment, is *in custodia legis*, and it would seem, therefore, that in these jurisdictions such property is not subject to execution.²

g. PROPERTY IN HANDS OF A GUARDIAN. — It seems that when property is in the hands of a guardian appointed by the court it is *in custodia legis* and not subject to execution.³

h. PROPERTY IN HANDS OF RECEIVER. — It has been frequently decided that property in the possession of a receiver is not subject to execution,⁴

also *Jaquett v. Palmer*, 2 Harr. (Del.) 144; *Payne v. Billingham*, 10 Iowa 360. Compare *Fieldhouse v. Croft*, 4 East 510; *Stevenson v. Douglass*, 2 New Bruns. 281.

1. Money Collected by Execution Exempt — England. — *Padfield v. Brine*, 3 Brod. & B. 294, 7 E. C. L. 443. See also *Collingridge v. Paxton*, 11 C. B. 683, 73 E. C. L. 683.

United States. — *Turner v. Fendall*, 1 Cranch (U. S.) 117; *Reno v. Wilson*, Hempst. (U. S.) 91.

Connecticut. — *Willes v. Pitkin*, 1 Root (Conn.) 47.

Illinois. — *Campbell v. Hasbrook*, 24 Ill. 244; *Reddick v. Smith*, 4 Ill. 452.

Indiana. — *Winton v. State*, 4 Ind. 321.

Kentucky. — *First v. Miller*, 4 Bibb (Ky.) 311.

Maine. — *Hardy v. Tilton*, 68 Me. 195, 28 Am. Rep. 34.

Maryland. — *Harding v. Stevenson*, 6 Har. & J. (Md.) 264.

Massachusetts. — *Thompson v. Brown*, 17 Pick. (Mass.) 462; *Wilder v. Bailey*, 3 Mass. 289; *Pollard v. Ross*, 5 Mass. 319.

Minnesota. — *Davis v. Seymour*, 16 Minn. 210.

Missouri. — *State v. Taylor*, 56 Mo. 492; *Ex p. Fearle*, 13 Mo. 468; *Marvin v. Hawley*, 9 Mo. 382, 43 Am. Dec. 547.

New York. — *Baker v. Kenworthy*, 41 N. Y. 215; *Muscott v. Woolworth*, 14 How. Pr. (N. Y. Supreme Ct.) 477; *Dubois v. Dubois*, 6 Cow. (N. Y.) 494; *Williams v. Rogers*, 5 Johns. (N. Y.) 164.

North Carolina. — *State v. Lea*, 8 Ired L. (30 N. Car.) 94; *Overton v. Hill*, 1 Murph. (5 N. Car.) 47.

Ohio. — *Dawson v. Holcomb*, 1 Ohio 275.

Vermont. — *Prentiss v. Bliss*, 4 Vt. 513, 24 Am. Dec. 631.

Wisconsin. — *Hill v. Lacrosse*, etc. R. Co., 14 Wis. 291, 80 Am. Dec. 783.

Compare *Dolby v. Mullins*, 3 Humph. (Tenn.) 437, 39 Am. Dec. 180; *Hamilton v. Ward*, 4 Tex. 356.

Order of Court to Pay Over Money. — Where the sheriff has collected money on an execution for a plaintiff, the court can order it to be paid over on an execution in the sheriff's hands against the plaintiff. *Summers v. Caldwell*, 2 Nott & M. (S. Car.) 341. See also *Turner v. Fendall*, 1 Cranch (U. S.) 117.

2. No Execution Against Assignee. — *Wilson v. Aaron*, 132 Ill. 238; *Hamilton Brown Shoe Co. v. Mercer*, 84 Iowa 537, 35 Am. St. Rep. 331; *Lord v. Meachem*, 32 Minn. 66; *St. Paul Second Nat. Bank v. Schranck*, 43 Minn. 38; *Hamilton Brown Shoe Co. v. Adams*, 5 Wash. 333. See also *Lowe v. Matson*, 140 Ill. 108; *Colby v. Coates*, 6 Cush. (Mass.) 558; *Calumet Paper Co. v. Haskell Show Printing Co.*, 144 Mo. 331; *Sabin v. Adams*, 5 Wash. 768.

As to property in the hands of an assignee under an invalid assignment, see the title FRAUDULENT SALES AND CONVEYANCES.

Interest of Assignor Not to Be Taken Under Execution. — In *Wilkes v. Ferris*, 5 Johns. (N. Y.) 336, 4 Am. Dec. 364, it was held that the resulting trust, or residuary interest, remaining to the assignor after the purposes of an assignment for the payment of debts are satisfied, is not such an interest as can be taken and sold on execution.

3. No Execution Against a Guardian. — See *Gassett v. Grout*, 4 Met. (Mass.) 486; *Godbold v. Bass*, 12 Rich. L. (S. Car.) 202. And see the title GUARDIAN AND WARD.

4. No Execution Against Property in Hands of Receiver. — *England.* — *Russell v. East Anglian R. Co.*, 3 Macn. & G. 104.

United States. — *Wiswall v. Sampson*, 14 How. (U. S.) 53. See also *In re Tyler*, 149 U. S. 181.

California. — *Yuba County v. Adams*, 7 Cal. 35.

Georgia. — *Field v. Jones*, 11 Ga. 413.

Illinois. — *Jackson v. Lahee*, 114 Ill. 287.

Iowa. — *Martin v. Davis*, 21 Iowa 535.

Louisiana. — *Nelson v. Conner*, 6 Rob. (La.) 339.

Maryland. — *Farmers' Bank v. Beaston*, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226.

Massachusetts. — *Columbian Book Co. v. De Golyer*, 115 Mass. 67.

Missouri. — *Bentley v. Shrieve*, 4 Md. Ch. 412.

Nebraska. — *Ackerman v. Ackerman*, 50 Neb. 54.

New York. — *Hoerle v. McIlhargy*, 61 N. Y. Super. Ct. 184; *Gouverneur v. Warner*, 2 Sandf. (N. Y.) 624; *Waring v. Robinson*, 1 Hoffm. Ch. (N. Y.) 524. See also *Wallace v. Wallace*, 21 N. Y. App. Div. 542.

North Carolina. — *Skinner v. Maxwell*, 68 N. Car. 400.

except under leave of court first duly obtained.¹

i. **REPLEVINED PROPERTY.** — Property taken under a writ of replevin from an officer who has seized it on execution remains *in custodia legis* and is not subject to execution.²

j. **PROPERTY TAKEN FROM PRISONER.** — It has been decided that property taken from a person confined in prison, upon either criminal or civil process, is not subject to execution.³

V. FORM AND CONTENTS OF WRIT — In General. — As a general rule, in the absence of statutory requirements, a writ of execution is sufficient if in the form sanctioned by universal usage, and technical objections should be disregarded.⁴

Pennsylvania. — Robinson v. Atlantic, etc., R. Co., 66 Pa. St. 160.

South Dakota. — South Bend Toy Mfg. Co. v. Pierre F. & M. Ins. Co., 4 S. Dak. 173.

Texas. — Edwards v. Norton, 55 Tex. 405; Taylor v. Gillean, 23 Tex. 508.

Sale Void. — It has been decided that a sale under execution without leave of court, while the property sold is in the hands of a receiver, is wholly illegal and void. Wiswall v. Sampson, 14 How. (U. S.) 52; Walling v. Miller, 108 N. Y. 173, 2 Am. St. Rep. 400; Edwards v. Norton, 55 Tex. 405.

Liens Suspended. — When persons have acquired liens upon property by placing their executions in the hands of the sheriff before the appointment of a receiver, and such persons are not made parties to the proceeding in which the receiver is appointed, have no notice of such proceeding and no opportunity of being heard, the appointment of the receiver does not divest such liens, but only suspends them, and, after the property has passed from the receiver's control, the liens may be enforced. *Quere* as to whether the liens of these persons would have been divested by making them parties to the proceeding in which the receiver was appointed. Dann Mfg. Co. v. Parkhurst, 125 Ind. 317.

Judgment Against Person Whose Property Is in Hands of a Receiver Subject to Execution. — In Wheaton v. Spooner, 52 Minn. 417, it was decided that when A obtained a judgment against B, C, a judgment creditor of A, was not prevented from levying upon such judgment of A against B by reason of the appointment of a receiver of the property of B.

Partnership Suits. — It has been said that when a receiver has been appointed on a bill filed by one partner against his copartner, to hold the property of the firm during the litigation between the members thereof, the creditors are not bound to wait until the equities between the partners may be adjusted, but that the assets in such cases are to be treated as still belonging to the firm, and that the creditors may proceed in any way that may lawfully be done to acquire a lien which will doubtless entitle them to priority over less diligent creditors. Jackson v. Lahee, 114 Ill. 287. See also Waring v. Robinson, 1 Hoffm. Ch. (N. Y.) 524.

And in such a case it has been decided that a creditor may attach the property in the hands of the receiver. Adams v. Woods, 8 Cal. 153, 68 Am. Dec. 313, 9 Cal. 24. See also Adams v. Hackett, 7 Cal. 187; Ackerman v.

Ackerman, 50 Neb. 54. And see the title PARTNERSHIP.

1. **Leave of Court Necessary.** — Yuba County v. Adams, 7 Cal. 35; Hoerle v. McIlhargy, 61 N. Y. Super. Ct. 184.

2. **Cannot Levy Upon Replevined Property.** — Hagan v. Lucas, 10 Pet. (U. S.) 400; Rhines v. Phelps, 8 Ill. 455; Pipher v. Fordyce, 88 Ind. 436; Bates County Nat. Bank v. Owen, 79 Mo. 429; Beagle v. Smith, 50 Neb. 446; Oswego First Nat. Bank v. Dunn, 97 N. Y. 149; Acker v. White, 25 Wend. (N. Y.) 614; Tremaine v. Mortimer, 57 N. Y. Super. Ct. 340; Selleck v. Phelps, 11 Wis. 380.

3. **Prisoner's Property Not Subject.** — Dahms v. Sears, 13 Oregon 47. See also *Ex p.* Hurn, 92 Ala. 102, 25 Am. St. Rep. 23; Connolly v. Thurber Whyland Co., 92 Ga. 651; Robinson v. Howard, (Mass.) 7 Cush. 257; Morris v. Pennington, 14 Gray (Mass.) 220, 74 Am. Dec. 675; Hubbard v. Garner, (Mich. 1897) 73 N. W. Rep. 390; Holker v. Hennessey, 141 Mo. 527; Byrne v. Byrne, 89 Wis. 659.

4. **Form and Contents of Writ.** — Field v. Parker, 4 Hun (N. Y.) 342; Harlan v. Harlan, 14 Lea (Tenn.) 107.

Writs Issued by Justices of the Peace will not be held insufficient because of technical defects in form or contents. Great strictness is not required. Gunn v. Benson, 5 Verg. (Tenn.) 221; Governor v. Bailey, 3 Hawks (10 N. Car.) 463.

A Writ Issued Out of Courts of Chancery on a decree for the payment of money should follow the form of writs issued out of the courts of law. Lowndes v. Pinckney, 2 Strobb. Eq. (S. Car.) 44.

The Testatum Clause is not necessary under a statute authorizing executions to issue at the same time to sheriffs of different counties. Butterfield v. Howe, 19 Wend. (N. Y.) 86.

Surplusage. — Unnecessary recitals in a writ will not generally render it invalid, but may be rejected as surplusage. Walls v. Smith, 19 Ga. 8; Jackson v. Sternbergh, 1 Johns. Cas. (N. Y.) 153; Holmes v. Rogers, (Supreme Ct.) 18 N. Y. St. Rep. 652; Simpson v. Simpson, 64 N. Car. 427.

Indorsements on a writ of execution have been held so much a part of the same as to vitiate it. Fuller v. Wells, 42 Kan. 551.

On the other hand, it has been held that they may be looked to for the purpose of curing mere informal defects, Meaux v. Rutgers, Sneed (Ky.) 288; Johnston v. Lynch, 3 Bibb (Ky.) 334; Nichols v. Taylor, 6 T. B. Mon. (Ky.) 325; or for the purpose of identification,

Statutory Requirements as to form and contents should always be complied with, or the writ may be void.¹ On the other hand, if they are substantially complied with, it will be sufficient.²

Particular Requirements. — Questions as to the form and contents of writs of execution issued out of courts of justice are questions of procedure rather than of substantive law, and do not properly fall within the scope of this work.³ A general outline only is given here.

Direction and Command. — The writ should run in the name of the sovereign — that is, of the state, the commonwealth, or the people of the state, according to the practice in the particular jurisdiction;⁴ and it must direct or command the officer to make a levy.⁵

Recitals as to Property. — Ordinarily, in the absence of statutory provision to the contrary, an execution on a judgment at law for the recovery of money should be general and not special, that is, it should issue against the goods and chattels and lands and tenements of the debtor generally, and not undertake to specify particular property to be levied upon.⁶ It is otherwise, if the judgment specifies the particular property out of which it shall be collected,⁷ or if a special execution is required by statute.⁸

McGuire v. Galligan, 53 Mich. 453. But a writ that is void on its face is not cured by an indorsement. *Cooper v. Jacobs*, 82 Ala. 411.

1. Necessity to Comply with Statutory Requirements. — *McMahan v. Colclough*, 2 Ala. 68; *Bales v. Scott*, 26 Ind. 202; *Ensley v. McCorkle*, 74 Ind. 240; *Rollins v. Rich*, 27 Me. 557; *Hayford v. Everett*, 68 Me. 505; *Place v. Riley*, 98 N. Y. 1, 7 Civ. Pro. Rep. (N. Y.) 403. See also *Swift v. Agnes*, 33 Wis. 228. And see the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 388.

2. Substantial Compliance Sufficient. — *Field v. Parker*, 4 Hun (N. Y.) 342; *Park v. Church*, 5 How. Pr. (N. Y. Supreme Ct.) 381. See also *McMahan v. Colclough*, 2 Ala. 68.

3. This subject will be found fully treated under the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 387-433.

4. Direction in Name of State. — *Nixon v. Harrell*, 5 Jones L. (50 N. Car.) 76.

In many of the states this is expressly required, either by the constitution or by statute. See *Reddick v. Cloud*, 7 Ill. 670.

An Irregularity in this respect is amendable, and will not render the writ void. *Hibberd v. Smith*, 50 Cal. 511; *Thompson v. Bickford*, 19 Minn. 17. See also *Carnahan v. Pell*, 4 Colo. 190; *State v. Cassidy*, 4 S. Dak. 58.

Contra. — *Sidwell v. Schumacher*, 99 Ill. 426. See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 389.

5. Command to Levy, etc. — *Gaskill v. Aldrich*, 41 Ind. 338.

But see *Peddle v. Hollinshead*, 9 S. & R. (Pa.) 277, holding that a writ commanding the sheriff to have the money, but not commanding him as it ought to levy, etc., is not bad, because the omission is a mere clerical mistake which the *præcipe* will cure.

The execution need not expressly direct the officer to make a sale, but it is sufficient if it requires him to make the money, etc. *Chamberlain v. Beck*, 68 Ga. 346; *Wayman v. Southard*, 10 Wheat. (U. S.) 1. See also *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104; *Merwin v. Hawker*, 31 Kan. 222.

Directions to Dispose of Goods. — A writ which commands the sheriff to levy, etc., and which

omits a direction to dispose of the property to be taken as the law directs, is not so defective as to be void and to excuse the default of the officer to whom it is directed. *Chase v. Plymouth*, 20 Vt. 469, 50 Am. Dec. 52.

6. Recitals as to Property — General Executions. — *Covell v. Heyman*, 111 U. S. 176; *Clouts v. Ritch*, 12 Fla. 633; *Brown v. Duncan*, 132 Ill. 413, 22 Am. St. Rep. 545; *Pracht v. Pister*, 30 Kan. 568; *Koepke v. Dyer*, 80 Mich. 311; *Kritzer v. Smith*, 21 Mo. 296; *Darby v. Carson*, 9 Ohio 149; *Taylor v. Ames*, 5 R. I. 361; *Cloud v. Smith*, 1 Tex. 611.

Statute Silent as to Form of the Writ. — When a statute authorizes the issuance of an execution upon the recovery in an action at law, in the absence of any provision for a special execution, it will be presumed that a general execution is intended. *Mayer v. Farmers' Bank*, 44 Iowa 212.

See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 390-393.

Special Writ Not Void. — A special execution, when the writ should be general, may be set aside on motion, but it is not void, and the debtor may waive objections. *Pracht v. Pister*, 30 Kan. 568. See also *Swiggart v. Harber*, 5 Ill. 364, 39 Am. Dec. 418; *Rockwell v. Jones*, 21 Ill. 279; *Corriell v. Doolittle*, 2 Greene (Iowa) 385.

7. Special Executions. — *Winslow v. O'Pry*, 56 Ga. 138; *Merwin v. Hawker*, 31 Kan. 222. See also *Clinch v. Ferril*, 48 Ga. 365; *Cabell v. Grubbs*, 48 Mo. 353; *Pelton v. Platner*, 13 Ohio 209, 42 Am. Dec. 197.

8. Special Execution Required by Statute. — *Mayer v. Farmers' Bank*, 44 Iowa 212; *Kendall v. McFarland*, 4 Oregon 292; *O'Donnell v. School Dist.*, 133 Pa. St. 162.

See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 393.

General Execution Not Void. — When a special execution is required by statute, and a general one is issued instead, the writ is not void, but merely voidable, and no other property is taken and sold than that which was authorized by the judgment to be taken and sold, and the sale will be upheld. *Stotts v. Brookfield*, 55 Ark. 307; *Booth v. Estes*, 16 Ark. 104;

The Return Day. — The proper practice is to make the writ returnable in term time during the next term after its issuance,¹ unless the return day is otherwise fixed by statute,² but irregularities in this respect will not render the writ void.³

Teste. — The writ should have the proper teste,⁴ but defects therein, or an omission thereof, may be cured by amendment.⁵ In most jurisdictions, perhaps, this matter is regulated by statute.

Date. — In many jurisdictions, it is provided by statute that a writ of execution shall be dated as of the day it is actually issued,⁶ but at common law, if issued during the term at which judgment is rendered, it should bear teste as of the first day of the term, and binds the goods and chattels from that time.⁷ Failure to date the writ, or dating it improperly, is not fatal to its validity.⁸

Signature. — The writ must be signed by the officer issuing it,⁹ unless it is

Swayze v. McCrossin, 13 Smed. & M. (Miss.) 317; *Cabell v. Grubbs*, 48 Mo. 353; *Liebman v. Ashbacher*, 36 Ohio St. 94. See also *Natchez v. Minor*, 10 Smed. & M. (Miss.) 246; *West v. Krebaum*, 88 Ill. 263.

The Defendant in the Writ Alone can object to the irregularity, if any, in issuing a general execution on a judgment in a foreclosure suit, for the deficiency that may exist after the sale of the condemned property, without first exhausting the specific remedy given by the judgment. *Stotts v. Brookfield*, 55 Ark. 307.

General Commands May Be Treated as Surplusage, if the writ also contains the proper specific commands, and they alone are performed. *Merwin v. Hawker*, 31 Kan. 222; *Dixon v. Williams*, 82 Ga. 105; *Floyd v. Chess Carley Co.*, 76 Ga. 752. See also *State v. Cave*, 49 Mo. 129.

Executions to Reach the Franchises of a Corporation must be special, and not general, unless a general writ is authorized by statute. *Susquehanna Canal Co. v. Bonham*, 9 W. & S. (Pa.) 27, 42 Am. Dec. 315, following *Ammant v. New Alexandria, etc.*, *Turnpike Road Co.*, 13 S. & R. (Pa.) 210, 15 Am. Dec. 593; *Lusk's Appeal*, 108 Pa. St. 152. See also *Reynolds v. Reynolds Lumber Co.*, 169 Pa. St. 626, 47 Am. St. Rep. 935; *Mausel v. New York, etc.*, R. Co., 171 Pa. St. 606.

An Execution Against a Married Woman may be general, although the statute declares that the judgment shall be levied and collected only out of her separate estate; but the sheriff cannot levy on any other than her separate property. *Clinkscales v. Hall*, 15 S. Car. 602; *Thompson v. Sargent*, 15 Abb. Pr. (N. Y. Supreme Ct.) 452. See also *Moncrief v. Ward*, 25 How. Pr. (N. Y. C. Pl.) 94.

Exempt Property. — The writ need not expressly direct the officer not to levy upon the homestead or other exempt property of the debtor, though it is usual to except such property. *Maxwell v. Reed*, 7 Wis. 582.

Where there Has Been a Waiver of Exemption, the waiver should be made to appear in the body of the writ or by indorsement thereon. *Wilson v. Arnold*, 172 Pa. St. 264, wherein it is said that the waiver must be contained in the writ, so that the sheriff charged with its execution may be fully advised that he may levy upon exempt property.

1. The Return Day. — *Wilson v. Huston*, 4 Bibb (Ky.) 332; *Turner v. Walker*, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329; *Miner v. Walter*,

8 Phila. (Pa.) 571; *Spring v. Ayer*, 23 Vt. 516.

2. Statutory Provisions as to Return Day. — See *Graham v. Chandler*, 12 Ala. 829; *Keyes v. Chapman*, 5 Conn. 169; *Chamberlin v. Beck*, 68 Ga. 346; *Scanlin v. Stewart*, 138 Ind. 574; *Lackey v. Lubke*, 36 Mo. 115; *Estes v. Long*, 71 Mo. 605; *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307; *Gibbons v. Larcom*, 3 Wend. (N. Y.) 303; *Rowley v. Nichols*, 14 R. I. 14; *Union Bank v. McClung*, 9 Humph. (Tenn.) 91; *Tillman v. McDonough*, 2 Tex. App. Civ. Cas., § 52.

3. Effect of Irregularity. — *Shirley v. Wright*, 2 Ld. Raym. 775; *Goode v. Miller*, 78 Ky. 235; *Gibbons v. Larcom*, 3 Wend. (N. Y.) 303; *Faircloth v. Ferrell*, 63 N. Car. 640; *Ingham v. Snyder*, 1 Whart. (Pa.) 116.

As to the designation of the return day in the writ of execution, and as to the effect of errors, see the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 397-399.

4. The Teste. — *Trotter v. Nelson*, 1 Swan (Tenn.) 7.

5. Peddle v. Hollinshead, 9 S. & R. (Pa.) 277; *Park v. Church*, 5 How. Pr. (N. Y. Supreme Ct.) 381. See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 399.

6. The Date. — See *Brown v. Parker*, 15 Ill. 307; *Morgan v. Taylor*, 38 N. J. L. 317. See also the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 400.

7. Should Bear Teste as of First Day of Term at Common Law. — *Davis v. Oswalt*, 18 Ark. 414, 68 Am. Dec. 182; *Graham v. Wilson*, 5 Harr. (Del.) 435; *Center v. Billingshurst*, 1 Cow. (N. Y.) 33; *Bond v. Willet*, 1 Abb. App. Dec. (N. Y.) 165, 1 Keyes (N. Y.) 377; *Finley v. Smith*, 2 Ired. L. (24 N. Car.) 225; *Watt v. Johnson*, 4 Jones L. (49 N. Car.) 190; *Farley v. Lea*, 4 Dev. & B. L. (20 N. Car.) 169, 32 Am. Dec. 680; *Union Bank v. McClung*, 9 Humph. (Tenn.) 91.

8. Roberts v. Church, 17 Conn. 142; *Usry v. Saulsbury*, 62 Ga. 179. See also the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 401.

9. Signature. — *Powers v. Swigart*, 8 Ark. 365; *Short v. State*, 79 Ga. 550; *Dearborn Laundry Co. v. Chicago, etc.*, R. Co., 55 Ill. App. 438; *Wooters v. Joseph*, 137 Ill. 113, 31 Am. St. Rep. 355; *Muñis v. Herrera*, 1 N. Mex. 362; *Purcell v. McFarland*, 1 Ired. L. (23 N. Car.) 34, 35 Am. Dec. 734; *Huggins v.*

otherwise provided by statute.¹ In some states, it is required by statute to be signed by the judgment creditor or his attorney.²

Seal. — The writ should be under the seal of the court,³ unless this requirement is dispensed with by statute; and in some jurisdictions, though not in all, omission of the seal will render the writ void.⁴

Description of Judgment. — It is also necessary that the writ shall refer to the judgment, and show on its face the rendition by a competent court of such a judgment as justifies its issuance.⁵

Conformity to Judgment. — The writ must conform to the judgment, and be warranted thereby, in every essential particular,⁶ but a substantial conformity is all that is required.⁷ It must agree substantially with the judgment in respect to the parties plaintiff,⁸ and the parties defendant,⁹ and as to the amount.¹⁰

Waiver of Informalities. — Any informality in the writ may be waived by the defendant, and in such a case the writ cannot be collaterally attacked.¹¹

VI. LEVY — 1. Definition and General Considerations. — To levy an execution means to do the act or acts by which a sheriff sets apart and appropriates, for the purpose of satisfying the amount of his writ, a part or the whole of the

Ketchum, 4 Dev. & B. L. (20 N. Car.) 414. But see *McCormick v. Meason*, 1 S. & R. (Pa.) 92; *Jett v. Shinn*, 47 Ark. 373.

1. *Hernandez v. Drake*, 81 Ill. 34.

2. **Signature by Judgment Creditor or His Attorney.** — *Park v. Church*, 5 How. Pr. (N. Y. Supreme Ct.) 381; *Carpenter v. Simmons*, 28 How. Pr. (N. Y. Super. Ct.) 12; *People v. Van Hoesen*, 62 How. Pr. (Cortland County Ct.) 76; *Ryan v. Parr*, (Supreme Ct.) 16 N. Y. Supp. 829; *Collins v. Smith*, 75 Wis. 392. See *Hill v. Haynes*, 54 N. Y. 153.

Subscription After Levy. — Unless the writ be subscribed by the party or his attorney, as required by statute, it is irregular, and a levy thereunder will be set aside on motion; and the subscription of the process after the levy has been made will not have a retroactive effect and validate the levy previously made. *Bonesteel v. Orvis*, 23 Wis. 506, 99 Am. Dec. 201.

3. **The Seal.** — *Hall v. Lackmond*, 50 Ark. 113, 7 Am. St. Rep. 84; *Porter v. Haskell*, 11 Me. 177; *Seawell v. Cape Fear Bank*, 3 Dev. L. (14 N. Car.) 279, 22 Am. Dec. 722; *Taylor v. Taylor*, 83 N. Car. 116.

4. **That the Omission of a Seal May Be Cured by Amendment,** and does not render the writ absolutely void, see *Kyle v. Evans*, 3 Ala. 481, 37 Am. Dec. 705; *Hall v. Lackmond*, 50 Ark. 113, 7 Am. St. Rep. 84; *Mitchell v. Duncan*, 7 Fla. 13; *Dever v. Akin*, 40 Ga. 423; *Warmoth v. Dryden*, 125 Ind. 355; *Arnold v. Nye*, 23 Mich. 286; *Taylor v. Courtinay*, 15 Neb. 190; *Wright v. Nostrand*, 94 N. Y. 31; *Corwith v. Illinois State Bank*, 18 Wis. 560, 86 Am. Dec. 793. See also *Bridewell v. Mooney*, 25 Ark. 524; *Kahn v. Kuhn*, 44 Ark. 404; *Rice v. Dale*, 45 Ark. 34; *Jett v. Shinn*, 47 Ark. 373.

Omission Held to Invalidate Writ. — In the following cases it was held that the omission of a seal, required by the constitution or by statute, rendered the writ absolutely void. *Ætna Ins. Co. v. Hallock*, 6 Wall. (U. S.) 556; *Mann v. Reed*, 49 Ill. App. 406; *Peasley v. Weaver*, 64 Ill. App. 80, following *Sidwell v. Schumacher*, 99 Ill. 427; *Roseman v. Miller*, 84 Ill. 297; *Broadwell v. Paradise*, 81 Ill. 474; *Bonin*

v. Durand, 2 La. Ann. 776; *Hutchins v. Edson*, 1 N. H. 139; *Beal v. King*, 6 Ohio 11; *Porter v. Haskell*, 11 Me. 177, following *Toof v. Bently*, 5 Wend. (N. Y.) 276; *Seawell v. Cape Fear Bank*, 3 Dev. L. (14 N. Car.) 279, 22 Am. Dec. 722; *Taylor v. Taylor*, 83 N. Car. 116. But see *Purcell v. McFarland*, 1 Ired. L. (23 N. Car.) 34, 35 Am. Dec. 734. See also *Phillippe v. Higdon*, Busb. L. (44 N. Car.) 380. See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 402-405.

5. **Description of Judgment.** — *Jones v. Goodbar*, 60 Ark. 182; *Anderson v. Gray*, 134 Ill. 550, 23 Am. St. Rep. 606. See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 405.

6. **Conformity of Writ to Judgment.** — See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 408, where the decisions on this point are collected.

7. *Graham v. Price*, 3 A. K. Marsh. (Ky.) 522, 13 Am. Dec. 199. See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 410.

8. **As to Parties Plaintiff.** — *Shorter v. Mims*, 18 Ala. 655; *Com. v. Fisher*, 2 J. J. Marsh. (Ky.) 137. See the title EXECUTIONS, 8 ENCYC. OF PL. AND PR. 412, where is treated this requirement as to parties generally, and also as to joint plaintiffs, partners, executors and administrators, assignors and assignees, etc.

9. **As to Parties Defendant.** — *Douglas v. Whiting*, 28 Ill. 362. And see the title EXECUTIONS, 8 ENCYC. OF PL. AND PR. 418.

10. **As to the Amount.** — The execution must state the sum of money to be collected, and in doing so it must conform to the judgment. *Maxwell v. King*, 3 Verg. (Tenn.) 460; *Hightower v. Handlin*, 27 Ark. 20; *Gorsuch v. Thomas*, 57 Md. 334; *Caverly v. Nichols*, 4 Johns. (N. Y.) 189. And see the title EXECUTIONS, 8 ENCYC. OF PL. AND PR. 426, where the requisites of an execution with respect to the amount, and as to interest and costs, are shown at length.

11. **Waiver of Irregularities.** — *Magowen v. Hay*, 3 A. K. Marsh. (Ky.) 452; *Morse v. Dewey*, 3 N. H. 535.

defendant's property.¹

Necessity for Levy. — The sheriff must, during the life of the writ, levy upon the property proposed to be sold, since the execution does not authorize the sale of the debtor's property unless such levy is made,² and this is true whether the property is personal³ or real,⁴ though there are cases in which it

1. **Levy Defined.** — *Burkett v. Clark*, 46 Neb. 466; *Lloyd v. Wyckoff*, 11 N. J. L. 218. See also *Anderson v. Lee*, 53 Ga. 189; *Karnes v. Alexander*, 92 Mo. 660; *Horgan v. Lyons*, 59 Minn. 217, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 148; *Bland v. Whitfield*, 1 Jones L. (46 N. Car.) 122; *Bogges v. Gamble*, 3 Coldw. (Tenn.) 148.

Object of Levy. — "The great object of a levy is to take property into the custody of the law, and by this act of the officer render it liable to the lien of the execution, thus putting it out of the power of the judgment debtor to divert it to any other use or purpose." *Tullis v. Brawley*, 3 Minn. 277.

2. **Levy Necessary** — *Kellogg v. Buckler*, 17 Ga. 187; *Smith v. Smith*, 60 N. Y. 161; *Hathaway v. Howell*, 54 N. Y. 97; *Walker v. Henry*, 85 N. Y. 130. See also *Layton v. Steel*, 3 Harr. (Del.) 512; *Persels v. McConnell*, 16 Ill. App. 526; *Wintermute v. Hankinson*, 6 N. J. L. 140; *McCombs v. Becker*, 3 Hun (N. Y.) 342; *Abeel v. Anderson*, 39 Hun (N. Y.) 514; *Bond v. Willett*, 31 N. Y. 102.

Substitution of Other Property. — The officer after having levied upon and advertised certain property for sale has no right to substitute other property and offer it for sale under such advertisement. *State v. Fuller*, 14 Ohio 545.

3. **Necessity for Levying upon Personalty** — *Arkansas*. — *Kennedy v. Clayton*, 29 Ark. 270; *Field v. Lawson*, 5 Ark. 376.

California. — *Taffis v. Manlove*, 14 Cal. 47, 73 Am. Dec. 610; *Dutertre v. Driard*, 7 Cal. 549; *Smith v. Morse*, 2 Cal. 524.

Colorado. — *Herr v. Broadwell*, 5 Colo. App. 467, per Thomson, J.

Delaware. — *Layton v. Steel*, 3 Harr. (Del.) 512.

Georgia. — *Yoemans v. Bird*, 81 Ga. 340; *Hart v. Thomas*, 75 Ga. 529; *Isam v. Hooks*, 46 Ga. 309; *Levy v. Shockley*, 29 Ga. 710.

Iowa. — *Reeves v. Sebern*, 16 Iowa 234, 85 Am. Dec. 513.

Kansas. — *J. M. W. Jones Stationery, etc., Co. v. Case*, 26 Kan. 299, 40 Am. Rep. 310.

Kentucky. — *Demint v. Thompson*, 80 Ky. 255. See also *Huston v. Duncan*, 1 Bush (Ky.) 205.

Maryland. — *Beatty v. Chapline*, 2 Har. & J. (Md.) 7, per Chase, C. J.

Michigan. — *Quackenbush v. Henry*, 42 Mich. 75.

Minnesota. — *Horgan v. Lyons*, 59 Minn. 217.

Mississippi. — *Willis v. Loeb*, 59 Miss. 169; *Butler v. Lee*, 54 Miss. 476; *Parker v. Dean*, 45 Miss. 408; *Gates v. Flint*, 39 Miss. 365. See also *Minter v. Swain*, 52 Miss. 174; *Banks v. Evans*, 10 Smed. & M. (Miss.) 35, 48 Am. Dec. 734; *Hamblen v. Hamblen*, 33 Miss. 455, 69 Am. Dec. 358.

Missouri. — *Karnes v. Alexander*, 92 Mo. 660; *Wise v. Darby*, 9 Mo. 131.

New Jersey. — *Cook v. Wood*, 16 N. J. L. 254; *Matthews v. Warne*, 11 N. J. L. 295; *Lloyd v.*

Wyckoff, 11 N. J. L. 218. See also *Nelson v. Van Gazelle Valve Mfg. Co.*, 45 N. J. Eq. 594. *New York*. — *Stonebridge v. Perkins*, 141 N. Y. 1; *Colt v. Phoenix F. Ins. Co.*, 54 N. Y. 595; *Stief v. Hart*, 1 N. Y. 20; *Bliss v. Ball*, 9 Johns. (N. Y.) 132; *Ryder v. Gilbert*, 16 Hun (N. Y.) 163.

North Carolina. — *State v. Poor*, 4 Dev. & B. L. (20 N. Car.) 384, 34 Am. Dec. 387; *Blevins v. Baker*, 11 Ired L. (33 N. Car.) 291; *Seawell v. Cape Fear Bank*, 3 Dev. L. (14 N. Car.) 279, 22 Am. Dec. 722; *Long v. Hall*, 97 N. Car. 286.

Pennsylvania. — *Lewis v. Smith*, 2 S. & R. (Pa.) 142; *Rudy v. Com.*, 35 Pa. St. 166, 78 Am. Dec. 330; *Weidensaul v. Reynolds*, 49 Pa. St. 73; *Schuylkill County's Appeal*, 30 Pa. St. 358; *Paxson's Appeal*, 49 Pa. St. 195; *Stern's Appeal*, 64 Pa. St. 447; *Dauids v. Harris*, 9 Pa. St. 501; *Bank v. Fordyce*, 9 Pa. St. 275, 49 Am. Dec. 561.

Ohio. — *Murphy v. Swadener*, 33 Ohio St. 85; *State v. Fuller*, 14 Ohio 545.

Tennessee. — *James v. Kennedy*, 10 Heisk. (Tenn.) 607; *Bradley v. Keesee*, 5 Coldw. (Tenn.) 223, 94 Am. Dec. 246. See also *Evans v. Higdon*, 1 Baxt. (Tenn.) 245.

Texas. — *Bryan v. Bridge*, 6 Tex. 137.

Vermont. — *Jewett v. Guyer*, 38 Vt. 209.

Virginia. — *Humphrey v. Hitt*, 6 Gratt. (Va.) 509, 52 Am. Dec. 133.

4. **Necessity for Levying upon Realty** — *Alabama*. — *Ware v. Bradford*, 2 Ala. 676, 36 Am. Dec. 427, per Collier, C. J., *obiter*.

Arkansas. — *Hughes v. Watt*, 26 Ark. 228, per Gregg, J.

Kentucky. — *Addison v. Crow*, 5 Dana (Ky.) 271.

Maryland. — *Elliott v. Knott*, 14 Md. 121, 74 Am. Dec. 519; *Dorsey v. Dorsey*, 28 Md. 388; *Wright v. Orrell*, 19 Md. 155; *Jarboe v. Hall*, 37 Md. 345; *Berry v. Griffith*, 2 Har. & G. (Md.) 337, 18 Am. Dec. 309; *Waters v. Duvall*, 11 Gill & J. (Md.) 37, 33 Am. Dec. 693; *Estep v. Weems*, 6 Gill & J. (Md.) 303.

Mississippi. — *Hamblen v. Hamblen*, 33 Miss. 455, 69 Am. Dec. 358.

Pennsylvania. — *Henderson v. Henderson*, 133 Pa. St. 399, 19 Am. St. Rep. 650.

South Carolina. — *Manning v. Dove*, 10 Rich. L. (S. Car.) 395.

Tennessee. — *Harman v. Hann*, 6 Baxt. (Tenn.) 90.

Texas Statute. — *Sayles Civ. Stat.*, art. 2291, dispenses with an entry upon the premises, but requires an indorsement of the levy upon the writ. *Sanger v. Trammell*, 56 Tex. 361; *Redlick v. Williams*, (Tex. 1887) 5 S. W. Rep. 375. See also *Hancock v. Henderson*, 45 Tex. 479; *Cavanaugh v. Peterson*, 47 Tex. 197.

Title of Purchaser Not Vitiating. — In *North Carolina* it has been said: "There is no law that we know of which requires a purchaser of land at a sheriff's sale to show that the executions had been levied on the same before the sale by the sheriff to him. If he shows a

has been held that in the case of realty a formal levy is unnecessary.¹

2. By Whom Made. — Generally the levy must be made by the officer to whom the execution is directed, and by no other.²

Confined to One County. — A sheriff to whom an execution is directed can make a levy only in the county of which he is the sheriff.³

3. When Made — *a.* **IN GENERAL.** — The levy must not be made until the officer has received the writ and had directions, express or implied, to make the levy.⁴ It must precede the sale,⁵ and must be made within the time fixed by statute.⁶

b. **BEFORE THE RETURN DAY.** — The officer may levy the execution as soon as he receives it,⁷ but, generally, so far as concerns the power derived by the officer from the writ, he has the entire time within which the writ is returnable to make the levy.⁸ The creditor, however, has a right to insist

judgment, execution sale and a sheriff's deed to himself for the land, he is entitled to recover the possession as against the defendant in the execution." *McEntire v. Durham*, 7 Ired. L. (29 N. Car.) 151, 45 Am. Dec. 512.

In *Mississippi* it has been held that in all cases in which land has been advertised and sold under a valid judgment and execution, and a deed made to the purchaser, a levy will be presumed. *Hamblen v. Hamblen*, 33 Miss. 455, 69 Am. Dec. 358.

But in *Maryland* it has been held that a sale of land which is not preceded by a levy is invalid, and that the purchaser acquires no title. *Waters v. Duvall*, 11 Gill & J. (Md.) 37, 33 Am. Dec. 693; *Elliott v. Knott*, 14 Md. 121; *Jarboe v. Hall*, 37 Md. 347. Compare *Estep v. Weems*, 6 Gill & J. (Md.) 303.

1. Formal Levy Dispensed With. — *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256; *Wood v. Colvin*, 2 Hill (N. Y.) 566, 38 Am. Dec. 598; *Van Gelder v. Van Gelder*, 26 Hun (N. Y.) 356.

In *Minnesota* it has been decided that the statute making a levy necessary is applicable only to personal property, and that no formal levy of an execution upon real property is necessary. *Lockwood v. Bigelow*, 11 Minn. 113; *Bidwell v. Coleman*, 11 Minn. 78; *Tullis v. Brawley*, 3 Minn. 277; *Rohrer v. Turrill*, 4 Minn. 407; *Hutchins v. Carver County*, 16 Minn. 13; *Ashton v. Slater*, 19 Minn. 347; *Knox v. Randall*, 24 Minn. 479. See also *Wakefield v. Brown*, 38 Minn. 361, 8 Am. St. Rep. 671.

2. Made Only by Officer to Whom Directed. — *Porter v. Stapp*, 6 Colo. 32; *Bybee v. Ashby*, 7 Ill. 151, 43 Am. Dec. 47; *Johnson v. Elkins*, 90 Ky. 163; *Steel v. Metcalf*, 4 Tex. Civ. App. 313; *Alley v. Carroll*, 3 Sneed (Tenn.) 110. See also *Satterwhite v. Melczar*, (Arizona 1890) 24 Pac. Rep. 184.

Disqualification of Officer. — An officer who has an interest in the judgment which is the foundation of the execution is disqualified to make the levy. *Carpenter v. Stilwell*, 11 N. Y. 61; *Mills v. Young*, 23 Wend. (N. Y.) 314; *Erwin v. Bowman*, 51 Tex. 513. And when the sheriff is disqualified by reason of the interest in the process, his deputy is also disqualified. *May v. Walters*, 2 McCord L. (S. Car.) 470; *Singletary v. Carter*, 1 Bailey L. (S. Car.) 467, 21 Am. Dec. 480; *Riner v. Stacy*, 8 Humph. (Tenn.) 288. See also *Chambers v. Thomas*, 1 Litt. (Ky.) 268, 3 A. K. Marsh. (Ky.) 536.

An Execution Issued to Any Constable may be

levied by a constable other than the one to whom it was first delivered, if he is otherwise qualified to act. *County Ct. v. Buck*, 27 Ill. 440. See also *Lynn v. Sisk*, 9 B. Mon. (Ky.) 135.

Levy by One Not an Officer. — When a private person without authority or appointment from any source assumes to act as a constable and makes a levy upon the goods of another, he becomes a trespasser, and it is no defense to him that he then and there had in his possession an execution against such person issued by a justice of the peace. *McMillan v. Rowe*, 15 Neb. 520.

Clerical Work, such as writing out the levy or making an inventory, may be done by any person whom the officer may employ. *Lloyd v. Wyckoff*, 11 N. J. L. 218. See also *Cox v. Montford*, 66 Ga. 62.

Louisiana Statute. — It is expressly provided by statute in Louisiana that only the officer to whom the execution is directed can make the levy. *Levy v. Acklen*, 37 La. Ann. 545.

Michigan Statute. — By statute in Michigan, a sheriff may levy an execution directed to a constable. *Foster v. Wiley*, 27 Mich. 244, 15 Am. Rep. 185.

3. Cannot Levy Outside the County. — *Oldfield v. Eulert*, 148 Ill. 614, 39 Am. St. Rep. 231; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489; *Benson v. Smith*, 42 Me. 414, 66 Am. Dec. 285; *Pillsbury v. Smyth*, 25 Me. 427; *Mangum v. Hamlet*, 8 Ired. L. (30 N. Car.) 44; *Hardy v. Jasper*, 3 Dev. L. (14 N. Car.) 158; *Kendrick v. Rice*, 16 Tex. 254; *Kent v. Roberts*, 2 Story (U. S.) 591. See also *Needles v. Frost*, 2 Okla. 19.

It has been held that when a constable is authorized by statute to execute process throughout an entire county, he may levy an execution on property anywhere within the county, although it is not in his precinct. *Cundiff v. Teague*, 46 Tex. 475, *distinguishing* *Leland v. Wilson*, 34 Tex. 94. See also *Lewis v. Wall*, 70 Ga. 646.

4. After Writ and Directions Received. — *Hall v. Crocker*, 3 Met. (Mass.) 245.

5. Before Sale. — *Conniff v. Doyle*, 8 Phila. (Pa.) 630.

6. Within Statutory Time. — *Cake v. Cannon*, 2 Houst. (Del.) 427.

7. May Levy at Once. — *Goode v. Miller*, 78 Ky. 235.

8. May Levy During Life of Writ. — *Langdon v. Chittington*, 2 Root (Conn.) 133; *Dayton v.*

that the officer shall proceed within a reasonable time to seize the property of the debtor, even in the absence of specific instructions to the officer, if the latter knows or by reasonable effort can ascertain that the debtor has property liable to seizure,¹ and special instructions from the creditor, accompanied by information of facts constituting a necessity for an immediate levy, must be complied with when practicable.²

c. ON THE RETURN DAY. — A levy may be made on the return day,³ or at least, as has been said, at any time on the return day, so long as the court to which it is returnable continues in session that day.⁴

d. AFTER THE RETURN DAY. — After the return day the officer has no right to make a levy, since the writ, whether it has been returned by the officer or is still in his hands, is *functus officio*,⁵ and a levy made on the return

Lynes, 31 Conn. 578; State v. Ferguson, 13 Mo. 166; State v. Leland, 82 Mo. 260; State v. Rollins, 13 Mo. 179; Hombs v. Corbin, 20 Mo. App. 497; Person v. Newsom, 87 N. Car. 142; Ledbetter v. Arledge, 8 Jones L. (53 N. Car.) 475; State v. Parchmen, 3 Head (Tenn.) 609.

1. **Creditor's Right to Expeditious Levy.** — State v. Vandever, 3 Harr. (Del.) 29; Hargrave v. Penrod, 1 Ill. 401, 12 Am. Dec. 201; Green v. Lowell, 3 Me. 373; Albany City Bank v. Dorr, Walk. (Mich.) 318; Steele v. Crabtree, 40 Neb. 420; Hinman v. Borden, 10 Wend. (N. Y.) 368, 25 Am. Dec. 568; Lindsay v. Armfield, 3 Hawks (10 N. Car.) 553, 14 Am. Dec. 603; Hearn v. Parker, 7 Jones L. (52 N. Car.) 150; Habersham v. Sears, 11 Oregon 431; State v. Parchmen, 3 Head (Tenn.) 609; State v. Brophy, 38 Wis. 413; Elmore v. Hill, 46 Wis. 618, 51 Wis. 366.

2. Guiterman v. Sharvey, 46 Minn. 183, 24 Am. St. Rep. 218.

3. **Levy Made on Return Day.** — Lowry v. Reed, 89 Ind. 442; Gaines v. Clark, 1 Bibb (Ky.) 608; Prescott v. Wright, 6 Mass. 20; Sturges's Appeal, 86 Pa. St. 413.

4. **During Session of Court on Return Day.** — Blaisdell v. Sheafe, 5 N. H. 201. See also Perkins v. Woolaston, 1 Salk. 321; Wolley v. Mosely, Cro. Eliz. 761; Prescott v. Wright, 6 Mass. 20; Stevens v. Bigelow, 12 Mass. 434; Chadbourne v. Hodgdon, 1 N. H. 359.

5. **No Levy After Return Day.** — *England.* — Perkins v. Woolaston, 1 Salk. 321.

Alabama. — Waldrop v. Friedman, 90 Ala. 157, 24 Am. St. Rep. 775.

Arkansas. — Chipman v. Fambro, 16 Ark. 291; Newton v. State Bank, 14 Ark. 9.

California. — Tower v. McDowell, (Cal. 1892) 31 Pac. Rep. 843.

Connecticut. — Worthington v. Hollister, 1 Root (Conn.) 101; Stoyel v. Lawrence, 3 Day (Conn.) 1.

Delaware. — West v. Shockley, 4 Harr. (Del.) 287; Lofland v. Jefferson, 4 Harr. (Del.) 303.

Illinois. — Corbin v. Pearce, 81 Ill. 461; Launtz v. Gross, 16 Ill. App. 329; Weaver v. Bloomington Third Nat. Bank, 56 Ill. App. 664; Berry v. Lovi, 107 Ill. 612; Willoughby v. Dewey, 63 Ill. 246; Phillips v. Dana, 4 Ill. 551.

Kentucky. — Gaines v. Clark, 1 Bibb (Ky.) 608; Castleman v. Griffith, Sneed (Ky.) 293; Rudd v. Johnson, 5 Litt. (Ky.) 19. See also Bell v. Com., 1 J. J. Marsh. (Ky.) 550.

Louisiana. — Dugat v. Babin, 8 Martin N. S. (La.) 391; Johnston v. Wall, 1 Martin N. S. (La.) 541.

Maine. — Wyer v. Andrews, 13 Me. 168, 29 Am. Dec. 497.

Maryland. — Gaither v. Martin, 3 Md. 146.

Massachusetts. — Prescott v. Wright, 6 Mass. 20; Rand v. Cutler, 155 Mass. 451; Slater v. Lamb, 150 Mass. 239. See also Wakefield v. Lithgow, 3 Mass. 249.

Michigan. — Evans v. Calman, 92 Mich. 427, 31 Am. St. Rep. 606; Quackenbush v. Henry, 42 Mich. 75; Blair v. Compton, 33 Mich. 414.

Mississippi. — Edwards v. Ingraham, 31 Miss. 272.

Missouri. — McDonald v. Gronefeld, 45 Mo. 28; Jefferson v. Curry, 71 Mo. 85; State Bank v. Bray, 37 Mo. 194. See also Estes v. Long, 71 Mo. 605.

New Hampshire. — Rangeley v. Goodwin, 18 N. H. 217.

New Jersey. — Kemble v. Harris, 36 N. J. L. 526; Matthews v. Warne, 11 N. J. L. 295.

New York. — Ansonia Brass, etc., Co. v. Conner, 103 N. Y. 502; Walker v. Henry, 85 N. Y. 130; Hathaway v. Howell, 54 N. Y. 97; Devoe v. Elliot, 2 Cai. (N. Y.) 244; Crouse v. Bailey, (Supreme Ct.) 10 N. Y. Supp. 273; Smith v. Smith, 60 N. Y. 161; Murray v. Bininger, 3 Abb. App. Dec. (N. Y.) 336; Rowe v. Richardson, 5 Barb. (N. Y.) 385; Slingerland v. Swart, 13 Johns. (N. Y.) 255; Jackson v. Rosevelt, 13 Johns. (N. Y.) 97; Vail v. Lewis, 4 Johns. (N. Y.) 450.

North Carolina. — Doe v. M'Kinnie, 4 Hawks (11 N. Car.) 279, 15 Am. Dec. 519; McEachin v. McFarland, 1 Dev. L. (12 N. Car.) 444; Huggins v. Ketchum, 4 Dev. & B. L. (20 N. Car.) 414; Love v. Gates, 2 Ired. L. (24 N. Car.) 14.

Oregon. — Faull v. Cooke, 19 Oregon 455, 20 Am. St. Rep. 836.

Pennsylvania. — Sturges's Appeal, 86 Pa. St. 413; Duncan's Appeal, 37 Pa. St. 500; Grant v. Hancock, 5 Phila. (Pa.) 103, 20 Leg. Int. (Pa.) 348; Com. v. Magee, 8 Pa. St. 240, 49 Am. Dec. 509; Fidler v. Patton, 8 W. & S. (Pa.) 455.

South Carolina. — M'Elwee v. Sutton, 2 Bailey L. (S. Car.) 361; Fox v. Lamar, 2 Brev. (S. Car.) 417.

Texas. — Cain v. Woodward, 74 Tex. 549; Hamilton v. Ward, 4 Tex. 356; Tillman v. McDonough, 2 Tex. App. Civ. Cas., § 52; Harris v. Ellis, 30 Tex. 4.

Vermont. — Downer v. Hazen, 10 Vt. 418; Barnard v. Stevens, 2 Aik. (Vt.) 429.

Virginia. — O'Bannon v. Saunders, 24 Gratt. (Va.) 138; Grandstaff v. Ridgely, 30

day is not irregular merely but is absolutely null and void.¹ It is a trespass on the part of the officer who makes it,² and a purchaser thereunder acquires no title, the rule of *caveat emptor* applying.³

e. AFTER THE RETURN OF THE WRIT. — The officer is not authorized to make a levy after he has returned the writ, as the writ, upon being returned, although before the return day, becomes *functus officio*.⁴

4. How Made — *a.* IN GENERAL. — The officer must follow the directions of his precept,⁵ and in doing so he should do as little mischief to the debtor as possible;⁶ and he must perform unequivocal acts sufficient to constitute a levy and must act with the intention of making a levy.⁷

b. STATUTORY REQUIREMENTS. — When the method of making the levy is prescribed by statute, in whole or in part, it is the duty of the officer to proceed strictly according to the statute in making the levy, and if he does not do so the levy or the sale may be set aside or he may be made to respond in damages to any one whom he has injured by his neglect.⁸ But it is only

Gratt. (Va.) 1; Chapman v. Harrison, 4 Rand. (Va.) 336, 1 Rob. Prac. 532.

West Virginia. — Cockerell v. Nichols, 8 W. Va. 159.

Sheriff Cannot Receive Payment After Return Day. — Chipman v. Fambro, 16 Ark. 291; Wyer v. Andrews, 13 Me. 168, 29 Am. Dec. 497; Wood v. Robinson, 3 Smed. & M. (Miss.) 271; Hamilton v. Ward, 4 Tex. 356; Paine v. Tutwiler, 27 Gratt. (Va.) 440; Grandstaff v. Ridgely, 30 Gratt. (Va.) 1.

Additional Levies. — The officer is not authorized after the return day to make any additional levies that may be necessary because he has made a levy before the return day. McDonald v. Gronefeld, 45 Mo. 28.

Presumption as to Time of Levy. — When it does not appear at what time the levy was made, it will not be presumed as against the officer that it was made after the return day. Fidler v. Patton, 8 W. & S. (Pa.) 455. See also Hartwell v. Root, 19 Johns. (N. Y.) 345, 10 Am. Dec. 232.

Connecticut Statute. — Act Conn. 1878, c. 20, provides that when an officer shall have levied an execution and made return thereof to the proper court, and by mistake or inadvertence the same shall not have been made and completed until after the lawful return day, such levy shall not, for such reason, be held invalid, but shall be good and effectual as if the same had been levied in the time provided by statute. Norris v. Sullivan, 47 Conn. 474.

1. Levy After Return Day Void. — Waldrop v. Friedman, 90 Ala. 157; Castleman v. Griffith, Sneed (Ky.) 293; Jefferson v. Curry, 71 Mo. 85; Rangeley v. Goodwin, 18 N. H. 217; Murray v. Binger, 3 Abb. App. Dec. (N. Y.) 339; Grant v. Hancock, 5 Phila. (Pa.) 193, 20 Leg. Int. (Pa.) 348; Fox v. Lamar, 2 Brev. (S. Car.) 417.

2. Officer Commits a Trespass. — Kemble v. Harris, 36 N. J. L. 526; Tillman v. McDonough, 2 Tex. App. Civ. Cas., § 52. See also Rowe v. Richardson, 5 Barb. (N. Y.) 385.

3. Purchaser Gets No Title. — State Bank v. Bray, 37 Mo. 194. See also Johnston v. Wall, 1 Martin N. S. (La.) 541; Huggins v. Ketchum, 4 Dev. & B. L. (20 N. Car.) 414; Grant v. Hancock, 5 Phila. (Pa.) 193, 20 Leg. Int. (Pa.) 348. Compare Jackson v. Roosevelt, 13 Johns. (N. Y.) 97.

4. No Levy After the Return of the Writ. — Brown v. Baker, 9 Port. (Ala.) 503; Carnahan v. People, 2 Ill. App. 630; Cochran v. U. S. Bank, 11 Rob. (La.) 64; Cook v. Wood, 16 N. J. L. 254; Rowley v. Nichols, 14 R. I. 14; Paine v. Hoskins, 3 Lea (Tenn.) 284.

5. Direction of Writ Must Be Followed. — Mysroll v. Violette, 55 Me. 108.

Directions from Plaintiff Unnecessary. — No particular directions by the plaintiff to the officer to make a levy are necessary. Stuarts v. Reynolds, 4 Harr. (Del.) 112.

6. Rights of Debtor Must Be Regarded. — Handy v. Clippert, 50 Mich. 355.

7. Intention to Levy. — Taffis v. Manlove, 14 Cal. 47, 73 Am. Dec. 610. See also Westervelt v. Pinckney, 14 Wend. (N. Y.) 123, 28 Am. Dec. 516; Alexander v. Springs, 5 Ired. L. (27 N. Car.) 475.

8. Compliance with Statutory Requirements — California. — Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441.

Connecticut. — Metcalf v. Gillet, 5 Conn. 401; Hobart v. Frisbie, 5 Conn. 592.

Maine. — Mysroll v. Violette, 55 Me. 108; Benson v. Smith, 42 Me. 414, 66 Am. Dec. 285; Lambert v. Hill, 41 Me. 475.

Massachusetts. — Litchfield v. Cudworth, 15 Pick. (Mass.) 23; Howe v. Starkweather, 17 Mass. 240; Eddy v. Knap, 2 Mass. 154. See also Baker v. Baker, 125 Mass. 7.

Michigan. — Blair v. Compton, 33 Mich. 414. See also James v. Pontiac, etc., Plank Road Co., 8 Mich. 92.

New Hampshire. — Saunders v. Nashua First Nat. Bank, 61 N. H. 31. See also Whittier v. Varney, 10 N. H. 295; Avery v. Bowman, 39 N. H. 393; Libbey v. Copp, 3 N. H. 45; Mead v. Harvey, 2 N. H. 495.

New Jersey. — Voorhees v. Chaffers, 24 N. J. L. 507; Den v. Gaston, 24 N. J. L. 818. See also Elmer v. Burgin, 2 N. J. L. 173; Princeton Bank v. Crozer, 22 N. J. L. 383, 53 Am. Dec. 254.

North Carolina. — Blanchard v. Blanchard, 3 Ired. L. (25 N. Car.) 105, 38 Am. Dec. 710; Huggins v. Ketchum, 4 Dev. & B. L. (20 N. Car.) 414.

Ohio. — Seymour v. Milford, etc., Turnpike Co., 10 Ohio 476.

Pennsylvania. — Carrier v. Esbaugh, 70 Pa. St. 239.

necessary where the acts necessary to constitute a valid levy are prescribed by statute, to follow the established procedure, and in the given case there is nothing for decision except whether this has been done or not.¹

c. NOTICE AND DEMAND. — It has generally been held that it is not essential to the validity of the levy that the officer should give the debtor notice before making the levy unless service of the writ is required by statute, even though the debtor has the right to designate which class of property shall be first taken,² though it has been said that a good officer when it is practicable will always inform the debtor of an execution which he may have against him, if he believes that the debtor is not aware of it, and confer with the debtor before making a levy.³ In some jurisdictions the officer is required by statute to serve the writ upon the debtor before levying and to make a demand of payment.⁴

d. SELECTION OF PROPERTY — (1) *By Debtor.* — At the common law the debtor has no election as to which of his distrainable property shall be first taken.⁵

Statutory Right. — In many jurisdictions, however, statutes have been enacted conferring this right upon the debtor.⁶

Vermont. — *Morton v. Edwin*, 19 Vt. 77. But see *Little v. Sleeper*, 37 Vt. 105, 86 Am. Dec. 697.

1. *Herr v. Broadwell*, 5 Colo. App. 467, *per* Thomson, J. See also *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475; *Doe v. Kollock*, 3 Houst. (Del.) 326; *Huggins v. Ketchum*, 4 Dev. & B. L. (20 N. Car.) 414.

2. **Notice Unnecessary.** — *Drake v. Murphy*, 42 Ind. 82; *Ayres v. Campbell*, 9 Iowa 213, 74 Am. Dec. 346; *Collins v. Ritchie*, 31 Kan. 371; *Duncan v. Matney*, 29 Mo. 368, 77 Am. Dec. 575. See also *Jones v. Allen*, 88 Ky. 381.

But in *Illinois* the contrary doctrine obtains. *McCluskey v. McNeely*, 8 Ill. 578; *Foote v. People*, 12 Ill. App. 94; *Bingham v. Maxcy*, 15 Ill. 290; *Pitts v. Magie*, 24 Ill. 610; *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418. See also *Rock v. Haas*, 110 Ill. 528; *Bullen v. Dawson*, 139 Ill. 633.

Service and Levy Distinguished. — The service of an execution is distinguishable from the levy thereof in strictly legal parlance, and is the communication of its contents to the execution defendant, accompanied by or followed with a demand for a satisfaction, and in its natural order precedes the levy of the writ. *Terrell v. State*, 66 Ind. 570.

3. *Duncan v. Matney*, 29 Mo. 368, 77 Am. Dec. 575.

4. **Notice Required by Statute** — *Alabama*, — *White v. Farley*, 81 Ala. 563.

California. — *Frink v. Roe*, 70 Cal. 296.

Connecticut. — *Coe v. Wickham*, 33 Conn. 389; *Roberts v. Church*, 17 Conn. 142. See also *Dutton v. Tracy*, 4 Conn. 365.

Georgia. — *Rutherford v. Crawford*, 53 Ga. 138.

Illinois. — *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418.

Indiana. — *Guerin v. Kraner*, 97 Ind. 533; *Terrell v. State*, 66 Ind. 570. See also *Cones v. Wilson*, 14 Ind. 465; *Godman v. Smith*, 17 Ind. 152.

Maine. — *Chaffin v. Cummings*, 37 Me. 76.

Missouri. — *Lohmann v. Stocke*, 94 Mo. 672; *Harper v. Hopper*, 42 Mo. 124; *Harris v. Chouteau*, 37 Mo. 165; *Buchanan v. Atchison*,

39 Mo. 503. See also *Adams v. Tracy*, 13 Mo. App. 579.

Pennsylvania. — *Conniff v. Doyle*, 8 Phila. (Pa.) 630.

Texas. — *Cook v. De la Garza*, 13 Tex. 436; *Kendrick v. Rice*, 16 Tex. 254. See also *Kingsland v. Harrell*, 1 Tex. App. Civ. Cas., § 739.

Vermont. — *Dow v. Smith*, 6 Vt. 519; *Collins v. Perkins*, 31 Vt. 624. See also *Eastman v. Curtis*, 4 Vt. 616.

Personal Notice. — Whenever it is practicable to do so the notice of an execution must be served upon the debtor personally. *Boggess v. Pennell*, 46 Ill. App. 150.

5. *Bodley v. Downing*, 4 Litt. (Ky.) 28.

6. **Statutes Giving Debtor Right to Select** — *Arkansas.* — *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338.

Georgia. — *Thompson v. Mitchell*, 73 Ga. 127; *Benson v. Dyer*, 69 Ga. 190; *Barden v. Grady*, 37 Ga. 660; *Hammond v. Myrick*, 14 Ga. 77.

Indiana. — *State v. Willis*, 33 Ind. 118.

Louisiana. — *Miller v. Morgan*, 6 Martin N. S. (La.) 86.

Missouri. — *Landes v. Perkins*, 12 Mo. 238; *Ashby v. Dillon*, 19 Mo. 619; *Kritzer v. Smith*, 21 Mo. 296.

Texas. — *Beck v. Avondino*, 82 Tex. 314; *Jackson v. Browning*, 1 Tex. App. Civ. Cas., § 605.

Debtor Must Furnish Description of Property. — *Bingham v. Maxcy*, 15 Ill. 290. See also *Thorpe v. Wheeler*, 23 Ill. 544; *Ross v. Lister*, 14 Tex. 469; *Texas-Mexican R. Co. v. Wright*, 88 Tex. 346; *Anderson v. Oldham*, 82 Tex. 228.

Debtor Must Exhibit Title to Realty. — *Beaird v. Foreman*, 1 Ill. 385, 12 Am. Dec. 197. See also *Wolford v. Phelps*, 2 J. J. Marsh. (Ky.) 31.

Debtor Cannot Designate Another's Property. — *Forbes v. Hill*, Dall. (Tex.) 486. See also *Thompson v. Mitchell*, 73 Ga. 127; *Todd v. Gordy*, 29 La. Ann. 498.

Only One Election. — The debtor having once exercised his right to select property to be levied upon cannot thereafter insist that other

Waiver of Right. — As this right is conferred solely for the benefit of the debtor he may exercise it or not at his pleasure, and if he neglects or refuses to make a selection the officer should levy on such property as he can find, observing the order, if any, pointed out by the statute.¹

(2) *By Creditor.* — Where there is any reasonable ground to induce the officer to believe that in levying an execution he may make a mistake and expose himself to an action for damages, he may require the creditor to point out the property for levy,² but although the pointing out of property by the creditor upon the failure of the debtor to do so is a protection to the officer, it is not essential to the validity of the levy.³

(3) *Encumbered and Aliened Realty.* — Where the debtor has aliened or encumbered his land subject to the lien of a judgment, and an execution is thereafter issued on such judgment, the creditor who issues the execution may levy upon the encumbered or aliened property without first resorting to other property belonging to the debtor, and is not required to so levy his execution as to make the alienees or incumbrancers contribute, or to levy upon it in the inverse order in which it was aliened or encumbered.⁴ It has been said, however, that where the debtor has sold property, and has other property out of which satisfaction may be made, there can be no reason but mere wantonness for levying upon the property which has been sold.⁵

5. Amount of Property to Be Taken. — It is the duty of the officer to levy on property sufficient to satisfy the execution and all proper fees and costs,⁶ and

property should be taken. *Larson v. Laird*, 36 Ill. App. 402. See also *Colburn v. Barton*, 17 Ill. App. 391.

Title of Purchaser. — The title of the purchaser will be upheld although the officer has proceeded in disobedience of the debtor's selection. *Cavender v. Smith*, 1 Iowa 306; *Tillotson v. Doe*, 5 Blackf. (Ind.) 590. See also *Beck v. Avondino*, 82 Tex. 314; *Thompson v. Mitchell*, 73 Ga. 127.

1. Waiver of Right. — *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338; *Frink v. Roe*, 70 Cal. 296; *Noble v. Nettles*, 3 Rob. (La.) 152; *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418; *Cook v. Scott*, 6 Ill. 333; *Deville v. Hayes*, 23 La. Ann. 550; *Harrison v. Cachelin*, 35 Mo. 77; *Scott v. Allen*, 1 Tex. 508; *Bryan v. Bridge*, 6 Tex. 137; *Jackson v. Browning*, 1 Tex. App. Civ. Cas., § 605. See also *State v. Willis*, 33 Ind. 118.

2. Creditor's Right to Select. — *Armstrong v. Grant*, 7 Kan. 285. See also *Bond v. Ward*, 7 Mass. 123, 5 Am. Dec. 28.

Creditor Cannot Select a Particular Tract of Land. — It has been held that the creditor has no right to control the action of the officer by directing a levy on a particular tract of land, unless the right is given him by statute. *Fraser v. Thrift*, 50 Cal. 476. See also *Maybury v. Jones*, 4 Yeates (Pa.) 21.

In Illinois, by statute, the creditor has the right to elect on what property he shall have the writ levied, except exempt property, provided, however, that the land on which the defendant resides and his personal property shall not be taken until the other property, if any, has been first resorted to. *Colburn v. Barton*, 17 Ill. App. 391; *Thorpe v. Wheeler*, 23 Ill. 544; *Evans v. Landon*, 6 Ill. 307; *Bingham v. Maxcy*, 15 Ill. 290.

3. Benson v. Dyer, 69 Ga. 190; *Herring v. Polley*, 8 Mass. 113.

4. Encumbered Land. — *Wilson v. Hurst*, Pet.

(C. C.) 140; *Milmine v. Bass*, 29 Fed. Rep. 632; *Barden v. Grady*, 37 Ga. 666; *Sansberry v. Lord*, 82 Ind. 521; *Warfield v. Brewer*, 4 Gill (Md.) 265; *James v. Hubbard*, 1 Paige (N. Y.) 228.

5. Aliened Land. — *Sidener v. White*, 46 Ind. 588, *per* Downey, J.

6. Sufficient to Satisfy the Execution. — *Wallace v. Atlanta Medical College*, 52 Ga. 164; *French v. Snyder*, 30 Ill. 339, 83 Am. Dec. 193; *Indiana Cent. R. Co. v. Bradley*, 15 Ind. 23; *Hefner v. Hesse*, 29 La. Ann. 149; *Denvey v. Fox*, 22 Barb. (N. Y.) 522; *Dewitt v. Oppenheimer*, 51 Tex. 103.

Property of Small Value. — If the officer really thinks that the debtor's property is insufficient to pay the costs of levying upon and selling it, he may refuse to levy and may return the writ unsatisfied. *Matter of Mowry*, 12 Wis. 52.

Price Obtainable at Sale to Be Considered. — In making a levy it is the duty of the officer to make a proper allowance for depreciation in price as the usual effect of a forced sale. *Atcheson v. Hutchison*, 51 Tex. 223. See also *Griffin v. Ganaway*, 8 Ala. 625; *Com. v. Lightfoot*, 7 B. Mon. (Ky.) 298; *Dewitt v. Oppenheimer*, 51 Tex. 103.

A Direction from a Plaintiff to make a part only of the execution is one which he has the right to make and which should be obeyed by the officer. *Rogers v. McDearmid*, 7 N. H. 506.

Excessive Levy Should Not Be Made. — The officer should levy upon and sell only so much of the defendant's property as is sufficient to satisfy the execution and costs, and it is not his duty to levy upon all of the debtor's property when a portion thereof will be sufficient.

Delaware. — *Boggs v. Vandyke*, 3 Harr. (Del.) 288.

Iowa. — *Cook v. Jenkins*, 30 Iowa 452.

Kentucky. — *Muir v. Pettit*, (Ky. 1896) 35 S. W. Rep. 907; *Patterson v. Carneal*, 3 A. K.

in determining what is a sufficient levy he is left to exercise his own judgment free from the restraint or control of either the defendant or the plaintiff, and is accountable to the plaintiff on the one hand if he fails to levy on as much as a reasonably prudent man would deem sufficient for that purpose, and on the other hand, to the defendant for an unreasonable and unnecessary levy.¹

6. Levy upon Land — *a.* **WHAT CONSTITUTES.** — The decisions are not altogether in accord as to what steps should be taken by an officer in levying upon land. In the *United States*, where a levy upon land is made for the purpose of subsequently selling the premises, the officer, according to the great weight of authority, has no right and it is not his duty to enter upon the premises and evict the debtor in order to make a levy. But it is only necessary that he should, by some unequivocal act, indicate an intention to make a levy and indorse the fact of the levy on his writ, with a proper description of the land. It is well settled, however, that a levy on land cannot consist of a mere mental determination and that the officer must do some unequivocal act showing an intention to make a levy and that the levy must be capable of being proved.²

Marsh. (Ky.) 618, 13 Am. Dec. 208; Lynn v. Sisk, 9 B. Mon. (Ky.) 135.

Maine. — Glidden v. Chase, 35 Me. 90, 56 Am. Dec. 690.

Massachusetts. — Pickett v. Breckenridge, 22 Pick. (Mass.) 297, 33 Am. Dec. 745.

Michigan. — Handy v. Clippert, 50 Mich. 355; Campau v. Godfrey, 18 Mich. 27, 100 Am. Dec. 133; Blair v. Compton, 33 Mich. 414.

Mississippi. — McGehe v. Handley, 5 How. (Miss.) 625.

Missouri. — Silver v. McKeil, 52 Mo. 518.

Nevada. — Hastings v. Johnson, 1 Nev. 613.

New Hampshire. — Rogers v. McDearmid, 7 N. H. 506.

New Jersey. — Lloyd v. Wyckoff, 11 N. J. L. 218.

Pennsylvania. — Earl's Appeal, 13 Pa. St. 483.

Texas. — Cornelius v. Burford, 28 Tex. 202, 91 Am. Dec. 309.

United States. — Schroeder v. Young, 161 U. S. 334.

Liability of Sheriff for Making Excessive Levy. — The following cases support the right to bring an action for damages against the sheriff for making an excessive levy: Lynn v. Sisk, 9 B. Mon. (Ky.) 135; Handy v. Clippert, 50 Mich. 355; Cornelius v. Burford, 28 Tex. 202, 91 Am. Dec. 309. See also Boggs v. Vandyke, 3 Harr. (Del.) 288.

Any Levy upon Land Not Excessive. — A levy upon land cannot, it would seem, be open to the objection that it is excessive, but when the officer undertakes to sell land it is his duty to sell no more than is necessary. Van Dyke v. Martin, 53 Ga. 221; Palmer v. Gardiner, 77 Ill. 143; Drake v. Murphy, 42 Ind. 82; Cook v. De la Garza, 13 Tex. 431. See also Wallace v. Atlanta Medical College, 52 Ga. 164; Clower v. Fleming, 81 Ga. 247; Cook v. Jenkins, 30 Iowa 452; Buckholder v. Sigler, 7 W. & S. (Pa.) 154.

Prior Liens. — Where there are older executions, the plaintiff's right is to levy upon and seize property sufficient to pay his *fi. fa.* after satisfying the prior liens. Mullings v. Bothwell, 29 Ga. 706. See also Landreaux v. Hazleton, 1 Martin N. S. (La.) 600.

1. Officer to Use His Discretion. — Barfield v.

Barfield, 77 Ga. 83; French v. Snyder, 30 Ill. 339, 83 Am. Dec. 193; Com. v. Lightfoot, 7 B. Mon. (Ky.) 298; Denvrey v. Fox, 22 Barb. (N. Y.) 522; Pugh v. Calloway, 10 Ohio St. 488; Governor v. Carter, 3 Hawks (10 N. Car.) 328, 14 Am. Dec. 588; Lynch v. Com., 6 Watts (Pa.) 495, 31 Am. Dec. 490; Cornelius v. Burford, 28 Tex. 202, 91 Am. Dec. 309; Dewitt v. Oppenheimer, 51 Tex. 103. See also Payne v. O'Shea, 84 Mo. 129.

2. What Constitutes a Proper Levy upon Land. — For cases in which this question has been discussed, see the following:

United States. — Watson v. Bondurant, 21 Wall. (U. S.) 123; Thompson v. Phillips, 1 Baldw. (U. S.) 246; Front St. Cable R. Co. v. Drake, 65 Fed. Rep. 539. See also Raisin v. Statham, 22 Fed. Rep. 144.

Arkansas. — Fenno v. Coulter, 14 Ark. 38; Anderson v. Fowler, 8 Ark. 388; Hightower v. Handlin, 27 Ark. 20; Whiting v. Beebe, 12 Ark. 421.

California. — Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441.

Colorado. — Herr v. Broadwell, 5 Colo. App. 467.

Connecticut. — Pendleton v. Button, 3 Conn. 406.

Georgia. — Kilgo v. Castleberry, 38 Ga. 512, 95 Am. Dec. 406; Isam v. Hooks, 46 Ga. 309; Ansley v. Wilson, 50 Ga. 418; Walker v. Zorn, 50 Ga. 370; Rutherford v. Crawford, 53 Ga. 138; Anderson v. Lee, 53 Ga. 189; Van Dyke v. Martin, 53 Ga. 221.

Illinois. — Evans v. Landon, 6 Ill. 307; Bellingall v. Duncan, 8 Ill. 477; Barrett v. Trainor, 50 Ill. App. 420.

Kentucky. — Jones v. Allen, 88 Ky. 381; Vallandingham v. Worthington, 85 Ky. 83; McBurnie v. Overstreet, 8 B. Mon. (Ky.) 300. See also Demint v. Thompson, 80 Ky. 255; Addison v. Crow, 5 Dana (Ky.) 271; Huston v. Duncan, 1 Bush (Ky.) 205.

Maryland. — Busey v. Tuck, 47 Md. 171.

Massachusetts. — Hall v. Crocker, 3 Met. (Mass.) 245; Bond v. Bond, 2 Pick. (Mass.) 382; Hammatt v. Bassett, 2 Pick. (Mass.) 564.

Michigan. — Campau v. Barnard, 25 Mich. 381.

Mississippi. — Hamblen v. Hamblen, 33

b. LAND NOT TO BE LEVIED UPON UNTIL PERSONALTY EXHAUSTED —
(1) English Doctrine. — Prior to the statute of 5 Geo. II., c. 7, it was the duty of the sheriff not to levy upon the lands of the debtor, if there were enough personal goods to satisfy the execution,¹ but since the enactment of that statute the creditor has had the election whether he will seize lands or goods, unless, under peculiar circumstances of equity, he is restrained from exercising

Miss. 455, 69 Am. Dec. 358; *Butler v. Lee*, 54 Miss. 476.

Missouri. — *Duncan v. Matney*, 29 Mo. 368, 77 Am. Dec. 575; *Dunnica v. Coy*, 28 Mo. 525, 75 Am. Dec. 133.

New York. — *Rodgers v. Bonner*, 55 Barb. (N. Y.) 9; *Catlin v. Jackson*, 8 Johns. (N. Y.) 520; *Wood v. Colvin*, 5 Hill (N. Y.) 228.

North Carolina. — *Doe v. M'Kinnie*, 4 Hawks (11 N. Car.) 279, 15 Am. Dec. 519; *Bland v. Whitfield*, 1 Jones L. (46 N. Car.) 122; *Seawell v. Cape Fear Bank*, 3 Dev. L. (14 N. Car.) 279, 22 Am. Dec. 722.

Ohio. — *Morgan v. Kinney*, 38 Ohio St. 610.

Oregon. — *British Columbia Bank v. Page*, 7 Oregon 454.

Pennsylvania. — *Kile v. Giebner*, 114 Pa. St. 381.

Rhode Island. — *Lynch v. Earle*, 18 R. I. 531.

South Carolina. — *Martin v. Bowie*, 37 S. Car. 102.

See also *Harrison v. Maxwell*, 2 Nott & M. (S. Car.) 347, 10 Am. Dec. 611.

Tennessee. — *Harman v. Hann*, 6 Baxt. (Tenn.) 90.

Louisiana Doctrine. — As a general rule, an actual taking and holding of possession by the officer is required in order to make a levy on land in the country parishes. *Winn v. Elgee*, 6 Rob. (La.) 100; *Gordon v. Gilfoil*, 27 La. Ann. 265; *Gusman v. De Poret*, 33 La. Ann. 333; *Pipkin v. Sheriff*, 36 La. Ann. 781. See also *Corse v. Stafford*, 24 La. Ann. 262; *Morgan v. Johnson*, 27 La. Ann. 539; *Kilbourne v. Frellsen*, 22 La. Ann. 207.

Texas Statute. — In Texas it is expressly provided by statute (Sayles' Civ. Stat., art. 2291), that it shall not be necessary to make an entry upon the premises. *Sanger v. Trammell*, 66 Tex. 361. See also *Cain v. Woodward*, 74 Tex. 549; *Catlin v. Bennett*, 47 Tex. 165; *Hancock v. Henderson*, 45 Tex. 479; *White v. Graves*, 15 Tex. 183.

Washington Statute. — In Washington, it is provided by statute that the levy shall be made by filing a copy of the writ and a description of the property with the county auditor. *Front St. Cable R. Co. v. Drake*, 65 Fed. Rep. 539.

Entry Without Eviction. — An entry upon the premises by the officer, or by the creditor accompanied by the officer, for the purpose of taking a momentary seizure, and possession without actually evicting or dispossessing the debtor or his tenants, is, it would seem, authorized and does not constitute a trespass. *Butterfield v. Haskins*, 33 Me. 392.

Special Execution or Order of Sale. — An execution or order of sale commanding a sale of real estate therein specifically described need not be levied nor need the officer take possession of any part of the land, put up a notice thereon, or make proclamation thereon to the

effect that he has made a levy. *Burkett v. Clark*, 46 Neb. 466.

Leasehold Interest. — A leasehold interest in land is levied upon and sold as a chattel, but the sheriff is not required to exercise any dominion or control over it founded on an idea of a right to the possession. *Rex v. Deane*, 2 Show. 85. See also *Steers v. Daniel*, 4 Fed. Rep. 587; *Jefferson v. Dawson*, 3 Keb. 243; *Taylor v. Cole*, 3 T. R. 292; *Playfair v. Musgrove*, 14 M. & W. 239; *Smith v. Morse*, 2 Cal. 544; *Kile v. Giebner*, 114 Pa. St. 381; *Maurer v. Sheaffer*, 116 Pa. St. 339; *Dalzell v. Lynch*, 4 W. & S. (Pa.) 256; *Sowers v. Vie*, 14 Pa. St. 99; *Williams v. Downing*, 18 Pa. St. 60; *Sterling v. Com.*, 2 Grant's Cas. (Pa.) 162; *Titusville Novelty Iron Works' Appeal*, 77 Pa. St. 103.

How Leasehold Should Be Described. — A leasehold interest in land should be described in the levy as such; and a levy on a house and lot as land will not be upheld as a levy on a term for years in the house and lot, nor will a general levy on goods, without more, be considered a levy on a term for years. *Massey v. Farmers' Bank*, 1 Del. Ch. 399, 1 Harr. (Del.) 186.

Land Held in Cotenancy or Joint Tenancy. — When a tract of land is owned by several persons in common or jointly the proper course is to levy upon the debtor's interest in the whole tract and not to set off a part of the tract by metes and bounds and levy upon that as the debtor's share of the land. *Starr v. Leavitt*, 2 Conn. 243, 7 Am. Dec. 268; *Blossom v. Brightman*, 21 Pick. (Mass.) 283; *Peabody v. Minot*, 24 Pick. (Mass.) 329; *Bartlett v. Harlow*, 12 Mass. 348, 7 Am. Dec. 76; *Baldwin v. Whiting*, 13 Mass. 27; *Porter v. Hill*, 9 Mass. 34, 6 Am. Dec. 22; *Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133; *Staniford v. Fullerton*, 18 Me. 229; *Davis v. Barnard*, 60 N. H. 550; *Carter v. Beals*, 44 N. H. 408; *Hall v. Young*, 37 N. H. 134; *Smith v. Knight*, 20 N. H. 9; *Thompson v. Barber*, 12 N. H. 563; *French v. Lund*, 1 N. H. 42, 8 Am. Dec. 31; *Aycock v. Kimbrough*, 61 Tex. 543; *Good v. Coombs*, 28 Tex. 35; *Smith v. Benson*, 9 Vt. 138, 31 Am. Dec. 614; *Galusha v. Sinclear*, 3 Vt. 394; *Howe v. Blanden*, 21 Vt. 315; *Jewett v. Stockton*, 3 Yerg. (Tenn.) 492, 24 Am. Dec. 504. But see *Treon v. Emerick*, 6 Ohio 391.

May Levy upon One of Several Tracts Held in Cotenancy. — *Aycock v. Kimbrough*, 61 Tex. 543; *Butler v. Roys*, 25 Mich. 53, 12 Am. Rep. 218. See also *Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133; *Treon v. Emerick*, 6 Ohio 391; *Hoyt v. Day*, 32 Ohio St. 101; *Earles v. Meaders*, 1 Baxt. (Tenn.) 248; *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466. But see *Blossom v. Brightman*, 21 Pick. (Mass.) 283.

1. English Doctrine. — *Comyns' Dig.* 131, 2 *Coke's Inst.* 394. See also *Davy v. Pepys*, *Plowd.* 438.

this right to the prejudice of an alienee, devisee, or heir.¹

(2) *United States Doctrine*. — In the United States the general rule is that the debtor has the right to have his personal goods exhausted before any of his real estate can be seized, and in many states there are statutes to this effect.²

7. Levy upon Chattels — *a. RIGHT TO ENTER UPON THE DEBTOR'S PREMISES* — (1) *In General*. — The officer may enter upon the debtor's premises to levy upon his goods without committing a trespass,³ but he is not authorized to turn the debtor out and take exclusive possession of his premises.⁴

1. *Hanson v. Barnes*, 3 Gill & J. (Md.) 359, 22 Am. Dec. 322. See also *Dowdell v. Neal*, 10 Ga. 148.

2. *United States Doctrine — Personalty First Subject* — *United States*. — *U. S. v. Drennen*, Hempst. (U. S.) 320. See also *Georgia v. Atlantic, etc., R. Co.*, 3 Woods (U. S.) 434.

Alabama. — *Weir v. Clayton*, 19 Ala. 132.

Delaware. — *Walker v. Hukill*, 1 Harr. (Del.) 347; *Fiddeman v. Biddle*, 1 Harr. (Del.) 500; *Cloud v. Lore*, 5 Houst. (Del.) 163.

Georgia. — *Robinson v. Burge*, 71 Ga. 526. See also *Hopkins v. Burch*, 3 Ga. 222.

Indiana. — Rev. Stat., 1881, § 730 (2 Rev. Stat., 1876, p. 210, § 444); *Wright v. Dick*, 116 Ind. 538; *Neilson v. Bronnenburg*, 81 Ind. 193; *Barret v. Thompson*, 5 Ind. 457.

Kansas. — *Greeno v. Barnard*, 18 Kan. 518; *Collins v. Ritchie*, 31 Kan. 371; *Koehler v. Ball*, 2 Kan. 160, 83 Am. Dec. 451.

Louisiana. — *Miller v. Morgan*, 6 Martin N. S. (La.) 86.

Minnesota. — *Jakobsen v. Wigen*, 52 Minn. 6.

New York. — *Flanders v. Batten*, 50 Hun (N. Y.) 542; *Neilson v. Neilson*, 5 Barb. (N. Y.) 565.

North Carolina. — *Perry v. Hardison*, 99 N. Car. 21; *Farrior v. Houston*, 100 N. Car. 369, 6 Am. St. Rep. 597; *Henshaw v. Branson*, 3 Ired. L. (25 N. Car.) 298.

Oregon. — *Wright v. Young*, 6 Oregon 87.

Rhode Island. — *Aldrich v. Wilcox*, 10 R. I. 405.

Tennessee. — *Crowder v. Sims*, 7 Humph. (Tenn.) 257; *Hassell v. Southern Bank*, 2 Head (Tenn.) 381; *Boyd v. Armstrong*, 1 Yerg. (Tenn.) 40; *Dice v. Penn*, 2 Swan (Tenn.) 561.

Existence of Personalty Not Known. — The officer is justified in levying upon land when he does not know of the existence of personalty, *Stancill v. Branch*, Phil. L. (61 N. Car.) 306, 93 Am. Dec. 592. See also *Sloan v. Stanly*, 11 Ired. L. (33 N. Car.) 627; *Morgan v. Taylor*, 55 Ga. 224; *Beck v. Bower*, 68 Ga. 738. And the officer is only required to exercise reasonable and ordinary diligence in searching for personalty. *Collins v. Ritchie*, 31 Kan. 371. See also *Ryder v. Buckmaster*, 4 Ill. 196.

Insufficient Personalty. — It has been held that where the personal property is insufficient the real estate may be levied upon after the levy upon the personal property without awaiting a sale of the personal property. *Sul-lenger v. Buck*, 22 Kan. 28.

Presumption of Want of Personalty. — In the absence of all contrary evidence it will be presumed that land was levied upon because no chattels could be found. *Knox v. Randall*, 24 Minn. 479; *Vilas v. Reynolds*, 6 Wis. 214. See also *Godman v. Boggs*, 12 Neb. 13.

Several Debtors. — When an execution is issued against more than one defendant, and one of them has no personal property, his land may be taken in execution regardless of the fact that the other defendants have chattels subject to execution. *Drake v. Murphy*, 42 Ind. 82; *Faris v. Banton*, 6 J. J. Marsh. (Ky.) 235; *Crowder v. Sims*, 7 Humph. (Tenn.) 257. *Compare Hassell v. Southern Bank*, 2 Head (Tenn.) 381.

Title of Innocent Purchaser. — It has been held that if the officer levies upon and sells land before exhausting the personalty, the sale will be valid and the title of an innocent purchaser upheld. *U. S. v. Drennen*, Hempst. (U. S.) 320; *Weir v. Clayton*, 19 Ala. 132; *Robinson v. Burge*, 71 Ga. 526; *Frakes v. Brown*, 2 Blackf. (Ind.) 295; *Faris v. Banton*, 6 J. J. Marsh. (Ky.) 235; *Hayden v. Dunlap*, 3 Bibb (Ky.) 216; *Neilson v. Neilson*, 5 Barb. (N. Y.) 565; *Lawrence v. Grambling*, 13 S. Car. 120; *Dice v. Penn*, 2 Swan (Tenn.) 561; *Olde v. Frost*, 59 Tex. 684; *Pearson v. Flanagan*, 52 Tex. 266. See also *Beeler v. Bullitt*, 3 A. K. Marsh. (Ky.) 280, 13 Am. Dec. 161. *Compare Jacobsen v. Wigen*, 52 Minn. 6.

Waiver of Debtor's Right. — The debtor may waive his right to have his chattels first exhausted, and if he fails or refuses to turn out chattels, the officer may levy upon the land in the first instance. *Graves v. Merwin*, 19 Conn. 96; *Allen v. Gleason*, 4 Day (Conn.) 376; *Pitts v. Magie*, 24 Ill. 610; *Stancill v. Branch*, Phil. L. (61 N. Car.) 306, 93 Am. Dec. 592; *Morgan v. Kinney*, 38 Ohio St. 610; *Deadwood First Nat. Bank v. Black Hill Fair Assoc.*, 2 S. Dak. 145. See also *Sloan v. Stanly*, 11 Ired. L. (33 N. Car.) 627. *Compare Cloud v. Lore*, 5 Houst. (Del.) 163.

And it has been held that the debtor, if he prefers to keep his personalty, may request the officer to first levy upon his land, and that the officer will be justified in obeying such instructions. *Stancill v. Branch*, Phil. L. (61 N. Car.) 306, 93 Am. Dec. 592. See also *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475.

3. Officer's Right to Enter Debtor's Premises. — *Parham v. Thompson*, 2 J. J. Marsh. (Ky.) 159. See also *Steers v. Daniel*, 4 Fed. Rep. 587.

4. Officer Cannot Take Exclusive Possession. — *Bayne v. Patterson*, 40 Mich. 658. See also *Snell v. Crowe*, 3 Utah 26.

Right of Creditor to Enter. — It has been held that the creditor or his agent may also enter upon the debtor's premises or enter his house with the officer and remain there long enough to show property to the officer and while an inventory is being taken. *U. S. v. Baker*, 1 Cranch (C. C.) 268; *Parham v. Thompson*, 2 J.

(2) *Right to Break and Force Doors.* — The officer has no right to break the outer door of a dwelling house in order to make a levy upon the debtor's chattels, and a levy made in pursuance of such breaking is invalid.¹ A store, or factory, or other building not used as a dwelling house may, however, be broken into by the officer.² And after the officer has gained a peaceable entrance into the debtor's house, if the inner doors are closed so that he cannot seize the debtor's goods he should demand that they be opened, and if they are not opened, he has a right to break them and seize the goods.³

b. PAPER LEVY INSUFFICIENT. — It is well settled that a mere "paper levy," or "pen and ink levy," as an attempted levy made by merely indorsing on the writ the fact of the levy has been called, is insufficient, and that the officer must perform some other acts indicating an intention to seize the property, and of sufficient notoriety to give information that a levy has been made.⁴

c. MANUCAPTION AND REMOVAL OF GOODS — (1) *English Doctrine.* — In England in order to make a valid levy upon personalty the officer must enter upon the premises where the goods are, and take possession of them, and

J. Marsh. (Ky.) 159. See also Thompson v. Craigmyle, 4 B. Mon. (Ky.) 391.

Right to Enter upon Premises of a Stranger. — It has been held that an officer may enter upon the premises of a third person to levy upon the debtor's goods, but that he does so at the risk of being liable if no property of the debtor is found there. *M'Gee v. Given*, 4 Blackf. (Ind.) 16.

1. Outer Doors Not to Be Broken. — *Saunders v. Millward*, 4 Harr. (Del.) 246; *Boggs v. Vandyke*, 3 Harr. (Del.) 288; *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551; *Ilseley v. Nichols*, 12 Pick. (Mass.) 270; *Swain v. Mizner*, 8 Gray (Mass.) 182; *Bailey v. Wright*, 39 Mich. 96; *Welsh v. Wilson*, 34 Minn. 92; *People v. Hubbard*, 24 Wend. (N. Y.) 369, 35 Am. Dec. 628.

Breaking Doors After Levy. — The officer may break doors in order to carry off the property or effect a sale after having once made a lawful levy. *Saunders v. Millward*, 4 Harr. (Del.) 246. See also *Prettyman v. Dean*, 2 Harr. (Del.) 494.

May Break Doors of Stranger's House. — In *De Graffenreid v. Mitchell*, 3 McCord L. (S. Car.) 506, 15 Am. Dec. 648, it was held that an officer may break open the door of a third person's house in which the debtor has property.

2. Doors of House Other than a Dwelling May Be Broken. — *Nelson v. Van Gazelle Valve Mfg. Co.*, 45 N. J. Eq. 594; *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321.

3. Inner Doors May Be Broken. — *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551.

4. Paper Levy Insufficient — *Arkansas.* — *Kennedy v. Clayton*, 29 Ark. 270.

Dakota. — See *Powell v. McKechnie*, 3 Dakota 319.

Illinois. — *Persels v. McConnell*, 16 Ill. App. 526; *Havely v. Lowry*, 30 Ill. 446; *Minor v. Herriford*, 25 Ill. 344; *Chittenden v. Rogers*, 42 Ill. 100; *People v. Johnson*, 4 Ill. App. 346; *Corbin v. Pearce*, 81 Ill. 461; *Mulheisen v. Lane*, 82 Ill. 117; *Davidson v. Waldron*, 31 Ill. 121, 83 Am. Dec. 266.

Iowa. — *Rix v. Silknitter*, 57 Iowa 262.

Kansas. — *Crisfield v. Neal*, 36 Kan. 278.

Kentucky. — *Demint v. Thompson*, 80 Ky. 255.

Maryland. — *Horse v. Knowles*, 74 Md. 602, citing 7 AM. AND ENG. ENCYC. OF LAW 148. See also *Waters v. Duval*, 11 Gill & J. (Md.) 48, 33 Am. Dec. 693.

Michigan. — *Quackenbush v. Henry*, 42 Mich. 75.

New York. — *Price v. Shipps*, 16 Barb. (N. Y.) 585; *Green v. Burke*, 23 Wend. (N. Y.) 493; *Ray v. Harcourt*, 19 Wend. (N. Y.) 495; *Van Wyck v. Pine*, 2 Hill (N. Y.) 666; *Dresser v. Ainsworth*, 9 Barb. (N. Y.) 619.

Ohio. — *Murphy v. Swadener*, 33 Ohio St. 85; *Minor v. Smith*, 13 Ohio St. 79.

Pennsylvania. — *Linton v. Com.*, 46 Pa. St. 294.

Tennessee. — *James v. Kennedy*, 10 Heisk. (Tenn.) 607; *Connell v. Scott*, 5 Baxt. (Tenn.) 595.

Texas. — *Bryan v. Bridge*, 6 Tex. 137.

In Delaware it has long been the practice merely to make an inventory and appraisal of goods and chattels without actually seizing them. *Flinn v. Fennimore*, 7 Houst. (Del.) 262; *Polite v. Jefferson*, 5 Harr. (Del.) 388; *Hargadine v. Ford*, 5 Houst. (Del.) 380; *Layton v. Steel*, 3 Harr. (Del.) 512; *Sipple v. Scotten*, 1 Harr. (Del.) 107; *Farmers' Bank v. Massey*, 1 Harr. (Del.) 186.

Inventory Furnished by Debtor. — There is some conflict of authority as to the effect of a paper levy when the debtor furnishes an inventory of his property and does not insist upon the performance of other acts, but it seems that such a levy under these circumstances is good as against the debtor, though probably not valid as against other creditors and purchasers. For cases discussing this question, see the following: *Dean v. Thatcher*, 32 N. J. L. 470; *Caldwell v. Fifield*, 24 N. J. L. 161; *Fox v. Cronan*, 47 N. J. L. 493, 54 Am. Rep. 190; *Walker v. Hill*, 22 N. J. Eq. 513; *Dresser v. Ainsworth*, 9 Barb. (N. Y.) 619; *Van Wyck v. Pine*, 2 Hill (N. Y.) 666; *Perry v. Hardison*, 99 N. Car. 21; *Brand v. Whitfield*, 1 Jones L. (46 N. Car.) 122; *Gilkey v. Dickerson*, 3 Hawks (10 N. Car.) 293; *Lowry v. Coulter*, 9 Pa. St. 349, distinguishing *Trovillo v. Tilford*, 6 Watts (Pa.) 468; *Rhame v. McRoy*, 7 Rich. L. (S. Car.) 37; *Weatherby v. Covington*, 3 Strobb. L. (S. Car.) 27.

either actually remove them or leave an assistant or bailiff in charge of them; and to leave the property in the possession of the debtor is considered a badge of fraud.¹

(2) *United States Doctrine*. — According to the weight of authority in the United States, it is not necessary that the officer, levying an execution upon chattels capable of manual seizure, should take possession of them and actually remove them; it is, however, impossible to lay down a precise rule as to what interference with the debtor's possession is necessary and sufficient to constitute a valid levy, as the cases are not at all clear upon this point.² In

1. English Doctrine—Manucaption Necessary. — *Rice v. Serjeant*, 7 Mod. 37; *Bradley v. Wyndham*, 1 Wils. 44; *Blades v. Arundale*, 1 M. & S. 711. See also *Minor v. Herriford*, 25 Ill. 344; *Quackenbush v. Henry*, 42 Mich. 75; *Williamson v. Johnston*, 12 N. J. L. 86; *Westervelt v. Pinckney*, 14 Wend. (N. Y.) 123, 28 Am. Dec. 516; *Com. v. Stremback*, 3 Rawle (Pa.) 341, 24 Am. Dec. 351; *Schuylkill County's Appeal*, 30 Pa. St. 358; *Carey v. Bright*, 58 Pa. St. 70; *Cox v. M'Dougal*, 2 Yeates (Pa.) 434; *Bradley v. Kesee*, 5 Coldw. (Tenn.) 223, 94 Am. Dec. 246.

2. United States Doctrine—Cases Holding Manucaption Unnecessary — *Alabama*. — *McCullough v. McClintock*, 88 Ala. 567. See also *Campbell v. Spence*, 4 Ala. 543, 39 Am. Dec. 301; *Goode v. Longmire*, 35 Ala. 668.

Arkansas. — *Tucker v. Bond*, 23 Ark. 268; *Whiting v. Beebe*, 12 Ark. 421; *Fenno v. Coulter*, 14 Ark. 38.

Delaware. — *Polite v. Jefferson*, 5 Harr. (Del.) 388.

Illinois. — *Gaines v. Becker*, 7 Ill. App. 315; *Smith v. Hughes*, 24 Ill. 270. See also *Logsdon v. Spivey*, 54 Ill. 104; *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 216.

Indiana. — *Hadley v. Hadley*, 82 Ind. 95.

Kentucky. — *Williams v. Herndon*, 12 B. Mon. (Ky.) 484, 54 Am. Dec. 551; *Lampton v. Taylor*, Litt. Sel. Cas. (Ky.) 273; *Hill v. Harris*, 10 B. Mon. (Ky.) 120, 50 Am. Dec. 542; *McBurnie v. Overstreet*, 8 B. Mon. (Ky.) 300; *Richardson v. Bartley*, 2 B. Mon. (Ky.) 328. Compare *Demint v. Thompson*, 80 Ky. 255.

Maryland. — *Horsey v. Knowles*, 74 Md. 602. Compare *Beatty v. Chapline*, 2 Har. & J. (Md.) 7.

Michigan. — *Quackenbush v. Henry*, 42 Mich. 75.

Mississippi. — *Hamblen v. Hamblen*, 33 Miss. 455, 69 Am. Dec. 358. See also *Parker v. Dean*, 45 Miss. 408.

New Jersey. — *Dean v. Thatcher*, 32 N. J. L. 470; *Erie R. Co. v. Ackerson*, 33 N. J. L. 33; *Brewster v. Vail*, 20 N. J. L. 56, 38 Am. Dec. 547; *Caldwell v. Fifield*, 24 N. J. L. 150; *Casher v. Peterson*, 4 N. J. L. 361; *Lloyd v. Wyckoff*, 11 N. J. L. 218; *Nelson v. Van Gazelle Valve Mfg Co.*, 45 N. J. Eq. 594; *Cumberland Bank v. Hand*, 19 N. J. L. 166. See also *Sterling v. Van Cleve*, 12 N. J. L. 285.

New York. — *Dean v. Campbell*, 19 Hun (N. Y.) 534; *Bond v. Willet*, 1 Abb. App. Dec. (N. Y.) 165; 1 Keyes (N. Y.) 377; *Barker v. Miller*, 6 Johns. (N. Y.) 195; *Farrington v. Sinclair*, 15 Johns. (N. Y.) 428; *Elias v. Farley*, 2 Abb. App. Dec. (N. Y.) 11, 3 Keyes (N. Y.) 398; *Roth v. Wells*, 29 N. Y. 471; *Barker v. Binniger*, 14 N. Y. 270; *Green v. Burke*, 23 Wend.

(N. Y.) 490; *Rew v. Barber*, 3 Cow. (N. Y.) 272; *Beekman v. Lansing*, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707; *Alvord v. Haynes*, 13 Hun (N. Y.) 26. See also *Knapp v. Smith*, 27 N. Y. 277; *Stewart v. Wells*, 6 Barb. (N. Y.) 79; *Stiff v. Hart*, 1 N. Y. 20; *Connah v. Hale*, 23 Wend. (N. Y.) 462; *Van Wyck v. Pine*, 2 Hill (N. Y.) 666; *Ray v. Harcourt*, 19 Wend. (N. Y.) 495; *Bliss v. Ball*, 9 Johns. (N. Y.) 132; *Ryder v. Gilbert*, 16 Hun (N. Y.) 163; *Westervelt v. Pinckney*, 14 Wend. (N. Y.) 123, 28 Am. Dec. 516; *Camp v. Chamberlain*, 5 Den. (N. Y.) 198.

North Carolina. — *Bland v. Whitfield*, 1 Jones L. (46 N. Car.) 122. See also *Sawyer v. Bray*, 102 N. Car. 79, 11 Am. St. Rep. 713; *Mangum v. Hamlet*, 8 Ired. L. (30 N. Car.) 44; *Tredwell v. Rascoe*, 3 Dev. L. (14 N. Car.) 50; *Rives v. Porter*, 7 Ired. L. (29 N. Car.) 74. Compare *Long v. Hall*, 97 N. Car. 286; *Seawell v. Cape Fear Bank*, 3 Dev. L. (14 N. Car.) 279, 22 Am. Dec. 722; *Blevins v. Baker*, 11 Ired. L. (33 N. Car.) 291; *State v. Poor*, 4 Dev. & B. L. (20 N. Car.) 384, 34 Am. Dec. 387; *M'Leod v. Pearce*, 2 Hawks (9 N. Car.) 111, 11 Am. Dec. 742; *Blount v. Mitchell*, Tayl. (3 N. Car.) 131; *Roberts v. Scales*, 1 Ired. L. (23 N. Car.) 90.

Ohio. — *Moore v. Powell*, 1 Disney (Ohio) 144; *Acton v. Knowles*, 14 Ohio St. 18; *Pugh v. Calloway*, 10 Ohio St. 488. See also *State v. Fuller*, 14 Ohio 545; *Murphy v. Swadener*, 33 Ohio St. 85.

Pennsylvania. — *Duncan's Appeal*, 37 Pa. St. 500; *McGinnis v. Prieson*, 85 Pa. St. 111; *Cox v. M'Dougal*, 2 Yeates (Pa.) 434; *Stuckert v. Keller*, 105 Pa. St. 386; *Commonwealth Ins. Co. v. Berger*, 42 Pa. St. 292, 82 Am. Dec. 504; *Wood v. Vanarsdale*, 3 Rawle (Pa.) 401; *Com. v. Stremback*, 3 Rawle (Pa.) 341, 24 Am. Dec. 351; *Corlies v. Stanbridge*, 5 Rawle (Pa.) 286; *Dorrance v. Com.*, 13 Pa. St. 160. See also *Davids v. Harris*, 9 Pa. St. 501; *Trovillo v. Tilford*, 6 Watts (Pa.) 468; *McHugh v. Malony*, 4 Phila. (Pa.) 59, 17 Leg. Int. (Pa.) 132. Compare *Schuylkill County's Appeal*, 30 Pa. St. 358.

South Carolina. — *Moss v. Moore*, 3 Hill L. (S. Car.) 276. See also *Weatherby v. Covington*, 3 Strobb. L. (S. Car.) 27.

Tennessee. — *Bradley v. Kesee*, 5 Coldw. (Tenn.) 223, 94 Am. Dec. 246; *Brown v. Allen*, 3 Head (Tenn.) 429; *Etheridge v. Edwards*, 1 Swan (Tenn.) 426; *Tyler v. Dunton*, 1 Tenn. Ch. 361; *Connell v. Scott*, 5 Baxt. (Tenn.) 595. Compare *James v. Kennedy*, 10 Heisk. (Tenn.) 607; *Evans v. Higdon*, 1 Baxt. (Tenn.) 245.

Virginia. — *Bullitt v. Winston*, 1 Munf. (Va.) 269.

Seizure Waived by Debtor. — It seems well settled that the officer need not take chattels

some states of the Union, however, it has been held that the officer must actually remove chattels, and cannot leave them in possession of the debtor, but in some of these states the decisions are based upon or influenced by statutory enactments.¹

Removal Before Sale.—It is well settled that, if the goods are allowed to remain in the debtor's possession, the officer must take them into his possession, or remove them within a reasonable time, so as to have them present at the time and place of sale.²

into his possession when they are in view and under his control, if the debtor waives seizure and requests that the property be left in his possession. *Taftts v. Manlove*, 14 Cal. 47, 73 Am. Dec. 610, *per* Baldwin, J.; *McGirr v. Hunter*, 13 Ill. App. 195; *Logsdon v. Spivey*, 54 Ill. 104; *Jayne v. Dillon*, 28 Miss. 283; *Ray v. Harcourt*, 19 Wend. (N. Y.) 495, *per* Nelson, C. J.; *Baker v. M'Duffie*, 23 Wend. (N. Y.) 289; *Mills v. Thursby*, 11 How. Pr. (N. Y. Supreme Ct.) 121; *Bond v. Willet*, 1 Abb. App. Dec. (N. Y.) 165, 1 Keyes (N. Y.) 377; *Stuckert v. Keller*, 105 Pa. St. 386; *Troville v. Tilford*, 6 Watts (Pa.) 468; *Weatherby v. Covington*, 3 Strobb. L. (S. Car.) 27, 49 Am. Dec. 623; *Harlan v. Harlan*, 14 Lea (Tenn.) 107; *Etheridge v. Edwards*, 1 Swan (Tenn.) 426; *Bullitt v. Winstons*, 1 Munf. (Va.) 269.

Estoppel by Giving Forthcoming Bond.—If the debtor executes a forthcoming bond, he is thereafter estopped from objecting that the levy was improperly made because the property was not taken into the officer's custody and removed by him. *Cawthorn v. McCraw*, 9 Ala. 519; *Roebuck v. Thornton*, 19 Ga. 149; *Walker v. Shotwell*, 13 Smed. & M. (Miss.) 544; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; *Pugh v. Calloway*, 10 Ohio St. 488; *Hastings v. Quigley*, 4 Pa. L. J. 220, 2 Clark (Pa.) 431; *Perit v. Wallis*, 2 Yeates (Pa.) 524; *Cox v. M'Dougal*, 2 Yeates (Pa.) 434; *Ballard v. Dibrell*, 94 Tenn. 229.

1. Cases Holding Manuipation Necessary.—*Arizona*.—*Satterwhite v. Melczer*, (Arizona 1890) 24 Pac. Rep. 184.

California.—*Taftts v. Manlove*, 14 Cal. 47, 73 Am. Dec. 610; *Hawkins v. Roberts*, 45 Cal. 38; *Smith v. Morse*, 2 Cal. 524. See also *Dutertre v. Driard*, 7 Cal. 549.

Connecticut.—*Hollister v. Goodale*, 8 Conn. 332, 21 Am. Dec. 674.

Georgia.—*Yocmans v. Bird*, 81 Ga. 340; *Hart v. Thomas*, 75 Ga. 529. See also *Isam v. Hooks*, 46 Ga. 309; *Levy v. Shockley*, 29 Ga. 710.

Iowa.—*Hanson v. Taper Sleeve Pulley Incorporation*, 72 Iowa 622. See also *Allen v. McCalla*, 25 Iowa 464, 96 Am. Dec. 56; *Crawford v. Newell*, 23 Iowa 453.

Kansas.—*J. M. W. Jones Stationery, etc., Co. v. Case*, 26 Kan. 299.

Louisiana.—*Goubeau v. New Orleans, etc., R. Co.*, 6 Rob. (La.) 345. See also *Calderwood v. Prevost*, 9 Rob. (La.) 182; *Lambeth v. Sentell*, 38 La. Ann. 691; *Mille v. Hebert*, 19 La. Ann. 58; *Simpson v. Allain*, 7 Rob. (La.) 504.

Maine.—*Gower v. Stevens*, 19 Me. 92, 36 Am. Dec. 737. Compare *Nichols v. Patten*, 18 Me. 231, 36 Am. Dec. 713.

Massachusetts.—*Shephard v. Butterfield*, 4 Cush. (Mass.) 425, 50 Am. Dec. 796; *Sander-*

son v. Edwards, 16 Pick. (Mass.) 144; *Carrington v. Smith*, 8 Pick. (Mass.) 419; *Hemmenway v. Wheeler*, 14 Pick. (Mass.) 408, 25 Am. Dec. 411; *Bagley v. White*, 4 Pick. (Mass.) 395, 16 Am. Dec. 353.

Minnesota.—*Horgan v. Lyons*, 59 Minn. 217, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 148. See also *Swart v. Thomas*, 26 Minn. 141; *Barber v. Amundson*, 52 Minn. 358; *Wilson v. Powers*, 21 Minn. 193; *Gale v. Battin*, 16 Minn. 148.

Missouri.—*Hombs v. Corbin*, 20 Mo. App. 497; *Elliott v. Bowman*, 17 Mo. App. 693; *Yeldell v. Stemmons*, 15 Mo. 443; *Sexton v. Monks*, 16 Mo. 156; *Boyce v. Smith*, 16 Mo. 317; *Newman v. Hook*, 37 Mo. 207, 90 Am. Dec. 378; *Foster v. Potter*, 37 Mo. 529; *Lackey v. Lubke*, 36 Mo. 115; *State v. Doan*, 39 Mo. 44. See also *Sams v. Armstrong*, 8 Mo. App. 573; *Bilby v. Hartman*, 29 Mo. App. 125. Compare *Douglas v. Orr*, 58 Mo. 573.

New Hampshire.—*Bryant v. Osgood*, 52 N. H. 182; *Young v. Walker*, 12 N. H. 506; *Runlett v. Bell*, 5 N. H. 433; *Chadbourne v. Sumner*, 16 N. H. 129, 41 Am. Dec. 520; *Huntington v. Blaisdell*, 2 N. H. 317; *Odiorne v. Colley*, 2 N. H. 68, 9 Am. Dec. 39.

South Dakota.—*McLaughlin v. Alexander*, 2 S. Dak. 226. See also *State v. Cassidy*, 4 S. Dak. 58.

Texas.—*Gunter v. Cobb*, 82 Tex. 598. See also *Cavanaugh v. Peterson*, 47 Tex. 197; *Bryan v. Bridge*, 6 Tex. 137.

Vermont.—See *Jewett v. Guyer*, 38 Vt. 209.

2. Must Be Removed Before Sale.—*Nabرابing v. Mobile Bank*, 58 Ala. 204; *Windmillers v. Chapman*, 139 Ill. 163; *Minor v. Herriford*, 25 Ill. 344; *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Havely v. Lowry*, 30 Ill. 446; *Logsdon v. Spivey*, 54 Ill. 104; *Murphy v. Swadener*, 33 Ohio St. 85; *Minor v. Smith*, 13 Ohio St. 79; *Dixon v. White Sewing Mach. Co.*, 128 Pa. St. 397, 15 Am. St. Rep. 683; *Wood v. Vanarsdale*, 3 Rawle (Pa.) 401; *McHugh v. Molony*, 4 Phila. (Pa.) 59, 17 Leg. Int. (Pa.) 132; *Parys's Appeal*, 41 Pa. St. 273, 80 Am. Dec. 615; *Schuylkill County's Appeal*, 30 Pa. St. 358; *Com. v. Contner*, 18 Pa. St. 439; *Com. v. Stremback*, 3 Rawle (Pa.) 341, 24 Am. Dec. 351; *Troville v. Tilford*, 6 Watts (Pa.) 468; *Lowry v. Coulter*, 9 Pa. St. 340. See also *Hanson v. Taper Sleeve Pulley Incorporation*, 72 Iowa 622; *Cowden v. Brady*, 8 S. & R. (Pa.) 505.

Continued Possession of Debtor Evidence of Fraud.—If the debtor is allowed to continue in possession and control of chattels for a long time without any effort on the creditor's part to sell such chattels, this will be deemed *prima facie* evidence of fraud and collusion as against third persons. *Barnes & Billington*, 1 Wash. (U. S.) 29. See also *Davidson v. Waldron*, 31

Right of Officer to Remove. — Whether it is necessary or not, the officer may remove chattels if he thinks fit to do so, especially if he deems such a course necessary for his own security,¹ and it has been said that it is better to take actual possession of them unless the debtor gives a delivery bond.²

d. NECESSITY FOR PUBLICITY. — In making the levy the officer should do nothing to conceal the transaction, but his acts should be open and unequivocal.³

e. VIEW OF GOODS NECESSARY. — It is agreed by all the authorities that the officer must see the goods and have them in such a position that he can subject them to his immediate possession and control, if he so desires.⁴

f. DOMINION AND CONTROL OF PROPERTY. — Whether the property of the debtor is actually removed by the officer or not he must assume dominion and control over it, take it into his custody momentarily, and perform express acts showing an intention on his part to subject the property to the satisfaction of the writ.⁵

Ill. 120, 83 Am. Dec. 206; *Swigert v. Thomas*, 7 Dana (Ky.) 220; *Farrington v. Sinclair*, 15 Johns. (N. Y.) 429; *Farrington v. Caswell*, 15 Johns. (N. Y.) 430; *Storm v. Woods*, 11 Johns. (N. Y.) 110; *Whipple v. Foot*, 2 Johns. (N. Y.) 422, 3 Am. Dec. 422; *Roberts v. Scales*, 1 Ired. L. (23 N. Car.) 90.

1. Officer May Always Remove. — *Fenno v. Coulter*, 14 Ark. 38; *Hightower v. Handlin*, 27 Ark. 20; *Boggs v. Vandyke*, 3 Harr. (Del.) 288; *McBurnie v. Overstreet*, 8 B. Mon. (Ky.) 300; *Rogers v. Darnaby*, 4 B. Mon. (Ky.) 238; *Addison v. Crow*, 5 Dana (Ky.) 271; *Cahn v. Person*, 56 Miss. 360; *Pugh v. Calloway*, 10 Ohio St. 488; *Nixon v. Nash*, 12 Ohio St. 647, 80 Am. Dec. 390. See also *Catlin v. Jackson*, 8 Johns. (N. Y.) 520; *Blevins v. Baker*, 11 Ired. L. (33 N. Car.) 291; *Wadsworth v. Parsons*, 6 Ohio 450.

Chattels in Debtor's Actual Possession. — In England it is well settled that chattels cannot be distrained which are in the actual possession of and being used by the debtor. *Coke Litt.* 47a; *Field v. Adames*, 12 Ad. & El. 649, 40 E. C. L. 147; *Simpson v. Hartopp*, Willes 572; *Storey v. Robinson*, 6 T. R. 138; *Gorton v. Falkner*, 4 T. R. 565. See also *Sunbolf v. Alford*, 3 M. & W. 248.

But in the *United States* there are authorities to the contrary. *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492; *State v. Dillard*, 3 Ired. L. (25 N. Car.) 102, 38 Am. Dec. 708. See also *Mack v. Parks*, 8 Gray (Mass.) 517, 69 Am. Dec. 267; *Maxham v. Day*, 16 Gray (Mass.) 213.

2. Etheridge v. Edwards, 1 Swan (Tenn.) 426. See also *Morgan v. Spangler*, 14 Ohio St. 102.

3. Publicity of Levy. — *Green v. Burke*, 23 Wend. (N. Y.) 490; *Beekman v. Lansing*, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707; *Murphy v. Swadener*, 33 Ohio St. 85; *Liebman v. Ashbacker*, 36 Ohio St. 94; *Duncan's Appeal*, 37 Pa. St. 500; *Portis v. Parker*, 8 Tex. 23, 58 Am. Dec. 95. See also *Crisfield v. Neal*, 36 Kan. 278.

Witnesses. — It is well for the officer to have his acts witnessed by persons from the neighborhood. *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206. But this is not necessary. *Tucker v. Bond*, 23 Ark. 268; *Minor v. Smith*, 13 Ohio St. 79. See also *Cornell v. Cook*, 7 Cow. (N. Y.) 310.

4. Goods Subject to Control of Officer — *California*. — *Taftis v. Manlove*, 14 Cal. 47, 73 Am. Dec. 610.

Illinois. — *Persells v. McConnell*, 16 Ill. App. 526; *Minor v. Herriford*, 25 Ill. 344.

Iowa. — *Rix v. Silknitter*, 57 Iowa 262.

Maryland. — *Horsey v. Knowles*, 74 Md. 602.

Mississippi. — *Banks v. Evans*, 10 Smed. & M. (Miss.) 35, 48 Am. Dec. 734.

New Jersey. — *Nelson v. Van Gazelle Valve Mfg. Co.*, 45 N. J. Eq. 594.

New York. — *Ray v. Harcourt*, 19 Wend. (N. Y.) 495; *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; *Dresser v. Ainsworth*, 9 Barb. (N. Y.) 619.

Ohio. — *Murphy v. Swadener*, 33 Ohio St. 85; *Minor v. Smith*, 13 Ohio St. 79.

Pennsylvania. — *Earl's Appeal*, 13 Pa. St. 483; *Titusville Novelty Iron Works's Appeal*, 77 Pa. St. 103; *Duncan's Appeal*, 37 Pa. St. 500; *Wood v. Vanarsdale*, 3 Rawle (Pa.) 401; *Conniff v. Doyle*, 8 Phila. (Pa.) 630; *Carey v. Bright*, 58 Pa. St. 70; *Schuylkill County's Appeal*, 30 Pa. St. 358; *Linton v. Com.*, 46 Pa. St. 294.

Tennessee. — *Bradley v. Kesee*, 5 Coldw. (Tenn.) 223, 94 Am. Dec. 246; *Connell v. Scott*, 5 Baxt. (Tenn.) 595; *Tyler v. Dunton*, 1 Tenn. Ch. 361; *Ballard v. Dibrell*, 94 Tenn. 229.

Texas. — *Bryan v. Bridge*, 6 Tex. 137.

Wisconsin. — *Brown v. Pratt*, 4 Wis. 513, 65 Am. Dec. 330.

See also *Elliott v. Bowman*, 17 Mo. App. 693.

5. Officer Must Assume Control — *Alabama*. — *Andrews v. Keith*, 34 Ala. 722.

Arkansas. — *Kennedy v. Clayton*, 29 Ark. 270.

Dakota. — *Powell v. McKechnie*, 3 Dakota 319.

Georgia. — *Roebuck v. Thornton*, 19 Ga. 149.

Illinois. — *Marshall v. Moore*, 36 Ill. 321; *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Havely v. Lowry*, 30 Ill. 446; *Minor v. Herriford*, 25 Ill. 344.

Iowa. — *Rix v. Silknitter*, 57 Iowa 262; *Hanson v. Taper Sleeve Pulley Incorporation*, 72 Iowa 622.

Kansas. — *Crisfield v. Neal*, 36 Kan. 278; *J. M. W. Jones Stationery, etc., Co. v. Case*, 26 Kan. 299, 40 Am. Rep. 310.

g. CRITERION OF PROPER LEVY. — In a number of cases it has been said that the true criterion of a proper levy is that the officer should do such acts as would but for the protection of the writ make him a trespasser.¹

h. CONFUSION OF GOODS. — When the goods of the debtor are so confused or mixed with those of a stranger that the property of the one cannot be distinguished from that of the other, and the stranger fails to point out to the officer the goods which are not subject to execution, a levy may be made upon the whole.²

i. UNWIELDY ARTICLES. — When articles are ponderous and unwieldy, such as lumber, stone, grain, and ore, the officer may allow them to remain in the debtor's possession, and he need only go to them, assume control of them,

Kentucky. — *Demint v. Thompson*, 80 Ky. 255.

Michigan. — *Quackenbush v. Henry*, 42 Mich. 75.

Minnesota. — See *Wilson v. Powers*, 21 Minn. 193.

Mississippi. — *Parker v. Dean*, 45 Miss. 408; *Hamblen v. Hamblen*, 33 Miss. 455, 69 Am. Dec. 358.

Missouri. — *Douglas v. Orr*, 58 Mo. 573.

New Hampshire. — *Odiorne v. Colley*, 2 N. H. 66, 9 Am. Dec. 39.

New York. — *Beekman v. Lansing*, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707; *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; *Rodgers v. Bonner*, 55 Barb. (N. Y.) 9; *Wehle v. Conner*, 83 N. Y. 231; *Camp v. Chamberlain*, 5 Den. (N. Y.) 198; *Bond v. Willett*, 31 N. Y. 102; *Dunderdale v. Sauvestre*, 13 Abb. Pr. (N. Y. C. Pl.) 116; *Price v. Shippis*, 16 Barb. (N. Y.) 585; *Dresser v. Ainsworth*, 9 Barb. (N. Y.) 619; *Seymour v. Newton*, 17 Hun (N. Y.) 30; *Ray v. Harcourt*, 19 Wend. (N. Y.) 495; *Barker v. Binninger*, 14 N. Y. 270.

North Carolina. — *Perry v. Hardison*, 99 N. Car. 21.

Ohio. — *Pugh v. Calloway*, 10 Ohio St. 488; *Minor v. Smith*, 13 Ohio St. 79; *Murphy v. Swadener*, 33 Ohio St. 85.

Pennsylvania. — *Duncan's Appeal*, 37 Pa. St. 500.

Tennessee. — *Tyler v. Dunton*, 1 Tenn. Ch. 361; *Bradley v. Kesse*, 5 Coldw. (Tenn.) 223, 94 Am. Dec. 246; *Connell v. Scott*, 5 Baxt. (Tenn.) 595.

Texas. — *Portis v. Parker*, 8 Tex. 23, 58 Am. Dec. 95.

Vermont. — *Jewett v. Guyer*, 38 Vt. 209.

Wisconsin. — *Brown v. Pratt*, 4 Wis. 513, 65 Am. Dec. 330.

Seizure of Part in Name of Whole. — It seems that the officer need not at once remove or assume control over all of the debtor's goods, and that in making an inventory he need only describe a part of them, and may make a sweeping declaration that he levies upon the whole. *Cole v. Davies*, 1 Ld. Raym. 725; *Hart v. Thomas*, 75 Ga. 529; *Roebuck v. Thornton*, 19 Ga. 149; *Trovillo v. Tilford*, 6 Watts (Pa.) 468; *Weidensaul v. Reynolds*, 49 Pa. St. 73; *Wilson's Appeal*, 13 Pa. St. 426; *Lewis v. Smith*, 2 S. & R. (Pa.) 142. See also *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287; *Bliss v. Ball*, 9 Johns. (N. Y.) 132; *Schuylkill County's Appeal*, 30 Pa. St. 358; *Moss v. Moore*, 3 Hill L. (S. Car.) 276. Compare *Watson v. Hoel*, 1 N. J. L. 158; *Hustick v. Allen*, 1 N. J. L. 195, decided under New Jersey statute.

1. Acts Otherwise Amounting to a Trespass. — *United States.* — *Hardesty v. Pyle*, 15 Fed. Rep. 778.

Alabama. — *Goode v. Longmire*, 35 Ala. 668, 76 Am. Dec. 309; *Cawthorn v. McCraw*, 9 Ala. 519.

Illinois. — *Windmiller v. Chapman*, 139 Ill. 163; *Gaines v. Becker*, 7 Ill. App. 315; *Havely v. Lowry*, 30 Ill. 446; *Minor v. Herriford*, 25 Ill. 344. See also *Richardson v. Rardin*, 88 Ill. 124; *Chittenden v. Rogers*, 42 Ill. 100.

Iowa. — *Allen v. McCalla*, 25 Iowa 464, 96 Am. Dec. 56; *Ritz v. Silknitter*, 57 Iowa 262.

Kansas. — *Crisfield v. Neal*, 36 Kan. 278.

Kentucky. — *Carlisle v. Wathen*, 78 Ky. 365; *McBurnie v. Overstreet*, 8 B. Mon. (Ky.) 303.

Massachusetts. — *Miller v. Baker*, 1 Met. (Mass.) 27.

Mississippi. — *Hamblen v. Hamblen*, 33 Miss. 455, 69 Am. Dec. 358.

Missouri. — *Douglas v. Orr*, 58 Mo. 573.

Nebraska. — *Grand Island Banking Co. v. Costello*, 45 Neb. 119; *Johnson v. Walker*, 23 Neb. 736.

New Jersey. — *Nelson v. Van Gazelle Valve Mfg. Co.*, 45 N. J. Eq. 594.

New York. — *Rodgers v. Bonner*, 55 Barb. (N. Y.) 9; *Connah v. Hale*, 23 Wend. (N. Y.) 462; *Bond v. Willett*, 31 N. Y. 102; *Beekman v. Lansing*, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707; *Westervelt v. Pinckney*, 14 Wend. (N. Y.) 123, 28 Am. Dec. 516; *Wintringham v. Lafoy*, 7 Cow. (N. Y.) 735; *Green v. Burke*, 23 Wend. (N. Y.) 490; *Roth v. Wells*, 29 N. Y. 471; *Copley v. Rose*, 2 N. Y. 116; *Stonebridge v. Perkins*, 141 N. Y. 1. See also *Wall v. Osborn*, 12 Wend. (N. Y.) 39; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323; *Allen v. Crary*, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566; *Phillips v. Hall*, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108.

Pennsylvania. — *Dixon v. White Sewing Mach. Co.*, 128 Pa. St. 397, 15 Am. St. Rep. 683; *Duncan's Appeal*, 37 Pa. St. 500; *Welsh v. Bell*, 32 Pa. St. 12.

South Dakota. — *State v. Cassidy*, 4 S. Dak. 58. See also *Powell v. McKechnie*, 3 Dakota 319.

Tennessee. — *Bradley v. Kesse*, 5 Coldw. (Tenn.) 223, 94 Am. Dec. 246; *Connell v. Scott*, 5 Baxt. (Tenn.) 595.

Texas. — *Bryan v. Bridge*, 6 Tex. 137.

Vermont. — *Smith v. Niles*, 20 Vt. 315, 49 Am. Dec. 782.

Wisconsin. — *Gallagher v. Bishop*, 15 Wis. 276.

2. Levy when Goods Confused. — *Wellington v. Sedgwick*, 12 Cal. 469; *Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233. See also

forbid their removal, and indorse upon the writ the fact that he has levied upon such property.¹

j. GROWING CROPS. — A levy upon growing crops may be made by obtaining a view of them and assuming dominion over them by some act as nearly equivalent to a seizure as is practicable, and by making a memorandum of the levy and informing the debtor of the levy; and, from the nature of the case, no asportation is necessary, nor is it necessary that the officer shall keep a watch or guard over them.²

k. PROPERTY INTRUSTED TO CUSTODIAN. — The officer may, if he desires, intrust the property levied upon to the keeping of a custodian without thereby abandoning the levy,³ but this is a matter within the officer's discretion and is not necessary to the validity of the levy.⁴

l. CHATTELS IN WHICH OTHER PERSONS HAVE AN INTEREST — (1) *Reversionary Interest.* — When the reversionary interest in chattels is levied upon, the owner of the particular estate therein must arrange with the officer to produce the chattels at the day and place of sale, or in default of such arrangement must allow the officer to seize them.⁵

(2) *Chattels Held in Cotenancy or Joint Tenancy.* — When the personal property levied upon is held in cotenancy or joint tenancy, the officer should not attempt to divide the property,⁶ but he should take it all.⁷

Mayer v. Wilkins, 37 Fla. 244; *Brown v. Bacon*, 63 Tex. 595; *Carr v. Mead*, 77 Va. 142. And see generally the title *CONFUSION OF GOODS*, vol. 6, p. 592.

1. **Levy upon Unwieldy Goods.** — *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Stanley v. Moynihan*, 45 Ill. App. 192; *Harris v. Evans*, 81 Ill. 419; *Hill v. Harris*, 10 B. Mon. (Ky.) 120, 1 Am. Rep. 542; *Gallagher v. Bishop*, 15 Wis. 276. See also *Portes v. Parker*, 8 Tex. 23, 58 Am. Dec. 95.

2. **Growing Crops.** — *McGirr v. Hunter*, 13 Ill. App. 195; *Godfrey v. Brown*, 86 Ill. 454; *Stuart v. Phelps*, 39 Iowa 14; *Barr v. Cannon*, 69 Iowa 20; *Bilby v. Hartman*, 29 Mo. App. 125; *Johnson v. Walker*, 23 Neb. 736; *Long v. Hall*, 97 N. Car. 286; *Whipple v. Foot*, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442; *Woodworth v. Woodworth*, 21 Barb. (N. Y.) 343; *State v. Poor*, 4 Dev. & B. L. (20 N. Car.) 384, 34 Am. Dec. 387. See also *Crine v. Tifts*, 65 Ga. 644; *Pierce v. Roche*, 40 Ill. 292; *Penhallow v. Dwight*, 7 Mass. 34, 5 Am. Dec. 21; *Crumett v. Crawford*, 10 Lea (Tenn.) 21. And see the title *CROPS*, vol. 8, p. 310.

Officer Need Not Harvest. — It has been held that the officer is not bound to harvest the crop before the day of sale, although it matures in time for him to do so. *Bilby v. Hartman*, 29 Mo. App. 129, *distinguishing* *Heard v. Fairbanks*, 5 Met. (Mass.) 111, 38 Am. Dec. 394.

3. **Custodian Appointed by Officer.** — *Smith v. Hughes*, 24 Ill. 270; *Cooley v. Harper*, 4 Ind. 454; *Richardson v. Bartley*, 2 B. Mon. (Ky.) 328; *Lampton v. Taylor*, Litt. Sel. Cas. (Ky.) 273; *Ames v. Taylor*, 49 Me. 381; *Stilson v. Gibbs*, 46 Mich. 216; *Horgan v. Lyons*, 59 Minn. 217; *Ray v. Harcourt*, 19 Wend. (N. Y.) 495; *Wood v. Vanarsdale*, 3 Rawle (Pa.) 401; *Tyler v. Dunton*, 1 Tenn. Ch. 361; *Brown v. Allen*, 3 Head (Tenn.) 429; *Etheridge v. Edwards*, 1 Swan (Tenn.) 426; *Dawson v. Daniel*, 2 Flipp. (U. S.) 305; *Very v. Watkins*, 23 How. (U. S.) 469.

The Debtor may be selected by the sheriff as

the bailee or keeper. *Smith v. Hughes*, 24 Ill. 270; *Cooley v. Harper*, 4 Ind. 454; *Ray v. Harcourt*, 19 Wend. (N. Y.) 495; *Brown v. Allen*, 3 Head (Tenn.) 429. See also *Ames v. Taylor*, 49 Me. 381.

4. *Ray v. Harcourt*, 19 Wend. (N. Y.) 495; *Beekman v. Lansing*, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707; *Lampton v. Taylor*, Litt. Sel. Cas. (Ky.) 273; *Wood v. Vanarsdale*, 3 Rawle (Pa.) 401. See also *Dawson v. Daniel*, 2 Flipp. (U. S.) 305. *Compare* *Stilson v. Gibbs*, 46 Mich. 215.

5. **Reversionary Interest Levied Upon.** — *Blanton v. Morrow*, 7 Ired. Eq. (42 N. Car.) 47, 53 Am. Dec. 391.

6. *Mersereau v. Norton*, 15 Johns. (N. Y.) 179; *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540. See also *Blevins v. Baker*, 11 Ired. L. (33 N. Car.) 291.

7. **All of Chattels Held in Cotenancy or Joint Tenancy Levied Upon** — *England.* — *Heydon v. Heydon*, 1 Salk. 392; *Smith v. Stokes*, 1 East 363; *Fox v. Hanbury*, 2 Cowp. 445; *Eddie v. Davidson*, Doug. 650; *Pope v. Haman*, Comb. 217.

California. — *Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147; *Veach v. Adams*, 51 Cal. 609; *Waldman v. Broder*, 10 Cal. 378.

Illinois. — *Neary v. Cahill*, 20 Ill. 214; *Newhall v. Buckingham*, 14 Ill. 405.

Kansas. — *Hershfield v. Clafin*, 25 Kan. 166, 37 Am. Rep. 237.

Massachusetts. — *Melville v. Brown*, 15 Mass. 82. See also *Reed v. Howard*, 2 Met. (Mass.) 36.

New Hampshire. — *Pettingill v. Bartlett*, 1 N. H. 87.

New York. — *Fiero v. Betts*, 2 Barb. (N. Y.) 633; *Mersereau v. Norton*, 15 Johns. (N. Y.) 179. See also *Waddell v. Cook*, 2 Hill (N. Y.) 47, 37 Am. Dec. 372, which case is *cited* in *Newhall v. Buckingham*, 14 Ill. 405, and in *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540. See further *Walsh v. Adams*, 3 Den. (N. Y.) 125, which case is *cited* in *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540.

(3) *Partnership Chattels*. — The manner in which an execution against a partner may be levied on the property of the firm of which such partner is a member has given rise to much discussion and some diversity of decision.¹ But the decided weight of authority seems to be that when the property levied upon is the property of the firm, the officer may, and for his own security and that of the execution creditor, should, take all the chattels levied on, and after the sale of the defendant partners' interest therein, redeliver the same to the other partners and the purchaser who are said to be tenants in common of the chattels so sold.²

Nevada. — *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540.

North Carolina. — *Blevins v. Baker*, 11 Ired. L. (33 N. Car.) 291.

Kentucky Statute. — Civil Code Ky., § 666, provides that an officer in levying an execution on personal property held by a creditor jointly with another shall not deprive such person, without his consent in writing, of the possession of the property, except for the purpose of having it inventoried and appraised. *Vicory v. Strausbaugh*, 78 Ky. 425.

In *Mississippi* it is provided by statute (Code 1880, § 1770) that where a defendant in execution shall own or be entitled to an interest in any property not in his own exclusive possession, such interest may be levied on and sold by the sheriff without taking the property into his actual possession; and since he may levy without disturbing the possession of the other owners, he must do so. *Blumenfeld v. Seward*, 71 Miss. 342, citing *Willis v. Loeb*, 59 Miss. 169.

The Interest Seized. — The sheriff, in levying an execution against a joint tenant or cotenant, should not levy upon property owned in joint tenancy or cotenancy as belonging to the debtor exclusively, but the levy should be on the interest of the debtor alone. *Neary v. Cahill*, 20 Ill. 214; *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540. Compare *Pettingill v. Bartlett*, 1 N. H. 87.

1. *Cropper v. Coburn*, 2 Curt. (U. S.) 465.

2. *Levy upon Partnership Chattels* — *England*. — *Parker v. Pistor*, 3 B. & P. 288. See also *Johnson v. Evans*, 7 M. & G. 240, 49 E. C. L. 240; *Pope v. Haman*, Comb. 217.

United States. — *U. S. v. Williams*, 4 McLean (U. S.) 236. See also *Gilmore v. North American Land Co.*, Pet. (C. C.) 460.

Alabama. — *Andrews v. Keith*, 34 Ala. 722. See also *Moore v. Sample*, 3 Ala. 319; *Winston v. Ewing*, 1 Ala. 129, 34 Am. Dec. 768.

California. — *Waldman v. Broder*, 10 Cal. 378; *Clark v. Cushing*, 52 Cal. 617; *Wright v. Ward*, 65 Cal. 525.

Colorado. — *Felt v. Cleghorn*, 2 Colo. App. 4.

Connecticut. — *Johnson v. State Bank*, 21 Conn. 148.

Delaware. — *Davis v. White*, 1 Houst. (Del.) 228.

Illinois. — *Newhall v. Buckingham*, 14 Ill. 405. See also *White v. Jones*, 38 Ill. 159; *James v. Stratton*, 32 Ill. 202; *Chandler v. Lincoln*, 52 Ill. 75.

Kansas. — *Hersfield v. Claffin*, 25 Kan. 166, 37 Am. Rep. 237.

Maine. — *Moore v. Pennell*, 52 Me. 162, 83 Am. Dec. 500; *Douglas v. Winslow*, 20 Me. 89.

Maryland. — *M'Elderry v. Flannagan*, 1 Har. & G. (Md.) 308.

Minnesota. — *Barrett v. McKenzie*, 24 Minn. 20; *Caldwell v. Auger*, 4 Minn. 217, 77 Am. Dec. 515; *Wickham v. Davis*, 24 Minn. 167.

Missouri. — *Wiles v. Maddox*, 26 Mo. 81; *Lloyd v. Tracy*, 53 Mo. App. 175. See also *Coggshall v. Munger*, 54 Mo. App. 420; *McCoy v. Hyatt*, 80 Mo. 130.

New Jersey. — *Clements v. Jesup*, 36 N. J. Eq. 569; *James v. Burnet*, 20 N. J. L. 635.

New York. — *Turner v. Smith*, 1 Abb. Pr. N. S. (N. Y. C. Pl.) 304; *Scrugham v. Carter*, 12 Wend. (N. Y.) 131; *Ryder v. Gilbert*, 16 Hun (N. Y.) 163; *Smith v. Orser*, 42 N. Y. 132; *Atkins v. Saxton*, 77 N. Y. 195. See also *Phillips v. Cook*, 24 Wend. (N. Y.) 389; *Waddell v. Cook*, 2 Hill (N. Y.) 48, 37 Am. Dec. 372; *Mowbray v. Lawrence*, 13 Abb. Pr. (N. Y. Supreme Ct.) 318; *Hergman v. Dettlebach*, 11 How. Pr. (N. Y. Supreme Ct.) 46; *Goll v. Hinton*, 8 Abb. Pr. (N. Y. Supreme Ct.) 122. Compare *Matter of Smith*, 16 Johns. (N. Y.) 102; *Moody v. Payne*, 2 Johns. Ch. (N. Y.) 548.

North Carolina. — *Tredwell v. Rascoe*, 3 Dev. L. (14 N. Car.) 50.

Ohio. — *Nixon v. Nash*, 12 Ohio St. 647, 80 Am. Dec. 390. See also *Place v. Sweetzer*, 16 Ohio 142.

South Carolina. — *Schatzill v. Bolton*, 2 McCord L. (S. Car.) 478, 13 Am. Dec. 748.

Tennessee. — *Haskins v. Everett*, 4 Sneed (Tenn.) 531. See also *Saunders v. Bartlett*, 12 Heisk. (Tenn.) 316; *Rains v. McNairy*, 4 Humph. (Tenn.) 358, 40 Am. Dec. 651.

Utah. — See *Snell v. Crowe*, 3 Utah 26.

Vermont. — *Lamoille Valley R. Co. v. Bixby*, 55 Vt. 235; *Reed v. Shepardson*, 2 Vt. 120, 19 Am. Dec. 697; *Bardwell v. Perry*, 19 Vt. 292, 47 Am. Dec. 687; *Washburn v. Belkows Falls Bank*, 19 Vt. 278.

Virginia. — *Shaver v. White*, 6 Munf. (Va.) 110, 8 Am. Dec. 730; *Wayt v. Peck*, 9 Leigh (Va.) 434.

But see *Hutchinson v. Dubois*, 45 Mich. 143; *Sirrine v. Briggs*, 31 Mich. 443; *Morrison v. Blodgett*, 8 N. H. 238, 29 Am. Dec. 653; *Tappan v. Blaisdell*, 5 N. H. 190. And see the title PARTNERSHIP.

Indiana Doctrine. — In *Williams v. Lewis*, 115 Ind. 45, 7 Am. St. Rep. 403, the court says. "As incidental to the right of sale the officer may, without interfering with the rights of the other partners, take possession of the interest seized and deliver it to the purchaser, who takes subject to the rights of the other partners and to the contingency that an accounting may show that he took no beneficial interest by the purchase." See also *Ferguson v. Day*, 6 Ind. App. 138; *Branch v. Wiseman*, 51 Ind. 1.

Pennsylvania Doctrine. — It has been denied in *Pennsylvania* that the sheriff is authorized to take possession of the chattels belonging to

(4) *Mortgaged Chattels*. — Where an execution may be levied upon mortgaged chattels and the chattels are in the hands of the mortgagor, the officer has a right as against the mortgagee to take the property into his possession

the firm and exclude the defendant copartners from possession. *Deal v. Bogue*, 20 Pa. St. 228, 57 Am. Dec. 702. See also *Reinheimer v. Hemingway*, 35 Pa. St. 432; *Knerr v. Hoffman*, 65 Pa. St. 126; *Vandike v. Roskam*, 67 Pa. St. 330; *Richard v. Allen*, 117 Pa. St. 199, 2 Am. St. Rep. 652.

Statutory Regulation. — In some jurisdictions this matter is regulated by statute. *Harris v. Phillips*, 49 Ark. 58; *Vicary v. Strausbaugh*, 78 Ky. 425; *Anderson v. Chenney*, 51 Ga. 372; *Patterson v. Trumbull*, 40 Ga. 104; *Aultman v. Fuller*, 53 Iowa 60; *Hubbard v. Curtis*, 8 Iowa 1, 74 Am. Dec. 283; *Pittman v. Robicheau*, 14 La. Ann. 108; *Choppin v. Wilson*, 27 La. Ann. 444; *Levy v. Cowan*, 27 La. Ann. 556; *Marston v. Dewberry*, 21 La. Ann. 518; *Blumenfeld v. Seward*, 71 Miss. 342; *Willis v. Loeb*, 59 Miss. 169; *Middlebrook v. Zapp*, 79 Tex. 321; *Canales v. Perez*, 65 Tex. 291; *Howell v. Jones*, 3 Tex. App. Civ. Cas., § 208. And see generally the codes and statutes of the various states.

Accommodation of Partners. — As the firm's credit will be seriously affected by the seizure of its property, it is desirable that an arrangement should be made by which the goods may be kept safely until the time of sale, and the officer should not seize partnership property when the partners show no disposition to prevent the sale of the defendant's interest. *U. S. v. Williams*, 4 McLean (U. S.) 236. See also *Waters v. Taylor*, 2 Ves. & B. 299; *Atkins v. Saxton*, 77 N. Y. 195; *Waddell v. Cook*, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; *Thompson v. Tinnin*, 25 Tex. Supp. 56.

Dissolution of Partnership. — It has been said that the seizure of the firm's property dissolves the partnership from the time of the seizure on condition that the property shall afterwards be sold. *Hershfield v. Claflin*, 25 Kan. 166, 37 Am. Rep. 237, *per* Valentine, J.

Seizure of Specific Articles. — The officer in levying an execution against a partner upon the assets of the partnership cannot seize particular chattels belonging to the firm as the property of the partner against whom he has the execution, and sell the entire interest in such chattels in disregard of the interests of the copartners; and many of the cases maintain that the officer should levy upon the debtor's interest in the entire assets of the partnership.

England. — *Heydon v. Heydon*, 1 Salk. 392. See also *Bachurst v. Clinkard*, 1 Show. 173; *Eddie v. Davidson*, 2 Doug. 650.

Alabama. — In *Daniel v. Owens*, 70 Ala. 297.

Connecticut. — In *Church v. Knox*, 2 Conn. 514. See also *Brewster v. Hammet*, 4 Conn. 540.

Illinois. — *Gerard v. Bates*, 124 Ill. 150, 7 Am. St. Rep. 350.

Indiana. — *Williams v. Lewis*, 115 Ind. 45, 7 Am. St. Rep. 403; *Stumph v. Bauer*, 76 Ind. 157; *Branch v. Wiseman*, 51 Ind. 1; *Ferguson v. Day*, 6 Ind. App. 138.

Kansas. — See *Spalding v. Black*, 22 Kan. 55.

Louisiana. — *Pittman v. Robicheau*, 14 La. Ann. 108; *Marston v. Dewberry*, 21 La. Ann. 518; *Levy v. Cowan*, 27 La. Ann. 556; *Carvin v. Bates*, 10 La. Ann. 756; *Smith v. McMicken*, 3 La. Ann. 319; *Tennessee Bank v. McKeage*, 11 Rob. (La.) 130.

Maine. — See *Moore v. Pennell*, 52 Me. 162, 83 Am. Dec. 500.

Massachusetts. — *Allen v. Wells*, 22 Pick. (Mass.) 450, 33 Am. Dec. 757.

Michigan. — *Sirrine v. Briggs*, 31 Mich. 443. See also *Hutchinson v. Dubois*, 45 Mich. 143.

Mississippi. — *Blumenfeld v. Seward*, 71 Miss. 342; *Sanders v. Young*, 31 Miss. 111.

New Hampshire. — *Morrison v. Blodgett*, 8 N. H. 238, 29 Am. Dec. 653; *Gibson v. Stevens*, 7 N. H. 352. See also *Treadwell v. Brown*, 43 N. H. 290.

New York. — See *Matter of Smith*, 16 Johns. (N. Y.) 102; *Waddell v. Cook*, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; *Atkins v. Saxton*, 77 N. Y. 195.

Virginia. — *Shaver v. White*, 6 Munf. (Va.) 110, 8 Am. Dec. 730; *Wayt v. Peck*, 9 Leigh (Va.) 434.

Compare *Felt v. Cleghorn*, 2 Colo. App. 4; *Wiles v. Maddox*, 26 Mo. 77; *Wright v. Radcliffe*, 61 Mo. App. 257.

The Nature of the Interest Seized. — The officer in levying an execution upon partnership assets has no right to seize and sell the entire property in goods, but must levy upon the debtor's undivided and indefinite interest only; *i. e.*, not upon the partnership effects themselves, but upon the right of the partner to a share of the surplus that may remain after all the partnership debts are paid. *Bachurst v. Clinkard*, 1 Show. 173.

United States. — *Clagett v. Kilbourne*, 1 Black (U. S.) 346. See also *U. S. v. Williams*, 4 McLean (U. S.) 236.

Alabama. — *Winston v. Ewing*, 1 Ala. 129, 34 Am. Dec. 768.

Connecticut. — *Brewster v. Hammet*, 4 Conn. 540.

Illinois. — *White v. Jones*, 38 Ill. 159.

Iowa. — *Edgar v. Caldwell*, 1 Morr. (Iowa) 434.

Maine. — *Moore v. Pennell*, 52 Me. 162, 83 Am. Dec. 500.

Massachusetts. — *Allen v. Wells*, 22 Pick. (Mass.) 450, 33 Am. Dec. 757.

Michigan. — *Hutchinson v. Dubois*, 45 Mich. 143.

Mississippi. — *Sanders v. Young*, 31 Miss. 111.

Missouri. — *Wiles v. Maddox*, 26 Mo. 77.

New York. — *Atkins v. Saxton*, 77 N. Y. 195; *Matter of Smith*, 16 Johns. (N. Y.) 102; *Waddell v. Cook*, 2 Hill (N. Y.) 47, 37 Am. Dec. 372.

Ohio. — *Nixon v. Nash*, 12 Ohio St. 647, 80 Am. Dec. 390.

Pennsylvania. — In *Doner v. Stauffer*, 1 P. & W. (Pa.) 108, 21 Am. Dec. 370. See also *Vandike v. Roskam*, 67 Pa. St. 330. See also *Conniff v. Doyle*, 8 Phila. (Pa.) 630; *Deal v. Bogue*, 20 Pa. St. 228, 57 Am. Dec. 702.

Utah. — See *Snell v. Crowe*, 3 Utah 26.

and custody and to exhibit it at the sale.¹ But in whatever manner the levy be made, it must be subordinate to the rights of the mortgagee.²

(5) *Pledged or Leased Chattels*. — When a chattel has been pawned, pledged, or leased, the officer, in levying an execution against the bailor, should not take possession of such chattel because the bailor has no present right of possession.³

8. Levy Upon Choses in Action. — At the common law a levy could not be made upon choses in action,⁴ and in making a levy upon them under statutes the provision of such statutes as to the method of making the levy must be followed.⁵

1. Levy Upon Mortgaged Chattels — *Alabama*. — *McConeghy v. McCaw*, 31 Ala. 447.

Illinois. — *People v. Johnson*, 15 Ill. App. 153; *Durfee v. Grinnell*, 69 Ill. 371. See also *Merritt v. Niles*, 25 Ill. 282.

Indiana. — See *State v. Milligan*, 106 Ind. 109; *Byram v. Stout*, 127 Ind. 195; *Foster v. Bringham*, 99 Ind. 505. See also *Olds v. Andrews*, 66 Ind. 147; *Broadhead v. McKay*, 46 Ind. 595; *Emmons v. Hawn*, 75 Ind. 356; *Sparks v. Compton*, 70 Ind. 393; *Geisendorff v. Eagles*, 70 Ind. 418; *Louthain v. Miller*, 85 Ind. 161; *Hackleman v. Goodman*, 75 Ind. 202; *Manns v. Brookville Nat. Bank*, 73 Ind. 243; *Raymond v. Parish*, 70 Ind. 256; *Mobley v. Letts*, 61 Ind. 11; *Landers v. George*, 49 Ind. 309; *Sidener v. Bible*, 43 Ind. 230; *Heimberger v. Boyd*, 18 Ind. 420; *Schrader v. Wolfen*, 21 Ind. 230.

Kentucky. — *Fugate v. Clarkson*, 2 B. Mon. (Ky.) 41, 36 Am. Dec. 589; *Mercer v. Tinsley*, 14 B. Mon. (Ky.) 220; *McIsaacs v. Hobbs*, 8 Dana (Ky.) 268; *Philips v. Morris*, 7 J. J. Marsh. (Ky.) 279.

Michigan. — *Nelson v. Ferris*, 30 Mich. 497; *Cary v. Hewitt*, 26 Mich. 228; *Stanton First Nat. Bank v. Summers*, 75 Mich. 107; *Wilson v. Montague*, 57 Mich. 638. See also *Smith v. Menominee Circuit Judge*, 53 Mich. 560; *Macomber v. Saxton*, 28 Mich. 516; *Haynes v. Leppig*, 40 Mich. 602. Compare *Tannahill v. Tuttle*, 3 Mich. 104, 61 Am. Dec. 480; *Eggleson v. Mundy*, 4 Mich. 295.

Minnesota. — *Barber v. Amundson*, 52 Minn. 358.

New York. — *Hull v. Carnley*, 11 N. Y. 501, 17 N. Y. 202; *Goulet v. Asseler*, 22 N. Y. 225; *Manning v. Monaghan*, 28 N. Y. 585. See also *Hamill v. Gillespie*, 48 N. Y. 556; *Hall v. Sampson*, 35 N. Y. 274, 91 Am. Dec. 56; *Hathaway v. Brayman*, 42 N. Y. 322, 1 Am. Rep. 524.

Texas. — *Sparks v. Pace*, 60 Tex. 298. See also *Garrity v. Thompson*, 64 Tex. 597; *Erwin v. Blanks*, 60 Tex. 583; *Wright v. Henderson*, 12 Tex. 43; *Wootton v. Wheeler*, 22 Tex. 338; *Gillian v. Henderson*, 12 Tex. 47; *Belt v. Raguet*, 27 Tex. 471; *Adoue v. Seeligson*, 54 Tex. 593.

Statutory Provisions. — In some states it is made necessary to tender to the mortgagee the amount due to him under the mortgage before taking the property. *Keith v. Haggart*, 4 Dakota 438; *Blotcky v. O'Neill*, 83 Iowa 574; *Paul v. Hayford*, 22 Me. 234. See also *Holbrook v. Baker*, 5 Me. 309, 17 Am. Dec. 236; *Welch v. Whittemore*, 25 Me. 86; *Coughran v. Sundback*, 9 S. Dak. 483.

2. Levy Subordinate to Mortgagee's Rights. — *Smith v. Menominee Circuit Judge*, 53 Mich.

560; *Frisbee v. Langworthy*, 11 Wis. 375; *Cotton v. Marsh*, 3 Wis. 221. See also *Haynes v. Leppig*, 40 Mich. 602.

Mortgagee in Possession. — From some of the cases it would seem that the officer has a right to take the goods into his possession and custody notwithstanding the fact that the mortgagee at the time of the levy is in actual possession or has the right of possession. *McIsaacs v. Hobbs*, 8 Dana (Ky.) 268. See also *Fugate v. Clarkson*, 2 B. Mon. (Ky.) 41, 36 Am. Dec. 589; *Stanton First Nat. Bank v. Summers*, 75 Mich. 107. But see *Fox v. Cronan*, 47 N. J. L. 493, 54 Am. Rep. 190; *Cotton v. Marsh*, 3 Wis. 221; *Cotton v. Watkins*, 6 Wis. 629.

3. Pledged or Leased Chattels. — *Mechanics Bldg., etc., Assoc. v. Conover*, 14 N. J. Eq. 219; *Srodes v. Caven*, 3 Watts (Pa.) 258; *Cotton v. Watkins*, 6 Wis. 629.

But in Louisiana the rule is otherwise. *Horne v. Dennis*, 34 La. Ann. 389.

4. McLaughlin v. Alexander, 2 S. Dak. 226, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 129.

5. Levy Upon Choses in Action — *California*. — *Crandall v. Blen*, 13 Cal. 15. See also *Davis v. Mitchell*, 34 Cal. 81.

Louisiana. — *Mille v. Hebert*, 19 La. Ann. 58; *Fluker v. Bullard*, 2 La. Ann. 338; *Gaines v. Merchants' Bank*, 4 La. Ann. 369; *Galbraith v. Snyder*, 2 La. Ann. 492; *Taylor v. Stone*, 2 La. Ann. 910; *Offut v. Monquit*, 2 La. Ann. 785. See also *Goubeau v. New Orleans, etc., R. Co.*, 6 Rob. (La.) 345; *Simpson v. Allain*, 7 Rob. (La.) 500; *Stockton v. Stanbrough*, 3 La. Ann. 390; *McDonald v. Mechanics', etc., Ins. Co.*, 32 La. Ann. 594.

Minnesota. — *Swart v. Thomas*, 26 Minn. 141; *Tullis v. Brawley*, 3 Minn. 277; *Wheaton v. Spooner*, 52 Minn. 417; *Henry v. Traynor*, 42 Minn. 234.

New Jersey. — *Princeton Bank v. Crozer*, 22 N. J. L. 383, 53 Am. Dec. 254.

Ohio. — *Seymour v. Milford, etc., Turnpike Co.*, 10 Ohio 476.

South Dakota. — *McLaughlin v. Alexander*, 2 S. Dak. 226.

Corporate Stock. — In making a levy upon corporate stock, the provisions of the statute authorizing such levy should be followed.

Illinois. — *People v. Goss, etc., Mfg. Co.*, 99 Ill. 355. See also *Union Nat. Bank v. Byram*, 131 Ill. 92.

Iowa. — *Moore v. Marshalltown Opera-House Co.*, 81 Iowa 45. See also *Moor v. Walker*, 46 Iowa 164.

Louisiana. — *Harris v. Mobile Bank* 5 La. Ann. 538.

9. Execution Against Several Defendants. — When an officer has an execution against several defendants, he is not bound to levy it equally upon the property of each, but he may levy the execution upon the property of any one or more of the defendants, leaving them to settle among themselves the proportion which each ought to contribute.¹

10. When There Are Several Executions — *a.* IN THE HANDS OF THE SAME OFFICER. — The general rule is that it is the duty of the officer to levy executions in the order in which they are delivered to him,² and when he has levied upon property under one execution, the second execution operates as a constructive levy, and all that the officer must do is to indorse a levy upon the second writ, and even this is unnecessary according to some of the decisions.³

Massachusetts. — *Howe v. Starkweather*, 17 Mass. 240.

Michigan. — *Blair v. Compton*, 33 Mich. 414.

Minnesota. — *Wheaton v. Spooner*, 52 Minn. 417.

Missouri. — *Foster v. Potter*, 37 Mo. 525.

New Jersey. — *Princeton Bank v. Crozer*, 22 N. J. L. 383, 53 Am. Dec. 254. See also *Voorhis v. Terhune*, 50 N. J. L. 147, 7 Am. St. Rep. 781.

Tennessee. — *Memphis Appeal Pub. Co. v. Pike*, 9 Heisk. (Tenn.) 697.

1. How Levy Made When Several Defendants — *Georgia.* — *Keaton v. Cox*, 26 Ga. 162.

Kentucky. — *Faris v. Banton*, 6 J. J. Marsh. (Ky.) 235.

Louisiana. — *U. S. v. Hawkins*, 4 Martin N. S. (La.) 317.

Massachusetts. — *Parker v. Dennie*, 6 Pick. (Mass.) 227.

New Jersey. — *Randolph v. Daly*, 16 N. J. Eq. 313.

New York. — *Root v. Wagner*, 30 N. Y. 9, 86 Am. Dec. 348; *Flanders v. Batten*, 50 Hun (N. Y.) 542; *Godfrey v. Gibbons*, 22 Wend. (N. Y.) 569.

Pennsylvania. — *Gibbs v. Atkinson*, 3 Pa. L. J. 139, 1 Clark (Pa.) 476.

Rhode Island. — In *Burdick v. Burdick*, 16 R. I. 495.

Tennessee. — *Hassell v. Southern Bank*, 2 Head (Tenn.) 381.

Texas. — *Mitchusson v. Wadsworth*, 1 Tex. App. Civ. Cas., § 976; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769.

Vermont. — *Warren v. Edgerton*, 22 Vt. 199, 54 Am. Dec. 66.

Virginia. — *Humphrey v. Hitt*, 6 Gratt. (Va.) 509, 52 Am. Dec. 133.

Wisconsin. — *Hyde v. Rogers*, 59 Wis. 154.

Husband and Wife. — It has been held that when a judgment has been recovered jointly against a husband and wife, without any specific directions as to the estate out of which it is to be satisfied, an execution may be levied upon the property of either. *Howard v. North*, 5 Tex. 290.

Principal and Surety. — When an execution is issued against defendants, between whom the relation of principal and surety exists, the execution may be levied upon the property of either or both. *Manry v. Shepperd*, 57 Ga. 68; *Battle v. Stephens*, 32 Ga. 25; *Edwards v. Walker*, 4 Rob. (La.) 181; *Fuller v. Loring*, 42 Me. 481; *Pearson v. Morrison*, 2 S. & R. (Pa.) 20; *Knight v. Charter*, 22 W. Va. 422. See also *Kendrick v. Rice*, 16 Tex. 254.

Statutes Requiring Exhaustion of Principal's Property. — For cases discussing such statutes see the following: *Moss v. Agricultural Bank*, 4 Smed. & M. (Miss.) 726; *Hamblin v. Foster*, 4 Smed. & M. (Miss.) 139; *Hyman v. Seaman*, 33 Miss. 185; *Cheatham v. Brien*, 3 Head (Tenn.) 552; *Atkinson v. Rhea*, 7 Humph. (Tenn.) 59; *Bryant v. Rudisell*, 4 Heisk. (Tenn.) 656; *Anderson v. Talbot*, 1 Heisk. (Tenn.) 407.

2. Order of Levying Several Executions — *Delaware.* — *Rust v. Pritchett*, 5 Harr. (Del.) 260.

Indiana. — *Bragg v. State*, 30 Ind. 427.

Kentucky. — *Million v. Com.*, 1 B. Mon. (Ky.) 310, 36 Am. Dec. 580; *Arberry v. Noland*, 2 J. J. Marsh. (Ky.) 421; *Com. v. Straton*, 7 J. J. Marsh. (Ky.) 90.

Minnesota. — *Albrecht v. Long*, 25 Minn. 163.

Texas. — *Walker v. Anderson*, 31 Tex. 646.

West Virginia. — *Hartman v. Campbell*, 5 W. Va. 394.

Wisconsin. — *Knox v. Webster*, 18 Wis. 406, 86 Am. Dec. 779; *Russell v. Lawton*, 14 Wis. 209, 80 Am. Dec. 769; *Ohlson v. Pierce*, 55 Wis. 205.

In North Carolina it has been held that the execution bearing teste of the earliest date should be levied first. *Jones v. Judkins*, 4 Dev. & B. L. (20 N. Car.) 454, 34 Am. Dec. 392.

Junior Execution Levied First. — If the officer first levies and sells under a junior execution the property of the goods is bound by the sale. *Love v. Williams*, 4 Fla. 126; *McClelland v. Slingluff*, 7 W. & S. (Pa.) 134, 42 Am. Dec. 224.

3. Actual Seizure under Second Execution Unnecessary — *England.* — *Jones v. Atherton*, 7 Taunt. 56, 2 E. C. L. 56. See also *Goldschmidt v. Hamlet*, 6 M. & G. 192, 46 E. C. L. 192.

United States. — *Hagan v. Lucas*, 10 Pet. (U. S.) 400.

Illinois. — *Leach v. Pine*, 41 Ill. 65, 89 Am. Dec. 375; *Field v. Macullar*, 20 Ill. App. 392.

Indiana. — *Brown v. Loesch*, 3 Ind. App. 145.

Mississippi. — *Cahn v. Person*, 56 Miss. 360.

Missouri. — *State v. Curran*, 45 Mo. App. 142; *State v. Doan*, 39 Mo. 44; *Patterson v. Stephenson*, 77 Mo. 329.

New Jersey. — *Millville Nat. Bank v. Shaw*, 42 N. J. L. 550.

New York. — *Van Winkle v. Udall*, 1 Hill (N. Y.) 559; *Birdseye v. Ray*, 4 Hill (N. Y.) 160; *Russell v. Gibbs*, 5 Cow. (N. Y.) 390; *Seymour v. Newton*, 17 Hun (N. Y.) 30; *Dean v. Campbell*, 19 Hun (N. Y.) 534; *Ryder v.*

b. IN THE HANDS OF DIFFERENT OFFICERS. — According to the weight of authority, as a general rule, the officer cannot levy an execution upon property upon which another officer has previously made a levy under another writ,¹ and it is well settled that in those cases where a levy is permitted to be made upon property already levied upon by another officer, the officer levying the second execution cannot touch or remove such property, the second levy being constructive only.²

11. Indorsement of the Levy — *a. NECESSITY FOR INDORSEMENT.* — It is usual for the officer, at the time of making the levy, or at a convenient time thereafter, to indorse his levy on the writ, which indorsement does not constitute a levy, but is merely evidence of it,³ and, according to the weight of authority, it is essential to the validity of the levy on land that the officer should make an indorsement on his levy.⁴ According to the weight of

Gilbert, 16 Hun (N. Y.) 163; *Lansingburgh Bank v. Crary*, 1 Barb. (N. Y.) 543; *Cresson v. Stout*, 17 Johns. (N. Y.) 117, 8 Am. Dec. 373; *Slade v. Van Vechten*, 11 Paige (N. Y.) 21; *Wehle v. Conner*, 63 N. Y. 258; *Peck v. Tiffany*, 2 N. Y. 451.

North Carolina. — *Penland v. Leatherwood*, 101 N. Car. 509.

Pennsylvania. — *Battersby v. Haubert*, 14 Phila. (Pa.) 112, 37 Leg. Int. (Pa.) 26; *McCormick v. Miller*, 3 P. & W. (Pa.) 230; *Winegardner v. Hafer*, 15 Pa. St. 144; *Watmough v. Francis*, 7 Pa. St. 206.

See also *Huger v. Osborne*, 1 Bay (S. Car.) 319.

Prior Levy Invalid. — A prior levy which for any reason is invalid is insufficient to support a constructive levy of a subsequent execution, and such subsequent writ must be actually levied. *Murphy v. Swadener*, 33 Ohio St. 85. See also *Brazier v. Thomas*, Busb. L. (44 N. Car.) 28.

1. Cannot Levy upon Property in Custodia Legis — *England.* — *Wood v. Wood*, 4 Q. B. 397, 45 E. C. L. 397.

United States. — *Fox v. Hempfield R. Co.*, 2 Abb. (U. S.) 151; *Leopold v. Godfrey*, 11 Biss. (U. S.) 158; *Turner v. Fendall*, 1 Cranch (U. S.) 117; *Hagan v. Lucas*, 10 Pet. (U. S.) 400; *Harris v. Dennie*, 3 Pet. (U. S.) 292; *Buck v. Colbath*, 3 Wall. (U. S.) 344; *McCullough v. Large*, 20 Fed. Rep. 309; *Fischer v. Daudistal*, 9 Fed. Rep. 145.

Illinois. — *Jackson v. Lahee*, 114 Ill. 287; *Marshall v. Moore*, 36 Ill. 321.

Indiana. — *Winton v. State*, 4 Ind. 321; *Hooks v. York*, 4 Ind. 636; *Sibert v. Humphries*, 4 Ind. 481; *Knobe v. Baldrige*, 73 Ind. 54; *Pipher v. Fordyce*, 88 Ind. 436; *Stout v. La Follette*, 64 Ind. 365.

Kansas. — *J. M. W. Jones Stationery, etc., Co. v. Case*, 26 Kan. 299, 40 Am. Rep. 310.

Kentucky. — *Rogers v. Darnaby*, 4 B. Mon. (Ky.) 238.

Massachusetts. — *Watson v. Todd*, 5 Mass. 271.

Missouri. — *Bates County Nat. Bank v. Owen*, 79 Mo. 429; *Metzner v. Graham*, 57 Mo. 404; *Hombs v. Corbin*, 20 Mo. App. 497.

New York. — *Seymour v. Newton*, 17 Hun (N. Y.) 30; *Hartwell v. Bissell*, 17 Johns. (N. Y.) 128; *Dubois v. Harcourt*, 20 Wend. (N. Y.) 41; *Gilbert v. Moody*, 17 Wend. (N. Y.) 358; *Acker v. White*, 25 Wend. (N. Y.) 614; *Oswego First Nat. Bank v. Dunn*, 97 N. Y. 149.

Pennsylvania. — *Ross v. Clarke*, 1 Dall. (Pa.) 354; *Frey v. Leeper*, 2 Dall. (Pa.) 131.

Tennessee. — *Bradley v. Keesee*, 5 Coldw. (Tenn.) 223, 94 Am. Dec. 246; *Brown v. Allen*, 3 Head (Tenn.) 429.

Virginia. — *Davis v. Bonney*, 89 Va. 755.

2. England. — *Bachurst v. Clinkard*, 1 Show. 173.

United States. — *Taylor v. Carryl*, 20 How. (U. S.) 583; *Hagan v. Lucas*, 10 Pet. (U. S.) 400; *Buck v. Colbath*, 3 Wall. (U. S.) 334; *Fox v. Hempfield R. Co.*, 2 Abb. (U. S.) 151; *Williams v. Benedict*, 8 How. (U. S.) 107; *Wisswall v. Sampson*, 14 How. (U. S.) 52; *Marks v. Dickson*, 20 How. (U. S.) 503; *Covell v. Heyman*, 111 U. S. 176; *Freeman v. Howe*, 24 How. (U. S.) 450; *U. S. v. Johnson County*, 6 Wall. (U. S.) 166; *Leopold v. Godfrey*, 50 Fed. Rep. 145; *Raisin v. Statham*, 22 Fed. Rep. 144.

Kentucky. — *Com. v. Straton*, 7 J. J. Marsh. (Ky.) 90.

Missouri. — *Metzner v. Graham*, 57 Mo. 404; *Allen v. Davis*, 53 Mo. App. 15; *State v. Curran*, 45 Mo. App. 142.

New York. — *Benson v. Berry*, 55 Barb. (N. Y.) 620; *Dubois v. Harcourt*, 20 Wend. (N. Y.) 41.

North Carolina. — *Penland v. Leatherwood*, 101 N. Car. 509; *Bland v. Whitfield*, 1 Jones L. (46 N. Car.) 125.

Ohio. — *Pugh v. Calloway*, 10 Ohio St. 488.

Pennsylvania. — *Winegardner v. Hafer*, 15 Pa. St. 144.

3. Usual to Make Indorsement of Levy. — *Hart v. Thomas*, 75 Ga. 529; *Leach v. Pine*, 41 Ill. 65, 89 Am. Dec. 375; *Duncan's Appeal*, 37 Pa. St. 500; *McCormick v. Miller*, 3 P. & W. (Pa.) 230.

4. Indorsement of Levy on Land Necessary. — *Ansley v. Wilson*, 50 Ga. 418; *Few v. Walton*, 62 Ga. 447; *Douglas v. Whiting*, 28 Ill. 362; *McBurnie v. Overstreet*, 8 B. Mon. (Ky.) 300; *Jones v. Allen*, 88 Ky. 381; *Vallandigham v. Worthington*, 85 Ky. 83; *Dorsey v. Dorsey*, 28 Md. 388; *Wright v. Orrell*, 19 Md. 151; *Sanger v. Trammell*, 66 Tex. 361; *Redlick v. Williams*, (Tex. 1887) 5 S. W. Rep. 375. See also *U. S. v. Hess*, 5 Sawy. (U. S.) 533; *Herr v. Broadwell*, 5 Colo. App. 467; *Demint v. Thompson*, 80 Ky. 255; *Hamblen v. Hamblen*, 33 Miss. 455, 69 Am. Dec. 358; *Duncan v. Mainey*, 29 Mo. 368, 77 Am. Dec. 575. Compare *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Vroman v. Thompson*, 51 Mich. 1.

authority it is necessary to indorse upon the writ a levy on chattels.¹

b. METHOD OF MAKING INDORSEMENT. — It is sufficient, if it appear by reasonable construction, that everything necessary to constitute a valid levy has been performed,² but the fact of a levy must be stated in positive terms

Front St. Cable R. Co. *v.* Drake, 65 Fed. Rep. 539; Hammel *v.* Queen's Ins. Co., 54 Wis. 72, 41 Am. Rep. 1. But see Van Gelder *v.* Van Gelder, 26 Hun (N. Y.) 356; Lynch *v.* Earle, 18 R. I. 531.

Description of Land in Indorsement. — It is necessary to describe the land levied upon with reasonable certainty, and as a general rule a levy which is reasonably certain will be upheld. The land should be described with sufficient particularity and distinctness to enable a purchaser to know what he is buying and to enable an officer to put the purchaser in possession, but the description need not necessarily be such that the land may be identified by inspection of the levy and deed, and if the description be general but sufficiently correct to enable the land to be identified by the use of such means as are admissible in a court of justice for that purpose, it will be deemed sufficient.

Georgia. — Rutherford *v.* Crawford, 53 Ga. 138; Anderson *v.* Lee, 53 Ga. 189; Brown *v.* Moughon, 70 Ga. 756; Brinson *v.* Lassiter, 81 Ga. 41.

Maryland. — Dorsey *v.* Dorsey, 28 Md. 388; Williamson *v.* Perkins, 1 Har. & J. (Md.) 449; Waters *v.* Duvall, 6 Gill & J. (Md.) 76.

Michigan. — Burrowes *v.* Gibson, 42 Mich. 121.

New Hampshire. — Smith *v.* Smith, 66 N. H. 611; Saunders *v.* Nashua First Nat. Bank, 61 N. H. 31.

North Carolina. — Farrior *v.* Houston, 100 N. Car. 369, 6 Am. St. Rep. 597.

Pennsylvania. — Hyskill *v.* Givin, 7 S. & R. (Pa.) 369; Wildasin *v.* Bare, 171 Pa. St. 387.

Tennessee. — Parker *v.* Swan, 1 Humph. (Tenn.) 80, 34 Am. Dec. 619; Wright *v.* Watson, 11 Humph. (Tenn.) 529; Brigance *v.* Erwin, 1 Swan (Tenn.) 375, 57 Am. Dec. 779; Trotter *v.* Nelson, 1 Swan (Tenn.) 7.

Texas. — Smith *v.* Crosby, 86 Tex. 15, 40 Am. St. Rep. 818.

See also Gault *v.* Woodbridge, 4 McLean (U. S.) 329; Laughlin *v.* Hawley, 9 Colo. 170; Swift *v.* Lee, 65 Ill. 336; Mitchell *v.* Ireland, 54 Tex. 301; Maeck *v.* Sinclear, 10 Vt. 103.

1. Indorsement of Levy on Chattels. — Barnes *v.* Billington, 1 Wash. (U. S.) 29; Toulmin *v.* Lesesne, 2 Ala. 359; Davidson *v.* Waldron, 31 Ill. 120, 83 Am. Dec. 206; Stanley *v.* Moynihan, 45 Ill. App. 192; McClelland *v.* Slingluff, 7 W. & S. (Pa.) 134, 42 Am. Dec. 224. See also Sprague *v.* Brown, 40 Wis. 612. Compare McBurnie *v.* Overstreet, 8 B. Mon. (Ky.) 300; Havens *v.* Gordon, 5 Hun (N. Y.) 178.

Inventory Unnecessary. — According to the weight of authority, it is not necessary in all cases to make a schedule or inventory of the chattels seized in order to constitute a valid levy, but it is always proper to make such inventory or schedule. Toulmin *v.* Lesesne, 2 Ala. 359; Quackenbush *v.* Henry, 42 Mich. 75; State *v.* Doan, 39 Mo. 44; Haggerty *v.* Wilber, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321;

Bond *v.* Willett, 31 N. Y. 102, 29 How. Pr. (N. Y.) 47; Roth *v.* Wells, 29 N. Y. 471; Green *v.* Burke, 23 Wend. (N. Y.) 490; Beekman *v.* Lansing, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707; Watts *v.* Cleaveland, 3 E. D. Smith (N. Y.) 553; Pugh *v.* Calloway, 10 Ohio St. 488; Minor *v.* Smith, 13 Ohio St. 79; Wood *v.* Vandersdale, 3 Rawle (Pa.) 401; Weidensaul *v.* Reynolds, 49 Pa. St. 73. See also Sprague *v.* Brown, 40 Wis. 612. Compare Earl's Appeal, 13 Pa. St. 483.

Statutes Requiring Inventory. — In some states it is required by statute that an inventory of the chattels levied upon shall be made. Farmers' Bank *v.* Massey, 1 Harr. (Del.) 186; Nelson *v.* Van Gazelle Valve Mfg. Co., 45 N. J. Eq. 594. See also Lloyd *v.* Wyckoff, 11 N. J. L. 218.

Not Necessary to Furnish Inventory to Debtor. — Ferguson *v.* Washer, 49 Mich. 390.

2. Form of Indorsement. — Bissell *v.* Nooney, 33 Conn. 411. See also Bollin *v.* Gantt, 93; Ala. 89; Byer *v.* Etnyre, 2 Gill (Md.) 150, 41 Am. Dec. 410; Waid *v.* Gaylord, 1 Hun (N. Y.) 607; Law *v.* Smith, 4 Ind. 56; Wilson's Appeal, 13 Pa. St. 426; Morgan *v.* Spangler, 14 Ohio St. 102. Compare Munroe *v.* Thomas, 5 Cal. 470; Payne *v.* Billingham, 10 Iowa 360.

On What Indorsement Should Be Made. — It is insufficient to indorse the levy in a book or on a loose sheet of paper. State *v.* Vick, 3 Ired. L. (25 N. Car.) 488; Dickson *v.* Peppers, 7 Ired. L. (29 N. Car.) 429; Saco *v.* Hopkinton, 29 Me. 268. But the officer may make a memorandum of the levy on a separate piece of paper, and copy the memorandum on the writ before its return. Duncan *v.* Matney, 29 Mo. 368, 77 Am. Dec. 575. Or he may write out and sign his levy on a separate piece of paper, and paste it to the execution. Stanley *v.* Moynihan, 45 Ill. App. 192; McCormick *v.* Miller, 3 P. & W. (Pa.) 230.

Signature of Officer Necessary. — Rutherford *v.* Crawford, 53 Ga. 138. See also Sharp *v.* Kennedy, 50 Ga. 208.

Amendment of Indorsement. — The officer's indorsement may be amended before the return of the execution. Johnson *v.* Sommers, 3 Ill. App. 55. See also Nelson *v.* Cook, 19 Ill. 440. But after the return of the execution it cannot be amended. Wills *v.* McKinney, 41 N. J. L. 120.

Unnecessary to State Time of Seizure. — Fitler *v.* Patton, 8 W. & S. (Pa.) 455. See also Scott *v.* Scott, 85 Ky. 385; Kightlinger's Appeal, 101 Pa. St. 540; Hatcher *v.* Kelly, 1 Bibb (Ky.) 282; Cowsls *v.* Hastings, 9 Met. (Mass.) 476.

Statutory Requirements. — A substantial compliance with the requirements of a statute prescribing how property shall be described is sufficient. Huggins *v.* Ketchum, 4 Dev. & B. L. (20 N. Car.) 414. See also Doe *v.* Kollock, 3 Houst. (Del.) 326; Baker *v.* Baker, 125 Mass. 7; Morrissey *v.* Love, 4 Ired. L. (26 N. Car.) 38; Chasteen *v.* Phillips, 4 Jones L. (49 N. Car.) 459, 69 Am. Dec. 760. But such compliance with

and must not be left for implication.¹

12. Levy After Taking Debtor's Body. — No levy can be made upon the debtor's personal or real estate after his body has been taken and he has been committed to prison under a *capias ad satisfaciendum*.²

13. Abandonment of Levy. — The levy is not abandoned by leaving the goods in the debtor's possession for a reasonable time.³

VII. LIEN AND PRIORITIES — 1. Distinction Between Judgment and Execution Liens. — In entering upon a discussion of the lien of an execution, it is proper to call attention to the well-known distinction between such lien and the lien of the judgment on which the execution is founded, which will be treated in another part of this work.⁴

statute is necessary. *Borden v. Smith*, 3 Dev. & B. L. (20 N. Car.) 34; *Blanchard v. Blanchard*, 3 Ired. (25 N. Car.) 105, 38 Am. Dec. 710; *Huggins v. Ketchum*, 4 Dev. & B. L. (20 N. Car.) 414.

1. *Scriba v. Deanes*, 1 Brock. (U. S.) 166.

2. *Dewey v. Bradbury*, 2 Tyler (Vt.) 201. See also *Nelson v. Clough*, 3 Cush. (Mass.) 463; *Nowell v. Waitt*, 121 Mass. 554; *Mazyck v. Coil*, 2 Bailey L. (S. Car.) 101.

3. **No Abandonment Because of Debtor's Possession**—*United States*. — *Berry v. Smith*, 3 Wash. (U. S.) 60.

Georgia. — *Terry v. Americus Bank*, 77 Ga. 528; *Jones v. Parker*, 55 Ga. 11.

Indiana. — *State v. Nelson*, 1 Ind. 522; *Cooley v. Harper*, 4 Ind. 454; *Brown v. Loesch*, 3 Ind. App. 145.

Missouri. — *Hard v. Foster*, 98 Mo. 297.

New York. — *Russell v. Gibbs*, 5 Cow. (N. Y.) 390.

North Carolina. — *Mangum v. Hamlet*, 8 Ired. L. (30 N. Car.) 44.

Ohio. — *Acton v. Knowles*, 14 Ohio St. 18.

Pennsylvania. — *Howell v. Alkyn*, 2 Rawle (Pa.) 282; *Chancellor v. Phillips*, 4 Dall. (Pa.) 213; *McGinnis v. Prieson*, 85 Pa. St. 111; *Lantz v. Worthington*, 4 Pa. St. 153, 45 Am. Dec. 682; *Connell v. O'Neil*, 154 Pa. St. 582; *Keyser's Appeal*, 13 Pa. St. 409, 53 Am. Dec. 487; *Sedgwick's Appeal*, 7 W. & S. (Pa.) 260. See also *Com. v. Stremback*, 3 Rawle (Pa.) 341, 24 Am. Dec. 351.

Tennessee. — *Brown v. Allen*, 3 Head (Tenn.) 429.

Unreasonable Delay. — If the debtor is allowed to remain in possession of the chattels for an unreasonable length of time, the levy will be deemed to have been abandoned as against other creditors and purchasers. *Dutertre v. Driard*, 7 Cal. 549; *Sweetser v. Matson*, 153 Ill. 568, reversing 50 Ill. App. 518, 46 Am. St. Rep. 911; *Allen v. Levy*, 59 Miss. 613; *Cumberland Bank v. Hann*, 19 N. J. L. 166; *Corlies v. Stanbridge*, 5 Rawle (Pa.) 286; *Earl's Appeal*, 13 Pa. St. 483; *Chancellor v. Phillips*, 4 Dall. (Pa.) 213; *Com. v. Stremback*, 3 Rawle (Pa.) 341, 24 Am. Dec. 351.

Indefinite Postponement. — Indefinite postponements of the sale at the direction of the creditor will be taken as an abandonment of the levy as against third persons. *Smith v. Dickson*, 9 Ga. 400; *Burleigh v. Piper*, 1 Iowa 649; *Lantz v. Worthington*, 4 Pa. St. 153, 45 Am. Dec. 682. See also *Berry v. Smith*, 3 Wash. (U. S.) 60; *Mentz v. Hamman*, 5 Whart. (Pa.) 150, 34 Am. Dec. 546.

Levy in Fraud of Other Creditors. — When the levy is made for the sole purpose of holding the debtor's goods as security and keeping the other creditors at bay, and when the officer is instructed by the creditor to proceed no further after making the levy, such levy will be considered as having been abandoned if the goods are allowed to remain in the hands of the debtor for an unreasonable length of time, and will not avail as against third persons.

England. — *Edwards v. Harben*, 2 T. R. 596; *Rice v. Serjeant*, 7 Mod. 37. See also *Bradley v. Wyndham*, 1 Wils. 44.

Arkansas. — *Slocumb v. Blackburn*, 18 Ark. 309.

Illinois. — *Koren v. Roemheld*, 6 Ill. App. 275. See also *Gilmore v. Davis*, 84 Ill. 487; *Ross v. Weber*, 26 Ill. 221.

Missouri. — *Wise v. Darby*, 9 Mo. 131; *Field v. Liverman*, 17 Mo. 218; *Parker v. Waugh*, 34 Mo. 340.

New York. — *Kellogg v. Griffin*, 17 Johns. (N. Y.) 274; *Dunderdale v. Sauvestre*, 13 Abb. Pr. (N. Y. C. Pl.) 116; *Rew v. Barber*, 3 Cow. (N. Y.) 272; *Storm v. Woods*, 11 Johns. (N. Y.) 111; *Whipple v. Foot*, 2 Johns. (N. Y.) 422, 3 Am. Dec. 442; *Doty v. Turner*, 8 Johns. (N. Y.) 20; *Cornell v. Cook*, 7 Cow. (N. Y.) 315; *Brown v. Cook*, 9 Johns. (N. Y.) 361; *Russell v. Gibbs*, 5 Cow. (N. Y.) 394.

North Carolina. — *Douglas v. Mitchell*, 3 Murph. (7 N. Car.) 239; *Wilson v. Hensley*, 4 Ired. L. (26 N. Car.) 66; *Roberts v. Scales*, 1 Ired. L. (23 N. Car.) 88.

Ohio. — See *Houk v. Condon*, 40 Ohio St. 569; *Acton v. Knowles*, 14 Ohio St. 18.

Pennsylvania. — *Com. v. Stremback*, 3 Rawle (Pa.) 341, 24 Am. Dec. 351; *Bradley v. Wyndham*, 1 Wils. 44, cited in *Cowden v. Brady*, 8 S. & R. (Pa.) 510; *Hickman v. Caldwell*, 4 Rawle (Pa.) 376, 27 Am. Dec. 274; *Eberle v. Mayer*, 1 Rawle (Pa.) 366; *Kauffelt's Appeal*, 9 Watts (Pa.) 334; *Larzelere Co.'s Appeal* (Pa. 1888), 13 Atl. Rep. 85; *Hastings v. Quigley*, 4 Pa. L. J. 220, 2 Clarke (Pa.) 431; *Parys's Appeal*, 41 Pa. St. 273, 80 Am. Dec. 615; *Bingham v. Young*, 10 Pa. St. 395; *Keyser's Appeal*, 13 Pa. St. 409, 53 Am. Dec. 487; *Truitt v. Ludwig*, 25 Pa. St. 145; *Stern's Appeal*, 64 Pa. St. 447; *Truitt v. Ludwig*, 25 Pa. St. 145; *Brown's Appeal*, 26 Pa. St. 490; *Snyder v. Beam*, 1 Browne (Pa.) 366.

Tennessee. — *Anderson v. Talbot*, 1 Heisk. (Tenn.) 407.

Virginia. — *Governor v. Vanmeter*, 9 Leigh (Va.) 18, 33 Am. Dec. 221.

4. See the title JUDGMENTS.

2. General Nature of an Execution Lien — *a. DEFINITION.* — It has been said that the lien of an execution does not vest in the judgment creditor either *a jus in re* or *a jus ad rem*. It is simply a right by law to charge the property of the judgment debtor which is subject to levy and sale with the payment of the debt; operating as an incumbrance on it, of which all who subsequently deal with him must at their peril take notice.¹

b. EXECUTION MUST BE FOUNDED ON A VALID JUDGMENT. — If the judgment upon which an execution is issued be void, it follows, as a matter of course, that the writ and a levy thereunder can give no lien.²

c. ATTACHING OF EXECUTION LIEN DOES NOT CHANGE TITLE TO PROPERTY. — The fact that the lien of an execution has attached to the property of a debtor does not divest him of his title thereto,³ nor give to either the execution creditor or the officer to whom the writ is delivered any right to or control over such property before a levy is actually made.⁴

d. EFFECT OF LEVY — (1) *On Personal Property.* — The levy of an execution upon personalty of the debtor vests the title thereto and the right to possession thereof in the officer making the levy, or at least gives him a special property therein for the purpose of satisfying the execution.⁵

1. General Nature of Lien. — *Thames v. Rembert*, 63 Ala. 561; *McMahan v. Green*, 12 Ala. 71, 46 Am. Dec. 242; *Otey v. Moore*, 17 Ala. 280, 52 Am. Dec. 173; *Lynn v. Gridley*, Walk. (Miss.) 548, 12 Am. Dec. 501.

2. Execution on Void Judgment Gives No Lien. — *Adams v. Hubbard*, 30 Mich. 104; *Muller v. Plue*, 45 Neb. 701. See also *Warmoll v. Young*, 5 B. & C. 660, 12 E. C. L. 347; *Leach v. Pine*, 41 Ill. 65, 89 Am. Dec. 375.

3. Title Remains in Execution Debtor — *England*. — *Samuel v. Duke*, 3 M. & W. 622, 6 Dowl. P. C. 536, 1 H. & H. 127; *Payne v. Drewe*, 4 East 523; *Swain v. Morland*, 1 Brod. & B. 370, 5 E. C. L. 122.

Alabama. — *Thames v. Rembert*, 63 Ala. 561. *Illinois.* — *Marshall v. Cunningham*, 13 Ill. 20.

Indiana. — *Dixon v. Duke*, 85 Ind. 434.

Maryland. — See *Jones v. Jones*, 1 Bland (Md.) 443, 18 Am. Dec. 327.

Missouri. — *Field v. Milburn*, 9 Mo. 492.

New Hampshire. — *Churchill v. Warren*, 2 N. H. 298, 9 Am. Dec. 73; *Folsom v. Chesley*, 2 N. H. 432.

New York. — *Hotchkiss v. M'Vickar*, 12 Johns. (N. Y.) 403. See also *Ansonia Brass, etc., Co. v. Conner*, 103 N. Y. 502.

North Carolina. — *Jones v. Judkins*, 4 Dev. & B. L. (20 N. Car.) 454, 34 Am. Dec. 302; *Horton v. McCall*, 66 N. Car. 159; *Ladd v. Adams*, 66 N. Car. 164.

South Carolina. — *Bates v. Moore*, 2 Bailey L. (S. Car.) 614; *Paysinger v. Shumpard*, 1 Bailey L. (S. Car.) 237.

4. Execution Gives No Title to Property Before Levy — *United States.* — *In re Paine*, 17 Nat. Bank. Reg. 37, 18 Fed. Cas., No. 10,673.

Alabama. — *Otey v. Moore*, 17 Ala. 280, 52 Am. Dec. 173; *Street v. Duncan*, (Ala. 1898) 23 So. Rep. 523; *Perkins v. Brierfield Iron, etc., Co.*, 77 Ala. 403.

Delaware. — *Layton v. Steel*, 3 Harr. (Del.) 512. See also *Taylor v. Horsey*, 5 Harr. (Del.) 131.

Illinois. — *Finney v. Harding*, 136 Ill. 573; *Mulheisen v. Lane*, 82 Ill. 117; *Travers v. Cook*, 42 Ill. App. 580.

New Jersey. — *Wintermute v. Hankinson*, 6 N. J. L. 140; *Matthews v. Warne*, 11 N. J. L. 295; *Lloyd v. Wyckoff*, 11 N. J. L. 218.

New York. — *Hotchkiss v. M'Vickar*, 12 Johns. (N. Y.) 403; *Slingerland v. Swart*, 13 Johns. (N. Y.) 255; *Hathaway v. Howell*, 54 N. Y. 97. See also *Smith v. Smith*, 60 N. Y. 161.

North Carolina. — *Horton v. McCall*, 66 N. Car. 159; *Ladd v. Adams*, 66 N. Car. 164.

Tennessee. — *Conley v. Deere*, 11 Lea (Tenn.) 274.

5. Levy Vests Title in Officer Making It — *United States.* — *Hagan v. Lucas*, 10 Pet. (U. S.) 400.

Alabama. — *Barnes v. Baker*, Minor (Ala.) 373.

Illinois. — *Leach v. Pine*, 41 Ill. 65, 89 Am. Dec. 375; *Travers v. Cook*, 42 Ill. App. 580. See also *Corbin v. Pearce*, 81 Ill. 461.

Mississippi. — See *Parker v. Dean*, 45 Miss. 408.

Missouri. — *Field v. Milburn*, 9 Mo. 492.

New Jersey. — *Hamilton v. Hamilton*, 25 N. J. L. 544.

New York. — *Steffin v. Steffin*, 4 Civ. Pro. Rep. (N. Y. Supreme Ct.) 179.

Pennsylvania. — *Sturges's Appeal*, 86 Pa. St. 413; *Religious Soc. v. Hitchcock*, 2 Browne (Pa.) 333.

South Carolina. — *Gibbes v. Mitchell*, 2 Bay (S. Car.) 120.

Tennessee. — *Harvey v. Berry*, 1 Baxt. (Tenn.) 252; *Fry v. Manlove*, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775; *Murphy v. Partee*, 7 Baxt. (Tenn.) 373; *Etheridge v. Edwards*, 1 Swan (Tenn.) 426; *Evans v. Barnes*, 2 Swan (Tenn.) 292; *Lester's Case*, 4 Humph. (Tenn.) 383; *Overton v. Perkins*, 10 Yerg. (Tenn.) 328.

Virginia. — *Humphrey v. Hitt*, 6 Gratt. (Va.) 509, 52 Am. Dec. 133.

Levy Vests Title in Creditor. — Under the *Connecticut* statute an execution duly levied on property of the debtor, and returned and recorded, vests all the title of the debtor in the creditor and his heirs and assigns. *Schroeder v. Tomlinson*, 70 Conn. 348.

(2) *On Real Property*. — But it is considered that a levy on land does not give the officer either the title thereto or the right to possession thereof.¹

e. WHEN THE LIEN BECOMES A VESTED RIGHT. — The lien of an execution, before a levy, is not usually considered a vested right of the creditor, but the levy, as it fixes a specific lien on particular property, does create a vested right which is within the protection of the federal constitution.²

3. Commencement of the Lien — *a. COMMON-LAW RULE*. — At the common law an execution had relation to its teste, which was always some day in the term at which the judgment was entered, and bound the defendant's goods from that time.³ In *Tennessee* the common-law rule still prevails as to personal property,⁴ as it formerly did in *North Carolina*.⁵

b. RULE ESTABLISHED BY STATUTE OF FRAUDS — (1) *Evils Resulting from the Common-law Rule*. — This relation of the lien under the common law, however, proved inconvenient and mischievous in practice, as it tended to embarrass trade.⁶

(2) *The Statute of Frauds*. — To obviate this mischief was the intent of the provision of the statute of frauds (29 Car. II., c. 3, § 16), that "no writ of fieri facias or other writ of execution shall bind the property of the goods of the party against whom such writ of execution is sued forth, but from the time such writ shall be delivered to the sheriff."⁷

(3) *Present Force of the Rule*. — The rule thus established prevails at the present time in *England*⁸ and *Canada*,⁹ and has been very generally recog-

1. Levy on Realty Gives No Title Thereto. — *Addison v. Crow*, 5 Dana (Ky.) 271; *Overton v. Perkins*, 10 Yerg. (Tenn.) 328. See also *Taylor v. Mumford*, 3 Humph. (Tenn.) 66.

2. Levy Creates a Vested Right. — *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311; *McKeithan v. Terry*, 64 N. Car. 25. See also *Horton v. McCall*, 66 N. Car. 159; *Overton v. Perkins*, Mart. & Y. (Tenn.) 367; *Miller v. Estill*, 8 Yerg. (Tenn.) 452; *Batdorff v. Focht*, 44 Pa. St. 195; *Bain v. Lyle*, 68 Pa. St. 60; *Kightlinger's Appeal*, 101 Pa. St. 540.

South Carolina Doctrine that the Lien Was a Vested Right Before Levy. — See *Warren v. Jones*, 9 S. Car. 292; *Carrier v. Thompson*, 11 S. Car. 79.

3. Common-law Rule. — *Moile's Case*, Cro. Eliz. 174; *Audley v. Halsey*, Cro. Car. 148.

4. Common-law Rule Prevails in Tennessee. — *Coffee v. Wray*, 8 Yerg. (Tenn.) 464; *Daley v. Perry*, 9 Yerg. (Tenn.) 442; *Riddle v. Moitley*, 1 Lea (Tenn.) 468; *Preston v. Surgoine*, Peck (Tenn.) 72; *Edwards v. Thompson*, 85 Tenn. 720, 4 Am. St. Rep. 807; *Cecil v. Carson*, 86 Tenn. 139.

Relation to Teste Cannot Be Extended Beyond Day on Which Judgment Was Rendered. — The lien of an execution cannot, as against a *bona fide* purchaser from the debtor, attach to any goods at an earlier period than the hour of opening of the court on the day when the judgment was rendered. *Berry v. Clements*, 9 Humph. (Tenn.) 312; *Stahlman v. Watson*, (Tenn. 1897) 39 S. W. Rep. 1055; *Cecil v. Carson*, 86 Tenn. 139; *Cox v. Hodge*, 1 Swan (Tenn.) 371. See also *Johnson v. Ball*, 1 Yerg. (Tenn.) 291, 24 Am. Dec. 451.

But if there be nothing on the record to show at what hour the court opens its session on the first day of the term, judgments rendered on that day must be said to relate to the first instant of the day, and executions issued

thereon, tested on that day, must necessarily have a corresponding relation; and the lien attaches upon the personal property of the debtor at that time. *Cox v. Hodge*, 1 Swan (Tenn.) 371.

The Common-law Rule Does Not Apply as to Choses in Action. — *Stahlman v. Watson*, (Tenn. 1897) 39 S. W. Rep. 1055; *English v. King*, 10 Heisk. (Tenn.) 666.

Nor as to Real Property. — *Anderson v. Taylor*, 6 Lea (Tenn.) 382. But compare *Anderson v. Taylor*, 1 Tenn. Ch. 436.

5. In North Carolina Common-law Rule Once Prevailed. — *Yarborough v. State Bank*, 2 Dev. L. (13 N. Car.) 23; *Palmer v. Clarke*, 2 Dev. L. (13 N. Car.) 354, 21 Am. Dec. 340; *Arrington v. Sledge*, 2 Dev. L. (13 N. Car.) 359; *Jones v. Judkins*, 4 Dev. & B. L. (20 N. Car.) 454, 34 Am. Dec. 392.

In *North Carolina*, however, legislation has abrogated the common-law rule. Code N. Car. 1883, § 448; *Sawyers v. Sawyers*, 93 N. Car. 321; *Spicer v. Gambill*, 93 N. Car. 378; *Weisenfeld v. McLean*, 96 N. Car. 248.

6. Evils Resulting from the Common-law Rule. — See the opinion of Bland, C., in *Jones v. Jones*, 1 Bland (Md.) 443, 18 Am. Dec. 327.

7. Abrogation of Common-law Rule by Statute of Frauds. — *Love v. Williams*, 4 Fla. 126.

8. Rule Established by Statute of Frauds Prevails in England. — *Samuel v. Duke*, 3 M. & W. 622, 6 Dowl. P. C. 536, 1 H. & H. 127; *Waghorne v. Langmead*, 1 B. & P. 571; *Payne v. Drewe*, 4 East 523; *Smallcomb v. Buckingham*, 1 Salk. 320, 1 Ld. Raym. 251, Comyns 35; *Lowthall v. Tonkins*, 2 Eq. Cas. Abr. 380; *Hutchinson v. Johnston*, 1 T. R. 729, 1 Rev. Rep. 380.

9. And in Canada. — *Doe v. McDonell*, 4 U. C. Q. B. O. S. 195; *Converse v. Michie*, 16 U. C. C. P. 167; *Clifford v. Logan*, 9 Manitoba L. Rep. 423; *Doe v. Hollister*, 5 U. C. B. O. S. 739; *Doe v. Williston*, 4 New Bruns. 459;

nized by the courts in the *United States*,¹ though in many of the states it is very materially modified by statute.²

Johnson v. Crocker, 9 New Bruns. 94. See also *Meyers v. Meyers*, 19 Grant's Ch. (U. C.) 185; *McGivern v. McCausland*, 19 U. C. C. P. 460.

The Rule Applies to Lands.—*Doe v. McDonell*, 4 U. C. Q. B. O. S. 195; *Doe v. Hollister*, 5 U. C. Q. B. O. S. 739.

1. American Cases Recognizing Rule Established by Statute of Frauds—United States.—*Massingill v. Downs*, 7 How. (U. S.) 760; *Pulliam v. Osborne*, 17 How. (U. S.) 471; *Maul v. Scott*, 2 Cranch (C. C.) 367; *Cunningham v. Offutt*, 5 Cranch (C. C.) 524; *Waller v. Best*, 3 How. (U. S.) 111; *In re Paine*, 17 Nat. Bank. Reg. 37, 18 Fed. Cas., No. 10,673; *The Daniel Kaine*, 35 Fed. Rep. 785.

Alabama.—*McBroom v. Rives*, 1 Stew. (Ala.) 72; *Collingsworth v. Horn*, 4 Stew. & P. (Ala.) 237, 24 Am. Dec. 753; *Caperton v. Martin*, 5 Ala. 217; *Otey v. Moore*, 17 Ala. 280, 52 Am. Dec. 173; *Newcombe v. Leavitt*, 22 Ala. 631; *King v. Kenan*, 38 Ala. 63; *Whitfield v. Clark*, 48 Ala. 555; *Toney v. Wilson*, 51 Ala. 499; *Hendon v. White*, 52 Ala. 597; *Walker v. Elledge*, 65 Ala. 51; *Carlisle v. May*, 75 Ala. 502; *Perkins v. Brierfield Iron*, etc., Co., 77 Ala. 403.

Arkansas.—*Trapnall v. Jordan*, 7 Ark. 430; *Anderson v. Fowler*, 8 Ark. 388; *Pettit v. Johnson*, 15 Ark. 55; *Davis v. Oswalt*, 18 Ark. 414, 68 Am. Dec. 182; *Hanauer v. Casey*, 26 Ark. 352; *Isbell v. Epps*, 28 Ark. 35; *Harris v. Phillips*, 49 Ark. 58.

Colorado.—*Joslin v. Spangler*, 13 Colo. 491; *Doyle v. Herod*, 9 Colo. App. 257.

Delaware.—*Layton v. Steel*, 3 Harr. (Del.) 512; *Stuarts v. Reynolds*, 4 Harr. (Del.) 112. But see *Taylor v. Horsey*, 5 Harr. (Del.) 131.

Florida.—*Love v. Williams*, 4 Fla. 126; *Kimball v. Jenkins*, 11 Fla. 111, 89 Am. Dec. 237.

Illinois.—*Garner v. Willis*, 1 Ill. 368; *Marshall v. Cunningham*, 13 Ill. 20; *McClure v. Engelhard*, 17 Ill. 47; *Ross v. Weber*, 26 Ill. 221; *People v. Smith*, 29 Ill. App. 577; *Logsdon v. Spivey*, 54 Ill. 104; *Lawrence v. McIntire*, 83 Ill. 399; *Ford v. Marcell*, 107 Ill. 136; *Dobbins v. Peoria First Nat. Bank*, 112 Ill. 553; *Barth v. Commercial Nat. Bank*, 115 Ill. 472; *Hanchett v. Ives*, 133 Ill. 332.

Indiana.—*M'Call v. Trevor*, 4 Blackf. (Ind.) 496; *Vandibur v. Love*, 10 Ind. 54; *Cones v. Wilson*, 14 Ind. 465; *Lindley v. Kelley*, 42 Ind. 204; *Willson v. Binford*, 54 Ind. 569; *McCrisaken v. Osweiler*, 70 Ind. 131; *Marsh v. Vawter*, 71 Ind. 22; *Dixon v. Duke*, 85 Ind. 434; *Durbin v. Haines*, 99 Ind. 463; *Dann Mfg. Co. v. Parkhurst*, 125 Ind. 317; *Moss v. Jenkins*, 146 Ind. 589; *Chatten v. Gerber*, 2 Ind. App. 386.

Kentucky.—*Whitehead v. Woodruff*, 11 Bush (Ky.) 209; *Lackey v. Mimms*, 5 Ky. L. Rep. 855; *Mt. Vernon Banking Co. v. Henderson Hominy Mills*, 15 Ky. L. Rep. 333; *Couchman v. Maupin*, 78 Ky. 33; *Chenault v. Bush*, 84 Ky. 528; *Soaper v. Howard*, 85 Ky. 256.

Maryland.—*Jones v. Jones*, 1 Bland (Md.) 443, 18 Am. Dec. 327; *Selby v. Magruder*, 6

Har. & J. (Md.) 454; *Prentiss Tool, etc., Co. v. Whitman, etc., Mfg. Co.*, (Md. 1898) 41 Atl. Rep. 49; *Furlong v. Edwards*, 3 Md. 100; *Gaither v. Martin*, 3 Md. 146.

Mississippi.—*Lynn v. Gridley*, Walk. (Miss.) 548, 12 Am. Dec. 591; *Michie v. Planters' Bank*, 4 How. (Miss.) 130, 34 Am. Dec. 112.

Missouri.—*Brown v. Burrus*, 8 Mo. 26; *Wiles v. Maddox*, 26 Mo. 77; *Gott v. Williams*, 29 Mo. 461.

New Jersey.—*James v. Burnet*, 20 N. J. L. 635; *Newell v. Sibley*, 4 N. J. L. 438; *Den v. Hillman*, 7 N. J. L. 180.

New York.—*Guilford v. Mills*, (Supreme Ct.) 18 N. Y. Supp. 275, *affirmed* 137 N. Y. 554; *Sickles v. Sullivan*, 22 Civ. Pro. Rep. (N. Y. Supreme Ct.) 322, 65 Hun (N. Y.) 620, 47 N. Y. St. Rep. 82, *affirmed* in 136 N. Y. 649; *Matter of Muehlfield, etc., Piano Co.*, 12 N. Y. App. Div. 492; *Becker v. Becker*, 47 Barb. (N. Y.) 497; *Wells v. Marshall*, 4 Cow. (N. Y.) 411; *Stewart v. Beale*, 7 Hun (N. Y.) 405, *affirmed* in 68 N. Y. 629; *Dean v. Campbell*, 19 Hun (N. Y.) 534; *Beals v. Guernsey*, 8 Johns. (N. Y.) 446, 5 Am. Dec. 348; *Hotchkiss v. M'Vicker*, 12 Johns. (N. Y.) 403; *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; *Cresson v. Stout*, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373; *Beals v. Allen*, 18 Johns. (N. Y.) 363, 9 Am. Dec. 221; *Williams v. Shelly*, 37 N. Y. 375.

Pennsylvania.—*Shafner v. Gilmore*, 3 W. & S. (Pa.) 438; *Miffin v. Will*, 2 Yeates (Pa.) 177; *Swick v. McLaughlin*, 4 Lack. Leg. N. (Pa.) 240; *Duncan v. McCumber*, 10 Watts (Pa.) 212; *Wilson's Appeal*, 13 Pa. St. 426; *Schuylkill County's Appeal*, 30 Pa. St. 358; *Wilson's Appeal*, 90 Pa. St. 370.

Texas.—*Garner v. Cutler*, 28 Tex. 176.

Virginia.—*Puryear v. Taylor*, 12 Gratt. (Va.) 401; *Frayser v. Richmond, etc., R. Co.*, 81 Va. 388.

West Virginia.—*Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562; *Wiant v. Hays*, 38 W. Va. 681.

What Amounts to a Delivery.—Leaving an execution at the sheriff's office, or in the house where he usually transacts his business, is equivalent to a delivery thereof to him or his undersheriff. *Miffin v. Will*, 2 Yeates (Pa.) 177.

Placing the writ in a box in the prothonotary's office, which is set apart for the use of the sheriff, and to which he has free access at all times, is not sufficient. *Person's Appeal*, 78 Pa. St. 145.

Delivery of Execution Before Docketing of Judgment.—In a *New York* case where an execution and a transcript of the judgment on which it issued were sent to a county other than that in which the judgment was perfected, and the execution was received by the sheriff one day before the judgment was docketed, it was held that the execution became operative from the time when the judgment was actually docketed. *Stoutenburgh v. Vandenberg*, 7 How. Pr. (N. Y. Supreme Ct.) 229.

2. Modification of the Rule in the United States.—See *infra*, this section, *Modern Tendency Towards Abolition of Lien Before Levy*.

(4) *Rule Operates Only in Favor of Third Persons.* — The provision of the statute of frauds above set forth applies only in favor of third persons, and does not change the common-law rule of the relation of the lien to the teste of the writ as between the execution debtor and the creditor.¹

(5) *Failure of Officer to Indorse Receipt of Writ.* — A provision of law, where the lien of an execution commences from its delivery to the proper officer, requiring him to indorse on the execution the day of its receipt, is directory merely and intended only to be evidence of such receipt. The failure of the officer to make such entry cannot prejudice the execution plaintiff,² but he may show the time of the delivery by extrinsic evidence.³

c. MODERN TENDENCY TOWARDS ABOLITION OF LIEN BEFORE LEVY. — In modern times there is a very strong tendency towards an entire abolition of any execution lien before an actual levy, particularly in regard to real estate.⁴

1. *Rule Operates Only in Favor of Third Persons.* — *Rawlinson v. Oriel*, Comb. 144; *Dodd v. McCraw*, 8 Ark. 83, 46 Am. Dec. 301; *Berry v. Clements*, 9 Humph. (Tenn.) 312. See also *Jones v. Jones*, 1 Bland (Md.) 443, 18 Am. Dec. 327.

2. *Lien Not Lost by Failure of Officer to Indorse Time of Delivery on Writ.* — *Hester v. Keith*, 1 Ala. 316; *McMahan v. Green*, 12 Ala. 71, 46 Am. Dec. 242; *Childs v. Jones*, 60 Ala. 352; *Johnson v. McLane*, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102; *Hale's Appeal*, 44 Pa. St. 438.

Failure to Enter Execution on Docket. — The lien of an execution which has been delivered to the sheriff is not lost by his failure or neglect to enter it on his execution docket. *Childs v. Jones*, 60 Ala. 352.

Failure of Clerk to Record Levy. — The lien acquired by levy on land in a county to which the fieri facias has been sent from the county where it was issued is not lost by reason of the failure of the circuit clerk to record the levy as required by law. *Soaper v. Howard*, 85 Ky. 256.

3. *Time of Delivery May Be Proved By Extrinsic Evidence.* — *Hester v. Keith*, 1 Ala. 316; *McMahan v. Green*, 12 Ala. 71, 46 Am. Dec. 242.

And for this purpose parol evidence is admissible. *Hale's Appeal*, 44 Pa. St. 438; *Person's Appeal*, 78 Pa. St. 145.

Delivery Cannot Be Proved by Docket of Justice Who Rendered the Judgment. — In *Missouri* it has been held that where there was no indorsement on the execution, as required by law, of the time when it was received by the constable, the time of the delivery of the execution could not be proved by the docket of the justice who rendered the judgment, for such docket was no evidence on the point. The constable, having failed to state the fact in his return, might be permitted to amend the same. *Gott v. Williams*, 29 Mo. 461. In this case it does not appear what would be the effect of such omission on the part of the constable, and whether, in case of such failure, any extraneous evidence could be introduced to show the time of the delivery.

4. *Modern Tendency Towards Abolition of Lien Before Levy.* — See the following cases:

California. — *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Johnson v. Gorham*, 6 Cal. 195, 65 Am. Dec. 501.

Iowa. — *Stahl v. Roost*, 34 Iowa 475; *Reeves v. Sebern*, 16 Iowa 234, 85 Am. Dec. 513.

Minnesota. — *Albrecht v. Long*, 25 Minn. 163. *Oklahoma.* — *Burnham v. Dickson*, 5 Okla. 112.

Pennsylvania. — *Wilson's Appeal*, 90 Pa. St. 370; *Ross's Appeal*, 106 Pa. St. 82; *Stauffer v. Lancaster County*, 1 Watts (Pa.) 300, 26 Am. Dec. 69; *Packer's Appeal*, 6 Pa. St. 277.

South Carolina. — *Bachman v. Sulzbacher*, 5 S. Car. 58.

Tennessee. — *Anderson v. Taylor*, 6 Lea (Tenn.) 382.

Virginia. — *Humphrey v. Hitt*, 6 Gratt. (Va.) 509, 52 Am. Dec. 133.

Wisconsin. — *Knox v. Webster*, 18 Wis. 406, 86 Am. Dec. 779; *Russell v. Lawton*, 14 Wis. 202, 80 Am. Dec. 769.

Lien Completed by Levy. — The property of a corporation is bound by an execution from the time when it is delivered to the sheriff to be executed; all that is necessary to complete the lien is that the sheriff should make an actual levy during the life of the execution. *Matter of Muehlfield, etc., Piano Co.*, 12 N. Y. App. Div. 492.

A levy creates "a perfect lien upon the property levied on in favor of the plaintiff in the execution." *Van Alstyne v. Cook*, 25 N. Y. 489.

Execution Against Member of Partnership. — Under the *Arkansas* statutes an execution against a partner is not a lien upon his interest in the firm property until an actual levy is made thereon; for though his interest may be levied upon and sold for his separate debt, he has no such beneficial interest in the chattels of the firm as would be bound by the general lien of an execution against him individually. *Harris v. Phillips*, 49 Ark. 58.

Recording of Execution. — In *New Jersey* an execution not recorded is not operative upon real estate. *Johnston v. Darrab*, 8 N. J. L. 282. See also *Clement v. Kaighn*, 15 N. J. Eq. 47; *Elmer v. Burgin*, 2 N. J. L. 173.

In *Illinois* a levy upon land in a county other than that in which the judgment was rendered becomes a lien as soon as it is recorded. *Ewing v. Ainsworth*, 53 Ill. 464.

But a failure to record the certificate of levy will not prevent a sale taking effect by relation back to the levy, where no rights of creditors or subsequent purchasers without notice have intervened. *McClure v. Engelhardt*, 17 Ill. 47. See also *Reichert v. McClure*, 23 Ill. 516.

Rule Applies Only as to Third Persons. — The doctrine that the statute of frauds was in-

Property Levied On under One Execution Bound by Lien of Other Executions in Hands of Levying Officer. — Where an officer has in his hands an execution, and levies upon personal property and reduces it to possession, it is then in the custody of the law, and other executions in his hands, or subsequently received by him, become a lien on such property from the time of their delivery.¹

4. Extent of the Lien — *a.* **GENERAL RULE AS TO PROPERTY BOUND.** — The general rule as to the extent of the lien of an execution or fieri facias is that it is operative upon and binds all property, real or personal, of the execution debtor, which is subject to levy and sale in obedience to its mandate.²

Debtor Must Have Title to Property. — In order that property may be bound by the lien of an execution, it is necessary that the debtor should have the title thereto.³ But the lien may attach to property which is pledged or encumbered,

tended only to protect junior creditors and *bona fide* purchasers from the debtor is applied by analogy in those states where the lien of the execution commences only when a levy is made. *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441.

1. Property Levied on under One Execution Subject to Lien of Other Executions in Hands of Levying Officer — *England.* — *Jones v. Atherton*, 2 Marsh 355, 7 Taunt. 56, 2 E. C. L. 56. See also *Saunders v. Bridges*, 3 B. & Ald. 95, 5 E. C. L. 235.

Canada. — *Beekman v. Jarvis*, 3 U. C. Q. B. 280.

United States. — See *Hagan v. Lucas*, 10 Pet. (U. S.) 400.

Illinois. — *Leach v. Pine*, 41 Ill. 65, 89 Am. Dec. 375; *Field v. Macullar*, 20 Ill. App. 392.

Kansas. — See *J. M. W. Jones Stationery*, etc., *Co. v. Hentig*, 29 Kan. 75.

Kentucky. — *Locke v. Coleman*, 4 T. B. Mon. (Ky.) 316.

Missouri. — *State v. Doan*, 39 Mo. 44.

New Jersey. — See *Millville Nat. Bank v. Shaw*, 42 N. J. L. 550.

New York. — *Cresson v. Stout*, 17 Johns. (N. Y.) 116, 7 Am. Dec. 373.

North Carolina. — *Penland v. Leatherwood*, 101 N. Car. 509, 9 Am. St. Rep. 38.

Ohio. — *Ryan v. Root*, 56 Ohio St. 302.

The Discharge of the Levy would not change the liens of the other executions in the hands of the sheriff. *Leach v. Pine*, 41 Ill. 65, 89 Am. Dec. 375.

Setting Aside of Prior Execution. — Nor would the setting aside of the execution under which the levy was made have that effect. *Saunders v. Bridges*, 3 B. & Ald. 95, 5 E. C. L. 235.

Case Distinguished. — In a first reading the case of *Bayard v. Bayard*, 5 Pa. L. J. 160, 3 Clark (Pa.) 261, seems to be in conflict with the doctrine set out in the text, but it is distinguishable on the ground that the officer who made the levy did not receive any other execution until after he had finished selling the property levied on.

Doctrine that Rule Does Not Apply as Against Execution in Hands of Another Officer. — See *Penland v. Leatherwood*, 101 N. Car. 509, 9 Am. St. Rep. 38.

2. Lien Extends to All Property Subject to Levy and Sale. — *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85; *Durbin v. Haines*, 99 Ind. 463; *Million v. Riley*, 1 Dana (Ky.) 360, 25 Am. Dec. 149; *Whitehead v. Woodruff*, 11 Bush (Ky.) 209; *Lackey v. Mimms*, 5 Ky. L. Rep.

855; *Ray v. Birdseye*, 5 Den. (N. Y.) 619, 4 Hill (N. Y.) 158; *Stewart v. Beale*, 7 Hun (N. Y.) 405, *affirmed* 68 N. Y. 629.

A levy upon an execution debtor's one-half interest in a crop of tobacco gives to the creditor a lien upon the debtor's interest. *Vicory v. Strausbaugh*, 78 Ky. 425.

"All Goods." — The lien of an execution attaches to all goods owned by the defendant during its life. *Barnes v. Hayes*, 1 Swan (Tenn.) 304; *Matter of Gies Lithographic Co.*, 7 N. Y. App. Div. 550; *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562.

Growing Crops. — The levy of an execution upon land does not create a lien upon the crops growing thereon. But an execution may be levied upon the growing crops as well as upon the land and a lien upon them thus secured. *Bloom v. Welsh*, 27 N. J. L. 177.

Increase of Animals Levied On. — If a lien be acquired by the levy of an execution on domestic animals with unborn young, the lien will attach to the young after they are born. *Talbot v. Magee*, 59 Mo. App. 347; *Blum v. Light*, 81 Tex. 414. See also *Youngs v. Williams*, 21 N. Y. Wkly. Dig. 249, in which case the lien of a levy on sheep was held to extend to the wool growing on them, and to continue after severance of the wool.

But if there be no title in the execution debtor to the animals, no lien can attach to the unborn young in their wombs, though after birth the young may become subject to the execution. *Blum v. Light*, 81 Tex. 414.

Partnership Property. — The levy of an execution binds all the property of a partnership, although the judgment upon which the execution is based be in form only against the general partners. *Van Alstyne v. Cook*, 25 N. Y. 489.

Lien on Both Real and Personal Property. — By the delivery of an execution to the officer to be executed, a general lien is cast on all of the defendant's real and personal estate in the officer's bailiwick. *Anderson v. Fowler*, 8 Ark. 388.

No Lien on Personal Property. — Under the *Texas* execution law of 1842, an execution was not a lien on personal property. *Mercein v. Burton*, 17 Tex. 206.

3. Debtor Must Have Title to Property. — *Gorrell v. Kelsey*, 40 Ohio St. 117; *Springer v. Smith*, 3 Lea (Tenn.) 737; *Williams v. Lowe*, 4 Humph. (Tenn.) 62. See also *Knowles v. Jourdan*, 61 Ga. 300; *Duffy v. Dawson*, 22 Civ. Pro. Rep. (N. Y. City Ct.) 235, 2 Misc. Rep. (N. Y. C. Pl.) 401.

subject, however, to the prior lien of the pledgee or encumbrancer.¹

b. PROPERTY SUBJECT TO LIEN BUT NOT TO LEVY. — The general rule above set out is, however, like all general rules, subject to modifications and exceptions. Thus in some cases property may be bound by the lien of an execution though it cannot lawfully be levied upon.²

c. PROPERTY SUBJECT TO LEVY BUT NOT TO LIEN. — And, conversely, some kinds of property are not bound by the lien of the execution, but yet may properly be levied upon while in the possession of the execution debtor.³

d. RULE AS TO PROPERTY ACQUIRED WHILE WRIT IS CURRENT. — The general lien of an execution binds not merely the goods and chattels which the debtor has at the time when it is placed in the sheriff's hands, but also all goods and chattels acquired by him while the writ is current and unsatisfied.⁴

Rule as to Levy. — The specific lien acquired by a levy upon certain property does not attach to property afterwards acquired by the debtor,⁵ unless he has voluntarily mingled it with the property liable to be sold.⁶

1. Property Pledged or Encumbered. — *Whitehead v. Woodruff*, 11 Bush. (Ky.) 209; *Furlong v. Edwards*, 3 Md. 99; *Sickles v. Sullivan*, 22 Civ. Pro. Rep. (N. Y. Supreme Ct.) 322, 136 N. Y. 649.

Property Seized under Attachment Against Debtor from Another Court. — An execution issued by a state court is a lien against the debtor's interest in a vessel which has been attached by a United States marshal, for, subject to the special property which the marshal has acquired by the seizure, and the rights of the libellants, the debtor's interest in the vessel remains in him. *The Daniel Kaine*, 35 Fed. Rep. 785.

Lien Subject to Prior Equities Against Debtor. — The mere levy of an execution without sale fixes a lien attaching to the legal title to the realty levied on, and this is subject to any equity against the debtor, relating to a period of time prior to the levy. Thus the lien of such levy is not superior to the right of the grantor to rescind for duress or fraud. *Harris v. Gaines*, 2 Lea (Tenn.) 12.

2. Lien May Attach to Property Not Subject to Levy. — *Davis v. Bonney*, 89 Va. 755; *Frayser v. Richmond*, etc., R. Co., 81 Va. 388; *Hicks v. Roanoke Brick Co.*, 94 Va. 741; *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562; *Wiatt v. Hays*, 38 W. Va. 681. See also *Willson v. Binford*, 54 Ind. 569.

Contra. — *Edwards v. Thompson*, 85 Tenn. 720, 4 Am. St. Rep. 807; *Cecil v. Carson*, 86 Tenn. 139; *Stahlman v. Watson*, (Tenn. 1897) 39 S. W. Rep. 1055.

The Rule Stated in the Text Has Been Applied to amounts due on a contract for work not completed, *Hicks v. Roanoke Brick Co.*, 94 Va. 741; property in the hands of a receiver, *Davis v. Bonney*, 89 Va. 755; mortgaged property, *Green v. Western Nat. Bank*, 86 Md. 279; a promissory note made by a private person, *People v. National Mut. Ins. Co.*, 19 N. Y. App. Div. 247; property *in custodia legis*, *Branch Bank v. Broughton*, 15 Ala. 127; *Columbus Factory v. Herndon*, 54 Ga. 209; *Bayard v. Bayard*, 5 Pa. L. J. 160, 3 Clark (Pa.) 261; *Parrish v. Saunders*, 3 Humph. (Tenn.) 431; and, by analogy, to property of joint tenants, on which a levy may be made, but of which the sheriff cannot take possession without the consent of the tenants who hold jointly with the execution debtor, *Vicory v. Strausbaugh*, 78 Ky. 425.

The Creditor Must Be Diligent in Following up His Lien, and must follow up his execution by the commencement of his suit in equity; or, at least, by giving notice of his claim, and of his intention to pursue the trust fund, or by doing some decisive act showing such intent; before he can be considered as having a specific lien on property which has not been levied on or which could not be reached by an execution at law. *Weed v. Pierce*, 9 Cow. (N. Y.) 722.

Cases Distinguished. — The cases of *McConnell v. Denham*, 72 Iowa 494, and *Moore v. Moore*, 6 Ohio Dec. 154, are not in conflict with the doctrine stated in the text, because in the states where they were decided an execution does not bind the debtor's property before actual seizure.

3. Property Subject to Levy Though Not Bound by Lien. — Such is the case with respect to money. *Doyle v. Sleeper*, 1 Dana (Ky.) 531. See also *Reid v. Ramey*, 2 Rich. L. (S. Car.) 4; *Lynch v. Hanahan*, 9 Rich. L. (S. Car.) 186. Or bank or other corporate stock. *Princeton Bank v. Crozer*, 22 N. J. L. 383.

4. Lien Attaches to Property Acquired While Writ Is Current. — *Clifford v. Logan*, 9 Manitoba L. Rep. 423; *Blatchford v. Boyden*, 122 Ill. 657.

The rule set out in the text obtained in *South Carolina* prior to the adoption of the code. *Brown v. Gilliland*, 3 Desaus. (S. Car.) 539; *Grooms v. Dixon*, 5 Strobb. L. (S. Car.) 149; *Carrier v. Thompson*, 11 S. Car. 79.

Lien Attaches to Proceeds of Goods Sold. — Certain goods upon which the sheriff had levied an execution and thereby obtained a lien were also claimed by the receiver of the trust estate of a former partner of the judgment debtor, and it was agreed that the receiver should sell the goods and hold the proceeds subject to the lien of the levy by the sheriff. It was held that the proceeds of the sale in the hands of the receiver represented the goods levied upon by the sheriff and were not a part of the estate held by the receiver as such. *Hooley v. Gieve*, 7 Abb. N. Cas. (N. Y. C. Pl.) 271, affirmed 73 N. Y. 599.

5. Lien of Levy Does Not Extend to Property Subsequently Acquired. — *Caldwell v. Field*, 24 N. J. L. 150.

6. Mingling of After-acquired Property with That Levied Upon. — *Roth v. Wells*, 29 N. Y. 471, affirming 41 Barb. (N. Y.) 194.

C. RULE AS TO PROPERTY DISPOSED OF WHILE WRIT IS CURRENT — (1)
Rule Stated. — While property subject to the lien of an execution still belongs to the debtor, and he may sell it and convey good title to it, a sale does not divest the lien, but it still binds the property in the hands of the vendee.¹

1. Sale of Property Does Not Divest Lien —
England. — Samuel *v.* Duke, 3 M. & W. 622, 6 Dowl. P. C. 536, 1 H. & H. 127; Payne *v.* Drewe, 4 East 523; Moile's Case, Cro. Eliz. 174.

United States. — Massingill *v.* Downs, 7 How. (U. S.) 767; Beebe *v.* U. S., 161 U. S. 104.

Alabama. — Street *v.* Duncan, (Ala. 1898) 23 So. Rep. 523; Branch Bank *v.* Curry, 13 Ala. 304; Parks *v.* Coffey, 52 Ala. 32; Hendon *v.* White, 52 Ala. 597; Thames *v.* Rembert, 63 Ala. 561; Perkins *v.* Brierfield Iron, etc., Co., 77 Ala. 410. See also McMahan *v.* Green, 12 Ala. 71, 46 Am. Dec. 242; Mathews *v.* Mobile Mut. Ins. Co., 75 Ala. 85.

Arkansas. — See Dodd *v.* McCraw, 8 Ark. 83, 46 Am. Dec. 301.

Delaware. — Taylor *v.* Horsey, 5 Harr. (Del.) 131.

Illinois. — Marshall *v.* Cunningham, 13 Ill. 20.

Indiana. — M'Call *v.* Trevor, 4 Blackf. (Ind.) 496; Dixon *v.* Duke, 85 Ind. 434; Dann Mfg. Co. *v.* Parkhurst, 125 Ind. 317; Griffin *v.* Wallace, 66 Ind. 410. See also Cones *v.* Wilson, 14 Ind. 465.

Iowa. — See Nelson *v.* Larson, 78 Iowa 25.

Kentucky. — Harrison *v.* Wilson, 2 A. K. Marsh. (Ky.) 547; Hood *v.* Winsatt, 1 B. Mon. (Ky.) 208; Warner *v.* Everett, 7 B. Mon. (Ky.) 262; Million *v.* Riley, 1 Dana (Ky.) 360, 25 Am. Dec. 149; Addison *v.* Crow, 5 Dana (Ky.) 273; Daniel *v.* Cochran, 4 Bibb (Ky.) 532; Chenault *v.* Bush, 84 Ky. 528; Morton *v.* Robards, 4 Dana (Ky.) 258; Kilby *v.* Haggin, 3 J. J. Marsh. (Ky.) 208. See also Mt. Vernon Banking Co. *v.* Henderson Hominy Mills, 15 Ky. L. Rep. 333.

Mississippi. — Lynn *v.* Gridley, Walk. (Miss.) 548, 12 Am. Dec. 591.

New Hampshire. — Churchill *v.* Warren, 2 N. H. 298, 9 Am. Dec. 73; Folsom *v.* Chesley, 2 N. H. 432.

New Jersey. — James *v.* Burnet, 20 N. J. L. 635; Newell *v.* Sibley, 4 N. J. L. 438; Lloyd *v.* Wyckoff, 11 N. J. L. 218.

New York. — Hotchkiss *v.* M'Vickar, 12 Johns. (N. Y.) 403; Haggerty *v.* Wilber, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; Sickles *v.* Sullivan, 22 Civ. Pro. Rep. (N. Y. Supreme Ct.) 322, 65 Hun (N. Y.) 620, 47 N. Y. St. Rep. 82, affirmed in 136 N. Y. 649.

North Carolina. — Harding *v.* Spivey, 8 Ired. L. (30 N. Car.) 63; Jones *v.* Judkins, 4 Dev. & B. L. (20 N. Car.) 454, 34 Am. Dec. 392; Ricks *v.* Blount, 4 Dev. L. (15 N. Car.) 128.

South Carolina. — Paysinger *v.* Shumpard, 1 Bailey L. (S. Car.) 237; Bates *v.* Moore, 2 Bailey L. (S. Car.) 614.

Tennessee. — Preston *v.* Surgoine, Peck (Tenn.) 72; Harvey *v.* Berry, 1 Baxt. (Tenn.) 252; James *v.* Kennedy, 10 Heisk. (Tenn.) 607; Edwards *v.* Thompson, 85 Tenn. 720, 4 Am. St. Rep. 807; Cecil *v.* Carson, 86 Tenn. 139; Stahlman *v.* Watson, (Tenn. 1897) 39 S. W. Rep. 1055. See also Conley *v.* Deere, 11 Lea (Tenn.) 274.

Texas. — Borden *v.* McRae, 46 Tex. 396.

Virginia. — Puryear *v.* Taylor, 12 Gratt. (Va.) 401; Evans *v.* Greenhow, 15 Gratt. (Va.) 153; Charron *v.* Boswell, 18 Gratt. (Va.) 216; Trevillian *v.* Guerrant, 31 Gratt. (Va.) 525.

An Assignment of the Debtor's Interest in a Surplus Arising from Sale under a prior levy does not deprive a second execution creditor whose execution was delivered to the sheriff who had seized the property, before such assignment, of his right to such surplus. Millville Nat. Bank *v.* Shaw, 42 N. J. L. 550.

Property Which the Execution Debtor Has Exchanged for other property remains subject to the lien, even though the property received by him in exchange has already been levied on. Grooms *v.* Dixon, 5 Strobb. L. (S. Car.) 149.

Sale After Levy in New York. — According to the law of the state of New York, notwithstanding a levy the judgment debtor remains the owner and may sell the property, subject, however, to the execution lien. Mumper *v.* Rushmore, 79 N. Y. 19; Hatch *v.* Collins, 34 Hun (N. Y.) 314.

But any levy which is in law valid as against the defendant in the execution, and will justify a sale under it, will operate to defeat a subsequent purchase, though *bona fide* and for a valuable consideration. Butler *v.* Maynard, 11 Wend. (N. Y.) 548, 27 Am. Dec. 100.

Crop Delivered to Landlord as Rent. — Under the *Georgia* statute, part of a crop delivered to a landlord as rent, according to the terms of the lease, is not subject to the lien of an execution against the tenant. Singleton *v.* Clack, 79 Ga. 523.

Judicial Sale. — The rule set out in the text has been applied in the case of a sale by order of the court, for purposes of partition, of property owned by the execution debtor jointly with others, so as to hold the undivided interest of the debtor liable to sale under the execution, notwithstanding the prior sale. Harding *v.* Spivey, 8 Ired. L. (30 N. Car.) 63.

Ratification of Unauthorized and Irregular Deed. — The lien of an execution of land of a corporation upon which it has been levied cannot be divested by a subsequent ratification of an unauthorized deed, not legally executed, conveying such land; but such deed, though executed before the lien attached, is void as against the execution. Galloway *v.* Hamilton, 68 Wis. 651.

Conveyance in Pursuance of Prior Agreement. — Land conveyed by an execution creditor to another person after the lien of an execution has attached thereto remains subject to the lien, although the conveyance was merely the effectuating of a sale made before the lien attached, and the fulfilment of a legal and moral obligation on the part of the debtor. Million *v.* Riley, 1 Dana (Ky.) 360, 25 Am. Dec. 149; Jones *v.* Allen, 88 Ky. 381.

Under a verbal contract for the sale of an article to be manufactured by the vendor, if the contract is within the statute of frauds, the title does not pass to the purchaser until there

Statute of Limitations — Adverse Possession. — A purchaser from an execution debtor may, of course, acquire a good title even as against the execution creditor, by the running of the statute of limitations in his favor, and by continued adverse possession.¹

Stranger Coming into Possession of Property Incurs No Personal Liability. — The lien of an execution being upon the debtor's property alone, a third person coming into possession of it incurs no personal liability to the creditor for the value of the property.²

(2) *Modification in Favor of Bona Fide Purchasers.* — In many jurisdictions the general rule that the lien of an execution binds the debtor's property in the hands of his vendee is very materially modified in favor of *bona fide* purchasers, and it is considered that such a purchaser from a debtor before any levy is made will hold the property free from the lien of the execution if he took without notice and paid a valuable consideration.³

has been a delivery to him; and if a valid execution against the vendor is in the hands of the sheriff during the interval between the manufacture and the delivery of the article, the lien of the execution is superior to the title of the purchaser. *Sawyer v. Ware*, 36 Ala. 676.

Acknowledgment of Forfeiture of Lease. — When an execution has been levied on a leasehold interest of the execution debtor, he cannot affect the rights of the creditor by a subsequent voluntary acknowledgment of forfeiture of the lease. *Farnum v. Hefner*, 79 Cal. 575, 12 Am. St. Rep. 174.

Property Remaining in Debtor Must Be First Exhausted. — All levies on chattels, real and personal, of the execution debtor, must be satisfactorily accounted for before the execution will be allowed to interfere with property bought of him by a third person, and in such person's possession. *Dougherty v. Marsh*, 11 Ga. 277.

Extent to Which Title of Purchaser May Be Divested. — Where a fraudulent conveyance of property sought to be subjected to an execution is alleged, the single question under Code Miss. 1880, § 1767, is whether such property is claimed by a third person under a fraudulent conveyance from the judgment defendant, and a decision favorable to the plaintiff does not affect the title of the claimant beyond what is necessary to satisfy the execution. *Smith v. Newlon*, 62 Miss. 230.

1. Perfection of Purchaser's Title by Adverse Possession — Statute of Limitations. — *Barclay v. Smith*, 66 Ala. 230; *Dodd v. McCraw*, 8 Ark. 83, 46 Am. Dec. 301; *Ruker v. Womack*, 55 Ga. 399; *Douglass v. Eblin*, 57 Ga. 152; *Braswell v. Plummer*, 56 Ga. 594.

2. Stranger Incurs No Personal Liability. — *Finney v. Harding*, 136 Ill. 573; *Paysinger v. Shumard*, 1 Bailey L. (S. Car.) 237.

3. Protection of Bona Fide Purchasers — California. — *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441.

New Jersey. — See *Moses v. Thomas*, 26 N. J. L. 124, affirmed in *Van Waggoner v. Moses*, 26 N. J. L. 570.

New York. — *Stewart v. Beale*, 7 Hun (N. Y.) 405, affirmed in 68 N. Y. 629; *Dean v. Campbell*, 19 Hun (N. Y.) 534; *Osborn v. Alexander*, 40 Hun (N. Y.) 323, affirming 17 Abb. N. Cas. (Oneida County Ct.) 132, note; *Steffin v. Steffin*, 4 Civ. Pro. Rep. (N. Y. Supreme Ct.)

179; *Ray v. Birdseye*, 5 Den. (N. Y.) 619, 4 Hill (N. Y.) 158; *Millspaugh v. Mitchell*, 8 Barb. (N. Y.) 333; *Butler v. Maynard*, 11 Wend. (N. Y.) 548, 27 Am. Dec. 100; *Thompson v. Van Vechten*, 5 Abb. Pr. (N. Y. Super. Ct.) 458, not affected by reversal of case in 6 Bosw. (N. Y.) 373; *In re Paine*, 17 Nat. Bank. Reg. 37, 18 Fed. Cas. No. 10,673; *Roth v. Wells*, 29 N. Y. 471, affirming 41 Barb. (N. Y.) 194; *Bond v. Willett*, 31 N. Y. 102, 29 How. Pr. (N. Y.) 47, 1 Abb. App. Dec. (N. Y.) 165, 1 Keyes (N. Y.) 377; *Hendricks v. Robinson*, 2 Johns. Ch. (N. Y.) 283, affirmed 17 Johns. (N. Y.) 438.

Tennessee. — See *Rocco v. Parczyk*, 9 Lea (Tenn.) 328.

Virginia. — *Purveyor v. Taylor*, 12 Gratt. (Va.) 401; *Evans v. Greenhow*, 15 Gratt. (Va.) 153; *Charron v. Boswell*, 18 Gratt. (Va.) 216; *Trevillian v. Guerrant*, 31 Gratt. (Va.) 525.

West Virginia. — *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562.

English Doctrine as to Sale in Market Overt. — In *England* a purchaser from the execution debtor in market overt takes the goods free of the lien of the execution. *Samuel v. Duke*, 3 M. & W. 622, 6 Dowl. P. C. 536, 1 H. & H. 127; *Payne v. Drewe*, 4 East 523; *Lowthall v. Tonkins*, 2 Eq. Cas. Abr. 380.

Under the West Virginia Code a writ of fieri facias is a lien upon the personal property, not of such nature as to be subject to levy, owned by the debtor before its return day, if docketed as required by law. And such lien will prevail against a purchaser for value, without notice other than the constructive notice arising from such docketing; otherwise the lien will not affect a *bona fide* purchaser for value, without notice of the writ. *Wiant v. Hays*, 38 W. Va. 681.

Bona Fide Purchaser Without Notice from Fraudulent Grantee or Donee of Debtor. — In *Alabama* the doctrine seems to prevail that the coming in of a *bona fide* purchaser without notice, from a fraudulent grantee or donee of the execution debtor, will extinguish the lien of the execution as to the property purchased by him. *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85.

Burden of Proof. — A purchaser must assume the burden of proof and show affirmatively all the facts necessary to entitle him to such protection. *Williams v. Shelly*, 37 N. Y. 375; *In re Paine*, 17 Nat. Bank. Reg. 37, 18 Fed. Cas. No. 10,673.

Purchaser After Levy Not Protected. — As a levy on particular property not only fixes a specific lien thereon, but is constructive notice to all the world of such lien,¹ a purchaser from an execution debtor after a levy does not acquire an indefeasible title as against the execution creditor.²

Sale under Junior Execution. — If an officer makes a levy on and sells the defendant's goods under a junior execution, the purchaser will take them free from the lien of the senior execution,³ for he is not presumed to suppose that

What Constitutes a Bona Fide Purchaser. — In *New York* it is considered that in order for a person to be entitled to protection as a *bona fide* purchaser he must have parted with some fresh consideration; and that one who merely takes property in payment of, or as security for, a pre-existing indebtedness is not protected against the execution lien. *Ray v. Birdseye*, 5 Den. (N. Y.) 619, 4 Hill (N. Y.) 158; *Osborn v. Alexander*, 40 Hun (N. Y.) 323, *affirming* 17 Abb N. Cas. (Oneida County Ct.) 132, note; *Thompson v. Van Vechten*, 6 Bosw. (N. Y.) 373, *reversing* 5 Abb. Pr. (N. Y.) 458.

But in *Virginia* a deed to secure *bona fide* debts has been upheld against an execution creditor. *Evans v. Greenhow*, 15 Gratt. (Va.) 153.

When Lien of Execution Commences as Against Prior Judgments on Which No Execution Has Issued. — In order to give a subsequent judgment creditor a preference over a prior judgment creditor who has failed to issue an execution upon his judgment, it is essential that an execution on the later judgment should not only be issued, but should be actually levied upon the lands of the defendant. *Larison v. Dilts*, (N. J. Ch. 1895) 32 Atl. Rep. 1059.

1. Constructive Notice Arising from Levy. — *Hargrove v. De Lisle*, 32 Tex. 170. See also *Young v. Schofield*, 132 Mo. 650.

2. Purchaser After Levy Not Protected. — *Steffin v. Steffin*, 4 Civ. Pro. Rep. (N. Y. Supreme Ct.) 179; *Butler v. Maynard*, 11 Wend. (N. Y.) 548, 27 Am. Dec. 100; *Anderson v. Taylor*, 1 Tenn. Ch. 436; *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562.

Loss of Lien Arising from Levy. — Of course, if the lien of a levy has been lost by any act of the judgment creditor, a subsequent *bona fide* purchaser may acquire a title free from the lien of the execution. *Anderson v. Taylor*, 1 Tenn. Ch. 436.

Rule as to Recording Levy. — Under the *Connecticut* statutes, executions duly levied, returned, and recorded vest in the creditor and his heirs and assigns all the debtor's title to the property levied on; but as against third persons, the title of the execution creditor is not perfected until the execution proceedings have been returned and recorded in the land records; and while under a levy duly perfected the title of the creditor commonly relates back to the first step in the process, this legal fiction is never permitted to work injustice to a *bona fide* purchaser in whom rights may have meanwhile become vested. *Schroeder v. Tomlinson*, 70 Conn. 348. See also *Zook v. Smith*, 6 Baxt. (Tenn.) 213; *Anderson v. Talbot*, 1 Heisk. (Tenn.) 407.

The *Pennsylvania* Act of April 22, 1856, provides that "the lien of no execution levied on real estate shall commence or be continued as against any purchaser or mortgagee, unless

the same be indexed in the county where the real estate is situated." The docketing of the *fiert facias* lien is not a compliance with this statute or constructive notice to the subsequent mortgagee. If the levy does not appear on record there is no statutory lien. *Ross's Appeal*, 106 Pa. St. 82.

3. Sale under Junior Execution — England. — *Smallcomb v. Cross*, 1 Ld. Raym. 251, 1 Salk. 320, 1 Comyn's Rep. 35; *Payne v. Drewe*, 4 East 523. See also *Hutchinson v. Johnston*, 1 T. R. 729, 1 Rev. Rep. 380.

Colorado. — *Speelman v. Chaffee*, 5 Colo. 247. *Florida.* — See *Love v. Williams*, 4 Fla. 126.

Illinois. — *Rogers v. Dickey*, 6 Ill. 636, 41 Am. Dec. 204; *People v. Smith*, 29 Ill. App. 577.

Kentucky. — *Kilby v. Haggin*, 3 J. J. Marsh. (Ky.) 208.

Mississippi. — *Michie v. Planters' Bank*, 4 How. (Miss.) 130, 34 Am. Dec. 112. But see *Lynn v. Gridley*, Walk. (Miss.) 548, 12 Am. Dec. 591.

Missouri. — *Field v. Milburn*, 9 Mo. 492. *New York.* — *Beals v. Allen*, 18 Johns. (N. Y.) 363, 9 Am. Dec. 221; *Lambert v. Paulding*, 18 Johns. (N. Y.) 311; *Marsh v. Lawrence*, 4 Cow. (N. Y.) 469.

North Carolina. — *Faircloth v. Ferrell*, 63 N. Car. 640. See also *Harding v. Spivey*, 8 Ired. L. (30 N. Car.) 63.

The Sale Must Be Fully Consummated in order to pass title to a purchaser under a junior execution. *Speelman v. Chaffee*, 5 Colo. 247.

The Remedy of the Senior Execution Creditor is against the sheriff or other officer to whom the writs have been intrusted. *Beals v. Allen*, 18 Johns. (N. Y.) 363, 9 Am. Dec. 221; *Sandford v. Roosa*, 12 Johns. (N. Y.) 162; *Faircloth v. Ferrell*, 63 N. Car. 640. See the title SHERIFFS, MARSHALS, AND CONSTABLES. Or such creditor may have recourse to the fund arising from the sale, if not already paid out to other creditors. *Faircloth v. Ferrell*, 63 N. Car. 640.

Rule Held Not to Apply to Sales of Real Property. — Where a creditor has a lien upon real estate of his debtor by reason of a judgment and execution, such lien is not defeated or prejudiced by a sale of the property under a junior execution. *Williamson v. Johnston*, 12 N. J. L. 86. But see *Sandford v. Roosa*, 12 Johns. (N. Y.) 162.

The Doctrine Set Out in the Text Has Been Denied in South Carolina. *Robinson v. Cooper*, 1 Hill L. (S. Car.) 286; *Kerr v. Montgomery*, 1 Hill L. (S. Car.) 277; *Carrier v. Thompson*, 11 S. Car. 79. See also *Jones v. McNeill*, 1 Hill L. (S. Car.) 84. In the case first cited it was said, however, that if the proceeds of the sale be applied to the prior executions, their lien would be discharged.

And in Alabama, also, the courts do not seem

the officer has committed any impropriety in the performance of his duty.¹

Sale under Dormant Execution. — And a similar rule has been applied in the case of a sale under a dormant execution.²

f. TERRITORIAL EXTENT OF LIEN — (1) *General Rule.* — The general rule as to the territorial extent of the lien of an execution is that it is coextensive with the jurisdiction of the officer to whom the writ is delivered, and attaches to all the defendant's goods and chattels within such territory,³ and as the writ is in most cases delivered to the sheriff or some other officer whose jurisdiction has the same limits, its lien usually extends throughout the county in which it is issued.⁴ In some states, however, the rule that the lien of an execution extends to the defendant's property throughout the state is established.⁵

(2) *Effect of Removal of Property.* — If an execution be regularly kept alive, its lien upon goods of the defendant which have become subject thereto is not lost, but is merely suspended, by reason of the goods being carried beyond the limits of the county,⁶ and the lien revives immediately, and

to recognize it. *Lancaster v. Jordan*, 78 Ala. 197.

Sale While Senior Writ Is Enjoined. — In *Lynn v. Gridley*, Walk. (Miss.) 548, 12 Am. Dec. 591, it was held that property which was sold under a junior execution, while the senior execution was suspended by an injunction, remained subject to the lien of such senior execution, and might be levied upon in the hands of any person when the injunction was removed.

Sale under Fraudulent Attachment. — Where attached property has been sold under order of the court and purchased by a third person, he becomes the owner of the property, regardless of the claims of any one; and no lien is acquired by a subsequent levy on such property under an execution against the original owner, though it be alleged that the attachment was fraudulent. *Murphy v. Nash*, (Tex. Civ. App. 1898) 45 S. W. Rep. 944.

1. **Reason of the Rule.** — *Rogers v. Dickey*, 6 Ill. 636, 41 Am. Dec. 204; *Michie v. Planters' Bank*, 4 How. (Miss.) 130, 34 Am. Dec. 112. See also *Smallcomb v. Cross*, 1 Ld. Raym. 252.

2. **Sale under Dormant Execution.** — *Richards v. Allen*, 3 E. D. Smith (N. Y.) 399.

3. ***Lien Co-extensive with Jurisdiction of Officer to Whom Writ Is Delivered.** — *Kregelo v. Adams*, 9 Biss. (U. S.) 343; *Abeel v. Anderson*, 39 Hun (N. Y.) 514; *Lambert v. Paulding*, 18 Johns. (N. Y.) 311; *Earl's Appeal*, 13 Pa. St. 483; *Childs v. Dilworth*, 44 Pa. St. 123.

4. **Execution Binds All Goods and Chattels Within the County** — *Alabama.* — *Pond v. Griffin*, 1 Ala. 678; *Wood v. Gary*, 5 Ala. 43; *Hill v. Slaughter*, 7 Ala. 632; *McMahan v. Green*, 12 Ala. 71, 46 Am. Dec. 242; *Newcombe v. Leavitt*, 22 Ala. 631; *King v. Kenan*, 38 Ala. 63; *Sims v. Eslava*, 74 Ala. 594; *Carlisle v. May*, 75 Ala. 502; *Beebe v. U. S.*, 161 U. S. 104; *Carlisle v. Godwin*, 68 Ala. 137.

Arkansas. — *Anderson v. Fowler*, 8 Ark. 388. *Illinois.* — *Pike v. Baker*, 53 Ill. 163.

Indiana. — *Durbin v. Haines*, 99 Ind. 467.

Kentucky. — *Hood v. Winsatt*, 1 B. Mon. (Ky.) 208; *Claggett v. Force*, 1 Dana (Ky.) 428; *Mitchell v. Ashby*, 78 Ky. 254; *Chenault v. Bush*, 84 Ky. 528.

New York. — *Ray v. Birdseye*, 5 Den. (N. Y.)

619, 4 Hill (N. Y.) 158; *Stewart v. Beale*, 7 Hun (N. Y.) 405, affirmed 68 N. Y. 629; *Matter of Gies Lithographic Co.*, 7 N. Y. App. Div. 550.

Pennsylvania. — *The Daniel Kaine*, 35 Fed. Rep. 785; *Schuykill County's Appeal*, 30 Pa. St. 358.

Canada. — *Clifford v. Logan*, 9 Manitoba L. Rep. 423.

Territorial Extent of Execution Issued by Justice of the Peace. — In *Arkansas* and *Missouri* an execution issued by a justice of the peace is a lien on all the goods and chattels of the defendant in execution within the limits of the township to which the execution is directed. *Isbell v. Epps*, 28 Ark. 35; *Brown v. Burrus*, 8 Mo. 26.

But in *Missouri*, where a judgment is obtained in one township and the defendant resides in another, and the execution is directed to the constable of the township where the judgment is rendered, the officer may execute the writ throughout the county, and the lien is coextensive with the limits of the officer's jurisdiction, and binds any personal property of the defendant within the county. *Gott v. Williams*, 29 Mo. 461.

5. **Lien Extends Throughout State in Tennessee.** — *Cecil v. Carson*, 86 Tenn. 139; *Stahlman v. Watson*, (Tenn. 1897) 39 S. W. Rep. 1055.

The Same Rule Prevailed in South Carolina prior to the adoption of the code, under which personal property is not bound until an actual levy, and is perhaps still in force so far as to authorize a levy in any part of the state. *Woodward v. Hill*, 3 McCord L. (S. Car.) 241; *State v. O'Conner*, Rice L. (S. Car.) 150.

In *North Carolina* the same doctrine seems to have been recognized. See *Allen v. Plummer*, 63 N. Car. 307.

6. **Lien Not Lost by Removal of Goods from County** — *Alabama.* — *Hill v. Slaughter*, 7 Ala. 632; *McMahan v. Green*, 12 Ala. 71, 46 Am. Dec. 242; *Newcombe v. Leavitt*, 22 Ala. 631; *Street v. Duncan*, (Ala. 1898) 23 So. Rep. 523.

Kentucky. — *Mitchell v. Ashby*, 78 Ky. 254; *Forman v. Proctor*, 9 B. Mon. (Ky.) 124; *Hood v. Winsatt*, 1 B. Mon. (Ky.) 208; *Claggett v. Force*, 1 Dana (Ky.) 428.

New York. — *Lambert v. Paulding*, 18 Johns. (N. Y.) 311.

relates back to the time when it first attached, upon the property being brought back within the county, whether by the execution debtor or by a purchaser from him.¹

Removal Without State — Statute of Limitations. — The rule above set forth applies to property which has been removed beyond the limits of the state,² unless the statute of limitations of the state to which it was removed has perfected the title of a purchaser.³

5. Duration of the Lien — a. A MATTER OF STATUTORY REGULATION. — The duration of the lien, or the life of an execution, is a matter which is regulated entirely by statute, and the reader is referred to the statutes in force in the various jurisdictions for specific information as to this question.⁴ Those cases which have particularly referred to the various special statutes on the subject are set out in the note.⁵

b. RULE AS TO CESSATION OF LIEN ON RETURN DAY OF WRIT. — A very generally prevailing rule is that the lien of an execution terminates on the return day of the writ,⁶ unless a levy has been made before that time, in which

Lien Follows the Property. — In *Street v. Duncan*, (Ala. 1898) 23 So. Rep. 523, the court said that the lien follows the property to the county into which it is removed, but it is doubtful whether so broad a doctrine would receive general assent.

1. Lien Revives When Property Is Brought Back Within County. — *Hill v. Slaughter*, 7 Ala. 632; *McMahan v. Green*, 12 Ala. 71, 46 Am. Dec. 242; *Mitchell v. Ashby*, 78 Ky. 254.

Sale of Property to Which Lien Has Not Attached Before It Is Brought Within County. — Property of an execution debtor not subject to the lien of an execution because not within the county does not become subject to the lien by being brought into the county by a *bona fide* purchaser to whom it was delivered by the debtor beyond the limits of the county. *Pike v. Baker*, 53 Ill. 163; *Clagget v. Force*, 1 Dana (Ky.) 428.

2. Property Removed Beyond Limits of State. — *McMahan v. Green*, 12 Ala. 71, 46 Am. Dec. 242.

3. Perfection of Title of Purchaser by Statute of Limitations. — *Newcombe v. Leavitt*, 22 Ala. 631. See also *McMahan v. Green*, 12 Ala. 71, 46 Am. Dec. 242.

4. A Statutory Lien. — *Wheeler v. Haines*, 114 Ind. 108.

5. Illinois. — In Illinois an execution may be sued out at any time within seven years after the date of the judgment, and becomes a lien upon delivery to the sheriff. If no levy is made within the seven years, the lien is lost; but if a levy is made within such time, it may be enforced by a sale within one year after the expiration of the seven years. *Dobbins v. Peoria First Nat. Bank*, 112 Ill. 553; *Barth v. Commercial Nat. Bank*, 115 Ill. 472.

The rule above stated superseded that set out in the cases of *Weis v. Tiernan*, 91 Ill. 27; *Ewing v. Ainsworth*, 53 Ill. 464; *Rainey v. Nance*, 54 Ill. 29. See also *Riggin v. Mulligan*, 9 Ill. 50; *Tenney v. Hemenway*, 53 Ill. 97; *Gridley v. Watson*, 53 Ill. 186.

In Kentucky the lien of a *fieri facias* continues while it is in the hands of the officer to be executed. *Waller v. Best*, 3 How. (U. S.) 111.

South Carolina. — Prior to the adoption of the South Carolina Code, executions were liens

upon personal property from the date of their lodgment in the sheriff's office, even after they had lost their active energy. *Snipes v. Sheriff*, 1 Bay (S. Car.) 295; *Brown v. Gilliland*, 3 Desaus. (S. Car.) 539; *Greenwood v. Naylor*, 1 McCord L. (S. Car.) 414; *State v. Laval*, 4 McCord L. (S. Car.) 342; *Mitchell v. Anderson*, 1 Hill L. (S. Car.) 73, 26 Am. Dec. 158; *Warren v. Jones*, 9 S. Car. 288.

Under the South Carolina Act of 1873 (15 Stat. 495; see Code Civ. Pro. 1893, § 311) executions ceased to be returnable within sixty days, and retained their active energy "until the regular term of the court from which they were sued which shall follow next after the full completion of five years from its lodgment." *Adickes v. Lowry*, 12 S. Car. 97. See also *McLaurin v. Kelly*, 40 S. Car. 486.

This act provided further that where any execution issued since the first day of March, 1870, "has now a lien by reason of a levy in accordance with the provisions of the Code of Procedure," the lien should date from the day it so became a lien under the code, and, as to real estate, should endure for ten years from that time. *Adickes v. Lowry*, 12 S. Car. 97.

Virginia. — Under Code Va., § 3602, the lien of the writ of *fieri facias* continues so long as the judgment can be enforced. *Hicks v. Roanoke Brick Co.*, 94 Va. 741. Compare *Carr v. Glasscock*, 3 Gratt. (Va.) 328.

Missouri Statute of 1863 Reviving Liens. — The provision of section 1 of the Missouri Act of March 3, 1863 (Sess. Acts 1863, p. 20), reviving executions theretofore issued and not satisfied, and all liens which accrued in virtue thereof, had reference to the state of affairs existing at the time at which it was passed, when the existing civil commotion interrupted the sessions of the courts and rendered sales of property levied on impracticable. The act did not apply to an execution returned unsatisfied by express order of the plaintiff long before the civil disturbances began, and which was founded on a judgment the lien of which had expired before the act was passed. *Turner v. Keller*, 38 Mo. 332.

6. Lien Terminates at Return Day of Writ — England. — *Perkins v. Woolaston*, 1 Salk. 321, 2 Ld. Raym. 1256.

United States. — *Webster v. Woolbridge*, 3

case the lien is continued as to the property levied on, in order that a sale may be made.¹

Duration of Lien Acquired by Levy. — The time during which this lien acquired by the levy may remain in force varies in the different jurisdictions.²

Dill. (U. S.) 74; *Cunningham v. Offutt*, 5 Cranch (C. C.) 524.

Illinois. — *Launtz v. Gross*, 16 Ill. App. 329; *Minor v. Herriford*, 25 Ill. 344; *Corbin v. Pearce*, 81 Ill. 461; *Garner v. Willis*, 1 Ill. 368. *Indiana.* — *Chatten v. Gerber*, 2 Ind. App. 386.

Kentucky. — *Daniel v. Cochran*, 4 Bibb (Ky.) 532; *Tabb v. Harris*, 4 Bibb (Ky.) 29, 7 Am. Dec. 732. See also *Addison v. Crow*, 5 Dana (Ky.) 271.

Missouri. — *State Bank v. Bray*, 37 Mo. 194; *Stewart v. Severance*, 43 Mo. 322, 97 Am. Dec. 392; *McDonald v. Gronefeld*, 45 Mo. 28.

New Jersey. — *Lloyd v. Wyckoff*, 11 N. J. L. 218; *Matthews v. Warne*, 11 N. J. L. 295; *Cook v. Wood*, 16 N. J. L. 254.

New York. — *Walker v. Henry*, 85 N. Y. 130; *Abeel v. Anderson*, 39 Hun (N. Y.) 514; *Hathaway v. Howell*, 54 N. Y. 97; *Ansonia Brass, etc., Co. v. Conner*, 103 N. Y. 502; *Smith v. Smith*, 60 N. Y. 161; *Matter of Pond*, 21 Misc. Rep. (N. Y. Supreme Ct.) 114; *Watrous v. Lathrop*, 4 Sandf. (N. Y.) 700.

North Carolina. — *Ross v. Alexander*, 65 N. Car. 576.

Pennsylvania. — *Sturges's Appeal*, 86 Pa. St. 413. See also *Religious Soc. v. Hitchcock*, 2 Browne (Pa.) 333.

Tennessee. — *Union Bank v. McClung*, 9 Humph. (Tenn.) 91.

West Virginia. — *Wiant v. Hays*, 38 W. Va. 681.

The Rule Set Out in the Text Does Not Obtain in Virginia. *Puryear v. Taylor*, 12 Gratt. (Va.) 401; *Evans v. Greenhow*, 15 Gratt. (Va.) 153; *Charron v. Boswell*, 18 Gratt. (Va.) 216; *Trevillian v. Guerrant*, 31 Gratt. (Va.) 525.

1. Lien After Return Day as to Property Levied On. — *Illinois.* — *Launtz v. Gross*, 16 Ill. App. 329; *Minor v. Harriford*, 25 Ill. 344; *Corbin v. Pearce*, 81 Ill. 461; *Logsdon v. Spivey*, 54 Ill. 104.

Indiana. — *Chatten v. Gerber*, 2 Ind. App. 386.

Kentucky. — *Addison v. Crow*, 5 Dana (Ky.) 271.

Minnesota. — *Knox v. Randall*, 24 Minn. 479.

Missouri. — *State Bank v. Bray*, 37 Mo. 194; *Stewart v. Severance*, 43 Mo. 322, 97 Am. Dec. 392; *McDonald v. Gronefeld*, 45 Mo. 28.

New York. — *Walker v. Henry*, 85 N. Y. 130; *Abeel v. Anderson*, 39 Hun (N. Y.) 514; *Matter of Pond*, 21 Misc. Rep. (N. Y. Supreme Ct.) 114; *Ansonia Brass, etc., Co. v. Conner*, 103 N. Y. 502.

North Carolina. — *Ross v. Alexander*, 65 N. Car. 576.

Pennsylvania. — *Sturges's Appeal*, 86 Pa. St. 413; *Religious Soc. v. Hitchcock*, 2 Browne (Pa.) 333.

West Virginia. — *Wiant v. Hays*, 38 W. Va. 681.

Actual Possession by Officer Not Necessary. — To continue the lien of an execution it is not absolutely necessary that the levying officer should take personal property levied on into

actual possession. It is sufficient if it be forthcoming to answer the exigencies of the writ. *Dorrance v. Com.*, 13 Pa. St. 160; *McGinnis v. Prieson*, 85 Pa. St. 111. See also *Wood v. Vanarsdale*, 3 Rawle (Pa.) 401; *Trovillo v. Tilford*, 6 Watts (Pa.) 468, 31 Am. Dec. 484.

No Constructive Levy Can Arise from the Mere Delivery of the Execution or be presumed therefrom. *Walker v. Henry*, 85 N. Y. 130; *Hathaway v. Howell*, 54 N. Y. 97; *Ansonia Brass, etc., Co. v. Conner*, 103 N. Y. 502; *Smith v. Smith*, 60 N. Y. 161.

A Demand of Payment is not a substitute for a levy, and does not preserve the lien. *Abeel v. Anderson*, 39 Hun (N. Y.) 514.

Return of Sheriff that Property Is Secreted. — In *Maryland* it has been held that the lien of an execution on the personal property of the defendant is not discharged because the sheriff returns that part of the property is secreted; but when such property is discovered it may be taken under a new execution. *Selby v. Magruder*, 6 Har. & J. (Md.) 454.

2. Duration of Lien of Levy — Indiana. — Under Code Ind. 1881, § 741, the lien of a levy on personal property as against *bona fide* purchasers and other judgment creditors who levy thereon is limited to thirty days from the return of the execution under which the levy was made, unless a second execution be issued thereon. *Wheeler v. Haines*, 114 Ind. 108; *Chatten v. Gerber*, 2 Ind. App. 386. And as to real property, the levy of such writ is discharged after six months. *Wheeler v. Haines*, 114 Ind. 108.

Missouri. — In *Missouri* it is provided by statute that where for any cause real estate which has been levied on shall not be sold at the next term of the court, the execution and the lien thereby created shall remain and continue in force until the end of the second term of the court in the county where the land is situated, and until a term of the said court is held at which the said real estate may be sold according to law. *Webster v. Woolbridge*, 3 Dill. (U. S.) 74; *Huff v. Morton*, 94 Mo. 405, citing *Rev. Stat. Mo. 1879, § 2389 (Rev. Stat. 1889, § 4951)*.

The above act applied to executions of which the return term had passed before it became a law. *Wood v. Messerly*, 46 Mo. 255.

It extended the lien until a term of court at which a sale was possible, *Stewart v. Severance*, 43 Mo. 322, 97 Am. Dec. 392; *McDonald v. Gronefeld*, 45 Mo. 28; but no further, *Webster v. Woolbridge*, 3 Dill. (U. S.) 74.

It preserves the lien only as to the specific land levied upon, *McDonald v. Gronefeld*, 45 Mo. 28; and consequently does not afford any relief to a creditor, where no levy was made while his execution was in force, *State Bank v. Bray*, 37 Mo. 194.

The act applies to a special execution in attachment. *Groner v. Smith*, 49 Mo. 318.

Pennsylvania. — Section 18 of the *Pennsylvania Act of March 20, 1810*, provides that when a constable levies an execution issued

Waiver. — The lien acquired by a levy may, of course, be waived.¹

c. PROVISIONS FOR PRESERVING LIEN. — In some of the states provision is made for preserving the original lien of an execution by the issuing of *alias* and *pluries* writs on the return days of the original or *alias* writs,² by the issuing of successive executions from term to term of the court from which the original writ issued,³ or by other appropriate proceedings.⁴

by a justice of the peace on goods or chattels of the defendant, the levy shall be a lien on such goods and chattels for twenty days after levying the same, and no longer. *Page v. Gardner*, 1 Pa. Dist. Rep. 539, 11 Pa. Co. Ct. Rep. 577.

Texas — Suspension of Process from Federal Courts by Civil War. — The lien created by a levy upon land under an execution from a federal court in February, 1861, remained in force until the issuance of another execution in May, 1867, on account of the suspension of process from federal courts because of the civil war in the meantime. Such second execution brought into activity the lien which had been in abeyance, in consequence of the war, for six years. *Hargrove v. De Lisle*, 32 Tex. 170.

1. Waiver of Lien Acquired by Levy. — *Ross v. Alexander*, 65 N. Car. 576.

2. Preservation of Original Lien by Alias and Pluries Writs. — *Caperton v. Martin*, 5 Ala. 217; *Lancaster v. Jordan*, 78 Ala. 107; *Hood v. Winsatt*, 1 B. Mon. (Ky.) 208; *Forman v. Proctor*, 9 B. Mon. (Ky.) 124; *Mitchell v. Ashby*, 78 Ky. 254; *Harding v. Spivey*, 8 Ired. L. (30 N. Car.) 63; *Brasfield v. Whitaker*, 4 Hawks (11 N. Car.) 309; *Allen v. Plummer*, 63 N. Car. 307; *M'Lean v. Upchurch*, 2 Murph. (6 N. Car.) 353; *Gilky v. Dickerson*, 2 Hawks (9 N. Car.) 341; *Hamilton v. Henry*, 5 Ired. L. (27 N. Car.) 218; *Horton v. McCall*, 66 N. Car. 159; *Ricks v. Blount*, 4 Dev. L. (15 N. Car.) 128.

Return of Original "Too Late to Hand." — An *alias fieri facias*, although founded on one which was returned "too late to hand," has a lien on goods from the teste of the first. *Yarborough v. State Bank*, 2 Dev. L. (13 N. Car.) 23.

Writs from Different Counties. — The rule that an *alias* execution relates back to the date of the original is not affected by the fact that the *alias* writ was issued from a county other than that from which the original execution issued. *Allen v. Plummer*, 63 N. Car. 307.

Alias Writ to County to Which Property Has Been Removed. — Where property subject to the lien of an execution has been removed to a county other than that to which the execution originally issued, and an *alias* is issued to the county where the property is, the lien relates back to the time when the original execution was placed in the hands of an officer. *Hood v. Winsatt*, 1 B. Mon. (Ky.) 208.

Failure to Reissue Writ Against All Defendants. — Where there are several defendants in a judgment, and executions have issued against all of them, but at the reissue at one term of the court the name of one of the defendants is omitted from the execution, the lien on his land is destroyed. *Brem v. Jamieson*, 70 N. Car. 566.

Doctrine that Alias Writ Never Relates Back. — In *Tennessee* an *alias* execution bearing teste from the return day of the first does not oper-

ate as a lien on the personal property by relation from the date of the judgment, but only from the return day of the first execution. *Union Bank v. McClung*, 9 Humph. (Tenn.) 91.

And a somewhat similar doctrine seems to prevail in *Indiana*. See *Kregelo v. Adams*, 9 Biss. (U. S.) 343.

3. Preservation of Original Lien by Issuing Successive Executions. — *Beebe v. U. S.*, 161 U. S. 104; *Childs v. Jones*, 60 Ala. 352; *Carlisle v. Godwin*, 68 Ala. 137; *Leach v. Williams*, 8 Ala. 759; *Perkins v. Brierfield Iron, etc., Co.*, 77 Ala. 403; *Keel v. Larkin*, 72 Ala. 493; *King v. Kenan*, 38 Ala. 63; *Sims v. Eslava*, 74 Ala. 594; *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85; *Carlisle v. May*, 75 Ala. 502; *Collingsworth v. Horn*, 4 Stew. & P. (Ala.) 237, 24 Am. Dec. 753; *Parks v. Coffey*, 52 Ala. 32; *Hendon v. White*, 52 Ala. 597; *Massingill v. Downs*, 7 How. (U. S.) 760.

What Is a "Term." — The phrase "entire term" as used in section 3210 of the *Alabama Code* of 1876, which provides that the lien of an execution shall continue only so long as writs are "regularly issued and delivered to the sheriff without the lapse of an entire term," means simply "from one session of the court to another" — the period of time intermediate between the two terms as fixed by law. Therefore, an execution issued by the Probate Court, which holds regular terms on the second Monday of each month, loses its lien by the lapse of the entire interval between two regular monthly terms. *Carlisle v. May*, 75 Ala. 502.

Failure to Return One Writ. — Where an *alias fieri facias* is issued and delivered to the sheriff, but not returned by him, and a *pluries fieri facias* is issued at the next term of court and a sale made thereunder, the continuity of the lien is not broken. *Parks v. Coffey*, 52 Ala. 32.

Return of Execution Before Return Day. — The lien of an execution will not be lost by its return a short time before the return day, by mistake, or by express direction of the plaintiff in execution, where an *alias* is issued before another term has elapsed, and it does not appear that the execution was returned or its reissuance delayed for the purpose of favoring the defendant in execution. *Wood v. Gary*, 5 Ala. 52; *Johnson v. Williams*, 8 Ala. 529.

Irregular or Defective Writ. — The continuity of a lien of execution is not broken by the fact that one writ issued was grossly irregular and imperfect, and would have been quashed on motion, but such writ was recalled by order of the plaintiff, and on the same day another execution was issued and received by the sheriff, where, excluding such execution entirely from the file and from consideration, there was not a lapse of an entire term between the return of one execution and the receipt of another by the sheriff. *Clark v. Spencer*, 75 Ala. 49.

4. Bill in Equity to Reach Equitable Personality. — Section 2986 of the *Code of Tennessee* (Code

Loss of Lien by Laches. — These provisions must be strictly complied with, for the lien is lost if an entire term is permitted to elapse without the issue of an execution,¹ or if there is any other gap between successive writs.²

6. Priorities — a. BETWEEN VARIOUS EXECUTION LIENS — (1) Introductory. — It frequently happens that several executions are issued against a debtor who is not possessed of property sufficient to satisfy all of them, and the question as to the priorities between the several writs then becomes of much importance,³ for, in the absence of a statute establishing a different rule, the various creditors are entitled to be satisfied in full in the order of the priority of their executions until the debtor's property is exhausted.⁴

1896, § 4714) provides that the lien of an execution on equitable personalty shall cease, unless a bill in equity to subject the interest is filed within thirty days "from the return of the execution unsatisfied." *Riddle v. Motley*, 1 Lea (Tenn.) 468.

1. Loss of Lien by Lapse of Term Without Issue of Writ. — *Collier v. Wood*, 85 Ala. 91; *Dargan v. Waring*, 11 Ala. 988, 46 Am. Dec. 234; *Gamble v. Fowler*, 58 Ala. 576; *Collier v. Wood*, 85 Ala. 91; *Cary v. Gregg*, 3 Stew. (Ala.) 433; *McBroom v. Rives*, 1 Stew. (Ala.) 72; *Toney v. Wilson*, 51 Ala. 499; *Sims v. Eslava*, 74 Ala. 594; *Perkins v. Brierfield Iron, etc., Co.*, 77 Ala. 403; *Carlisle v. Godwin*, 68 Ala. 137; *Walker v. Elledge*, 65 Ala. 51; *Collingsworth v. Horn*, 4 Stew. & P. (Ala.) 237, 24 Am. Dec. 753; *Whitfield v. Clark*, 48 Ala. 555; *Hobson v. Kissam*, 8 Ala. 357; *Branch Bank v. Broughton*, 15 Ala. 127; *Bennett v. Gamble*, 1 Tex. 124.

Lien Not Preserved by Issuance of Ca. Sa. to Intervening Term. — Where a term is permitted to elapse, between the terms to which an original and an *alias* execution are returnable, the issuance of a *capias ad satisfaciendum* to the intervening term will not continue the lien created by the former execution. *Cary v. Gregg*, 3 Stew. (Ala.) 433.

As Against Whom Lien Is Lost. — Section 3211 of the Alabama Code of 1876 provides that "the liens of executions, as between different judgment creditors and between judgment creditors and purchasers from the defendant for a valuable consideration, are declared to be that if an entire term elapse between the return of an execution and the suing out of an *alias*, the lien created by the delivery of the first execution to the sheriff is lost." The court cannot construe this statute so as to interpolate the words "without notice" after the phrase "purchasers from the defendant for a valuable consideration." *Carlisle v. Godwin*, 68 Ala. 137.

A Junior Creditor or other Third Person May Acquire a Preference during the time in which the lien of the senior execution creditor is lost by his failure to sue out writs returnable to successive terms. *McBroom v. Rives*, 1 Stew. (Ala.) 72; *Cary v. Gregg*, 3 Stew. (Ala.) 433; *Dargan v. Waring*, 11 Ala. 988, 46 Am. Dec. 234; *Collingsworth v. Horn*, 4 Stew. & P. (Ala.) 237, 24 Am. Dec. 753.

2. Loss of Lien by Interval Between Executions. — *Garner v. Willis*, 1 Ill. 368; *Brown v. Cape Girardeau County*, 1 Mo. 154; *Brem v. Jamieson*, 70 N. Car. 566.

Loss of Lien by Not Delivering One of a Series of Writs. — If the original or any intermediate

writ was never delivered to the sheriff, an *alias fieri facias* has no lien as against any other creditor anterior to its teste. *Palmer v. Clarke*, 2 Dev. L. (13 N. Car.) 354, 21 Am. Dec. 340; *Dawson v. Shepherd*, 4 Dev. L. (15 N. Car.) 497.

Lien Subsequently Acquired Does Not Relate Back. — In case of such a lapse, or a loss of the lien as indicated in the preceding section, the subsequent issuing of another writ creates an entirely new lien, which can have no relation back to the time when the first lien attached. *Collier v. Wood*, 85 Ala. 91; *Hobson v. Kissam*, 8 Ala. 357; *Branch Bank v. Broughton*, 15 Ala. 127; *Toney v. Wilson*, 51 Ala. 499; *Gamble v. Fowler*, 58 Ala. 576; *Collier v. Wood*, 85 Ala. 91; *Perkins v. Brierfield Iron, etc., Co.*, 77 Ala. 403; *Cunningham v. Offutt*, 5 Cranch (C. C.) 524; *Maul v. Scott*, 2 Cranch (C. C.) 367. See also *Watrous v. Lathrop*, 4 Sandf. (N. Y.) 700.

Lapse Perfects Title of One Who Purchased Subject to Oriental Lien. — *Hood v. Winsatt*, 1 B. Mon. (Ky.) 208.

3. Priorities. — In many cases the principles relating to loss of the priority of an execution lien as against other liens, and the loss or suspension of the lien as against the debtor or purchasers from him, are so closely connected as to render complete separate treatment impossible without much duplication. For this reason, all such matters will be treated under the heading *Extinguishment or Suspension of the Lien, infra*.

4. Order of Satisfaction. — *Lynch v. Hanahan*, 9 Rich. L. (S. Car.) 186; *Cooper v. Scott*, 2 McMull. L. (S. Car.) 150. See also *Gilmer v. Warren*, 17 Ga. 426.

Extent of Satisfaction. — A creditor who has obtained judgment and issued execution for the penalty of a bond, given for the payment of money by instalments, has a right, in preference to junior execution creditors, to apply the proceeds of his debtor's property to the payment of instalments not due. As against other creditors, he has a right to collect the whole debt; the utmost they can ask is that interest shall be deducted from the instalments until the times when they are severally to be paid. *Martin v. Bowie*, *Dudley L.* (S. Car.) 81.

Priorities as Between Ca. Sa. and Elegit. — Under a *Virginia* statute providing that all executions of *capias ad satisfaciendum* should bind the real estate of the defendant from the time when they were levied, it has been held that where several creditors recover judgment and sue out writs of *capias ad satisfaciendum* against the debtor, upon which he is taken

(2) *Priority According to Teste of Writ.* — In the jurisdictions where and in the times when the common-law rule as to the lien of an execution from its teste has prevailed,¹ it has been held that executions took priority according to their teste, without reference to the time of their delivery to the sheriff, provided all were delivered before their return days and before a sale of the debtor's property.²

(3) *Priority According to Delivery of Writ.* — From the general rule that an execution becomes a lien from the time of its delivery to the sheriff or other officer³ is naturally deduced another general rule, viz., that several executions placed in the hands of an officer take priority according to the time of their delivery, and it is the duty of the officer first to levy under and satisfy the one first delivered to him, and to proceed with the others according to the same rule.⁴ But this rule, like the one upon which it is founded, has been considerably modified, as will be shown.

and charged in execution, and then another creditor recovers judgment against the same debtor, and sues out an *elegit* on which his lands are extended, and a moiety of them delivered, and then the debtor is regularly discharged from the writs of *capias ad satisfaciendum* as an insolvent debtor, putting unto his schedule the whole of his lands which had been extended under the *elegit*, the lien of the writ of *capias ad satisfaciendum* does not overreach and avoid the extent under the *elegit*. *Foreman v. Loyd*, 2 Leigh (Va.) 284, *overruling* *Jackson v. Heiskell*, 1 Leigh (Va.) 257, *recognized* in *Snead v. McCouil*, 12 How. (U. S.) 407, and *Charron v. Boswell*, 18 Gratt. (Va.) 216.

1. See *supra*, this section, *Commencement of the Lien*.

2. *Priority According to Teste of Writs.* — *Palmer v. Clarke*, 2 Dev. L. (13 N. Car.) 354, 21 Am. Dec. 340; *Green v. Johnson*, 2 Hawks (9 N. Car.) 309, 11 Am. Dec. 763; *Jones v. Jenkins*, 4 Dev. & B. L. (20 N. Car.) 454, 34 Am. Dec. 392; *Harding v. Spivey*, 8 Ired. L. (30 N. Car.) 63; *Faircloth v. Ferrell*, 63 N. Car. 640; *Parrish v. Saunders*, 3 Humph. (Tenn.) 431. See also *Brasfield v. Whitaker*, 4 Hawks (11 N. Car.) 309; *Coffee v. Wray*, 8 Yerg. (Tenn.) 464.

3. See *supra*, this section, *Commencement of the Lien*.

4. *Writ First Delivered Takes Priority* — *England*. — *Hutchinson v. Johnston*, 1 T. R. 729, 1 Rev. Rep. 380; *Smallcomb v. Cross*, 1 Ld. Raym. 251, 1 Salk. 320, 1 Comyn's Rep. 35; *Sawle v. Paynter*, 1 D. & R. 307, 16 E. C. L. 37, 24 Rev. Rep. 659; *Jones v. Atherton*, 2 Marsh. 375, 7 Taunt. 56, 2 E. C. L. 56, 17 Rev. Rep. 442.

Canada. — *Rowe v. Jarvis*, 13 U. C. C. P. 495; *Converse v. Michie*, 16 U. C. C. P. 167. See also *Gates v. Smith*, 13 U. C. C. P. 572.

United States. — *Cunningham v. Offutt*, 5 Cranch (C. C.) 524.

Alabama. — *Bell v. King*, 8 Port. (Ala.) 147; *Wood v. Gary*, 5 Ala. 43. See also *Bliss v. Watkins*, 16 Ala. 229.

Arkansas. — *Trapnall v. Jordan*, 7 Ark. 430. See also *Hanauer v. Casey*, 26 Ark. 352.

Colorado. — *Speelman v. Chaffee*, 5 Colo. 247; *Joslin v. Spangler*, 13 Colo. 491.

Delaware. — *Stuarts v. Reynolds*, 4 Harr. (Del.) 112.

Georgia. — *Parkerson v. Sessions*, 40 Ga. 171; *Erwin v. Moore*, 15 Ga. 361.

Illinois. — *Smith v. Lind*, 29 Ill. 24; *Hanchett v. Ives*, 133 Ill. 332; *Garner v. Willis*, 1 Ill. 368; *Rogers v. Dickey*, 6 Ill. 636, 41 Am. Dec. 204; *Leach v. Pine*, 41 Ill. 65, 89 Am. Dec. 375; *Everingham v. National City Bank*, 25 Ill. App. 637, *affirmed* 124 Ill. 527; *Lawrence v. McIntire*, 83 Ill. 399.

Indiana. — *Moore v. Fitz*, 15 Ind. 43.

Kentucky. — *Tabb v. Harris*, 4 Bibb (Ky.) 29, 7 Am. Dec. 732; *Daniel v. Cochran*, 4 Bibb (Ky.) 532; *Kenyon v. Ficklin*, 6 B. Mon. (Ky.) 414, 44 Am. Dec. 776; *Kilby v. Haggin*, 3 J. J. Marsh. (Ky.) 212; *Morton v. Robards*, 4 Dana (Ky.) 258.

Minnesota. — *Albrecht v. Long*, 25 Minn. 163; *Albrecht v. Long*, 27 Minn. 81.

Mississippi. — *Michie v. Planters' Bank*, 4 How. (Miss.) 130, 34 Am. Dec. 112; *Lynn v. Gridley*, Walk. (Miss.) 548, 12 Am. Dec. 591.

Missouri. — *Kring v. Green*, 10 Mo. 195. See also *Brown v. Cape Girardeau County*, 1 Mo. 154.

Nebraska. — *Hibbard v. Weil*, 5 Neb. 41.

New Jersey. — *Richards v. Morris Canal*, etc., Co., 20 N. J. L. 136; *Rammel v. Watson*, 31 N. J. L. 281; *Clement v. Kaighn*, 15 N. J. Eq. 47.

New York. — *Martin v. Mallery*, 60 Hun (N. Y.) 245; *Wells v. Marshall*, 4 Cow. (N. Y.) 411. See also *Lambert v. Paulding*, 18 Johns. (N. Y.) 311; *Adams v. Dyer*, 8 Johns. (N. Y.) 347, 5 Am. Dec. 344; *Waterman v. Haskin*, 11 Johns. (N. Y.) 228; *Souls v. Cornell*, 15 N. Y. App. Div. 161.

Ohio. — *Meier v. Cardington First Nat. Bank*, 55 Ohio St. 446.

Oklahoma. — *Burnham v. Dickson*, 5 Okla. 112.

Pennsylvania. — *Childs v. Dilworth*, 44 Pa. St. 123; *McClelland v. Slingluff*, 7 W. & S. (Pa.) 134, 42 Am. Dec. 224; *Hale's Appeal*, 44 Pa. St. 438; *Person's Appeal*, 78 Pa. St. 145; *Ulrich v. Dreyer*, 2 Watts (Pa.) 303; *Himmelreich v. Shaffer*, 182 Pa. St. 201.

South Carolina. — *Lynch v. Hanahan*, 9 Rich. L. (S. Car.) 186; *Greenwood v. Naylor*, 1 McCord L. (S. Car.) 414; *Woodward v. Hill*, 3 McCord L. (S. Car.) 241. See also *M'Cants v. Rogers*, 3 Brev. (S. Car.) 388.

Texas. — *Garner v. Cutler*, 28 Tex. 175;

(4) *Priority According to Time of Levy.* — The modern tendency towards the entire abolition of any execution lien before an actual levy¹ has led to the doctrine that as between several executions in the hands of different officers, the one under which a levy is first made gains the priority, though it may not have been the first to be delivered to an officer.²

Walker v. Anderson, 31 Tex. 646; *McMahon v. Hall*, 36 Tex. 59.

Virginia. — *Charron v. Boswell*, 18 Gratt. (Va.) 216.

Wisconsin. — See *Knox v. Webster*, 18 Wis. 406, 86 Am. Dec. 779; *Sheboygan Bank v. Trilling*, 75 Wis. 163; *Ohlson v. Pierce*, 55 Wis. 205.

Requirement that Execution Be Recorded Before Delivery. — Under the *New Jersey* statutes requiring the recording of executions before delivery, an execution duly recorded when delivered to the sheriff is entitled to priority, as to real estate, over an execution previously delivered, but not recorded until after the delivery of the other. *Johnston v. Darrah*, 8 N. J. L. 282; *Elmer v. Burgin*, 2 N. J. L. 173. See also *Clement v. Kaighn*, 15 N. J. Eq. 47.

Registration of the Judgment does not grant to a creditor any priority of his execution over another writ actually delivered to the sheriff before his, merely because he has precedence in point of time of a registered judgment, unless his execution be taken out within one year from the time of such registration. *Rowe v. Jarvis*, 13 U. C. C. P. 495.

Sale under Junior Writ Before Delivery of Alias Founded on Senior Writ. — Under section 3211 of the Code of *Alabama*, "if an alias be sued out before the lapse of an entire term, and delivered to the sheriff before the sale of the property under a junior execution, the lien created by the delivery of the first execution must be preferred;" and, by necessary implication, if the alias is not delivered to the sheriff before the sale under the junior execution, the lien of the latter must be preferred, and the purchaser at the sale under it acquires a title superior to a purchaser at a subsequent sale under the senior execution. *Lancaster v. Jordan*, 78 Ala. 197.

1. See *supra*, this section, *Commencement of the Lien*.

2. **Execution under which First Levy Is Made Gains Priority** — *Arkansas.* — *Derrick v. Cole*, 60 Ark. 394; *Lewis v. Dillard*, 76 Fed. Rep. 688.

California. — *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256; *Johnson v. Gorham*, 6 Cal. 195, 65 Am. Dec. 501.

Indiana. — *Moore v. Fitz*, 15 Ind. 43; *M'Call v. Trevor*, 4 Blackf. (Ind.) 496; *Rockhill v. Hanna*, 15 How. (U. S.) 189.

Kentucky. — *Tilford v. Burnham*, 7 Dana (Ky.) 109; *Arberry v. Noland*, 2 J. J. Marsh. (Ky.) 421; *Million v. Com.*, 1 B. Mon. (Ky.) 310, 36 Am. Dec. 580; *Kilby v. Haggin*, 3 J. J. Marsh. (Ky.) 208; *Bourne v. Hoeker*, 11 B. Mon. (Ky.) 23.

Louisiana. — See *Payne v. Randon*, 10 La. Ann. 349.

Minnesota. — See *Albrecht v. Long*, 25 Minn. 163, 27 Minn. 81.

Missouri. — *Field v. Milburn*, 9 Mo. 492.

North Carolina. — *Penland v. Leatherwood*, 101 N. Car. 509, 9 Am. St. Rep. 38; *Weisen-*

field v. McLean, 96 N. Car. 248. See also *Jones v. Judkins*, 4 Dev. & B. L. (20 N. Car.) 454, 34 Am. Dec. 392; *Watt v. Johnson*, 4 Jones L. (49 N. Car.) 190.

Pennsylvania. — See *Religious Soc. v. Hitchcock*, 2 Browne (Pa.) 333.

South Carolina. — See *Bachman v. Sulzbacher*, 5 S. Car. 58, *infra*, this note.

Virginia. — See *Humphrey v. Hitt*, 6 Gratt. (Va.) 509, 52 Am. Dec. 133.

Wisconsin. — *Knox v. Webster*, 18 Wis. 406, 86 Am. Dec. 779; *Mygatt v. Tarbell*, 78 Wis. 351. See also *Russell v. Lawton*, 14 Wis. 209, 80 Am. Dec. 769; *Auerbach v. Marks*, 94 Wis. 668.

Rule Operates in Reference to Real Property. — Where there are no judgment or attachment liens, the levy operates upon the real property as it does upon the personal property — that is, the execution first served has priority. *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256.

Prior Levy Induced by False Representations. — The fact that the attorneys of an execution plaintiff have, by false representations to a deputy sheriff, induced him to receive the writ and make a levy under it before any levy is made under other executions previously delivered to the sheriff, does not constitute a fraud which will defeat the right gained by the first levy. *Albrecht v. Long*, 27 Minn. 81.

A Levy under Each of Two Executions on the Same Day prevents any preference or priority in favor of that under which the first levy was made. *Bachman v. Sulzbacher*, 5 S. Car. 58.

Officer Must Take Actual Possession of Property. — An execution under which an officer takes actual possession of the personal property levied on has precedence over one previously levied on the same property, but under which no actual possession has been taken and retained by the officer levying it. *Barham v. Massey*, 5 Ired. L. (27 N. Car.) 192.

When Constructive Levy Is Sufficient. — Where a constable has levied on goods under an execution, and while they are in his hands the sheriff makes a constructive levy on the goods under execution in his hands, such executions take priority over another execution subsequently coming into the hands of the constable. *Penland v. Leatherwood*, 101 N. Car. 509, 9 Am. St. Rep. 38.

Levy Must Be Followed by Sale of Property. — Under Rev. Code *Indiana*, 1831, p. 276, providing that the lien of an execution may be "divested in favor of another execution in the hands of another officer, without regard to the time of delivery, if such other officer make the first levy and proceed with due diligence in perfecting execution of the same," the first levy does not divest the previous lien unless duly followed by a sale of the property. If the execution first levied be recalled, the lien of the other execution stands in full force. *M'Call v. Trevor*, 4 Blackf. (Ind.) 496.

Effect of Fraud in Procuring Release of Prior Levy. — An execution creditor who, in collu-

(5) *Priority Between Executions from Different Courts.* — The rules recognized in the various states as to the priority of writs of execution according to their delivery or their teste apply with equal force although the executions be issued from different state courts¹ or be delivered to different officers.²

Writs from Federal and State Courts. — But it seems to be well established that whatever rule may be recognized in the particular state, as to executions from different state courts, where one writ issues from a federal court and the other from a state court, the writ first actually levied has priority.³

(6) *Priority Gained by Vigilance.* — In *New York* it has been held that a junior execution creditor, by the institution of supplementary proceedings and the discovery thereby of money held by a third person to be paid to the debtor upon certain contingencies, and by obtaining an order for the satisfaction of his execution out of such money, may obtain a priority over a senior creditor who is less vigilant.⁴ But the *Virginia* court has denied that a junior execution creditor becomes entitled to any priority by reason of having first filed his suggestion and succeeded in finding out a debt due to the common debtor.⁵

(7) *Priorities Arising from the Judgment* — (a) *Priority According to Oldest Judgment.* — In case the judgments upon which executions are issued are themselves liens upon the property seized under one of the writs, the proceeds of sale must be applied to the satisfaction of the oldest judgment,⁶ and such judgment is also entitled to priority of satisfaction out of property bound only by the execution lien, but to which the lien of the several executions has attached simultaneously.⁷

(b) *Judgments Equal — Priority Gained by First Issue and Levy of Execution.* — It frequently happens that property is bound by the liens of two or more judgments, between which, as such, there is no priority. In such case the judgment creditor who first procures the issue and levy of an execution for his debt will gain a priority.⁸

sion with the debtor, has, by fraud and false representations, procured another execution creditor to release a prior levy upon the debtor's goods, so that he may make a levy, is estopped from claiming priority as against such other execution creditor. *Auerbach v. Marks*, 94 Wis. 668.

1. **Writs from Different Courts — Priority According to Delivery.** — *Kring v. Green*, 10 Mo. 195; *Meier v. Cardington First Nat. Bank*, 55 Ohio St. 446; *McMahan v. Hall*, 36 Tex. 59; *Charron v. Boswell*, 18 Gratt. (Va.) 216.

Priority According to Teste. — *Johnson v. Ball*, 1 Yerg. (Tenn.) 291, 24 Am. Dec. 451; *Daley v. Perry*, 9 Yerg. (Tenn.) 442.

Exceptions to the Rule. — In *Tennessee* an exception to this rule has been made by a statute providing that when an execution issued on a judgment of a court of record and an execution on a justice's judgment are levied on the same personal property, the execution first levied shall have preference. *Peck v. Robinson*, 3 Head (Tenn.) 438.

And this exception has been recognized in *North Carolina* as the rule. *Lash v. Gibson*, 1 Murph. (5 N. Car.) 266; *Irwin v. Sloan*, 2 Dev. L. (13 N. Car.) 349.

The *Tennessee* court has recognized another exception by holding that in the case of two judgments rendered in different counties, and executions thereon delivered to the sheriff of a third county, the writ first delivered has priority, though the levy and sale were under both executions. *Hickman v. Murfree*, Mart. & Y. (Tenn.) 26.

Writ from Probate Court. — In *Alabama* and *Arkansas* a writ of execution issued from the Court of Probate has the same force as a lien as a writ issued from any other court. *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85; *Anderson v. Fowler*, 8 Ark. 388.

2. **Writs Delivered to Different Officers.** — *Riddle v. Marshal*, 1 Cranch (C. C.) 96; *Hanchett v. Ives*, 133 Ill. 332; *Kring v. Green*, 10 Mo. 195; *McGinnis v. Prieson*, 85 Pa. St. 111. See also *Lynch v. Hanahan*, 9 Rich. L. (S. Car.) 186.

3. **As Between Executions from Federal and State Courts First Levy Gives Priority.** — *Pulliam v. Osborne*, 17 How. (U. S.) 471; *Leopold v. Godfrey*, 11 Biss. (U. S.) 158; *Brown v. Clarke*, 4 How. (U. S.) 4; *Schaller v. Wickersham*, 7 Coldw. (Tenn.) 376; *James v. Kennedy*, 10 Heisk. (Tenn.) 607; *Longstreet v. Hill*, 11 Heisk. (Tenn.) 53.

4. **Priority Gained by Vigilance.** — *Duffy v. Dawson*, 22 Civ. Pro. Rep. (N. Y. City Ct.) 235, affirmed 2 Misc. Rep. (N. Y. C. Pl.) 401.

5. **No Priority Gained by First Discovering Assets.** — *Charron v. Boswell*, 18 Gratt. (Va.) 216.

6. **Property Subject to Judgment Lien — Preference of Oldest Judgment.** — *Lowry v. Reed*, 89 Ind. 442; *Friar v. Ray*, 5 Mo. 510; *Jennings v. Dennis*, 6 Smed. & M. (Miss.) 379.

7. **Lien of Executions Attaching Simultaneously — Preference of Oldest Judgment.** — *Bliss v. Watkins*, 16 Ala. 229; *Wood v. Gary*, 5 Ala. 43.

8. **Priority Gained by First Beginning to Execute** — *United States*. — *Rockhill v. Hanna*, 15 How. (U. S.) 189.

(c) **Priority Founded on Subject-matter of Judgment.** — An execution may have a priority over other executions against the same debtor on account of the subject-matter of the judgment on which it is founded being in the nature of a preferred claim.¹

(8) **Effect of Levy under Junior Writ.** — An officer having two or more executions in his hands cannot deprive the senior writ of its priority by making a levy under a junior writ, for in such case the property must be sold under, and the proceeds of the sale must be applied to the satisfaction of, the senior writ.²

Sale under Junior Writ. — The doctrine has been extended so far as to hold the proceeds of sale applicable to the satisfaction of the senior execution, though the sale was actually made under the junior.³

Alabama. — Jones v. Davis, 2 Ala. 730.

Delaware. — Rust v. Pritchett, 5 Harr. (Del.) 260.

Indiana. — Michaels v. Boyd, 1 Ind. 259; Lowry v. Reed, 89 Ind. 442.

Kentucky. — Million v. Com., 1 B. Mon. (Ky.) 310, 36 Am. Dec. 580.

Mississippi. — Burney v. Boyett, 1 How. (Miss.) 39.

Missouri. — Field v. Milburn, 9 Mo. 492; Shirley v. Brown, 80 Mo. 244.

New Jersey. — Close v. Close, 28 N. J. Eq. 472. See also Rammel v. Watson, 31 N. J. L. 281; Larison v. Dilts, (N. J. 1895) 32 Atl. Rep. 1059; Clement v. Kaighn, 15 N. J. Eq. 47; Bogert v. Lydecker, 45 N. J. L. 317.

New York. — Ray v. Harcourt, 19 Wend. (N. Y.) 495; Adams v. Dyer, 8 Johns. (N. Y.) 347, 5 Am. Dec. 344; Waterman v. Haskin, 11 Johns. (N. Y.) 228.

Ohio. — Sellers v. Corwin, 5 Ohio 398.

Wisconsin. — Knox v. Webster, 18 Wis. 406, 86 Am. Dec. 779.

1. Priority Founded on Subject-matter of Judgment. — State v. Pemberton, Dudley (Ga.) 15; Thompson v. Peebles, 85 N. Car. 418; Jones v. McNeill, 1 Hill L. (S. Car.) 84.

Under the *Missouri* statutes an execution for purchase money has no priority on account of the origin of the debt. Straus v. Rothan, 102 Mo. 261, overruling Boyd v. J. M. Ward Furniture, etc., Co., 38 Mo. App. 210. See also Kane v. Manley, 63 Mo. App. 43.

2. Levy Made under Junior Writ — Sale Must Be for Satisfaction of Senior. — Hutchinson v. Johnston, 1 T. R. 729, 1 Rev. Rep. 380; Sawle v. Paynter, 1 D. & R. 307, 16 E. C. L. 37, 24 Rev. Rep. 659; Jones v. Atherton, 2 Marsh. 375, 7 Taunt. 56, 2 E. C. L. 56, 17 Rev. Rep. 442; Riddle v. Marshal, 1 Cranch (C. C.) 96; Everingham v. National City Bank, 124 Ill. 527, affirming 25 Ill. App. 637; Hanchett v. Ives, 133 Ill. 332; Harding v. Spivey, 8 Ired. L. (30 N. Car.) 63. See also Lowry v. Reed, 89 Ind. 442.

Levy under Both Writs at Same Time. — The proceeds of a sale must be paid to the oldest execution, though both are levied at the same time. Stuarts v. Reynolds, 4 Harr. (Del.) 112. See also Hickman v. Murfree, Mart. & Y. (Tenn.) 26.

Pennsylvania Doctrine. — The doctrine above stated is recognized and applied in Pennsylvania to the extent only of giving the senior execution the preference where goods are levied on under it before being sold by virtue

of a prior levy under a junior execution. Shafner v. Gilmore, 3 W. & S. (Pa.) 438; Schuylkill County's Appeal, 30 Pa. St. 358, distinguishing McClelland v. Slingluff, 7 W. & S. (Pa.) 134, 42 Am. Dec. 224.

A constructive levy is sufficient. Wilson's Appeal, 13 Pa. St. 426.

3. Sale under Junior Writ — Proceeds Applicable to Senior. — Rowe v. Jarvis, 13 U. C. C. P. 495; Hanauer v. Casey, 26 Ark. 352; Speelman v. Chaftee, 5 Colo. 247; Parkerson v. Sessions, 40 Ga. 171; Vance v. Red, 2 Spears L. (S. Car.) 90. See also Blair v. Horseby, Dudley L. (S. Car.) 357; Cobb v. Pressly, 2 McMull. L. (S. Car.) 416; Lemmond v. Short, 3 Strobb. L. (S. Car.) 313; Garner v. Cutler, 28 Tex. 175.

Executions Returned Before Sale. — The provision of the *Nebraska* statute that in all cases other than those specified "the writ of execution first delivered to the officer shall be first satisfied" relates to executions in the hands of the officer at the time of the sale of the lands of the judgment debtor, and not to executions which have been returned by the officer before such time, whether with or without a levy thereon. Hibbard v. Weil, 5 Neb. 41.

The Doctrine Stated in the Text Has Been Denied in England by the case of Rybot v. Peckham, 1 T. R. 731, note a, 1 Rev. Rep. 382, note, in which it was held that where a sale has been actually made under the junior execution, the plaintiff therein was entitled to the proceeds of the sale. And this rule is recognized in *Mississippi* and *Pennsylvania*, in cases where there has been no levy under the senior writ. Reynolds v. Ingersoll, 11 Smed. & M. (Miss.) 249, 49 Am. Dec. 57; McClelland v. Slingluff, 7 W. & S. (Pa.) 134, 42 Am. Dec. 224.

Authority to Sell under Junior Writ — No Such Authority under Senior. — A sheriff must apply the money arising from a sale to the execution under which he sells, and where he has authority to sell and to raise money under a junior execution, and no such authority under the senior, he is bound to apply the moneys arising from such sale to the former execution according to his authority. Mushback v. Ryerson, 11 N. J. L. 346.

Sale under Junior Execution Before Assertion of Lien of Senior. — A junior execution may have priority where the plaintiff having the senior execution has not asserted a lien until a sale has been made of property levied on under the authority of the junior writ. Hill v. Slaughter,

(9) *Manner of Determining Priorities.* — In *New York*, where there is a contest between different executions in the hands of the sheriff, the order of priority is usually determined by the court upon motion between the execution creditors, and the court has ample power to direct how the money made on the executions shall be paid; and where it makes such direction, the sheriff is bound to apply the money accordingly.¹

(10) *When There Is No Priority* — (a) *Writs Sued Out at Same Term.* — Under the common-law doctrine of the relation of executions to their teste, writs tested at the same term are on a perfect equality, for each is tested as of the first day of the term.² And in some states which do not recognize the common-law doctrine there are statutory provisions enforcing equality between executions sued out at the same term of court.³

(b) *Writs Delivered at Same Time.* — Where the rule of priority according to the time of delivery of the writs is recognized, it follows naturally that in case two or more executions are delivered to an officer at the same time there is no priority between them, but they are entitled to proportionate shares of whatever may be realized out of the common debtor's property.⁴

(c) *Ontario Creditors' Relief Act.* — In the province of *Ontario* all priorities between execution creditors were abolished by the Creditors' Relief Act of 1880.⁵

b. BETWEEN EXECUTION AND OTHER LIENS — (1) *General Rule.* — The general rule as to the priorities between executions and other liens on the

7 Ala. 632. See also *Harding v. Spivey*, 8 Ired. L. (30 N. Car.) 63.

1. *Manner of Determining Priorities.* — *Duffy v. Dawson*, 22 Civ. Pro. Rep. (N. Y. City Ct.) 235, affirmed 2 Misc. Rep. (N. Y. C. Pl.) 401.

2. *Equality of Executions Tested at Same Term.* — *Jones v. Edmonds*, 3 Murph. (7 N. Car.) 43; *Porter v. Earthman*, 4 Verg. (Tenn.) 358; *Berry v. Clements*, 9 Humph. (Tenn.) 312; *Love v. Harper*, 4 Humph. (Tenn.) 113.

This rule applies though one of the judgments was rendered at an earlier day in the term than the other, *Porter v. Earthman*, 4 Verg. (Tenn.) 358; or even though the judgments were recovered at different terms, *Jones v. Edmonds*, 3 Murph. (7 N. Car.) 43.

3. *Equality Between Executions Sued Out at Same Term of Court.* — *Hibbard v. Weil*, 5 Neb. 41; *Meier v. Cardington First Nat. Bank*, 55 Ohio St. 446; *Ryan v. Root*, 56 Ohio St. 302.

Effect of Intervening Liens — The rule of equality established by statute in *Ohio* between executions issued on judgments rendered in the same court and at the same term and delivered to the officer during the term or within ten days thereafter is not disturbed by the intervention between the judgments or levies of another lien which becomes superior to the judgments or levies that are subsequent thereto; but even although the amount of money realized on the levy is insufficient to satisfy all the executions, the whole amount must be distributed to all the execution creditors in proportion to the amounts of their respective executions, notwithstanding such intervening lien. *Meier v. Cardington First Nat. Bank*, 55 Ohio St. 446.

But the Rule Does Not Apply to Executions Issued from Different Courts, though on judgments rendered at the same time and during corresponding terms. Such executions take priority from the time of their delivery to the officer. *Meier v. Cardington First Nat. Bank*, 55 Ohio St. 446.

4. *No Priority Between Writs Delivered at Same Time.* — *Ashworth v. Uxbridge*, 2 Dowl. N. S. 377; *Trapnall v. Jordan*, 7 Ark. 430. See also *State v. Cisney*, 95 Ind. 265.

Writs Delivered on Same Day. — In some jurisdictions the rule stated in the text is applied where two or more writs are delivered on the same day, though at different hours. *State v. Hunger*, 17 Neb. 216; *Hibbard v. Weil*, 5 Neb. 41; *Meier v. Cardington First Nat. Bank*, 55 Ohio St. 446; *Ex p. Stagg*, 1 Nott & M. (S. Car.) 405.

Equal Division until Smaller Execution Is Satisfied. — In *Campbell v. Ruger*, 1 Cow. (N. Y.) 215, two judgments against the same defendant in favor of different plaintiffs and for different amounts were docketed at the same time, and executions were simultaneously issued to the sheriff and levied on personal property, which was sold under both executions. It was held that the moneys arising from the sale should be equally divided between the two executions until the smaller one was satisfied, and the residue should then be applied upon the larger execution.

5. *Abolition of Priorities by Ontario Creditors' Relief Act.* — *Porteous v. Myers*, 12 Ont. App. 85; *McDonagh v. Jephson*, 16 Ont. App. 107; *Harvey v. McNeil*, 12 Ont. Pr. Rep. 362; *Davies Brewing, etc., Co. v. Smith*, 10 Ont. Pr. Rep. 627. See also *Levy v. Davies*, 12 Ont. Pr. Rep. 93.

No Priority as to Costs. — Under the Creditors' Relief Act a creditor under whose execution a levy is made which produces an amount not sufficient to pay all the claims in full is not entitled to a priority of payment of his costs of obtaining judgment and execution. *Porteous v. Myers*, 12 Ont. App. 85.

Rule Not Affected by Existence of a Lien Prior to All Executions. — The act applies to execution creditors whose liens are subsequent to an existing mortgage, and such creditors, upon a foreclosure of the mortgage, must

property of the debtor is that when the lien of the execution has once attached ¹ it takes precedence over all other liens subsequently arising, so long as it is kept alive; ² while, on the other hand, the attaching of an execution lien does not displace other existing liens on the debtor's property. ³

(2) *Various Liens and Claims Particularly Considered*—(a) *Attachment*.—The weight of authority in reference to the priorities between executions and attachments supports the following rule: Where the lien of an execution has attached to the debtor's goods by reason of the delivery of the writ to an officer, an attachment subsequently sued out cannot gain priority, even though it be first levied; ⁴ while on the other hand the levying of an attachment ⁵ creates a lien in favor of the attaching creditor which cannot be superseded by an execution subsequently issued and delivered to an officer. ⁶

divide ratably the balance left after a payment of the mortgage debt, interest, and costs. *Harvey v. McNeil*, 12 Ont. Pr. Rep. 362.

When the Rule of Equality Does Not Apply.—In *Davies Brewing, etc., Co. v. Smith*, 10 Ont. Pr. Rep. 627, an execution was delivered to the sheriff on the 6th of December, and levied on the 8th, a mortgage on the defendant's goods was given on the 9th, and a second execution was delivered to the sheriff on the 22d of the same month. The mortgagee paid to the sheriff the whole amount of the first execution, specially appropriating the payment to that execution, and the sheriff received the payment on that execution. It was held that the second execution creditor was not entitled to share in this money, for it was never a part of the debtor's estate, and therefore the provisions of the Creditors' Relief Act did not apply.

1. See *supra*, this section, *Commencement of the Lien*.

2. **Execution Lien Takes Precedence of Other Liens Subsequently Arising.**—*Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85; *McMahan v. Green*, 12 Ala. 71, 46 Am. Dec. 242; *Brockett v. Bradford*, 53 Ga. 274; *O'Hara v. Booth*, 29 La. Ann. 817; *Schwartz v. Banks*, 13 Phila. (Pa.) 540, 34 Leg. Int. (Pa.) 250; *Kindig v. Atkinson*, 13 Phila. (Pa.) 542, 34 Leg. Int. (Pa.) 196; *State v. Guerry*, 15 Rich. L. (S. Car.) 353. See also *McPherson v. McPherson*, 10 Ont. Pr. Rep. 140; *Milmine v. Bass*, 29 Fed. Rep. 632.

3. **Existing Liens Not Displaced by Execution.**—*Swift's Iron, etc., Works v. Johnsen*, 26 Fed. Rep. 828; *Morton v. Robards*, 4 Dana (Ky.) 258; *McAdow v. Black*, 4 Mont. 475. See also *O'Rourke v. O'Connor*, 39 Cal. 442.

Right to Redeem from Prior Incumbrances.—An execution creditor at law has a right to come into a court of equity and redeem an incumbrance upon a chattel interest, in like manner as a judgment creditor at law is entitled to redeem an incumbrance upon the real estate; and the party so redeeming will be entitled to preference according to his legal priority. *Disborough v. Outcalt*, 1 N. J. Eq. 298.

A Lien upon Personal Property Not Reduced to Possession or Recorded is void as to execution creditors. *Sedgwick City Bank v. Pollard*, (Kan. App. 1898) 54 Pac. Rep. 14.

4. **More Delivery of Execution Gives Priority over Subsequent Attachment**—*United States*.—*Steiber v. Hoyer*, 1 Cranch (C. C.) 40.

Alabama.—*Parks v. Coffey*, 52 Ala. 32; *Governor v. Davis*, 20 Ala. 366.

Illinois.—*Hanchett v. Ives*, 133 Ill. 332;

Everingham v. National City Bank, 25 Ill. App. 637, affirmed 124 Ill. 527; *Leach v. Pine*, 41 Ill. 65, 89 Am. Dec. 375; *Lawrence v. McIntire*, 83 Ill. 399.

Massachusetts.—*Parker v. Dennie*, 6 Pick. (Mass.) 227.

New York.—*Wells v. Marshall*, 4 Cow. (N. Y.) 411; *Lambert v. Paulding*, 18 Johns. (N. Y.) 311.

Virginia.—*Purveyer v. Taylor*, 12 Gratt. (Va.) 401.

Under the Colorado Code, executions issued on judgments recovered previous to writs of attachment have priority; and where executions have been issued upon judgments and levied by the sheriff upon the goods of the debtor, attachments sued out at the same term of court as that at which the judgments were rendered, and levied upon the same stock of goods, are not entitled to probate with the executions. *Brady v. Farwell*, 8 Colo. 97.

Judgment and Execution Without Knowledge of Creditor—Ratification.—Where a debtor has confessed judgments in favor of some of his creditors without their knowledge, for the purpose of defrauding other creditors, and the debtors' attorneys have issued executions on such judgments, which have been levied, still without the knowledge of the creditors, such executions will be postponed to an attachment sued out by other creditors and levied after the executions, but before such executions have been ratified by the creditors in whose favor they were issued. *Galle v. Tode*, 148 N. Y. 270. In this case the court intimated that, as the execution creditors had not in any way participated in the fraud, their executions would have been preferred if the ratification by them had taken place prior to the levy of the attachment.

5. See the title ATTACHMENT, vol. 3, p. 220.

6. **Levy of Attachment Gives Priority over Execution Subsequently Issued and Delivered.**—*The Daniel Kaine*, 35 Fed. Rep. 785; *Pond v. Griffin*, 1 Ala. 678; *Goore v. M'Daniel*, 1 McCord L. (S. Car.) 480.

Levy of Attachment on Partnership Property—Vacation as to Some Partners.—Where an attachment issued against three persons as partners and levied on firm property is subsequently vacated as to two of them, it ceases to be a lien on the property of the firm, and an execution issued thereafter on a judgment in an action against the firm commenced before the attachment suit, and levied on firm property, is entitled to priority over an execution subsequently issued under a judgment in the

Doctrine that First Levy Gives Priority. — In some states the priority of the execution by reason of first delivery is denied, and it is considered that the writ first levied gains priority.¹

(b) **Distress Warrant.** — An execution which has been delivered to the sheriff takes priority over a subsequent distress warrant for rent, though the latter be first levied,² but a distress warrant obtains a priority when a levy is made under it before any execution is issued.³

(c) **Mortgage.** — As a general rule an execution takes priority of a chattel mortgage executed after a delivery of the writ, though before any actual levy thereunder,⁴ and a levy on land gives priority over a subsequent mortgage.⁵ On the other hand, a mortgage has priority over executions issued, delivered, and levied subsequent to the time when it was executed.⁶

Effect of Failure to Record Mortgage. — This priority of the mortgage, however, depends also on a compliance with the laws of the several states in reference to recording such instruments,⁷ and a mortgagee may lose the priority to which he would otherwise be entitled by a failure to have his mortgage

attachment suit. *Souls v. Cornell*, 15 N. Y. App. Div. 161.

Rule as to Real Estate Bound by Judgment Lien. — After a judgment has become a lien upon real estate, such lien cannot be divested by a subsequent attachment of such real estate, but it may be sold on a fi. fa. issued after the levy of the attachment. *Reeves v. Johnson*, 12 N. J. L. 29.

1. **First Levy Gives Priority.** — *Moore v. Fitz*, 15 Ind. 43; *Bourne v. Hocker*, 11 B. Mon. (Ky.) 23; *Burnham v. Dickson*, 5 Okla. 112; *Peck v. Robinson*, 3 Head (Tenn.) 438.

2. **Priority of Execution Over Subsequent Distress Warrant.** — *Rogers v. Dickey*, 6 Ill. 636, 41 Am. Dec. 204; *Rowland v. Hewitt*, 19 Ill. App. 450; *Leopold v. Godfrey*, 50 Fed. Rep. 145; *Herron v. Gill*, 112 Ill. 247. Compare with subsection *Landlord's Lien for Rent, infra*, this section.

Dormant Execution. — The rule is otherwise where an execution has become dormant. *Blake v. De Liesseline*, 4 McCord L. (S. Car.) 496.

3. **Priority of Distress Warrant Levied before Issue of Execution.** — *Lewis v. Dittard*, 76 Fed. Rep. 688, 40 U. S. App. 404.

4. **Priority Gained by Delivery of Execution Before Mortgage Is Executed.** — *Clifford v. Logan*, 9 Manitoba L. Rep. 423; *Davies Brewing, etc., Co. v. Smith*, 10 Ont. Pr. Rep. 627; *Brush v. Sequin*, 24 Ill. 254; *Osborn v. Alexander*, 40 Hun (N. Y.) 323. See also *McGivern v. McCausland*, 19 U. C. C. P. 460; *Stewart v. Kramer*, 99 Ga. 125.

5. **Levy on Land Gives Priority Over Subsequent Mortgage.** — *Brandon v. Moore*, 50 Ark. 247, 7 Am. St. Rep. 96. See also *State v. Laval*, 4 McCord L. (S. Car.) 336.

6. **Mortgage Has Priority Over Subsequent Executions** — *Indiana*. — *Rahm v. Butterfield*, 82 Ind. 163.

Kansas. — *Rankine v. Greer*, 38 Kan. 343, 5 Am. St. Rep. 751; *McDonald v. Richolson*, 3 Kan. App. 235; *Ross v. Richolson*, 3 Kan. App. 239.

Michigan. — *German American Seminary v. Saenger*, 66 Mich. 249.

Mississippi. — *Butler v. Lee*, 54 Miss. 476; *Byrd v. Clark*, 52 Miss. 623.

Missouri. — *Young v. Schofield*, 132 Mo. 650; *Taylor v. Smith*, 47 Mo. App. 141; *Woolner v. Levy*, 48 Mo. App. 469; *Kane v. Manley*, 63 Mo. App. 43, 1 Mo. App. Rep. 590.

Montana. — *McAdow v. Black*, 4 Mont. 475.

South Carolina. — *Cooper v. Scott*, 2 McMull. L. (S. Car.) 150.

Virginia. — See *Alexandria First Nat. Bank v. Turnbull*, 32 Gratt. (Va.) 695.

Canada. — *Davies Brewing, etc., Co. v. Smith*, 10 Ont. Pr. Rep. 627.

Hawaii. — *Ho Sun v. Hitchcock*, 9 Hawaiian 616.

Execution for Purchase Price of Mortgaged Goods. — In *Missouri* a creditor who has secured a mortgage on goods is entitled to priority over a subsequent execution on a judgment for the purchase price, although at the time of obtaining his mortgage he knew that the purchase price was unpaid. *Kane v. Manley*, 63 Mo. App. 43, 1 Mo. App. Rep. 590. See also *Taylor v. Smith*, 47 Mo. App. 141, in which case the mortgagee had no notice that the purchase price was unpaid.

Mortgage of Goods to Be Afterwards Acquired. — Where a mortgage covers goods thereafter to be acquired by the mortgagor as well as goods owned by him at the time the mortgage is given, and after such goods are acquired they are levied upon under an execution for a debt which arose after the mortgage was given, the execution will, nevertheless, have priority over the mortgage. *Looker v. Peckwell*, 38 N. J. L. 253, *affirmed* 39 N. J. L. 134.

7. **Compliance with Recording Acts.** — *Woolner v. Levy*, 48 Mo. App. 469.

Mortgage Recorded but Not Indexed. — When a mortgage on growing crops is only recorded and not indexed, and a creditor (whose debt was in existence prior and subsequent to the execution of the mortgage) levies an execution on said crops, having no actual notice of said mortgage at the time of the levy, but before a sale under the execution is notified of such mortgage and the said mortgage is duly indexed, the lien of the mortgage will be prior to the lien of the creditor under the execution levy. *Kessey v. McHenry*, 54 Iowa 187.

recorded until after an execution has been delivered¹ or levied.²

(d) **Pledge.** — It is well established as a rule that the rights of a pledgee in the thing pledged are superior to those of a subsequent execution creditor of the pledgor.³

(e) **Unrecorded Conveyance.** — It is a natural outcome of the recording acts so universally in force⁴ that the levy of an execution on land is considered to give the execution creditor a priority of right over the grantee in a prior conveyance of the land, which has not been recorded at the time of the levy.⁵

(f) **Mechanic's Lien.** — An execution has no priority over a pre-existing lien of a mechanic or artisan on property of the debtor in his possession,⁶ but an

1. **Loss of Priority by Failure to Record Mortgage Before Delivery of Execution.** — *Williams v. Mellor*, 12 Colo. 1; *Hathaway v. Howell*, 54 N. Y. 97. See also *Sedgwick City Bank v. Pollard*, (Kan. App. 1898) 54 Pac. Rep. 14.

Recording Before Levy. — When an execution creditor has gained priority of delivery of his writ before a chattel mortgage is recorded, his rights remain the same though the mortgage is recorded and possession of the property is delivered under it before any actual levy is made. *Williams v. Mellor*, 12 Colo. 1.

2. **Loss of Priority by Failure to Record Before a Levy.** — *Stevenson v. Texas, etc.*, R. Co., 105 U. S. 703; *Hawkins v. Files*, 51 Ark. 417; *French v. Allen*, 50 Me. 437; *Houk v. Condon*, 40 Ohio St. 569. See also *McDonald v. Richolson*, 3 Kan. App. 235; *Ross v. Richolson*, 3 Kan. App. 239.

Effect of Recording Before Sale. — In *Kentucky* it has been held that a mortgage on land recorded after a levy, but before a sale thereunder, was entitled to priority. *Righter v. Forrester*, 1 Bush (Ky.) 279.

But in *Arkansas* the contrary doctrine prevails. *Hawkins v. Files*, 51 Ark. 417.

Actual Knowledge and Notice. — If an execution creditor has actual knowledge and notice of a mortgage prior to his execution, the mortgage takes precedence although not recorded. *McAdow v. Black*, 4 Mont. 475.

3. **Priority of Right of Pledgee.** — *Lewis v. Dillard*, 76 Fed. Rep. 688, 40 U. S. App. 404; *Reeves v. Sebern*, 16 Iowa 234, 85 Am. Dec. 513. See also *Sickles v. Sullivan*, 22 Civ. Pro. Rep. (N. Y. Supreme Ct.) 322, 65 Hun (N. Y.) 620, 47 N. Y. St. Rep. 82, *affirmed* 136 N. Y. 549.

An indenture assigning crops as security for money lent and authorizing the assignee to take possession of them at any time will take precedence of an execution against the assignor if the authority given by the indenture has been executed and the assignee has taken possession of the crops before the execution is issued and delivered to the sheriff, for in such case the circumstances are the same as though the debtor himself had put the assignee in actual possession of the crops. If, however, the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. *Congreve v. Evetts*, 10 Exch. 298.

Imperfect Pledge. — The owner of certain stock in a corporation assigned and delivered his certificates to secure an indebtedness, and also to procure subsequent advances from the assignee, but no transfer of the stock was made on the books of the company as re-

quired by the by-laws. Subsequently an execution was issued against the assignor and levied upon the stock, the execution creditor having no notice of the assignment and delivery of the certificates until after such levy. It was held that the lien by virtue of the levy of the execution was superior to the lien by virtue of the pledge. *People's Bank v. Gridley*, 91 Ill. 457.

4. See the title RECORDING ACTS.

5. **Priority of Execution Over Unrecorded Conveyance.** — *McClure v. Engelhardt*, 17 Ill. 47; *Linn v. Le Compté*, 47 Tex. 440; *Borden v. McRae*, 46 Tex. 396; *Grimes v. Hobson*, 46 Tex. 416; *Senter v. Lambeth*, 59 Tex. 259; *Hawkins v. Willard*, (Tex. Civ. App. 1896), 38 S. W. Rep. 365; *Grace v. Wade*, 45 Tex. 522, *overruling* *Price v. Cole*, 35 Tex. 461.

Equitable Rights of Grantee in Unrecorded Conveyance. — Where the legal title to land has been in one who held solely in trust for another, and after the land has been reconveyed to the *cetui que trust* a levy is made thereon under an execution against the trustee, the equitable rights of the grantee in the deed are not lost because of the fact that the deed of reconveyance has not been placed on record prior to the levy. *Hawkins v. Willard*, (Tex. Civ. App. 1896) 38 S. W. Rep. 365.

Recording After Levy. — The priority acquired by the levy of an execution cannot be defeated by subsequently recording a prior conveyance or deed of trust. *Reichert v. McClure*, 23 Ill. 516. But *compare* *Schroeder v. Tomlinson*, 70 Conn. 348.

Rule as to Deed Recorded in Due Time. — A deed, when it is recorded in due time, has relation to the date of the execution, and vests the title in the vendee from that time, as against an execution delivered to the sheriff after the execution of the deed but before it is lodged to be recorded. *McConnell v. Brown*, Litt. Sel. Cas. (Ky.) 459.

Actual Notice of Conveyance. — In some jurisdictions, however, it has been held that the rule set out in the text will not apply in a case where there has been actual notice of the conveyance at the time of levy. *Brunson v. Brooks*, 68 Ala. 248. See also *Corey v. Smalley*, 106 Mich. 257.

But notice after the levy, though before the sale, will not prevent the operation of the rule. *Borden v. McRae*, 46 Tex. 396; *Grimes v. Hobson*, 46 Tex. 416; *Senter v. Lambeth*, 59 Tex. 259; *Grace v. Wade*, 45 Tex. 522, *overruling* *Price v. Cole*, 35 Tex. 461.

6. **Execution Does Not Divest Pre-existing Artisan's Lien.** — *Roberts v. Toronto Bank*, 25 Ont. Rep. 194.

execution lien which has attached to chattels by reason of a delivery of the writ to an officer is not postponed to a subsequent lien arising by reason of repairs afterwards made on the chattels, though the mechanic was ignorant of the existence of the execution lien.¹

(g) **Vendor's Lien.** — If no specific vendor's lien is preserved at the time property is sold, and an execution lien attaches to it before the vendor asserts his claim, the execution will have priority.²

(h) **Landlord's Lien for Rent.** — The statutory lien of a landlord upon crops grown or growing upon the demised premises, for the rent thereof, is paramount to the lien of an execution under which the crops have been levied upon,³ unless before such levy the crops have been removed from the demised premises by the tenant.⁴

(i) **Claim for Wages.** — Under a statute giving to laborers and others a preferred lien for their wages, claims for wages due for labor performed after a levy on property of the employer are not entitled to priority over the execution under which the levy was made.⁵

(j) **Dower.** — The general lien upon the goods of a husband, acquired by placing an execution against him in the hands of the sheriff, before the husband's death, is not paramount to the wife's right of dower;⁶ but if personality of the husband be actually levied on before his death, the sheriff may sell the same afterwards, and thereby defeat the widow's dower therein, because by the levy the sheriff has acquired a special property in the goods.⁷

(k) **Effect of Insolvency or Bankruptcy of Debtor.**⁸ — This subject will be treated under another title in this work.

(l) **Effect of Assignment for the Benefit of Creditors.** — The effect of an assignment for the benefit of creditors upon an execution lien has been considered elsewhere in this work.⁹

7. Extinguishment or Suspension of the Lien — a. BY SATISFACTION — (1) Rule Stated. — It is a rule so elementary as to render citation of authority almost unnecessary that the lien of an execution is absolutely extinguished by a full satisfaction.¹⁰

(2) **Effect of a Levy on Particular Property.** — It is generally considered that, when a levy is made on particular property of the execution debtor, the

1. **Work Done After Attaching of Execution Lien.** — *McCrisaken v. Osweiler*, 70 Ind. 131.

2. **Priority of Execution Where No Vendor's Lien Has Been Preserved.** — *Blatchford v. Boyden*, 122 Ill. 657; *McClelland v. Payne*, 16 Lea (Tenn.) 709. See also *Smith v. Union Bank*, 11 Manitoba L. Rep. 182.

3. **Landlord's Lien on Crops Paramount.** — *Wetzel v. Mayers*, 91 Ill. 497; *Travers v. Cook*, 42 Ill. App. 580.

4. **Removal of Crop from Demised Premises.** — *Governor v. Davis*, 20 Ala. 366; *Wetzel v. Mayers*, 91 Ill. 497; *Travers v. Cook*, 42 Ill. App. 580; *Geiger v. Harman*, 3 Gratt. (Va.) 125.

5. **Wages Earned After Levy Not Preferred to Execution.** — *Schwartz v. Banks*, 13 Phila. (Pa.) 540, 34 Leg. Int. (Pa.) 250; *Kindig v. Atkinson*, 13 Phila. (Pa.) 542, 34 Leg. Int. (Pa.) 196.

6. **Mere Delivery of Execution During Life of Husband Does Not Defeat Dower.** — *James v. Marcus*, 18 Ark. 421.

7. **Levy During Life of Husband May Operate to Defeat Dower.** — *Arnett v. Arnett*, 14 Ark. 57; *James v. Marcus*, 18 Ark. 421.

8. See the title **INSOLVENCY AND BANKRUPTCY**.

9. See the title **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 3, p. 100.

10. **Lien of Execution Extinguished by Satisfaction.** — *Daley v. Perry*, 9 Yerg. (Tenn.) 442.

A Tender of an amount sufficient to satisfy

an execution discharges its lien upon property levied on. *Tiffany v. St. John*, 65 N. Y. 314, 22 Am. Rep. 612.

Effect of Sale under Levy. — When an execution is levied, and property sold, for the full amount of the execution, the lien created by the levy is thereby extinguished. *Ettlinger v. Tansey*, 17 B. Mon. (Ky.) 364.

Sale on Credit. — In such case the lien of the execution is discharged as against the debtor by the return, although the sale be on credit; and the creditor must look to the sale bond of the purchaser, and to that alone, for the satisfaction of his demand. *Ettlinger v. Tansey*, 17 B. Mon. (Ky.) 364. See also *M'Ghee v. Ellis*, 4 Litt. (Ky.) 244, 14 Am. Dec. 124.

Opening Fi. Fa.'s Marked Satisfied — Effect on Lands Conveyed After Satisfaction. — Certain fi. fa.'s which had been issued were entered satisfied both by the return of the levying officer and the plaintiffs. Subsequently, on a showing that no actual payment had been made, the court ordered that the fi. fa.'s be opened, and proceed against the defendants, as though no such entry has been made. It was held that lands sold by the execution debtor to a bona fide purchaser, after the entry of payment, and before the vacation of the satisfaction, were not subject to the lien. *Dougherty v. Marsh*, 11 Ga. 277. To the same effect is *Taylor v. Ranney*, 4 Hill (N. Y.) 619.

general lien on all his property is merged, or transmuted into a special lien on the property seized,¹ and the balance of his property is, as to junior creditors or *bona fide* purchasers, relieved from the incumbrance.²

(3) *Effect of Taking Body of Defendant under Ca. Sa.* — An execution will lose its lien on the property of the defendant, if his body be taken under a writ of *capias ad satisfaciendum* sued out by the execution creditor, for the debtor's arrest under such process is *prima facie* a satisfaction of the debt.³

b. BY STATUTORY LIMITATION. — An execution necessarily expires by statutory limitation at the end of the time during which it is by law allowed to remain in force.⁴

c. BY REVERSAL OR VACATION OF JUDGMENT. — The lien of an execution is necessarily extinguished by the reversal, vacation, or setting aside of the judgment on which the execution is founded.⁵

d. BY SETTING ASIDE OF EXECUTION. — In case an execution be set aside by the court, any lien acquired under it will be divested, for the situation will be the same as though no execution had ever been issued.⁶

e. BY ABANDONMENT, LACHES, OR PERVERSION OF WRIT — (1) *Lien Cannot Be Lost without Fault of Plaintiff.* — When the lien of an execution

1. *Levy Creates a Special Lien.* — *Anderson v. Fowler*, 8 Ark. 388; *Patterson v. Fowler*, 23 Ark. 459; *McKeithan v. Terry*, 64 N. Car. 25; *Horton v. McCall*, 66 N. Car. 159. See also *Barnes v. Hyatt*, 87 N. Car. 315.

2. *Balance of Property Relieved from Lien.* — *Barnes v. Baker*, Minor (Ala.) 373; *Anderson v. Fowler*, 8 Ark. 388; *Joslin v. Spangler*, 13 Colo. 491; *Farmers' Bank v. Massey*, 1 Harr. (Del.) 186; *Matthews v. Warne*, 11 N. J. L. 295; *Walpole v. Ink*, 9 Ohio 142. See also *Barber v. Reynolds*, 44 Cal. 519.

Contra. — *Johanson v. McLane*, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102. See also *Everingham v. National City Bank*, 25 Ill. App. 637, affirmed by 124 Ill. 527.

Direction to Levy on Particular Property. — But a mere direction to levy upon particular property does not suspend the lien as to all other property of the execution debtor. *Everingham v. National City Bank*, 25 Ill. App. 637, affirmed by 124 Ill. 527.

3. *Lien of Execution Lost if Body of Defendant Taken under Ca. Sa.* — *Cohen v. Grier*, 4 McCord L. (S. Car.) 509; *Lynch v. Hanahan*, 9 Rich. L. (S. Car.) 186; *Johnston v. Shubert*, 2 Hill L. (S. Car.) 502.

Lien of Fi. Fa. Next in Order Immediately Attaches. — As soon as the body of the defendant is taken under *ca. sa.* the lien of the *fi. fa.* next in order to that of the creditor who sued out the *ca. sa.* immediately attaches, and becomes an incumbrance upon the property of the defendant. *Cohen v. Grier*, 4 McCord L. (S. Car.) 509. See also *Lynch v. Hanahan*, 9 Rich. L. (S. Car.) 186.

And such priority is preserved though the defendant make an assignment under the Prison Bounds Act. *Cohen v. Grier*, 4 McCord L. (S. Car.) 509.

4. *Time During Which Execution May Remain in Force.* See *supra*, this section, *Duration of the Lien.*

How a New Point of Departure for Running of Statute May Be Established. — A rule against an officer instituted in the court from which a *fieri facias* issued, and the answer or return of such officer, setting forth his reasons and excuses

for not collecting said *fieri facias* constituted such a proceeding on the part of the plaintiff, when taken in connection with the return of the officer, as amounts in equity to an official return by the officer on the *fieri facias* and establishes a new point of departure from which the statute begins to run. And an entry and return on the *fieri facias* less than seven years from the date and dismissal of the rule, though more than seven years from the date of the *fieri facias*, is made at a time when the *fieri facias* is not dormant. *Corley v. White*, 69 Ga. 338.

Expiration of Execution Pending Contest by Creditors for Priority — Lien Not Divested. — Where during the life of an execution the creditor had petitioned to the insolvent court for a preference, claiming a priority of lien under the execution, and other creditors of the debtor, for whose benefit he had assigned, objected to such preference; and where pending the determination of the matters in the insolvent court, the execution expired by limitation, it was held that the creditor's rights as to priority of lien were not thereby prejudiced. *Kiehn v. Bestor*, 30 Ill. App. 458.

5. *Lien Extinguished by Reversal, Vacation, or Setting Aside of Judgment.* — *Field v. Macullar*, 20 Ill. App. 392; *Spaulding v. Lyon*, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 203; *May v. Cooper*, 24 Hun (N. Y.) 7; *Phillips v. Wheeler*, 67 N. Y. 104.

As to effect of appeal, etc., see *infra*, this section, subsection *Effect of Appeal or Writ of Error, and Supersedeas.*

6. *Lien Divested Where Execution Set Aside.* — *May v. Cooper*, 24 Hun (N. Y.) 7.

Setting Aside of Sale. — But, under the *Kentucky* statutes, the fact that a sale under an execution has been set aside, does not affect the lien created by the levy, but such lien is left in full force. *Anderson v. Briscoe*, 12 Bush (Ky.) 344, citing c. 38, art. 15, § 4, Gen. Stat. of Kentucky (Kentucky Statute, 1894, § 1710, par. 4).

The statutory provision cited rendered obsolete the decision in *Ettlinger v. Tansey*, 17 B. Mon. (Ky.) 364.

has once attached to the property of the defendant, it cannot be lost without some fault on the part of the plaintiff, some act with which he is chargeable, or some neglect which the law makes prejudicial to his rights.¹

(2) *Abandonment of Lien.* — A plaintiff in execution may, undoubtedly, waive the benefit of a levy under his writ, and abandon the lien thereby acquired,² but such abandonment must be distinctly and clearly proved,³ by showing acts of the plaintiff clearly evincing an intention to abandon, or omissions of such a nature as to amount to an abandonment.⁴

Issue of Alias Writ. — The issue of a second writ of execution before the return of that under which a levy has been made, while irregular, does not necessarily amount to an abandonment of the levy.⁵

Delay. — An abandonment of a levy may be presumed from delay in enforcing the same, but no fixed rule can be laid down as to what delay will have this effect, and each case must be determined from its own particular circumstances.⁶

1. *Lien Cannot Be Lost without Fault of Plaintiff.* — *Wood v. Gary*, 5 Ala. 43; *Street v. Duncan*, (Ala. 1898) 23 So. Rep. 523; *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85; *Williams v. Mellor*, 12 Colo. 1; *Halsted v. Davison*, 10 N. J. Eq. 290; *Caldwell v. Fifield*, 24 N. J. L. 150; *Benson v. Berry*, 55 Barb. (N. Y.) 620; *Benjamin v. Smith*, 12 Wend. (N. Y.) 404; *Matter of Pond*, 21 Misc. Rep. (N. Y. Supreme Ct.) 114; *Schuylkill County's Appeal*, 30 Pa. St. 358. See also *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206.

2. *Levy May Be Waived and Lien thereby Acquired Abandoned.* — *Schuylkill County's Appeal*, 30 Pa. St. 358; *Evans v. Barnes*, 2 Swan. (Tenn.) 292; *Lester's Case*, 4 Humph. (Tenn.) 383.

3. *Abandonment Must Be Clearly Proved.* — *Evans v. Barnes*, 2 Swan. (Tenn.) 292; *Lester's Case*, 4 Humph. (Tenn.) 383.

4. *Circumstances Amounting to Abandonment.* — The following cases contain apt illustrations of circumstances which amount to an abandonment.

Colorado. — *Speelman v. Chaffee*, 5 Colo. 247.
Georgia. — *Rushin v. Shields*, 11 Ga. 637, 56 Am. Dec. 436.

Iowa. — *McConnell v. Denham*, 72 Iowa 494; *Hanson v. Taper Sleeve Pulley Incorporation*, 72 Iowa 622.

Kentucky. — *Ashland Bldg., etc., Assoc. v. Jones*, (Ky. 1897) 41 S. W. Rep. 437.

Maine. — *Hatch v. Jerrard*, 69 Me. 355.

Missouri. — *Brown v. Cape Girardeau County*, 1 Mo. 154.

Nebraska. — *Rickards v. Cunningham*, 10 Neb. 417.

Pennsylvania. — *Kauffelt's Appeal*, 9 Watts (Pa.) 334; *Schuylkill County's Appeal*, 30 Pa. St. 358.

Tennessee. — *Daley v. Perry*, 9 Yerg. (Tenn.) 442.

Circumstances Not Amounting to Abandonment. — Below are given cases which show what circumstances may exist without involving any abandonment:

United States. — *Freeman v. Dawson*, 110 U. S. 264; *Dawson v. Daniel*, 2 Flipp. (U. S.) 305; *Vance v. Royal Clay Mfg. Co.*, 82 Fed. Rep. 251.

New Jersey. — *Moses v. Thomas*, 26 N. J. L. 124, affirmed by *Van Waggoner v. Moses*, 26 N. J. L. 570.

Ohio. — *Houk v. Condon*, 40 Ohio St. 569.

Pennsylvania. — *Childs v. Dilworth*, 44 Pa. St. 123.

South Carolina. — *Malcolm v. Tucker*, Col. Dec. (S. Car.) 1829; *M'Intosh v. Stubbs*, Col. Dec. (S. Car.) 1829.

Tennessee. — *Shepherd v. Woodfolk*, 10 Lea (Tenn.) 593.

Canada. — *Rowe v. Jarvis*, 13 U. C. C. P. 495; *Hamilton v. Bouek*, 5 U. C. Q. B. O. S. 664.

A Question of Fact. — The question whether or not there is an abandonment in any particular case must be one of fact depending upon the circumstances under which the act was done. *Rowe v. Jarvis*, 13 U. C. C. P. 495.

Effect of Levy on Part of Property Only. — In *New Jersey* it has been held that a levy on a part only of the defendant's goods does not amount to a waiver of the right to make an additional levy. *Moses v. Thomas*, 26 N. J. L. 124, affirmed by *Van Waggoner v. Moses*, 26 N. J. L. 570. But in *Pennsylvania* it is considered that such a course amounts to an abandonment of the rest of the debtor's property to other creditors. *Schuylkill County's Appeal*, 30 Pa. St. 358.

5. *Issue of Second Writ not an Abandonment of Levy under First.* — *West v. St. John*, 63 Iowa 287; *Potts's Appeal*, 20 Pa. St. 253; *Menge v. Wiley*, 100 Pa. St. 617.

Seizure of Same Property under Second Writ. — The rule stated in the text holds good even though the same property be again seized under the second writ. *Wilson v. Gilbert*, 161 Ill. 49, affirming 58 Ill. App. 651; *Mason v. Hull*, 55 Ohio St. 256; *Potts's Appeal*, 20 Pa. St. 253, and sold thereunder; *Evans v. Barnes*, 2 Swan (Tenn.) 292; *Lester's Case*, 4 Humph. (Tenn.) 383. But there may be an abandonment of the first levy if the second writ be levied on different property. *Missimer v. Ebersole*, 87 Pa. St. 109, distinguishing *Potts's Appeal*, 20 Pa. St. 253.

Sheriff Must Not Have Surrendered Possession under Original Levy. — It is, of course, necessary to the preservation of the lien of the original levy that the sheriff have not at any time surrendered possession of the goods under such original levy. *Wilson v. Gilbert*, 161 Ill. 49, affirming 58 Ill. App. 651.

6. *Cases Must Be Determined from Particular Circumstances Shown.* — *State Bank v. Etter*, 15 Ark. 268.

Regaining Lien After Abandonment. — Where an execution creditor has abandoned his lien by ordering that the proceeds of property levied on may be paid to other creditors, he may, by rescinding his order, regain his lien, as to so much of the proceeds as have not been disposed of in accordance with his order, but so far as his order has been complied with, his lien is irretrievably lost.¹

(3) **Loss of Lien through Laches.** — The lien acquired by a levy under an execution, like any other right, may be lost, at least as to third persons, through the laches of the execution creditor in neglecting to enforce his execution within a reasonable time.² It is impossible to lay down any fixed rule as to how long a delay will extinguish the lien; and each case must be governed by its own circumstances, for it is manifest that a delay which would be unreasonable in one case, on account of the parties, or the subject-matter of the levy, might, under other circumstances, be entirely reasonable and proper.³

Delay Amounting to Abandonment. — In *State Bank v. Etter*, 15 Ark. 268, a delay of two years and a half after a levy, taken in connection with the other circumstances of the case, was held to show an abandonment; and in *Allen v. Levy*, 59 Miss. 615, a delay of four years was held to have the same effect.

Delay Not Amounting to Abandonment. — What delay may not amount to an abandonment is illustrated by the cases of *Speelman v. Chaffee*, 5 Colo. 247; *Locke v. Coleman*, 4 T. B. Mon. (Ky.) 315; and *Zook v. Smith*, 6 Baxt. (Tenn.) 213.

1. **Regaining Lien After Abandonment.** — *Hatch v. Jerrard*, 69 Me. 355.

2. **Lien May Be Lost by Unreasonable Delay in Enforcing Execution** — *Alabama*. — *McMahan v. Green*, 12 Ala. 71, 46 Am. Dec. 242.

Arkansas. — *Brandon v. Moore*, 50 Ark. 247, 7 Am. St. Rep. 96.

Georgia. — *Douglass v. Eblin*, 57 Ga. 152.

Kentucky. — *Cook v. Clemens*, 87 Ky. 566.

New Jersey. — *Halsted v. Davison*, 10 N. J. Eq. 290.

New York. — *Sage v. Woodin*, 66 N. Y. 578.

North Carolina. — *Faircloth v. Ferrell*, 63 N. Car. 640.

Pennsylvania. — *Slutter v. Kirkendall*, 100 Pa. St. 307.

South Carolina. — *Woodward v. Hill*, 3 McCord L. (S. Car.) 241.

Tennessee. — *Hall v. Hall*, Jackson (Tenn. 1875); *Conway v. Jett*, 3 Yerg. (Tenn.) 481, 24 Am. Dec. 590.

Creditor Need Not Act in Bad Faith. — In order for an execution creditor to lose his priority through delay, it is not necessary that he should have acted in bad faith or with an intention to defraud, in delaying the execution of the writ. *Sage v. Woodin*, 66 N. Y. 578.

Loss of Lien of Levy by Failure to Take out Venditioni Exponas. — If an execution be levied on property but no return be made and no *venditioni exponas* be taken out, the benefit of the levy is lost; but the lien of the execution remains the same as if that levy had not been made. *Gilky v. Dickerson*, 2 Hawks (9 N. Car.) 341.

Rule Applies Only in Favor of Third Persons. — *Driver v. Graham*, 58 Ala. 623; *Keel v. Larkin*, 72 Ala. 493. See also *Duer v. Morrill*, 20 Ill. App. 355; *Anderson v. Taylor*, 1 Tenn. Ch. 430.

Laches Is Not Imputable to a Plaintiff, who being prevented from selling defendant's land

under execution, because of the fact that such land was set off and occupied by the defendant as a homestead, at the expiration of twelve years during which it was so occupied proceeded without unreasonable delay to carry out his levy by sale under a writ of *venditioni exponas*. *Brandon v. Moore*, 50 Ark. 247, 7 Am. St. Rep. 96.

A Reasonable Postponement by an execution plaintiff of the sale of land levied upon, where there is no intention to waive his priority or to defraud junior creditors and the junior creditors are not in fact injured, does not cause the plaintiff to lose his priority. *Dancy v. Hubbs*, 71 N. Car. 424.

Rule Stated in Text Not Recognized as to Land. — *Rockhill v. Hanna*, 15 How. (U. S.) 189. See also *Locke v. Coleman*, 2 T. B. Mon. (Ky.) 13, 15 Am. Dec. 118.

3. **What Delay Is Reasonable Depends upon Circumstances of Particular Case.** — *Acton v. Knowles*, 14 Ohio St. 18.

A Question for the Jury. — Whether the delay was reasonable or unreasonable in a given case is peculiarly a question for the jury, under the instructions of the court. *Acton v. Knowles*, 14 Ohio St. 18.

Cases Wherein Delay Was Held Sufficient to Extinguish Lien — *Arkansas*. — *Patterson v. Fowler*, 23 Ark. 459, (3 yrs. 8 mos.); *Slocumb v. Blackburn*, 18 Ark. 309, (5 yrs.).

Georgia. — *Ruker v. Womack*, 55 Ga. 399, (4 yrs.).

Kentucky. — *Cynthiana Deposit Bank v. Berry*, 2 Bush. (Ky.) 237, (3 yrs.); *Owens v. Patteson*, 6 B. Mon. (Ky.) 488, 44 Am. Dec. 780, (no return on execution for nearly three years after levy, sale seventeen months after levy held good as against execution); *Cook v. Clemens*, 87 Ky. 566, (2 yrs.).

Mississippi. — *Allen v. Levy*, 59 Miss. 613, (4 yrs.).

New York. — *Platt v. Burckle*, 1 How. Pr. (N. Y. Supreme Ct.) 226, (5 yrs.); *Bliss v. Ball*, 9 Johns. (N. Y.) 132, (1 yr.).

Ohio. — *Acton v. Knowles*, 14 Ohio St. 18, (14 mos.).

Pennsylvania. — *Chancellor v. Phillips*, 4 Dall. (Pa.) 213, (10 mos.); *Snyder v. Beam*, 1 Browne (Pa.) 366, (1 yr.); *McClure v. Ege*, 7 Watts (Pa.) 74, (1 yr. 8 mos.).

Tennessee. — *Mann v. Roberts*, 11 Lea (Tenn.) 57, (over 5 yrs.).

Cases Wherein Delay was Held Not Sufficient to Extinguish Lien — *Canada*. — *Robinson v. Wad-*

(4) *Loss of Lien through Perversion of Writ* — (a) **Rule Stated.** — It is a well settled principle of law that the office of an execution is merely to enforce payment of a debt,¹ and, consequently, an attempt to make use of it for purposes of security merely, or to shield the property of the debtor from seizure by other creditors, is a perversion of the writ, and will postpone it to other executions subsequently issued. Hence, if a plaintiff delivers an execution to the sheriff with a direction not to levy at all, or until further orders, or to levy and hold without sale, it creates no lien on the defendant's property as against a creditor issuing and proceeding with a subsequent execution, and the same is true if similar orders be given after delivery or after the levy, or if such be the intent of the creditor though no express orders to that effect be given.²

dell, 24 U. C. Q. B. 488, (2 years and a half, the creditor having supposed meanwhile that the debtor's goods were exhausted).

Arkansas. — Barber v. Peay, 31 Ark. 392, (nearly 5 yrs.); Harman v. May, 40 Ark. 146, (26 mos.).

Georgia. — Terry v. Bank of Americus, 77 Ga. 528, (1 yr.).

Missouri. — Porter v. Mariner, 50 Mo. 364, (4 yrs.).

Pennsylvania. — Perit v. Wallis, 2 Yeates (Pa.) 524, (2 yrs.), and in Lewis v. Smith, 2 S. & R. (Pa.) 142, a still greater delay was held not to divest the lien.

1. **Office of Execution Is to Collect, Not to Secure Debt.** — Williams v. Mellor, 12 Colo. 1; Speelman v. Chaffee, 5 Colo. 247; Gilmore v. Davis, 84 Ill. 487; Burleigh v. Piper, 51 Iowa 649; Mann v. Roberts, 11 Lea (Tenn.) 57.

2. **Loss of Lien by Perversion of Writ** — *England.* — Hunt v. Hooper, 12 M. & W. 664, 13 L. J. Exch. 183, 1 Dowl. & L. 626, 8 Jur. 203; Pringle v. Isaac, 11 Price 445; Lovick v. Crowder, 8 B. & C. 132, 15 E. C. L. 165, 2 M. & R. 84, 6 L. J. K. B. O. S. 263; Smallcomb v. Cross, 1 Ld. Raym. 251; Kempland v. Macauley, Peake N. P. (ed. 1795) 66; Rice v. Serjeant, 7 Mod. 37. See also Edwards v. Harben, 2 T. R. 596.

Canada. — Johnson v. Crocker, 9 New Bruns. 94; Montreal Bank v. Munro, 23 U. C. Q. B. 414; Trust, etc., Co. v. Cuthbert, 13 Grant's Ch. (U. C.) 412; *In re* Ross, 3 Ont. Pr. Rep. 394; Record v. Record, 21 New Bruns. 277; Crane v. Clarke, Hil. T. New Bruns. 1828; Ross v. Hamilton, E. T. 3 Vict; Hazley v. McArthur, 11 Manitoba L. Rep. 602; Foster v. Smith, 13 U. C. Q. B. 243; Kerr v. Kinsey, 15 U. C. C. P. 531. See also Hamilton v. Bryson, 12 New Bruns. 629.

United States. — Berry v. Smith, 3 Wash. (U. S.) 60.

Alabama. — Branch Bank v. Robinson, 5 Ala. 623; Wood v. Gary, 5 Ala. 43; Alabama Gold L. Ins. Co. v. McCreary, 65 Ala. 127; Burnham v. Martin, 54 Ala. 189; Branch Bank v. Broughton, 15 Ala. 127; Albertson v. Goldsby 28 Ala. 711; Dryer v. Graham, 58 Ala. 623; Keel v. Larkin, 72 Ala. 493.

Arkansas. — Tucker v. Bond, 23 Ark. 268; Siocomb v. Blackburn, 18 Ark. 309.

California. — Dutertre v. Driard, 7 Cal. 549.

Colorado. — Doyle v. Herod, 9 Colo. App. 257; Speelman v. Chaffee, 5 Colo. 247.

Illinois. — Gilmore v. Davis, 84 Ill. 487; Western Union Cold Storage Co. v. Rose, 60 Ill. App. 452; Matson v. Sweetser, 50 Ill. App.

518; Sparre v. Abbott, 40 Ill. App. 646; Koren v. Roemheld, 6 Ill. App. 275; Kiehn v. Bestor, 30 Ill. App. 458; Sweetser v. Matson, 153 Ill. 568, 46 Am. St. Rep. 911; Davidson v. Waldron, 31 Ill. 120, 83 Am. Dec. 206; Everingham v. National City Bank, 25 Ill. App. 637. *affirmed* on opinion of court below, 124 Ill. 527.

Indiana. — M'Call v. Trevor, 4 Blackf. Ind., 496; Johnson v. McLane, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102; Moore v. Fitz, 15 Ind. 43; Zug v. Laughlin, 23 Ind. 170; Griffin v. Wallace, 66 Ind. 410; Syfers v. Bradley, 115 Ind. 345.

Iowa. — Border v. Bengel, 12 Iowa 330; Burleigh v. Piper, 51 Iowa 646.

Kentucky. — Deposit Bank v. Lee, 13 Ky. L. Rep. 495.

Mississippi. — Michie v. Planters' Bank, 4 How. (Miss.) 130, 34 Am. Dec. 112.

Missouri. — Wise v. Darby, 9 Mo. 131; Parker v. Waugh, 34 Mo. 340.

New York. — Kennedy v. Burr, (Supreme Ct.) 2 N. Y. Supp. 798; Price v. Shippis, 16 Barb. (N. Y.) 585; Kimball v. Munger, 2 Hill (N. Y.) 364; Smith v. Erwin, 77 N. Y. 466; Kellogg v. Griffin, 17 Johns. (N. Y.) 274; Ball v. Shell, 21 Wend. (N. Y.) 222; Storm v. Woods, 11 Johns. (N. Y.) 110; Rew v. Barber, 3 Cow. (N. Y.) 272; Knower v. Barnard, 5 Hill (N. Y.) 377; Dunderdale v. Sauvestre, 13 Abb. Pr. (N. Y. C. Pl.) 116; Benjamin v. Smith, 4 Wend. (N. Y.) 332; Richards v. Allen, 3 E. D. Smith, (N. Y.) 399; Robertson v. Lawton, 91 Hun (N. Y.) 67.

North Carolina. — Palmer v. Clarke, 2 Dev. L. (13 N. Car.) 354, 21 Am. Dec. 340; Norton v. McCall, 66 N. Car. 159; Harding v. Spivey, 8 Ired. L. (30 N. Car.) 63; Ricks v. Blount, 4 Dev. L. (15 N. Car.) 128. See also Faircloth v. Ferrell, 63 N. Car. 640.

Pennsylvania. — Earl's Appeal, 13 Pa. St. 483; Dunham v. Rundle, 4 Pa. Super. Ct. Rep. 174; Freeburger's Appeal, 40 Pa. St. 244; Snyder v. Kunkleman, 3 P. & W. (Pa.) 487; Meir v. Hale, 3 W. & S. (Pa.) 285; Broadhead v. Cornman, 171 Pa. St. 322, 37 W. N. C. (Pa.) 154; Platt-Barber Co. v. Groves, 7 Pa. Super. Ct. Rep. 599; Larzelere Co.'s Appeal, (Pa. 1888) 13 Atl. Rep. 85; Lowry v. Coulter, 9 Pa. St. 349; Com. v. Stremback, 3 Rawle (Pa.) 341, 24 Am. Dec. 351; Corlies v. Stanbridge, 5 Rawle (Pa.) 286; Parys's Appeal, 41 Pa. St. 273, 80 Am. Dec. 615; Keyser's Appeal, 13 Pa. St. 409, 53 Am. Dec. 487; Stern's Appeal, 64 Pa. St. 447; Landis v. Evans, 113 Pa. St. 332; Huber v. Schnell, 1 Browne (Pa.) 16; Hickman v. Caldwell, 4 Rawle (Pa.) 376, 27 Am.

(b) **Reason for the Rule.** — The reason given for the rule above stated is that the delay of the senior creditor operates as a fraud upon other creditors, and, therefore, the law withdraws the care which it has assumed over, and the charge which it has imposed upon, the debtor's property, in favor of such senior creditor, and transfers the benefits thereof to junior creditors.¹

(c) **Modification of the Rule in Some Jurisdictions.** — In *Delaware*, *New Jersey*, and *South Carolina*, it is considered that a stay of execution by order of the plaintiff is not *per se* a badge of fraud, and will not necessarily deprive the execution of its priority.²

Dec. 274; *Lyon v. Hampton*, 20 Pa. St. 46; *Truitt v. Ludwig*, 25 Pa. St. 145; *Eberle v. Mayor*, 1 Rawle (Pa.) 366; *Kent's Appeal*, 87 Pa. St. 165.

South Carolina. — See *Vance v. Red*, 2 Spears L. (S. Car.) 90.

Tennessee. — *Daley v. Perry*, 9 Yerg. (Tenn.) 442; *Anderson v. Talbot*, 1 Heisk. (Tenn.) 407; *Etheridge v. Edwards*, 1 Swan (Tenn.) 429; *Mann v. Roberts*, 11 Lea (Tenn.) 57.

Washington. — *Wunsch v. McGraw*, 4 Wash. 72.

Cases Holding that the Rule Does Not Apply as to Land. — A stay of execution on real estate for any time short of the statutory period of limitation of the judgment lien may be granted by the creditor without prejudice to his rights. *Marshall v. Moore*, 36 Ill. 321; *Slatery v. Jones*, 96 Mo. 216, 9 Am. St. Rep. 344.

Evidence. — A direction of the execution creditor not to levy or not to sell is evidence *prima facie* that the writ is being used as a mere security. *Speelman v. Chaffee*, 5 Colo. 247; *Williams v. Mellor*, 12 Colo. 1.

As to what evidence is admissible, see *Johnson v. Crocker*, 9 N. Bruns. 94.

As to the sufficiency of evidence, see *Kennedy v. Burr*, (Supreme Ct.) 2 N. Y. Supp. 798.

Rule as to Purchasers. — It has been held that the same rule applies for the protection of subsequent purchasers or mortgagees from the execution debtor. *Foster v. Smith*, 13 U. C. Q. B. 243; *Dryer v. Graham*, 58 Ala. 623; *Keel v. Larkin*, 72 Ala. 493; *Ball v. Shell*, 21 Wend. (N. Y.) 222; *Hickok v. Coates*, 2 Wend. (N. Y.) 419, 20 Am. Dec. 632; *Com. v. Stremback*, 3 Rawle (Pa.) 341, 24 Am. Dec. 351; *Kent's Appeal*, 87 Pa. St. 165. But this has been denied. *Palmer v. Clarke*, 2 Dev. L. (13 N. Car.) 354, 21 Am. Dec. 340; *Arrington v. Sledge*, 2 Dev. L. (13 N. Car.) 359.

The Rule Does Not Apply as Between the Execution Debtor and Creditor — *Alabama.* — *Keel v. Larkin*, 72 Ala. 493.

Indiana. — *Griffin v. Wallace*, 66 Ind. 410; *McCall v. Trevor*, 4 Blackf. (Ind.) 496; *Johnson v. McLane*, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102; *Moore v. Fitz*, 15 Ind. 43; *Zug v. Laughlin*, 23 Ind. 170.

North Carolina. — *Palmer v. Clarke*, 2 Dev. L. (13 N. Car.) 354, 21 Am. Dec. 340; *Arrington v. Sledge*, 2 Dev. L. (13 N. Car.) 359.

New York. — *Richards v. Allen*, 3 E. D. Smith (N. Y.) 399.

Pennsylvania. — *Kent's Appeal*, 87 Pa. St. 165.

The Rights of an Assignee for the Benefit of Creditors are no greater in this respect than those of the debtor who made the assignment. *Kent's Appeal*, 87 Pa. St. 165.

Contra. — *In re Ross*, 3 Ont. Pr. Rep. 394.

1. Delay Operates as Fraud on Junior Creditors — *Arkansas.* — *Tucker v. Bond*, 23 Ark. 268; *Slocomb v. Blackburn*, 18 Ark. 309.

Colorado. — *Speelman v. Chaffee*, 5 Colo. 247.

Indiana. — *Zug v. Laughlin*, 23 Ind. 170.

North Carolina. — *Norton v. McCall*, 66 N. Car. 159; *Palmer v. Clarke*, 2 Dev. L. (13 N. Car.) 354, 21 Am. Dec. 340.

Pennsylvania. — *Snyder v. Kunkleman*, 3 P. & W. (Pa.) 487; *Weir v. Hale*, 3 W. & S. (Pa.) 285; *Flick v. Troxell*, 7 W. & S. (Pa.) 65; *Lowry v. Coulter*, 9 Pa. St. 349; *Keyser's Appeal*, 13 Pa. St. 409, 53 Am. Dec. 487; *Broadhead v. Cornman*, 171 Pa. St. 322, 37 W. N. C. (Pa.) 154; *Larzelere Co.'s Appeal*, (Pa. 1888) 13 Atl. Rep. 85; *Dunham v. Rundle*, 4 Pa. Super. Ct. Rep. 174; *Platt-Barber Co. v. Groves*, 7 Pa. Super. Ct. Rep. 599. See also *In re Thorn*, 2 Pa. St. 331.

The Rule Applies though Creditor Had No Actual Fraudulent Intent. — *Hunt v. Hooper*, 12 M. & W. 664, 1 Dowl. & L. 626, 13 L. J. Exch. 183, 8 Jur. 203; *Trust, etc., Co. v. Cuthbert*, 13 Grant's Ch. (U. C.) 412; *Sweetser v. Matson*, 153 Ill. 568, 46 Am. St. Rep. 911, reversing 50 Ill. App. 518; *Everingham v. National City Bank*, 25 Ill. App. 637, affirmed on opinion of court below, 124 Ill. 527; *Keyser's Appeal*, 13 Pa. St. 409, 53 Am. Dec. 487.

For this is one of the cases in which the law will imply fraud. *Branch Bank v. Broughton*, 15 Ala. 127; *Sweetser v. Matson*, 153 Ill. 568, 46 Am. St. Rep. 911, reversing 50 Ill. App. 518; *Everingham v. National City Bank*, 25 Ill. App. 637, affirmed on opinion of court below, 124 Ill. 527; *Parker v. Waugh*, 34 Mo. 340.

2. Lien Not Necessarily Postponed by Stay of Execution. — *Janvier v. Sutton*, 3 Harr. (Del.) 37; *Starr v. Lewis*, 3 Harr. (Del.) 40, note a; *Hickman v. Hickman*, 3 Harr. (Del.) 484; *State v. Records*, 5 Harr. (Del.) 146; *Caldwell v. Fifield*, 24 N. J. L. 150; *Cumberland v. Hann*, 19 N. J. L. 166; *Sterling v. Van Cleve*, 12 N. J. L. 285; *Moses v. Thomas*, 26 N. J. L. 124, affirmed by *Van Waggoner v. Moses*, 26 N. J. L. 570; *James v. Burnett*, 20 N. J. L. 635; *Williamson v. Johnston*, 12 N. J. L. 86; *Greenwood v. Naylor*, 1 McCord L. (S. Car.) 414. See also *Fischel v. Keer*, 45 N. J. L. 507.

Delay, etc., Merely Affords Evidence of Fraudulent Intent. — *Caldwell v. Fifield*, 24 N. J. L. 150, overruling, as to this point, *Cumberland Bank v. Hann*, 19 N. J. L. 166.

Actual Fraud Postpones Lien. — The New Jersey courts, however, recognize the rule that the lien will be postponed where a stay is granted for the purpose of delaying and defeating other creditors, or the proceeding is otherwise tainted with fraud. *Matthews v.*

In *Canada* it seems that an execution creditor whose writ has been returned *nulla bona* may issue another *fi. fa.* and leave it in the hands of the sheriff for the purpose of retaining or obtaining priority in the event of the debtor's having, or acquiring, any chattel property liable to seizure, provided he acts in good faith.¹

(d) **Circumstances Amounting to Perversion of Writ** — *aa. BURDEN OF PROOF.* — In order to deprive an execution of its priority, it is incumbent upon a contesting creditor to show that the writ was issued or used for a purpose condemned by law.²

bb. WHAT DELAY IS PERMISSIBLE. — An execution cannot be considered dormant or fraudulent because the execution creditor seeks to make the most of the goods levied on, though some delay is caused thereby, in consequence of postponing the sale to avoid sacrificing the property.³

Reasonable Indulgence. — It is not necessary that a creditor, in order to preserve the priority of the lien of his execution, should at once proceed to push his debtor to the wall; but he may, without losing his priority, if he acts in good faith, grant the debtor a reasonable indulgence to allow him to save his goods from sacrifice,⁴ or to avoid subjecting his family to unnecessary inconvenience or annoyance,⁵ as by not interfering with his possession of his goods for a reasonable time.⁶

cc. WHAT INTERFERENCE WITH EXECUTION WILL POSTPONE LIEN. — It has been remarked that there is no settled rule whereby it may be determined when a senior writ loses its preference, and that each particular case must be determined by its own peculiar circumstances.⁷ But it is settled that, in order for an execution

Warne, 11 N. J. L. 295; Cook v. Wood, 16 N. J. L. 254; Sterling v. Van Cleve, 12 N. J. L. 285; Williamson v. Johnston, 12 N. J. L. 86; Fischel v. Keer, 45 N. J. L. 507. See also Hopkins v. Chandler, 17 N. J. L. 299.

The Question of Fraud Is for the Jury. — See Tradesmen's Bank v. Fairchild, 31 N. J. L. 371.

1. Robinson v. Waddell, 24 U. C. Q. B. 488.

2. **Contesting Creditor Assumes Burden of Proof.** — Sweet v. Williams, 162 Pa. St. 94. See also Robinson v. Waddell, 24 U. C. Q. B. 488.

Presumption that Writ Was Delivered to Be Executed. — Where there is no evidence beyond the fact of the delivery of the writ to the sheriff, it may fairly be inferred that it was intended for immediate execution according to its mandate. Johnson v. Crocker, 9 New Bruns. 94.

3. **Postponement of Sale to Avoid Sacrificing Property.** — Power v. Van Buren, 7 Cow. (N. Y.) 560.

But compare Burleigh v. Piper, 51 Iowa 649.

4. **Reasonable Indulgence to Save Goods from Sacrifice.** — Connell v. O'Neil, 154 Pa. St. 582, 32 W. N. C. (Pa.) 256.

5. **Delay to Avoid Subjecting Debtor's Family to Unnecessary Annoyance.** — Landis v. Evans, 113 Pa. St. 332.

6. **Permitting Debtor's Possession for Reasonable Time.** — Rew v. Barber, 3 Cow. (N. Y.) 272; Levy v. Wallis, 4 Dall. (Pa.) 167; Keyser's Appeal, 13 Pa. St. 409, 53 Am. Dec. 487; McGinnis v. Prieson, 85 Pa. St. 111; Broadhead v. Cornman, 171 Pa. St. 322, 37 W. N. C. (Pa.) 154; Howell v. Alkyn, 2 Rawle (Pa.) 282; Religious Soc. v. Hitchcock, 2 Browne (Pa.) 333; Etheridge v. Edwards, 1 Swan (Tenn.) 426.

Fraudulent Intent. — Of course, if the creditor have any fraudulent intent, his lien is lost as

against a junior creditor. Levy v. Wallis, 4 Dall. (Pa.) 167; Keyser's Appeal, 13 Pa. St. 409, 53 Am. Dec. 487; McGinnis v. Prieson, 85 Pa. St. 111; Howell v. Alkyn, 2 Rawle (Pa.) 282.

Private Sales by Debtor. — The debtor being permitted to make private sales of the property in the regular conduct of his business, has been considered as a badge of fraud. Parys's Appeal, 41 Pa. St. 273, 80 Am. Dec. 615; Dunham v. Rundle, 4 Pa. Super. Ct. Rep. 174.

Sale by Assignee of Debtor. — The lien of an execution creditor will not be postponed in favor of a junior execution because of an arrangement made by the assignee for the benefit of creditors of the debtor with the sheriff and the execution creditor, by which the assignee is permitted to take possession of and make sale of the debtor's goods, where the facts do not show any design of the creditor to merely get security or hinder other creditors, but the contrary. Broadhead v. Cornman, 171 Pa. St. 322, 37 W. N. C. (Pa.) 154. See also, to the same effect, Kent's Appeal, 87 Pa. St. 165.

Permitting Debtor to Retain Possession for Unreasonable Time. — If the goods are permitted to remain in the debtor's possession for an unreasonable length of time, the execution will be deemed fraudulent as to creditors and purchasers. Lovick v. Crowder, 8 B. & C. 132, 15 E. C. L. 165; Sage v. Woodin, 66 N. Y. 578; Anderson v. Talbot, 1 Heisk. (Tenn.) 407; Etheridge v. Edwards, 1 Swan (Tenn.) 429. See also Howell v. Alkyn, 2 Rawle (Pa.) 282.

7. **Each Case Must Be Determined According to Its Circumstances.** — Everingham v. National City Bank, 25 Ill. App. 637, affirmed on opinion of court below, 124 Ill. 527.

creditor to lose his priority, it is necessary that he should have given some direction or command which is inconsistent with the mandate of the writ, and which it would be a breach of duty on the part of the sheriff to disobey.¹

Acquiescence in Delay of Officer. — An execution plaintiff does not lose the benefit of his lien by mere acquiescence in the delay of the officer to whom the process has been intrusted; but, in order for such delay to have this effect, it must appear that it resulted from the instructions of the plaintiff in execution, or his attorney.²

dd. **A QUESTION FOR THE JURY.** — Whether a writ of execution, when delivered to the sheriff, was really intended to be executed, is properly a question for the jury.³

(e) **Effect of Subsequent Instructions to Execute Writ.** — Where an execution creditor has once lost his priority of lien by a perversion of the writ, he cannot, by thereafter giving the officer instructions to execute the writ in good faith, regain his original lien as against other executions which have acquired liens while his writ was stayed.⁴ But such instructions will revive his execution, and give it priority from the time the instructions were given, as against cred-

1. Creditor Must Have Given Direction Inconsistent with Mandate of Writ. — *Koren v. Roemheld*, 6 Ill. App. 275.

Instructions Not Inconsistent with Intention to Have Writ Executed. — The following cases illustrate what instructions to the officer to whom an execution is delivered, may be harmless, as not inconsistent with an intention on the part of the creditor to have his writ executed. *Leach v. Williams*, 8 Ala. 759; *People v. National Mut. Ins. Co.*, 19 N. Y. App. Div. 247; *Matter of Pond*, 21 Misc. Rep. (N. Y. Supreme Ct.) 114; *Keyser's Appeal*, 13 Pa. St. 409, 53 Am. Dec. 487; *Snyder v. Kelly*, 4 Pa. Super. Ct. Rep. 636.

Instructions Held Inconsistent with Mandate of Writ. — In the following cases, the instructions given to the officer have been held inconsistent with the mandate of the writ of execution. *Bradley v. Wyndham*, 1 Wils. 44; *Gates v. Smith*, 13 U. C. C. P. 572; *Freeburger's Appeal*, 40 Pa. St. 244.

Circumstances Showing that Writ Was Not Delivered to Be Executed. — See *Robertson v. Lawton*, 91 Hun (N. Y.) 67.

Order from Officer of Corporation to Stay Execution — Excess of Authority. — An execution in favor of a corporation will not lose its lien because the sheriff has stayed proceedings in consequence of an order to that effect, from one of the officers, who had no authority to give such an order. *Spyker v. Spence*, 8 Ala. 333.

A Mere Failure or Refusal to Give Directions does not constitute such an interference on the part of the creditor with the execution as will have the effect of rendering it dormant. *Koren v. Roemheld*, 6 Ill. App. 275; *Kiehn v. Bestor*, 30 Ill. App. 458.

2. Lien Not Lost by Acquiescence in Delay. — *Canada.* — *McGivern v. McCausland*, 19 U. C. C. P. 460.

Alabama. — *Wood v. Gary*, 5 Ala. 43; *Leach v. Williams*, 8 Ala. 759; *Burnham v. Martin*, 54 Ala. 189.

Colorado. — *Williams v. Mellor*, 12 Colo. 1.
New York. — *Russell v. Gibbs*, 5 Cow. (N. Y.) 390; *Whipple v. Foot*, 2 Johns. (N. Y.) 422; 3 Am. Dec. 442; *Matter of Pond*, 21 Misc.

Rep. (N. Y. Supreme Ct.) 114; *Herkimer County Bank v. Brown*, 6 Hill (N. Y.) 232; *Doty v. Turner*, 8 Johns. (N. Y.) 20; *Thompson v. Van Vechten*, 5 Abb. Pr. (N. Y. Super. Ct.) 458; *Benjamin v. Smith*, 12 Wend. (N. Y.) 404.

Ohio. — *Acton v. Knowles*, 14 Ohio St. 18.

Pennsylvania. — *Gillespie v. Keating*, 180 Pa. St. 150, 40 W. N. C. (Pa.) 201, affirming 17 Pa. Co. Ct. Rep. 418, 26 Pittsb. Leg. J. N. S. (Pa.) 362; *McGinnis v. Prieson*, 85 Pa. St. 111; *Sweet v. Williams*, 162 Pa. St. 94; *McCoy v. Reed*, 5 Watts (Pa.) 300.

South Carolina. — *Snipes v. Charleston Dist.*, 1 Bay (S. Car.) 295.

Practice of Sheriff Not to Levy Unless Expressly Instructed. — Where it is the practice of a sheriff never to levy an execution placed in his hands unless he has instructions to do so, and the attorney for the plaintiff in the execution knows of such practice, the priority of the lien of an execution will be lost where no direction to levy is given by such attorney. *Johnson v. Crocker*, 9 New Bruns. 94.

Unreasonable Delay. — Such acquiescence has, however, been held to render the execution dormant where the delay continues for an unreasonable length of time. *Cynthiana Deposit Bank v. Berry*, 2 Bush (Ky.) 236, (3 years); *Owens v. Pattenon*, 6 B. Mon. (Ky.) 489, 44 Am. Dec. 780, (17 months); *Acton v. Knowles*, 14 Ohio St. 18, (14 months). See also *Snyder v. Beam*, 1 Browne (Pa.) 366; *Wood v. Keller*, 2 Miles (Pa.) 81.

Presumption from Long Delay Without Levy. — When an officer holds a process for a long period of time without enforcement of the same, the presumption arises that he holds it by direction of the plaintiff. *Williams v. Mellor*, 12 Colo. 1.

3. A Question for the Jury. — *Johnson v. Crocker*, 9 New Bruns. 94; *Kerr v. Kinsey*, 15 U. C. C. P. 531.

4. Lien Cannot Be Revived to Take Precedence of Other Liens Acquired During Dormancy. — *Montreal Bank v. Munro*, 23 U. C. Q. B. 414; *Berry v. Smith*, 3 Wash. (U. S.) 60. See also *Branch Bank v. Broughton*, 15 Ala. 127; *Knower v. Barnard*, 5 Hill (N. Y.) 377.

itors acquiring liens subsequent to such instructions.¹

(f) **Writ Issued to Be Executed Not Affected by Perversion of Prior Writs.** — When an *alias* or *pluries* writ of execution is issued in good faith to be executed, its lien from its teste or delivery, as the case may be, is not postponed on account of a perversion of the original writ on which it is based, or any intermediate writ.²

f. **EFFECT OF APPEAL, OR WRIT OF ERROR, AND SUPERSEDEAS.** — No universal rule can be laid down as to the effect of an appeal from, or writ of error to the judgment on which an execution is based, and a consequent supersedeas, for while there are many authorities in favor of the doctrine that such proceeding will discharge a levy which has been made on goods of the defendant, and release any lien which has been created thereby,³ there is also a very respectable support for the doctrine enunciated by the Supreme Court of the United States, that "the levy of an execution is not defeated by a subsequent writ of supersedeas, but all the proceedings, by sale or otherwise, in the due course and completion of the levy, have relation back to the time of the seizure."⁴

g. **EFFECT OF STAY OF EXECUTION.** — The preponderance of authority is in favor of the doctrine that the lien of a *fieri facias* upon goods of the debtor on which a levy has been made is not lost by reason of an order of the court staying execution of the writ until some disposition be made of a proceeding antagonistic thereto, even though there be no express provision in such order that the lien shall continue unimpaired.⁵

1. **Lien Takes Priority According to Date of Instructions to Execute.** — *Gates v. Smith*, 13 U. C. C. P. 572; *Sparre v. Abbott*, 40 Ill. App. 646; *Miller v. Kosch*, 74 Hun (N. Y.) 50. See also *Withers v. Parker*, 4 H. & N. 524, 28 L. J. Exch. 292, affirmed by 5 H. & N. 725, 29 L. J. Exch. 320; *Huber v. Schnell*, 1 Browne (Pa.) 16.

When it is clearly shown that the writ first delivered to the sheriff was used merely as a security originally, it is incumbent upon the plaintiff in such writ, in order to preserve its priority over a subsequent execution, to prove affirmatively that orders to proceed and sell under the first writ were given to the sheriff before he received the second writ. *Freeburger's Appeal*, 40 Pa. St. 244.

As to what instructions will authorize the officer to proceed, and thus revive the executions, see *Gates v. Smith*, 13 U. C. C. P. 572.

2. **Writ Issued to Be Executed Not Affected by Perversion of Prior Writs.** — *Branch Bank v. Robinson*, 5 Ala. 623; *Wood v. Gary*, 5 Ala. 43; *Roberts v. Oldham*, 63 N. Car. 297. See also *Sweet v. Williams*, 162 Pa. St. 94.

3. **Levy Discharged and Lien Released by Supersedeas.** — *Keith v. Wilson*, 3 Metc. (Ky.) 202; *Flowers v. Fletcher*, Sneed (Ky.) 225; *Lockridge v. Biggerstaff*, 2 Duv. (Ky.) 281, 87 Am. Rep. 498; *Eldridge v. Chambers*, 8 B. Mon. (Ky.) 411; *Rocco v. Parczyk*, 9 Lea (Tenn.) 328; *Fry v. Manlove*, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775; *McCamy v. Lawson*, 3 Head (Tenn.) 256; *Ela v. Welch*, 9 Wis. 395. See also *Parker v. Dean*, 45 Miss. 408.

An Appeal Vacates an Execution based on the judgment appealed from. *Karr v. Schade*, 7 Lea (Tenn.) 294.

Supersedeas Bond a Security for the Debt. — Where an execution defendant executes a supersedeas bond and sues out a writ of error after a levy on goods is made, the bond is

considered security for the debt, and ample indemnity to the creditor for arresting the action of the sheriff under the writ. *Parker v. Dean*, 45 Miss. 408.

The Lien Is Not Revived by a determination of the appeal in favor of the execution plaintiff. *Keith v. Wilson*, 3 Metc. (Ky.) 202.

Rule Does Not Apply to Levy Made on Realty. — The lien acquired by the levy of an execution on land is not lost by reason of a certiorari and supersedeas and bond thereon, which proceedings are afterwards dismissed and judgment given on the bond. *Littleton v. Yost*, 3 Lea (Tenn.) 267. See also *McCamy v. Lawson*, 3 Head (Tenn.) 256.

4. **Levy Not Defeated by Supersedeas.** — *Freeman v. Dawson*, 110 U. S. 264, citing *Boyle v. Zacharie*, 6 Pet. (U. S.) 648; *U. S. v. Dashiell*, 3 Wall. (U. S.) 688; *Capen v. Doty*, 13 Allen (Mass.) 262; *Bond v. Willett*, 31 N. Y. 102; *Batdorff v. Focht*, 44 Pa. St. 195.

Execution Lodged Pending Appeal. — An appeal does not prevent the lien of an execution lodged pending such appeal. *M'Cants v. Rogers*, 3 Brev. (S. Car.) 388.

5. **Stay by Order of Court Does Not Destroy Lien.** — *Batdorff v. Focht*, 44 Pa. St. 195; *Bain v. Lyle*, 68 Pa. St. 60; *Reid v. Lindsey*, 104 Pa. St. 156. See also *Richards v. Morris Canal, etc., Co.*, 20 N. J. L. 136; *Ansonia Brass, etc., Co. v. Conner*, 103 N. Y. 502; *Kightlinger's Appeal*, 101 Pa. St. 540; *Schwartz v. Banks*, 13 Phila. (Pa.) 540, 34 Leg. Int. (Pa.) 250.

Special Direction that Lien Be Preserved. — Necessarily, the lien is preserved where the order staying the execution contains an express provision to that effect, such as "sheriff to be secure in his levy," even though the stay extend beyond the return day of the writ. *Slutter v. Kirkendall*, 100 Pa. St. 307. See also *Kightlinger's Appeal*, 101 Pa. St. 540.

This Doctrine Is Denied, however, in *Kentucky* and *North Carolina*, where it is considered that a stay of execution will release a levy theretofore made and free the property from any lien acquired thereby.¹

h. EFFECT OF GIVING FORTHCOMING OR DELIVERY BOND. — It is generally considered that the lien of an execution on property which has been levied upon is not divested by the giving of a forthcoming or delivery bond, and the consequent surrender, by the levying officer, of possession of the property.²

i. EFFECT OF INJUNCTION. — In many jurisdictions it is considered that an injunction against the sale of property levied on under an execution does not destroy the lien on such property acquired by the levy, but merely suspends it during the time the injunction remains in force, and that the lien revives when the injunction is dissolved.³

Rule Not Changed Where Defendant Gives Bond for Return of Goods. — *Bain v. Lyle*, 68 Pa. St. 60; *Reid v. Lindsey*, 104 Pa. St. 156.

Rule Applies Where Stay Ordered Before Levy. — See *Richards v. Morris Canal, etc.*, Co., 20 N. J. L. 136.

Stay Suspends Running of Statutory Term for Execution of Process. — *Ansonia Brass, etc.*, Co. v. *Conner*, 103 N. Y. 502.

Stay by Operation of Law to Prevent Sacrifice of Property. — The lien of a levy is not lost or postponed to junior executions by reason of a stay of sale thereunder for a year under a law providing for such stay in case the property will not sell for two-thirds its appraised value. *Sedgwick's Appeal*, 7 W. & S. (Pa.) 260.

1. Levy Released and Lien Lost by Stay — North Carolina. — *Hamilton v. Henry*, 5 Ired. L. (27 N. Car.) 218.

Voluntary Stay by Agreement of Parties — Kentucky. — A return by an officer that an execution after having been levied was stayed by the agreement of the parties, imports the cessation of the levy and a release of the property. *Eldridge v. Chambers*, 8 B. Mon. (Ky.) 411.

2. Lien Not Divested by Forthcoming or Delivery Bond, etc. — Alabama. — *Caperton v. Martin*, 5 Ala. 217; *Branch Bank v. Curry*, 13 Ala. 394.

Illinois. — *Brush v. Seguin*, 24 Ill. 254.

Pennsylvania. — *Sedgwick's Appeal*, 7 W. & S. (Pa.) 260; *Lantz v. Worthington*, 4 Pa. St. 153, 45 Am. Dec. 682. See also *Hastings v. Quigley*, 4 Pa. L. J. 220, 2 Clark (Pa.) 431.

Tennessee. — *Lester's Case*, 4 Humph. (Tenn.) 383; *Malone v. Abbott*, 3 Humph. (Tenn.) 532; *Evans v. Barnes*, 2 Swan (Tenn.) 292.

Virginia. — *Lusk v. Ramsay*, 3 Munf. (Va.) 417.

Unreasonable Delay after Taking Bond. — In a case where the sheriff, after making the levy, took a bond conditioned for the return of the property levied on, and left it in the possession of the debtor for nearly a year, at the end of which time it was sold, it was held that the purchaser took the property discharged of the lien created by the levy, as the sheriff had not relied upon that lien, but rather upon the bond and security given. *Snyder v. Beam*, 1 Browne (Pa.) 366.

Effect of Replevying an Execution — Kentucky. — In *Ferguson v. Williams*, 3 B. Mon. (Ky.) 302, 39 Am. Dec. 466, it was held that property

levied on by the sheriff under a writ of fieri facias, but taken out of his hands by a writ of replevin, was not released from the levy; as the replevin was not an abrogation of the levy, but it remained in full force, and no other execution could subsequently be levied upon the same property except in subordination to the prior levy. But compare *Harrison v. Wilson*, 2 A. K. Marsh. (Ky.) 547; *Addison v. Crow*, 5 Dana (Ky.) 271.

Forfeiture of Bond. — In *Tennessee* and *Virginia* it is considered that, on the forfeiture of such a bond, it becomes a quasi judgment, and has the effect of merging into itself the lien of the levy, and of discharging the lien of the execution. *Lester's Case*, 4 Humph. (Tenn.) 383; *Malone v. Abbott*, 3 Humph. (Tenn.) 532; *Lusk v. Ramsay*, 3 Munf. (Va.) 417. See also *Frayser v. Richmond, etc.*, R. Co., 81 Va. 388; *Puryear v. Taylor*, 12 Gratt. (Va.) 401.

But this is denied in *Alabama*. See *Branch Bank v. Curry*, 13 Ala. 304; *Caperton v. Martin*, 5 Ala. 217.

3. Injunction Merely Suspends Lien. — *Lamore v. Cox*, 32 La. Ann. 246; *Knox v. Randall*, 24 Minn. 479; *Lynn v. Gridley*, Walk. (Miss.) 548, 12 Am. Dec. 591; *Gibbes v. Mitchell*, 2 Bay (S. Car.) 120.

Tennessee Rule. — In *Tennessee* the rule set forth in the text is recognized in cases where the levy has been made on real property. *Overton v. Perkins*, Mart. & Y. (Tenn.) 367; *Miller v. Estill*, 8 Verg. (Tenn.) 452; *McCamy v. Lawson*, 3 Head (Tenn.) 256. Though it is not accepted where the levy has been made on personalty. *Telford v. Cox*, 15 Lea (Tenn.) 298; *Overton v. Perkins*, Mart. & Y. (Tenn.) 367; *McCamy v. Lawson*, 3 Head (Tenn.) 256; *Stinson v. McMurray*, 6 Humph. (Tenn.) 339.

But in *Conway v. Jett*, 3 Verg. (Tenn.) 481, 24 Am. Dec. 590, the court qualified the rule as to personalty by holding that the debtor does not destroy the lien of a creditor upon property levied on, by obtaining an injunction, so as to subject the property to other execution, unless the fiat of the judge order security to be given, and such security is given.

A Junior Execution May Have Priority over a senior while the latter is suspended by an injunction. — *Mitchell v. Anderson*, 1 Hill L. (S. Car.) 60, 26 Am. Dec. 158.

Sale under Junior Writ While Senior Writ Is Enjoined. — When the operative energy of an execution has been suspended by an injunction, a sale under a junior execution does not

Doctrine that Lien Is Destroyed — Recourse to Injunction Bond. — The widespread practice of requiring the party moving for an injunction to furnish a bond has given rise to a doctrine that the lien of the execution is totally destroyed by an injunction, and the injunction bond being substituted for the plaintiff's security, he must have recourse to that when the injunction is dissolved.¹

Perpetual Injunction. — There can be no lien upon land which has been levied on where a sale under the execution has been perpetually enjoined.²

j. EFFECT OF CLAIM OF EXEMPTION. — Under the *Alabama* statutes the lien of an execution on property levied on and claimed as exempt, is not destroyed or impaired by the pendency of the contest, nor by its termination, if the decision be in favor of the execution plaintiff.³

k. EFFECT OF INTERPOSITION OF CLAIM TO PROPERTY BY THIRD PERSON. — The lien of an execution on property upon which a levy has been made is not, in *Alabama*, divested by the interposition of a claim to such property by a third person.⁴ The lien is merely suspended as to the particular property levied on, during the pendency of the claim suit,⁵ and revives immediately upon a determination adverse to the claimant.⁶

affect the lien acquired by such elder execution; but the property in the hands of any person remains liable to a levy when the injunction is removed. *Lynn v. Gridley*, Walk. (Miss.) 548, 12 Am. Dec. 591.

In *Duckett v. Dalrymple*, 1 Rich. L. (S. Car.) 143, the officer held two writs, and the elder was enjoined and the property was levied on and sold under the junior writ, but prior to the sale the injunction was dissolved; and it was held that the senior execution was entitled to be first paid out of the proceeds of the sale.

Effect of Injunction upon Computation of Time Execution May Remain in Force. — In *Gibbes v. Mitchell*, 2 Bay (S. Car.) 120, it was held that any delay occasioned by the defendant himself, as by an injunction out of chancery, etc., should not be taken into account in computing the time an execution might remain in force. See also *Ansonia Brass, etc., Co. v. Conner*, 103 N. Y. 502, where a similar rule was applied in case of a stay of execution.

But in *Illinois* it is considered that an injunction cannot have the effect of suspending the running of the ninety days within which an execution is required by statute to be made returnable, and therefore, when an execution is enjoined before any levy is made, and the injunction is not dissolved until after the return day of the writ, the lien of the execution is destroyed. *Launtz v. Gross*, 16 Ill. App. 329.

Rule Denied in Kentucky. — The rule set out in the text has been denied in Kentucky. *Flowers v. Fletcher*, Sneed (Ky.) 225; *Eldridge v. Chambers*, 8 B. Mon. (Ky.) 411.

These cases contain no reference to an injunction bond, and for that reason cannot properly be classified with the later cases of *Keith v. Wilson*, 3 Metc. (Ky.) 202, and *Lockridge v. Biggerstaff*, 2 Dev. (Ky.) 281, 87 Am. Dec. 498, cited in the next note.

1. Injunction Destroys Lien of Execution when Bond Is Given. — *Barnes v. Baker*, Minor (Ala.) 373; *Keith v. Wilson*, 3 Metc. (Ky.) 202; *Lockridge v. Biggerstaff*, 2 Duv. (Ky.) 281, 87 Am. Dec. 498; *Bisbee v. Hall*, 3 Ohio 449. See also *Conway v. Jett*, 3 Verg. (Tenn.) 481, 24 Am. Dec. 590.

The Lien Is Not Revived, in such case, by a

dissolution of the injunction. *Keith v. Wilson*, 3 Metc. (Ky.) 202; *Lockridge v. Biggerstaff*, 2 Duv. (Ky.) 281, 87 Am. Dec. 498.

2. Perpetual Injunction. — *Snow v. Nash*, 50 Tex. 216.

3. Lien Not Destroyed by Claim of Exemption. — *Sims v. Eslava*, 74 Ala. 594, citing Code Alabama, 1876, § 2835 (Code 1896, § 2067). In this case it was further considered that the death of the defendant was not a termination of the contest in favor of the plaintiff.

4. Lien Not Divested by Interposition of Claim by Third Person. — *Hagan v. Lucas*, 10 Pet. (U. S.) 400; *Mills v. Williams*, 2 Stew. & P. (Ala.) 390; *Sandlin v. Anderson*, 82 Ala. 330; *Street v. Duncan*, (Ala. 1898) 23 So. Rep. 523; *Branch Bank v. McCollum*, 20 Ala. 280; *Babcock v. Williams*, 9 Ala. 150; *Doremus v. Walker*, 8 Ala. 194, 42 Am. Dec. 634.

Giving of Bond and Receipt of Property by Claimant. — This is true although the claimant give a bond, and receive possession of the property. *Hagan v. Lucas*, 10 Pet. (U. S.) 400. But compare *Walker v. McDowell*, 4 Smed. & M. (Miss.) 118, 43 Am. Dec. 476.

Effect of Executing Claim Bond to Junior Execution Creditor Only. — When a slave is levied on at the suit of three creditors, and is claimed by a stranger, who executes a claim bond to the junior execution creditor only, and that creditor alone contests the title with the claimant, and succeeds in condemning the slave, the other creditors have no right to claim the money which he receives from the claimant, in discharge of the claim bond. *Burnett v. Handley*, 8 Ala. 685.

5. Lien Suspended as to Particular Property Levied on. — *Mills v. Williams*, 2 Stew. & P. (Ala.) 390; *Branch Bank v. McCollum*, 20 Ala. 280; *Doremus v. Walker*, 8 Ala. 194, 42 Am. Dec. 634.

Lien on Other Property Not Affected. — *Mills v. Williams*, 2 Stew. & P. (Ala.) 390.

6. Lien Revived by Determination Adverse to Claimant. — *Doremus v. Walker*, 8 Ala. 194, 42 Am. Dec. 634; *Street v. Duncan*, (Ala. 1898) 23 So. Rep. 523; *Sandlin v. Anderson*, 82 Ala. 330.

See also *Munter v. Leinkauff*, 78 Ala. 546; *Babcock v. Williams*, 9 Ala. 150.

If the Claim Be Sustained, the lien of the execution is, of course, lost, as to the property in dispute.¹

7. EFFECT OF FAILURE TO INDEMNIFY LEVYING OFFICER. — In some jurisdictions it is considered that the sheriff or other levying officer has the right, when a doubt arises after a levy, whether the property seized belongs to the defendant in execution or is claimed by a third person, to demand from the plaintiff in execution a bond of indemnity to protect him in making a sale of the property. If this bond be not given, the sheriff, or other levying officer, is justified in giving up possession of the property; and the levy is thereby discharged, and the lien resulting from the levy destroyed.² Or, if there are two or more executions, and the plaintiff in the senior writ refuses indemnity, a junior creditor may secure a transference of the prior lien to himself by giving the required indemnity bond.³

m. EFFECT OF DEATH OF EXECUTION DEBTOR. — The question has frequently arisen as to the effect upon the lien of an execution of the death of the debtor after such lien has attached; and the weight of authority both *English* and *American* supports the doctrine that when the lien has once attached it is not divested by the subsequent death of the debtor, but the officer may thereafter proceed to levy upon his property to satisfy the execution.⁴

Death of Debtor Before Delivery of Writ. — This rule holds good even though the debtor may have died before the delivery of the writ, for the provision of the statute of frauds that the execution shall have no lien until such delivery

1. Lien Destroyed if Claim Sustained. — *Street v. Duncan*, (Ala. 1898) 23 So. Rep. 523; *Sandlin v. Anderson*, 82 Ala. 330; *Mosely v. Gainer*, 10 Tex. 393.

2. Lien Destroyed by Return of Property upon Refusal to Indemnify Sheriff. — *Pickard v. Peters*, 3 Ala. 493; *Otey v. Moore*, 17 Ala. 280, 52 Am. Dec. 173; *Cotten v. Thompson*, 25 Ala. 671; *Smith v. Osgood*, 46 N. H. 178.

3. Junior Creditor May Acquire Lien by Giving Indemnity Bond When Senior Creditor Refuses. — *Pickard v. Peters*, 3 Ala. 493; *Dabney v. Stackhouse*, 49 Miss. 513; *Smith v. Osgood*, 46 N. H. 178. *Contra*, *Girard Bank v. Philadelphia, etc., R. Co.*, 2 Miles (Pa.) 447.

Effect of Subsequent Indemnity by Senior Execution Creditor. — The operation of the rule set out in the text is not affected by the fact that, after a junior creditor who has given indemnity has successfully contested the claim to the property, and a *venditioni exponas* has been issued, the senior creditor also executes an indemnity bond. *Dabney v. Stackhouse*, 49 Miss. 513.

Refusal to Indemnify Does Not of Itself Destroy Lien. — A refusal by an execution creditor to give the indemnity bond required does not, of itself, destroy his lien, but it remains in full force if no junior creditor gives an indemnity bond, and the sheriff does not give up possession of the property seized. *Pickard v. Peters*, 3 Ala. 493; *Branch Bank v. McCollum*, 20 Ala. 280.

The Above Rules Can Have No Application in a state where the right of the sheriff to demand indemnity is denied, as in *South Carolina*. *Adair v. McDaniel*, 1 Bailey L. (S. Car.) 158, 19 Am. Dec. 664.

4. Lien Not Lost by Death of Debtor — *England*. — *Parkes v. Mosse*, Cro. Eliz. 181; *Waghorne v. Langmead*, 1 B. & P. 571; *Rawlinson v. Oriel*, Comb. 144; *Ranken v. Harwood*, 10

Jur. 794, 5 Hare 215. See also *Anonymous*, 2 Vent. 218.

Canada. — *Meyers v. Meyers*, 19 Grant's Ch. (U. C.) 185. See also *In re Grant*, 28 Grant's Ch. (U. C.) 457.

Alabama. — *Carlisle v. May*, 75 Ala. 502; *Hurt v. Nave*, 49 Ala. 459; *Jones v. Ray*, 50 Ala. 599; *Hendon v. White*, 52 Ala. 597; *Clark v. Kirksey*, 54 Ala. 219; *Childs v. Jones*, 60 Ala. 352; *Keel v. Larkin*, 72 Ala. 493; *Sims v. Eslava*, 74 Ala. 594. See also *Caperton v. Martin*, 5 Ala. 217; *Dryer v. Graham*, 58 Ala. 623; *Collingsworth v. Horn*, 4 Stew. & P. (Ala.) 237, 24 Am. Dec. 753.

Florida. — *Kimball v. Jenkins*, 11 Fla. 111, 89 Am. Dec. 237.

Illinois. — *Dodge v. Mack*, 22 Ill. 93; *Logsdon v. Spivey*, 54 Ill. 104.

New Jersey. — *Den v. Hillman*, 7 N. J. L. 180.

New York. — *Becker v. Becker*, 47 Barb. (N. Y.) 497.

Tennessee. — *Harvey v. Berry*, 1 Baxt. (Tenn.) 252; *Neil v. Gaut*, 1 Coldw. (Tenn.) 396.

Lien Cannot Be Created After Death of Defendant. — If, at the time of the death of the execution defendant, the execution plaintiff has acquired no lien on his personal property, the court cannot afterwards create a lien on such property in favor of the creditor. *Jeanes v. Anderson*, 1 Ind. 492. See also *Sims v. Eslava*, 74 Ala. 594; *Whitfield v. Clark*, 48 Ala. 555; *M'Mahon v. Glasscock*, 5 Yerg. (Tenn.) 304; *Gwin v. Latimer*, 4 Yerg. (Tenn.) 22.

Death of Execution Plaintiff. — In case the plaintiff dies after the teste of the writ of execution, or after a fieri facias sued out, it may nevertheless be executed. *Jones v. Jones*, 1 Bland (Md.) 413, 18 Am. Dec. 327; *Neil v. Gaut*, 1 Coldw. (Tenn.) 396.

does not apply in favor of the debtor and his representatives, and as to them the common-law rule that the execution binds from its teste is considered to be still in force.¹

Doctrine that Right to Levy Ceases upon Death of Debtor. — In other jurisdictions, however, it is considered that the right of an execution creditor to make a levy on and sale of the debtor's property under an execution ceases upon the death of the debtor, and that the lien of the execution, if it still remains, must be enforced by other proceedings.²

Lien of Levy Continues After Defendant's Death. — But if the execution be levied upon goods of the defendant before his death, the officer may sell them afterwards to satisfy the execution, for by the levy the officer acquires a special property in the goods, which are thereby detached from the general estate of the debtor, and do not constitute a part thereof for the purpose of administration in the event of his death after the levy, unless the debt is paid and the property released by his representatives.³

VIII. SATISFACTION AND DISCHARGE — 1. Scope of Section. — Satisfaction of a judgment is a satisfaction and discharge of an execution issued thereon, but it is not proposed to treat in this section questions relating to the satisfaction of judgments, except incidentally. The subject will be fully treated in another part of this work.⁴

1. Lien as to Debtor Commences at Teste of Writ — Not Divested by Death Before Delivery — *England*. — *Waghorne v. Langmead*, 1 B. & P. 571; *Rawlinson v. Oriel*, Comb. 144; *Ranken v. Harwood*, 10 Jur. 794, 5 Hare 215. See also *Anonymous*, 2 Vent. 218.

Canada. — *Burrows v. Isener*, 5 Nova Scotia 371, refusing to recognize *Thoroughgood's Case*, Noy 73.

Maryland. — *Jones v. Jones*, 1 Bland (Md.) 443, 18 Am. Dec. 327.

New Jersey. — *Den v. Hillman*, 7 N. J. L. 180.

Tennessee. — *Harvey v. Berry*, 1 Baxt. (Tenn.) 252; *Neil v. Gaut*, 1 Coldw. (Tenn.) 396; *Preston v. Surgoine*, Peck. (Tenn.) 72; *Black v. Planters' Bank*, 4 Humph. (Tenn.) 367; *Boyd v. Armstrong*, 1 Yerg. (Tenn.) 40; *Daley v. Perry*, 9 Yerg. (Tenn.) 442; *Mongomery v. Realhafer*, 85 Tenn. 668, 4 Am. St. Rep. 780, *distinguishing* *Rutherford v. Read*, 6 Humph. (Tenn.) 423.

Death of Debtor Before Rendition of Judgment. — The doctrine has been carried to the extent of holding the lien of the execution binding upon the property of the debtor where he died before the judgment was rendered, but the execution was tested as of the first day of the term, and before his death. *Bragner v. Langmead*, 7 T. R. 20.

2. Doctrine that Right to Levy Ceases upon Death of Debtor. — *Arkansas*. — *State Bank v. Etter*, 15 Ark. 268; *Davis v. Oswalt*, 18 Ark. 414, 68 Am. Dec. 182; *James v. Marcus*, 18 Ark. 421.

Kentucky. — *Wagon v. M'Coy*, 2 Bibb (Ky.) 198; *Holeman v. Holeman*, 2 Bush (Ky.) 514; *Burge v. Brown*, 5 Bush (Ky.) 535, 96 Am. Dec. 369. See also *Huey v. Redden*, 3 Dana (Ky.) 488.

North Carolina. — *Sawyers v. Sawyers*, 93 N. Car. 321, *distinguishing* *Aycock v. Harrison*, 65 N. Car. 8, and *Grant v. Hughes*, 82 N. Car. 216, and *overruling* by necessary implication *M'Carson v. Richardson*, 1 Dev. & B. L. (18 N. Car.) 561.

Ohio. — *Massie v. Long*, 2 Ohio 287, 15 An. Dec. 547.

Texas. — *Conkrite v. Hart*, 10 Tex. 140, *explaining* *Bennett v. Gamble*, 1 Tex. 124; *McMiller v. Butler*, 20 Tex. 402; *Hooper v. Caruthers*, 78 Tex. 432. See also *Chandler v. Burdett*, 20 Tex. 42.

Virginia. — *Trevillian v. Guerrant*, 31 Gratt. (Va.) 525.

3. Lien of Levy Continues After Death of Debtor. — *Barber v. Peay*, 31 Ark. 392; *Davis v. Oswalt*, 18 Ark. 414, 68 Am. Dec. 182; *James v. Marcus*, 18 Ark. 421; *Mundy v. Bryan*, 18 Mo. 29; *Massie v. Long*, 2 Ohio 287, 15 Am. Dec. 547; *Connell v. O'Neil*, 154 Pa. St. 582, 32 W. N. C. (Pa.) 256. See also *State Bank v. Etter*, 15 Ark. 268; *Arnett v. Arnett*, 14 Ark. 57; *Brandon v. Moore*, 50 Ark. 247, 17 Am. St. Rep. 96; *Grosvenor v. Gold*, 9 Mass. 209.

Kentucky Doctrine. — In *Kentucky* the lien created by a levy upon the land of the execution debtor prior to his death is not discharged by such death, but may be enforced in equity as a claim against his estate, such claim having a priority. *Holeman v. Holeman*, 2 Bush (Ky.) 514; *Burge v. Brown*, 5 Bush (Ky.) 535, 96 Am. Dec. 369.

But the right of the levying officer to enforce his levy by a sale of the land ceases upon the death of the debtor. *Holeman v. Holeman*, 2 Bush (Ky.) 514; *Burge v. Brown*, 5 Bush (Ky.) 535, 96 Am. Dec. 369.

And a sale cannot be made without a revivor against the decedent's heirs. *Burge v. Brown*, 5 Bush (Ky.) 535, 96 Am. Dec. 369.

Tennessee Doctrine. — In *Overton v. Perkins*, 10 Yerg. (Tenn.) 328, land had been levied on, but not sold before the return day of the execution. Subsequently the debtor died, and after his death a *venditioni exponas* issued, directing the property to be sold, but no scire facias or other process had issued to make the liens or personal representatives of the debtor parties. It was held that a sale could not be made.

4. Satisfaction and Discharge. — See the title JUDGMENTS AND DECREES.

2. By Levy and Sale — *a. LEVY ON PERSONAL PROPERTY* — (1) *General Rule — Satisfaction Presumed.* — It is well settled that the levy of an execution on personal property of sufficient value to satisfy the same operates *prima facie* as a satisfaction, so as to bar further executions or levies, or an action or scire facias on the judgment; ¹ and the burden of proof is upon the plaintiff or any other person who asserts that for any reason it does not constitute a satisfaction. ²

The Reason of the Rule is "that by the levy the defendant is in law deprived of his property, which, until the contrary is made to appear, is presumed to have been disposed of by the sheriff; and whether it is applied by the sheriff

1. *Levy on Sufficient Personal Property Is Prima Facie a Satisfaction — England.* — Clerk *v.* Withers, 2 Ld. Raym. 1072; Mountney *v.* Andrews, Cro. Eliz. 237; Slie *v.* Finch, 2 Rolle 57; Cockram *v.* Welbye, 2 Show. 79; Speake *v.* Richards, Hob. 206; Williams *v.* Cary, 4 Mod. 404.

United States. — U. S. *v.* Dashiell, 3 Wall (U. S.) 688; Campbell *v.* Pope, Hempst. (U. S.) 271; Corning *v.* Burdick, 4 McLean (U. S.) 133. *Alabama.* — Campbell *v.* Spence, 4 Ala. 543, 39 Am. Dec. 301; Rapier *v.* Gulf City Paper Co., 69 Ala. 476.

Arkansas. — Biscoe *v.* Sandefur, 14 Ark. 568; Whiting *v.* Beebe, 12 Ark. 421; Walker *v.* Bradley, 2 Ark. 578; Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338; Pettit *v.* Johnson, 15 Ark. 55.

California. — People *v.* Chisholm, 8 Cal. 29. *Delaware.* — Campbell *v.* Carey, 5 Harr. (Del.) 427.

Georgia. — Newsom *v.* McLendon, 6 Ga. 392; Chisolm *v.* Chittenden, 45 Ga. 213; Horn *v.* Ross, 20 Ga. 210, 65 Am. Dec. 621; Dowdell *v.* Neal, 10 Ga. 148; Dougherty *v.* Marsh, 11 Ga. 277; Foster *v.* Rutherford, 20 Ga. 676; Oliver *v.* State, 64 Ga. 480.

Illinois. — Ambrose *v.* Weed, 11 Ill. 490; Pearl *v.* Wellman, 8 Ill. 311; Montgomery *v.* Wayne, 14 Ill. 373; Smith *v.* Hughes, 24 Ill. 270; Yourt *v.* Hopkins, 24 Ill. 326; Martin *v.* Charter, 27 Ill. 294; Trenary *v.* Cheever, 48 Ill. 28; Chandler *v.* Higgins, 109 Ill. 602; Curtis *v.* Root, 28 Ill. 367; Harris *v.* Evans, 81 Ill. 419; Gregory *v.* Stark, 4 Ill. 611.

Indiana. — Lindley *v.* Kelley, 42 Ind. 294; Stewart *v.* Nunemaker, 2 Ind. 47; Law *v.* Smith, 4 Ind. 56; Barret *v.* Thompson, 5 Ind. 457; Frank *v.* Brasket, 44 Ind. 92; McCabe *v.* Goodwine, 65 Ind. 288; Harmon *v.* State, 82 Ind. 197.

Iowa. — Lucas *v.* Cassaday, 2 Greene (Iowa) 208; McWilliams *v.* Myers, 10 Iowa 325.

Kentucky. — Allen *v.* Johnson, 4 J. J. Marsh. (Ky.) 235; Morrow *v.* Hart, 1 A. K. Marsh. (Ky.) 291.

Maine. — Fuller *v.* Loring, 42 Me. 481.

Massachusetts. — Ladd *v.* Blunt, 4 Mass. 402.

Michigan. — Farmers', etc., Bank *v.* Kingsley, 2 Dougl. (Mich.) 379; Henry *v.* Gregory, 29 Mich. 68; Lustfield *v.* Ball, 103 Mich. 17; Friyer *v.* McNaughton, 110 Mich. 22.

Minnesota. — Hastings First Nat. Bank *v.* Rogers, 13 Minn. 407, 97 Am. Dec. 239; Bennett *v.* McGrade, 15 Minn. 132.

Mississippi. — Kershaw *v.* Merchants' Bank, 7 How. (Miss.) 386, 40 Am. Dec. 70; McGehee *v.* Handley, 5 How. (Miss.) 625; Doe *v.* Hamilton, 23 Miss. 496, 57 Am. Dec. 149; Locke *v.*

Brady, 30 Miss. 21; Wade *v.* Watt, 41 Miss. 248; Parker *v.* Dean, 45 Miss. 408; Walker *v.* McDowell, 4 Smed. & M. (Miss.) 118, 43 Am. Dec. 476; Peale *v.* Bolton, 24 Miss. 630; Brown *v.* Kidd, 34 Miss. 291; Alexander *v.* Polk, 39 Miss. 737; Parker *v.* Dean, 45 Miss. 408; Pickens *v.* Marlow, 2 Smed. & M. (Miss.) 428; Bingham *v.* Hyatt, Smed. & M. Ch. (Miss.) 437.

Missouri. — State *v.* Six, 80 Mo. 61; Blair *v.* Caldwell, 3 Mo. 353; Trigg *v.* Harris, 49 Mo. 176.

New Jersey. — Johnson *v.* Tuttle, 9 N. J. Eq. 365; Banta *v.* McClellan, 14 N. J. Eq. 120; Carr *v.* Weld, 19 N. J. Eq. 319; Conway *v.* Wilson, 44 N. J. Eq. 457; Hanness *v.* Bonnell, 23 N. J. L. 159.

New York. — Green *v.* Burke, 23 Wend. (N. Y.) 490; *Ex p.* Lawrence, 4 Cow. (N. Y.) 417, 15 Am. Dec. 386; Hoyt *v.* Hudson, 12 Johns. (N. Y.) 207; Wood *v.* Torrey, 6 Wend. (N. Y.) 562; Mickles *v.* Haskin, 11 Wend. (N. Y.) 125; People *v.* Hopson, 1 Den. (N. Y.) 574; Peck *v.* Tiffany, 2 N. Y. 451.

North Carolina. — Gilkey *v.* Dickerson, 3 Hawks (10 N. Car.) 293.

Ohio. — Cass *v.* Adams, 3 Ohio 223.

Pennsylvania. — Hunt *v.* Breeding, 12 S. & R. (Pa.) 37, 14 Am. Dec. 665; Porter *v.* Boone, 1 W. & S. (Pa.) 251.

South Carolina. — Davis *v.* Barkley, 1 Bailey L. (S. Car.) 142; McElwee *v.* Jeffreys, 7 S. Car. 228; Peay *v.* Fleming, 2 Hill Eq. (S. Car.) 97; Ordinary *v.* Spann, 1 Rich. L. (S. Car.) 429; Mayson *v.* Day, 1 Rich. (S. Car.) 435; Moore *v.* Kelly, 2 McMull. L. (S. Car.) 350.

South Dakota. — Wood *v.* Conrad, 2 S. Dak. 405.

Tennessee. — Young *v.* Read, 3 Yerg. (Tenn.) 297; Hogshead *v.* Carruth, 5 Yerg. (Tenn.) 227; Carroll *v.* Fields, 6 Yerg. (Tenn.) 305; Cook *v.* Smith, 1 Yerg. (Tenn.) 148; Fry *v.* Manlove, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775; Finley *v.* King, 1 Head (Tenn.) 123; Williams *v.* Bowdon, 1 Swan (Tenn.) 282. And see Clark *v.* Bell, 8 Humph. (Tenn.) 26.

Texas. — Cornelius *v.* Burford, 28 Tex. 202, 91 Am. Dec. 309; Cravens *v.* Wilson, 48 Tex. 324; Bryan *v.* Bridge, 10 Tex. 149; Garner *v.* Cutler, 28 Tex. 175; White *v.* Graves, 15 Tex. 183.

Virginia. — Taylor *v.* Dundass, 1 Wash. (Va.) 92; Bullitt *v.* Winston, 1 Munf. (Va.) 269.

West Virginia. — North Western Bank *v.* Hays, 37 W. Va. 475.

2. *Burden of Proof.* — Hastings First Nat. Bank *v.* Rogers, 13 Minn. 407, 97 Am. Dec. 239; Newsom *v.* McLendon, 6 Ga. 392. And see cases cited in the note preceding.

to the payment of the execution or not, it operates as a satisfaction in law." 1

Parties Collaterally Interested. — The rule applies as well in favor of parties collaterally interested in the satisfaction of the execution as it does in favor of the plaintiff in the execution.²

Value of Property. — To give rise to the presumption of satisfaction, the levy must have been made upon property of sufficient value to satisfy the same.³ Some courts have held that this must be shown affirmatively before satisfaction will be presumed,⁴ but others have held that when it appears that a levy has been made, and there is no showing as to the value of the property, the presumption is that it was of sufficient value to satisfy the execution.⁵

(2) *The Satisfaction Merely Prima Facie.* — In some of the cases it has been said broadly that the levy of an execution on sufficient personal property to satisfy it operates *per se* as a satisfaction, and that it discharges the judgment.⁶ Generally, however, the courts have not meant by this that there is an absolute satisfaction in all cases merely by virtue of the levy, and under all circumstances; and if they have intended to go so far the cases cannot now be regarded as authority. The levy is only *prima facie* evidence of a satisfaction, or, as it is sometimes said, there is a satisfaction *sub modo* only; and it is well settled that the presumption may be rebutted.⁷

1. **Reason of the Rule.** — *Brown v. Kidd*, 34 Miss. 291.

2. **Persons Interested Collaterally in Satisfaction of Execution.** — *Brown v. Kidd*, 34 Miss. 291. See *infra*, this section, *Satisfaction in Favor of Third Persons*.

3. **Property Must Be of Sufficient Value to Satisfy the Execution** — *Georgia*. — *Lynch v. Pressley*, 8 Ga. 327; *Marshall v. Morris*, 13 Ga. 185; *Horn v. Ross*, 20 Ga. 210, 65 Am. Dec. 621.

Illinois. — *Montgomery v. Wayne*, 14 Ill. 373; *Everingham v. National City Bank*, 25 Ill. App. 637.

Indiana. — *Indiana Cent. R. Co. v. Bradley*, 15 Ind. 23; *Lindley v. Kelley*, 42 Ind. 294.

Louisiana. — *Dabbs v. Hemken*, 3 Rob. (La.) 123; *Edwards v. Walker*, 4 Rob. (La.) 181.

Mississippi. — *Planters' Bank v. Spencer*, 3 Smed. & M. (Miss.) 305.

Missouri. — *Hombs v. Corbin*, 20 Mo. App. 497.

New Jersey. — *Moses v. Thomas*, 25 N. J. L. 124.

New York. — *Taylor v. Ranney*, 4 Hill (N. Y.) 619.

South Carolina. — *Mazyck v. Coil*, 2 Bailey L. (S. Car.) 101.

Tennessee. — *Fuller v. Watkins*, 11 Heisk. (Tenn.) 489.

In *Marshall v. Morris*, 13 Ga. 185, it was held that where an execution was for more than three times the amount of the value of the property levied on, the officer need not wait for a sale of the goods seized, but might proceed forthwith to replevy for the residue.

4. **Presumption as to Value.** — *Fuller v. Watkins*, 11 Heisk. (Tenn.) 489; *Taylor v. Ranney*, 4 Hill (N. Y.) 619.

5. *Anderson v. Fowler*, 8 Ark. 388; *North Western Bank v. Hays*, 37 W. Va. 475.

6. **Statement that the Levy Is Per Se a Satisfaction** — *England*. — *Mountney v. Andrews*, Cro. Eliz. 237; *Clerk v. Withers*, 1 Salk. 322.

Alabama. — *Campbell v. Spence*, 4 Ala. 543, 39 Am. Dec. 301.

California. — *People v. Chisholm*, 8 Cal. 29.

Illinois. — *Smith v. Hughes*, 24 Ill. 270;

Martin v. Charter, 27 Ill. 294; *Harris v. Evans*, 81 Ill. 419.

Mississippi. — *Kershaw v. Merchants' Bank*, 7 How. (Miss.) 386, 40 Am. Dec. 70.

New Jersey. — *Carr v. Weld*, 19 N. J. Eq. 319.

New York. — *Troup v. Wood*, 4 Johns. Ch. (N. Y.) 228; *Ex p. Lawrence*, 4 Cow. (N. Y.) 417, 15 Am. Dec. 386.

Pennsylvania. — *Hunt v. Breeding*, 12 S. & R. (Pa.) 37, 14 Am. Dec. 665.

Tennessee. — *Pigg v. Sparrow*, 3 Hayw. (Tenn.) 144; *Hogshead v. Carruth*, 5 Yerg. (Tenn.) 227.

Texas. — *Cornelius v. Burford*, 28 Tex. 202, 91 Am. Dec. 309.

7. **Presumption of Satisfaction from Levy May Be Rebutted** — *United States*. — *U. S. v. Dashiell*, 3 Wall. (U. S.) 688.

Alabama. — *Webb v. Bumpass*, 9 Port. (Ala.) 201, 33 Am. Dec. 310; *Crawford v. Mobile Bank*, 5 Ala. 55.

Arkansas. — *Walker v. Bradley*, 2 Ark. 578; *Caudle v. Dare*, 7 Ark. 46; *Biscoe v. Sandefur*, 14 Ark. 568; *Whiting v. Beebe*, 12 Ark. 421.

Georgia. — *Newsom v. McLendon*, 6 Ga. 392; *Lynch v. Pressley*, 8 Ga. 327.

Illinois. — *Montgomery v. Wayne*, 14 Ill. 373; *Trenary v. Cheever*, 48 Ill. 28; *Chandler v. Higgins*, 109 Ill. 602; *Curtis v. Root*, 28 Ill. 367; *Smith v. Lozano*, 1 Ill. App. 171; *Baker v. Mansur*, etc., *Implement Co.*, 67 Ill. App. 357; *Ambrose v. Weed*, 11 Ill. 488.

Indiana. — *Doe v. Dutton*, 2 Ind. 309, 52 Am. Dec. 510.

Iowa. — *Williams v. Gartrell*, 4 Greene (Iowa) 287.

Kentucky. — *Morrow v. Hart*, 1 A. K. Marsh. (Ky.) 292.

Maine. — *Fuller v. Loring*, 42 Me. 481.

Michigan. — *Farmers', etc., Bank v. Kingsley*, 2 Doug. (Mich.) 379; *Lustfield v. Ball*, 103 Mich. 17.

Minnesota. — *Bennett v. McGrade*, 15 Minn. 132; *Willis v. Jelineck*, 27 Minn. 18.

Mississippi. — *Banks v. Evans*, 10 Smed. & M. (Miss.) 35, 48 Am. Dec. 734; *Wade v. Watt*, 41 Miss. 248; *Walker v. McDowell*, 4 Smed. &

(3) *Circumstances Rebutting Presumption* — (a) **General Rule.** — It may be laid down as a general rule that the presumption of satisfaction arising from a levy on personal property is rebutted, as far as the defendant is concerned, by proof that the plaintiff has been prevented by the act of the defendant or the operation of law from reaping the fruits of his levy; or, generally, by showing that, for any other reason not due to the fault of the officer or himself, there has been no actual satisfaction.¹

(b) **Waste, Destruction, or Loss of Property.** — The *prima facie* satisfaction resulting from a levy becomes absolute, if the property is wasted, destroyed, or otherwise lost through the misconduct or negligence of the plaintiff or the officer,² and in the latter case the remedy of the plaintiff is against the officer.³ There is no satisfaction, however, if the property is destroyed or lost without any fault on their part, but in such a case the loss falls on the defendant.⁴

(c) **Property Not Taken from the Defendant's Possession.** — A levy is not a satisfaction of the execution in favor of the defendant, though it may be in favor of third persons,⁵ if the defendant is left in possession of the property and permitted

M. (Miss.) 118, 43 Am. Dec. 476; *Pickens v. Marlow*, 2 Smed. & M. (Miss.) 428; *Alexander v. Polk*, 39 Miss. 737; *Moody v. Harper*, 28 Miss. 615.

Missouri. — *Moss v. Craft*, 10 Mo. 720; *Williams v. Boyce*, 11 Mo. 537; *Lillard v. Shannon*, 60 Mo. 522; *Blackburn v. Jackson*, 26 Mo. 310.

New Hampshire. — *Churchill v. Warren*, 2 N. H. 298, 9 Am. Dec. 73.

New Jersey. — *Hanness v. Bonnell*, 23 N. J. L. 159; *Banta v. McClennan*, 14 N. J. Eq. 120.

New York. — *Green v. Burke*, 23 Wend. (N. Y.) 490; *People v. Hopson*, 1 Den. (N. Y.) 574; *Peck v. Tiffany*, 2 N. Y. 451; *Taylor v. Ranney*, 4 Hill (N. Y.) 619; *Denvery v. Fox*, 22 Barb. (N. Y.) 522; *Waddell v. Elmendorf*, 5 Den. (N. Y.) 447; *Voorhees v. Gros*, 3 How. Pr. (N. Y. Supreme Ct.) 262; *Radde v. Whitney*, 4 E. D. Smith (N. Y.) 378.

North Carolina. — *Matter of King*, 2 Dev. L. (13 N. Car.) 341, 21 Am. Dec. 335; *Binford v. Alston*, 4 Dev. L. (15 N. Car.) 351.

Ohio. — *Ford v. Skinner*, 4 Ohio 378.

Oregon. — *Wright v. Young*, 6 Oregon 87.

Pennsylvania. — *Taylor's Appeal*, 1 Pa. St. 390; *Hoard v. Wilcox*, 47 Pa. St. 51; *Rice v. Groff*, 58 Pa. St. 116; *Bean v. Seyfert*, 12 Phila. (Pa.) 224, 34 Leg. Int. (Pa.) 338; *Peddle v. Hollinshead*, 9 S. & R. (Pa.) 277.

South Carolina. — *McElwee v. Jeffreys*, 7 S. Car. 228; *Stone v. Tucker*, 2 Bailey L. (S. Car.) 495; *Dilling v. Foster*, 21 S. Car. 334; *Lawrence v. Wofford*, 17 S. Car. 586; *Peay v. Fleming*, 2 Hill Eq. (S. Car.) 97.

Tennessee. — *Fry v. Manlove*, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775; *State Bank v. Turney*, 7 Humph. (Tenn.) 271; *Williams v. Bowden*, 1 Swan (Tenn.) 282.

Texas. — *Cravans v. Wilson*, 35 Tex. 52; *Garner v. Cutler*, 28 Tex. 175.

Virginia. — *Walker v. Com.*, 18 Gratt. (Va.) 13, 98 Am. Dec. 631; *Rhea v. Preston*, 75 Va. 757; *Com. v. Byrne*, 20 Gratt. (Va.) 207.

1. **Circumstances that Will Rebut the Presumption of Satisfaction.** — *Nelson v. Ferris*, 30 Mich. 497; *Garner v. Cutler*, 28 Tex. 175. And see *Williams v. Gartrell*, 4 Greene (Iowa) 287.

Proof of Inability to Sell for want of bidders rebuts any presumption of satisfaction. See

Peddler v. Hollinshead, 9 S. & R. (Pa.) 277, and *Morton v. Smith*, 2 Dill. (U. S.) 316.

The same is true where there was inability to sell for want of time to advertise. See *Beebe v. U. S.*, 161 U. S. 104.

Judgment Obtained as Collateral Security. — A levy by virtue of an execution upon a judgment obtained as a collateral security for the payment of another judgment is not a satisfaction of the latter. *Ontario Bank v. Hallett*, 8 Cow. (N. Y.) 192.

2. **Waste, Destruction, or Loss of Property — Neglect or Misconduct of Execution Plaintiff or Officer — United States.** — *Corning v. Burdick*, 4 McLean (U. S.) 133.

Alabama. — *Campbell v. Spence*, 4 Ala. 543, 39 Am. Dec. 301.

Illinois. — *Harris v. Evans*, 81 Ill. 419.

Indiana. — *Stewart v. Nuncemaker*, 2 Ind. 47; *McCabe v. Goodwine*, 65 Ind. 288; *Harmon v. State*, 82 Ind. 197.

Maine. — *Fuller v. Loring*, 42 Me. 481.

Massachusetts. — *Ladd v. Blunt*, 4 Mass. 402.

Missouri. — *Kenrick v. Huff*, 71 Mo. 570.

New Jersey. — *Banta v. McClennan*, 14 N. J. Eq. 120.

New York. — *Peck v. Tiffany*, 2 N. Y. 451; *Hoyt v. Hudson*, 12 Johns. (N. Y.) 207; *People v. Hopson*, 1 Den. (N. Y.) 574; *Matter of Dawson*, 20 Abb. N. Cas. (N. Y. Supreme Ct.) 188, *affirmed*, without opinion, in 47 Hun (N. Y.) 634.

Virginia. — *Walker v. Com.*, 18 Gratt. (Va.) 13, 98 Am. Dec. 631.

3. See the title SHERIFFS, MARSHALS, AND CONSTABLES.

Delivery of Property to Third Person. — If an officer, on levying an execution, delivers the goods to a third person on his giving a receipt to return them or pay the amount of the execution, he cannot afterwards take other goods of the defendant. *Hoyt v. Hudson*, 12 Johns. (N. Y.) 207.

4. **Loss Without Fault of Plaintiff or the Officer.** — *Starr v. Moore*, 3 McLean (U. S.) 354; *Whitcomb v. Beebe*, 12 Ark. 421; *McElwee v. Jeffreys*, 7 S. Car. 228.

5. **Property Left in Defendant's Possession.** — See *infra*, this section, *Satisfaction in Favor of Third Persons*.

to use it as his own, and no further steps are taken under the writ.¹

Sheriff's Liability for Neglect Does Not Prevent Issuance of New Writ. — Where property has been left in the debtor's possession and has been lost to the plaintiff, through the neglect or misconduct of the sheriff or other officer, and the loss has not been occasioned by the fraud or acquiescence of the creditor, the fact that the officer and his sureties are liable to the creditor does not affect the right of the creditor to sue out an *alias* execution, as the remedies against the debtor and the officer are cumulative.²

(d) **Removal or Withdrawal of Property by the Defendant.** — There is no satisfaction if, after the levy of an execution on sufficient property to satisfy the same, but before a sale, the defendant, or another with his permission or connivance, withdraws or removes the property levied upon without the consent of the plaintiff or the levying officer,³ or if he obtains possession under false pretenses as to the title.⁴

(e) **Restoration of Property and Abandonment of Levy.** — Nor is there a satisfaction in favor of the defendant, if the property levied upon is restored to him or to another for his benefit, at his request, or with his consent.⁵ It has been held

1. *Georgia*. — See *Marshall v. Morris*, 13 Ga. 185.

Illinois. — *Montgomery v. Wayne*, 14 Ill. 373.

Indiana. — *Cooley v. Harper*, 4 Ind. 454.

Michigan. — *Lustfield v. Ball*, 103 Mich. 17.

Minnesota. — *Bennett v. McGrade*, 15 Minn. 132.

Mississippi. — *Banks v. Evans*, 10 Smed. & M. (Miss.) 35, 48 Am. Dec. 734; *Wade v. Watt*, 41 Miss. 248.

New York. — *Peck v. Tiffany*, 2 N. Y. 451; *Denvrey v. Fox*, 22 Barb. (N. Y.) 522.

North Carolina. — *Binford v. Alston*, 4 Dev. L. (15 N. Car.) 351.

Pennsylvania. — *Cummin's Appeal*, 9 W. & S. (Pa.) 73; *David's v. Harris*, 9 Pa. St. 501; *Cathcart's Appeal*, 13 Pa. St. 416; *Campbell's Appeal*, 32 Pa. St. 88.

South Carolina. — *Stone v. Tucker*, 2 Bailey L. (S. Car.) 495.

Tennessee. — *Charlton v. Lay*, 5 Humph. (Tenn.) 496.

Texas. — *Garner v. Cutler*, 28 Tex. 175; *Cravens v. Wilson*, 48 Tex. 324.

Virginia. — *Rhea v. Preston*, 75 Va. 757.

Destruction of Property. — Where the sheriff levies an execution on personal property, and at the solicitation of the defendant permits it to remain in his possession, and the property is afterwards destroyed, the loss falls upon the defendant in the execution, and not on the sheriff. *Wade v. Watt*, 41 Miss. 248.

See also *Lear v. Edmonds*, 1 B. & Ald. 157, wherein it is expressly laid down by Abbott, J., where goods had been seized on a distress for rent, that "if the goods have been relinquished at the request of the party, then the distress would not operate as a bar" to an action for rent.

2. Sheriff Liable — Cumulative Remedies. — *Cooley v. Harper*, 4 Ind. 454, wherein it is said that to decide otherwise would only have the effect of producing circuity of action, for, if the sheriff should be required to satisfy the plaintiff, the defendant would in turn be answerable to the sheriff. See also, to the same effect, *Howard v. Bennett*, 72 Ill. 297; *Williams v. Bowdon*, 1 Swan (Tenn.) 282.

3. No Satisfaction if Property Be Removed or Withdrawn by the Defendant — *Alabama*. — *Webb v. Bumpass*, 9 Port. (Ala.) 201, 33 Am. Dec. 310.

Arkansas. — *Biscoe v. Sandefur*, 14 Ark. 568.

California. — *Barber v. Reynolds*, 44 Cal. 534.

Illinois. — *Ambrose v. Weed*, 11 Ill. 488; *Montgomery v. Wayne*, 14 Ill. 373; *Smith v. Hughes*, 24 Ill. 270; *Curtis v. Root*, 28 Ill. 367; *Trenary v. Cheever*, 48 Ill. 28.

New Jersey. — *Hanness v. Bonnell*, 23 N. J. L. 159.

New York. — *Ontario Bank v. Hallett*, 8 Cow. (N. Y.) 192; *Mickles v. Haskin*, 11 Wend. (N. Y.) 125; *People v. Onondaga C. P.*, 19 Wend. (N. Y.) 79.

Virginia. — *Walker v. Com.*, 18 Gratt. (Va.) 13, 98 Am. Dec. 631.

4. Possession Obtained by False Pretenses. — *Ontario Bank v. Hallett*, 8 Cow. (N. Y.) 192.

5. Restoration or Abandonment at Request of Defendant — *England*. — See *Lear v. Edmonds*, 1 B. & Ald. 157.

United States. — *U. S. v. Dashiell*, 3 Wall. (U. S.) 688.

Alabama. — *Summerhill v. Trapp*, 48 Ala. 363.

Arkansas. — *Walker v. Bradley*, 2 Ark. 578; *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338; *Biscoe v. Sandefur*, 14 Ark. 568.

Illinois. — *Howard v. Bennett*, 72 Ill. 297; *Chandler v. Higgins*, 109 Ill. 602.

Kentucky. — *M'Ginniss v. Lilliard*, 4 Bibb (Ky.) 490; *Morrow v. Hart*, 1 A. K. Marsh. (Ky.) 292.

Minnesota. — *Hastings First Nat. Bank v. Rogers*, 15 Minn. 381; *Willis v. Jelineck*, 27 Minn. 18.

Mississippi. — *Walker v. McDowell*, 4 Smed. & M. (Miss.) 118, 43 Am. Dec. 476.

Missouri. — *Young v. Cleveland*, 33 Mo. 126, 82 Am. Dec. 155; *Blackburn v. Jackson*, 26 Mo. 308; *Lillard v. Shannon*, 60 Mo. 522.

New Hampshire. — *Churchill v. Warren*, 2 N. H. 298, 9 Am. Dec. 73.

New Jersey. — *Conway v. Wilson*, 44 N. J. Eq. 457.

New York. — *People v. Hopson*, 1 Den. (N. Y.) 574; *Ostrander v. Walter*, 2 Hill (N. Y.)

in effect that this rule does not apply where a levy is abandoned and the property returned under a new contract with the defendant, as where he promises or binds himself to pay the debt on a future day.¹ But there are several cases to the contrary.² The rule does not apply where a levy is abandoned without the defendant's consent, if there is no necessity for its abandonment.³

(f) **Abandonment of Invalid or Wrongful Levy.** — If the levy of an execution is wrongful or invalid, so that the officer has no right to proceed further under the same and sell the property, and it is therefore abandoned, it does not constitute a satisfaction.⁴

Levy on Property of a Third Person. — There is no satisfaction if a levy on property

329; *Holbrook v. Champlin*, Hoffm. Ch. (N. Y.) 148; *Voorhees v. Gros*, 3 How. Pr. (N. Y. Supreme Ct.) 262.

North Carolina. — *Parker v. Jones*, 5 Jones Eq. (58 N. Car.) 276, 75 Am. Dec. 441; *Matter of King*, 2 Dev. L. (13 N. Car.) 341, 21 Am. Dec. 335; *Howerton v. Sprague*, 64 N. Car. 451; *Douglas v. Mitchell*, 3 Murph. (7 N. Car.) 239.

Ohio. — *Ford v. Skinner*, 4 Ohio 378.

Oregon. — *Wright v. Young*, 6 Oregon 87.

Pennsylvania. — *Porter v. Boone*, 1 W. & S. (Pa.) 251; *Duncan v. Harris*, 17 S. & R. (Pa.) 436; *Taylor's Appeal*, 1 Pa. St. 390.

Tennessee. — *Williams v. Bowdon*, 1 Swan (Tenn.) 283; *Carns v. Pickett*, 2 Sneed (Tenn.) 655; *Murphy v. Partee*, 7 Baxt. (Tenn.) 373.

Virginia. — *Walker v. Com.*, 18 Gratt. (Va.) 13, 98 Am. Dec. 631.

1. Abandonment under New Agreement with Defendant. — *Blair v. Caldwell*, 3 Mo. 353.

2. On the other hand, in *Williams v. Boyce*, 11 Mo. 537, it was held, without referring to the case of *Blair v. Caldwell*, above cited, that the levy of an execution upon property sufficient to satisfy it, and its release, and a return of the property to the defendant, upon a new agreement between him and the plaintiff, was not a satisfaction. See also *Wright v. Young*, 6 Oregon 87; *Duncan v. Harris*, 17 S. & R. (Pa.) 436; *Holbrook v. Champlin*, Hoffm. Ch. (N. Y.) 148.

3. Abandonment of Levy Without Defendant's Consent. — "It cannot be tolerated," said the Tennessee court, "to let an officer exercise the discretion of abandoning at his pleasure the property he has seized; nor can it be permitted that the plaintiff in the execution shall, by his order or assent, change the direction which the law affixes to final process in the hands of her officers." *Young v. Read*, 3 Yerg. (Tenn.) 297; *McIver v. Ballard*, 96 Ind. 76; *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338. And see *McWilliams v. Myers*, 10 Iowa 325; *Smith v. Hughes*, 24 Ill. 270; *Colburn v. Bartlett*, 17 Ill. App. 391; *Neff v. Hagaman*, 78 Ind. 57; *Harmon v. State*, 82 Ind. 197; *Moore v. Kelly*, 2 McMull. L. (S. Car.) 350.

Abandonment Before Levy. — An execution is not satisfied by abandonment of the writ before levy. See *Steele v. Murray*, 1 Blackf. (Ind.) 179; *McIver v. Ballard*, 96 Ind. 76; *Cairns v. Smith*, 8 Johns. (N. Y.) 337.

Release of Property upon Failure to Give Indemnifying Bond. — Where property is levied upon and the sheriff restores it to the debtor because of the creditor's failure to execute an indemnifying bond, the levy does not preclude the plaintiff from suing out an alias writ and seiz-

ing the same property as was taken under the first writ. *Clark v. Reiniger*, 66 Iowa 507.

In Georgia, after a levy has been made and a claim interposed, but before the claim papers have been returned to the court, the sheriff may execute the process anew by a further levy; but after the claim has been returned to the court, the sheriff has no right to withdraw the execution at his pleasure and re-levy, except by leave and order of the court. *Wyatt v. Chapman*, 66 Ga. 727. See also *Branch v. Riley*, 19 Ga. 161; *Ayers v. Lamb*, 65 Ga. 627; *State v. Jeter*, 65 Ga. 256; *Lynch v. Pressley*, 8 Ga. 327; *Wyley v. Stanford*, 22 Ga. 385; *Kendall v. Westbrook*, 54 Ga. 587; *Hardwick v. Whitfield*, 31 Ga. 684; *Rawson v. Gregory*, 59 Ga. 733; *Manry v. Shepperd*, 57 Ga. 68.

4. Abandonment of Invalid Levy. — *Ezra v. Manlove*, 7 Blackf. (Ind.) 389; *Com. v. Abell*, 6 J. J. Marsh. (Ky.) 476; *Perry v. Perry*, 2 Gray (Mass.) 326; *Dewing v. Durant*, 10 Gray (Mass.) 29; *Green v. Burke*, 23 Wend. (N. Y.) 490; *Bisbee v. Hall*, 3 Ohio 449; *McKeeby v. Webster*, 170 Pa. St. 624. And see *Stoyel v. Cady*, 4 Day (Conn.) 222; *Langdon v. Langdon*, 1 Root (Conn.) 453; *Pillsbury v. Smyth*, 25 Me. 427; *Burnham v. Coffin*, 8 N. H. 114, 28 Am. Dec. 383; *Bole v. Bogardis*, 86 Pa. St. 37.

In *Mulford v. Estudillo*, 32 Cal. 131, on the return of a mandate from the Supreme Court of the United States to the circuit court, affirming the judgment of the circuit court, a new judgment was rendered by the circuit court, and an execution was issued on the new judgment and levied on property sufficient to satisfy it. It was held that the circuit court had no jurisdiction to render the new judgment, and that the levy, therefore, was not a satisfaction of the original judgment.

Levy by Officer Who Is a Minor—Abandonment. — In *Green v. Burke*, 23 Wend. (N. Y.) 490, a levy was made by the constable, who at the time was a minor, and he subsequently abandoned the levy to relieve himself from the consequence of taking upon himself the duties of the office while within age. It was held that the levy was not a satisfaction, and that the plaintiff might sue out a new execution and levy upon other property.

Appraisal Law. — Where an execution was levied upon personal property, and the benefit of the *Arkansas Appraisalment Act of 1846* was claimed by the defendant, and the property failed to bring two-thirds of its appraised value when offered for sale by the sheriff, and was returned to the defendant, it was held that the levy was not a satisfaction

is abandoned and the property released because it does not belong to the defendant, and is therefore not liable to seizure under the execution.¹

(g) **Release of Property under Forthcoming or Delivery Bond.** — There is a conflict in the decisions as to the effect of a release of property levied upon when the defendant gives a forthcoming or delivery bond.

Effect Before Breach of Conditions. — No doubt all the courts will hold that the right to levy an execution is at least suspended after such a bond is given, so long as there has been no breach of its conditions, provided the bond is regular and valid.²

Effect After Breach of Conditions. — Under some statutes, when the property levied upon is released under a valid forthcoming or delivery bond, and the bond is forfeited for breach of its conditions, the forfeiture has the operation and effect of a judgment, and it is held that it satisfies and extinguishes the original judgment and execution.³ Where, however, the statute is such that forfeiture of a forthcoming or delivery bond does not have the effect of a judgment, when the bond is forfeited the plaintiff may either proceed under it against the defendant and his sureties, or issue an execution on the original

of the execution, and that the plaintiff was entitled to an *alias* writ to procure satisfaction of his judgment. *Caudle v. Dare*, 7 Ark. 46.

1. Release of Levy After Claim by Third Person. — In *Lynch v. Pressley*, 8 Ga. 328, it was held that there was no satisfaction of an execution by reason of a levy, where the property was claimed by a third person, and the plaintiff in the execution released and dismissed the levy because of want of evidence to show that the property was liable to seizure. It was held that the plaintiff in such a case need not wait until the claim was disposed of, but could re-levy upon other property. See also *Patton v. Hamner*, 33 Ala. 307; *Walker v. McDowell*, 4 Smed. & M. (Miss.) 118, 43 Am. Dec. 476; *Blivin v. Bleakley*, 23 How. Pr. (N. Y. Supreme Ct.) 124; *Burns v. Toner*, 9 Phila. (Pa.) 37, 29 Leg. Int. (Pa.) 68; *State Bank v. Turney*, 7 Humph. (Tenn.) 271; *Murphy v. Partee*, 7 Baxt. (Tenn.) 373.

In Mississippi, where a claimant of property makes an affidavit and bond, further proceedings on the execution must be stayed until the final decision of the claim, to the extent of the value of the property claimed; but the officer may make an additional levy for the amount of the execution, less the value of the property claimed. *Davis v. Netterville*, 68 Miss. 429.

In Pennsylvania it has been held that, upon a claim being made by a third person, the sheriff may either abandon the levy or restrict it to the defendant's interest. *Dixon v. White Sewing Mach. Co.*, 128 Pa. St. 397, 15 Am. St. Rep. 683, in which case it is said: "The general right of the sheriff to change his levy, to enlarge, or restrict, or abandon it, is unquestionable. Having made a mistake, he is not bound to persevere in it." See also *Patterson v. Anderson*, 40 Pa. St. 363, 80 Am. Dec. 579; *Schuylkill County's Appeal*, 30 Pa. St. 358.

Property Subject to a Mortgage. — There is no satisfaction if a levy is released by the plaintiff because the property is mortgaged and the condition of the mortgage has not been broken. *Dilling v. Foster*, 21 S. Car. 334.

2. Effect of Giving Forthcoming or Delivery Bond — Suspension of Right to Levy Before Forfeiture. — See *U. S. v. Graves*, 2 Brock. (U. S.) 385; *Rhea v. Preston*, 75 Va. 757; *Harrison v.*

Wilson, 2 A. K. Marsh. (Ky.) 547; *Chancellor v. Vanhook*, 2 B. Mon. (Ky.) 447; *Houser v. Williams*, 84 Ga. 601.

3. Effect After Forfeiture — Forfeiture Having Effect of Judgment. — *United States*. — *U. S. v. Graves*, 2 Brock. (U. S.) 379; *Brown v. Clarke*, 4 How. (U. S.) 4. The first of the above cases was decided under the *Virginia* practice, and the latter under the *Mississippi* practice. See also *Amis v. Smith*, 16 Pet. (U. S.) 303.

Arkansas. — *Biscoe v. Sandefur*, 14 Ark. 568; *Wright v. Yell*, 13 Ark. 503, 58 Am. Dec. 336; *Whiting v. Beebe*, 12 Ark. 421, *Douglas v. Twombly*, 25 Ark. 124; *Lipscomb v. Grace*, 26 Ark. 231, 7 Am. Rep. 607.

Kentucky. — *Joyce v. Farquhar*, 1 A. K. Marsh. (Ky.) 20; *Harrison v. Wilson*, 2 A. K. Marsh. (Ky.) 547; *Chitty v. Glenn*, 3 T. B. Mon. (Ky.) 424.

Mississippi. — *Witherspoon v. Spring*, 3 How. (Miss.) 60, 32 Am. Dec. 310; *M'Nutt v. Wilcox*, 3 How. (Miss.) 417; *Davis v. Dixon*, 1 How. (Miss.) 64, 26 Am. Dec. 695; *Weathersby v. Proby*, 1 How. (Miss.) 98; *U. S. Bank v. Patton*, 5 How. (Miss.) 200, 35 Am. Dec. 428; *Barker v. Planters' Bank*, 5 How. (Miss.) 566; *Minor v. Lancashire*, 4 How. (Miss.) 347; *Wanzer v. Barker*, 4 How. (Miss.) 363; *Clark v. Anderson*, 2 How. (Miss.) 852; *Field v. Morse*, 1 Smed. & M. (Miss.) 347; *Burns v. Stanton*, 2 Smed. & M. (Miss.) 457; *Stewart v. Fuqua*, Walk. (Miss.) 175; *Connell v. Lewis*, Walk. (Miss.) 251; *Sampson v. Breed*, Walk. (Miss.) 267; *Davis v. Hoopes*, 33 Miss. 173.

Tennessee. — *Young v. Read*, 3 Yerg. (Tenn.) 297; *Camp v. Laird*, 6 Yerg. (Tenn.) 246; *Carroll v. Fields*, 6 Yerg. (Tenn.) 305; *Pigg v. Sparrow*, 3 Hayw. (Tenn.) 144.

Virginia. — *Taylor v. Dundass*, 1 Wash. (Va.) 92; *Lusk v. Ramsay*, 3 Munf. (Va.) 417. And see *Downman v. Chinn*, 2 Wash. (Va.) 189; *Randolph v. Randolph*, 3 Rand. (Va.) 490.

Until Forfeiture of the bond, there is no satisfaction, even in those jurisdictions in which it is held that there is a satisfaction after the bond is forfeited. *Cooke v. Piles*, 2 Munf. (Va.) 153; *Lusk v. Ramsay*, 3 Munf. (Va.) 417; *Pingaman v. Hyatt*, Smed. & M. Ch. (Miss.) 437.

judgment, or, if necessary, bring a suit or proceeding by scire facias to revive the same.¹

If the Bond Is Invalid, so that there is no remedy upon it, or is quashed, there is no satisfaction.²

(h) Delay or Postponement of Sale. — Postponement of an execution sale or delay in selling, if at the request of the defendant, or, when without his consent, if it does not prejudice him, does not affect the plaintiff's right to proceed with the sale,³ though it may release sureties, or postpone the plaintiff's execution in favor of junior lien holders.⁴

(i) Satisfaction Prevented by Legal Process or Proceedings. — If the property levied upon is taken from the officer, and an actual satisfaction prevented, by legal process or proceedings, without fault on his part or on the part of the plaintiff, the levy is not a satisfaction.⁵

1. Doctrine that There Is No Satisfaction — Remedies Cumulative. — *Alabama*. — *Hopkins v. Land*, 4 Ala. 427; *Crawford v. Mobile Bank*, 5 Ala. 55; *Caperton v. Martin*, 5 Ala. 217.

Arkansas. — *Walker v. Bradley*, 2 Ark. 578.

Georgia. — *Chesapeake Guano Co. v. Wilder*, 85 Ga. 550.

Louisiana. — *Williams v. Brent*, 7 Martin N. S. (La.) 211.

Missouri. — *Lillard v. Shannon*, 60 Mo. 522.

North Carolina. — *Parker v. Jones*, 5 Jones Eq. (58 N. Car.) 276, 75 Am. Dec. 441; *Matter of King*, 2 Dev. L. (13 N. Car.) 341, 21 Am. Dec. 335.

Pennsylvania. — *Taylor's Appeal*, 1 Pa. St. 390; *Lantz v. Worthington*, 4 Pa. St. 153, 45 Am. Dec. 682; *Taylor v. Hulme*, 4 W. & S. (Pa.) 407.

Texas. — *Cole v. Robertson*, 6 Tex. 356, 55 Am. Dec. 784.

In Illinois, it is expressly provided by statute that an officer may take a forthcoming bond and deliver the property levied upon to the owner, and that, if the property is not produced at the sale in compliance with the condition of the bond, he may proceed with the execution in the same manner as if no levy had been made. See *Martin v. Charter*, 27 Ill. 204; *Ambrose v. Weed*, 11 Ill. 488; *Trenary v. Cheever*, 48 Ill. 28; *Curtis v. Root*, 28 Ill. 367; *Smith v. Lozano*, 1 Ill. App. 171.

2. No Satisfaction Where the Bond Is Invalid. — *Bingaman v. Hyatt*, Smed. & M. Ch. (Miss.) 437; *Rhea v. Preston*, 75 Va. 757.

Even where the statute gives a forfeited forthcoming or delivery bond the effect of a judgment, so that it will operate to extinguish the original judgment, it will not have this effect if it be quashed, but in such a case the effect will be to revive the original judgment. *Whiting v. Beebe*, 12 Ark. 421; *Bingaman v. Hyatt*, Smed. & M. Ch. (Miss.) 437. Compare *Douglas v. Twombly*, 25 Ark. 124.

3. Delay or Postponement of Sale under Execution. — *United States*. — *Berry v. Smith*, 3 Wash. (U. S.) 60.

Georgia. — *Jones v. Parker*, 55 Ga. 11; *Terry v. Bank of Americus*, 77 Ga. 528.

Indiana. — *State v. Nelson*, 1 Ind. 522; *Cooley v. Harper*, 4 Ind. 454; *Brown v. Loesch*, 3 Ind. App. 145.

Iowa. — *Williams v. Gartrell*, 4 Greene (Iowa) 287.

Mississippi. — *Reynolds v. Ingersoll*, 11 Smed. & M. (Miss.) 249, 49 Am. Dec. 57.

Missouri. — *Hard v. Foster*, 98 Mo. 207.

New York. — *Russell v. Gibbs*, 5 Cow. (N. Y.) 390.

North Carolina. — *Mangum v. Hamlet*, 8 Ired. L. (30 N. Car.) 44.

Ohio. — *Acton v. Knowles*, 14 Ohio St. 18.

Pennsylvania. — *Keyser's Appeal*, 13 Pa. St. 409; *Howell v. Alkyn*, 2 Rawle (Pa.) 282; *Chancellor v. Phillips*, 4 Dall. (Pa.) 213; *Lantz v. Worthington*, 4 Pa. St. 153, 45 Am. Dec. 682; *McGinnis v. Prieson*, 85 Pa. St. 111; *Connell v. O'Neil*, 154 Pa. St. 582.

Tennessee. — *Brown v. Allen*, 3 Head (Tenn.) 429.

Virginia. — *Walker v. Com.*, 18 Gratt. (Va.) 13, 98 Am. Dec. 631.

4. See *infra*, this section, *Satisfaction in Favor of Third Persons*.

5. Satisfaction Prevented by Legal Process or Proceedings. — *Alexander v. Polk*, 39 Miss. 737; *Hanness v. Bonnell*, 23 N. J. L. 159; *Fry v. Manlove*, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775.

Release by Order of Court. — If, after an execution has been levied on sufficient property to satisfy the same, the court orders that the judgment be not enforced, the order releases the levy, and the levy will not operate as a satisfaction. *Mulford v. Estudillo*, 32 Cal. 131.

On an Injunction being granted against further proceedings under an execution, after the same has been levied upon chattels, the sheriff is bound to restore the property to the owner, and the levy will not constitute a satisfaction. *Bisbee v. Hall*, 3 Ohio 449; *Lockridge v. Biggerstaff*, 2 Duv. (Ky.) 281, 87 Am. Dec. 468; *Telford v. Cox*, 15 Lea (Tenn.) 298; *Keith v. Wilson*, 3 Metc. (Ky.) 202. And see *Stackhouse v. Zuntz*, 41 La. Ann. 415.

Property Placed in Hands of Receiver. — The presumption of satisfaction from the fact of levy is sufficiently rebutted, if it appears by the sheriff's return that the property was taken out of his possession by due course of law, and placed in the possession of a receiver in chancery, whether such action was taken at the instance of the defendant or not. *Alexander v. Polk*, 39 Miss. 737.

Interpleader. — A levy is not a satisfaction if the officer is prevented from selling by an interpleader. *Rice v. Groff*, 58 Pa. St. 116; *Bean v. Sevfert*, 12 Phila. (Pa.) 224, 34 Leg. Int. (Pa.) 338.

Merely pendency of an interpleader is not

(j) **Insufficiency of Proceeds** — *aa. IN GENERAL.* — If the proceeds realized upon a sale of property levied upon under an execution are not sufficient to satisfy the execution, it operates as a satisfaction *pro tanto* only; and the plaintiff is entitled to another writ in order to obtain satisfaction in full, provided the failure of the property to produce sufficient to satisfy the execution was not due to any fault on his part, or on the part of the officer.¹

bb. APPLICATION OF PROCEEDS TO SUPERIOR CLAIMS. — Even when the proceeds realized on a sale under the execution are sufficient to satisfy the same, the levy will not operate as a satisfaction if the proceeds are exhausted because of their application to the satisfaction of prior executions, or to the payment of any debt which is a prior lien.²

enough, if it has not been determined. *Burns v. Toner*, 9 Phila. (Pa.) 37, 29 Leg. Int. (Pa.) 68.

Replevin. — If the property levied upon is taken from the officer by replevin by a third person, there is no satisfaction; but the replevin suit must have been determined. The mere pendency thereof is not ground for issuing an *alias* writ. *Dawson v. Sparks*, 77 Ind. 88; *Stewart v. Nunemaker*, 2 Ind. 47; *Hunn v. Hough*, 5 Heisk. (Tenn.) 708. See also *Murphy v. Partee*, 7 Baxt. (Tenn.) 373.

Writ of Error and Supersedeas. — In *Walker v. McDowell*, 4 Smed. & M. (Miss.) 118, 43 Am. Dec. 476, it was held that, where a levy has been made on personal property, and the sheriff has returned the execution "superse- ded," and it appears from the record that the judgment upon which the execution issued had been removed to the high court of errors and appeals, and judgment rendered there upon the writ of error bond against the principal and sureties therein, the facts show a removal of the levy. See also *Keith v. Wilson*, 3 Metc. (Ky.) 202; *Parker v. Dean*, 45 Miss. 408; *Fry v. Manlove*, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775; *Rocco v. Parczyk*, 9 Lea (Tenn.) 328; *McCamy v. Lawson*, 3 Head (Tenn.) 256.

The issuance of an execution which was superseded by a writ of error is not sufficient to destroy the presumption of satisfaction arising from a previous levy on personal property, if the regularity of the execution thus contested does not appear to have been determined. *Brown v. Kidd*, 34 Miss. 291.

Delivery on Claim of Property by Third Person. — Where an execution has been levied on personal property, and a claimant's bond is given to try the right to the property levied on, the condition of which is, among other things, for the redelivery of the property, and the statute provides that upon the execution of a claimant's bond the property levied on shall be delivered to the claimant, the execution of the claimant's bond removes the levy on the property. *Walker v. McDowell*, 4 Smed. & M. (Miss.) 118, 43 Am. Dec. 476.

1. Proceeds of Property Insufficient to Satisfy Execution — *United States.* — *Corning v. Burdick*, 4 McLean (U. S.) 133; *U. S. v. Dashiell*, 3 Wall. (U. S.) 688; *Milmine v. Bass*, 29 Fed. Rep. 632.

Arkansas. — *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338.

Georgia. — *Lynch v. Pressley*, 8 Ga. 327; *Marshall v. Morris*, 13 Ga. 185; *Horn v. Ross*, 20 Ga. 210, 65 Am. Dec. 621.

Illinois. — *Ambrose v. Weed*, 11 Ill. 488; *Mongtomery v. Wayne*, 14 Ill. 373; *Trenary v. Cheever*, 48 Ill. 28; *Chandler v. Higgins*, 109 Ill. 602; *Everingham v. National City Bank*, 25 Ill. App. 637.

Indiana. — *M'Intosh v. Chew*, 1 Blackf. (Ind.) 289; *Burr v. Mendenhall*, 80 Ind. 49.

Louisiana. — *Dabbs v. Hemken*, 3 Rob. (La.) 123; *Edwards v. Walker*, 4 Rob. (La.) 181.

Massachusetts. — *Dodge v. Doane*, 3 Cush. (Mass.) 463.

Mississippi. — *Doe v. Hamilton*, 23 Miss. 496, 57 Am. Dec. 149; *Peale v. Bolton*, 24 Miss. 630; *Moody v. Harper*, 28 Miss. 615.

Missouri. — *Hombs v. Corbin*, 20 Mo. App. 497.

New Jersey. — *Moses v. Thomas*, 26 N. J. L. 124.

New York. — *Peck v. Tiffany*, 2 N. Y. 451.

South Carolina. — *Mazyck v. Coil*, 2 Bailey L. (S. Car.) 101; *Trimmier v. Winsmith*, 23 S. Car. 449.

Texas. — *Bryan v. Bridge*, 10 Tex. 149; *Cravens v. Wilson*, 48 Tex. 324.

Wisconsin. — See *Sheboygan Bank v. Trilling*, 75 Wis. 163.

Pointing Out of Other Property by the Defendant. — The presumption that an execution is satisfied arising from proof of a levy upon personal property sufficient in value to satisfy it is repelled by proof that after such levy the agent of the defendant, knowing thereof, pointed out to the officer other property belonging to his principal, and allowed it to be levied on and sold under the execution. *Cornelius v. Burford*, 28 Tex. 202, 91 Am. Dec. 309.

The Sheriff's Return on an execution to the effect that property levied upon was sufficient to satisfy the execution is not conclusive, and does not estop the plaintiff from showing the contrary. *Cravens v. Wilson*, 35 Tex. 52. See also *Campbell v. Pope*, Hempst. (U. S.) 271.

2. Application of Proceeds to Superior Claims — *Georgia.* — *Horn v. Ross*, 20 Ga. 210, 65 Am. Dec. 621.

Mississippi. — *Moody v. Harper*, 28 Miss. 615; *Bibb v. Jones*, 7 How. (Miss.) 397.

New Jersey. — *Hanness v. Bonnell*, 23 N. J. L. 159.

New York. — *People v. Hopson*, 1 Den. (N. Y.) 574.

South Carolina. — *Peay v. Fleming*, 2 Hill Eq. (S. Car.) 97.

Texas. — *Bryan v. Bridge*, 10 Tex. 149; *Garnier v. Cutler*, 28 Tex. 175; *Cornelius v. Burford*, 28 Tex. 202, 91 Am. Dec. 309.

cc. APPLICATION TO INFERIOR CLAIMS. — A levy on sufficient property to satisfy an execution, followed by a sale of the property, certainly does not operate as a satisfaction in favor of the defendant, though it may be in favor of third persons,¹ if the proceeds of the sale are applied, with the defendant's consent, upon another execution or claim, though it may be an inferior lien or claim.² And it has been held that there is no satisfaction in such a case even when the proceeds are so applied without the defendant's consent, as he is not injured by a mere change in the order of paying his debts.³

(k) Executions Against Joint Defendants. — When an execution against two or more defendants is levied on the property of one sufficient to satisfy it, the levy is not a satisfaction of the execution in favor of the other or others, so long as the property has not been sold under the writ.⁴ But it is *prima facie* satisfaction in favor of the defendant whose property is levied upon, when he seeks to enforce his remedies against his codefendants.⁵

b. LEVY ON REAL PROPERTY. — In several states it has been held that if an execution is levied on land of sufficient value to satisfy the same, the levy raises a presumption of satisfaction, just as in the case of a levy on personal property.⁶ The weight of authority, however, is against this doctrine, and to the effect that a levy on land does not operate even *prima facie* as a satisfaction,⁷ since neither the title nor the possession is affected by a mere levy on

1. Application of Proceeds to Payment of Inferior Claims. — See *infra*, this section, *Satisfaction in Favor of Third Persons*.

2. Barber v. Reynolds, 44 Cal. 519; Hamilton v. Mooney, 84 N. Car. 14; Folsom v. Chesley, 2 N. H. 432.

3. Barber v. Reynolds, 44 Cal. 519; State Bank v. Winger, 1 Rawle (Pa.) 295.

4. Execution Against Joint Defendants. — Walker v. Bradley, 2 Ark. 578; M'Ginnis v. Lillard, 4 Bibb (Ky.) 490.

In 2 Tidd's Pr. 1019, it is said: "When the sheriff has taken the defendant's goods upon a fieri facias to the amount of the sum directed to be levied, the defendant is discharged, and may plead it in bar to an action of debt or scire facias upon the judgment. But where two persons are jointly and severally bound, and execution is had against one of them, and his goods are seized but not sold, this cannot be pleaded in an action of debt against the other obligor, because it is no actual satisfaction."

This was quoted, apparently with approval, in Fry v. Manlove, 1 Baxt. (Tenn.) 259, 25 Am. Rep. 775.

5. Kershaw v. Merchants' Bank, 7 How. (Miss.) 386, 40 Am. Dec. 70.

When Two Executions Issue for the Same Debt against different defendants, a levy and sale under one extinguishes the other. Planters' Bank v. Spencer, 3 Smed. & M. (Miss.) 305.

6. Levy on Land — Doctrine That It Is *Prima Facie* a Satisfaction — *United States*. — Milmine v. Bass, 29 Fed. Rep. 632 (under *Indiana* practice).

Arkansas. — Anderson v. Fowler, 8 Ark. 386; Anthony v. Humphries, 9 Ark. 176; Whiting v. Beebe, 12 Ark. 421; Pettit v. Johnson, 15 Ark. 55. But see Black v. Nettles, 25 Ark. 606, and Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 336.

Indiana. — M'Intosh v. Chew, 1 Blackf. (Ind.) 289; Lasselle v. Moore, 1 Blackf. (Ind.) 226; Miller v. Ashton, 7 Blackf. (Ind.) 29; Macy v. Hollingsworth, 7 Blackf. (Ind.) 349; Lindley v. Kelley, 12 Ind. 294; Frank v. Brasket, 44 Ind. 92; McCabe v. Goodwine, 65 Ind. 288; Neff v. Hagaman, 78 Ind. 57.

Kentucky. — Grant v. Boyd, Sneed (Ky.) 348; Hopkins v. Chambers, 7 T. B. Mon. (Ky.) 257.

Pennsylvania Statute. — In Rudy v. Com., 35 Pa. St. 166, 78 Am. Dec. 330, it was held, under a statute (Act Pa., June 16, 1836) authorizing the sheriff to seize and take money only when he could find no real or other personal estate of the debtor, that a levy on real estate which had not been disposed of was an insuperable obstacle to the seizure of the money, because it could not appear, except by sale, that the levy already made was insufficient to satisfy the debt.

7. Doctrine That There Is No *Prima Facie* Satisfaction — *United States*. — U. S. v. Dashiell, 3 Wall. (U. S.) 688.

Alabama. — Fry v. Branch Bank, 16 Ala. 282.

Georgia. — Deloach v. Myrick, 6 Ga. 410; Hammond v. Myrick, 14 Ga. 77; Foster v. Rutherford, 20 Ga. 676; Chapman v. Akin, 39 Ga. 347; Overby v. Hart, 68 Ga. 493.

Illinois. — Gregory v. Stark, 4 Ill. 611; Gold v. Johnson, 59 Ill. 63; Herrick v. Swartwout, 72 Ill. 340; Robinson v. Brown, 82 Ill. 279; Cassell v. Morrison, 8 Ill. App. 175; Everingham v. National City Bank, 25 Ill. App. 637.

Iowa. — Reed v. Crosthwait, 6 Iowa 219, 71 Am. Dec. 406. But see McWilliams v. Myers, 10 Iowa 325. Under the statute (Code, § 3086), see Downard v. Crenshaw, 49 Iowa 296.

Massachusetts. — Ladd v. Blunt, 4 Mass. 402.

Michigan. — See Spafford v. Beach, 2 Dougl. (Mich.) 150.

Minnesota. — Davidson v. Gaston, 16 Minn. 230.

Mississippi. — Smith v. Walker, 10 Smed. & M. (Miss.) 584; Beazley v. Prentiss, 13 Smed. & M. (Miss.) 97; Peale v. Bolton, 24 Miss. 630.

New York. — Taylor v. Ranney, 4 Hill (N. Y.) 621; Shepard v. Rowe, 14 Wend. (N. Y.) 260.

Ohio. — Reynolds v. Rogers, 5 Ohio 169. And see Commercial Bank v. Western Reserve Bank, 11 Ohio 444, 38 Am. Dec. 739. Compare, however, Arnold v. Fuller, 1 Ohio 458.

Pennsylvania. — Gro v. Huntingdon Bank, 1

land.¹

Elegit. — A return of "lands delivered" on an *elegit* is a legal satisfaction of the judgment.²

Levy on Land Not Resulting in Satisfaction. — The levy of an execution on land when followed by a sale thereof does not result in a satisfaction of the judgment, if, because of the want of title in the defendant, insufficiency of the proceeds or their application to prior liens, interruption by legal process or proceedings, or for any other reason, there is no actual satisfaction.³

c. SATISFACTION IN FAVOR OF THIRD PERSONS — (1) *In General.* — Of course the levy of an execution on sufficient property to satisfy the same operates as a satisfaction in favor of third persons, who may be interested in having the execution satisfied, whenever it operates as a satisfaction in favor of the defendant. And even when the circumstances are such that there is no satisfaction in favor of the defendant, there may be a satisfaction in favor of third persons.⁴

(2) *Sureties.* — If other persons besides the defendant are liable as sureties, a levy on sufficient property to satisfy the execution will operate as a satisfaction in their favor, though the levy be afterwards released at the request of the defendant, or with his consent, provided it is done with the concurrence of the plaintiff in the execution, for the sureties cannot be deprived of the benefit of the levy on the defendant's property without their concurrence.⁵ If the release is procured by the defendant without the con-

P. & W. (Pa.) 425; *Coleman v. Mansfield*, 1 Miles (Pa.) 56; *Hoard v. Wilcox*, 47 Pa. St. 51. *South Dakota.* — *Wood v. Conrad*, 2 S. Dak. 405.

Tennessee. — *Hogshead v. Carruth*, 5 Yerg. (Tenn.) 227; *Alley v. Carroll*, 3 Sneed (Tenn.) 110; *Boyd v. Mann*, 9 Baxt. (Tenn.) 349; *Overton v. Perkins*, 10 Yerg. (Tenn.) 328.

Texas. — *White v. Graves*, 15 Tex. 183; *Townsend v. Smith*, 20 Tex. 465, 70 Am. Dec. 400; *Cundiff v. Teague*, 46 Tex. 475. And see *Howeth v. Mills*, 19 Tex. 296.

1. **Reason for the Distinction.** — *Peale v. Bolton*, 24 Miss. 630, 633. And see *Hogshead v. Carruth*, 5 Yerg. (Tenn.) 227, and *Wood v. Conrad*, 2 S. Dak. 405.

2. **Elegit — Return of Delivery.** — *Hinesly v. Hunn*, 5 Harr. (Del.) 236. See 2 Tidd 1037; 2 Bac. Abr., tit. Execution, D.; Com. Dig., Execution, H.; *Blumfield's Case*, 5 Coke 87a; *Lancaster v. Fielder*, 2 Ld. Raym. 1451; *Thomas v. Platts*, 43 N. H. 629.

3. **Levy Not Resulting in Actual Satisfaction.** — *Beebe v. U. S.*, 161 U. S. 104; *Cowles v. Bacon*, 21 Conn. 451, 56 Am. Dec. 371; *Clarkson v. Beardsley*, 45 Conn. 196; *Doe v. Dutton*, 2 Ind. 309, 52 Am. Dec. 510; *Law v. Smith*, 4 Ind. 56; *Bryant v. Johnson*, 24 Me. 304; *Pillsbury v. Smyth*, 25 Me. 427; *Rice v. Cook*, 75 Me. 45. And see *Farmers' Bank v. Leonard*, 4 Harr. (Del.) 536.

Inability to Sell for want of bidders, *Morton v. Smith*, 2 Dill. (U. S.) 316; *Peddle v. Hollinshead*, 9 S. & R. (Pa.) 277; or for want of time to advertise, *Beebe v. U. S.*, 161 U. S. 104.

Refusal of Purchaser to Complete Purchase. — *Slater v. Lamb*, 150 Mass. 239.

Levy of Void Execution. — *Pillsbury v. Smyth*, 25 Me. 427; *Burnham v. Coffin*, 8 N. H. 114, 28 Am. Dec. 383. And see *Stoyel v. Cady*, 4 Day (Conn.) 222; *Langdon v. Langdon*, 1 Root (Conn.) 453.

Injunction. — If a sale under an execution

levied on real estate is enjoined, there is no satisfaction. *Shanklin v. Sims*, 110 Ind. 143; *Beazley v. Prentiss*, 13 Smed. & M. (Miss.) 97; *Overton v. Perkins*, Mart. & Y. (Tenn.) 367.

Sale of Land Not Affecting Title. — In *Townsend v. Smith*, 20 Tex. 465, 70 Am. Dec. 400, it is said: "A levy upon land is no satisfaction of the judgment. Nor does the sale and purchase of the land by the judgment creditor operate a satisfaction of the judgment, if by reason of any substantial defects in the execution or proceedings thereon no title passed to the purchaser. If the title to the land was not affected by the sale, the consequence is that the judgment debtor is the owner of his estate as before, and the judgment remains in force, unaffected by anything done under the execution. This seems clear upon principle, and is well settled by authority in point." See also *U. S. v. Poole*, 5 Fed. Rep. 412; *Cross v. Zane*, 47 Cal. 602; *Scherr v. Himmelman*, 53 Cal. 312; *Cowles v. Bacon*, 21 Conn. 451, 56 Am. Dec. 371; *Ware v. Pike*, 12 Me. 203; *Piscataquis County v. Kingsbury*, 73 Me. 326; *Dennis v. Arnold*, 12 Met. (Mass.) 449; *Tate v. Anderson*, 9 Mass. 92; *Ladd v. Blunt*, 4 Mass. 402; *Gooch v. Atkins*, 14 Mass. 378; *Perry v. Perry*, 2 Gray (Mass.) 326; *Lay v. Shaubhut*, 6 Minn. 273, 80 Am. Dec. 446; *Coleman v. Mansfield*, 1 Miles (Pa.) 56.

4. **Satisfaction in Favor of Third Persons.** — See *Newsom v. McLendon*, 6 Ga. 392.

5. **Satisfaction in Favor of Sureties** — *California.* — *Morley v. Dickinson*, 12 Cal. 561; *Mulford v. Estudillo*, 23 Cal. 94.

Georgia. — *Newsom v. McLendon*, 6 Ga. 393; *Brown v. Riggins*, 3 Ga. 405; *Curan v. Colbert*, 3 Ga. 239, 46 Am. Dec. 427; *Lumsden v. Leonard*, 55 Ga. 376; *Rawson v. Gregory*, 59 Ga. 733.

Kentucky. — *Jones v. Bullock*, 3 Bibb (Ky.) 467.

New York. — See *La Farge v. Herter*, 4

sent or concurrence of the plaintiff or by virtue of a forthcoming or delivery bond, the forfeiture of which is not given the operation and effect of a judgment,¹ the levy will not constitute a satisfaction even as against sureties.² And generally there is no satisfaction in favor of a surety, if without any neglect or fault of the plaintiff, or the officer, the levy has failed to result in actual satisfaction.³

Release of Property of Surety. — Where an execution is issued against the principal and his surety jointly, and levied on the property of the surety only, and the property is released by the execution plaintiff at his request, the levy is not a satisfaction of the execution in favor of the surety; and it can make no difference that the principal, whose property was not levied upon, did not consent to the release.⁴

Delay in Enforcing a Levy on the property of the principal may release the surety.⁵

(3) **Junior Lienholders and Purchasers.** — A levy may not amount to a satisfaction of the execution in favor of the defendant, and yet it may be a satisfaction in favor of third persons holding liens, by subsequently issued execution or otherwise, junior to the lien of the execution plaintiff, or of subsequent *bona fide* purchasers. The rights of junior lienholders and subsequent purchasers cannot be prejudiced by a release or surrender of the property levied on without their consent, nor by unreasonable delay in proceeding to a sale under the execution.⁶

3. By Payment. — Payment of the amount of the debt for which an execution has issued either to the execution plaintiff, or to the proper officer, or to any other person authorized to receive payment, will operate as a complete satisfaction and discharge of the execution, and when the payment is made to

Barb. (N. Y.) 346. Compare *Radde v. Whitney*, 4 E. D. Smith (N. Y.) 378.

North Carolina. — *Howerton v. Sprague*, 64 N. Car. 451.

Ohio. — *Commercial Bank v. Western Reserve Bank*, 11 Ohio 444, 38 Am. Dec. 739.

Pennsylvania. — *Bank v. Fordyce*, 9 Pa. St. 275, 49 Am. Dec. 561.

Tennessee. — *Finley v. King*, 1 Head (Tenn.) 123; *Clark v. Bell*, 8 Humph. (Tenn.) 28.

Virginia. — *Baird v. Rice*, 1 Call (Va.) 18, 1 Am. Dec. 497.

See *Stone v. Tucker*, 2 Bailey L. (S. Car.) 495.

Generally as to the discharge of sureties, see the title SURETYSHIP.

1. Forthcoming or Delivery Bond. — See *supra*, this section, *Release of Property under Forthcoming or Delivery Bond*.

2. Nonconcurrence of Principal. — *Summerhill v. Trapp*, 48 Ala. 363; *Ambrose v. Weed*, 11 Ill. 488.

3. Hamilton v. Mooney, 84 N. Car. 14. See also *Smith v. McLeod*, 3 Ired. Eq. (38 N. Car.) 390; *Forbes v. Smith*, 5 Ired. Eq. (40 N. Car.) 369, 49 Am. Dec. 432; *Nelson v. Williams*, 2 Dev. & B. Eq. (22 N. Car.) 118. Compare *Kessler v. Linker*, 82 N. Car. 456.

Inability to Sell for Want of Bidders. — *Moss v. Craft*, 10 Mo. 720.

Delivery of Property to Assignee in Bankruptcy. — *Hamilton v. Mooney*, 84 N. Car. 12.

Levy on Property Not Subject to the Execution. — *State Bank v. Turney*, 7 Humph. (Tenn.) 271.

Supersedeas Preventing Satisfaction. — *Fry v. Manlove*, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775.

Remedy of Surety Against Principal. — The rule that a levy on personal property of the principal sufficient to satisfy the execution discharges the surety does not apply in favor of the principal where the surety has paid the judgment and instituted an action against the principal, so as to constitute a defense to such action. *Clark v. Bell*, 8 Humph. (Tenn.) 26.

Presumption and Burden of Proof. — In *Rawson v. Gregory*, 59 Ga. 733, it was held that when a plaintiff in execution levies on the personal property of the principal defendant therein, sufficient to satisfy the same, and without the consent of the surety therein dismisses the levy, such an act is *prima facie* an injury to the surety, and it is incumbent on the plaintiff to show that the property did not belong to the principal defendant, or other facts going to show that the surety was not injured by the dismissal.

4. Release of Property of Surety at His Request. — *Walker v. Com.*, 18 Gratt (Va.) 13, 98 Am. Dec. 631.

5. Delay in Enforcing Levy. — In *Jones v. Bullock*, 3 Bibb (Ky.) 467, it was held that a stay of execution by the creditor, when levied on the property of the principal, without the privity or consent of the sureties, operated as a release of the sureties. Compare *White v. Graves*, 15 Tex. 183. See the title SURETYSHIP.

6. Satisfaction in Favor of Junior Lienholders and Purchasers. — *Chisolm v. Chittenden*, 45 Ga. 213; *Johnson v. Tuttle*, 9 N. J. Eq. 365; *Hayden v. State Prison*, 1 Sandf. Ch. (N. Y.) 195.

For a full treatment of this question see *supra*, this title, *Lien and Priorities*.

the officer, it makes no difference, as far as the defendant is concerned, that the money is not paid over to the plaintiff, the remedy of the plaintiff in such case being against the officer and the sureties on his official bond.¹

Withdrawal of Payment. — Payment to the officer does not operate as a satisfaction in favor of the defendant, if the money is withdrawn by the defendant.²

In What Payment Must Be Made. — Payment to the officer, to amount to a satisfaction, must ordinarily be in money. He has no authority to bind the plaintiff by accepting anything else.³ And the same is true of payment to the clerk of the court authorized by statute.⁴ But payment otherwise than in money, as by a bond or note, made to the plaintiff, or to the officer with the plaintiff's consent, is a satisfaction.⁵

Payment by Another than the Defendant has the same effect at law as a payment by the defendant, even when it is made without his knowledge.⁶ In equity,

1. Payment Is a Satisfaction — *Alabama.* — *Webb v. Bumpass*, 9 Port. (Ala.) 201, 33 Am. Dec. 310.

California. — See *Skelly v. Westminster School Dist.*, 103 Cal. 652.

Georgia. — *Wilkinson v. Thigpen*, 71 Ga. 497.

Indiana. — *Beard v. Millikan*, 68 Ind. 231.

Mississippi. — *Head v. Gervais, Walk.* (Miss.) 431, 12 Am. Dec. 577.

North Carolina. — *Collier v. Newbern Bank*, 2 Dev. Eq. (17 N. Car.) 525.

Pennsylvania. — *Kuhn v. North*, 10 S. & R. (Pa.) 399; *Slusher v. Washington County*, 27 Pa. St. 205.

South Carolina. — *O'Neill v. Lusk*, 1 Bailey L. (S. Car.) 220.

Tennessee. — *Atkinson v. Cooper*, 2 Humph. (Tenn.) 361.

Payment of Execution to an Attorney operates as a discharge of the same in the absence of any agreement in regard to it, or assignment of it. *Morris v. Lake*, 9 Smed. & M. (Miss.) 521, 48 Am. Dec. 724; *Miller v. Scott*, 21 Ark. 396; *Frazier v. Parks*, 56 Ala. 363; *Harper v. Harvey*, 4 W. Va. 539; *Yoakum v. Tilden*, 3 W. Va. 167, 100 Am. Dec. 738; *Rogers v. McKenzie*, 81 N. Car. 164. See the title ATTORNEY AND CLIENT, vol. 3, p. 365.

Payment to One of Several Plaintiffs is a good payment and will operate as a satisfaction, and operates as a discharge, unless there was notice not to pay him more than his proportion. See *Lazarus v. Follmer*, 4 W. & S. (Pa.) 9; *M'Laughlin v. Rutherford*, 1 Yerg. (Tenn.) 169.

Payment to Prochein Ami. — See *Collins v. Brook*, 5 H. & N. 700.

Payment to Unauthorized Officer. — If an execution directed to the sheriff is fraudulently altered without the plaintiff's consent by inserting a direction to a constable, payment to the constable is no discharge. *Brier v. Woodbury*, 1 Pick. (Mass.) 362.

Payment to Officer After Return Day. — When no levy has been made before the return day, the sheriff is not authorized to receive payment after the return day, as the writ is then *functus officio*; and the plaintiff, notwithstanding the payment, may sue out an alias writ. See *Barton v. Lockhart*, 2 Stew. & P. (Ala.) 109; *Cockerell v. Nichols*, 8 W. Va. 159; *Wood v. Robinson*, 3 Smed. & M. (Miss.) 271; *Edwards v. Ingraham*, 31 Miss. 272; *Hamilton v. Ward*, 4 Tex. 356. And see *Chapman v. Cowles*, 41

Ala. 103, 91 Am. Dec. 508; *Harris v. Ellis*, 30 Tex. 4, 94 Am. Dec. 296. But see *James v. Yates*, 3 Metc. (Ky.) 343.

After Return of Writ. — Payment to the officer after he has returned the execution is no satisfaction unless the plaintiff receives the money. *Bobo v. Thompson*, 3 Stew. & P. (Ala.) 385.

Payments After Return Day and After Expiration of Officer's Term. — Payments made to the sheriff after the return day of a *fi. fa.*, and the expiration of his term of office, are not payments to the plaintiff unless actually paid over. And where money is paid to a sheriff before and after the return day, and after his term of office, and he pays over less than he received before the return day, the plaintiff being ignorant of the subsequent payments, the defendant cannot claim that what the ex-sheriff paid over were the subsequent payments, and thus get credit for them and the prior payments, but the plaintiff may apply the amount paid to the prior receipts which would bind him. *Slusher v. Washington County*, 27 Pa. St. 205.

2. Withdrawal of Payment by the Defendant. — *Tarkinton v. Guyther*, 13 Ired. L. (35 N. Car.) 100.

Credit Indorsed by Mistake. — Indorsement of a credit on an execution by the agent of the plaintiff through mistake is not a satisfaction *pro tanto*. *Frankfort Bank v. Markley*, 1 Dana (Ky.) 373.

3. Payment to the Officer Must Be in Money. — *Taylor v. Kelly*, 6 Jones L. (51 N. Car.) 324; *Draper v. State*, 1 Head (Tenn.) 262; *Haynes v. Bridge*, 1 Coldw. (Tenn.) 34; *Crutchfield v. Robins*, 5 Humph. (Tenn.) 15, 42 Am. Dec. 417; *Carman v. Mott*, 5 New Bruns. 131.

4. Payment to Clerk of the Court. — Where a statute authorized payment of money upon judgments rendered, to be made to the clerk of the court, it was held that the judgment, and an execution issued thereon, were not satisfied by payment to the clerk of any debts due by himself, choses in action, or property, but that the payment must be made in money. *Crutchfield v. Robins*, 5 Humph. (Tenn.) 15, 42 Am. Dec. 417. See also *Lytle v. Etherly*, 10 Yerg. (Tenn.) 389.

5. Consent of Plaintiff. — *Taylor v. Hulme*, 4 W. & S. (Pa.) 407.

6. Payment by a Third Person. — *Boren v. M'Gehee*, 6 Port. (Ala.) 432, 31 Am. Dec. 695; *Frazier v. Parks*, 56 Ala. 363; *Morris v. Lake*, 9 Smed. & M. (Miss.) 521, 48 Am. Dec. 724; *Head v. Gervais, Walk.* (Miss.) 431, 12 Am.

however, the judgment will be kept alive, when justice so requires, for the purpose of affording the person paying it a remedy against the defendant.¹

Payment of a Judgment satisfies and extinguishes an execution issued thereon.² The question what constitutes payment of a judgment is fully treated under another title.³

4. Vacation of Entry of Satisfaction.—If an execution is returned as satisfied, when for any reason there has been no satisfaction, and the plaintiff is entitled to another writ, the court may vacate the satisfaction and direct another writ to issue, either on motion,⁴ or on *scire facias*.⁵

Grounds for Vacating.—An indorsement or entry of satisfaction will be vacated and a new writ authorized, even after a sale of property levied upon, if the writ, levy, or sale was void, so that the title to the property did not pass,⁶ or if the entry or indorsement was made by mistake when in fact there was no satisfaction,⁷ or if it was made wrongfully by the officer or by any other person without authority.⁸

Necessity for Vacating.—According to the better opinion, after entry of satisfaction of an execution after a sale of property levied upon, no further execution can be issued upon the judgment until the levy and sale and entry of satisfaction are set aside, and a new execution awarded by order of the court.⁹

IX. RELIEF AGAINST WRIT OR LEVY—1. **Scope of Section.**—The questions relating to the mode of obtaining relief against a writ of execution, or a levy thereunder, are to so great an extent questions of procedure that a general outline only is necessary in this work.¹⁰

2. Relief Against Writ—**Motion to Quash.**—The usual modern remedy of a debtor, when a writ of execution has been issued illegally or improvidently, is by motion to quash the writ in the court from which it was issued.¹¹

Dec. 577; *Reed v. Pruyn*, 7 Johns. (N. Y.) 426, 5 Am. Dec. 287; *Sandford v. McLean*, 3 Paige (N. Y.) 117.

Payment of an Execution by One of Several Defendants is a payment and discharge of it as against both, whether the payment be indorsed on the execution or not, and so far extinguishes the execution that it cannot be subsequently assigned to the debtor paying it, and be levied by him on the property of his codefendant. *Davis v. Stevens*, 10 N. H. 186; *Stanley v. Nutter*, 16 N. H. 22; *Hammatt v. Wyman*, 9 Mass. 138; *Brackett v. Winslow*, 17 Mass. 153; *Adams v. Drake*, 11 Cush. (Mass.) 504.

Contra, under *Minnesota* statute. See *Ankeny v. Moffett*, 37 Minn. 109.

1. Keeping Judgment Alive in Equity.—*Barringer v. Boyden*, 7 Jones L. (52 N. Car.) 187; *Dempsey v. Bush*, 18 Ohio St. 376; *Fleming v. Beaver*, 2 Rawle (Pa.) 128; *Brown v. Black*, 96 Pa. St. 482. See the title **SUBROGATION**.

2. Payment of Judgment.—See *Knight v. Morrison*, 79 Ga. 55, 11 Am. St. Rep. 405.

3. See the title **JUDGMENTS AND DECREES**.

4. Vacating Satisfaction—On Motion.—*Willson v. Stilwell*, 14 Ohio St. 467; *Laughlin v. Fairbanks*, 8 Mo. 367. See also *Ward v. Brumfit*, 2 M. & S. 238; *McMichael v. Branch Bank*, 14 Ala. 496; *Watson v. Reissig*, 24 Ill. 281, 76 Am. Dec. 746; *Burkes v. Maine*, 16 East 2; *Aycock v. Harrison*, 63 N. Car. 145; *Field v. Paulding*, 3 Abb. Pr. (N. Y. C. Pl.) 139; *Anderson v. Nicholas*, 4 Robt. (N. Y.) 630. And see the title **JUDGMENTS AND DECREES**.

5. Scire Facias.—*Stoyel v. Cady*, 4 Day (Conn.) 222; *Arnold v. Fuller*, 1 Ohio 458. And see the title **JUDGMENTS AND DECREES**.

6. Void Writ, Levy, or Sale.—See *Hughes v.*

Streeter, 24 Ill. 647, 76 Am. Dec. 777; *Watson v. Reissig*, 24 Ill. 281, 76 Am. Dec. 746; *Stoyel v. Cady*, 4 Day (Conn.) 222; *Field v. Paulding*, 3 Abb. Pr. (N. Y. C. Pl.) 139; *Arnold v. Fuller*, 1 Ohio 458. And see the title **JUDGMENTS**.

7. Satisfaction Entered or Indorsed by Mistake.—See *Frankfort Bank v. Markley*, 1 Dana (Ky.) 373. And see the title **JUDGMENTS AND DECREES**.

8. Satisfaction Wrongfully Entered or Indorsed.—*McMichael v. Branch Bank*, 14 Ala. 496; *Hughes v. Streeter*, 24 Ill. 647, 76 Am. Dec. 777; *Laughlin v. Fairbanks*, 8 Mo. 367; *Willson v. Stilwell*, 14 Ohio St. 464. See also *Adams v. Smith*, 5 Cow. (N. Y.) 280; *Maguire v. Marks*, 28 Mo. 193, 75 Am. Dec. 121; *Richardson v. McDougall*, 19 Wend. (N. Y.) 80. And see the title **JUDGMENTS AND DECREES**.

9. Necessity for Vacating Satisfaction.—*Hughes v. Streeter*, 24 Ill. 647, 76 Am. Dec. 777. See the title **JUDGMENTS AND DECREES**.

In *Frankfort Bank v. Markley*, 1 Dana (Ky.) 373, where an agent of the plaintiff had, through mistake, entered a credit on an execution, an *alias* writ issued by the clerk for the full amount of the judgment, without an order of court vacating the satisfaction, was held to be valid. But this case was disapproved by the court in *Hughes v. Streeter*, 24 Ill. 647, 76 Am. Dec. 777, and was said to be opposed to the uniform practice, and not to be sanctioned by the common law.

10. Relief Against the Writ.—See the title **EXECUTIONS AGAINST PROPERTY**, 8 ENCYC. OF PL. AND PR. 487-483.

11. Motion to Quash the Writ—United States.—*Amis v. Smith*, 16 Pet. (U. S.) 303.

Grounds for Quashing the Writ. — The writ may be quashed, in the discretion of the court,¹ whenever it has been irregularly or improvidently issued, or is informal or defective in matter of substance.² Thus, it is ground for quashing if the judgment has been paid, either before or after the issuance of the writ,³ if the writ was prematurely issued,⁴ or was issued on a dormant judgment,⁵ or after the death of the plaintiff or the defendant without a previous revivor,⁶ or if there is no judgment authorizing it,⁷ or in any case where it is irregular in form.⁸

Alabama. — *Rhodes v. Smith*, 66 Ala. 174.

Arkansas. — *State Bank v. Noland*, 13 Ark. 299.

California. — *Buell v. Buell*, 92 Cal. 393.

Florida. — *Wordehoff v. Evers*, 18 Fla. 339.

Georgia. — *Sims v. Hatcher*, 77 Ga. 389.

Illinois. — *Jenkins v. Merriweather*, 109 Ill. 647.

Kansas. — *Bogle v. Bloom*, 36 Kan. 512.

Kentucky. — *Amyx v. Smith*, 1 Metc. (Ky.) 529.

Maine. — *Folan v. Folan*, 59 Me. 566.

Michigan. — *Blair v. Compton*, 33 Mich. 414.

Mississippi. — *Kramer v. Holster*, 55 Miss. 243.

Missouri. — *Mellier v. Bartlett*, 89 Mo. 134, following *Heuring v. Williams*, 65 Mo. 446, and *Parker v. Hannibal*, etc., R. Co., 44 Mo. 415.

New York. — *Wallace v. Swinton*, 64 N. Y. 188.

North Carolina. — *Coward v. Chastain*, 99 N. Car. 443, 6 Am. St. Rep. 533.

Ohio. — *Miller v. Longacre*, 26 Ohio St. 291.

Oregon. — *Flint v. Phipps*, 20 Oregon 340, 23 Am. St. Rep. 124.

Pennsylvania. — *Davis v. Sommer*, 1 Miles (Pa.) 397.

Rhode Island. — *Chapin v. James*, 11 R. I. 86, 23 Am. Rep. 412.

Tennessee. — *Hardin v. Williams*, 5 Heisk. (Tenn.) 385.

Utah. — *Ducheneau v. Ireland*, 5 Utah 108.

Vermont. — *Porter v. Vaughn*, 24 Vt. 211.

Virginia. — *Hamilton v. Shrewsbury*, 4 Rand. (Va.) 427, 15 Am. Dec. 779.

West Virginia. — *Lowther v. Davis*, 33 W. Va. 132.

See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 460.

1. Grounds for Quashing Writ — Discretion of Court. — *Boyle v. Zacharie*, 6 Pet. (U. S.) 648. See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 470.

2. Irregularities and Informalities Generally. — *Truett v. Legg*, 32 Md. 147; *Schultze v. State*, 43 Md. 295; *Dillon v. Rash*, 27 Mo. 243; *Ruby v. Hannibal*, etc., R. Co., 39 Mo. 480; *Johnson v. Latta*, 84 Mo. 139; *Sizer v. Miller*, 2 How. Pr. (N. Y. Supreme Ct.) 44; *Hasty v. Simpson*, 84 N. Car. 590; *Bentley v. Jones*, 8 Oregon 48; *Beale v. Buchanan*, 9 Pa. St. 123; *Vadakin v. Soper*, 2 Aik. (Vt.) 248; *Shackelford v. Apperson*, 6 Gratt. (Va.) 451.

Issuance of Two Writs Simultaneously. — In *Adams v. Smallwood*, 8 Jones L. (53 N. Car.) 258, it was held that, as the plaintiff is not entitled to two writs at the same time, without special leave from the court, the court may quash one of them.

3. Payment of Judgment. — *Harkins v. Clemens*, 1 Port. (Ala.) 30; *Reed v. Pruyn*, 7

Johns. (N. Y.) 426, 5 Am. Dec. 287. See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 463.

Part Payment. — When the judgment has been paid in part only, the writ cannot be quashed entirely, *Morris v. Lake*, 9 Smed. & M. (Miss.) 521, 48 Am. Dec. 724; but it may be quashed to the extent of the payment. *Lockhart v. McElroy*, 4 Ala. 572; *Sandburg v. Papineau*, 81 Ill. 446; *Barnes v. Robinson*, 4 Verg. (Tenn.) 186; *Smock v. Dade*, 5 Rand. (Va.) 639, 16 Am. Dec. 780.

4. Writ Issued Prematurely. — *Shorter v. Mims*, 18 Ala. 655; *Knights v. Martin*, 155 Ill. 486, 56 Ill. App. 65. And see the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 464.

5. Execution Issued on Dormant Judgment. — *Gardner v. Mobile*, etc., R. Co., 102 Ala. 635, 48 Am. St. Rep. 84; *Buell v. Buell*, 92 Cal. 393; *Chase v. Frost*, 60 Ill. 143; *Price v. Nesbitt*, 37 Md. 618; *Union Bank v. Sargeant*, 53 Barb. (N. Y.) 422; *Manufacturers', etc., Bank v. Frederickson*, 2 Miles (Pa.) 70; *State v. Brookover*, 38 W. Va. 141.

It has been held, however, that if a writ is issued under such circumstances as to entitle the plaintiff to leave of court to issue it on a formal application, the court may in its discretion refuse to set the writ aside. *Frean v. Garrett*, 24 Hun (N. Y.) 161; *Wooster v. Wuterich*, 2 Abb. N. Cas. (N. Y. Super. Ct.) 206; *Underwood v. Green*, 36 N. Y. Super. Ct. 481, 56 N. Y. 247.

6. Issue of Writ After Death of Parties. — *Moore v. Bell*, 13 Ala. 460; *Boyd v. Dennis*, 6 Ala. 55; *Aycock v. Harrison*, 65 N. Car. 8. See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 465.

7. Writ Not Authorized by Judgment. — *Page v. Coleman*, 9 Port. (Ala.) 275; *Isaacs v. Judge*, 5 Stew. & P. (Ala.) 402; *Hill v. McKenzie*, 39 Ala. 314; *Davidson v. Seegar*, 15 Fla. 671; *Ballard v. Davis*, 1 J. J. Marsh. Ky.) 376; *Newsom v. Newsom*, 4 Ired. L. (26 N. Car.) 381. See further *Rutherford v. Raburn*, 10 Ired. L. (32 N. Car.) 144.

Thus, if a judgment has been opened or set aside, the execution may be quashed. *Struthers v. Lloyd*, 14 Pa. St. 216; *Hamlin v. Coleman*, 74 Ga. 837; *Ballard v. Whitlock*, 18 Gratt. (Va.) 235.

Prejudicial variance between the judgment and the writ is also ground for quashing it. *Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404. See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 466.

8. Irregularities in Form. — See *Little v. Heard*, 16 Ala. 358; *Beale v. Buchanan*, 9 Pa. St. 123; *Truett v. Legg*, 32 Md. 147; *Tuggle v. Smith*, 6 T. B. Mon. (Ky.) 76.

Mere Clerical Errors or Mistakes will not be

Injunction is not a proper remedy in the case of mere irregularities in the issuance or form of the writ, nor, as a general rule, in any case where there is an adequate remedy at law by motion to quash,¹ but an injunction will lie if there is no adequate remedy at law.²

A Writ of Error will not lie to review irregularities in the issue or form of a writ of execution, as they do not in any way affect the judgment.³

A Writ of Prohibition is not a proper remedy to obtain relief against an execution irregularly or illegally issued, or defective in form, for the reason that it is a remedy to be resorted to only for the purpose of arresting proceedings that are without, or in excess of, the jurisdiction of the court or officer,⁴ and for the further reason that there is ordinarily an adequate remedy by motion to quash.⁵

Certiorari. — In some jurisdictions, but not in all, the issuance of an execution may be reviewed on certiorari.⁶

The Writ of Audita Querela was formerly employed to obtain relief against an execution, and may doubtless still be used where it has not been abolished by statute.⁷

3. Motion to Quash or Set Aside Levy — Jurisdiction. — If there is any irregularity in the levy, the court out of which the writ was issued has jurisdiction to quash the levy or set it aside upon motion.⁸

ground for quashing a writ of execution, if they cannot result in prejudice. *Murphy v. Lewis*, Hempst. (U. S.) 17; *Kleissendorff v. Fore*, 3 B. Mon. (Ky.) 471; *Grissom v. Allen*, 10 Mo. 303.

1. Injunction. — *Alabama*. — *Triest v. Enslen*, 106 Ala. 180.

California. — *Moulton v. Knapp*, 85 Cal. 385. *Delaware*. — *Hastings v. Cropper*, 3 Del. Ch. 165.

Georgia. — *Hart v. Lazaron*, 46 Ga. 396; *Newton Mfg. Co. v. White*, 47 Ga. 400; *Hambrick v. Crawford*, 55 Ga. 335; *Morris v. Morris*, 76 Ga. 733.

Illinois. — *Babcock v. McCamant*, 53 Ill. 214. *Indiana*. — See *Eaton v. Markley*, 126 Ind. 123, following *Russell v. Cleary*, 105 Ind. 502.

Louisiana. — *Hudson v. Dangerfield*, 2 La. 63, 20 Am. Dec. 297.

Maryland. — *Gorsuch v. Thomas*, 57 Md. 334.

Mississippi. — *Ricks v. Richardson*, 70 Miss. 424.

North Carolina. — *Foard v. Alexander*, 64 N. Car. 69; *Coward v. Chastain*, 99 N. Car. 443, 6 Am. St. Rep. 533.

Oregon. — *Leinenweber v. Brown*, 24 Oregon 548.

South Carolina. — *Wagner v. Pegues*, 10 S. Car. 259.

2. Lasselle v. Moore, 1 Blackf. (Ind.) 220; *Needles v. Frost*, 2 Okla. 19. See also *Snively v. Harkrader*, 30 Gratt. (Va.) 487.

This remedy by injunction in the case of executions is fully treated in another part of this work. See the title INJUNCTIONS.

3. Writ of Error. — *Taylor v. Powers*, 3 Ala. 285; *Moore v. Bell*, 13 Ala. 469; *Folan v. Folan*, 59 Me. 566; *Dingman v. Myers*, 13 Gray (Mass.) 1; *Johnson v. Harvey*, 4 Mass. 483; *Hicks v. Murphy*, Walk. (Miss.) 66; *Nelson v. Brown*, 23 Mo. 13. See also *Amis v. Smith*, 16 Pet. (U. S.) 303; *Diamond v. Carpenter*, 3 Johns. (N. Y.) 141; *Bowen v. Lanier*, Term (4 N. Car.) 241; *Moss v. Moss*, 4 Hen. & M. (Va.) 314; *Leftwich v. Stovall*, 1 Wash. (Va.) 303; *In re St. Albans First Nat. Bank*, 49 Fed. Rep. 120.

4. Writ of Prohibition. — *Atkins v. Siddons*, 66 Ala. 453.

5. Ducheneau v. Ireland, 5 Utah 108. See the title PROHIBITION.

6. Certiorari. — In *Justices v. Hunt*, 29 Ga. 155; *Ewing v. Burton*, 5 How. (Miss.) 660; *Matter of Rourke*, 13 Nev. 253, and *State v. McGrath*, 44 N. J. L. 164, it was held that certiorari would not lie. But in *Cooper v. May*, 1 Harr. (Del.) 18; *McClay v. Houston*, 1 Harr. (Del.) 529, and *Atkin v. Mooney*, Phil. L. (61 N. Car.) 31, the contrary was held. See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 458.

7. Writ of Audita Querela. — *McCargo v. Chapman*, 20 How. (U. S.) 555; *Thompson v. Lassiter*, 86 Ala. 536; *Hill v. De Launay*, 34 Ga. 427; *Folan v. Folan*, 59 Me. 566; *Jones v. George*, 80 Md. 294; *Brackett v. Winslow*, 17 Mass. 153; *Ex p. James*, 59 Mo. 280; *Linn v. Hamilton*, 34 N. J. L. 305; *Foard v. Alexander*, 64 N. Car. 69; *Gordonier v. Billings*, 77 Pa. St. 498; *Chapin v. James*, 11 R. I. 86, 23 Am. Rep. 412; *Marsh v. Haywood*, 6 Humph. (Tenn.) 210; *Hovey v. Niles*, 26 Vt. 541; *Smock v. Dade*, 5 Rand. (Va.) 639, 16 Am. Dec. 780. See also the title AUDITA QUERELA, 3 ENCYC. OF PL. AND PR. 113.

8. Motion to Quash or Set Aside Levy — Jurisdiction to Quash. — *Hill v. De Launay*, 34 Ga. 427; *Palmer v. Gardiner*, 77 Ill. 143; *Blair v. Compton*, 33 Mich. 414; *Jones v. Williams*, 2 Swan (Tenn.) 105; *Bryan v. Bridge*, 6 Tex. 137.

Vermont Statute. — Rev. Laws Vt., § 1596, authorize a petition to vacate a levy when it "is irregular, informal, or not according to law, and the title derived therefrom is doubtful." It has been uniformly held that this statute does not apply where the levy is void. *Whitefield v. Adams*, 65 Vt. 632; *Parker v. Parker*, 54 Vt. 341; *Hyde v. Taylor*, 19 Vt. 599; *Briggs v. Green*, 33 Vt. 565. The statute is not applicable to those cases that are defective in substance as to the subject matter. *Bell v. Roberts*, 13 Vt. 582; *Hopkins v. Hayward*, 34 Vt. 474. In the last-mentioned case,

Audita Querela. — Formerly the writ of audita querela was the remedy employed in such cases, and it may no doubt be resorted to now, unless it has been abolished by statute. In practice, however, the writ has been almost entirely superseded by motion to quash.¹

Grounds for Quashing Levy — Irregularities in the Writ. — A levy may be quashed if the writ of execution itself is so defective or irregular as not to warrant the levy.²

Irregularities in the Levy. — A levy may also be quashed or set aside, even when the writ is regular, if it was not made in accordance with the law, as where it has been made by a disqualified officer,³ or prematurely,⁴ or upon property upon which there is no right to levy,⁵ or where it is excessive,⁶ or in any other case where, for any reason, the levy is illegal.⁷

EXECUTIVE. (See also the titles CONSTITUTIONAL LAW, vol. 6, p. 1009; GOVERNOR; PRESIDENT; PUBLIC OFFICERS; UNITED STATES; and see MINISTERIAL.) — “Executive” means qualifying for, or pertaining to, the

the irregularity complained of was that the appraisers, by direction of the creditor, did not appraise improvements on the premises, but appraised the land only. See also *Hurlbut v. Mayo*, 1 D. Chip. (Vt.) 387.

Effect of Quashing. — When an execution is quashed, a levy that has been previously made falls with it, and the sheriff is bound to return the goods to the defendant. *Wellington v. Sedgwick*, 12 Cal. 469.

Reinstatement of Levy. — In *Wilson v. Herriott*, 86 Ga. 777, it was held that where the court has erred in dismissing a levy, it may, at the same term of the court, on motion, reinstate the case and set aside the erroneous judgment.

Parties. — The sheriff is not a necessary party to a motion to quash the levy. *Demint v. Thompson*, 80 Ky. 255.

1. **Audita Querela.** — See *Hill v. De Launay*, 34 Ga. 427; *Hopkins v. Hayward*, 34 Vt. 474.

2. **Irregularities in the Execution.** — *Scott v. Allen*, 1 Tex. 508. See also *Bonesteel v. Orvis*, 23 Wis. 506, 99 Am. Dec. 201.

Death of Plaintiff After Levy. — In *Keenney v. Holloway*, 6 J. J. Marsh. (Ky.) 321, it was held that a stranger could not have a levy quashed because of the death of the plaintiff after it was made. It was said in this case to be doubtful whether the defendant would be entitled to have it quashed in such case.

3. **Irregularities in the Levy — Disqualification of Officer.** — *State v. Jeter*, 60 Ga. 489.

4. **Premature Levy.** — *Hill v. De Launay*, 34 Ga. 427. And see *Jones v. McCarl*, 7 Abb. Pr. (N. Y. C. Pl.) 418.

5. **Violation of the Debtor's Right to Select the property to be levied upon is ground for quashing the levy.** *Pitts v. Magie*, 24 Ill. 610.

Plaintiff's Right of Election. — In *Evans v. Langdon*, 6 Ill. 307, it was held that the plaintiff was entitled to have the levy set aside and to have an *alias* execution issued, because he had not been given an opportunity to exercise a right to elect the property to be levied upon which was conferred upon him by statute.

A Levy on Property Not Subject to Execution will be quashed on motion, as where a levy is made upon an equity of redemption in personal property, or upon property *in custodia*

legis. See *McLemore v. Benbow*, 19 Ala. 76; *Reeves v. Chattahoochee Brick Co.*, 85 Ga. 477; *Commercial Bank v. Waters*, 10 Smed. & M. (Miss.) 559. See also *Robinson v. Atlantic*, etc., R. Co., 66 Pa. St. 160; *McLemore v. Benbow*, 19 Ala. 76.

A Levy on Exempt Property may be quashed by the court out of which the execution issued. *Jones v. Williams*, 2 Swan (Tenn.) 105. See also *Catron v. Lafayette County*, 125 Mo. 67. And see the title EXEMPTIONS.

Levy on Property of Third Person — Vacation on Motion of Plaintiff. — The plaintiff in an execution may move to vacate the levy and remove the satisfaction of record, when the levy was made on property belonging to a third person, and he has been compelled to refund the money to the purchaser at the execution sale, or has become liable to the owner of the property. *Sanders v. Hamilton*, 3 Dana (Ky.) 550; *Osborne v. Wilson*, 37 Minn. 8; *Adams v. Smith*, 5 Cow. (N. Y.) 280; *Tudor v. Taylor*, 26 Vt. 444. *Contra*, *Lansing v. Quackenbush*, 5 Cow. (N. Y.) 38.

Vacation on Motion of Owner of Property. — It has been held, however, that the owner of the property levied upon cannot move to vacate the levy, as the court will not thus determine the question of title, but he will be left to his statutory remedy for trying his right to the property, or to his remedy by action of trespass. *Cawthorn v. Knight*, 11 Ala. 268; *Jarrett v. Tomlinson*, 3 W. & S. (Pa.) 114. And see *Pennsylvania Ins. Co. v. Kettland*, 1 Binn. (Pa.) 499; *Seitzinger v. Fisher*, 1 W. & S. (Pa.) 293.

6. **Excessive Levy.** — *Per* Marston, J., in *Blair v. Compton*, 33 Mich. 414; *Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133; *Palmer v. Gardiner*, 77 Ill. 143; *Bogle v. Bloom*, 36 Kan. 512.

7. **Other Cases of Illegality in the Levy.** — *Bryan v. Bridge*, 6 Tex. 137.

Failure to Describe Land. — In *Huggins v. Ketchum*, 4 Dev. & B. L. (20 N. Car.) 414, it was held that where the levy of an execution, issued out of a justice's court, is insufficient, by reason of its failure to describe the land levied on, the defendant in execution may move the county court to stay an order of sale based on such levy.

execution of the laws; as, executive power or authority; executive duties. In government, executive is distinguished from legislative and judicial, "legislative" being applied to the organ or organs or government which make the laws; "judicial," to that which interprets and applies the laws; "executive," to that which carries them into effect.¹

EXECUTOR DE SON TORT.—See the title EXECUTORS AND ADMINISTRATORS, *post*.

1. *State v. Denny*, 118 Ind. 382. See also *Charleston, etc., Bridge Co. v. Kanawha County Ct.*, 41 W. Va. 658; *In re Railroad Com'rs*, 15 Neb. 679.

Opinion of Justices. (See also the title OPINIONS OF JUSTICES.)—The Constitution of *Florida* provided that the governor might at any time require the opinion of the justices of the Supreme Court as to the interpretation of the Constitution upon any question affecting "his executive powers and duties." In construing this clause McWhorter, C. J., said: "Is the opinion you desire one relating to your 'executive powers and duties'? The exact legal meaning of the word *executive* has been many times authoritatively fixed and defined. It means a duty appertaining to the execution of the laws as they exist. It would follow that the law must be enacted according to all the terms prescribed by the Constitution before the duty of executing it can exist. Any duty imposed by the Constitution on the governor with reference to a bill, before it becomes a law, is not an *executive* duty." Opinion on Executive Communication, 23 Fla. 298. See also *State v. Deal*, 24 Fla. 308.

Executive Authority — Extradition from Justice. (See also the title EXTRADITION.)—A *United States* statute authorizes the *executive* authority of the state to demand the surrender of fugitives from justice and to arrest and deliver them up. It was objected in *Massachusetts* that the governor had no authority to issue a warrant without the advice of the council, the argument being that under the constitution the *executive* authority was not vested in the governor alone, but in the gov-

ernor aided and advised by the council. The court said: "But we think this is founded on too narrow an interpretation of the Act of Congress. By the term '*executive* authority' as there used, nothing more was intended than to prescribe the department of the government to which application should be made for the surrender of fugitives from justice. It was the *executive* authority, as distinguished from the judicial and legislative branches of the government, that was to exercise the power and authority conferred by the act. But it was not intended that every member of that department should be called into action for the purpose; but only so much thereof as should be necessary to carry its provisions into effect." *Com. v. Hall*, 9 Gray (Mass.) 267.

Board of Aldermen.—In *Atty.-Gen. v. Boston*, 142 Mass. 200, it was held that the board of aldermen of the city of Boston had authority to pass an order directing the superintendent of streets to remove a sidewalk bordering on a paved street, and that such order was not *executive* or administrative within the meaning of the statute vesting the *executive* power in the mayor. The court said: "The power to determine whether public convenience requires the construction of a sidewalk, and equally so its removal, involves the exercise of judgment not administrative only, and the exercise of the power is judicial in its character, although expressed in a legislative form."

Bribery — Executive Officer.—In *State v. Womack*, 4 Wash. 19, a member of a board of education was held an *executive* officer within a statute against bribery.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, titles *CITATIONS IN PROBATE PROCEEDINGS*, vol. 4, p. 537; *EXECUTORS AND ADMINISTRATORS*, vol. 8, p. 650; *LEGATEES AND DISTRIBUTEES*, vol. 13, p. 1; *PROBATE AND ADMINISTRATION*; *WILLS*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ABATEMENT OF LEGACIES*, vol. 1, p. 42; *ADEMPMENT OF LEGACIES*, vol. 1, p. 610; *ADVANCEMENTS*, vol. 1, p. 760; *ALLOWANCES*, vol. 2, p. 156; *ANNUITIES*, vol. 2, p.

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I. DEFINITIONS.—An **Executor** is the person to whom the execution of the last will and testament of the personal estate is, by the testator's appointment, confided.¹

An **Administrator** is a person authorized to manage and distribute the estate of an intestate or of a testator who has no executor.²

II. ORIGIN OF ADMINISTRATION.—Anciently, when one died intestate, the king as *parens patriæ* used by his ministers to seize the goods of the intestate to the end that they should be preserved and disposed of for the burial of the deceased, for the payment of his debts, and to advance his wife and children if he had any, and if not, then for his blood. Afterwards this trust was committed by the crown to the ordinary as the most fit person therefor, since he had the cure and charge of the soul of the deceased during his lifetime.³ This condition of things continued until the enactment of statute 31 Edw. III., c. 11, Stat. Westm., which provided that "in the case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods." Afterwards the power of the ordinary was somewhat enlarged by statute 21 Hen. VIII., c. 5, which provided that the administration should be granted "to the widow of the deceased or to the next of his kin, or to both as by the discretion of the same ordinary shall be thought good."⁴

III. WHEN ADMINISTRATION IS NECESSARY OR PROPER—1. **In General.**—Administration on the estate of a deceased person by duly constituted personal representatives is necessary in all cases, as a general rule, because an executor or administrator is the only representative of the personal assets of the decedent, and has exclusive title thereto.⁵

1. **Executor Defined.**—2 Black. Com. 503; *Holladay v. Holladay*, 16 Oregon 147.

Swinburne says: "To appoint an executor, is to place one in the stead of the testator, who may enter to the testator's goods and chattels, and who hath action against the testator's debtors, and who may dispose of the same goods and chattels, towards the payment of the testator's debts, and performance of his will." Swinb. on Wills, part 4, § 2, pl. 2. See also *Brownrigg v. Pike*, 7 Prob. Div. 61.

2. **Administrator Defined.**—Bouv. Law Dict., tit. Administration.

For Definitions of the Several Kinds of Administrators, see *infra*, this title, *Appointment and Tenure of Office*.

3. **Origin of Administration.**—2 Black. Com. 491; *Hensloe's Case*, 9 Coke 37.

4. 2 Black. Com. 495. See also *Blewitt v. Nicholson*, 2 Fla. 200, in which the origin and growth of administration under the English law is traced.

5. **Necessity of Administration in General.**—Tyler v. Bell, 2 Myl. & C. 89, 1 Keen 826, 1 Jur. 20, 6 L. J. Ch. 169; *Neubrecht v. Santmeyer*, 50 Ill. 74; *Leamon v. McCubbin*, 82 Ill. 263; *Hickox v. Frank*, 102 Ill. 660; *Marshall v. King*, 24 Miss. 85; *State v. Moore*, 18 Mo. App. 406; *Davidson v. Potts*, 7 Ired. Eq. 42

N. Car.) 272; *Sharp v. Farmer*, 4 Dev. & B. L. (20 N. Car.) 122; *Bradford v. Felder*, 2 McCord Eq. (S. Car.) 168; *Hall v. Wilson*, 6 Wis. 433.

In North-western Conference of Universalists v. Myers, 36 Ind. 375, *Buskirk, J.*, said: "The policy of our laws seems to require that letters of administration shall be taken upon the estate of every person dying testate or intestate, and that the estate shall be settled according to the statute regulating the settlement of decedents' estates, where the estate exceeds in value five hundred dollars."

In *Linsensigler v. Gourley*, 56 Pa. St. 166, 94 Am. Dec. 51, the decedent after enlisting in the army and just before going to the field, gave to a friend a sealed envelope containing a note with the request that it should be delivered at once to a person named, and it was held that even though the transaction amounted to a military will, the note was nevertheless subject to administration.

Presumption as to Necessity.—It will be presumed in every case that an executor or administrator is necessary, unless facts are shown making an exception to the general rule. *Ansley v. Baker*, 14 Tex. 607, 65 Am. Dec. 136; *Green v. Rugely*, 23 Tex. 540.

Where the decedent left her husband and an

2. Necessity for Purpose of Making Distribution. — If there are no creditors, the next of kin entitled to the estate may collect and make distribution among themselves without administration,¹ but the court of probate still has jurisdiction to grant administration, though the estate owes no debts and there is only one distributee.²

3. Necessity When There Are Creditors. — The principle of the common law that the title to a decedent's personal estate passes to his personal representative makes administration necessary if there are creditors of the estate, so as to enable the creditors to bring suit and subject the property of the estate to the payment of the debts.³ In those jurisdictions, however, where the title

only child surviving her, and there was no administration on the estate or on the community property for eight years after her death, it will be presumed as to the community real property that there was no necessity for administration. *Hill v. Young*, 7 Wash. 33.

Burden of Proof as to Necessity. — In *Bowen v. Stewart*, 123 Ind. 507, it was held that the burden of showing that administration is unnecessary is on the heirs, where they resist an application for administration made by a county treasurer on the ground that the decedent was indebted to the county for taxes, and that the applicant was charged with the duty of collecting such taxes.

In *Alexander v. Barfield*, 6 Tex. 400, it is said that neither the heir nor the next of kin can be the representative of a deceased person in any judicial sense, without administration committed to him.

Where Some of the Heirs Are Infants, an administrator may be appointed to manage the succession until partition of the estate, though the property has been sold and some of the heirs are of age and have accepted unconditionally. *Dees v. Tildon*, 2 La. Ann. 412.

Proof of Existence of Assets. — In *Grimes v. Talbert*, 14 Md. 169, *quoted with approval* in *Neal v. Charlton*, 52 Md. 495, and *Donaldson v. Raborg*, 26 Md. 312, *Bartol, J.*, says: "In an application for letters, the dying intestate and leaving personal estate must be shown; the former must be 'proved to the satisfaction of the court,' the latter need not be conclusively established; *prima facie* evidence thereof is all that is necessary. The action of the court is not dependent upon the weight of evidence. If the application be resisted and proof be offered to show that the intestate left no property, it cannot avail unless it be clear and explicit and above all doubt. It was not designed by the statute, that questions of title to personal property should be tried and determined by the orphans' court, in a summary proceeding upon an application for letters. Neither the organization of the court, nor their mode of proceeding, enables them satisfactorily to pass upon such a question."

Legal Title to Personalty Vests in Personal Representative. — See *infra*, this title, *Management and Care of Estate — Personal Property — Title and Right to Possession*.

1. Power of Next of Kin to Dispense with Administration. — *Glover v. Hill*, 85 Ala. 41; *Akin v. Akin*, 78 Ga. 24; *Henderson v. Clark*, 5 Cushm. (Miss.) 436; *McCracken v. McCaslin*, 50 Mo. App. 85; *Rapp's Estate*, 12 Pa. Co. Ct. Rep. 609; *Hege's Estate*, 12 Lanc. L. Rev.

(Pa.) 105; *Green's Estate*, 5 Pa. Co. Ct. Rep. 605; *Roberts v. Messinger*, 134 Pa. St. 298; *Filler's Estate*, 6 Pa. Super. Ct. Rep. 364; *Huson v. Wallace*, 1 Rich. Eq. (S. Car.) 1.

Where There Are No Debts and only one heir, no administration is necessary merely for the purpose of effecting a distribution. *McIntyre v. Chappell*, 4 Tex. 187.

When There Are No Creditors, the heirs or legatees may collect, if they can, the estate together, and make such distribution among themselves as they may agree to and carry into effect, without the intervention of any administrators; and the law favors such arrangements. In such cases it is only where the heirs or legatees fail to make such collection and distribution that administration becomes necessary. *Foote v. Foote*, 61 Mich. 181.

If Substantially All the Debts Have Been Paid by the persons beneficially entitled to the estate administration is not necessary. *Catlin v. Huestis*, 11 Ohio Cir. Ct. Rep. 120, 5 Ohio Cir. Dec. 23.

No Personalty or Debts. — The appointment of an administrator is unnecessary, if not invalid, where the decedent leaves no personal property or debts. *Flood v. Pilgrim*, 32 Wis. 376; *Filbey v. Carrier*, 45 Wis. 469.

Community Estates. — Where the succession of a deceased husband, which is wholly composed of his half of the community property, the other half of which belongs to his surviving widow, is entirely free from debts, or only owes such trifling debts as she offers to pay, the appointment of an administrator of his succession is unnecessary and illegal. The surviving widow has the right to take possession of the whole property and exclusively administer it, as the owner of one half of it, and as the usufructuary of the other half. *Burton v. Brugier*, 30 La. Ann. 479.

2. Existence of Debts Not Essential to Jurisdiction. — "The authority of the probate court to grant administration, even though there is but one distributee, and the estate owes no debts, cannot be questioned; nor can it be doubted, that when such administration is granted before the property has been reduced to possession by the distributee, the rights of the administrator are, as to the personal estate, exclusive, and he alone can give a valid discharge upon payment of a demand due the intestate." *Johnson v. Longmire*, 39 Ala. 143, *citing* *Beattie v. Abercrombie*, 18 Ala. 9; *Jenkins v. Freyer*, 4 Paige (N. Y.) 51. See also *Garrett v. Boeing*, 37 U. S. App. 42.

3. Rule that Administration Is Necessary When There Are Creditors. — *Flash v. Gresham*, 36

to a decedent's property vests in the heirs, subject only to the payment of debts, the rule is different, and the heirs may dispense with the necessity of administration by paying the debts.¹

Such is the Rule in Louisiana where the civil law obtains.²

4. Necessity When There Are Debtors. — The same principle requires administration when there are debts owing to the decedent to be collected, because ordinarily no one can sue in respect to property except the holder of the legal title.³

Ark. 529; *Harwood v. Marye*, 8 Cal. 580; *Taber v. Packwood*, 1 Day (Conn.) 150; *Roorbach v. Lord*, 4 Conn. 347; *Pritchard v. Norwood*, 155 Mass. 539; *Jacobs v. Maloney*, 64 Mo. App. 270; *Screven v. Bostick*, 2 McCord Eq. (S. Car.) 410, 16 Am. Dec. 664; *Ansley v. Baker*, 14 Tex. 607, 65 Am. Dec. 136; *Green v. Rugely*, 23 Tex. 540.

The Rule that a Personal Representative Is Necessary to enable a creditor to sue, is not affected by the statute casting the descent directly on the heirs of the decedent subject to administration. *Green v. Rugely*, 23 Tex. 540.

In *McGonigal v. Colter*, 32 Wis. 614, it was held that administration was not necessary before a creditor could sue a legatee where only one debt remained unpaid, and the sole legatee had received more than enough personal property to pay it.

Presumption as to Existence of Debts. — In *Shirley v. Warfield*, 12 Tex. Civ. App. 449, it was held that there was no presumption against the existence of debts arising from the lapse of more than ten years from the death of an intestate, so as to prevent the probate court from taking jurisdiction. See also *Martin v. Robinson*, 67 Tex. 368; *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852; *Crawford v. McDonald*, 88 Tex. 626; *Templeton v. Ferguson*, 89 Tex. 47.

Existence of Debts Must Be Shown. — In *Wright v. Smith*, 19 Nev. 143, it was held that there was no presumption either for or against the existence of debts, and that the court had no right to appoint an administrator without satisfactory proof that the property was subject to administration and that the appointment would accomplish some useful end. See also *Carr v. Huette*, 73 Ind. 378.

What Are Debts. — In *McElhanev v. Crawford*, 96 Ga. 174, it was held that a good cause of action against a decedent for libel was not such a debt as would prevent the widow from taking possession of the estate without administration. See also *Summerlin v. Rabb*, 11 Tex. Civ. App. 53.

1. Rule that Heirs May Pay Debts and Dispense with Administration. — *Ducloslange's Succession*, 1 La. Ann. 181; *Martin v. Dupre*, 1 La. Ann. 239; *Sutton's Succession*, 20 La. Ann. 150; *Broussard v. Ditch*, 30 La. Ann. 1109; *Hebert's Succession*, 33 La. Ann. 1099; *Lamm's Succession*, 40 La. Ann. 312; *Wright v. Smith*, 19 Nev. 143; *Hogue v. Sims*, 9 Tex. 546; *Blair v. Cisneros*, 10 Tex. 34.

2. Rule in Louisiana. — See Louisiana cases cited in note next above.

Discretion of Judge. — Although there are no debts, the appointment of an administrator may sometimes be advantageous, or even necessary, and it is subject-matter within the discretion of the judge. *Story's Succession*, 3

La. Ann. 502; *Romero's Succession*, 42 La. Ann. 894.

Heirs Residing in Remote Parishes. — Administration is not necessary merely because some of the heirs reside in remote parishes and have only a small interest in the estate. *Alleman v. Bergeron*, 16 La. Ann. 191.

Estate Not Sufficient to Pay Expense of Administration. — Administration is not necessary where the estate is not sufficient to pay the expense thereof. *Soubiran v. Rivollet*, 4 La. Ann. 328.

Insurance Policy Payable to Personal Representatives. — Administration is not necessary merely because an insurance policy was made payable "to the assured, his executors, administrators, or assigns." *Pratt v. Manhattan L. Ins. Co.*, 47 La. Ann. 855.

Heirs May Dispense with Administration. — The heirs who are of age may dispense with administration. *Ducloslange's Succession*, 1 La. Ann. 181; *Self v. Morris*, 7 Rob. (La.) 24; *O'Donald v. Lobdell*, 2 La. 299.

3. Only Personal Representative Can Collect Assets. — *Leamon v. McCubbin*, 82 Ill. 263; *Rousch v. Hundley*, 3 West. L. Month. (Ohio) 126, 2 Ohio Dec. (Reprint) 445; *Duly v. Duly*, 3 West. L. Month. (Ohio) 42, 2 Ohio Dec. (Reprint) 425; *Smiley v. Bell*, Mart. & Y. (Tenn.) 378; *Ketchum v. Dew*, 7 Coldw. (Tenn.) 532.

"Heirs and distributees cannot in their own names, in law or in equity, prosecute suits to recover the unadministered estate of the intestate, or to collect debts; but such suits can only be maintained by the personal representative who has qualified as such, if there be one, or, if not, by one or more to be appointed to administer; except in cases where the distributees may sue in equity to recover the estate, or portions thereof, because, although there be an administrator or administrators, etc., they refuse to administer upon the estate sued for, or to prosecute suits for the recovery thereof; and in such cases the personal representatives are necessary parties." *McChord v. Fisher*, 13 B. Mon. (Ky.) 194.

It Is Held in Alabama that where nothing remains to be done except to reduce assets to possession the person beneficially entitled to the estate may sue for debts due it. *Bethea v. McColl*, 5 Ala. 308; *Miller v. Eatman*, 11 Ala. 609; *Vanzant v. Morris*, 25 Ala. 285; *Marshall v. Crow*, 29 Ala. 278; *Carter v. Owens*, 41 Ala. 217; *Fetwell v. McLemore*, 52 Ala. 124; *Sullivan v. Lawler*, 72 Ala. 68.

When an estate is entirely free from debt, and the only office of an administrator would be the reduction of the assets to possession and distribution, the administration is deemed a useless ceremony, and it has long been the practice of courts of equity in this state to dispense with it, entertaining suits by the next of

5. Value of Estate. — Ordinarily the value of an estate is not material, but in some jurisdictions it is provided by statute that administration shall not be granted on an estate of less than a certain value.¹

6. Estates of Minors. — Administration on the estate of a deceased minor is held unnecessary by some authorities, because minors cannot contract debts and therefore cannot be presumed to have any creditors;² but other authorities hold that administration may be granted on the estate of a minor as well as on that of any other person.³

7. Estates of Married Women. — The estate of a deceased married woman is generally subject to administration as in any other case, because there is no presumption that she may not have incurred debts during her lifetime.⁴

8. Estates of Indians. — Where Indians maintain the tribal relation their estates are not subject to be administered in the probate court of the state, unless by the consent of the general government.⁵

IV. APPOINTMENT AND TENURE OF OFFICE — **1. Executors** — *a. HOW CONSTITUTED* — (1) *Source of Executor's Authority.* — An executor, according to the common-law doctrine, derives his office solely from the will by which he is appointed,⁶ and not from the probate, which is held to be only evidence of his right.⁷ In many, if not all, of the states of the Union the authority of an executor, while derived primarily from the will, is not derived solely therefrom, and is not complete until the executor has qualified by complying with certain statutory requirements, and has received letters testamentary from a court of competent jurisdiction;⁸ but the nomination contained in the will

kin. *McGhee v. Alexander*, 104 Ala. 116; *Cooper v. Davison*, 86 Ala. 367; *Wright v. Robinson*, 94 Ala. 479.

1. Value of Estate. — In *Maine* administration will not be granted on an estate, unless it amounts to at least twenty dollars. *Bean v. Bumpus*, 22 Me. 549; *Fowle v. Coe*, 63 Me. 245.

In other jurisdictions the estate must exceed the amount of the allowance to the widow and children, in order to authorize a grant of administration. *Stewart v. Stewart*, 74 Ga. 355; *Clark v. Fleming*, 78 Ga. 782; *Pace v. Oppenheim*, 12 Ind. 533; North-western Conference of Universalists *v. Myers*, 36 Ind. 375.

2. Administration on Estate of Minor Held Unnecessary. — *Bethea v. McColl*, 5 Ala. 308; *Vanzant v. Morris*, 25 Ala. 285; *Lynch v. Rotan*, 39 Ill. 14; *McCleary v. Menke*, 109 Ill. 294; *Cobb v. Brown*, *Spears Eq. (S. Car.)* 564.

Marriage of Minor. — The presumption, however, that a minor cannot have any creditors does not apply where he was married, and therefore administration may be granted on his estate. *Norton v. Thompson*, 68 Mo. 143.

3. Administration on Estate of Minor Held Proper. — *Wheeler v. St. Joseph, etc., R. Co.*, 31 Kan. 640; *Union Pac. R. Co. v. Dunden*, 37 Kan. 4; *Horton v. Trompeter*, 53 Kan. 150; *Roberts v. Eales*, 10 Ky. L. Rep. 360.

4. Administration on Estates of Married Women. — *Patterson v. High*, 8 Ired. Eq. (43 N. Car.) 52; *Ruch v. Hildebrand*, 2 W. N. C. (Pa.) 661, 24 Pittsb. L. J. (Pa.) 15; *Wood v. Wheeler*, 7 Tex. 13.

Exception to Rule as to Married Women. — In *Maryland*, by statute, if a married woman dies without descendants and without leaving any debts, her husband takes her estate absolutely, without the necessity of administration. *In re Lee*, 76 Md. 108; *Wilkinson v. Robertson*, 85 Md. 447.

5. Estates of Indians Maintaining Tribal Relation. — *U. S. v. Payne*, 4 Dill. (U. S.) 387 [citing *The Kansas Indians*, 5 Wall. (U. S.) 737, 757, 759; *Mackey v. Cox*, 18 How. (U. S.) 100; *Mungosah v. Steinbrook*, 3 Dill. (U. S.) 418; *Gray v. Coffman*, 3 Dill. (U. S.) 393].

6. Executor Derives Authority Solely from Will — *Alabama.* — *Wood v. Cosby*, 76 Ala. 557.

Arkansas. — *Ludlow v. Flournoy*, 34 Ark. 451.

Kentucky. — *Muldrow v. Fox*, 2 Dana (Ky.) 82.

Maine. — *Hathorn v. Eaton*, 70 Me. 219.

Maryland. — *Winchester v. Union Bank*, 2 Gill & J. (Md.) 79.

Missouri. — *Powell v. Hurt*, 31 Mo. App. 632.

New Jersey. — *Voorhees v. Stoothoff*, 11 N. J. L. 145; *Covenhoven v. Covenhoven*, 1 N. J. L. 243.

New York. — *Hartnett v. Wandell*, 60 N. Y. 346, 19 Am. Rep. 194, 16 Abb. Pr. N. S. 383, reversing 2 Hun (N. Y.) 552, 5 Thomp. & C. (N. Y.) 98, but affirming *Matter of Alexander*, 16 Abb. Pr. N. S. (N. Y. Surrogate Ct.) 9.

See also 1 Wms. Exrs. (7th Am. ed.) 278; *Wentworth on Office of Exrs.* (14th ed.), p. 3.

7. Probate Only Evidence of Executor's Right. — *Smith v. Milles*, 1 T. R. 480; *Humphreys v. Humphreys*, 3 P. Wms. 349; *Cleveland v. Chandler*, 3 Stew. (Ala.) 489; *Gardner v. Gantt*, 19 Ala. 666. See also cases cited in the immediately preceding note.

8. Mere Nomination in Will Not Sufficient to Constitute Executor — *Alabama.* — *Cleveland v. Chandler*, 3 Stew. (Ala.) 489; *Wood v. Cosby*, 76 Ala. 557; *Gardner v. Gantt*, 19 Ala. 666.

Arkansas. — *Diamond v. Shell*, 15 Ark. 26.

Maine. — *Millay v. Wiley*, 46 Me. 230; *McKeen v. Frost*, 46 Me. 239.

Missouri. — *Stagg v. Green*, 47 Mo. 500; *Lamb v. Helm*, 56 Mo. 420.

cannot be disregarded by the court, unless the person named is for some reason disqualified to act as executor,¹ and the authority of the court in the premises is limited to qualifying the executor and issuing letters testamentary, and does not extend to the appointment, as that authority pertains to the testator alone.²

(2) *Terms by Which Executors May Be Appointed.* — The appointment of an executor may be either express or constructive.³

Executor According to the Tenor of the Will. — Where the appointment of an executor is constructive, he is usually called an executor according to the tenor of the will. Such appointment is effected by any words or circumlocution by which the testator commits to the charge of the person named, those duties which pertain to the office of executor.⁴ But a mere direction to a

New York. — *Humbert v. Wurster*, 22 Hun (N. Y.) 405.

South Carolina. — *Crosland v. Murdock*, 4 McCord L. (S. Car.) 217; *Poag v. Carroll*, Dudley L. (S. Car.) 1.

Texas. — *Tippett v. Mize*, 30 Tex. 361, 94 Am. Dec. 313.

In *Millay v. Wiley*, 46 Me. 230, it was said that under the statute which provides that "when any will is duly proved and allowed, the judge of probate may issue letters testamentary thereon, if he is legally competent, accepts the trust, and gives bond to discharge the same," the following prerequisites seem to be necessary to constitute a person an executor: 1st, the probate of the will; 2d, competency in the opinion of the probate judge; 3d, acceptance of the trust; 4th, delivery of a bond to discharge the same; and 5th, reception of letters testamentary.

In *Stagg v. Green*, 47 Mo. 500, it was held that the mere fact that a person has been named executor in a will, does not make him an executor, but only gives him the right to become such on complying with the conditions required by law.

1. Nomination in Will Cannot Be Disregarded by Court, Except for Cause. — The court must appoint as executor, the person who is named as such in the will, unless he is shown to be incompetent on some one of the grounds specified in the statute. *In re Bauquier*, 88 Cal. 302.

Letters testamentary must be granted to the person named in the will, unless he is disqualified by law. *Holladay v. Holladay*, 16 Oregon 147.

In *Holbrook v. Head*, (Ky. 1888) 6 S. W. Rep. 592, where the county court admitted the will to probate, and refused to permit the executors to qualify, it was said: "The testator confided the custody and control of his property to the one nominated as executor by his last will, and the person named as such is entitled to qualify, unless, by reason of his mental condition or some legal disability, he is prevented from acting as executor. It is the testator that appoints his executor, and the question as to his peculiar fitness for such a position, or his want of ability to manage the estate because of his failure in his own financial affairs, cannot be addressed to the discretion of the county judge when asked to permit him to qualify." *Worthington v. Worthington*, (Ky. 1896) 35 S. W. Rep. 113.

In *Smith's Appeal*, 61 Conn. 420, Torrance,

J., said that it is "quite clear upon principle and authority that where a testator appoints an executor out of the class recognized, either by the common law or by statute, as capable of accepting and performing the duties of such a trust, the court invested with authority to admit the will to probate cannot reject the person so appointed, or refuse to approve of the appointment, except in cases where the law has specially so provided."

2. Probate Court Cannot Appoint Executor. — *Blakely v. Frazier*, 20 S. Car. 144.

3. Appointment of Executors Either Express or Constructive. — 1 Wms. Exrs. (7th Am. ed.) 278; *Grant v. Spann*, 34 Miss. 294; *Carpenter v. Cameron*, 7 Watts (Pa.) 51.

In *Creath v. Brent*, 3 Dana (Ky.) 129, it was held that an executor with plenary powers was appointed by a clause as follows: "I likewise appoint him my executor to settle my business, to pay off all my debts and accounts which he may consider just, though they may not prove them according to law."

In *Moke v. Norrie*, 14 Hun (N. Y.) 128, the testator appointed his wife "executrix" and certain other persons "executors." In other portions of the will he conferred certain powers upon his "executors," appointed his "executors" guardians of his children, and directed that his property be held in trust by his "executors." It was held, that the testator intended to include "executrix" in the word "executors," and that the wife was therefore entitled to act as one of the trustees and guardians under the will.

4. Executor According to the Tenor. — When the court can gather from the terms of a will that the person named therein is required to pay the debts and to administer the estate, it will grant probate to him as executor according to the tenor. In *Goods of Bluet*, 15 L. R. Ir. 140.

Naming a person as one whom the testator would wish to see that the intentions of his will are carried out constitutes such person an executor according to the tenor. In *Goods of Archdall*, 5 L. R. Ir. 618.

The appointment of two persons as trustees, to dispose of the testator's effects as they might see fit, and to receive his life insurance for the benefit of his sons, was held to constitute them executors according to the tenor. In *Goods of Gale*, 18 L. T. N. S. 606, 16 W. R. 942.

So, also, the appointment of two persons as trustees, with full power to dispose of all the

legatee to pay funeral expenses out of his legacy, or a direction to a person to pay debts or funeral expenses out of a particular fund, or leaving the whole personal property to a trustee in trust for a specific purpose, does not create an executor according to the tenor.¹

Executor Must Be Named in Will. — An executor must be named in the will by which he is appointed, or by a reference in the will to some paper in existence.²

Identity of Person Intended. — The will must name or describe the person intended to be appointed executor, so that his identity may be ascertained with reasonable certainty.³

testator's property and invest the proceeds in government funds for certain purposes. *Goods of Chappell*, 37 L. J. P. 32, 17 L. T. N. S. 618, 16 W. R. 488.

An appointment at the end of a will to receive and pay the contents before mentioned, makes the persons so appointed, executors. *Pickering v. Tower*, Ambl. 364, 1 Eden 142.

Directing Public Administrator to Sell Real Estate. — It was held in *Baker v. Baker*, 18 N. Y. App. Div. 189 [citing 1 Wms. Exrs. (7th Am. ed.) 278; *Exp. McDonnell*, 2 Bradf. (N. Y.) 32; and *Matter of Blancan*, 4 Redf. (N. Y.) 151], that a direction in a will that the public administrator shall "sell out all real estate" is an appointment of the person holding that position as executor of the will, and letters testamentary were issued accordingly.

By Making an Infant Executor and Appointing a Guardian for the infant, the testator does not indicate an intention that the guardian shall be executor. In *Goods of Stewart*, L. R. 3 P. & D. 244.

A Direction to a Person to Receive Property and Divide It among the beneficiaries under the will constitutes him an executor according to the tenor. In *Goods of Saunders*, 11 Jur. N. S. 1027. See also:

England. — In *Goods of Cooper*, 8 Jur. N. S. 394; In *Goods of Spotten*, 5 L. R. 1r. 403; In *Goods of Goodworth*, 37 L. J. P. 49; In *Goods of Heaton*, 7 Jur. N. S. 832; In *Goods of Manly*, 3 Sw. & Tr. 56, 31 L. J. P. 198, 8 Jur. N. S. 493, 7 L. T. N. S. 200; In *Goods of Baylis*, L. R. 1 P. & D. 21, 11 Jur. N. S. 1028, 35 L. J. P. 15, 13 L. T. N. S. 446; In *Goods of Leven*, 15 Prob. Div. 22; In *Goods of Allam*, 66 L. T. N. S. 382; In *Goods of Wilkinson*, (1892) Prob. 227; In *Goods of Russell*, (1892) Prob. 380.

Alabama. — *Wright v. Watson*, 96 Ala. 536; *Banks v. Speers*, 97 Ala. 560.

Massachusetts. — *Hill v. Whidden*, 158 Mass. 267.

Mississippi. — *Hyman v. Rollins*, 70 Miss. 412.

New Jersey. — *Corle v. Monkhouse*, 50 N. J. Eq. 537.

New York. — *Exp. McDonnell*, 2 Bradf. (N. Y.) 32; *Matter of Blancan*, 4 Redf. (N. Y.) 151; *Exp. McCormick*, 2 Bradf. (N. Y.) 169; *Bayeaux v. Bayeaux*, 8 Paige (N. Y.) 333.

North Carolina. — *Dickson v. Crawley*, 112 N. Car. 629.

South Carolina. — *State v. Watson*, 2 Spears L. (S. Car.) 97; *Nunn v. Owens*, 2 Strobb. L. (S. Car.) 101.

Vermont. — *Re Powers*, 65 Vt. 399.

In *Fleming v. Bolling*, 3 Call (Va.) 75, it was held that a devise that "my book be given up to my brother R., and that he receive all debts

due to me and pay all that I owe," constituted R. executor of the will.

Origin of Rule as to Executors According to the Tenor. — In *Hartnett v. Wandell*, 60 N. Y. 346, 19 Am. Rep. 194, 16 Abb. Pr. N. S. (N. Y.) 383, Allen, J., said that the rule as to executors according to the tenor of the will "grows out of the fundamental principle, universally recognized, that effect shall be given to the will of a testator, when not contrary to the rules of law, as such will and the intent of the author of it can be gathered from the whole instrument."

1. Language Insufficient to Constitute Executor According to Tenor. — In *Goods of Smith*, 10 Jur. N. S. 1084, 34 L. J. P. 15; In *Goods of Toomy*, 3 Sw. & Tr. 562, 34 L. J. P. 3, 13 W. R. 106; In *Goods of Jones*, 2 Sw. & Tr. 155, 4 L. T. N. S. 477, 31 L. J. P. 199; In *Goods of Love*, 7 L. R. 1r. 178.

2. Executors Must Be Named in Body of Will. — In *Goods of Dallow*, L. R. 1 P. & D. 189, 12 Jur. N. S. 492, 35 L. J. P. 81, 14 W. R. 902, 14 L. T. N. S. 573, it was held that a will did not appoint executors by a direction that certain things should be done by "executors herein-after named," where no executors were named except in a clause following the testator's signature.

In *Goods of Woods*, L. R. 1 P. & D. 556, 37 L. J. P. 23, 16 W. R. 407, it was held that writing the words "executors and witnesses" opposite the names of the attesting witnesses was not a sufficient naming of such persons as executors. Sir J. P. Wilde, delivering the opinion, said: "If the executrix had said in the body of the will that the witnesses to the will were to be her executors, I think the court would have been able to carry out what was no doubt her desire, and to grant probate to them; but she has not gone so far. Even if she had said, 'I leave one sovereign each to the executors and witnesses of my will,' it might perhaps have been sufficient; but it is consistent with the language she has used that the executor and the witness were different persons, and that construction is confirmed by the words which follow, 'for their trouble.' If the executor and the witness were the same person, the words would have been 'for his trouble.' I cannot therefore hold that there is any appointment of executor in the body of the will. The court is not at liberty to take notice of the words beneath the signature, which do not form part of the will."

3. Identity of Person. — In *Goods of Twohill*, 3 L. R. 1r. 21, the will named as one of the executors the testator's brother-in-law, Edmund O'Kelly. The testator had no brother-in-law Edmund O'Kelly, but he had a brother-in-law Edward O'Kelly. It was held that

Use of Word "Executor." — Though the will must show definitely the testator's intention to appoint the person named as his executor, the use of the word "executor" is not necessary to render the appointment effective, but it is sufficient if such intention may be gathered from the whole will.¹ The intention must, however, be sufficiently definite for that purpose, and the court, in determining whether the will effectively appoints an executor, cannot proceed on loose conjectural interpretation, nor by considering what a man might be imagined to do in the testator's circumstances.²

(3) *Marriage of Executrix.* — At common law a man marrying a woman who is an executrix becomes an executor in her right, and renders himself a trustee with her for the assets of the estate;³ but as a general rule in the *United States* this has been changed by statutes which provide in effect that on the marriage of an executrix her powers shall cease,⁴ and in *England* it is provided by the Married Women's Property Act of 1882 that the husband of an executrix shall not be liable for acts done by her in that capacity either before or after her marriage unless he intermeddled in the administration.⁵

(4) *Delegation of Power to Appoint.* — A testator may not only make a direct appointment of the executor of his will, but he may also delegate the power of appointment, and an appointment made by the person or persons to whom the power is delegated is as valid and effective as if made directly by the testator.⁶

evidence of the circumstances, habits, and position of the testator's family was admissible to prove that Edward O'Kelly was the only person to whom the name and description in the will could be applied, and probate was granted to him accordingly.

In *Goods of Gausden*, 31 L. J. P. 53, the appointment "of my wife M. G." as executrix was held not to be a *falsa demonstratio*, though M. G. was not the wife of the testator, the marriage being void on the ground of affinity.

In *Goods of Sawtell*, 2 Sw. & Tr. 448, 6 L. T. N. S. 395, 10 W. R. 782, it was held that there was no appointment of an executor willing and competent to take probate, where the will appointed "William George, of 4 Finsbury Square, watchmaker," and it appeared that neither the testator nor his family knew any one of that name, and that no such person could be found or heard of at the address given in the will.

In *Goods of Baskett*, 105 L. T. 271, was an application that probate should be decreed to three persons as executors of the will of the deceased. One of the applicants was described in the will as Frederick Allen, residing at a certain golf club. The applicant's real name was William Charles Allen, and he resided at another neighboring golf club. There was evidence to show that the deceased knew no other person of the name of Allen, and that he always called the applicant Frederick, and that he had requested the applicant to act as his executor. It was held that probate ought to be granted to the applicant in his proper name and proper description, described in the will as Frederick Allen of a certain address.

Appointment Void for Uncertainty. — In *Goods of Baylis*, 2 Sw. & Tr. 613, 8 Jur. N. S. 546, 31 L. J. P. 119, 17 L. T. N. S. 251, the testator appointed "A. as my executor, with any two of my sons." The appointment as to the sons was held void for uncertainty.

The appointment of "one of my sisters" sole executrix is void for uncertainty, where

the testator had three sisters living when the will was executed, though two of them died in the testator's lifetime. In *Goods of Blackwell*, 2 Prob. Div. 72.

1. Use of Word "Executor" Not Necessary. — In *Goods of Morony*, 1 Ir. L. R. 483, the testator conferred certain authority on his "executors," and in the last clause of the will used the words, "I herewith appoint and empower James Clancy and Pat O'Connor." There was no other appointment of executors. The court supplied the words "my executors" in the last clause.

In *Goods of Bradley*, 8 Prob. Div. 215, 52 L. J. P. 101, 47 J. P. 825, there was a recital in the will that "I appoint P. and W.," but it was not stated in what capacity they were appointed. The testator also bequeathed legacies "to each of my executors," and gave to "said executors" the residue of his property for certain purposes. It was held that the testator intended to appoint P. and W. as executors, and probate was granted to them accordingly.

But in *Goods of Bonham*, 8 Jur. N. S. 596, where the will recited that "I appoint J. O'H. and G. B. of the W.," and there stopped, it was held not sufficient to constitute them executors of the will.

2. Intention Must Appear Definitely. — *Fosdick v. Delafield*, 2 Redf. (N. Y.) 392.

3. Marriage of Executrix Constitutes Husband Executor — Common-law Rule. — *Bachelor v. Bean*, 2 Vern. 61; *Norton v. Sprig*, 1 Vern. 309; *Matter of M'Williams*, 1 Sch. & Lef. 173; *Adair v. Shaw*, 1 Sch. & Lef. 243; *Paget v. Read*, 1 Vern. 143; *Smith v. Smith*, 21 Beav. 385; *Wood v. Chetwood*, 27 N. J. Eq. 311; *Lindsay v. Lindsay*, 1 Desaus. (S. Car.) 150; *Gates v. Whetstone*, 8 S. Car. 244, 28 Am. Rep. 284.

4. See the various local codes and statutes in the United States.

5. See Stat. 45 & 46 Vict., c. 75.

6. Power to Appoint Executors May Be Delegated. — In *Goods of Ryder*, 2 Sw. & Tr. 127, 7

(5) *Conditional, Qualified, or Limited Appointment.* — The appointment of an executor may be limited as to the time when the person appointed shall begin or when he shall cease to be executor, or as to where the executor shall act, or as to the subject-matter over which the executorial power is to be exercised, or it may be on conditions either precedent or subsequent.¹

(6) *Substitutionary Appointment.* — A testator may provide, in case of the death, failure, or inability of the persons named in his will as executors, for the substitution of a successor or successors in the executorship.²

(7) *Executor of Executor.* — If a sole executor dies leaving an executor,

Jur. N. S. 196, 3 L. T. N. S. 756, 31 L. J. P. 215; *Farnum v. Administrator Gen.*, L. R. 14 App. 651; *State v. Rogers*, 1 Houst. (Del.) 569; *Hartnett v. Wandell*, 16 Abb. Pr. N. S. (N. Y. Ct. App.) 383, 60 N. Y. 346, 19 Am. Rep. 194; *Matter of Alexander*, 16 Abb. Pr. N. S. (N. Y. Surrogate Ct.) 9; *Hutton v. Hutton*, 41 N. J. Eq. 267.

It has been decided that a testator may in his will delegate the authority to name an executor to some third person or persons, and the appointment made by them will be the same as if made in the will." *Wilson v. Curtis*, (Ind. 1898) 51 N. E. Rep. 913 [citing 1 Williams, Exrs., pp. 195, 202; *Woerner, Admn.*, § 239; *Schouler, Exrs.*, § 41; *Crosby, Exrs. and Adms.*, p. 52; 1 *Thornt. Admn.* 13, and cases cited; 1 AM. AND ENG. ENCYC. OF LAW, 180, and notes; *Hartnett v. Wandell*, 60 N. Y. 346, 19 Am. Rep. 194; *State v. Rogers*, 1 Houst. (Del.) 569; *Mulford v. Mulford*, 42 N. J. Eq. 76; *Bishop v. Bishop*, 56 Conn. 208; *Kinney v. Keplinger*, 172 Ill. 449].

In *Bishop v. Bishop*, 56 Conn. 208, the court said: "The executor is the creation solely of the testator, and it is within the power of the latter not only to appoint personally, but he may project his power of appointment into the future, and exercise it after death through an agent selected by him; and the agent may be pointed out by name, or by his office, or other method of certain identification."

Exercise of Power of Appointment. — In *Goods of Ryder*, 2 Sw. & Tr. 127, 7 Jur. N. S. 196, it was held that where the language of the will was, "I must beg A. to appoint some one to see this my will executed," A. might appoint himself.

In *Moss v. Bardswell*, 3 Sw. & Tr. 187, 6 Jur. N. S. 589, the will made C. executor and trustee, with power to appoint by deed or will other persons as co-trustees or succeeding trustees. C. died without taking probate, but by will appointed E. and F. to be succeeding trustees in respect of his testator's estate. It was held that in the language of the two wills, the distinction between "trustee" and "executor" was so marked that E. and F. were not by C.'s will constituted executors of the will of the first testator.

Duty to Exercise Power of Appointment. — In *Hutton v. Hutton*, 41 N. J. Eq. 267, it was held that a provision of a will that "I authorize and empower and request my said executors" to appoint others to act with them, in case the number of executors should fall below a certain number, was connected with the management of the estate, and imposed on the acting executors a duty to appoint, which they could be compelled to perform.

1. Conditional or Limited Appointment of Executors. — *Hill v. Tucker*, 13 How. (U. S.) 458. See also 1 Wms. Exrs. 199 *et seq.*

A testator may appoint different executors in different countries in which his effects may lie; or different executors as to different parts of his estate in the same country. *Hunter v. Bryson*, 5 Gill & J. (Md.) 483, 25 Am. Dec. 313.

Limitation as to Time when Executorial Function Shall Begin. — The appointment by a testator of each of his sons when he shall come of age to be executor entitled his sons, on coming of age, to probate. In *Goods of Barnes*, 7 Jur. N. S. 195; *Frisby v. Withers*, 61 Tex. 134.

Limitation as to Place. — A testator made his will in England, and appointed B. and C. executors. Afterwards while in India he made a codicil, and later executed a paper appointing E. and F. "my executors in this country." It was held that E. and F. did not have any power over the testator's property in England. In *Goods of Wallich*, 3 Sw. & Tr. 423, 33 L. J. P. 87, 9 L. T. N. S. 809.

Conditional Appointment. — Where the testator appointed his son, residing in Australia, executor, "if and when he shall return to England," it was held that the return of the son to England eight years after the testator's death was a return within the meaning of the will, though he only came to England for the benefit of his health and returned to Australia six months later. *In re Arbib*, (1891) 1 Ch. 601.

In *Knox v. Newman*, 44 N. J. Eq. 309, it was held that the appointment by the testator of his son as executor was not intended to take effect unless the son should be twenty-one years old at the testator's death, where the clause appointing certain persons executors provided, "in case my son D. shall at the time of my decease be of the full age of twenty-one years, and all the persons herein appointed then living, I do hereby nominate and appoint my said son executor in the place and stead of C., but in case of the death of either of the three named executors at the time of my decease, I nominate and appoint my said son executor in the place and stead of the one then deceased. In case of the death of either of the said executors after my decease, the two surviving may nominate and appoint another, who with those surviving shall be the executors."

2. Testator May Provide for Substitution of Successor in Executorship. — *Edwards's Estate*, 35 Leg. Int. (Pa.) 182, 12 Phila. (Pa.) 85.

Condition of Substitution. — A substitutionary appointment, in case the executors first named both die before the testator, or both refuse to act, is conditional, and cannot take effect where one of them survived the testator and

the latter becomes, at common law, the executor of the first testator, and the right of representation may be thus transmitted indefinitely, as long as the chain is not broken by intestacy.¹ This has been the law in *England* since

accepted the executorship and then died. *Fosdick v. Delafield*, 2 Redf. (N. Y.) 392.

Substitution in Case of Death.—Where a will provides that in case of the death of an executor named in the will another person shall be executor in his place, such person is entitled to be substituted in case of the death of the executor, whether the death occurred before or after the testator's death. In *Goods of Johnson*, 1 Sw. & Tr. 17, 27 L. J. P. 9; In *Goods of Lighton*, 1 Hagg. Ecc. 235; In *Goods of Betts*, 30 L. J. P. 167; *Matter of Cornell*, 17 Misc. Rep. (N. Y. Surrogate Ct.) 468.

Person Attainted.—Where a testator provides in his will that if his executor should be attainted of felony or treason another should stand in his room, the substitution was good if the other be attainted in the testator's lifetime. *Carte v. Carte*, Ridgw. temp. Hardw. 3 Atk. 174, Ambl. 28.

Substitution in Case of Refusal to Act.—Where a will provides that "failing A." B. shall be substituted executor, the condition of substitution is satisfied by A.'s refusal to act, and probate may be granted to B. on renunciation by A. In *Goods of Colquhoun*, 17 L. T. N. S. 123, 16 W. R. 88, 37 L. J. P. 1.

Substitution in Case of Absence.—Where a person was appointed executor, and "in case of his absence on foreign duty," it was provided that another person should be executor, the condition of the substitution is satisfied by the absence from the country of the person first named, when the necessity of proving the will arose. In *Goods of Langford*, L. R. 1 P. & D. 458, 17 L. T. N. S. 415, 37 L. J. P. 20.

Where a testator appointed his son sole executor, and in the event of his going abroad, or being and remaining abroad for more than two months, then he appointed D. his executor, and the son, after the testator's death, went abroad without taking probate, and there remained, the court granted probate to D. but reserved power to the son to probate the will. In *Goods of Lane*, 33 L. J. P. 185.

1. Executor of Executor Is Executor of First Testator.—In *Goods of Reid*, (1896) Prob. 129; In *Goods of Grant*, 1 Prob. Div. 435, 24 W. R. 929, 45 L. J. P. Div. 88; *Com. Dig.*, titles Administration (G), Administrator (B6); 1 Wms. Exrs. and Admsrs. (7th Am. ed.) 293.

At common law an executor of an executor was *ipso facto* the executor of the first testator. This rule was changed (in *Massachusetts*) by the Statutes of 1783, c. 24, § 19, which provided that "the executor of an executor shall not in consequence thereof become an executor of the first testator." In the various revisions of the statutes the language has been slightly changed, until, in the Public Statutes, it reads, "The executor of an executor shall not, as such, administer on the estate of the first testator." *Foster v. Bailey*, 157 Mass. 160; *Tallon v. Tallon*, 156 Mass. 313.

Foreign Will.—Where a foreign will was not admitted to probate in England, the chain of representation as to the estate in England is broken, and the executor of the executor does

not become the representative in England of the estate of the first testator. In *Goods of Gaynor*, L. R. 1 P. & D. 723; *Twyford v. Trail*, 7 Sim. 92.

Appointment of Executor Under Power.—In *Barr v. Carter*, 2 Cox 429, it was held that where a married woman made a will merely executing a power given her by a marriage settlement, and appointed an executor, she being the executrix of her former husband, the general probate of her will transmitted the representation of her first husband's estate.

In *Goods of Hughes*, 29 L. J. P. 165, it was held that where a married woman, who was executrix of a will which she had proved, made a will under a power, and appointed executors, the chain of executorship was not continued by such appointment, and that such executors did not become executors of her testator.

Married Women.—A married woman who is executrix may transmit representation by making a will appointing executors. *Birkett v. Vandercom*, 3 Hagg. Ecc. 750.

Joint Executors.—Representation is not transmitted where one of several executors dies, leaving an executor, but it survives to the surviving executor. *Goods of Smith*, 3 Curt. 31.

Limited Probate.—The rule that an executor of an executor is the representative of the first testator applies, though the original probate was a limited one. In *Goods of Beer*, 2 Robt. 349.

But a limited probate of the executors will not continue the chain of representation. In *Goods of Bayne*, 1 Sw. & Tr. 132.

Substitutionary Appointment of Executor.—Where a will provides that on the death of the executor named therein, the court shall appoint some one to administer the estate, the executor of the executor named in such will is not the executor of the first testator, since a testator may appoint his executors to act jointly, or in succession. *Roanoke Nav. Co. v. Green*, 3 Dev. L. (14 N. Car.) 434.

Administrator Appointed During Minority of Executor.—If the executor of an executor is a minor, and an administrator is appointed during minority, such administrator represents the estate of the first testator. *Anonymous*, *Freem.* 288. But see *Limmer v. Every*, *Cro. Eliz.* 211, in which it is said that an administrator appointed during the minority of the executor of an executor does not represent the original testator. This point, however, does not appear in this case as reported in 4 Leon. 58, *sub nom.* *Limmer v. Eyrie*.

Death of Executor Before Probate.—If the executor dies before the testator, or before taking probate if he survives testator, the executorship is not transmitted to his executor. *Isted v. Stanley*, 3 Dyer 372a; *Hayton v. Wolfe*, *Cro. Jac.* 614; *Day v. Chatfield*, 1 Vern. 209; *Anonymous*, 3 Salk. 21; *Brown v. Poyns*, *Styles* 147; *Pullen v. Sericant*, 2 Ch. Rep. 300; *Matter of Drayton*, 4 McCord L. (S. Car.) 40.

Renunciation Under First Will.—If the executor of an executor renounce under the first

very early times,¹ and it prevails in the *United States* except where it has been abrogated by statute.² The rule, however, is restricted to the executor of an executor, and does not apply to the executor of an administrator, or the administrator of an executor.³

will at the time he qualifies under the second will, he does not become the executor of the first testator. *Hart v. Smith*, 20 Fla. 58; *Worth v. M'Aden*, 1 Dev. & B. Eq. (21 N. Car.) 199.

Acts to Be Done After Executor's Death. — The rule as to the devolution of executorship applies, though nothing remains to be done except the sale and distribution of the estate, which, by the terms of the will, were not to be made until the death of the executor named therein. *Burch v. Burch*, 19 Ga. 174.

1. Origin of Rule. — In *Crane v. Alling*, 14 N. J. L. 593, it was said that "at common law executors of executors did not represent the first testator; at least they could not sue or be sued as such until the statute of 25 Edw. III." (stat. 5, c. 5).

Reason of Rule. — The reason of the rule is stated by Sir William Blackstone as follows: "For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another in whom he has equal confidence." 2 Bl. Com. 506.

"The right of the executor of a deceased executor to represent the first testator is not derived from nor is it founded on any notion of privity between him and his immediate testator. If it had been, then the right would have existed at the common law." *Crane v. Alling*, 14 N. J. L. 593.

Representation of First Testator. — In *O'Driscoll v. Fishburne*, 1 Nott & M. (S. Car.) 77, Mr. Justice Gantt said: "There can be no question but that the executor of an executor represents the first testator, and may declare as such, without naming or noticing the first executor; and *e converso*, where an action is brought against the executor of an executor, for a debt due by the testator, he may be declared against, as the executor of the deceased testator, without noticing the first executor."

2. Devolution Recognized in the United States — *Connecticut.* — *White School House v. Post*, 31 Conn. 240.

Florida. — *Hart v. Smith*, 20 Fla. 58.

Georgia. — *Burch v. Burch*, 19 Ga. 174; *Windsor v. Bell*, 61 Ga. 671.

New Jersey. — *Annin v. Vandoren*, 14 N. J. Eq. 135.

North Carolina. — *Roanoke Nav. Co. v. Green*, 3 Dev. L. (14 N. Car.) 434.

Rhode Island. — *Perry v. De Wolf*, 2 R. I. 103. Now otherwise by statute. See Pub. Stat., c. 184, § 23, and the case from this jurisdiction, *infra*, this note.

South Carolina. — *Matter of Drayton*, 4 McCord L. (S. Car.) 46; *O'Driscoll v. Fishburne*, 1 Nott & M. (S. Car.) 77; *Lay v. Lay*, 10 S. Car. 208. Otherwise now by statute. See Laws 1880, p. 363, § 3, and the case from this jurisdiction, *infra*, this note.

Tennessee. — *Drane v. Bayliss*, 1 Humph. (Tenn.) 174.

It was formerly provided by statute in *Ken-*

tucky that "executors of executors shall do and perform all things, in the execution of the will of the first testator, which shall remain undone at the death of the first executor, and shall and may sue and be sued in all things respecting the estate, in the same manner as such first executor could or might have sued or been sued." *Dean v. Dean*, 7 T. B. Mon. (Ky.) 304. But by later statute the rule is otherwise. See Gen. Stat. 1887, p. 592, § 11.

Devolution Prohibited by Statute. — *West v. Hall*, 3 Har. & J. (Md.) 221; *Salisbury v. Black*, 6 Har. & J. (Md.) 297, 14 Am. Dec. 279; *Haslett v. Glenn*, 7 Har. & J. (Md.) 23; *Alexander v. Stewart*, 8 Gill & J. (Md.) 226; *Foster v. Bailey*, 157 Mass. 160; *Tallon v. Tallon*, 156 Mass. 313; *Perrin v. Judge*, 49 Mich. 342; *Fosdick v. Delafield*, 2 Redf. (N. Y.) 392; *Auburn Theological Seminary v. Cole*, 18 Barb. (N. Y.) 360; *Shook v. Shook*, 19 Barb. (N. Y.) 653; *Matter of Allen*, 2 Dem. (N. Y.) 203; *McGuinness v. Whalen*, 17 R. I. 619; *Reeves v. Tappan*, 21 S. Car. 1; *Reed v. Wilson*, 73 Wis. 497. See also various local codes.

3. Administrator of Executor Is Not Representative of the Testator. — In *Goods of Martin*, 3 Sw. & Tr. 1; In *Goods of Bridger*, 4 Prob. Div. 77; *Tingrey v. Brown*, 1 B. & P. 310; *Crafton v. Beal*, 1 Ga. 322; *Seabrook v. Williams*, 3 McCord L. (S. Car.) 371.

The Administrator of a Deceased Administrator does not represent the first intestate, but an administrator *de bonis non* must be appointed. *Alabama.* — *Ikelheimer v. Chapman*, 32 Ala. 676.

Indiana. — *Ray v. Doughty*, 4 Blackf. (Ind.) 115.

Kentucky. — *Sebre v. Eve*, 1 A. K. Marsh. (Ky.) 404.

Mississippi. — *Probate Judge v. Phipps*, 5 How. (Miss.) 59.

South Carolina. — *Davis v. Wright*, 2 Hill L. (S. Car.) 560.

Canada. — *Ingalls v. Reid*, 15 U. C. C. P. 490.

In *Ikelheimer v. Chapman*, 32 Ala. 676, Walker, J., said: "There never was a time when, upon the death of an administrator, the trust passed to his representative. The executor of an executor was the executor of the first testator; but the case was different as to administrators. The reason for this difference was that upon the payment of debts and legacies the surplus of the goods belonged to the executor *proprio jure*, and the authority of the executor was founded on the special confidence of the testator. On the other hand, the administrator was but an officer, on whom the deceased had imposed no trust or confidence. *Vaughan* 182; 2 Black. Com. 506; 1 Petersdorf's Abr. 247; 4 Bac. Abr. 23, Exrs. and Admsr., B. 2; Went. on Exrs. 215."

In *Hendricks v. Snodgrass*, Walk. (Miss.) 86, the court said: "If a person dies intestate, and administration is granted to A. B., who dies without having administered all the intestate's goods, in this case the ordinary must

b. WHO MAY BE AN EXECUTOR — (1) In General. — All persons capable of making wills, and some others besides, are capable of being made executors, except such as are expressly forbidden by law; and those who are so forbidden are so few that practically it may be said that any one may be made an executor.¹

grant administration of the goods unadministered to another; for the first administrator cannot continue the trust reposed in him to his executor or administrator, because he has no interest but what he derives from the act of the ordinary."

Settlement of Deceased Administrator's Accounts. — The personal representative of a deceased administrator may settle the accounts of his intestate as administrator. *Thomason v. Thomason*, 1 Metc. (Ky.) 53; *Prestige v. Pendleton*, 28 Miss. 379.

1. Competency in General. — *Smith's Appeal*, 61 Conn. 420; *Holbrook v. Head*, 9 Ky. L. Rep. 755; *Berry v. Hamilton*, 12 B. Mon. (Ky.) 191, 54 Am. Dec. 515; *Stewart, Appellant*, 56 Me. 300; *Holladay v. Holladay*, 16 Oregon 147.

In *Swinb. Wills*, part 5, § 1, pl. 1, it is said that "wherein farasmuch as the law doth give liberty to the testator to appoint whom he will to be his executor, and likewise to give legacies to whom he will, certain persons excepted, this may be delivered for a rule, that every person may be an executor, and is capable of a legacy, saving such as are forbidden."

It is a maxim that "whom the testator will trust, so will the law." *Senior v. Ackerman*, 2 Redf. (N. Y.) 302.

The subject is now generally regulated by statute, to which reference must be had in each jurisdiction.

Bankruptcy. — Bankruptcy after the testator's death does not disqualify one to be an executor. *Gourjon's Succession*, 7 Rob. (La.) 422.

Poverty or Insolvency is not generally considered a disqualification. *Matter of Osborn*, 87 Cal. 1; *Willson v. Whitfield*, 38 Ga. 269; *Berry v. Hamilton*, 12 B. Mon. (Ky.) 191, 54 Am. Dec. 515; *Bowman v. Wootton*, 8 B. Mon. (Ky.) 67; *Shields v. Shields*, 60 Barb. (N. Y.) 57; *Wood v. Wood*, 4 Paige (N. Y.) 299; *Fairbairn v. Fisher*, 4 Jones Eq. (57 N. Car.) 390; *Wilkins v. Harriss*, 1 Winst. Eq. (60 N. Car.) 41; *Higginson v. Fabre*, 3 Desaus. (S. Car.) 89.

An honest executor who is poor is as worthy of confidence and trust as an honest executor who is rich. *In re Osborn*, 87 Cal. 1 [citing *McKim v. Aulbach*, 130 Mass. 491, 39 Am. Rep. 470; *Wilson's Appeal*, 115 Pa. St. 101; *Peter v. Beverly*, 10 Pet. (U. S.) 534; *Ormiston v. Olcott*, 84 N. Y. 346; *Langford v. Gascoyne*, 11 Ves. Jr. 333].

Indebtedness to the Estate which the executor denies, making his interest antagonistic to that of the estate, does not disqualify him to be executor under the *Alabama* statute, which specifies as grounds of unfitness minority, conviction of infamous crime, or incompetence by reason of intemperance, improvidence, or want of understanding. *Kidd v. Bates*, (Ala. 1898) 23 So. Rep. 735.

Executor of Prior Executor. — It is no disqualification for an executor that he is the executor of a prior executor, between whom and the estate of the first testator there were unsettled accounts. *Perry v. De Wolf*, 2 R. I. 103.

Bad Temper. — An ill-regulated temper, want of self-control, and the habit of using abusive language towards those named as co-executors are not a disqualification. *McGregor v. McGregor*, 3 Abb. App. Dec. (N. Y.) 92.

Immoral Character. — Inasmuch as an executor derives his authority from the will, if he be one whom the law regards as competent to be an executor, the court has no power to reject him on account of any supposed defect of moral character. *Berry v. Hamilton*, 12 B. Mon. (Ky.) 191, 54 Am. Dec. 515. See also *In Goods of Samson*, L. R. 3 P. & D. 48, 42 L. J. P. 59, 21 W. R. 568, 28 L. T. N. S. 478; *Coope v. Lowerre*, 1 Barb. Ch. (N. Y.) 45.

Gamblers. — The court may, however, refuse letters to a professional gambler. *McMahon v. Harrison*, 6 N. Y. 443.

Criminals. — In 1 Wms. Exrs. (7th Am. ed.) 273, it is said: "It has always been held that persons attainted or outlawed may sue as executors, because they sue *in auter droit*, and for the benefit of the parties deceased. And it has been decided that a person appointed executor, and after the testator's death convicted of felony, is not thereby disentitled to maintain a suit in a Court of Probate with a view of establishing the validity of the will by which he is appointed executor; for that his office being *in auter droit* was not forfeited by the conviction." See also *Redf. Wills*, art. 3, c. 2, § 8.

Want of Business Experience. — A want of business experience does not render a person "incapable to accept the trust," under the *Connecticut* statute. *Smith's Appeal*, 61 Conn. 420.

Want of Understanding. — Ignorance of legal rights is not a "want of understanding," under the *New York* statute, which will disqualify. *Shilton's Estate*, Tuck. (N. Y.) 73.

A Lack of Intelligence is the "want of understanding" contemplated by the *New York* statute. *Matter of Manley*, 12 Misc. Rep. (N. Y. Surrogate Ct.) 472.

Drunkards. — In *Pennsylvania* the fact that a person has been adjudged an habitual drunkard does not disqualify him. *Sill v. M'Knight*, 7 W. & S. (Pa.) 244; *Imhoff v. Witmer*, 31 Pa. St. 243. But it is otherwise in *New York*. See *Matter of Manley*, 12 Misc. Rep. (N. Y. Surrogate Ct.) 472.

In some states drunkenness is expressly declared a disqualification by statute. See the various local statutes in the *United States*.

Want of Integrity. — Want of integrity is not a sufficient ground for rejecting an executor under the *Connecticut* statute providing for the appointment of an administrator with the will annexed in the place of an executor "incapable to accept the trust." *Smith's Appeal*, 61 Conn. 426.

But it is a disqualification under the *California* statute, and the word "integrity," as used therein, is construed to mean soundness of moral principle and character, and is

(2) *Married Women.*—Coverture was not a disqualification at common law, but a *feme covert* could not accept an executorship without her husband's consent.¹

(3) *Infants.*—At common law infancy did not disqualify a person for the office of executor. By statute, however, an infant is disqualified from acting during his minority, and administration with the will annexed is to be granted if the infant was sole executor. But if he is one of several executors, they who are of sufficient age may execute the will.²

(4) *Corporations.*—The right of a corporation sole to act as executor has never been questioned, but it has been doubted whether a corporation aggregate can act in that capacity. The older English authorities lay down the rule that such corporations may act as executors. Later authorities seem to hold the opposite doctrine, for which several reasons are assigned. These reasons are that a corporation aggregate cannot take the oath of office or be a feoffee in trust to another's use, and that it is a body organized for a special purpose; but the reason most commonly given is that the element of personal confidence which is involved in the appointment of personal representatives is lacking in the case of corporations aggregate. The modern English doctrine, however, is that a corporation aggregate may be executor and may act through persons styled syndics.³

synonymous with probity, honesty, and uprightness in business relations with others; and it is held that the mere fact that a person named as executrix in a will claims the property as her own, which the legatees insist belongs to the estate, does not of itself show want of integrity or disqualify her from serving as executrix, if the adverse claim is honestly made. *In re Bauquier*, 88 Cal. 302.

1. Married Woman May Be Executrix with Husband's Consent.—English *v. McNair*, 34 Ala. 40; Jenkins *v. Jenkins*, 23 Ind. 79; Stewart, Appellant, 56 Me. 300; Binnerman *v. Weaver*, 8 Md. 517; Barber *v. Bush*, 7 Mass. 510; Palmer *v. Oakley*, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41; Gyger's Estate, 65 Pa. St. 311.

A statute providing that if an executrix shall marry, her powers shall cease, does not impliedly make a married woman incompetent. Stewart, Appellant, 56 Me. 300.

In Georgia a statute expressly provided that a married woman could not be appointed executrix. Leverett *v. Dismukes*, 10 Ga. 98.

Presumption as to Husband's Consent.—Where an administration is collaterally attacked, the husband's consent will be presumed. English *v. McNair*, 34 Ala. 40; Stewart, Appellant, 56 Me. 300.

Inability to Give Bond.—In *Rhode Island* it is held that though a will appointing a married woman executrix dispenses with sureties on her bond, she cannot give the personal bond required, and therefore cannot qualify. Hammond *v. Wood*, 15 R. I. 566.

Marriage of Executrix.—As to the effect of the marriage of an executrix, see *infra*, this section, *Termination of Authority—Marriage of Executrix or Administratrix*.

2. Infant May Be Executor at Common Law.—1 Wms. Executors (7th Am. ed.), p. 271.

But see Bailey *v. Miller*, 5 Ired. L. (27 N. Car.) 444, 44 Am. Dec. 47, holding that an infant could not be an executor.

Legal Age to Act as Executor.—In *Mississippi* eighteen years is the legal age for an executor, and if a testator directs that his son

shall be executor when he becomes of age, he will be entitled to act as soon as he arrives at the age of eighteen years. Christopher *v. Cox*, 25 Miss. 162.

Posthumous Child.—In Swift *v. Duffield*, 5 S. & R. (Pa.) 38, it is said: "It is now settled, according to the dictates of common sense and humanity, that a child *en ventre sa mere*, for all purposes for his own benefit, is considered as absolutely born. He takes by descent—under the statute of distribution—is entitled to the benefit of a charge for raising portions for children—may be executor."

3. Competency of Corporations.—1 Wms. Exrs. (7th Am. ed.) 270; 1 Bl. Com. 477; 1 Mor. Priv. Corp., § 357.

A Syndic of a Corporation named as executor will be granted administration with the will annexed. Goods of Darke, 1 Sw. & Tr. 516, 29 L. J. P. 71, 8 W. R. 273, 2 L. T. N. S. 24.

In Georgetown College *v. Browne*, 34 Md. 450, it was held that a corporation cannot become an executor, and that the English practice of allowing a corporation when named executor to designate a person styled a syndic, has never prevailed in *Maryland*.

In Porter *v. Trall*, 30 N. J. Eq. 106, the question whether a corporation could act as executor in *New Jersey* was raised, but not decided.

In Matter of Kirkpatrick, 22 N. J. Eq. 463, the court said: "The question whether a corporation aggregate can be an executor or administrator presents the next difficulty. It is well settled that a corporation sole can be executor. The person who constitutes the corporation can take the oath and execute the office. The older authorities hold, or rather lay down the rule, that a corporation aggregate can be an executor. Later authorities seem to hold the opposite doctrine, though in substance they agree with it. They hold that a corporation aggregate cannot execute the office of executor, as it cannot take the official oath; but that in such case administration with the will annexed will be committed to persons appointed by them for the purpose, who are styled syndics.

Corporations Created to Act as Fiduciaries. — In some jurisdictions the statutes provide for the creation of corporations for the express purpose of acting as executors, etc.¹

(5) *Aliens and Nonresidents.* — An alien may be an executor at common law.² In some of the states of the Union, aliens are disqualified by statute from acting as executors, but the term "alien" does not include a resident of another state, if he is a citizen of the United States, and, as a general rule, nonresidence in the state where the will is admitted to probate is not a disqualification of the person named therein as executor, if he is a citizen of the United States.³

c. ACCEPTANCE OF EXECUTORSHIP. — A person named in a will as executor does not become such merely by virtue of the nomination, but it is necessary for him to accept the executorship. The acceptance, however, need not be of a formal character. It may be effected by any acts which show an intention to accept,⁴ such as proving the will,⁵ taking out letters testa-

Swinburne on Wills, 5, § 1; Wentworth's Off. of Exrs. 39, n. 1; 3 Bac. Abr. 5, tit. Executor; 11 Vin. Abr. 140; Toller on Exrs. 30; 1 Wms. Exrs. (7th Am. ed.) 270; *In re Darke*, 2 Sw. & Tr. 516; 2 Redfield on Wills 59, § 3. So, when the king is appointed executor, as no suit could be brought against him, letters testamentary are not issued to him, but to a person appointed by him for that purpose. Toller 30; Went. 29, n. a; 4 Inst. 335. The case of a corporation aggregate falls clearly within the principle of the king, and of a corporation sole. I think the case is stronger when, as here, the application is to commit administration to one of the corporators. All corporations consist of the natural persons who constitute them; these natural persons are the corporation, and there is no reason why they should not, like a corporation sole, have the executorship or administration committed to them individually. This is the view of Godolphin, who, when stating who may be appointed executors (p. 75, c. 1, pt. 2, § 1), says, 'or many, jointly representing one body, as a college, city, or other corporation.' Any number of the next of kin may have administration jointly. When the corporators are too numerous, they may select one, or the ordinary may, of his own choice, prefer any one, as in the case of next of kin."

1. **Corporations Created to Act as Fiduciaries.** — Fidelity Ins., etc., Co. v. Niven, 5 Houst. (Del.) 416; Minnesota L. & T. Co. v. Beebe, 40 Minn. 7. See also 1 Mor. Priv. Corp., § 357, and various local codes.

2. **Alien May Be Executor at Common Law.** — 1 Wms. Exrs. (7th Am. ed.) 270.

3. **Disqualification of Aliens by Statute.** — See the various local codes and statutes in the *United States*.

Alienage Only Statutory Disqualification. — Cutler v. Howard, 9 Wis. 399.

Citizens of United States Not "Aliens." — The *New York* statute declaring "an alien not being an inhabitant of this state" attaches only to persons who are nonresidents of the state, and not to citizens of the United States. McGregor v. McGregor, 3 Abb. App. Dec. (N. Y.) 92; Demarest's Estate, 1 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 302.

Nonresidence in the State Where the Will Is Probated is not generally a disqualification of the person named as executor. *In re Connor*,

16 Mont. 465; *Sterling's Estate*, 9 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 448; *Hammond v. Wood*, 15 R. I. 566; *Humes v. Cox*, 1 Pin. (Wis.) 551; *Cutler v. Howard*, 9 Wis. 399.

A Statute Providing for the Removal from office of an executor, who leaves the state, does not preclude a nonresident executor from receiving letters testamentary. *Corrigan v. Jones*, 14 Colo. 311.

California Statute. — In *In re Brown*, 80 Cal. 381, it was held that the statute providing that "where a person absent from the state * * * is named executor. * * * if there is no other executor, letters of administration with the will annexed must be granted," did not preclude a nonresident executor from receiving letters testamentary.

Repeal of Statute Disqualifying Nonresidents. — Where a statute making nonresidence a disqualification is repealed after an application for letters has been denied on the ground that the applicant was a nonresident, the application may be renewed and letters granted. *In re Connor*, 16 Mont. 465.

See also the title *ALIENS*, subdiv. *Disabilities of Aliens*, vol. 2, p. 68.

4. **Acts Showing Intention to Accept Constitute Acceptance.** — *Davis v. Inscoc*, 84 N. Car. 396.

Receiving Property of Estate as Agent of Acting Executor. — One who was appointed executor and trustee, but did not prove the will or receive any of the property, except as agent of the executor who proved, did not, by acting as such agent, accept the executorship. *Lowry v. Fulton*, 9 Sim. 104, 3 Jur. 454.

Assisting Acting Executor. — Nor does a person named in a will as executor, who did not prove the will, accept the executorship by assisting a co-executor, who had proved the will, to collect debts. *Orr v. Newton*, 2 Cox 274.

Mere Inaction or Delay, unaccompanied by intention, cannot amount to an acceptance. *Ralston's Estate*, 158 Pa. St. 645.

Paying Funeral Expenses. — Mere payment of funeral expenses by a person named as executor, who was also a son of the testator, is not an acceptance. *Ralston's Estate*, 158 Pa. St. 645, 33 W. N. C. (Pa.) 473.

5. **Proving Will Is Acceptance of Executorship.** — *Muecklow v. Fuller*, Jac. 198; *Ward v. Butcher*, 2 Moll. 533; *Hanson v. Worthington*, 12 Md. 418; *Worth v. M'Aden*, 1 Dev. & B. Eq. (21 N. Car.) 199.

mentary,¹ taking the oath of office as executor,² or by any acts or intermeddling which will make one liable as executor *de son tort*.³ But one who is appointed both executor and trustee under a will does not by accepting the trust accept also the executorship.⁴

d. RENUNCIATION OF EXECUTORSHIP — (1) *Right to Renounce.* — A person named as executor cannot be compelled to accept the executorship, but he may renounce it at his pleasure,⁵ and this right cannot be affected by any agreement made in the lifetime of the testator to accept the executorship.⁶

(2) *Renunciation for a Consideration.* — Though a person named in a will as executor has the right to renounce, he cannot use the right for his individual gain, and therefore a renunciation or an agreement to renounce, founded on a consideration, is void as against public policy.⁷

(3) *When Right of Renunciation May Be Exercised.* — The right of an executor to renounce is unlimited only so long as he has not proved the will, or done any act as executor, or otherwise accepted the office,⁸ but the court

1. Taking Out Letters Testamentary Is Acceptance of Executorship. — *Hanson v. Worthington*, 12 Md. 418.

2. Taking Oath of Office Is Acceptance of Executorship. — *Bowman's Appeal*, 62 Pa. St. 166.

3. Acts Which Render One Liable as Executor De Son Tort constitute an acceptance of executorship. *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388; *Magwood v. Legge*, Harp. L. (S. Car.) 116.

Requesting an insurance company with which the deceased had insured his life to pay the amount of the policy to a mortgagee of the policy is an acceptance. *In re Stevens*, 56 L. J. Ch. 155, (1897) 1 Ch. 422, 76 L. T. N. S. 18, 45 W. R. 284.

Partial Administration Constitutes Acceptance. — *In Goods of Coates*, 105 L. T. 249; *Read v. Truelove*, Ambl. 417.

4. Acceptance of Trust Under Will Not Acceptance of Executorship. — *Cocks v. Barlow*, 5 Redf. (N. Y.) 406.

5. Right to Renounce. — *Douglass v. Forrest*, 4 Bing. 686, 15 E. C. L. 113; *Doyle v. Blake*, 2 Sch. & Lef. 239; *Cable v. Cable*, 76 Iowa 163; *Sawyer v. Dozier*, 5 Ired. L. (27 N. Car.) 97.

Action to Compel Acceptance of Renunciation. — The heirs of a testator cannot sue to compel the person named as executor to qualify or to formally renounce. *Cable v. Cable*, 76 Iowa 163.

6. Agreement to Accept Executorship Not Binding. — *Doyle v. Blake*, 2 Sch. & Lef. 239.

7. Renunciation for Consideration. — In *Staunton v. Parker*, 19 Hun (N. Y.) 55, the court, adopting the language of a surrogate whose decision was under review, said: "An executor has the undoubted right to renounce of his own motion, if he desires. But a renunciation for a consideration — a renunciation purchased in any manner, without the concurrence of the testator, and during his lifetime — is a very different matter. If agreements of this nature are to be enforced, then surely testators may well doubt, not only as to who will carry out their wills, but whether they will be carried out at all. * * * The door would be thrown wide open to fraud and corruption on the part of designing men and intriguing descendants, and imposition upon confiding testators."

Agreement to Renounce for Consideration Void as Against Public Policy. — *Hargreaves v. Wood*,

2 Sw. & Tr. 602, 32 L. J. P. 8, 7 L. T. N. S. 338, 11 W. R. 31; *Ellicott v. Chamberlain*, 38 N. J. Eq. 604, 48 Am. Rep. 327; *Owings v. Owings*, 1 Har. & G. (Md.) 484; *Bowers v. Bowers*, 26 Pa. St. 74, 67 Am. Dec. 398. But see *Ourigan's Case*, 6 Ir. Jur. N. S. 116; *Bassett v. Miller*, 8 Md. 548.

8. No Right to Renounce After Acting as Executor. — In *Goods of Veiga*, 32 L. J. P. 9, 11 W. R. 84, 3 Sw. & Tr. 13, 7 L. T. N. S. 644; In *Goods of Badenach*, 3 Sw. & Tr. 465, 10 Jur. N. S. 521, 33 L. J. P. 179, 11 L. T. N. S. 275; *Hanson v. Worthington*, 12 Md. 418; *Sears v. Dillingham*, 12 Mass. 358; *Bowman's Appeal*, 62 Pa. St. 166; *Hermes's Estate*, 32 Pittsb. Leg. J. (Pa.) 474. Compare *Easby v. Easby*, 2 Hayw. & H. (C. C.) 207.

Renunciation After Taking Oath. — An executor may renounce after taking oath, but before acting. *M'Donnell v. Prendergast*, 3 Hagg. Ecc. 216; *Sawyer v. Dozier*, 5 Ired. L. (27 N. Car.) 97.

In *Miller v. Meetch*, 8 Pa. St. 417, it was held that there could be no renunciation after the executor had taken the oath of office; but the contrary was held in *Bowman's Appeal*, 62 Pa. St. 166.

Renunciation After Acts of Administration by Co-Executors. — A disclaimer executed by an executor who, with two other executors, had a power of sale, but who did not join with them in a sale under the power, reciting that he had from the testator's decease declined to act, and had never acted in the executorship, is a renunciation *ab initio*. *Peppercorn v. Wayman*, 5 De G. & Sm. 230, 16 Jur. 794, 21 L. J. Ch. 827.

Recognition of Foreign Renunciation. — In *Goods of Veiga*, 32 L. J. P. 9, 11 W. R. 84, 3 Sw. & Tr. 13, 7 L. T. N. S. 644, it was held that a renunciation after having acted as executor, would not be recognized in England, though it was valid under the laws of a foreign jurisdiction where it was made and where the testator was domiciled at the time of his death.

What Intermeddling Precludes Renunciation. — In *Cummings v. Cummings*, 3 Jones & L. 64, it was held that a slight intermeddling with the assets by the surviving executor who had not joined in proving the will did not amount to an acceptance of the office of executor, so as to preclude him from afterwards refusing to act.

Intermeddling by Mistake. — In *Goods of Fell*, Volume XI.

may permit him to renounce after acceptance, though he has no longer an absolute right to do so.¹

Renunciation by Executor of Executor. — An executor of an executor who has accepted the executorship under the second will, thereby accepts the executorship under the first will also, and he cannot afterwards renounce it.²

(4) *How Renunciation May Be Made* — (a) **Express Renunciation** — *aa.* BY ACT OF RECORD. — Some authorities hold that an express renunciation must be made by a writing filed in the proper court, or by some act entered of record,³ but no particular form of renunciation is required,⁴ and it need not be under seal.⁵

bb. BY MATTER IN PAIS. — While it is held by many authorities that a renunciation must be by an act of record, there are other authorities holding that it may be by matter *in pais*.⁶

2 Sw. & Tr. 126, 9 W. R. 252, 3 L. T. N. S. 756, it was held that intermeddling by mistake did not affect the right to renounce.

1. **Renunciation After Acceptance, by Leave of Court.** — *Jackson v. Whitehead*, 3 Phil. Ecc. 577.

No Renunciation After Proving Will and Taking Oath. — In *Sears v. Dillingham*, 12 Mass. 358, it was held that an executor, after proving the will and giving bond, could not renounce.

In *North Carolina* the court of probate may accept the renunciation of an executor at any time before he has intermeddled with the estate, even after he has proved the will. *Mitchell v. Adams*, 1 Ired. L. (23 N. Car.) 298; *Sawyer v. Dozier*, 5 Ired. L. (27 N. Car.) 97.

2. **Renunciation by Executor of Executor.** — *Brooke v. Haynes*, 1 L. R. 6 Eq. 25; In *Goods of Delacour*, 9 Ir. R. Eq. 86. But see *Mitchell v. Adams*, 1 Ired. L. (23 N. Car.) 298, where *Ruffin, C. J.*, said: "It is quite certain that an executor cannot refuse the office in part and undertake it in part; but if he enter on the duties, he is compellable to go through with them. But this is only true in respect of all the burdens imposed on him by the same will. For, if he be the executor of one who was the executor of a prior testator, he may take upon himself the administering of the will of his immediate testator, and refuse the other. The executorship of both wills is not therefore one and the same office, but each is a distinct one; and the Court of Probate may allow the trusts in respect of the two estates to be divided."

And in *Barker v. Railton*, 6 Jur. 549, it was suggested that an executor could prove the will of his testator, and at the same time renounce the probate of the will of a testator, of which will his testator had been the sole executor.

3. **Renunciation Must Be by Act Entered of Record** — *England.* — *Long v. Symes*, 3 Hagg. Ecc. 776.

Arkansas. — *Newton v. Cocke*, 10 Ark. 169. *Massachusetts.* — *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33.

Mississippi. — *Muirhead v. Muirhead*, 6 Smed. & M. (Miss.) 451.

North Carolina. — *Springs v. Erwin*, 6 Ired. L. (28 N. Car.) 27.

Pennsylvania. — *Miller v. Meetch*, 8 Pa. St. 417; *Com. v. Mateer*, 16 S. & R. (Pa.) 416; *Bowman's Appeal*, 62 Pa. St. 166; *Heron v. Hoffner*, 3 Rawle (Pa.) 397.

Renunciation Not Effective Until Filed. — In *Goods of Morant*, L. R. 3 P. & D. 151,

4. **No Particular Form of Renunciation Required.** — *Broker v. Charter, Cro. Eliz.* 92; *Kirtlan's Estate*, 16 Cal. 161; *Stocksdale v. Conaway*, 14 Md. 99, 74 Am. Dec. 515; *Carpenter v. Jones*, 44 Md. 625; *Com. v. Mateer*, 16 S. & R. (Pa.) 416; *Miller v. Meetch*, 8 Pa. St. 417.

The New York Statute requires a renunciation to be by formal act in the presence of witnesses. *Staunton v. Parker*, 19 Hun (N. Y.) 60.

Renunciation by Letter. — A renunciation may be made by letter filed in the probate office. *Broker v. Charter, Cro. Eliz.* 92, *Owen* 44, *Moor* 272, 1 Leon. 135; *Com. v. Mateer*, 16 S. & R. (Pa.) 416.

In *Com. v. Mateer*, 16 S. & R. (Pa.) 416, the executor addressed to one David Watts a letter as follows: "Sir: By Samuel Huston, the bearer, I understand that the late John Huston, deceased, nominated me as one of the executors of his last will and testament; my situation renders me altogether unfit for the execution thereof; you will please to have another appointed to officiate in my place, and oblige, yours respectfully, William Jameson." It was held that such letter, having been filed in the register's office, was a sufficient renunciation.

A Mere Agreement to Renounce will not be recognized as a renunciation. *Hargreaves v. Wood*, 32 L. J. P. 8, 2 Sw. & Tr. 602, 11 W. R. 31, 7 L. T. N. S. 338.

Recitals of Deed of Renunciation. — An informal deed of renunciation, reciting in substance, though not in terms, that the executor had not intermeddled, is sufficient. In *Goods of Gibson*, L. R. 1 P. & D. 105, 12 Jur. N. S. 344, 35 L. J. P. 114, 14 L. T. N. S. 23.

5. **Renunciation Need Not Be Under Seal.** — In *Goods of Boyle*, 3 Sw. & Tr. 426, 33 L. J. P. 109, 10 L. T. N. S. 541; *Ellis v. McGill*, 8 U. C. Q. B. 224.

6. **Renunciation by Matter in Pais.** — *Keane's Estate*, 56 Cal. 407; *Ayres v. Weed*, 16 Conn. 291; *Solomon v. Wixon*, 27 Conn. 520; *Pollard v. Mohler*, 55 Md. 284; *Thornton v. Winston*, 4 Leigh (Va.) 152.

A Disclaimer executed by an executor who, with two other executors, had a power of sale of copyhold property, and who, without joining with them in a sale, reciting that he had, from the testator's decease, declined to act, and had never acted, in the executorship or the trusts of the will, is a refusal *ab initio*, there being nothing to impeach the *bona fides* of the transaction. *Peppercorn v. Wayman*, 5 De G. & Sm. 230, 16 Jur. 794, 21 L. J. Ch. 827.

CC. POWER OF ATTORNEY TO EXECUTE RENUNCIATION. — An executor may authorize a third person, by power of attorney, to execute a renunciation for him.¹

(b) **Implied Renunciation.** — Renunciation of an executorship may not only be made expressly, but it may also be implied from the acts or conduct of the executor, such as neglecting or refusing to qualify.²

(5) *Effect of Renunciation* — (a) **General Rule.** — The effect of a renunciation by a sole executor, or all of several executors, is to leave the administration vacant, whereupon letters of administration with the will annexed may be granted;³ and the renunciation is absolutely binding and conclusive on the renouncing executor, unless he afterwards retracts it.⁴ But where several executors are nominated by the will and one or more of them renounce, they must nevertheless be joined in an action brought by those who accept the trust.⁵

(b) **Right to Become Administrator After Renunciation.** — Though a renunciation by an executor is conclusive on him, it is only conclusive as to the right renounced, and therefore does not necessarily preclude him from afterwards taking out letters of administration.⁶

Renunciation by Oral Statement in Court. — Notwithstanding the provision of the *New York* code that renunciation of an executorship is to be made by a written instrument signed by the executor and acknowledged or proved and certified in like manner as a deed to be recorded in a county, it is held that an executor may renounce by an oral statement in court, if the renunciation is accepted by the court and acted on by the parties in interest. *Matter of Baldwin*, 27 N. Y. App. Div. 506.

1. **Renunciation May Be Made by Attorney.** — In *Goods of Rosser*, 3 Sw. & Tr. 490.

2. **Renunciation Implied from Acts — In General.** — *Stacy v. Elph*, 1 Myl. & K. 195; *Ayres v. Weed*, 16 Conn. 291; *Solomon v. Wixon*, 27 Conn. 520; *Smith's Appeal*, 61 Conn. 420; *Bishop v. Bishop*, 56 Conn. 208; *Muldrow v. Fox*, 2 Dana (Ky.) 74.

Renunciation Implied from Neglect or Refusal to Qualify. — *Den v. Peay*, 2 Murph. (6 N. Car.) 85; *Uldrick v. Simpson*, 1 S. Car. 283; *Gaines v. Catron*, 1 Humph. (Tenn.) 514; *Drane v. Bayliss*, 1 Humph. (Tenn.) 174; *Robertson v. Gaines*, 2 Humph. (Tenn.) 367; *Simpson v. Young*, 2 Humph. (Tenn.) 514; *Thornton v. Winston*, 4 Leigh (Va.) 152; *Nelson v. Carrington*, 4 Munf. (Va.) 332, 6 Am. Dec. 519; *Monroe v. James*, 4 Munf. (Va.) 194; *Burnley v. Duke*, 1 Rand. (Va.) 108.

By Statute in Alabama, a renunciation may be implied from the failure of the executor to apply for letters within thirty days after probate of the will. *Wheat v. Fuller*, 82 Ala. 572.

Filing Caveat. — An executor does not renounce the executorship by filing a caveat against the probate of the will. *Matter of Maxwell*, 3 N. J. Eq. 611.

Qualifying as Administrator. — One who qualifies as administrator of an estate before probate of the testator's will does not thereby renounce his right to qualify as executor of the will. *Taylor v. Tibbatts*, 13 B. Mon. (Ky.) 177.

But taking letters of administration with the will annexed implies a renunciation of the executorship. *Briscoe v. Wickliffe*, 6 Dana (Ky.) 157.

3. **Renunciation Leaves Administration Vacant.** — *Broker v. Charter*, Cro. Eliz. 92; *Thornton v. Winston*, 4 Leigh (Va.) 152.

4. **Renunciation Conclusive Unless Retracted.** — *Venables v. East India Co.*, 12 Jur. 855, 18 L. J. Exch. 266.

5. **Renouncing Executors Must Be Joined in Action by Acting Executors.** — *Creswick v. Woodhead*, 5 Scott N. R. 778, 4 M. & G. 811, 43 E. C. L. 419, 6 Jur. 973, 12 L. J. C. P. 111; *Venables v. East India Co.*, 2 Exch. 633, 12 Jur. 855, 18 L. J. Exch. 266; *Hill v. Smalley*, 25 N. J. L. 374.

6. **Right of Renouncing Executor to Letters of Administration.** — In *Goods of Blisset*, 41 L. T. N. S. 816, it was held that where a husband, who was left sole executor and universal legatee under his wife's will, renounced as executor, he might nevertheless take administration with the will annexed, as universal legatee, in which capacity he had not renounced his beneficial interest under the will. See also *In Goods of Biggs*, L. R. 1 P. & D. 595; *In Goods of Loftus*, 10 Jur. N. S. 324, 3 Sw. & Tr. 307, 10 L. T. N. S. 240; *In Goods of Wheelwright*, 3 Prob. Div. 71, 47 L. J. P. 87, 27 W. R. 139, 39 L. T. N. S. 127; *In Goods of Bennet*, 6 Jur. N. S. 326, note.

Renunciation of an executorship does not deprive the renouncing executor of the right to take out letters of administration with the will annexed. *Briscoe v. Wickliffe*, 6 Dana (Ky.) 157.

Right to Take Administration as Agent of Other Executors. — In *Goods of Russell*, L. R. 1 P. & D. 634, 20 L. T. N. S. 231, 38 L. J. P. 31, it was held that an executor who had renounced in Australia might be appointed by the executors proving the will in that colony, their agent to obtain letters of administration with the will annexed in England, and that letters would be granted to him accordingly.

Renouncing Executor Acting as Agent. — In *Dove v. Everard*, 1 Russ. & M. 231, Tambl. 376, it was held that if one of two persons named as trustees and executors disclaims and renounces, and afterwards possesses himself of assets as the agent of the other, who has accepted the trust and proved the will, he does not thereby become accountable as a trustee and executor, and ought not to be made a party to a suit for the administration of the estate.

(c) **Renunciation by Executor Who Is Also Trustee.** — If an executor is also a trustee under the will, a renunciation of the executorship does not divest him of his character as trustee, unless the trust is annexed to the office of executor. If the trust is annexed to the person it is not renounced by a renunciation of the executorship.¹

(6) **Retracting Renunciation** — (a) **Right to Retract in General.** — An executor by renouncing does not lose absolutely the right to receive letters testamentary until the renunciation has been acted on. He may retract his renunciation at any time before administration with the will annexed is granted,² but not afterwards.³

(b) **Right of One of Several Executors to Retract.** — At common law, where there are several executors and one renounces and the other or others prove the will, the renunciation is not binding on him so long as one or more of his co-executors continue in office, but he who renounced may at any time afterwards come in and administer; and if he survives the acting executor, or if the acting executor is removed, he may retract his renunciation and take the executorship at any time before letters of administration with the will annexed are granted.⁴

1. Renunciation as Executor Not Renunciation as Trustee. — *Tainter v. Clark*, 13 Met. (Mass.) 220; *Clark v. Tainter*, 7 Cush. (Mass.) 567; *Treadwell v. Cordis*, 5 Gray (Mass.) 341; *Parker v. Sears*, 117 Mass. 513; *Garner v. Dowling*, 11 Heisk. (Tenn.) 48.

2. Renunciation May Be Retracted — *England*. — *M'Donnell v. Prendergast*, 3 Hagg. Ecc. 216. *United States Courts.* — *In re Benton*, 2 Hayw. & H. (C. C.) 315, 30 Fed. Cas. No. 18, 234.

Kentucky. — *Taylor v. Tibbatts*, 13 B. Mon. (Ky.) 177.

New York. — *Robertson v. McGeoch*, 11 Paige (N. Y.) 640; *Casey v. Gardiner*, 4 Bradf. (N. Y.) 13; *Dempsey's Estate*, Tuck. (N. Y.) 51.

North Carolina. — *Davis v. Inscoe*, 84 N. Car. 396.

Virginia. — *Thornton v. Winston*, 4 Leigh (Va.) 152.

But see *Carpenter v. Jones*, 44 Md. 625.

Retraction a Matter of Right. — The power to retract a renunciation has been held to be a matter of right, and not a mere privilege. *Casey v. Gardiner*, 4 Bradf. (N. Y.) 13.

Retraction Before Renunciation Is Complete. — A renunciation of an executorship is not complete, and may be retracted at any time, before it is filed in the court. In *Goods of Morant*, L. R. 3 P. & D. 151, 30 L. T. N. S. 74, 43 L. J. P. 16.

Retraction After Renunciation Is Complete. — The court of probate has jurisdiction in a proper case to allow an executor to retract his renunciation, even where the renunciation is complete. In *Goods of Bell*, 4 Prob. Div. 85, 40 L. T. N. S. 659.

Retraction Allowed Only for Benefit of Estate. — In *Goods of Gill*, L. R. 3 P. & D. 113, it was held that an executor who had filed a renunciation would not be permitted to retract it, unless he could show that the retraction would be for the benefit of the estate, or for those interested under the will.

Renunciation After Acting as Executor. — In *Matter of Suarez*, 3 Dem. (N. Y.) 164, it was held that the *New York* statute allowing a retraction of renunciation by an executor does

not apply to persons who have actually received letters testamentary, performed for the time the duties of the office, and procured on their own application a revocation of their letters. See also *Matter of Beakes*, 5 Dem. (N. Y.) 128.

3. No Retraction After Issue of Letters with the Will Annexed. — In *Taylor v. Tibbatts*, 13 B. Mon. (Ky.) 177, the court said: "An executor who had made a voluntary renunciation was not permitted to retract his renunciation, after administration *cum testamento annexo* was granted to another person, because originally, at common law, the executor had a right to the *residuum*, unless that right was expressly or impliedly excluded by the will, which right he surrendered by his renunciation, and it passed by the grant of administration, to the administrator *cum testamento annexo*, and having passed could not be arbitrarily reclaimed. The rule having been thus established, continued in existence after the reason for its adoption had ceased." See also *In Goods of Richardson*, 6 Jur. N. S. 326; *Trow v. Shannon*, 59 How. Pr. (N. Y. Supreme Ct.) 214; *Matter of Baldwin*, 27 N. Y. App. Div. 506; *Thornton v. Winston*, 4 Leigh (Va.) 152.

In *Thornton v. Winston*, 4 Leigh (Va.) 152, the executrix named in the will did not qualify, but consented that letters of administration with the will annexed should be granted to her daughter, but she (the executrix) stated that she reserved the right to qualify after the death of her daughter. It was held that by such consent at the grant of administration she renounced the executorship and could not qualify after the death of her daughter, notwithstanding such reservation.

Discretion of Court. — In *New York* it is discretionary with the surrogate to grant letters testamentary to a person who has renounced the executorship. *Matter of Cornell*, 17 Misc. Rep. (N. Y. Surrogate Ct.) 468.

4. Renunciation Not Conclusive When Co-Executors Take Probate. — *Robinson v. Pett*, 3 P. Wms. 249; *Rex v. Simpson*, 3 Burr. 1463; *Wankford v. Wankford*, 1 Salk. 307; *Perry v. De Wolf*, 2 R. I. 103.

In *Hensloe's Case*, 9 Coke 36, it was said:

In England it is provided by statute that where any person renounces the probate of a will of which he is appointed executor, or one of the executors, the rights of such person in respect to the executorship shall wholly cease, and the representation of the testator and the administration of his effects shall without any further renunciation devolve and be committed in like manner as if such person had not been appointed executor.¹

In the United States the common-law rule is variously modified by statute, an instance of which is the provision that if an executor refuse for a certain length of time to qualify, the court of probate may commit administration with the will annexed to another in like manner as where the executor refuses the trust.²

c. **REVOCATION OF APPOINTMENT.** — The appointment of executors may be revoked by naming other persons in a codicil to the will, or in a later will, but the subsequent appointment will not have the effect of revoking the prior appointment, unless it appears that such was the testator's intention.³

"When many are named executors, and some of them refuse, and some of them prove the will, those who have refused may afterwards at their pleasure administer, notwithstanding this refusal before the ordinary; but if all refuse before the ordinary, and the ordinary committeth administration to another, there they cannot afterwards administer; and this difference is proved by our books in 21 E. 4, 24, where it is resolved by the justices that if twenty be named executors and one proveth the will, it sufficeth for them all, and the refusal before the ordinary is not any estoppel against them to administer after when they please, in our law."

Retraction After Removal or Death of Co-Executor. — *Codding v. Newman*, 3 Thomp. & C. (N. Y.) 364; *Robertson v. McGeech*, 11 Paige (N. Y.) 640.

The Renunciation of One Executor in the lifetime of another is binding on him, unless after he has become the survivor. *Arnold v. Blencowe*, 1 Cox 426.

But under the statutes of *Upper Canada* a renunciation by one of two or more executors is peremptory, and cannot be recalled on the death of the acting executor or executors. *Allen v. Parke*, 17 U. C. C. P. 105.

If the Acting Executor Becomes Insane, after renunciation by his co-executor, the renouncing executor may come in and administer. *Matter of Taggart*, 1 Ashm. (Pa.) 321.

Renunciation Made Because Two Executors Were Deemed Unnecessary. — In *Dempsey's Estate*, Tuck. (N. Y.) 51, it was held that a retraction by an executor should be allowed where the renunciation was originally made only because it was deemed unnecessary that two executors should act at one time.

1. Statutory Rule in England. — 20 & 21 Vict., c. 77, § 79; In *Goods of Noddings*, 3 Sw. & Tr. 15; In *Goods of Lorimer*, 2 Sw. & Tr. 471.

This statute does not prevent the court from allowing a retraction of the renunciation according to the old practice in a proper case, as where it has taken place after an intermeddling. In *Goods of Badenach*, 3 Sw. & Tr. 465.

But the retraction in such case will not be allowed unless it appears to be for the benefit of the estate of the persons interested under the will. In *Goods of Gill*, L. R. 3 F. & D. 113; In *Goods of Loftus*, 3 Sw. & Tr. 307.

A Renunciation Before the Act Took Effect is excluded from the operation of the statute. In *Goods of Whitham*, L. R. 1 P. & D. 303.

2. Statutory Rule in United States. — *Perry v. De Wolf*, 2 R. I. 103. See also the various local codes and statutes.

3. Revocation by Subsequent Appointment of Sole Executor. — The appointment of executors is revoked by a codicil appointing another person sole executor of the will. In *Goods of Lowe*, 33 L. J. P. 155, 3 Sw. & Tr. 478; In *Goods of Bailey*, L. R. 1 P. & D. 628, 17 W. R. 401, 20 L. T. N. S. 278.

Revocation by Substituting New Executor. — In *Barrett v. Wilkins*, 5 Jur. N. S. 687, the testator appointed W. and B. trustees for certain purposes. In a subsequent part of the will he appointed them executors. In a codicil to the will he stated that he had appointed B. one of the trustees under his will, and then continued: "It is my will and desire to substitute in his stead and place T. Now I do hereby, by this my codicil, nominate and appoint T. to be one of the trustees of my will and codicils, in the place and stead of B., to act with and in conjunction with W., and I hereby give T. the same powers and authorities as I have throughout my will given to and reposed in B., in the same and as full and ample a manner as if the name of T. had throughout my will been inserted in the place of the name of B." It was held that the appointment of B. as executor was revoked.

In *Nelson's Estate*, 147 Pa. St. 160, the testatrix made a second will revoking her first will and appointing a different person executor. The second will was made for the purpose of disposing of property acquired after the first will was made, and after disposing of such after-acquired property, gave the balance of her property to the same persons to whom it was given by her first will, "re-enacting so much of" the first will as referred thereto. It was held that the appointment of the executor by the first will was revoked.

When Second Appointment Does Not Revoke First Appointment. — After the testator had made a will appointing L., K., and W. executors, he made another will disposing of his personal property differently, but not affecting the realty which was disposed of by the first will, and he appointed L. and one D. executors of the second will. It was held that the sec-

2. Administrators — a. JURISDICTION TO APPOINT ADMINISTRATORS — (1) By What Courts Exercised. — In England jurisdiction in the matter of the administration of estates was exercised by the ecclesiastical courts before the statute 20 & 21 Vict., c. 77, 1857, called the Probate Court Act, was passed.¹ By that statute the court of probate was established and jurisdiction of all other courts to grant letters of administration was abolished. In 1873, the Judicature Act was passed creating the High Court of Justice, with its several divisions, and transferring to the probate division the jurisdiction theretofore exercised by the probate court.²

In the United States this jurisdiction is derived entirely from local statutes, and is vested in courts of various names, exercising what is called probate jurisdiction.³

(2) *Jurisdictional Facts* — (a) **Death.** — The power of the court to grant letters of administration exists only when the person whose estate is sought to be administered is dead, and if he is not dead, the authorities are almost unanimous in holding that a grant of administration or probate of a will, and all proceedings thereunder, are void.⁴

and appointment of executors did not revoke the first appointment. In *Goods of Leese*, 2 Sw. & Tr. 442, 31 L. J. P. 169, 5 L. T. N. S. 848. See also *In Goods of Budd*, 3 Sw. & Tr. 196; *In Goods of Howard*, L. R. 1 P. & D. 636.

1. Jurisdiction in England Before Probate Court Act. — 2 Bl. Com. 495. See also *supra*, this title, *Origin of Administration*.

2. 36 & 37 Vict., c. 66.

3. Probate Jurisdiction in the United States. — See the title PROBATE COURTS. See also the title PROBATE AND ADMINISTRATION, ENCYC. OF PL. AND PR., vol. 16.

4. Administration on Estate of Living Person Is Void — *England.* — *Allen v. Dundas*, 3 T. R. 129. *United States.* — *Lavin v. Emigrant Industrial Sav. Bank*, 1 Fed. Rep. 641, 18 Blatchf. (U. S.) 1, 9 Rep. 541; *Griffith v. Frazier*, 8 Cranch (U. S.) 23.

Alabama. — *Duncan v. Stewart*, 25 Ala. 408, 60 Am. Dec. 527.

California. — *Stevenson v. Superior Ct.*, 62 Cal. 60.

Florida. — *Epping v. Robinson*, 21 Fla. 49.

Illinois. — *Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458.

Kentucky. — *French v. Frazier*, 7 J. J. Marsh. (Ky) 425.

Massachusetts. — *Jochumsen v. Suffolk Sav. Bank*, 3 Allen (Mass.) 87; *Waters v. Stickney*, 12 Allen (Mass.) 1; *Day v. Floyd*, 130 Mass. 488.

Missouri. — *Johnson v. Beazley*, 65 Mo. 264.

New Hampshire. — *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213.

New York. — *Bolton v. Schriever*, 135 N. Y. 65, 29 Abb. N. Cas. (N. Y.) 300.

North Carolina. — *State v. White*, 7 Ired. L. (29 N. Car.) 116; *Springer v. Shavender*, 118 N. Car. 33.

Pennsylvania. — *Devlin v. Com.*, 101 Pa. St. 273, 47 Am. Rep. 710.

South Carolina. — *Moore v. Smith*, 11 Rich. L. (S. Car.) 572, 73 Am. Dec. 122.

Tennessee. — *D'Arusment v. Jones*, 4 Lea (Tenn.) 251, 40 Am. Rep. 12.

Texas. — *Schleicher v. Gutbrod*, (Tex. Civ. App. 1896) 34 S. W. Rep. 657; *Martin v. Robinson*, 67 Tex. 368; *Withers v. Patterson*, 27 Tex. 479, 86 Am. Dec. 643.

Virginia. — *Andrews v. Avory*, 14 Gratt. (Va.) 229, 73 Am. Dec. 355.

Wisconsin. — *Melia v. Simmons*, 45 Wis. 334.

Effect of Letters as Adjudication of Death. — In *Griffith v. Frazier*, 8 Cranch (U. S.) 9, Mr. Chief Justice Marshall said: "Suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law."

In *Stevenson v. Superior Ct.*, 62 Cal. 60, Ross, J., said: "Until death occurs there is no 'subject matter' over which it is possible for any court to exercise jurisdiction. It is true that the Court of Probate, before issuing letters of administration, must first determine affirmatively the question of death. But notwithstanding such determination the fact that the supposed intestate is alive may still be shown, and when shown establishes the nullity of the entire proceedings."

Statute Authorizing Administration on Presumption of Death. — In *Lavin v. Emigrant Industrial Sav. Bank*, 1 Fed. Rep. 641, administration on the plaintiff's estate was granted under a statute providing that "if any person shall be absent from this state [Rhode Island] for the term of three years without due proof of his being alive, administration may be granted upon such person's estate as if he were dead." The defendant bank, with which the plaintiff had deposited money, paid it over to the administrator. Afterwards the plaintiff appeared and demanded the amount of the deposit. The defendants set up as a defense to the demand payment to the administrator. The court held that the effect of the administration in such case was to deprive the plaintiff of his property

Proof of Death. — The fact of death is generally so notorious that no difficulty attends the proof of it, but if no direct evidence can be had, it may be proved by a continued absence or other circumstances, like any other fact.¹ And administration may be granted on a presumption of death, though it may afterwards be overturned by proof that the party was actually alive.²

Civil Death. — At common law a person who had entered into religion and become a monk professed was civilly dead, and might make a testament and appoint executors, or if he made none, the ordinary might grant administration to his next of kin as if he were actually dead intestate.³ But there was a distinction between civil death as applied to a person who had entered into religion, and civil death as applied to one convicted of felony, in that, though a person adjudged to imprisonment for life was considered civilly dead for some purposes, he was not so considered to the extent of granting administration on his estate, and therefore civil death by reason of a sentence of life imprisonment does not give a probate court jurisdiction to grant administration unless it is so provided by statute.⁴

without due process of law. See also *Carr v. Brown*, 20 R. I. (pt. 1) 217.

Effect of Grant of Administration as Adjudication of Death. — In *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555, the court held that the surrogate had jurisdiction to issue letters of administration in two cases: first, when the person whose estate is to be administered is dead, and second, when the surrogate judicially determines that the party is dead, though he is in fact alive. This ruling was based on the provision of the *New York* statute that "before any letters of administration shall be granted on the estate of any person who shall have died intestate, the fact of such person's dying intestate shall be proved to the satisfaction of the surrogate," and that letters granted by any officer having jurisdiction "shall be conclusive evidence of the authority of the persons to whom the same may be granted, until the same shall be reversed on appeal or revoked." In a subsequent decision in the same case (76 N. Y. 316), the same court held that to sustain letters of administration when the party was alive, there must have been produced to the surrogate some competent evidence of the party's death, and the surrogate must himself pass on the question judicially.

Subrogation of Administrator to Rights of Creditors. — Where administration on the estate of a living person is granted on the presumption of death, and the administrator pays the debts, he will be subrogated to the rights of creditors. *Beam v. Copeland*, 54 Ark. 70. See generally the title SUBROGATION.

1. **Proof of Death.** — See the title PRESUMPTIONS.

2. **Administration Granted on Presumption of Death.** — In *Goods of Winstone*, 105 L. T. 12; *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248; *Lancaster v. Washington L. Ins. Co.*, 62 Mo. 121; *Morrison's Estate*, 183 Pa. St. 155, affirming 5 Pa. Dist. Rep. 571, 12 Montg. Co. Rep. (Pa.) 121; *Renner's Estate*, 6 Pa. Dist. Rep. 84.

In some jurisdictions death is presumed after seven years' absence without being heard of. In *Goods of Winstone*, 105 L. T. 12; *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248. Compare *Donaldson v. Lewis*, 7 Mo. App. 403. See the title PRESUMPTIONS.

The absence contemplated by the *Pennsylvania* statute (Act of June 24, 1885) authorizing a grant of administration on the estate of a person who has been absent for seven years without being heard of, is absence from his last known place of residence. *Morrison's Estate*, 183 Pa. St. 155.

Presumption of death may be overcome by slight evidence that the party was living when letters of administration were granted on his estate. *Lancaster v. Washington L. Ins. Co.*, 62 Mo. 121.

General Reputation is admissible in proof of death. *Ringhouse v. Keever*, 49 Ill. 470.

In *Goods of Bishop*, 28 L. J. P. 93, 1 Sw. & Tr. 303, 7 W. R. 375, the alleged decedent set out on a voyage from Demerara to London, the ordinary duration of which was five or six weeks. A few days after sailing a hurricane passed over the West Indian Islands, in which it was supposed that the ship and all on board were lost. Six months afterwards an application for a grant of administration was rejected as premature, since, though the vessel might have been lost, the crew might have been picked up by another vessel bound on so long a voyage that tidings of them could not have been received in the time which had elapsed; but the motion was renewed three months later and granted, nothing in the meantime having been heard, either of the vessel or any of the crew. See also *In Goods of Smyth*, 28 L. J. P. 1; *In Goods of Norris*, 1 Sw. & Tr. 6, 27 L. J. P. 4; *In Goods of Main*, 1 Sw. & Tr. 11, 27 L. J. P. 5.

3. **Civil Death by Entering Religion.** — 1 Bl. Com. 132.

4. **Civil Death by Conviction of Crime.** — *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118; *Avery v. Everett*, 36 Hun (N. Y.) 6, 110 N. Y. 317, 6 Am. St. Rep. 368; *Matter of Zeph*, 50 Hun (N. Y.) 523.

A former statute of *New York* provided that a person sentenced to imprisonment for life in the state prison should "be deemed and taken to be civilly dead to all intents and purposes in law;" and it was held that such statutes changed the common-law rule. *Graham v. Adams*, 2 Johns. Cas. (N. Y.) 408; *Matter of Deming*, 10 Johns. (N. Y.) 232.

In *Frazer v. Fulcher*, 17 Ohio 260, *Hitchcock, J.*, delivering the opinion of the court,

(b) **Intestacy.** — The power of the court to grant letters of general and original administration exists only when one has died intestate and the grant is founded on an adjudication, express or implied, that the deceased died intestate.¹

Discovery of Will After Grant of Letters of Administration. — Although intestacy is a jurisdictional fact on an application for letters of general original administration, it is well settled that the appointment of an administrator is not void, where a will is afterwards discovered, because the appointment involves a finding of the fact of intestacy, and such finding, until reversed or set aside, is conclusive so far as affects the validity of acts done in the due course of administration.²

said: "If there is anything in the legislation of the state which would authorize the appointment of an administrator upon the estate of a person in this situation, we have not been able to find it, nor has it been pointed out to us. But it is said that, by the rules of the common law, there is such a thing as a civil death as well as a natural death. We know that in England there are cases in which a man, although in full life, is said to be civilly dead, but I have not learned, until this case was brought before us, that there was but one kind of death known to our laws. In New York they have a statute which provides that where a man is, for the punishment of crime, sentenced to imprisonment in the penitentiary for life, he shall be considered as civilly dead, to all intents and purposes in law. In the case of *Troup v. Wood*, 4 Johns. Ch. (N. Y.) 247, Chancellor Kent says that he apprehends that this law, which was passed March, 1799, was only declaratory of the existing law. This opinion is based upon the pre-existing statutes of the state, and upon the common law of England, which by statute was a part of the law of New York. In the subsequent case of *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118, the chancellor says he was mistaken, in the opinion expressed in the case first cited, that the Act of 1799 was only declaratory of the existing law. And in the latter case he decides that, although a man might be sentenced to imprisonment for life in punishment for a crime, still he would not be held to be civilly dead, unless the crime was committed after the law of 1799 took effect. If, then, we rely upon the authority of Chancellor Kent, there is no principle of the common law by which a man in the situation of Frazer would be held to be civilly dead. If it were otherwise, it would make no difference in this state, for it is perfectly manifest that the general assembly, in the section of the administration law heretofore quoted, had reference to no other than natural death."

1. Intestacy Essential to Grant of General Original Administration. — *Bulkley v. Redmond*, 2 Bradf. (N. Y.) 281; *Slade v. Washburn*, 3 Ired. L. (25 N. Car.) 557.

Where it appears that the decedent left an instrument purporting to be his will, administration cannot be granted until the validity of the will is determined, though the next of kin declare that they do not intend to offer it for probate. *In re Taggart*, (Surrogate Ct.) 16 N. Y. Supp. 514.

Proof of Intestacy. — It will be presumed that a decedent died intestate, if there is no evi-

dence to the contrary. *Stokesberry v. Reynolds*, 57 Ind. 425.

The oath of the person applying for letters that the decedent died intestate, except as to real estate, is sufficient to authorize a grant. *In Goods of Parkin*, 1 Sw. & Tr. 465, 5 Jur. N. S. 1366, 29 L. J. P. 47.

The fact of intestacy is ordinarily shown by proving that no will can be found. *Bulkley v. Redmond*, 2 Bradf. (N. Y.) 281.

If the Fact that the Decedent Died Intestate Is Notorious no proof of intestacy need be made. *Eslin v. District of Columbia*, 22 Ct. of Cl. 160.

Lost Will. — Proof that a decedent executed a will which he afterwards destroyed will not defeat an application for an administrator, unless its contents can be proved with such degree of certainty that it may be established as a will. *In re Ellis*, 55 Minn. 401, 43 Am. St. Rep. 514.

Will Made by Insane Person. — Administration will be granted as in case of intestacy, where the testator was insane when he made the will. *In Goods of Rich*, (1892) Prob. 143.

2. Discovery of Will After Grant of Administration. — A grant of administration as in case of intestacy is not rendered void by the subsequent production and probate of the will, but all acts rightfully done in due course of administration while it was in force are valid.

Alabama. — *Floyd v. Clayton*, 67 Ala. 265; *Jennings v. Moses*, 38 Ala. 402.

New Hampshire. — *Kittredge v. Folsom*, 8 N. H. 98.

New York. — *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125.

Ohio. — *Bigelow v. Bigelow*, 4 Ohio 138, 19 Am. Dec. 591; *Barkaloo v. Emerick*, 18 Ohio 268.

South Carolina. — *Benson v. Rice*, 2 Nott & M. (S. Car.) 577; *Foster v. Brown*, 1 Bailey L. (S. Car.) 221, 19 Am. Dec. 672; *Price v. Nesbit*, 1 Hill Eq. (S. Car.) 445.

Tennessee. — *Pinkerton v. Walker*, 3 Hayw. (Tenn.) 221; *Baldwin v. Buford*, 3 Yerg. (Tenn.) 16; *Franklin v. Franklin*, 91 Tenn. 119.

In *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, the court said: "Our attention has been called to no case, and we are confident that none can be found, holding that the subsequent discovery of a will and its admission to probate render the prior appointment of an administrator absolutely void, so as to give no protection to persons who, in dealing with the administrator, have acted on the faith thereof."

Appointment of Administrator Is Adjudication of Intestacy. — In *Franklin v. Franklin*, 91 Tenn. 119, Snodgrass, J., delivering the opinion.

(c) **Residence Within Jurisdiction of Court.** — It is a very general rule that the courts of the domicil of a decedent have jurisdiction to grant letters of administration, and residence of the decedent at the time of his death within the territorial limits over which the jurisdiction of the court extends is a fact which must concur with the facts of death and intestacy, in order to give the court jurisdiction to grant letters, unless the decedent left therein property subject to administration or such property came in afterwards.¹ But there must have been an actual residence, and a mere temporary residence is not sufficient.²

Local Courts in United States. — In the United States, where there is a court having probate jurisdiction in each county, letters testamentary or of administration on the goods of a deceased resident of the state can be granted only by the court of the county in which he resided at the time of his death.³

(d) **Assets Within Jurisdiction of Court** — *aa. GENERAL RULE.* — It is also a general rule that though the decedent was a nonresident, administration may be granted on his estate if there are assets within the jurisdiction of the court at the time the application for letters is made.⁴ If a nonresident decedent left property in several counties, the proper court of any of such counties may

of the court, said: "Intestacy, like inhabitaney, is one of the facts the county court must determine, and the two questions fall together within the power of the court to settle when the appointment of an administrator is asked. When the appointment is made, both are adjudged, and that is conclusive until reversed or vacated."

Removal of Administrator on Discovery of Will. — Where a will is found after appointment of a general administrator, an administrator with the will annexed may be appointed without removing the first administrator, as the latter appointment supersedes the former administration. *McCauley v. Harvey*, 49 Cal. 497.

1. Courts of Domicil Have Jurisdiction. — *Doe v. Owens*, 2 B. & Ad. 423, 22 E. C. L. 115; *Enohin v. Wylie*, 10 H. L. Cas. 1, 8 Jur. N. S. 897, 31 L. J. Ch. 402, 10 W. R. 467, 6 L. T. N. S. 263; *Wilkins v. Ellett*, 108 U. S. 256; *Fletcher v. McArthur*, 68 Fed. Rep. 65; *Harlan's Estate*, 24 Cal. 182, 85 Am. Dec. 58.

Residence or Property Within Jurisdiction. — A probate court has no jurisdiction of the estate of a decedent unless either he was a resident of the state, or there is in the state property owned by him.

Georgia. — *Patillo v. Barksdale*, 22 Ga. 356.
Indiana. — *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477; *Toledo, etc., R. Co. v. Reeves*, 8 Ind. App. 667.

Iowa. — *Christy v. Vest*, 36 Iowa 285.
Kansas. — *Mallory v. Burlington, etc., R. Co.*, 53 Kan. 557.

Kentucky. — *Embry v. Miller*, 1 A. K. Marsh. (Ky.) 300, 10 Am. Dec. 732; *Drake v. Vaughan*, 6 J. J. Marsh. (Ky.) 143; *Fletcher v. Sanders*, 7 Dana (Ky.) 345, 32 Am. Dec. 96.

Louisiana. — *Moise v. Mutual Reserve Fund L. Assoc.*, 45 La. Ann. 736.

Massachusetts. — *Crosby v. Leavitt*, 4 Allen (Mass.) 410.

Nebraska. — *Moore v. Moore*, 33 Neb. 509.
New York. — *Van Giesen v. Bridgford*, 18 Hun (N. Y.) 73, 83 N. Y. 348; *Flinn v. Chase*, 4 Den. (N. Y.) 85.

The Court of a Guardian's Residence has jurisdiction to appoint an administrator of the estate

of the deceased ward. *Trumbo v. Richardson* (Ky. 1897) 38 S. W. Rep. 700.

2. Temporary Residence Does Not Give Jurisdiction. — *George v. Watson*, 19 Tex. 354.

3. Probate Court in County of Residence — *California.* — *Harlan's Estate*, 24 Cal. 182, 85 Am. Dec. 58.

Georgia. — *McBain v. Wimbish*, 27 Ga. 259.
Kentucky. — *McC Campbell v. Gilbert*, 6 J. J. Marsh. (Ky.) 592; *Trumbo v. Richardson*, (Ky. 1897) 38 S. W. Rep. 700.

Louisiana. — *Williamson's Succession*, 3 La. Ann. 261; *Miltenberger v. Knox*, 21 La. Ann. 399.

Massachusetts. — *Holyoke v. Haskins*, 5 Pick. (Mass.) 20, 16 Am. Dec. 372; *Cutts v. Haskins*, 9 Mass. 543; *Stevens v. Gaylord*, 11 Mass. 256.

Mississippi. — *Cocke v. Finley*, 29 Miss. 127.

Nebraska. — *Moore v. Moore*, 33 Neb. 509; *Spencer v. Wolfe*, 49 Neb. 8; *Missouri Pac. R. Co. v. Bradley*, 51 Neb. 596.

New York. — *James v. Adams*, 22 How. Pr. (N. Y. Supreme Ct.) 409; *Taylor v. Public Administrator*, 6 Dem. (N. Y.) 158.

North Carolina. — *Collins v. Turner*, Term (4 N. Car.) 105; *Johnson v. Corpenning*, 4 Ired. Eq. (39 N. Car.) 216.

Pennsylvania. — *Lewis's Estate*, 10 Pa. Co. Ct. Rep. 331.

Rhode Island. — *People's Sav. Bank v. Wilcox*, 15 R. I. 258.

Tennessee. — *Wilson v. Frazier*, 2 Humph. (Tenn.) 30.

Texas. — *George v. Watson*, 19 Tex. 354.

4. Assets Give Jurisdiction — *England.* — *Evans v. Burrell*, 28 L. J. P. 82; In Goods of *Fittock*, 9 Jur. N. S. 311, 32 L. J. P. 157; In Goods of *Butson*, 9 L. R. Ir. 21.

United States. — *Wilkins v. Ellett*, 108 U. S. 256.

Alabama. — *Equitable L. Assur. Soc. v. Vogel*, 76 Ala. 441, 52 Am. Rep. 344; *Miller v. Jones*, 26 Ala. 247; *Broughton v. Bradley*, 34 Ala. 694, 73 Am. Dec. 474; *Watson v. Collins*, 37 Ala. 587.

Florida. — *Blewitt v. Nicholson*, 2 Fla. 200.

Georgia. — *Sprayberry v. Culberson*, 32 Ga. 299.

Illinois. — *Bowles v. Rouse*, 8 Ill. 409.

appoint an administrator,¹ and in such case the court which first gets jurisdiction by proper proceedings has the right to act, and an appointment by the court of any other county is invalid.²

bb. WHEN NECESSARY. — The power of the court to grant letters does not depend, however, on the existence of assets within its jurisdiction, unless the decedent did not reside therein at the time of his death.³

ON WHAT ASSETS ADMINISTRATION MAY BE GRANTED. — Letters of administration may be granted on the estate of a decedent, if he left within the jurisdiction of the court any property, tangible or intangible, which is subject to administration,⁴ or if any such property be brought within the jurisdiction of the

Indiana. — *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477.

Iowa. — *Christy v. Vest*, 36 Iowa 285.

Kentucky. — *Embry v. Miller*, 1 A. K. Marsh. (Ky.) 303, 10 Am. Dec. 732; *Henderson v. Clarke*, 4 Litt. (Ky.) 277; *Thumb v. Gresham*, 2 Metc. (Ky.) 306; *Rutherford v. Clark*, 4 Bush (Ky.) 27; *Hyatt v. James*, 8 Bush (Ky.) 9.

Maryland. — *Grimes v. Talbert*, 14 Md. 169.

Massachusetts. — *Crosby v. Leavitt*, 4 Allen (Mass.) 410.

Missouri. — *Bartlett v. Hyde*, 3 Mo. 490; *Spradling v. Pipkin*, 15 Mo. 118; *Wood v. Matthews*, 73 Mo. 477.

Nebraska. — *Moore v. Moore*, 33 Neb. 509; *Spencer v. Wolf*, 49 Neb. 8.

New York. — *Slatter v. Carroll*, 2 Sandf. Ch. (N. Y.) 573; *Goodrich v. Pendleton*, 4 Johns. Ch. (N. Y.) 549; *Matter of Schoonmaker*, 18 N. Y. Wkly. Dig. 410.

North Carolina. — *Shields v. Union Cent. L. Ins. Co.*, 119 N. Car. 380; *Smith v. Munroe*, Ired. L. (23 N. Car.) 345.

Ohio. — *In re Fallon*, 3 Ohio N. P. 62, 4 Ohio Dec. 395.

Discretion of Court. — In *Goods of Ewing*, 6 Prob. Div. 19, 50 L. J. P. 11, 44 L. T. N. S. 278, 29 W. R. 474, the decedent was possessed of property of small value in England, and entitled under the will of another person to large assets in Scotland which were being duly administered there, and it was held that a grant of administration in England was discretionary with the court.

1. Nonresident Decedent Leaving Assets in Several Counties. — *Moore v. Moore*, 33 Neb. 509; *Missouri Pac. R. Co. v. Bradley*, 51 Neb. 596; *Ex p. Dauthereau*, 2 Brev. (S. Car.) 459.

2. Jurisdiction First Acquired Is Exclusive. — *In re Griffith*, 84 Cal. 107; *In re Worthington*, 4 Ohio Dec. 381.

3. When Assets Are Essential to Jurisdiction. — It is only when the intestate resided out of the state at the time of his death that the existence of assets in the state is necessary to give the court jurisdiction. Consequently the non-existence of assets in the state would not make an administration void if the intestate was an inhabitant of the county at the time of his death. *Watson v. Collins*, 37 Ala. 587.

4. On What Assets Administration May Be Granted. — In *Parsons v. Spaulding*, 130 Mass. 83, it was held that administration was properly granted, though the only property to be affected thereby consisted of a promissory note secured by a mortgage on land, and the land had been for more than twenty years in the adverse possession of the person opposing the grant of administration.

A Debt Due to the Decedent is an asset on which administration may be founded. *Equitable L. Assur. Soc. v. Vogel*, 76 Ala. 441, 52 Am. Rep. 344.

Claim for Property Taken. — "The claim which the administrator with the will annexed may have against the person who has disposed of the estate of the testator is certainly an asset sufficient to justify the issuing of letters of administration." *In re Nesmith*, (Supreme Ct.) 1 N. Y. Supp. 343.

Interest in Cause of Action. — An unliquidated claim in a pending suit is assets on the possession of which administration may be granted. *Robinson v. Epping*, 24 Fla. 237; *Murphy v. Creighton*, 45 Iowa 179.

Alabama Claims. — A claim against the United States for war premiums under the Act of Congress re-establishing the Court of Alabama Claims for the allowance of claims for the payment of premiums charged for war risks after the sailing of any Confederate cruisers, and making provisions for the payment of the claims so allowed by the secretary of the treasury out of the balance of the Geneva award not appropriated to the payment of direct claims, is an asset on which administration may be granted. *Manning v. Leighton*, 65 Vt. 84.

Action for Death of Intestate. — A right of action given by statute to an administrator to recover for negligence causing the death of the decedent is sufficient to sustain a grant of administration. *Brown v. Louisville, etc., R. Co.*, 97 Ky. 228; *Findlay v. Chicago, etc., R. Co.*, 106 Mich. 700; *Hutchins v. St. Paul, etc., R. Co.*, 44 Minn. 5.

But such a cause of action given by the statutes of the state in which the intestate was killed, and of which he was a resident, cannot be regarded as assets in another state so as to give the courts of such other state jurisdiction to grant letters of administration. *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177.

Existence of Assets Above Exemptions. — An application for a grant of administration will not be denied merely because there are no assets above exemptions. *Bell v. Hall*, 76 Ala. 546; *Wheat v. Fuller*, 82 Ala. 572.

Property of Small Value. — In *Harrington v. Brown*, 5 Pick. (Mass.) 519, it was said that articles of furniture, plate, etc., though of small value, or any other corresponding to *bona notabilia* in England, would be sufficient to give the court jurisdiction.

As to Value of Assets which may be the subject of administration, see *supra*, this title, *When Administration Is Necessary or Proper — Value of Estate.*

court after his death.¹ If a nonresident decedent left only real property in the state, administration may be granted on it, if in the particular jurisdiction the real property of a decedent passes to his personal representatives, or if he left also creditors in the state who are entitled to have the lands sold for the payment of their claims.²

dd. SITUS OF ASSETS — (aa) *General Rule.* — The locality of tangible personal property, for the purpose of probate jurisdiction, is the place where it happens to be, but the locality of intangible property is governed by certain arbitrary rules designed primarily to prevent conflict of jurisdiction between different ordinaries.³

(bb) *Simple Contract Debts.* — Simple contract debts are generally held, for the purpose of granting administration, to be assets at the place where the debtor resided at the time of the death of the creditor,⁴ and the locality of such a

1. Assets Brought into Jurisdiction After Death. — *Robinson v. Robinson*, 11 Ala. 947; *Christy v. Vest*, 36 Iowa 287; *Pinney v. McGregory*, 102 Mass. 186; *Stearns v. Wright*, 51 N. H. 600; *Johnston v. Smith*, 25 Hun (N. Y.) 171; *Matter of Hughes*, 95 N. Y. 55.

Assets Temporarily in Jurisdiction. — But the fact that assets were brought into the jurisdiction for a temporary purpose after the decedent's death is not sufficient. *Christy v. Vest*, 36 Iowa 285.

Thus it was held that the temporary situation in the state of property of trifling value in the hands of a bailee was not the existence of assets in the state for the purpose of founding administration. *Kohler v. Knapp*, 1 Bradf. (N. Y.) 241.

As to what are assets for purpose of founding administration, see also *infra*, this title, *Assets*.

2. Administration Granted on Real Estate Alone — *Georgia.* — *Sprayberry v. Culberson*, 32 Ga. 299.

Illinois. — *Bowles v. Rouse*, 8 Ill. 409.

Indiana. — *Toledo, etc., R. Co. v. Reeves*, 8 Ind. App. 667.

Iowa. — *Little v. Sinnett*, 7 Iowa 324.

Kentucky. — *Rutherford v. Clark*, 4 Bush (Ky.) 27.

Massachusetts. — *Bowdoin v. Holland*, 10 Cush. (Mass.) 17.

Mississippi. — *Partee v. Kortrecht*, 54 Miss. 66.

Nebraska. — *Moore v. Moore*, 33 Neb. 509.

New York. — *Slatter v. Carroll*, 2 Sandf. Ch. (N. Y.) 573.

The Word Assets, as used in the statute authorizing a grant of letters of administration on the estate of nonresidents who die leaving assets, includes land situate in the county where the administration is granted. *Bishop v. Lalouette*, 67 Ala. 197; *Nicrosi v. Giuly*, 85 Ala. 365.

In California administration may be granted though the decedent was a nonresident and owed no debts and left only real estate in the state. *Matter of Strong*, 119 Cal. 663.

A Late English Statute authorizes the grant of letters of administration on real estate. Stat. 60 & 61 Vict., c. 65.

3. Situs of Assets — General Rule. — The general rule as to the *situs* of assets is stated by Lord Abinger, C. B., in *Atty.-Gen. v. Bouwens*, 4 M. & W. 191, as follows: "As to the locality of many descriptions of effects, household and movable goods, for instance, there

never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and titles to property, it was established as law that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resides at the time of the testator's death; and it was also decided that, as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found. In truth, with respect to simple contract debts, the only act of administration that could be performed by the ordinary would be to recover or to receive payment of the debt, and that would be done by him within whose jurisdiction the debtor happened to be."

A Cause of Action for Wrongful Death is an asset, for the purpose of granting administration, in the state where the killing occurred. *Missouri Pac. R. Co. v. Bradley*, 51 Neb. 596.

Chattels Real. — The *situs* of chattels real is the place where they are situate. In *Goods of Gentili*, 9 Ir. R. Eq. 541.

Goods in Transit with Intent to Change Domicil. — In *Burnett v. Meadows*, 7 B. Mon. (Ky.) 277, 46 Am. Dec. 517, the decedent, a citizen of Virginia, started with his family and property to remove to Kentucky, but died on the way while still in Virginia. His family continued the journey with the property to Kentucky, and it was held that the property would be regarded, for the purpose of granting administration, as having been in Kentucky at the time of the decedent's death.

4. Situs of Simple Contract Debts Is Residence of Debtor — *England.* — *Yeoman v. Bradshaw*, 3 Salk. 70.

United States. — *Wyman v. Halstead*, 109 U. S. 656.

Georgia. — *Arnold v. Arnold*, 62 Ga. 627.

Massachusetts. — *Ex p. Picquet*, 5 Pick. (Mass.) 65; *Pinney v. McGregory*, 102 Mass. 186; *Merrill v. New England Mut. L. Ins. Co.*, 103 Mass. 245, 4 Am. Rep. 548.

Missouri. — *Matter of Ames*, 52 Mo. 290; *Becraft v. Lewis*, 41 Mo. App. 546.

New Hampshire. — *Thompson v. Wilson*, 2 N. H. 291; *Stearns v. Wright*, 51 N. H. 600.

debt for this purpose is not affected by the fact that a bill of exchange or promissory note has been given for it, because the bill or note does not alter the nature of the debt, but is merely an evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable.¹

A Life Insurance Policy is generally regarded not as a specialty, though it is under the corporate seal of the insurer, but as a simple contract debt having a *situs* at the place of residence of the insurer,² though it has been held that the policy is an asset where it happens to be at the time of the decedent's death, if the insurer was doing business in that jurisdiction and could be sued therein,³ and in some cases the policy has been regarded as assets at the domicile of the decedent.⁴ If the policy is payable in a particular place, it is

New Jersey. — *Banta v. Moore*, 15 N. J. Eq. 97.

New York. — *Chapman v. Fish*, 6 Hill (N. Y.) 554; *Fox v. Carr*, 16 Hun (N. Y.) 434; *Kohler v. Knapp*, 1 Bradf. (N. Y.) 241.

North Carolina. — *Grant v. Reese*, 94 N. Car. 720.

South Carolina. — *Dial v. Gary*, 14 S. Car. 581, 37 Am. Rep. 737.

Vermont. — *Vaughn v. Barret*, 5 Vt. 333, 26 Am. Dec. 306.

The Fact That the Debtor Resides in One State and Does Business in Another does not affect the locality of the debt as assets of the creditor's estate. It is still an asset in the state where the debtor resides. *Kohler v. Knapp*, 1 Bradf. (N. Y.) 241.

Removal of Debtor After Creditor's Death. — Though as a general rule simple contract debts are assets where the debtor resided at the time of the creditor's death, yet if the debtor goes to another state without intent to defraud the administrators of the creditor's domicile, the debt becomes assets in the state into which the debtor goes. *Fox v. Carr*, 16 Hun (N. Y.) 434; *Pinney v. McGregory*, 102 Mass. 186.

Collection by Domiciliary Administrator. — In *Fletcher v. Sanders*, 7 Dana (Ky.) 351, 32 Am. Dec. 96, it was said that "a debt due by parol contract will always be assets in the state where the debtor resides, unless it shall lawfully come to the hands of the domiciliary administrator."

Claims Against the United States. — Debts due from or claims against the United States are not local assets at the seat of the government, but have their locality in the state where the decedent resided. *Wyman v. Halstead*, 109 U. S. 654; *King v. U. S.*, 27 Ct. of Cl. 529.

1. Locality of Debt Evidenced by Bill or Note. — *Yeoman v. Bradshaw*, 3 Salk. 70; *Wyman v. Halstead*, 109 U. S. 656, and cases cited; *Tryon v. U. S.*, 32 Ct. of Cl. 425; *Becraft v. Lewis*, 41 Mo. App. 546. But see *St. John v. Hodges*, 9 Baxt. (Tenn.) 334; *Young v. O'Neal*, 3 Sneed (Tenn.) 55.

The New York Code provides that "for the purpose of conferring jurisdiction upon a surrogate's court, a debt owing to a decedent by a resident of the state is regarded as personal property situated within the county where the debtor resides; and a debt owing to him by a domestic corporation is regarded as personal property situated within the county where the principal office of the corporation is situated.

But the foregoing provision does not apply to a debt evidenced by a bond, promissory note, or other instrument for the payment of money only, in terms negotiable or payable to the bearer or holder. Such a debt is, for the purpose of conferring jurisdiction, regarded as personal property at the place where the bond, note, or other instrument is, whether within or without the state." *Matter of Miller*, 5 Dem. (N. Y.) 381.

A Draft drawn in one state on a bank in another state is assets where the debtor resides. *Tryon v. U. S.*, 32 Ct. of Cl. 425.

Note Secured by Mortgage on Land. — It has been held that the locality of a debt evidenced by the note of the debtor is not affected by the fact that the note was secured by mortgage on real estate. *Eells v. Holder*, 12 Fed. Rep. 668, 2 McCrary (U. S.) 622; *Chamberlin v. Wilson*, 45 Iowa 149. See *Cutter v. Davenport*, 1 Pick. (Mass.) 81, 11 Am. Dec. 149.

2. Situs of Life Insurance Policy — Place Where Debtor Insurer Resides. — *Merrill v. New England Mut. L. Ins. Co.*, 103 Mass. 245, 4 Am. Rep. 548; *Sulz v. Mutual Reserve Fund L. Assoc.*, 7 Misc. Rep. (N. Y. Supreme Ct.) 593, 145 N. Y. 563.

Life Insurance Policy Not a Specialty. — *Sulz v. Mutual Reserve Fund L. Assoc.*, 7 Misc. Rep. (N. Y. Supreme Ct.) 593, affirmed 83 Hun (N. Y.) 139, 145 N. Y. 563. Compare *Gurney v. Rawlins*, 2 M. & W. 87, 2 Gale 235.

3. Policy Held Assets in Jurisdiction Where It Is at Decedent's Death. — In *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138, the decedent, whose domicile was in Michigan, died in Illinois, having in her possession a life insurance policy issued by a Massachusetts insurance company. The insurer was doing business in Illinois under the statute of that state which requires foreign corporations to appoint in writing a resident attorney on whom all lawful process against the company could be served with like effect as if the company existed in Illinois. It was held that the insurer would be regarded as having a domicile in Illinois in the sense of the rule that the debt on the policy is assets at its domicile so as to uphold a grant of administration there. See also *Smith v. New York L. Ins. Co.*, 57 Fed. Rep. 133, affirmed 67 Fed. Rep. 694, 29 U. S. App. 220; *Johnston v. Smith*, 25 Hun (N. Y.) 171. But see *contra*, *Moise v. Mutual Reserve Fund L. Assoc.*, 45 La. Ann. 736.

4. Policy Held Assets at Decedent's Domicil. — *Holyoke v. Union Mut. L. Ins. Co.*, 22 Hun (N. Y.) 75, affirmed 84 N. Y. 648. See also

held that it constitutes assets at the place where it is payable, and administration must be granted there.¹

(cc) *Specialty Debts.* — A specialty debt is generally held to have its *situs* where the specialty happens to be at the time of the owner's death.²

(dd) *Judgments.* — A judgment in favor of a decedent has its *situs*, for the purpose of granting administration, at the place where the judgment was entered.³

b. ORIGINAL AND GENERAL ADMINISTRATORS — (1) *Right to Appointment* — (a) *In General.* — The right to administer the estates of decedents is wholly regulated by modern statutes, but they are all founded on the English statutes of 31 Edw. III., stat. 1, c. 11, and 21 Henry VIII., c. 5,⁴ and they all recognize as a fundamental principle that a person entitled to the estate of a decedent is entitled to the administration.⁵ Under some of the statutes, how-

Morrison v. Mutual L. Ins. Co., 57 Hun (N. Y.) 97.

1. *Life Insurance Policy Payable at Particular Place.* — Pritchard v. Standard L. Assur. Co., 7 Ont. Rep. 188; Omalley v. Scottish Commercial Ins. Co., 4 Quebec L. Rep. 226.

2. *Situs of Specialty Debts.* — A bond is assets in the jurisdiction where it happens to be at the time of the owner's death. Byron v. Byron, Cro. Eliz. (472); Fletcher v. Sanders, 7 Dana (Ky.) 351, 32 Am. Dec. 96; Beers v. Shannon, 73 N. Y. 292; Grace v. Hannah, 6 Jones L. (51 N. Car.) 94; Leake v. Gilchrist, 2 Dev. L. (13 N. Car.) 73.

Government Bonds Deposited for Safe Keeping. — In Shakespeare v. Fidelity Ins., etc., Co., 97 Pa. St. 173, it was held that United States bonds, deposited by a citizen of another state with a trust company in Pennsylvania for safe keeping, on a certificate of deposit transferable by indorsement, were not assets of the depositor in Pennsylvania.

3. *Situs of Judgment* is the place where the judgment was entered. Anonymous, 8 Mod. 244; Adams v. Savage, 6 Mod. 136, 1 Salk. 40; Gold v. Strode, Carth. 148; Beers v. Shannon, 73 N. Y. 292; Swancy v. Scott, 9 Humph. (Tenn.) 327; Vaughn v. Barret, 5 Vt. 333, 26 Am. Dec. 306; Slocum v. Sanford, 2 Conn. 533; Strong v. White, 19 Conn. 238.

4. *English Statute.* — The right to letters of administration on the estate of a decedent in England is governed by stat. 21 Henry VIII., c. 5, § 3, which provides that in case any person die intestate, or the executors named in any testament refuse to prove, the ordinary shall grant administration "to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good," and that "where divers persons claim the administration as next of kin which be equal in degree of kindred to the testator or person deceased, and where any person only desireth the administration as next of kin, where indeed divers persons be in equality of kindred as is aforesaid, that in every such case the ordinary to be at his election and liberty to accept any one or more making request where divers do require the administration." 1 Wms. Exrs. (7th Am. ed.) 489.

Statutes in the United States. — The Montana Statute provides that "letters of administration on the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, who are re-

spectively entitled thereto, in the following order: *First*, the surviving husband or wife or some competent person whom he or she may request to have appointed. *Second*, the children. *Third*, the father and mother. *Fourth*, the brothers. *Fifth*, the sisters. *Sixth*, the grandchildren. *Seventh*, the next of kin entitled to share in distribution of the estate. *Eighth*, the public administrator. *Ninth*, the creditors. *Tenth*, any person legally competent." *In re Stewart*, 18 Mont. 597.

The New York Statute provides that "administration in case of intestacy must be granted to the relatives of the deceased entitled to succeed to his personal property who will accept the same in the following order: 1. To the surviving husband or wife. 2. To the children. 3. To the father. 4. To the mother. 5. To the brothers. 6. To the sisters. 7. To the grandchildren. 8. To any other next of kin entitled to share in the distribution of the estate. If a person entitled is a minor, administration must be granted to his guardian, if competent, in preference to creditors or other persons. If no relative, or guardian of a minor relative, will accept the same, the letters must be granted to the creditors of the deceased; the creditor first applying, if otherwise competent, to be entitled to preference. If no creditor applies, the letters must be granted to any other person or persons legally competent. The public administrator in the city of New York has preference, after the next of kin, over creditors and all other persons. In other counties the county treasurer shall have preference next after creditors over all other persons. If several persons of the same degree of kindred to the intestate are entitled to administration, they must be preferred in the following order: first, men to women; second, relatives of the whole blood to those of the half blood; third, unmarried women to married. If there are several persons equally entitled to administration, the surrogate may grant letters to one or more of such persons; and administration may be granted to one or more competent persons, although not entitled to the same, with the consent of the person entitled to be joined with such person or persons; which consent must be in writing, and filed in the office of the surrogate." Laws N. Y. 1893, c. 686, p. 1680.

Compare the statutes in other states.

5. *Interest in Estate Gives Right to Administer* — *England.* — Young v. Peirce, Freem. 496;

ever, relationship to the decedent gives the right to the administration, though the relatives have no beneficial interest in the estate.¹

Priority of Right Prescribed by Statute. — Where the statute fixes the priority of the right to appointment, the probate court is concluded thereby and cannot refuse to appoint a person so entitled, unless he lacks the necessary qualifications² or unless it would hazard the estate to observe the order of

In *Goods of Gill*, 1 Hagg. Ecc. 341; *Weldrill v. Wright*, 2 Phill. Ecc. 248.

California. — *Matter of Egger*, 114 Cal. 464.

Georgia. — *Clay v. Jackson*, T. U. P. Charl. (Ga.) 71; *Leverett v. Dismukes*, 10 Ga. 98; *Long v. Huggins*, 72 Ga. 776.

Louisiana. — *Rice's Succession*, 21 La. Ann. 614.

Maryland. — *Hoffman v. Gold*, 8 Gill & J. (Md.) 79.

Mississippi. — *Langan v. Bowman*, 12 Smed. & M. (Miss.) 715.

New Jersey. — *Cramer v. Sharp*, 49 N. J. Eq. 558.

New York. — *Public Administrator v. Hughes*, 1 Bradf. (N. Y.) 125; *Sweezy v. Willis*, 1 Bradf. (N. Y.) 495.

Pennsylvania. — *Fulmer's Estate*, 2 C. Pl. Rep. (Pa.) 65; *Ellmaker's Estate*, 4 Watts (Pa.) 34; *Matter of Cook*, 1 Phila. (Pa.) 342, 9 Leg. Int. (Pa.) 51; *Matter of Willink*, 4 Phila. (Pa.) 188, 17 Leg. Int. (Pa.) 237; *Re Brann's Estate*, 7 Kulp (Pa.) 369; *Cantlin's Estate*, 2 Pa. Dist. Rep. 522.

Rhode Island. — *Johnson v. Johnson*, 15 R. I. 109.

Virginia. — *Cutchin v. Wilkinson*, 1 Call (Va.) 3; *Thornton v. Winston*, 4 Leigh (Va.) 152.

Reason and Policy of Rule. — In *Leverett v. Dismukes*, 10 Ga. 98, Lumpkin, J., said that "the reason given why the person having title to the estate ought to have the administration is because he is most interested and will take best care of it."

"The policy of the law," said the court in *Thomas v. Knighton*, 23 Md. 318, 87 Am. Dec. 571, "in selecting persons nearest in interest, in preference to others more remote, was to bind up the interest of administrator with that of persons entitled to the estate."

Nature of Interest. — One who claims property adversely to the estate has no interest therein which will entitle him to the administration. *Matter of Willink*, 4 Phila. (Pa.) 188, 17 Leg. Int. (Pa.) 237.

Interest Determined by Law of Domicil. — In *Public Administrator v. Hughes*, 1 Bradf. (N. Y.) 125, the intestate was a bastard, domiciled in England. A lawful son of the intestate's mother applied for letters of administration in New York. The application was denied on the ground that the right to the succession to the intestate's estate was governed by the law of her domicil, and therefore the claimant, not being a lineal descendant of the intestate, could not be recognized in New York as one of her kindred. But see *Peters v. Public Administrator*, 1 Bradf. (N. Y.) 200.

Equality of Interest Gives Equality of Right to Administrator. — In *Rajnowski v. Detroit*, etc., R. Co., 74 Mich. 20, it was held that a statute giving the father and mother of a person an equal interest in damages recovered for his

death by wrongful act gives them an equal interest in the administration of his estate.

Interest Gives Prior Right Over Next of Kin. —

In *Leverett v. Dismukes*, 10 Ga. 98, it was held that where the intestate leaves neither widow nor children, nor the representatives of children, nor father, nor mother, but a married sister, who is sole distributee and heir at law, the husband of the sister is entitled to administration in preference to the uncle, notwithstanding the latter is nearer in blood to the deceased. And in *Young v. Peirce*, Freem. 496, administration was refused to the next of kin because she had released all her interest, and the letters were committed to the party beneficially entitled.

The Law in Force at the Time the Application Is Made or at the time the letters were granted, and not the law in force at the time of the decedent's death, determines the right to letters of administration. *Matter of McLaughlin*, 103 Cal. 429, Griffith v. Coleman, 61 Md. 250; *In re Connor*, 16 Mont. 465.

1. Relatives Not Interested in Estate. — In *Public Administrator v. Watts*, 1 Paige (N. Y.) 382, decided in 1829, Chancellor Walworth held that a person had no claim to administration unless he had an immediate interest in the estate; that relationship nearer than that of any other person residing in the United States gave him no title, if it fell short of that standard, and that if the next or nearest of kin was legally disqualified, or refused to act, the claim of the public administrator became paramount. In 1849, Surrogate Bradford held, in *Public Administrator v. Peters*, 1 Bradf. (N. Y.) 100, that a relative of a decedent had no better claim than a stranger, unless his interest in the estate was such that if distribution should be made at once he would be entitled to a distributive share. This decision was overruled in the case of *Lathrop v. Smith*, 35 Barb. (N. Y.) 64, which was affirmed by the Court of Appeals in 24 N. Y. 420, where the court laid down the doctrine that a person's right to participate in the distribution of an estate was not, as had formerly been held, an essential qualification of an administrator's claim as a relative of the decedent, but that the right of any person who was of the decedent's blood was superior to that of the public administrator.

As to Right of Relatives to administer when they have no beneficial interest in the estate, see also *infra*, this section, *Right of Next of Kin to Administrator*.

2. Priority Prescribed by Statute Is Matter of Right. — *Hayes v. Hayes*, 75 Ind. 395; *State v. Collier*, 62 Mo. App. 38; *Coope v. Lowerre*, 1 Barb. Ch. (N. Y.) 45; *Bridgman v. Bridgman*, 30 W. Va. 212.

Discretion of Court. — In *Carpenter v. Jones*, 44 Md. 625, the court said: "But few cases can arise in this state, where the appointment of an administrator is within the discretion of

appointment prescribed.¹

Necessity of Making Timely Application. — In some jurisdictions the right to priority is conditioned on an application for appointment being made within a certain time after the intestate's death, and if the application is not made within the specified time the court may appoint one of the next class;² but it has no power to depart from the order prescribed by statute without giving the persons entitled to a preference an opportunity to take out letters within the time prescribed.³

(b) **Right of Husband to Administer** — *aa. GENERAL RULE.* — In *England* and in all of the *United States*, with a few exceptions, the surviving husband has the exclusive right to administer on the estate of his deceased wife.⁴

bb. EXISTENCE OF MARRIAGE RELATION. — The existence of the marriage relation at the time of the wife's death is essential to the right of the husband to administer on her estate; and therefore if the marriage was void for any cause, or if during the wife's lifetime a decree of nullity or of absolute divorce

the Orphans' Court. The person entitled is generally designated by our statute, and when so designated the requirement of the statute must be strictly obeyed."

No Private or Personal Discretion can be exercised by the ordinary, when acting officially. *Canterbury v. House*, 1 Cowp. 140, 100ft. 622.

1. Priority Prescribed by Statute Disregarded When Hazardous to Estate. — *Spencer's Estate*, 7 Pa. Dist. Rep. 216.

2. Necessity of Making Timely Application. — *Schnell v. Chicago*, 38 Ill. 382; *Spencer v. Wolfe*, 49 Neb. 8; *Bridgman v. Bridgman*, 30 W. Va. 212.

The appointment of one who is not next of kin of the deceased within the time allowed by law for the next of kin to apply is irregular. *Bronson v. Burnett*, 1 Chand. (Wis.) 136, 2 Pin. (Wis.) 185.

3. Opportunity to Take Out Letters. — *State v. Collier*, 62 Mo. App. 38.

4. Husband Has First Right to Administer on Estate of Deceased Wife — *England*. — *Humphrey v. Bullen*, 1 Atk. 458; *Elliott v. Gurr*, 2 Phillim. 19; *Sand's Case*, 3 Salk. 22; *Fettiplace v. Gorges*, 1 Ves. Jr. 46.

United States Courts. — *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138.

California. — *In re Carmody*, 88 Cal. 616.

Florida. — *Blewitt v. Nicholson*, 2 Fla. 200.

Georgia. — *Long v. Huggins*, 72 Ga. 776.

Illinois. — *O'Rear v. Crum*, 135 Ill. 294.

Kentucky. — *Hart v. Soward*, 12 B. Mon. (Ky.) 391; *Brown v. Alden*, 14 B. Mon. (Ky.) 114.

Maryland. — *Hubbard v. Barcus*, 38 Md. 175; *Willis v. Jones*, 42 Md. 422.

Michigan. — *Breen v. Pangborn*, 51 Mich. 29.

Mississippi. — *Langan v. Bowman*, 12 Smed. & M. (Miss.) 715; *Fowler v. Kell*, 14 Smed. & M. (Miss.) 68; *Lee v. Bennett*, 31 Miss. 119; *Jordan v. Ball*, 44 Miss. 194.

Montana. — *In re Stewart*, 18 Mont. 595.

New Hampshire. — *Probate Judge v. Chamberlain*, 3 N. H. 129; *Weeks v. Jewett*, 45 N. H. 540.

New York. — *In re Strutzkoher*, (Supreme Ct.) 14 N. Y. Supp. 501; *McCosker v. Golden*, 1 Bradf. (N. Y.) 64; *Matter of Harvey*, 3 Redf. (N. Y.) 214; *Lux's Estate*, 1 Month. L. Bul. (N. Y.) 48; *Renholm v. Public Administrator*, 2 Redf. (N. Y.) 456; *Dewey v. Goodenough*, 56 Barb. (N. Y.) 54.

North Carolina. — *Hoppiss v. Eskridge*, 2 Ired. Eq. (37 N. Car.) 54.

Pennsylvania. — *Saulnier's Estate*, 3 Whart. (Pa.) 442; *Altemus's Case*, 1 Ashm. (Pa.) 49; *Coover's Appeal*, 52 Pa. St. 427.

Rhode Island. — *Weaver v. Chace*, 5 R. I. 356.

Tennessee. — *Fairbanks v. Hill*, 3 Lea (Tenn.) 732.

Virginia. — *Bray v. Dudgeon*, 6 Munf. (Va.) 132.

Wisconsin. — *Ellsworth v. Hinds*, 5 Wis. 613.

A Contest Over the Wife's Will does not affect the husband's right to letters of administration in *North Carolina*, since the statute gives him the right in case she leaves a will without appointing an executor, as well as when she dies intestate. *Matter of Meyers*, 113 N. Car. 545.

Exception to Rule Preferring Husband. — In *Louisiana* an heir, present or represented, is preferred to the surviving husband or wife. *Williamson's Succession*, 3 La. Ann. 261.

In *Colorado* it is held that the exclusive right given to the husband to administer the personal estate of his deceased wife does not obtain. *Goodrich v. Treat*, 3 Colo. 408.

Wife's Separate Estate. — It has been held in *Pennsylvania* that a husband has no peculiar right to administer his wife's separate estate. *Saulnier's Estate*, 3 Whart. (Pa.) 442; *Ellmaker's Estate*, 4 Watts (Pa.) 34.

Origin of Husband's Right to Administer. — Though this right is unquestioned, the origin of it is disputed. On the one hand, it is said to rest on the ground that the husband is "the next and most lawful friend" of his wife, within the statute 31 Edw. III., stat. 1, c. 11. *Sand's Case*, 3 Salk. 22; *Elliott v. Gurr*, 2 Phill. Ecc. 19; *Fettiplace v. Gorges*, 1 Ves. Jr. 46; *In re Lambert*, 39 Ch. Div. 626.

On the other hand, it is said that the right existed at common law *jure mariti*. *Watt v. Watt*, 3 Ves. Jr. 244.

In *Alabama*, before the code was adopted, the husband was not entitled as matter of right to administration of the wife's estate to the exclusion of her next of kin, because a husband does not bear that relation to his wife. *Vanderveer v. Alston*, 16 Ala. 494; *Randall v. Shrader*, 17 Ala. 333.

had been rendered, he is not entitled to administer;¹ but it is not affected by the fact that the marriage was merely voidable, if it was not in fact annulled during the wife's lifetime,² nor by a decree of divorce *a mensa et thoro*.³

cc. INTEREST IN WIFE'S ESTATE. — If the wife's property is limited to her next of kin, or if the husband releases all his interest in his wife's estate, he is not entitled to the administration.⁴

dd. EFFECT OF WILL MADE BY WIFE. — Nor has he the right if his wife made a will and appointed an executor thereof.⁵

(c) Right of Widow to Administer — *aa.* GENERAL RULE. — In *England* the widow is not entitled as a matter of right to administer on the estate of her deceased husband, but under statute 21 Hen. VIII., c. 5, it is discretionary with the court to grant the administration "to the widow or next of kin, or to both," though the usual practice is to give her the preference; and in some of the *United States* the rule is the same.⁶

1. **Existence of Marriage Is Essential.** — *Browning v. Reane*, 2 Phill. Ecc. 69; In Goods of Hay, 11 Jur. N. S. 936, 35 L. J. P. 3, 14 W. R. 147, 13 L. T. N. S. 335; *Altemus's Case*, 1 Ashm. (Pa.) 49.

2. **Husband Entitled to Administer though Marriage Was Voidable.** — *Elliott v. Gurr*, 2 Phill. Ecc. 19; *A. v. B.*, L. R. 1 P. & D. 559.

3. **Right Not Affected by Divorce a Mensa et Thoro.** — In Goods of Worman, 1 Sw. & Tr. 513; In Goods of Faraday, 2 Sw. & Tr. 369; In Goods of Weir, 2 Sw. & Tr. 451; In Goods of Stephenson, L. R. 1 P. & D. 287; *Clark v. Clark*, 6 W. & S. (Pa.) 85.

4. **Right Barred by Release of Interest in Estate.** — *Allen v. Humphrys*, 8 Prob. Div. 16; *Marshall v. Beall*, 6 How. (U. S.) 70; *Ward v. Thompson*, 6 Gill & J. (Md.) 349; *Fowler v. Kell*, 14 Smed. & M. (Miss.) 68. But see In Goods of Oranmore, 30 L. J. P. 183.

Partial Release or Temporary Suspension of Interest Not Sufficient. — A husband is not deprived of his right to administer by an ante-nuptial settlement, by which his wife's property and the benefits and issues are reserved for her separate use, to be at her own disposal by sale or will, if she died without making any disposition thereof. *Hart v. Soward*, 12 B. Mon. (Ky.) 391.

Nor is his right barred by having entered into a separate agreement, under which specific articles of personal property were agreed to be held by each respectively, but which contained nothing evidencing an intention on the part of the husband to abandon his right to all the property which his wife might thereafter acquire and die possessed of, in case there was no divorce. *Willis v. Jones*, 42 Md. 422.

Wife's Property Limited to Her Next of Kin. — The right of a husband to administer on his wife's estate is excluded by a limitation to the next of kin of the wife. *Anderson v. Dawson*, 15 Ves. Jr. 532.

5. **Effect of Will Appointing Executor.** — A husband has no right to administer the estate of his deceased wife, if she made a will and appointed an executor, though the will did not dispose of any property. In Goods of Dods-worth, 73 L. T. N. S. 315.

Effect of Will Without Appointing Executor. — But in *North Carolina* he is not deprived of his right by the fact that a contest is pending over his wife's will, if she did not appoint an

executor, since the statute gives a husband the right to administer either when his wife dies intestate, or when she dies testate if she did not appoint an executor. *Matter of Meyers*, 113 N. Car. 545.

Disabilities Affecting Husband's Right. — See *infra*, this section, *Who Are Competent to Be Administrators; Removal from Office or Revocation of Letters*.

6. **Widow Ordinarily Preferred to Next of Kin — England.** — *Goddard v. Goddard*, 3 Phill. Ecc. 638; In Goods of Corser, 31 L. J. P. 170; *Peat v. Peat*, 19 W. R. 856, 25 L. T. N. S. 108; *Argent v. Argent*, 11 Jur. N. S. 864, 34 L. J. P. 133, 4 Sw. & Tr. 52.

Massachusetts. — *M'Gooch v. M'Gooch*, 4 Mass. 348.

New Hampshire. — *Munsey v. Webster*, 24 N. H. 126.

Pennsylvania. — *McClellan's Appeal*, 16 Pa. St. 110; *Gyger's Estate*, 65 Pa. St. 311; *Bowersox's Appeal*, 100 Pa. St. 434, 45 Am. Rep. 387; *Wilkey's Appeal*, 108 Pa. St. 567; *Scanlon's Estate*, 2 Pa. Dist. Rep. 742.

Administration Not Granted to Widow if Unsuitable. — If the widow is evidently unsuitable for the discharge of the trust, as where she is under the influence of a debtor of the intestate, and made the application for administration at the request of such debtor, she is not entitled to administration. *Stearns v. Fiske*, 18 Pick. (Mass.) 24.

Joint Administration to Widow and Next of Kin. — According to the English practice, the widow, though only equal in right with the next of kin, will ordinarily be granted the sole administration, and a joint grant to her and the next of kin will not be made in the absence of special circumstances. In Goods of Richards, L. R. 2 P. & D. 216, 40 L. J. P. 29, 19 W. R. 443, 24 L. T. N. S. 142; In Goods of Newbold, L. R. 1 P. & D. 285, 36 L. J. P. 14, 15 W. R. 202, 15 L. T. N. S. 248.

Joint Administration to Widow and Distributees. — Stat. 21 Hen. VIII., c. 5, § 3, providing that administration may be granted to the widow or next of kin or to both, in the discretion of the court, precludes the court from making a joint grant to the widow and one of the persons entitled to distribution. In Goods of Browning, 2 Sw. & Tr. 634, 31 L. J. P. 161, 19 W. R. 96, 7 L. T. N. S. 217.

Rule in Louisiana. — In Louisiana the heir of

Exclusive Right of Widow. — In some of the other states the widow is by statute given preference over the next of kin.¹ And in others still she is not entitled to preference, either by statute or by the practice of the courts, but the matter is in the discretion of the court.²

bb. EXISTENCE OF MARRIAGE RELATION. — As a general rule a woman has no right to administer as the widow of a decedent unless she is actually such, and therefore if the marriage was void, or if it was dissolved by a decree of absolute divorce, she is not entitled to administer as the decedent's widow;³ but a decree of divorce *a mensa et thoro* obtained by her does not defeat her right.⁴

cc. RELEASE OF INTEREST IN HUSBAND'S ESTATE. — A woman who releases all her interest in her husband's estate by an ante-nuptial contract loses her right to administer, unless the statute gives her such right without regard to interest;⁵ but a post-nuptial contract does not have this effect at common law, because of the incapacity of a married woman to make binding agreements with her husband.⁶

dd. DESERTION. — A woman may forfeit her right to administer on her husband's estate by deserting him, but the mere fact that she was living apart from him at the time of his death is not sufficient ground for denying her right.⁷

the decedent is entitled to administer in preference to the wife. *Coste's Succession*, 43 La. Ann. 144; *Williamson's Succession*, 3 La. Ann. 261.

1. **Exclusive Right of Widow to Administer** — *Alabama.* — *Williams v. McConico*, 27 Ala. 572; *Curtis v. Williams*, 33 Ala. 570.

Iowa. — *Read v. Howe*, 13 Iowa 50.
Kentucky. — *Shropshire v. Withers*, 5 J. J. Marsh. (Ky.) 210.

Michigan. — *Grece v. Helm*, 91 Mich. 450.

Mississippi. — *Pendleton v. Pendleton*, 6 Smed. & M. (Miss.) 448; *Muirhead v. Muirhead*, 6 Smed. & M. (Miss.) 451; *Jordan v. Ball*, 44 Miss. 194.

Montana. — *In re Stewart*, 18 Mont. 595.

New York. — *Lathrop v. Smith*, 24 N. Y. 417; *Cluett v. Mattice*, 43 Barb. (N. Y.) 417; *Matter of Wilson*, 92 Hun (N. Y.) 318.

South Carolina. — *McBeth v. Hunt*, 2 Strobbh. L. (S. Car.) 335.

Tennessee. — *Phillips v. Green*, 4 Heisk. (Tenn.) 350 (Act 1859-60). See, for an earlier statute, *infra*, the next note.

Texas. — *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121.

2. **Granting Administration to Widow Discretionary with Court.** — *Williamson v. Furbush*, 31 Ark. 539; *Garretson v. Garretson*, 2 Ohio Cir. Dec. 581.

The *Tennessee* Act of 1815, providing that administration should be granted to the next of kin, was repealed by being omitted in the adoption of the code, so that the court was left at liberty to select either one of the next of kin, or a creditor, or the widow. *Swan v. Swan*, 3 Head (Tenn.) 163; *Fairbanks v. Hill*, 3 Lea (Tenn.) 732; *Wilson v. Frazier*, 2 Humph. (Tenn.) 30; *Wright v. Wright*, Mart. & Y. (Tenn.) 43.

For a later statute see the next note *supra*.

3. **Widow's Right to Administer Barred by Absolute Divorce.** — *O'Gara v. Eisenlohr*, 38 N. Y. 296.

Divorce Vacated After Husband's Death. — Where a decree of divorce is vacated for fraud after the husband's death, the widow is re-

stored to her right of administration. *Boyd's Appeal*, 38 Pa. St. 246.

Decree Not Signed by Judge. — A judgment of divorce will not defeat the widow's right to administer unless it appears to have been signed by the judge. *Barry's Succession*, 47 La. Ann. 838.

Foreign Divorce. — A foreign divorce obtained by a husband who deserted his wife and obtained a domicile in the foreign jurisdiction does not defeat her right to administer. *Fyock's Estate*, 135 Pa. St. 522.

Voidable Marriage. — In *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121, it was held that the right of a surviving wife to administer on the estate of her deceased husband was not defeated by the fact that at the time of his marriage to her he had a former wife living, where she was ignorant of it until after the man's death, her marriage having been entered into while the civil law, under which such marriage was merely voidable and not void, was in force in *Texas*.

4. **Widow's Right Not Barred by Divorce a Mensa et Thoro.** — In *Goods of Ihler*, L. R. 3 P. & D. 50, 42 L. J. P. 18, 21 W. R. 550, 28 L. T. N. S. 479; *Fyock's Estate*, 135 Pa. St. 522, *affirming* 7 Pa. Co. Ct. Rep. 425.

5. **Release of Entire Interest in Estate Bars Right to Administer.** — *Matter of Davis*, 106 Cal. 453; *Maurer v. Naill*, 5 Md. 324; *Edelen v. Edelen*, 11 Md. 415.

Partial Release of Interest Not a Bar. — A widow is not deprived of her right to administer by an ante-nuptial contract providing that she shall have a certain part of her husband's estate, but will not claim any greater interest. *Sieber's Appeal*, 1 Penny. (Pa.) 191.

6. **Post-nuptial Agreement Not a Bar.** — *Read v. Howe*, 13 Iowa 50; *Nusz v. Grove*, 27 Md. 391. But see *Garretson v. Garretson*, 4 Ohio Cir. Ct. Rep. 336.

Effect of Enabling Statutes. — As to the effect of modern legislation on the capacity of married women to enter into contracts with their husbands, see the title HUSBAND AND WIFE.

7. **Misconduct of Widow.** — Misconduct of a

cc. EFFECT OF GRANTING ADMINISTRATION TO THIRD PERSON. — If the widow is given a certain time after her husband's death within which to apply for letters of administration, she cannot be deprived of her right by the appointment of a third person within that time, unless she has renounced or waived it in some way.¹

(a) **Right of Next of Kin to Administer.** — The class entitled next after the husband or widow of a decedent to administer on the estate is the decedent's next of kin,² and though their right is predicated on their interest in the intestate's estate, relatives, even if they have no interest in the estate, will ordinarily be preferred to strangers, so that if the next of kin entitled to the

widow in having eloped from her husband and lived in adultery, or in leading an immoral life, is sufficient to warrant the court in granting administration to the next of kin in preference to the widow. In *Goods of Anderson*, 33 L. J. P. 149, 11 L. T. N. S. 21, 3 Sw. & Tr. 489; In *Goods of Creed*, 6 Jur. N. S. 590; In *Goods of Boddan*, 28 L. T. N. S. 368.

Desertion by Wife. — A wife who leaves her husband and renounces all conjugal intercourse with him for a considerable time before his death is not entitled to administration of his estate. *Odiorne's Appeal*, 54 Pa. St. 175, 93 Am. Dec. 683.

Mere Fact of Separation Not Sufficient. — The mere fact that a husband and wife were living apart at the time of his death will not deprive the wife of her preference in the right of administering on his estate. *Williams v. McConico*, 27 Ala. 572; *Read v. Howe*, 13 Iowa 50; *Nusz v. Grove*, 27 Md. 391; *Ross's Estate*, 11 Pa. Co. Ct. Rep. 601; *Scanlon's Estate*, 12 Pa. Co. Ct. Rep. 339.

1. Effect of Granting Administration to Third Person. — In *Alabama* the widow is given forty days after her husband's death within which to apply for letters, and her right can only be relinquished in some one of the modes specified in the statute. Therefore a previous grant to a third person within that time on an *ex parte* application, and in the absence of any relinquishment, does not preclude her from applying within the statutory period, though the order appointing such third person recites that it was made known to the court by A. B., special attorney of said widow, that she relinquishes her right of administration to the applicant. *Dunham v. Roberts*, 27 Ala. 701. See also, *infra*, this section, *Removal from Office or Revocation of Letters*.

2. Next of Kin Entitled to Administer in Absence of Husband or Wife. — *Cobb v. Newcomb*, 19 Pick. (Mass.) 336; *Donahav v. Hall*, 45 N. J. Eq. 720; *Sayre v. Sayre*, 48 N. J. Eq. 267; *McClellan's Appeal*, 16 Pa. St. 110.

Formerly in *Tennessee* it was discretionary to grant letters to the next of kin or to the widow. *Swan v. Swan*, 3 Head (Tenn.) 163; *Fairbanks v. Hill*, 3 Lea (Tenn.) 732. See *supra*, this section, *Right of Widow to Administer — General Rule*.

And in *Louisiana* the heirs of a decedent are preferred to the widow. *Romero's Succession*, 42 La. Ann. 894.

In *Texas* the next of kin of "volunteers from a foreign country who may have fallen in the battles of the republic," in the war of independence with Mexico, have the exclusive right to administration. *Templeton v. Falls Land*, etc., Co., 77 Tex. 55; *Hill v. Grant*, (Tex. Civ.

App. 1898) 44 S. W. Rep. 1016; *Vogelsang v. Dougherty*, 46 Tex. 467.

A Natural and Lawful Child born six months after the marriage of her parents is entitled to administration on the estate of a deceased parent. *Turnock v. Turnock*, 16 L. T. N. S. 611, 36 L. J. P. 85.

The Grandfather is "the next of kin entitled to share in the distribution of the estate" of his deceased grandson, and entitled to letters of administration to the exclusion of an uncle. *Phillips v. Peteet*, 35 Ala. 696.

The Grandmother is nearer of kin than an aunt of the decedent, and is entitled to administration. *Blackborough v. Davis*, 1 P. Wms. 41.

A Son of an intestate is entitled to administration in preference to the intestate's father. *Crooke v. Watt*, 2 Vern. 125.

Who Are Next of Kin. — See the title NEXT OF KIN.

Right of Next of Kin to Administer Is Personal. — The right of the next of kin to administer on an intestate's estate is strictly personal, and if the next of kin be a *feme covert*, she, and not her husband, is entitled to the administration, which should be granted to her alone, and not to her jointly with her husband; and it will not therefore be error for the court to grant letters of administration to an entire stranger, who is suitable and well qualified, to the exclusion of the husband of the next of kin. *Richards v. Mills*, 31 Miss. 450; *Matter of Cresse*, 28 N. J. Eq. 236.

The Next of Kin of an Intestate, as a general rule, have by law the same title to the administration as has the widow, unless she is expressly preferred by statute, though, under ordinary circumstances, the practice is to make the grant to the widow. In *Goods of Corser*, 31 L. J. P. 170.

Next of Kin Must Take Administration in That Character. — A person entitled as next of kin must take administration in that character, and cannot take as creditor. In *Goods of Corser*, 31 L. J. P. 170.

Next of Kin of Bastard. — At Common Law a bastard, being *filius nullius*, can have no next of kin except lineal descendants, and therefore, if he dies intestate, without wife or issue, there is no next of kin entitled to administer, but the right vests in the king. *Jones v. Goodchild*, 3 P. Wms. 33. See also *Public Administrator v. Hughes*, 1 Bradf. (N. Y.) 125; *Peter v. Public Administrator*, 1 Bradf. (N. Y.) 200.

In the *United States*, as a general rule, a bastard by statute may inherit and transmit inheritances through his mother, and therefore his next of kin on his mother's side, half brothers and sisters or others, are entitled to

distribution refuse or are incompetent to act, those who are in the next degree of kindred to the intestate are entitled to administer.¹

Nature of Right. — The right of the next of kin to the administration is a legal right which cannot be denied except for cause,² and it may be asserted at any time before the appointment of a creditor or stranger;³ but it is not absolute or exclusive, and if the next of kin fail to apply or qualify and another person is appointed, their right is lost.⁴

(e) **Right of Creditors to Administer** — *aa. GENERAL RULE.* — If neither husband nor wife, nor next of kin, take out administration, the creditors of the decedent are entitled to administer. In *England* this is by custom, and rests on the ground that a creditor cannot be paid his debt in the absence of a representative of the decedent, and therefore administration is granted to him only when every other representative fails. In the *United States* the right is generally given by statute.⁵

administration on his estate. *Langmade v. Tuggle*, 78 Ga. 770.

Or they may take out letters of administration on the estates of persons so related to them. *Johnson v. Johnson*, 15 R. I. 109.

But a bastard cannot administer on the estate of his father. *Pico's Estate*, 52 Cal. 84; *Myatt v. Myatt*, 44 Ill. 473.

See also the title *BASTARDY*, vol. 3, p. 871.

1. Kindred of Beneficiary Not Interested in Estate May Be Entitled to Administer — *England.* — In *Goods of Llanwarne*, 15 L. T. N. S. 193, L. R. 1 P. & D. 306, 36 L. J. P. 25; In *Goods of Johnson*, 2 Sw. & Tr. 595, 7 L. T. N. S. 337.

United States Courts. — *Matter of Afflick*, 3 MacArthur (D. C.) 95.

California. — *Anderson v. Potter*, 5 Cal. 63.

Maryland. — *McColgan v. Kenny*, 68 Md. 258.

Mississippi. — *Richards v. Mills*, 31 Miss. 450.

New York. — *Butler v. Perrott*, 1 Dem. (N. Y.) 9; *Matter of Thompson*, 33 Barb. (N. Y.) 334; *Lathrop v. Smith*, 24 N. Y. 417; *Swezey v. Willis*, 1 Bradf. (N. Y.) 495.

North Carolina. — *Carthey v. Webb*, 2 Murph. (6 N. Car.) 268.

2. Next of Kin Have Legal Right to Administer. — *Byrd v. Gibson*, 1 How. (Miss.) 568; *Smith v. Moore*, 3 How. (Miss.) 40.

And if a person entitled to the administration of an estate applies therefor and is competent, his application cannot be denied in favor of a stranger. *Hayes v. Hayes*, 75 Ind. 395; *Colvin's Estate*, 25 Pittsb. Leg. J. (Pa.) 101; *Comfort's Estate*, 12 Pa. Co. Ct. Rep. 571; *McClellan's Appeal*, 16 Pa. St. 110; *William's Appeal*, 7 Pa. St. 259; *Able's Estate*, 1 Leg. Gaz. Rep. (Pa.) 420; *Guldin's Appeal*, 2 W. N. C. (Pa.) 527, 33 Leg. Int. (Pa.) 290; *Brittain's Appeal*, 1 Am. L. J. 426.

If a Son of the Decedent Is a Nonresident, the court may refuse to grant letters of administration to him on that ground, but may instead grant letters to a creditor of the estate. *Ulhorn's Estate*, 12 Ohio Cir. Ct. Rep. 765, 1 Ohio Dec. 631.

3. Next of Kin May Apply at Any Time Before Appointment of Others. — *Cotton v. Taylor*, 4 B. Mon. (Ky.) 357; *Haxall v. Lee*, 2 Leigh (Va.) 267.

4. Next of Kin Have No Absolute or Exclusive Right. — In *Stoker v. Kendall*, Busb. L. (44 N. Car.) 242, *Pearson, J.*, delivering the opinion

of the court, said: "The object in appointing an administrator is to have the estate of the intestate taken care of. Since the statute of distributions, it in fact makes but little difference who is appointed administrator, so that he is a fit person, and gives the bond required by law. Prior to that statute, as the administrator had a right to the surplus, after the debts were paid, it was a matter of very considerable consequence to obtain letters of administration; and there were frequently contests about the right. But now it can only affect the right of the creditor to retain; and when the next of kin are guilty of laches as to the time of making the application or otherwise, the County Court may exercise a sound discretion in the premises."

5. When Creditors of Decedent Are Entitled to Administer — *England.* — In *Goods of Bate-man*, L. R. 2 P. & D. 242, 40 L. J. P. 24, 24 L. T. N. S. 399, 19 W. R. 759.

United States. — *Lewis v. Broadwell*, 3 McLean (U. S.) 568.

Georgia. — *Carnochan v. Abrahams*, T. U. P. Charlt. (Ga.) 207; *Tanner v. Huss*, 80 Ga. 614.

Indiana. — *Wilson v. Davis*, 37 Ind. 141; *Loving v. King*, 97 Ind. 133.

Louisiana. — *Nicolas's Succession*, 2 La. Ann. 97.

Maryland. — *Glenn v. Reid*, 74 Md. 238.

Massachusetts. — *Stebbins v. Palmer*, 1 Pick. (Mass.) 71, 11 Am. Dec. 146; *Smith v. Sherman*, 4 Cush. (Mass.) 408.

Michigan. — *Wilkinson v. Conaty*, 65 Mich. 614; *Aldrich v. Annin*, 54 Mich. 230.

New York. — *Matter of Frye*, 75 Hun (N. Y.) 402.

North Carolina. — *Carthey v. Webb*, 2 Murph. (6 N. Car.) 268.

Virginia. — *Haxall v. Lee*, 2 Leigh (Va.) 267; *M'Candlish v. Hopkins*, 6 Call (Va.) 208.

Foundation of Creditors' Right. — In *Aldrich v. Annin*, 54 Mich. 230, *Cooley, C. J.*, said: "Creditors of a deceased person are to enforce their claims against his estate through proceedings in the probate court, and the statute makes ample provision for the purpose. If other parties interested fail to take out letters of administration the creditor himself may do so, and such proceedings will then be taken as will adjust all equities on the principle of relative equality. If the creditors might severally go into equity for the enforcement of their de-

bb. PREFERENCE OF CREDITORS OVER NEXT OF KIN. — Though the right of creditors is generally subordinate to that of the next of kin, under some circumstances they may be preferred.¹

cc. PRIORITY OF RIGHT AMONG CREDITORS. — Ordinarily the creditor to the largest amount will be preferred to others, but the rule is not invariable, and in some jurisdictions the creditor first applying has the first right.²

dd. WHAT CREDITORS ARE ENTITLED TO ADMINISTER. — The authorities do not seem to define clearly the nature of a claim which will constitute the holder a creditor, so as to entitle him to administration. As a general rule any one who has a cause of action against the decedent which survives is such a creditor, but not if the cause of action does not survive.³

Claim for Funeral Expenses. — A claim for funeral expenses may constitute a person a creditor to whom administration will be granted.⁴

mands, the purpose of the statute of distribution would be defeated, and estates might be eaten up in litigation."

In *Kentucky* a creditor may institute an action for the settlement of the estate without waiting for the appointment of an administrator. *Davis v. Auxier*, (Ky. 1897) 41 S. W. Rep. 767.

Effect of Tender of Debt by Heirs. — In *Culley v. Mohlenbrock*, 36 Ill. App. 84, it was held that the heirs at law may, by tendering the amount of a debt, deprive the creditor of his right to be appointed administrator. *Reeves, P. J.*, delivering the opinion of the court, said: "The only conceivable reason for giving a creditor the right to administer upon the estate of a deceased person over persons generally, is that he has an interest in the estate to the extent of his claim. When those to whom the estate would go, under the law, offer to pay the claim and tender the same, all reason for giving the creditor a preference in the appointment as administrator ceases. His being a creditor does not give him such a preferential right that it may not be divested by the payment of his claim by those to whom the property of the estate belongs, subject to the payment of the debts of the estate."

Creditor or Any Fit Person. — Under the *Pennsylvania* Act of March 15, 1832, it is entirely within the discretion of the register of wills whether he will appoint a creditor or any fit person administrator. *Jakey's Estate*, 15 Pa. Co. Ct. Rep. 377, 3 Pa. Dist. Rep. 750, 35 W. N. C. (Pa.) 476.

Creditor of Nonresident. — The creditor of a person who dies while a nonresident of the state, but owns lands therein, has the right to take out letters of administration. *Bustard v. Dabney*, 4 Ohio 68.

Guardians of Poor-law Unions as Creditors. — In *England*, when a pauper dies intestate, the guardians of the poor-law union on which he was chargeable may take administration as a creditor. In *Goods of M'Kenna*, 13 L. T. N. S. 411, 35 L. J. P. 91; *Windeatt v. Sharland*, L. R. 2 P. & D. 266, 41 L. J. P. 9, *sub nom. In re Sharland*, 25 L. T. N. S. 574.

Next of Kin Cannot Administer as Creditor. — A person who is entitled to administer as next of kin cannot take a grant as a creditor. In *Goods of Corser*, 31 L. J. P. 170.

1. Preference of Creditors — Unsuitable Next of Kin. — In *Goods of Farrands*, 1 Prob. Div. 439, 24 W. R. 1018, it was held that where there

was a doubt as to the solvency of the estate, and the sole next of kin was a woman of drunken and dissolute habits, administration would be granted to a creditor.

In *Uhorn's Estate*, 12 Ohio Cir. Ct. Rep. 765, 1 Ohio Dec. 631, it was held that the court might refuse to appoint a son of the decedent, on the ground that he was a nonresident of the state, and instead grant letters to a creditor of the decedent.

Insolvency of Estate. — In *Sturges v. Tufts*, R. M. Charl. (Ga.) 17, it was said that administration would be granted to a creditor when the estate was insolvent, because in the case of an insolvent estate the next of kin can have no possible interest and in consequence no claim to administer.

But in *Hawke v. Wedderburne*, L. R. 1 P. & D. 594, it was held that the next of kin would not be passed over and administration granted to a creditor on the ground that the estate was insolvent, if the fact of insolvency was disputed.

2. Creditor to Largest Amount Preferred. — In *Goods of Smith*, 67 L. T. N. S. 503; In *Goods of Godfrey*, 2 Sw. & Tr. 133, 9 W. R. 499, 3 L. T. N. S. 895; *Andrews v. Murphy*, 30 L. J. P. 37, 4 Sw. & Tr. 198; *Glenn v. Reid*, 74 Md. 238; *Ex p. Ostendorff*, 17 S. Car. 22.

Substitution of Creditors. — Where an application for letters of administration has been made by a creditor, another creditor may be substituted for him in granting the letters. *Andrews v. Murphy*, 4 Sw. & Tr. 198.

Creditor First Applying Preferred. — The first applicant among creditors is entitled to the appointment as administrator, without reference to the amount or dignity of other claims. *Vick's Succession*, 19 La. Ann. 75; *Beraud's Succession*, 21 La. Ann. 666.

3. Cause of Action Against Intestate Gives Right to Administer. — *Stebbins v. Palmer*, 1 Pick. (Mass.) 71, 11 Am. Dec. 146; *Smith v. Sherburne*, 4 Cush. (Mass.) 408.

4. Funeral Expenses. — In *Newcombe v. Beloe*, L. R. 1 P. & D. 314, 36 L. J. P. 37, 16 L. T. N. S. 33, it was held that administration would be granted to a person as creditor for funeral expenses, where he had undertaken the funeral at the request of the universal legatee, but the court required the circumstances to be shown under which the expenses were incurred.

In *Lentz v. Pilert*, 60 Md. 296, 45 Am. Rep. 732, it was held that a niece of the decedent by

Debts Barred by Limitation. — It has been held that administration may be granted to a creditor, though his debt appears on its face to be barred by the statute of limitations.¹

Assigned Limitations. — Debts of a decedent assigned after his death do not constitute the assignee such a creditor as to entitle him to administer.²

(f) **Appointment of Strangers or Representatives of Persons Entitled.** — If there are none of the persons of the classes enumerated above who are competent to act, or if, though competent, they all fail or refuse to take out letters, the court may appoint any suitable person.³

marriage, having paid the funeral expenses, was entitled to letters of administration as a creditor, where he died leaving personal property in the state and no relatives.

Expense of Tomb. — In *Holland v. Wheaton*, 6 La. 443, 26 Am. Dec. 481, it was held that one who paid for the tomb of the decedent was not his creditor, but a creditor of the estate, and therefore not entitled to the curatorship.

1. Debt Barred by Statute of Limitations. — In *Goods of Coombs*, L. R. 1 P. & D. 193, 35 L. J. P. 78, 14 W. R. 975, 14 L. T. N. S. 635, a creditor was allowed to cite the next of kin, or show cause why it should not be granted to him (the creditor), though his right of action was barred by the statute of limitations, and the administration was granted to him on the failure of the next of kin to appear. See also *Ex p. Caig*, T. U. P. Charl. (Ga.) 159.

2. Assignment After Death of Intestate. — In *Goods of Galbraith*, 3 L. R. Ir. 169; *Pearce v. Castrix*, 8 Jones L. (53 N. Car.) 71; *Doak's Estate*, 46 Cal. 573, the same point was ruled by the probate court, but it was not passed on by the supreme court.

The decision in *Pearce v. Castri*, 8 Jones L. (53 N. Car.) 71, was based on the requirement of the statute that the applicant should prove the debt by his oath, which an assignee could not ordinarily do.

Claims Based on Contract with Executor or Administrator. — In *Fowler v. Walter*, 1 Dem. (N. Y.) 240, it was held that a person whose claim rested on a contract made with the executor was not a "creditor of the decedent" within the *New York* statute giving creditors the right to administer.

Doubtful Claims. — A doubtful claim which must be established by parol testimony and expensive litigation will not constitute the claimant a creditor so as to entitle him to administer on the debtor's estate. *Bourgeois's Succession*, 43 La. Ann. 247.

Legatees. — A mere legatee is not entitled to administer as a creditor. *Chapin v. Hastings*, 2 Pick. (Mass.) 361.

Officer of Creditor Corporation. — The officer of a corporation to which an intestate is indebted is not entitled to administer as a creditor, though he is charged with the collection of debts. *Glenn v. Reid*, 74 Md. 238; *Myers v. Cann*, 95 Ga. 383.

Legatee of Creditor. — The universal legatee of a creditor is a creditor of the deceased debtor. *Vick's Succession*, 19 La. Ann. 75.

Husband of Deceased Creditor. — The husband of a deceased creditor is not the creditor of the debtor, and cannot take administration as such, but he may take as the representative of his wife. In *Goods of Risdon*, L. R. 1 P. & D. 637, 38 L. J. P. 40, 20 L. T. N. S. 330.

Equitable Creditors. — In *Fairland v. Percy*, L. R. 3 P. & D. 217, 44 L. J. P. 11, 23 W. R. 597, 32 L. T. N. S. 405, a widow, as administratrix with the will annexed, continued the business of her husband until her death. She died insolvent and intestate. A creditor of the widow who had supplied her with goods in the business conducted by her was allowed administration on the estate of her husband, as an equitable creditor thereof, but was first required to obtain administration on the estate of the widow as a legal creditor.

3. Any Suitable Person May Be Appointed in default of a person entitled to administer.

England. — In *Goods of Lewis*, 25 L. T. N. S. 510, 19 W. R. 1038; In *Goods of Hastings*, 4 Prob. Div. 73, 47 L. J. P. 30, 39 L. T. N. S. 45; In *Goods of Young*, 36 L. J. P. 80, 15 L. T. N. S. 446; In *Goods of Smith*, 2 Sw. & Tr. 508, 31 L. J. P. 182, 10 W. R. 586, 7 L. T. N. S. 193; In *Goods of Jones*, 1 Sw. & Tr. 13, 27 L. J. P. 17; *Wells v. Brook*, 25 W. R. 463.

Arkansas. — *Beddinger v. Smith*, (Ark. 1890) 13 S. W. Rep. 734.

Iowa. — *Crossan v. McCrary*, 37 Iowa 684.

Maryland. — *Dalrymple v. Gamble*, 66 Md. 298.

Mississippi. — *Byrd v. Gibson*, 1 How. (Miss.) 568.

Missouri. — *Matter of Gerstacker*, 57 Mo. App. 71.

New Jersey. — *Matter of Cresse*, 28 N. J. Eq. 236.

North Carolina. — *Garrison v. Cox*, 95 N. Car. 353.

Pennsylvania. — *Frick's Appeal*, 114 Pa. St. 29, *sub nom.* *Frick v. Baldwin*, (Pa. 1886) 4 Cent. Rep. 676.

Special Circumstances. — In *Goods of White*, 2 Sw. & Tr. 457, 31 L. J. P. 161, 10 W. R. 430, 6 L. T. N. S. 162, it was held that there were no special circumstances justifying the court in departing from the ordinary practice and granting letters to a stranger for the benefit of the persons entitled, where the intestate died in England and the next of kin, her children, were living in Georgia, though communication with the children from England was cut off by reason of the blockade of the southern ports of the United States.

Infirmity of Person Entitled. — In *Goods of Clarke*, 46 L. J. P. Div. 16, 25 W. R. 82, where the mother of the intestate, being entitled to administer, was aged and infirm, and presumably incapable of administering, the court granted letters to a sister of the intestate, under 20 & 21 Vict., c. 77, § 73.

Unless the Next of Kin Renounces a stranger could not be appointed within seventy-five days after the death of the intestate under the

Appointment of Representatives of Persons Entitled to Administer. — As stated above, general original administration is granted in the following order: first, to the surviving husband or wife; second, to the next of kin; third, to creditors. So far the rule is substantially the same in *England* and the *United States*. The principal difference lies in the fact that the American statutes generally prescribe with much minuteness the successive classes to which administration may be granted, and do not permit an appointment from one class if any one of the preceding class is competent and willing to administer; while statute 21 & 22 Vict., c. 77, § 73, permits the court of probate to appoint any person, though he may have no interest in the estate, in case it shall appear to the court to be "necessary or convenient" by reason of any "special circumstances." In England therefore, a stranger or the representative of persons who had the primary right of administration, but are deceased, or are abroad, or are not qualified or able to act, may be appointed administrator.¹

law in force in *Illinois* in 1866. *Judd v. Ross*, 146 Ill. 40.

Consent of Persons Entitled. — A stranger may be appointed administrator with the consent of the persons entitled. *Matter of Silvar*, (Cal. 1896) 46 Pac. Rep. 296.

1. Guardian of Minor Next of Kin May Be Appointed Administrator — In *England*. — In *Goods of Murphy*, 5 Jur. N. S. 416; In *Goods of Parnell*, 26 L. T. N. S. 744, 41 L. J. P. 35, L. R. 2 P. & D. 379, 20 W. R. 494; In *Goods of Wier*, 2 Sw. & Tr. 451, 8 Jur. N. S. 393, 28 L. J. P. 111; In *Goods of Morris*, 2 Sw. & Tr. 360, 5 L. T. N. S. 768, 31 L. J. P. 80; *Stratton v. Linton*, 31 L. J. P. 48; *John v. Bradbury*, L. R. 1 P. & D. 245, 15 L. T. N. S. 414, 36 L. J. P. 33, 15 W. R. 285; In *Goods of See*, 4 Prob. Div. 86, 48 L. J. P. 70, 40 L. T. N. S. 658, 27 W. R. 665; In *Goods of Creed*, 6 Jur. N. S. 590.

Rule in United States as to Right of Guardian to Administer. — In some jurisdictions guardians of infants have a prior right of administration over creditors of the estate, and all persons not entitled to share in the estate, but not over any of the relatives who are enumerated in the statutes as entitled to administer. *Clough v. Borello*, (Cal. 1897) 48 Pac. Rep. 330; *Bourgeois's Succession*, 43 La. Ann. 247; *Sample v. Sarborough*, 43 La. Ann. 315; *Boudreaux's Succession*, 42 La. Ann. 296; *Langan v. Bowman*, 12 Smed. & M. (Miss.) 715; *Wickwire v. Chapman*, 15 Barb. (N. Y.) 302.

Committee or Guardian of Insane Person. — The committee or guardian of an insane person, who is entitled to administration on an estate, may be appointed administrator. *Alford v. Alford*, 3 Jur. N. S. 990; *Guardians of Poor v. Findlay*, 3 Sw. & Tr. 265, 33 L. J. P. 21, 9 L. T. N. S. 346, 9 Jur. N. S. 1253, 12 W. R. 59; *Mowry v. Latham*, 17 R. I. 480.

Assignee in Bankruptcy. — Administration may be granted to the assignee in bankruptcy of the person entitled. In *Goods of Coles*, 3 Sw. & Tr. 181, 33 L. J. P. 175, 9 Jur. N. S. 1080, 9 L. T. N. S. 519; In *Goods of Chune*, 3 Sw. & Tr. 564, 11 L. T. N. S. 641; *Tillev v. Trussler*, 26 W. R. 760.

Representatives of Person Entitled. — In *England*, when a person entitled to administration is deceased, his personal representative may be appointed administrator. In *Goods of Allen*, 3 Sw. & Tr. 559, 13 W. R. 106, 34 L. J. P. 1; In *Goods of Crause*, 1 Sw. & Tr. 146; In *Goods of Richards*, L. R. 1 P. & D. 156, 13 L.

T. N. S. 757, 35 L. J. P. 44; In *Goods of Harding*, L. R. 2 P. & D. 394, 20 W. R. 615, 26 L. T. N. S. 668; In *Goods of Nicholls*, L. R. 2 P. & D. 461, 41 L. J. P. 88, 21 W. R. 161, 27 L. T. N. S. 323.

Thus, if a husband dies before taking out letters of administration on the estate of his deceased wife, the right goes to his representatives, because it is vested in him at her death; but had the wife survived, her choses in action not reduced into her husband's possession would have survived to her. *Elliot v. Collier*, 3 Atk. 526.

Where a person entitled to administer on the estate of another dies under such circumstances that it cannot be determined which of the two died first, letters will be granted to their respective next of kin. In *Goods of Wheeler*, 31 L. J. P. 40; In *Goods of Wainwright*, 1 Sw. & Tr. 257, 27 L. J. P. 2; In *Goods of Grinstead*, 21 L. T. N. S. 731; In *Goods of Astell*, 31 L. J. P. 38; In *Goods of Bond*, 44 L. J. P. 41, 23 W. R. 597, 33 L. T. N. S. 71; In *Goods of Peck*, 2 Sw. & Tr. 507, 29 L. J. P. 95; In *Goods of Serjeant*, 20 W. R. 872, 26 L. T. N. S. 669.

But where a statute prescribes the order in which administration shall be granted, and that in default of one class the right shall pass to the next, the English rule does not apply. *Public Administrator v. Peters*, 1 Bradf. (N. Y.) 100; *Matter of O'Neil*, 2 Redf. (N. Y.) 544.

In North Carolina, on the death of a husband after the death of his wife, before administering her estate, it must be administered through his administrator. *Wooten v. Wooten*, (N. Car. 1898) 31 S. E. Rep. 491.

On the Death of a Residuary Legatee his personal representatives are entitled to administer. *Matter of Booraem*, 55 N. J. Eq. 759.

Creditor of Person Entitled to Administer. — In *England*, under statutes 20 & 21 Vict., c. 77, a creditor of a decedent, who in his lifetime was entitled to administration, may succeed to his right. In *Goods of Fraser*, L. R. 1 P. & D. 327, 16 L. T. N. S. 154, 36 L. J. P. 63; In *Goods of Wensley*, 7 Prob. Div. 13, 51 L. J. P. 21, 30 W. R. 431.

But this rule does not seem to obtain in the *United States*. See *In re Pitchlynn*, 20 D. C. 55, where it was held that the creditor of an alleged distributee has no right as such to apply for letters of administration upon the personal estate of the ancestor.

(2) *Right to Nominate Administrator* — (a) *Rule in England.* — In England if a person entitled to administration resides out of the country, or if special circumstances exist, the administration may be granted to his attorney. This is by virtue of statute 20 & 21 Vict., c. 77, § 73, which provides that “where a person has died or shall die wholly intestate as to his personal estate, or leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the court to be necessary or convenient in any such case by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the court to grant administration of the personal estate of such deceased person to the person who, if this act had not been passed, would by law have been entitled to a grant thereof; but it shall be lawful for the court, in its discretion, to appoint such person as the court shall think fit to be such administrator upon his giving such security (if any) as the court shall direct, and every such administration may be limited as the court shall think fit.” The practice of the English courts under this statute is to grant letters to the nominee of the person named as executor, or the person entitled to administer, when sufficient reasons exist for the person entitled not taking the administration himself.¹

Special Circumstances are necessary under the statute to require the appointment of the nominee of the executor or the person entitled to administer, and if such person resides in England and is able to take the administration himself, it will not be granted to his nominee.²

1. Administration May Be Granted to Nominee of Person Entitled — *England.* — In *Goods of Prosser*, 11 Ir. R. Eq. 37; In *Goods of Fletcher*, 8 Jur. N. S. 572; *Farrell v. Brownbill*, 10 Jur. N. S. 593, 3 Sw. & Tr. 467, 33 L. J. P. 185; In *Goods of Bianchi*, 28 L. J. P. 139, 1 Sw. & Tr. 511; In *Goods of Rosser*, 33 L. J. P. 155, 12 W. R. 1014, 10 L. T. N. S. 695; In *Goods of Blake*, 35 L. J. P. 91, 14 W. R. 1021, 14 L. T. N. S. 769; In *Goods of Hale*, 44 L. J. P. 45, L. R. 3 P. & D. 207, 31 L. T. N. S. 799; *Tomlinson v. Gilby*, 54 L. J. P. Div. 80, 33 W. R. 800, 49 J. P. 632; In *Goods of Pine*, L. R. 1 P. & D. 388, 36 L. J. P. 95, 17 L. T. N. S. 31; In *Goods of Warren*, L. R. 1 P. & D. 538, 37 L. J. P. 12, 17 L. T. N. S. 221; In *Goods of Richardson*, L. R. 2 P. & D. 244, 40 L. J. P. 36, 25 L. T. N. S. 384, 19 W. R. 979; *Teague v. Wharton*, L. R. 2 P. & D. 360, 41 L. J. P. 13, 20 W. R. 214, 25 L. T. N. S. 764; In *Goods of Hopkins*, L. R. 3 P. & D. 235, 44 L. J. P. 42, 33 L. T. N. S. 320; In *Goods of Smithson*, 15 L. T. N. S. 296, 36 L. J. P. 77; In *Goods of Martindale*, 1 Sw. & Tr. 8, 4 Jur. N. S. 196, 27 L. J. P. 29; In *Goods of Roberts*, 1 Sw. & Tr. 64; In *Goods of Goldsborough*, 1 Sw. & Tr. 295, 5 Jur. N. S. 417, 7 W. R. 375; In *Goods of Leeson*, 1 Sw. & Tr. 463, 29 L. J. P. 19, 5 Jur. N. S. 1270, 1 L. T. N. S. 74; In *Goods of O'Brien*, 2 Sw. & Tr. 604, 31 L. J. P. 194, 7 L. T. N. S. 249; In *Goods of Morley*, 3 Sw. & Tr. 425, 33 L. J. P. 108, 12 W. R. 1064, 10 L. T. N. S. 540; In *Goods of Escot*, 4 Sw. & Tr. 186, 28 L. J. P. 17.

Interest in Nominee Not Necessary. — Administration may be granted with the consent of all persons interested to their nominee, though

the nominee has no interest in the estate himself. *Farrell v. Brownbill*, 3 Sw. & Tr. 467.

Nonresident Attorney. — Administration may be granted to the attorney of the next of kin, though he resides without the jurisdiction of the court, if his sureties reside within the jurisdiction. In *Goods of Leeson*, 1 Sw. & Tr. 463, 29 L. J. P. 19, 5 Jur. N. S. 1270, 1 L. T. N. S. 74.

Formal Power of Attorney Not Necessary. — If the court is satisfied that the person entitled to administration desires the person applying to act as his attorney, the formal power of attorney will not be required. In *Goods of Morley*, 3 Sw. & Tr. 425, 33 L. J. P. 108, 12 W. R. 1064, 10 L. T. N. S. 540.

Effect of General Power of Attorney. — Administration could be granted under a general power of attorney, though it was not in terms sufficient for that purpose, where it was uncertain when the person who gave the power would return to England, or where she was. In *Goods of Escot*, 4 Sw. & Tr. 186, 28 L. J. P. 17.

Power of Attorney to Nominate. — A person who has the right to nominate an administrator may give another a power of attorney to make the nomination. In *Goods of Rosser*, 33 L. J. P. 155, 10 L. T. N. S. 695, 12 W. R. 1014.

2. Special Circumstances — **Consent or Desire of Person Entitled.** — The mere fact that the persons entitled to administration consent to the appointment of some other person, or desire that some other person should take the grant, is not a special circumstance which will warrant the court in appointing such person. In

The Right to Nominate belongs to the person named as executor in the will, or if no executor was appointed, or the decedent died intestate, it belongs to the person entitled to the administration.¹

(b) **Rule in United States.** — In the United States the rule as to the right of nomination is not uniform. In some of the states the right is given by statute and cannot be disregarded by the courts, while in others it is allowed only to a qualified extent, or is not recognized at all;² but the right to nominate,

Goods of Richardson, L. R. 2 P. & D. 244, 40 L. J. P. 36, 25 L. T. N. S. 384, 19 W. R. 979; *In Goods of Blake*, 25 L. J. P. 91, 14 W. R. 1021, 14 L. T. N. S. 769; *In Goods of Hale*, L. R. 3 P. & D. 207.

Disagreement Between Next of Kin. — The fact that the next of kin are unable to agree among themselves which of them shall take administration, and are all willing that it shall be granted to a nominee who has no interest in the estate, is not a special circumstance which would warrant the court in appointing such nominee. *Teague v. Wharton*, L. R. 2 P. & D. 360, 41 L. J. P. 13, 20 W. R. 214, 25 L. T. N. S. 764.

But where one of the next of kin, having applied for letters of administration, was opposed by the others and litigation ensued, which was ultimately suspended under an agreement that administration should be granted to a third person who had no interest in the estate, it was held that special circumstances existed which warranted the court in granting administration to such third person. *Farrell v. Brownbill*, 10 Jur. N. S. 593, 3 Sw. & Tr. 467, 33 L. J. P. 185.

Doubt as to Legitimacy of Next of Kin. — Where a doubt was raised as to the legitimacy of the sole next of kin, and a deed was entered into by the parties interested for the distribution of the property among themselves, and it was part of the arrangement that administration should be applied for by a person who had no interest in the estate, it was held that there were special circumstances which authorized the court to grant administration to the person designated. *In Goods of Hopkins*, L. R. 3 P. & D. 235, 44 L. J. P. 42, 33 L. T. N. S. 320.

Infirmity of Persons Entitled. — Where the persons entitled to administer are old, they may name another person to take administration for their benefit. *In Goods of Roberts*, 1 Sw. & Tr. 64.

Resident Able to Administer Cannot Nominate Administrator. — *In Goods of Burch*, 2 Sw. & Tr. 139, 30 L. J. P. 171, 9 W. R. 639, 4 L. T. N. S. 451; *In Goods of Bullar*, 39 L. J. P. 26, 22 L. T. N. S. 146.

1. Who May Nominate Administrator — Married Woman. — Administration may be granted to the nominee of a married woman without her husband's consent. *In Goods of Pine*, L. R. 1 P. & D. 388, 36 L. J. P. 95, 17 L. T. N. S. 31; *In Goods of Warren*, L. R. 1 P. & D. 538, 37 L. J. P. 12, 17 L. T. N. S. 221.

Foreign Administrator-General. — The administrator-general of a colony who is entitled to administration on the estate of an intestate who dies in the colony may nominate persons to take out letters as his attorney in England. *In Goods of O'Brien*, 2 Sw. & Tr. 604, 31 L. J. P. 194, 7 L. T. N. S. 249.

Nomination by Creditor. — A creditor of the

decedent who is entitled to administration as such, cannot nominate a person not personally interested in the estate. *In Goods of Prosser*, 11 Ir. R. Eq. 37.

Nominee of Bulk of Creditors Preferred to Particular Creditor. — A stranger nominated by the bulk of the creditors of an insolvent estate, may be preferred to a particular creditor whose debt was small. *In Goods of Smithson*, 36 L. J. P. 77, 15 L. T. N. S. 296.

Nomination by Corporation as Creditor. — Administration may be granted to the nominee of a corporation which is a creditor of the deceased. *Tomlinson v. Gilby*, 54 L. J. P. 80, 33 W. R. 800, 49 J. P. 632.

Nomination Where Infants Are Beneficiaries. — When it is desired that a stranger should take administration for the benefit of infants, the next of kin should renounce his right to the guardianship, and the infants should then elect the stranger to be their guardian, in which capacity he may take administration. *In Goods of Molineux*, 19 W. R. 568, 25 L. T. N. S. 162; *In Goods of Langham*, 20 W. R. 319, 25 L. T. N. S. 951.

2. Right of Nomination Given by Statute — California. — *Carr's Estate*, 25 Cal. 585; *Morgan's Estate*, 53 Cal. 243; *Cotter's Estate*, 54 Cal. 215; *Beech's Estate*, 63 Cal. 458; *Hyde's Estate*, 64 Cal. 228; *Matter of Stevenson*, 72 Cal. 164; *Matter of Allen*, 78 Cal. 581; *In re Bedell*, 97 Cal. 339; *In re Woods*, 97 Cal. 428; *In re Dorris*, 93 Cal. 611; *Matter of Muersing*, 103 Cal. 585; *Matter of Donovan*, 104 Cal. 623; *Silvar's Estate*, (Cal. 1896) 46 Pac. Rep. 296.

Georgia. — *Halliday v. Du Bose*, 59 Ga. 268; *Headman v. Rose*, 63 Ga. 458; *Tanner v. Huss*, 80 Ga. 614; *Myers v. Cann*, 95 Ga. 383. *Montana.* — *In re Stewart*, 18 Mont. 595.

No Right to Nominate Unless Administration Is Vacant. — The right to nominate an administrator exists only where the administration is vacant, and not after the appointment of an administrator. *Carr's Estate*, 25 Cal. 585.

Right of Nomination Not Allowed. — In some jurisdictions a person entitled to administer cannot nominate another to the exclusion of the person next entitled.

Alabama. — *Curtis v. Williams*, 33 Ala. 570. *Maryland.* — *Owings v. Owings*, 1 Har. & G. (Md.) 484; *Ex p. Young*, 8 Gill (Md.) 285; *Thomas v. Knighton*, 23 Md. 318, 87 Am. Dec. 571; *Georgetown College v. Browne*, 34 Md. 450; *Brown v. Stewart*, 4 Md. Ch. 368.

Massachusetts. — *Cobb v. Newcomb*, 19 Pick. (Mass.) 336.

New Jersey. — *Matter of Cresse*, 28 N. J. Eq. 236.

New York. — *Matter of Ward*, 6 N. Y. Leg. Obs. 111; *Matter of Root*, 5 N. Y. Leg. Obs. 449.

Pennsylvania. — *Comfort's Estate*, 12 Pa. Co. Ct. Rep. 571; *Williams's Appeal*, 7 Pa. St.

when given by statute, is not usually extended to a person who is in any way disqualified from exercising his right to administer in person.¹

259; *Guldin's Appeal* 2 W. N. C. (Pa.) 527, 33 Leg. Int. (Pa.) 290; *Brittain's Appeal*, 1 Am. L. J. 426; *Able's Estate*, 1 Leg. Gaz. Rep. (Pa.) 420; *McClellan's Appeal*, 16 Pa. St. 110; *Coover's Appeal*, 52 Pa. St. 427; *Re Loeffler's Estate*, 8 Kulp (Pa.) 199.

A Widow cannot relinquish her right in favor of a stranger to the exclusion of a child of the decedent willing to act. *Riegel's Appeals*, 17 W. N. C. (Pa.) 279.

"The widow can renounce, and the law appoints her successor, and not she. So also the children may renounce, and the law appoints their successor. The right is personal merely to themselves, without the power of substitution." *Davis v. Brown*, 1 Redf. (N. Y.) 259.

Agent of Creditor.—A special agent of one or more creditors cannot claim the curatorship of a succession over creditors or strangers. *Chew v. Flint*, 7 La. 395.

Next of Kin Residing Abroad.—In *North Carolina* it is held that where the next of kin reside abroad the court will grant administration to the nominee of such next of kin. *Smith v. Munroe*, 1 Ired. L. (23 N. Car.) 345. See also, as to the right in general, *Ritchie v. McAuslin*, 1 Hayw. (1 N. Car.) 220; *Wallis v. Wallis*, 1 Winst. L. (60 N. Car.) 78; *Little v. Berry*, 94 N. Car. 433; *Williams v. Neville*, 108 N. Car. 559.

Appointment of Nominee as Condition of Renunciation.—Though a person entitled to administration may not have the right to nominate an administrator to the exclusion of the person next entitled, she may renounce her right on condition that a certain person be appointed, and if the nominee is not appointed the renunciation will not take effect. *Shomo's Appeal*, 57 Pa. St. 356.

Advisory Effect of Nomination.—Nomination by persons entitled to preference, though not binding on the court, is entitled to consideration. *Thompson v. Hockett*, 2 Hill. L. (S. Car.) 347; *McBeth v. Hunt*, 2 Strobb. L. (S. Car.) 335; *Ex p. Ostendorff*, 17 S. Car. 22.

Nomination of One Member of a Class by the Others.—Though a person entitled to administration cannot nominate another person to the exclusion of those next entitled, the majority of the members of a class may nominate one of their number, and such nomination will as a general rule be respected by the probate court. *Ellmaker's Estate*, 4 Watts (Pa.) 34; *Jones's Appeal*, 10 W. N. C. (Pa.) 249; *Frick v. Baldwin*, (Pa. 1886) 4 Cent. Rep. 676; *Schauffuss's Estate*, 5 Kulp (Pa.) 275.

In *Cramer v. Sharp*, 49 N. J. Eq. 558, it was said that "while the request of a majority does not bind the court absolutely, for the reason that the statute makes it the duty of the court, in the exercise of its discretion—which must, of course, be a judicial discretion, regulated by principle and not by caprice—to appoint an administrator from among the next of kin; yet, where the majority nominate one of their own number, against whom no disqualifying objection exists, the court will as a general rule appoint their nominee. And the reason is that those having the largest interest in the estate may, in the majority of instances,

from considerations of self-interest, be safely trusted to select that person of their own number who is most competent, by reason of his integrity and business qualifications, to administer the estate honestly and successfully."

If the Person Entitled to Preference Is Unsuitable, as when the eldest son has an interest in opposition to the other heirs, administration will not be granted to him, but the others may delegate their right to a stranger. *Biebers Appeal*, 11 Pa. St. 157; *Heron's Estate*, 6 Phila. (Pa.) 87, 22 Leg. Int. (Pa.) 221.

Necessity of Writing.—In *Long v. Huggins*, 72 Ga. 776, it was held that the selection of an administrator by a majority of those entitled to administer must be in writing.

1. Persons Who Are Not Competent to Administer, under the laws of the particular jurisdiction, because of nonresidence, or for any other cause, cannot nominate. *Hyde's Estate*, 64 Cal. 228; *In re Bedell*, 97 Cal. 339; *Matter of Muersing*, 103 Cal. 585; *Matter of Donovan*, 104 Cal. 623; *State v. Woody*, 20 Mont. 413.

But a Surviving Husband or Wife, though incompetent to serve on account of nonresidence, may nevertheless nominate a suitable person as administrator. *Cotter's Estate*, 54 Cal. 215; *Matter of Stevenson*, 72 Cal. 164; *In re Bedell*, 97 Cal. 339.

The Reason for This Exception in favor of a husband or wife is stated by *Temple, C.*, in *Matter of Dorris*, 93 Cal. 611, as follows: "In general, there is not the same reason for favoring the other persons entitled to administer in certain cases. Some of them may not even be interested in the estate. Hence they are only entitled to nominate when they are the persons entitled to administer, and then the nomination is submitted to the discretion of the court, which may, if there is good reason for so doing, refuse to confirm the nominee, and appoint the person next entitled."

A Widow on Remarrying, however, becomes incapable of acting as administratrix of her former husband's estate, and cannot nominate a third person. *Matter of Allen*, 78 Cal. 581.

A Nonresident Alien who but for his alienage would be entitled to administer has no right to nominate a person to act in his place. *Sutton v. Public Administrator*, 4 Dem. (N. Y.) 33.

Nomination by Guardian of Minor.—It is held in *Georgia* that if a person entitled to administer is a minor, his guardian may nominate a disinterested person. *Myers v. Cann*, 95 Ga. 383.

But in *California* the guardian of a minor heir, not being one of the persons to whom administration must be granted, cannot nominate another. *In re Woods*, 97 Cal. 428.

Effect of Nomination by Incompetent Person.—Where a distributee is not entitled to act as administrator, a nomination by him of another person for that purpose is addressed to the discretion of the court. *Morgan's Estate*, 53 Cal. 243; *Beech's Estate*, 63 Cal. 458.

Nomination for Consideration.—In *Owings v. Owings*, 1 Har. & G. (Md.) 484, it was said that it is not consistent with the policy of the law to encourage agreements by which the right to administer on a deceased person's

(6) **Revoking Nomination.** — In jurisdictions where persons entitled to administer are permitted to nominate others to act in their place, a nomination once made and acted on cannot be arbitrarily revoked.¹

(3) *Who Are Competent to Be Administrators* — (a) **In General.** — Generally speaking any one is competent to act as administrator, except such as are forbidden by law,² and the classes of disqualified persons are usually specified

estate is declined in favor of one who contracts to pay the declining party for yielding his right to administer all the commissions allowed for the settlement of such estate, as in bad hands the practice might lead to gross violations of trust and most pernicious consequences.

But in *Bassett v. Miller*, 8 Md. 548, the question under consideration was the validity of a contract by a widow to relinquish her right to administer the estate of her deceased husband in consideration of the payment to her of all the commissions except one hundred dollars, and it was held that the contract was not against public policy, but was valid and binding. Mason, J., delivering the opinion of the court, said: "So far from the case of *Owings v. Owings*, 1 Har. & G. (Md.) 484, being an authority against the validity of the contract declared upon in this case, the court expressly refrain from deciding the point. The question upon which that action was defeated was not that the contract was not valid and binding, but that the plaintiff, who brought the suit, was not the proper party to maintain the action. It is true that the court say in their opinion, 'it is not consistent with the policy of the law to encourage such transfers, as, in bad hands, the practice might lead to gross violations of trusts and the most pernicious consequences.' While we are willing to concede the propriety of this suggestion, we do not admit that this dictum is sufficient to control the court in the case now before them, or to constitute the rule of law to govern us in subsequent cases. The reason assigned why such transfers are against the policy of the law, namely, because, 'in bad hands, the practice might lead to gross violations of trusts,' etc., has not the force which it is supposed to have, for the reason that all such contracts or transfers with parties not preferred by law must be subject to the sanction and confirmation of the Orphans' Court; and it is not to be supposed that that court would assent to the appointment of an unworthy representative in order merely to carry out such an arrangement. While such contracts should not be encouraged, it is far better, in view of public policy and sound morality, that they should be sustained, than that conduct should be tolerated by this court, by which solemn engagements may be repudiated, and fraud and deception perpetrated with impunity." See also *infra*, this section, *Renunciation of Right to Administer*.

1. **Revoking Nomination.** — A nomination cannot be revoked without reason after a proceeding has been instituted by the nominee to obtain letters. *Matter of Silvar*, (Cal. 1896) 40 Pac. Rep. 296.

2. **No One Incompetent Except as Declared by Statute.** — *Williamson v. Furbush*, 31 Ark. 539; *In re Bauquier*, 88 Cal. 302; *Morgan's Estate*,

8 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 77. 2 How. Pr. N. S. (N. Y.) 194; *Coope v. Lowerre*, 1 Barb. Ch. (N. Y.) 45; *Emerson v. Bowers*, 14 N. Y. 449.

Meaning of Word Competent. — The word "competent," as used in the *California* statute, means not addicted to drunkenness, not imprudent, and not wanting in integrity or understanding. *Pacheco's Estate*, 23 Cal. 476.

Competency Is Question for Judicial Determination. — *Davis v. Swearingen*, 56 Ala. 539; *Barclift v. Treece*, 77 Ala. 528; *Wheat v. Fuller*, 82 Ala. 572; *Wilkinson v. Conaty*, 65 Mich. 614.

Present Interest in Estate. — A present right to participate in the distribution of an estate is not an essential qualification of one claiming letters of administration as a relative. *Butler v. Perrott*, 1 Dem. (N. Y.) 9; *Lathrop v. Smith*, 24 N. Y. 420. See *contra*, *Public Administrator v. Watts*, 1 Paige (N. Y.) 382; *Public Administrator v. Peters*, 1 Bradf. (N. Y.) 100.

Intermeddlers. — A person entitled to administration does not become incompetent or lose his right by an act of intermeddling which renders him liable as executor *de son tort*. *Bingham v. Crenshaw*, 34 Ala. 683; *Carnochan v. Abrahams*, T. U. P. Charl. (Ga.) 210.

Strangers. — The mere fact that one is not of kin to the deceased does not incapacitate him to hold the office of administrator. *Kirtland's Estate*, 16 Cal. 161. See also *supra*, this section, *Appointment or Strangers or Representatives of Persons Entitled*.

Illegitimate Children. — The court may appoint an illegitimate son administrator. *Pico's Estate*, 56 Cal. 413.

An Unsuitable Person will not be appointed administrator. *Stearns v. Fiske*, 18 Pick. (Mass.) 24.

Incompatible Offices. — The positions of guardian of the infant heir of the decedent and administrator of the decedent's estate are not necessarily incompatible so as to preclude the appointment of the guardian as administrator. *Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617.

Suspicion that Trust Will Be Abused. — The right to administration cannot be denied merely because suspicions are entertained that the party will abuse his trust. *Rust v. Randolph*, 5 Martin (La.) 89.

Undue Intimacy with Distributee. — Illicit intercourse with a distributee does not disqualify one from acting as administrator. *Bennett v. Howard*, 18 R. I. 354.

Entering Religion. — In *Smith v. Young*, 5 Gill (Md.) 197, it was held that a person who was a nun in a convent in the District of Columbia was not thereby disqualified from taking out letters of administration on the estate of her father in Maryland.

As to Who Are Competent to be administrators, see also *supra*, this section, *Executors — Who*

by statute in the United States.¹

(b) **Corporations.** — A corporation cannot be appointed administrator unless the power to administer is expressly conferred by its charter, or by statute.²

(c) **Married Women.** — Coverture is not a disqualification unless expressly made so by statute,³ but a married woman cannot at common law administer without her husband's consent.⁴

(d) **Infants.** — An infant is incompetent to act as administrator.⁵

(e) **Aliens and Nonresidents.** — At common law a person was not disqualified to act as administrator by the fact that he was an alien.⁶ In the United States a distinction is generally made between residents of other states and aliens, the word "alien" being used to designate persons not citizens of the United States. A citizen of one state may take out letters in another state, unless he is declared incompetent by statute, and he is not affected by a statute which disqualifies "aliens."⁷ The fact of nonresidence, however, even in the absence of a statute making it a disqualification, may be considered by the court in determining the qualifications of the applicant, and letters may be refused on that ground.⁸

May Be an Executor; and infra, Removal from Office or Revocation of Letters.

1. **An Illustration** of the statutory provisions regarding persons who are incompetent to act as administrators may be found in the *Montana* statute which provides that "no person is competent to serve as administrator or administratrix, who when appointed, is *First*, under the age of majority. *Second*, convicted of an infamous crime. *Third*, adjudged by the court to be incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity." *In re Stewart*, 18 Mont. 597. Compare other local statutes.

2. **Corporation Not Competent to Act as Administrator.** — *Tomlinson v. Gilby*, 54 L. J. P. Div. 80, 33 W. R. 800, 49 J. P. 632; *Matter of Thompson*, 33 Barb. (N. Y.) 334.

Statutory Authority to Act. — *Reed v. Baltimore Trust, etc., Co.*, 72 Md. 531. See also *supra*, this section, *Who May Be an Executor*.

3. **Coverture Not a Disqualification** — *Alabama*, — *English v. McNair*, 34 Ala. 40.

Louisiana. — *Dussumier v. Coiron*, 2 Rob. (La.) 368.

Maryland. — *Binnerman v. Weaver*, 8 Md. 517.

New Jersey. — *Lippincott v. Wikoff*, 54 N. J. Eq. 107.

New York. — *Matter of Curser*, 25 Hun (N. Y.) 579; *West v. Mapes*, 4 Redf. (N. Y.) 496.

Pennsylvania. — *Guldin's Appeal*, 2 W. N. C. (Pa.) 527.

Texas. — *Nickelson v. Ingram*, 24 Tex. 630.

Married Women Disqualified by Statute. — *Leverett v. Dismukes*, 10 Ga. 98.

4. **Consent of Husband Necessary.** — *English v. McNair*, 34 Ala. 40; *Dussumier v. Coiron*, 2 Rob. (La.) 368.

5. **Infants Not Competent.** — *Davis v. Miller*, 106 Ala. 154; *Briscoe v. Tarkington*, 5 La. Ann. 692; *Davis v. Jacquin*, 5 Har. & J. (Md.) 110; *Rea v. Englesing*, 56 Miss. 463; *Collins v. Spears, Walk.* (Miss.) 310; *Carow v. Mowatt*, 2 Edw. Ch. (N. Y.) 57; *Wallis v. Wallis*, 1 Winst. L. (60 N. Car.) 78.

Emancipation of Infants. — In *Louisiana* an infant who has been emancipated becomes

competent to administer. *Gaines's Succession*, 42 La. Ann. 699.

But an emancipation effected by marriage does not remove the disqualification of infancy. *Briscoe v. Tarkington*, 5 La. Ann. 692.

6. **Aliens Competent at Common Law.** — 1 Williams on Executors (7th Am. ed.) 537.

Alien Enemies, if nonresidents, are incompetent. *Carthey v. Webb*, 2 Murph. (6 N. Car.) 268.

7. **Distinction Between Aliens and Nonresidents.** — *Sutton v. Public Administrator*, 4 Dem. (N. Y.) 33; *Libbey v. Mason*, 112 N. Y. 525.

Nonresidents Competent to Administer. — *Gale v. Corey*, 112 Ind. 39; *Penney's Succession*, 10 La. Ann. 290; *Ehlen v. Ehlen*, 64 Md. 360; *In re Selling*, (Surrogate Ct.) 2 N. Y. Supp. 634; *Matter of Williams*, 44 Hun (N. Y.) 67, affirming 5 Dem. (N. Y.) 202; *Libbey v. Mason*, 112 N. Y. 525, 16 Civ. Pro. Rep. (N. Y.) 191; *M'Laurin v. Thompson*, *Dudley L.* (S. Car.) 335; *Jones v. Jones*, 12 Rich. L. (S. Car.) 623; *Ex p. Barker*, 2 Leigh (Va.) 719.

Nonresidents Disqualified by Statute. — *Beech's Estate*, 63 Cal. 458; *Cotter's Estate*, 54 Cal. 215; *In re Dorris*, 93 Cal. 611; *Carnochan v. Abrahams*, T. U. P. Charlt. (Ga.) 204; *Child v. Gratiot*, 41 Ill. 357; *State v. Woody*, 20 Mont. 413; *In re Stewart*, 18 Mont. 597; *Colvin's Estate*, 25 Pittsb. Leg. J. (Pa.) 101; *Sarkie's Appeal*, 2 Pa. St. 157; *Frick's Appeal*, 114 Pa. St. 29; *Re Bullock's Estate*, 28 Pittsb. L. J. N. S. (Pa.) 252.

Implied Disqualification of Nonresidents. — In *Child v. Gratiot*, 41 Ill. 357, it was held that a statute providing for the revocation of letters on the removal of an administrator from the state impliedly prohibited a nonresident from receiving letters. See also *Sarkie's Appeal*, 2 Pa. St. 157; *Frick's Appeal*, 114 Pa. St. 29. But see *contra*, *Chicago, etc., R. Co. v. Gould*, 64 Iowa 343.

8. **Nonresidence Considered in Determining Qualifications.** — *O'Brien's Estate*, 63 Iowa 622; *Chicago, etc., R. Co. v. Gould*, 64 Iowa 343; *Radford v. Radford*, 5 Dana (Ky.) 157; *Bridgman v. Bridgman*, 30 W. Va. 212.

Discretion as to Nonresidents. — *Ex p. Barker*, 2 Leigh (Va.) 719, which was an application by a nonresident for letters of administration,

(f) **Disqualifying Conditions or Habits.** — Insolvency is held to disqualify a person to act as administrator of a decedent's estate,¹ but not mere poverty.²

Bodily Ailments and Infirmities do not of themselves disqualify a person from receiving letters of administration.³

Want of Understanding is a disqualification, where it amounts to a lack of intelligence.⁴

Illiteracy, as a general rule, does not render one incompetent.⁵

Want of Business Experience and Capacity alone is held not to disqualify a person to act as administrator, if he is a person of intelligence and good judgment.⁶

An Improvident Person is not competent, under the statutes of some of the states, to act as administrator.⁷

Indebtedness to the Estate is not a disqualification,⁸ but it is said to be against the policy of the law to appoint a debtor.⁹

Prejudice Against or Hostility to the Other Next of Kin has been held not to be a disqualification,¹⁰ but an interest antagonistic to the other heirs or to the estate, as where one stands in the relation of a party litigant, is a sufficient ground for refusing letters of administration.¹¹

Brockenbrough, J., said that "the applicant being a citizen and resident of another state furnishes no legal objection. It is a matter of sound discretion. If there were creditors of the deceased in this state, and if the distributees lived in this state, it might be indiscreet and improper to give administration to a non-resident; but where the facts are otherwise, as in this case, the objection does not lie."

1. **Insolvency Disqualifies.** — *Hills v. Mills*, 1 Salk. 36; *Levan's Appeal*, 112 Pa. St. 294; *McArthur's Estate*, 26 Pittsb. Leg. J. (Pa.) 57; *Cornpropst's Appeal*, 33 Pa. St. 537.

2. **Poverty Not a Disqualification.** — *Croft v. Williams*, 88 N. Y. 384.

3. **Disease or Infirmary Not a Disqualification.** — *Matter of Berrien*, 3 Dem. (N. Y.) 263; *Robertson's Estate*, 1 Pa. Dist. Rep. 317.

4. **Want of Understanding a Disqualification.** — *Matter of Li Po Tai*, 108 Cal. 484; *Matter of Manley*, 12 Misc. Rep. (N. Y. Surrogate Ct.) 472; *Shilton's Estate*, Tuck. (N. Y.) 73.

What Constitutes Want of Understanding. — The fact that a person cannot speak English, and is not acquainted with the constitution of the state, does not show want of understanding. *Matter of Li Po Tai*, 108 Cal. 484.

Nor can it be presumed from the simple lack of information on legal subjects or business matters. *Shilton's Estate*, Tuck. (N. Y.) 73.

5. **Illiteracy Not a Disqualification.** — *Gregg v. Wilson*, 24 Ind. 227; *Matter of Haley*, 21 Misc. Rep. (N. Y. Surrogate Ct.) 777; *Bowersox's Appeal*, 100 Pa. St. 437, 45 Am. Rep. 387. But see *Stephenson v. Stephenson*, 4 Jones L. (40 N. Car.) 472.

Discretion as to Appointment of Illiterate Person. — *Matter of Hahlin*, 53 How. Pr. (N. Y. Surrogate Ct.) 501, it was held that letters should not be granted to a person unable to read and write, unless for special reasons in the discretion of the surrogate.

6. **Want of Business Experience and Capacity Not a Disqualification.** — *Scanlon's Estate*, 12 Pa. Co. Ct. Rep. 339.

In *Stephenson v. Stephenson*, 4 Jones L. (40 N. Car. 472) it was held that a person who could not write or read writing, and had no experience in keeping accounts or settling estates, was incompetent.

7. **Improvidence Is a Disqualification** — *California*. — *Matter of Connors*, 110 Cal. 408.

Montana. — *Root v. Davis*, 10 Mont. 228.

New York. — *Emerson v. Bowers*, 14 N. Y. 449; *Coggeshall v. Green*, 9 Hun (N. Y.) 471; *O'Brien v. Neubert*, 3 Dem. (N. Y.) 156, *sub nom.* *O'Brien's Estate*, 67 How. Pr. (N. Y. Surrogate Ct.) 503; *McGregor v. McGregor*, 1 Keyes (N. Y.) 133; *Blanch v. Morrison*, 4 Dem. (N. Y.) 297; *Hayward v. Place*, 4 Dem. (N. Y.) 487; *Shilton's Estate*, Tuck. (N. Y.) 73; *Matter of Manley*, 12 Misc. Rep. (N. Y. Surrogate Ct.) 472; *Coope v. Lowerre*, 1 Barb. Ch. (N. Y.) 45; *McMahon v. Harrison*, 6 N. Y. 448.

What Constitutes Improvidence. — The fact that a man at the age of sixty-one was not possessed of property of any considerable value, and that for some years he had not supported his wife and minor children, does not necessarily show improvidence. *Root v. Davis*, 10 Mont. 228.

Improvidence to Disqualify Must Amount to a Lack of Intelligence. — *Shilton's Estate*, Tuck. (N. Y.) 73; *Matter of Manley*, 12 Misc. Rep. (N. Y. Surrogate Ct.) 472.

A Professional Gambler is presumably of such improvidence as to be incompetent to discharge the duties of administrator. *McMahon v. Harrison*, 6 N. Y. 443.

8. **Indebtedness Not a Disqualification.** — *Weis's Succession*, 43 La. Ann. 475; *Churchill v. Prescott*, 2 Bradf. (N. Y.) 304; *Morgan's Estate*, 8 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 77, 2 How. Pr. N. S. (N. Y.) 194. But see *Robert's Estate*, 3 Montg. Co. Rep. (Pa.) 212.

9. **Appointment of Debtor Against Policy of Law.** — *Neustadt's Estate*, 12 Phila. (Pa.) 8, 34 Leg. Int. (Pa.) 126.

10. **Prejudice Against or Hostility to Other Next of Kin Held Not Disqualification.** — *In re Bauquier*, 88 Cal. 478. But see *Bridgman v. Bridgman*, 30 W. Va. 212.

11. **Antagonistic Interests Held Sufficient Ground for Refusing Letters.** — *Heron's Estate*, 6 Phila. (Pa.) 86, 22 Leg. Int. (Pa.) 220; *Hassinger's Appeal*, 10 Pa. St. 454; *Bieber's Appeal*, 11 Pa. St. 157; *Robertson's Estate*, 1 Pa. Dist. Rep. 317; *Fulmer's Estate*, 2 C. Pl. Rep. (Pa.) 65; *Ellmaker's Estate*, 4 Watts (Pa.) 34; *Welch's Appeal*, 1 Penny. (Pa.) 9.

Use of Intoxicating Liquors. — In some jurisdictions habitual drunkenness renders a person incompetent to act as administrator, but he is not rendered incompetent by the mere fact that he uses intoxicating liquors.¹

Bad Character is sometimes considered a disqualification.²

A Surviving Partner of a decedent as a general rule cannot be appointed administrator of the estate.³

In Louisiana women are disqualified to act in the capacity of curatrix of an estate, unless they are heirs or legatees, by the provisions of the Civil Code of that state that women cannot perform any civil functions except those which the law specifically declares them capable of exercising.⁴

(4) **Preferences and Selections.** — Where there are several persons equally entitled to administration, it is generally in the discretion of the court, subject to certain rules adopted by the court or prescribed by statute, to select the person deemed most suitable,⁵ and in exercising this discretion, the court, though not bound to do so, should consider the wishes of the majority of the persons interested in the estate.⁶ Males are generally preferred to females where other things are equal.⁷ Sometimes the oldest next of kin will be

1. **Habitual Drunkenness a Disqualification.** — Root v. Davis, 10 Mont. 228; Matter of Manley, 12 Misc. Rep. (N. Y. Surrogate Ct.) 472; Kechele's Estate, Tuck. (N. Y.) 52, 1 Redf. (N. Y.) 472. But see Sill v. M'Knight, 7 W. & S. (Pa.) 244.

The mere fact that one uses intoxicating liquors is not a disqualification. Root v. Davis, 10 Mont. 228.

In Order to Be a Disqualification the use of intoxicating liquors must be so excessive as to warrant the overseers of the poor in designating such person as an habitual drunkard. Kechele's Estate, Tuck. (N. Y.) 52.

2. **Persons of Bad Character Disqualified.** — In *In re Diller*, 6 Ohio Dec. 182, it was held that a widow who was unfit to administer by reason of her bad character would be denied the right given her by statute to administer on her husband's estate, though she tendered ample bonds. See also Lippincott v. Wikoff, 54 N. J. Eq. 107.

Want of Integrity. — The fact that a surviving husband claims the whole estate of his deceased wife as his own does not show a want of integrity so as to disqualify him to act as her administrator. *In re Carmody*, 88 Cal. 616. See also, as to facts constituting want of integrity, Root v. Davis, 10 Mont. 228; Cramer v. Sharp, 49 N. J. Eq. 558.

Persons Convicted of Crime. — In *New York* a person who has been convicted of an infamous crime is disqualified by statute. Coope v. Lowerre, 1 Barb. Ch. (N. Y.) 45; O'Brien v. Neubert, 3 Dem. (N. Y.) 156; *sub nom.* O'Brien's Estate, 67 How. Pr. (N. Y. Surrogate Ct.) 503.

3. **Surviving Partner of Decedent Not Competent.** — Matter of Garber, 74 Cal. 338; Heward v. Slagle, 52 Ill. 336; *In re Stewart*, 18 Mont. 595; Brown's Estate, 33 Leg. Int. (Pa.) 148, 11 Phila. (Pa.) 127; Coe v. Dial, 12 Tex. 100. But see Cook v. Lewis, 36 Me. 340.

4. **Women Disqualified in Louisiana.** — Carraby v. Carraby, 7 Martin N. S. (La.) 466; Cason v. Cabrara, 4 La. Ann. 538; Block's Succession, 6 La. Ann. 810. But a woman may administer a succession in which she is an heir. Sears v. Wilson, 5 La. Ann. 689; Block's Succession, 6

La. Ann. 810; Sloane's Succession, 12 La. Ann. 610.

5. **Discretion of Probate Court in Making Selection** — *Georgia*. — Jackson v. Jackson, 101 Ga. 132.

Indiana. — Wallis v. Cooper, 123 Ind. 40.

Louisiana. — Chaler's Succession, 39 La. Ann. 308.

Maryland. — Bowie v. Bowie, 73 Md. 232.

Pennsylvania. — Levan's Appeal, 112 Pa. St. 294; Brubaker's Appeal, 98 Pa. St. 21.

Tennessee. — Wright v. Wright, Mart. & Y. (Tenn.) 43.

West Virginia. — Bridgman v. Bridgman, 30 W. Va. 212.

Statutory Preference. — If the statute provides for preferences among persons equally entitled, the court has no discretion, but must grant administration accordingly. Matter of Nickals, 21 Nev. 462.

Natural or Legal Guardians. — In *Louisiana* it is within the discretion of the court to grant administration to the grandmother who is the legal tutrix of the infant heir, in preference to the mother who is the natural tutrix. Boudreaux's Succession, 42 La. Ann. 296.

6. **Duty to Regard Wishes of Persons Interested.** — Chaler's Succession, 39 La. Ann. 308; Cramer v. Sharp, 49 N. J. Eq. 558; Ellmaker's Estate, 4 Watts (Pa.) 34; Jones's Appeal, 10 W. N. C. (Pa.) 249; Frick's Appeal, 114 Pa. St. 29; Schaufuss's Estate, 5 Kulp (Pa.) 275; Thompson v. Hockett, 2 Hill L. (S. Car.) 347; McBeth v. Hunt, 2 Strobb. L. (S. Car.) 335; *Ex p.* Ostendorff, 17 S. Car. 24.

7. **Preference of Males to Females** — *England*. — Chittenden v. Knight, 2 Cas. temp. Lee, 559; Ellison v. McCormick, 14 W. R. 742; Iredale v. Ford, 1 Sw. & Tr. 305, 5 Jur. N. S. 474, 7 W. R. 462; Cordeux v. Trasler, 4 Sw. & Tr. 48, 11 Jur. N. S. 587, 34 L. J. P. 127.

Indiana. — Andis v. Lowe, 8 Ind. App. 687. *New Jersey*. — Matter of Hill, 55 N. J. Eq. 764.

New York. — Lussen v. Timmerman, 4 Dem. (N. Y.) 250; *In re Selling*, (Surrogate Ct.) 2 N. Y. Supp. 634; Moran's Estate, 5 Misc. Rep. (N. Y. Surrogate Ct.) 176; Wickwire v. Chapman, 15 Barb. (N. Y.) 302.

appointed administrator in preference to the younger persons in equal degree of relationship.¹ Relatives of the whole blood are generally preferred to those of the half blood in equal degree of relationship.² Unmarried women are preferred to married women;³ paternal relatives to maternal relatives;⁴ and generally a person whose capacity and circumstances make his appointment the most beneficial to the estate.⁵

(5) *Time When Appointment May Be Made.* — As a general rule there is no requirement that any particular time shall elapse after the death of a decedent

Male Charged with Intemperance and Misconduct. — In *Ellison v. McCormick*, 14 W. R. 742, administration was granted to the oldest male next of kin, who represented the majority of interests, in preference to a female, though charges of intemperance and misconduct were made against him.

Right of Male Subordinate to Majority of Interest. — In *Iredale v. Ford*, 1 Sw. & Tr. 305, 5 Jur. N. S. 474, 7 W. R. 462, it was held that administration would not be granted to a male in preference to a female, where it was opposed by those who had a majority of interests in the estate. Sir C. Cresswell said in reference to the rule preferring males: "But there is another maxim, * * * that it is usual to make the grant to the party with whom the majority of interests are desirous of intrusting it, and I think this last is a more stringent rule than the other, which makes a choice between the sexes."

Right of Male Subordinate to Priority of Application. — In *Cordeux v. Trasler*, 4 Sw. & Tr. 48, 11 Jur. N. S. 587, 34 L. J. P. 127, administration was granted to a female, in preference to the male next of kin, where she applied first. Sir J. P. Wilde, referring to the rule that the right of the majority of interests is superior to the right of the male next of kin, to administer in preference to females, said: "There is yet another principle, * * * namely, that a preference will be given *priori petenti*."

Nonresident Males. — Where males are by statute given a preference over females, that right is not affected by nonresidence, if nonresidence is not a disqualification. *Lussen v. Timmerman*, 4 Dem. (N. Y.) 250.

Males of Bad Character Not Entitled to Preference. — In *re Selling*, (Surrogate Ct.) 2 N. Y. Supp. 634, administration was granted to a nonresident married daughter of the decedent, in preference to a resident son, who was a gambler, thief, forger, and ex-keeper of a disorderly house.

1. Preference of Oldest Next of Kin. — In *Goods of Stainton*, L. R. 2 P. & D. 212, 40 L. J. P. 25, 24 L. T. N. S. 320, 19 W. R. 567; *Warwick v. Greville*, 1 Phill. Ecc. 125; *Coppin v. Dillon*, 4 Hagg. 376; *Owings v. Bates*, 9 Gill (Md.) 463.

Daughter of Decedent Preferred to Grandson. — *Lee v. Sedgwick*, 1 Root (Conn.) 52; *Gyger's Estate*, 65 Pa. St. 311.

Adult Female Preferred to Guardian of Infant Male. — In *Cottle v. Vanderheyden*, 11 Abb. Pr. N. S. (N. Y. Ct. App.) 17, 39 How. Pr. (N. Y. Supreme Ct.) 289; it was held that the guardian of a minor son of an intestate was not entitled to letters of administration, in preference to an adult daughter, because the policy of the statute is to grant administration directly to those most interested in the estate.

See also *Cluett v. Mattice*, 43 Barb. (N. Y.) 417; *Wickwire v. Chapman*, 15 Barb. (N. Y.) 302.

2. Whole Blood Preferred to Half Blood. — *Mercer v. Moorland*, 2 Cas. temp. Lee, 499; *Stratton v. Linton*, 31 L. J. P. 48; *Moran's Estate*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 176.

In *Pennsylvania* no distinction is made in granting letters of administration between the half blood and the whole blood. *Single's Appeal*, 59 Pa. St. 55.

A Male of the Half Blood is preferred by the New York statute to females of the whole blood. *Moran's Estate*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 176.

3. Unmarried Woman Preferred to Married Woman. — *Matter of Curser*, 89 N. Y. 401, 2 Civ. Pro. Rep. (N. Y.) 411; *Shand's Estate*, 3 Month. L. Bul. (N. Y.) 31; *Smith v. Young*, 5 Gill (Md.) 197; *Griffith v. Coleman*, 61 Md. 250.

4. Paternal and Maternal Relatives in Equal Degree. — In *Maryland* relatives of a widow on the side of the father are preferred to relatives on the side of the mother, so that a first cousin on the father's side and a first cousin on the mother's side are not in equal degree of kinship. *Kearney v. Turner*, 28 Md. 408.

In *Cantlin's Estate*, 13 Pa. Co. Ct. Rep. 381, it was held that where the personal estate of a decedent was insolvent, but he left real estate derived from his mother, administration would be granted to a maternal cousin in preference to a paternal uncle.

5. Business Experience. — A person of business experience will generally be preferred to one without such experience. *Williams v. Wilkins*, 2 Phill. Ecc. 100.

The provision of the *Louisiana* statute that the "most solid" of several applicants shall be selected requires the judge to consider their business experience and capacity. *Chaler's Succession*, 39 La. Ann. 308.

Ability to Take Care of Estate. — The court should select from the class the person best qualified to take care of the estate. *Atkins v. McCormick*, 4 Jones L. (49 N. Car.) 274.

Creditors of Intestate. — In *Webb v. Needham*, 1 Add. 494, it was held that the fact that one of the next of kin was a creditor of the decedent would weigh against him rather than for him.

Debtor of Intestate. — One not a debtor to the estate will be preferred to one who is, although the debtor deposits in the court the amount due from him. *Lindner v. Goldenbow*, 4 La. 143; *Chaler's Succession*, 39 La. Ann. 308.

Interest in Estate. — Between persons of equal degree of relationship, that one will be preferred who is most interested in executing the trust faithfully. *Langan v. Bowman*, 12 Smed. & M. (Miss.) 715; *Moore v. Moore*, 1 Dev. L. (12 N. Car.) 352.

before a personal representative may be appointed, except so far as notice of the application for appointment may be required to be given.¹ In some jurisdictions the power to grant letters of general and original administration is limited by statute to a certain period after the death of the decedent,² but such limitation does not apply to administration *de bonis non*³ or with the will annexed.⁴ In other jurisdictions there is no limitation.⁵

(6) *Renunciation of Right to Administer.* — A renunciation may be implied from acts inconsistent with a claim to the right to administer,⁶ and, when the statute requires a person entitled to letters of administration to make application within a specified time, failure to apply within such time operates as a waiver or renunciation of the right.⁷

1. Notice of Application. — See *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, title PROBATE AND ADMINISTRATION.

Appointment on Day of Death. — In *Comfort's Estate*, 12 Pa. Co. Ct. Rep. 571, it was held that an appointment of an administrator was not void because it was made on the day of the decedent's death.

Appointment Forthwith. — In the *District of Columbia*, if the fact is notorious that the decedent died intestate, an administrator may be appointed forthwith, but if the fact is not notorious seven days must elapse after an application before the appointment can be made. *Eslin v. District of Columbia*, 22 Ct. of Cl. 160.

2. Limitation of Time for Granting Original Administration — Connecticut. — Seven years. *Lawrence's Appeal*, 49 Conn. 412.

Iowa. — Five years; or in case decedent died out of the state, five years after his death is known. *Lees v. Wetmore*, 58 Iowa 170.

Kentucky. — Twenty years. *Anderson v. Smith*, 3 Metc. (Ky.) 493.

Massachusetts. — Twenty years. *Wales v. Willard*, 2 Mass. 119.

Pennsylvania. — Twenty-one years. *Foster v. Com.*, 35 Pa. St. 148.

Tennessee. — Twenty years. *Rice v. Henly*, 90 Tenn. 69.

Texas. — Four years. *Lloyd v. Mason*, 38 Tex. 212; *Wardrup v. Jones*, 23 Tex. 491; *Harwood v. Wyley*, 70 Tex. 538. Formerly there was no limitation in Texas as to the time within which administration might be granted. *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852.

3. Limitation Not Applicable to Administration D. B. N. — *Crossan v. McCrary*, 37 Iowa 684; *Bancroft v. Andrews*, 6 Cush. (Mass.) 493.

4. Limitation Not Applicable to Administration C. T. A. — The *Connecticut* statute limiting the time within which administration may be granted to seven years after the death of the decedent is held to apply only to intestate estates. The appointment of an administrator with the will annexed is governed by the statute allowing ten years for the proof of wills. *Lawrence's Appeal*, 49 Conn. 412.

5. There Is No Limitation in California as to the time within which letters of administration may be granted. *Healy v. Buchanan*, 34 Cal. 567.

Application by Creditor under Dormant Judgment. — In *Ray v. Strickland*, 89 Ga. 840, it was held that an application by a creditor under a judgment which had become dormant after the death of the decedent was not too late,

since the bar of the right to sue on the judgment could be waived by the administrator.

6. Request for Appointment of Another. — A written request by a person entitled to letters of administration for the appointment of another person is a renunciation of his right. *In re Bedell*, 97 Cal. 339; *Carpenter v. Jones*, 44 Md. 625.

Withdrawing Application in Favor of Another Applicant. — A right to letters of administration is waived by withdrawing the application while an application by another person is pending. *Coe v. Dial*, 12 Tex. 100.

Permitting Others to Administer. — A person entitled to letters of administration may be estopped to assert his right where he permits others to administer without objection. *Matter of Hill*, 6 Wash. 285.

Application in One Capacity Not a Waiver of Right in Another Capacity. — An application made by a person as a creditor of the decedent is not a waiver of the applicant's right to take letters as public administrator. *McKinnon's Estate*, 64 Cal. 226.

Discovery of Will After Renunciation. — A renunciation by a widow of her right to administration on the supposition that her husband had died intestate does not affect her right to administration with the will annexed on the subsequent discovery of a will and renunciation by the executor. *Brodie v. Mitchell*, 85 Md. 516.

Consent to Probate of Will. — The right to administration is not renounced by joining in a petition for the probate of an alleged will of the decedent, which is afterwards declared invalid. *McIntire v. Worthington*, 68 Md. 203.

Release of Interest in Estate. — A mere release by a wife of all interest in her husband's estate, by an agreement made with him during his lifetime, is not a renunciation of her right to administration, where the agreement contains no allusion to or promise concerning a renunciation, the statute requiring renunciation to be made by a written instrument. *Matter of Wilson*, 92 Hun (N. Y.) 318.

7. Renunciation Implied from Failure to Apply for Letters — Alabama. — *Curtis v. Burt*, 34 Ala. 729; *Forrester v. Forrester*, 37 Ala. 308; *Davis v. Swearingen*, 56 Ala. 31; *Cunningham v. Thomas*, 59 Ala. 158; *Markland v. Albes*, 81 Ala. 433.

Florida. — *Rawlins v. Rawlins*, 18 Fla. 345.

Maryland. — *Dalrymple v. Gamble*, 66 Md. 298.

Massachusetts. — *Cobb v. Newcomb*, 19 Pick. (Mass.) 336.

But an Express Renunciation, in order to be effective, should be in writing, or by some act of record.¹

The Effect of a Renunciation is to devolve the right to administration on the class next entitled;² but where a husband is entitled to take out administration in the right of his wife to her intestate next of kin, the renunciation of the wife in favor of a third person will not deprive the husband of his right.³

Retraction of Renunciation. — A renunciation cannot be retracted after letters have been granted to another,⁴ or if any circumstances exist which would render a retraction inequitable.⁵

(7) *Validity and Effect of Appointment* — (a) *Collateral Attack*. — By some authorities it is not considered that courts of probate are courts of limited jurisdiction within their sphere, and therefore a decree granting letters testamentary or of administration cannot be attacked collaterally on the ground that the court did not have jurisdiction of the particular case, unless the want of jurisdiction appears on the face of the proceedings, or because of any error or irregularity;⁶ but the decree, if not absolutely void, is conclusive on col-

Mississippi. — *Jordan v. Ball*, 44 Miss. 194.

North Carolina. — *Hill v. Alspaugh*, 72 N. Car. 402.

Oregon. — *Ramp v. McDaniel*, 12 Oregon 108.

South Carolina. — *Exp. White*, 38 S. Car. 41.

In *Rawlins v. Rawlins*, 18 Fla. 345, it was held that the right of a widow to letters of administration on the estate of her deceased husband is not absolute, but is conditional on her application, and if she fails to apply others may be appointed.

Failure of the next of kin, who were parties to a proceeding in which letters of administration were revoked, to ask that letters be issued to them is a renunciation of their right. *Dalrymple v. Gamble*, 66 Md. 298.

Failure to apply for letters does not operate as a renunciation until the expiration of the time allowed by statute for making application. *Cobb v. Newcomb*, 19 Pick. (Mass.) 336.

1. *Express Renunciation Must Be in Writing*. — *Matter of Wilson*, 92 Hun (N. Y.) 318; *Williams v. Neville*, 108 N. Car. 559.

Renunciation Must Appear of Record. — A declaration made in the probate court will not operate as a renunciation so as to authorize the appointment of another person by reason thereof, unless it is entered of record. *Arnold v. Sabin*, 1 Cush. (Mass.) 525.

Personal Appearance in Court Not Necessary. — A person entitled to letters of administration may renounce the right without appearing personally in court. *Triplett v. Wells*, Litt. Sel. Cas. (Ky.) 49.

2. *Renunciation Devolves Right on Class Next Entitled*. — *McColgan v. Kenny*, 68 Md. 258.

A person who has renounced in one capacity may afterwards take out letters of administration in another capacity. In *Goods of Biggs*, L. R. 1 P. & D. 595.

3. *Husband Entitled to Administer in Right of Wife Not Affected by Her Renunciation*. — *Haynes v. Matthews*, 1 Sw. & Tr. 460.

4. *No Retraction After Letters Granted to Another*. — *England*. — In *Goods of Park*, 6 Jur. N. S. 660.

California. — *Keane's Estate*, 56 Cal. 407.

Kentucky. — *Triplett v. Wells*, Litt. Sel. Cas. (Ky.) 49.

Maryland. — *Stocksdale v. Conaway*, 14 Md. 99, 74 Am. Dec. 515; *Lutz v. Mahan*, 80 Md.

233; *Glenn v. Reid*, 74 Md. 238; *Carpenter v. Jones*, 44 Md. 626; *Pollard v. Mohler*, 55 Md. 289.

Pennsylvania. — *Lewis's Estate*, 15 Pa. Co. Ct. Rep. 397.

In *Goods of Park*, 6 Jur. N. S. 660, it was held that a renunciation might be retracted with consent of the court before the issue of letters to another, but that the court was not bound to allow such retraction.

In *Lutz v. Mahan*, 80 Md. 233, it was held that retraction of the renunciation would not be allowed unless it was made under a mistake or there was other sufficient reason.

Retracting Private Renunciation. — A private renunciation may be retracted at will within the time allowed to apply for letters. *Muirhead v. Muirhead*, 6 Smed. & M. (Miss.) 451.

5. *Retraction Not Allowed if Inequitable*. — In *Kirtland's Estate*, 16 Cal. 161, the court refused to allow retraction of a renunciation where another person had gone to the expense and trouble of applying for letters of administration.

6. *Rule Forbidding Collateral Attack* — *United States*. — *Simmons v. Saul*, 138 U. S. 439; *Comstock v. Crawford*, 3 Wall. (U. S.) 396; *McNitt v. Turner*, 16 Wall. (U. S.) 352; *Garrett v. Boeing*, 68 Fed. Rep. 51; *McCants v. Peninsular Land Co.*, 68 Fed. Rep. 66; *Tucker v. Nebeker*, 2 App. Cas. (D. C.) 326; *Francisco v. Chicago*, etc., R. Co., 35 Fed. Rep. 647; *Richmond*, etc., R. Co. v. *Gorman*, 7 App. Cas. (D. C.) 91.

Alabama. — *Savage v. Benham*, 17 Ala. 119; *Barclift v. Treece*, 77 Ala. 528; *Coltart v. Allen*, 40 Ala. 155, 88 Am. Dec. 757; *Ickelheimer v. Chapman*, 32 Ala. 676; *Burke v. Mutch*, 66 Ala. 569; *Exp. Hardy*, 68 Ala. 333; *Landford v. Dunklin*, 71 Ala. 603; *Bean v. Chapman*, 73 Ala. 144; *May v. Marks*, 74 Ala. 249; *Kling v. Connell*, 105 Ala. 590.

California. — *Irwin v. Scriber*, 18 Cal. 499.

Illinois. — *Walker v. Walker*, 55 Ill. App. 118; *Wight v. Wallbaum*, 39 Ill. 554; *Shepherd v. Rhodes*, 60 Ill. 301; *Meek v. Allison*, 67 Ill. 46.

Louisiana. — *Hogan v. Thompson*, 2 La. Ann. 538; *Davie v. Stevens*, 10 La. Ann. 496; *Sizemore v. Wedge*, 20 La. Ann. 124; *Woods v. Lee*, 21 La. Ann. 505; *Morgan v. Locke*, 28 La. Ann. 806; *Duson v. Dupré*, 32 La. Ann. 896; *Grevemberg v. Bradford*, 44 La. Ann. 400.

lateral attack so long as it remains in force. In no case, however, can an

Michigan. — Johnson *v.* Johnson, 66 Mich. 525.

Missouri. — Wetzell *v.* Waters, 18 Mo. 396; Rowden *v.* Brown, 91 Mo. 429.

Nebraska. — Moore *v.* Moore, 33 Neb. 509; Missouri Pac. R. Co. *v.* Lewis, 24 Neb. 848; Bradley *v.* Missouri Pac. R. Co., 51 Neb. 653; Waldow *v.* Beemer, 45 Neb. 626.

New York. — Lowman *v.* Elmira, etc., R. Co., 85 Hun (N. Y.) 188; O'Connor *v.* Huggins, 113 N. Y. 511; Porter *v.* Purdy, 29 N. Y. 106, 86 Am. Dec. 283; Roderigas *v.* East River Sav. Inst., 63 N. Y. 460, 20 Am. Rep. 555; Kelly *v.* West, 80 N. Y. 139; Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491.

North Carolina. — Lyle *v.* Siler, 103 N. Car. 261; London *v.* Wilmington, etc., R. Co., 88 N. Car. 584; Hampton *v.* Hardin, 88 N. Car. 592.

Oregon. — Ramp *v.* McDaniel, 12 Oregon 108.

Pennsylvania. — Sager *v.* Lindsey, 118 Pa. St. 25.

Tennessee. — Eller *v.* Richardson, 89 Tenn. 575; East Tennessee, etc., R. Co. *v.* Mahoney, 89 Tenn. 311.

Texas. — Williams *v.* Howard, 10 Tex. Civ. App. 527; Ferguson *v.* Templeton, (Tex. Civ. App. 1895) 32 S. W. Rep. 148; Templeton *v.* Ferguson, 89 Tex. 47; Fisk *v.* Norvel, 9 Tex. 13, 58 Am. Dec. 128.

Utah. — Chilton *v.* Union Pac. R. Co., 8 Utah 47.

Vermont. — Abbott *v.* Coburn, 28 Vt. 663, 67 Am. Dec. 735; Lawrence *v.* Englesby, 24 Vt. 42; Steen *v.* Bennett, 24 Vt. 303; McFarland *v.* Stone, 17 Vt. 165, 44 Am. Dec. 325.

Virginia. — Burnley *v.* Duke, 2 Rob. (Va.) 108; Fisher *v.* Bassett, 9 Leigh (Va.) 119, 33 Am. Dec. 227; Schultz *v.* Schultz, 10 Gratt. (Va.) 358, 60 Am. Dec. 335; Cox *v.* Thomas, 9 Gratt. (Va.) 323; Hutcheson *v.* Priddy, 12 Gratt. (Va.) 85; Andrews *v.* Avory, 14 Gratt. (Va.) 229, 73 Am. Dec. 355.

Washington. — State *v.* Ayer, 17 Wash. 127.

When Appointment Is Void. — The appointment of an administrator is absolutely void, and subject to collateral attack, where the letters of administration previously granted are still in force, or where there is a will naming an executor who is living and competent to act.

United States. — Griffith *v.* Frazier, 8 Cranch (U. S.) 9; Kane *v.* Paul, 14 Pet. (U. S.) 33.

Alabama. — Ramey *v.* Green, 18 Ala. 771; Hooper *v.* Scarborough, 57 Ala. 510; Plowman *v.* Henderson, 59 Ala. 559.

California. — Haynes *v.* Meeks, 20 Cal. 288; Hamilton's Estate, 34 Cal. 464.

Florida. — Epping *v.* Robinson, 21 Fla. 36.

Georgia. — Justices *v.* Selman, 6 Ga. 432.

Indiana. — Landers *v.* Stone, 45 Ind. 404.

Kentucky. — White *v.* Brown, 7 T. B. Mon. (Ky.) 448; Taylor *v.* Tibbatts, 13 B. Mon. (Ky.) 184.

Missouri. — Scott *v.* Crews, 72 Mo. 261; Macey *v.* Stark, 116 Mo. 481.

North Carolina. — *In re* Bowman, 121 N. Car. 373.

South Carolina. — Petigru *v.* Ferguson, 6 Rich. Eq. (S. Car.) 378.

Virginia. — Andrews *v.* Avory, 14 Gratt. (Va.) 229, 73 Am. Dec. 355.

The fact that the existence of a will was not known at the time of appointment of the administrator is not material. The appointment is still absolutely void. Kittredge *v.* Folsom, 8 N. H. 98.

So, too, a grant of administration is void where it was made on the estate of a person supposed to be dead, but who was in fact living. See *supra*, this section, *Jurisdiction to Appoint Administrators — Jurisdictional Facts — Death*.

Or where the record in the proceeding for the appointment shows a want of jurisdictional facts. Paul *v.* Willis, 69 Tex. 261; Harwood *v.* Wylie, 70 Tex. 538.

Or where the letters were granted by the clerk in vacation, and not afterwards approved by the court as required by statute. Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177. Compare Rayburn *v.* Rayburn, 34 W. Va. 400.

Or where a contest respecting the probate of the will was pending when the letters were granted. Slade *v.* Washburn, 3 Ired. L. (25 N. Car.) 557.

Or where administration with the will annexed is granted on an *ex parte* application, and the will is afterwards adjudged void, though distribution has been made under such administration. Smith *v.* Stockbridge, 39 Md. 640.

Or where the appointee was an infant. Knox *v.* Nobel, 77 Hun (N. Y.) 230; Continental Trust Co. *v.* Nobel, 10 Misc. Rep. (N. Y. Supreme Ct.) 325. But see *contra*, Savage *v.* Benham, 17 Ala. 119; Davis *v.* Miller, 106 Ala. 154; Ray *v.* Doughty, 4 Blackf. (Ind.) 115.

When Appointment Is Merely Voidable. — It has been held that an appointment is not void, but merely voidable, and therefore not subject to collateral attack, where the appointee was an infant. Savage *v.* Benham, 17 Ala. 119; Davis *v.* Miller, 106 Ala. 154; Ray *v.* Doughty, 4 Blackf. (Ind.) 115. But see *contra*, Knox *v.* Nobel, 77 Hun (N. Y.) 230; Continental Trust Co. *v.* Nobel, 10 Misc. Rep. (N. Y. Supreme Ct.) 325.

Or when several estates were included in one administration. Williams *v.* Howard, 10 Tex. Civ. App. 527; Templeton *v.* Ferguson, 89 Tex. 47; Grande *v.* Herrera, 15 Tex. 533.

Or where the service of notice of the application was irregular. Chilton *v.* Union Pac. R. Co., 8 Utah 47.

Or where administration was not necessary. Garrett *v.* Boeing, 68 Fed. Rep. 51; McCants *v.* Peninsular Land Co., 68 Fed. Rep. 66.

Or where the applicant was not entitled to administration because she was not the widow of the decedent as alleged, or because another person had a prior right. Francisco *v.* Chicago, etc., R. Co., 35 Fed. Rep. 647; Simmons *v.* Saul, 138 U. S. 439.

Or where the appointment was made by the court of the wrong county. Kling *v.* Connell, 105 Ala. 590; Irwin *v.* Scriber, 18 Cal. 499; Eller *v.* Richardson, 89 Tenn. 575; East Tennessee, etc., R. Co. *v.* Mahoney, 89 Tenn. 311.

administrator impeach his own appointment.¹ On the other hand, it is said that courts of probate are courts of inferior and limited jurisdiction, and that their decrees may be collaterally attacked on the ground that the jurisdictional facts did not exist in the particular case, though they were averred of record, and found by the court rendering the decree.²

(b) **Acts Done Under Invalid Appointment.** — If a grant of letters testamentary or of administration is merely voidable, but not void, all the acts done by virtue of such letters are valid, though the letters are afterwards revoked as having been improperly granted.³ If, on the other hand, the grant is absolutely void, the general rule is that all acts done pursuant to it are void also,⁴ though some acts may be valid even when the grant of letters is void.⁵

(c) **Debtor of Testator Appointed Executor — Rule at Common Law.** — At common law if a debtor of the testator was appointed executor the debt was extinguished,⁶

But see *contra*, *Ex p. Barker*, 2 Leigh (Va.) 719.

Or where the judge of probate and the applicant are within the prohibited degree of relationship. *Hine v. Hussey*, 45 Ala. 496; *Hayes v. Collier*, 47 Ala. 726; *Plowman v. Henderson*, 59 Ala. 559.

Or where an oath of office and bond were not taken. *Ryan v. American Freehold Land, etc.*, *Mortg. Co.*, 96 Ga. 322; *Gallagher v. Holland*, 20 Nev. 164.

A grant of letters of administration obtained by suppressing a will containing no appointment of executors is not void *ab initio*. *Boxall v. Boxall*, 27 Ch. Div. 220, 53 L. J. Ch. 838, 32 W. R. 896.

1. **Administrator Cannot Impeach Appointment.** — *Ela's Appeal*, (N. H. 1894) 38 Atl. Rep. 501.

2. **Rule Permitting Collateral Attack.** — In *People's Sav. Bank v. Wilcox*, 15 R. I. 258, it was held that courts of probate are technically courts of limited jurisdiction, and that where the jurisdiction depends upon some collateral fact which can be decided without going into the case on its merits, jurisdiction may be questioned collaterally, and disproved, even though the jurisdictional fact be averred of record, and is actually founded upon evidence by the court rendering the judgment.

For Full Discussion of the question of collateral attack, on orders and decrees of probate courts, and the character of probate courts, see the titles JUDGMENTS AND DECREES; PROBATE COURTS; PROBATE AND LETTERS OF ADMINISTRATION.

3. **Acts Done Under Voidable Appointment Are Valid** — *Alabama*. — *Floyd v. Clayton*, 67 Ala. 265.

Illinois. — *Meek v. Allison*, 67 Ill. 46.

Louisiana. — *Matter of Altemus*, 32 La. Ann. 364; *Cloutier v. Lemée*, 33 La. Ann. 305; *Roberts v. Succession*, 49 La. Ann. 80; *Matter of Altemus*, 32 La. Ann. 367; *Succession of Dugart*, 30 La. Ann. 268; *Condon's Succession*, 28 La. Ann. 755.

Nebraska. — *Missouri Pac. R. Co. v. Bradley*, 51 Neb. 596.

North Carolina. — *London v. Wilmington, etc.*, R. Co., 88 N. Car. 584; *Hampton v. Hardin*, 88 N. Car. 592.

Virginia. — *Fisher v. Bassett*, 9 Leigh (Va.) 119, 33 Am. Dec. 227.

In *Royall v. Eppes*, 2 Munf. (Va.) 479, it was said that an administrator appointed and qualified by a court of competent authority is the

lawful representative of the personal estate until his appointment is rescinded, though another had a better right to be administrator.

In *Portz v. Schantz*, 70 Wis. 497, it was held that where the affidavit of notice of the hearing of the application for the appointment of an administrator did not show the period of publication, the appointment of the administrator was not absolutely void, but that he would have at least the powers of a special administrator for the purpose of transferring choses in action belonging to the estate.

While the letters of an infant administratrix remain unsuspended and unrevoked, payments made to her by debtors of the estate, and the delivery of goods of the estate to her by her co-administrators, are to be considered in the same light as if her authority were undisputed. The granting of letters of administration is a judicial act, and where the court granting them has jurisdiction, individuals and courts of justice are bound to respect the authority of the letters, and to presume *omnia rite acta*. *Ray v. Doughty*, 4 Blackf. (Ind.) 115.

4. **Acts Done Under Void Appointment Are Void.** — *Continental Trust Co. v. Nobel*, 10 Misc. Rep. (N. Y. Supreme Ct.) 325.

5. **Valid Acts Done Under Void Appointment.** — The payment of funeral expenses of the decedent is valid, though the appointment of the person acting as administrator was void. *Hurt v. Horton*, 12 Tex. 285.

6. **Debt Released at Common Law.** — *Dorchester v. Webb*, Cro. Car. 372; *Freakley v. Fox*, 9 B. & C. 130, 17 E. C. L. 342, 4 M. & R. 18; *Wankford v. Wankford*, 1 Salk. 299; *Strong v. Bird*, L. R. 18 Eq. 315, 43 L. J. Ch. 814, 22 W. R. 788, 30 L. T. N. S. 745; *Gardner v. Miller*, 19 Johns. (N. Y.) 188; *Jenkins v. Mackenzie*, 6 U. C. Q. B. 544; 2 Bl. Com. 511.

Reason of Rule. — In *Tracy v. Card*, 2 Ohio St. 431, *Thurman, J.*, said: "For this rule different reasons have been given. Some judges have thought that the appointment of the executor is to be considered in the nature of a specific bequest to him of the debt, not to be paid unless there are not sufficient assets to pay the debts; but if there are, then to take preference of the general legacies." *Marvin v. Stone*, 2 Cow. (N. Y.) 809; *Powell, J.*, in *Wankford v. Wankford*, 1 Salk. 303. But reason and the weight of authority, are against this view. Perhaps not one testator out of a hundred imagines that the mere appointment of his debtor to be his executor, will discharge

but a grant of administration to the debtor of the decedent merely suspended the remedy of the estate for a time against the debtor, and did not extinguish the debt.¹

Rule in Equity. — But the rule in equity is that a debt due from an executor or administrator is considered as having been paid to himself, and therefore he is accountable for the amount of his debt as assets in his hands.²

Rule in United States. — In the United States the equitable rule is generally followed, and in the absence of any statute on the subject a debt of the executor is assets in his hands, and he is accountable for it as such.³

the debt. It is not in the natural course of things to give legacies in a manner so indirect; and unless we are ready to aid in defeating the intent of creditors, instead of being governed by it, as we ought, we cannot accede to this doctrine of 'specific bequest.' The reason more commonly given for the rule, and which is supported by a preponderance of authority, is thus stated in Williams on Executors 1123, 1124: 'The principle is, that a debt is merely a right to recover the amount by way of action; and, as an executor cannot maintain an action against himself, his appointment by the creditor to that office suspends the action for the debt; and where a personal action is once suspended by the voluntary act of the party entitled to it, it is forever gone and discharged.'

In *Bacon v. Fairman*, 6 Conn. 129, it was said that "the rule itself originated in a principle never adopted in this state, viz., that the executor was entitled to the surplus of the personal estate, after payment of debts."

Tendency of Modern Decisions. — In *Kaster v. Pierson*, 27 Iowa 90, 1 Am. Rep. 254, the court said: "The rule appears arbitrary, unjust in its effects, and unsupported by reason, and ought certainly to be received with little favor by the courts of the present day. We have not been referred to a single modern case that supports it."

In *Thomas v. Thompson*, 2 Johns. (N. Y.) 471, *Van Ness, J.*, said that there were many exceptions to the rule that where a creditor appoints his debtor executor the debt is released, and that "the leaning of courts of justice has, of late, been in favor of restricting its generality, and it is perhaps to be wished that it never had existed."

Debtor Appointed Executor Durante Minoritate. — In *Caweth v. Phillips*, 1 Ld. Raym. 605, it was held that the appointment of a debtor as executor *durante minore etate* did not discharge the debt because the debtor was the executor only in trust for the other during his minority.

If There Are Not Sufficient Assets to pay the debts and legacies, the appointment of a debtor to be executor does not release the debt. *Gardner v. Miller*, 19 Johns. (N. Y.) 188; 2 Bl. Com. 512.

Failure of Executor to Act. — There was some doubt as to whether the debt of a sole executor, who did not administer and refused probate, was released. *Wankford v. Wankford*, 1 Salk. 307; *Abram v. Cunningham*, 1 Vent. 303.

But if the debtor was one of several executors, and the others administered, the debt was released though he refused to act. *Wankford v. Wankford*, 1 Salk. 308; *Cheetham v. Ward*, 1 B. & P. 630.

1. Appointment of Debtor as Administrator Not Extinguishment of Debt. — *King v. Green*, 2 Stew. (Ala.) 133.

2. Debt Not Released in Equity. — *Freakley v. Fox*, 9 B. & C. 130, 17 E. C. L. 342; *Ingle v. Richards*, 28 Beav. 366; *Flud v. Rumcey*, Yelv. 160; *Phillips v. Phillips*, 2 Freem. Ch. 11; *Errington v. Evans*, 2 Dick. 456; *Carey v. Goodinge*, 3 Bro. C. C. 111; *Berry v. Usher*, 11 Ves. Jr. 90; *Simmons v. Gutteridge*, 13 Ves. Jr. 264; *Brown v. Selwin*, Cas. temp. Talb. 242; *In re Hyslop*, (1894) 3 Ch. 522, 8 Reports 680; *Fleming v. Bolling*, 3 Call (Va.) 75.

3. Rule in Equity Adopted in United States — Debt Not Extinguished — *Alabama*. — *Weems v. Bryan*, 21 Ala. 306; *Wright v. Lang*, 66 Ala. 397.

Connecticut. — *Bacon v. Fairman*, 6 Conn. 126; *Williams v. Morehouse*, 9 Conn. 475.

Kentucky. — *Mitchell v. Rice*, 6 J. J. Marsh. (Ky.) 628.

Massachusetts. — *Ipswich Mfg. Co. v. Story*, 5 Metc. (Mass.) 313; *Stevens v. Gaylord*, 11 Mass. 256; *Winship v. Bass*, 12 Mass. 202; *Tarbell v. Jewett*, 129 Mass. 460.

Michigan. — *Crow v. Conant*, 90 Mich. 253, 30 Am. St. Rep. 427.

New York. — *Matter of Butler*, 1 Connolly (N. Y.) 58.

North Carolina. — *Moore v. Miller*, Phil. Eq. (62 N. Car.) 359.

Ohio. — *Bigelow v. Bigelow*, 4 Ohio 138, 19 Am. Dec. 591; *Hall v. Pratt*, 5 Ohio 72; *Tracy v. Card*, 2 Ohio St. 448; *Campbell v. Johnson*, 41 Ohio St. 588.

Pennsylvania. — *Griffith v. Chew*, 8 S. & R. (Pa.) 33, 11 Am. Dec. 556; *Eichelberger v. Morris*, 6 Watts (Pa.) 42; *Anderson v. Anderson*, 41 W. N. C. (Pa.) 329.

South Carolina. — *Charles v. Jacobs*, 9 S. Car. 295; *Hall v. Hall*, 2 McCord Eq. (S. Car.) 269; *Farys v. Farys*, Harp. Eq. (S. Car.) 263; *Griffin v. Bonham*, 9 Rich. Eq. (S. Car.) 71.

Tennessee. — *Rader v. Yeargin*, 85 Tenn. 486.

Wisconsin. — *Finch v. Houghton*, 19 Wis. 149.

See also *infra*, this title, *Assets — Debts and Rights of Action — Debts Due from Executor or Administrator; and Accounting — Charges — What Property Must Be Accounted For in General*.

A Lien Securing a Debt of the Administrator is not discharged by his appointment. *Murray v. Luna*, 86 Tenn. 326.

The Washington Statute provides that "the naming of any person as executor in a will, or the appointment of any person as administrator, shall not operate as a discharge from any just claim which the testator or intestate had against the executor or administrator, but the

(d) **Creditor of Testator Appointed Executor.** — If a debtor appoints his creditor executor the debt is not extinguished unless assets come into the executor's hands, in which case the executor has the right to retain the amount of his debt out of such assets, and the debt is extinguished.¹

(e) **Appointment as Evidence of Death.** — A grant of letters of administration is *prima facie* evidence that the intestate was dead when the letters were granted.²

(f) **Appointment Under Authority of Confederate Government.** — It is generally held that the appointment of an administrator under the authority of the Confederate government was valid, though there have been some decisions to the contrary.³

c. SECONDARY AND LIMITED ADMINISTRATORS — (1) *Administrators with the Will Annexed* — (a) **Definition.** — An administrator with the will annexed (*cum testamento annexo*) is one appointed when no executor was appointed, or, if an appointment was made, when the sole executor or sole surviving executor dies or is incompetent or refuses to act.⁴

(b) **When Appointment Is Authorized.** — In order to authorize the appointment of an administrator with the will annexed, it must appear that there is a valid will in existence,⁵ which has been duly admitted to probate;⁶ that there are

claim shall be included in the inventory, and the executor and administrator shall be liable to the same extent as he would have been had he not been appointed executor or administrator." Eastham v. Landon, 17 Wash. 48.

1. **Appointing Creditor Executor Not an Extinguishment of Debt.** — Woodward v. Darcey, Plowd. 185; Fryer v. Gildridge, Hob. 10; Cock v. Cross, 2 Lev. 73; Wankford v. Wankford, 1 Salk. 305; Ex p. Shackelford, 1 Strobb. Eq. (S. Car.) 275. As to right of retainer, see the title DEBTS OF DECEDENTS, vol. 8, p. 1003.

Receipt of Assets. — The rule that when a creditor is appointed executor by his debtor his right of action is suspended because he is presumed to have retained his debt, and is the person both to pay and receive, applies only when the executor has received assets. Lowe v. Peskett, 16 C. B. 500, 81 E. C. L. 500, 24 L. J. C. P. 196; Richards v. Molony, 2 Ir. Ch. Rep. 1.

Negotiable Instrument Transferred by Executor. — The rule does not apply where the debt arises on a negotiable instrument which has been legally transferred by the executor. Lowe v. Peskett, 16 C. B. 500, 81 E. C. L. 500, 24 L. J. C. P. 196.

2. **Letters of Administration Are Evidence of Death.** — Sims v. Boynton, 32 Ala. 353; Peterkin v. Inloes, 4 Md. 175; Munro v. Merchant, 26 Barb. (N. Y.) 383; Brickhouse v. Brickhouse, 11 Ired. L. (33 N. Car.) 404.

3. **Appointment Under Authority of Confederate Government.** — In Allen v. Kellam, 69 Ala. 442, it was held that letters of administration granted by the probate courts of a seceded state during the civil war were valid. See also Nelson v. Boynton, 54 Ala. 368, expressly repudiating the contrary doctrine which had been laid down in Bibb v. Avery, 45 Ala. 691.

In Clay v. Robinson, 7 W. Va. 348, it was held that an administrator appointed in Greenbriar county under the authority of the Confederate government of Virginia could lawfully perform the functions of his office as such, and that his acts would be valid until he was succeeded by a lawfully constituted administrator appointed under the laws of West Virginia.

But After a Confederate State Constitution was Superseded by a new one, such letters of administration were void. Page v. Cook, 26 Ark. 122.

4. **Administrator with Will Annexed Defined.** — Bouv. Law Dict., title Administration.

The term "administrators" as used in the statutes includes administrators with the will annexed. Ex p. Brown, 2 Bradf. (N. Y.) 22.

Administrators De Bonis Non with the Will Annexed. — See *infra*, this section, *Administrators De Bonis Non*.

5. **Existence of Will Essential.** — In Goods of Greig, 14 W. R. 349; Podmore v. Wharton, 3 Sw. & Tr. 449, 10 Jur. N. S. 756; 33 L. J. P. 143, 10 L. T. N. S. 754; Hanson v. Shepherd, 16 W. R. 144, 17 L. T. N. S. 123; Barton's Estate, 52 Cal. 538; Coleman's Estate, 13 Pa. Co. Ct. Rep. 81.

Lost Will. — In Goods of Greig, 14 W. R. 349, administration with the will annexed was granted, though the will could not be found, and the only evidence of it was a codicil containing independent dispositions and referring to the will.

In Podmore v. Wharton, 3 Sw. & Tr. 449, 10 Jur. N. S. 756, 33 L. J. P. 143, 10 L. T. N. S. 754, letters of administration with the will annexed as contained in a draft were granted, where the court was satisfied that the person who had taken out the original letters had suppressed or destroyed the will.

Doubt as to Competency of Testator. — In Hanson v. Shepherd, 16 W. R. 144, 17 L. T. N. S. 123, where the competency of the testator was doubtful the court refused, on motion, to grant letters as in the case of intestacy, but made a grant with the will annexed.

Will Invalid Under Law of Testator's Domicil. — If the will is invalid under the law of the testator's domicil letters of administration with the will annexed will not be granted. Coleman's Estate, 13 Pa. Co. Ct. Rep. 81, 2 Pa. Dist. Rep. 206.

If the Will Is Set Aside, the office of the administrator with the will annexed thereupon ceases. Smith v. Stockbridge, 39 Md. 640; Kilton v. Anderson, 18 R. I. 136.

6. **Probate of Will.** — The county court has no jurisdiction to appoint an administrator

unadministered assets belonging to the testator's estate within the jurisdiction of the court;¹ and that the administration is vacant,² either because no executor was appointed by the will,³ or because the sole executor or all of several executors have died,⁴ renounced the trust or failed to qualify,⁵ or are for any reason unable to act because of absence or other disqualification.⁶

with the will annexed unless the will has been admitted to probate. *Chase v. Ross*, 36 Wis. 267.

1. Existence of Assets Essential. — In *Goods of Lock*, 24 W. R. 281; *Matter of Nesmith*, 48 Hun (N. Y.) 621, 1 N. Y. Supp. 343.

2. Vacancy in Administration. — If there is an executor who is under no disability and has not renounced the executorship, the appointment of an administrator with the will annexed is void. *Springs v. Erwin*, 6 Ired. L. (28 N. Car.) 27. So also, if there is an executor *de facto*. In *Goods of Delacour*, 9 Ir. R. Eq. 86.

But in *Printup v. Patton*, 91 Ga. 422, it was held that such appointment is not necessarily void merely because it appears that letters testamentary had issued to an executor, since the executor may have resigned or been removed before the administrator with the will annexed was appointed.

The Death of an Executor leaving a will appointing an executor does not create a vacancy at common law. *Seabrook v. Williams*, 3 McCord L. (S. Car.) 371. See also *supra*, this section, *Executors — Executor of Executor*.

3. Administrator C. T. A. Appointed When Will Does Not Name Executor. — In *Goods of Cozens*, 16 L. T. N. S. 208, 15 W. R. 532; In *Goods of Palmer*, 11 L. R. Ir. 1; In *Goods of Sawtell*, 31 L. J. P. 65; *Ward v. Oates*, 43 Ala. 515; *Suttle v. Turner*, 8 Jones L. (53 N. Car.) 403; *Smith v. Wingo*, Rice L. (S. Car.) 287.

Attempted Appointment of Executors. — In *Goods of Cozens*, 16 L. T. N. S. 208, 15 W. R. 532, where the will after giving all of the testator's property to a son concluded with the appointment of two persons named as "trustees," the court held that the persons named as trustees were not executors, and granted administration with the will annexed.

Name Inserted in Will Without Testator's Consent. — In *Goods of Sawtell*, 31 L. J. P. 65, administration with the will annexed was granted, where it appeared that the testator on his death-bed gave instructions for a will to a person who was unknown to him, and who named as executor a person who was unknown to the testator, or to any of his friends or relatives.

4. Death of Executor. — In *Goods of Fleming*, 6 Jur. N. S. 486; In *Goods of Noddings*, 9 W. R. 40, 3 Sw. & Tr. 15.

Death of Executor Without Renouncing or Taking Probate. — If an executor dies without either renouncing or taking probate, the executor of the survivor of two acting executors becomes the personal representative of the original decedent. In *Goods of Lorimer*, 2 Sw. & Tr. 471, 31 L. J. P. 189, 10 W. R. 809, 6 L. T. N. S. 612.

Break in Chain of Executorship. — In *Collinson v. Mawe*, 28 L. J. P. 90, the testator appointed B., C., and D. executors, and made B. residuary legatee. The will was proved by C. alone, power being reserved to grant probate to the other executors. Afterwards B. died, leaving

a will which was duly proved by his executor. After this C. died intestate, leaving part of the estate of the first testator unadministered, and D., the surviving executor of the first testator, did not appear to a citation calling on him to accept or refuse probate of the will. It was held that the chain of the executorship was broken, and letters of administration with the will annexed were granted to the attorney of B.'s executor, who was then abroad.

In *Goods of Bond*, 70 L. T. N. S. 813, B. made a will appointing S. executor and providing that in case S. should die before her, (testatrix), or should die without having completed his duties as executor, then her son was to be the executor. S. died after taking probate of B.'s will, but before he had completed his duties as executor. The son of the testatrix survived her, but died before S. It was held that the chain of executorship was not broken, but that the executors of S. were her personal representatives, and that they were entitled to letters with the will annexed.

5. Appointment on Renunciation of Executor or Failure to Qualify — England. — In *Goods of Jordan*, 16 W. R. 407, 37 L. J. P. 22, L. R. 1 P. & D. 555; In *Goods of Arms*, 11 Reports 587, 71 L. T. N. S. 699; In *Goods of Thompson*, 67 L. T. N. S. 357.

California. — *Garber's Estate*, 74 Cal. 338.

Iowa. — *Cable v. Cable*, 76 Iowa 163.

Maryland. — *Wheeler v. Stifler*, 82 Md. 648.

New Hampshire. — *Leavitt v. Leavitt*, 65 N. H. 102.

North Carolina. — *Suttle v. Turner*, 8 Jones L. (53 N. Car.) 403; *Springs v. Erwin*, 6 Ired. L. (28 N. Car.) 27.

Pennsylvania. — *Coleman's Estate*, 15 Pa. Co. Ct. Rep. 252, 3 Pa. Dist. Rep. 558.

South Carolina. — *Smith v. Wingo*, Rice L. (S. Car.) 287.

Tennessee. — *Baldwin v. Buford*, 4 Verg. (Tenn.) 16; *Drane v. Bayliss*, 1 Humph. (Tenn.) 174.

Virginia. — *Thompsons v. Meek*, 7 Leigh (Va.) 419.

Wisconsin. — *Finch v. Houghton*, 19 Wis. 149; *Batchelder v. Batchelder*, 20 Wis. 452.

6. Absence of Executor. — In *Goods of Cooper*, L. R. 2 P. & D. 21, administration with the will annexed was granted where the executor had become bankrupt and left the country.

Absence of Executor's Executor. — In *Goods of Grant*, 45 L. J. P. Div. 88, 24 W. R. 929, 1 Prob. Div. 435, administration with the will annexed was granted under 38 Geo. III., c. 87, § 1, and 21 & 22 Vict., c. 95, § 18, where the executor's executor was out of the jurisdiction of the court.

The Marriage of a Sole Executrix extinguishes her authority as such under the *Wisconsin* statute, and authorizes the appointment of an administrator with the will annexed. *Chase v. Ross*, 36 Wis. 267. See also *infra*, this section, *Termination of Authority — Marriage of Executrix or Administratrix*.

The Mere Consent of the Executor Named in the Will does not authorize the appointment of an administrator with the will annexed.¹

(c) **Right to Appointment — General Principles.** — The governing principle in granting letters of administration with the will annexed, as in granting original letters, is that the right to the administration follows the right to property, and the grant will be generally made to the person having the largest interest,² unless the persons entitled to letters are designated by statute.³ Thus legatees are held to be entitled, by virtue of their interest, as against the surviving husband or widow of the testator.⁴

Representative of Deceased Executor. — The executor or administrator of a deceased executor has not an interest in the estate of the first testator so as to carry the right to the administration with the will annexed.⁵

Universal or Residuary Legatees. — Within the rule that the person having the largest interest under the will is entitled to the administration with the will

1. **Consent of Executor.** — If the will appointed an executor, the court will not, on the executor's consent, grant administration with the will annexed, but it can do so only on the executor's renunciation of probate, or after a citation has been served on him and he has failed to appear within the prescribed time. *Garrard v. Garrard*, L. R. 2 P. & D. 238, 19 W. R. 569.

2. **Right to Administration with the Will Annexed Follows Right to Property.** — In *Goods of Bailey*, 2 Sw. & Tr. 135, 30 L. J. P. 190, 9 W. R. 540, 4 L. T. N. S. 890; In *Goods of Pile*, 2 Sw. & Tr. 628, 31 L. J. P. 40, 7 L. T. N. S. 194. In *Goods of Westropp*, 5 Jur. N. S. 1318; In *Goods of Homan*, 9 Prob. Div. 61, 52 L. J. P. 94, 31 W. R. 955; *In re Bergin*, 100 Cal. 376; *Horskins v. Morel*, T. U. P. Charl. (Ga.) 69; *Long v. Huggins*, 72 Ga. 776; *Smith v. Wingo*, Rice L. (S. Car.) 287; *Thornton v. Winston*, 4 Leigh (Va.) 152.

Husband of Beneficiary. — The husband of a person beneficially interested in the estate is not entitled as a matter of right to administration with the will annexed. In *Goods of Williams*, 17 L. T. N. S. 518; *Ellmaker's Estate*, 4 Watts (Pa.) 34.

Person Having Largest Interest Entitled to Administer. — As a general rule the right to letters with the will annexed belongs to the person having the largest interest in the estate. In *Goods of Homan*, 9 Prob. Div. 61, 52 L. J. P. 94, 31 W. R. 955; *Horskins v. Morel*, T. U. P. Charl. (Ga.) 69.

In *Sawbridge v. Hill*, L. R. 2 P. & D. 219, 40 L. J. P. 27, 24 L. T. N. S. 320, 19 W. R. 705, the testator divided the residue of his estate equally between his son, his only next of kin, and his three illegitimate daughters. The son unsuccessfully opposed probate of the will. He had a larger interest in the specific legacies than the daughters, and it appeared that there was in fact no residue. It was held that the son was entitled to administration with the will annexed, but the court refused to require the payment of the costs in the proceeding to contest the will as a condition of the grant to him.

Remainderman Under Will. — *Matter of Drowne*, 1 Connolly (N. Y.) 163, it was held that where the residuary estate was bequeathed in trust for the benefit of the testator's widow during her life or widowhood with remainder over, letters of administration with

the will annexed should be granted to the remaindermen, and not to the widow.

Corporation Named as Executor. — In *England* when a corporation aggregate is named as executor, administration with the will annexed will be granted to its syndic. In *Goods of Darke*, 1 Sw. & Tr. 516, 29 L. J. P. 71, 36 L. T. 24.

Attorney in Fact of Foreign Executor. — In the case of a foreign will, administration with the will annexed is usually granted to the attorney in fact of a foreign executor. *St. Jurgo v. Dunscomb*, 2 Bradf. (N. Y.) 105.

Preference of Males to Females. — In *New York* the preference of males to females, in granting letters of administration, does not apply to letters with the will annexed. *Wood's Estate*, 27 Abb. N. Cas. (N. Y. Surrogate Ct.) 329.

An Erroneous Description of the Legatee will not affect his right to a grant of administration with the will annexed, if it appears that he was in fact the person intended. In *Goods of Hooper*, 13 L. T. N. S. 445, 14 W. R. 210.

Right to Letters with Will Annexed Not Lost by Opposing Probate. — *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33.

3. **Statutory Regulation of Right to Administration with the Will Annexed.** — In some jurisdictions the statutes provide that administration with the will annexed shall be granted as in case of intestacy. *Matter of Garber*, 74 Cal. 338; *Matter of McDonald*, 118 Cal. 277; *Ward v. Oates*, 43 Ala. 515.

4. **Legatees Entitled to Administration as Against Husband of Testatrix.** — In *Goods of Bailey*, 2 Sw. & Tr. 135, 30 L. J. P. 190, 9 W. R. 540, 4 L. T. N. S. 890; *Matter of Drowne*, 1 Connolly (N. Y.) 163.

5. **Representative of Deceased Executor.** — In *Fosdick v. Delafield*, 2 Redf. (N. Y.) 392, it was held that the executor of a deceased executor, though holding funds of the first testator, had no interest in the question as to who was entitled to the administration. *Compare Neave's Estate*, 9 S. & R. (Pa.) 186. In this case the will directed the executors to distribute the residue of the estate at their discretion. All the executors died indebted to the estate, and without having made distribution. It was held that administration with the will annexed should be granted to the administrator of the last surviving executor.

annexed, a universal or residuary legatee is entitled to the exclusion of all other persons.¹

Right of Next of Kin. — If a will does not dispose of the testator's personality, or if there is an unbequeathed residue, administration with the will annexed will be granted to the next of kin, as persons entitled to the estate.²

Disqualification of Person Entitled. — If the person entitled to letters is disqualified, they will generally be granted to his guardian or committee.³

1. Universal Legatees Entitled to Administration with the Will Annexed — *England.* — In Goods of Goodyar, 1 Sw. & Tr. 127, 4 Jur. N. S. 1243; In Goods of Scarborough, 6 Jur. N. S. 1166, 9 W. R. 149; In Goods of Arms, 11 Reports 587, 71 L. T. N. S. 699; In Goods of Shephard, 41 L. T. N. S. 530; *Presant v. Goodwin*, 6 Jur. N. S. 404, 29 L. J. P. 115; In Goods of Ludlow, 1 Sw. & Tr. 29; In Goods of Whiston, 2 Sw. & Tr. 318; *sub nom. Cubbon v. Steele*, 30 L. J. P. 192, 5 L. T. N. S. 140; *Atkinson v. Barnard*, 2 Phill. Ecc. 317; *Thomas v. Butler*, 1 Vent. 219.

New Jersey. — Matter of Kirkpatrick, 22 N. J. Eq. 463; Matter of Booraem, 55 N. J. Eq. 759.

New York. — *Spinning's Estate*, Tuck. (N. Y.) 78; *Bradley v. Bradley*, 3 Redf. (N. Y.) 512.

Pennsylvania. — *Guntton's Estate*, 3 Kulp (Pa.) 34; *Elliott's Estate*, 12 Pa. Co. Ct. Rep. 410, 2 Pa. Dist. Rep. 382; *Robert's Estate*, 3 Montg. Co. Rep. (Pa.) 212.

Where a Convent Is Residuary Legatee, letters of administration with the will annexed will be granted to the superior of the convent. In Goods of M'Auliffe, (1895) Prob. 290, 11 Reports 610.

A Creditor is not entitled to letters with the will annexed on account of the insolvency of the estate, if the widow and residuary legatee are willing to take it. *Hawke v. Wedderburne*, 37 L. J. P. 33, 18 L. T. N. S. 336, 16 W. R. 712.

Who Are Residuary Legatees. — A bequest to S. of "the residue of my things," after specific bequests of plate, furniture, etc., the last specific bequest being one of thirty pounds, does not entitle S. to letters as residuary legatee. In Goods of Ludlow, 1 Sw. & Tr. 29. See generally the title LEGACIES AND DEVICES.

Discretion of Court. — In Matter of Kirkpatrick, 22 N. J. Eq. 463, it was held that the rule of the testamentary courts of *England*, that the residuary legatee is entitled to administration in preference to next of kin and creditors, and that it is not discretionary with the court to grant to any other person than the residuary legatee when he is willing and able to accept, is the rule adopted by the courts of *New Jersey*.

Legatee in Trust. — The rule that a universal legatee or residuary legatee has the first right to administration with the will annexed has been applied so as to give the right to a legatee in trust. In Goods of Palmer, 11 L. R. Ir. 1; In Goods of Ford, 23 L. T. N. S. 323, 18 W. R. 960; *Hutchinson v. Lambert*, 3 Add. Acc. 27; In Goods of Goodyar, 1 Sw. & Tr. 127, 4 Jur. N. S. 1243.

It has been held, however, that a mere trustee having no beneficial interest has no right to the administration, but that the *cestui que trust* is entitled. Matter of Thompson, 33

Barb. (N. Y.) 334. So, also, as to mere trustees. *Coussmaker v. Chamberlayne*, 2 Cas. temp. Lee 243; *Boddicott v. Dalzeel*, 2 Cas. temp. Lee 294; *Fawkener v. Jordan*, 2 Cas. temp. Lee 327.

In Goods of Cosnahan, L. R. 1 P. & D. 183, 14 W. R. 969, 14 L. T. N. S. 337, 35 L. J. P. 76, it was held that where a testator assigned his property in trust, to take effect on his death, for his widow and children, the court, in favor of the intention, would pass over the widow and grant administration to the trustee. As to substituted trustees, see *Cresswell v. Cresswell*, 2 Add. Acc. 342.

2. Next of Kin. — In Goods of Jordan, L. R. 1 P. & D. 555, 37 L. J. P. 22, 16 W. R. 407; In Goods of Aston, 6 Prob. Div. 203, 50 L. J. P. 77, 30 W. R. 92; In Goods of Rhoades, L. R. 1 P. & D. 119, 35 L. J. P. 125.

Grant to Wife as Against Residuary Legatee. — In Goods of Poole, 35 L. J. P. 97, the decedent had a will prepared in which an annuity, the amount being left in blank, was given to his wife, and the residue to his children. The names of the executors were not filled in, and at the instigation of third persons he executed the will in its unfinished condition, at the same time remarking that it would not be good until the blanks were supplied. It was held that the court could not, on affidavit, say that the decedent did not execute the will *animo disponendi*, but that as there was an uncertainty as to the residuary bequest, the right of the wife under statute 21 Henry VIII., c. 5, § 3, would prevail, and administration with the will annexed should be granted to her.

Right to Appointment When Legatees Cannot Take. — Where there are neither residuary, principal, nor specific legatees who can receive letters of administration with the will annexed, letters are properly granted to the next of kin. *Kircheis v. Scheig*, 3 Redf. (N. Y.) 277. See also Matter of Thompson, 33 Barb. (N. Y.) 334.

3. Guardian of Infant Beneficiary. — Where the person entitled to distribution is a minor, letters with the will annexed may be granted to his guardian. In Goods of See, 4 Prob. Div. 86, 48 L. J. P. 70, 40 L. T. N. S. 658, 27 W. R. 665.

In *New York* it is provided by statute that where an infant would be entitled, but for his infancy, to letters with the will annexed, the grant shall be made to his guardian. *Blanck v. Morrison*, 4 Dem. (N. Y.) 297, *sub nom. Blanck's Estate*, 3 How. Pr. N. S. (N. Y.) 58; Matter of Tyler, 6 Dem. (N. Y.) 48; *In re Lasak*, (Supreme Ct.) 8 N. Y. Supp. 740, *affirmed* without opinion in 121 N. Y. 706.

Committee of Lunatic. — If a sole legatee is a lunatic, letters will be granted to his committee. In Goods of Scarlett, 21 W. R. 79, 27 L. T. N. S. 215.

Death of Person Entitled.—In case of the death of the person beneficially entitled to the estate, his personal representative has the right to administration with the will annexed in preference to the testator's next of kin or creditors, unless it is otherwise provided by statute.¹

(2) *Administrators De Bonis Non*—(a) **Definition.**—An administrator *de bonis non* (*administratis*) is one appointed to administer so much of the estate as may be left unadministered on the death, resignation, or removal of a sole executor or administrator, or all of several executors or administrators.² If the predecessor was an administrator with the will annexed or an executor, the successor is called "administrator *de bonis non* with the will annexed" (*de bonis non cum testamento annexo*, ordinarily abbreviated *d. b. n. c. t. a.*).³

(b) **Jurisdiction.**—Jurisdiction to appoint an administrator *de bonis non* is in the court which granted original administration.⁴

(c) **When Appointment Is Authorized.**—An administrator *de bonis non* must be appointed whenever, by reason of the death, removal, or resignation of a sole executor or administrator, or a sole surviving executor or administrator, or otherwise, there is a vacancy in the administration,⁵ and there

1. Executor of Deceased Beneficiary.—*Sidebottom v. Sidebottom*, L. R. 2 P. & D. 365, 41 L. J. P. 23, 20 W. R. 302, 25 L. T. N. S. 855; *Clay v. Jackson*, T. U. P. Charl. (Ga.) 71; *Hendren v. Colgin*, 4 Munf. (Va.) 231; *Cutchin v. Wilkinson*, 1 Call (Va.) 1.

Personal Representative of Deceased Legatee Excluded by Statute.—In *New York* by statute, if there is no residuary or other legatee who can take administration, the next of kin of testator are entitled. *Brown's Estate*, 19 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 278.

Death of Testator and Residuary Legatee by Same Catastrophe.—Where the testator and residuary legatee both perish in the same catastrophe, and there is nothing to show who was the survivor, the legacy does not take effect, and the personal representative of the legatee is not entitled to administration with the will annexed. In *Goods of Carmichael*, 32 L. J. P. 70, 11 W. R. 462, 4 Sw. & Tr. 224. See the title SURVIVORSHIP (IN COMMON DISASTER).

2. Administrator De Bonis Non Defined.—*Woerner on Exrs. & Admsrs.*, § 351; *Crosswell on Exrs. & Admsrs.*, § 211; 3 *Redf. on Wills* 101; 2 *Bl. Com.* 506.

"Every administrator after the first is an administrator *de bonis non* in fact, and it is not important it should so appear of record." *Veach v. Rice*, 131 U. S. 315 [citing *Moseley v. Mastin*, 37 Ala. 219; *Ex p. Maxwell*, 37 Ala. 362, 79 Am. Dec. 62; *Grande v. Herrera*, 15 Tex. 533; *Steen v. Bennett*, 24 Vt. 303].

In *California* no such officer as an administrator *de bonis non* is known. When the authority of a general administrator is terminated and a new one is appointed, the new administrator takes the place of the former administrator in all respects. *Haynes v. Meeks*, 20 Cal. 288.

3. Administrator De Bonis Non with Will Annexed.—*Woerner on Exrs. & Admsrs.*, § 179.

4. Jurisdiction—Court Which Granted Original Administration.—*Beasley v. Howell*, (Ala. 1898) 22 So. Rep. 989; *People v. White*, 11 Ill. 341; *Pawling v. Speed*, 5 T. B. Mon. (Ky.) 582; *Ex p. Lyons*, 2 Leigh (Va.) 761.

In *Clapp v. Beardsley*, 1 Vt. 151, it was held that the appointment of an administrator *de*

bonis non by the probate court of a district other than the one of the original appointment, but to which the town of the decedent's residence had been afterwards attached, was not void, but only voidable. See also *supra*, this section, *Jurisdiction to Appoint Administrators*.

5. Administration Must Be Vacant.—It is essential to the validity of a grant of administration *de bonis non*, that the office should be vacant at the time of the appointment.

United States Courts.—*Griffith v. Frazier*, 8 Cranch (U. S.) 9.

Alabama.—*Matthews v. Douthitt*, 27 Ala. 273, 62 Am. Dec. 765; *Rambo v. Wyatt*, 32 Ala. 363, 70 Am. Dec. 544; *Allen v. Kellam*, 69 Ala. 443.

California.—*Matter of Pina*, 112 Cal. 14; *Hamilton's Estate*, 34 Cal. 464; *Haynes v. Meeks*, 20 Cal. 288.

Connecticut.—*Chamberlin's Appeal*, 70 Conn. 363.

Georgia.—*Justices v. Selman*, 6 Ga. 432.

Illinois.—*Munroe v. People*, 102 Ill. 406.

Indiana.—*Landers v. Stone*, 45 Ind. 404.

Kentucky.—*Creath v. Brent*, 3 Dana (Ky.) 129; *White v. Brown*, 7 T. B. Mon. (Ky.) 446.

South Carolina.—*Petigru v. Ferguson*, 6 Rich. Eq. (S. Car.) 378; *Ex p. Crafts*, 28 S. Car. 281.

Death of Administrator in Chief.—If an administrator dies before completing the administration, letters should be granted of administration *de bonis non*. *Hendricks v. Snodgrass*, Walk. (Miss.) 86; *Merrill v. Merrill*, 92 N. Car. 657.

Death or Removal of One of Several Executors or Administrators.—If there are several executors or administrators, the death of one of them does not authorize the appointment of an administrator *de bonis non*, but the representation survives to the survivor. *Hudson v. Hudson*, Cas. temp. Talb. 127; *Arnold v. Blencowe*, 1 Cox 126; *Hooper v. Scarborough*, 57 Ala. 510; *State v. Green*, 65 Mo. 528; *Lewis v. Brooks*, 6 Yerg. (Tenn.) 167.

In *Adams v. Buckland*, 2 Vern. 514, the question was whether, when one of two joint administrators dies, the administration ceases, like a letter of attorney granted to two, or whether it survives to the survivor. It was

are any unadministered assets belonging to the estate,¹ or any unsatis-

held that it survives; the lord keeper saying, "It is not a bare authority; but rather an office."

Void Order Removing Administrator in Chief. — If the order removing the administrator in chief is void, a grant of letters of administration *de bonis non* is void also. *McDowell v. Jones*, 58 Ala. 25.

Necessity of Formal Revocation of Previous Letters. — If sufficient facts appear of record to justify the revocation of letters previously issued, the absence of any formal entry of the revocation does not invalidate the appointment *de bonis non*. *Bailey v. Scott*, 13 Wis. 618.

Disappearance of Administrator. — In *Goods of Covell*, 15 Prob. Div. 8, where the administrator, after partly administering the estate, left his home, and though several years had elapsed, no trace of him could be discovered, the court revoked the grant made to him, and made a grant of administration *de bonis non* to another.

Absconding Administrator. — A grant *de bonis non* may be made where the administrator absconds, leaving debts unpaid. *Brattle v. Gustin*, 1 Root (Conn.) 425.

Public Administrator — Expiration of Term of Office. — Where a grant of letters to the sheriff *virtute officii* expires with the termination of his term of office, an order of revocation is not necessary to create a vacancy, and therefore a grant *de bonis non* may be made after the expiration of his term of office, without any formal order of revocation. *Landford v. Dunklin*, 71 Ala. 594.

Marriage of Administratrix. — In *Oakes v. Buckley*, 49 Wis. 592, it was held that the marriage of the administratrix was sufficient ground for appointing an administrator *de bonis non*. See also *infra*, this section, *Termination of Authority — Marriage of Executrix or Administratrix*.

Effect of Final Discharge. — In *Indiana*, before the passage of the Act of March 5, 1891, when an estate had been finally settled and the administrator had been discharged, letters of administration *de bonis non* could not be granted as long as the final settlement remained in force. *Pate v. Moore*, 79 Ind. 23; *Vestal v. Allen*, 94 Ind. 273; *Croxton v. Renner*, 103 Ind. 227.

By that act it was provided that a grant *de bonis non* might be made after the final discharge of the administrator, on showing that there are assets within the jurisdiction of the court, which have not been, but should be, administered. *Wahl v. Schierling*, 11 Ind. App. 696.

But even before the passage of the Act of 1891, a grant *de bonis non* was not precluded by the entry of an order discharging the original administrator, but continuing the administration as to matters embraced in exceptions to the report. *Green v. Brown*, 8 Ind. App. 110.

Nor was it precluded by the discharge of the administrator because he could find no assets, since, in that event, there could be no final settlement. *Langsdale v. Woollen*, 99 Ind. 581; *Langsdale v. Woollen*, 120 Ind. 81.

The Act of March 5, 1891, giving the right to have an administrator *de bonis non* appointed in certain cases after the final settlement of the estate had been made, is remedial, and applies to cases where the settlement was made before the act was passed, as well as afterwards. *Barnett v. Vanmeter*, 7 Ind. App. 45.

A grant *de bonis non* may be made after the discharge of the original administrator, where a part of the decedent's estate was not inventoried or accounted for. *Tillson v. Ward*, 46 Ill. App. 179.

Termination of Administration. — An administrator *de bonis non* cannot be appointed after the expiration of the term to which administration is limited by statute. *Dodge v. Phelan*, 2 Tex. Civ. App. 441.

1. Unadministered Assets Essential to Appointment of Administrator D. B. N. — *Chamberlin's Appeal*, 70 Conn. 363; *Scott v. Fox*, 14 Md. 388; *Haven v. Haven*, (N. H. 1898) 39 Atl. Rep. 972.

If There Are No Assets Unadministered, administration *de bonis non* cannot be granted unless there are debts due from the estate. *Chapin v. Hastings*, 2 Pick. (Mass.) 361.

What Are Unadministered Assets. — A Pending Action in the name of the administrator in chief is unadministered assets. *Hayward v. Place*, 4 Dem. (N. Y.) 487.

Leaseholds inventoried but not accounted for or distributed will support a grant of administration *de bonis non*. *Neal v. Charlton*, 52 Md. 495.

Unpaid Claims in favor of the estate authorize the appointment of an administrator *de bonis non*, where they were duly inventoried as part of the estate, and accounted for only by an entry on a list of choses in action filed with the administration account, "Refuses to pay because of inability," and it afterwards appears that such claims are collectible. The approval of such an entry does not constitute a credit to the executor, but merely amounts to a ruling that the claims were uncollectible. *Mallory's Appeal*, 62 Conn. 218.

Conversion into Money of all the assets is not ground for refusing to appoint an administrator *de bonis non*. *De Valengin v. Duffy*, 14 Pet. (U. S.) 282; *Donaldson v. Raborg*, 26 Md. 312.

Property Sold by an Executor or Administrator, for his own use, in collusion with the purchaser, will be regarded in equity as unadministered. *Cubbidge v. Boatwright*, 1 Russ. 549; *Swink v. Snodgrass*, 17 Ala. 653, 52 Am. Dec. 190; *Forniquet v. Forstall*, 34 Miss. 87; *Cochran v. Thompson*, 18 Tex. 652.

A Demand for the Use and Occupation of Land is not unadministered assets, where it was not necessary for the payment of debts, and the administrator did not have possession of the land. *Filbey v. Carrier*, 45 Wis. 469.

Amount of Unadministered Assets. — In *Massachusetts* administration *de bonis non* will not be granted unless there are unadministered assets exceeding twenty dollars. *Pinney v. McGregory*, 102 Mass. 186; *Chapin v. Hastings*, 2 Pick. (Mass.) 361.

Proof of Assets. — *Prima facie* evidence of unadministered assets is sufficient to authorize a

fied debts¹ or legacies,² or if there are any administrative functions to be performed.³

grant of administration *de bonis non*. Scott v. Fox, 14 Md. 388.

In Tillson v. Ward, 46 Ill. App. 179, it was said: "The title to real or personal property cannot be adjudicated in a proceeding such as this, but if it appears upon the hearing of such application that the deceased had an apparently well grounded right to property, real or personal, the proper course is to grant administration if it otherwise ought to be granted, and invest an administrator with power to institute appropriate proceedings to legally test such claims."

1. Unpaid Debts. — The appointment of an administrator *de bonis non* is proper if there are unpaid debts of the decedent, though there is no personal estate unadministered. Brattle v. Gustin, 1 Root (Conn.) 425; Bancroft v. Andrews, 6 Cush. (Mass.) 493; State v. Farmer, 54 Mo. 439.

Debts Barred by Limitation. — But those which are presumed to have been paid or those which are barred by the statute of limitations are not ground for such appointment. Chandler v. Hudson, 11 Tex. 32; Murphy v. Menard, 14 Tex. 62.

What Are Debts — Legacies. — A legacy is not a debt so as to authorize a grant *de bonis non*, where there are no unadministered assets. Chapin v. Hastings, 2 Pick. (Mass.) 361.

Averment of Debts. — A recital in an order appointing an administrator *de bonis non*, that the former administrator had died "without closing the business of the estate," implies the existence of debts. Corley v. Goll, 8 Tex. Civ. App. 184.

Distribution Without Paying Debts. — The fact that the estate has been distributed to the heirs will not affect the right to administration *de bonis non* when there are debts unpaid. Brattle v. Converse, 1 Root (Conn.) 174.

2. Unpaid Legacies. — If any legacies remain unpaid an administrator *de bonis non* may be appointed. Alexander v. Stewart, 8 Gill & J. (Md.) 226; Buss v. Buss, 75 Mich. 163; Scott v. Crews, 72 Mo. 261; Boulton v. Scott, 3 N. J. Eq. 231.

In American Board of Com'rs for Foreign Missions' Appeal, 27 Conn. 344, it was held that where there was no specific unadministered property, an administrator *de bonis non* should not be appointed because there was an unpaid legacy, though there were ample assets, but that the legatee might present his claim against the executor's estate. Ellsworth, J., said: "As the very words themselves import, such an administration is called in only where there is specific property of the deceased remaining unadministered. He then takes it as the immediate successor of the decedent, and never as succeeding a prior executor or administrator, for with such prior executor or administrator he has no privity whatever — not even enough to bring suit in his own name on a judgment rendered in the name of such prior executor or administrator." Two of the five judges concurred in this opinion, and the other two dissented. See also Chapin v. Hastings, 2 Pick. (Mass.) 361.

3. Appointment Merely to Distribute Estate. —

It is generally held that an administrator *de bonis non* should be appointed, though nothing remains to be done except to distribute the estate, because the administration is not complete until settlement and distribution. Carrol v. Connet, 2 J. J. Marsh. (Ky.) 195; Alexander v. Stewart, 8 Gill & J. (Md.) 226; Salisbury v. Black, 6 Har. & J. (Md.) 297, 14 Am. Dec. 279; Haslett v. Glenn, 7 Har. & J. (Md.) 23; Donaldson v. Raborg, 26 Md. 325; Scott v. Crews, 72 Mo. 261; Taylor v. Brooks, 4 Dev. & B. L. (20 N. Car.) 139. But see *contra*, Glover v. Hill, 85 Ala. 41, where it was held that when all the decedent's debts have been paid, or are presumed to be paid, or are barred, and no administrative debts remain but settlement and distribution of the estate, there is no necessity for the appointment of an administrator *de bonis non*.

In Akin v. Akin, 78 Ga. 24, property was devised to the executors for the use and maintenance of the testator's widow, and for the maintenance and education of his children. The executors were directed to manage it in whatever way they might deem most beneficial for the widow and children. The executors placed the widow in possession of the property, and at her death all the children were of age, the executors were dead, and the estate owed no debts. It was held that a grant of administration *de bonis non* was not necessary to distribute the remaining property, which consisted of real estate, among the children. See also *supra*, this title, *When Administration Is Necessary or Proper*.

To Transfer Trust Property. — In Goods of Hancock, 10 Jur. N. S. 758, 33 L. J. P. 174, 3 Sw. & Tr. 557, an administrator *de bonis non* was appointed merely for the purpose of making a transfer of trust property.

To Execute Deed. — An administrator *de bonis non* may be appointed to execute a deed of land sold under order of the court by the original administrator, who died without conveying it to the purchaser, the statute (Rev. Stat., art. 1871) providing that "whenever an estate is unrepresented * * * the court shall grant further administration upon such estate when necessary." Adams v. Richardson, 5 Tex. Civ. App. 439.

But it was held in *Missouri* that an administrator *de bonis non* cannot be appointed to execute a deed which his predecessor had neglected to execute. Long v. Joplin Min., etc., Co., 68 Mo. 422.

To Correct Deed of Original Administrator. — An administrator *de bonis non* will not be appointed after the discharge of the original administrator merely to correct a mistake in a deed made by the original administrator. Grayson v. Weddle, 63 Mo. 523.

To Sue. — If an executor refuses to bring an action for negligence causing the death of the testator, and procures his discharge, administration *de bonis non* may be granted for the purpose of bringing such action. Merkle v. Bennington Tp., 68 Mich. 133.

If Nothing Remains to Be Done by the admin.

But on the Death of the Executor Leaving an Executor, representation devolved at common law on the executor's executor, and the appointment of an administrator *de bonis non* was not authorized.¹

Where a Will Appointing an Executor Does Not Dispose of All the Estate, the appointment of an administrator *de bonis non* to administer the portion undisposed of is not authorized in those jurisdictions where executors are authorized to administer the entire estate, whether disposed of by will or not.²

(d) **Time Within Which Appointment Must Be Made.** — There is no definite limitation as to the time within which an administrator *de bonis non* must be appointed after the death of a decedent, and the limitation prescribed in the case of original administrators does not apply to administrators *de bonis non*; ³ but as a general rule an administrator *de bonis non* cannot be appointed on the ground that there are debts of the decedent remaining unpaid, if payment may be presumed from lapse of time, or if the debts are barred by the statute of limitations,⁴ unless the administrator has power to waive the bar.⁵

(e) **Right to Appointment.** — As a general rule administration *de bonis non* will be granted to the widow, next of kin, creditors, or other persons interested in the estate, in accordance with the same rules that govern grants of original administration.⁶

istrator, a grant of letters *de bonis non* is of no effect. *Wilcoxon v. Reese*, 63 Md. 542.

1. **Death of Executor Leaving Executor.** — *Seabrook v. Williams*, 3 McCord L. (S. Car.) 371. See also *supra*, this section, *Executors — Executor of Executor*.

2. **Property Undisposed of by Will Appointing Executor.** — *Venable v. Mitchell*, 29 Ga. 566; *Hays v. Jackson*, 6 Mass. 149.

3. **Appointment of Administrators De Bonis Non Is Not Limited** by statutes prescribing the time within which general original administration shall be granted. *Crossan v. McCrary*, 37 Iowa 684; *Holmes, Petitioner*, 33 Me. 577; *Kempton v. Swift*, 2 Met. (Mass.) 70; *Bancroft v. Andrews*, 6 Cush. (Mass.) 493; *Adams v. Richardson*, 5 Tex. Civ. App. 439.

The Texas Statute limiting the period of administration does not deny the right to appoint an administrator *de bonis non* to close the estate after the expiration of such period. *Williams v. Howard*, 10 Tex. Civ. App. 527.

4. **When Debts Are Barred by Limitation, or Payment May Be Presumed** from lapse of time, an administrator *de bonis non* cannot be appointed on the ground of the existence of debts. *Chandler v. Hudson*, 11 Tex. 32; *Murphy v. Menard*, 14 Tex. 62. See also the subdivision preceding.

5. **Waiver of Statute of Limitations.** — In *Ray v. Strickland*, 89 Ga. 840, it was held that it was proper to appoint an administrator *de bonis non* where there was an unsatisfied judgment against the decedent which had become dormant after his death, administrators having power under statute (Code 1882, § 2542) to waive the bar of the statute of limitations accruing after the decedent's death. See also *supra*, this section, *Original and General Administrators — Time When Appointment May Be Made*.

6. **Interest in Estate.** — The general rule is that a grant of administration *de bonis non* ought to follow the interest. *Savage v. Blythe*, 2 Hagg. Appendix 150; *Almes v. Almes*, 2 Hagg. Appendix 155; In Goods of *Middleton*, 2 Hagg. Ecc. 60; *Fielder v. Hanger*, 3 Hagg. Ecc. 769; In Goods of *Pountney*, 4 Hagg. Ecc. 290; *Emsley v. Young*, 19

R. I. 65; *Cutchin v. Wilkinson*, 1 Call (Va.) 1; *Hendren v. Colgin*, 4 Munf. (Va.) 231.

Interest of Husband in Wife's Choses in Action. — In Goods of *Risdon*, L. R. 1 P. & D. 637, 38 L. J. P. 40, 20 L. T. N. S. 330, it was held that where a woman obtained letters of administration as a creditor, and then married, and died leaving part of the estate unadministered, and the debt in respect to which she had obtained letters still owing, the husband had not reduced the wife's choses in action in the debt into possession by merely taking possession of that part of the deceased debtor's estate which he found in her hands, and he was refused a grant *de bonis non* of the goods of the debtor until he had first taken out administration for his wife.

In *Clay v. Jackson*, T. U. P. Charl't. (Ga.) 71, it was held that letters of administration *de bonis non* would be granted to the person entitled to the estate, to the exclusion of the next of kin of the intestate.

Person Entitled to Original Grant. — In Goods of *Johnson*, 7 L. R. Ir. 1, it was said that the general rule is that the person originally entitled in distribution is to be preferred to a party taking a derivative interest, in making a grant *de bonis non*, but that the court has discretion in the matter. See also In Goods of *Watts*, 1 Sw. & Tr. 538, 29 L. J. P. 108, 8 W. R. 340; In Goods of *Carr*, L. R. 1 P. & D. 251, 16 L. T. N. S. 181, 15 W. R. 718.

Next of Kin. — In *New Jersey* the statute preferring the next of kin to strangers in grants of administration applies to administration *de bonis non*. *Donahay v. Hall*, 45 N. J. Eq. 720.

The next of kin entitled to administration *de bonis non* are those who were such at the death of intestate. *Cardale v. Harvey*, 1 Cas. temp. Lee 179.

In *Massachusetts* the widow and next of kin are not entitled to preference, but the statute provides that administration *de bonis non* may be granted to "any suitable person." *Russell v. Hoar*, 3 Met. (Mass.) 187.

Seniority. — In *Maryland* seniority gives no preference as among those in equal degree of relationship to the decedent, but the selection

Administrators De Bonis Non with the Will Annexed. — And in case of administration *de bonis non* with the will annexed, the grant is usually made to the same persons who are entitled to original administration with the will annexed.¹

(f) **Validity of Appointment.** — As a general rule the appointment of an administrator *de bonis non* will be presumed to have been valid and regular unless the contrary appears from the record;² and the validity of the appointment is not

ⁱ is in the discretion of the court. *Bowie v. Bowie*, 73 Md. 232.

Creditors. — Where there are debts of the decedent remaining unpaid, administration *de bonis non* may be granted to a creditor. *Brattle v. Converse*, 1 Root (Conn.) 174; *Deans v. Wilcoxon*, 25 Fla. 980.

Who Are Creditors. — One who furnished the widow of the testator with necessaries is not a creditor of the testator so as to entitle him to administration *de bonis non*. *Hunt v. Holden*, 2 Mass. 168.

Loss of Right. — A widow does not lose her preferred right to letters *de bonis non* by renouncing her right to the original administration. *Pendleton v. Pendleton*, 6 Smed. & M. (Miss.) 448.

1. Residuary Legatees Generally Preferred. — *Mallory's Appeal*, 62 Conn. 218; *In re Ward*, 1 Redf. (N. Y.) 254; *Bradley v. Bradley*, 3 Redf. (N. Y.) 512. But see *Spinning's Estate*, *Tuck* (N. Y.) 78.

Specific Legatees. — In *Goods of King*, 8 Prob. Div. 162, administration *de bonis non* with the will annexed was granted to a legatee without requiring the residuary legatee to be cited, where the estate had been administered except as to such legatee.

In *Goods of Wilde*, 13 Prob. Div. 1, a grant was made to a specific legatee without citing the residuary legatee, where the residuary legatee resided abroad, and had no beneficial interest, there being no residue.

But a limited administration *de bonis non* with the will annexed will not generally be granted to a legatee. Persons entitled to the general grant should be first cited, and if they do not take administration the legatee will be entitled to the grant. In *Goods of Watts*, 1 Sw. & Tr. 538, 29 L. J. P. 108, 8 W. R. 340.

Assignee in Bankruptcy. — Where the residuary legatee is a bankrupt, administration *de bonis non* with the will annexed may be granted to his assignee in bankruptcy. *Downward v. Dickinson*, 10 Jur. N. S. 1084, 34 L. J. P. 4.

If the residuary legatees are minors their guardian is entitled to administration *de bonis non* with the will annexed for their benefit, though they had been nominated as executors of the will and residuary legatees in trust, and as such had renounced probate of administration with the will annexed. In *Goods of Loftus*, 3 Sw. & Tr. 307, 10 Jur. N. S. 324, 33 L. J. P. 59.

Personal Representatives of Executor. — If the executor be also residuary legatee and die intestate before fully administering the estate, administration *de bonis non* will be granted to his personal representatives, and not to the next of kin of the testator. *Isted v. Stanley*, 3 Dyer 372a.

In *Goods of Hicks*, 39 L. J. P. 27, 18 W. R. 471, 22 L. T. N. S. 553, where an executor died after proving the will, leaving part of the estate unadministered, administration *de bonis non* was granted to his administrator, the persons entitled to priority being abroad and difficult to be found.

Husband of Sole Legatee. — In *Goods of Martin*, 32 L. J. P. 5, 11 W. R. 191, the testator appointed his widow sole executrix and universal legatee. The widow, after taking probate, remarried, and made a will under a power, appointing her second husband sole executor. The second husband took limited probate of her will and administration of the rest of her effects. It was held that he was entitled to administration *de bonis non* with the will of the first husband annexed, since he represented the whole of his wife's personal estate. See also *supra*, this section, *Administrators with the Will Annexed*.

As to grant of administration *de bonis non*, when executor dies leaving executor, see *supra*, this section, *Executors — How Constituted — Executor of Executor*.

2. Presumption of Regularity — Alabama. — *Russell v. Erwin*, 41 Ala. 292; *Sims v. Waters*, 65 Ala. 442.

Mississippi. — *Gray v. Harris*, 43 Miss. 421.

Missouri. — *Rogers v. Johnson*, 125 Mo. 202.

Texas. — *Willis v. Ferguson*, 59 Tex. 172.

Vermont. — *Steen v. Bennett*, 24 Vt. 303.

Wisconsin. — *Oakes v. Buckley*, 49 Wis. 592.

Presumption as to Unadministered Assets. —

The appointment of an administrator *de bonis non* raises the presumption that the estate had not been fully administered, though an order was made approving the final account of the original administrator. *Rogers v. Johnson*, 125 Mo. 202.

Presumption as to Vacancy in Administration. — A grant of letters *de bonis non* raises the presumption that the administration was vacant, but such presumption cannot prevail on a collateral attack where there is evidence which shows affirmatively that the administration was not vacant. *Allen v. Kellam*, 69 Ala. 442. See also *Green v. Scarborough*, 49 Ala. 137; *Chappell v. Doe*, 43 Ala. 153.

Effect of Void Appointment. — If the appointment is void, the appointee is not even administrator *de facto*. *Hooper v. Scarborough*, 57 Ala. 510.

Effect of Accepting Letters. — The acceptance of letters *de bonis non* is the relinquishment of the original administration, though there was no formal resignation. *Turner v. Wilkins*, 56 Ala. 173.

Collateral Attack. — The doctrine in regard to attacking collaterally the appointment of administrators *de bonis non* is the same as in the case of appointment of general original administrators, which see *supra*.

affected by any mere informality in the appointment.¹

(3) *Special and Temporary Administrators* — (a) **Power to Make Appointment.** — Besides administration extending to the decedent's whole personal estate, courts of probate have inherent power, whenever justice requires it, to grant administration limited either as to time or subject-matter;² and the exercise of this power is generally a matter of discretion.³

(b) **When Appointment Is Authorized.** — The power to appoint a special or temporary administrator may be exercised whenever there is no executor, and a grant of general letters of administration cannot, for any reason, be made at the time; or when the executor, in case the decedent left a will, is temporarily unable to act.⁴

1. Informality Does Not Avoid the Appointment. — Russell v. Erwin, 41 Ala. 292; Bailey v. Scott, 13 Wis. 618.

Designation of Character. — The validity of a grant *de bonis non* is not affected by the fact that the letters were general in form. Moseley v. Mastin, 37 Ala. 216; Steen v. Bennett, 24 Vt. 303.

2. Power to Grant Limited Administration. — 1 Wms. Exrs. (7th Am. ed.), p. 577.

Power Is Inherent. — "Courts vested with the jurisdiction of granting letters testamentary and of administration have the inherent power of granting a limited administration whenever it is necessary for the purposes of justice." McArthur v. Scott, 113 U. S. 399.

The Power to Grant Limited Administration is asserted in Martin v. Dry Dock, etc., R. Co., 92 N. Y. 70. The court said: "No sound reason exists why the surrogate, in the exercise of his authority, should not limit the application of the letters issued by him. We think it rests with him to say, in the exercise of his discretion, what powers should be conferred upon an administrator, and so long as he does not exceed the authority vested in him by law there is no valid ground for assuming that the letters issued by him are unauthorized; he has kept himself within the letter and the spirit of the statute, already cited, which authorizes him 'to direct and control.' In this case he merely allowed the administratrix to institute the first step to be taken for the collection of a claim which existed against the defendant. The law does not prevent or forbid him from issuing letters in the form which he followed; he therein limited the power of the administratrix instead of extending it."

Effect of Unauthorized Limitation. — In Wolffe v. Eberlein, 74 Ala. 99, 49 Am. Rep. 809, Somerville, J., says of the power of the probate court to grant letters of administration limited to a particular act: "Conceding that courts of probate have no power to limit the duties of the administrator to the narrow sphere of conducting a single suit, we are unable to perceive upon what principle this would vitiate the appointment itself. The power to appoint is unquestionable, and so likewise is the judicial act of appointment in exercise of the power. The objection, if valid, goes only to the effort to put a limitation upon the authority of the administrator, which would present the case only of the exercise of a lawful power in an unlawful or irregular manner. This would, at most, render the judgment voidable and not void, and such irregularity could be presented only in a direct proceeding, and not on col-

lateral assaillment. Burke v. Mutch, 66 Ala. 568, and cases there cited. Perhaps the sounder view would be, that the attempt to limit would be a mere nullity, inasmuch as the law fixes the duties of the administrator after appointment, and not the probate judge in violation of the law."

The Power to Appoint a Temporary Administrator Is Restricted in *New York* to cases where there will necessarily be delay in granting letters testamentary or general letters of administration. Tooker v. Bell, 1 Dem. (N. Y.) 52.

As to Statutory Power in the United States to grant special and temporary letters of administration, see various local statutes.

Modification of Order of Appointment. — The powers conferred on an administrator by an order granting limited letters may be modified by a subsequent order. Molloy's Estate, 2 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 15.

3. Special Appointment Discretionary. — Grece v. Helm, 91 Mich. 450; Matter of Chase, 32 Hun (N. Y.) 318; McGregor v. Buel, 24 N. Y. 166; Mootrie v. Hunt, 4 Bradf. (N. Y.) 173; Hicks v. Hicks, 12 Barb. (N. Y.) 322.

4. Appointment of Temporary Administrators — **In General.** — De Flechier's Succession, 1 La. Ann. 20; Grece v. Helm, 91 Mich. 450; South Brooklyn Saw-Mill Co. v. Dock, 3 Dem. (N. Y.) 55; Dock's Estate, 7 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 237; West v. Mapes, 14 N. Y. Wkly. Dig. 92; Lawrence v. Parsons, 27 How. Pr. (N. Y. Supreme Ct.) 26.

"When from Any Cause General Administration Cannot Be Immediately Granted, one or more special administrators may be appointed to collect and preserve the property of the deceased." Pickering v. Weiting, 47 Iowa 242.

Illness of Executor. — A special administrator may be appointed when a sole surviving executor is prevented by illness from transacting the business of the estate. In Goods of Ponsonby, 11 Reports 613, 64 L. J. P. 119, 44 W. R. 240.

Or When an Appeal Is Pending from an order requiring the executor to give bond. Sarle v. Probate Ct., 7 R. I. 270.

Appointment of Executor to Take Effect at Specified Time. — If a will appointing an executor directs him to take charge of the testator's estate at a designated time, and the testator dies before the time designated arrives, the appointment of a temporary administrator to act during the intervening time is necessary. 1 Wms. Exrs. (7th Am. ed.), p. 601.

Vacancy in Administration. — The appointment of a special or temporary administrator is authorized only when there is no execu-

(c) **Selection of Special or Temporary Administrators — In General.** — The selection of persons for appointment as special or temporary administrators is not governed by the rules applicable in the case of a general administrator, but is usually a matter within the discretion of the probate court.¹

Appointment of Person Nominated as Executor. — Where a will is contested, the person named therein as executor may be appointed temporary administrator.²

Persons Entitled to General Letters. — The usual practice in *England* is to grant limited letters of administration to a person who is not entitled to a general grant.³

Disinterested Persons. — Where there is a conflict of interests, a disinterested person should be appointed temporary administrator.⁴

tor or general administrator. *Newman v. Schwerin*, 61 Fed. Rep. 865; *Grace v. Neel*, 41 Ark. 165; *Schroeder v. San Mateo County*, 70 Cal. 343.

Where an Appeal Has Been Taken from the Appointment of an Administrator, his powers are suspended, and the probate court should appoint a special administrator. *Gresham v. Pyron*, 17 Ga. 263; *Palms v. Wayne Probate Judge*, 39 Mich. 302.

Infancy of Person Entitled to Administer. — See *infra*, this section, *The General Kinds of Special and Temporary Administrators — Administrators Durante Minoritate*.

Who May Apply for Appointment. — In *England* a special administrator may be appointed, even on the application of a person not a party to the controversy. *Tichborne v. Tichborne*, 20 L. T. N. S. 820, 1015, 38 L. J. P. 35, 70, L. R. 1 P. & D. 730, 17 W. R. 832.

After Letters Testamentary Have Been Duly Issued, the court has no power to appoint a special or temporary administrator, unless the executor is first suspended or removed. *Schroeder v. San Mateo County*, 70 Cal. 343; *Pickering v. Weiting*, 47 Iowa 242; *Matter of Palmer*, 117 N. Car. 133.

The Mere Fact that There Is a Contest as to the will, will not authorize the appointment of a special administrator, if the will has been admitted to probate and the persons named as executors are competent to act. *Worthington v. Worthington*, (Ky. 1896) 35 S. W. Rep. 113.

1. **Selection of Appointee a Matter of Discretion.** — *Hanna v. Munn*, 3 Md. 230; *Cain v. Warford*, 3 Md. 454; *Lamb v. Helm*, 56 Mo. 420; *State v. Judge*, 10 Mont. 401; *Matter of Plath*, 56 Hun (N. Y.) 223.

Any One Possessing the Necessary Qualifications may be appointed special administrator. *Matter of Plath*, 56 Hun (N. Y.) 223.

But it has been held in *Pennsylvania* that pending a contest as to the validity of a will, letters of administration should be issued to such persons as would be entitled in case of intestacy. *Hoar's Appeal*, 18 W. N. C. (Pa.) 503.

The Right Is Not Lost by the signing and filing of a petition consenting to the probate of a will, and the granting of letters to the executor named in it. *McIntire v. Worthington*, 68 Md. 203.

2. **Appointment of Person Named as Executor.** — In *Wright v. Rogers*, L. R. 2 P. & D. 179, 40 L. J. P. 8, 23 L. T. N. S. 569, 19 W. R. 192, it was held that the persons named in the will as executors should, pending an appeal from a decree suspending the will, be granted special

administration in order that they might be able to make a good title to leasehold property of the estate.

Considerations of Economy are said to require, ordinarily, the appointment of the person named as executor of a disputed will. *Jones v. Hammersley*, 2 Dem. (N. Y.) 286; *Haas v. Childs*, 4 Dem. (N. Y.) 137. See also *Matter of Bankard*, 19 N. Y. Wkly. Dig. 452.

But when he is charged with exercising undue influence over the testator, his application has generally been denied. *Haas v. Childs*, 4 Dem. (N. Y.) 137; *Cornwell v. Cornwell*, 1 Dem. (N. Y.) 1; *In re Wanninger*, (Surrogate Ct.) 3 N. Y. Supp. 137; *Matter of Sterns*, 2 Connolly (N. Y.) 272.

And whether the surrogate should or should not appoint as temporary administrator one who is named as executor in a disputed will must be decided in each case on its particular facts and circumstances. *Jones v. Hammersley*, 2 Dem. (N. Y.) 286.

Executor Having Interest Hostile to Estate. — An executor named in a will should not be appointed temporary administrator pending a contest as to its probate, if he has an interest in any degree hostile to the estate. *Crandall v. Shaw*, 2 Redf. (N. Y.) 100; *Howard v. Dougherty*, 3 Redf. (N. Y.) 535; *Costello's Estate*, 1 Month. L. Bul. (N. Y.) 16; *Moesbyll's Estate*, 3 Month. L. Bul. (N. Y.) 80; *Winpenny's Estate*, 5 Leg. Gaz. (Pa.) 140.

It Is Discretionary with the Orphans' Court of Maryland to grant temporary administration to the person named as executor, or to the largest legatee, or to the person who would be entitled to administration in case of intestacy. *Hanna v. Munn*, 3 Md. 230; *Cain v. Worford*, 3 Md. 454.

3. **Appointment of Person Not Entitled to General Grant.** — *Patteson v. Hunter*, 30 L. J. P. 272.

Personal Representative of Legatee. — In *Goods of Collier*, 2 Sw. & Tr. 444, 31 L. J. P. 63, 5 L. T. N. S. 849, a limited grant of administration in the absence of the executor, was made to the personal representative of a legatee, though the statute (38 Geo. III., c. 87) authorizes such grants to a legatee, but does not mention the personal representative of the legatee.

Letters Pendente Lite Granted to Defendant. — In *De Chatelain v. Pontigny*, 1 Sw. & Tr. 34, 27 L. J. P. 18, the court granted administration *pendente lite* to the defendant, the plaintiff not opposing it.

4. **Appointment of Disinterested Person.** — *Young v. Brown*, 1 Hagg. Ecc. 54; *Stratton v.*

(d) **Effect of Appointment.** — A grant of limited letters of administration does not preclude a grant of general letters to another person.¹

(e) **Tenure of Office.** — Special administrators are appointed for temporary purposes, and not as permanent representatives of the decedent's estate, and when the time for the appointment of a regular administrator arrives, or when the condition of affairs which made the appointment of a special administrator necessary has ceased to exist, the special letters may be superseded by general letters of administration.²

The Death of an Executor does not render absolutely void the appointment of an administrator *durante absentia*, but only renders it voidable.³

(f) **The Several Kinds of Special and Temporary Administrators** — *aa. LIMITATION AS TO TIME* — (*aa*) *Administrators Durante Minoritate.* — If a sole executor, or person entitled to administer in case there is no executor, is a minor, letters of administration will be granted to some suitable person during the minority of such person. This is called administration *durante minoritate*.⁴ It is the usual practice to appoint the guardian of the person during whose minority the appointment is made,⁵ but the court is not required in all cases to appoint the guardian,⁶ the

Stratton, 2 Cas. temp. Lee 49; Dietz v. Dietz, 38 N. J. Eq. 484; Matter of Eddy, 10 Misc. Rep. (N. Y. Surrogate Ct.) 211; Mootrie v. Hunt, 4 Bradf. (N. Y.) 173; Ellmaker's Estate, 4 Watts (Pa.) 37.

1. Grant of General Letters Notwithstanding Limited Grant. — Flora v. Mennice, 12 Ala. 836; Jordan v. Polk, 1 Sneed (Tenn.) 430.

2. Special Administration Superseded by Grant of General Administration. — Flora v. Mennice, 12 Ala. 836; Farrow v. Bragg, 30 Ala. 261; Clemens v. Walker, 40 Ala. 189; Briarfield Iron Works Co. v. Foster, 54 Ala. 622; Hayes v. Hayes, 75 Ind. 395; Cadman v. Richards, 13 Neb. 383; Matter of Eisner, 5 Dem. (N. Y.) 383; Matter of Lewis, 17 Weekly Dig. (N. Y.) 311; Cowles v. Hayes, 71 N. Car. 230.

But if the person appointed special or temporary administrator is afterwards appointed general administrator his powers as special or temporary administrator continue until he qualifies as a general administrator. Fisher's Estate, 15 Wis. 511.

The Appointment of a Collector of a Decedent's Estate Is Absolutely Superseded and ended by the issuing of letters of administration with the will annexed to another person, and the special letters of administration need not be in terms revoked by the decree under which the letters with the will annexed were issued. Nothing further is required to terminate the collector's authority over the estate, or his right to retain its funds. Matter of Lewis, 17 N. Y. Wkly. Dig. 311; Matter of Eisner, 5 Dem. (N. Y.) 383.

Return of Absent Executor. — When an absent executor returns to the state, an administrator who was appointed, pursuant to the *Missouri* statute, to act during his absence, may be removed, though the letters do not show that they were granted pursuant to such statute. Matter of Estes, 65 Mo. App. 38, 2 Mo. App. Rep. 1139.

Where an Executor Is Appointed for a Limited Period or until the happening of some event, his power ceases with the occurrence of such event. Conron v. Clarkson, 3 Ch. Chamb. Rep. 368. See also *infra*, this section, *The Several Kinds of Special and Temporary Administrators*.

3. Appointment Durante Absentia Not Rendered Void by Death of Executor. — Rainsford v. Taynton, 7 Ves. Jr. 460, 3 B. & P. 26.

4. Appointment Durante Minoritate. — In Goods of Thomas, 28 L. T. N. S. 677; Foxwist v. Tremain, 1 Mod. 47; In Goods of Burgess, 9 Jur. N. S. 553, 32 L. J. P. 158, 11 W. R. 687, 9 L. T. N. S. 86, 4 Sw. & Tr. 188; Collins v. Spears, Walk. (Miss.) 310; Pitcher v. Armat, 5 How. (Miss.) 288; Wallis v. Wallis, 1 Winst. L. (60 N. Car.) 78; Ritchie v. McAuslin, 1 Hayw. (1 N. Car.) 220.

But see Richards v. Mills, 31 Miss. 450, in which it was held that if the next of kin entitled to distribution are minors, the right to administer devolves on those who are in the next degree of kindred to the decedent.

If There Are Several Executors and one of them is of age, while the others are minors, the court will not appoint an administrator *durante minoritate*, because the executor who is of age may execute the will. Pigot's Case, Brownl. 46. But see Colborne v. Wright, 2 Lev. 240.

But if There Are Several Next of Kin Equally Entitled to Administration in a case of intestacy, and one of them is an adult, while the others are minors, the rule which governs when there are several executors does not apply, but administration may be refused to the next of kin who is of age, and granted to a third person during the minority of the others. Cartright's Case, Freem. 258.

The Authority of an Administrator Durante Minoritate is limited in point of time to the minority of the person, but there is no other limit. *In re Cope*, 16 Ch. Div. 49, 50 L. J. Ch. Div. 13, 43 L. T. N. S. 566, 29 W. R. 98.

5. Appointment of Guardian of Minor. — In Goods of Orleans, 1 Sw. & Tr. 253; In Goods of Weir, 2 Sw. & Tr. 451; Brotherton v. Hellier, 2 Cas. temp. Lee 131; In Goods of Sartoris, 1 Curt. 910; John v. Bradbury, L. R. 1 P. & D. 245; Blanck v. Morrison, 4 Dem. (N. Y.) 297.

6. Appointment of Person Other than Guardian. — Appleby v. Appleby, 1 Cas. temp. Lee 135; West v. Willby, 3 Phill. Ecc. 374; In Goods of Ewing, 1 Hagg. Ecc. 381; Havers v. Havers, Barn. Ch. Cas. 23.

selection of an administrator *durante minoritate*, as in other cases of special or temporary administration, being in the discretion of the court.¹

Tenure of Office. — Administration *durante minoritate* terminates when the minor or any one of several minors during whose minority the grant was made attains majority.²

(bb) *Administrators Durante Absentia.* — If the executor appointed by a will, or the person entitled to the administration of a decedent's estate, is temporarily out of the country, it may be necessary that an administrator be appointed to act during his absence, for the same reasons that require a grant of temporary letters of administration when the executor or person entitled to administer is a minor.³ This species of administration was granted at common law only before probate or grant of original letters of administration.⁴

Tenure of Office. — The powers of an administrator *durante absentia* usually terminate on the return or death of the executor or person entitled to administer.⁵

(cc) *Administrators Pendente Lite.* — When the right to the executorship under a will or the administration of the estate of an intestate is in litigation an administrator may be appointed to preserve and protect the estate while the litigation is pending,⁶ and the appointment may be made where the contest

1. **Selection Discretionary with Court.** — *Thomas v. Butler*, 1 Vent. 217; *West v. Willby*, 3 Phill. Ecc. 374; *Briers v. Goddard*, Hob. 250; *Pitcher v. Armat*, 5 How. (Miss.) 288.

2. **Tenure of Office.** — *Taylor v. Watts*, Freem. 425; *Freke v. Thomas*, 1 Ld. Raym. 667; *In re Cope*, 16 Ch. Div. 49, 50 L. J. Ch. Div. 13, 43 L. T. N. S. 566, 29 W. R. 98.

The Death of One of Several Minors during whose minority administration was granted does not terminate the administration. *Jones v. Strafford*, 3 P. Wms. 89; *Anonymous*, Brownl. 47. See also *supra*, this section, *Special and Temporary Administrators — Tenure of Office.*

3. **Appointment Durante Absentia.** — *Clare v. Hedges*, 1 Lutw. 342; *Slater v. May*, 2 Ld. Raym. 1071; *In Goods of Lewis*, 29 L. J. P. 94; *In Goods of Hampson*, L. R. 1 P. & D. 1, 11 Jur. N. S. 911, 35 L. J. P. 1; *Matter of Estes*, 65 Mo. App. 38, 2 Mo. App. Rep. 1139; *Ritchie v. McAuslin*, 1 Hayw. (1 N. Car.) 220; *Willing v. Perot*, 5 Rawle (Pa.) 264.

In New York a special administrator may be appointed "when by reason of absence from this state, of any executor named in a will, or for any other cause, a delay is necessarily produced in granting" letters testamentary. *Crandall v. Shaw*, 2 Redf. (N. Y.) 100.

The Practice in the United States when an executor departs from the state in which he was appointed and remains absent for a considerable length of time is to appoint an administrator *de bonis non*, or to disregard the absentee and grant general letters to another person. *Schoul. Exrs. & Admsrs.*, § 133.

4. **Administration Durante Absentia Not Granted After Probate or General Letters.** — 1 Wms. Exrs. (7th Am. ed.), p. 595; *Griffith v. Frazier*, 8 Cranch (U. S.) 9.

The consequence of this rule was that if an executor or administrator went abroad after probate or grant of letters the estate was without a representative. This defect was remedied in *England* by statute 38 Geo. III., c. 87, which provided "that at the expiration of twelve calendar months from the death of any

testator, if the executors or executor to whom probate of the will shall have been granted are or is then residing out of the jurisdiction of his Majesty's courts of law and equity, it shall be lawful for the ecclesiastical court which hath granted probate of such will, upon the application of any creditor, next of kin, or legatee, grounded on affidavit hereinafter mentioned, to grant such special administration as hereinafter is also mentioned." 1 Wms. Exrs. (7th Am. ed.), p. 596.

But by the terms of this statute a special administrator appointed under it can represent the estate only in proceedings in equity. *In Goods of Davies*, 2 Hagg. Ecc. 79.

Subsequent statutes, however, have extended the power of the court so far as to authorize a limited grant of administration whenever the convenience of the estate may require it. *In Goods of Jenkins*, 28 W. R. 431; *In Goods of Richardson*, 35 L. T. N. S. 767; *In Goods of Ruddy*, L. R. 2 P. & D. 330.

5. **Tenure of Office — Return of Executor or Person Entitled to Administer.** — *In Goods of Cassidy*, 4 Hagg. Ecc. 360; *Matter of Estes*, 65 Mo. App. 38.

An administrator *durante absentia*, appointed pursuant to statute 38 Geo. III., c. 87, becomes *functus officio* only on the termination of the proceeding in equity for the purposes of which he was appointed, and not on the return of the executor or administrator while such proceeding is still pending. *Rainsford v. Taynton*, 7 Ves. Jr. 460.

The Death of the Absent Executor does not *ipso facto* render the authority of the administrator *durante absentia* void, but renders it voidable only. *Rainsford v. Taynton*, 7 Ves. Jr. 460, 3 B. & P. 26.

6. **Administrator May Be Appointed Pendente Lite — *En land*.** — *Bellew v. Bellew*, 4 Sw. & Tr. 58, 13 L. T. N. S. 247, 34 L. J. P. 125, 11 Jur. N. S. 588; *Ball v. Oliver*, 2 Ves. & B. 96; *In Goods of Morgan*, 9 Eng. L. & Eq. 581; *Walker v. Woollaston*, 2 P. Wms. 576; *Wills v. Rich*, 2 Atk. 285; *Maskeline v. Harrison*, 2

arose after the death of a general administrator as well as in other cases.¹ The power to make such appointments seems always to have been admitted in cases of intestacy,² but it was formerly considered that such appointment could not be made where the litigation respected a will, because the power of the ordinary to grant letters of administration was strictly limited to ascertained cases of intestacy.³ This strictness, however, was afterwards relaxed because of the necessity that there should be a temporary keeper of the goods of the decedent while the controversy lasted, and it was finally settled that the rule extended to cases involving a contest of a will as well as to cases of intestacy.⁴

Cas. temp. Lee 258; In Goods of Dawes, L. R. 2 P. & D. 147, 23 L. T. N. S. 397.

California. — In re Moore, 86 Cal. 72; In re Woods, 94 Cal. 566.

Michigan. — Palms v. Wayne Probate Judge, 39 Mich. 302.

New York. — Hicks v. Hicks, 12 Barb. (N. Y.) 322.

Pennsylvania. — Ellmaker's Estate, 4 Watts (Pa.) 34.

Tennessee. — Crozier v. Goodwin, 1 Lea (Tenn.) 368.

Texas. — Fisk v. Norvel, 9 Tex. 13, 58 Am. Dec. 128, and Giddings v. Steele, 28 Tex. 732, 91 Am. Dec. 336, to the effect that the statute provides for the appointment of an administrator under the designation of an administrator *pro tem.* for substantially the same purposes and with like powers and limitations of an administrator *pendente lite.*

There Must Be a Contest as to the right to the administration or the executorship in order to authorize the appointment of an administrator *pendente lite.* It is not sufficient that the persons entitled delay taking out letters. Munnikhuysen v. Magraw, 57 Md. 172; South Brooklyn Saw-Mill Co. v. Dock, 3 Dem. (N. Y.) 55.

Nor is such appointment authorized by the fact that there is a contest as to the probate of a will which disposes of real estate alone. Tooker v. Bell, 1 Dem. (N. Y.) 52.

Litigation in Another Court. — The power of the probate court to appoint an administrator *pendente lite* is not limited to cases where the contest is pending in that court, but may be exercised though the proceeding is in another court. Rogers v. Dively, 51 Mo. 193; State v. Moehlenkamp, 133 Mo. 134; Matter of Blair, 60 Hun (N. Y.) 523.

Necessity for Protection of Estate. — An administrator *pendente lite* will be appointed where a *bona fide* suit is pending, irrespective of the property being in any particular danger. In such case the court follows the practice of the court of chancery in appointing receivers. Bellow v. Bellow, 4 Sw. & Tr. 58, 13 L. T. N. S. 247, 34 L. J. P. 125, 11 Jur. N. S. 588.

Appointment in Respect to Partnership Property. — Where the estate of the decedent consists of a share of a business which he was carrying on in partnership at the time of his death, and which was continued by the surviving partner, an administrator *pendente lite* will not be appointed against the wish of the surviving partner, unless he is dealing improperly with the business. Horrell v. Witts, L. R. 1 P. & D. 103, 12 Jur. N. S. 673, 35 L. J. P. 55, 14 W. R. 515, 14 L. T. N. S. 137.

After the Estate Has Been Finally Settled by a general administrator no appointment of an administrator *pendente lite* can be made. Fisk v. Norvel, 9 Tex. 13, 58 Am. Dec. 128.

Necessity of Special Appointment. — The appointment of a general administrator while a contest as to a will is pending is void, as exceeding the power of the court, and cannot therefore be supported as a grant of administration *pendente lite.* Slade v. Washburn, 3 Ired. L. (25 N. Car.) 557.

Selection of Administrators Pendente Lite. — In Maryland by statute the person named as executor in the will is entitled to appointment *pendente lite.* Renshaw v. Williams, 75 Md. 498. See also *supra*, this section, *Selection of Special or Temporary Administrators.*

1. Contest Arising After Death of General Administrator. — *England.* — In Goods of Mergan, 9 Eng. L. & Eq. 581; Ball v. Oliver, 2 Ves. & B. 96.

Alabama. — Watson v. Bothwell, 11 Ala. 650; Robinson v. Robinson, 11 Ala. 947; Clemens v. Walker, 40 Ala. 189.

Georgia. — Walker v. Dougherty, 14 Ga. 653; Dean v. Biggers, 27 Ga. 73.

North Carolina. — Pratt v. Kitterell, 4 Dev. L. (15 N. Car.) 168; Slade v. Washburn, 3 Ired. L. (25 N. Car.) 557; Springs v. Erwin, 6 Ired. L. (28 N. Car.) 27.

Tennessee. — Jordan v. Polk, 1 Sneed (Tenn.) 430.

2. Rule Always Admitted in Cases of Intestacy. — 1 Wms. Exrs. (7th Am. ed.), p. 587.

3. Rule Denied When Litigation Respected Will. — Robin's Case, Moo. 636; Smyth v. Smyth, 3 Keb. 54; Frederick v. Hook, Carth. 153; Slade v. Washburn, 3 Ired. L. (25 N. Car.) 557.

4. Appointment Pending Contest of Will. — *England.* — Walker v. Woollaston, 2 P. Wms. 576; Wills v. Rich, 2 Atk. 285; Maskeline v. Harrison, 2 Cas. temp. Lee 258.

Missouri. — Lamb v. Helm, 56 Mo. 420; State v. Moehlenkamp, 133 Mo. 134.

New York. — Matter of Eddy, 10 Misc. Rep. (N. Y. Surrogate Ct.) 211; Lawrence v. Parsons, 27 How. Pr. (N. Y. Supreme Ct.) 26.

North Carolina. — Slade v. Washburn, 3 Ired. L. (25 N. Car.) 557.

"It was not until after much controversy and some conflicting decisions, that it was settled that such an administration could be granted pending a controversy about a will." Satterwhite v. Carson, 3 Ired. L. (25 N. Car.) 549.

Contest of Codicil Not Affecting Appointment of Executor. — If the contest is in regard to the validity of a codicil which does not affect the appointment of the executors, the court will

At What Time Administration Pendente Lite May Be Granted. — After letters testamentary or of administration have been granted the court has no power to appoint an administrator *pendente lite*, unless such letters are first revoked.¹

Tenure of Office. — An administrator *pendente lite* is appointed to act only during the continuance of the litigation that was the occasion of his appointment, and his powers cease with the termination of the suit.²

(*dd*) **Other Temporary Administrators.** — In addition to the instances considered above, temporary letters of administration may be granted where delay occurs in producing the will for probate,³ or where the will has been lost.⁴ So also if a sole executor or person entitled to administration is insane, temporary letters of administration may be granted during his insanity.⁵

not appoint an administrator *pendente lite*. Mortimer v. Paull, L. R. 2 P. & D. 85, 39 L. J. P. 47, 18 W. R. 901, 22 L. T. N. S. 631.

Controversy as to Right to General or Limited Probate. — An administrator *pendente lite* may be appointed where the litigation is on the question whether the executors named in the will are entitled to a limited or general grant of probate. In Goods of Dawes, L. R. 2 P. & D. 147, 23 L. T. N. S. 397.

1. **Where the Will Has Been Admitted to Probate,** and letters testamentary actually granted, the executors have qualified, and their letters remain unrevoked, the Orphans' Court has no power to appoint an administrator *pendente lite*. The effect of such an order would be to create the greatest confusion in the administration of the estate; for there would be different and opposing parties, both clothed with the powers of administration at the same time. Munnikhuisen v. Magraw, 35 Md. 285.

If the Executor Has Qualified, a curator cannot be appointed pending an appeal from the order admitting the will to probate. McClure v. Alphin, (Ky. 1897) 41 S. W. Rep. 1.

Under the Missouri Statute the court has the authority, after a will has been admitted to probate and letters testamentary issued, to suspend the powers of the executor and appoint an administrator *pendente lite*. Rogers v. Dively, 51 Mo. 193; Lamb v. Helm, 56 Mo. 420; State v. Mohlenkamp, 133 Mo. 134.

2. **Administrator Pendente Lite Appointed for Temporary Purposes Only.** — Robards v. Lamb, 89 Mo. 303.

Functions of Administrator Pendente Lite Terminate with Decree. — Wieland v. Bird, (1894) Prob. 262, 6 Reports 574.

The Office of an Administrator Pendente Lite Continues Pending the Suit Only, and at the termination of the suit his powers and authority immediately cease. "The very title 'administrator *pendente lite*,'" says Dayton, J., "carries with it its own explanation." Cole v. Wooden, 18 N. J. L. 15.

An Appeal from the Decree Operates as an Extension of the suit, and the powers of the administrator *pendente lite* continue until the appeal is disposed of. Taylor v. Taylor, 6 Prob. Div. 29.

Revocation of Letters. — Letters of administration granted *pendente lite* will not be revoked until the termination of the suit. Robinson's Estate, 12 Phila. (Pa.) 14, 34 Leg. Int. (Pa.) 159.

3. **Delay in Producing Will for Probate.** — Where the decedent stated a few days before his death that he had made his will while in

India and had left the will there, temporary administration was granted on the ground that a long interval must elapse before the will could be forwarded from India, during which it was important that there should be some one to protect and manage the property. In Goods of Metcalf, 1 Add. Ecc. 343. See also Sager v. Mead, 164 Pa. St. 125, 35 W. N. C. (Pa.) 333.

In 1 Gibson's Cod. Jur. Ecc. 574, it is said that if the executor does not come in and prove the will temporary administration will be granted until he does so, though there is no controversy regarding the executorship.

4. **Lost Will.** — Where it was shown that there was a will in existence after the testator's death, and the will could not be found and its contents were unknown, temporary administration was granted until the original could be found and brought in for probate. In Goods of Campbell, 2 Hagg. Ecc. 555.

5. **Administration During Insanity of Executor or Person Entitled to Administration.** — In Goods of Burrell, 1 Sw. & Tr. 64; In Goods of Espinasse, 3 Ir. L. R. 185; Hills v. Mills, 1 Salk. 36; In Goods of Milnes, 3 Add. Ecc. 55; In Goods of Crump, 3 Phill. Ecc. 497; Ex p. Evelyn, 2 Myl. & K. 4; In Goods of Binckes, 1 Curt. Ecc. 286; In Goods of Joseph, 1 Curt. Ecc. 907; In Goods of Southmead, 3 Curt. Ecc. 28.

If One of Several Executors or Administrators Becomes Insane, the usual practice is to revoke the letters already granted and grant new letters to such as may be competent. In Goods of Phillips, 2 Add. Ecc. 336; In Goods of Marshall, 1 Curt. Ecc. 297; In Goods of Newton, 3 Curt. Ecc. 428.

Inquisition of Lunacy Not Necessary. — In Ex p. Evelyn, 2 Myl. & K. 4, it is stated in a communication from Dr. Lushington to the lord chancellor, in reply to an inquiry as to the fact of administration during the incapacity of the next of kin, against whom no committee had issued, that "it is the practice of the Ecclesiastical Court to grant administration for the use and benefit of a lunatic, though the person alleged to be so has not been found a lunatic by inquisition. When such a case occurs, the Ecclesiastical Court requires affidavits, stating the fact of lunacy, and that no inquisition has been had, and, of course, no committee appointed. The court then grants administration to the next of kin of the lunatic, for the use and benefit of the lunatic pending the lunacy, and it requires sureties in double the amount of the property, and such sureties must justify."

bb. LIMITATION AS TO SUBJECT-MATTER—(*aa*) *Administration Granted for Particular Purpose*—*aaa. In General.*—Besides administration limited as to time, grants may be made in order to effectuate some particular purpose.¹

bbb. Administrators Ad Litem.—The principal instance of this kind of limited administration is that which is granted for the prosecution or defense of particular suits in which the executor or the administrator with general powers, if any, is unable to act, or cannot properly represent the estate, or where the prosecution of a particular cause of action is the only function for a personal representative to perform. Administrators appointed for this purpose are termed administrators *ad litem*.² Of this character are administrators appointed under the *English* practice for the purpose of instituting or substantiating proceedings in chancery.³ It is not necessary in all cases that the

To Whom Granted.—The usual practice of the court when a sole executor or administrator becomes insane is to grant letters to his committee for his use and benefit during his insanity. In *Goods of Phillips*, 2 Add. Ecc. 336. See also *In Goods of Penny*, 4 Notes of Cas. 659; *In Goods of Binckes*, 1 Curt. Ecc. 286.

But the grant may be made to a residuary legatee with the consent of the committee of the insane executor. In *Goods of Milnes*, 3 Add. Ecc. 55.

The Practice in the United States when a sole executor or administrator becomes a lunatic seems to be to revoke the letters theretofore granted to him, and to grant letters *de bonis non* to another person. See *infra*, this section, subdiv. 4. *e. Removal from Office or Revocation of Letters.*

1. Administration for Particular Purposes.—In *Goods of Drinkwater*, 2 Sw. & Tr. 611, 31 L. J. P. 93, 7 L. T. N. S. 251, a son who was entitled to the whole personal estate of the deceased father wrote from a foreign country to a cousin in England, giving him directions as to securing the amount of the property and transmitting a sum of money to him, and administration was granted to the cousin limited to carrying into effect the directions contained in such letter.

In *Goods of Tucker*, 3 Sw. & Tr. 585, 34 L. J. P. 29, a woman died in France leaving personal estate of her own in England. It was alleged that by the law of France, her husband, from whom she had eloped, could not establish his claim to her property, without a grant from the court of probate. It was held that the court had no jurisdiction to make a limited grant to enable him to establish his claim in the courts of France.

2. Administrators Ad Litem—*United States Courts.*—McArthur *v.* Scott, 113 U. S. 340.

Alabama.—Malone *v.* Hill, 68 Ala. 225; Clark *v.* Knox, 70 Ala. 607, 45 Am. Rep. 93; Page *v.* Bartlett, 101 Ala. 193.

Arkansas.—Wade *v.* Bridges, 24 Ark. 569; Mangum *v.* Cooper, 28 Ark. 253.

Illinois.—May *v.* Leighty, 36 Ill. App. 17.

Michigan.—*In re* Nugent, 77 Mich. 500.

New Jersey.—Matter of Lothrop, 33 N. J. Eq. 246.

New York.—Martin *v.* Dry Dock, etc., R. Co., 92 N. Y. 70, affirming 14 N. Y. Wkly. Dig. 251.

Tennessee.—M'Nairy *v.* Bell, 6 Verg. (Tenn.) 302; Denning *v.* Todd, 91 Tenn. 422; McKamy *v.* McNabb, 97 Tenn. 236.

Texas.—Callahan *v.* Houston, 78 Tex. 494.

Appointment Authorized if Administration Is Vacant or Representative Disqualified.—Newman *v.* Schwerin, 61 Fed. Rep. 865; *Ex p.* Lyon, 60 Ala. 650; Malone *v.* Hill, 68 Ala. 225; Grace *v.* Neel, 41 Ark. 165; Denning *v.* Todd, 91 Tenn. 422.

In *Goods of Williams*, 31 L. J. P. 40 note, letters of administration limited to the purpose of suing for the negligence by which the intestate's death was caused were granted to her mother, where her husband was abroad and not expected to return until after the period limited for bringing such action.

Appointment for Purpose of Suing General Administrator.—In May *v.* Leighty, 36 Ill. App. 17, it was held that where an administrator had inventoried notes given by himself to the decedent, but claimed credit for them on the ground that he was only to pay them in the lifetime of the decedent, an administrator *pro tem.* should be appointed to sue on the notes for the purpose of determining the administrator's liability.

Appointment to Set Aside Fraudulent Conveyance by Decedent.—In *In re* Nugent, 77 Mich. 500, it was held that under the *Michigan* statute authorizing suit by a personal representative to set aside a fraudulent conveyance made by the decedent, an administrator might be appointed for the purpose of bringing such suit.

In *New York* the appointment is limited to rights of action given by special provision of law, and is not authorized in case of an ordinary claim or debt due the decedent. Mallon's Estate, 13 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 205.

In *Texas* an administrator may be appointed for the purpose of prosecuting an action for the recovery of land. Callahan *v.* Houston, 78 Tex. 494.

3. Administration Limited to Chancery Proceedings—*England.*—In *Goods of Brown*, L. R. 2 P. & D. 455; Burdon *v.* Morgan, L. R. 2 P. & D. 371, 41 L. J. P. 26, 20 W. R. 613, 26 L. T. N. S. 405; In *Goods of Dodgson*, 1 Sw. & Tr. 259; Maclean *v.* Davison, 1 Sw. & Tr. 425; Hawarden *v.* Dunlop, 2 Sw. & Tr. 614, 31 L. J. P. 180, 7 L. T. N. S. 251; In *Goods of Frampton*, 3 Sw. & Tr. 169, 9 Jur. N. S. 755, 8 L. T. N. S. 701; In *Goods of Turner*, 3 Sw. & Tr. 476, 10 Jur. N. S. 708, 33 L. J. P. 180; In *Goods of Hesse*, 1 Hagg. Ecc. 93; Harris *v.* Milburn, 2 Hagg. Ecc. 62; Woolley *v.* Green, 3 Phill. Ecc. 314.

appointment should be made by the court of probate, but in some jurisdictions the court in which the suit or proceeding is pending, though not a court of probate, may make the appointment.¹

ccc. *Administrators Ad Colligendum.* — Another instance of administration limited as to subject matter is the appointment of an administrator to collect the assets of the estate when there is delay in granting letters testamentary or of administration. One so appointed is known as a collector or administrator *ad colligendum*.²

(bb) *Administration Granted in Respect to Particular Property.* — Under some circumstances the court is authorized to grant letters of administration limited to particular property,³ but such grant will not be made unless strong reasons are given therefor.⁴

1. **Appointment by Court in Which Suit Is Pending.** — *Wolfe v. Eberlein*, 74 Ala. 99, 49 Am. Rep. 809; *Wade v. Bridges*, 24 Ark. 569; *M'Nairy v. Bell*, 6 Verg. (Tenn.) 302. But see *contra*, *Cadman v. Richards*, 13 Neb. 583.

2. **Administrators Ad Colligendum.** — In *Goods of Tepper*, 25 L. T. N. S. 853; In *Goods of Schwerdtfeger*, 45 L. J. P. Div. 46, 24 W. R. 298, 34 L. T. N. S. 72, 1 Prob. Div. 424; In *Goods of Stewart*, 38 L. J. P. 39, L. R. 1 P. & D. 727; In *Goods of Wyckoff*, 3 Sw. & Tr. 20, 9 Jur. N. S. 84, 32 L. J. P. 214, 11 W. R. 218, 7 L. T. N. S. 565; In *Goods of Clarkington*, 2 Sw. & Tr. 380, 10 W. R. 124, 8 Jur. N. S. 84, 7 L. T. N. S. 218; *Flora v. Mennice*, 12 Ala. 836; *Sargent v. Sargent*, 168 Mass. 420; *Mootrie v. Hunt*, 4 Bradf. (N. Y.) 173; *Lawrence v. Parsons*, 27 How. Pr. (N. Y. Supreme Ct.) 26; *Crandall v. Shaw*, 2 Redf. (N. Y.) 100.

A special administrator may be appointed for the purpose of collecting a French spoliation claim. *Sargent v. Sargent*, 168 Mass. 420.

In Wisconsin there was no statute in 1867 authorizing the appointment of a person to collect and to take charge of an estate until letters in the ordinary form should be issued. *Lill's Chicago Brewery Co. v. Russell*, 22 Wis. 178.

The present statute provides that when there shall be a delay in granting letters testamentary or of administration, occasioned by an appeal from the allowance or disallowance of the will, or from any other cause, or when it shall appear to the satisfaction of the court to be necessary, the county court may appoint a special administrator to act until the matter occasioning the delay shall be disposed of or the necessity therefor cease to exist, and an executor or administrator is appointed; and that such special administrator shall have power to collect all the goods, chattels and credits of the deceased and preserve the property, etc. *Sanb. & B. Wis. Stat.* 1898, §§ 3810-11.

3. **Administration Limited to Particular Property or Interests.** — *Allen v. Humphrys*, 8 Prob. Div. 16, 52 L. J. P. 24, 48 L. T. N. S. 125, 31 W. R. 272, 47 J. P. 24; In *Goods of King*, 8 Prob. Div. 162, 52 L. J. P. 93, 31 W. R. 843; In *Goods of Asford*, 1 Sw. & Tr. 540, 8 W. R. 340; *Pegg v. Chamberlain*, 1 Sw. & Tr. 527, 8 W. R. 273; In *Goods of Baynes*, 7 Jur. N. S. 832; In *Goods of Rhoades*, L. R. 1 P. & D. 110, 35 L. J. P. 125; In *Goods of Hughes*, L. R. 3 P. & D. 140, 43 L. J. P. 29, L. T. N. S. 377; In *Goods of Hammond*, 6 Prob. Div. 104, 50 L. J. P. 70, 44 L. T. N. S. 649, 29 W. R. 807.

In *Goods of Councell*, L. R. 2 P. & D. 314, 41 L. J. P. 16, 25 L. T. N. S. 763, a married woman who was a legatee under the will of her father died in the lifetime of her father, leaving a son. Her husband survived her, but died before her father, leaving a will. It was held that her son was entitled to administration on her father's estate, limited to the bequest to her, since the bequest under 7 Wm. IV. and 1 Vict., c. 26, § 33, took effect as if the legatee had died immediately after her father, in which case she would have been a widow.

In *Goods of Burdett*, 1 Prob. Div. 427, 45 L. J. P. Div. 71, 34 L. T. N. S. 855, a creditor of an intestate, after taking out administration in that character, was adjudicated a bankrupt and died leaving a part of his intestate's estate unadministered. The trustee in bankruptcy assigned to one C., a creditor of the deceased debtor, the debts due from the estate of the first decedent. It was held that C. was entitled to a grant of administration *de bonis non* on the estate of the first intestate limited to the deceased administrator's interest therein.

In *Patterson v. Hunter*, 30 L. J. P. 272, where a creditor insured the life of his debtor, but the policy was by mistake made payable to the representative of the debtor, administration on his estate was granted to the creditor limited to the policy.

In *Goods of Dixon*, 10 Jur. N. S. 854, letters of administration were granted to the assignee of a deceased tradesman, limited to the book debts specified in the deed of assignment.

If a person applying for administration has no direct interest in the personal estate of the decedent, the letters must be limited to the particular fund to which he is entitled. In *Goods of Dodgson*, 5 Jur. N. S. 252, 1 Sw. & Tr. 260, 28 L. J. P. 116.

4. **Strong Reasons Required.** — In *Goods of Watts*, 1 Sw. & Tr. 538; In *Goods of Somerset*, L. R. 1 P. & D. 350.

Limited Administrations Not Favored in American Practice. — A learned text writer says that "American policy appears to be to resist general or full administration on the one hand, whether original or *de bonis non*, and whether as to estates testate or intestate, as (together with appointing executors) the usual and normal grant of authority, and discouraging on the other hand, limited grants under strange names upon mere judicial discretion, but rather facilitating removals and the creation of vacancies in an emergency to provide by way of substitute for the miscellaneous

d. PUBLIC ADMINISTRATORS — (1) In General — Definition. — A public administrator has been defined as an officer authorized by the statute law of several of the states to effect a settlement of estates of persons dying without relatives entitled to administer.¹ It seems, however, that this definition is too narrow in the limitation to the settlement of the estates of persons "dying without relatives entitled to administer," because, as a general rule, the estate may be committed to the public administrator whenever for any reason it is not otherwise administered, whether there are persons entitled to administer or not.²

Nature of Public Administration. — A public administrator is generally on the same footing with other administrators, being liable to the same extent and amenable to the same remedies.³

(2) *How Appointed.* — In some of the states a public administrator is appointed or elected in each county, while in others some county officer is *ex officio* public administrator.⁴

(3) *Committing Estates to Public Administrator.* — As a general rule an estate may be committed to the public administrator whenever there is no person interested in it competent and willing to act,⁵ or in any other case in

kinds of limited administration, what may be termed a special administration." Schoul. Exrs. & Admsrs., § 135.

1. Public Administrator Defined. — Abb. L. Dict., title Administrator.

Bouvier defines public administration thus: "That which the public administrator performs. This happens in many of the states by statute in those cases where persons die intestate, without leaving any who are entitled to apply for letters of administration." Bouv. L. Dict., title Administration.

2. See *infra*, this section and subdivision, *Committing Estates to Public Administrator.*

3. Public Administrator on Same Footing as Others. — Governor *v.* Gantt, 1 Stew. (Ala.) 388; Governor *v.* Davis, 9 Ala. 917; McLaughlin *v.* Nelms, 9 Ala. 925; Thornton *v.* Loague, 95 Tenn. 93.

Collateral Attack. — The authority of the public administrator in any case is not subject to collateral attack. Dunn *v.* German-American Bank, 109 Mo. 90.

4. In Alabama a general administrator is appointed in each county by the judge of probate. Russell *v.* Erwin, 41 Ala. 292. And in case there is no general administrator, administration may be committed to the sheriff or coroner. Burnett *v.* Nesmith, 62 Ala. 261; Burke *v.* Mutch, 66 Ala. 568; Landford *v.* Dunklin, 71 Ala. 594.

In Tennessee the public administrator is elected and holds his office until his successor is elected and qualified, and in case of vacancy the county court fills the vacancy for the unexpired term. State *v.* Anderson, 16 Lea (Tenn.) 321.

Sheriff Ex Officio Public Administrator. — State *v.* Watts, 23 Ark. 304; Williamson *v.* Furbush, 31 Ark. 539; Wilson *v.* Dibble, 16 Fla. 782; McNeil *v.* Smith, 55 Ga. 313; Hammon *v.* Pearl, 6 T. B. Mon. (Ky.) 410; Scarce *v.* Page, 12 B. Mon. (Ky.) 311; Hutcheson *v.* Priddy, 12 Gratt. (Va.) 85.

Clerk of Superior Court Ex Officio Public Administrator. — Johnston *v.* Tatum, 20 Ga. 775.

5. Vacant Administration. — The public administrator will be authorized to take charge of an estate only when the administration is

vacant, and he cannot ask for the removal of an administrator previously appointed. Winn's Succession, 26 La. Ann. 162; Miller's Succession, 28 La. Ann. 573; Burnside's Succession, 34 La. Ann. 728; Saloy's Succession, 44 La. Ann. 433; Headlee *v.* Cloud, 51 Mo. 301; Becraft *v.* Lewis, 41 Mo. App. 546.

In Burnside's Succession, 34 La. Ann. 728, it was said in regard to the public administrator, that "the utility of his office arises according to law, and his services are required only when a testate succession is not being administered at all. His office was intended to fill a vacancy, but he has no power to provoke a vacancy."

In Smith's Succession, 40 La. Ann. 105, Bermudez, C. J., said: "The purpose which the legislature intended to accomplish when it created the trust of public administrator was to provide for a prompt and safe custody of the property composing vacant successions, which otherwise might be exposed to ruin and devastation. Hence it is that the law distinctly provides that it is only where the deceased has left no will appointing an executor, and where there are no heirs present or represented, that the public administrator can be put in charge of an unclaimed estate, and that, even where appointed, his functions cease on the recognition of the heirs. It has accordingly been held that where the heirs have taken possession, the public administrator cannot interfere."

Estates Not Otherwise Administered. — The public administrator is entitled to the administration of all estates not otherwise administered. Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237; Public Administrator *v.* Watts, 1 Paige (N. Y.) 347.

Death of Executor. — The public administrator is not entitled to administer where the testamentary executor has died and there are heirs in the state. Succession of Bougere, 30 La. Ann. 422.

If the Executor Refuses to Qualify and no one will administer, the estate will be committed to the sheriff. Hammon *v.* Pearl, 6 T. B. Mon. (Ky.) 415.

Delay in Application by Persons Entitled. — In North Carolina an estate may be committed to

which it may be authorized by law.¹

In Case of the Refusal of the public administrator to administer. the probate court may compel him to act, and mandamus will lie to set the court in motion.²

Priority of Right of Public Administrators. — In some jurisdictions public administrators are enumerated in the statutes prescribing the order in which administration shall be granted, sometimes giving them the preference over creditors of the estate.³

the public administrator, if the persons entitled to the administration do not apply thereof within six months after the decedent's death. *Jenkins v. Sapp*, 3 Jones L. (48 N. Car.) 510; *Hill v. Alspaugh*, 72 N. Car. 402; *Garrison v. Cox*, 95 N. Car. 353.

Temporary Absence of Heirs. — Mere temporary absence of the widow or heirs from the state does not authorize the commitment of an estate to the public administrator. *Longuefosse's Succession*, 34 La. Ann. 583.

And the heir is entitled to the appointment, as against the public administrator, if present in time to oppose the appointment of the public administrator, though he was absent when the application was made. *White's Succession*, 45 La. Ann. 632.

Commitment to Public Administrator Pending Contest. — In *Louisiana* an estate will be committed to the public administrator pending a contest as to the right to the administration, and in such case he has only the powers of a provisional administrator. *Supple's Succession*, 23 La. Ann. 24.

But he cannot be appointed provisionally pending a contest, if he is himself an applicant. *Miller's Succession*, 27 La. Ann. 574.

Preservation of Estate. — The commitment of an estate to the public administrator is authorized by the fact that there was no one capable of taking care of it, and that it was liable to deterioration and loss. *Adams v. Larrimore*, 51 Mo. 130.

Partnership Estate. — The interest of a decedent partner in the partnership effects may be committed to the public administrator. *Headlee v. Cloud*, 51 Mo. 301.

Administration De Bonis Non. — Administration *de bonis non* may be committed to the public administrator. *Ketchum v. Morrell*, 2 N. Y. Leg. Obs. 58.

Proof of the Authority of a public administrator is made by a copy of the record of his appointment. *Davis v. Shuler*, 14 Fla. 438; *Littleton v. Christy*, 11 Mo. 390.

The Mere Fact that a Sheriff Is Administrator does not show that he acted as public administrator so as to require the estate to be committed to his successor in office. *King v. Griffin*, 6 Ala. 387.

Effect of Granting Letters to Public Administrator. — The grant of letters to the public administrator does not disqualify him afterwards to take out letters in his private capacity. *Macey v. Stark*, 116 Mo. 481.

1. In *Missouri* the statute provides that the public administrator may be ordered to take charge of the estate for any good cause. *Callahan v. Griswold*, 9 Mo. 784.

2. **Public Administrator Compellable to Act.** — A public administrator has no right to refuse to administer on an estate, and the court may compel him to act. *Johnston v. Tatum*, 20 Ga. 775.

The probate judge may be compelled by mandamus to make an order compelling the public administrator to administer. *Brennan v. Harris*, 20 Ala. 185.

3. **Priority of Right of Public Administrator.** — In *California* a public administrator is entitled to a preference over creditors. *McKinnon's Estate*, 64 Cal. 226; *Hyde's Estate*, 64 Cal. 228.

But formerly creditors were entitled to preference. *Doak's Estate*, 46 Cal. 573.

In *Illinois* creditors are preferred to the public administrator. *Rosenthal v. Prussing*, 108 Ill. 128.

Right as Against Next of Kin. — On the removal of an administrator, the public administrator cannot be given priority of appointment as special administrator, over a person whom the statute prescribing the order in which letters shall be granted prefers to the public administrator, though another section of the statute provides that when an administrator is removed a special administrator shall be appointed, or the court may direct the public administrator to take charge of the estate, it being provided by still another section that when a special administrator is appointed the court shall observe the preference prescribed by the section of the statute first above mentioned. *In re Ming*, 15 Mont. 79.

But as against relatives not entitled to share in the estate, the public administrator is entitled to administer. *Matter of Eggers*, 114 Cal. 464.

Alien Relatives. — The public administrator has a right superior to alien blood relatives of the decedent. *Murphy's Estate*, Myr. Prob. (Cal.) 185.

Guardian of Next of Kin. — In *New York*, by special statute, the public administrator is preferred to the guardian of the next of kin. *Speckles v. Public Administrator*, 1 Dem. (N. Y.) 475.

The Law in Force at the Time a Grant of Administration Is Made, and not the law in force at the time of the death of the decedent, governs as to the right of the public administrator. Thus it was held that where a statute giving the guardian of an infant heir priority of right over the public administrator was extended so as to include guardians of incompetent persons, the guardian of an incompetent person was entitled to be administrator where the application was made after the second statute was passed, though the decedent had died previously. *Matter of McLaughlin*, 103 Cal. 420.

Preference Over Nominees of Person Entitled to Administer. — If the next of kin are disqualified to administer, they cannot, by nominating another, deprive the public administrator of his right to administer. *Morgan's Estate*, 53 Cal. 243; *Kelly's Estate*, 57 Cal. 81; *Hyde's Estate*, 64 Cal. 228; *Matter of Garber*, 74 Cal. 338; *Sutton v. Public Administrator*, 4 Dem. (N. Y.) 33; *Public Administrator v. Watts*, 1 Paige

(4) *Necessity of Letters or Order of Court.* — As a general rule a public administrator has no authority to act until he has received letters of administration, or until he is directed by order of the probate court to assume the administration,¹ but in some jurisdictions, if the estate is exposed to loss or damage, the public administrator may act without an order of court.²

(5) *Tenure of Office.* — The question has frequently arisen as to whether the administration of an estate in course of settlement by a public administrator when his term of office expires is to be completed by him or by his successor in office, and the decisions have not been uniform. In some jurisdictions it is held that the grant of administration attaches to and passes with the office.³ In other jurisdictions it is held that the administration of an estate commenced by a public administrator and not completed when his term of office expired is nevertheless to be completed by him, and does not devolve on his successor,⁴ but he is not entitled to administer on an estate as against his successor in office merely because his petition for administration was pending when his term of office expired.⁵

Revoking Letters of Public Administrator. — If letters have been improvidently granted to the public administrator, or if, without authority, he takes charge of an estate, his letters may be revoked, or his action in assuming the administration may be annulled.⁶

e. ADDITIONAL APPOINTMENT. — When a person named as executor in a will, or entitled to the administration of an estate, so desires, he may have a third person associated with him in the office,⁷ and such associate

(N. Y.) 382; *Matter of Blank*, 2 Redf. (N. Y.) 443.

Preference to Trust Companies. — The public administrator may, in the discretion of the court, be preferred to a trust company authorized by statute to administer, because an individual will be preferred to a corporation. *Goddard v. Public Administrator*, 1 Dem. (N. Y.) 480, 94 N. Y. 544.

Waiver of Preference. — A public administrator does not waive his right of preference over creditors by withdrawing a petition made by him for administration in his individual capacity. *McKinnon's Estate*, 64 Cal. 226.

Wishes of Decedent. — Administration may be committed to the public administrator though the deceased expressed a wish that another person should settle the estate. *Morgan's Estate*, 53 Cal. 243.

1. Letters Necessary to Enable Public Administrator to Act — *California.* — *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Hamilton's Estate*, 34 Cal. 464.

Florida. — *Davis v. Shuler*, 14 Fla. 438.

Illinois. — *Thomas v. Adams*, 10 Ill. 319; *Langworthy v. Baker*, 23 Ill. 484.

Louisiana. — *Miller's Succession*, 27 La. Ann. 574.

Tennessee. — *State v. Anderson*, 16 Lea (Tenn.) 321.

The public administrator does not administer by virtue of his office, but by virtue of a regular letter granted to him in each particular case. *Miller v. Franklin Bank*, 1 Paige (N. Y.) 444.

Estoppel to Deny Authority. — If a public administrator receives assets under an order of court directing him to administer, he is estopped afterwards to deny that he is administrator, though no letters were issued to him. *Thompson v. Bondurant*, 15 Ala. 346, 50 Am. Dec. 136.

2. Order of Court Unnecessary — Estate Exposed to Loss. — *Williamson v. Furbush*, 31 Ark. 539; *Adams v. Larrimore*, 51 Mo. 130.

But where the public administrator acts on his own judgment in taking charge of the estate, his determination that such action is necessary to save the estate from loss is not conclusive. The final determination of the question is for the probate court. *McCabe v. Lewis*, 76 Mo. 296.

3. Successor in Office Entitled to Pending Administration. — *Ragland v. Calhoun*, 36 Ala. 606; *Landford v. Dunklin*, 71 Ala. 594; *May v. Marks*, 74 Ala. 249; *Cabrol's Succession*, 28 La. Ann. 602; *Cox v. Martin*, 75 Miss. 229; *Levi v. Huggins*, 14 Rich. L. (S. Car.) 166.

4. Successor in Office Not Entitled to Pending Administration — *California.* — *Rogers v. Hoberlein*, 11 Cal. 120; *Aveline's Estate*, 53 Cal. 259.

Georgia. — *Beale v. Hall*, 22 Ga. 431.

Kentucky. — *Olsen v. Rich*, 79 Ky. 244.

Missouri. — *Warren v. Carter*, 92 Mo. 288.

Tennessee. — *Thornton v. Loague*, 95 Tenn. 93.

Virginia. — *Dabney v. Smith*, 5 Leigh (Va.) 13; *Tunstall v. Withers*, 86 Va. 892.

5. Petition Pending When Term of Office Expired. — *In re Pingree*, 100 Cal. 78.

6. An Improvident Order committing an estate to the public administrator may be revoked. *Proctor v. Wanmaker*, 1 Barb. Ch. (N. Y.) 303; *Varnell v. Loague*, 9 Lea (Tenn.) 158.

Wrongfully Assuming Administration. — If the public administrator takes charge of an estate without an order of the probate court, his action may be annulled by the court. *McCabe v. Lewis*, 76 Mo. 296.

7. Person Entitled to Administration May Have Associate Appointed — *England.* — In *Goods of Grundy*, 37 L. J. P. 21.

California. — *Kirtland's Estate*, 16 Cal. 161.

Mississippi. — *Jordan v. Ball*, 44 Miss. 194.

need not be selected from the class next entitled to the administration, nor is their consent necessary,¹ but it is only with the consent of the person entitled to administer that the appointment can be made.²

3. Qualification of Executors and Administrators. — It is a universal requirement by statute, in both *England* and the *United States*, that an administrator shall give bond for the faithful discharge of the duties of his office, and as a general rule executors also are required to give bond in the *United States*, unless it is dispensed with by the will.³ Both executors and administrators are required to take an oath of office, the form of which is usually prescribed by statute.⁴

Failure to Qualify. — The authorities are divided as to the effect on the acts of the personal representative of his failure to qualify as required by law. In

New York. — *In re Root*, 1 Redf. (N. Y.) 257.

Tennessee. — *Johnson v. Molsbee*, 5 Lea (Tenn.) 444; *Phillips v. Green*, 4 Heisk. (Tenn.) 350.

But see *contra*, *Gause's Estate*, 1 Chest. Co. Rep. (Pa.) 105.

Right to Associate Appointment Not Limited to Intestacy. — Under the *New York* statute providing that letters of administration may be granted to one or more competent persons, though not entitled to the same, with the consent of the person entitled, to be joined with such person, the right to an associate appointment is not limited to cases of intestacy, but a person who is legally entitled to letters of administration with the will annexed may have another person joined with him, though such other person is not in his own right entitled to letters. *Matter of Moehring*, 24 Misc. Rep. (N. Y. Surrogate Ct.) 418. See also *Quintard v. Morgan*, 4 Dem. (N. Y.) 168.

Purpose of Associate Appointment. — In *Kirtland's Estate*, 16 Cal. 161, it was said that the object of the statute authorizing the appointment of some competent person, at the request of the person entitled, to be joined with such person, was to allow those entitled to letters the aid of those more competent.

1. Selection of Associate to the Exclusion of Relatives. — In *Shropshire v. Withers*, 5 J. J. Marsh. (Ky.) 210, the intestate left a widow and brothers and sisters, but no children. The widow applied for letters of administration, and asked that a person selected by her be associated with her in the administration. The brothers of the intestate opposed the appointment of the association, claiming that they were entitled to preference. The court, by Mr. Chief Justice Robertson, said: "If the wife desired the counsel or co-operation of a coadjutor, the court was not bound to select one of the brothers; such a selection might have frustrated the objects of the wife, and have virtually defeated her right. She was entitled to the administration. The brothers could claim no right to be associated with her; her right was sole and exclusive; and if, at her instance, and for her benefit, the county court thought proper to associate another person with her, the brothers had no right to demand the appointment. The county court might have appointed her alone; and as she was unwilling to be associated with one of the brothers, it may be presumed that she would have been qualified as sole administratrix rather than to have been connected with any

one of them in the administration. They have, therefore, sustained no injury, and have no cause for complaint."

2. Consent of Person Entitled Necessary. — In *Peters v. Public Administrator*, 1 Bradf. (N. Y.) 200, the court said that "such a thing was never heard of, as the court forcing upon a party entitled a joint administration against his consent;" and cited *Elwes v. Elwes*, 2 Cas. temp. Lee 573; *Budd v. Silver*, 2 Phill. Ecc. 115; *Warwick v. Greville*, 1 Phill. Ecc. 123; *Coppin v. Dillon*, 4 Hagg. Ecc. 376; *Leggatt v. Leggatt*, 1 Lee 348; *Dampier v. Colson*, 2 Phill. Ecc. 55; *Coe v. Hume*, 4 Hagg. Ecc. 398.

The Death of One of Two Executors before the death of the testator does not authorize a court of probate to appoint an administrator with the will annexed to act with the surviving executor, and such appointment is without jurisdiction and void. *Terry's Appeal*, 67 Conn. 181.

Consent Not Revocable. — After a widow has consented to join a stranger with her in the administration, she cannot revoke the consent. *Williams' Estate*, Tuck. (N. Y.) 8.

3. Qualification — Necessity of Giving Bond. — See *infra*, this title, *Administration Bonds*.

An Executor of an Executor must qualify as executor of the first estate before he can act as the executor of the other estate. *Drane v. Bayliss*, 1 Humph. (Tenn.) 174.

4. Oath Required in England. — 3 Williams Exrs. (7th Am. ed.) 662.

Oath Required in United States. — *Morris v. Chicago*, etc., R. Co., 65 Iowa 727, 54 Am. Rep. 39; *Questi v. Rills*, 8 Martin N. S. (La.) 582; *Gallagher v. Holland*, 20 Nev. 164; *Burnley v. Duke*, 1 Rand. (Va.) 108; *Monroe v. James*, 4 Munf. (Va.) 194. See also the various local codes and statutes in the *United States*.

Oath Taken Before Appointment. — The requirement of the statute that an administrator shall subscribe an oath of office before entering on his duties is satisfied by taking the oath before appointment. *Morris v. Chicago*, etc., R. Co., 65 Iowa 727, 54 Am. Rep. 39.

Before Whom Oath Is Taken. — The oath may be taken before any officer competent to administer oaths and transmitted to the court of probate. *Penny's Succession*, 13 La. Ann. 94.

In *Georgia* the oath may be subscribed before the court of ordinary. *Echols v. Barrett*, 6 Ga. 443.

Form of Oath. — The oath of an administrator *de bonis non* is not vitiated by omitting the words that the decedent "died without leaving

some jurisdictions it is held that such omission renders the appointment absolutely void, from which it follows that all acts done by the representative pursuant to such appointment are without authority and void also.¹ In other jurisdictions it is held that failure to qualify is merely an irregularity which renders the appointment voidable, but that until the authority so conferred is duly revoked, all acts done by the representative are valid and binding.²

Dispensing with Qualification. — Notwithstanding the positive requirement of the statute that a personal representative must qualify by giving bonds and taking an oath of office, these things may be dispensed with by the persons interested in the estate.³

4. Termination of Authority — *a.* **DISCHARGE ON COMPLETING ADMINISTRATION.** — When an executor or administrator has fully performed all the duties of his office by collecting the assets, paying the debts, distributing the residue, if any, to those entitled, and settling his accounts in the probate court, he is entitled to be discharged from the trust, and all his powers and liabilities thereupon cease.⁴

Until the Administration Is Completed, however, the court has no power to discharge an administrator, and an order of discharge before that time is invalid.⁵

b. **EXPIRATION OF STATUTORY PERIOD.** — In some jurisdictions a definite period is prescribed by statute beyond which an administration cannot extend, and at the expiration of such period the powers of the representative cease,⁶

any lawful will," because the oath of the former administrator may be presumed to have set at rest the question of a will. *Williams v. Verne*, 68 Tex. 414.

1. Acts Before Qualification Void. — *Aldrich v. Willis*, 55 Cal. 81; *Moore v. Ridgeway*, 1 B. Mon. (Ky.) 234; *Carter v. Carter*, 10 B. Mon. (Ky.) 327; *Mitchell v. Rice*, 6 J. J. Marsh. (Ky.) 623; *Monroe v. James*, 4 Munf. (Va.) 194.

2. Acts Done Without Qualifying Held Valid. — *Ryan v. American Freehold Land Mortg. Co.*, 96 Ga. 322.

Oath Taken After Letters Are Issued. — The failure of an administrator to take oath before letters are issued does not render his appointment void so as to subject it to collateral attack. *Gallagher v. Holland*, 20 Nev. 164.

Time to Qualify May Be Extended by the Court. — *Willard v. Cleveland*, 14 Tex. Civ. App. 557.

For a full discussion as to the effect of failure of a personal representative to give bond, see *infra*, this title, *Administration Bonds*.

3. Dispensing with Qualification. — An executor may act without qualifying on the consent of the persons interested in the estate. *Hays v. Vickery*, 41 Ind. 583.

In *Texas* the ordinary qualification by giving bond and taking oath may be dispensed with by the will. *Connellee v. Roberts*, 1 Tex. Civ. App. 363.

4. Discharge on Completing Administration. — *Carter v. Anderson*, 4 Ga. 516; *In re Higgins*, 15 Mont. 474; *Weyer v. Watt*, 48 Ohio St. 545.

Notice Must Be Given of an application for discharge. *Head v. Bridges*, 67 Ga. 227; *Roberts v. Johns*, 16 S. Car. 171.

The notice must be given as prescribed by statute, and if the statute directs the notice to be published in a newspaper or newspapers, a publication by posting notices is not sufficient. *Gadsden v. Jones*, 1 Fla. 373; *Anderson v. Northrop*, 30 Fla. 612.

Appearance of Parties. — A final discharge granted after a hearing is binding on all par-

ties appearing. *Ward v. Parker*, 19 S. Car. 603.

5. Discharge Not Authorized until Completion of Administration. — *McClaskey v. Barr*, 79 Fed. Rep. 408; *Blanchard v. Williamson*, 70 Ill. 647; *Weyer v. Watt*, 48 Ohio St. 545; *Wiseman's Estate*, 4 W. N. C. (Pa.) 59.

Vacating Discharge Granted by Mistake. — If the ordinary grants a discharge under a mistake that the estate has been fully administered, he has power to vacate it. *Collier v. Cross*, 20 Ga. 1.

Approval of Final Account Not of Itself Termination of Administration. — *Norman v. Norman*, 3 Ala. 389; *Simmons v. Price*, 18 Ala. 405; *Rugle v. Webster*, 55 Mo. 246; *Weyer v. Watt*, 48 Ohio St. 545; *Hazelton v. Bogardus*, 8 Wash. 102.

Administrative Acts to Be Performed. — As long as there are outstanding claims to collect, suits to defend, or legacies to be paid, an executor is not entitled to a discharge. *Mott's Estate*, 4 Kulp (Pa.) 43.

6. In Louisiana the functions of an executor terminate at the end of a year unless continued beyond that period by an order of court, but the functions of an administrator continue until the administration is finished. *Michot v. Flotte*, 12 La. Ann. 129; *Ferguson v. Glaze*, 12 La. Ann. 667; *Taylor v. Jeffries*, 10 La. Ann. 435; *Lafon v. Gravier*, 1 Martin N. S. (La.) 243; *Gayoso de Lemos v. Garcia*, 1 Martin N. S. (La.) 324; *Johnson v. Brown*, 3 Martin N. S. (La.) 601; *Waters's Succession*, 12 La. Ann. 97; *Brown v. Williams*, 16 La. 344.

In *Texas* the period of administration of a vacant succession is limited to one year from the date of the appointment of the administrator, but power is given to the court, if the interests of the succession require it, to prolong the administration from year to year for five years. *Flores v. Howth*, 5 Tex. 329. See also *Jones v. Perkins*, 8 Tex. 337; *Murphy v. Menard*, 14 Tex. 62; *Moody v. Looscan*, (Tex. Civ. App. 1898) 44 S. W. Rep. 621.

unless the court, by virtue of authority given by statute, grants an extension of the time.¹

c. RESIGNATION—(1) *At Common Law.*—At common law an executor or administrator who had once accepted the trust had no absolute right to resign or renounce it, and thus by his own voluntary act terminate his representative character.² It has also been held by some authorities that the probate court has no power to accept the resignation of an executor or administrator.³ Other authorities hold that the power to remove a personal representative includes the power to permit him to resign, and that the acceptance of a resignation is, in effect, a removal,⁴ or that an offer to resign may constitute cause for removal.⁵

In Wisconsin the period is six years after the letters are granted. *Matter of Pierce*, 56 Wis. 560; *Ford v. Ford*, 88 Wis. 122.

1. *Extension of Time.*—See the *Texas* cases cited in the immediately preceding note.

2. *Resignation Not Permitted at Common Law*—*England.*—Anonymous, 1 Vent. 335.

Georgia.—*Matter of Mussault*, T. U. P. Charl. (Ga.) 259.

Massachusetts.—*Sears v. Dillingham*, 12 Mass. 358.

North Carolina.—*Washington v. Blount*, 8 Ired. Eq. (43 N. Car.) 253.

South Carolina.—*Haigood v. Wells*, 1 Hill Eq. (S. Car.) 59.

Tennessee.—*Coleman v. Raynor*, 3 Coldw. (Tenn.) 25.

See also *supra*, this section, *Renunciation of Executorship*; *Renunciation of Right to Administer.*

In *Webb v. Keller*, 39 La. Ann. 55, it was said that "an executor who has qualified, and who is at the same time universal legatee, cannot by an act purely his own, cease to be executor, and represent himself as sole heir. He cannot be permitted to deny his capacity as executor by setting up that he has accepted unconditionally as universal legatee, and holds the estate, not as executor, but as owner." *Quoting from Townsend's Succession*, 37 La. Ann. 408. See also *Bird v. Jones*, 5 La. Ann. 644; *Wells v. Wells*, 30 La. Ann. 936; *Frazier's Succession*, 35 La. Ann. 382; *Townsend v. Sykes*, 38 La. Ann. 859.

3. *Probate Court Not Authorized to Accept Resignation at Common Law*—*Alabama.*—*Driver v. Riddle*, 8 Port. (Ala.) 343; *Thomason v. Blackwell*, 5 Stew. & P. (Ala.) 181.

Georgia.—*Matter of Mussault*, T. U. P. Charl. (Ga.) 259.

North Carolina.—*Washington v. Blount*, 8 Ired. Eq. (43 N. Car.) 253; *Mitchell v. Adams*, 1 Ired. L. (23 N. Car.) 298.

South Carolina.—*Haigood v. Wells*, 1 Hill Eq. (S. Car.) 59.

Wisconsin.—*Sitzman v. Pacquette*, 13 Wis. 291.

4. *Power to Remove Includes Acceptance of Resignation*—*Illinois.*—*Marsh v. People*, 15 Ill. 284.

Iowa.—*Shawhan v. Loffer*, 24 Iowa 217; *U. S. Rolling Stock Co. v. Potter*, 48 Iowa 56.

Massachusetts.—*Thayer v. Homer*, 11 Met. (Mass.) 104.

Minnesota.—*Rumrill v. St. Albans First Nat. Bank*, 28 Minn. 202; *Balch v. Hooper*, 32 Minn. 158.

Nebraska.—*Trumble v. Williams*, 18 Neb. 144.

North Carolina.—*Tulburt v. Hollar*, 102 N. Car. 406.

Oregon.—*Ramp v. McDaniel*, 12 Oregon 108.

Tennessee.—*McGowan v. Wade*, 3 Yerg. (Tenn.) 375.

In *Comstock v. Crawford*, 3 Wall. (U. S.) 396, it was held that the court might accept the resignation of an administrator who has done no act as administrator. Mr. Justice Field, delivering the opinion of the court, said: "The power to accept the resignation and make the second appointment, under the circumstances of this case, were necessary incidents of the power to grant letters of administration in the first instance. It does not appear that the first administrator ever took possession of the property of the intestate, or attempted to exercise any control over it; and his inability to act left the estate in fact without any administrator. The duty of the court therefore to provide for its proper administration could not otherwise have been discharged than by a new appointment."

Accepting Resignation Equivalent to Removal.—In *Marsh v. People*, 15 Ill. 284, it was held that, though there was no law allowing an administrator to resign, yet the acceptance of his resignation is equivalent to a revocation of his authority.

Conflict of Interests.—In *Thayer v. Homer*, 11 Met. (Mass.) 104, it was held that under the statute authorizing the court to remove an executor who is "evidently unsuitable" for the office, the court may accept his resignation, if his interests conflict with his duties as executor.

5. *Offer to Resign Ground for Removal.*—In *Rumrill v. St. Albans First Nat. Bank*, 28 Minn. 202, Gilfillan, C. J., said: "An executor or administrator, having accepted and qualified, cannot resign his trust. The statute contemplates that the probate court may, by order, remove the executor or administrator, (Gen. Stat. 1866, c. 49, § 14, subd. 2), or, what is the same thing, revoke the letters (subdivision 2, section 3, same chapter), but it contains no provision looking to a resignation, even with the consent of the court. A resignation tendered by an executor or administrator might be good ground for removing him or revoking his letters, and an acceptance of the resignation by the court, if entered, in the form of an order, in the record which the statute requires the court to keep of appointment

(2) *By Statute.* — The right to resign is now given by statute in many jurisdictions,¹ but the statutes give only a conditional or qualified right, and do not put it absolutely in the power of an executor or administrator to resign whenever he chooses.² The matter is subject to the discretionary power of the probate court,³ which may refuse its assent unless the executor or administrator shows that he has good cause for resigning.⁴ It is also generally required by the statutes that the representative wishing to resign must give to the parties in interest notice of his intention,⁵ settle his

of administrators, etc., with all orders relating to the same (Gen. Stat. 1866, c. 49, § 8, subd. 3), might be taken to have the effect of a removal or revocation of the letters. But a resignation tendered, and an acceptance indorsed on it and filed, no entry being made in the record, and no further act done in respect to it — and that appears to have been all there was in this case — can have no legal effect on the *status* of the administrator."

1. Resignation Authorized by Statute — *Alabama.* — Skinner v. Frierson, 8 Ala. 915; Gayle v. Elliott, 10 Ala. 264.

California. — Haynes v. Meeks, 10 Cal. 110, 70 Am. Dec. 703.

Georgia. — Carter v. Anderson, 4 Ga. 516.

Kentucky. — Warfield v. Brand, 13 Bush (Ky.) 77.

Louisiana. — Sevier v. Gordon, 25 La. Ann. 231.

Massachusetts. — Thayer v. Homer, 11 Met. (Mass.) 104.

Missouri. — Macey v. Stark, 116 Mo. 481.

Nebraska. — Trumble v. Williams, 18 Neb.

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New Hampshire. — Morgan v. Dodge, 44 N. H. 258, 82 Am. Dec. 213.

New York. — Flinn v. Chase, 4 Den. (N. Y.) 85; Matter of Bernstein, 3 Redf. (N. Y.) 20.

North Carolina. — Tulburt v. Hollar, 102 N. Car. 406.

Oregon. — Ramp v. McDaniel, 12 Oregon 108.

Tennessee. — Harrison v. Henderson, 7 Heisk. (Tenn.) 315; Coleman v. Raynor, 3 Coldw. (Tenn.) 25.

Texas. — Ingram v. Maynard, 6 Tex. 130.

The Act of January 21, 1856 (Stanton's Rev. Stat. 514), authorizing the county courts to accept the resignation of a personal representative, "and appoint another in his place, to whom the court shall order the estate of the decedent to be delivered," is the first act in *Kentucky* which authorized a personal representative to resign his trust, and was simply intended to provide a mode in which a personal representative might resign; and did not enlarge the right of action of the successor against his predecessor. Warfield v. Brand, 13 Bush (Ky.) 77.

Married Women — Concurrence of Husband. — In Rambo v. Wyatt, 32 Ala. 363, 70 Am. Dec. 544, it was held that the right given by statute to any "administrator or administratrix" to resign, authorizes an administratrix who married after letters were granted to her to resign without the concurrence of her husband.

2. Right Is Conditional. — Haynes v. Meeks, 20 Cal. 288; Flinn v. Chase, 4 Den. (N. Y.) 85.

3. Permitting Resignation Discretionary with Court. — Coleman v. Raynor, 3 Coldw. (Tenn.) 25.

4. Resignation Not Permitted Without Good Cause Being Shown. — Craig v. Craig, 3 Barb. Ch. (N. Y.) 76.

What Constitutes Good Cause. — Good cause for resignation exists where the executor, who had nearly completed the execution of the will, was about to make changes in the manner of his life, which would involve prolonged absences from the United States. Tilden v. Fiske, 4 Dem. (N. Y.) 357.

Or where an administrator is about to remove from the state. Trumble v. Williams, 18 Neb. 144.

But It Is Not Good Cause for resigning that the executor is "too busy with his own matters" to continue in the management of the estate. Baier v. Baier, 4 Dem. (N. Y.) 162, *sub nom.* Baier's Estate, 2 How. Pr. N. S. (N. Y. Surrogate Ct.) 323; Matter of Bernstein, 3 Redf. (N. Y.) 20.

Or that it is inconvenient for him to act further. Flinn v. Chase, 4 Den. (N. Y.) 85.

Nor will a surrogate's court revoke an executor's letters at his own request on an allegation that his interests, as surviving partner of the decedent, conflict with his duties as executor, and necessitate a resort to another tribunal, where the estate should be represented by a disinterested person. Becker v. Lawton, 4 Dem. (N. Y.) 341.

A Provision in a Will for Filling Vacancies that may be caused by resignation may be considered in determining whether the executor had a sufficient reason for resigning, though it does not give the executor the right to resign at will. Tilden v. Fiske, 4 Dem. (N. Y.) 357.

5. Notice of Intention Required. — Macey v. Stark, 116 Mo. 481; Vail v. Male, 37 N. J. Eq. 521; Ramp v. McDaniel, 12 Oregon 108; Coleman v. Raynor, 3 Coldw. (Tenn.) 25.

Effect of Failure to Give Notice. — In Ramp v. McDaniel, 12 Oregon 108, it was said not to be necessary that a resignation, to be valid, should be made in conformity with the statute requiring notice of intention to resign to be published, but that apart from the statute an administrator might resign with the consent of the court.

In Sivley v. Summers, 57 Miss. 712, it was held that the fact that notice was not given to the legatees did not hinder the court from accepting the resignation of the executor; that notice to the distributees or legatees is a condition precedent to a valid settlement with the court of the administration account of the person resigning, but that the court may accept a resignation and appoint a successor at once, requiring the outgoing executor or administrator to give notice and make settlement, until which he remains liable on his bond.

In Emmons v. Gordon, (Mo. 1893) 24 S. W. Rep. 146, an executor appeared before the pro-

accounts,¹ and deliver up all the assets in his hands.²

What Constitutes Resignation. — A resignation may be implied as well as express.³

Acceptance of Resignation. — A resignation may be accepted by acting on or recognizing it, though no formal order of acceptance is entered.⁴

Effect of Resignation. — The resignation of an executor or administrator terminates his authority and duties,⁵ which thereupon devolve on his co-executor or co-administrator, if any,⁶ and terminates the jurisdiction of the probate

bate court and made proof that he had given notice of his intention to make final settlement of the estate. A settlement was made, and an order was entered directing the executor to pay over the balance in his hands "to his successor." Afterwards the court appointed an administrator *de bonis non*, to whom the balance was paid under the order theretofore made. It was held that these facts constituted a good resignation, as between the executor and the administrator *de bonis non*, though no notice was given by the executor that he intended to apply for leave to resign.

On the Other Hand, it has been held that if the notice is not given as required by law, the discharge is void. *Head v. Bridges*, 67 Ga. 227; *Vail v. Male*, 37 N. J. Eq. 521.

1. Settlement of Accounts Required Before Resignation — *Alabama*. — *Waller v. Ray*, 48 Ala. 468.

California. — *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703.

Georgia. — *Carter v. Anderson*, 4 Ga. 516.

Louisiana. — *Sevier v. Gordon*, 25 La. Ann. 231.

Massachusetts. — *Thayer v. Homer*, 11 Met. (Mass.) 104.

New Hampshire. — *Morgan v. Dodge*, 44 N. H. 258, 82 Am. Dec. 213.

Tennessee. — *Coleman v. Raynor*, 3 Coldw. (Tenn.) 25.

Texas. — *Ingram v. Maynard*, 6 Tex. 130.

In *Harrison v. Henderson*, 7 Heisk. (Tenn.) 315, it was held that "the requirement of the settlement is an imperative direction to the court; but that it should be made and completed before the court shall, in exercise of its discretion, appoint the successor, is not required." See also *Union Nat. Bank v. Poulson*, 31 N. J. Eq. 239.

In *Emmons v. Gordon*, (Mo. 1893) 24 S. W. Rep. 146, Black, J., said: "When an executor or administrator resigns he must account in the probate court with his successor, for the successor in office represents the heirs, devisees, creditors, and others interested in the estate. * * * As the settlement of an executor who has resigned his letters must be made in the probate court with his successor, it follows that he can make no final settlement until a successor is appointed. Until then there is no one with whom the settlement can be made."

Notice of Settlement. — An executor or administrator who intends to resign or has resigned is not required to give notice of final settlement. *Robards v. Lamb*, 89 Mo. 303; *State v. Gray*, 106 Mo. 533.

2. Delivery of Assets Is Condition Precedent to Right to Resign. — *Jennings v. Le Breton*, 80 Cal. 8; *Coleman v. Raynor*, 3 Coldw. (Tenn.) 25.

3. Implied Resignation. — In *Matter of Allen*, 78 Cal. 581, it was held that an instrument

signed by an executrix and filed in court, reciting that she had married and was "no longer authorized to be or act as executrix," and asking the court to appoint another person as administrator, was equivalent to an express resignation.

Accepting Letters De Bonis Non. — The acceptance by an administrator of letters *de bonis non* granted to himself and another is equivalent to a resignation of his former letters. *Turner v. Wilkins*, 56 Ala. 173.

4. Appointment of Successor. — A resignation is accepted by the appointment of an administrator in the place of the one who has resigned. *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703; *Jennings v. Le Breton*, 80 Cal. 8.

Formal Order Not Necessary. — In *U. S. Rolling Stock Co. v. Potter*, 48 Iowa 56, it was held that an executor who resigns will, after a reasonable time for filling his place, be released from the duty of participating in the settlement of the estate, though no formal order has been entered accepting his resignation.

5. Effect of Resignation in General. — The acceptance of a resignation has the effect of a revocation of the letters. *Balch v. Hooper*, 32 Minn. 158.

An executor, after resigning, becomes a mere creditor or debtor of the estate, as the case may be. *Ingram v. Maynard*, 6 Tex. 130.

An executor, after resignation and the adjustment of his accounts and the appointment of his successor, cannot be required to pass on a claim against the estate, or do any other official act. *Oldham v. Smith*, 26 Tex. 532.

Pending Actions. — A pending action against an administrator is not abated by his resignation, but the plaintiff therein may proceed with his suit, although the resignation is suggested and shown, unless the resigning administrator is able to show either due administration of the assets or a transfer of all the assets to the succeeding administrator. *Skinner v. Friereson*, 8 Ala. 915.

Preservation of Estate. — "The authorities and duties of an administrator cease with the resignation of his trust and settlement of his accounts, but his conservative powers in respect to the estate still continue until he absolves himself from responsibility by delivering it to a successor. He has not only the power, under such circumstances, to preserve the estate, but the law makes it his duty." *Gayle v. Elliott*, 10 Ala. 264.

Husband of Resigning Administratrix. — The resignation by a married woman, to whom letters were granted while sole, terminates the authority of her husband, though the resignation was without his consent. *Rambo v. Wyatt*, 32 Ala. 363, 70 Am. Dec. 544.

6. Resignation by One of Two Executors. — Where one of two executors applied for discharge and surrendered the trust, and the other

court over him;¹ but it does not relieve him from any existing liabilities.² If the executor is also a trustee, his resignation as executor is not a relinquishment of the trust.³

d. MARRIAGE OF EXECUTRIX OR ADMINISTRATRIX. — At Common Law, if an executrix or administratrix married, her powers were not extinguished thereby,⁴ but her husband became executor or administrator in her right.⁵

By Statute, in many jurisdictions, the authority of an executrix or administratrix is terminated by marriage, and her husband has no right to the administration, but an administrator *de bonis non* must be appointed.⁶

continues to act, the acting executor possesses all the power conferred by law or the will, as to the personal estate of the testator, whether the surrender was valid or not. *Columbus Ins., etc., Co. v. Humphries*, 64 Miss. 258.

1. Jurisdiction of Probate Court. — In *Francis v. Northcote*, 6 Tex. 185, it was held that after an administrator has accounted and been discharged, the court having probate jurisdiction (County Court) has no further jurisdiction over him, and cannot compel him to restate his accounts; but that recourse against him can be had only in the District Court.

2. Existing Liabilities. — *Skinner v. Frierson*, 8 Ala. 915; *McGowan v. Wade*, 3 Yerg. (Tenn.) 375.

But he is relieved from any liability for the future acts of his co-administrator. *Com. v. Smith*, 4 Phila. (Pa.) 270.

3. Resignation of Executor Who Is Also Trustee Not Relinquishment of Trust. — *Doe v. Hiscott*, 6 U. C. Q. B. O. S. 23; *Doe v. Claus*, 3 U. C. Q. B. O. S. 146.

4. Power of Executrix or Administratrix Not Extinguished by Marriage at Common Law. — *Moss v. Rowland*, 3 Bush (Ky.) 505; *Cadwallader v. Evans*, 1 Disney (Ohio) 592; *Hamilton v. Levy*, 41 S. Car. 374.

5. Husband of Executrix or Administratrix Entitled to Administer in Her Right. — *Thrustout v. Coppin*, 2 W. Bl. 801; *Kavanaugh v. Thompson*, 16 Ala. 817; *Pistole v. Street*, 5 Port. (Ala.) 64; *Dowty v. Hall*, 83 Ala. 165; *Stewart, Appellant*, 56 Me. 300; *Barber v. Bush*, 7 Mass. 510; *Wood v. Chetwood*, 27 N. J. Eq. 311; *Gates v. Whetstone*, 8 S. Car. 244, 28 Am. Rep. 284.

In *Barber v. Bush*, 7 Mass. 510, it was held that, under the Act of 1783, if a sole administratrix married, the marriage did not terminate her authority, but made her husband joint administrator with her; but that if she was one of several administrators her authority would terminate on her marriage. But see *Pub. Stat.* 1882, c. 145, § 9.

Suspension of Powers During Coverture. — In *Pistole v. Street*, 5 Port. (Ala.) 64, it was held that an administratrix, after marriage, was incapable of doing any valid act in relation to the estate, or of controlling her husband in regard thereto.

Power Restored on Removal of Coverture. — But it is not to be understood that by marriage the wife ceases to be administratrix, or that as to her the trust is suspended during coverture. She retains her character of administratrix, and after the termination of the coverture is liable for any devastavit of her husband, and is restored to the authority she had when the coverture commenced. *Rambo v. Wyatt*, 32

Ala. 363, 70 Am. Dec. 544. See also *Pistole v. Street*, 5 Port. (Ala.) 64.

6. Statutory Rule — Powers of Executrix or Administratrix Extinguished by Marriage. — *Smith v. McIntire*, 83 Fed. Rep. 456; *Whittaker v. Wright*, 35 Ark. 511; *Duhme v. Young*, 3 Bush (Ky.) 343; *Young v. Duhme*, 4 Metc. (Ky.) 239; *Tribble v. Broadus*, (Ky. 1893) 23 S. W. Rep. 349; *State v. Rucker*, 59 Mo. 17; *Roberts v. Place*, 18 N. H. 183; *Oakes v. Buckley*, 49 Wis. 592; *Chase v. Ross*, 36 Wis. 267. See also the various local codes and statutes in the United States.

Disqualification of Married Women Is Statutory. — In *Hamilton v. Levy*, 41 S. Car. 374, the court said: "A careful inquiry will develop the fact that in those states of this Union where marriage operates to revoke administration previously granted the wife while a *feme sole*, such a result is owing to a statutory change of the common law. In this state no such change has been introduced."

Under the Georgia Statute the marriage of an executrix terminates her authority, but her husband may act in her right until an administrator with the will annexed is appointed. *Fields v. Carlton*, 84 Ga. 597.

Consent of Husband to Continuance. — In *Indiana* an executrix or administratrix will be removed if she marries, unless her husband consents in writing to her continuing in the discharge of the duties of the office. *Jenkins v. Jenkins*, 23 Ind. 79.

In *Newhouse v. Gale*, 1 Redf. (N. Y.) 217, it was said that the statute which provides that if any administratrix marries after her appointment, the surrogate may, on application of any person interested, revoke the appointment, "does not forbid [her] acting after marriage, when such marriage takes place subsequent to the issuing of letters; and from the examination of authorities on this subject, I should have no hesitation in continuing the administratrix upon filing the consent of her husband, and the execution of a new bond, in which he should unite with her and the sureties."

Marriage Merely Ground for Removal. — In *California* the authority of an executrix or administratrix does not cease *ipso facto* on her marriage, but she thereby becomes merely incompetent and liable to removal, but her powers continue until she is removed. *Schroeder v. San Mateo County*, 70 Cal. 343; *McMillan v. Hayward*, 94 Cal. 357; *Cosgrove v. Pitman*, 103 Cal. 268.

And her acts, until she is suspended or removed, are valid. *Schroeder v. San Mateo County*, 70 Cal. 343.

Powers until Appointment of Successor. — Though the marriage of an executrix ex-

c. REMOVAL FROM OFFICE OR REVOCATION OF LETTERS — (1) *The Power.* — It is well settled that the authority of an executor or administrator may be revoked in a proper case. The mode of effecting this depends on the source of the representative's authority. The removal of an executor from office is effected by a proceeding in the nature of a proceeding to remove him from office where his authority is derived from the will alone, and does not depend on a grant of letters testamentary; but if his authority is derived from letters testamentary, then his removal is effected by a revocation of such letters. In the case of an administrator whose authority always depends on a grant of letters by a court, the removal is effected by a revocation of such letters.¹

By What Court Exercised. — As a general rule, the power to revoke letters of an executor or administrator, or to remove him from office, is vested exclusively in the court of probate in which the administration is pending,² and exists by virtue of its power over its decrees, and as an incident to its jurisdiction over the administration.³

Jurisdiction in Equity. — It has been said that courts of equity have no power, unless expressly given by statute, to revoke letters testamentary or of administration, though they may enjoin the executor or administrator from acting, and may appoint a receiver of the estate;⁴ but in some states of the Union

tinguishes her authority, it does not deprive her of the right to retain possession of the property of the estate until her successor is appointed, or until otherwise ordered by the court. *Buckley v. Buckley*, 16 Nev. 180.

1. *Power to Revoke Well Settled.* — *In re* *Baldridge*, (Arizona 1887) 15 Pac. Rep. 141; *Hake v. Stotts*, 5 Colo. 140; *Carey v. Reed*, 82 Md. 383; *Barber v. Converse*, 1 Redf. (N. Y.) 330; *Smith v. Collier*, 3 Dev. & B. L. (20 N. Car.) 65; *Stoefer v. Ludwig*, 4 S. & R. (Pa.) 202; *McCaffrey's Estate*, 38 Pa. St. 331; *Spencer's Estate*, 7 Pa. Dist. Rep. 216; *Varnell v. Loague*, 9 Lea (Tenn.) 158.

At Common Law the ordinary had power to revoke letters of administration at his pleasure. *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213; *Thompson v. Hucket*, 2 Hill L. (S. Car.) 347, *citing* *Toller's Law of Exrs.* 121.

Power Should Be Exercised with Caution. — In *Smith v. Collier*, 3 Dev. & B. L. (20 N. Car.) 65, *Gaston, J.*, said that while it cannot be doubted that a court possesses the power to revoke an administration, and that there are cases in which it is the duty of the court to exercise that power, a court ought to consider well before it recalls an administration once duly granted, because such a proceeding may lead to inconvenience and perplexity.

Executor Failing to Qualify. — The court has no power, however, to make an order revoking the authority of an executor where he did not qualify, and no letters were granted, because, in such case, he is not the executor. *Matter of Richardson*, 8 Misc. Rep. (N. Y. Surrogate Ct.) 140.

Defenses — Revocation Against Petitioner's Interest. — Revocation of letters testamentary because of the executor's failure to give bond, will not be denied on the ground that the revocation would be against the interest of the petitioner (the testator's widow) because the executor furnished her with supplies on advantageous terms. *Johnson v. Clements*, (Ala. 1893) 14 So. Rep. 14.

Effect of Order Requiring Bond. — The power

to revoke the letters is not affected by the fact that the executor has been ordered to give bond, where he has appealed from the order without obtaining a supersedeas. *Holderbaum v. Shriver*, 82 Iowa 730.

2. *Jurisdiction Generally in Court of Probate Exclusively.* — *Culver v. Hardenbergh*, 37 Minn. 225; *Hosack v. Rogers*, 11 Paige (N. Y.) 603; *In re Wood*, (Supreme Ct.) 8 N. Y. Supp. 884; *Ledbetter v. Lofton*, 1 Murph. (5 N. Car.) 224; *Moore v. Moore*, 1 Dev. L. (12 N. Car.) 352; *Murrill v. Sandlin*, 86 N. Car.) 54; *Ordinary v. Wallace*, 1 Rich. L. (S. Car.) 507.

A court in one state has no authority to revoke letters testamentary granted in another state. *Chapman v. Fish*, 6 Hill (N. Y.) 554; *Tillman v. Walkup*, 7 S. Car. 60.

In *North Carolina*, where the office of probate judge is abolished, the clerks of superior courts have jurisdiction of proceedings for the removal of executors and administrators. *Edwards v. Cobb*, 95 N. Car. 4.

The power conferred on the surrogate to remove executors and administrators is wholly independent of any other power which he may exercise. The precise ground upon which he may move and the manner of proceeding are prescribed specifically by statute, and must in all cases be strictly observed. *People v. Hartman*, 2 Sweeney (N. Y.) 576.

3. *Source of Power — Control over Decrees.* — *In re Wood*, (Supreme Ct.) 8 N. Y. Supp. 884.

Power Incident to Jurisdiction over Administration. — *Marston v. Wilcox*, 2 Ill. 60; *Carey v. Reed*, 82 Md. 383.

4. *Rule that Equity Has No Jurisdiction to Revoke Letters.* — *Leddel v. Starr*, 19 N. J. Eq. 159; *Bolles v. Bolles*, 44 N. J. Eq. 385; *Hai-good v. Wells*, 1 Hill Eq. (S. Car.) 59.

Nor does a statute authorizing the substitution of "trustees" give equity power to revoke letters testamentary or of administration, and make another appointment. *Ex p. Galluchat*, 1 Hill Eq. (S. Car.) 148.

A court of equity may enjoin an executor

this power is exercised by courts of equity in cases where they have acquired jurisdiction of the estate on other grounds.¹

Determination of Incidental Matters. — Jurisdiction to revoke letters includes also jurisdiction to determine whether the petitioner, or the person who had been appointed, bears the necessary relation to the decedent to entitle him to maintain a proceeding for revocation, or to receive letters of administration.²

Revocation Only for Cause. — Letters may not, however, be revoked arbitrarily, but sufficient cause must be shown.³

Discretion of Court. — And the exercise of this power by the court is generally a matter of discretion.⁴

(2) *Who May Apply for Removal.* — The revocation of letters may be had on the application of any person who has an interest in the estate, or in the proper administration thereof;⁵ or who is entitled to admin-

who has become bankrupt since the testator's death from acting as executor. *Bowen v. Phillips*, (1897) 1 Ch. 174, 75 L. T. N. S. 628, 45 W. R. 286.

1. Power of Removal Sometimes Exercised by Courts of Equity — *Georgia.* — *Chappell v. Akin*, 39 Ga. 177; *Walker v. Morris*, 14 Ga. 323.

Kentucky. — *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171.

New Jersey. — *Cooper v. Cooper*, 5 N. J. Eq. 9.

North Carolina. — *Wilkins v. Harriss*, Winst. Eq. (60 N. Car.) 41.

Texas. — *Long v. Wortham*, 4 Tex. 381.

Virginia. — *Walters v. Hill*, 27 Gratt. (Va.) 388.

It Is Only in Extreme Cases that a court of equity will remove an executor or administrator. *Randle v. Carter*, 62 Ala. 95.

If the interposition of equity is demanded, it must be for some purpose auxiliary to relief being sought in courts of probate. *Holbrook v. Campau*, 22 Mich. 288; *Leddel v. Starr*, 19 N. J. Eq. 159.

2. Determination of Incidental Matters. — On an application to revoke letters granted to a person claiming to be the decedent's widow, on the ground that her marriage to the decedent was void because of a previous marriage to another person still living, the court may inquire into the validity of her first marriage. *Matter of Hetherington*, 25 N. Y. Wkly. Dig. 4.

So also, when the application is made by a person claiming to be a creditor of the decedent, which is denied by the administrator, the court may try and determine the issue so raised. *Matter of Wheeler*, 46 Hun (N. Y.) 64.

3. Letters Revoked Only for Cause — *United States.* — *In re Patten*, 18 D. C. 392.

California. — *Matter of Welch*, 86 Cal. 179.

Illinois. — *Marston v. Wilcox*, 2 Ill. 60.

Maryland. — *Levering v. Levering*, 64 Md. 399.

Mississippi. — *Muirhead v. Muirhead*, 6 Smed. & M. (Miss.) 451.

Pennsylvania. — *Young's Estate*, 16 Pa. Co. Ct. Rep. 54, 4 Pa. Dist. Rep. 44.

South Carolina. — *Witherspoon v. Watts*, 18 S. Car. 422.

A Strong Case Must Be Made to induce the court to take possession of the property from an executor who has qualified and given bond for the faithful discharge of his trust, and has taken possession under the will. *Haines v. Carpenter*, 1 Woods (U. S.) 262.

4. Revocation Is Discretionary. — *In re Baldridge*, (Arizona 1887) 15 Pac. Rep. 141; *Deck v. Gherke*, 6 Cal. 666; *Matter of Graber*, 111 Cal. 432; *Holmes v. Holmes*, 26 Vt. 536; *Bronson v. Burnett*, 1 Chand. (Wis.) 136, 2 Pin. (Wis.) 185; *Pike's Estate*, 45 Wis. 391.

5. Interest in General. — *In Vail v. Givan*, 55 Ind. 59, it was held that revocation could be had only on the application of some person interested in the estate, or of his co-administrator or a surety.

Any Person Interested May Apply for Removal of Executor or Administrator — *Alabama.* — *Watson v. Glover*, 77 Ala. 323.

Massachusetts. — *Brackett v. Williams*, 110 Mass. 549.

Mississippi. — *Gasque v. Moody*, 12 Smed. & M. (Miss.) 153; *Dowdy v. Graham*, 42 Miss. 451.

New York. — *Fernbacher v. Fernbacher*, 4 Dem. (N. Y.) 227.

North Carolina. — *Edwards v. Cobb*, 95 N. Car. 4.

Wisconsin. — *Pike's Estate*, 45 Wis. 391.

The Heir of the Decedent may make application for the removal of an executor or administrator for unfaithfulness or neglect. *Brown v. Ventress*, 24 La. Ann. 187; *Reed v. Crocker*, 12 La. Ann. 445; *In re Partridge*, 31 Oregon 297. And the fact that he is a nonresident does not affect this right. *In re Baldridge*, (Arizona 1887) 15 Pac. Rep. 141.

But see *Frick's Appeal*, 114 Pa. St. 29, holding that since a nonresident has no right to administer, he has no right to ask for the revocation of letters granted to another.

The Widow of the Decedent has a sufficient interest in his estate to authorize her to apply for the revocation of the administrator's letters. *Pace v. Oppenheim*, 12 Ind. 533; *Mills v. Carter*, 8 Blackf. (Ind.) 203; *Evans v. Buchanan*, 15 Ind. 438; *Proctor v. Wanmaker*, 1 Barb. Ch. (N. Y.) 302.

Creditors of Decedent. — Letters may be revoked on petition of creditors where they were granted without security, pursuant to the will. *Laird v. Dick*, 4 Cranch (C. C.) 666; *Decuir's Succession*, 23 La. Ann. 166; *Rogers v. Morrison*, 21 La. Ann. 455; *Wim's Succession*, 27 La. Ann. 687; *Wildridge v. Patterson*, 15 Mass. 148; *Brackett v. Williams*, 110 Mass. 549; *Clark v. Niles*, 42 Miss. 460; *Hartnett v. Wandell*, 60 N. Y. 346, 19 Am. Rep. 194.

Who Are Creditors. — A person applying for the revocation of letters in the character of a creditor must be a creditor of the estate, and it

ister in preference to the person appointed, and who has not in any way waived or lost his rights;¹ or the court may act of its motion, or at the

is not sufficient that he is a creditor of the executrix, or of the heirs. *Carroll v. Huie*, 21 La. Ann. 561. Or that he is a creditor of a firm of which the decedent was a member, and the business of which is carried on under the will by the surviving partners and the executors. *Matter of Stern*, 2 Connol. (N. Y.) 204.

The surrogate has jurisdiction to determine whether the petitioner is a creditor. *Gillingham's Estate*, (Supreme Ct.) 10 N. Y. St. Rep. 864; *Matter of Wheeler*, 46 Hun (N. Y.) 64.

Where one had a controversy with the estate, and it was yet undecided and uncertain whether he was a debtor or a creditor of the estate, the considerations should be weighty to induce the court to remove the executor on the application of one situated like him. *Wiley v. Brainerd*, 11 Vt. 107.

Debtors.—It has been held that a debtor to the estate was not a person interested who might apply for the removal of the executor or administrator. *Drexel v. Berney*, 1 Dem. (N. Y.) 163.

In *Donaldson v. Lewis*, 7 Mo. App. 403, it was contended that there was no provision of law authorizing debtors of an estate to move to revoke a grant of letters. The court, by Bakeswell, J., said: "We are aware of no express provision of law to that effect, nor do we think it necessary. It has been held that qualification under the statute protects the debtor in dealings with the administrator. Nevertheless, one cannot be bound to pay to one not really administrator of the estate; and if the debtor has the right not to pay to a pretended and *prima facie* claimant, we do not know how he is to assert that right in a case of this kind, unless by a proceeding of this nature. He must proceed by a direct attack. It would not be permitted to him to show, in an action by the administrator against him, that letters were improvidently granted. The debtor is interested in seeing that his creditor is paid, and it is no answer to say that he may safely pay another, and thus relieve himself from liability to his real creditor. He has such an interest in the matter, therefore, as to give him a standing in court."

Legatee in Contested Will.—A legatee and executor in a will which has been adjudged void, having appealed from the decree, has a sufficient interest in the estate pending the appeal to enable him to apply for a revocation of the administrator's letters. *Newhouse v. Gale*, 1 Redf. (N. Y.) 217.

The Assignee of a Residuary Devisee has a sufficient interest to enable him to apply for a revocation of the executor's letters. *Yeaw v. Searle*, 2 R. I. 164.

Natural Guardian.—A parent, as the natural guardian of an infant beneficiary under a will, is not a person "interested in the estate," and therefore cannot apply for revocation of the executor's letters. *Quin v. Hill*, 6 Dem. (N. Y.) 39.

The Representative of a Minor Heir may apply for the removal of the executor or administrator. *Verkes v. Broom*, 10 La. Ann. 94.

Defendant in Action by Administrator.—It has been held that the defendant in an action by

an administrator is not, by reason thereof, interested in the estate so as to entitle him to have letters of administration revoked. *Kent v. Pennsylvania R. Co.*, 6 Mackey (D. C.) 335; *Missouri Pac. R. Co. v. Bradley*, 51 Neb. 596; *Missouri Pac. R. Co. v. Jay*, (Neb. 1898) 74 N. W. Rep. 259. But see *contra*, *Mallory v. Burlington*, etc., R. Co., 53 Kan. 557; *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477.

Sureties.—The sureties in the bond of an administrator may have his letters revoked. *Vail v. Givan*, 55 Ind. 59; *Hardaway v. Parham*, 27 Miss. 103; *Allen v. Sanders*, 34 N. J. Eq. 203; *De Lane's Case*, 2 Brev. (S. Car.) 167; *Baldwin v. Buford*, 4 Verg. (Tenn.) 16.

One Whose Appointment as Administrator Is Void because an administrator had already been appointed by a court whose appointment was voidable but not void, has no such interest in the estate as to enable him to move for revocation of the voidable appointment. *Coltart v. Allen*, 40 Ala. 155, 88 Am. Dec. 757.

1. Persons Who Had Prior Right.—*Matter of Pacheco*, 23 Cal. 476; *Wooten's Estate*, 56 Cal. 322; *Matter of Li Po Tai*, (Cal. 1895) 39 Pac. Rep. 30; *Muirhead v. Muirhead*, 6 Smed. & M. (Miss.) 451; *Edmundson v. Roberts*, 1 How. (Miss.) 322; *Mullanphy v. St. Louis County Ct.*, 6 Mo. 563; *Williams v. Neville*, 108 N. Car. 559; *Williams's Appeal*, 7 Pa. St. 214; *Comfort's Estate*, 12 Pa. Co. Ct. Rep. 571; *Wilson v. Hoss*, 3 Humph. (Tenn.) 142. See also cases cited *infra*, this section, *Grounds for Removal—Improvident or Irregular Appointment*.

But Only the Person Entitled to administer can make the application on the ground that the incumbent had no right. *Edmundson v. Roberts*, 1 How. (Miss.) 322; *Garrison v. Cox*, 95 N. Car. 353.

An Illegitimate Son has no right to apply for the removal of his mother as administratrix on the ground that she was not lawfully married to the intestate, because he would have no right to administer. *Myatt v. Myatt*, 44 Ill. 473.

Applicant Incompetent at Time of Prior Grant.—Where letters of administration have been issued to a competent person they will not be revoked upon the subsequent claim of one who was incompetent at the time of the grant. *Sharpe's Appeal*, 87 Pa. St. 163.

Assignment of Interest in Estate—Fraud.—Where the decree of revocation is sought by a widow of the intestate who has assigned her interest in the estate as widow, by the procurement of the administrator, though she alleges fraud in such procurement, the proceedings will be dismissed, the surrogate court being unable to set aside the instrument for fraud, and until this is done the petitioner is excluded from the class of persons interested in the estate, as defined by the *New York* statute. *Woodruff v. Woodruff*, 3 Dem. (N. Y.) 595.

A Motion May Be Made by a Creditor for the removal of an administrator who was appointed in contravention of the creditors' right within the time during which they have priority over strangers. *Ward v. Cameron*, 37 Ala. 691.

suggestion of an *amicus curiæ*.¹

(3) *Grounds for Removal*—(a) *Improvident or Irregular Appointment.*—Where a grant of letters is irregular or improvident because another has a prior right to the appointment, or because the administration was unauthorized, or for any other reason, it may be revoked on application of the person entitled.² But if the person entitled to the appointment knew that an application by another was pending, and did not oppose it, or if he neglects for an unreasonable length of time to apply, and letters are in the meantime granted to another, he cannot afterwards have the letters so granted revoked on the ground that he was entitled to priority.³

Public Administrator.—But the public administrator cannot have letters granted to another person revoked on the ground that the public administrator had a prior right. *Tittman v. Edwards*, 27 Mo. App. 492.

Letters with Will Annexed.—The *California* statute authorizing the revocation of letters when granted to any other person than the persons entitled thereto by law, applies to letters of administration with the will annexed. *Matter of Li Po Tai*, 108 Cal. 484, *reversing* (Cal. 1895) 39 Pac. Rep. 30.

An Executor named in a will discovered after the grant of letters of administration may move for revocation of such letters. *Patton's Appeal*, 31 Pa. St. 465.

In *Alabama* the statute makes it mandatory on the court to revoke such letters on the application of the person named as executor. *Watson v. Glover*, 77 Ala. 323.

Waiver of Right to Apply for Removal—*Alabama.*—*Sowell v. Sowell*, 41 Ala. 359; *Markland v. Albes*, 81 Ala. 433.

California.—*Keane's Estate*, 56 Cal. 407.

Maryland.—*Edwards v. Bruce*, 8 Md. 387.

New York.—*Williams's Case*, 18 Abb. Pr. (N. Y. Surrogate Ct.) 350.

Texas.—*Coe v. Dial*, 12 Tex. 100.

1. Removal Ex Mero Motu or at Suggestion of Amicus Curie—*Alabama.*—*Curtis v. Williams*, 33 Ala. 570; *Broughton v. Bradley*, 34 Ala. 694, 73 Am. Dec. 474; *Koger v. Franklin*, 79 Ala. 505.

Dakota.—*Territory v. Bramble*, 2 Dakota 193.

Indiana.—*Jeffersonville R. Co. v. Swayne*, 26 Ind. 477.

Mississippi.—*Gasque v. Moody*, 12 Smed. & M. (Miss.) 153; *Clark v. Niles*, 42 Miss. 460.

New York.—*Barber v. Converse*, 1 Redf. (N. Y.) 330.

North Carolina.—*County Ct. v. Bissell*, 2 Jones L. (47 N. Car.) 387.

Oregon.—*In re Partridge*, 31 Oregon 297.

Texas.—*Wright v. McNatt*, 49 Tex. 425.

2. Improvident Grant to Person Not Entitled to Administer—*England.*—*Brown v. Wood*, Aleyn 36; *Blackborough v. Davis*, 1 Salk. 38; *Anonymous*, *Hetley* 48.

California.—*Wooten's Estate*, 56 Cal. 322; *Matter of Pacheco*, 23 Cal. 476; *Matter of Li Po Tai*, (Cal. 1895) 39 Pac. Rep. 30.

Maryland.—*Raborg v. Hammond*, 2 Har. & G. (Md.) 42.

Mississippi.—*Edmundson v. Roberts*, 1 How. (Miss.) 322; *Muirhead v. Muirhead*, 6 Smed. & M. (Miss.) 451.

Missouri.—*Mullanphy v. St. Louis County Ct.*, 6 Mo. 563.

North Carolina.—*Williams v. Neville*, 108 N. Car. 559.

Pennsylvania.—*Schaufuss's Estate*, 5 Kulp (Pa.) 275; *Comfort's Estate*, 12 Pa. Co. Ct. Rep. 571; *In re Neidig*, 183 Pa. St. 492; *Williams's Appeal*, 7 Pa. St. 259.

Tennessee.—*Wilson v. Hoss*, 3 Humph. (Tenn.) 142.

Wisconsin.—*Bronson v. Burnett*, 1 Chand. (Wis.) 136; 2 Pin. (Wis.) 185.

Unauthorized Administration.—If an administration is without authority of law, the authority of the administrator may be revoked. *In re Huckstep*, 5 Mo. App. 582; *McCabe v. Lewis*, 76 Mo. 296.

Undervaluation of Estate.—The fact that probate has been taken for too small an amount is not ground for revoking it. In *Goods of Muir*, 28 L. J. P. 49, 5 Jur. N. S. 445, 1 Sw. & Tr. 294.

Premature Appointment of Stranger.—Letters may be revoked if they were improvidently granted to a stranger within the time prescribed by law for those entitled to take letters. *Mullanphy v. St. Louis County Ct.*, 6 Mo. 563. Or if granted without notice to the person entitled. *Comfort's Estate*, 12 Pa. Co. Ct. Rep. 571.

Disregarding Wish of Decedent.—It is not ground for revoking letters of administration that the decedent expressed a wish that a certain other person should be appointed. *Groves's Estate*, 4 York Leg. Rec. (Pa.) 191.

Grant on Day of Death.—It is not a ground of revocation that letters were granted on the day of the decedent's death, and in the absence of imperative necessity. *Comfort's Estate*, 12 Pa. Co. Ct. Rep. 571.

Appointment of Minor.—Letters granted to a minor will not be revoked for that reason after he attains his majority, where he ratifies his appointment and all his acts as administrator. *Davis v. Miller*, 106 Ala. 154.

Appointment During Minority.—In *Pennsylvania* letters granted to a stranger during the minority of the infant next of kin are subject to revocation when one of the minors comes of age. *Riegel's Appeal*, 17 W. N. C. (Pa.) 279.

Nonresident Decedent.—Letters of administration will not be revoked merely on a showing that the decedent was a nonresident, since the appointment would be proper if he left any property within the jurisdiction of the court. *Langmade v. Hamilton*, 89 Ga. 441.

3. Waiver of Right—Failure to Oppose Application.—*Ex p. White*, 38 S. Car. 41.

The Widow of a Decedent cannot have letters granted to a creditor revoked, where she had

Disregarding Preference Among Persons of Same Class. — Nor can letters of administration be revoked because they were granted in disregard of the preference usually given among persons of the same class.¹

(b) **Probate of Will After Appointment of Administrator.** — The appointment of an administrator may be revoked when a will is admitted to probate after the appointment was made.²

(c) **Setting Aside Will After Appointment of Administrator with Will Annexed.** — If the will is set aside after an administrator with the will annexed is appointed, his letters may be revoked.³

(d) **Probate of Codicil Removing Executor.** — If a codicil revoking the appointment of an executor is adjudged valid after letters testamentary are issued, such letters will be revoked.⁴

(e) **Appointment Procured by Fraud or False Suggestion.** — It is always ground for revoking the appointment of an executor or administrator that it was procured by fraud or false suggestion of any material fact,⁵ and this cause exists independently of any statute.⁶

But False Suggestion of Immaterial Facts is not ground of revocation.⁷

(f) **Misconduct.** — Letters testamentary or of administration may be revoked if the executor or administrator disregards the directions of the will, disobeys the orders of the court, or is guilty of any other misconduct in regard to the duties of his office, which may prejudice the rights of persons interested in the estate, or in the proper administration thereof.⁸

neglected for an unreasonable length of time to apply for a grant to herself. *Jenkins v. Sapp*, 3 Jones L. (48 N. Car.) 510. See also *supra*, this section, *Who May Apply for Removal*.

1. **Appointment of Younger Brother.** — *Ayliffe v. Ayliffe*, 2 Keb. 812; *Lutz v. Mahan*, 80 Md. 233.

Appointment of Niece Instead of Nephew. — *Hill v. Bird*, Style 102.

Appointment of Smaller Creditor Instead of Largest. — *Dubois v. Trant*, 12 Mod. 438.

A Grant to a Stranger may be revoked at the instance of the person entitled to administer. *Smith v. Wingo*, Rice L. (S. Car.) 287.

As to preferences and selection of persons among persons of the same class, see *supra*, this section, *Original and General Administration* — *Preferences and Selections*.

2. **Discovery of Will After Appointment.** — *Kane v. Paul*, 14 Pet. (U. S.) 33; *Miller v. Dugas*, 77 Ga. 388, 4 Am. St. Rep. 90; *Dalrymple v. Gamble*, 66 Md. 298; *Kittredge v. Folsom*, 8 N. H. 98; *Bigelow v. Bigelow*, 4 Ohio 138, 19 Am. Dec. 591.

Pending Proceeding for Probate. — Letters will be revoked when a will is subsequently admitted to probate in another state, and the administrator knew that the proceeding therefor was pending when he applied for letters. *Thomas v. Morrisett*, 76 Ga. 384.

Supposed Existence of Will. — Letters should not be revoked on an unproved allegation that there was a will in existence, or that a will which had been executed had been lost or fraudulently destroyed. *Holland v. Ferris*, 2 Bradf. (N. Y.) 334.

3. **Setting Aside Probate of Will.** — *Newcomb v. Newcomb*, 73 L. T. N. S. 317.

If a Will Is Revoked by the Subsequent Birth of a Child, letters theretofore granted will be revoked. *Hart v. Hart*, 70 Ga. 764.

4. **Codicil Removing Executor.** — *In re Wood*, (Supreme Ct.) 8 N. Y. Supp. 884.

5. **Letters Revoked for Fraud.** — *Hawkins v. Robinson*, 3 T. B. Mon. (Ky.) 144; *Raborg v. Hammond*, 2 Har. & G. (Md.) 42.

False Allegation of Prior Right. — It is fraud for which letters will be revoked to falsely represent that the person applying for letters is the only son of the decedent, though the oldest son had renounced his right to administer. *Lutz v. Mahan*, 80 Md. 233.

False Denial of Conflicting Interests. — In *Matter of West*, 40 Hun (N. Y.) 291, one obtained an appointment as co-administrator by falsely representing to the person who was entitled to sole letters that there was no conflict of interests between them, but after his appointment the co-administrator asserted adverse claim to most of the property which was in the possession of the decedent at the time of her death. It was held that the appointment was obtained by false suggestion of a material fact, and should be revoked.

To Whom False Representation Must Be Made. — A false representation must be made to the court by which the letters are granted in order to justify revocation on the ground that they were obtained by false suggestion of a material fact. *Corn v. Corn*, 4 Dem. (N. Y.) 304, 9 Civ. Pro. Rep. (N. Y.) 243, 3 How. Pr. N. S. (N. Y.) 357.

6. **Fraud in Obtaining Letters — Ground Independent of Statute.** — *Cornish v. Cornish*, 1 Lee Ecc. 14; *Burgis v. Burgis*, 1 Lee Ecc. 121; *Drummond v. Hamilton*, 1 Lee Ecc. 357; *Smith v. Corry*, 1 Lee Ecc. 418; *Trimlestown v. Trimlestown*, 3 Hagg. Ecc. 243; *Proctor v. Wanmaker*, 1 Barb. Ch. (N. Y.) 302.

7. **False Representation of Immaterial Facts,** such as the place of residence of the decedent, is not ground for revoking letters of administration. *Langmade v. Hamilton*, 89 Ga. 441.

8. **Misconduct in General.** — An administrator was held guilty of misconduct for which his letters would be revoked where he resisted all attempts to inventory the property, and treated

Transactions for Individual Benefit. — Any dealings with the estate by an executor

his co-executor in a disrespectful and unbecoming manner. *Matter of West*, 40 Hun (N. Y.) 291.

In *Matter of Fernbacher*, 17 Abb. N. Cas. (N. Y. Surrogate Ct.) 339, 8 Civ. Pro. Rep. (N. Y.) 308, *sub nom.* *Fernbacher v. Fernbacher*, 4 Dem. (N. Y.) 227, 3 How. Pr. N. S. (N. Y.) 81, it was held that where the executors intentionally omitted assets from their first account, and subsequently falsely represented the sum for which the testator's business was sold, neglected to make any effort to collect the amount for which it was sold, and surrendered the entire assets to the widow, knowing that she was about to convert them to her own use, and enabled her to do so, there was sufficient proof of misconduct and improvident management to justify their removal from office.

Obstructing the Administration of an Estate in order to favor another estate in which the executor has a greater interest, and to conceal from his co-executor a debt due by him, is dishonesty for which the executor may be removed. *Mitchell v. Mitchell*, Montreal L. R. 3 Super. Ct. 31, 15 Rev. Leg. 167, 31 L. C. Jur. 178, 10 Leg. N. 119.

Taking Property at Appraised Value. — In *Texas* the statute forbids a representative to take the property of the estate at its appraised value, and if he does so it is ground for his removal. *Chifflet v. Willis*, 74 Tex. 245.

Sale of Property Without Order of Court. — It is cause for removing an executor that he transferred to himself individually shares of stock belonging to the decedent and sold the shares without an order of court, in a jurisdiction where an executor or administrator is required to obtain leave of court before selling the personal property. *Levering v. Levering*, 64 Md. 399.

Disregarding the Directions of the Will is misconduct for which the executor's letters may be revoked. *Matter of Havemeyer*, 3 N. Y. App. Div. 519; *Chew v. Chew*, 3 Grant's Cas. (Pa.) 289.

Refusal to Obey Orders of the Court is cause for revocation. *In re Moulton*, (Supreme Ct.) 10 N. Y. Supp. 717; *Wright v. McNatt*, 49 Tex. 425.

Thus, an executor's letters may be revoked for his failure to comply with an order requiring him to bring the money in his hands into court. *Porter v. Timanus*, 12 Md. 293. Or to deposit it in bank. *Jones v. Jones*, 41 Md. 354.

Refusal to execute an order of sale is ground for removal. *Wright v. McNatt*, 49 Tex. 425.

Asserting Rights Under a Contract with the Decedent is a ground for revoking letters where the decedent was of unsound mind at the time he entered into the contract with the executor. *Matter of Gleason*, 17 Misc. Rep. (N. Y. Surrogate Ct.) 510.

Consent to Adverse Judgment. — It is misconduct for an executrix in an action against an insurance company to agree that judgment may be entered for the defendant, though she claims that the policy had already been paid to her son, who had applied the proceeds to the testator's debts. *James's Estate*, 10 Pa. Co. Ct. Rep. 220.

Transferring Estate to Secure Creditors. — A conveyance by an executor to his sureties, of the property of the estate to indemnify them against liability on the bond, is ground for revoking the executor's letters. *Fleet v. Simmons*, 3 Dem. (N. Y.) 542; *Rogers v. Squires*, 26 Hun (N. Y.) 388.

Borrowing Funds of the Estate. — The mere fact that an executor or administrator borrows funds of the estate is not cause for revoking his letters. *Matter of Petrie*, 5 Dem. (N. Y.) 352.

Preference of Creditors. — An unauthorized preference of creditors by an executor or administrator is misconduct. *Foltz v. Prouse*, 17 Ill. 487.

Unauthorized Interference with Real Estate. — An executor is not guilty of misconduct in undertaking the management and control of the real estate, where the devisees withhold the personality from the executor, and hinder and embarrass him in the performance of his duties. *Young's Estate*, 16 Pa. Co. Ct. Rep. 54.

Denying Inspection of Title Deeds by Heirs. — The refusal of an executor to permit the heir to inspect the title deeds of the real estate is misconduct for which his letters may be revoked. *Tompkins Estate*, 6 Kulp (Pa.) 99.

Denying Inspection of Papers by Co-executors. — So also is the refusal of an executor to permit his co-executors to inspect papers belonging to the estate. *Chew's Estate*, 2 Pars. Eq. Cas. (Pa.) 153.

Refusal to Execute Deed. — An executor is guilty of misconduct, if he refuses to join in a deed of lands directed by the will to be sold, where his refusal is on the ground that he desires to purchase himself at a less price. *Oliver v. Frisbie*, 3 Dem. (N. Y.) 22.

Refusal to Execute Mortgage. — It is also misconduct if, in a spirit of resentment and hostility towards his co-executors, he refuses to join in a mortgage for the support of the widow; though if he subsequently agrees to sign the mortgage, the order of revocation may be suspended subject to his good conduct. *Bickling's Estate*, 14 Pa. Co. Ct. Rep. 661, 15 Pa. Co. Ct. Rep. 284.

Refusal to Execute Power of Sale. — A refusal to execute a mandatory power of sale is not misconduct for which the executor's letters may be revoked, where the time of sale was in the discretion of the executor, and his judgment was exercised in good faith. *Haight v. Brisbin*, 96 N. Y. 132; *Wilcox v. Quinby*, (Supreme Ct.) 20 N. Y. Supp. 5; *Parsons's Estate*, 82 Pa. St. 465; *Corby's Estate*, 5 Kulp (Pa.) 160; *Peck's Estate*, 5 Kulp (Pa.) 204; *Morris's Estate*, 16 Phila. (Pa.) 344, 41 Leg. Int. (Pa.) 115.

Delegation of Authority. — It is held in *New York* that the delegation of his authority by an executor shows incompetency for which his letters may be revoked. *Savage v. Gould*, 60 How. Pr. (N. Y. Supreme Ct.) 234. See also *French v. McGee*, Montreal L. R. 2 Q. B. 59, 9 Leg. N. 86.

But in *Pennsylvania* it is held that the statutes providing for revocation of letters do not authorize revocation on the ground that an ad-

or administrator for his individual benefit constitute a breach of duty for which his letters may be revoked.¹

(g) **Neglect of Duty** — *aa. IN GENERAL.* — Neglect by an executor or administrator of the duties of his office is sufficient ground for revoking his letters.²

bb. WASTE OR MISMANAGEMENT. — If an executor or administrator has been guilty of any waste or mismanagement of the estate his letters may be revoked.³

ministrator has given a stranger an irrevocable power of attorney to act for him in the settlement of the estate. *Johnston's Appeal*, (Pa. 1887) 11 Atl. Rep. 78.

Paying Private Debts with Trust Funds. — Though it is devastavit for an executor or administrator to use the funds of the estate in the payment of his individual debts, yet, when the amount used is small, and the interests of creditors, legatees, and distributees are not endangered, and the executor or administrator was guilty of no improper motive, it is not cause for revoking his letters. *Killam v. Costley*, 52 Ala. 85.

Burden of Proof. — The burden of proving misconduct, in a proceeding to revoke letters testamentary on that ground, is on the petitioner. *Schlager's Estate*, 16 Pa. Co. Ct. Rep. 510, 4 Pa. Dist. Rep. 495.

Acts Done Before Appointment. — It is not a ground for removing an administrator that before his appointment and while acting as attorney for his predecessor in the administration he received an excessive fee for his services. *Miller v. Hider*, 9 Colo. App. 50.

1. Procuring Allowance of Claims — Fraud. — If an administrator by fraud procures the allowance of an unfounded claim against the estate, the letters will be revoked. *Owens v. Link*, 48 Mo. App. 534.

Purchase of Legatee's Interest — False Representations. — Letters may be revoked where an executor, by false representations, and by taking advantage of the poverty of the residuary legatee, induced her to sell her interest in the estate to him for much less than its value. *Lett v. Emmett*, 37 N. J. Eq. 535.

Purchase by Executor at His Own Sale. — The mere fact that executors become purchasers at their own sale is not ground for revoking their letters. *Webb v. Dietrich*, 7 W. & S. (Pa.) 401.

Foreclosing Mortgage on Land. — Nor is the fact that an administrator foreclosed a mortgage on the decedent's real estate and became the purchaser, since administrators have no authority over the real estate of their intestate. *Matter of Monroe*, 142 N. Y. 484.

2. Refusal or Neglect to Perform Duties Is Ground for Revocation. — *Matter of Bauquier*, 88 Cal. 302; *Treat's Appeal*, 40 Conn. 290; *Butler v. Sisson*, 49 Conn. 588; *Marsh v. Peopler*, 15 Ill. 284; *Wildridge v. Patterson*, 15 Mass. 148; *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376.

Neglect to Execute Power of Sale. — If an executor neglects or unreasonably delays to execute a power of sale given by the will, it is ground for removing him from office. *Haight v. Brisbin*, 96 N. Y. 132; *Wilcox v. Quinby*, (Supreme Ct.) 20 N. Y. Supp. 5; *Parsons's Estate*, 82 Pa. St. 465; *Corby's Estate*, 5 Kulp (Pa.) 160; *Peck's Estate*, 5 Kulp (Pa.) 204; *Morris's Estate*, 16 Phila. (Pa.) 344, 31 Leg. Int. (Pa.) 115.

In *Adams v. Van Vleck*, 4 Dem. (N. Y.) 343, it was held that where executors failed to sell and reinvest, they might be removed by the surrogate on application by the proper parties.

Failure to Deposit Funds. — An executor who fails to deposit the funds of the estate as required by law may be removed from office. *Depas v. Riez*, 2 La. Ann. 30; *Mann's Succession*, 4 La. Ann. 28; *Peytavin's Succession*, 7 Rob. (La.) 477; *Peale v. White*, 7 La. Ann. 449.

Delay in Completing Administration. — An unreasonable delay in completing the administration is sufficient ground for revoking the letters of an executor or administrator. *In re Moore*, (Cal. 1889) 22 Pac. Rep. 653.

But the burden rests on the petitioner to show negligence or injury by reason of the delay, and the administrator may rely on the presumption in his favor of fair conduct and faithful performance of duty. The mere fact that administration had been pending sixteen years does not impose on the administrator the necessity of disproving the charge of negligence. If, however, he offers to explain the delay he may do so by showing that the administration has been prolonged by reason of litigation for which he was not responsible. *Matter of Moore*, 83 Cal. 583.

If the Executor Has Used All Reasonable Care and Diligence in administering the estate, but it has been impossible to complete administration within the time allowed by statute, his letters will not be revoked because of the delay. *Ford v. Ford*, 88 Wis. 122.

An Estate Must Be Administered According to the Will, even though final settlement within the time required by statute is thereby rendered impossible. *Scott v. West*, 63 Wis. 529.

Delay Caused by Necessary Litigation is not ground for revoking letters. *Andrews v. Carr*, 2 R. I. 117. Nor is delay caused by contesting claims against the estate, since the object of the administrator's appointment is to protect the estate against invalid and doubtful claims. *Andrews v. Carr*, 2 R. I. 117.

3. Waste or Mismanagement Is Ground for Revocation. — *Hake v. Stotts*, 5 Colo. 140; *Rogers v. Morrison*, 21 La. Ann. 455; *Lehr v. Tarball*, 2 How. (Miss.) 905; *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376; *Elmendorf v. Lansing*, 4 Johns. Ch. (N. Y.) 562; *Parson's Estate*, 82 Pa. St. 465.

Error of Judgment. — Letters will not be revoked because of any error of judgment on a doubtful question, or mistake of the executor or administrator as to his legal rights. *Sparrow's Succession*, 39 La. Ann. 996; *Gray's Estate*, 4 Kulp (Pa.) 157.

Investment of Funds in Confederate Treasury Notes without proper order or judgment of some court having jurisdiction of the matter has been held a devastavit for which an administrator may be removed. *Oglesby v. Howard*, 43 Ala. 144.

cc. FAILURE TO GIVE BOND. — If an executor or administrator fail to give bond as required by law, or by an order of the court, his letters may be revoked.¹

dd. FAILURE TO MAKE INVENTORY. — Letters testamentary or of administration may be revoked if the executor or administrator fails or refuses to make and return an inventory of the estate within the time required by law, or as directed by order of the court.²

Payment on Forged Order of Court. — In *Matter of Welch*, 86 Cal. 179, 110 Cal. 605, it was held that the court was not justified in revoking letters of administration because the administrator paid money to an attorney for the minor heirs on a forged order of the court, where the administrator had previously paid the attorney money under an allowance by the court, and was induced by the attorney to believe that the court would grant him a large allowance.

Acting on Advice of Counsel. — Acts done in good faith, under advice of counsel, do not furnish grounds for revoking letters of administration. *Loxley's Estate*, 38 Leg. Int. (Pa.) 276, 14 Phila. (Pa.) 317.

A Merely Technical Maladministration will not authorize the revocation of letters testamentary or of administration, but it must be such as involves actual injury, or reasonable apprehension of injury, or is attended with circumstances indicative of fraud. *Killam v. Costley*, 52 Ala. 85.

Irregularities. — An administrator's letters will not be revoked because of mere irregularities in his administration which do not show any incapacity or dishonesty. *Mitchell v. Mitchell*, 12 Leg. N. 180, 16 Can. Sup. Ct. Rep. 722.

Purchasing Land in Another State. — An executor will not be removed because he invested funds of the estate in the purchase of real estate in another state, which the testator in his lifetime had agreed to purchase, though a loss is sustained in consequence of a defect of title, which was apparently good at the time of the purchase. *Denton v. Sanford*, 39 Hun (N. Y.) 487.

1. Failure to Give Bond Is Ground for Revocation — California. — *Barrett v. Placer County*, (Cal. 1897) 47 Pac. Rep. 592.

Kentucky. — *Davenport v. Irvine*, 4 J. J. Marsh. (Ky.) 60.

Louisiana. — *De Flechier's Succession*, 1 La. Ann. 20.

Maryland. — *Carey v. Reed*, 82 Md. 383.

Mississippi. — *Clark v. Niles*, 42 Miss. 460.

New York. — *In re O'Brien*, (Surrogate Ct.) 19 N. Y. Supp. 541.

North Carolina. — *McFadgen v. Council*, 81 N. Car. 195.

Pennsylvania. — *Longenberger's Estate*, 148 Pa. St. 564.

Necessity of Order Requiring Bond. — In *Texas* an executor cannot be removed for failure to give bond unless he has been ordered to do so by the court. *Perkins v. Wood*, 63 Tex. 396.

Time to Give Bond. — Letters cannot be revoked for failure to give bond until the time allowed therefor (ten days) has elapsed. *Horlor's Succession*, 23 La. Ann. 396.

Failure to Give Additional Bond. — In *National Bank v. Stanton*, 116 Mass. 435, it was held that where an executor and residuary legatee, who had given bond to pay debts and legacies,

and was afterwards required by the judge of probate to give a similar bond in a larger sum, failed to do so, he might be removed from office.

Inadequate Bond — Time to Procure Renewal. — Under the *New York* statute letters of administration cannot be revoked because of a failure of the administrator to give further security until the time (five days) allowed by statute, in which to procure a new bond, has elapsed. *In re Moulton*, (Supreme Ct.) 10 N. Y. Supp. 717.

Counter Bond. — In *Kentucky* an administrator may be required to give counter security, and if he fails to do so his letters may be revoked. *Richards v. Porter*, 6 T. B. Mon. (Ky.) 1.

Public Administrator. — In *North Carolina* a public administrator cannot be removed for failure to renew his bond, unless he had notice, though the statute provides that such failure shall cause a vacancy in the office. *Trotter v. Mitchell*, 115 N. Car. 190. See also *Matter of Trotter*, 115 N. Car. 193.

For a Full Discussion of the subject of bonds of executors and administrators, see *infra*, this title, *Administration Bonds*.

2. Failure to Make Inventory Is Ground of Revocation. — *Oglesby v. Howard*, 43 Ala. 144; *Matter of Graber*, 111 Cal. 432; *Treat's Appeal*, 40 Conn. 290; *McFadden v. Ross*, 93 Ind. 134; *In re Holladay*, 18 Oregon 168; *Steel v. Holladay*, 20 Oregon 463; *In re Mills*, 22 Oregon 210; *Brophy's Estate*, 34 Leg. Int. (Pa.) 240, 12 Phila. (Pa.) 18; *Ruenbuhl v. Heffron*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1028.

But not when the assets consist only of money and choses in action received from a former administrator. *Hubbard v. Smith*, 45 Ala. 516.

When Default Occurs. — An administrator is not in default in not filing an inventory until the time allowed by law (ten days) has elapsed. *Horlor's Succession*, 23 La. Ann. 396.

Necessity of Order Requiring Inventory. — In *New York* failure to file an inventory, in the absence of an order requiring it, is not ground for revoking letters. *In re Moulton*, (Supreme Ct.) 10 N. Y. Supp. 717.

Excuse for Failure. — Sickness of the executrix and the failure of her co-executors to exhibit evidence of the assets in their custody is an excuse for failure to file inventory within the time required by law. *In re Patten*, 18 D. C. 392.

Personalty of Decedent's Wife. — Though at common law a married woman's personalty belongs to her husband and at his death must be inventoried as part of his estate, the failure of a widow who has taken out letters of administration on her husband's estate to inventory such property is not ground for revoking

ee. FAILURE TO ACCOUNT. — It is a sufficient ground for revoking letters that the executor or administrator has neglected for a long time to render a statement of his accounts.¹

(h) **Removal from Jurisdiction of Court.** — Letters may be revoked when the executor or administrator departs permanently from the state,² or where he departs from the state and continues to reside out of it for a certain period;³ but letters are not revoked *eo instanti* by the removal of an executor or administrator from the state. An order of the court is necessary to effect a revocation.⁴

(i) **Unfitness and Incapacity** — *aa.* UNFITNESS — (*aa*) *In General.* — The numerous conditions which disqualify an executor or administrator for the discharge of the duties of his office, and therefore furnish grounds for his removal, generally fall within the designation either of unfitness or incapacity. He may be unfit or unsuitable for the duties of his trust because of habits, character, condition, or occupation.⁵

her letters. *Speakman's Appeal*, 71 Pa. St. 25.

Real Estate Fraudulently Conveyed. — An administrator must inventory real estate fraudulently conveyed by the intestate, if the creditors offer to indemnify him, and his refusal to do so is good cause for revoking his letters. *Andrews v. Tucker*, 7 Pick. (Mass.) 250.

Land Set Off on Execution. — It is not ground for revocation that the administrator declines to inventory or commence proceedings to recover, for the benefit of the heirs, real estate which formerly belonged to the decedent, but which had been set off on execution against him in his lifetime, though the heirs claim that the judgment was recovered by fraud. *Richards v. Sweetland*, 6 Cush. (Mass.) 324.

Special Inventory. — In *In re Patten*, 18 D. C. 392, it was held that the *Maryland* statute of 1798, authorizing the removal of the executor if he failed to return an inventory within three months after his qualification, applied only to the ordinary inventory, and not to any special inventory which the court might order.

As to when inventory must be made and returned, or filed, see *infra*, this article, *Inventory and Appraisal*.

1. Failure to Settle Accounts. — *Jones v. Jones*, 41 Md. 354.

In *Armstrong v. Stowe*, 77 N. Car. 360, failure to make a settlement of the account of the testator's estate for twenty years was held sufficient cause for revocation.

Failure for Seven Years was held sufficient in *Simon's Estate*, 155 Pa. St. 215.

Failure for Five Years to file account was held sufficient in *Brown v. Ventress*, 24 La. Ann. 187.

Failure to File an Account Within a Twelve-month, as required by statute, was held sufficient in *Ford v. Kittredge*, 26 La. Ann. 190.

Neglect to File an Account for Nearly a Year After the Time Fixed by the Court for that purpose was held sufficient in *Evans v. Buchanan*, 15 Ind. 438.

But More Failure to Make Regular Settlements, from which no injury has resulted, was not ground for revoking letters. *Hightower v. Moore*, 46 Ala. 387.

Nonresidents. — It is discretionary with the court to revoke letters if the executor or ad-

ministrator is a nonresident and fails to settle his accounts. *Cutler v. Howard*, 9 Wis. 309.

2. Removal from State Ground for Revocation. — *Yerkes v. Broom*, 10 La. Ann. 94; *Winn's Succession*, 27 La. Ann. 688; *Sohn's Estate*, 1 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 373.

Absence Not Injurious to the Estate, however, is not ground for revocation. *McDonogh's Succession*, 7 La. Ann. 472.

Absence When Letters were Granted. — Where the executor was a nonresident of the state when letters testamentary were issued, they cannot be revoked because of his continued nonresidence. *Sterling's Estate*, 9 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 448.

Absence by Leave of Court, from the County in which administration is pending, is not ground for revoking the letters. *Hall v. Monroe*, 27 Tex. 700.

Discretion of Court. — In *Grotz's Estate*, 1 Northam. L. Rep. (Pa.) 96, it was held to be discretionary with the court to revoke letters testamentary where the executor had moved out of the state.

3. Length of Absence. — The length of absence from the state which will justify the revocation of letters is fixed in *Pennsylvania* at one year. *James's Estate*, 10 Pa. Co. Ct. Rep. 220. And in *Texas* at three months. *Hall v. Monroe*, 27 Tex. 700.

As to time of absence which will furnish ground for revocation of letters, see also the various local codes.

4. Removal from State Not Revocation of Letters *Eo Instanti*. — *McCreary v. Taylor*, 38 Ark. 393; *State v. Rucker*, 59 Mo. 17.

5. Unfitness in General. — Executors are not unfit or unsuitable for the duties of their office merely because they are men of inconsiderable means, not transacting business or having any place of business. *Postley v. Cheyne*, 4 Dem. (N. Y.) 492; *Sterling's Estate*, 9 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 448. See also *Emerson v. Bowers*, 14 N. Y. 449.

There Should Be Undoubted Proof of the utter improvidence and unfitness of an executor for the duties of his trust to justify his removal. *Matter of Johnson*, (Surrogate Ct.) 15 N. Y. St. Rep. 752, citing *Cotterell v. Brock*, 1 Bradf. (N. Y.) 148.

Gambling. — Unfitness is not shown by the fact that an executor sometimes plays cards,

(bb) *Unfriendly Relations or Adverse Interests.*—Unfriendly relations with a co-executor or co-administrator, or hostility or ill-will towards the persons interested in the estate, may render the executor or administrator unfit or unsuitable.¹

(cc) *Financial Circumstances.*—If the financial circumstances of an executor or administrator are such as to expose the estate to risk of injury or loss, his letters may be revoked.²

(dd) *Indebtedness to Estate.*—As a general rule, letters will not be revoked because the executor or administrator is indebted to the estate.³

(ee) *Litigation with Estate.*—It is well settled that letters testamentary or of administration are not subject to revocation merely because the executor or administrator holds a claim against the estate.⁴ It has, however, been con-

where it appears that he is a man of ample means and of strict integrity. *Harris v. Hicks*, 13 Tex. Civ. App. 134.

Habitual Drunkenness is a sufficient ground for revoking the letters of an executor or administrator. *Gurley v. Butler*, 83 Ind. 501; *Matter of Cady*, 36 Hun (N. Y.) 122, affirmed 103 N. Y. 678, 9 N. E. Rep. 442.

Accepting Incompatible Office—Probate Judge.—The acceptance by an administrator of the office of probate judge does not affect the administration, on the ground of incompatibility, the administration being a trust rather than an office. *Whitworth v. Oliver*, 39 Ala. 286.

Representing Different Estates.—The fact that an executor or administrator also represents another estate, the interests of which conflict, does not require revocation of his letters. *Wright v. Wright*, 72 Ind. 149.

1. Unfriendly Relations with a Co-executor, if the interests of the estate are thereby jeopardized, will warrant revocation of the executor's letters. *Silberman's Estate*, 14 W. N. C. (Pa.) 259.

But such remedy will not be applied merely because there is a disagreement between them, or to gratify the malice or bad feeling of one against the other. *Morgan's Estate*, 26 W. N. C. (Pa.) 236, 47 Leg. Int. (Pa.) 155, 20 Phila. (Pa.) 28. See also *Fairbairn v. Fisher*, 4 Jones Eq. (57 N. Car.) 390.

Hostility to the Beneficiaries of the Estate.—An executor may be removed where his relations with the heirs are not harmonious, and they have adverse interests. *Bicking's Estate*, 3 Pa. Dist. Rep. 454; *Dayton's Estate*, 1 Kulp (Pa.) 118; *Pike's Estate*, 45 Wis. 391.

Hostility to Creditors is a sufficient ground for revoking letters. *Matter of Jacob*, 5 N. Y. App. Div. 508.

Adverse Interests.—Letters may be revoked where the executor or administrator has interests adverse to the beneficiaries of the estate. *Thayer v. Homer*, 11 Met. (Mass.) 104; *Simpson v. Jones*, 82 N. Car. 323; *In re Mills*, 22 Oregon 210; *Kellberg's Appeal*, 86 Pa. St. 129.

Refusal to Account for Moneys Received as Agent.—Executors are not unsuitable for the trust so as to justify their removal under the *Massachusetts* statute, because they refuse to account for large sums of money received by them as the testator's business agents more than twenty years before the testator's death, though almost the whole estate consists of debts due from the executors. *Hussey v. Coffin*, 1 Allen (Mass.) 354.

2. Letters Revoked for Insolvency.—*Greentree's Estate*, 3 W. N. C. (Pa.) 519; *Edward's Estate*, 5 W. N. C. (Pa.) 431.

Letters Not Revoked for Insolvency.—*Schanck v. Schanck*, 7 N. J. Eq. 140; *Matter of Hart*, (Supreme Ct.) 6 N. Y. St. Rep. 535. Compare *Elmendorf v. Lansing*, 4 Johns. Ch. (N. Y.) 562.

Precarious Circumstances.—An executor may be removed if his circumstances are so precarious as not to offer adequate security for his due administration of the estate, though the testator knew such circumstances. *Senior v. Ackerman*, 2 Redf. (N. Y.) 302; *Freeman v. Kellogg*, 4 Redf. (N. Y.) 218.

But the bare fact that the estate of the executor is of less value than the estate of his testator is not sufficient. *Grubb v. Hamilton*, 2 Dem. (N. Y.) 414.

The Poverty of an Executor does not furnish ground for equity to restrain him from acting, unless his financial condition has been changed for the worse since the testator's death. *Wilkins v. Harris*, Winst. Eq. (60 N. Car.) 41.

Bankruptcy.—Letters may be revoked where the administrator becomes a bankrupt. *Dwight v. Simon*, 4 La. Ann. 490. See also *Bowen v. Phillips*, (1897) 1 Ch. 174, 75 L. T. N. S. 628, 45 W. R. 286, holding that, where an executor has become bankrupt, the court of equity will enjoin him from acting as executor.

Improvidence Is a Ground for revoking letters testamentary or of administration in *New York*, and the word, as used in the statute, refers to the habits of mind and conduct which become part of the man, rendering him unfit for the trust in question. *Freeman v. Kellogg*, 4 Redf. (N. Y.) 218; *Emerson v. Bowers*, 14 N. Y. 449.

3. Indebtedness to the Estate is not in all cases cause for revoking letters, since the sureties on the bond of the executor or administrator will be liable if he fails to account for the whole debt. *Winship v. Bass*, 12 Mass. 198.

But indebtedness to the estate, together with insolvency and unfriendly relations with the co-executors, was held sufficient ground in *Silberman's Estate*, 14 W. N. C. (Pa.) 259.

Denial of Indebtedness to the Estate does not furnish cause for revoking the letters. *Molony's Estate*, 1 Phila. (Pa.) 294, 9 Leg. Int. (Pa.) 14, 5 Clark (Pa.) 139.

4. Litigation with Estate.—This is recognized by all authorities relating to the effect of appointing a creditor of the decedent executor or administrator, and to the right of an execu-

tended that litigation between the personal representatives and the estate is a ground for revoking letters, but it is generally held that such ground alone is not sufficient.¹

b. INCAPACITY. — The incapacity for which an executor or administrator may be removed from office, or his letters revoked, may result either from his mental condition, or from his lack of the qualifications which the law requires.²

cc. UNSUITABLENESS EXISTING AT TIME OF APPOINTMENT. — Some cases hold that an executor or administrator may be removed if he is unsuitable for the discharge of his duties at the time when the petition for his removal is heard, though the facts alleged to render him unsuitable existed at the time of his appointment; but that a removal for unsuitableness will not be made merely on proof that he was unsuitable when he was appointed, without proof that he continues to be so.³

(4) *How Removal or Revocation Is Effected* — (a) *In General.* — As a general rule, the statutes relating to the revocation of letters testamentary or of

tor or administrator to retain, or otherwise enforce claims held by him against the estate; as to which see the title *DEBTS OF DECEDENTS*, vol. 8, p. 1003; and *supra*, this section, *Effect of Appointment*.

1. *Litigation with Estate Is Not Ground for Revoking Letters.* — *Mitchell v. Mitchell*, Montreal L. R. 4 Q. B. 191, 17 Rev. Leg. 703; *Gray's Estate*, 4 Kulp (Pa.) 157; *Murray v. Angell*, 16 R. I. 692.

2. *Insanity.* — Letters may be revoked if the executor or administrator becomes *non compos mentis*. *Offley v. Best*, 1 Sid. 373; *Matter of Moore*, 68 Cal. 281; *Matter of Blinn*, 99 Cal. 216; *Matter of Taggart*, 1 Ashm. (Pa.) 321.

The *Massachusetts* statute provides that "where any executor shall become insane, or otherwise incapable of discharging his trust, or evidently unsuitable therefor, the judge of probate may remove him." *Thayer v. Homer*, 11 Met. (Mass.) 104.

Incapacity Arising from Long Illness is sufficient cause for revocation of letters. *Babbitt v. Babbitt*, 26 N. J. Eq. 54.

For a Full Discussion of the disqualifying conditions, see *supra*, this section, *Who May Be an Executor*.

3. *Unsuitableness Existing at Time of Appointment.* — *Drake v. Green*, 10 Allen (Mass.) 124. In this case Hoar, J., referring to unsuitableness as ground for revoking letters, said: "It is not enough to show that the administrator was unsuitable at the time he was appointed, without showing further that the disqualification has continued, or has been revived. The appointment has been regularly made, and, if not appealed from, is valid and conclusive. All parties in interest were notified according to law, and their remedy, if they were dissatisfied with the appointment, was by appeal. The person appointed, whether suitable to discharge the trust or not, has become the administrator, perhaps because no one took the trouble to prove his unsuitableness. On a petition to remove him, the court does not reconsider the question whether his original appointment was proper. That has been adjudicated. His qualifications when he was appointed may incidentally be introduced in evidence, in order to show what his present qualifications are. But if since his appointment he has not become a suitable adminis-

trator, he has become an unsuitable one, and may be removed for that cause upon petition, although the present unfitness may have existed before his appointment to an equal degree, and would have been a good cause for refusing to appoint him in the first instance. Thus, for example, a person who applies for administration may have interests conflicting with those of the estate. The probability that these would prove an embarrassment in the proper performance of his duty might be a sufficient reason for a refusal of the judge of probate to intrust him with the administration. But he is appointed. Either the fact was not brought to the notice of the judge, or he did not think it a sufficient objection. The administrator enters upon the discharge of his trust. It may be that his claims adverse to the estate are amicably adjusted; or he may show by his conduct that he is ready to make his own rights subordinate to those whose interests he represents. It would not then be just or lawful to deprive him of his vested interest in the administration, by merely showing the condition of things before his appointment, and thus in effect rejudging the correctness of the decision which had been made. But suppose on the other hand that his claims remain unsettled, and without reasonable prospect of a fair settlement; or that by act or speech he shows that he intends to secure an unfair advantage to himself; then, within the meaning of the statute, he may be held to have 'become evidently unsuitable for the discharge of his trust;' and we think it would be no sufficient answer to an application for his removal, that he was just as unsuitable when he was appointed."

But see *Lehr v. Tarball*, 2 How. (Miss.) 905, where it was held that when an administrator possessed the same capacity when the application to remove him on the ground of incapacity was made, as he did when he was appointed, the court would not remove him, though the appointment was injudicious, it not being shown that there was any change in his habits or any alienation in his mind, or that the estate had suffered by his acts.

Letters Granted to a Minor are not revocable after the minor becomes of age and ratifies the acts done by him. *Davis v. Miller*, 106 Ala. 154.

administration contemplate a direct proceeding for that purpose by some person interested;¹ though in some jurisdictions a proceeding by a party in interest is not necessary, but the court may act *ex mero motu*.²

(b) **Annulment of Will or Revocation of Probate.** — If a will appointing an executor is adjudged invalid, the authority of the executor is thereby revoked;³ but if there is no executor, and letters of administration with the will annexed have been granted, revoking the probate of the will does not revoke such letters.⁴

(c) **Discovery of Will After Grant of Administration.** — Where a will appointing an executor is discovered after letters of administration have been legally granted, the letters of administration are thereby repealed.⁵

(d) **Second Grant of Letters.** — The court of probate has not power ordinarily to appoint an administrator if there is, at the time, an executor or administrator in office,⁶ but if a ground of revocation exists, some authorities hold that the appointment of another person is a revocation of the previous letters.⁷

(e) **Disqualification.** — The mere fact that an executor or administrator has become disqualified does not of itself operate as a revocation of his letters. An order of removal is necessary.⁸

(f) **Cancellation of Bond.** — Neither does the cancellation of the bond of an executor or administrator operate as a revocation of his letters.⁹

(g) **Removal of Trustee Who Is Also Executor.** — Where the same person is both trustee and executor, removing him from the office of trustee does not necessarily revoke the letters issued to him as executor.¹⁰

1. Direct Proceeding Necessary. — *Vail v. Givan*, 55 Ind. 59; *Glover's Succession*, 43 La. Ann. 458.

Letters Cannot Be Revoked in a Collateral Proceeding, such as a proceeding for the sale of land to pay debts. *McLaurin v. McLaurin*, 106 N. Car. 331; *Chew v. Chew*, 3 Grant's Cas. (Pa.) 289.

2. Power of Court to Act Ex Mero Motu. — *County Ct. v. Bissell*, 2 Jones L. (47 N. Car.) 387; *Wright v. McNatt*, 49 Tex. 425. See *supra*, this section, *The Power; Who May Apply for Removal*.

Revocation on Opposition to Account. — In *Glover's Succession*, 43 La. Ann. 458, it was held that an order removing an executor might be made on an opposition to his account, at the trial of which charges of maladministration were made and proved without objection.

When Application May Be Made. — A petition to revoke letters on the ground that they were improvidently granted must be filed within the time limited for taking an appeal from the order granting the letters. *Edwards v. Bruce*, 8 Md. 302; *McColgan v. Kenny*, 68 Md. 258.

An Application Filed Within a Month After the Intestate's Death by his widow, to revoke letters granted to a daughter of the intestate a few days after his death, is in proper time, and it is immaterial whether the judge of probate is kept in ignorance of the widow's existence by fraud or inadvertence. *Rollin v. Whipper*, 17 S. Car. 34.

3. Annulment of Will Revokes Executor's Authority. — *Heffner's Succession*, 49 La. Ann. 407; *Clagett v. Hawkins*, 11 Md. 381. But see *Huff's Estate*, 15 S. & R. (Pa.) 39.

Mere Contest of Will is not ground for revoking letters with the will annexed. *Elwell v. Universalist Church*, 63 Tex. 220.

On the Reversal of a Judgment Declaring the Will Invalid, letters of administration previously granted will be revoked. *Patton's Appeal*, 31 Pa. St. 465.

4. Revoking Probate of Will Does Not Revoke Letters of Administration with Will Annexed. — *Floyd v. Herring*, 64 N. Car. 409.

5. Discovery of Will After Grant of Administration. — *Kane v. Paul*, 14 Pet. (U. S.) 33; *Kittridge v. Folsom*, 8 N. H. 98; *Bigelow v. Bigelow*, 4 Ohio 138, 19 Am. Dec. 591.

6. Letters Cannot Be Granted Unless Administration Is Vacant. — See *supra*, this section, *Jurisdiction to Appoint Administrators*.

7. Letters Revoked by Subsequent Grant. — Where administration has been granted to the wrong person, a second grant to the right person is a repeal of the first without any order of revocation. *Newman v. Beaumont*, *Owen* 50.

So where an administrator had left the state and the ordinary granted letters of administration to another without any other formality, it was held a sufficient revocation of the authority of the first administrator. *M'Laurin v. Thompson*, *Dudley L.* (S. Car.) 335. But see *contra*, *Pratt v. Stocke*, *Cro. Eliz.* 315; *Haynes v. Meeks*, 20 Cal. 288.

8. Disqualification Not Ipso Facto Revocation—Insanity. — In *Matter of Moore*, 68 Cal. 281, it was held that an absolute vacancy in an administration of an estate is not created by the fact that the administrator had been adjudged insane and committed to a lunatic asylum.

In *Brown v. Mann*, 68 Cal. 517, it was held that an administrator was not rendered *civiliter mortuus* by a conviction of embezzlement, so as to prevent service on him of notice of appeal in an action in which he was sued as administrator.

Mere Removal from the State does not operate as a revocation, but an order of removal is necessary. *State v. Rucker*, 59 Mo. 17.

9. Cancellation of Bond Not Revocation of Letters. — *Clarke v. Rice*, 15 R. I. 132.

10. Removal of Trustee Who Is Also Executor. — *Deraismes v. Dunham*, 22 Hun (N. Y.) 86; *Quackenboss v. Southwick*, 41 N. Y. 117.

(5) *Effect of Removal* — (a) *In General.* — When letters are revoked, or an order of removal is made, the authority of the executor or administrator ceases, and he cannot afterwards do any act as executor or administrator, but he must settle his accounts and deliver up to his successor all the property of the estate in his hands.¹

(b) *Validity of Previous Acts.* — As to acts done in due course of administration before letters are revoked, the rule is now laid down that such acts are valid and binding, unless the probate or grant of letters was absolutely void;² though the earlier authorities are not in accord on this point.³

1. *Revocation Terminates Authority.* — *Davenport v. Irvine*, 4 J. J. Marsh. (Ky.) 60.

In the Case of an Executor it is held that the revocation of his letters does not divest his title to money collected and goods reduced to possession and converted, but that as to such money and goods he is accountable to the creditors, legatees, and distributees. The ground on which this decision rests is that the title of an executor in the effects of the testator is derived from the will and exists independently of the letters testamentary. *Gregory v. Harrison*, 4 Fla. 56.

Delivery of Assets to Successor. — *Pinney v. Barnes*, 17 Conn. 420; *Marsh v. People*, 15 Ill. 284; *Kelly v. Weddle*, 1 Ind. 550; *Aldridge v. McClelland*, 34 N. J. Eq. 237; *Tome's Appeal*, 50 Pa. St. 285.

Accounts Must Be Settled on Revocation. — *Whitworth v. Oliver*, 39 Ala. 286; *Glenn v. Billingslea*, 64 Ala. 345; *Marsh v. People*, 15 Ill. 284; *Davis v. Cheves*, 32 Miss. 317; *Aldridge v. McClelland*, 34 N. J. Eq. 237; *Gerould v. Wilson*, 16 Hun (N. Y.) 530, *affirmed* in 81 N. Y. 573; *Lawrence's Estate*, Tuck. (N. Y.) 68; *Dunford v. Weaver*, 21 Hun (N. Y.) 349; *Matter of Hood*, 104 N. Y. 103; *Huff's Estate*, 15 S. & R. (Pa.) 39.

2. *Acts Are Void if Letters Were Void.* — *Chinn v. Taylor*, 64 Tex. 385.

If Letters Are Voidable Only, acts intermediate the grant of the letters and the revocation thereof are valid. *Floyd v. Clayton*, 67 Ala. 265; *Rebhan v. Mueller*, 114 Ill. 343, 55 Am. Rep. 869; *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 15 Am. St. Rep. 494; *Foster v. Brown*, 1 Bailey L. (S. Car.) 221, 19 Am. Dec. 672; *Price v. Nesbit*, 1 Hili Eq. (S. Car.) 445; *Benson v. Rice*, 2 Nott & M. (S. Car.) 577; *Baldwin v. Buford*, 4 Yerg. (Tenn.) 16.

Discovery of Will After Grant of Letters. — If a will appointing an executor is discovered and admitted to probate after a grant of letters of administration by competent authority, on a proper case made, such letters of administration are thereby annulled, but they are not void *ab initio* so as to avoid the acts of the administrator previously done in the ordinary course of administration.

England. — *Packman's Case*, 6 Coke 19; *Semine v. Semine*, 2 Lev. 90.

Illinois. — *Rebhan v. Mueller*, 114 Ill. 343, 55 Am. Rep. 869.

New Hampshire. — *Kittredge v. Folsom*, 8 N. H. 98.

Ohio. — *Bigelow v. Bigelow*, 4 Ohio 138, 19 Am. Dec. 591.

South Carolina. — *Foster v. Brown*, 1 Bailey L. (S. Car.) 221, 19 Am. Dec. 672; *Poag v. Carroll*, *Dudley L.* (S. Car.) 1; *Benson v. Rice*, 2 Nott & M. (S. Car.) 577.

If a Later Will or Codicil than the one under which an executor is acting is discovered and admitted to probate, the acts of such executor are nevertheless valid. *Jones v. Jones*, 14 B. Mon. (Ky.) 373; *Wood v. Nelson*, 9 B. Mon. (Ky.) 600; *Waters v. Stickney*, 12 Allen (Mass.) 1, 90 Am. Dec. 122; *Emanuel v. Norcum*, 7 How. (Miss.) 150; *Ralston v. Telfair*, 2 Dev. & B. Eq. (22 N. Car.) 414. See also *Arterburn v. Young*, 14 Bush (Ky.) 509; *Thompson v. Samson*, 64 Cal. 330. But see *Hughes v. Burris*, 85 Mo. 660.

But Payment of a Legacy by the Executor is rendered void by a subsequent revocation of the probate of the will. *Hinkle v. Eichelberger*, 2 Pa. St. 483.

Effect of Revocation on Pending Action. — A pending action against an administrator will be discontinued on his pleading revocation of his letters. *Taylor v. Savage*, 1 How. (U. S.) 282, 2 How. (U. S.) 395; *National Bank v. Stanton*, 116 Mass. 438; *Wiggin v. Plumer*, 31 N. H. 251.

But a discontinuance in such case will not be permitted in *Alabama*, unless the defendant shows that he has accounted for and turned over all the assets of the estate. *Skinner v. Frierson*, 8 Ala. 915.

Effect on Existing Liabilities. — Revocation of letters of administration does not bar an action for any personal liability incurred by the administrator in the management of the estate. *Gadsden v. Jones*, 1 Fla. 373.

As to the effect of revocation of letters testamentary or of administration, see also *supra*, this section, *Validity and Effect of Appointment*; and *infra*, this title, *Sale of Real Estate under Order of Court*.

3. *Conflict of Earlier Authorities.* — The uncertainty of the earlier authorities as to the effect of revocation on intermediate acts of administration is referred to and commented on in *Kittredge v. Folsom*, 8 N. H. 98. *Parker, J.*, at p. 108, says: "The law is laid down in 1 *Williams on Executors* 367, that if administration be granted on the concealment of a will, and afterwards a will appear, inasmuch as the grant was void from its commencement, all acts performed by the administrator in that character shall be equally void; and for this the case of *Abraham v. Cunningham*, reported in 2 Lev. 182, *T. Jones* 72, and in several other books, is cited. But in the next page of the same writer it is said: 'It should seem, however, that as between the rightful representative and the person to whom the executor or administrator under a void probate or grant of letters has alienated the effects of the deceased, the act of alienation, if done in due course of administration shall not be void. Thus in the case of *Graysbrook v. Fox*, 1 Plowd. 279,

(c) **Reappointment.** — It has been held that when letters testamentary have been revoked there is no authority for issuing new letters to the executor,¹ but it has also been held that the revocation of letters of administration because they were irregularly granted, or because of the failure of the administrator to give sureties, does not disqualify the person removed from being reappointed.²

V. ASSETS — 1. What Are Assets in General. — The word “assets” is derived from the French *assez*, meaning sufficient, and originally signified a sufficiency of property to pay the decedent's debts. In the course of time the idea of sufficiency gave way to that of applicability, and in modern usage the term

above mentioned, it was laid down by the court that if the sale had been made to discharge funeral expenses, or debts which the executor or administrator was compellable to pay, the sale would have been indefeasible forever.’ 1 Williams 368; and so is the case, *vide* 1 Plowd. 282. Now, how anything can be done in due course of administration, where the administration and everything done under it is merely and wholly void, it is difficult to discover. The due course of that which had no rightful existence, but was a mere nullity, would seem to be the due course of wrong, or nonentity, and presents a solecism somewhat worse than two original grants of administration on the same estate. The position, also, that a purchaser can obtain an indefeasible title from the void act of one whose supposed authority is a mere nullity seems to have more of legerdmain than of law in it. Again, it is said in the same author: ‘It must be observed that whether the probate or letters of administration be void or voidable, if the grant be by a court of competent jurisdiction, a *bona fide* payment to the executor or administrator of a debt due to the estate will be a legal discharge to the debtor.’ 1 Williams 370. That is to say, that the payment of a debt to him who has no authority to receive it, and whose act in receiving it is a void act, is a good discharge to him who owed the debt. In *Allen v. Dundas*, 3 T. R. 125, the court held that payment to an executor who had obtained probate of a forged will was a discharge to the debtor, notwithstanding the probate was afterwards avoided in the ecclesiastical court; on the principle that the debtor could not have controverted the title of the executor so long as the probate was unrepealed, and might well pay when he could make no defense. See also *Elden v. Keddell*, 8 East 189; *Bac. Abr.*, Executors, etc., E, 13. So where administration is granted, and afterwards there appears to be an executor, if the administrator has paid debts, legacies, or funeral expenses, he may retain, because he was compelled to pay; and the true executor has no prejudice, for he would have been bound to pay them. And in *Graysbrook v. Fox*, 1 Plowd. 279, *Weston, Justice*, was of opinion that the sale of the goods by the administrator was indefeasible, although it was not shown that they were sold to discharge debts or funeral expenses. There is evidently an inaccuracy in the use of the term ‘void,’ in many instances in the books, upon this and other subjects; and the attempt to reconcile all the authorities upon the matter now under consideration must be in vain.”

1. New Letters Testamentary After Revocation. — In *Matter of Dearing*, 4 Dem. (N. Y.) 81, *Surrogate Coffin* said: “There seems to have

been no provision of law made under which new letters can be issued to an executor or administrator where they have been revoked, and no common-law rule appears to exist authorizing it to be done. The decree of revocation must be regarded as conclusive and final, unless obtained fraudulently, or on some other ground which would warrant the court in setting it aside or vacating it. Suppose the executor whose letters have been revoked had been the only one named in the will, and an administrator with the will annexed had been duly appointed, and afterwards the ground of revocation had ceased to exist, could the court displace the administrator and replace the executor? So, if an executor, after entering upon his duties, should remove from the state, and, on being required, should fail to give a bond, in consequence of which his letters should be revoked, would he afterwards, on removing into the state again, be entitled to be restored to the office he had vacated? And again, suppose he were, while executor, convicted of an infamous crime and imprisoned in a state prison, in consequence of which his letters were revoked; and suppose that, pending his term of imprisonment, he should be pardoned and restored to citizenship, could the court again create him executor? These questions require an answer in the negative. Where letters have once been revoked, the appointment of the executor has ceased to exist, just as completely as if he had never been named by the testator. He cannot be rehabilitated.”

2. Reappointment of Administrators. — In *Barber v. Converse*, 1 Redf. (N. Y.) 330, *Surrogate Merwin* said that “the statute which authorizes the surrogate to revoke letters on failure to give new sureties makes no provision as to who shall be appointed in the place of the administrators removed, or how they shall be appointed. For aught that appears in the statute, the rights of all parties are the same as if letters had never been issued. The statute does not restrict the appointment to those that are subsequently entitled. If the person removed, the next day after his removal, should apply to the surrogate and present proper bonds, there is nothing in the statute to prevent his being appointed; that is, the removal does not disqualify.” See also *Delany v. Noble*, 3 N. J. Eq. 559.

But an administrator whose letters have been revoked because of his failure to give bond cannot have the appointment of the person of inferior right revoked and be reappointed merely because he has, since the appointment of such other person, become able to give security. *Williams's Case*, 18 Abb. Pr. (N. Y. Surrogate Ct.) 350, *Tuck*, (N. Y.) 8.

means property applicable to the payment of the decedent's debts, and includes every kind of property owned by a decedent, tangible or intangible, legal or equitable.¹ In some jurisdictions there are statutes declaring what

1. Assets Defined. — Burrill's Law Dict., title Assets.

Property of Every Kind Is Assets. — *De Valengin v. Duffy*, 14 Pet. (U. S.) 282; *Duffy v. Neale*, Taney's Dec. (U. S.) 271; *U. S. v. Drennen*, Hempst. (U. S.) 320; *Williams v. Morehouse*, 9 Conn. 470; *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477; *Emeret's Estate*, 2 Pars. Eq. Cas. (Pa.) 195; *Milligan v. Humbard*, 11 Heisk. (Tenn.) 137.

Money. — In *U. S. v. Eggleston*, 4 Sawy. (U. S.) 199, 23 Int. Rev. Rec. 113, it was held that under the *Oregon* statute nothing is assets in the hands of an administrator applicable to the payment of a demand against the estate but money.

Money Invested by an Administrator in a firm of which he was a member ceases to be assets of the estate, but may be recovered as a debt due the estate. *In re* Richart, 58 Ill. App. 91.

Proceeds of Sale of Legatee's Interest. — The price for which a legatee sells his interest in the estate is not a part of the estate in the sense that he may be charged with the receipt of assets, since the transaction in no way disturbs the estate or affects any claimant, but merely substitutes one person for another, to receive a proportionate share of any balance that may remain after claims are paid. *Ristine v. Kurtz*, 97 Iowa 338.

Proceeds of Execution Sale of Decedent's Property. — In *Haynsworth v. Frierson*, 11 Rich. L. (S. Car.) 476, it was held that where an execution was issued during the lifetime of the judgment debtor, and a sale was made under it after his death, the proceeds of the sale were not assets of the judgment debtor's estate, but might be applied by the sheriff in satisfaction of the judgment on which the execution was issued. This case is distinguishable from *Salvo v. Schmidt*, 2 Spears L. (S. Car.) 512, where a landlord took goods under a distress warrant issued before the death of the tenant, but levied afterwards, in that a distress warrant does not have a lien, while a *fi. fa.* has, and therefore the landlord was held answerable as executor *de son tort*.

Deed of Trust for Benefit of Creditors — Assignment of Debt to Decedent's Family. — In *Tennant v. Headlee*, 31 W. Va. 585, a debtor conveyed all his property to a trustee for creditors with the usual power of sale. The trustee paid all the expenses of executing the trust, and some of the debts in full. Of the other debts he paid about one thousand six hundred dollars, leaving about five hundred and fifty dollars unpaid. The creditors entitled to this unpaid balance assigned it to the trustee for the benefit of the family of the debtor, who was then dead. There was then remaining in the hands of the trustee about four hundred and forty dollars of the trust fund. It was held that such balance belonged to the family of the debtor, and was not assets which would go to his administrator.

Estoppel to Deny That Property Received Is Assets. — If an executor or administrator receives property in his representative capacity,

he is estopped from denying afterwards that it is property of the estate.

United States. — *De Valengin v. Duffy*, 14 Pet. (U. S.) 283; *Baring v. Putnam*, 1 Holmes (U. S.) 261.

Alabama. — *Colburn v. Broughton*, 9 Ala. 351; *Miller v. Jones*, 26 Ala. 247; *Irby v. Kitchell*, 42 Ala. 438.

Georgia. — *Duncan v. Bryan*, 11 Ga. 63.

Massachusetts. — *Phillips v. Rogers*, 12 Met. (Mass.) 405; *White v. Swain*, 3 Pick. (Mass.) 365.

North Carolina. — *Sain v. Bailey*, 90 N. Car. 566.

South Carolina. — *Manigault v. Holmes*, *Bailey Eq. (S. Car.)* 289.

This is a fundamental rule of equity. *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388, citing *Fonb. Eq.*, bk. 2, c. 7, § 7.

Liquor License. — The right of a person to carry on the retail liquor business after paying the tax does not pass, at his death, to his administrator, where a bond is required by statute from persons engaged in the liquor business, but the right is in the nature of a license to the person who complies with the statute. *People v. Sykes*, 96 Mich. 452; *Blumenthal's Petition*, 125 Pa. St. 412; *In re Grimm*, 181 Pa. St. 233; *In re Buck*, 185 Pa. St. 57. But see *contra*, *Reilly's Estate*, 6 Pa. Dist. Rep. 252, holding that a liquor license is an asset of the estate of the person to whom it was granted, on the same principle that the goodwill of a business is an asset.

Property Subject to Lien. — A lease belonging to a decedent, though subject to a lien, is assets in the hands of his administrator. *Vincent v. Sharp*, 2 Stark. 507, 3 E. C. L. 507.

Proof of Decedent's Ownership. — A presumption of ownership in the decedent of money or evidences of debt arises from the fact that they were in his possession at the time of his death. *Robbins v. Robbins*, (Ky. 1886) 1 S. W. Rep. 152; *Karch's Estate*, 133 Pa. St. 84.

But such presumption may be rebutted. Thus the presumption that the decedent was the owner of money in his hands at the time of his death is overcome by evidence on behalf of his widow who claimed the money, that she had previously borrowed money to the amount of such sum, and had given her note therefor to the lender. *Karch's Estate*, 133 Pa. St. 84.

In *Cummings's Estate*, 153 Pa. St. 397, 32 W. N. C. (Pa.) 173, it was held that the facts of the case showed that the decedent was the owner of certain bonds registered in the name of a third person, where it appeared that about ten years before his death the decedent deposited the bonds in question with others in a safe deposit box, in which they remained until his death; that the aggregate value of all the bonds so deposited was exactly equal to the amount of a fund bequeathed in one clause of his will; that the third person in whose name the bonds in question had been registered never asserted any claim to them, though they were so registered ten years before the decedent's death; that a claim of ownership in

shall constitute assets of a decedent's estate.¹

Doctrine as to Exempt Property. — Within the rule that applicability to the payment of debts is the test of the character of property as assets of the estate of the deceased owner, property exempt by statute from liability for debts does not constitute assets, unless the exemption relates only to process against the person of the owner. If the exemption continues after the death of the owner for the benefit of his family, then, unless it is only for a limited time, the property does not become assets of his estate.²

2. Assets in Respect to Different Kinds of Property — a. PERSONAL PROPERTY GENERALLY — (1) Rule Stated. — It has always been the rule that a decedent's personal property of every description constitutes assets of his estate and passes to his personal representatives.³ This includes remainders as well as

such third person was only asserted by his executor when the fact in regard to the bonds was brought out by the appraisal of the decedent's estate; and there was no evidence that the third person had purchased the bonds in question, or that he had procured them to be registered in his name.

Recovery by Executor Against Estate of Co-executor. — Where an executor paid money on an indebtedness due from himself and his co-executor to the testator's estate, and afterwards recovered against the estate of his co-executor therefor, the money so recovered belongs to the executor personally, and not to the testator's estate. *Miller's Appeal*, 127 Pa. St. 95, 24 W. N. C. (Pa.) 267.

As to What Are Assets in General, see also the title *INSOLVENCY AND BANKRUPTCY*.

1. See, for instance, Laws of *New York* 1893, p. 1693. See also statutes in other jurisdictions.

2. **Exemptions.** — Property exempt from execution becomes assets of the estate on the death of the owner, if the statute giving the exemption relates only to process issued against the person of the owner. *Johnson v. Cross*, 66 N. Car. 167.

But if the exemption continues in favor of the family of the owner after his death, the exempt property is not assets of his estate. *Griffith v. Com.*, 1 Dana (Ky.) 271; *Graham v. Bettis*, 1 B. Mon. (Ky.) 52; *Turner v. Fisher*, 4 Sneed (Tenn.) 209; *Thompson v. Alexander*, 11 Heisk. (Tenn.) 313; *Morris v. Morris*, 9 Heisk. (Tenn.) 814; *Rocco v. Cicalla*, 12 Heisk. (Tenn.) 508.

Homestead Exemption. — The statutes relating to homestead exemptions do not generally exempt the fee in the land, but they only exempt the land while it is occupied as a homestead by the widow and minor children; and therefore, subject to the homestead right, the fee is assets when needed for the payment of demands against the estate of the deceased owner. *Drake v. Kinsell*, 38 Mich. 232.

It was held, however, under the *Texas* statute, that the homestead is permanently exempted from liability for the debts of the deceased owner if he leaves a constituent of the family surviving. *McAllister v. Godbold*, (Tex. Civ. App. 1894) 29 S. W. Rep. 417; *Zwernemann v. Von Rosenberg*, 76 Tex. 522. In the case last cited, *Stayton, C. J., dissented*, saying that the decision was based on the theory that the homestead character, once attaching to the property, inheres, and, as an

estate, descends to whomsoever may inherit the property, and that this has been steadily denied. *Citing Tadlock v. Eccles*, 20 Tex. 782, 73 Am. Dec. 213; *Brewer v. Wall*, 23 Tex. 590, 76 Am. Dec. 76; *Johnson v. Taylor*, 43 Tex. 122; *Grothaus v. De Lopez*, 57 Tex. 672; *Shannon v. Gray*, 59 Tex. 251; *Ashe v. Yungst*, 65 Tex. 636.

In *Minnesota*, prior to 1889, the homestead of a debtor on his decease became assets for the payment of his debts, subject only to the homestead rights of his widow and minor children, if any. *McGowan v. Baldwin*, 46 Minn. 477; *Dunn v. Stevens*, 62 Minn. 380.

By the probate code of 1889 (Gen. Stat. Minn. 1894, § 4470) it was provided that the homestead of a decedent should descend to the surviving husband or wife, the children and the issue of any deceased child or children of the decedent, "free from all debts or claims upon the estate of the deceased," but this provision was held invalid as respects contracts made before its enactment, because it impaired their obligation by so materially affecting the subsisting remedy as to substantially lessen their value. *Dunn v. Stevens*, 62 Minn. 380, and note on p. 381.

If the Exempt Property Is in the Hands of a Third Person, who claims to own it, the administrator may sue for the possession thereof, so that it may be allotted to the widow. *Staggs v. Ferguson*, 4 Heisk. (Tenn.) 690.

As to Exemptions in favor of the decedent's family, see also the titles *ALLOWANCES*, vol. 2, p. 156; *DOWER*, vol. 10, p. 122; *EXEMPTIONS FROM EXECUTION*; *HOMESTEAD*; *HUSBAND AND WIFE*.

3. All Personalty Is Assets. — *Smith v. Denny*, 37 Mo. 20; *Gray v. Swain*, 2 Hawks (9 N. Car.) 15.

Personalty Specifically Bequeathed. — The title of the executor to personal property is not affected by the fact that it was specifically bequeathed. *Easley v. Easley*, 18 B. Mon. (Ky.) 91.

Property Set Aside to Pay Legacy. — Property in the hands of an executor, and set aside by him for the payment of a legacy, does not become the subject of a bailment in favor of the legatee, but remains assets of the estate. *Graveley v. Graveley*, 25 S. Car. 1, 60 Am. Rep. 478.

Property Purchased by Administrator from Intestate. — If an administrator claims property in his own right, under a purchase from the decedent, and the purchase is held void as to creditors, or if he obtained the property from

personal property in possession; ¹ contingent interests; ² and things intangible which are of a personal nature, as well as things tangible. ³

(2) *Goodwill of Decedent's Business.* — Where a decedent was engaged in business at the time of his death, the goodwill thereof if it is available, or the proceeds of it if it has been sold, are assets of his estate; ⁴ but before the executor or administrator can be charged with the goodwill, it must be shown that it had some value. ⁵

Partnership Business — Commercial Partnerships. — It was formerly a disputed question whether the goodwill of a business conducted by a commercial partnership survives, on the death of a member of the firm, to the survivors, or whether the interest of the deceased partner therein was assets of his estate; but it is

the intestate by fraud, it is assets in his hands. *Stephens v. Barnett*, 7 Dana (Ky.) 261; *Emmerson v. Herriford*, 8 Bush (Ky.) 229.

Property Fraudulently Sold by Executor or Administrator. — If a sale by an administrator is canceled for fraud, the law regards the property which was the subject of the sale as unadministered assets of the estate, and it passes back into the hands of the administrator to be disposed of in due course of administration. *Giddings v. Steele*, 28 Tex. 732, 91 Am. Dec. 336.

The Watch of a Deceased Person was made assets by the *Maryland* Act of 1830. *Snively v. Beavans*, 1 Md. 208.

Increase and Profits of Personalty. — See *infra*, this section, *Property Accruing After Death*.

Timber. — Trees on the land of a decedent, blown down before his death to such an extent that they cannot grow as trees usually grow, are severed from the realty and belong to his executors. *In re Ainslie*, 28 Ch. Div. 89, 54 L. J. Ch. Div. 5, 33 W. R. 195.

Reservation of Right to Timber by Vendor. — Where a vendor reserves the timber growing on the land sold, to be removed within a certain time, it is personal property, and on his death before removal is assets in the hands of his administrator. *McClintock's Appeal*, 71 Pa. St. 365.

1. Remainders in Personalty. — A vested remainder in personal property is personal assets in the hands of the executor or administrator. *Bowling v. Dobyons*, 5 Dana (Ky.) 445; *Dean v. Dean*, 7 T. B. Mon. (Ky.) 307.

2. Contingent as Well as Absolute Interests in the personal property and choses in action pass to the executor or administrator. *Clapp v. Stoughton*, 10 Pick. (Mass.) 468; *State v. Moore*, 18 Mo. App. 406. See also *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580.

3. A Patent Right is personal property and passes to the personal representative, though the patent laws (Rev. Stat. U. S., § 4884) provide for a grant of the patent to the patentee, "his heirs and assigns." *Shaw Relief Valve Co. v. New Bedford*, 19 Fed. Rep. 753.

A Trade Secret is assets in the hands of the personal representative of the owner. *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664.

So also are nostrums compounded under a secret recipe, though all the materials used are purchased after the testator's death. *Gibblett v. Read*, 9 Mod. 459.

Term of Indentured Servant. — Under the territorial act of *Illinois* of September 17, 1807, the term of service of an indentured servant

was personal property and passed to the executor or administrator. *Phœbe v. Jay*, 1 Ill. 268.

Shares of Stock in a corporation, owned by a decedent at the time of his death, are personal property. *South Western R. Co. v. Thomason*, 40 Ga. 408; *Citizens' St. R. Co. v. Robbins*, 128 Ind. 449, 25 Am. St. Rep. 445.

4. Goodwill Is Assets. — *Smale v. Graves*, 14 Jur. 662, 19 L. J. Ch. N. S. 157; *Hitchcock v. Coker*, 6 Ad. & El. 438, 33 E. C. L. 98; *M'Donald v. Richardson*, 1 Giff. 81; *Thompson v. Winnebago County*, 48 Iowa 155; *Matter of Randell*, 2 Connoly (N. Y.) 29.

Business Subject to Pledge. — In *McGovern's Estate*, 2 Northam. L. Rep. (Pa.) 194, it was held that the goodwill of a liquor business did not constitute assets of the owner's estate, where he had no business at the time of his death, but simply a claim to the return of his business after a certain debt, for which it was pledged, should be paid.

Goodwill of Inn. — The goodwill of an inn is local and does not exist independently of the building in which it is carried on, and therefore where a husband kept an inn in a house owned by his wife, and she continued it after his death, the goodwill was held not to be assets of his estate. *Elliot's Appeal*, 60 Pa. St. 161.

But if a deceased innkeeper had a leasehold in the building, the goodwill with the leasehold is assets in the hands of the administrator, and he is chargeable with a price offered for them and refused. *Wiley's Appeal*, 8 W. & S. (Pa.) 244; *Coppels's Estate*, 4 Phila. (Pa.) 378, 18 Leg. Int. (Pa.) 254.

Printing Office. — In *Seighman v. Marshall*, 17 Md. 550, it was held that the goodwill of a printing office was not assets under the *Maryland* statute, because of too uncertain and contingent a nature to be the subject of appraisal.

Sale of Goodwill — Proceeds Are Assets. — If the goodwill of a decedent's business is sold by the executor or administrator, the proceeds are assets. *Worral v. Hand*, 1 Peake N. P. (ed. 1795) 74; *Christie v. Clark*, 27 U. C. Q. B. 21, 16 U. C. C. P. 544; *Journe's Succession*, 21 La. Ann. 391.

Continuation of Business. — If an executor or administrator carries on the business of the decedent, he is chargeable with the goodwill as part of the assets. *Matter of Randell*, 2 Connoly (N. Y.) 29; *Emeret's Estate*, 2 Pars. Eq. Cas. (Pa.) 195.

5. Proof of Value Necessary. — *Fay v. Fay*, (N. J. 1886) 6 Atl. Rep. 12.

now generally held that the deceased partner's interest is assets, unless the partnership agreement provides otherwise.¹

Partnerships Between Professional Persons stand on a different footing, and the goodwill, on the death of one of the partners, survives to the surviving partner or partners.²

(3) *Debts and Rights of Action* — (a) **In General.** — All debts due a decedent and all rights of action on which he could himself have sued pass to his personal representatives as assets of his estate, if the cause of action survives. This includes all moneys due the decedent by virtue of any bond, judgment, note, or otherwise, whether payable at the time of his death, or becoming payable afterwards.³ So, too, a demand in favor of the estate may arise out of some transaction by the executor or administrator, as where he pays out of the funds of the estate a debt for which the decedent was a surety, or makes a payment to a distributee under the mistaken belief that the estate is solvent, or takes a note payable to himself individually for the price of property sold or money loaned by him.⁴

1. Goodwill of Commercial Partnership. — In *Hammond v. Douglas*, 5 Ves. Jr. 539, it was held that in the case of commercial partnerships the goodwill survives to the survivors; but the propriety of that decision was doubted by Lord Eldon in *Crawshay v. Collins*, 15 Ves. Jr. 227.

And in *Wedderburn v. Wedderburn*, 22 Beav. 84, it was held that the goodwill of a partnership business did not survive to the survivors on the death of a partner unless it was so provided by the partnership agreement. See also *Smith v. Everett*, 27 Beav. 446. And see *Platt v. Platt*, 42 Conn. 347, where it was held that the goodwill of the business, if continued, is to be valued in estimating the decedent's interest.

2. Partnership Between Professional Persons. — *Farr v. Pearce*, 3 Madd. 75.

As to the nature of the goodwill of a business as property, see also the title **GOODWILL**.

3. Choses in Action Are Assets. — *Brunk v. Means*, 11 B. Mon. (Ky.) 217; *Clapp v. Stoughton*, 10 Pick. (Mass.) 468; *Dawes v. Beylston*, 9 Mass. 352, 6 Am. Dec. 72; *Hayes v. Hayes*, 45 N. J. Eq. 461; *Dial v. Gary*, 14 S. Car. 581, 37 Am. Rep. 737.

Arrearages of Income Due at Death. — Where the decedent was entitled to the income of a fund for life, sums due on account of such income and unpaid at the time of his death are assets of his estate and pass to his executor or administrator. *Seitzinger's Estate*, 170 Pa. St. 500, 37 W. N. C. (Pa.) 211.

Joint Demands. — It was formerly held that a debt due to several persons jointly would, on the death of one of them, pass to the survivor or survivors, and not to the decedent's personal representatives. *Cote v. Dequindre*, Walk. (Mich.) 64; *Teller v. Wetherell*, 9 Mich. 464; *Martin v. McReynolds*, 6 Mich. 72; *Jackson v. People*, 6 Mich. 154.

For a Discussion of the Present Doctrine as to the effect of the death of one of several creditors, see the title **JOINT TENANTS AND TENANTS IN COMMON**.

Evidences of Debt. — The term "goods," as used in the statutes relating to the granting of letters of administration, includes bills, notes, and choses in action. *Epping v. Robinson*, 21 Fla. 36; *Bloxham v. Crane*, 19 Fla. 163.

A Note Payable to a Person "or His Heirs" belongs to his personal representatives. *Doak v. Robinson*, 12 New Bruns. 278.

A Bond held by a decedent at the time of his death, though not due, is assets and may be sold for the payment of debts. *Grose v. McMullen*, 2 Del. Ch. 227.

An Indemnity Bond given to the decedent is not assets, however, except for the purpose of being applied to the indemnity. *Molloy v. Elam*, Meigs (Tenn.) 590.

A Judgment, on the death of the judgment creditor, vests in his personal representatives, and they may issue execution thereon in their own names. *Simmons v. Heman*, 17 Mo. App. 444.

And the fact that an appeal from the judgment is pending is immaterial, if the enforcement of the judgment has not been stayed in any way. *Matter of Jacob*, 5 N. Y. App. Div. 508.

The Wages of an Employee due at the time of his death are assets of his estate. *Hawkins v. McCalla*, 95 Ga. 192.

A Claim for Services Rendered by the decedent in his lifetime is personal property which may be sold by the administrator. *Lappin v. Mumford*, 14 Kan. 9.

Debt Due Bankrupt. — Under the Bankrupt Act of 1800 a debt due to a bankrupt passed to the personal representative of the assignee on the assignee's death. *Richards v. Maryland Ins. Co.*, 8 Cranch (U. S.) 84.

Contracts. — A contract between a decedent and stock brokers for the sale to the decedent of stocks, and not the stocks, is assets, where the decedent had not demanded a delivery of the stocks, and only a small part of the price had been paid at the time of his death. *Hitchcock v. Mosher*, 106 Mo. 578.

4. Claim for Surety Debt Paid by Administrator. — An amount paid by the administrator out of the trust funds on a debt for which the decedent was surety, and afterwards recovered by the administrator from the principal debtor, is an asset of the estate. *Mowry v. Adams*, 14 Mass. 327.

Improper Payments by Executor or Administrator. — Where an administrator, believing the estate to be solvent, pays a distributee his share in full, a claim for overpayment on its

All Causes of Action Relating to the Person of the decedent, or to things personal belonging to his estate, are personal assets and pass to his executor or administrator.¹

Causes of Action Relating to Real Estate are sometimes personal assets of the deceased owner's estate, and as such belong to his executor or administrator. In the case of real covenants, the right to sue for a breach is in the executor or administrator, if the breach occurred before the decedent's death, but if it occurred after his death the right of action is in the heir or devisee.² The same distinction in regard to the time of the death of the owner of real estate is made in determining whether a cause of action for a trespass on or injury to land is a personal asset, and it is held that if his death occurred before the trespass or injury the right of action passes to the executor or administrator, otherwise to the heir or devisee.³

¹Subsequently appearing that the estate was insolvent is assets. *Mansfield v. Lynch*, 59 Conn. 331.

In *Clark v. Hougham*, 2 B. & C. 149, 9 E. C. L. 47, Mr. Justice Bayley, in answer to the argument of counsel that where a payment by an executor or administrator is a devastavit, the right to recover it belongs to him individually and that he can only sue to recover it back in his own name, remarked that he could not assent to the truth of the argument; but on the contrary, when an executor or administrator discovers that he has in his representative capacity paid that which he ought not, he may in the same character recover it again. "The money was assets, and if the suit be as executor or administrator it will continue assets; but if the suit be in the individual capacity, the demand will be in the first instance subject to a set off, or when recovered will be liable to the plaintiff's debts. A devastavit is a wrong, and the law will not compel an executor to persevere in a wrong."

Note Payable to Administrator. — Where an administratrix before her appointment loaned money of the estate and took a note therefor, the note will, at her election, inure to the benefit of the estate. *Kalckhoff v. Zoehrlaut*, 40 Wis. 427.

Notes for Price of Property Sold. — In *Young v. Wickliffe*, 7 Dana (Ky.) 450, it was held that notes taken by the executor on a sale of property of the decedent were not assets; but it was afterwards held in *Morrison v. Page*, 9 Dana (Ky.) 428, that such notes were assets in his hands.

In *Pulliam v. Winston*, 5 Leigh (Va.) 324, it was held that a bond taken by an administrator for the price of property of the estate will be considered as assets of the estate, at least until it is ascertained on a settlement of the administrator's accounts that a balance is due him from the estate.

1. Actions to Recover Personalty. — A right of action to recover personal property vests in the personal representatives of the claimant at his death. *Hull v. Deatly*, 7 Bush (Ky.) 692.

Action for Injuries to Personalty. — The right to recover for injuries to personal property of a decedent belongs to his executor or administrator, and not to the heir. *Smith v. Denny*, 37 Mo. 20.

Personal Covenants. — If a personal covenant be broken during the lifetime of the covenantor, the cause of action therefor passes at

his death to his personal representatives. *Mott v. Mott*, 11 Barb. (N. Y.) 127.

In *Carr v. Roberts*, 2 B. & Ad. 905, 22 E. C. L. 211, the intestate in his lifetime granted an annuity to A., and afterwards conveyed his property to B., who covenanted to indemnify him against payment of the annuity. Default in the payment of the annuity was made during the intestate's lifetime, and after his death the annuitant recovered a judgment against his administratrix. The administratrix having paid the judgment, it was held that the right to recover the amount so paid from B. was an asset of the intestate's estate.

Action for Slander of Title. — A cause of action for slander of title to property survives to the personal representatives of the owner. *Hatchard v. Mege*, 18 Q. B. Div. 771.

Claim for Devastavit by Administrator. — The claim of an administrator *de bonis non* against the administrator in chief for devastavit is a personal asset in the hands of the administrator *de bonis non*. *Banks v. Speers*, 103 Ala. 436.

Personal Injuries. — In *Bradshaw v. Lancashire, etc.*, R. Co., L. R. 10 C. P. 189, it was held that where a passenger on a railway was injured by an accident, in consequence of which he afterwards died, his executrix could recover for breach of contract against the railway company the damages to his personal estate arising, before his death, from medical expenses and losses occasioned by his inability to attend to business.

But in *Pulling v. Great Eastern R. Co.*, 9 Q. B. Div. 110, it was held that such recovery could not be had where the decedent was injured by being struck by a locomotive at a railway crossing, since the injury in such case did not involve a breach of contract, but was tortious.

2. Action for Breach of Real Covenants. — *Abney v. Brownlee*, 2 Bibb (Ky.) 170; *South v. Hoy*, 3 T. B. Mon. (Ky.) 94; *Rice v. Spotswood*, 6 T. B. Mon. (Ky.) 41, 17 Am. Dec. 115; *Pawling v. Speed*, 5 T. B. Mon. (Ky.) 582; *Ashby v. Moore*, 7 J. J. Marsh. (Ky.) 164; *Katcher v. Galloway*, 2 Bibb (Ky.) 180; *Combs v. Tarlton*, 2 Dana (Ky.) 465; *Laberge v. McCausland*, 3 Mo. 585; *Hamilton v. Wilson*, 4 Johns. (N. Y.) 72, 4 Am. Dec. 253; *Beddoe v. Wadsworth*, 21 Wend. (N. Y.) 120. See also the title COVENANTS, vol. 8, p. 162.

3. Action for Trespass on Land. — The right to recover damages for trespass on land during

(b) **Death by Wrongful Act.** — The question whether the statutory right of action for death by wrongful act is an asset of the decedent's estate depends, in each jurisdiction, on the terms of the statute creating it. These statutes usually declare the recovery to be for the benefit of certain relatives of the decedent, in which case it is not a general asset of his estate. By some of the statutes, however, the right of action is given to the personal representatives without any designation of the persons to be benefited by the recovery, in which event it is a general asset and is applicable to the payment of debts and other administration purposes.¹

(c) **Debts Due from Executor or Administrator.** — At common law the appointment of a debtor executor or administrator was a release or extinguishment of the debt, but the rule in equity was that the debt became assets in the hands of the executor or administrator for the payment of debts and legacies, and even for the benefit of the next of kin.² In the *United States* the equitable rule has been generally adopted by the courts, or expressly enacted by statute, and a debt due from an executor or administrator becomes, immediately on his appointment, assets in his hands.³ But the rule first stated is merely one

the lifetime of the owner passes at his death to his personal representatives, and not to his heirs. *Haight v. Green*, 19 Cal. 113; *New Orleans, etc., R. Co. v. Moye*, 39 Miss. 374; *Hotchkiss v. Auburn, etc., R. Co.*, 36 Barb. (N. Y.) 600.

Injury to Rental Value of Land. — A claim for injury to the rental value of land during the lifetime of the owner is personal and vests in the owner's personal representatives, though the heirs or devisees are entitled to recover for any damage resulting from the same cause after the owner's death. *Paret v. New York El. R. Co.*, 60 N. Y. Super. Ct. 441; *Shepard v. Manhattan R. Co.*, 117 N. Y. 442; *Griswold v. Metropolitan El. R. Co.*, 122 N. Y. 102.

Appropriation of Land by Railroad Company. — The right to recover damages for the appropriation of land by a railroad company is personal, and at the death of the owner vests in his personal representatives. *Harshbarger v. Midland R. Co.*, 131 Ind. 177.

Damage to Fee of Lunatic's Land. — The rule that the proceeds of a sale by the court of real estate belonging to lunatics and infants will be considered real estate so long as the incompetency continues, applies to damages recovered for injuries to the fee of a lunatic's estate. *Ford v. Livingston*, 70 Hun (N. Y.) 178.

1. Right of Action for Death by Wrongful Act Not General Assets — *Georgia*. — *Hawkins v. McCalla*, 95 Ga. 192.

Illinois. — *Goltra v. People*, 53 Ill. 224; *Washington v. Louisville, etc., R. Co.*, 34 Ill. App. 658, 136 Ill. 49.

Indiana. — *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477.

Iowa. — *Morris v. Chicago, etc., R. Co.*, 65 Iowa 730, 54 Am. Rep. 39.

Kansas. — *Missouri Pac. R. Co. v. Bennett*, 5 Kan. App. 231; *McCarthy v. Chicago, etc., R. Co.*, 18 Kan. 46, 26 Am. Rep. 742; *Eureka v. Merrifield*, 53 Kan. 794; *Martin v. Missouri Pac. R. Co.*, 58 Kan. 475.

Maryland. — *State v. Pittsburgh, etc., R. Co.*, 45 Md. 41.

Missouri. — *Stoeckman v. Terre Haute, etc., R. Co.*, 15 Mo. App. 585.

Tennessee. — *Glass v. Howell*, 2 Lea (Tenn.) 50.

Right Held General Assets in Some Jurisdictions. — *Marvin v. Maysville St. R., etc., Co.*, 49 Fed. Rep. 436; *Findlay v. Chicago, etc., R. Co.*, 106 Mich. 700.

This was also the rule under the *Arkansas Act of February 3, 1875*, but by a later statute the recovery is for the benefit of the family of the decedent and does not become part of the general assets of the estate. *Little Rock, etc., R. Co. v. Townsend*, 41 Ark. 382.

For a Full Discussion of the right to a recovery for injuries resulting in death, see this work, vol. 8, p. 851, title DEATH BY WRONGFUL ACT; and for the procedure see ENCYC. OF PL. AND PR., title DEATH BY WRONGFUL ACT, vol. 5, p. 848.

2. See *supra*, this title, *Appointment and Tenure of Office — Validity and Effect of Appointment*.

3. Debts Due from Executor or Administrator Are Assets in Hand — *Alabama*. — *Childress v. Childress*, 3 Ala. 752; *Purdum v. Tipton*, 9 Ala. 914; *Weems v. Bryan*, 21 Ala. 302.

Connecticut. — *Bacon v. Fairman*, 6 Conn. 129.

Iowa. — *Kaster v. Pierson*, 27 Iowa 90, 1 Am. Rep. 254.

Maryland. — *Whiting v. Leakin*, 66 Md. 255.

Massachusetts. — *Leland v. Felton*, 1 Allen (Mass.) 531; *Stevens v. Gaylord*, 11 Mass. 256; *Winship v. Bass*, 12 Mass. 199; *Ipswich Mfg. Co. v. Story*, 5 Met. (Mass.) 310; *Sigourney v. Wetherell*, 6 Met. (Mass.) 553.

Michigan. — *Crow v. Conant*, 90 Mich. 247, 30 Am. St. Rep. 427.

Mississippi. — *Kelsey v. Smith*, 1 How. (Miss.) 68.

Missouri. — *Young v. Thrasher*, 48 Mo. App. 327; *McCarty v. Frazer*, 62 Mo. 263.

New Jersey. — *Wood v. Tallman*, 1 N. J. L. 177.

New York. — *Decker v. Miller*, 2 Paige (N. Y.) 149; *Burkhalter v. Norton*, 3 Dem. (N. Y.) 610; *Gardner v. Miller*, 19 Johns. (N. Y.) 188.

Ohio. — *Bigelow v. Bigelow*, 4 Ohio 138, 19 Am. Dec. 591; *Hall v. Pratt*, 5 Ohio 72; *Tracy v. Card*, 2 Ohio St. 431; *Shields v. Odell*, 27 Ohio St. 398; *Mitchell v. Townner*, 7 West. L. J. (Ohio) 581, 1 Ohio Dec. (Reprint) 352.

Pennsylvania. — *Pusey v. Clemson*, 9 S. &

of convenience, and will not be allowed to work prejudice to those beneficially interested, nor does it apply where the executor or administrator treats the debt as a subsisting obligation.¹

(4) *Effects Appropriated by Decedent to Special Purposes.* — If a decedent, in his lifetime, deposit with a third person money or property with directions to use it for particular purposes, and such directions are complied with by the depository, though after the death of the decedent, he is not liable to the executor or administrator as for assets of the decedent in his hands.²

R. (Pa.) 204; *Eichelberger v. Morris*, 6 Watts (Pa.) 42.

South Carolina. — *Hall v. Hall*, 2 McCord Eq. (S. Car.) 269; *Farys v. Farys*, Harp. Eq. (S. Car.) 261; *Griffin v. Bonham*, 9 Rich. Eq. (S. Car.) 71; *Schnell v. Schroder, Bailey Eq.* (S. Car.) 334; *Jacobs v. Woodside*, 6 S. Car. 490; *Charles v. Jacobs*, 9 S. Car. 295.

Washington. — *Eastham v. Landon*, 17 Wash. 48.

Reason of Rule. — In *Young v. Thrasher*, 48 Mo. App. 327, it was said that "this rule is based on the principle that, where the same person is liable to pay money in one capacity and to account for it in another, the law will presume that he has done that which it was his duty to do, that is, paid the debt." See also *Ipswich Mfg. Co. v. Story*, 5 Met. (Mass.) 313; *Stevens v. Gaylord*, 11 Mass. 256; *Winship v. Bass*, 12 Mass. 204.

In *Simmons v. Gutteridge*, 13 Ves. 262, it was said that "a debt due by an executor to the estate of the testator is assets for the same plain reason upon which an executor, who is a creditor, may retain; that he cannot sue himself."

Joint Administrators. — A debt due from an administrator is assets in his hands when he is one of several administrators as well as when he is sole administrator. *Simon v. Albright*, 12 S. & R. (Pa.) 429.

Debt of Firm of Which Executor Was Member. — The rule also applies to an indebtedness of a firm of which the executor or administrator is a member. *Matter of Consalus*, 95 N. Y. 340; *Eaton v. Walsh*, 42 Mo. 272.

Debt Created After Testator's Death. — A debt due from an administrator with the will annexed is assets in his hands, though it was created after the testator's death. *Martin v. Train*, 6 Ohio Cir. Ct. Rep. 49, 3 Ohio Cir. Dec. 344.

Debts Not Due When Administration Commenced. — If a debt owing by an executor or administrator is not due at the commencement of the administration, it will become cash to the credit of the estate whenever it falls due in the course of the administration. *Davenport v. Richards*, 16 Conn. 315; *Griffin v. Bonham*, 9 Rich. Eq. (S. Car.) 71.

Principal Debtor Appointed Executor by Surety. — Where payment of a bond, the principal obligor in which was executor of his surety's will, is enforced against the estate of the surety, the executor will be charged with the amount so paid as assets in his hands. *Kealhofer v. Emmert*, 79 Md. 248.

Contingent Liability. — The principle that appointing a debtor administrator of the creditor's estate converts the debt into cash does not apply where the liability of the estate is only contingent. *Shields v. Odell*, 27 Ohio St. 398.

Where an Executor Is Insolvent and Is Indebted to the Estate his commissions will be applied in satisfaction of his indebtedness. *Freeman v. Freeman*, 4 Redf. (N. Y.) 211.

1. Rule Merely One of Convenience — Effect on Liens. — In *Kinney v. Ensign*, 18 Pick. (Mass.) 232, it was held that a mortgage was not extinguished by the mere fact that the mortgagor had become administrator of the mortgagee and had accounted for the mortgage as cash in his administration accounts, but he was permitted to set up the mortgage for the purpose of exercising in behalf of the estate the power of redeeming from a prior mortgage. See also *Crow v. Conant*, 90 Mich. 247, 30 Am. St. Rep. 427; *Soverhill v. Suydam*, 59 N. Y. 140; *Miller v. Donaldson*, 17 Ohio 264; *Murray v. Luna*, 86 Tenn. 326.

But when the bond has become assets, no act of the parties can turn it back into an obligation. *Bigelow v. Bigelow*, 4 Ohio 138, 19 Am. Dec. 591.

Effect of Rule on Interest. — In *Clark's Appeal*, 2 Watts (Pa.) 405, it was held that the presumption that a debt from an executor to the estate is paid at the time of his appointment does not operate to relieve an executor from payment of interest on the debt for a year after the testator's death, under the rule that an executor having one year in which to settle the estate is not charged with interest on any balance in his hands.

2. Deposit to Pay Specified Creditor. — Where money was placed by the decedent in the hands of a third person to pay a designated creditor, and the payment to such creditor was made after the decedent's death, it relates back to the time of the receipt of the money by the third person, and therefore the money cannot be recovered by the administrator as assets of the estate. *Carr's Estate*, 3 Pa. Dist. Rep. 740, 15 Pa. Co. Ct. Rep. 354, 35 W. N. C. (Pa.) 448.

Deposit for Decedent's Use. — Where the decedent deposited money with a third person for his (the decedent's) use, but without designating any particular purposes to which it should be applied, it was held that the administrator was entitled to recover the balance remaining over and above expenditures for the decedent's support and funeral expenses. *Price v. Boyce*, 10 Ind. App. 145.

Deposit for Funeral Expenses. — Money placed by a decedent in the hands of a third person to pay funeral expenses, the cost of erecting a monument, the costs of saying masses for the repose of his soul, etc., is not assets applicable to the payment of claims against the estate. *Bedell v. Scoggins*, (Cal. 1895) 40 Pac. Rep. 954; *Gilman v. McArdle*, 99 N. Y. 400, 52 Am. Rep. 41; *Matter of Hildebrand*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 245.

But if any balance remains in the hands of

(5) *Property Accruing After Death.* — Property may be assets in the hands of an executor or administrator, though it was never owned by the decedent. Within this principle is everything acquired by the executor or administrator by his use or dealings with the estate; everything acquired under contracts made by the decedent in his lifetime or accruing after his death by virtue of pre-existing contingencies or conditions; all increase and profits of the personal estate accruing after the decedent's death; and, in fine, everything which comes into the hands of the executor or administrator by virtue of his office.¹

the depository after the purposes of the deposit have been accomplished, such balance is assets. *Matter of Conklin*, 2 Connolly (N. Y.) 176. See also *Williams v. Morehouse*, 9 Conn. 470. In this case the decedent assigned a claim against B to A in trust to pay, first, the expenses of executing the trust, then a specified debt to A, and then to apply the balance in payment of all other debts of the decedent, and the residue, if any, to be paid as the decedent should direct. B was appointed administrator of the decedent's estate, but neglected to inventory or account for the demand so assigned to A. Nothing was done under the deed of trust. It was held that the debt of B to the decedent was assets, at least to the extent of the decedent's residuary interest under the assignment.

A Sum Charged on Land Devised, and directed by the executors to be paid to certain persons, is not assets for general executorial purposes. *Jackson v. Updegraffe*, 1 Rob. (Va.) 114.

1. Property Purchased with Funds of Estate. — Property purchased by the administrator with the funds of the estate are assets of the estate, whether he was the rightful administrator or not. *In re Archer*, (Surrogate Ct.) 23 N. Y. Supp. 1041; *Parker v. Portis*, 14 Tex. 166; *Redwood v. Riddick*, 4 Munf. (Va.) 222. See also *McCoy v. Crawford*, 9 Tex. 353.

Property Acquired by Continuing Decedent's Business. — If an executor carries on the testator's trade or business, the profits and the stock or materials purchased for the purpose of such trade or business are assets in the executor's hands. *In re Evans*, 34 Ch. Div. 597; *Ex p. Garland*, 10 Ves. Jr. 110; *In re Johnson*, 15 Ch. Div. 548; *Com. Dig.*, tit. Assets (C).

This is true even though none of the decedent's property is employed in the trade or business. Thus in *Gibblett v. Read*, 9 Mod. 459, Lord Hardwicke held that a share in a newspaper should be considered as the personal property of the deceased, transmissible to his representatives, and that the profits of printing the same subsequent to his death should be distributed accordingly. And his lordship said that there were many cases where no part of the property of a testator had been employed or made use of in carrying on the business, and yet the executor had been held accountable for the profits of the business as the testator's personal estate; as in the instance of physical secrets or nostrums, where everything was carried on with materials purchased after the testator's death, and yet the nostrum was part of the personal estate of the testator. See also *Moseley v. Rendell*, L. R. 6 Q. B. 338; *Abbott v. Parfitt*, L. R. 6 Q. B. 346.

And in *Pitt v. Pitt*, 2 Cas. temp. Lee, 508, the administratrix of a deceased ropemaker in

the king's yard at Woolwich was cited in the Prerogative Court of Canterbury to exhibit an inventory and account. The deceased had four apprentices, and the question was whether the administratrix was bound to insert in the inventory the amount of the wages earned by them, in the yard of the deceased, since his death. Sir G. Lee was of opinion that she, who did not belong to the yard, could have apprentices there only as administratrix to the deceased; and he accordingly decreed her to charge herself with the profits arising from the apprentices.

Executory Contract of Sale. — If a person makes an executory contract to sell goods, and it is performed after the death of the buyer by delivery to his executor, the goods will be assets in the executor's hands. 3 Wms. Exrs. (7th Am. ed.) 102. *Citing Wentw. Off. Ex.* (14th ed.) 188; *Com. Dig.*, tit. Assets (C).

Contract to Make Lease. — If A covenant with B to make him a lease of certain land by such a day, and B dies before the day and before any lease is made, A is bound to make the lease to the executor of B, and the lease so made shall be assets in his hands; or, if A refuses to grant the lease, he is liable to make the executor a compensation in damages, which are also assets. 3 Wms. Exrs. (7th Am. ed.) 102. *Citing Wentw. Off. Ex.* (14th ed.) 188; *Chapman v. Dalton*, 1 Plowd. 286; *Com. Dig.*, tit. Assets (C).

Renewal of Lease. — If an executor renews a lease held by his testator, the new lease becomes assets in his hands. Anonymous, 2 Ch. Cas. 208; *Bromfield v. Chichester*, 2 Dick. 480; *James v. Dean*, 11 Ves. Jr. 392; *Randall v. Russell*, 3 Meriv. 190; *Green v. Green*, 2 Redf. (N. Y.) 408; *Emeret's Estate*, 2 Pars. Eq. Cas. (Pa.) 195; *Fow's Estate*, 3 Pa. Dist. Rep. 316. See also *Fitzroy v. Howard*, 3 Russ. 225; *Giddings v. Giddings*, 3 Russ. 241; *Fosbrooke v. Balguy*, 1 Myl. & K. 226.

And this is true, though the new lease embraces property additional to that covered by the original lease and at an increased rent. *In re Morgan*, 18 Ch. Div. 93.

Renewal of Franchise. — An administrator who obtains in his own name a renewal of a charter for a ferry owned by the decedent at the time of his death, holds it as an asset of the estate. *Huson v. Wallace*, 1 Rich. Eq. (S. Car.) 1.

Chattels in Remainder. — Chattels which were never vested in the decedent in possession, but accrue to the executor or administrator by remainder, are assets in his hands. *Bowling v. Dobyons*, 5 Dana (Ky.) 445; *Dean v. Dean*, 7 T. B. Mon. (Ky.) 307.

Thus, if a lease be made to one for life, remainder to his executor for years, such remainder will be assets in the hands of the

(6) *Legacies and Distributive Shares.* — If a person entitled to a legacy or distributive share dies before it is paid to him, the right devolves on his personal representatives.¹

(7) *Interests in Partnerships.* — The assets of a partnership, of which the decedent was a member, are not assets of his estate, but the surviving partner has the right to the exclusive custody as against the deceased partner's personal representatives until liquidation of the partnership affairs, and until the liquidation the interest of the deceased partner does not become assets of his estate.²

executor though it were never in the testator. So where a lease for years is bequeathed to A for life, and afterwards to B, who dies before A, although B never had this term in him, it shall be assets in the hands of his executor. So a remainder in a term for years, though it never vested in the testator's possession, and though it still continue a remainder, shall be assets in the hands of the executor; for it bears a present value, and is vendible. 3 Wms. Exrs. (7th Am. ed.) 102. *Citing Wentw. Off. Ex.* (14th ed.) 189; *Com. Dig., Assets (C).*

Chattels Accruing by Force of Conditions. — Where a lease for years, or other chattel, was granted by the testator, on condition that if the grantee did not pay a sum of money, or do certain acts, it should revert, and the condition is broken after the testator's death, the chattel will be brought back to the executor and will be assets. The rule is the same where the condition is, that the testator shall pay money or do any other act to avoid the grant. 3 Wms. Exrs. (7th Am. ed.) 104, 105 [*citing Wentw. Off. Ex.* (14th ed.) 181, 182; *Hawkins v. Lawse*, 1 Leon. 155; *Harecourt v. Wrenham*, Moo. 858; 1 Roll. Rep. 56, pl. 32; 1 Brownl. 76; 1 Roll. Abr. 920, (G) pl. 5; *Alexander v. Gresham*, 1 Leon. 225].

The Hire or Profits of Chattels, while in the possession of the personal representatives, are assets of the estate. *Anderson v. Miller*, 6 J. J. Marsh. (Ky.) 572; *Barnett v. Stephens*, 2 B. Mon. (Ky.) 446; *Edelen v. State*, 4 Gill & J. (Md.) 277; *Hall v. Griffith*, 2 Har. & J. (Md.) 483; *Wilson v. Barnett*, 9 Gill & J. (Md.) 158; *Lee v. Pindle*, 12 Gill & J. (Md.) 289.

So also the increase of live stock belonging to the estate, born after the intestate's death. *Matter of Merchant*, 39 N. J. Eq. 506. And profits arising out of the use by the administrator of the funds of the estate. *Wingate v. Pool*, 25 Ill. 118. Or from the business of the testator carried on by his executors under a provision of the will that they should continue the business for a certain time "for the benefit of the estate." *Gandolfo v. Walker*, 15 Ohio St. 251.

Dividends on Shares of Stock declared after the death of the owner are personal assets and pass to his executor or administrator. *Welles v. Cowles*, 4 Conn. 188.

Money Paid by Heirs to Prevent Sale of Land. — Money paid to an executor or administrator by the heirs of the decedent to prevent the sale of the decedent's real estate for his debts is assets of the estate. *Fay v. Taylor*, 2 Gray (Mass.) 154.

Money Recovered on Appeal Bond. — So, too, money recovered on an appeal bond given to an executor on appeal from a judgment recov-

ered by him as executor. *Sasscer v. Walker*, 5 Gill & J. (Md.) 102, 25 Am. Dec. 272.

1. Legacies and Distributive Shares Are Assets — *Arkansas.* — *Lemon v. Rector*, 15 Ark. 437; *Pryor v. Ryburn*, 16 Ark. 671; *Anthony v. Peay*, 18 Ark. 24; *Worsham v. Feild*, 18 Ark. 448; *Atkins v. Guice*, 21 Ark. 164; *Pope v. Boyd*, 22 Ark. 535; *Norwood v. Holliman*, 27 Ark. 445; *Jacks v. Adair*, 31 Ark. 616; *Whelan v. Edwards*, 31 Ark. 723; *Collins v. Warner*, 32 Ark. 87; *Purcell v. Carter*, 45 Ark. 299.

Kentucky. — *Wilkinson v. Perrin*, 7 T. B. Mon. (Ky.) 214.

Maine. — *Storer v. Blake*, 31 Me. 280.

Maryland. — *Duvall v. Harwood*, 1 Har. & G. (Md.) 474.

Massachusetts. — *Osgood v. Foster*, 5 Allen (Mass.) 560.

Wisconsin. — *Pease v. Walker*, 20 Wis. 573.

But an administrator is not chargeable with a bequest to the intestate unless he had knowledge of it. *Malinda v. Gardner*, 24 Ala. 719.

2. Interest in Partnership Not Assets Before Liquidation — *United States.* — *McCartey v. Nixon*, 2 Dall. (U. S.) 65, note; *Bohler v. Tappan*, 1 McCrary (U. S.) 135.

Alabama. — *Lang v. Waring*, 17 Ala. 154; *Calvert v. Marlow*, 18 Ala. 67; *Offutt v. Scott*, 47 Ala. 126.

Arkansas. — *Bonne v. Kay*, 5 Ark. 19.

California. — *Smith v. Walker*, 38 Cal. 385, 99 Am. Dec. 415; *McKay v. Joy*, (Cal. 1886) 9 Pac. Rep. 940.

Connecticut. — *Canfield v. Hard*, 6 Conn. 180; *Filley v. Phelps*, 18 Conn. 294.

Indiana. — *Holland v. Fuller*, 13 Ind. 195.

Maryland. — *Smith v. Wood*, 31 Md. 293.

Mississippi. — *Hanway v. Robertshaw*, 49 Miss. 758.

New York. — *Voorhis v. Childs*, 17 N. Y. 355; *Berolzheim v. Strauss*, 51 N. Y. Super. Ct. 96; *Betts v. June*, 51 N. Y. 278; *Camp v. Fraser*, 4 Dem. (N. Y.) 212; *Sweet v. Taylor*, 36 Hun (N. Y.) 256.

North Carolina. — *Mendenhall v. Benbow*, 84 N. Car. 649.

Vermont. — *Stearns v. Houghton*, 38 Vt. 587.

Wisconsin. — *Shields v. Fuller*, 4 Wis. 102, 65 Am. Dec. 293; *Roys v. Vilas*, 18 Wis. 169.

The Interest of a Deceased Partner in the partnership property is not assets until settlement of the firm affairs. *Hoppock's Estate*, 1 N. Y. Month. L. Bul. 32; *Thomson v. Thomson*, 1 Bradf. (N. Y.) 24.

But the representatives of the deceased partner have a lien on all firm property to the amount of the deceased partner's share. *Hooley v. Gieve*, 9 Abb. N. Cas. (N. Y. C. Pl.) 8.

b. REAL PROPERTY GENERALLY — (1) General Principles — (a) Common-law Rule. — At common law the real property of a decedent could not be subjected to his simple contract debts, but it descended directly to his heirs who became liable for the debts by specialty or matters of record to the value of the inheritance, and in case of a deficiency of personal property the creditors by simple contract lost their debts.¹

(b) Statutory Rule. — This rule of the common law was changed by statute at an early day, and the real estate of a decedent, in case of a deficiency of personal property, now descends to the heirs of the deceased owner, subject to the payment of his debts, for which purpose it may be sold in an appropriate proceeding.²

What Is Real Property. — Real property within this rule consists not only of lands and buildings of which the decedent was seized in fee simple, but also of incorporeal hereditaments, and in some cases of the rents and profits and the proceeds of land.³

Partnership as to Profits and Losses Only. — Where the partnership is as to profits and losses only, the title to the property being in one person and the others having a right to share in the profits and being liable for a proportion of the losses, the title, on the death of the partner holding the legal title, does not devolve on the surviving partners, but passes to his personal representatives. *Ross v. Willett*, 76 Hun (N. Y.) 211.

For a Full Discussion of the rights of surviving partners as against the personal representatives of deceased partners, see the title **PARTNERSHIP**.

1. Land Not Applicable to Debts at Common Law. — *Vincent v. Platt*, 5 Harr. (Del.) 164; *Sheldon v. Rice*, 30 Mich. 296, 18 Am. Rep. 136; *Manning v. Drake*, 1 Mich. 34; *McPike v. Wells*, 54 Miss. 136.

2. Lands Subject to Debts by Statute — England. — *Fleming v. Buchanan*, 3 De G. M. & G. 976; *Johnson v. Compton*, 4 Sim. 47; *Ponsford v. Hartley*, 2 Johns. & H. 736; *Cooper v. Blissett*, 1 Ch. Div. 691.

Canada. — *Sickles v. Asselstine*, 10 U. C. Q. B. 203; *Gardiner v. Gardiner*, 2 U. C. Jur. 554. *United States Courts.* — *Tate v. Norton*, 94 U. S. 746; *U. S. v. Drennen*, Hempst. (U. S.) 320; *Meeks v. Vassault*, 3 Sawy. (U. S.) 206.

Alabama. — *Ashurst v. Ashurst*, 13 Ala. 784; *Smith v. Smith*, 13 Ala. 334; *Smith v. Wiley*, 19 Ala. 217, 22 Ala. 396, 58 Am. Dec. 262; *Smith v. King*, 22 Ala. 558; *Pettit v. Pettit*, 32 Ala. 308; *Duncan v. Stewart*, 25 Ala. 413, 60 Am. Dec. 527; *Anderson v. McGowan*, 42 Ala. 280; *Bishop v. Lalouette*, 67 Ala. 197.

Connecticut. — *Griswold v. Bigelow*, 6 Conn. 264.

Florida. — *Union Bank v. Powell*, 3 Fla. 175, 52 Am. Dec. 367.

Illinois. — *Vansyckle v. Richardson*, 13 Ill. 171; *Stillman v. Young*, 16 Ill. 318.

Maryland. — *Carnan v. Turner*, 6 Har. & J. (Md.) 65.

Michigan. — *Burns v. Berry*, 42 Mich. 176.

Minnesota. — *State v. Probate Ct.*, 25 Minn. 22.

Mississippi. — *Clark v. Hornthal*, 47 Miss. 434; *McPike v. Wells*, 54 Miss. 136.

New Jersey. — *Wright v. Hartshorne*, cited in *Den v. De Hart*, 6 N. J. L. 457; *Den v. Jaques*, 10 N. J. L. 259.

Ohio. — *Piatt v. St. Clair*, 6 Ohio 227; *Wright (Ohio)* 261.

Pennsylvania. — *Horner v. Hasbrouck*, 41 Pa. St. 169.

South Carolina. — *Galphin v. M'Kinney*, 1 McCord Eq. (S. Car.) 280.

Tennessee. — *Henry v. Mills*, 1 Lea (Tenn.) 144.

Virginia. — *Scott v. Ashlin*, 86 Va. 581.

Rule Is Without Exception. — Real estate of a decedent is made applicable to the payment of his debts when the personal is insufficient, in England and in all the states of the Union. *Clark v. Hornthal*, 47 Miss. 434.

Land Not Applicable Until Personalty Is Exhausted. — See the titles **DEBTS OF DECEDENTS**, vol. 8, p. 1003; **MARSHALING ASSETS**; and *infra*, this title, *Sale of Real Estate Under Order of Court*.

Land of a decedent is assets in his administrator's hands only *sub modo*, that is, the title and right of possession descend to the heir, subject to administration for the payment of debts. *Hill v. Mitchell*, 5 Ark. 608.

In Florida real estate formerly passed to the executor or administrator as assets. *Sanchez v. Hart*, 17 Fla. 507; *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334; *Jacksonville, etc., R. Co. v. Adams*, 27 Fla. 443. But it is otherwise now by statute. *Rose v. Withers*, 39 Fla. 460.

3. What Is Real Property. — So far as executors and administrators are concerned, the character of property, whether real or personal, is that which it bears at the death of the decedent, and it is not affected by any subsequent conversion. *Hamer v. Bethea*, 11 S. Car. 416. See also titles **CONVERSION AND RECONVERSION**, vol. 7, p. 463; **REAL PROPERTY**.

As to the Doctrine that Real Estate Is Equitable Assets, see *infra*, this section, *Equitable Assets*.

As to the Rents and Profits of Realty as assets, see *infra*, this section, *Rents and Profits of Real Estate*.

As to the Proceeds of Realty as assets, see *infra*, this section, *Proceeds of Sale of Real Property*.

Contract to Purchase Land. — The vendee's interest in an executory contract for the purchase of land is real estate, and at his death passes as such to his heirs. *Palmer v. Morrison*, 104 N. Y. 132; *Stephenson v. Yandle*, 3 Hayw. (Tenn.) 109; *Myrick v. Boyd*, 3 Hayw. (Tenn.) 179; *Neal v. Cox*, Peck (Tenn.) 443.

Option to Purchase Land. — In *Gustin v. Union School-Dist.*, 94 Mich. 502, 34 Am. St. Rep.

(c) **Distinction Between Realty and Proceeds Thereof as Assets.** — It is held under some of the statutes that the real property itself becomes assets in the hands of the executor or administrator for the payment of debts,¹ while, on the other hand, it is held that the land itself is not assets, but that the proceeds of the land, when sold to pay debts, are assets.²

(2) **Estates for Life or Years.** — All leasehold or other estates in land for life, or for terms of years, are chattel interests at common law, and pass, on the death of the owner, to his personal representatives;³ but in some juris-

361, it was held that an option to purchase land is personal property and passes to the personal representative of the holder of the option. See *Richardson v. Hardwick*, 106 U. S. 252.

Certificate of Purchase at Execution Sale. — The interest of a person who holds a certificate of purchase of land sold under execution is real estate, and passes, on his death, to his heirs who are entitled to a sheriff's deed. *Potts v. Davenport*, 79 Ill. 455.

Right to Redemption Money. — On redemption of land bought by a decedent at a sheriff's sale, the right to receive the redemption money is in the administrator if a conveyance has not been made by the sheriff, but if a sheriff's deed has been made the right to the redemption money is in the heir. *Campbell v. Campbell*, 3 Head (Tenn.) 325.

Cause of Action for Trespass on Real Property. — As to when the right to recover damages for trespass on the real property of a decedent passes to his executor or administrator and when to his heir or devisee, see *supra*, this section, *Debts and Rights of Action*.

Proceeds of Mortgage Given by Heirs. — Where the heirs of a decedent mortgaged the land descended without leave of court the proceeds are not assets of the decedent's estate, but belong to the heirs. *Shute v. Wilkins*, 163 Mass. 491.

Interest of Proprietor of Town. — The interest of a person who procures a town to be established on his land under the general law regulating the establishment of towns, which provides for the appointment of trustees by whom lots are to be sold, is a personal interest and passes to his personal representatives. The trustees are vested, not only with the title, but the possession of the proprietor. They are the sellers and responsible for the title, and are the proper parties to a controversy involving the legal estate. *Pemberton v. Riddle*, 5 T. B. Mon. (Ky.) 402.

Church Pew. — A church pew owned by a decedent does not pass to his personal representatives, but can be subjected to the decedent's debts only by having it sold like other real estate. *McNabb v. Pond*, 4 Bradf. (N. Y.) 7.

1. **Rule that Real Estate Is Assets** — *Alabama*, — *Bishop v. Lalouette*, 67 Ala. 197.

Arkansas, — *Tate v. Norton*, 94 U. S. 746.

California, — *Meeks v. Vassault*, 3 Sawy. (U. S.) 212.

Connecticut, — *Booth v. Starr*, 5 Day (Conn.) 286; *Griswold v. Bigelow*, 6 Conn. 258, by Mitchell, C. J. See also *Davis v. Weed*, 44 Conn. 569, 2 Browne Nat. Bank Cas. 115.

Minnesota, — *State v. Probate Ct.*, 25 Minn. 22.

2. **Rule that Proceeds of Sale to Pay Debts Are Assets** — *Canada*, — *Seaton v. Taylor*, 3 U. C.

Q. B. 303; *Crawford v. Willox*, 6 New Bruns. 634.

Illinois, — *Vansyckle v. Richardson*, 13 Ill. 171; *Nolan v. Jackson*, 16 Ill. 272.

Kentucky, — *Heeter v. Jewell*, 6 Bush (Ky.) 510.

New Jersey, — *O'Hanlin v. Den*, 20 N. J. L. 31; *Haines v. Price*, 20 N. J. L. 480; *Den v. Hunt*, 11 N. J. L. 1.

North Carolina, — *Fike v. Green*, 64 N. Car. 665; *Vaughn v. Deloatch*, 65 N. Car. 378.

In *Haines v. Price*, 20 N. J. L. 480, Carpenter, J., said: "Land is not in the hands or subject to the control of executors or administrators *qua* executors or administrators. By the provision of the statute it is the money arising from the sale of the real estate of the decedent, received by the executor or administrator, which shall be considered as assets in his hands for the payment of debts. Under our statute, to make them responsible at law to the creditors for the value of the real estate, it must first be sold, and the money therefor received, and then, and then only, can it be considered as assets."

In *McPike v. Wells*, 54 Miss. 136, Simrall, C. J., refers to "the power of the administrator to resort to the real estate and make it assets for creditors."

3. **Leaseholds Are Chattels** — *Indiana*, — *Cade v. Brownlee*, 15 Ind. 369, 77 Am. Dec. 95; *Smith v. Dodds*, 35 Ind. 452.

Kentucky, — *Lewis v. Ringo*, 3 A. K. Marsh. (Ky.) 248.

Mississippi, — *Faler v. McRae*, 56 Miss. 227.

Pennsylvania, — *Keating v. Condon*, 68 Pa. St. 75; *Coppels's Estate*, 4 Phila. (Pa.) 378, 18 Leg. Int. (Pa.) 254; *Wiley's Appeal*, 8 W. & S. (Pa.) 244; *Walker's Estate*, 6 Pa. Co. Ct. Rep. 515.

A lease for ninety-nine years renewable forever is personal assets in *Maryland*. *Allender v. Sussan*, 33 Md. 11, 3 Am. Rep. 171.

Nonresident Lessee. — A leasehold in New York, belonging to a nonresident, is personal under the *New York* statute. *Despard v. Churchill*, 7 Alb. L. J. 415, *affirmed* 53 N. Y. 192.

Estates Pur Autre Vie Are Personalty. — *Fox v. Long*, 8 Bush (Ky.) 554; *Den v. Keltv*, 16 N. J. L. 525; *Reynolds v. Collin*, 3 Hill. (N. Y.) 441.

A Rent Charge Pur Autre Vie, if the grantee dies living *cestui que vie* goes to the grantee's executor, though not named in the grant. *Bearpark v. Hutchinson*, 7 Bing. 178, 20 E. C. L. 92, 4 M. & P. 848.

Lease for Life. — A lease of land for the life of the lessor is a chattel, and passes to the personal representatives of the lessee at his death. *Cunningham v. Baxley*, 96 Ind. 369; *Campbell v. Hunt*, 104 Ind. 213.

dictions such interests are made real estate by statute, and descend to the heir.¹

(3) *Land Purchased by Executor or Administrator.* — Land purchased by an executor or administrator with the funds or for the benefit of the estate is personal assets in his hands.²

(4) *Mortgages* — (a) *Interest of Mortgagee.* — A mortgage, being merely security for a debt, is personal property before foreclosure, and goes to the personal representatives of the holder on his death.³

(b) *Interest of Mortgagor.* — The interest of a mortgagor in mortgaged real estate is real property, and at his death before foreclosure descends to his heirs;⁴ but if the owner of an equity of redemption dies after the mortgage

Agreement for Lease. — An agreement for a lease for two lives, of which the decedent's was one, was held an equitable interest which was personal assets under the *New York* statute (1 Rev. Laws, p. 178, § 4). *Stiles v. Burch*, 5 Paige (N. Y.) 132.

1. *Estate for Years Is Realty by Statute.* — *McKee v. Howe*, 17 Colo. 538; *Kelley v. Shultz*, 12 Heisk. (Tenn.) 218.

Estate Pur Autre Vie Is Realty by Statute. — *Alexander v. Miller*, 7 Heisk. (Tenn.) 65.

2. *Purchase with Funds of Estate.* — *Haynes v. Bessellieu*, 25 Ark. 499; *Grimstead v. Huggins*, 13 Lea (Tenn.) 728; *Johnson v. Patterson*, 13 Lea (Tenn.) 626; *Roberts v. Jackson*, 3 Yerg. (Tenn.) 79.

Purchase Under Execution for Debt Due Estate. — Where an administrator recovers judgment on notes taken on a loan of moneys of the estate, and purchases land of the judgment debtor at a sale under an execution issued on the judgment, the lands are assets in his hands, though the entire transaction was in his individual name (*Haynsworth v. Bischoff*, 6 S. Car. 159), or the sheriff's deed was by mistake made to the heirs of the decedent. *Bennett v. Kiber*, 76 Tex. 385.

Purchase at Foreclosure of Contract. — Land purchased by an administrator at a sale under a foreclosure of the vendee's interest in a contract made by the decedent is assets in the administrator's hands. *Stevenson v. Polk*, 71 Iowa 278.

Purchase at Foreclosure of Mortgage. — Land bought by an executor at a foreclosure sale under a mortgage belonging to the estate, or at an execution sale for a debt due to the estate, or taken in payment of a debt due to the estate, is to be treated as personal property, and it is immaterial whether the deed is taken in the names of the executors as such, or in their individual names. *Dusing v. Nelson*, 7 Colo. 185; *Boylston v. Carver*, 4 Mass. 598; *Kunzie v. Wixom*, 39 Mich. 384; *Lockman v. Reilly*, 95 N. Y. 64; *Clark v. Clark*, 8 Paige (N. Y.) 152, 35 Am. Dec. 676; *Valentine v. Belden*, 20 Hun (N. Y.) 537; *Matter of Gilbert*, 39 Hun (N. Y.) 61.

Purchase by Administrator from Heirs. — In *Coster v. Brack*, 19 Ala. 210, it was held that if an administrator purchased land from the heirs of his intestate, it cannot be regarded in a court of law as assets in his hands.

3. *Mortgage Is Personal Property — England.* — *Tabor v. Grover*, 2 Vern. 367.

Illinois. — *Lucas v. Harris*, 20 Ill. 165.

Maine. — *Hemmenway v. Lynde*, 79 Me. 299.

Massachusetts. — *Smith v. Dyer*, 16 Mass. 21; *Taft v. Stevens*, 3 Gray (Mass.) 504; *Steel v. Steel*, 4 Allen (Mass.) 417; *Richardson v. Hildreth*, 8 Cush. (Mass.) 225; *Dewey v. Van Deusen*, 4 Pick. (Mass.) 19; *Fay v. Cheney*, 14 Pick. (Mass.) 399.

Michigan. — *Abbott v. Godfroy*, 1 Mich. 178; *Albright v. Cobb*, 30 Mich. 355.

Mississippi. — *Griffin v. Lovell*, 42 Miss. 402.

New Jersey. — *Kinna v. Smith*, 3 N. J. Eq. 14; *Grant v. Chambers*, 7 N. J. Eq. 223; *Miller v. Henderson*, 10 N. J. Eq. 320; *Montgomery v. Bruere*, 4 N. J. L. 295; *Osborne v. Tunis*, 25 N. J. L. 633; *Terhune v. Bray*, 16 N. J. L. 54.

New York. — *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467.

Vermont. — *Pierce v. Brown*, 24 Vt. 165. In *Tabor v. Grover*, 2 Vern. 367, it was held that a mortgage in fee before foreclosure goes to the executor, and not to the heir, though two descents are cast, and though more is due on it than the value, and the mortgagor has said by answer that he will not redeem it.

In *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467, it was held that though the technical fee may descend to the heir of the mortgagee, he takes it in trust for the personal representative.

The Mortgaged Premises, Before and After Foreclosure, Are Regarded as Personal Assets, under *Massachusetts Rev. Stat.*, c. 65, §§ 11, 12, and 15, to be administered and disposed of by the executor or administrator as such, the title being vested in him and not in the heirs. *Richardson v. Hildreth*, 8 Cush. (Mass.) 225.

Even if the Mortgagee Had Entered for Condition Broken, but consented that the mortgagor might occupy, paying interest under the name of rent, and the mortgagee died before foreclosure, a writ of entry to recover possession after his death must be brought by the administrator and not by the heir. *Dewey v. Van Deusen*, 4 Pick. (Mass.) 19; *Fay v. Cheney*, 14 Pick. (Mass.) 399.

Land Taken in Satisfaction of Mortgage. — If an executor takes a conveyance of mortgaged land in satisfaction of the mortgage debt the land is personalty in his hands, being a substitute for the mortgage. *Vonkers Sav. Bank v. Kinsley*, 78 Hun (N. Y.) 186.

Mortgage as Muniment of Title. — If, however, the mortgage is transferred to the owner of the fee to be held as a muniment of title, it belongs on his death to his heir or devisee, and not to his personal representatives. *Browne v. Perris*, 23 Abb. N. Cas. (N. Y. Supreme Ct.) 226.

4. *Equity of Redemption.* — If the owner of an

is foreclosed, the surplus proceeds are personalty.¹

(5) *Rents and Profits of Real Estate*—(a) *Rents Accruing During Lifetime of Owner*.—It is elementary that rents which accrue during the lifetime of the owner of the leased premises are personal property and go to his personal representatives as assets of his estate.²

(b) *Rents Accruing After Death of Owner*.—It is equally well settled that, in the absence of a statute providing otherwise, or any testamentary direction, rents of real estate which accrue after the death of the owner go to his heirs or devisees and are not assets in the hands of his personal representatives.³

equity of redemption dies while the land continues redeemable, the right of redemption descends to his heirs, and not to his personal representatives. *Elliot v. Patton*, 4 Yerg. (Tenn.) 10. See *infra*, this section, *Sale Under Foreclosure of Mortgage*. See also the titles EQUITY OF REDEMPTION, *ante*; MORTGAGES.

1. *Surplus Proceeds of Foreclosure Sale*.—*Smith v. Smith*, 13 Mich. 258; *Bogert v. Furman*, 10 Paige (N. Y.) 496; *Sweezey v. Willis*, 1 Bradf. (N. Y.) 495. See *infra*, this section, *Sale Under Foreclosure of Mortgage*.

2. *Rents Accruing in Lifetime of Owner*—*Alabama*.—*Palmer v. Steiner*, 68 Ala. 400.

Illinois.—*Foltz v. Prouse*, 17 Ill. 487.

Indiana.—*King v. Anderson*, 20 Ind. 385; *McDowell v. Hendrix*, 67 Ind. 513; *Humphries v. Davis*, 100 Ind. 369; *Henry v. Stevens*, 108 Ind. 281.

Iowa.—*Foteaux v. Lepage*, 6 Iowa 123.

Kentucky.—*Smith v. Bland*, 7 B. Mon. (Ky.) 21; *O'Bannon v. Roberts*, 2 Dana (Ky.) 54.

Maine.—*Stinson v. Stinson*, 38 Me. 593; *Mills v. Merryman*, 49 Me. 65.

Massachusetts.—*Gibson v. Farley*, 16 Mass. 280.

Missouri.—*Bealey v. Blake*, 70 Mo. App. 229.

New Hampshire.—*Sparhawk v. Allen*, 25 N. H. 261.

New York.—*Marshall v. Moseley*, 21 N. Y. 280; *Fay v. Holloran*, 35 Barb. (N. Y.) 295; *Kohler v. Knapp*, 1 Bradf. (N. Y.) 241; *Cole v. Patterson*, 25 Wend. (N. Y.) 456; *Hannan v. Osborn*, 4 Paige (N. Y.) 336; *Harris v. Meyer*, 3 Redf. (N. Y.) 450; *Miller v. Crawford*, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 376.

North Carolina.—*Fleming v. Chunn*, 4 Jones Eq. (57 N. Car.) 422.

Pennsylvania.—*Haslage v. Krugh*, 25 Pa. St. 97; *Robb's Appeal*, 41 Pa. St. 45.

Tennessee.—*Rowan v. Riley*, 6 Baxt. (Tenn.) 67.

On Foreclosure of a Mortgage After the Death of the Mortgagor, the rents and profits received by the heirs during the period allowed by law for redemption cannot be recovered by the personal representatives, though there is no other property with which the debts of the mortgagor can be paid. *Dexter v. Hayes*, 88 Iowa 403.

In *Georgia* it is held that where land is rented for one year, the lessor's heirs have no right to the rents accruing during that time, but that such rents pass to the executors and administrators of the lessor. *Autrey v. Autrey*, 94 Ga. 579.

A Claim for the Use and Occupation of Land is assets in the hands of the personal representatives of the owner of the land. *Swart v. Revela*, (Ky. 1895) 29 S. W. Rep. 24.

When Rents Accrue.—Rent payable in advance accrues at the time specified for its payment, and on the death of the lessor after that time, and within the period for which the rent is reserved, it passes to the lessor's personal representatives. *Matter of Weeks*, 5 Dem. (N. Y.) 194; *Miller v. Crawford*, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 376, *disapproving* *Matter of Eddy*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 396; *Matter of Gilfillan*, 3 N. Y. Month. L. Bul. 46.

Extension of Time of Payment.—In *Wadsworth v. Allcott*, 6 N. Y. 64, it was held that where the term of a lease ended in April and the rent was payable in August out of the crops growing on the premises when the term expired, and the landlord died in June, the rent due in August went to his executors.

3. *Rents Accruing After Death of Owner Not Assets*—*Illinois*.—*Foltz v. Prouse*, 17 Ill. 487; *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312; *Crosby v. Loop*, 13 Ill. 625; *Green v. Massie*, 13 Ill. 363.

Indiana.—*Rubottom v. Morrow*, 24 Ind. 202, 87 Am. Dec. 324; *Evans v. Hardy*, 76 Ind. 527; *Dorsett v. Gray*, 98 Ind. 273; *Watson v. Penn*, 108 Ind. 21.

Iowa.—*Foteaux v. Lepage*, 6 Iowa 123; *Kinsell v. Billings*, 35 Iowa 154.

Kentucky.—*Oldham v. Collins*, 4 J. J. Marsh. (Ky.) 50; *Heeter v. Jewell*, 6 Bush (Ky.) 512; *Wilson v. Unselt*, 12 Bush (Ky.) 215; *Thompson v. Bailey*, 1 Ky. L. Rep. 321.

Maine.—*Brown v. Fessenden*, 81 Me. 525; *Kimball v. Sumner*, 62 Me. 305; *Fuller v. Young*, 10 Me. 365; *Heald v. Heald*, 5 Me. 387; *Stinson v. Stinson*, 38 Me. 593; *Mills v. Merryman*, 49 Me. 65.

Massachusetts.—*Gibson v. Farley*, 16 Mass. 280; *Stearns v. Stearns*, 1 Pick. (Mass.) 158; *Newcomb v. Stebbins*, 9 Met. (Mass.) 544; *Boynton v. Peterborough, etc.*, R. Co., 4 Cush. (Mass.) 467; *Lobdell v. Hayes*, 12 Gray (Mass.) 236; *Towle v. Swasey*, 106 Mass. 100; *Brigham v. Elwell*, 145 Mass. 520.

Missouri.—*Bealey v. Blake*, 70 Mo. App. 229; *Seudder v. Ames*, 89 Mo. 496; *In re Huckstep*, 5 Mo. App. 582; *Shouse v. Krusor*, 24 Mo. App. 279.

New York.—*Kohler v. Knapp*, 1 Bradf. (N. Y.) 241.

Ohio.—*Overturf v. Dugan*, 29 Ohio St. 230.

Pennsylvania.—*Woodburn's Estate*, 138 Pa. St. 606, 21 Am. St. Rep. 932, 27 W. N. C. (Pa.) 305; *Sloan's Appeal*, 168 Pa. St. 439, 47 Am. St. Rep. 889, 36 W. N. C. (Pa.) 372.

South Carolina.—*Huff v. Latimer*, 33 S. Car. 255.

Tennessee.—*Smith v. Thomas*, 14 Lea (Tenn.) 324; *Rowan v. Riley*, 6 Baxt. (Tenn.) 67; *Boyd v. Martin*, 9 Heisk. (Tenn.) 382;

Rents Accruing After Death Made Assets by Statute. — In some jurisdictions the rents and profits of real estate accruing after the death of the owner are, by statute, assets in the hands of the personal representatives for the payment of debts.¹

Rents Collected by Executor or Administrator. — Although as a general rule, the real estate descends to the owner's heirs, and the executor or administrator has nothing to do with it except in case of a deficiency of assets, yet when, as a matter of fact, he collects the rents, he is held responsible for them as assets

Combs v. Young, 4 Yerg. (Tenn.) 218, 26 Am. Dec. 225.

Virginia. — *Lightner v. Speck*, (Va. 1897) 28 S. E. Rep. 326.

Dividends on Stock in a Turnpike Company, declared after the death of a stockholder, are personalty, though the stock is real estate. *Welles v. Cowles*, 4 Conn. 188.

Use of Personalty in Connection with Land Demised. — The principle that rents accruing after the death of the lessor go to his heirs, and not to his personal representatives, is not modified by the fact that the lease covers and provides for the use of the personal property in connection with the real estate. *Fay v. Holloran*, 35 Barb. (N. Y.) 295; *Marshall v. Moseley*, 21 N. Y. 280; *Armstrong v. Cummings*, 58 How. Pr. (N. Y. Supreme Ct.) 332.

In the case last cited the court cites among other authorities *Newman v. Anderton*, 2 B. & P. N. R. 224, where Mansfield, C. J., states the rule to be that "it must occur constantly that the value of the demised premises is increased by the goods upon the premises; and yet the rent reserved still continues to issue out of the house or land, and not out of the goods."

In *Matter of Strickland*, 10 Misc. Rep. (N. Y. Surrogate Ct.) 486, the intestate entered into an agreement with one Jenkel, by which Jenkel was to work the intestate's farm on shares. There were several cows on the farm, and it was further provided by the agreement that Jenkel should carry the milk to the cheese factory and enter it in the name of the intestate, who was to draw the proceeds from the factory, and, after certain payments, to divide the balance with Jenkel. It was held that such agreement was not a lease, and that therefore the proceeds of the milk delivered at the factory by Jenkel after the intestate's death were not rent, and consequently did not pass to the heirs of the intestate as against his personal representatives.

Insolvency of Estate. — The rule that the rents and profits of real estate accruing after the death of the owner are not assets, but belong to the devisees or heirs at law, applies though the estate is insolvent and the rents have come into the hands of the executor or administrator, unless he has received them under an agreement with the heirs or devisees that they should be assets to save the real estate from sale, or for the advantage of all persons interested, or unless the will gave him the rents to be administered as assets.

Maine. — *Heald v. Heald*, 5 Me. 387; *Fuller v. Young*, 10 Me. 365; *Stinson v. Stinson*, 38 Me. 593; *Mills v. Merryman*, 49 Me. 65; *Kimball v. Sumner*, 62 Me. 305; *Brown v. Fessenden*, 81 Me. 525.

Massachusetts. — *Stearns v. Stearns*, 1 Pick. (Mass.) 158; *Newcomb v. Stebbins*, 9 Met.

(Mass.) 544; *Boynnton v. Peterborough*, etc., R. Co., 4 Cush. (Mass.) 467; *Lobdell v. Hayes*, 12 Gray (Mass.) 236; *Towle v. Swasey*, 106 Mass. 100; *Gibson v. Farley*, 16 Mass. 280.

In regard to this rule it was said in *Fessenden*, Appellant, 77 Me. 98, that "the technicality which gives to heirs and devisees the rents of an insolvent estate is an extreme doctrine against creditors."

It Has Been Held in Connecticut that where an estate is insolvent the administrator is accountable for rents accruing under leases made by the decedent. *Storer v. Hinkly*, 1 Root (Conn.) 182.

Pendency of Administration Suit. — In *Codding v. Bispham*, 36 N. J. Eq. 574, it was held that, land being assets for the payment of debts, rents accruing pending a suit in chancery for administration of the estate, and collected by a receiver appointed in the suit, were also assets for the payment of debts.

So, too, it has been held, where the personal property is not sufficient to pay all debts, that the rents accruing after the testator's death on property devised may be used by the executor to pay debts in order to save the land itself from sale. *Frimmer v. Todd*, (N. J. 1894) 28 Atl. Rep. 581.

Power to Receive the Rents Is Implied from a Provision in the Will that the executor may sell the real estate when and as he thinks proper, and rent or lease it until the sale. *Morse v. Morse*, 85 N. Y. 53.

As to the liability of heirs to creditors for rents received, see title DEBTS OF DECEDENTS, vol. 8, p. 1003.

1. Rents Accruing After Death Made Assets by Statute—*Arkansas.* — *Menifee v. Menifee*, 8 Ark. 9.

California. — *Washington v. Black*, 83 Cal. 290.

Iowa. — *Dexter v. Hayes*, 88 Iowa 493.

Michigan. — *Howard v. Patrick*, 38 Mich. 795.

Wisconsin. — *Crow v. Day*, 69 Wis. 637.

In *Alabama* the administrator or executor may take rents accruing after the lessor's death. *Palmer v. Steiner*, 68 Ala. 400.

In *Georgia* rents accruing during the year of the owner's death pass to his executor or administrator as assets of his estate. *Parker v. Chestnutt*, 80 Ga. 12.

In *New Hampshire*, under the statute, if an estate is insolvent the executor or administrator is entitled to receive the rents accruing after the testator's death, but generally in other cases the land descends to the heirs or devisees without any right or duty on the part of the executor or administrator as such to meddle with it. *Gregg v. Currier*, 36 N. H. 200; *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316; *Sparhawk v. Allen*, 25 N. H. 266.

in some jurisdictions,¹ while in other jurisdictions it is held that the rule that rents of real estate accruing after the owner's death are not assets of his estate is not affected by the mere fact that they have come into the hands of the executor or administrator.²

Lease by Executors and Administrators. — In some jurisdictions executors and administrators are authorized to rent the real estate of their decedents, and the rents received are made assets.³

(6) *Proceeds of Sale of Real Property* — (a) **Sale Made by Deceased Owner.** — If the owner of real property sells it during his lifetime, whether by an executed or an executory contract, the purchase money remaining unpaid at his death is personal property and the right thereto vests in his personal representatives, and not in his heirs.⁴

1. Rents Collected by Executor or Administrator Are Assets. — *Gamble v. Gibson*, 59 Mo. 585; *Dix v. Morris*, 1 Mo. App. 93, 66 Mo. 514; *Jennings v. Copeland*, 90 N. Car. 572.

In *Boyce v. Grundy*, 9 Pet. (U. S.) 275, it was held that if the administrator of a deceased vendor, pending an action against him by the vendee to rescind a contract of sale, receives the rents and profits of the property under an agreement with the devisee, the amount so received is assets in his hands.

2. Maine. — *Heald v. Heald*, 5 Me. 387; *Fuller v. Young*, 10 Me. 365; *Stinson v. Stinson*, 38 Me. 593; *Mills v. Merryman*, 49 Me. 65; *Kimball v. Sumner*, 62 Me. 305; *Brown v. Fessenden*, 81 Me. 525.

Massachusetts. — *Gibson v. Farley*, 16 Mass. 280; *Stearns v. Stearns*, 1 Pick. (Mass.) 158; *Newcomb v. Stebbins*, 9 Met. (Mass.) 544; *Boynton v. Peterborough, etc.*, R. Co., 4 Cush. (Mass.) 467; *Loddell v. Hayes*, 12 Gray (Mass.) 236; *Towle v. Swasey*, 106 Mass. 100.

Pennsylvania. — *Burnell's Estate*, 9 W. N. C. (Pa.) 334; *Burnell's Estate*, 10 W. N. C. (Pa.) 155; *Sloan's Appeal*, 168 Pa. St. 430, 47 Am. St. Rep. 889, 36 W. N. C. (Pa.) 372.

3. Rent Reserved in Lease by Executors or Administrators. — *Smith v. Smith*, 13 Ala. 329; *Anderson v. McGowan*, 42 Ala. 280; *Rector v. Ranken*, 1 Mo. 371.

This statute changes the common-law rule laid down in *Leavens v. Butler*, 8 Port. (Ala.) 380 and *Terry v. Ferguson*, 8 Port. (Ala.) 500, that an executor or administrator has no power over the real estate of his decedent.

The Statute Authorizing Executors and Administrators to Lease the real estate of their decedents confers a bare authority, which must be exercised as the statute directs, otherwise they are not entitled to the rents arising therefrom as against the heir or devisee. *Chighizola v. Le Baron*, 21 Ala. 406; *Martin v. Williams*, 18 Ala. 190.

Provisions of Will. — An executor or administrator who, under a direction in the will that the estate shall be kept together for a certain time, lets the real estate, or occupies it himself, is chargeable with the rents as assets in his hands. *Smith v. King*, 22 Ala. 558. To the same effect is *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590.

Illegal Sale by Administrator. — If an administrator makes an illegal sale of the decedent's real estate and puts the purchaser in possession, he is not chargeable with the rents of the land while in the occupation of the purchaser, because the land of a decedent is assets in the

administrator's hands only through the exercise of the statutory powers of sale and renting. *Anderson v. McGowan*, 42 Ala. 280.

For a full discussion of the right to rents and profits of real estate, as between the personal representatives and the heirs or devisees of the lessor, see the titles LANDLORD AND TENANT; LEASES.

4. Unpaid Purchase Money of Land Sold by Decedent — *Arkansas.* — *Anthony v. Peay*, 18 Ark. 24.

Indiana. — *Henson v. Ott*, 7 Ind. 512.

Massachusetts. — *Loring v. Cunningham*, 9 Cush. (Mass.) 87.

New York. — *Denham v. Cornell*, 67 N. Y. 556, affirming 7 Hun (N. Y.) 662; *Matter of Everit*, 2 Edw. Ch. (N. Y.) 597; *Schroepel v. Hopper*, 40 Barb. (N. Y.) 425; *Smith v. Gage*, 41 Barb. (N. Y.) 60.

Pennsylvania. — *Sutter v. Ling*, 25 Pa. St. 466.

Executory Contract of Sale. — In *Skinner v. Newberry*, 51 Ill. 203, it was held that moneys due the testator at his decease on contracts for the sale of real estate made by him during his life are considered part of his personal estate the same as other debts due the estate, though no deed has been executed. *Lawrence, J.*, said that the question "is one about which no doubt can reasonably be entertained, and we suppose it is merely made by counsel in order that the executors may feel no uncertainty as to their responsibilities in the disposition of an estate understood to be very large." See also *Fletcher v. Ashburner*, 1 Bro. C. C. 497, 1 White T. L. Cas. (6th ed.) 968; *Muldrow v. Muldrow*, 2 Dana (Ky.) 386; *In re Drenkle*, 3 Pa. St. 377.

A Vendor's Lien is a mere chose in action and goes by succession to the vendor's executor or administrator. *Evans v. Enloe*, 70 Wis. 345.

Purchase Money Payable to Vendor's Heirs. — If a contract of sale requires the vendee to pay the purchase money to the vendor's "heirs," meaning his children, it is not a part of his estate, and therefore his personal representatives are not entitled to any part of it unless the estate be insolvent. *Stevens v. Flannagan*, 131 Ind. 122.

Purchase Money Payable Conditionally. — In *Colgan's Estate*, 160 Pa. St. 140, 34 W. N. C. (Pa.) 88, it was held that the purchase money was assets of the vendor's estate, though by the terms of the sale the vendee was only to pay the money if the vendor "ever needs it," and the vendor did not require payment before his death, but did not in any way release the debt.

(b) **Sale to Pay Deceased Owner's Debts.** — If the real estate of a decedent has been sold to pay debts, either under an order of court or under a power in the will, the proceeds are assets in the hands of the executor or administrator.¹

(c) **Sale Under Foreclosure of Mortgage.** — If a mortgage is foreclosed during the lifetime of the owner of the equity of redemption, the surplus proceeds, after satisfying the mortgage debt, are personalty and go to his executor or administrator,² but if the mortgage is foreclosed after the death of the owner of the equity of redemption, the surplus proceeds are real estate and descend to his heirs.³

(d) **Sale Under Execution.** — When the real estate of a decedent is sold under execution, the surplus, in the absence of any statutory provision on the subject, is real estate and descends to the heirs;⁴ but in some jurisdictions it is provided by statute that such surplus shall be paid to the personal representatives.⁵

(e) **Partition Sale.** — If the real estate of a decedent is sold under an order of court for partition among the heirs, the proceeds are not assets in the hands of the administrator for the payment of debts, unless they are made so by order of the court.⁶

(f) **Growing Crops.** — Crops growing on the land of a decedent at the time of his death, or emblements, are personal property and pass to his personal representatives.⁷

1. Proceeds of Sale Under Order of Court to Pay Debts. — See *supra*, this section, *Distinction Between Realty and Proceeds Thereof as Assets*.

The Proceeds of a Void Sale are not assets, however, if the sale was void because not made according to law. *Ashurst v. Ashurst*, 13 Ala. 781. Or because the court did not have jurisdiction to order a sale. *Pettit v. Pettit*, 32 Ala. 288.

Surplus Proceeds. — If real estate is sold by an ancillary administrator for the payment of debts, any surplus remaining will be transmitted to the principal administrator, and not distributed to the decedent's heirs. *In re Gable*, 79 Iowa 178.

Interest of Heir in Surplus Proceeds. — Where real estate is sold for the payment of debts, the interest of an heir in the surplus is personal property and passes to the personal representatives of such heir. *Graham v. Dickinson*, 3 Barb. Ch. (N. Y.) 169; *Couch v. Delapaine*, 2 N. Y. 397.

Proceeds of Land in Another State. — Where an executor, having taken ancillary administration in another state, sells land of the decedent there under an order of court, for the payment of debts, the surplus remaining in his hands is personal property for which he must account to the domiciliary court. *Jennison v. Hapgood*, 10 Pick. (Mass.) 78; *Heydock's Appeal*, 7 N. H. 496; *Porter v. Heydock*, 6 Vt. 374.

Sale Under Power in Will. — As to effect of a devise to executors for the payment of testator's debts or devise that the land be sold for the payment of debts, see *infra*, this section, *Assets in Respect to Character as Legal or Equitable — Equitable Assets*.

2. Surplus Proceeds of Mortgage Foreclosure Sale made in the lifetime of the owner of the equity of redemption are assets of his estate. *Smith v. Smith*, 13 Mich. 258; *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 130, 7 Am. Dec. 478; *Cox v. McBurney*, 2 Sandf. (N. Y.) 561. See *supra*, this section, *Interest of Mortgage*.

And the administrator must execute a bond, with sufficient sureties and with condition as required by the statute in the case of lands sold by the order of the orphans' court. *Camden Mut. Ins. Assoc. v. Jones*, 23 N. J. Eq. 171.

3. Foreclosure After Death of Owner of Equity of Redemption. — *Wright v. Rose*, 2 Sim. & S. 323; *Bogert v. Furman*, 10 Paige (N. Y.) 496. See *supra*, this section, *Interest of Mortgage*.

4. Surplus Proceeds of Execution Sale. — *Garlic v. Patterson*, Cheves Eq. (S. Car.) 27.

5. Proceeds of Execution Sale Payable to Personal Representatives by Statute. — *Vincent v. Platt*, 5 Harr. (Del.) 164; *Phillips v. Phillips*, 4 Del. Co. Rep. (Pa.) 348; *Morrison's Case*, 9 W. & S. (Pa.) 116; *Weimer v. Karch*, 153 Pa. St. 385.

6. Proceeds of Partition Sale Not Assets of Decedent's Estate. — *Johnston v. Union Bank*, 37 Miss. 526.

But as to the coparceners, a partition sale operates as a conversion of the real estate into personalty, and the share of the coparcener on his death is assets of his estate. *State v. Harper*, 54 Mo. App. 286; *Robinson v. McGregor*, 16 Barb. (N. Y.) 531; *Wagner's Estate*, 2 Pa. Dist. Rep. 238.

7. Crops Growing on Decedent's Land Are Personalty — *Georgia*. — *Thornton v. Burch*, 20 Ga. 791.

Illinois. — *Cheney v. Roodhouse*, 32 Ill. App. 49, affirmed in 135 Ill. 257.

Indiana. — *King v. Anderson*, 20 Ind. 385; *Humphrey v. Merritt*, 51 Ind. 197; *McDowell v. Hendrix*, 67 Ind. 513.

Kentucky. — *White v. Clarke*, 7 T. B. Mon. (Ky.) 641; *Parham v. Thompson*, 2 J. J. Marsh. (Ky.) 159; *Singleton v. Singleton*, 5 Dana (Ky.) 92.

Maine. — *Dennett v. Hopkinson*, 63 Me. 350.

Massachusetts. — *Penhallow v. Dwight*, 7 Mass. 34, 5 Am. Dec. 21.

Michigan. — *McGee v. Walker*, 106 Mich. 521.

(8) *Award in Condemnation Proceedings.* — As between the personal representatives and the heirs of a decedent, compensation awarded for land taken for public purposes is personal property and belongs to the executor or administrator, if the land was taken before the owner's death, but if it was taken after his death it is real estate and belongs to the heirs.¹

(9) *Squatters' Claims.* — The claim of a squatter on public land, and his improvements made on the land during his occupancy, are not assets.²

c. **INSURANCE MONEY** — (1) *Fire Insurance.* — If insured property is destroyed after the death of the assured, the insurance money represents the property destroyed, and is applicable to the payment of his debts in the same

Missouri. — *Whaley v. Whaley*, 51 Mo. 36.

New York. — *Wadsworth v. Allcott*, 6 N. Y. 64; *Matter of Kick*, (Surrogate Ct.) 11 N. Y. St. Rep. 688.

Pennsylvania. — *Kupp's Estate*, 2 Wood. (Pa.) 229; *Jones's Appeal*, 102 Pa. St. 285.

South Carolina. — *Gwin v. Hicks*, 1 Bay (S. Car.) 503; *M'Laurin v. M'Coll*, 3 Strobb. L. (S. Car.) 21; *Waring v. Purcell*, 1 Hill Eq. (S. Car.) 193.

As to ownership of crops growing at the termination of a particular estate, see the title CROPS, vol. 8, p. 301.

Crop Growing on Exempt Land. — The fact that a crop is growing on exempt land of a decedent does not affect the rule that it is assets and passes to his personal representatives. *Dickey v. Wilkins*, (Miss. 1895) 17 So. Rep. 374.

Crops on Land Assigned as Dower. — Growing crops standing on land assigned to the widow as dower pass with the land, and do not pass to the executor. *Ralston v. Ralston*, 3 Greene (Iowa) 533.

Crop on Land Devised. — In the absence of statutory regulations, a crop growing on land which has been devised passes to the devisee as against the executor or administrator. The authorities are all agreed that this is the rule, but they do not seem to be able to account for the difference between the right of the personal representative as against the heir, and as against the devisee. *Spencer's Case*, *Winch* 51; *Cox v. Godsalve*, 6 East 604, note b; *Cooper v. Woolfitt*, 2 H. & N. 122; *West v. Moore*, 8 East 339; *Hathorn v. Eaton*, 70 Me. 219; *Dennett v. Hopkinson*, 63 Me. 350; *Bradner v. Faulkner*, 34 N. Y. 347; *Stall v. Wilbur*, 77 N. Y. 158; *Shofner v. Shofner*, 5 Sneed (Tenn.) 94.

In some jurisdictions, however, the matter is regulated by statutes which abolish the distinction between the rights of heirs and of devisees. *Bradner v. Faulkner*, 34 N. Y. 347; *Thompson v. Thompson*, 6 Munf. (Va.) 514. See also *Dennett v. Hopkinson*, 63 Me. 350.

Rule in Alabama. — It is provided by statute in Alabama (Code, § 2098), that a crop commenced by the decedent "may" be completed and gathered by the executor or administrator. It has been held that this statute gives the executor or administrator the option of making a growing crop assets of the estate by completing and gathering it, and that if he does not exercise his option the crop does not become assets. *Loeb v. Richardson*, 74 Ala. 311; *Wright v. Watson*, 96 Ala. 536; *Blair v. Murphree*, 81 Ala. 454.

But if the crop was practically completed at the decedent's death, though it was not done growing, it is assets of his estate, and no election by the executor or administrator is necessary. *Marx v. Nelms*, 95 Ala. 304.

Crops Planted After Decedent's Death. — The rule is restricted to crops which were planted in the decedent's lifetime, and does not include any planted or grown after his death. *Rodman v. Rodman*, 54 Ind. 444.

What Crops Are Within the Rule. — The words "emblems and annual crops" include only such as are the product of cultivation and labor, and do not include grass or hay. *Evans v. Hardy*, 76 Ind. 531; *Evans v. Iglehart*, 6 Gill & J. (Md.) 171.

1. **Land Taken for Public Use Before Owner's Death.** — *Welles v. Cowles*, 4 Conn. 182; *Neal v. Knox*, etc., R. Co., 61 Me. 298; *Brooks v. Goss*, 61 Me. 307; *Hay's Estate*, 29 Pittsb. Leg. J. (Pa.) 311.

The award, however, in some jurisdictions, is subject to the debts of the decedent in the same manner as the land, and payment may be ordered to be made to the administrator for that purpose. *Mallory v. Craig*, 15 N. J. Eq. 73.

Land Taken After Owner's Death. — Damages awarded for land taken by a railroad company after the death of the owner belong to his heirs at law, and not to his administrator, though the administrator previously represented the estate insolvent, and afterwards obtained license to sell the whole estate for the payment of debts. *Hankins v. Kimball*, 57 Ind. 42; *Boynton v. Peterborough*, etc., R. Co., 4 Cush. (Mass.) 467; *Moore v. Boston*, 8 Cush. (Mass.) 277.

In South Carolina damages for land taken by a railroad company and appraised before the death of the owner, but not paid in his lifetime, are not assets, because it is held that until payment of the damages the fee of the land remains in the owner. *Buckner v. Savannah*, etc., R. Co., 7 S. Car. 325.

Land in Possession of Executor. — In *Detroit v. Schilling*, 93 Mich. 429, it was held that where the executor was in possession of the land when it was taken, the award should be paid to him for distribution.

Insolvent Estates. — In *New Hampshire* an award of damages for land of an insolvent estate taken for public purposes is properly made to the administrator, and not to the heirs. *Goodwin v. Milton*, 25 N. H. 458.

2. **Squatter's Claim on Public Land Not Assets.** — *Holton v. Holton*, 99 Ga. 250; *Bowen v. Burnett*, 1 Pin. (Wis.) 658.

manner as the insured property would have been,¹ though the policy was made payable to the assured, "his executors or administrators."²

(2) *Life Insurance*. — Money received on a life insurance policy is assets of the estate of the insured, if the policy was payable to him or to his legal representatives,³ unless it is otherwise provided by statute;⁴ but if the policy is made payable to a third person, as the wife or children of the insured, the proceeds belong to the person or persons so named, and are not assets of the estate of the insured.⁵

1. Insurance on Real Estate — Proceeds Are Realty. — *Parry v. Ashley*, 3 Sim. 97; *Harrisons v. Harrison*, 4 Leigh (Va.) 371.

Insurance Money Represents Insured Property. — In *Nichols's Appeal*, 128 Pa. St. 428, it was held that where insured real estate was destroyed by fire after the death of the assured, and his personalty was insufficient for the payment of his debts, the insurance money was applicable to the debts.

In *Haxall v. Shippen*, 10 Leigh (Va.) 561, 34 Am. Dec. 745, it appeared that one Shore died leaving a plantation by will to his widow for life, with remainder to his children. There was insurance on the building, running to him, his heirs and assigns. The widow occupied the house, and the policy was kept in force. She married Haxall, and afterwards the buildings were destroyed by fire. The court held, in a well-considered opinion, that the insurance money was part of the realty and belonged to the children of Shore, subject to the life estate of Mrs. Haxall.

Payment in Lifetime of Assured. — In *Jagger v. Bird*, 42 Hun (N. Y.) 423, a mill insured in the name of the life tenant was burned, and the amount of the policy was, with the assent of the life tenant, deposited in a savings bank to the credit of the joint owners of the remainder. The mill was not rebuilt, and the money remained on deposit for several years. It was held that such deposit constituted the insurance money personalty which would pass at the death of the remaindermen to their personal representatives as assets.

Policy Obtained by Executor. — In *Colburn v. Lansing*, 46 Barb. (N. Y.) 37, the testator directed that his widow should be furnished with a house. The executor set apart a house for her use, and obtained a policy of insurance on it in his own name as executor, and paid the premiums out of funds of the estate. While the house was occupied by the widow it was destroyed by fire. It was held that the insurance money was assets in the hands of the executor, because the estate was obliged to provide another house for the widow, and that the residuary legatees were not entitled to such money. See also *Matter of O'Connell*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 50.

2. Policy Payable to Executors or Administrators. — *Wyman v. Wyman*, 26 N. Y. 253.

3. Insurance Money — Policy Payable to Insured or His Legal Representatives. — *Union Mut. L. Ins. Co. v. Stevens*, 19 Fed. Rep. 671; *People v. Phelps*, 78 Ill. 147; *Johnston v. Smith*, 25 Hun (N. Y.) 171; *Webb v. Roettinger*, 1 Ohio Dec. 191, 12 Ohio Cir. Ct. Rep. 730; *Miller's Appeal*, 30 Leg. Int. (Pa.) 28, 5 Leg. Gaz. (Pa.) 26; *Fox's Estate*, 1 W. N. C. (Pa.) 412; *Kennedy's Estate*, 2 W. N. C. (Pa.) 492.

Policy Assigned to Creditor. — If a policy was

assigned to a creditor as collateral security, the balance of the proceeds, after paying the debt secured, is assets of the estate of the insured, though the assignment was absolute in form. *Harrisburg Nat. Bank v. Hiester*, 2 Pearson (Pa.) 253.

In *Glaholm v. Rowntree*, 6 Ad. & El. 710, 33 E. C. L. 189, 2 N. & P. 557, the testator, after depositing a policy of insurance on his life, as collateral security, died leaving the creditor and another as executors. The creditor then applied to the insurers for the money due on the policy, but they refused to pay it unless the executors gave a receipt. They did so, but the creditor protested that he signed it as executor merely to satisfy the insurers. It was held that the executors were not chargeable with the insurance money except as to the surplus after payment of the debt.

Right to Paid-up Policy. — A right to receive a paid-up policy under a policy theretofore issued is a right of property and passes to the personal representatives of the insured as assets of the estate. *Winchell v. Hancock Mut. L. Ins. Co.*, (Mass. 1879) 8 Rep. 549.

Policy on Life of Husband or Wife. — A policy on the life of a husband payable to his wife or to her representatives after his decease is assets of her estate on her decease, though her husband survived her. *Baltz's Estate*, 4 W. N. C. (Pa.) 447; *Kerr's Appeal*, 34 Leg. Int. (Pa.) 419; *Anderson's Estate*, 85 Pa. St. 202.

So also a policy on the life of a wife payable to her husband, his executors, etc., is assets of the husband's estate, though his wife survived him. *Hardy's Estate*, 4 W. N. C. (Pa.) 463.

4. Statutory Exemption from Debts. — In some states it is provided by statute that the proceeds of a life insurance policy are not subject to the debts of the insured, but shall be for the benefit of his family. *Kelley v. Mann*, 56 Iowa 625; *Rhode v. Bank*, 52 Iowa 375; *State v. Anderson*, 16 Lea (Tenn.) 321.

5. Policy Payable to Third Person Not Assets. — 2 Woer. Law of Adm. 647.

Illinois. — *Pinneo v. Goodspeed*, 120 Ill. 524.

Maine. — *Douglass v. Parker*, 84 Me. 522; *Cables v. Prescott*, 67 Me. 582.

Massachusetts. — *McCarthy v. Metropolitan L. Ins. Co.*, 162 Mass. 254.

Mississippi. — *Bishop v. Curphey*, 60 Miss. 22.

New York. — *Senior v. Ackerman*, 2 Redf. (N. Y.) 302; *Matter of Van Dermoor*, 42 Hun (N. Y.) 326.

North Carolina. — *Simmons v. Biggs*, 99 N. Car. 236; *Conigland v. Smith*, 79 N. Car. 303.

Pennsylvania. — *Morrell's Estate*, 8 W. N. C. (Pa.) 183; *Tiedeken's Estate*, 11 Phila. (Pa.) 95, 32 Leg. Int. (Pa.) 378; *McCutcheon's Estate*, 11 W. N. C. (Pa.) 125.

See also the title LIFE INSURANCE.

Limitation of Amount. — In some states the

(3) *Mutual Benefit Insurance*. — Moneys received on a certificate of membership in a mutual benefit association, the constitution and by-laws of which provide for insurance for the benefit of the member's family, or for such persons as the member may designate, go, on the death of the member, to his family, or the person designated by him, and are not assets subject to the payment of his debts.¹

(4) *Employers' Liability Insurance*. — Money paid to an employer by an employers' liability insurance company on a policy indemnifying him against loss by reason of injuries to employees is not assets of the estate of the employee on account of whose injury payment is made.²

d. **PROPERTY CONVEYED BY DECEDENT IN FRAUD OF CREDITORS**. — The authorities are not uniform as to whether property transferred by a decedent in his lifetime for the purpose of defrauding his creditors is assets. It has been held under statute 13 Eliz., c. 5, declaring transfers made for the purpose of defrauding creditors void, that the property transferred is assets in the hands of the personal representatives of the transferor.³ At common law the fraudulent grantee was chargeable as executor *de son tort*, even though there was a rightful executor or administrator.⁴ In some jurisdictions prop-

amount that may be expended by a person for insurance on his life for the benefit of his family is limited by statute to a certain sum per annum, and if the premiums paid exceed that amount the excess may be reached by creditors. *Matter of Wendell*, 3 How. Pr. N. S. (N. Y. Surrogate Ct.) 68; *Matter of Palmer*, 3 Dem. (N. Y.) 129.

For a Full Discussion of the right to the proceeds of life insurance policies, see the title **LIFE INSURANCE**.

1. **Mutual Benefit Insurance Not Assets** — *United States*. — *Worley v. Northwestern Masonic Aid Assoc.*, 10 Fed. Rep. 227, 3 McCrary (U. S.) 53, 14 Cent. L. J. 154, 11 Ins. L. J. 141, 16 West. Jur. 85.

Kentucky. — *Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush (Ky.) 489; *Duvall v. Goodson*, 79 Ky. 224.

Maryland. — *Maryland Mut. Benev. Soc. v. Clendennin*, 44 Md. 429.

Michigan. — *Catholic Mut. Ben. Assoc. v. Priest*, 46 Mich. 429; *Catholic Mut. Ben. Assoc. v. Firname*, 50 Mich. 82.

New York. — *Bown v. Catholic Mut. Ben. Assoc.*, 33 Hun (N. Y.) 263; *Hellenberg v. District No. 1*, 94 N. Y. 580; *Matter of Wendell*, 3 How. Pr. N. S. (N. Y. Surrogate Ct.) 68; *Brummer v. Cohn*, 86 N. Y. 11; *Matter of Palmer*, 3 Dem. (N. Y.) 129; *Matter of Brooks*, 5 Dem. (N. Y.) 326; *Greeno v. Greeno*, 23 Hun (N. Y.) 478.

Pennsylvania. — *Hodges's Appeal*, 8 W. N. C. (Pa.) 209.

Right Determined by Constitution and By-Laws. — It is well settled that the disposition of moneys paid at a decedent's death by benefit associations of which he was a member must be determined entirely by the constitutions and by-laws of such associations, and that such moneys are not assets of the decedent's estate. *Matter of Palmer*, 3 Dem. (N. Y.) 129; *Matter of Brooks*, 5 Dem. (N. Y.) 326; *Greeno v. Greeno*, 23 Hun (N. Y.) 478; *Bown v. Catholic Mut. Ben. Assoc.*, 33 Hun (N. Y.) 263; *Hellenberg v. District No. 1*, 94 N. Y. 580.

The object of such associations is not to benefit the estates of members during life, or to increase them after death, but to provide

funds for the benefit of their families, or others who may be designated during the lifetime of the members. *Loos v. John Hancock Mut. L. Ins. Co.*, 41 Mo. 538; *Bown v. Catholic Mut. Ben. Assoc.*, 33 Hun (N. Y.) 263; *Matter of Wendell*, 3 How. Pr. N. S. (N. Y. Surrogate Ct.) 68.

For a full discussion of the right to insurance money, see the titles **BENEVOLENT OR BENEFICIAL ASSOCIATIONS**, vol. 3, p. 1041; **FIRE INSURANCE**; **LIFE INSURANCE**; and references there given.

2. **Employer's Liability Insurance**. — *Hawkins v. McCalla*, 95 Ga. 192.

3. **Rule that Property Fraudulently Conveyed Is Assets**. — In *Shears v. Rogers*, 3 B. & Ad. 362, 23 E. C. L. 96, it was held that a lease assigned by the decedent in his lifetime for the purpose of defrauding his creditors was assets in the hands of his personal representatives. Lord Tenterden, C. J., said: "The deed of assignment being void, the lease remained the property of the testator, and was clearly assets in the hands of the defendants. The authorities show that wherever a man makes a gift of goods which is fraudulent and void as against creditors, and dies, he is considered to have died in full possession with respect to the claim of the creditors, and the goods are assets in the hands of his executor." See also *Shee v. French*, 3 Drew. 716.

The same rule has also been adopted in *Connecticut*. *Minor v. Mead*, 3 Conn. 289; *Booth v. Patrick*, 3 Conn. 106.

A different view of the effect under 13 Eliz., c. 5, of a fraudulent conveyance, seems to have been taken in *Lassiter v. Cole*, 8 Humph. (Tenn.) 621.

4. **Fraudulent Grantee Chargeable as Executor De Son Tort**. — *Hawes v. Leader*, Cro. Jac. 279, Yelv. 196; *Edwards v. Harben*, 2 T. R. 587; *Osborne v. Moss*, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252.

This, however, is no longer the rule in New York, it having been changed by statute providing that "no person shall be liable to an action as executor of his own wrong for having received, taken, or interfered with the property or effects of a deceased person; but

erty fraudulently conveyed by a decedent is made assets by statute, and the executor or administrator is entitled to recover it if necessary for the payment of debts.¹ In other jurisdictions the personal representatives cannot recover property so conveyed, but that right is given to the creditors alone.²

e. **GOVERNMENT CLAIMS — Existing Legal Right.** — A claim against the government is an asset of the estate of the claimant, and passes to his executor or administrator to be applied in satisfaction of his debts, like any other claim existing in favor of the estate, if it is founded on a contract obligation or other right which the law recognizes.³ And the character of such a claim as assets is not affected by the fact that a grant or appropriation based on it is made directly to the claimant's heirs.⁴

shall be responsible as a wrongdoer in the proper action, to the executors or general or special administrators of such deceased person." *Babcock v. Booth*, 2 Hill (N. Y.) 181, 38 Am. Dec. 578. See also *infra*, this title, *Executors De Son Tort*.

1. Statutes — Property Fraudulently Conveyed Is Assets — California. — *Murphy v. Clayton*, 114 Cal. 526.

Indiana. — *Love v. Mikals*, 11 Ind. 227; *Hess v. Hess*, 19 Ind. 238; *Martin v. Reed*, 30 Ind. 218; *Bearss v. Montgomery*, 46 Ind. 544; *Garner v. Graves*, 54 Ind. 188; *Bottorff v. Covert*, 90 Ind. 508; *Willis v. Thompson*, 93 Ind. 62.

Massachusetts. — *Martin v. Root*, 17 Mass. 222; *Gibbens v. Peeler*, 8 Pick. (Mass.) 254; *Holland v. Cruft*, 20 Pick. (Mass.) 321; *Wall v. Provident Sav. Inst.*, 6 Allen (Mass.) 320.

Wisconsin. — *Andrew v. Hinderman*, 71 Wis. 148.

Fraudulent Conveyance Not Consummated by Delivery. — Where a transfer of property is void as to creditors, and the property remains in the possession of the grantor until his death, it is assets in the hands of his personal representatives. *Bethel v. Stanhope*, Cro. Eliz. 810; *Kent v. Lyon*, 4 Fla. 474, 56 Am. Dec. 404; *Babcock v. Booth*, 2 Hill (N. Y.) 181, 38 Am. Dec. 578; *Hunt v. Butterworth*, 21 Tex. 133, 73 Am. Dec. 223.

In *Maine* it is the duty of an administrator to sell for the payment of debts, lands of the decedent which were fraudulently conveyed by him, when the administrator had notice of the fraud. *Brown v. Whitmore*, 71 Me. 65.

To What Debts Applicable. — The proceeds of a sale by an administrator of real estate conveyed by his intestate with intent to defraud creditors are applicable to the payment of all creditors alike, though the conveyance was void at the time only as against the then existing creditor. *Norton v. Norton*, 5 Cush. (Mass.) 524; *Lynn v. Yeaton*, 3 Cranch (C. C.) 182.

2. Personal Representatives Not Entitled to Recover Property Fraudulently Conveyed. — *Roden v. Murphy*, 10 Ala. 804; *Marler v. Marler*, 6 Ala. 367; *Dearman v. Radcliffe*, 5 Ala. 192; *Walton v. Bonham*, 24 Ala. 513; *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460.

Property Given Away by a Decedent in His Lifetime and never coming into the possession of the administrator is not regarded as assets in *South Carolina*. *Anderson v. Belcher*, 1 Hill L. (S. Car.) 246, 26 Am. Dec. 174. See also the title **FRAUDULENT SALES AND CONVEY-**

ANCES; and *infra*, this title, *Management and Care of Estate — Collection of Debts*.

3. Claims Against the Government Are Assets. — *Briggs v. Walker*, 171 U. S. 466.

Claims Under Treaties with Foreign Governments. — Where money has been paid to the United States by a foreign government to indemnify citizens of the United States for the capture or destruction of their property by persons for whose acts such foreign government is responsible, a claim against such fund for property destroyed or captured is assets of the claimant's estate. *Comegys v. Vasse*, 1 Pet. (U. S.) 193; *Thurston v. Lowder*, 40 Me. 197; *Grant v. Bodwell*, 78 Me. 460; *Pierce v. Stidworthy*, 79 Me. 234; *Foster v. Fifield*, 20 Pick. (Mass.) 67; *Manning v. Leighton*, 65 Vt. 84.

Arrears of Military Bounty. — Arrears of bounty due by the United States to a volunteer who died in the service are payable to his administrator as part of his estate, and not to his relatives. *Seidel's Estate*, 2 Woodw. (Pa.) 259.

Pay of Soldiers. — So also arrears of pay due a soldier at the time of his death. *Maitland v. Grissinger*, 1 Woodw. (Pa.) 294. And claims of officers of the Revolutionary war for compensation for their services as promised by the commonwealth of Virginia. *Merriweather v. Herran*, 8 B. Mon. (Ky.) 165.

Right to Patent under Pre-emption Law. — In *Burch v. McDaniel*, 2 Wash. Ter. 58, it was held that where a person has entered on public land under the pre-emption law, his possession gives him a salable and possessory right, which on his death, without perfecting his title, passes to his administrator as assets of his estate, under Rev. Stat., § 2269.

But in *Dawson v. Mayall*, 45 Minn. 408, it was held that a patent issued after the death of the pre-emptor was for the benefit of his heirs, and was not property of the estate subject to administration, though the patent was issued to the administrator. To the same effect are *Cothran v. McCoy*, 33 Ala. 65, and *Burns v. Hamilton*, 33 Ala. 210, 70 Am. Dec. 570.

4. Land Certificate Issued to Heirs. — Where a person, at the time of his death, had become entitled to a land grant under a previous statute, in consideration of services rendered by him to the state after the statute took effect, a subsequent grant to his heirs of the land to which he was entitled, was not a voluntary donation, but was in discharge of a legal obligation, and the grant is assets applicable to the

Gratuities or Donations.— If, on the other hand, a claim is founded on a voluntary donation made by the government as a reward for past services, however meritorious, or as compensation for any loss or injury for which the government was not liable, it is not assets which can be applied to the debts of the person entitled, but generally belongs to his widow and children.¹

f. TRUST PROPERTY.— If there was any specific personal property in the hands of a decedent, belonging to others, which he held in trust or otherwise, and it can be clearly distinguished from the decedent's own property, it is not assets in the hands of his personal representatives; but if such property has no earmarks and is not distinguishable from the mass of the decedent's own property, the person owning it must come in as a general creditor of the estate, and the property itself is assets in the hands of the executor or administrator.² In this category are moneys or securities received by a public officer in his official capacity, or by an agent or attorney, and not mingled with his individual funds.³

payment of the decedent's debts. *Goldsmith v. Herndon*, 33 Tex. 705; *Rogers v. Kennard*, 54 Tex. 30; *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852. See also *Pendleton v. Shaw*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1002; *State v. Zanco*, (Tex. Civ. App. 1898) 44 S. W. Rep. 527.

Where a Person, Before His Death, Had Become Entitled to a Land Grant under the Colonist Laws of Texas, a grant subsequently made to his heirs is not a gratuity, but is assets and applicable to the payment of his debts. *Soye v. Maverick*, 18 Tex. 101; *Allen v. Clark*, 21 Tex. 404; *Marks v. Hill*, 46 Tex. 345; *McKinney v. Brown*, 51 Tex. 97.

1. Gratuities from Government Not Assets.— *Taft v. Marsily*, 47 Hun (N. Y.) 175; *Matter of Cooley*, 6 Dem. (N. Y.) 77; *Causici v. La Coste*, 20 Tex. 269.

Reward for Voluntary Services.— The same principle was applied in *Emerson v. Hall*, 13 Pet. (U. S.) 409, where an appropriation was made by Congress to the heirs of a deceased officer as suitable reward for meritorious but voluntary services rendered to the public by the deceased.

Loss of Life in Public Disaster.— And in *Mulledy's Succession*, 47 La. Ann. 1580, where an appropriation was made to the heirs and legal representatives of a person who lost his life in the Ford's Theatre disaster.

Property Destroyed by Public Enemy.— And in *Gillan v. Gillan*, 55 Pa. St. 430, it was held that money appropriated by the state of *Pennsylvania* to pay for property of citizens destroyed by the Confederate army was a mere gratuity, and that money paid out of such appropriation for the destruction of the property of a person since deceased was not assets of his estate.

Past Sufferings in Service of State.— In *Eastland v. Lester*, 15 Tex. 98, it was held that the *Texas* statute providing that all volunteers who had been captured by the Mexicans at certain places should be entitled to certain monthly pay from the time of mustering into service until released from imprisonment, was gratuitous in its effect, and that where a volunteer was dead at the date of the statute, the amount so allowed was not assets of his estate, but passed directly to his widow and children.

Patent Issued to Heirs under Donation Act.— A settler under the Donation Act providing

that "upon the death of any settler before the expiration of the four years continued possession required by this act, all the rights of the deceased under this act shall descend to the heirs at law of such settler," has neither a descendible nor a devisable interest in the donation, and when, on his death before completing the required period of residence on the land, a patent is issued to his heirs, they take, not as heirs of the settler, but as donees of the United States. "A new inheritance is grafted upon them, of which they are the root, and not their ancestor." *Hall v. Russell*, 3 Sawy. (U. S.) 506; *Delay v. Chapman*, 3 Oregon 459.

Pensions.— The persons to whom pensions are payable are generally regulated by the pension laws, and arrearages due at a pensioner's death are payable to his family, and are not assets subject to his debts. *Quickel's Estate*, 5 York Leg. Rec. (Pa.) 71; *Hodge v. Leaning*, 2 Dem. (N. Y.) 553; *Watson's Appeal*, 6 Pa. St. 505. See also *Beecher v. Barber*, 6 Dem. (N. Y.) 129. But see *Foot v. Knowles*, 4 Met. (Mass.) 386; *Slade v. Slade*, 11 Cush. (Mass.) 469.

If, however, pension moneys have been received by a pensioner in his lifetime and deposited by him in bank, or loaned to a third person, they are assets of his estate. *Beecher v. Barber*, 6 Dem. (N. Y.) 129. See the title PENSIONS.

2. Property Held in Trust by Decedent Is Not Assets of His Estate—England.— *Deering v. Torrington*, 1 Salk. 79.

United States.— *Trecothick v. Austin*, 4 Mason (U. S.) 16; *U. S. v. Cutts*, 1 Sumn. (U. S.) 133, 25 Fed. Cas. No. 14,912.

Arkansas.— *Chowning v. Stanfield*, 49 Ark. 87.

Georgia.— *Cooper v. White*, 19 Ga. 554.

Maine.— *Thompson v. White*, 45 Me. 445.

Massachusetts.— *Smiley v. Allen*, 13 Allen (Mass.) 465; *Johnson v. Ames*, 11 Pick. (Mass.) 173.

New York.— *Matter of Van Duzer*, 51 How. Pr. (N. Y. Surrogate Ct.) 411; *Kip v. New York Bank*, 10 Johns. (N. Y.) 63; *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 119, 7 Am. Dec. 478.

North Carolina.— *Green v. Collins*, 6 Ired. L. (28 N. Car.) 139.

3. Money Collected by Public Officer.— Moneys received by a public officer in his official capacity are not assets in the hands of his

g. **PROPERTY SUBJECT TO POWER OF APPOINTMENT.** — Where a person has a general power of appointment, and he actually exercises his power, whether by deed or will, the property appointed will, in the contemplation of a court of equity, form a part of the assets of his estate, so as to be subject to the demands of his creditors in preference to the claims of his devisees, legatees, or appointees, even though he never had any ownership or control of the property during his life.¹

h. **FOREIGN ASSETS.** — It was formerly held that assets in any part of the world were assets in every part of the world.² The modern rule, however, is that, though administration extends only to the assets of the intestate within the jurisdiction of the court by which it was granted,³ yet, if a personal

administrator, but are trust funds for his successor in office, if they have been kept separate as an official fund, or can be traced and identified as such. *People v. Houghtaling*, 7 Cal. 348; *State v. Corey*, 4 West. L. Month. (Ohio) 563, 2 Ohio Dec. (Reprint) 669.

And the proceeds of a note given to an officer in his own name for the purpose of satisfying an execution in the hands of the officer belong to the execution creditor, and do not go to the executor or administrator of the officer as assets of his estate. *Childs v. Jordan*, 106 Mass. 321.

Money Received by Attorney. — Money of a client received by an attorney and not mixed with the money of the attorney, but kept separately, is not an asset of the attorney's estate. *Schoolfield v. Rudd*, 9 B. Mon. (Ky.) 294.

Note Taken by Agent. — In *Thompson v. White*, 45 Me. 445, the master of a vessel loaned part of the money received for freight, taking a promissory note therefor payable to himself, and died before the note was paid. It was held that the note was the property of the owner of the vessel, and was held by the master in trust for the owner, and was clearly distinguishable from the assets of the master's estate.

Note Taken for Money Due Third Person. — In *Charleston v. Duncan*, 3 Brev. (S. Car.) 386, it was held that where the decedent, being authorized by a city to sell lottery tickets, took notes for the price of tickets sold, and the notes fell into the hands of his administrator, the administrator could not retain the proceeds as assets, but that the city was entitled to recover from him. This decision was placed on the ground that decedent was a mere agent, and that the title to the price of the tickets was never in him.

In *Garner v. Graves*, 54 Ind. 188, it was held that notes taken by a husband in his own name for property of his wife sold by him belonged to his wife and not to his estate.

But in *McColl v. Weatherly*, 5 Strobb. L. (S. Car.) 72, a distinction was made between the case of an agent and one who has the title to property in a representative capacity, and it was held that where a guardian took a note payable to himself as guardian for the hire of property belonging to his ward, the legal title to the note was in the guardian, and at his death, though he died insolvent, devolved on his administrator.

Deposit in Trust. — A deposit in a savings bank is not an asset of the depositor's estate where it was made in terms as trustee for a third person. *Matter of Collyer*, 4 Dem. (N.

Y.) 24; *Anderson v. Thomson*, 38 Hun (N. Y.) 394; *Crowe v. Brady*, 5 Redf. (N. Y.) 1.

In *Farrelly v. Ladd*, 10 Allen (Mass.) 127, it was held that if a married woman delivered her own money to a third person to deposit in a savings bank in his name in trust for her, the money so deposited was not an asset of his estate, but that the trust terminated at his death and she became entitled to the money as against his personal representatives.

Deposit in Individual Name. — Money belonging to a third person and deposited in the decedent's name is not assets of the estate. *Grinstead v. Phoenix Nat. Bank*, (Ky. 1898) 44 S. W. Rep. 952.

Money Deposited by Guardian. — Money deposited by a guardian to his credit as such is not an asset of his estate, but belongs to his wards. *Gary v. People's Nat. Bank*, 26 S. Car. 538, 4 Am. St. Rep. 733.

Consignee with Option to Purchase. — If the consignee of goods has the right to buy them at a stipulated price, and elects to hold them as consignee, his executor cannot make them assets by electing to hold them as a purchase. *Bacon v. Sondley*, 3 Strobb. L. (S. Car.) 542, 51 Am. Dec. 646.

Property Held by Decedent as Factor. — A factor is a trustee for his principal, and property held by him in that capacity does not pass to his personal representatives. *Veil v. Mitchel*, 4 Wash. (U. S.) 105; *Fahnestock v. Bailey*, 3 Metc. (Ky.) 49, 77 Am. Dec. 161; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296. See also *Charleston v. Duncan*, 3 Brev. (S. Car.) 386.

1. Property Subject to Power of Appointment. — In *re Harvey's Estate*, 13 Ch. Div. 216; *Brandies v. Cochrane*, 112 U. S. 352; *Duncan v. Manson*, 3 App. Cas. (D. C.) 272; *Clapp v. Ingraham*, 126 Mass. 200. See also 2 Sugden on Powers 27; 4 Kent Com. 339.

2. Rule that Assets Anywhere Are Assets Everywhere. — In *Atty.-Gen. v. Dimond*, 1 Cromp. & J. 356, Lord Lyndhurst said: "The effects of the testator are assets wherever situated, whether at home or abroad; and such effects as are in a foreign country at the time of the testator's death, although they remain and are wholly administered there by the executor, are equally assets."

3. Administration Does Not Extend Beyond Jurisdiction of Court Granting It. — *Strong v. White*, 19 Conn. 249; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 383.

For a Full Discussion of the law relating to assets in a foreign jurisdiction, see the title FOREIGN AND ANCILLARY ADMINISTRATORS.

representative, by any acts done in the domestic jurisdiction, can collect foreign assets, as by selling and transferring bills, notes, bonds, or other securities payable abroad, or by delivering bills of lading or other documents of title, which acts would be recognized as conferring a substantial title in the foreign jurisdiction, he should be held accountable for due diligence as to such assets.¹

3. Assets in Respect to Character as Legal or Equitable — a. LEGAL ASSETS. — Assets in respect to their character or quality are either legal or equitable. There has been a great deal of confusion in the decisions as to the distinction between these two classes of assets, but it is now well settled that all the property of a decedent which goes to his executor or administrator *virtute officii*, and which may be reached in a court of law by creditors of the estate, falls within the designation of legal assets; and this is true whether the property is real or personal, and whether the decedent's interest in it was legal or equitable.²

An Equitable Interest in property may be legal assets. Within this principle are equities of redemption in personal property or in real estate when the mortgage is not in fee.³

1. Collection of Foreign Assets. — See *Hutchins v. State Bank*, 12 Met. (Mass.) 421.

In *Atty.-Gen. v. Bouwens*, 4 M. & W. 171, Lord Abinger, C. B., said: "If an instrument is created of a chattel nature, capable of being transferred by acts done here, and sold for money here, there is no reason why the ordinary or his appointee should not administer that species of property. Such an instrument is in effect a salable chattel, and follows the nature of other chattels as to the jurisdiction to grant probate. * * * Let us suppose the case of a person dying abroad, all whose property in England consists of foreign bills of exchange, payable to order, which bills of exchange are well known to be the subject of commerce, and to be usually sold on the Royal Exchange. The only act of administration which his administrator could perform here would be to sell the bills and apply the money to the payment of his debts."

In *Merrill v. New England Mut. L. Ins. Co.*, 103 Mass. 245, 4 Am. Rep. 548, Wells, J., said: "The administrator appointed at the place of domicile of the deceased is the principal administrator, and personal securities in the possession and control of the intestate at the time of his decease vest in him. He can do no legal act for their collection in another jurisdiction without an ancillary appointment there. And if another has already been appointed auxiliary administrator, the collection can be made within that jurisdiction only through him. But the principal administrator may always dispose of or collect such securities if he can do so without being obliged to resort to the domicile of the debtor."

In *Matter of Butler*, 38 N. Y. 397, it was said that "while the executor might not have been permitted officially to sue in the courts of another state which had not given him letters of administration, yet he could lawfully receive all personal property there situated, would be liable as for neglect of duty if he did not use due diligence to collect debts there due to the testator, and could transfer a title which would authorize his assignee to recover by action any personal property situate in either of those states." See also *Clark v. Blackington*, 110 Mass. 369; *Schultz v. Pulver*, 11 Wend. (N. Y.) 361; *Stokely's Estate*, 19 Pa. St. 476.

2. What Are Legal Assets. — *Cook v. Gregson*, 2 Jur. N. S. 510; *Harvey v. Steptoe*, 17 Gratt. (Va.) 289. Compare *Jones v. Lackland*, 2 Gratt. (Va.) 81.

Legal assets are such as the executor or administrator is entitled to receive by virtue of his office. *Atty.-Gen. v. Brunning*, 6 Jur. N. S. 1083, 8 H. L. Cas. 243, 30 L. J. Exch. 379, 8 W. R. 362.

And may be reached in a court of law by a creditor seeking satisfaction of his debts out of them. *Hughlett v. Hughlett*, 5 Humph. (Tenn.) 453.

Instances of Legal Assets. — Besides the familiar instances of property which passes to a decedent's executors or administrators, the following have been held to be legal assets: Money refunded to the executor by a distributee to whom it had been paid under the mistaken supposition that the estate was solvent. *Speed v. Nelson*, 8 B. Mon. (Ky.) 499.

Money paid by the government of the United States out of a fund received from a foreign government to indemnify citizens of the United States for property captured on the high seas. *Rogers v. Hosack*, 18 Wend. (N. Y.) 319.

Debts due the estate. *Rutledge v. Hazlehurst*, 1 McCord Eq. (S. Car.) 466.

Proceeds of the sale of personal property. *Backhouse v. Patton*, 5 Pet. (U. S.) 160.

3. Equity of Redemption in Personal Property.

— It was said in *Cox's Case*, 3 P. Wms. 341, and in *Hartwell v. Chitters*, Ambl. 308, that an equity of redemption in personal property is equitable assets. These cases were never regarded as satisfactory, and in *Sharpe v. Scarborough*, 4 Ves. 538, Sir John Mitford, solicitor general, said in his argument that they had been considered as overruled, and the lord chancellor held that, whether right or wrong, they applied only to bond creditors, and not to judgment creditors. They were, however, relied on by Bayley, J., in *Clay v. Willis*, 1 B. & C. 364, 8 E. C. L. 156; but the equity of redemption in that case was equitable assets because the mortgaged property had been devised for the payment of debts. But it is now settled that an equity of redemption in personal property is legal assets. Mr. Cox, in his note to *Cox's Case*, 3 P. Wms. 341, says that on looking into the master's report it

The Real Estate of a decedent, also, is legal assets in some jurisdictions, while in others the opposite rule obtains.¹

b. EQUITABLE ASSETS. — Any property left by a decedent, whatever may be its nature, constitutes equitable assets, if creditors are obliged to resort to a court of equity in order to subject it to their claim. The necessity on the part of creditors of resorting to a court of equity is the controlling feature, and it is immaterial whether the remedy of the executor or administrator for the recovery of the property is at law or in equity.²

Real Estate Is Equitable Assets in those jurisdictions where the creditors of a decedent can subject his realty to their claims only by proceeding in a court of equity.³

appears that, only two creditors being in equal degree, the master declined to distinguish which were legal and which were equitable assets. So that the point was not in fact determined. He also stated that it has been decided that chattels, whether real or personal, mortgaged or pledged by the testator and redeemed by the executor, are assets for so much as they are worth beyond the sum paid for their redemption, though recoverable in equity only. He cites as authority *Hawkins v. Lawse*, 1 Leon. 155; *Harecourt v. Wrenham*, Moo. 858, and *Alexander v. Gresham*, 1 Leon. 225. See also *Cook v. Gregson*, 3 Drew. 547, 2 Jur. N. S. 510, 25 L. J. Ch. 706; *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 71.

Equity of Redemption in Chattels Real. — In *Hanley v. McDermott*, 9 Ir. R. Eq. 35, it was held that the proceeds of the sale of an equity of redemption in a chattel real are legal assets, whether the testator has or has not charged all his property with the payment of his debts.

Equity of Redemption in Copyholds. — In *In re Burrell*, L. R. 9 Eq. 443, 39 L. J. Ch. 544, 22 L. T. N. S. 263, it was held that an equity of redemption in a copyhold was legal assets under 3 & 4 Wm. IV., c. 104, where the testator died before January 1, 1870.

Reversion in Fee on Mortgage for Years. — A mortgagor's reversion in fee on a mortgage for a term of years is held to be legal assets, because the bond creditors may have a judgment against the heir with a *cessat* execution until the reversion comes into possession. *Plunket v. Penon*, 2 Atk. 290.

But the rule is otherwise in the case of an equity of redemption on a mortgagee in fee. *Plunket v. Penon*, 2 Atk. 290; *Jones v. Lackland*, 2 Gratt. (Va.) 81.

The Equity of Redemption in Real Property is legal assets in *New York*. *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 71.

1. Real Estate. — Real estate is legal assets in those jurisdictions where it is not necessary to resort to a court of equity to subject it to the payment of debts. *Bloodgood v. Bruen*, 2 Bradf. (N. Y.) 8; *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 71; *Hood v. Hood*, 85 N. Y. 561.

"Whenever real estate is by statute made liable for the payments of the debts of the deceased it constitutes legal assets." *Titterington v. Hooker*, 58 Mo. 593.

Real Estate in the British Plantations in America was made legal assets by Stat. 5 Geo. II., c. 7, § 4, but it seems to have been held even before this statute that a foreign plantation was to be considered as a chattel for the payment of debts. *Noell v. Robinson*, 2 Vent. 358.

And it has been held that notwithstanding the statute such estates may be devised so as to make them equitable assets. *Charlton v. Wright*, 12 Sim. 274.

This decision, however, was afterwards overruled in the Privy Council. *Turner v. Cox*, 8 Moo. P. C. 288.

Equitable Assets Received by Executor in Money. — It is held that where equitable assets come into the hands of the executor in money, they are legal assets. *Marston v. Downes*, 1 Ad. & El. 31, 28 E. C. L. 24, 4 N. & M. 861, 6 C. & P. 381, 25 E. C. L. 448.

2. Equitable Assets. — *Cook v. Gregson*, 3 Drew. 547, 2 Jur. N. S. 510, 25 L. J. Ch. 706; *Titterington v. Hooker*, 58 Mo. 593; *Hughlett v. Hughlett*, 5 Humph. (Tenn.) 453.

Inchoate Interest of Purchaser at Probate Sale. — In *Vaughan v. Holmes*, 22 Ala. 593, it was held that when land is sold by an administrator under an order of court it is bound for the payment of the purchase money, until a decree is made divesting the legal title, and that if the purchaser dies before such decree is entered the right which his heirs have to demand a legal title on payment of the notes given for the purchase money is equitable assets of his estate, which neither the probate court nor a court of chancery can direct to be appropriated to the payment of the notes in preference to the other debts of the estate.

Separate Property of Married Women. — The separate property of a married woman under the Married Women's Property Act is equitable assets in the hands of her executor. *In re Poole*, 25 W. R. 862, 37 L. T. N. S. 119, 46 L. J. Ch. Div. 803, 6 Ch. Div. 739.

Official Bonds. — In *Nash v. Bryant*, 25 Beav. 533, 4 Jur. N. S. 550, 27 L. J. Ch. 748, a broker gave bond to the corporation of London to secure the performance of his duties. He made default, and the amount of the bond was received by the corporation. It was held that on his death the corporation held the amount so received merely as trustee for certain purposes which failed, namely, to secure the due performance of the decedent's duty of broker, and that therefore such amount was equitable assets in which all the creditors of the decedent were entitled to share, and not merely those who had suffered by his defaults.

3. When Real Estate Is Equitable Assets. — *Backhouse v. Patton*, 5 Pet. (U. S.) 160; *Jones v. Lackland*, 2 Gratt. (Va.) 81.

As to the doctrine that real estate or its proceeds are legal assets, see *supra*, this section, *Legal Assets*.

Sale under Order of Court. — In *Tappen v.* Volume XI.

Real Estate Devised in Trust for Payment of Debts, and the proceeds thereof when sold, were held in some early English cases to be legal assets, but it is now established by an unbroken line of decision, both *English* and *American*, that such a devise renders the land affected by it, and the proceeds when sold, equitable assets.¹

Real Estate Devised Subject to Debts has been held to be equitable assets, but the authorities are not uniform as to this.²

c. **DIFFERENCE BETWEEN LEGAL AND EQUITABLE ASSETS.**—Legal assets differ from equitable assets in two particulars; viz., first, legal assets are distributable among the creditors of the estate according to the priority of their several claims, while equitable assets are shared *pari passu* by all the creditors;³

Kain, 12 Johns. (N. Y.) 120, it was held that on a sale of the whole real estate of testator under a surrogate's order, the executors were responsible to the surrogate as trustees, and that the proceeds of the sale were equitable, and not legal assets.

Equitable Interest in Real Estate.—In Law v. Law, 3 Cranch (C. C.) 324, it was held that the proceeds of the sale of an equitable title to land are equitable assets.

An Equity of Redemption on a mortgage in fee is equitable assets. Plunket v. Penzon, 2 Atk. 290; Jones v. Lackland, 2 Gratt. (Va.) 81. But the rule is otherwise if the mortgage is for a term of years. Plunket v. Penzon, 2 Atk. 290.

1. **Lands Devised in Trust for Payment of Debts Are Equitable Assets**—*England.*—Barker v. May, 9 B. & C. 489, 17 E. C. L. 426; Clay v. Willis, 1 B. & C. 364, 8 E. C. L. 156; Lewin v. Okeley, 2 Atk. 50; Silk v. Prime, 1 Bro. C. C. 138, note; Newton v. Bennet, 1 Bro. C. C. 135; Bailey v. Ekins, 7 Ves. Jr. 319; Shiphard v. Lutwidge, 8 Ves. Jr. 26; Woolestoncroft v. Long, 1 Ch. Cas. 32; Anonymous, 2 Ch. Cas. 54; Bain v. Sadler, 40 L. J. Ch. 791, 19 W. R. 1077, 25 L. T. N. S. 202.

United States.—Dixon v. Ramsay, 1 Cranch (C. C.) 496.

Kentucky.—Cloudas v. Adams, 4 Dana (Ky.) 603; Helm v. Darby, 3 Dana (Ky.) 186; Clay v. Hart, 7 Dana (Ky.) 1; Justices v. Lee, 1 T. B. Mon. (Ky.) 249; Monroe v. Wilson, 6 T. B. Mon. (Ky.) 125; Speed v. Nelson, 8 B. Mon. (Ky.) 504.

New York.—Benson v. Le Roy, 4 Johns. Ch. (N. Y.) 651.

North Carolina.—Henderson v. Burton, 3 Ired. Eq. (38 N. Car.) 259.

Tennessee.—Hughlett v. Hughlett, 5 Humph. (Tenn.) 453; Harrison v. Henderson, 7 Heisk. (Tenn.) 315.

In Barker v. May, 9 B. & C. 489, 17 E. C. L. 426, Lord Tenterden, C. J., said: "In some of the older cases it has been held that where land is devised to be sold by executors, or devised to executors to be sold, the proceeds arising from the sale are legal assets. But later cases have established that if land be devised to trustees to be sold for payment of debts, and the same persons are executors, the effect of this is to create a charge upon the land to the amount of the debts, and that when sold, the proceeds in the hands of the executors are equitable and not legal assets; and that, consequently, a legatee entitled to a proportion of such assets cannot sue for them in the ecclesiastical court."

Descent Broken—Necessity to Constitute Equitable Assets.—It is generally stated in the English cases cited immediately above that the descent of real estate must be broken in order to constitute it equitable assets. In regard to this, Lord Eldon, in Bailey v. Ekins, 7 Ves. Jr. 319, said: "The rule cannot be accurate when it is stated that the descent ought to be broken. It would be more accurate to state it thus: that it must appear upon the will that the testator meant the descent to be broken. Suppose a devise to trustees, in trust to pay debts; and, all the trustees dying in the life of the testator, the estate descends upon the heir; would not that be equitable assets? By the failure of the devise the heir must have had it, as the trustee would, subject to the debts; and yet the descent is not broken, but intended to be broken. But when it is said the heir takes by his better title, still the question is, whether he takes as he would if that devise had not been made, taking all the circumstances of the devise together."

The Surplus Proceeds of Land Conveyed in Trust to Secure Debts after satisfaction of the debts secured are equitable assets which must be distributed ratably among all the creditors of the grantor. Jones v. Lackland, 2 Gratt. (Va.) 81.

2. **Real Estate Devised Subject to Debts.**—Benson v. Le Roy, 4 Johns. Ch. (N. Y.) 651.

In Lowe v. Peskett, 16 C. B. 500, 81 E. C. L. 500, 24 L. J. C. P. 196, it was held that a devise of real estate to the testator's son, who was appointed one of the executors, charged with the payment of a sum of money for certain purposes, constituted equitable assets in the hands of the executors. See also Rochester v. Buford, 5 J. J. Marsh. (Ky.) 32.

But in Pascalis v. Canfield, 1 Edw. Ch. (N. Y.) 201, it was held that a devise to the testator's sons, who were made executors of the will, with power of sale of the property devised for the payment of debts in case the personalty should be insufficient, did not make the property devised equitable assets, because the creditors of the testator had a right of action against the sons personally, and their judgments would become liens on the land devised, the legal title being in the sons.

Property Devised in Trust after payment of debts is assets in the hands of the administrators with the will annexed. Woodfin v. McNealy, 9 Fla. 256.

3. **Difference in Respect to Distribution Among Creditors.**—Clay v. Willis, 1 B. & C. 364, 8 E. C. L. 156; Backhouse v. Patton, 5 Pet. (U. S.)

second, legal assets may be reached by creditors in a court of law, while equitable assets can be reached by creditors only in a court of equity.¹

d. DISTINCTION ABOLISHED BY STATUTE IN UNITED STATES. — As a general rule the practical importance of the distinction between legal assets and equitable assets no longer exists in the United States, because the statutes regulating the distribution of the estates of decedents prescribe the order in which all the assets, without regard to their nature, shall be applied to the payment of debts.²

VI. INVENTORY AND APPRAISAL — 1. Necessity for Making Inventory —

a. RULE IN ENGLAND. — It has been the duty of executors and administrators since very early times to make inventories of the estates of their testators or intestates. It was provided by statute 21 Hen. VIII., c. 5, that such inventories should be made; and statute 22 and 23 Car. II., c. 10, § 1, provided that administration bonds should be conditioned to exhibit an inventory. It is said that inventories were required at a much earlier period than the statute of Hen. VIII., and the ancient ecclesiastical law was very strict in respect thereto. In the course of time the practice was adopted of exhibiting inventories only when required by a citation from the court, and such is the present English practice under the Probate Court Act, which requires administrators to give bond to make an inventory when lawfully called on, and to exhibit the same whenever required by law so to do.³

b. RULE IN UNITED STATES. — The statutes of all the states of the Union require an inventory to be made and filed within a certain time, but in practice it is sometimes made only when called for.⁴

c. WHEN INVENTORY MAY BE DISPENSED WITH. — While as a general rule the statutes require an inventory to be made in all cases, at least when called for by a person interested in the estate, it may in some instances be dispensed with.⁵ A testator, however, has no power to relieve his executors

160; *Henderson v. Burton*, 3 Ired. Eq. (38 N. Car.) 259; *Rutledge v. Hazlehurst*, 1 McCord Eq. (S. Car.) 466.

1. Difference in Respect to Remedies of Creditors. — In *Cook v. Gregson*, 3 Drew. 547, 2 Jur. N. S. 510, 25 L. J. Ch. 706, Sir R. T. Kindersley, V. C., said: "As a general rule this is the distinction between legal and equitable assets — legal are those with respect to which, if a creditor brings an action at law to recover his debt against the executor, and the executor pleads *plene administravit*, the truth of his plea is to be ascertained by ascertaining what he has received and what he has fully administered; and if the court of law can say these are not assets received by him as executor, they will not be taken into account in a plea of *plene administravit*, and the creditor must resort to a court of equity, and then they are equitable and not legal assets. There is no manner of doubt as to that being the general rule; it does not depend upon whether the testator's interest was legal or equitable."

The True Test as to whether assets are legal or equitable is said to be not whether the executor or administrator can reach them without resorting to a court of equity, but whether they can be so reached by creditors. *Titterington v. Hooker*, 58 Mo. 593. See also *Rutledge v. Hazlehurst*, 1 McCord Eq. (S. Car.) 466.

Equitable Assets Cannot Be Subjected to Debts until the creditor has obtained a judgment at law, issued execution, and had a return of *nulla bona*. *Brown v. State Bank*, 31 Miss. 454; *Farned v. Harris*, 11 Smed. & M. (Miss.) 366; *Partee v. Mathews*, 53 Miss. 140.

2. Distinction Abolished by Statute in United States. — *Titterington v. Hooker*, 58 Mo. 593; *Bloodgood v. Bruen*, 2 Bradf. (N. Y.) 8; *Matter of Sperry*, 1 Ashm. (Pa.) 347.

In *Titterington v. Hooker*, 58 Mo. 593, it was said: "We are of opinion that the precise and simple yet effective provisions of our administration law, whereby the whole estate of a decedent, both real and personal, may be subjected to the payment of his debts, were designed entirely to supersede the more cumbersome machinery of the common law, and that the whole doctrine of equitable assets, marshaling assets in equity for the payment of debts, and bills for discovery of assets and account, is without application here, save in so far as the principles underlying these proceedings may be invoked in illustration or explanation of analogous remedies afforded by our statute."

As to the Order of Payment of Debts and the property applicable thereto, see the title DEBTS OF DECEDENTS, vol. 8, p. 1003, and various local statutes.

3. Necessity of Inventory — Rule in England. — 2 Wms. Exrs. (7th Am. ed.) 174; 4 Burns Ecc. Law 236.

4. Necessity of Inventory — Rule in United States. — Woer. Am. Law of Administration, § 315; *Crosweil Exrs. and Admsrs.*, § 311. See also the various local codes and statutes in the United States.

5. No Assets Known to Executor. — An executor need not file an inventory if no assets have come to his possession or knowledge. "He is only bound to inventory and appraise the

from this duty, and a provision in a will that they shall not be required to file an inventory is void.¹

2. Object of Inventory and Appraisal. — The object of the inventory and appraisal is to fix the value and amount of the property for the purpose of accounting with the executor or administrator.²

3. What Property Inventoried — *a. IN GENERAL.* — As a general rule it is the duty of an executor or administrator to include in his inventory all the property of every kind which belonged to the decedent.³

goods and chattels so far as he may know or ascertain them. He has a right to exercise some discretion as to how far he will make himself, *prima facie*, liable to the parties interested. And if in good faith he should decline to file an inventory and appraisal of personal estate alleged to belong to decedent, but of which he has no knowledge, nor possession, nor satisfactory evidence, the parties who allege the contrary should be left to their appropriate remedy, to wit, to surcharge the executor upon the filing and settlement of his account." *Langton's Estate*, 16 Phila. (Pa.) 368, 41 Leg. Int. (Pa.) 263. To the same effect, see *Thurlough v. Kendall*, 62 Me. 166; *Walker v. Hall*, 1 Pick. (Mass.) 20.

Waiver of Inventory and Appraisal. — In *Barnes's Estate*, 1 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 59, it was said that the making and filing of an inventory and appraisal may be waived by the parties in interest, and that the waiver is binding on their assignee.

Admission of Assets. — In a suit to recover a legacy an inventory may be denied if the executor confesses assets sufficient to cover the legacy, with interest and the costs of the suit. *Fleet v. Holmes*, 2 Cas. temp. Lee 101.

Effect of Preliminary Inventory. — In some jurisdictions a preliminary inventory is made to ascertain whether the estate is of sufficient value to authorize the granting of letters of administration, and it is held that when administration is thereafter granted, such preliminary inventory does not dispense with the necessity of an inventory by the administrator. *Pace v. Oppenheim*, 12 Ind. 533.

A Bond Given by an Executor Who Is Also Residuary Legatee to pay all the debts of the estate dispenses with the necessity of an inventory under the statutes of some states. *State v. Boyd*, 2 Gill & J. (Md.) 365; *Jones v. Richardson*, 5 Met. (Mass.) 247; *Holden v. Fletcher*, 6 Cush. (Mass.) 235; *Alger v. Colwell*, 2 Gray (Mass.) 404; *Colwell v. Alger*, 5 Gray (Mass.) 67; *Stebbins v. Smith*, 4 Pick. (Mass.) 97; *Durfee v. Abbott*, 50 Mich. 278.

1. Power of Testator to Dispense with Inventory. — In *Potter v. McAlpine*, 3 Dem. (N. Y.) 108, it was held that a provision of the will that the executors should not be required to file an inventory was contrary to public policy.

2. Object of Inventory and Appraisal. — *Morrison v. Burlington, etc., R. Co.*, 84 Iowa 663; *Pipkin's Succession*, 7 La. Ann. 617; *In re Higgins*, 15 Mont. 484; *Thompson v. Thompson*, 77 Ga. 692.

3. All Property of Decedent Must Be Inventoried. — *Williams v. Morehouse*, 9 Conn. 474; *State v. French*, 60 Conn. 478; *Matthews v. Turner*, 64 Md. 109; *Matter of Butler*, 38 N. Y. 397.

Property Exempt from Execution. — An executor or administrator must inventory as assets of the decedent's estate all the property of the decedent not exempt from execution. *Matter of Holderbaum*, 82 Iowa 69.

Provisions on hand at the time of the decedent's death must be inventoried. *Griswold v. Chandler*, 5 N. H. 492.

Accretions. — An inventory relates to the time of the decedent's death, and therefore only goods of which he was possessed at the time of his death, and not the subsequent profits, need be included in the inventory. *Pitt v. Woodham*, 1 Hagg. Ecc. 250; *Snodgrass v. Andrews*, 30 Miss. 472, 64 Am. Dec. 169; *McCall v. Peachy*, 3 Munf. (Va.) 288.

Property of the Decedent Claimed by the Executor or Administrator must be included in the inventory. *State v. French*, 60 Conn. 478; *Simms v. Guess*, 52 Ill. App. 543.

Property Claimed by Third Persons. — Property claimed to belong to the decedent should be included in the inventory, though it is claimed adversely by a third person, even if in the possession of the third person under such claim of title, but this is without prejudice to the rights of such third person. *Groun v. Abat*, 7 La. 17; *Carcagno's Succession*, 43 La. Ann. 1151; *Bourne v. Stevenson*, 58 Me. 499; *Turner v. Ellis*, 24 Miss. 173.

In *Dilts v. Stevenson*, 17 N. J. Eq. 407, it was held that a promissory note taken in the decedent's name should not be omitted from the inventory because it was claimed by his wife as hers, as being in payment of the sale of a gift to her from the decedent.

Wearing Apparel. — The wearing apparel of the decedent must be included in the inventory if he left only collateral kindred. *Steen's Estate*, 1 Pa. Co. Ct. Rep. 473.

Obligation Incurred by Decedent as Surety. — If a surety die leaving his estate liable for the debt, his claim against the principal for reimbursement is not to be inventoried by the administrator until the debt has been actually paid. *Andruss v. Doolittle*, 11 Conn. 283.

Property Found Among That of the Deceased is properly inventoried among his effects. *Waterhouse v. Bourke*, 14 La. Ann. 358.

Choses in Action. — The inventory must include all the choses in action, notes, and other claims existing in favor of the estate. *Williams v. Morehouse*, 9 Conn. 470; *Pool's Succession*, 14 La. Ann. 688; *Bourne v. Stevenson*, 58 Me. 499; *Black v. Whitall*, 9 N. J. Eq. 572. Even though they are in the possession of a third person. *Potter v. Titcomb*, 10 Me. 53.

In *Maryland* debts are not included in the inventory, but are placed on a separate list, in which they are marked "separate, collectible, or desperate," and the executor or administrator

b. REAL PROPERTY. — Apart from any statutory provisions, an executor or administrator is not required to inventory the real estate of a decedent,¹ but in many jurisdictions in the *United States* the statutes provide that real estate shall be included in the inventory as well as personal property,² and it would seem that the same requirement now exists by statute in *England*.³

c. PROPERTY FRAUDULENTLY CONVEYED. — In some jurisdictions the inventory must include property fraudulently conveyed by the decedent in his lifetime.⁴

d. PROPERTY IN FOREIGN JURISDICTION. — It is generally held that an executor or administrator is not obliged to include in his inventory assets which are in a foreign jurisdiction, but that he is responsible only for the property within the jurisdiction where his letters were granted.⁵

tor is charged only with those marked "speciate." *Handy v. Collins*, 60 Md. 238, 45 Am. Rep. 725.

The Appraisement of Notes and Accounts in the inventory of the effects of a succession is required by law. *Pool's Succession*, 14 La. Ann. 688.

Property Held by Decedent or by the Executor as Life-tenant. — Property in the possession of a legatee for life, with remainder over, should not be included in the inventory of her estate, but should be at once transferred to the remainderman. *King's Estate*, 12 W. N. C. (Pa.) 109.

Nor is an executor required to inventory property held by himself as life-tenant under the provisions of the will. *Brooks v. Brooks*, 12 S. Car. 422.

Property Appropriated to Use of Testator's Family. — No account is to be taken of goods which a testator directed should be disposed of for the use of the family in the same manner as if he were living. *Cary v. Macon*, 4 Call (Va.) 605.

Statutory Allowances. — In some jurisdictions the statutory allowances for the immediate support of the decedent's family are not required to be inventoried, while in others a separate inventory is required as to the property included in the allowance, and in others again the statute contains no provision on the subject. See various local codes and statutes.

Advancements. — An advancement made by the testator in his lifetime is not a part of his estate to be inventoried, though the will declares that the advancement shall be deemed a part of the residue of the estate for the purpose of distribution among the legatees, and that the amount of the advancement shall be deducted from the share of the child advanced; the whole design and operation of such a clause being to designate the mode in which distribution shall be made in order to insure perfect equality among the legatees. *Black v. Whitall*, 9 N. J. Eq. 572.

Estate Owned in Common. — Where the guardian of several infants, on the death of one of them, takes out letters of administration, he should make an actual division of the property and file an inventory of the estate of the decedent. *Calvert v. Peebles*, 71 N. Car. 274.

Assets Received Before Grant of Letters. — Assets received after the death of the decedent, but before a grant of letters of administration, must be inventoried. *Sherwood v. Hill*, 25 Mo. 391.

1. Real Estate Not to Be Inventoried Unless Required by Statute. — *Henshaw v. Blood*, 1

Mass. 35; *Prescott v. Tarbell*, 1 Mass. 204; *Dundas's Estate*, 43 Leg. Int. (Pa.) 194, 18 Phila. (Pa.) 79.

The Proceeds of Real Estate Devised to Be Sold need not be included in the inventory, since the executor holds them as trustee, and not as executor. *Hughlett v. Hughlett*, 5 Humph. (Tenn.) 453.

2. Statutes Requiring Real Property to Be Inventoried. — *Minor v. Mead*, 3 Conn. 289; *Gold's Appeal*, Kirby (Conn.) 100; *Butler v. Ricker*, 6 Me. 268; *Lewis v. Carson*, 93 Mo. 587; *In re Higgins*, 15 Mont. 474; *Probate Ct. v. Keeler*, 2 D. Chip. (Vt.) 16; *Bates v. Kimball*, 1 Aik. (Vt.) 95; *Jones v. Billstein*, 28 Wis. 221. See also the various local codes and statutes in the United States.

3. See statute 60 & 61 Vict., c. 65.

4. Property Fraudulently Conveyed by Decedent. — *Minor v. Mead*, 3 Conn. 289; *Booth v. Patrick*, 8 Conn. 106; *Andrus v. Doolittle*, 11 Conn. 287; *Bassett v. McKenna*, 52 Conn. 439.

In *Massachusetts* real estate fraudulently conveyed by the intestate must be inventoried if the intestate's creditors request it, and offer to indemnify the administrator. *Andrews v. Tucker*, 7 Pick. (Mass.) 250.

In *Rhode Island* an executor or administrator is not required to inventory property which had been conveyed by the decedent in fraud of his creditors. *Gardner v. Gardner*, 17 R. I. 751; *Estes v. Howland*, 15 R. I. 127.

As to the rule that property conveyed by the decedent in fraud of his creditors constitutes assets of his estate, see *supra*, this title, *Assets*.

Conveyance by Decedent While Under Disability. — In *Gold's Appeal*, Kirby (Conn.) 100, it was held that real estate conveyed by the decedent before his death should be inventoried if the administrator had reason to believe that he was incompetent to convey at the time the conveyance was made.

5. Foreign Assets Need Not Be Inventoried. — *Raymond v. Von Watteville*, 2 Cas. temp. Lee 554; *Strong v. White*, 19 Conn. 238; *Black v. Whitall*, 9 N. J. Eq. 572; *Normand v. Grognaud*, 17 N. J. Eq. 425; *Governor v. Williams*, 3 Ired. L. (25 N. Car.) 152, 38 Am. Dec. 712.

The contrary, however, has been held in *New York*. *Matter of Butler*, 38 N. Y. 397.

Distinction Between Executors and Administrators. — In *North Carolina* it is held that an administrator is not required to inventory foreign assets, but that the rule is different in regard to executors. *Grant v. Reese*, 94 N. Car. 720. In this case, *Merrimon, J.*, delivering the

e. **PARTNERSHIP PROPERTY.** — Where the decedent was a member of a partnership, the various items of partnership property need not be set out in the inventory, but the decedent's interest in the concern should be noted in the inventory, merely as an interest in an unascertained balance.¹

f. **DEBTS DUE FROM EXECUTOR OR ADMINISTRATOR.** — Debts due from executors or administrators to their testators or intestates are generally held to be assets of the estate and must be inventoried as such.²

4. Time of Making. — The time within which the inventory must be made varies in the different states, according to the local statutes.³

opinion of the court, said: "It was held in *Governor v. Williams*, 3 Ired. 152, that administration of an estate granted here, although general in its terms, is necessarily limited to the property in this state, and gives no authority to the administrator to administer the property in another government; that the administrator cannot be required to return an inventory of such property, and that a failure to do so would be no breach of his administration bond, although the administrator might, in equity, be required to account personally, wherever he might be found, to those entitled to the estate in his hands. This rests on the ground of a personal trust in the administrator, without regard to where it was assumed. The administration in this state does not authorize the administrator to sue abroad, nor is he held responsible for property within a foreign jurisdiction, certainly, when there is administration of the property of the intestate there. *Plummer v. Brandon*, 5 Ired. Eq. (40 N. Car.) 190; *Carmichael v. Ray*, 5 Ired. Eq. (40 N. Car.) 365; *Sanders v. Jones*, 8 Ired. Eq. (43 N. Car.) 246; *Medley v. Dunlap*, 90 N. Car. 527, and cases there cited. An executor, however, stands upon a different footing, in some material respects. When he proves the will as required by the laws of the domicile of the testator, it passes the property, wherever it may be situate, to him, according to the legal effect of the will. He derives his authority from the will, and not simply from the act of the law."

1. Partnership Interest — How Inventoried. — *Thomson v. Thomson*, 1 Bradf. N. Y.) 24. See also *Camp v. Fraser*, 4 Dem. (N. Y.) 212; *Montgomery v. Dunning*, 2 Bradf. (N. Y.) 220.

In *Loomis v. Armstrong*, 63 Mich. 355, the court said: "In making the inventory it should have only referred to this interest as a partnership interest of a certain character, and where located, without undertaking to give the items of property belonging to such partnership, for the reason the administrator has not, and cannot have, control of it until the partnership accounts are settled and the debts paid, and cannot be made liable therefor."

Discretion of Court. — In *Justices v. McLaren*, 1 Ga. 291, it was held that the court of ordinary will exercise a sound discretion as to what kind of an inventory of the interest of a deceased copartner in the partnership effects will be accepted. See also *Reeves v. Freeling*, 2 Phill. Ecc. 56.

But see *Shipe's Appeal*, 114 Pa. St. 205, in which it was held that the interest of a deceased partner in the partnership assets should not be included in the inventory, and that

if so included, the administrator should be allowed credit for it in his account.

In *Maine* an executor or administrator of a deceased copartner is required by statute to include in his inventory copartnership estate. *Cook v. Lewis*, 36 Me. 340.

2. Debt Due from Executor or Administrator Must Be Inventoried. — *Weems v. Bryan*, 21 Ala. 302; *State v. Gregory*, 119 Ind. 503; *Burkhalter v. Norton*, 3 Dem. (N. Y.) 610.

In *Kelsey v. Smith*, 1 How. (Miss.) 68, it was held that it is the duty of an administrator to include in his inventory a debt due from himself to the decedent, and that if he fail to do so, it is a breach of his bond.

In *Lynch v. Divan*, 66 Wis. 490, it was held that any notes or other claims of the estate against an executor should be included in the inventory, whether the executor recognizes them as valid claims or not.

3. Time of Making Inventory and Appraisal — California. — The inventory and appraisal must be made within three months after the appointment. *Phelan v. Smith*, 100 Cal. 158.

Indiana. — Within sixty days after appointment. *Pace v. Oppenheim*, 12 Ind. 533.

Iowa. — Within fifteen days after appointment. *Poole v. Burnham*, 99 Iowa 493.

Massachusetts. — Within three months after the appointment. *Forbes v. McLugh*, 152 Mass. 412.

Oregon. — Within one month after appointment, or such further time as the court or judge may allow. *In re Holladay*, 18 Oregon 168.

See also the statutes in other jurisdictions.

Power of Testator to Fix Time. — In *Logan's Estate*, 1 Pa. Co. Ct. Rep. 76, it was held that the testator might provide by his will that the inventory and appraisal should not be made until the death of a life-tenant.

Excuse for Failure to File Inventory Within Prescribed Time. — In *Forbes v. McLugh*, 152 Mass. 412, it was contended that the failure of the executor to file his inventory within the prescribed time was excused by the fact that he had not received any assets within that time. The court, however, did not pass on that question, but held that even if that was an excuse, he was in default in not filing his inventory within a reasonable time after he received assets.

Statute Prescribing Time Is Directory. — In *Phelan v. Smith*, 100 Cal. 158, it was held that the provision of the statute requiring an inventory and appraisal to be filed within three months after the appointment of the administrator is directory, and does not render an inventory and appraisal invalid when subsequently filed.

5. By Whom Made — Inventory. — In *England* it is not the executor or administrator alone who must exhibit an inventory, but it may be required of any person into whose hands effects of the decedent may come.¹ In the *United States* only a duly appointed executor or administrator can be required to file an inventory.² And this duty is generally held, both in *England* and in the *United States*, to be incumbent on all classes of personal representatives.³

Appraisal. — In *England* the valuation of the items of an inventory is made by such person as the executor or administrator may consult, and may be made by any honest person in the neighborhood.⁴ In the *United States* the appraisal is made either by the executor or administrator himself, or by appraisers appointed, pursuant to local statutes, for that purpose.⁵

6. Compelling Inventory — Power to Compel. — If an executor or administrator does not return an inventory as required by law, the court of probate has power to compel him to do so.⁶

Who May Require Return of Inventory. — An executor or administrator may be compelled to exhibit an inventory at the request of any person having an interest in the estate, or even an appearance of an interest.⁷

1. Who Must Exhibit Inventory — Rule in England — The Personal Representatives of an Executor or Administrator may be required to exhibit an inventory, on the presumption that part of the effects of the first decedent had come into their hands. *Ritchie v. Rees*, 1 Add. Ecc. 144; *Holland v. Prior*, 1 Myl. & K. 245.

And this is true, though the personal representative of the deceased executor does not represent the original testator, there being an executor of the original testator still surviving. *Gale v. Luttrell*, 2 Add. Ecc. 234.

2. Rule in the United States. — Crosswell Exrs. & Admsr., § 314; *Mills v. Smith*, (Supreme Ct.) 19 N. Y. Supp. 854, 141 N. Y. 256.

3. Administrators De Bonis Non must file an inventory. *Alexander v. Stewart*, 8 Gill & J. (Md.) 226; *Probate Ct. v. Keeler*, 2 D. Chip. (Vt.) 16.

Administrator Durante Minoritate may be compelled to exhibit an inventory, though his administration has expired. *Taylor v. Newton*, 1 Cas. temp. Lee 15.

Administrator Pendente Lite must file an inventory. *Brotherton v. Hellier*, 2 Lee Ecc. 55.

Where an Executor Dies and the person who was named as co-executor in the will takes out letters testamentary, he must file an inventory, though the deceased executor had rendered a full account. *Dana's Estate*, Tuck. (N. Y.) 113.

But see *Green v. Thompson*, 84 Va. 376, in which it was said that it is not usual for a succeeding administrator to make an inventory.

4. Appointment of Appraisers in England. — 4 Burns' Ecc. Law, p. 250; 2 Wms. Exrs. (7th Am. ed.) 179.

5. Appointment of Appraisers in the United States. — Woer. Amer. Law of Administration, § 319. See also *Dilts v. Stevenson*, 17 N. J. Eq. 407; *Re Supplee's Estate*, 17 Pa. Co. Ct. Rep. 335, 5 Pa. Dist. Rep. 41.

Status of Appraiser. — "An appraiser is not an officer of the probate court. He is simply a person appointed by that court to appraise the goods and chattels, rights and credits of the deceased that shall have come to the knowledge of the administrator, and to make return thereof under oath to said court." *Fairbanks v. Mann*, 19 R. I. 499.

Power of Court to Control Appraisal. — The surrogate has no power to direct the appraisers as to the manner in which they are to estimate the value of the property, but they are to do this according to the best of their knowledge and ability. *Matter of McCaffrey*, 50 Hun (N. Y.) 371.

6. Probate Court May Compel Return of Inventory. — *McWillie v. Van Vacter*, 35 Miss. 428, 72 Am. Dec. 127; *Matter of McIntyre*, 4 Redf. (N. Y.) 489. See also *Matter of Comins*, 9 N. Y. App. Div. 492.

This power of the court may be exercised on information given by any person whether he has an interest in the estate or not. *Poole v. Burnham*, 99 Iowa 493.

Power of Testator to Fix Time. — Where executors are forbidden to enter on their duties until after the death of the testator's widow, they cannot be compelled during her lifetime to file an inventory or appraisement. *Lining-er's Appeal*, 110 Pa. St. 398.

7. Any Person Interested in the Estate may require the return of an inventory. *Phillips v. Bignell*, 1 Phill. Ecc. 241; *Gale v. Luttrell*, 2 Add. Ecc. 236; *Probate Judge v. Southard*, 62 N. H. 228; *Chifflet v. Willis*, 74 Tex. 245.

An Attorney Who Takes Administration in the name of another may be compelled by such other to exhibit an inventory. *Bailey v. Bristowe*, 2 Robert 145.

Contingent Interest. — A probable or contingent interest in an estate is sufficient to entitle one to require an inventory. *Myddleton v. Rushout*, 1 Phill. Ecc. 244; *Reeves v. Freeling*, 2 Phill. Ecc. 56; *Burgess v. Marriott*, 3 Curt. 424.

Determination of Interest. — In *New York* the surrogate has power, on an application to compel the return of an inventory, to pass on the question of the petitioner's interest in the estate; the statute providing that such application should be granted on proof, to the satisfaction of the court, that the petitioner had an interest in the estate. *Matter of Comins*, 9 N. Y. App. Div. 492; *Matter of Wagner*, 119 N. Y. 28.

Residuary Legatees may require an inventory. *Kenny v. Jackson*, 1 Hagg. Ecc. 105.

Time Within Which Inventory May Be Compelled. — The right to require an inventory is not barred merely by lapse of time,¹ but may generally be enforced at any time before final settlement of the administration accounts.² Lapse of time, however, in connection with other circumstances may be sufficient ground for denying the application for an inventory.³

7. Correction of Inventory and Appraisal. — There seems to be some doubt as to whether the ecclesiastical courts in *England* could entertain objections to an inventory. Those courts by their own decisions asserted this power,⁴ but in some cases they were prohibited by the court of King's Bench from hearing objections to inventories on the ground that such courts exercised merely ministerial functions in the premises.⁵ The general rule in the *United States* is that an inventory may be corrected in the probate court on proof of mistake.⁶

Correction of Appraisal. — If an appraisal is erroneous, neither the appraisers nor the court can correct it if it has been filed, but the only remedy in such case is to set it aside.⁷

8. Additional Inventory. — In some jurisdictions an additional inventory may be required where other property has been discovered since the first

An Executor Who Is Also Residuary Legatee may call on his co-executor for an inventory. *Paul v. Nettlefold*, 2 Add. Ecc. 237.

Representatives of Persons Interested. — The personal representative of the residuary legatee of one who was residuary legatee of the original testator has a sufficient interest to require an inventory. *Winchlow v. Smith*, 1 Cas. temp. Lee 417.

Creditors of Decedent. — One who claims to be a creditor of the decedent and swears to that fact may require the executor or administrator to return an inventory, though his debt is disputed. *Smith v. Price*, 1 Cas. temp. Lee 569; *Hackman v. Black*, 2 Cas. temp. Lee 251; *Creamer v. Waller*, 2 Dem. (N. Y.) 351; *Pendle v. Waite*, 3 Dem. (N. Y.) 261; *Forsyth v. Burr*, 37 Barb. (N. Y.) 540; *Thomson v. Thomson*, 1 Bradf. (N. Y.) 24.

Debt Barred by Limitation. — The right of a creditor to require an inventory is not affected by the fact that the statute of limitations has run against the debt since administration was granted. *Phillipson v. Harvey*, 2 Cas. temp. Lee 344.

Creditors Suing for Discovery of Assets. — A creditor has no right, however, to require an inventory where he has brought suit in chancery to discover assets, because he will not be allowed to proceed in both courts. *Myddleton v. Rushout*, 1 Phill. Ecc. 247; *Brotherton v. Hellier*, 2 Cas. temp. Lee 134.

Creditor Must Move as Such. — One who seeks as a creditor to compel an executor or administrator to file an inventory must declare himself to be such creditor, or set up facts which show him to be entitled as such. *Pendle v. Waite*, 3 Dem. (N. Y.) 261.

Attorney of Absent Heirs. — In *Louisiana* the attorney of absent heirs may inform the court that effects of the decedent are in the possession of a third person, and may take proceedings to have such effects included in the inventory. *Carcagno's Succession*, 43 La. Ann. 1151.

Contestant of Will. — The contestant of a will may require an inventory of the testator's estate to be filed. *In re Heenan*, 39 Leg. Int. (Pa.) 420, 15 Phila. (Pa.) 588.

1. Mere Lapse of Time Not a Bar. — *Jickling v. Bircham*, 2 Notes of Cas. 463.

2. Any Time Before Final Settlement. — *Walter v. Ford*, 74 Mo. 195, 41 Am. Rep. 312.

3. Lapse of Time in Connection with Other Circumstances. — *Burgess v. Marriott*, 3 Curt. 426.

As to effect of lapse of time, see also *Ritchie v. Rees*, 1 Add. Ecc. 144; *Pitt v. Woodham*, 1 Hagg. Ecc. 247; *Bowles v. Harvey*, 4 Hagg. 241; *Scurrah v. Scurrah*, 2 Curt. 919.

4. Rule that Ecclesiastical Courts May Entertain Objections to Inventories. — *Butler v. Butler*, 2 Phill. Ecc. 37; *Barclay v. Marshall*, 2 Phill. Ecc. 188; *Telford v. Morison*, 2 Add. Ecc. 329; *Hunter v. Byrn*, 2 Add. Ecc. 311; *Brogden v. Brown*, 2 Add. Ecc. 336; *Watson v. Milward*, 2 Lee Ecc. 332.

5. Rule that Ecclesiastical Courts Have No Power to Entertain Objections. — *Henderson v. French*, 5 M. & S. 406; *Griffiths v. Anthony*, 5 Ad. & El. 623, 31 E. C. L. 403; *Catchside v. Ovington*, 3 Burr. 1922; *Hinton v. Parker*, 8 Mod. 168.

6. Correction Permitted in United States. — *Matter of Payne*, 78 Hun (N. Y.) 292, affirmed 151 N. Y. 654; *Hallstead's Estate*, 2 Kulp (Pa.) 508; *Melizet's Appeal*, 17 Pa. St. 450, 55 Am. Dec. 573.

In *Bradford's Case*, 1 Browne (Pa.) 87, the court said: "The administrators, by the very terms of their bond, are required to file 'a true and perfect inventory' of the goods, chattels, and credits of the deceased. There can be no reason, if error has happened in the first inventory, why they should not correct it in a second."

Property Omitted. — In *New York* a personal representative cannot be required to inventory property which he has omitted, but his inventory may be surcharged or falsified on his account. *Montgomery v. Dunning*, 2 Bradf. (N. Y.) 220; *Greenhough v. Greenhough*, 5 Redf. (N. Y.) 192; *Sheerin v. Public Administrator*, 2 Redf. (N. Y.) 421.

7. Appraisal Cannot Be Corrected After Filing. — *Matter of Miller*, 1 Pearson (Pa.) 420, 1 Leg. Gaz. (Pa.) 59; *Davis's Estate*, 5 Kulp (Pa.) 162; *Matter of Galloway*, 1 Pearson (Pa.) 404.

inventory was made, or where a part of the property has been lost or destroyed since that time, or when for any other cause a second or further inventory is desirable.¹

9. Validity and Requisites. — An inventory must contain a statement of all the property left by the decedent.² It must be specific in its details;³ must be signed by the executor or administrator,⁴ and verified by him;⁵ and sometimes the statutes require notice of the making of the inventory and appraisal to be given.⁶

10. Failure to Make. — If an executor or administrator fails to file an inventory it is a breach of his official duty,⁷ for which his letters may be revoked,⁸

1. Rule that Additional Inventory May Be Made. — *Phelan v. Smith*, 100 Cal. 158; *Moore v. Holmes*, 32 Conn. 553; *Com. v. Bryan*, 8 S. & R. (Pa.) 128; *Bradford's Case*, 1 Browne (Pa.) 87.

If an administrator, on an application to compel him to file a further inventory, denies the existence of further assets, the application will be denied. *Matter of McIntyre*, 4 Redf. (N. Y.) 489.

Sufficiency of Additional Inventory. — A supplemental statement describing property omitted from the inventory filed is sufficient as an additional inventory, though not filed as such. *Ackerson v. Orchard*, 7 Wash. 377.

Rule in Massachusetts. — In Massachusetts, when assets come to the knowledge or possession of the executor or administrator after he has made his inventory, he does not make a second inventory, but accounts for the additional assets in his annual accounts. *Hooker v. Bancroft*, 4 Pick. (Mass.) 50.

2. All Property Must Be Inventoried. — See *supra*, this section, *What Property Inventoried*.

Disputed Property. — An inventory will not be rejected because it contains property the title to which is disputed. *Cooley v. Sanford*, Kirby (Conn.) 103.

Appraisal of Property Disposed of by Administrator. — An appraisal can be had without an actual inspection of the assets, and therefore the fact that the decedent's personalty had been disposed of by the administrator will not prevent an inventory and appraisal. *Silverbrandt v. Widmayer*, 2 Dem. (N. Y.) 263, *overruling* *Matter of Robbins*, 4 Redf. (N. Y.) 144; *Matter of Butler*, 38 N. Y. 397.

Fixing Value. — Bonds must be appraised at their market value, and not at their face value. *Matter of Shipman*, 82 Hun (N. Y.) 108.

In *Garrity's Estate*, 108 Cal. 463, it was held that where the executor has disposed of property which was not included in the appraisal of the estate, the court may take evidence of its value for the purpose of ascertaining the amount with which the executor should be charged, and is not required to appoint an appraiser for that purpose.

When Inventory Is Complete. — An inventory is complete when the appraisers have concluded their work and the instrument showing the result thereof has been signed and delivered by them, and the affidavit of the executor or administrator is not essential to give it legal existence. *Matter of Lux*, 100 Cal. 593.

3. Inventory Must Be Specific. — In *Pursel v. Pursel*, 14 N. J. Eq. 514, the practice of filing general instead of specific inventories was strongly disapproved. The ordinary said of

such inventories: "They do not answer the design of the law. They fail to furnish to parties interested the very information which they were designed to supply. They often lead, as in this case, to useless litigation, imperil the rights of parties, and impose upon the courts the painful duty of groping for the truth in the dark, or of deciding by uncertain and unreliable tests of truth." See also *Vanmeter v. Jones*, 3 N. J. Eq. 520, in which it was held that a paper containing the following items, "cash, bonds, and notes," — "household goods and kitchen furniture," was not, strictly speaking, an inventory, and might properly be rejected as such by the surrogate.

4. Inventory Must Be Signed. — *Parks v. Rucker*, 5 Leigh (Va.) 149; *Carr v. Anderson*, 2 Hen. & M. (Va.) 361.

5. Appraisal Must Be Verified. — *Horn v. Grayson*, 7 Port. (La.) 270; *In re Higgins*, 15 Mont. 474.

Clerical Errors in Verification. — The substitution of the word "decedent" instead of the word "affiant" in the verification, so as to make it read, "and all just claims of said deceased against said decedent" instead of "against said affiant," is a mere clerical error, and is not fatal. *Phelan v. Smith*, 100 Cal. 158.

Inventory by Joint Executors. — If an inventory appears on its face to have been returned by both executors it will be considered the act of both, though only one of the executors swore to it. *Hamilton v. Serra*, 6 Mackey (D. C.) 168.

6. Necessity of Notice. — An inventory or appraisal made without notice as required by law is invalid. *Salomon v. Heichel*, 4 Dem. (N. Y.) 176; *Scofield's Estate*, 1 N. Y. Month. L. Bul. 64.

7. Evidence of Misconduct. — Failure to file inventory is evidence of improper conduct. *Orr v. Kaines*, 2 Ves. 194; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62, *reversed* without opinion. See 1 Cow. (N. Y.) 744, note.

8. Failure to File Inventory Is Ground for Revoking Letters. — See *supra*, this title, *Appointment and Tenure of Office* — *Termination of Authority* — *Removal from Office or Revocation of Letters*.

Independent Executor. — In *Patten v. Cox*, 9 Tex. Civ. App. 299, where an executor was appointed under the *Texas* statute giving to testators power to authorize their executors to settle their estates without the aid of the probate court, and providing that the only jurisdiction of the court in such case should be to require an inventory, appraisal, and list of claims, it was held that failure to return an in-

or an action may be brought on his official bond;¹ and in *Connecticut* an executor or administrator who fails to file an inventory is subject to a statutory penalty of a fixed amount per month.²

11. **Effect of Inventory and Appraisal.** — *a.* EVIDENCE OF ASSETS. — The inventory returned by an executor or administrator is generally held to be evidence that he has received assets, but it is only *prima facie* evidence of that fact and may be corrected or explained by him.³

b. EVIDENCE OF DECEDENT'S OWNERSHIP. — An inventory is not conclu-

sive evidence did not defeat the executor's legal capacity to sue in behalf of the estate.

1. **Forfeiture of Bond.** — See *infra*, this title, *Administration Bonds — Breach of Bond*.

2. **Statutory Penalty.** — *State v. French*, 60 Conn. 478.

3. **Inventory is Prima Facie Evidence of Assets** — *England*. — *Giles v. Dyson*, 1 Stark. 32, 2 E. C. L. 22; *Hickey v. Hayter*, 1 Esp. N. P. 313, 6 T. R. 384.

Alabama. — *Steele v. Knox*, 10 Ala. 608; *Craig v. McGehee*, 16 Ala. 41.

Kentucky. — *Carrol v. Connet*, 2 J. J. Marsh. (Ky.) 195.

Louisiana. — *Dean's Succession*, 33 La. Ann. 867.

Maine. — *Reed v. Gilbert*, 32 Me. 519.

Michigan. — *Hilton v. Briggs*, 54 Mich. 265.

Mississippi. — *McWillie v. Van Vacter*, 35 Miss. 428, 72 Am. Dec. 127.

Missouri. — *Williams v. Petticrew*, 62 Mo. 460.

Nevada. — *McNabb v. Wixom*, 7 Nev. 163.

New Hampshire. — *Morrill v. Foster*, 33 N. H. 379.

New York. — *Willoughby v. McCluer*, 2 Wend. (N. Y.) 608; *Matter of Shipman*, 82 Hun (N. Y.) 108; *Matter of Woodworth*, 5 Dem. (N. Y.) 156; *Marre v. Ginochio*, 2 Bradf. (N. Y.) 165; *Matter of Ryalls*, 74 Hun (N. Y.) 205; *Matter of Mullon*, 145 N. Y. 98; *Forbes v. Halsey*, 26 N. Y. 53.

North Carolina. — *Huntingdon v. Spears*, 3 Ired. L. (25 N. Car.) 450; *Hoover v. Miller*, 6 Jones L. (51 N. Car.) 79; *Yarborough v. Harris*, 3 Dev. L. (14 N. Car.) 40; *Grant v. Reese*, 94 N. Car. 720.

Pennsylvania. — *Stewart's Appeal*, 110 Pa. St. 410; *Reese's Appeal*, 116 Pa. St. 272; *Stewart's Estate*, 137 Pa. St. 175, 26 W. N. C. (Pa.) 553.

South Carolina. — *Williams v. Mower*, 29 S. Car. 332.

Tennessee. — *Taylor v. Wood*, 4 Lea (Tenn.) 506; *Marr v. Rucker*, 1 Humph. (Tenn.) 348; *Snodgrass v. Snodgrass*, 1 Baxt. (Tenn.) 157.

Texas. — *White v. Shepperd*, 16 Tex. 163; *Little v. Birdwell*, 21 Tex. 597, 73 Am. Dec. 242.

Wisconsin. — *Cameron v. Cameron*, 15 Wis. 1, 82 Am. Dec. 652.

But see *King v. Johnson*, 94 Ga. 665, and *Hall v. Carter*, 8 Ga. 388, holding that an inventory is not of itself evidence of assets in the hands of the executor or administrator.

Though an inventory is not of itself evidence of assets in *Georgia*, it has been held that in an action against an administrator of a creditor for failure to collect the debt due from the estate of the deceased debtor, the inventory made by the debtor's administrator is admis-

sible in evidence to show the means of information of which the creditor's administrator might have availed himself touching the debtor's estate, and the particular property of which it apparently consisted. *Thompson v. Thompson*, 77 Ga. 692.

Inventory on Application for Probate. — In *England* the inventory exhibited according to the practice of the ecclesiastical courts by an executor for the purpose of obtaining probate did not have the effect of an ordinary inventory and was not generally *prima facie* evidence of his having received assets. *Stearn v. Mills*, 4 B. & Ad. 657, 24 E. C. L. 133, 1 N. & M. 436.

Effect as to Debts Due Decedent. — If an inventory does not show whether debts listed therein are sperate, doubtful, or desperate, the executor or administrator must account for them unless he shows a set-off, or that the debtors are insolvent. *Hickman v. Kamp*, 3 Bush (Ky.) 205; *Graham v. Davidson*, 2 Dev. & B. Eq. (22 N. Car.) 155; *Finch v. Ragland*, 2 Dev. Eq. (17 N. Car.) 137.

Effect as to Heirs. — A statement in an inventory that certain land standing in the name of the decedent was in fact held by him as the agent of another is not binding on the decedent's minor children. *Sagory v. Bouny*, 42 La. Ann. 618.

Effect as to Person Interested in Estate. — Failure to inventory property is not conclusive against a person interested in the estate. *Walker v. Walker*, 25 Ga. 76.

Corroboration of Individual Claim. — The fact that the administrator did not inventory a certain chattel is a strong circumstance in his favor when asserting an individual claim to the chattel. *Bradshaw v. Mayfield*, 18 Tex. 21.

Evidence of Solvency of Debtor. — An inventory is only *prima facie* evidence as to the solvency or insolvency of persons indebted to the estate. *Grant v. Reese*, 94 N. Car. 720; *Taylor v. Wood*, 4 Lea (Tenn.) 506.

But the presumption of solvency is stronger when the administrator is himself the debtor. *Hickman v. Kamp*, 3 Bush (Ky.) 205; *Lloyd v. Lloyd*, 1 Redf. (N. Y.) 399.

Demand Against Administrator. — The failure of an administrator to make any claim of set-off or defense to a demand against himself in the inventory is evidence against him, because the inventory is his own act, to the correctness of which he has sworn, particularly as to claims against himself and in favor of the estate. *Lloyd v. Lloyd*, 1 Redf. (N. Y.) 399.

Effect as to Successor. — The inventory does not bind, even presumptively, the successor of the executor or administrator by whom it is made. *Solomons v. Kursheedt*, 3 Dem. (N. Y.) 307.

sive as to the decedent's ownership of the property, either against a third person or against the executor or administrator.¹

c. EVIDENCE OF VALUE. — An appraisal is generally held to be *prima facie* evidence of the value of the property stated therein,² but some authorities hold that it is not evidence of value either against the personal representatives of the decedent, or against third persons.³

VII. ADMINISTRATION BONDS — 1. **Necessity of Bond** — *a. BONDS OF ADMINISTRATORS.* — Originally no administration bond was required. The first statute on the subject was 21 Hen. VIII., c. 5, which directed the ordinary to grant administration, "taking surety of him or them to whom shall be made such commission." The next statute was 22 and 23 Car. II., c. 10, which

1. Evidence of Decedent's Ownership. — In *Lamme v. Dodson*, 4 Mont. 560, it was said that the mere fact that an executor claims property as a part of the decedent's estate and includes it in his inventory does not make it such in fact.

Presumption of Ownership. — It is conclusively presumed until otherwise determined by law that personal property embraced in an inventory belongs to the decedent. *King's Estate*, 12 W. N. C. (Pa.) 109.

Estoppel to Deny Decedent's Ownership. — An executor or administrator is not estopped by his inventory to show either that the property belonged to a third person or to himself. *Baker v. Brickell*, 87 Cal. 329; *Fulcher v. Mandell*, 83 Ga. 715; *Eichhorn's Estate*, 7 Pa. Co. Ct. Rep. 433, 24 W. N. C. (Pa.) 364; *Stewart's Estate*, 137 Pa. St. 175, 26 W. N. C. (Pa.) 553.

And there is no distinction in this regard between an inventory voluntarily made and one compelled by decree of court. *White v. Shepperd*, 16 Tex. 163.

Community Property. — A widow acting as executrix is not concluded by the fact that she represented property in the inventory as belonging to her deceased husband's estate, though the statute provides that the inventory shall specify whether the property be separate or common. *Carroll v. Carroll*, 20 Tex. 731.

Recitals of Inventory. — In *Judge v. Tyson*, 42 Ala. 401, it was held that an administrator should not be charged with money contained in packages listed in the inventory, where the inventory stated that such packages were each indorsed with a memorandum indicating that the money in them belonged to some third person.

2. Inventory and Appraisal Prima Facie Evidence of Value — *California.* — *Wheeler v. Bolton*, 92 Cal. 159; *Matter of Radovich*, 74 Cal. 536, 5 Am. St. Rep. 466.

Indiana. — *Pace v. Oppenheim*, 12 Ind. 533.

Missouri. — *Williams v. Petticrew*, 62 Mo. 460.

New York. — *Matter of Mullen*, 145 N. Y. 98; *Willoughby v. McCluer*, 2 Wend. (N. Y.) 609; *Ames v. Downing*, 1 Bradf. (N. Y.) 321; *Matter of Saltus*, 3 Abb. App. Dec. (N. Y.) 243, 3 Keyes (N. Y.) 500; *Matter of Childs*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 560; *Matter of Maack*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 368; *Matter of Shipman*, 82 Hun (N. Y.) 108; *Matter of Van Houten*, 18 N. Y. App. Div. 301.

Pennsylvania. — *Reese's Appeal*, 116 Pa. St.

272; *Stewart's Appeal*, 110 Pa. St. 410; *Frey's Estate*, 6 Pa. Co. Ct. Rep. 84.

Wisconsin. — *Cameron v. Cameron*, 15 Wis. 1, 82 Am. Dec. 652.

Disproving Valuation. — In *Fox's Estate*, 5 Kulp (Pa.) 218, it was held that the value fixed by the appraisers was not to be overcome except by strong and convincing proof.

Value of Goods Retained by Widow. — In *Reiff's Appeal*, 2 Pa. St. 256, 3 Clark (Pa.) 310, 5 Pa. L. J. 255, it was held that the appraisal was conclusive on an administrator as to the value of the goods which he permitted the decedent's widow to retain.

Devise Based on Appraised Value. — Where a devise is made on condition that the devisee of the land should pay certain other persons "an amount equal to a one-third interest therein based upon the appraised value thereof as made by the appraisers of my estate," the valuation was held final and conclusive if made in good faith, and according to the honest judgment of the appraisers. *Mullen v. Mullen*, 62 Wis. 45.

3. Appraisal Not Evidence of Value. — In *Harrison v. Harrison*, 39 Ala. 489, it was held that the official appraisal of the property of the estate, being an *ex parte* statement of a third person, with which the administrator has nothing to do, is not admissible in evidence against him to prove the value of the property. See also *Glover v. Hill*, 85 Ala. 41.

"Bonds, Stocks, Notes, and Accounts have a face value, which is *prima facie* the amount with which these trustees are to be charged. There would seem to be no necessity for an appraisal of such property, and none is generally made. But, if made, as between the trustee and the distributees, they could not change the *prima facie* value from that shown upon the face of the evidence of indebtedness." *Moffitt v. Hereford*, 132 Mo. 513.

Evidence of Inadequate Price at Administrator's Sale. — The appraisal is not admissible to show that the price for which the administrator sold the property under order of sale was too low, unless the sale was made fraudulently and in bad faith. *Woodhouse v. Woodhouse*, 5 Redf. (N. Y.) 131.

Evidence of Value in Collateral Proceeding. — In *Morrison v. Burlington, etc.*, R. Co., 84 Iowa 663, it was held that in an action against a railroad company for killing live stock belonging to the decedent's estate, the appraisal was not evidence against the estate as to proof of value, since it was made merely for the purpose of accounting with the administrator.

required the ordinary, on granting administration, to take "sufficient bonds with two or more able sureties, respect being had to the value of the estate." The present *English* statute is 20 and 21 Vict., c. 77, which contains substantially the same provision in regard to sureties as the statute of Car. II., except that it requires the penalty of the bond to be double the amount under which the estate shall be sworn, unless the court, in any case, shall think fit to direct the same to be reduced. In the *United States* the statutes are uniform in requiring that administrators shall give bonds.¹

b. BONDS OF EXECUTORS — (1) *Rule in England*. — The ecclesiastical courts in England refused under any circumstances to require executors to give bond, because the office of executor was considered as a personal trust, resting in the confidence of the testator in the qualities which led to his selection for that special duty,² but the court of chancery at an early period assumed jurisdiction to compel the giving of bonds, when it was deemed necessary for the protection of the estate, and the rule still obtains that bonds will be required only when rendered necessary by reason of the existence of special circumstances.³

(2) *Rule in United States*. — Some of the states of the Union follow the English rule.⁴ In other states executors are required to give bond with sureties, unless it is dispensed with by the will,⁵ but a direction in a will that

1. **Bonds Required of Administrators by Statute.** — 1 Wms. Exrs. (7th Am. ed.), p. 613; Woer. Amer. Law of Admn., § 249. See also the various local codes and statutes in the United States.

Administrators Required to Give Bond in Canada. — *In re Frost*, 12 New Bruns. 127.

Origin and History. — For an interesting statement of the history of administration bonds, see the opinion of Vredenburgh, J., in *Ordinary v. Cooley*, 30 N. J. L. 271.

"**The Object and Purpose** of the administration bond is to secure a faithful administration of the estate, and a fair distribution of its proceeds among those who, by the laws of this commonwealth or of the country where the deceased had his domicile, shall be entitled to them." Picquet, Appellant, 5 Pick. (Mass.) 72.

"Administration bonds are for the benefit of creditors, and next of kin, and to compel the administrator to perform the trust reposed in him, and discharge the duties incumbent upon him." *Ordinary v. Smith*, 14 N. J. L. 479. See also *Ward v. Ward*, 1 Tex. Unrep. Cas. 123; *Hake v. Stotts*, 5 Colo. 140; *Hazen v. Durling*, 2 N. J. Eq. 133; *Holmes v. Cock*, 2 Barb. Ch. (N. Y.) 426.

The Bond Is a Part of the Qualification of the representative, and in some jurisdictions it is a condition precedent to the grant of letters. *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656; *Williams v. Ely*, 13 Wis. 1. See also *infra*, this section, *Failure to Give Bond*.

Administrators Pendente Lite are usually required to give bond. *Matter of Colvin*, 3 Md. Ch. 278; *Bloomfield v. Ash*, 4 N. J. L. 357.

Administrators with the Will Annexed will be required to give bond, though none could be required of the executor named in the will. *Com. v. Forney*, 3 W. & S. (Pa.) 353.

2. **Bonds Not Required of Executors at Common Law.** — *Ames v. Armstrong*, 106 Mass. 15. See also 1 Woer. Amer. Law of Admn., § 250; *Schouler Exrs. & Admsrs.*, § 137; *Croswell Exrs. & Admsrs.*, § 260.

3. **Bond Required When Necessary to Protect Estate.** — *Duncumban v. Stint*, 1 Ch. Cas. 121; *Batten v. Earnley*, 2 P. Wms. 163; *Slanning v. Style*, 3 P. Wms. 335; *Rous v. Noble*, 2 Vern. 249.

4. **Rule in United States — Executor Not Required to Give Bond** — *Louisiana*. — *Peale v. White*, 7 La. Ann. 449; *Cretien v. Bienvenu*, 41 La. Ann. 728.

New Jersey. — *Holcomb v. Coryell*, 12 N. J. Eq. 289; *Bird v. Wiggins*, 35 N. J. Eq. 111.

New York. — *Wood v. Wood*, 4 Paige (N. Y.) 299; *Mandeville v. Mandeville*, 8 Paige (N. Y.) 475; *Ballard v. Charlesworth*, 1 Dem. (N. Y.) 501; *Matter of Lowery*, 19 Misc. Rep. (N. Y. Surrogate Ct.) 83.

North Carolina. — *Drumright v. Jones*, 4 Ired. Eq. (39 N. Car.) 253; *Fairbairn v. Fisher*, 4 Jones Eq. (57 N. Car.) 390; *Wilkins v. Harriess*, Winst. Eq. (60 N. Car.) 41.

Pennsylvania. — *McKee's Estate*, 30 Pittsb. Leg. J. (Pa.) 392.

5. **Bond Required Unless Dispensed With by Will** — *United States*. — *Ex p. Lee*, 1 Cranch (C. C.) 394.

Alabama. — *Leatherwood v. Sullivan*, 81 Ala. 458; *Allen v. Draper*, 98 Ala. 590.

California. — *White's Estate*, 53 Cal. 19.

Georgia. — *Willson v. Whitfield*, 38 Ga. 269.

Iowa. — *Matter of Holderbaum*, 82 Iowa 69.

Kentucky. — *Bronaugh v. Bronaugh*, 7 J. J. Marsh. (Ky.) 621; *Bowman v. Wootton*, 8 B. Mon. (Ky.) 67; *Atwell v. Helm*, 7 Bush (Ky.) 504.

Massachusetts. — *Abercrombie v. Sheldon*, 8 Allen (Mass.) 532; *Wells v. Child*, 12 Allen (Mass.) 330; *Ames v. Armstrong*, 106 Mass. 15.

Mississippi. — *Clark v. Niles*, 42 Miss. 460.

Oregon. — *Bellinger v. Thompson*, 26 Oregon 320.

Rhode Island. — *Hammond v. Wood*, 15 R. I. 566.

Tennessee. — *Williams v. Pointer*, 3 Lea (Tenn.) 366.

no sureties shall be required does not relieve executors of the necessity of giving their personal bonds.¹ And in still another class of states the requirement that executors shall give bonds is absolute and cannot be dispensed with.²

Power of Court to Require Bond. — Though security is not required by statute, or is dispensed with by the will, the court may nevertheless require it, if deemed necessary for the protection of the estates;³ and any person interested in the estate may ask that security be given.⁴

Facts Authorizing Court to Require Bond. — Generally speaking, an executor may be required to give bond if, by reason of his condition or misconduct, or other circumstances, it is necessary for the protection of those entitled to the estate,⁵

Virginia. — *Fairfax v. Fairfax*, 7 Gratt. (Va.) 36.

Wisconsin. — *Evans v. Foster*, 80 Wis. 509; *Williams v. Ely*, 13 Wis. 1.

1. Personal Bond Necessary Though Sureties Are Dispensed With. — *Hammond v. Wood*, 15 R. I. 566.

2. Bond Not to Be Dispensed With in Some States. — *Wall v. Bissell*, 125 U. S. 382 (*Indiana* statute); *Bankhead v. Hubbard*, 14 Ark. 298; *Kittredge v. Folsom*, 8 N. H. 98; *Tappan v. Tappan*, 24 N. H. 400; *Heydock v. Duncan*, 43 N. H. 95.

3. Court May Require Security — *Alabama.* — *Smith v. Phillips*, 54 Ala. 8.

Kentucky. — *Atwell v. Helm*, 7 Bush (Ky.) 504; *Grigsby v. Cocke*, 85 Ky. 314; *Million v. Million*, 13 Ky. L. Rep. 143.

Mississippi. — *Clark v. Niles*, 42 Miss. 460.

New York. — *Wood v. Wood*, 4 Paige (N. Y.) 299; *Mandeville v. Mandeville*, 8 Paige (N. Y.) 475; *Colegrove v. Horton*, 11 Paige (N. Y.) 261; *Holmes v. Cock*, 2 Barb. Ch. (N. Y.) 426; *Freeman v. Kellogg*, 4 Redf. (N. Y.) 218.

Pennsylvania. — *Com. v. Forney*, 3 W. & S. (Pa.) 353; *Harberger's Appeal*, 98 Pa. St. 29; *Com. v. Rogers*, 53 Pa. St. 470; *In re Wilson*, 2 Pa. St. 325.

South Carolina. — *Powell v. Thompson*, 4 Desaus. (S. Car.) 162.

Bond Required After Letters Are Issued. — Security may be required of an executor, though letters testamentary have been issued without bond. *White's Estate*, 53 Cal. 19.

Where a Suit in Chancery to reduce into possession assets of the testator is brought by an executor, who has been permitted to qualify without security, the court of chancery may, in its discretion, require security before it will lend the executor its aid. *Bryce v. Stevenson*, 2 Rand. (Va.) 438.

In South Carolina it has been held that the court of equity cannot require an executor to give security. *Haigood v. Wells*, 1 Hill Eq. (S. Car.) 59.

4. Persons Interested May Demand Security — *Alabama.* — *Smith v. Phillips*, 54 Ala. 8; *Allen v. Draper*, 98 Ala. 590.

Kentucky. — *Atwell v. Helm*, 7 Bush (Ky.) 504.

New Jersey. — *Bird v. Wiggins*, 35 N. J. Eq. 111.

New York. — *Cotterell v. Brock*, 1 Bradf. (N. Y.) 148; *Cunningham v. Souza*, 1 Redf. (N. Y.) 462; *Merchant's Estate*, Tuck. (N. Y.) 17; *Sullivan's Estate*, Tuck. (N. Y.) 94.

Pennsylvania. — *Johnson's Appeal*, 12 S. & R. (Pa.) 317.

Vermont. — *Felton v. Sowles*, 57 Vt. 382.

A Creditor Is Interested in the estate, and as such may require an executor to give security, though security was dispensed with by the will. *Smith v. Phillips*, 54 Ala. 8.

The Legal Title to a Debt is not necessary to enable a person to apply as creditor for an order requiring the executor to give security, but if he has the right to sue at law in the name of the person having the legal title it is sufficient. *Phillips v. Smith*, 62 Ala. 575.

In England the general rule is that creditors are not entitled to require next of kin to give security, and it is held that a very strong case ought to be made out before the rule will be departed from. *John v. Bradbury*, L. R. 1 P. & D. 245, 15 L. T. N. S. 414; *Hughes v. Cook*, 1 Lee Ecc. 386; *Hackman v. Black*, 2 Cas. temp. Lee 251.

5. Pecuniary Irresponsibility — Insolvency. — If an executor becomes insolvent after the death of the testator, or his circumstances have become such as to endanger the estate, he may be required to give security. *Bowman v. Wootton*, 8 B. Mon. (Ky.) 67; *Shields v. Shields*, 60 Barb. (N. Y.) 56; *In re Filley*, (Surrogate Ct.) 20 N. Y. Supp. 427; *Holmes v. Cock*, 2 Barb. Ch. (N. Y.) 426; *Longenberger's Estate*, 148 Pa. St. 564; *Lindsay's Estate*, 10 W. N. C. (Pa.) 36; *Fagan's Estate*, 34 W. N. C. (Pa.) 66; *Powel v. Thompson*, 4 Desaus. (S. Car.) 162.

But insolvency existing at the time of the appointment of the executor does not authorize the requiring of security of him. *Willson v. Whitfield*, 38 Ga. 269; *Bowman v. Wootton*, 8 B. Mon. (Ky.) 67.

Poverty. — Mere poverty of an executor does not render security necessary. *Fairbairn v. Fisher*, 4 Jones Eq. (57 N. Car.) 390.

Nor the fact that the executor's property is not equal to the value of the estate. *Mandeville v. Mandeville*, 8 Paige (N. Y.) 475.

Precarious Circumstances. — The former *New York* statute provided that security might be required of an executor who was in "precarious" circumstances. *Shields v. Shields*, 60 Barb. (N. Y.) 56; *Cotterell v. Brock*, 1 Bradf. (N. Y.) 148.

In *Shields v. Shields*, 60 Barb. (N. Y.) 56, it was held that the circumstances of an executor were not precarious so as to authorize a court to require him to give security unless his character and conduct presented such evidence of improvidence or recklessness in the management of the estate, or of his own, as in the opinion of prudent and discreet men would endanger its security.

and the existence of facts rendering a bond necessary is for the determination of the probate judge in the exercise of his discretion.¹

c. **NEW OR ADDITIONAL BONDS.** — An executor or administrator may be required to give a new bond, or an additional bond, where it appears that the original bond, for any reason, does not furnish adequate security.²

Indebtedness and Uncertainty of Life. — In *Colton's Appeal*, (Pa. 1886) 3 Cent. Rep. 580, the executors were required to give security in view of the uncertainty of their lives and the large incumbrances on their real estate.

Contemplated Removal from State. — In *Wood v. Wood*, 4 Paige (N. Y.) 299, an executor was required to give security, where he had no property except an unliquidated demand, and was about to remove from the state, and the trust created by the will was to continue for many years.

Nonresident Executors. — In some jurisdictions security will be required of an executor if he is a nonresident. *Bobb's Succession*, 27 La. Ann. 344; *Davis's Succession*, 12 La. Ann. 399; *Bartlett's Estate*, 1 N. Y. Month. L. Bul. 24; *Van Wyck v. Van Wyck*, 22 Hun (N. Y.) 9; *Postley v. Cheyne*, 4 Dem. (N. Y.) 492; *Sterling's Estate*, 9 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 448; *Burdett's Estate*, 3 N. Y. Month. L. Bul. 19; *Harberger's Appeal*, 98 Pa. St. 29.

Though resident executors are not required to give security, it will be required of nonresidents. *McDonogh's Succession*, 7 La. Ann. 472; *Verkes v. Broom*, 10 La. Ann. 94; *Davis's Succession*, 12 La. Ann. 399; *Bodenheimer's Succession*, 35 La. Ann. 1034.

Who Are Nonresidents. — In *Van Wyck v. Van Wyck*, 22 Hun (N. Y.) 9, a citizen of another state who was accustomed to spend a part of the year at his former residence in New York, where he had a desk in an office and was a bank director, did not have his usual place of business in New York so as to authorize the issuance of letters to him without security.

In *Postley v. Cheyne*, 4 Dem. (N. Y.) 492, persons who resided in another state, but were officers of a corporation having its principal office in New York city, at which they attended daily during business hours, were held to have an office in the state for the regular transaction of business in person so as to entitle them to letters testamentary without giving security.

Foreign Will. — An executor offering a foreign will for probate will not be ordered to give security where the will provided that no security should be required, and none was required by the court of the domicile. *Leatherwood v. Sullivan*, 81 Ala. 458.

Misconduct Such as Raises an Apprehension of a Waste of Assets is sufficient to justify requiring an executor to give bond. *Powel v. Thompson*, 4 Desaus. (S. Car.) 162.

Mismanagement or Fraud. — If the court suspects the executor of fraud, or it appears that he is mismanaging the estate, he may be required to give security though the will provides otherwise. *Matter of Holderbaum*, 82 Iowa 69; *Bronaugh v. Bronaugh*, 7 J. J. Marsh. (Ky.) 621; *Clark v. Niles*, 42 Miss. 460; *Howard v. Howard*, 16 N. J. Eq. 486; *McKenna's Appeal*, 27 Pa. St. 237.

Or if he is wasting, or is likely to waste, the

estate. *Williams v. Pointer*, 3 Lea (Tenn.) 366.

But a Purpose to Waste the Estate must be shown before the court is authorized to require security. *Dengler v. Dengler*, 8 Ky. L. Rep. 344. See also *Farmers Nat. Bank v. McFerran*, 11 Ky. L. Rep. 183.

Use of Funds by Executor. — The use by an executor of the funds of the estate for his own purposes will justify an order requiring him to give security, without regard to his solvency. *McFadgen v. Council*, 81 N. Car. 195; *McKenna's Appeal*, 27 Pa. St. 237, 1 Grant's Cas. (Pa.) 364.

A Departure from the Ordinary Course of Administration, which hazards the assets, is ground for an order requiring an executor to give security. *Crawford's Estate*, 22 Pittsb. Leg. J. (Pa.) 157.

Insufficient Personality to Pay Debts. — In *Ex p. Lee*, 1 Cranch (C. C.) 394, an executor was required to give security where the testator's personal estate was not sufficient to pay all his debts. *Bronaugh v. Bronaugh*, 7 J. J. Marsh. (Ky.) 621.

Incapacity for Performance of Duties. — An executrix who has become so decrepit mentally and physically as to render her incapable of transacting the business of the estate may be required to give bond, or be removed, though the will gave her the entire personal estate and the use of the real estate for life, with a power of sale. *Cohen's Estate*, 9 Kulp (Pa.) 116.

Exemption of Executor Is Personal. — A provision of a will that the executor shall not be required to give security is personal to him, and does not apply to an administrator with the will annexed, or to an executor appointed by a codicil to the will, where the codicil does not provide that security shall not be required of the executor appointed thereby. *Ex p. Brown*, 2 Bradf. (N. Y.) 22; *Com. v. Forney*, 3 W. & S. (Pa.) 353; *Langley v. Harris*, 23 Tex. 564; *Fairfax v. Fairfax*, 7 Gratt. (Va.) 36.

Pendency of Contest of Will. — An executor will not be required to give security during the pendency of an issue to determine the validity of the will, merely because such issue is pending. *Smith's Estate*, 14 Pa. Co. Ct. Rep. 161.

1. Necessity of Bond Determined by Probate Judge. — *Bankhead v. Hubbard*, 14 Ark. 298; *Sharp's Appeal*, (Pa. 1887) 9 Atl. Rep. 860; *Felton v. Sowles*, 57 Vt. 382.

It Is Only After Letters Have Been Granted to an executor that the orphans' court acquires jurisdiction, under the *Pennsylvania* statute, to compel him to give security. *Harberger's Appeal*, 98 Pa. St. 29.

2. Insufficiency of Former Bond. — A new bond may be required whenever it is made to appear that the original bond is insufficient, either because the sureties are not responsible or because the amount is too small. *State v. Stroop*, 22 Ark. 329; *Renfro v. White*, 23 Ark. 195; *Gray v. Grundy*, 2 J. J. Marsh. (Ky.) 133; *Ellis v. McBride*, 27 Miss. 155; *Killcrease v.*

Amount of New Bond. — In some jurisdictions the statute provides that a new bond shall be in like penalty as the first.¹

Additional Bond on Sale of Real Estate. — And when real estate is sold under an order of court the executor or administrator is generally required to give an additional or special bond to secure the proper application of the proceeds.²

Killcrease, 7 How. (Miss.) 311; Sutton v. Weeks, 5 Redf. (N. Y.) 353; Laverty's Estate, 23 Pittsb. Leg. J. (Pa.) 81.

The California Statute provides that further security may be required (1) on the petition of any one interested in the estate representing that the sureties have become or are becoming insolvent, or that they have removed or are about to remove from the state, or that from any other cause the bond is insufficient; and (2) without any application, when it comes to the knowledge of the probate judge that the bond is from any cause insufficient. Lacoste v. Spivale, 64 Cal. 35.

Causes Named in Statute. — A new bond may be required only for the causes specified in the statute. Wood v. Williams, 61 Mo. 63.

The Fact that an Executor Has Given a Residuary Legatee's bond does not exempt him from giving additional security, if required. National Bank v. Stanton, 116 Mass. 438. See also *infra*, this section, *Special Bond of Sole or Residuary Legatee*.

An Order to "Strengthen and Increase" the Bond Is Not Complied With by giving a mortgage on the land of the decedent whose heir the administrator was, because it only conveyed property which was already subject to debts. *In re Sellars*, 118 N. Car. 573.

Increase of Assets. — When the court is informed that a large sum of money is likely to come into the administrator's hands, or property belonging to the estate is discovered after the original bond is given, an additional bond may be required. Taylor v. Sherburne, 1 Hayw. & H. (C. C.) 106, 23 Fed. Cas. No. 13,805; Calhoun v. McKnight, 36 La. Ann. 414.

And the additional security should be given to cover all the additional assets, and not merely that part to which the moving party is entitled. Hardy's Estate, 46 La. Ann. 1309.

In Vincent v. Platt, 5 Harr. (Del.) 164, an executor was required to give further security where land belonging to the estate was sold under execution and the surplus proceeds paid to the executor.

In Indiana an additional bond is required where the administrator receives the rents and profits of real estate by leave of court as provided by the statute. State v. Barrett, 121 Ind. 92.

In Goods of Weir, 1 Sw. & Tr. 506, 2 L. T. N. S. 191, 28 L. J. P. 111, the administratrix, after giving bond, received money from a bankrupt estate indebted to the decedent, and the court ordered a separate bond in a penalty which, together with the original bond, would be double the amount of the estate, including the amount received from the bankrupt.

Substituting Sureties. — A new bond will be taken in order to substitute a new surety for a surety on the original bond, and such new bond is sufficient though it is signed only by the new surety, if it recites the original bond. Patullo's Estate, Tuck. (N. Y.) 140.

No Bond on File. — Where an executor is ordered to give security, and no bond could be found, and there was nothing on the record to show who the surety was, he was properly ordered to give a new bond. Longenberger's Estate, 148 Pa. St. 564.

Insolvency of Administrator. — The insolvency of an administrator is not ground for demanding additional security if the sureties are sufficient. Sharkey's Estate, 2 Phila. (Pa.) 276, 14 Leg. Int. (Pa.) 132.

Marriage of Administratrix. — A new bond is not rendered necessary by the marriage of a *feme sole* administratrix. Airhart v. Murphy, 32 Tex. 131.

How Necessity for New Bond Is Determined. — The reason or necessity for increasing a bond is a matter for the determination of the tribunal to which application is made (in *North Carolina*, the clerk), and not for the court of appeal. *In re Sellars*, 118 N. Car. 573.

It Is Discretionary with the Court to require an executor to give an additional bond, and an order denying a petition to require such bond is not appealable. Cropper v. McLane, 6 App. Cas. (D. C.) 119.

Failure to Give an Additional Bond as required by an order of court is a ground for removing the executor or administrator. National Bank v. Stanton, 116 Mass. 435.

1. Amount of New Bond. — The *Illinois* statute provides that when a new bond is taken it shall be in like penalty as the first, and this requirement was held to have been satisfied by taking two new bonds, the aggregate of the penalties of which were just equal to the first bond. People v. Lott, 27 Ill. 215.

2. Additional Bond on Sale of Real Estate — *United States*. — Bright v. Boyd, 1 Story (U. S.) 478.

Alabama. — Pettit v. Pettit, 32 Ala. 288.

California. — Matter of Arguello, 50 Cal. 308; Burris v. Kennedy, 108 Cal. 331.

Florida. — Bushnell v. Krum, 32 Fla. 62.

Indiana. — Worgang v. Clipp, 21 Ind. 119, 83 Am. Dec. 343.

Kansas. — Higgins v. Reed, 48 Kan. 272.

Kentucky. — Mobberly v. Johnson, 78 Ky. 273.

Michigan. — Norman v. Olney, 64 Mich. 553; Drake v. Kinsell, 38 Mich. 232.

Minnesota. — Babcock v. Cobb, 11 Minn. 347.

Mississippi. — Rucker v. Dyer, 44 Miss. 591; Currie v. Stewart, 26 Miss. 646.

Nebraska. — McClay v. Foxworthy, 18 Neb. 295.

New York. — Jackson v. Holladay, 3 Redf. (N. Y.) 379; Holmes v. Cock, 2 Barb. Ch. (N. Y.) 426.

Pennsylvania. — Sawyers v. Hicks, 6 Watts (Pa.) 76.

Texas. — Saul v. Frame, 3 Tex. Civ. App. 596.

Virginia. — Corbell v. Zeluff, 12 Gratt. (Va.) 226.

Who May Apply for New Bond. — An application to require an executor or administrator to give a new or an additional bond may be made by any person interested in the estate, or such bond may be required by the court of its own motion.¹

Execution of New Bond. — A new bond required of an executor or administrator may be executed by an attorney in fact duly authorized;² and where a new bond is given for the purpose of substituting a new surety, it may be executed by the new surety alone.³

d. BOND OF OFFICER ACTING EX OFFICIO AS PUBLIC ADMINISTRATOR. — As a general rule when a public officer is *ex officio* public administrator, his official bond stands as security for the faithful administration of estates committed to him.⁴

e. SPECIAL BOND OF SOLE OR RESIDUARY LEGATEE. — In some jurisdictions an executor or administrator with the will annexed, who is also the sole legatee or the residuary legatee under the will, may, at his option, instead of giving the usual administration bond, give a bond with condition merely to pay all debts, legacies, and statutory allowances.⁵ By giving such a bond he conclusively admits assets sufficient to pay debts, legacies, and allowances, and binds himself and sureties absolutely in the penal sum to pay accordingly, even though the estate should prove insolvent.⁶

Wisconsin. — *Sitzman v. Pacquette*, 13 Wis. 291.

In Ohio it has been held that in ordering a sale of real estate the court will require an additional bond only when the penalty of or the sureties on the general bond are insufficient. *Wade v. Graham*, 4 Ohio 126.

As to the effect of failure to give such additional bond, see *infra*, this title, *Sale of Real Estate Under Order of Court*.

Under the provisions of the Revised Statutes of *Massachusetts* it was held that a special bond could be required to secure the proceeds of real estate only when more was ordered to be sold than was necessary for the payment of debts, and that in other cases the general bond stood as security. *Bennett v. Overing*, 16 Gray (Mass.) 267.

As to the present law in *Massachusetts*, see *Public Statutes*, c. 130, § 2.

1. Any Person Interested May Apply. — *Lacoste v. Splivalo*, 64 Cal. 35; *Block v. Bordelon*, 39 La. Ann. 872; *Hardy's Estate*, 46 La. Ann. 1309; *Loring v. Bacon*, 3 Cush. (Mass.) 465; *Ward v. State*, 40 Miss. 108; *Beckwith v. Avery*, 31 Gratt. (Va.) 533.

Tutrix of Minor. — The tutrix of a minor who is an heir in a succession may apply for additional security. *Hardy's Estate*, 46 La. Ann. 1309.

Order Ex Mero Motu. — *Ward v. State*, 40 Miss. 108; *Governor v. Gowan*, 3 Ired. L. (25 N. Car.) 342.

2. Execution by Attorney in Fact. — *Hall v. Monroe*, 27 Tex. 700.

3. Execution by Surety Alone. — *Patullo's Estate*, Tuck. (N. Y.) 140.

4. Officer Acting Ex Officio Public Administrator Liable on Official Bond. — *Payne v. Thompson*, 48 Ala. 535; *Governor v. Davis*, 9 Ala. 917; *Scarce v. Page*, 12 B. Mon. (Ky.) 311; *Cocke v. Finley*, 29 Miss. 127.

If a Special Bond Has Been Given by a sheriff who is acting *ex officio* public administrator, it has been held that he is nevertheless liable on his official bond. This conclusion, the court

said, was reached "with much hesitation." *State v. Watts*, 23 Ark. 304. But see *contra*, *McNeil v. Smith*, 55 Ga. 313.

In some states public administrators have the option to furnish a separate bond for every estate under their charge, or a general official bond for faithful administration of all estates on which administration is granted to them. In either case the conditions are appropriate to the functions of the office. *Buckley v. McGuire*, 58 Ala. 226; *State v. Purdy*, 67 Mo. 89.

5. Special Bond of Representative Who Is Sole or Residuary Legatee. — *Holden v. Fletcher*, 6 Cush. (Mass.) 235; *Alger v. Colwell*, 2 Gray (Mass.) 404; *Conant v. Stratton*, 107 Mass. 474; *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213; *Evans v. Foster*, 80 Wis. 509. Compare *Boisse v. Dickson*, 31 La. Ann. 741.

In Louisiana one who has been recognized by the probate court as universal legatee and testamentary executor, and ordered to be put into possession, can be compelled by a creditor to give security if he has continued to act as executor, and he cannot, to prevent the execution of the order to give security, contest the merits of the petitioning creditor's claim, which, however, is not admitted by giving the security. *Frazier's Succession*, 33 La. Ann. 593.

Surety Debts of Testator. — A bond given by an executor who is also the sole legatee, conditioned to "faithfully discharge all of the just debts and obligations" of the testator, covers the liability of the testator as surety on the bond of a public officer, including defaults by such officer after the testator's death, and after the executor had given bond. *Snyder v. State*, 5 Wyoming 318.

6. Effect of Bond. — *State v. Snowden*, 7 Gill & J. (Md.) 430; *Clarke v. Tufts*, 5 Pick. (Mass.) 337; *Stebbins v. Smith*, 4 Pick. (Mass.) 97; *Colwell v. Alger*, 5 Gray (Mass.) 67; *McElroy v. Hatheway*, 44 Mich. 309.

The whole estate passes to the residuary legatee when the bond is given, and administration thereupon terminates. *Cole's Will*, 52

f. WHEN BOND MAY BE DISPENSED WITH. — The general rules as to the necessity for bonds have already been stated.¹ It has been held that authority given to the court to dispense with sureties does not authorize it to dispense with the bond.² But if the administrator, or the executor in those jurisdictions where executors are required to give bond, is entitled to the beneficial use and enjoyment of the estate, a bond may be dispensed with, unless there are creditors of the decedent to be protected;³ and security may be waived by the beneficiaries, if they are under no disability.⁴

g. FAILURE TO GIVE BOND. — As a general rule, letters of administration are not void because of the failure of the administrator to give bond. They are, at the most, only voidable, and all acts of the administrator, so long as the letters remain in force, are valid.⁵ But in some jurisdictions it is held

Wis. 591. See also *Haydock v. Duncan*, 40 N. H. 45.

Proof of Assets. — In an action to recover a legacy, the plaintiff need give no proof except the bond that the executor has assets sufficient in his hands. *Jones v. Richardson*, 5 Met. (Mass.) 247.

Debts Secured. — Costs awarded out of the estate to the contestants of the will are a debt within the meaning of the bond. *Cole's Will*, 52 Wis. 591.

Substituting Bond in Common Form. — Such special bond cannot be canceled or surrendered by the executor, and a bond in common form substituted, long after it was time in the ordinary course to file an inventory. *Alger v. Colwell*, 2 Gray (Mass.) 404.

1. See *supra*, this section, *Necessity of Bond*.

2. **Whether Bonds May Be Dispensed With.** — In *Goods of Powis*, 34 L. J. P. 55, it was held that the discretionary power of the court to dispense with sureties does not authorize it, under any circumstances, to dispense with an administration bond. See also *In Goods of Brackenbury*, 2 Prob. Div. 272, 46 L. J. P. Div. 42, 36 L. T. N. S. 744, 25 W. R. 698.

In Louisiana an administrator is allowed the alternative, by statute, of giving a "special mortgage on unencumbered property of a value sufficient to serve as a guaranty for his administration. *Levy's Succession*, 48 La. Ann. 1520.

Special Administrator Appointed General Administrator. — When a special administrator, who has given bond as such, is appointed general administrator, his bond must be re-executed, or the sureties must consent to an order that it shall stand as the general administration bond. *Matter of Fisher*, 15 Wis. 511.

Administrator of Nonresident. — In *Picquet*, Appellant, 5 Pick. (Mass.) 65, it was held that the statute requiring an administrator to give bond applies in cases of a person dying without the commonwealth but leaving estate therein, and applies to foreigners as well as citizens.

3. **Right of Executor to Use of Estate.** — In *Langley v. Farmington*, 66 N. H. 431, the testator, after certain bequests, gave the balance of his estate to his wife, and provided that at her death the remainder should go to certain persons. He also appointed her executor of the will. It was held that she was entitled to the possession of the estate, whether she was absolute owner or only a life tenant, and that therefore she could not be required to give bond to secure the remaindermen.

Sole Heir or Devisee. — In *Bankhead v. Hubbard*, 14 Ark. 298, it was suggested that, notwithstanding the absolute requirement of the statute that executors should give bond, a case might arise in which it would be dispensed with. "This security is for the benefit of creditors, heirs, devisees, and legatees, and there are but few instances in which it should be dispensed with. Perhaps, in the case of a sole heir or devisee being appointed executor or administrator, and no debts against an estate, bond and security need not be given, because waste or mismanagement of the estate would be guarded against by motives of self interest, and in any event could injure no one but himself, and there may be other cases within a similar reason. But the case should be clear, because a doubt in the scale ought to operate in favor of requiring security, that being a general requisition, which the legislature had the power and thought proper to make." See also *Tappan v. Tappan*, 24 N. H. 400.

4. **Waiver of Security.** — Adult beneficiaries may waive security, but the guardian of infants cannot. *Freeman v. Kellogg*, 4 Redf. (N. Y.) 218. See also *Johns v. Johns*, 23 Ga. 31.

For a full discussion of the power to waive rights given by statute, see the title **WAIVER**.

5. **Appointment Not Void Because No Bond Was Given** — *Alabama*. — *Ex p. Maxwell*, 37 Ala. 362, 79 Am. Dec. 62; *Cunningham v. Thomas*, 59 Ala. 158; *Leatherwood v. Sullivan*, 81 Ala. 458.

California. — *Ions v. Harbison*, 112 Cal. 260. *Kentucky*. — *Peebles v. Watts*, 9 Dana (Ky.) 102, 33 Am. Dec. 531.

New York. — *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 37 Am. Dec. 299.

North Carolina. — *Davis v. Lanier*, 2 Jones L. (47 N. Car.) 307; *Spencer v. Cahoon*, 4 Dev. L. (15 N. Car.) 225.

Ohio. — *Slagle v. Entrekin*, 44 Ohio St. 637.

Utah. — *Harris v. Chipman*, 9 Utah 101.

In *Doe v. Read*, 6 New Bruns. 680, it was said that administration, if granted, is not void because no bond was given, but that the absence of a bond is a strong fact to rebut a presumption that administration was granted.

Conditional Appointment. — If the administrator is appointed "on his executing and filing" a bond, the appointment is conditional, and if the condition (giving bond) is not complied with, the appointment is void. *Gray v. Cruise*, 36 Ala. 559; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656.

Bond Given After Letters Are Issued. — But

that if an administrator fails to give bond, or if the bond is not valid, the administration is void.¹

h. CANCELLATION OF BOND. — After an administrator has qualified by giving bond, his appointment is not revoked by the mere cancellation of the bond.²

2. Validity and Requisites — *a. FORM AND RECITALS.* — In England it is provided by statute 20 and 21 Vict., c. 77 (Court of Probate Act), § 81, that "every person to whom any grant of administration shall be committed shall give bond to the judge of the court of probate to inure for the benefit of the judge for the time being, and, if the court of probate or (in the case of a grant from a district registrar) the district registrar shall require, with one or more surety or sureties conditioned for duly collecting, getting in, and administering the personal estate of the deceased, which bond shall be in such form as the judge shall from time to time by any general or special order direct."³

In the United States the form of the bond prescribed by statute is generally modeled on that given in the English statute of 22 and 23 Car. II., c. 10, and is substantially that the administrator will make and return a true inventory, administer according to law, render accounts, pay as directed by the court any balance remaining in his hands on the settlement of his accounts, and deliver up his letters in case a will should be found and proved.⁴

Necessity of Statutory Conditions. — It is essential to the validity of a bond that it should contain all the conditions required by statute,⁵ but it will, as a gen-

even if the execution of the bond is required before letters are issued, the mere order of time in which the act of receiving letters and the act of giving the bond are performed, will not affect the validity of the appointment, nor any act performed by the administrator after giving the bond. *Ions v. Harbison*, 112 Cal. 260.

Rule in Louisiana. — An executor becomes *functus officio* if he fails to furnish the bond required of him within thirty days after service of the order on him. *Bobb's Succession*, 27 La. Ann. 344.

Liability of Ordinary. — Neglect of the ordinary to take an administration bond renders him liable to an action, and damage from his neglect will be presumed. *Boggs v. Hamilton*, 2 Mill (S. Car.) 382.

1. Administration Void for Want of Bond. — *McGehee v. Ragan*, 9 Ga. 135; *M'Williams v. Hopkins*, 4 Rawle (Pa.) 382; *Bradley v. Com.*, 31 Pa. St. 522; *Feltz v. Clark*, 4 Humph. (Tenn.) 79; *O'Neal v. Tisdale*, 12 Tex. 40.

The same rule was suggested by Parker, C. J., in *Picquet, Appellant*, 5 Pick. (Mass.) 76, where he said that "probably" the administration would be void unless a bond was given with sureties who were inhabitants of the commonwealth as required by statute.

The Administration Is Suspended if a proper bond is not given by the executor, and the claims of creditors are not barred by neglect to present them, or to commence action, so long as the suspension continues. *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213.

Re-appointment on Giving Bond. — In *Feltz v. Clark*, 4 Humph. (Tenn.) 79, it was held that there is no administration until the bond is executed, but that if any person appointed administrator, by inadvertence failed to give bond, and after he had proceeded to act another person applied for the appointment, the court, in order to save confusion, would give preference to the first appointee, on the execution of a bond by him.

As to the effect of failure to give bond as ground for removal or as evidence of renunciation, see also *supra*, this title, *Appointment and Tenure of Office — Executors — Renunciation of Executorship*; and *Termination of Authority — Removal from Office or Revocation of Letters*.

2. Appointment Not Revoked by Cancellation of Bond. — *Clarke v. Rice*, 15 R. I. 132.

3. Form of Bond in England. — 1 Wms. Exrs. (7th Am. ed.), p. 614.

4. Form of Bond in United States — Stat. 22 & 23 Car. II. Followed. — *Schouler Exrs. & Admsrs.*, § 140. See also the various local codes and statutes in the United States.

Administrators with the Will Annexed are generally required to give bond in the same form as general and original administrators, with due provision for the payment of legacies added. *Folkes v. Docminique*, 2 Stra. 1137; *In Goods of Brackenbury*, 25 W. R. 698; *Casoni v. Jerome*, 58 N. Y. 315; *Hartzell v. Com.*, 42 Pa. St. 453.

And it has been held that unless the bond of such an administrator conforms to the requirements of the will, legatees may lose the right to sue on it. *Small v. Com.*, 8 Pa. St. 101; *Frazier v. Frazier*, 2 Leigh (Va.) 642. But see *Probate Judge v. Claggett*, 36 N. H. 381.

But if the bond of an administrator *de bonis non* with the will annexed was in the form of an ordinary administration bond, the sureties are nevertheless liable for the proceeds of real estate sold by the administrator under a power in the will. *Shalter's Appeal*, 43 Pa. St. 83, 82 Am. Dec. 552.

In those jurisdictions where the special duties imposed on the executor by the will devolve on the administrator *de bonis non*, the bond of such an administrator must be commensurate with the powers and trusts contained in the will. *Hartzell v. Com.*, 42 Pa. St. 453.

5. Bond Must Contain All Conditions Required by Statute. — In *Frye v. Crockett*, 77 Me. 157,

eral rule, be construed liberally in favor of the persons intended to be secured, and a substantial compliance with the requirements of the statute is sufficient to constitute a statutory bond.¹ According to this view it is held that a bond is not invalid because of mere clerical errors or omissions,² or because it con-

an executor's bond was held insufficient where it omitted to require the executor to account within the time required by law.

And if it does not contain any provision for creditors, they cannot hold the sureties liable on it. *Roberts v. Colvin*, 3 Gratt. (Va.) 342.

Court Cannot Vary Conditions. — In *Goods of Goldsborough*, 1 Sw. & Tr. 295, 5 Jur. N. S. 417, 7 W. R. 375, it was held that the court has no authority to vary the conditions of the bond, so that an attorney, where the person entitled is abroad, shall undertake only to pay over the personal estate which may come to his hands, to the party for whose use and benefit he takes administration, and not to administer it in the usual form according to law.

1. Substantial Compliance with Statute Sufficient. — In *Moore v. Chapman*, 2 Stew. (Ala.) 466, 20 Am. Dec. 56, the court said: "Though the form of the bond be prescribed by statute, yet it is sufficient for the ends of substantial justice if the material requisitions of the statute have been pursued, and the intention of the parties can be collected from the whole of the instrument taken together."

In *Cleaves v. Dockray*, 67 Me. 118, Dickerson, J., said: "A bond required by statute is not void, in all cases, as a statute bond, because it does not in all respects conform to the statute under which it is taken, as, for instance, when the bond contains all that the statute requires, and a further clause more favorable to the obligors than that the statute calls for, *Van Deusen v. Hayward*, 17 Wend. (N. Y.) 70; or when the condition in the bond is not more prejudicial to the obligors than one with a condition in due form would have been, *Morse v. Hodsdon*, 5 Mass. 316; or the additional matter may be rejected as surplusage, *Union Wharf v. Mussey*, 48 Me. 312; or the bond is so drawn as to include all the obligations imposed by the statute, and allow every defense given by law, *Insolvent Comr's v. Way*, 3 Ohio 103; or where the bond is voluntarily given, and the portion of the condition in excess of that required by law is separable from that provided by the statutes, *U. S. v. Mynderse*, 12 Int. Rev. Rec. 94, and *Postmaster-General v. Early*, 12 Wheat. (U. S.) 136. In the absence of any statutory provision declaring a variance from the statute form fatal, such variance does not render the bond void when the condition does not impose upon the obligors a greater burden than the law allows. *Com. v. Laub*, 1 W. & S. (Pa.) 261; *Baldwin v. Standish*, 7 Cush. (Mass.) 209." See also *Farley v. McConnell*, 7 Lans. (N. Y.) 428.

In *Georgia* it is expressly provided that a substantial compliance with the statute shall be sufficient. *White v. Spillers*, 85 Ga. 555; *Ford v. Adams*, 43 Ga. 340.

Varying Prescribed Form in Certain Cases. — In *Hall v. Cushing*, 9 Pick. (Mass.) 395, it was held that where a statute prescribes a form of an administrator's bond, and requires executors to give bond in the same manner, a bond given by an executor need not be in pre-

cisely the same form as the bond required of an administrator, but it may be varied as the duties of an executor vary from those of an administrator.

Bond of Administrator with Will Annexed. — It has been held in some jurisdictions that a bond given by an administrator with the will annexed is sufficient to bind him and his sureties, though it is in the form usually given by the administrator of an intestate's estate. *Probate Judge v. Claggett*, 36 N. H. 381; *Casoni v. Jerome*, 58 N. Y. 315.

In other jurisdictions it has been held that such bond is not sufficient. *Fulcher v. Com.*, 3 J. J. Marsh. (Ky.) 592; *Frazier v. Frazier*, 2 Leigh (Va.) 642; *Morrow v. Peyton*, 8 Leigh (Va.) 54; *Small v. Com.*, 8 Pa. St. 101. But see *Hartzell v. Com.*, 42 Pa. St. 453; *Shalter's Appeal*, 43 Pa. St. 83, 82 Am. Dec. 552.

Voidable at Option of Obligees. — In *Coea v. State*, 34 Miss. 179, it was held that a bond might be binding upon the obligors, but voidable as to the obligees.

2. Clerical Errors Not Fatal. — In *Moore v. Chapman*, 2 Stew. (Ala.) 466, 20 Am. Dec. 56, it was held that a bond was not vitiated by the fact that the name of the decedent was by mistake inserted where the name of the administrator should have been, or that by its terms it required the decedent to well and truly perform the duties of administrator, such mistake being apparent on the face of the bond. See also *White v. Spillers*, 85 Ga. 555.

Failure to Recite All the Details. — A bond conditioned that the administrator should "well, truly, and faithfully administer" upon such estate was held a sufficient compliance with the statute, which enumerated in detail the duties of an administrator, for the performance of which he was to give bond. *Lanier v. Irvine*, 21 Minn. 447.

Failure to State Name of Testator. — In *Foley v. Hamilton*, 89 Iowa 686, the omission of the testator's name from an executor's bond was held not to invalidate it, where the record showed that the principal and his sureties intended the bond to be given for the execution of the testator's will.

Failure to State the Given Name of the Decedent in an administrator's bond does not invalidate it where the name is inserted in the letters, as the grant of the letters and the execution of the bond are parts of one and the same transaction, and the different acts may be brought together to show what was intended. *State v. Price*, 15 Mo. 375.

Failure to State Which Obligor Is Administrator. — In *Paddleford v. State*, 57 Miss. 118, it was held that a bond which failed to state which of the obligors is the administrator was not fatally ambiguous, but might be explained by the record.

Failure to Recite Appointment. — In *Dayton v. Johnson*, 69 N. Y. 419, a bond was held sufficient though it did not state an actual appointment of the administrator, it appearing that he had accepted the position and acted as such.

tains recitals not required by law,¹ but it is otherwise in case material matters are omitted.² In some jurisdictions, however, the rule is that the statutory form must be strictly followed, and that a bond which is not in the statutory form is not good as a statutory bond,³ though it may be good as a common-law bond.⁴

But the Fact that the Bond Is Defective is held not to vitiate the appointment of the personal representative or to invalidate his acts.⁵

To Whom Bond Is Made Payable. — In *England* the bond is made payable to the judge of probate.⁶ In the *United States* it is payable to the commonwealth, state, or people, according to the prevailing designation of state sovereignty, or to some officer, usually the judge of probate.⁷

Incorrect Reference to Administrators. — In *Brewster v. Balch*, 41 N. Y. Super. Ct. 63, a bond which referred to the administrator and administratrix as "her" instead of "them" was held valid.

Condition to Obey County Judge Instead of Surrogate. — In *Farley v. McConnell*, 7 Lans. (N. Y.) 428, it was held that a bond was not invalid because it was conditioned that the administrator should obey all orders of the "county judge" instead of the "surrogate" of the proper county, where the county judge of any county having a population of less than a certain number was, under the statute, the constitutional surrogate of that county, and it did not appear that the county in question had a population exceeding such number.

Naming Wrong County. — In *Gerould v. Wilson*, 81 N. Y. 573, it was held that a bond was not invalid because it named the wrong county in designating the surrogate whose orders were to be obeyed.

Requiring Return of Inventory to Wrong Office. — In *Ordinary v. Smith*, 14 N. J. L. 479, it was said that it was not a fatal variance where an administration bond required the administrator to exhibit an inventory "into the surrogate's office of the county" instead "of into the registry of the prerogative court, in the secretary's office of this state," but it was held that the statute requiring inventories to be exhibited into the prerogative's office was repealed by a later act, and that the bond was in conformity with the later act.

Omitting Formal Conclusion. — In *Rose v. Winn*, 51 Tex. 545, it was held that an administrator's bond was valid, though it omitted the usual formal conclusion, "then this obligation to be void; otherwise to remain in full force and effect."

1. Recital More in Detail than Statute Requires. — The validity of a bond is not affected by the fact that it specifies the obligation of the administrator more in detail than is required by statute. *Carr v. Catlin*, 13 Kan. 393.

Additional Conditions. — Or by the fact that it contains conditions in addition to those required by statute. *Woods v. State*, 10 Mo. 608; *Gandolfo v. Walker*, 15 Ohio St. 251.

Surplusage — Description of Decedent. — A recital in the condition of a bond given by an administrator with the will annexed, that the decedent died intestate, is a mere description of the person and may be rejected as surplusage. *Probate Judge v. Claggett*, 36 N. H. 381.

2. Failure to Recite Amount of Penalty. — In *Evarts v. Steger*, 6 Oregon 55, it was held that an administrator's bond was void where it

failed to express any sum for which the obligors were bound. But see *contra*, *White v. Duggan*, 140 Mass. 18, 54 Am. Rep. 437.

Incomplete Bond. — In *Cowling v. Justices*, 6 Rand. (Va.) 349, a bond was held materially defective where the names of the obligees were not inserted in the penal part, and the names of the executor and of the court to which he was to return an account of his transactions were not inserted in the condition.

3. Strict Compliance with Statute Required. — In *Security Co. v. Pratt*, 65 Conn. 161, it was said that the requirement of the statute that all probate bonds shall be conditioned for the faithful discharge by the principal of the duties of his office according to law leaves no room for variation in the language of the condition, but that it must be the same in every bond.

In *Pennsylvania* it is held that a bond with one surety, instead of two as required by statute, is void. *M'Williams v. Hopkins*, 4 Rawle (Pa.) 382; *Bradley v. Com.*, 31 Pa. St. 522.

4. Sufficiency as Common-law Bond. — *Cleaves v. Dockray*, 67 Me. 118; *Frazier v. Frazier*, 2 Leigh (Va.) 642.

Voluntary Bond. — In *Bellinger v. Thompson*, 26 Oregon 320, it was held that if an executor voluntarily gives bond, though it could not be required of him, it is nevertheless valid.

In *Cretien v. Bienvenu*, 41 La. Ann. 728, it was held that a bond given by an executor in the absence of any law or order of court requiring it, or any demand therefor by creditors or claimants, is purely a voluntary bond, conferring no rights and creating no obligations, except such as are clearly expressed by the tenor and terms thereof, and that such an instrument filed without filling in all the blanks in the printed form, expressing no date and no amount, naming no principal obligor and defining no principal obligation, and specifying no condition on which the obligation of the sureties arises, is an absolute nullity. *Falkes v. Doeminique*, 2 Stra. 1137. See also *Bloomfield v. Ash*, 4 N. J. i. 357.

5. Defect in Bond Does Not Vitate Appointment — *Mobberly v. Johnson*, 78 Ky. 273; *Peebles v. Watts*, 9 Dana (Ky.) 102, 33 Am. Dec. 531.

6. To Whom Bond Is Made Payable in England. — Stat. 20 & 21 Vict., c. 77, § 81.

7. To Whom Payable in United States — To the Commonwealth. — *Johnson v. Fuquay*, 1 Dana (Ky.) 514; *Miltenberger v. Com.*, 14 Pa. St. 71. *To the People.* — *Holmes v. Cock*, 2 Barb. Ch. (N. Y.) 426; *Matter of Thompson*, 6 Dem. (N. Y.) 56.

To the Judge of Probate. — *Frye v. Crockett*,

b. AMOUNT OF PENALTY — In General. — As a general rule, the amount of the penalty of administration bonds, both in *England* and in the *United States*, is fixed at twice the estimated value of the subject of administration, though in some of the states a different rule obtains.¹

77 Me. 157; *Berkey v. Judd*, 34 Minn. 393; *Buel v. Dickey*, 9 Neb. 285; Probate Judge v. Adams, 49 N. H. 150.

To the Ordinary or Surrogate General. — *Williamson v. Updike*, 14 N. J. L. 270.

In North Carolina the bond was formerly payable to the justices of the county court who were present in court when the bond was given. *Vanhook v. Barnett*, 4 Dev. L. (15 N. Car.) 268.

The present statute requires the bond to be made payable to the state. Code N. Car. 1883, § 1388.

In Virginia bonds of executors and administrator were formerly payable to the justices of the county court. *Cowling v. Justices*, 6 Rand. (Va.) 349; *Franklin v. Depriest*, 13 Gratt. (Va.) 257.

But this rule has since been changed, and such bonds are now payable to the commonwealth. See Form of Bond in 4 Minor Inst. marg. p. 1311.

Bond Payable to Beneficiary. — When executors are required by the will to give security, but no objection is made by any person interested, and no circumstances exist authorizing the surrogate to require bond, the bond will be taken in the name of the beneficiaries under the will, and not in the name of the people. *Sullivan's Estate*, Tuck. (N. Y.) 94.

Error in Designating Payee. — A bond is not void because it was payable to the wrong person. *Johnson v. Fuquay*, 1 Dana (Ky.) 514.

1. Amount of Penalty Required in England. — In England the amount of the penalty is regulated by statute 20 & 21 Vict., c. 77, § 82, which provides that the bond "shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn, unless the court or district registrar, as the case may be, shall in any case think fit to direct the same to be reduced, in which case it shall be lawful for the court or district registrar so to do." The previous English statutes did not specify the amount of the penalty, but merely required "sufficient bonds, * * * respect being had to the value of the estate." 1 Wms. Exrs. (7th Am. ed.) 613, 615.

Amount of Penalty in United States — Double Estimated Value of Estate. — *Bankhead v. Hubbard*, 14 Ark. 298; *Matter of Prout*, 58 Hun (N. Y.) 608, 34 N. Y. St. Rep. 318, 19 Civ. Pro. Rep. (N. Y.) 435; *Sarle v. Probate Ct.*, 7 R. I. 270; *Williams v. Verne*, 68 Tex. 414; *Atkinson v. Christian*, 3 Gratt. (Va.) 428.

Amount of Penalty in Louisiana. — In Louisiana the amount of the bond to be given by an administrator when demanded by a creditor is one-fourth more than the amount of the debt. *Feray's Succession*, 31 La. Ann. 727.

Amount of Penalty in Mississippi. — In Mississippi the amount of the penalty of the bond of an executor or administrator must be "equal to the full value of the estate at least." *Ellis v. Witty*, 63 Miss. 117.

Present Value of Estate. — Bond may be taken for the present value of the estate where a part

of the estate had been embezzled by a former administrator. In *Goods of Halliwell*, 10 Prob. Div. 198, 54 L. J. P. 32, 33 W. R. 371, 49 J. P. 233.

Where the Estate Had Been Partially Administered when an application for letters of administration was made, a bond was taken in double the value of the unadministered portion. In *Goods of Oakey*, (1896) Prob. 7.

In *Goods of James*, 21 L. T. N. S. 730, where a wife who took administration on her husband's estate, became insane before completely administering it, administration was granted to the son with sureties justifying to the present instead of the original value of the estate. See also In *Goods of Fozard*, 3 Sw. & Tr. 173, 9 Jur. N. S. 756, 32 L. J. P. 160, 12 W. R. 19, 8 L. T. N. S. 702.

Successive Administrations. — Where administration was granted during minority, and the minor on coming of age takes on himself the administration, he must give security in the same amount that the administrator did in the first instance. *Abbott v. Abbott*, 2 Phill. Ecc. 578.

In *Matter of Nesmith*, 6 Dem. (N. Y.) 333, it was held that in fixing the penalty of the bond of an administrator *c. t. a.*, appointed in place of an administrator to whom letters were granted before the probate of the will, regard should be had to the amount of an unpaid legacy, though the estate had been distributed by the first administrator.

Applicant's Interest in Estate. — Where several persons equally entitled apply for administration, the one to whom it is granted will be required to give bond to the amount of the share of the one who opposed it. *Iredale v. Ford*, 1 Sw. & Tr. 305, 5 Jur. N. S. 474, 7 W. R. 462. See also *Pickering v. Pickering*, 1 Hagg. Ecc. 480, in which it was held that on the grant of administration *de bonis non*, with the will annexed, to one of two legatees, bond would be taken in the amount of the surplus beyond the interest of the other legatee, there being an affidavit of no outstanding debts.

When a clear and vested interest in a part of the fund is shown in the administrator, security will be required only for the residue. *Cotterell v. Brock*, 1 Bradf. (N. Y.) 148.

Property Considered in Fixing Penalty — Life Insurance. — In fixing the amount of security to be required from an executor, the proceeds of a life insurance policy for the benefit of the decedent's children, which the executor was entitled to collect as testamentary guardian, will be considered. *Senior v. Ackerman*, 2 Redf. (N. Y.) 302.

Exempt Property. — The value of property exempted in favor of the decedent's family will not be considered in estimating the value of the estate for the purpose of fixing the amount of the administrator's bond. In *re Bowden*, 33 Tex. 730.

Property Fraudulently Conveyed by Decedent. — In *In re Filley* (Surrogate Ct.) 20 N. Y. Supp. 427, the court said: "I am satisfied that while

Force and Effect of Estimate. — The estimated or appraised value of the estate, however, is not conclusive in fixing the penalty of the administration bond, but if the estimate is not correct, the amount of the penalty will be fixed according to the actual value of the estate.¹

Bond in Reduced Penalty. — In some cases the bond may be taken in a less penalty than twice the value of the estate;² or if the appointment of an administrator is necessary, merely for the purpose of executing formal papers, bond may be taken in a nominal amount.³

Reducing Penalty After Execution of Bond. — If a bond has been taken in an excessive penalty, it may be reduced to an amount proportionate to the value of the estate.⁴

the decision in *Peck v. Peck*, 3 Dem. (N. Y.) 548, holding that the surrogate's court, in fixing the bond of the executor, should not take into consideration any property of the title to which the testator or intestate had divested himself during his lifetime, whether a transfer was procured by fraud or otherwise, states the general rule; yet there is no such hard and fast rule upon the subject, since in some cases the main object in taking out letters is for the purpose of recovering property fraudulently conveyed. Laws 1858, c. 314, § 1, as amended, Laws 1889, c. 487. 'And [it is held] in any case an executor is chargeable with breach of trust for neglect in instituting any action or proceeding necessary to recover assets fraudulently disposed of by his decedent.' *In re Cornell*, 110 N. Y. 351; *Hangen v. Hachmeister*, 114 N. Y. 566, 11 Am. St. Rep. 691. In such cases, at least, bonds should be required covering the amount of probable recovery, and the statute seems to contemplate the exaction of the same by the proper court."

1. Penalty Fixed According to Actual Value. — In *England v. Wall*, 31 L. J. P. 16, it was held that where the actual value of the estate was only eight thousand pounds, the sureties would be allowed to justify for double that amount, though the estate had been sworn under two thousand pounds.

Property Inadvertently Included. — In *Calhoun v. McKnight*, 36 La. Ann. 414, it was held that an administrator should not be required to furnish bond on the basis of an inventory which inadvertently included property not owned by the decedent.

2. Bond in Reduced Penalty. — In *Goods of Blank*, 70 L. T. 810, 6 Rep. 563, where a non-resident testator left a large amount of personalty in England and nominal debts, the court required security limited to the actual amount of the estate in England.

Bond Given by Sole Next of Kin. — Where the administrator is the sole next of kin, bond may be taken for such sum as will be sufficient to secure creditors. In *Goods of Gent*, 1 Sw. & Tr. 54, 4 Jur. N. S. 341, 27 L. J. P. 37; In *Goods of M'Donald*, 32 L. J. P. 132, 11 W. R. 957; In *Goods of Harrigan*, 32 L. J. P. 204.

Consent of Next of Kin. — In *New York* it is provided by statute that if all the next of kin consent, bond may be taken in a penalty not exceeding twice the amount of the claims against the estate, and it has been held that such statute does not apply to an administrator with the will annexed, because the next of kin have no interest in such case. *Matter of Leroy*, 1 Connolly (N. Y.) 491, 16 Civ. Pro.

Rep. (N. Y.) 343. But see *Curtis v. Williams*, 3 Dem. (N. Y.) 63; *sub nom.* *Allen's Estate*, 7 N. Y. Civ. Pro. Rep. (N. Y. Surrogate Ct.) 159, in which it was held that the statute allowing a reduced bond by an administrator on consent of the next of kin applies to an administrator with the will annexed, and that the consent of the next of kin is sufficient to authorize taking a reduced bond from an administrator with the will annexed, though the next of kin may not be interested in the matter.

Arrangement Between Executors. — The amount of security which it is proper to require of an executor, in view of the amount of the fund, cannot be reduced by considering an arrangement by which such executor was to permit his co-executor to have the exclusive management of the estate, because such an arrangement could not affect the right of the executor to act as such at any time he might think proper. *Senior v. Ackerman*, 2 Redf. (N. Y.) 302.

Bond of Administrator Pendente Lite. — In *New Jersey* an administrator *pendente lite* is required to give bond with "two or more able sureties, regard being had to the value of the estate;" and it was held that under such a statute, where application *pendente lite* was made of an estate, the personalty of which amounted to more than one million dollars, and no proper person could be found to give adequate security, and the estate required immediate attention, letters would be issued on the giving of a bond in a sum sufficient to cover the property which, from time to time, would come into the hands of the administrator, the personalty being deposited with the court and remaining subject to its order. *Matter of Lewis*, 28 N. J. Eq. 234.

3. Nominal Penalty. — In *Goods of Bowlby*, 45 L. J. P. Div. 100, a bond in the nominal penalty of two hundred pounds was taken where a limited administration was granted merely to enable the personal representative to assign the legal estate in certain leaseholds to the value of six thousand pounds, which had been sold by trustees.

In *Goods of Stapoole*, 2 Sw. & Tr. 316, 30 L. J. P. 191, 5 L. T. N. S. 140, bond was taken in a nominal penalty where letters of administration were granted merely to enable the personal representative to execute a formal release to a trustee under a marriage settlement.

4. Penalty May Be Reduced if Excessive. — In *Goods of Gould*, 1 Sw. & Tr. 20, 11 Jur. N. S. 288, 34 L. J. P. 105, 13 L. T. N. S. 193; *Sarle v. Probate Ct.*, 7 R. I. 270.

c. SURETIES — (1) *When Necessary*. — The general rule in the *United States* is that there must be sureties on the bonds of executors and administrators.¹ The principal exception to the rule is in the case of executors who are relieved by will of the necessity of giving security.² In *England* it is largely in the discretion of the court whether administrators shall furnish sureties, but they are generally required.³

(2) *When Dispensed With*. — The power of court to dispense with sureties will not be exercised except under special circumstances.⁴

(3) *Who May Be Sureties* — **Nonresidents**. — At common law and under the present *English* practice, it is the general rule that sureties should be inhabitants of the realm, but the rule is not imperative.⁵ In some jurisdictions,

But it will not be reduced for a cause which the executor could have urged on the application to require bond. *In re Filley*, (Surrogate Ct.) 20 N. Y. Supp. 427.

1. **Sureties Necessary as a General Rule in United States**. — See the various local codes and statutes.

2. See *supra*, this section, *Necessity of Bond* — *Bonds of Executors*.

3. **Rule in England**. — This rule is under Statute 20 & 21 Vict., c. 77, § 81, which provides that every person to whom any grant of administration shall be committed shall give bond, "and if the court or (in the case of a grant from a district registrar) the district registrar shall require, with one or more surety or sureties."

Discretion of Court. — Justifying sureties are at the court's discretion according to the circumstances of each case, except that there is a general rule that when there is no personal service of the decree on those having a prior claim to the administration, sureties will be required. *Aitkin v. Ford*, 3 Hagg. Ecc. 194, note a; In *Goods of Milligan*, 2 Robert 108.

Limited Administration Granted to Widow. — Where letters are granted to the widow, limited until the will is found, and there is a minor daughter entitled to distribution, sureties may be required. In *Goods of Campbell*, 2 Hagg. Ecc. 555.

Administration During Minority. — Sureties may be required on the grant of administration during minority. *Howell v. Metcalfe*, 2 Add. Ecc. 350.

Residuary Legatee taking administration with the will annexed may be compelled to furnish sureties. *Friswell v. Moore*, 3 Phill. Ecc. 135.

On Application by the Next of Kin for sureties the court feels bound to grant it, but it may be sufficient for the sureties to justify in respect to the share of the person excluded from the administration. *Coppin v. Dillon*, 4 Hagg. Ecc. 376.

4. **Special Circumstances Necessary**. — *Howell v. Metcalfe*, 2 Add. Ecc. 348.

Inability to Obtain Sureties. — In *Goods of De La Farque*, 2 Sw. & Tr. 631, 31 L. J. P. 199, 7 L. T. N. S. 194, sureties were dispensed with where the applicant was entitled to the fund, and it appeared that in consequence of sickness he was in great poverty, and could not procure sureties.

Freedom from Debts. — In *Goods of Bejot*, 20 L. T. N. S. 231, sureties were dispensed with where a testator was a domiciled Frenchman, and it appeared that the legacies were all paid, and that there were no debts in England.

Where Risk Is Small. — Sureties will not be dispensed with merely because the risk is small. In *Goods of Earle*, 10 Prob. Div. 196, 54 L. J. P. 95, 34 W. R. 48, 49 J. P. 761; In *Goods of McGowan*, 10 Prob. Div. 197, 34 W. R. 48, 49 J. P. 761.

Appointment of Receiver. — Sureties will not be dispensed with merely because a receiver of the intestate's personal estate had been appointed by the court of chancery, and it is not clear in such case that the court of chancery will continue to have the management of the estate. *Jackson v. Jackson*, 35 L. J. P. 3, 14 W. R. 111, 13 L. T. N. S. 336, L. R. 1 P. & D. 12.

Administration by Assignee in Bankruptcy. — Sureties will not be dispensed with in favor of the official assignee of a deceased bankrupt who takes out administration. *Belcher v. Maberly*, 2 Curt. Ecc. 629.

Administration by Public Officer. — In *Solicitors of Cornwall v. Canning*, 5 Prob. Div. 114, on grant of administration to the solicitors of the duchy of Cornwall, sureties were dispensed with in view of the position of the applicant. So also in *Goods of Cope*, 15 Prob. Div. 107, on grant to the chief official receiver in bankruptcy.

Corporation as Executor or Administrator. — A corporation may be authorized by statute to qualify an executor or administrator without sureties. *Coleman v. Parrott*, 11 Ky. L. Rep. 947.

5. **Resident Sureties Generally Required**. — In *Cambiaso v. Negroto*, 2 Add. Ecc. 439, the court laid it down as a generally safe practice that the sureties should be inhabitants of the realm, though resident sureties were dispensed with in that case.

In *Goods of O'Byrne*, 1 Hagg. Ecc. 316, it was held that if an administrator was out of England, sureties should be resident therein. See also In *Goods of Noel*, 4 Hagg. Ecc. 207; *Rutherford v. Clark*, 4 Bush (Ky.) 32; *Jones v. Jones*, 12 Rich. L. (S. Car.) 623.

Nonresident Sureties. — The *English* rule requiring resident sureties has been relaxed since the Common Law Procedure Act (15 & 16 Vict., c. 76, § 18), providing for service of process upon persons abroad, and it has been held that nonresident sureties will be accepted, though the administrator was a nonresident, where he was unable to procure resident sureties, and summons is servable on the sureties under the Common Law Procedure Act. In *Goods of Reed*, 3 Sw. & Tr. 439; In *Goods of Ballginal*, 3 Sw. & Tr. 441, note, 32 L. J. P. 138, 11 W. R. 591, 9 L. T. N. S. 116; In *Goods*

however, it is provided by statute that sureties on an administration bond must reside within the jurisdiction of the court.¹

Attorneys. — In some jurisdictions attorneys at law are not competent to be sureties on administration bonds.²

Husband and Wife. — A husband or wife may be surety for the other under the married women's law, which enables married women to contract as if sole.³

Guaranty Companies. — It is not necessary that sureties should be natural persons, but a guaranty company may be taken as a surety.⁴

(4) **Number of Sureties.** — "Two or more able sureties" on administration bonds were required by statute 22 and 23 Car. II., c. 10, § 1;⁵ and this requirement has been adopted by every subsequent statute, both *English* and *American*.⁶ It being discretionary with the court in England to dispense with sureties, bond may be taken under certain circumstances with only one surety.⁷

Surety for Part of Amount of Bond. — In *England* the discretionary power of the court in the matter of requiring sureties extends to permitting an administrator to furnish bonds for a part only of the amount of his bond.⁸

Apportioning Liability of Sureties. — The *English* statute also permits the court

of Fernandez, 4 Prob. Div. 229. See also In Goods of Blank, 70 L. T. 810, 6 Rep. 563; In Goods of De Beaufort, (1893) Prob. 231, 1 Rep. 483, 69 L. T. 420, 62 L. J. P. 101, 57 J. P. 553.

In *South Carolina* it is held that the ordinary may accept nonresidents of the state as sureties on an administration bond. Jones v. Jones, 12 Rich. L. (S. Car.) 623.

Residents of Scotland. — In Herbert v. Shiell, 33 L. J. P. 142, 3 Sw. & Tr. 479, the court refused to allow residents of Scotland to be sureties, because the provision of the Common Law Procedure Act for service of process upon nonresidents excepted Scotland and Ireland.

In Goods of Houston, L. R. 1 P. & D. 85, 35 L. J. P. 41, persons resident in Scotland were accepted as sureties where the administrator was the sole distributee, and there were no creditors, Sir J. P. Wilde saying that a greater latitude might be allowed in such a case.

1. Resident Sureties Required by Statute. — Picquet, Appellant, 5 Pick. (Mass.) 76.

But a bond is not invalid because some of the sureties are nonresidents if there are sufficient resident sureties, and the approval of such a bond is a determination that the resident sureties were sufficient without regard to those who were nonresidents. Clarke v. Chapin, 7 Allen (Mass.) 425.

2. Attorneys Disqualified by Statute. — Cuppy v. Coffman, 82 Iowa 214; Hicks v. Chouteau, 12 Mo. 341.

3. Husband or Wife of Administrator May Be Surety on Administration Bond. — Matter of Grove, 6 Dem. (N. Y.) 369, *disapproving* McMaster's Estate, 12 Civ. Pro. Rep. (N. Y. Supreme Ct.) 177. See also titles HUSBAND AND WIFE; SURETYSHIP.

4. Guaranty Companies Competent as Sureties. — Carpenter v. Treasury Solicitor, 7 Prob. Div. 235, 51 L. J. P. 91, 46 L. T. N. S. 821, 31 W. R. 108. See also title FIDELITY INSURANCE.

As to who may be sureties in general see the title SURETYSHIP.

5. 1 Williams on Executors (7th Am. ed.), p. 613.

6. Two or More Sureties Required. — Woerner's

American Law of Administration, § 249. See also *In re Frost*, 12 New Bruns. 127.

Effect of Giving Only One Surety. — It has been held that if there is only one surety, when several are required by statute, the bond is void. Tappan v. Tappan, 24 N. H. 400; M'Williams v. Hopkins, 4 Rawle (Pa.) 382; Bradley v. Com., 31 Pa. St. 522. But see *contra*, Steele v. Tutwiler, 68 Ala. 107.

Presumption from Lapse of Time. — In Delk v. Punchard, 64 Tex. 360 (decided in 1885), it was held that an administrator's bond executed in 1838 would not be declared void because it had on it the name of but one surety, but that the presumptions would be liberally indulged in support of probate proceedings which occurred at so early a date.

7. Requiring Only One Surety. — In Goods of Bellamy, 44 L. J. P. 49, 23 W. R. 552, 33 L. T. N. S. 71, the court required only one surety where an administrator was the sole distributee, and all the debts except a few small ones amounting to twenty-five pounds had been paid. See also In Goods of Smith, 29 L. T. N. S. 932.

Where a Guaranty Company Was Appointed Executor the court granted letters of administration to the general manager of the company and accepted the company as sole surety on his bond. In Goods of Hunt, (1896) Prob. 288.

8. Sureties for Part of Amount of Bond. — It may be sufficient for sureties to justify in respect of only the shares of the persons excluded from the administration. Coppin v. Dillon, 4 Hagg. Ecc. 376.

So also the court allowed the applicant himself to give bond for the full amount of the usual penalties, and ordered him to find sureties in one hundred pounds, where the applicant was the husband of the sole next of kin, and was in humble circumstances and unable to find the requisite sureties. In Goods of Harrow, 21 L. T. N. S. 834.

And in Goods of Elliott, 3 Ir. L. R. 147, the amount of the security was limited to a sum sufficient to cover the limited share of an intestate distributee, where the adult distributees consented thereto, and there were no debts.

to take several bonds "so as to limit the liability of any surety to such an amount as the court or district registrar shall think reasonable."¹ But this practice is not followed in the *United States*.²

(5) *Justification of Sureties*. — In some jurisdictions sureties are required to justify as to their pecuniary responsibility,³ but it has been held that an executor's bond is not such an official bond as will fall within the provision of the statute "that all sureties upon official bonds shall make justification under oath of their pecuniary responsibility;"⁴ though the judge may require sureties to justify if there is any reasonable doubt of their responsibility.⁵

d. EXECUTION — (1) *Signature*. — The signature of the principal is necessary to give validity to the bond for any purpose, and until signed by him it is not binding on the sureties though they have signed it,⁶ but this applies only to the ordinary administration bond, and the signature of the principal is not necessary to an additional bond given for the purpose of adding a new surety, if such additional bond recites the former bond.⁷

Signing by Sureties. — A bond is binding on the sureties by whom it is signed, though they are not named in the body of the instrument,⁸ and it will bind them, though their names were signed by a third person, without authority, if they acquiesced in it.⁹ Under some circumstances the execution of the bond by a surety is not effectual to render him liable according to its terms, and these circumstances, generally speaking, are much the same as relieve sureties from liability in other cases.¹⁰

1. Apportioning Liability of Sureties in England. — Stat. 20 & 21 Vict., c. 77, § 82; In Goods of Smith, 29 L. T. N. S. 932; In Goods of Blank, 70 L. T. 810, 6 Rep. 563.

2. Apportioning Liability in United States. — In *Baldwin v. Standish*, 7 Cush. (Mass.) 207, it was held that an executor's bond, in which the sureties were each bound in half the penal amount, was sufficient to give effect to the executor's appointment, and to render his acts as such valid, where it had been approved by the judge of probate. Dewey, J., delivering the opinion of the court, said: "The Rev. Stat., c. 63, § 2, provide that 'every executor, before entering upon the execution of his trust, shall give bond with sufficient surety or sureties, in such sum as the judge of probate shall order.' Does this provision require that the sureties should be, each and all of them, bound in the same sum as the principals? If this question had arisen upon an appeal from a decree of the judge of probate, allowing and approving an executor's bond in such form, we should be strongly inclined to the opinion that it was a departure from the usual course of proceeding, which ought not to be introduced. There would be great practical difficulties in conducting a suit upon such a bond against principal and surety jointly, where the principal is bound in one penal sum and the surety in a different sum; and as no necessity can ordinarily exist for making a distinction of this kind, and taking a bond with many sureties, whose aggregate liability is the same as that of the principal, we think it should be avoided." See also *People v. Lott*, 27 Ill. 215.

Judge Woerner says this provision of the English statute "seems a wise and highly beneficial measure, commending itself to the favorable consideration of the legislative authorities, but seems not thus far to have received any attention or favor in America."

Woerner's American Law of Administration, § 257.

3. Sureties Must Justify. — Matter of Thompson, 6 Dem. (N. Y.) 56.

4. Bissell v. Durfee, 58 Mich. 237.

5. Carpenter v. Probate Judge, 48 Mich. 318. See the title SURETYSHIP.

6. Bond Void if Not Signed by Principal. — *Weir v. Mead*, 101 Cal. 125, 40 Am. St. Rep. 46; *Wood v. Washburn*, 2 Pick. (Mass.) 24.

In *Weir v. Mead*, 101 Cal. 125, 40 Am. St. Rep. 46, the court quote from the opinion of Field, J., in *Sacramento v. Dunlap*, 14 Cal. 421, as follows: "The liability of the sureties is conditional to that of the principal. They are bound if he is bound, and not otherwise. The very nature of the contract implies this. The fact that their signatures were placed to the instrument can make no difference in its effect. It purports on its face to be the bond of the three. Some one must have written his signature first, but, it is to be presumed, upon the understanding that the others named as obligors would add theirs. Not having done so, it was incomplete and without binding obligation upon either."

Time of Signing. — A bond is valid though it was signed by the administrator before his appointment. *Morris v. Chicago, etc., R. Co.*, 65 Iowa 727, 54 Am. Rep. 39.

7. Principal Need Not Sign Additional Bond. — *Patullo's Estate*, Tuck. (N. Y.) 140.

8. Sureties Who Sign Are Bound. — *Grimmet v. Henderson*, 66 Ala. 521; *State v. Anderson*, 16 Lea (Tenn.) 321; *Luster v. Middlecoff*, 8 Gratt. (Va.) 54, 56 Am. Dec. 129.

9. Name of Surety Signed by Third Party. — *State v. Hill*, 50 Ark. 458.

10. Effect of Signing by Surety. — In *Howe v. Peabody*, 2 Gray (Mass.) 556, it was held that where the bond of an administrator was altered by the judge of probate with the consent of the principal after it had been signed

(2) *Delivery*. — It is not necessary in all cases that there should be a formal delivery and acceptance of the bond, nor is a conditional delivery effectual, though made to the obligee, unless the condition is complied with.¹

e. ATTESTATION OR APPROVAL. — It is a general requirement that administration bonds must be attested or approved by the court or officer who takes them.²

f. NECESSITY OF PERSONAL BOND. — It is held in some cases that a personal bond must be given by an executor or administrator, and that a bond executed by a third person, in which the executor or administrator does not join, is not sufficient.³

by the principal and two of the sureties, it was not binding on the sureties who afterwards signed in ignorance of the alteration, because the first two sureties were released by the alteration, and the others signed the bond under a mistake as to the liability of those who had previously signed it. See the title ALTERATION OF INSTRUMENTS, vol. 2, p. 181.

Expectation that Others Would Sign. — A surety who signed the bond under an arrangement that others would sign it as sureties is liable though the others did not sign, if the arrangement was coupled with no condition that his liability was to depend on the execution of the bond by the others, and the bond was left, without any explanation, in the hands of the clerk, who was the officer authorized to approve it, and who did thereafter approve it without the additional sureties. *State v. Gregory*, 119 Ind. 503.

1. Delivery and Acceptance. — In *Brown v. Weatherby*, 71 Mo. 152, it was held that there was a delivery and acceptance of the bond where it was placed by the administrator, after being signed, in a pigeon hole of a desk in the office of the probate judge, where other probate papers were kept, and at which business of a probate nature was transacted, and the administrator thereafter entered on the discharge of his duties as such.

Presumption of Delivery. — The approval and possession of a bond by the probate judge raises the presumption of a delivery to him as the obligee. *Wright v. Lang*, 66 Ala. 389.

Delivery in Escrow. — The delivery of a bond to the executor by a surety who has executed it may be on condition that another person shall also sign as surety, and it will not become operative as to such surety unless the condition is complied with, though the executor delivered it to the probate judge as the bond of the persons who had signed it. *Bibb v. Reid*, 3 Ala. 88; *Wright v. Lang*, 66 Ala. 389. See also *Allen v. Marney*, 65 Ind. 398, 32 Am. Rep. 73. But see *contra*, *State v. Chrisman*, 2 Ind. 126, where it was held that a bond could not be delivered as an escrow to the obligee. See also *Berkey v. Judd*, 34 Minn. 393, where it was held that a surety who executed an executor's bond and left it with the judge of probate was estopped to claim that it was agreed between him (the surety) and the executors that the bond should not take effect until signed by others as sureties, the judge of probate having no notice, actual or constructive, of the agreement.

For a Full Discussion of the subject of *Delivery and Acceptance* of bonds, see titles **BONDS**, vol. 4, p. 618; **ESCROW**, *ante*.

2. Bonds Must Be Attested or Approved. — *Woerner's American Law of Administration*, § 259; *Schouler on Executors and Administrators*, § 141; *Morris v. Chicago, etc., R. Co.*, 65 Iowa 727, 54 Am. Rep. 39.

In *England* administration bonds are required, by a rule of court, to be attested by the person who administers the oath to the administrator. In *Goods of Parker*, L. R. 1 P. & D. 301, 15 L. T. N. S. 248, 15 W. R. 262, 36 L. J. P. 26.

Requirement Directory. — In some cases it is held that the statutes requiring the bond of an administrator to be approved are merely directory, and that noncompliance therewith will not invalidate the letters of administration, but is only an irregularity. *Henry v. State*, 9 Mo. 778; *James v. Dixon*, 21 Mo. 538; *State v. Farmer*, 54 Mo. 439; *Brown v. Weatherby*, 71 Mo. 152; *Cameron v. Cameron*, 15 Wis. 1, 82 Am. Dec. 652.

But it is held in *Maine* that the written approval of the probate judge is essential to the validity of the bond, *Austin v. Austin*, 50 Me. 74, 79 Am. Dec. 597; and that such requirement is not satisfied by the fact that a former bond given by an administrator, with the same sureties, was approved, and it is immaterial whether or not their financial condition has changed since the first bond was approved. *Mathews v. Patterson*, 42 Me. 257.

What Constitutes Approval. — In *Ford v. Adams*, 43 Ga. 340, it was held that there was sufficient approval of the bond where an order had been made reciting that the bond with good and sufficient security had been given, and directing letters of administration to issue, though there was no formal approval. *Lochrane, C. J.*, said: "Was there not by this order a higher dignity of attestation by the ordinary as to the *factum* of the bond than the signing of his name would have been? Is it not substantially a compliance with the requisitions prescribed in the code?"

Approval Before Hearing. — In *Wells v. Child*, 12 Allen (Mass.) 330, it was held that the approval of a bond dated on the day when the will was first presented for probate was sufficient, though it was said that "it would have been more regular for the judge not to approve in writing the bond without sureties until after the parties interested had had opportunity to show cause against its being so given."

Witnesses. — Under the *New Hampshire* statute of 1822, two witnesses were necessary to a bond. *Tappan v. Tappan*, 24 N. H. 400.

3. Necessity of Personal Bond. — *Townsend v. Hazard*, 9 R. I. 254; *Hammond v. Wood*, 15 R. I. 566.

g. **BONDS OF MARRIED WOMEN.** — At common law a married woman could not give bond, because coverture disqualified her to make any contract,¹ but in England and in nearly all the states of the Union enabling acts have been passed conferring on married women capacity to contract.²

h. **INTERNAL REVENUE STAMP.** — The internal revenue act of June 13, 1898, entitled "An Act to provide ways and means to meet war expenditures, and for other purposes," occasioned by the then existing war between the United States and the kingdom of Spain, requires (Schedule A) a fifty-cent stamp on every bond given "for the due execution or performance of the duties of any office or position and to account for money received by virtue thereof."³

If the Bond Is Not Stamped as required by the act, a penalty of not more than one hundred dollars, at the discretion of the court, is imposed on the delinquent party,⁴ and the bond cannot be "admitted, or used as evidence in any court, until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto."⁵

3. Custody of Bonds. — An administration bond is an official document, and must be filed in the proper office.⁶

4. Counter Security. — In some jurisdictions a surety who is in fear of suffering loss by reason of his suretyship, may obtain an order of court requiring the executor or administrator to give counter-security to indemnify him against such apprehended loss, in default of which the letters testamentary or of administration may be revoked.⁷ But this right is not an incident of the

The present English statute provides that "every person to whom any grant of administration shall be committed shall give bond to the judge of the court of probate." Stat. 20 & 21 Vict., c. 77, § 81. See *infra*, next note.

1. Married Women Incompetent to Give Bond at Common Law. — See the title HUSBAND AND WIFE.

In *Hammond v. Wood*, 15 R. I. 566, it was held that in *Rhode Island* the common-law disability still exists.

Bond Given by Third Person. — In *England*, before the Married Women's Property Act was passed, enabling married women to make contracts, when a married woman was appointed administratrix, the bond was executed by a third person on her behalf. In *Goods of Sutherland*, 4 Sw. & Tr. 189, 8 Jur. N. S. 465, 31 L. J. P. 126.

2. Married Women Competent by Statute. — See the title HUSBAND AND WIFE.

Joinder of Husband. — The practice in *England* of requiring the husband of an administratrix to join in the administration bond is dispensed with by the Married Women's Property Act, which relieved the husband from liability for the acts of his wife as administratrix. In *Goods of Ayres*, 8 Prob. Div. 168, 52 L. J. P. 98, 31 W. R. 660, 47 J. P. 440.

3. Internal Revenue Stamp. — Under provisions of the acts passed to raise revenues for the prosecution of the Civil War (1861–1865), similar to the present act, it was held that the official bond of an executor or administrator required a stamp. *Blake v. Hall*, 19 La. Ann. 49.

For a Full Discussion of the necessity of stamping documents, see the title REVENUE LAWS.

4. Penalty for Omission of Stamp. — Act Cong. June 13, 1898, § 7.

5. Unstamped Bond Not Admissible in Evidence. — Act Cong. June 13, 1898, § 14.

Rule of Evidence Not Applicable to State Courts.

— It has frequently been held that a provision of a federal statute that a document not stamped as required by the statute shall not be received in evidence, is not controlling on the state courts, it being for each state to determine the rules of evidence in its own courts.

Arkansas. — *Bumpass v. Taggart*, 26 Ark. 398, 7 Am. Rep. 623.

California. — *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617.

Colorado. — *Patterson v. Gile*, 1 Colo. 200.

Illinois. — *Latham v. Smith*, 45 Ill. 29; *Craig v. Dimock*, 47 Ill. 308.

Indiana. — *Plessinger v. Depuy*, 25 Ind. 419; *Goodwine v. Wands*, 25 Ind. 101; *Wallace v. Cravens*, 34 Ind. 534.

Massachusetts. — *Carpenter v. Snelling*, 97 Mass. 452; *Moore v. Quirk*, 105 Mass. 49, 7 Am. Rep. 499.

Michigan. — *Clemens v. Conrad*, 19 Mich. 170.

Mississippi. — *Davis v. Richardson*, 45 Miss. 499, 7 Am. Rep. 732.

New York. — *People v. Gates*, 43 N. Y. 40. And see *Moore v. Moore*, 47 N. Y. 467.

Pennsylvania. — *Chartiers, etc., Turnpike Co. v. McNamara*, 72 Pa. St. 278, 13 Am. Rep. 673.

Tennessee. — *Sporrer v. Eifler*, 1 Heisk. (Tenn.) 633.

Texas. — *Dailey v. Coker*, 33 Tex. 815, 7 Am. Rep. 279.

6. Bond Must Be Filed in Proper Office. — *Miller v. Gee*, 4 Ala. 359.

7. Counter Security May Be Required. — *Caldwell v. Hedges*, 2 J. J. Marsh. (Ky.) 485; *Sifford v. Morrison*, 63 Md. 14; *Brown v. Murdock*, 16 Md. 521; *Russell v. McDougall*, 3 Smed. & M. 234; *Mullin's Estate*, 15 Phila. (Pa.) 613, 39 Leg. Int. (Pa.) 478; *Com. v. Risdon*, 4 Brews. (Pa.) 165.

contract of suretyship, and it does not exist unless it is specially given by law. In such case the surety can protect himself only by requiring a bond of indemnity.¹

5. Liabilities on Administration Bonds — *a. GENERAL NATURE AND EXTENT OF LIABILITIES.* — The Liabilities of the Principal in an administration bond grow out of and are correlative to the duties imposed on him by law, and are not dependent on the bond.²

The Liabilities of the Sureties, on the other hand, are wholly fixed and limited by the terms of the bond, and they can be extended no further, though the bond does not contain conditions which it should have contained.³

Devastavit Committed Before Application. — Counter security may be required to indemnify the surety against loss by reason of devastavits already committed as well as any that may afterwards be committed. *Brown v. Murdock*, 16 Md. 521.

Administrator Acting at Suggestion of Surety. — A surety cannot require counter security on account of a neglect of duty by the administrator when such neglect was pursuant to the suggestion of the surety himself. *Mullin's Estate*, 15 Phila. (Pa.) 613, 39 Leg. Int. (Pa.) 478.

Neglect to File Inventory. — In *Pennsylvania* it is held that if an administrator neglects for five months to file an inventory and appraisal, his sureties are entitled to counter-security. *Voght's Estate*, 10 Lanc. Bar (Pa.) 71, 7 Luz. Leg. Reg. (Pa.) 241.

Neglect to File Account. — In *Seitzinger's Estate*, 2 Woodw. (Pa.) 223, it was held that counter-security would not be required on the mere proof that the administrator had omitted to file his account within the prescribed time, where no interests seemed to be at hazard.

A Corporation Authorized to Act as Surety may demand counter-security the same as other sureties. *March v. Fidelity, etc., Co.*, 79 Md. 399.

Failure to Give Counter-Security — Rights of Surety. — Under the *Maryland* statute, if counter-security is not given when ordered, the court may direct the executor or administrator to pay over to the surety the money on hand. *In re McKnight*, 1 App. Cas. (D. C.) 28.

On an application by the sureties for counter-security under the *Kentucky* Act of 1797, the administrator answered that he was unable and unwilling to give such security, and the court ordered that he be removed from office on condition that the petitioning sureties would assume the administration. *Roope v. Rodes*, 7 B. Mon. (Ky.) 109.

1. Right to Counter-Security Not Incident to Contract. — In *Delaney v. Tipton*, 3 Hayw. (Penn.) 14, the court said: "The surety makes himself safe, either by a bond or covenant of indemnity, or the law raises a promise of indemnity on the part of the principal in his favor. If there be a covenant or bond for indemnity, equity will enforce it; but not add to it or alter it. * * * The court cannot make for them a third contract, independent of those already mentioned, namely, that the principal shall give counter-security to the surety when required. For he shall not be subjected to that for which he did not stipulate, nor the surety be entitled to that which he did not originally require."

Contract to Indemnify Surety — Validity. — In *Forsyth v. Woods*, 11 Wall. (U. S.) 484, a surety signed an administration bond under the representation of a firm of which the administrator was a member, that the firm would take possession of the assets of the estate and conduct the administration as a partnership affair, and that the surety would become in effect the surety of the firm and not of the partner who was appointed administrator. It was held that such arrangement was contrary to the policy of the law, because it was designed to enable persons other than the one to whom the administration was granted to obtain possession of the estate, and that therefore the surety could not enforce against the firm any loss sustained by him in consequence of his suretyship.

2. Liability of Executor or Administrator Irrespective of Bond. — *Baltzell v. Hall*, 1 Litt. (Ky.) 100.

An executor "is chargeable independently of his fiducial bond, for whatever assets he received anywhere, and did not legally appropriate." *Fletcher v. Sanders*, 7 Dana (Ky.) 355, 32 Am. Dec. 96.

The liability of an executor to the administrator *de bonis non* who succeeds him exists independently of any bond, and he may be held responsible by such administrator for property of the estate unaccounted for, though there is no bond to sue on, and though the executor was expressly exempted by the testator from giving any. *Dwyer v. Kalteyer*, 68 Tex. 554.

3. Liabilities of Sureties Limited by Terms of Bond. — *McDowell v. Jones*, 58 Ala. 32; *Barbour v. Robertson*, 1 Litt. (Ky.) 93; *Baltzell v. Hall*, 1 Litt. (Ky.) 97; *Arnold v. Babbitt*, 5 J. J. Marsh. (Ky.) 665; *Carr v. Bob*, 7 Dana (Ky.) 417; *Warfield v. Brand*, 13 Bush (Ky.) 77; *Fulcher v. Com.*, 3 J. J. Marsh. (Ky.) 592; *Grady v. Hughes*, 80 Mich. 184; *McGovney v. State*, 20 Ohio 93; *Quinby v. Walker*, 14 Ohio St. 198.

"The liability of a surety in the bond of an administrator or executor is limited by the terms of its covenants, and cannot be extended by implication." *Hooper v. Hooper*, 32 W. Va. 529, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 217.

The Express Language of the Bond cannot be limited or qualified by any misrepresentation made by the administrator to his sureties. *Dayton's Estate*, 4 Kulp (Pa.) 451.

A Surety Stands in No Fiduciary Relation to the beneficiaries of the estate, and therefore he is not precluded from speculating in the assets. *Halsted v. Hyman*, 3 Bradf. (N. Y.) 426.

It Is Only a Contingent Liability that rests on the sureties until the principal shall fail in the performance of a duty required of him by law.¹

The Bond Is Retrospective in its operation, and renders the sureties liable in respect of property received or defaults committed before it was executed.²

Fraud in Procuring Sureties' Signatures. — The fact that the signature of the sureties was procured by the fraud of the administrator does not affect their liability on the bond, if the persons interested in the estate are innocent of the fraud.³

Irregular Execution of Bond. — In some jurisdictions irregularities in the execution of the bond do not affect the liability of the sureties, if the principal has acted under the bond.⁴

Irregular Grant of Administration. — Mere irregularities in the grant of letters of administration do not affect the liabilities of the sureties on the administrator's bond, but it may be effectual as a common-law bond. The recitals of the bond estop the sureties to deny the regularity of the appointment of their principal.⁵

New or Additional Bonds. — If a new bond is given, either to take the place of the former bond on the discharge of the sureties on it, or as additional security, the new sureties are liable for defaults of their principal occurring before the new bond was executed as well as afterwards;⁶ and the same is true

1. Liability of Sureties Contingent Until Breach. — *McDowell v. Jones*, 58 Ala. 25; *Palmer v. Pollock*, 26 Minn. 433. See also *McWilliams v. Norfleet*, 60 Miss. 987.

2. Bond Is Retrospective — *Kansas*. — *Brown v. State*, 23 Kan. 235.

Louisiana. — *Goode v. Buford*, 14 La. Ann. 102.

Massachusetts. — *Choate v. Arrington*, 116 Mass. 552.

Missouri. — *Sherwood v. Hill*, 25 Mo. 391; *State v. Creusbauer*, 68 Mo. 254.

New York. — *Scofield v. Churchill*, 72 N. Y. 565, *affirming* 9 Hun (N. Y.) 157.

Oregon. — *Bellinger v. Thompson*, 26 Oregon 320.

3. Fraud in Procuring Sureties' Signatures. — *McGaughey v. Jacoby*, 54 Ohio St. 487.

4. Irregularities in Execution of Bond. — In *Wright v. Lang*, 66 Ala. 389, it was held that where the sureties delivered the bond to the principal as an escrow, but without objection permitted him to act under it, though the condition had not been performed, they are estopped to deny its validity.

In *Steele v. Tutwiler*, 68 Ala. 107, it was held that though it is irregular to take and approve a bond having only one surety, yet, if the principal acts under it, the surety is liable to the same extent as if there had been two or more sureties. This decision was based on the statute which provides that "when any executor or administrator gives a bond, which is not payable or conditioned as required by law, such bond is not void, but stands, on its condition being broken, subject to all the remedies which could have been maintained on such bond had the same been payable and conditioned as required by law."

Though the Bond Is Not in the Form Prescribed by law, it is nevertheless good, if it was voluntarily given and contains no more than the law requires. *Ordinary v. Cooley*, 30 N. J. L. 179.

5. Irregular Grant of Administration. — The fact that an administrator *de bonis non* with

the will annexed was improperly appointed does not affect the liability of the sureties on the bond, if he acted under the appointment. *Shalter's Appeal*, 43 Pa. St. 83, 82 Am. Dec. 552. See also *Foster v. Com.*, 35 Pa. St. 148.

Letters Granted by Register to Himself. — In *Zeigler v. Sprenkle*, 7 W. & S. (Pa.) 175, it was held that, though letters granted by the register to himself were irregular, the sureties on the bond given by him are nevertheless bound by it. "The public interest and welfare," says Kennedy, J., "require that it should be so, and there is not even the semblance of reason why it should be otherwise. The obligors have no reason whatever to complain that they are held to be bound by their bond according to its tenor, since they entered into it of their own free will and accord."

Sureties Estopped to Question Regularity of Letters — *Alabama*. — *Plowman v. Henderson*, 59 Ala. 559.

Illinois. — *People v. Medart*, 166 Ill. 348.

Massachusetts. — *Cutler v. Dickinson*, 8 Pick. (Mass.) 386.

Pennsylvania. — *Foster v. Com.*, 35 Pa. St. 148; *Shalter's Appeal*, 43 Pa. St. 83, 82 Am. Dec. 552.

Tennessee. — *State v. Anderson*, 16 Lea (Tenn.) 321.

Even if the Letters Are Void, as in the case of a grant of administration on the estate of a living person, the bond is effectual as a common-law bond. *Williams v. Kiernan*, 25 Hun (N. Y.) 355.

So, too, where they are void for want of jurisdiction. *McChord v. Fisher*, 13 B. Mon. (Ky.) 193.

A bond given under a grant of letters while the estate is still in the hands of the public administrator under an appointment which has not been vacated is nevertheless good as a common-law bond. *Power v. Speckman*, 126 N. Y. 354.

6. New Bonds — Sureties Liable for Previous Defaults — *United States*. — *Beard v. Roth*, 35 Fed. Rep. 397.

when an additional surety signs the existing bond for the purpose of strengthening it.¹ In some cases the new sureties incur liabilities in respect to matters occurring before the new bond was given, though no liability rested on the original sureties.² If an additional bond is required to cover the proceeds of real estate sold by the executor or administrator under an order of court, the liability of the sureties extends only to such proceeds.³

Joint Bonds. — If coexecutors or coadministrators execute a joint bond, it has been held that each becomes liable for the others, unless the bond itself

Arkansas. — *Dugger v. Wright*, 51 Ark. 232, 14 Am. St. Rep. 48.

California. — *Powell v. Powell*, 48 Cal. 234; *Lacoste v. Splivalo*, 64 Cal. 35.

Illinois. — *Pinkstaff v. People*, 59 Ill. 148.

Kansas. — *Brown v. State*, 23 Kan. 235.

Massachusetts. — *Dawes v. Edes*, 13 Mass. 177; *Com. v. Gould*, 118 Mass. 300; *Loring v. Bacon*, 3 Cush. (Mass.) 405; *Choate v. Arrington*, 116 Mass. 552.

Missouri. — *State v. Berning*, 74 Mo. 87.

New York. — *Scofield v. Churchill*, 72 N. Y. 565.

Ohio. — *Foster v. Wise*, 46 Ohio St. 20, 15 Am. St. Rep. 542.

South Carolina. — *Enicks v. Powell*, 2 Strobb. Eq. (S. Car.) 196; *Field v. Pelot*, McMull. Eq. (S. Car.) 369; *Swindersine v. Miscally*, Bailey Eq. (S. Car.) 304; *Bobo v. Vaiden*, 20 S. Car. 271.

Tennessee. — *Morris v. Morris*, 9 Heisk. (Tenn.) 814.

Virginia. — *Lingle v. Cook*, 32 Gratt. (Va.) 262.

See also *Modawell v. Hudson*, 57 Ala. 75; *May v. Kelly*, 61 Ala. 489.

"The new bond or the obligation of the new sureties relates back, and the two sets of sureties are jointly liable to the distributees and others for whose benefit they have contracted, for breaches committed prior to the second execution." *Dugger v. Wright*, 51 Ark. 232, 14 Am. St. Rep. 48. See also *State v. Drury*, 36 Mo. 286.

But as between the two sets of sureties the liability of the sureties on the new bond is secondary to that of the sureties on the original bond, as to defaults occurring before the new bond was given. *Corrigan v. Foster*, 51 Ohio St. 225. Unless the matter is regulated by agreement between themselves, and parol evidence is admissible to show their relative liabilities. *Glenn v. Wallace*, 4 Strobb. Eq. (S. Car.) 149, 53 Am. Dec. 657.

There Is a Distinction in this respect between the bonds of executors and administrators and ordinary official bonds, the sureties on which are not liable for any official delinquency or default of their principal occurring before the bond was executed. *Lacoste v. Splivalo*, 64 Cal. 35; *Scofield v. Churchill*, 72 N. Y. 565.

The Benefit of Counter Security taken by the sureties on one of the bonds operates for the benefit of the others also, in the absence of an express agreement. *Wood v. Williams*, 61 Mo. 63; *Wolff v. Schaeffer*, 74 Mo. 154; *Enicks v. Powell*, 2 Strobb. Eq. (S. Car.) 196.

Application of Payments. — A payment by one who is surety on both bonds, without any direction at the time as to its application, will be applied on his liability on the first bond. *Lewis v. Gambs*, 6 Mo. App. 138. See gen-

erally the title APPLICATION OF PAYMENTS, vol. 2, p. 433.

Release of Sureties on Original Bond — Effect. — *Morris v. Morris*, 9 Heisk. (Tenn.) 814. See also *Perry v. Campbell*, 10 W. Va. 228.

Proof of Assets. — The fact that the administrator had assets in hand at the time the additional bond was given is shown by proof that a short time before he had received the proceeds of real estate sold by him, there being no evidence of disbursement or waste. *May v. Kelly*, 61 Ala. 489.

1. New Surety Signing Old Bond. — *State v. Anderson*, 16 Lea (Tenn.) 321.

2. Additional Liabilities of New Sureties. — In *Ennis v. Smith*, 14 How. (U. S.) 400, an administrator *de bonis non* took possession of money into which his predecessor had converted part of the estate, and charged himself with the amount in his account. Afterwards the orphans' court required him to give additional security. It was held that the sureties on the first bond were not liable for the money in question, because, according to the law of the jurisdiction, assets which had been administered by a personal representative did not pass to his successor in office. The sureties in the new bond, however, were held liable for such money. As to them the court was of the opinion that they did not bear the same relation to their principal that the original sureties did, but that in requiring the additional bond, the object of the law and the purpose of the court was to get from the administrator additional and adequate security, for the funds which he had stated in his sworn account to be still unadministered in his hands.

In *Fleece v. Jones*, 71 Ind. 340, it was held that where an administrator with the consent of the heirs, who were all of age, but without an order of court, took the real estate of the decedent to pay debts, and the court, after the sale, recognized it and required the administrator to give an additional bond, the sureties on such bond were liable for the proceeds of the sale.

3. Special Bond on Sale of Real Estate — Sureties Liable Only for Proceeds. — *Com. v. Winters*, 4 W. N. C. (Pa.) 346. See also *supra*, this section, *Necessity of Bond — New or Additional Bonds*.

In *Alabama* the sureties on a special bond given by an administrator on the sale of real estate are not liable for the proceeds of the sale unless the application thereof was directed by the decree of the court. This is by virtue of a statute which provides that the bond shall be "conditioned for the faithful payment and application of the money arising from such sale according to the final decree." *Pettit v. Pettit*, 32 Ala. 288.

shows that they intended otherwise;¹ but that they are principals as to the joint sureties, and therefore they are bound to protect the sureties from the consequences of each other's acts.²

The Amount for Which the Sureties May Be Held Liable is always measured by the liability of the principal,³ except that it cannot in any case exceed the penalty of the bond.⁴

Duration of Liability.—An administration bond remains in force as security for performance by the principal of the duties of his trust as long as the administration is pending, or until the sureties are relieved of liability according to law.⁵

b. PROPERTY COVERED BY BOND.—(1) *General Rule.*—As a general rule an administration bond covers everything belonging to the estate of the decedent that comes into the hands of the personal representative,⁶ but it

1. Joint Bond of Joint Representatives.—Each Liable for Other's Defaults.—*United States.*—*Lidderdale v. Robinson*, 2 Brock. (U. S.) 159.

Alabama.—*Jones v. Jones*, 42 Ala. 218; *Pearson v. Darrington*, 32 Ala. 227; *Williams v. Harrison*, 19 Ala. 277; *Little v. Heard*, 16 Ala. 358; *Little v. Knox*, 15 Ala. 576, 50 Am. Dec. 145; *Elliott v. Mayfield*, 4 Ala. 417.

Georgia.—*Lancaster v. Lewis*, 93 Ga. 727, citing 7 AM. AND ENG. ENCYC. OF LAW, pp. 216, 217.

Indiana.—*Moore v. State*, 49 Ind. 558.

Kentucky.—*Collins v. Carlisle*, 7 B. Mon. (Ky.) 13.

Maryland.—*Clarke v. State*, 6 Gill & J. (Md.) 288, 26 Am. Dec. 576.

Massachusetts.—*Brazer v. Clark*, 5 Pick. (Mass.) 96.

South Carolina.—*Gayden v. Gayden*, Mc-Mull. Eq. (S. Car.) 435.

Tennessee.—*Hughlett v. Hughlett*, 5 Humph. (Tenn.) 453.

See also *Green v. Hanberry*, 2 Brock. (U. S.) 403; *Stephens v. Taylor*, 62 Ala. 269; *Hannum v. Day*, 105 Mass. 33; *Ames v. Armstrong*, 106 Mass. 15; *Nanz v. Oakley*, 120 N. Y. 84; *Boyle v. St. John*, 28 Hun (N. Y.) 454; *Boyd v. Boyd*, 1 Watts (Pa.) 365; *Keowne v. Love*, 65 Tex. 152; *Sparhawk v. Buell*, 9 Vt. 41.

2. Protection of Joint Sureties.—*Little v. Knox*, 15 Ala. 576, 50 Am. Dec. 145; *Dobyns v. McGovern*, 15 Mo. 662; *Hoell v. Blanchard*, 4 Desaus. (S. Car.) 21; *Hughlett v. Hughlett*, 5 Humph. (Tenn.) 453.

But see *Collins v. Carlisle*, 7 B. Mon. (Ky.) 13, in which it was said that where two co-executors executed a joint bond with sureties, each was a surety for the other, and a cosurety with the other sureties.

3. Liability of Sureties Coextensive with Liability of Principal.—*Ward v. Tinkham*, 65 Mich. 695; *Beckett v. Place*, 12 Misc. Rep. (N. Y. Super. Ct.) 323; *Harrison v. Clark*, 87 N. Y. 572; *Kelly v. West*, 80 N. Y. 139; *Casoni v. Jerome*, 58 N. Y. 315.

Value of Assets Received.—The sureties cannot be held chargeable beyond the amount of the assets coming to the hands of the administrator, or which he ought, by due diligence, to have collected. *Thomson v. Searcy*, 6 Port. (Ala.) 393; *Miller v. Gee*, 4 Ala. 359; *Williams v. Hinkle*, 15 Ala. 713; *Outlaw v. Yell*, 5 Ark. 468.

Liability for Waste.—The liability of a surety for waste is the value of the property wasted,

less the commissions that the executor or administrator would have earned but for the misconduct or neglect. *McKim v. Hibbard*, 142 Mass. 422.

Interest on the amount in respect to which the sureties are held liable is also included. *Bell v. Arndt*, 24 Neb. 261; *Hood v. Hayward*, 124 N. Y. 1.

4. Liability of Surety Cannot Exceed Penalty of Bond.—*Com. v. Forney*, 3 W. & S. (Pa.) 353; *Zeigler v. Sprengle*, 7 W. & S. (Pa.) 175. See also *Wade v. Graham*, 4 Ohio 126.

Though the Penalty of the Bond Is the Limit of the sureties' liability it is not the measure, but in each case the amount for which the sureties are liable must be ascertained. *State v. French*, 60 Conn. 478; *McKim v. Bartlett*, 129 Mass. 226; *Brown v. Jacobs*, 24 Neb. 712.

Interest on Penalty.—There is a difference of opinion as to whether interest can be computed on the penalty of the bond for the purpose of increasing the amount for which the sureties may be held liable. It has been said that on principle there seems to be no sound reason why the obligee should not, where the whole penalty has become a debt, which the obligors unjustly detain, recover the penalty and interest upon it during all the time it may have been so detained, and that the better opinion seems to be in favor of allowing interest on the penalty to this extent. *Probate Judge v. Heydock*, 8 N. H. 491.

But it was held to the contrary in *Com. v. Meyerhaven*, 17 Phila. (Pa.) 108, 41 Leg. Int. (Pa.) 174. See also the title SURETYSHIP.

5. See *infra*, this section, *Liabilities on Administration Bonds—Release or Discharge of Sureties*.

6. General Rule—Bond Covers All Assets Received.—*Dawes v. Edes*, 13 Mass. 177.

All Moneys Received under color of official authority are covered by the bond. *Clark v. Fredenburg*, 43 Mich. 263; *Batsell v. Richards*, 80 Tex. 505.

This is the usual provision of the statutes prescribing the form of administration bonds. See the various local codes and statutes in the United States.

In *Massachusetts* the statute formerly provided that the sureties should be liable for property received before as well as after the execution of the bond and the grant of letters. *Dawes v. Edes*, 13 Mass. 177.

By the present statute it is provided that the bond shall be conditioned to administer the

does not cover money or property which did not come into his hands, if he was not entitled to it as the representative of the decedent, or if his failure to obtain possession was not caused by any fault or neglect on his part.¹

(2) *Property Taken Possession of by Heirs.* — It would seem on the principles of estoppel and waiver that the bond does not cover property which the heirs have taken from the possession of the personal representative in a jurisdiction where the heirs are authorized to take the property of the decedent and pay his debts.²

(3) *Property Not Received in Representative Capacity.* — It is held that the sureties on the bond of an executor or administrator are not liable for property received by him, which is neither assets of the estate nor subject to distribution by him, and to which as the legal representative of the decedent he was not entitled,³ though the court erroneously authorized

property which "may come" to the possession of the administrator or of any person for him. Pub. Stat. Mass. 1882, c. 130, § 2, subd. 2.

The English Statute 22 & 23 Car. II., c. 10, provided that the bond should be conditioned well and truly to administer all the goods, chattels, and credits inventoried, and all other goods, chattels, and credits of the decedent coming into the hands of the administrator or any one for him after the making of the inventory. By the later statute (20 & 21 Vict., c. 77), it is provided that the bond shall be conditioned "for duly collecting, getting in, and administering the personal estate of the deceased." 1 Wms. Exrs. (7th Am. ed.), pp. 613, 614.

Damages for Personal Injuries. — The sureties of an administrator are liable for damages recovered and collected in an action brought by him for negligence causing the death of a decedent, and the fact that the next of kin permitted the administrator to pay the debts of the decedent out of the amount of such recovery, though it was not applicable by law to the payment of debts, does not affect the liability of the sureties for the residue remaining after payment of the debts. *Glass v. Howell*, 2 Lea (Tenn.) 50.

Interest on Balances. — The bond of an administrator can be held liable for interest on balances only as they become due, and not for interest on the aggregate sum of principal and interest previously found due by the master. *Chick v. Farr*, 31 S. Car. 463.

Proceeds of Unauthorized Sale. — If an administrator sells personal property of the estate and receives the proceeds, his sureties are liable, though the sale was unauthorized, because made without an order of court. *State v. Scholl*, 47 Mo. 84.

Property Received Before Execution of Bond. — The bond is held to operate retrospectively and to cover property received by the executor or administrator before its execution as well as afterwards.

Alabama. — *May v. Kelly*, 61 Ala. 489.

Illinois. — *McClure v. People*, 19 Ill. App. 105.

Missouri. — *Sherwood v. Hill*, 25 Mo. 391.

New York. — *Gottsberger v. Taylor*, 19 N. Y. 150.

Oregon. — *Bellinger v. Thompson*, 26 Oregon 320.

1. Chattels Unadministered at Representative's Death. — The sureties of an administrator are

not liable for any chattels remaining *in specie* at the administrator's death, because they belong to the administrator *de bonis non*. *Carroll v. Connet*, 2 J. J. Marsh. (Ky.) 206.

Uncollected Debts. — The sureties on the bond of an executor or administrator are not liable for uncollected debts due the estate, if the representative was unable to collect, and the inability was not the result of his fault or neglect. *Lyon v. Osgood*, 58 Vt. 707.

In *Heck's Estate*, 11 Montg. Co. Rep. (Pa.) 66, it was held that the sureties were not liable for money which the administrator did not collect, even though he had charged himself with it.

Money Received for Individually. — The fact that an administrator gives his individual receipt for money of the estate received by him does not affect his representative liability therefor. *Prince v. Towns*, 33 Fed. Rep. 161.

Money Received for but Not Actually Received. — In *Chouteau v. Hill*, 2 Mo. 177, it was held that where an administrator gave a receipt for money due the estate, the sureties were liable for it, though the administrator did not actually receive it.

Money Paid to Heirs. — In *Hooker v. Bancroft*, 4 Pick. (Mass.) 50, it was held that the condition of an administrator's bond was not broken by his failure to account for money paid as a gratuity to the heirs by a supposed debtor of the estate to induce the administrator to withdraw an action which he had brought to recover the supposed debt, there being nothing in fact owing to the estate.

2. As to the right of the heirs to take possession of the property of the decedent and pay his debts, see *supra*, this title, *When Administrator Is Necessary or Proper*.

3. Property Not Received in Representative Right — Sureties Not Liable — *Florida.* — *Pace v. Pace*, 19 Fla. 438.

Massachusetts. — *Forbes v. Allen*, 166 Mass. 569.

New Hampshire. — *Gregg v. Currier*, 36 N. H. 200.

New Jersey. — *Ordinary v. Lippincott*, 10 N. J. L. 35.

Tennessee. — *Reeves v. Steele*, 2 Head (Tenn.) 649; *Snodgrass v. Snodgrass*, 1 Baxt. (Tenn.) 157; *Gambill v. Campbell*, 12 Heisk. (Tenn.) 737.

Virginia. — *Hutcherson v. Pigg*, 8 Gratt. (Va.) 220.

him to receive it.¹

(4) *Equitable Assets*. — According to the principle noted above, that the liabilities of the sureties are determined by the covenants of the bond, it is held that they are not liable for equitable assets under a covenant that the executor or administrator will well and truly administer according to law the "goods, chattels, and credits" of the decedent, because such covenant contemplates only legal duties.² But in some jurisdictions this rule has been changed by statute requiring the bond to be conditioned on the performance by the executor of all his duties,³ and the same result is probably effected by statutes which abolish the distinction between legal and equitable assets.⁴

(5) *Real Estate*. — Whether the sureties on an administration bond are

See also *infra*, this division of this section, *Acts and Functions Covered by Bond*.

The sureties cannot be held liable for assets which do not legally come to the administrator's hands, even though he charges himself with the receipt of them. *Ennis v. Smith*, 14 How. (U. S.) 400; *McCampbell v. Gilbert*, 6 J. J. Marsh. (Ky.) 592; *Harker v. Irick*, 10 N. J. Eq. 269.

Funds Received by an Administrator De Bonis Non from his predecessor have been held not to be covered by his bond, where he was not legally entitled to receive or recover them in the discharge of his legal duties, such as the proceeds of property which the original administrator had converted into money. *Ennis v. Smith*, 14 How. (U. S.) 400; *Warfield v. Brand*, 13 Bush (Ky.) 77.

Assets Not Subject to General Administration Purposes, however, are covered by the bond if the executor or administrator had the right to receive them. Thus in some jurisdictions it is provided by statute that the proceeds of insurance policies on the life of a decedent shall inure to the benefit of his widow and children free from his debts (see *supra*, this title, *Assets — Insurance Money — Life Insurance*); and such statutes are held to create only an exemption of the insurance money from the debts of the decedent, and to provide for distribution immediately to the widow and children, leaving the title for the recovery thereof in the executor or administrator. Therefore the sureties are liable for such money when it has been collected by their principal. *State v. Anderson*, 16 Lea (Tenn.) 321.

Partnership Property. — In *Pearson v. Keedy*, 6 B. Mon. (Ky.) 128, it was held that partnership funds coming to the hands of the surviving partner, who had been appointed administrator of the deceased partner, came to him as survivor and not as administrator, and that therefore the sureties on the administration bond were not liable. See also *Orrick v. Vahey*, 49 Mo. 428.

In *Hooper v. Hooper*, 32 W. Va. 526, it was held that if the survivor wastes the firm assets, and, when the partnership affairs are or under the law should be regarded as closed, the survivor is insolvent, his sureties as personal representative are not liable; but if he is solvent at that time they are liable. *Compare Caskie v. Harrison*, 76 Va. 85.

Money Received to Use of Particular Individuals. — Where an executor or administrator receives money to the use of a particular individual, the receipt operates as a specific appropriation

of that money; and the executor or administrator must be liable for the money so received in his individual capacity, it having nothing to do with the accounts of the decedent. *Little-dale, J.*, in *Ashby v. Ashby*, 7 B. & C. 444, 14 E. C. L. 77. See *Churchill v. Bertrand*, 3 Q. B. 568, 43 E. C. L. 871; *Cronan v. Cotting*, 99 Mass. 334.

Thus, in *Johnson v. Hall*, 101 Ga. 687, it was agreed between the heirs of whom the administrator was one that certain real estate of the decedent should not be administered, but should be sold at private sale. The sale was made accordingly, and a deed to the purchaser was executed by the heirs. The administrator having received the share of one of the heirs in the purchase money and failed to pay it over, such heir sought to recover the amount in an action on the bond; but it was held that the sureties were not liable, because the administrator was under no duty and had no right to receive the money.

In *Smith v. Smith*, 10 Ky. L. Rep. 636, the testator, after conveying land to his son J., in consideration of J.'s agreement to pay four thousand five hundred dollars to his seven brothers and sisters, bequeathed the four thousand five hundred dollars equally to said seven children. It was held that J.'s failure to pay the money to his brothers and sisters was merely the delinquency of a debtor, and that the sureties on his executor's bond were therefore not liable. See also *Campbell v. Sacray*, (Ky. 1898) 44 S. W. Rep. 980.

Money Collected After Removal from Office. — The sureties are not liable for money collected by the principal after he has been removed from office. *Brooks v. Jackson*, 125 Mass. 307.

1. **Erroneous Authorization by the Court to Receive Property**. — *Young v. People*, 35 Ill. App. 363.

2. **Equitable Assets — Liability of Sureties Dependent on Covenants of Bond**. — *Speed v. Nelson*, 8 B. Mon. (Ky.) 499; *Clay v. Hart*, 7 Dana (Ky.) 1; *Heeter v. Jewell*, 6 Bush (Ky.) 510; *Hughlett v. Hughlett*, 5 Humph. (Tenn.) 453; *Lester v. Vick*, 2 Heisk. (Tenn.) 476; *Porter v. Moores*, 4 Heisk. (Tenn.) 16; *Harrison v. Henderson*, 7 Heisk. (Tenn.) 315; *Wall v. Allen*, 4 Baxt. (Tenn.) 210.

3. **Sureties Liable by Statute for Equitable Assets**. — *Speed v. Nelson*, 8 B. Mon. (Ky.) 499; *Hughlett v. Hughlett*, 5 Humph. (Tenn.) 453.

4. **Distinction Between Legal and Equitable Assets Abolished**. — See *supra*, this title, *Assets — Equitable Assets*.

liable for the proceeds or the rents and profits of real estate which may come into the hands of the personal representative, depends principally on the terms of the bond. When the condition is merely to administer the "goods, chattels, and credits" of the decedent, it is generally held that the sureties incur no liability in respect to the real estate.¹

Proceeds of Sale Under Power in Will. — Accordingly, when such is the condition of the bond, it is not considered as covering the proceeds of real estate sold under a power in the will for the payment of debts,² though some authorities give it that effect by a construction borrowed from the doctrine of equitable conversion.³

Statutory Provisions. — Recent legislation has extended the powers of personal representatives in respect to the real estate and enlarged the scope of the bond, so that it is now a very general rule that the sureties are responsible for the proceeds or rents and profits of realty received by the executor or administrator in his representative capacity, as well as for personal property.⁴

1. Sureties Not Liable in Respect to Real Estate — Bond Conditioned to Administer Goods, Chattels, and Credits — Delaware. — *State v. Brown*, 2 Harr. (Del.) 5.

Indiana. — *State v. Barrett*, 121 Ind. 92; *Hankins v. Kimball*, 57 Ind. 42; *Rodman v. Rodman*, 54 Ind. 444.

Kentucky. — *Speed v. Nelson*, 8 B. Mon. (Ky.) 499; *Slaughter v. Froman*, 2 T. B. Mon. (Ky.) 95; *Oldham v. Collins*, 4 J. J. Marsh. (Ky.) 49; *McC Campbell v. Gilbert*, 6 J. J. Marsh. (Ky.) 595; *Heer v. Jewell*, 6 Bush (Ky.) 512; *Wilson v. Unselt*, 12 Bush (Ky.) 216; *Williams v. Walters*, 3 Ky. L. Rep. 336; *Stuart v. Hathaway*, 4 Ky. L. Rep. 438; *Eastin v. Hatchitt*, 15 Ky. L. Rep. 780.

Massachusetts. — *Gibson v. Farley*, 16 Mass. 280.

Mississippi. — *Rucker v. Dyer*, 44 Miss. 591. *New Hampshire.* — *Gregg v. Currier*, 36 N. H. 200.

New York. — *Matter of Woodworth*, 5 Dem. (N. Y.) 156.

Pennsylvania. — *M'Coy v. Scott*, 2 Rawle (Pa.) 222, 19 Am. Dec. 640; *Reed v. Com.*, 11 S. & R. (Pa.) 441; *Haslage v. Krugh*, 25 Pa. St. 97; *Com. v. Hilgert*, 55 Pa. St. 236.

Rhode Island. — *Probate Ct. v. Hazard*, 13 R. I. 3.

South Carolina. — *Allen v. Burton*, 1 McMull. L. (S. Car.) 249; *Wiley v. Johnsey*, 6 Rich. L. (S. Car.) 355.

Virginia. — *Burnett v. Harwell*, 3 Leigh (Va.) 89; *Hutcherson v. Pigg*, 8 Gratt. (Va.) 220.

Fixtures. — Machinery built into the wall, forming a part of it, is real estate, and the administrator and his sureties are not liable for its value. *Coey's Estate*, Tuck. (N. Y.) 125.

2. Proceeds of Real Estate Sold Under Will Sureties Not Liable — Kentucky. — *Speed v. Nelson*, 8 B. Mon. (Ky.) 499.

Massachusetts. — *White v. Ditson*, 140 Mass. 351, 54 Am. Rep. 473.

Rhode Island. — *Probate Ct. v. Hazard*, 13 R. I. 3.

Tennessee. — *Hughlett v. Hughlett*, 5 Humph. (Tenn.) 453.

Virginia. — *Jones v. Hobson*, 2 Rand. (Va.) 483; *Burnett v. Harwell*, 3 Leigh (Va.) 89; *Boyd v. Boyd*, 3 Gratt. (Va.) 109.

In most jurisdictions the form of the bond

has been changed by statute so as to cover the proceeds of real estate sold under a direction in the will. See the next succeeding paragraph of this section relating to statutory provisions.

3. Liability on Theory of Equitable Conversion. — *Hartzell v. Com.*, 42 Pa. St. 453; *Com. v. Forney*, 3 W. & S. (Pa.) 353; *Zeigler v. Sprenkle*, 7 W. & S. (Pa.) 175.

4. Liability of Sureties Extended by Statute. — In many jurisdictions the condition of administration bonds has been extended by statute so as to require the executor or administrator to perform all the duties of his trust, and such condition is held to include the proper application of the proceeds or rents and profits of real estate which may come into his hands in his representative capacity, and to render the sureties liable therefor, whether he acts under a power in the will or under an order of court.

Indiana. — *Worgang v. Clipp*, 21 Ind. 119, 83 Am. Dec. 343; *Reno v. Tyson*, 24 Ind. 56; *Hankins v. Kimball*, 57 Ind. 45.

Maine. — *Decker v. Decker*, 74 Me. 465.

Maryland. — *Cornish v. Willson*, 6 Gill (Md.) 299.

New Jersey. — *Matter of Givens*, 34 N. J. Eq. 191.

Ohio. — *Griswold v. Frink*, 22 Ohio St. 90; *Wade v. Graham*, 4 Ohio 126.

Virginia. — *Reherd v. Long*, 77 Va. 829. See also statutes in other states.

In Alabama the duty is imposed by statute on executors and administrators to rent the real estate of the decedent in certain cases, and if they neglect to do so the sureties on the administration bond are liable for the loss caused by such failure. *May v. Kelly*, 61 Ala. 489; *James v. Faulk*, 54 Ala. 184; *Pearson v. Darrington*, 32 Ala. 227.

In Delaware the statute (Act 1837) provides that the condition of the bond shall extend to rents and profits of real estate of the deceased received by the executor or administrator, and it is held that under this statute the sureties are liable for the rents and profits received, though such condition is not expressed in the bond. *State v. Waples*, 5 Harr. (Del.) 257.

This statute is still in force. See Rev. Code Del. 1893, c. 89, § 14.

In Maryland the sureties of an executor or administrator were not responsible before Act

(6) *Allowances to Decedent's Family.* — The liability of the sureties on an administration bond for the amount of statutory exemptions in favor of the family of the decedent depends on the duties imposed by the statute on the executor or administrator with reference to the exemptions. In those jurisdictions where an allowance is made directly to the family, and provision is made for setting it apart without the intervention of the personal representative, he is charged with no duty in respect to it, except to pay over or deliver it, if it is in his hands, and his sureties are not liable if he fails to make such payment or delivery, or if he converts to his own use the money or property so set apart, though he may be liable personally.¹ But in those jurisdictions where the statutes require the executor or administrator to set aside and pay over or deliver the amount of money or the specific articles allowed, the sureties on his bond are liable for the nonperformance of such duty.²

(7) *Debts Due from Executor or Administrator.* — There are two opposing lines of decisions in regard to the liability of the sureties on an administration bond for debts due from the executor or administrator to the estate. According to the one, such debts are regarded as paid as soon as the debtor becomes the personal representative of his deceased creditor, and his sureties are held liable therefor, as for so much cash received, though he was insolvent during

1831, c. 315, for the proceeds of a sale of the realty for the payment of debts. *Cornish v. Willson*, 6 Gill (Md.) 299.

In *Missouri* the bond is conditioned for the faithful administration of "the estate," and so is held to cover whatever comes to the hands of the executor or administrator in the course of his administration, including the rents and profits or the proceeds of land. *Governor v. Chouteau*, 1 Mo. 731.

It is accordingly held in *Missouri* that if an executor or administrator assumes the management of the real estate and collects the rents and profits, or if the will gives an executor authority to sell, and he exercises it, his sureties are liable for the rents and profits, or the proceeds of sale, as the case may be. *Gamage v. Bushell*, 1 Mo. App. 416; *Lewis v. Carson*, 16 Mo. App. 342; *Dix v. Morris*, 66 Mo. 514; *Stong v. Wilkson*, 14 Mo. 116.

In *New Hampshire* the rule is the same as in *Missouri*. *Probate Judge v. Heydock*, 8 N. H. 491.

Damages to Land Levied on for Debt Due Estate. — Where land levied on under execution for a debt due the estate is taken for public uses, and the damages awarded for the taking are paid to the administrator, the sureties are liable, the time to redeem from the execution having expired. *Phillips v. Rogers*, 12 Met. (Mass.) 405.

Partition Sale. — Where the statute imposes on the personal representative the duty of selling the real estate for purposes of partition, the sureties on the bond are liable for the proceeds of such sales. *Campbell v. English*, *Wright* (Ohio) 119.

Void Sale. — If a sale made by an administrator is void the sureties on the bond are not chargeable with the proceeds. *Pettit v. Pettit*, 32 Ala. 288. See also *Young v. People*, 35 Ill. App. 363.

Effect of Special Bond. — In *Alabama* the sureties on the general administration bond are liable for the proceeds of real estate sold by the administrator, where the sureties on the special bond were not liable because the court

did not direct the disposition of the proceeds. *Pettit v. Pettit*, 32 Ala. 288.

In *Massachusetts* the sureties on the general bond of an executor, who has sold real estate under a license of the probate court for the payment of debts, legacies, and charges of administration, are not liable for his failure to pay over to the residuary legatees the balance remaining after such payments, though he charged himself with it in his general account, if he had also given a special bond with sureties to account for and dispose of the proceeds according to law. *Robinson v. Millard*, 133 Mass. 236.

But where the special bond was conditioned that "after the payment of the debts, he will secure the surplus on interest," the sureties on it are not liable for his failure to pay debts with the proceeds, but it seems that the sureties on the general bond are liable. *Baylies v. Chace*, 1 Pick. (Mass.) 230.

Sale Without Order of Court. — A special bond given to secure the proceeds of a sale for the payment of debts renders the sureties liable for such proceeds, though the sale was made before the bond was given and without an order of court. *Fleece v. Jones*, 71 Ind. 340.

Failure to Require Special Bond. — The sureties on the general administration bond are liable for the proceeds of real estate sold under an order of court, though the sale was irregular in that a special bond was not taken as required by law. *Evans v. Gerken*, 105 Cal. 311.

1. **Allowances to Decedent's Family — When Sureties Not Liable for.** — *Morris v. Morris*, 9 Heisk. (Tenn.) 815; *Rocco v. Cicalla*, 12 Heisk. (Tenn.) 508. See also *Bayless v. Bayless*, 4 Coldw. (Tenn.) 359. Compare other local statutes.

2. **Sureties Liable in Some Jurisdictions.** — *Com. v. Longenecker*, 1 Chest. Co. Rep. (Pa.) 202. See also *infra*, this title, *Accounting — Credits — Payments to or for Benefit of Legatees and Distributees — Support of Decedent's Family; Statutory Grounds.*

the whole period of the administration.¹ According to the other line of decisions, a debt owing by an executor or administrator to the decedent's estate is regarded, so far as the liability of the sureties is concerned, in the same light as if the debt were due from a third person. That is, the sureties are liable in case actual payment to the estate is not made, only when the executor or administrator has not exercised the same diligence and good faith that are required in collecting debts due from strangers, and therefore they are not liable if the executor or administrator was insolvent during the whole period of his administration,² even though he has charged the debt in his account as available assets.³ But if he was solvent when he received his letters, and afterwards became insolvent without having paid his indebtedness to the estate, then the sureties are liable for it.⁴

(8) *Foreign Assets*. — In another part of this article the rule has been stated that an executor or administrator is not chargeable in his account with foreign assets unless they have been actually received by him or brought

1 **Rule that Sureties Are Liable for Debt of Insolvent Representative** — *Alabama*. — *Purdum v. Tipton*, 9 Ala. 914; *Wright v. Lang*, 66 Ala. 389.

California. — *Treweek v. Howard*, 105 Cal. 434.

Connecticut. — *Davenport v. Richards*, 16 Conn. 310.

Maryland. — *Lambrecht v. State*, 57 Md. 240.

Massachusetts. — *Winship v. Bass*, 12 Mass. 203; *Sigourney v. Wetherell*, 6 Met. (Mass.) 558; *Stevens v. Gaylord*, 11 Mass. 269; *Ipswich Mfg. Co. v. Story*, 5 Met. (Mass.) 313; *Kinney v. Ensign*, 18 Pick. (Mass.) 236; *Benchley v. Chapin*, 10 Cush. (Mass.) 176; *Leland v. Felton*, 1 Allen (Mass.) 535; *Mattoon v. Cowing*, 13 Gray (Mass.) 387; *Chapin v. Waters*, 110 Mass. 195.

Ohio. — *McGaughey v. Jacoby*, 54 Ohio St. 487; *Perkins v. Scott*, 9 Ohio Cir. Ct. Rep. 207, 2 Ohio Dec. 496.

South Carolina. — *Schnell v. Schroeder*, *Bailey Eq. (S. Car.)* 334; *Jacobs v. Woodside*, 6 S. Car. 490; *Twitty v. Houser*, 7 S. Car. 153; *Charles v. Jacobs*, 9 S. Car. 295.

2 **Rule that Sureties Are Not Liable for Debts of Insolvent Representative** — *Indiana*. — *State v. Gregory*, 119 Ind. 503.

Maine. — *Potter v. Titcomb*, 7 Me. 302.

It was not expressly held in this case that an executor or administrator may show his insolvency as a reason for not charging him in his account with a debt due from him to the decedent, but it seems that such conclusion would follow from the point decided, viz., that in order to compel an administrator, on his official bond, to pay the amount of a debt due from him to the intestate, it is necessary that he should first be charged with the amount, in an administration account, by a decree of the judge of probate.

Missouri. — *Scott v. Governor*, 1 Mo. 686; *McCarty v. Frazer*, 62 Mo. 263; *Young v. Thrasher*, 48 Mo. App. 327.

New Jersey. — *Harker v. Irick*, 10 N. J. Eq. 269.

New York. — *Gottsberger v. Smith*, 5 Duer (N. Y.) 566, 19 N. Y. 150; *Burkhalter v. Norton*, 3 Dem. (N. Y.) 610; *Keegan v. Smith*, 25 Civ. Pro. Rep. (N. Y. City Ct.) 417; *Baucus v. Barr*, 45 Hun (N. Y.) 582, 107 N. Y. 624. See

also dissenting opinion by Miller, J., in *Baucus v. Stover*, 89 N. Y. 1.

Ohio. — It has been so held in Ohio. *McCoy v. Allen*, 9 Ohio Cir. Ct. Rep. 607, 3 Ohio Dec. 511. But see, *contra*, the decision of the Supreme Court, in *McGaughey v. Jacoby*, 54 Ohio St. 487.

Pennsylvania. — *Garber v. Com.*, 7 Pa. St. 265; *Matter of Piper*, 15 Pa. St. 533.

Tennessee. — *Spurlock v. Earles*, 8 Baxt. (Tenn.) 437; *Rader v. Yeargin*, 85 Tenn. 486. In the case last cited *Folkes, J.*, said (at page 490), that the liability of the sureties on an administrator's bond for a debt of the administrator to the decedent is the same as where the debt was due from a stranger.

Vermont. — *Lyon v. Osgood*, 58 Vt. 707. Compare *Probate Ct. v. Merriam*, 8 Vt. 234.

Proof of Insolvency on Accounting. — In some jurisdictions it is held that the executor or administrator may on his accounting show his insolvency in order to relieve his sureties of liability for his indebtedness to the decedent. *Garber v. Com.*, 7 Pa. St. 265; *Burkhalter v. Norton*, 3 Dem. (N. Y.) 610; *Baucus v. Barr*, 45 Hun (N. Y.) 582, 107 N. Y. 624.

In *New Hampshire* the question whether the sureties of a debtor executor or administrator are relieved of liability for the debt by fact that the executor or administrator was at the time of his appointment and ever since has been insolvent has not been decided, though it has been held that on the accounting the executor or administrator, whether solvent or insolvent, is chargeable with the amount of his debt to the decedent. *Norris v. Towle*, 54 N. H. 290; *Jones v. Chase*, 55 N. H. 234.

In *North Carolina* it has been held that if an administrator had the ability to pay his debt to the estate, though his property was not subject to legal process, his bondsmen are liable. *Gay v. Grant*, 101 N. Car. 206.

3 **Charging Debt as Available Assets**. — *Lyon v. Osgood*, 58 Vt. 707.

4 **Sureties Liable for Debts of Solvent Representative**. — *Condit v. Winslow*, 106 Ind. 142; *Matter of Piper*, 15 Pa. St. 533; *Rader v. Yeargin*, 85 Tenn. 486; *Probate Ct. v. Merriam*, 8 Vt. 234. See also cases cited *infra*, this title, *Accounting — Charges — Choses in Action: Sales by Executors and Administrators*.

within the jurisdiction of the court under whose authority he is acting,¹ and the liability of his sureties is predicated on the same state of facts.²

(9) *Property Held by Decedent in Trust.* — In regard to property held by a decedent in trust, it has been decided that if the executor or administrator received it in his representative capacity, he and his sureties are liable on his bond for the proper application of it.³ But if he received the trust property not in his representative capacity, but as a trustee, the sureties on the administration bond are not liable.⁴

c. ACTS AND FUNCTIONS COVERED BY BOND. — The acts and functions in respect to which the sureties on an administration bond are liable are such only as relate to the discharge of the official duty of the executor or administrator,⁵ and do not include any acts which are beyond the scope of his powers and duties, even though such acts are pursuant to an order of court,⁶ or any

1. *Liability to Account for Foreign Assets.* — See *infra*, this title, *Accounting — Charges — Foreign Assets.*

2. *Liability of Sureties for Foreign Assets.* — *Fletcher v. Sanders*, 7 Dana (Ky.) 345, 32 Am. Dec. 96; *Cabanne v. Skinker*, 56 Mo. 357; *Governor v. Williams*, 3 Ired. L. (25 N. Car.) 152, 38 Am. Dec. 712. See also Probate Judge *v. Heydock*, 8 N. H. 491; *State v. Osborn*, 71 Mo. 86.

Land Sold Under Power in Will. — It has been held that where an executor qualifies as such in one state and sells lands belonging to the testator in another state, under a power conferred on him by the will, the sureties are not liable for the proceeds. *Cabanne v. Skinker*, 56 Mo. 357; *Emmons v. Gordon*, 140 Mo. 490. But see *contra*, *Hooper v. Hooper*, 29 W. Va. 276.

3. *Trust Property — Liability of Sureties.* — *Matter of Hobson*, 61 Hun (N. Y.) 504, *affirming* 131 N. Y. 575, 30 N. E. Rep. 63. See also *De Valengin v. Duffy*, 14 Pet. (U. S.) 282; *Perkins v. Perkins*, 46 N. H. 110; *Graham v. Van Duzer*, 2 Redf. (N. Y.) 322; *Calyer v. Calyer*, 4 Redf. (N. Y.) 305. Compare *Wells v. Wallace*, 2 Redf. (N. Y.) 58; *Du Bois v. Brown*, 1 Dem. (N. Y.) 317; *Matter of Collyer*, 4 Dem. (N. Y.) 24.

4. *When Sureties Are Not Liable for Trust Property.* — In *Quinby v. Walker*, 14 Ohio St. 193, the testator held certain bonds in trust to collect and pay over the income to the beneficiaries. On his death his executor took possession of the trust funds, though the will did not purport to make any disposition of them. The beneficiaries acquiesced in this act of the executor and did not call on him to account until many years after the final settlement of his accounts as executor. On this state of facts it was held that the executor in taking possession of the trust funds acted as trustee and not as executor, and that therefore the sureties on his bond were not liable for the misappropriation by him of such funds.

5. *Acts and Functions Covered — Performance of Duties Imposed by Law — Indiana.* — *Hinds v. Hinds*, 85 Ind. 312; *Worgang v. Clipp*, 21 Ind. 119, 83 Am. Dec. 343.

Kentucky. — *Clay v. Hart*, 7 Dana (Ky.) 1; *Speed v. Nelson*, 8 B. Mon. (Ky.) 503; *Neely v. Merritt*, 9 Bush (Ky.) 346; *Warfield v. Brand*, 13 Bush (Ky.) 77.

Maine. — *Groton v. Ruggles*, 17 Me. 137; *Williams v. Cushing*, 34 Me. 373.

Missouri. — *State v. Anthony*, 30 Mo. App. 638.

Mississippi. — *Davis v. Hoopes*, 33 Miss. 173. *New Hampshire.* — *Gregg v. Currier*, 36 N. H. 200; *Leavitt v. Wooster*, 14 N. H. 550.

North Carolina. — *McLean v. McLean*, 88 N. Car. 394.

Ohio. — *Wade v. Graham*, 4 Ohio 126.

Pennsylvania. — *Com. v. McGovern*, 4 Pa. Super. Ct. Rep. 598.

South Carolina. — *Ordinary v. Bonner*, 2 Hill L. (S. Car.) 468.

In *Alabama* the bond covers all the duties of an administrator, and includes the sale of land, in case of insolvency, as well as the administration of the personality. *Clarke v. West*, 5 Ala. 117.

Acts of Third Persons. — An executor or administrator may adopt the act of third persons so as to render his sureties liable. It was so held where an executor permitted his wife to appropriate money of the estate to her own use. *Smith v. Jewett*, 40 N. H. 513.

But where the property of the estate was carried away by a public enemy the sureties were not held liable for the loss. *Ordinary v. Corbett*, 1 Bay (S. Car.) 328.

Acts Committed Before Execution of Bond. — The sureties on the bond are liable for the acts of their principal committed before the bond was executed as well as afterwards. *Bellinger v. Thompson*, 26 Oregon 320. And see *supra*, this section, *Property Covered by Bond — General Rule*, first note.

Fraud of Executor or Administrator. — The sureties are liable for the fraud of the executor or administrator in exercising the functions of his office as well as for his defaults, when it is prejudicial to the persons entitled to complain. *Campbell v. State*, 62 Md. 1. See also *infra*, this section, *Breach of Bond*.

6. *Reporting an Estate as Insolvent* is not one of the official duties of an administrator in *Maine*, but is the duty of the commissioners of insolvency, and therefore the sureties on the administrator's bond are not liable in respect to such report, if the administrator undertakes to make it. *Nelson v. Woodbury*, 1 Me. 251.

Administrator Acting as Agent of Heirs. — The sureties of an administrator are not liable for his defaults as agent or trustee of the heirs in collecting the rents of real estate. *Denton v. Crouch*, (Ky. 1897) 41 S. W. Rep. 277.

An Administrator Who Is Ordered to Apply a Fund to the Support of Infants does not act in the

acts which render him liable personally, and not in his representative capacity.¹

Administration by Agent of Creditor. — Where the agent of a creditor of the decedent takes out letters of administration pursuant to a power of attorney given him by his principal, the sureties on his bond are not liable to such creditor.²

Executor or Administrator Acting in Other Fiduciary Capacities. — As a general rule the bond of an executor or administrator covers only his duties in that capacity, and not duties as trustee under the will, or in any other fiduciary relation which he may occupy, if the two offices are clearly separable,³ unless it is otherwise provided by statute,⁴ or unless the bond by its terms covers all the

performance of that duty as administrator, because the court has no authority to make such order, and therefore his sureties are not liable if he converts the fund to his own use. *State v. Anthony*, 30 Mo. App. 638.

Holding Fund Until Death of Life Beneficiary. — Where an administrator on the distribution of the proceeds of real estate was ordered by the court to retain the share of the widow during her life and pay her interest on it annually, and at her death to pay it to the persons entitled in remainder, it was held that the sureties were liable to the remaindermen, because the order did not impose any additional obligation on the administrator. *Com. v. McGovern*, 4 Pa. Super. Ct. Rep. 598.

1. Note Given for Debt of Decedent. — Within the principle that the bond stands as security only so far as the executor or administrator was acting in the performance of his representative duties, the sureties are not liable on a bond given by him for a debt of the decedent, because the execution of such bond is the personal act of the representative for which he is liable only in his individual capacity. *McLean v. McLean*, 88 N. Car. 394.

Breach of Covenant in Deed by Administrator. — The covenants in a deed by an administrator who sells and conveys real estate under an order of court are merely personal, and no liability rests on his sureties in respect to them. *Merrill v. Harris*, 26 N. H. 142, 57 Am. Dec. 359. See also *infra*, this title, *Sale of Real Estate Under Order of Court*.

Suing Out Injunction. — The sureties on an administrator's bond are not liable for damages caused by his improperly suing out an injunction, though he was not required to give an injunction bond. *Davis v. Hoopes*, 33 Miss. 173.

A Private Agreement with the Distributees to sell some of the property at a private sale for their benefit is not a representative act, and therefore the sureties on the bond are not liable for its breach. *Kennedy v. Adickes*, 37 S. Car. 174.

Executor Who Is Tenant for Life. — The sureties of an executor to whom the will gave property for life are not liable if he wastes it. *Felder v. Rose*, 1 Mo. App. Rep. 336; *Sarle v. Probate Ct.*, 7 R. I. 270.

An Agreement to Pay Interest for Forbearance by a creditor creates only a personal liability on the administrator making the agreement, and the sureties on his bond are not liable. *Ordinary v. Bonner*, 2 Hill L. (S. Car.) 468.

2. Administration by Agent of Creditor. — *Moodie v. Penman*, 3 Desaus. (S. Car.) 482.

3. Bond Covers Only Duties as Personal Representative. — *Barker v. Stanford*, 53 Cal. 451;

Hinds v. Hinds, 85 Ind. 312; *Warfield v. Brand*, 13 Bush (Ky.) 77; *Warren v. Benton*, 3 Ky. L. Rep. 332; *Odell v. Howle*, 77 Va. 361.

A Sale of Property of the Estate by an administrator is not an act for which his sureties are liable where he made the sale not in his capacity as administrator, but as a commissioner of the court which ordered the sale, which was made for the purpose of division among the next of kin, and not for the payment of debts. *Roper v. Burton*, 107 N. Car. 526. Compare *Brandon v. Mason*, 1 Lea (Tenn.) 615.

If the Two Offices Are Not Clearly Separable the sureties on the administration bond will be liable for all the acts of their principal in dealing with the estate. *Dorr v. Wainwright*, 13 Pick. (Mass.) 328; *Towne v. Ammidown*, 20 Pick. (Mass.) 535.

A Personal Trust Only, and Not an Official or Executorial Duty, is imposed by a devise to executors, "hereinafter named, for the use and benefit of" persons named, in trust to sell, on specified terms, and to divide the proceeds of sale among the persons named; and consequently the sureties on the official bond of the executors are not responsible for their failure to pay over the proceeds of sale as directed by the will. *Perkins v. Lewis*, 41 Ala. 649, 94 Am. Dec. 616; *Anderson v. McGowan*, 42 Ala. 280.

Same Person Administrator of Debtor and Creditor Estates. — Where the estate of one decedent is indebted to the estate of another, and the same person is administrator of both, and wastes the assets of the debtor estate, instead of paying them over to the creditor estate as he should have done, the sureties for his due administration of the creditor estate are liable for such default and devastavit. *Morrow v. Peyton*, 8 Leigh (Va.) 54.

Where the same person is administrator of one estate and executor of another, the sureties on the bond given by him as administrator do not incur any liability in respect to his acts as executor of the other estate, though the testator and the intestate were partners in business. *Norman v. Buckner*, 135 U. S. 500.

A Person Appointed Both Trustee and Executor must give a separate bond for each position. *Deering v. Adams*, 37 Me. 264; *P. C. & St. L. R. Co. v. Schmidt*, 4 Ohio Cir. Dec. 535.

4. In Tennessee it was provided by the Act of 1838, c. 111, § 18, that an executor and his sureties should be liable on his bond as executor for the performance of the trusts of the will, but that act is not in force now. *Porter v. Moores*, 4 Heisk. (Tenn.) 16; *Lester v. Vick*, 2 Heisk. (Tenn.) 476; *Hughlett v. Hughlett*, 5, *Humph. (Tenn.)* 453.

duties imposed by the will, in which event the sureties are liable for the exercise of testamentary trusts.¹ It is often a matter of difficulty to determine in which capacity particular acts have been done, but it is generally considered that until an executor or administrator who is also a guardian or trustee has rendered an account or done some act to indicate that he has transferred the property from himself in the one capacity to himself in the other capacity, he acts as executor or administrator, and his sureties are liable accordingly.²

d. BREACH OF BOND — (1) Failure to Return Inventory. — The first condition of the bond ordinarily is that the executor or administrator will make and return a true inventory of the estate within a certain time, and a failure to do so is a breach of the bond for which an action will lie against him and his sureties.³ But a breach cannot be predicated on the neglect to inventory

1. Bond Conditioned for Performance of All Duties Imposed by Will. — *State v. Wilmer*, 65 Md. 178; *Walker v. Potilla*, 7 Lea (Tenn.) 449.

A Condition to Perform Duties "Enjoined by Law" does not include testamentary trusts. *Carter v. Young*, 9 Lea (Tenn.) 210.

2. Executor or Administrator Acting in Other Capacities — *United States*. — *Pratt v. Northam*, 5 Mason (U. S.) 95. See also *Taylor v. Debbols*, 4 Mason (U. S.) 131.

District of Columbia. — *U. S. v. May*, 4 Mackey (D. C.) 4.

Illinois. — *Bell v. People*, 94 Ill. 230.

Indiana. — See *Hinds v. Hinds*, 85 Ind. 315.

Kentucky. — *Allen v. Kennedy*, (Ky. 1888) 8 S. W. Rep. 882.

Maine. — *Briggs v. Baptist Church*, (Me. 1887) 8 Atl. Rep. 257.

Maryland. — *Watkins v. State*, 2 Gill & J. (Md.) 220; *Seegar v. State*, 6 Har. & J. (Md.) 162, 14 Am. Dec. 265.

Compare Woolley v. Price, 86 Md. 176, holding that where a share of the estate was bequeathed to the executor in trust for a third person, such share, at the expiration of the time limited for the settlement by the executor passed by operation of law to him as trustee, and that his dealings with it thereafter were as trustee, and did not impose any liability on the sureties on his bond as executor.

Massachusetts. — *Parker v. Sears*, 117 Mass. 513; *White v. Ditson*, 140 Mass. 351, 54 Am. Rep. 473.

Michigan. — *Cranson v. Wilsey*, 71 Mich. 356. See also *Calkins v. Smith*, 41 Mich. 412; *Brown v. Forsche*, 43 Mich. 497.

North Carolina. — *Ruffin v. Harrison*, 81 N. Car. 208.

Oregon. — *Bellinger v. Thompson*, 26 Oregon 320.

South Carolina. — *Burnside v. Robertson*, 28 S. Car. 583.

Virginia. — *Swope v. Chambers*, 2 Gratt. (Va.) 319.

A Final Settlement of the accounts of an executor who is also a trustee under the will does not relieve the sureties on his executor's bond, unless he was formally discharged as executor, or his acts show that he thereafter assumed the character of trustee. *Cluff v. Day*, 124 N. Y. 195, reversing 55 N. Y. Super. Ct. 460.

Actual Transfer Necessary. — An insolvent fiduciary cannot transfer his mere indebtedness in one capacity to himself in another

capacity, so as to exonerate his sureties in the one capacity, and throw the burden on his sureties in the other. To make the transfer valid in such case it must consist of something more than a naked liability; it must be substantial assets. But if substantial assets are in the hands of the fiduciary, or he is solvent and liable to pay over his indebtedness in the one capacity to himself in the other capacity, all that is required to make the transfer in such case is for him to make his election to hold it in the latter capacity, and manifest that election by some act, admission, or declaration, and such election will bind his sureties on his bond given in the latter capacity. *Gilmer v. Baker*, 24 W. Va. 72.

Presumption as to Change of Relation. — When the time for the settlement of the accounts of an executor or administrator who is also guardian has elapsed, and the shares of the minors have been ascertained, it is presumed that the funds are thereafter held in the capacity of guardian, as that is the capacity in which he then has the right to hold them. *State v. Hearst*, 12 Mo. 365; *Coleman v. Smith*, 14 S. Car. 511; *Schnell v. Schroder*, *Bailey Eq. (S. Car.)* 334; *Carroll v. Bosley*, 6 Verg. (Tenn.) 220, 27 Am. Dec. 460.

When an Administrator Who Is Also Executor of the Sole Distributee receives money as administrator after the debts of the intestate have been paid, he will be presumed to have paid it to himself as executor, without any order of court for that purpose, and therefore the sureties on his bond are not liable for it. *Weir v. People*, 78 Ill. 192.

3. Failure to Return Inventory Is Breach of Bond — *Connecticut*. — *Blakeman v. Sherwood*, 32 Conn. 324; *Moore v. Holmes*, 32 Conn. 553; *State v. French*, 60 Conn. 478.

Illinois. — *People v. Hunter*, 89 Ill. 392.

Indiana. — *State v. Scott*, 12 Ind. 529.

Maine. — *Bourne v. Stevenson*, 58 Me. 499; *Potter v. Titcomb*, 10 Me. 53, 11 Me. 167.

Massachusetts. — *Dawes v. Edes*, 13 Mass. 177; *Paine v. Gill*, 13 Mass. 368; *Dawes v. Boylston*, 9 Mass. 357, 6 Am. Dec. 72; *Boston v. Boylston*, 4 Mass. 318; *Forbes v. McHugh*, 152 Mass. 412.

Mississippi. — *Edmundson v. Roberts*, 2 How. (Miss.) 822.

Missouri. — *Sherwood v. Hill*, 25 Mo. 391.

Ohio. — *Mighton v. Dawson*, 38 Ohio St. 650.

Pennsylvania. — *Com. v. Bryan*, 8 S. & R. (Pa.) 128; *In re Heenan*, 15 Phila. (Pa.) 588, 39 Leg. Int. (Pa.) 420.

goods which did not come to his knowledge.¹

(2) *Maladministration*. — Any wrongful or negligent act of an executor or administrator in dealing with the estate, or the failure to perform any of the duties of his office, is a breach of the bond for which he and his sureties are liable to an action at the instance of any one injured. Thus the sureties are liable, if their principal neglects to get in the assets,² or to sell the goods of the estate when necessary,³ or to take proper security for the price of goods sold on credit,⁴ or to obey the directions contained in

Vermont. — Probate Ct. *v.* Merriam, 8 Vt. 234.

Wisconsin. — *Ellis v. Johnson*, 83 Wis. 394; *Johannes v. Youngs*, 45 Wis. 445.

See *supra*, this title, *Inventory and Appraisal*.

A Citation to Inventory Assets is not necessary before a breach can be predicated on the right so as to authorize an action on the bond. *Potter v. Titcomb*, 10 Me. 53, 11 Me. 167; *Gilbert v. Duncan*, 65 Me. 469.

Return of Imperfect Inventory. — The condition of the bond requires a true and perfect inventory of the rights and credits which have come to the knowledge of the administrator, and it is not answered by returning an imperfect inventory. *Gilbert v. Duncan*, 65 Me. 469.

Notes of Administrator to Decedent. — Failure to inventory notes belonging to the estate and deposited in the hands of a third person is a breach of the administration bond, though the administrator was himself the promisor in the notes, and denies liability thereon. *Potter v. Titcomb*, 10 Me. 53.

Administrator de Bonis Non. — The failure of an administrator *de bonis non* to make an inventory of all the estate of the decedent which was not administered by the original administrator is a breach of the condition of his administration bond for which an action lies. *Probate Ct. v. Keeler*, 2 D. Chip. (Vt.) 16.

Executor Who Is Sole Legatee. — Where the executor is the sole legatee under the will, and there are no creditors, his failure to file an inventory within the time prescribed by law is a mere technical breach of the bond, and is cured by filing the inventory before an action is brought. *McKim v. Harwood*, 129 Mass. 75.

The Extent of the Liability for a breach of the condition to make and return a true inventory is the amount that may be found equitably due to any one who is injured thereby. *State v. French*, 60 Conn. 478.

The failure to file an inventory is not material, and no recovery can be had on the bond unless damage resulted. *Dobbs v. Cockerham*, 2 Port. (Ala.) 328; *Reynolds v. Reynolds*, 11 Ala. 1023; *State v. Gregory*, 119 Ind. 503.

And he is not chargeable on account of such failure with more than shall be proved to have been received by him, or to have been lost by his negligence. *Connolly's Appeal*, 1 Grant's Cas. (Pa.) 366; *McCall v. Peachy*, 3 Munf. (Va.) 288.

Effect of Statute Imposing Penalty. — The remedy given by the *Connecticut* statute imposing a penalty of twenty dollars a month for neglect to return an inventory is not exclusive, but an action may still be brought on the bond for the neglect. *State v. French*, 60 Conn. 478.

If No Assets Are Received by an executor within the time that he is required by law to

return an inventory, and he afterwards receives assets, he must then return an inventory, and failure to do so is a breach of his bond. *Forbes v. McHugh*, 152 Mass. 412.

1. *Goods Not Known to Administrator*. — *State v. Scott*, 12 Ind. 529.

Fraudulent Conveyance by Decedent. — An administrator does not commit a breach of his bond by his failure to inventory property which the decedent had conveyed in fraud of his creditors, if he did not know that the conveyance was fraudulent. *Booth v. Patrick*, 8 Conn. 108; *Scotfield v. Lounsbury*, 8 Conn. 109.

2. *Failure to Obtain Possession of Property of Estate*. — *Meeks v. Vassault*, 3 Sawy. (U. S.) 206; *Butler v. Sisson*, 49 Conn. 580; *Probate Ct. r. Carr*, 20 R. I. (pt. iii.) 196; *Lacy v. Stamper*, 27 Gratt. (Va.) 42; *Lyon v. Osgood*, 58 Vt. 707.

But there is no liability if the representative was without fault. Thus, the sureties are not liable where the debtor is insolvent, though one of them had succeeded in collecting a small individual claim of the debtor. *Gay v. Grant*, 101 N. Car. 206.

As to the duties and liabilities in general in regard to the collection of debts, see *infra*, this title, *Management and Care of Estate — Collection of Debts*.

Trust Created by Decedent in His Lifetime. — In *Beazley v. Kendrick*, 78 Ga. 121, the decedent, while confined in prison, directed one G. to collect money which was owing to him (decedent) and invest it for the benefit of his wife and children. G. collected the money and purchased a parcel of land, paying part of the price with the money so collected. He took a title bond in his own name and gave a mortgage for the unpaid part of the purchase money. The decedent's family resided on the land, and on his release from prison he ratified what G. had done. After the death of the decedent his widow paid the amount of the mortgage which had been given by G. and took a deed of the land in her own name. It was held that the failure of the administrator to take possession of and administer such land was not a breach of his bond, but that the remedy of the decedent's children, if any they had, was by a proceeding against the widow to recover possession of the land.

A Purchase by an Administrator at His Own Sale is not of itself a breach of the condition of his bond. *Trimmier v. Trail*, 2 Bailey L. (S. Car.) 480.

3. *Failure to Sell Goods*. — *State v. Scott*, 12 Ind. 529.

4. *Failure to Take Proper Security* for the price of goods sold on credit is a breach of the bond, though the loss occurs while the estate is in the hands of a succeeding administrator; but

the will.¹ But they are not liable for any acts or omissions from which no injury has resulted,² or for the acts of the executor or administrator at the request or with the consent of the parties in interest.³

Disobeying Orders of Court. — In some jurisdictions the disobedience by an executor or administrator of any order which the court has authority to make in respect to the administration is a breach of the bond for which the sureties are liable.⁴

Failure to Exercise Power to Sell Real Estate. — In those jurisdictions where the general administration bond does not cover the proceeds of real estate sold for the payment of debts, a special bond being required for that purpose, the general bond is not broken by the failure of the representative to obtain an order of sale or by refusing to receive the purchase money and to execute a conveyance after a sale has been made.⁵

where the administrator sold goods to the widow of the decedent and took her note not properly secured for the price, and the succeeding administrator received such note, and also a balance due the widow on her year's allowance, and he paid her such balance partly before and partly after the maturity of the note, and afterwards failed to collect the note, it was held that the loss to the estate to the extent of the amount of such balance paid to the widow was not the direct and necessary consequence of the breach of the duty of the first administrator in taking her note, but of the want of prudence of the second administrator, and that therefore the sureties on the first administrator's bond were not liable. *White v. Moe*, 19 Ohio St. 37.

So, too, if an executor sells property for notes and fails to account for them, his sureties are liable. *Verret v. Belanger*, 6 La. Ann. 109. See also *Lindley v. State*, 116 Ind. 235.

1. Neglecting Directions of Will. — "The will of a testator is the law of the estate, and no testate estate can be well and truly administered by proceedings which violate the legal provisions of the will." *Sanford v. Gilman*, 44 Conn. 461.

The Condition to Administer According to Law includes the performance of duties which may be imposed on the executor by statute, and therefore the condition is broken by the failure of the executor to raise an annuity by the sale of land as directed by the will. *Prescott v. Pitts*, 9 Mass. 376, cited in *Hall v. Cushing*, 9 Pick. (Mass.) 406.

So, too, if he fail to invest the personal estate of the testator in public funds, and apply the income thereof to the maintenance of the testator's minor children, as directed by the will. *Hall v. Cushing*, 9 Pick. (Mass.) 395.

Failure to Pay for a Legatee's Education as directed by the will has been held a breach of the bond. *Heady v. State*, 60 Ind. 316.

2. Neglect Not Resulting in Damage. — *Rison v. Young*, 7 Martin N. S. (La.) 298.

Suffering a Collusive Judgment to Be Recovered is not a breach of the condition to administer according to law "all the goods and chattels, rights and credits," of the decedent, where there is no personal property on which the execution can be levied, and it was levied on the real estate, because the heirs could not be dispossessed under such levy. *Gilbert v. Duncan*, 65 Me. 469.

Neglect to Sell Land as ordered by the court

is not a breach of the bond if no injury resulted. *State v. Smith*, 68 Mo. 641.

3. Acts Done at Request of Parties in Interest. — Defending a suit by a legatee is not maladministration for which the executor is liable on his bond, where he acted at the request of the other legatees, though the plaintiff in that action was successful. *Brazer v. Clark*, 5 Pick. (Mass.) 96.

Ratification of Acts. — The sureties of an executor are not liable to the devisees for the value of the land sold by him without leave of court, where he paid to the devisees the price received. *Homes v. O'Conner*, 9 Tex. Civ. App. 454.

4. Disobeying Orders of Court. — In New York the disobedience of any order of the surrogate in respect to the administration is a breach of the bond. *Baggott v. Boulger*, 2 Duer (N. Y.) 169.

Within this rule it was held that the sureties were liable for the expenses of a reference ordered for the purpose of giving the administrator an opportunity to reduce the balance which had been found against him on a former reference, though the second reference was on condition that the expenses should be borne by the administrator personally, and though it was so provided in the final decree. This provision of the decree, it was said, was one touching the administration of the estate, and a noncompliance with it constituted an official default within the condition of the bond. *Beckett v. Place*, 12 Misc. Rep. (N. Y. Super. Ct.) 323.

But the sureties are not liable for the amount of a fine imposed on the administrator for failure to answer a citation, where there had been no accounting and there was no proof of any sum due from the administrator to the estate. The order imposing the fine was not a determination of any amount due, but was a punishment for contempt. *Loop v. Northup*, 59 Hun (N. Y.) 75.

Order to Pay Money into Court. — In the absence of statutory authority the probate court has no power to order an administrator on resigning to pay the funds of the estate into court, and therefore his refusal to obey such an order is not a breach of the conditions of the bond. *Willson v. Hernandez*, 5 Cal. 437.

5. Neglect to Apply for License to Sell Land Not a Breach. — *Freeman v. Anderson*, 11 Mass. 190; *Hawkins v. Carpenter*, 88 N. Car. 403. But see *Probate Ct. v. Carr*, 20 R. I. (pt. iii.) 196.

Waste or Misappropriation. — Any waste or misappropriation of the assets of the estate is a breach of the condition to administer.¹

Failure to Deliver Assets to Successor. — If, on the termination of the representative capacity of an executor or administrator, before the administration is completed, he fails or refuses to deliver to his successor in office the assets remaining in his hands, this is a default for which his sureties are liable.²

Payment of Debts. — The failure or refusal of the personal representative to pay debts is not a breach of the condition of the bond in the form prescribed by Stat. 22 & 23 Car. II., "well and truly to administer" the estate,³ but the right is given by statute to creditors whose debts have been duly established and allowed against the estate to sue on the bond, if payment is not made;⁴

Refusing to Receive the Purchase Money of Land sold under an order of court is not a breach of the bond for which an action will lie. In such case the remedy is by petition to the judge of probate for the removal of the administrator. *Nelson v. Jaques*, 1 Me. 139.

Failure to Execute an Order of Sale cannot be assigned as a breach, if no injury resulted. *State v. Smith*, 68 Mo. 641.

1. Waste or Misappropriation Is Breach of Bond — *Alabama*. — *Dean v. Portis*, 11 Ala. 104; *Thomson v. Searcy*, 6 Port. (Ala.) 393. *Colorado*. — *Liddicoat v. Treglown*, 6 Colo. 47. *Florida*. — *State v. Crawford*, 23 Fla. 289. *Georgia*. — *Giles v. Brown*, 60 Ga. 658. *Illinois*. — *Borders v. People*, 31 Ill. App. 483.

Indiana. — *State v. Scott*, 12 Ind. 529; *Nelson v. Corwin*, 59 Ind. 489; *Jeffersonville*, etc., R. Co. v. Gent, 35 Ind. 39; *Robinson v. Skipworth*, 23 Ind. 311; *Ferguson v. Dunn*, 28 Ind. 58; *Spencer v. Morgan*, 5 Ind. 146; *Lane v. State*, 24 Ind. 421; *Parsons v. Milford*, 67 Ind. 489; *Fuhrer v. State*, 55 Ind. 150.

Maryland. — *State v. Dilley*, 64 Md. 314.

Michigan. — *Hatheway v. Sackett*, 32 Mich. 97.

Mississippi. — *Edmundson v. Roberts*, 2 How. (Miss.) 822.

Missouri. — *State v. Flynn*, 48 Mo. 413; *State v. Drury*, 36 Mo. 281.

New Hampshire. — *Probate Judge v. Mathes*, 60 N. H. 433.

New York. — *People v. Dunlap*, 13 Johns. (N. Y.) 437.

North Carolina. — *Lansdell v. Winstead*, 76 N. Car. 366.

Ohio. — *Gutridge v. Vanatta*, 27 Ohio St. 366.

Texas. — *Pierce v. Wallace*, 48 Tex. 399.

Pledging Notes of the Estate for the individual purposes of the administrator is an act of conversion for which his sureties are liable. *State v. Berning*, 74 Mo. 87.

Notes Distributed to Executor and Other Legatees. — In *Spencer v. Church*, 2 Root (Conn.) 80, it was held that where a note belonging to the estate was distributed to and among several legatees of whom the administrator was one, and he sold it and appropriated the proceeds to his own use, he was accountable to the other legatees for their respective shares, but was not liable on his administration bond for the appropriation.

Distribution Without Providing for Legacy. — The condition that the administrator shall "well and truly administer" is broken where he distributes the entire estate so that none

remains in his hands to meet a legacy given by the will of the decedent. *Dobbs v. Brain*, (1892) 2 Q. B. 207.

If an Administrator Has Committed a Devastavit, and the real estate is in consequence sold for the payment of debts, the sureties are liable on their bond to the heirs. *Com. v. Keil*, 9 Phila. (Pa.) 140, 30 Leg. Int. (Pa.) 232.

Collusion Between Heirs and Personal Representative. — If, by collusion between the heirs and the personal representative in distributing the assets the rights of a creditor are defeated, the heirs, and not the sureties on the administration bond, are primarily liable in equity. *Griffin v. Justices*, 22 Ga. 590.

2. Failure to Deliver Assets to Successor — *Maryland*. — *State v. Smith*, 64 Md. 101.

Mississippi. — *Prosser v. Yervy*, 1 How. (Miss.) 87.

New Hampshire. — *Probate Judge v. Claggett*, 36 N. H. 381; *Prescott v. Farmer*, 59 N. H. 90.

New York. — *Power v. Bermester*, (Supreme Ct.) 12 N. Y. Supp. 25.

Ohio. — *Slagle v. Entrekinn*, 44 Ohio St. 637.

Texas. — *Baldwin v. Dearborn*, 21 Tex. 446.

A Public Administrator in Arkansas is not in default in not paying over the assets to administrators appointed by the probate court, until his accounts have been settled and he has been ordered to pay over the balance. *Baker v. State*, 21 Ark. 405.

3. Nonpayment of Debts Not Breach Under 22 & 23 Car. 2. — *Canterbury v. Wills*, 1 Salk. 315, 1 Lutw. 882; *Wallis v. Pipon*, Amb. 183. See *Coney v. Williams*, 9 Mass. 114.

4. Statutory Right of Creditor to Sue on Bond. — In *Coney v. Williams*, 9 Mass. 114, it is said that by the statute directing the form of proceeding in suits on probate bonds, the neglect of an administrator to pay the debts of the deceased is recognized as one of the cases for which an administration bond may be put in suit for the benefit of a creditor, after his demand has been ascertained by a judgment of court, and payment demanded of the administrators, and that "whatever may be the construction in England, it must be considered as settled with us, and so is the practice, that the nonpayment of a debt, after it has been ascertained by a judgment of court or by commissions, is a breach of the condition of an administration bond, as an unfaithful administration." See also *People v. Dunlap*, 13 Johns. (N. Y.) 437; *Ordinary v. Phillpot*, 1 Bay (S. Car.) 462.

Failure to Pay Debts Approved and Ordered to Be Paid Is Breach. — *Huntsman v. Hooper*, 32

or if he pays debts out of the order prescribed by law, so that any creditor is deprived of the preference to which he may be entitled.¹

(3) *Failure to Account.* — Failure to render an account within the time required by law is a breach of administration bond,² for which nominal damages, at least, may be recovered.³ But it is generally held that the breach does not occur until the executor or administrator has neglected or refused to obey a citation from the court of probate to settle his accounts.⁴

Minn. 163; *State v. Creusbauer*, 68 Mo. 254; *State v. Walsh*, 67 Mo. App. 348.

A Claim Must Be Duly Established against the estate in order to render the refusal of the administrator to pay it a breach of his bond. *Probate Judge v. Couch*, 59 N. H. 39; *Probate Judge v. Locke*, 6 N. H. 396; *St. Paul First Nat. Bank v. How*, 28 Minn. 150.

Even if There Has Been No Misapplication of the assets, the failure to pay debts is a breach of the bond. The mere retention of the assets by the administrator in his hands, when he should apply them to the payment of debts, constitutes a breach in law. *Cannon v. Cooper*, 39 Miss. 784, 80 Am. Dec. 101.

Judgment for Invalid Claim. — The failure of an administrator to pay a judgment recovered in an action commenced after the claim was barred by the statute of limitations, the administrator having neglected to plead it, is not a breach of the bond for which the sureties can be held liable, though the administrator may be personally liable on the judgment. *Dawes v. Shed*, 15 Mass. 6, 8 Am. Dec. 80.

And the same is true where he pleaded the statute, but afterwards abandoned the plea and suffered a judgment by default. *Robinson v. Hodge*, 117 Mass. 222.

Nonpayment of a Void Judgment cannot be assigned as a breach of the bond so as to render the sureties liable for its payment. *Dickerson v. Robinson*, 6 N. J. L. 195, 10 Am. Dec. 396.

Permitting Sale of Real Estate for Debts. — "If executors and administrators permit the lands of their testators and intestates to be taken in execution, when they have sufficient personal estate in their hands, it is unfaithful administration, and a breach of the condition of their bonds. This is a necessary consequence of the provision of the statute, which has made the personal estate chargeable with the debts in the first instance, and the real estate chargeable only in case of a deficiency of personal assets." *Mead v. Harvey*, 2 N. H. 347.

Deceiving Creditors. — An administrator does not commit a breach of his bond in writing misleading and deceiving letters to creditors, whereby they were beguiled into a false sense of security and did not prove their claims within the time required by law. *Nagle v. Ball*, 71 Miss. 330.

Effect of Statute Giving Other Remedies. — The right of a creditor to sue on the bond is not taken away by a statute giving him a remedy against the persons and effects and the administrators themselves. Such remedy is cumulative. *Coney v. Williams*, 9 Mass. 114. See also, *infra*, this section, *Remedies Against Sureties*.

1. Payment of Debts Out of Prescribed Order Is Breach of Bond. — *State v. Brown*, 80 Ind. 425.

Injury to Preferred Creditors. — The payment

of debts of a lower rank before the payment of those of a higher rank does not render the sureties on the bond liable unless the assets were insufficient to pay all, so that some creditor has been deprived of the preference to which he was entitled. *Masterson v. Cauble*, 15 Ind. App. 515.

2. Failure to Account Is Breach of Bond — *Iowa*. — *Clark v. Cress*, 20 Iowa 50.

Massachusetts. — *McKim v. Harwood*, 129 Mass. 75; *McKim v. Bartlett*, 129 Mass. 226; *Bennett v. Russell*, 2 Allen (Mass.) 537.

Missouri. — *Devore v. Pitman*, 3 Mo. 179.

New Jersey. — *Matter of Webster*, 5 N. J. Eq. 96; *Ordinary v. Barcalow*, 36 N. J. L. 15; *Ordinary v. Hart*, 10 N. J. L. 65.

Pennsylvania. — *Com. v. Bryan*, 8 S. & R. (Pa.) 128.

South Carolina. — *Ordinary v. Mortimer*, 4 Rich. L. (S. Car.) 271.

Vermont. — *Matthews v. Page*, *Brayt*, (Vt.) 106; *Probate Ct. v. Keeler*, 2 D. Chip. (Vt.) 16.

Wisconsin. — *Johannes v. Youngs*, 45 Wis. 445.

Though a debt due from a testator to the executor exceeds the amount of assets received, and no creditor has presented any claim within the time limited for presentation of claims, it is nevertheless a breach of the bond if the executor omits to file an account, because it is intended that such a matter as the claim of an executor for a debt due from the testator shall be settled in the account of the executor in the probate court, and that it shall be there passed upon and adjudicated. *Forbes v. McHugh*, 152 Mass. 412.

Curing Failure. — Failure to file an account within the time prescribed is cured by filing it afterwards, but before suit is brought on the bond. *McKim v. Harwood*, 129 Mass. 75.

The Breach Is Waived by the allowance of an account without exception after the time required for filing the account, but before an action has been brought on the bond. *Loring v. Kendall*, 1 Gray (Mass.) 305.

But the Breach Is Not Waived by the action of the court in pronouncing unsatisfactory an account presented after the breach, and by a subsequent account on which no decree is rendered, though these are circumstances which may be evidence of a waiver. *Probate Ct. v. Eddy*, 8 R. I. 508.

A Settlement Out of Court between the administrator and the beneficiaries is not a compliance with the condition of the bond to render an account. *Clarke v. Clay*, 31 N. H. 393.

3. Nominal Damages. — *Clark v. Cress*, 20 Iowa 50.

4. No Breach Until Citation to Account Is Disobeyed. — *Nelson v. Jaques*, 1 Me. 139; *Butler v. Ricker*, 6 Me. 268; *Gilbert v. Duncan*, 65 Me. 469; *Probate Judge v. Couch*, 59 N. H. 39; *Probate Ct. v. Eddy*, 8 R. I. 339; *Dunnell*

(4) *Failure to Distribute or Pay Legacies.* — The neglect or refusal of an executor or administrator to make distribution among the next of kin is a breach of the bond only when it has been judicially ascertained that there is a balance remaining after the payment of debts and charges, and an order or decree of distribution has been entered.¹ But it is his duty to apply within a reasonable time for a decree of distribution when there is a balance properly distributable in his hands, and it is a breach of the bond if he neglects to do so.²

Failure to Pay a Legacy when it is due and payable is a breach of the bond, and gives the legatees a right of action against the principal and sureties on the administration bond.³

e. **RELEASE OR DISCHARGE OF SURETIES** — (1) *In General.* — The sureties on the bond of an executor or administrator will be released from their obligation by any dealings which operate to change or increase their liabilities.⁴

v. Municipal Ct., 9 R. I. 189; Municipal Ct. *v.* Henry, 11 R. I. 563; Municipal Ct. *v.* McElroy, 18 R. I. 749; Probate Ct. *v.* Carr, 20 R. I. (pt. iii.) 196. But see *Bratton v. Davidson*, 79 N. Car. 423.

Insolvent Estates. — The rule that an executor or administrator cannot be considered in default in not rendering his accounts until a citation to account has been disobeyed, is held not to apply to insolvent estates under the *Maine* statute. *Webb v. Gross*, 79 Me. 224.

1. Failure to Distribute — Not Breach Unless Distribution Has Been Decreed — England. — *Canterbury v. Tappen*, 8 B. & C. 151, 15 E. C. L. 174.

United States. — *Mackey v. Cox*, 18 How. (U.S.) 100.

Massachusetts. — *Choate v. Jacobs*, 136 Mass. 297.

Michigan. — *Cranson v. Wilsey*, 71 Mich. 356.

Mississippi. — *Jones v. Irvine*, 23 Miss. 365.

Missouri. — *Wolff v. Schaeffer*, 4 Mo. App. 367.

New Hampshire. — *Hurlburt v. Wheeler*, 40 N. H. 73.

New Jersey. — *Ordinary v. Smith*, 15 N. J. L. 92.

South Carolina. — *Burnside v. Robertson*, 28 S. Car. 583; *Ordinary v. Martin*, 1 Brev. (S. Car.) 552.

Vermont. — *Probate Ct. v. Kimball*, 42 Vt. 320.

Failure to Pay an Allowance Decreed to the Widow is a breach of the bond for which the sureties are liable. *Choate v. Jacobs*, 136 Mass. 297.

Invalid Order of Distribution. — The sureties are not liable for the failure of an administrator to obey an order of distribution where the order was unauthorized because it was made without bringing in all the persons entitled to the estate as parties to the proceeding. *McMahon v. Smith*, 20 Misc. Rep. (N. Y. Supreme Ct.) 395.

If the Distributee Is an Infant and has no guardian, the nonpayment of the amount ascertained by the decree of the ordinary to be due on the distributive share is not a sufficient breach to sustain an action on the bond by a *prochein ami*. *Mitchell v. Connolly*, 1 Bailey L. (S. Car.) 203.

Where a conveyance by a distributee to the administratrix of his share of the estate was

set aside after his death on the ground of fraud, at the suit of his widow and children, and a decree made by the orphans' court directing payment of such share to the administrator of the deceased distributee, the sureties of the administratrix were held liable for her failure to obey the decree, though she had theretofore made distribution in accordance with the title to the estate as it existed when the conveyance was in full force and operation. The first distribution, having been vitiated by the fraud in procuring the conveyance under which it was made, fell with the conveyance, and it then became the duty of the orphans' court to decree a proper and rightful administration of the estate. *Jenkins v. State*, 76 Md. 255.

2. Neglect to Apply for Decree of Distribution. — *Sanford v. Thorp*, 45 Conn. 241; *Rowland v. Isaacs*, 15 Conn. 122.

3. Failure to Pay Legacy Is Breach of Bond. — *Ruby v. State*, 55 Md. 484; *Peoples v. Peoples*, 4 Dev. & B. L. (20 N. Car.) 9.

Failure to Pay Income to Life Legatee. — The failure to pay to a life legatee the income of the personal estate as directed by the will is a breach of the condition of the bond "well and truly to administer" the estate. *Sanford v. Gilman*, 44 Conn. 461.

Before the nonpayment of a legacy can be assigned as a breach of the bond, it must be shown that there has been a settlement of the executor's accounts showing a balance in his hands after the payment of debts. *Ordinary v. Barcalow*, 36 N. J. L. 15.

4. Release of Sureties — Change of Liabilities by Dealings with Principal. — *Ward v. Tinkham*, 65 Mich. 695.

Taking Executor's Note for Legacy After Expiration of Time for Payment. — A surety on the bond of an executor, who is also a residuary legatee, is released by the act of a legatee who, without the surety's assent or procurement, accepts the executor's note for the amount of the legacy after the time limited by the will for paying it has expired. *Durfee v. Abbott*, 50 Mich. 479.

Permitting Improper Use of Trust Funds. — A secret agreement between the administrator and the distributees, by which the administrator is given the right to use the funds of the estate to carry on his private business, releases the sureties from liability for the funds so used, though a judgment is recovered therefor

So, Too, an Alteration of the Bond without the consent of the sureties will release them.¹

A Release Given by the Beneficiaries to a Surety, in order to be upheld, must be shown to be fair and reasonable, because the sureties stand in the same fiduciary relation to the beneficiaries as the principal does.²

(2) *Discharge of Principal.* — If the principal in the bond resigns, or his letters are revoked, or he is otherwise discharged, the liability of the sureties is thereby terminated so far as any future acts of the principal are concerned,³

against the administrator. *Rutter v. Hall*, 31 Ill. App. 647.

Laches in Proceeding Against the Principal may release the sureties, as where judgment was erroneously taken against the principal as an individual when he was solvent, and he became insolvent before the judgment was amended; but, in order that this may release the sureties, it must appear that, at the time the judgment was rendered, there were assets of the estate in the hands of the principal as administrator. It will not do to show that there was sufficient property in the hands of the heirs and distributees to whom it had been turned over in the distribution; for the judgment, even if it had been rendered correctly, would only have bound the property of the intestate in the hands of the administrators to be administered. *Collier v. Leonard*, 69 Ga. 311.

Neglect in Proceeding to Recover Assets from Third Person. — In *Matter of Connolly*, 73 Cal. 423, it was held that the sureties of an administrator were not released by the fact that the administrator *de bonis non* had brought suit against a third person to whom the original administrator had wrongfully transferred the assets of the estate, and that he failed to recover therein because of his negligence.

Extending Time to Pay Debts of Estate. — In *Gillet v. Rachal*, 9 Rob. (La.) 276, it was held that the doctrine that a surety is released by an extension of time without his consent to the principal debtor, does not apply so as to release the sureties of an administrator to whom a creditor of the estate gives time for the payment of his claim.

In *West v. Brison*, 99 Mo. 684, an administrator *de bonis non* recovered a judgment on the bond of the first administrator and levied execution on the property of the principal and sureties who were then solvent. Afterwards he withdrew the execution and took a deed of trust from the principal to secure the amount of the judgment. The property covered by the deed of trust depreciated in value, and the principal and all the sureties except the defendant became insolvent. It was held on these facts that the rule that a surety is released by extending the time of the payment of the debt without the consent of the surety was applicable and operated to release the defendant.

Agreement to Resist and Delay Creditors. — In *McMahan v. Paris*, 87 Ga. 660, it was held that the sureties were not released by reason of an agreement between the heirs of the decedent, unknown to the sureties, that the administrator should hold all the money and effects of said estate, and not pay the same over to the creditors, and should delay making returns, and should fight off and delay creditors in the collection of their debts, under the various laws

made after the war in relation to old and ante-war debts, pursuant to which the administrator was engaged in litigation with the creditors for several years, during which time they wasted the estate and became insolvent.

Satisfaction of Execution Against Administrator. — The sureties of an administrator are released from liability to a creditor by the sale of property under execution against the administrator, at which sale the creditor was the purchaser, and the return of the execution "satisfied," though the creditor loses the property purchased by reason of a superior title. *Atkinson v. Farmer*, 2 Murph. (6 N. Car.) 201.

Appointment of Cosurety Administrator De Bonis Non. — A surety is not released by the appointment of his cosurety administrator *de bonis non* when no default by the original administrator had been established, because until such has been established there is no debt owing by the sureties, and therefore the administrator *de bonis non* does not owe to himself in that capacity a debt for which he became liable as surety, on the former administrator's bond, so as to render applicable the rule that when a debtor and creditor are the same person the debt will be deemed to be paid. *Chick v. Farr*, 31 S. Car. 463.

Distribution of Estate of Deceased Cosurety. — A surety is not released by the fact that the administrator of a deceased cosurety who was appointed administrator *de bonis non* of the estate of the first decedent distributed the estate of the deceased cosurety, before suing on the bond given by his predecessor as administrator of the first decedent. *Poullain v. Brown*, 82 Ga. 412.

For a Full Discussion of matters which operate to release a surety, see the title SURETYSHIP.

1. Alteration of Bond Releases Sureties. — *Howe v. Peabody*, 2 Gray (Mass.) 556. See the title ALTERATION OF INSTRUMENTS, vol. 2, p. 181.

2. Release of Surety by Beneficiaries. — *Baines v. Barnes*, 64 Ala. 375.

3. Discharge of Principal Releases Surety from Future Liability. — *Austin v. Raiford*, 68 Ga. 201; *People v. Lott*, 27 Ill. 215; *Hessey v. Hessey*, 1 Ky. L. Rep. 424; *Tulburt v. Hollar*, 102 N. Car. 406.

Reappointment of Resigning Administrator. — The sureties of an administrator who have been released by the resignation of the principal do not again become liable where he is reappointed and gives a new and different bond. *Steele v. Graves*, 68 Ala. 17, 21.

Where One of Two Administrators Resigns, and the other is appointed sole administrator and gives a new bond, the sureties on the former bond which had been given jointly by both administrators are released. *Veach v. Rice*, 131 U. S. 293.

Expiration of Period of Administration. — If the

but they are liable for the defaults of the principal up to the time of his discharge.¹

(3) *Death of Surety.* — The obligation assumed by a surety is not discharged by his death. It continues during the entire period of the administration, and the estate of the surety becomes liable for any default occurring after his death.²

(4) *Giving New Bond.* — Where an executor or administrator is required to give a new or additional bond, as may be done in some jurisdictions, the question whether the sureties on the former bond are thereby released depends on the terms of the statute pursuant to which the new bond was required. As a general rule, if the application for the new bond was made by a surety on the former bond, the sureties on the former bond are released from liability for all defaults of the principal after the new bond was executed and approved. But if the court acted on its own motion, or if the application was made by some person other than a surety, the new bond is ordinarily cumulative in its effect, and the sureties on the former bond remain liable.³

(5) *Release by Order of Court.* — In some jurisdictions the court may by statute, on the application of any surety who conceives himself to be in danger of loss by reason of his suretyship, discharge him from future liability on the bond, requiring the principal to give another bond under penalty of being removed from office;⁴ and the same relief may be had under some of

period of administration is limited to a certain time the sureties are released by the expiration thereof; and an extension of the period does not renew their liabilities. *Rison v. Young*, 7 Martin N. S. (La.) 298.

Executor or Administrator Acting in Other Capacities. — An administrator is discharged, and the sureties on the administration thereby released, where he has been appointed guardian of the distributees and charges himself in his guardianship accounts with the balance in his hands as administrator. *Alston v. Munford*, 1 Brock. (U. S.) 266; *Vandever's Appeal*, 42 Pa. St. 74; *Simkins v. Cobb*, 2 Bailey L. (S. Car.) 60; *Myers v. Wade*, 6 Rand. (Va.) 444.

So, too, where an executrix, who is given a life estate in the personal property, has made a final settlement in the probate court and charged herself with her life estate, the condition of the bond is satisfied and the sureties are discharged. *Sarle v. Probate Ct.*, 7 R. I. 270. See also *supra*, this section, *Liabilities on Administration Bonds — Acts and Functions Covered by Bond.*

1. Sureties Liable for Defaults Up to Time of Discharge of Principal. — *Shelton v. Cureton*, 3 McCord L. (S. Car.) 412.

2. Death of Surety Does Not Discharge Obligation — Alabama. — *Hightower v. Moore*, 46 Ala. 387.

Arkansas. — *Hecht v. Skaggs*, 53 Ark. 291, 22 Am. St. Rep. 192.

New York. — *Mundorff v. Wangler*, 44 N. Y. Super. Ct. 495; *Stevens v. Stevens*, 2 Dem. (N. Y.) 469.

Pennsylvania. — *White v. Com.*, 39 Pa. St. 167; *Dickinson v. Callahan*, 19 Pa. St. 227.

Wyoming. — *Snyder v. State*, 5 Wyoming 318.

3. Effect of New Bond. — See *Veach v. Rice*, 131 U. S. 317; *Jones v. Ritter*, 56 Ala. 270; *Justices v. Selman*, 6 Ga. 432; *State v. Stroop*, 22 Ark. 329; *People v. Lott*, 27 Ill. 215; *People v. Curry*, 59 Ill. 35; *Pepper v. Donnelly*, 87 Ky. 259; *Russell v. McDougall*, 3 Smed. & M.

(Miss.) 238; Anno. Code Miss., § 1862; *Haskell v. Farrar*, 56 Mo. 497; *State v. Fields*, 53 Mo. 474; *State v. Drury*, 36 Mo. 286; *State v. Wolff*, 10 Mo. App. 95; *Com. v. Risdon*, 4 Brewst. (Pa.) 165; *Cowperthwaite's Estate*, 5 Pa. Co. Ct. Rep. 59.

4. Release by Order of Court on Application of Surety — Arkansas. — *Valcourt v. Sessions*, 30 Ark. 515.

Kentucky. — *Johnson v. Fuquay*, 1 Dana (Ky.) 514.

New York. — *Shook v. Goddard*, 2 Dem. (N. Y.) 201; *Lewis v. Watson*, 3 Redf. (N. Y.) 43; *Stevens v. Stevens*, 3 Redf. (N. Y.) 507.

Ohio. — *Foster v. Wise*, 46 Ohio St. 20, 15 Am. St. Rep. 542.

South Carolina. — *De Lane's Case*, 2 Brev. (S. Car.) 167; *McKay v. Donald*, 8 Rich. L. (S. Car.) 331; *Shelton v. Cureton*, 3 McCord L. (S. Car.) 412.

Mere Erasure of the Name of a surety is not effectual to release him from liability. *Brown v. Weatherby*, 71 Mo. 152.

Application by Executor. — A surety cannot be discharged on the application of the executor, and an order granting a discharge on such application is void. *Bellinger v. Thomson*, 26 Oregon 320; *Clark v. American Surety Co.*, 171 Ill. 235.

Proof of Danger Not Necessary. — Under the *South Carolina* statute providing that "it shall be the duty of the ordinary in whose office an administration bond is lodged, upon a petition filed by any of the sureties to the same, who conceive themselves in danger of being injured by such suretyship, to summon the administrator before him, and to make such order or decree for the relief of the petitioner as may not impair or affect the right of the parties interested in the estate," a surety who apprehends loss is entitled to be relieved from future liability on his own motion and without proof of any danger. *McKay v. Donald*, 8 Rich. L. (S. Car.) 331. Compare *De Lane's Case*, 2 Brev. (S. Car.) 167.

the statutes on an application by the surety for an order compelling the executor or administrator to give a new bond, the effect of which is to release the sureties on the former bond.¹ But this remedy is purely statutory and may be granted only when authorized by statute.²

(6) *Statute of Limitations.* — The statute of limitations does not operate to discharge the sureties, until the expiration of the statutory period after the right to sue on the bond has accrued.³

f. REMEDIES AGAINST SURETIES — (1) *At Law* — (a) *Who May Sue.* — An action on an administration bond after a breach thereof may be brought by or on the behalf of a creditor of the decedent, or by a legatee, distributee, or other person interested in the estate who has been injured by the default of the executor or administrator.⁴

Only Subsequent Defaults are affected by the discharge of a surety from liability on the bond, and he must show that the administrator accounted for money in his hands at the time of the discharge. *M'Meeekin v. Huson*, 3 Strobb. L. (S. Car.) 327; *Owens v. Walker*, 2 Strobb. Eq. (S. Car.) 289; *Waterman v. Bigham*, 2 Hill L. (S. Car.) 512; *Trimmier v. Trail*, 2 Bailey L. (S. Car.) 480.

The ordinary has no power to release a surety from a liability already incurred by the principal. *Waterman v. Bigham*, 2 Hill L. (S. Car.) 512. Compare *Beard v. Roth*, 35 Fed. Rep. 397, holding that where an indebtedness of the administrator to the estate appears on a settlement made after the discharge of a surety, such surety cannot be held liable unless it is shown that the administrator was in default before the discharge, and that no presumption to that effect is raised by proof that the administrator had previously received assets when it is further shown that after such report he disbursed a larger amount.

Until a New Bond Is Given the order for the discharge of the sureties on the former bond is ineffectual. *Howenstine v. Sweet*, 7 Ohio Cir. Dec. 498, 13 Ohio Cir. Ct. Rep. 239.

Public Administrators. — It is held in *Alabama* that the general administrator is not a public officer within the meaning of the statute authorizing the discharge of sureties "upon the official bond of any public officer required to be approved by the judge of the circuit court, or judge of probate, or chancellor." *Mitchell v. Nelson*, 49 Ala. 88. See also *Valcourt v. Sessions*, 30 Ark. 515.

In *Missouri* it is held that public administrators are entitled to the benefit of the statute which provides for the discharge of sureties on official bonds. *State v. Nolan*, 99 Mo. 569. Compare *State v. Wolff*, 10 Mo. App. 95.

1. See *supra*, this section, *Release or Discharge of Sureties — Giving New Bond*.

2. **Power to Release Sureties Is Statutory.** — In *Goods of Stark*, L. R. 1 P. & D. 76, 35 L. J. P. 42, 14 W. R. 349, 13 L. T. N. S. 682, was a motion to discharge the sureties on an administration bond and substitute others in their place. It was admitted on the argument that there was no precedent for the motion. Sir J. P. Wilde refused to order the discharge and substitution, saying: "I do not see how I can release them from the bond, for there may be liabilities already incurred, for which the proposed new sureties would not be responsible. The only way that occurs to me, in which they

can be released, is by the proposed new sureties giving them a bond of indemnity."

In *Clark v. American Surety Co.*, 171 Ill. 235, it was said that the power to release sureties is derived from the statute, and the statute must be pursued before, in any proceedings as between the surety and the administrator, the former can be discharged from the performance of his obligation.

In *Pennsylvania* the orphans' court has no authority to release a surety, even though he signed the bond through inadvertence. *Cowperthwaite's Estate*, 5 Pa. Co. Ct. Rep. 59, 20 W. N. C. (Pa.) 504.

3. **The Statute of Limitations** does not begin to run against an action on the bond at the death of the administrator, but only when his accounts are settled by his personal representative. *Williams v. Flippin*, 68 Miss. 680.

A Right of Action Accrues to a Distributee when a decree is rendered in his favor. *Ward v. Yonge*, 45 Ala. 474.

Or if no decree has been made, then at the time when it ought to have been made, and in *Michigan* this is four and a half years after the time limited for the payment. *Biddle v. Wendell*, 37 Mich. 452.

In regard to the statute of limitations generally, see the title *STATUTE OF LIMITATIONS*.

As to When Right of Action Accrues, see *infra*, this section, *Remedies Against Sureties — When Right of Action Accrues*.

Failure to Account. — The statute of limitations does not bar an action on an administration bond predicated on the failure of the administrator to render an account. Length of time and neglect on the part of the *cestui que trust* may furnish a presumption that the administrator has paid over to and distributed among those entitled to them the funds and property in his hands; but it is only a presumption, which is liable to be controlled by other evidence. *Fuller v. Cushman*, 170 Mass. 286.

4. **Who May Sue on Bond — Any Person Interested in Estate** — *Indiana.* — *State v. Scott*, 12 Ind. 529; *Songer v. Manwaring*, 1 Blackf. (Ind.) 251.

Maine. — *Rawson v. Piper*, 34 Me. 98.

New Hampshire. — *Gookin v. Hoit*, 3 N. H. 392; *Probate Judge v. Southard*, 62 N. H. 228.

New York. — *Boyle v. St. John*, 28 Hun (N. Y.) 454.

The Father of an Infant Beneficiary may sue as the next friend of the infant. *Stevens v. Cole*, 7 Cush. (Mass.) 467.

The English Statute (20 & 21 Vict., c. 77, § 83)

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An Administrator de Bonis Non cannot sue at common law on the bond of his predecessor,¹ but in this respect the common law has been changed by statute in some jurisdictions.²

(b) **When Right of Action Accrues.** — As a general rule no action can be brought on an administration bond until the claim of the plaintiff has been established

provides that "the court may, on application, made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the court to assign the same to some person to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach of the condition of the said bond." In *Goods of Jones*, 3 Sw. & Tr. 28; *Baker v. Brooks*, 3 Sw. & Tr. 32; In *Goods of Young*, L. R. 1 P. & D. 186.

The effect of this provision, which was not contained in the statute 22 & 23 Car. II., c. 10, is said to be no more than to enable a creditor on having the bond assigned to him to sue in his own name. *Sandrey v. Michell*, 3 B. & S. 405, 113 E. C. L. 405.

Stat. 21 & 22 Vict., c. 95, § 15, providing that bonds given before stat. 20 & 21 Vict., c. 77, took effect are to remain in force, is not retrospective, and therefore does not apply to a bond assigned before the passing of the first mentioned statute. *Young v. Hughes*, 4 H. & N. 76, 5 Jur. N. S. 102, 28 L. J. Exch. 161, 32 L. T. N. S. 259.

Legatees and Distributees may sue on the bond for their legacies or distributive shares. *Moore v. Waller*, 1 A. K. Marsh. (Ky.) 490; *Com. v. Black*, 3 J. J. Marsh. (Ky.) 194.

Assignee of Legatee. — Under the Rev. Code *Virginia*, c. 104, § 21, it was held that an action could not be maintained on an executor's bond, at the relation of an assignee of a decree for legacy, but that such an action could only be maintained at the relation of the person who has the legal right to the debt. *Burnett v. Harwell*, 3 Leigh (Va.) 95.

Creditors. — As to the right of creditors to sue the sureties on the bond, see *supra*, this section *Breach of Bond*, paragraph *Payment of Debts*.

The Commonwealth in Case of an Escheat has such an interest in the estate as entitles it to sue on the administration bond; but the right must be first established by an inquest. *Crawford v. Com.*, 1 Watts (Pa.) 480.

1. Administrator de Bonis Non Cannot Sue at Common Law on Bond of Predecessor — *United States*. — *Beard v. Roth*, 35 Fed. Rep. 397.

Alabama. — *Judge v. Price*, 6 Ala. 30.

Arkansas. — *State v. Rottaken*, 34 Ark. 144; *Green v. Byrne*, 46 Ark. 453; *Brice v. Taylor*, 51 Ark. 75.

Illinois. — *Marsh v. People*, 15 Ill. 284; *Stose v. People*, 25 Ill. 600.

Indiana. — *Young v. Kimball*, 8 Blackf. (Ind.) 167; *State v. Gooding*, 8 Blackf. (Ind.) 567; *Graham v. State*, 7 Ind. 470, 65 Am. Dec. 745; *Lucas v. Donaldson*, 117 Ind. 139.

Kentucky. — *Warfield v. Brand*, 13 Bush (Ky.) 77; *Bradshaw v. Com.*, 3 J. J. Marsh. (Ky.) 632; *Felts v. Brown*, 7 J. J. Marsh. (Ky.) 147.

Mississippi. — *Rives v. Patty*, 43 Miss. 338.

Ohio. — *Blizzard v. Filler*, 20 Ohio 479; *Chatfield v. Faran*, 1 Disney (Ohio) 488; *Tracy v. Card*, 2 Ohio St. 431; *Curtis v. Lynch*, 19 Ohio St. 392; *Douglas v. Day*, 28 Ohio St. 175.

Texas. — *Ward v. Ward*, 1 Tex. Unrep. Cas. 123.

Refusal of Predecessor to Deliver Unadministered Assets. — It has been held that an administrator *de bonis non* may sue on the bond of his predecessor for refusal to deliver up the unadministered assets. *Prosser v. Yerby*, 1 How. (Miss.) 87; *Probate Judge v. Claggett*, 36 N. H. 381; *Prescott v. Farmer*, 59 N. H. 90.

In *Judge v. Price*, 6 Ala. 36, this question was mooted, but was not decided, the case having gone off on the point that the sureties cannot be sued, either jointly or alone, until a judgment or decree has been first obtained against their principal, and an execution issued thereon proves to be unproductive.

2. Statutory Right of Administrator de Bonis Non to Sue on Bond of Predecessor — *Arkansas*. — *State v. Ferguson*, 8 Ark. 172; *Finn v. Hempstead*, 24 Ark. 111.

Illinois. — *Marsh v. People*, 15 Ill. 284.

Indiana. — *State v. Johnson*, 7 Blackf. (Ind.) 529; *Graham v. State*, 7 Ind. 470, 65 Am. Dec. 745; *Lane v. State*, 27 Ind. 108; *Myers v. State*, 47 Ind. 293; *Lucas v. Donaldson*, 117 Ind. 139.

Maryland. — *State v. Robinson*, 57 Md. 486.

Minnesota. — *Palmer v. Pollock*, 26 Minn. 433.

Missouri. — *State v. Hunter*, 15 Mo. 490; *Dodson v. Scroggs*, 47 Mo. 285.

New York. — *Boyle v. St. John*, 28 Hun (N. Y.) 454.

North Carolina. — *State v. Johnston*, 8 Ired. L. (30 N. Car.) 381; *State v. Britton*, 11 Ired. L. (33 N. Car.) 110; *State v. Moore*, 11 Ired. L. (33 N. Car.) 160, 53 Am. Dec. 401; *Ferebee v. Baxter*, 12 Ired. L. (34 N. Car.) 64; *Badger v. Jones*, 66 N. Car. 305; *Latham v. Bell*, 69 N. Car. 135; *Carlton v. Byers*, 70 N. Car. 691; *Goodman v. Goodman*, 72 N. Car. 508; *Lansdell v. Winstead*, 76 N. Car. 366; *Neal v. Becknell*, 85 N. Car. 299; *Grant v. Rogers*, 94 N. Car. 755; *Wilson v. Pearson*, 102 N. Car. 290; *Tulburt v. Hollar*, 102 N. Car. 406.

Ohio. — *Rairden v. Holden*, 15 Ohio St. 207; *Douglas v. Day*, 28 Ohio St. 175; *Webb v. Roettinger*, 4 Ohio Cir. Dec. 270.

Texas. — *Martel v. Martel*, 17 Tex. 391; *Boulware v. Hendricks*, 23 Tex. 667; *McDonald v. Alford*, 32 Tex. 35; *Brown v. Franklin*, 44 Tex. 559.

Virginia. — *Allen v. Cunningham*, 3 Leigh (Va.) 395.

Wisconsin. — *Golder v. Littlejohn*, 23 Wis. 251.

by a judgment at law or a decree of the probate court,¹ but in some jurisdictions such preliminary judgment or decree is not necessary.²

1. Judgment or Decree Essential to Right of Action—*England*.—*Canterbury v. Tappen*, 8 B. & C. 151, 15 E. C. L. 174.

United States.—*Mackey v. Coxe*, 18 How. (U. S.) 100; *Green v. Creighton*, 23 How. (U. S.) 90.

Alabama.—*Thompson v. Searcy*, 6 Port. (Ala.) 393; *Faulk v. Judge*, 2 Port. (Ala.) 538; *Judge v. Looney*, 2 Stew. & P. (Ala.) 70; *Judge v. French*, 3 Stew. & P. (Ala.) 263; *Judge v. Coalter*, 3 Stew. & P. (Ala.) 348; *Moore v. Chapman*, 2 Stew. (Ala.) 466, 20 Am. Dec. 56; *Perkins v. Moore*, 16 Ala. 9; *Kyle v. Mays*, 22 Ala. 692; *Holley v. Acre*, 23 Ala. 603; *Fretwell v. McLemore*, 52 Ala. 124; *Ward v. Yonge*, 45 Ala. 474; *May v. Kelly*, 61 Ala. 489.

Arkansas.—*Porter v. State*, 9 Ark. 226; *State v. Ritter*, 9 Ark. 244; *Gordon v. State*, 11 Ark. 12; *Baker v. State*, 21 Ark. 405; *Morton v. State*, 25 Ark. 46; *Hall v. Brewer*, 40 Ark. 433; *George v. Elms*, 46 Ark. 260; *State v. Roth*, 47 Ark. 222.

California.—*Chaquette v. Ortet*, 60 Cal. 594; *Weihe v. Statham*, 67 Cal. 84.

Dakota.—*Territory v. Bramble*, 2 Dakota 189.

Delaware.—*State v. Waples*, 5 Harr. (Del.) 257.

Illinois.—*Biggs v. Postlewait*, 1 Ill. 198. The contrary rule now obtains in *Illinois*. See next succeeding note.

Indiana.—*Eaton v. Benefield*, 2 Blackf. (Ind.) 52. The contrary rule now obtains in *Indiana*. See next succeeding note.

Maine.—*Nelson v. Jaques*, 1 Me. 139; *Butler v. Ricker*, 6 Me. 268; *Gilbert v. Duncan*, 65 Me. 469; *Potter v. Titcomb*, 7 Me. 302; *Williams v. Cushing*, 34 Me. 370; *Bourne v. Todd*, 63 Me. 427.

Maryland.—*Dorsey v. State*, 4 Gill & J. (Md.) 471; *Laidler v. State*, 2 Har. & G. (Md.) 277; *Seegar v. State*, 5 Har. & J. (Md.) 488; *State v. Hart*, 57 Md. 234.

Massachusetts.—*Choate v. Jacobs*, 136 Mass. 297; *Dawes v. Head*, 3 Pick. (Mass.) 128; *Coffin v. Jones*, 5 Pick. (Mass.) 61; *Paine v. Moffit*, 11 Pick. (Mass.) 496; *Prescott v. Parker*, 14 Mass. 429.

Michigan.—*Grady v. Hughes*, 80 Mich. 184.

Minnesota.—*Wood v. Myrick*, 16 Minn. 494; *Waterman v. Millard*, 22 Minn. 261; *Huntsman v. Hooper*, 32 Minn. 163.

Mississippi.—*Dinkins v. Bailey*, 23 Miss. 284; *Jones v. Irvine*, 23 Miss. 365; *Probate Judge v. Phipps*, 5 How. (Miss.) 59; *Thornton v. Glover*, 25 Miss. 132; *Dobbins v. Halfacre*, 52 Miss. 561.

New Hampshire.—*Hurlburt v. Wheeler*, 40 N. H. 73; *Probate Judge v. Couch*, 59 N. H. 39. See also *Probate Judge v. Adams*, 49 N. H. 150; *Prescott v. Farmer*, 59 N. H. 90.

New Jersey.—*Ordinary v. Smith*, 15 N. J. L. 92; *Dickerson v. Robinson*, 6 N. J. L. 195, 10 Am. Dec. 396.

New York.—*Hood v. Hood*, 85 N. Y. 561; *Haight v. Brisbin*, 100 N. Y. 219; *Perkins v. Stimmel*, 114 N. Y. 359, 11 Am. St. Rep. 659; *French v. Dauchy*, 134 N. Y. 543; *Potter v. Ogden*, 136 N. Y. 384; *Bischoff v. Engel*, 10

N. Y. App. Div. 240; *People v. Barnes*, 12 Wend. (N. Y.) 492; *Carow v. Mowatt*, 2 Edw. Ch. (N. Y.) 57; *People v. Corlies*, 1 Sandf. (N. Y.) 228.

Ohio.—*Cadwallader v. Longley*, 1 Disney (Ohio) 497; *Pickaway v. Hall*, 3 Ohio 225; *Dawson v. Dawson*, 25 Ohio St. 443.

Oregon.—*Hamlin v. Kinney*, 2 Oregon 91; *Adams v. Petrain*, 11 Oregon 304.

Pennsylvania.—*Com. v. Dill*, 1 Phila. (Pa.) 556, 12 Leg. Int. (Pa.) 80; *Com. v. Evans*, 1 Watts (Pa.) 437; *Stewart v. Moody*, 4 Watts (Pa.) 169; *Com. v. Fretz*, 4 Pa. St. 344; *Com. v. Moltz*, 10 Pa. St. 527, 51 Am. Dec. 499; *Com. v. Stub*, 11 Pa. St. 150, 51 Am. Dec. 515; *Boyd v. Com.*, 36 Pa. St. 355.

South Carolina.—*Ordinary v. Williams*, 1 Nott & M. (S. Car.) 587; *Simkins v. Powers*, 2 Nott & M. (S. Car.) 213; *Bague v. Blacklock*, 2 Desaus. (S. Car.) 602; *Jones v. Anderson*, 4 McCord L. (S. Car.) 113; *Ordinary v. Mortimer*, 4 Rich. L. (S. Car.) 271; *Ross v. Pettus*, 11 Rich. L. (S. Car.) 543; *Burnside v. Robertson*, 28 S. Car. 583; *Wilbur v. Hutto*, 25 S. Car. 246; *Ordinary v. Martin*, 1 Brev. (S. Car.) 552.

Vermont.—*Probate Ct. v. Kimball*, 42 Vt. 320.

A decree of a probate court on the settlement of the accounts of an executor or administrator by which it appears that he is not indebted to the estate is a complete protection to his sureties until it has been set aside. *Crouch v. Edwards*, 52 Ark. 499.

Two Prior Judgments Required.—It has been held that a creditor must first obtain his judgment for his demand against the executor or administrator, to be made out of the assets, then on *nulla bona* being returned, bring a second suit to convict him of a devastavit before the sureties can be sued on the bond. *Wilbur v. Hutto*, 25 S. Car. 246; *Gordon v. Justices*, 1 Munf. (Va.) 1; *Catlett v. Carter*, 2 Munf. (Va.) 24; *Hairston v. Hughes*, 3 Munf. (Va.) 568.

An Exception to the Rule that no action can be brought against the sureties until a judgment or decree has been rendered against the principal is where a resort is had to equity to enforce the liabilities of the sureties. In such case it has been held that the preliminary judgment or decree is not necessary. *Hood v. Hood*, 85 N. Y. 561; *Haight v. Brisbin*, 100 N. Y. 219; *Bischoff v. Engel*, 10 N. Y. App. Div. 240.

Where a Failure to Return an Inventory is the breach alleged, it is held that an heir, devisee, or creditor may sue on the bond, though his right has not been definitely fixed by a decree of the probate court. *Blakeman v. Sherwood*, 32 Conn. 324.

2. Preliminary Judgment or Decree Not Necessary—*Georgia*.—*Morgan v. West*, 43 Ga. 275. See *Justices v. Sloan*, 7 Ga. 31.

Illinois.—*People v. Miller*, 2 Ill. 83; *Tucker v. People*, 87 Ill. 76; *People v. Allen*, 8 Ill. App. 17.

Indiana.—*State v. Johnson*, 7 Blackf. (Ind.) 529. See also *Gould v. Steyer*, 75 Ind. 50.

Kentucky.—*Clarkson v. Com.*, 2 J. J. Marsh. (Ky.) 19.

There Must Also Be a Present Right of enjoyment in the party seeking relief. Thus, where a fund was bequeathed for life with remainder over, the remaindermen cannot sue on the bond of the executor or administrator with the will annexed for the waste of the fund until the death of the life tenant.¹

(c) Evidence. — In an action on an administration bond, a judgment or decree against the executor or administrator is considered, by the preponderance of authority, as conclusive evidence against the sureties, though they were not parties to the proceeding in which the judgment or decree was rendered;²

Missouri. — Governor *v.* Chouteau, 1 Mo. 731; State *v.* Porter, 9 Mo. 356; Oldham *v.* Trimble, 15 Mo. 225; State *v.* Morton, 18 Mo. 53; State *v.* Matson, 44 Mo. 305; State *v.* Flynn, 48 Mo. 413; State *v.* Thornton, 56 Mo. 325; State *v.* Shelby, 75 Mo. 482; State *v.* Grigsby, 92 Mo. 419.

North Carolina. — Williams *v.* Hicks, 1 Murph. (5 N. Car.) 437; Chairman *v.* Moore, 2 Murph. (6 N. Car.) 22; Strickland *v.* Murphy, 7 Jones L. (52 N. Car.) 242; Bratton *v.* Davidson, 79 N. Car. 423.

Texas. — Francis *v.* Northcote, 6 Tex. 185.

"After the time has elapsed for the allowance of claims against an estate, and when all demands and charges of every kind have been settled, and the sole duty remains upon the part of the executor to pay the legacies, or of the administrator to make distribution, and he fails so to do, an action may be maintained against him for this breach of duty without waiting for an order of distribution by the probate court." Clarke *v.* Sinks, 144 Mo. 448, citing State *v.* Matson, 44 Mo. 305; State *v.* Thornton, 56 Mo. 325; State *v.* Grigsby, 92 Mo. 419.

1. A Remainderman after a life estate in a fund has no cause of action against the sureties of the executor or the administrator with the will annexed, until the death of the life tenant. His only remedy is to apply for an order that the fund be brought into court for proper investment; and on the failure of the executor or administrator to comply with such order, the court may revoke his letters and appoint an administrator *de bonis non*, by whom an action may be brought on the bond. State *v.* Brown, 64 Md. 97.

2. Evidence — Judgment or Decree Against Principal Conclusive Against Sureties — *Alabama.* — Williamson *v.* Howell, 4 Ala. 693; Perkins *v.* Moore, 16 Ala. 9; Kyle *v.* Mays, 22 Ala. 692; Ragland *v.* Calhoun, 36 Ala. 606; Cousins *v.* Jackson, 49 Ala. 236; Jones *v.* Ritter, 56 Ala. 270; Martin *v.* Tally, 72 Ala. 23.

Arkansas. — George *v.* Elms, 46 Ark. 260.

Louisiana. — Chapron *v.* Chapron, 41 La. Ann. 486. But see Canal, etc., Co. *v.* Brown, 4 La. Ann. 545.

Maine. — Bourne *v.* Todd, 63 Me. 427.

Massachusetts. — Heard *v.* Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; White *v.* Weatherbee, 126 Mass. 450; Fuller *v.* Cushman, 170 Mass. 286.

Michigan. — Clark *v.* Fredenburg, 43 Mich. 263; Holden *v.* Lathrop, 65 Mich. 652.

Missouri. — State *v.* Holt, 27 Mo. 340, 72 Am. Dec. 273; Dix *v.* Morris, 66 Mo. 514; State *v.* Donegan, 12 Mo. App. 190, 83 Mo. 374.

New York. — Casoni *v.* Jerome, 58 N. Y. 315; Gerould *v.* Wilson, 81 N. Y. 573; Harrison *v.* Clark, 87 N. Y. 572; Deobold *v.* Oppen-

mann, 111 N. Y. 531, 7 Am. St. Rep. 760; Power *v.* Speckman, 126 N. Y. 354; Willcox *v.* Smith, 26 Barb. (N. Y.) 316; Thayer *v.* Clark, 48 Barb. (N. Y.) 243, affirmed in 41 N. Y. 620; McMahon *v.* Smith, 24 N. Y. App. Div. 25.

Oregon. — Bellinger *v.* Thompson, 26 Oregon 320; Thompson *v.* Dekum, 32 Oregon 506.

Pennsylvania. — Garber *v.* Com., 7 Pa. St. 265.

South Carolina. — Lyles *v.* Brown, Harp. L. (S. Car.) 31; Lyles *v.* Robinson, 1 Bailey L. (S. Car.) 25; Chambers *v.* Patton, 1 Bailey L. (S. Car.) 130; Lucas *v.* Guy, 2 Bailey L. (S. Car.) 403; Norton *v.* Wallace, 2 Rich. L. (S. Car.) 460; Bryan *v.* Blakeney, Dudley L. (S. Car.) 27. But see Ordinary *v.* Condy, 2 Hill L. (S. Car.), 313, holding that the judgment against the principal is only *prima facie* evidence against the sureties; Kaminer *v.* Hope, 9 S. Car. 253. Compare Simkins *v.* Cobb, 2 Bailey L. (S. Car.) 60; Ordinary *v.* Carlile, 1 McMull. L. (S. Car.) 100; Selleck *v.* Mathews, 7 Rich. L. (S. Car.) 26.

Other decisions in *South Carolina* hold that the judgment against the principal is admissible against the sureties, but do not state whether it is conclusive or only *prima facie* evidence. Lyles *v.* Caldwell, 3 McCord L. (S. Car.) 225; Shelton *v.* Cureton, 3 McCord L. (S. Car.) 412; Ordinary *v.* Hunt, 1 McMull. L. (S. Car.) 380.

Texas. — Stewart *v.* Morrison, 81 Tex. 396, 26 Am. St. Rep. 821.

"The Reason for this holding, as stated by the courts, is that by his contract the surety puts himself in privity with the administrator, and being so in privity he is bound by any decree that the surrogate has jurisdiction to make." McMahon *v.* Smith, 24 N. Y. App. Div. 25.

Judgment on Claim Barred by Limitation. — If an executor or administrator permits judgment to be taken against him on a claim against which the statute of limitations has run, the judgment is not conclusive on the sureties. They are entitled to the benefit of the statute notwithstanding the failure of their principal to plead it. Dawes *v.* Shed, 15 Mass. 6, 8 Am. Dec. 80.

The Nullity of the Judgment against the administrator for want of jurisdiction over his person may be proved as a defense in an action against the sureties. Buckner *v.* Archer, 1 McMull. L. (S. Car.) 85.

Fraud or Collusion between the administrator and a creditor who has obtained a judgment against the administrator may be shown in defense of an action by the creditor against the sureties of the administrator. Mere evidence that the debt had been paid by the administrator is not admissible. Boyd *v.* Caldwell, 4 Rich. L. (S. Car.) 117.

but in some jurisdictions it is held that such judgment or decree is only *prima facie* evidence against the sureties.¹

(2) *In Equity*. — It is said that there is no reported English case of a bill being filed against the principal and sureties in an administration bond where a devastavit is charged, and where it was sought to make the sureties liable.² In the *United States*, though there is some conflict of authority, there are many cases which affirm the jurisdiction of equity in this regard where special circumstances exist.³

(3) *Summary Remedies*. — It is provided by statute in *Alabama* that execution may be issued against the sureties on an administration bond on the return of "no property" to one issued against the administrator on a decree of the probate court.⁴

Settlement by Personal Representative of Executor or Administrator. — Some authorities hold that the sureties of a deceased executor or administrator are not bound by a decree rendered on a settlement of his accounts made by his personal representative. *Jenkins v. Gray*, 16 Ala. 100; *Gray v. Jenkins*, 24 Ala. 516; *Martin v. Ellerbe*, 70 Ala. 334. But see *Williams v. Flippin*, 68 Miss. 680.

Effect of Subsequent Settlement in Probate Court. — Notwithstanding the recovery of a judgment against the administrator, his sureties may show, in defense of an action on the bond, a subsequent settlement in the probate court, from which it appears that the administrator exhausted the whole estate in paying the expenses of the last illness, funeral expenses and administration expenses, because such defense could not have been raised in the action in which the judgment was rendered, there having been at that time no settlement. The sureties, by setting up such defense, do not attempt to impeach the judgment, but merely to show that, since the judgment was rendered, facts have occurred which show that there are no assets of the estate with which to pay it. *Fuller v. Connelly*, 142 Mass. 227.

1. Judgment or Decree Against Principal Only Prima Facie Evidence Against Sureties — *Georgia*. — *Gibson v. Robinson*, 90 Ga. 756, 35 Am. St. Rep. 250; *Bird v. Mitchell*, 101 Ga. 46.

Mississippi. — *Lipscomb v. Postell*, 38 Miss. 476, 77 Am. Dec. 651; *Williams v. Flippin*, 68 Miss. 680.

Ohio. — *Gilbert v. Gilbert*, 7 Ohio Cir. Dec. 58; *Todd v. Lewis*, 2 Handy (Ohio) 280.

Tennessee. — *Seat v. Cannon*, 1 Humph. (Tenn.) 471.

Virginia. — *Justices v. Turner*, 6 Leigh (Va.) 116.

2. Jurisdiction in Equity — No English Precedents. — *Rorback v. Dorsheimer*, 25 N. J. Eq. 516; *Carow v. Mowatt*, 2 Edw. Ch. (N. Y.) 57.

3. Cases Affirming Equitable Jurisdiction — *United States*. — *Green v. Creighton*, 23 How. (U. S.) 90; *Payne v. Hook*, 7 Wall. (U. S.) 425; *Donohue v. Roberts*, 1 Fed. Rep. 449.

Alabama. — *Morris v. Morris*, 58 Ala. 443; *Baines v. Barnes*, 64 Ala. 375; *Dowty v. Hall*, 83 Ala. 165.

Arkansas. — *Clark v. Shelton*, 16 Ark. 480; *Moren v. McCown*, 23 Ark. 93; *Norton v. Miller*, 25 Ark. 108; *Osborne v. Graham*, 30 Ark. 66; *Reinhardt v. Gartrell*, 33 Ark. 730; *State v. Turner*, 49 Ark. 317.

Georgia. — *Alexander v. Mercer*, 7 Ga. 549.

Illinois. — *People v. Lott*, 27 Ill. 215.

Kentucky. — *Moore v. Waller*, 1 A. K. Marsh. (Ky.) 488; *Carrol v. Connet*, 2 J. J. Marsh. (Ky.) 195; *Mitchell v. Miller*, 6 Dana (Ky.) 79; *Lee v. Waller*, 3 Metc. (Ky.) 61.

Mississippi. — *Buie v. Pollock*, 55 Miss. 309; *Whitfield v. Evans*, 56 Miss. 488; *Clopton v. Houghton*, 57 Miss. 787; *Jones v. Patty*, 73 Miss. 179.

The jurisdiction of this matter is statutory in *Mississippi*. Prior to the statute it was held that equity had no jurisdiction. *Halfacre v. Dobbins*, 50 Miss. 766.

New York. — *Hood v. Hood*, 85 N. Y. 561; *Haight v. Brisbin*, 100 N. Y. 219; *Bischoff v. Engel*, 10 N. Y. App. Div. 240; *Haines v. Meyer*, 25 Hun (N. Y.) 414; *Towner v. Tooley*, 38 Barb. (N. Y.) 598.

South Carolina. — *Knox v. Pickett*, 4 Desaus. (S. Car.) 92, 199; *Taylor v. Taylor*, 2 Rich. Eq. (S. Car.) 123. See also *Gayden v. Gayden*, McMull. Eq. (S. Car.) 444; *McBee v. Crocker*, McMull. Eq. (S. Car.) 485; *O'Neal v. Herbert*, McMull. Eq. (S. Car.) 495. *Contra*, *Teague v. Dendy*, 2 McCord Eq. (S. Car.) 207, 16 Am. Dec. 643.

Tennessee. — *Whitaker v. Whitaker*, 12 Lea (Tenn.) 393.

Virginia. — *Bachelor v. Elliott*, 1 Hen. & M. (Va.) 10; *Clarke v. Webb*, 2 Hen. & M. (Va.) 8; *Spottswood v. Dandridge*, 4 Munf. (Va.) 289.

"The jurisdiction of a court of equity to enforce the bond arises from its jurisdiction over administrators, its disposition to prevent multiplicity of suits, and its power to adapt its decrees to the substantial justice of the case." *Green v. Creighton*, 23 How. (U. S.) 90.

If There Is an Adequate Remedy at Law a court of equity will not take jurisdiction. *Hoell v. Blanchard*, 4 Desaus. (S. Car.) 21.

Thus where an estate has been settled and the executor discharged, a bill in chancery will not lie to recover the amount of an alleged improper payment on the ground that the order of the court was void for want of jurisdiction, because if the court did not have jurisdiction the order of final settlement was void, and the remedy at law by an action on the executor's bond is adequate, and chancery has no jurisdiction. *People v. Medart*, 166 Ill. 348, affirming 63 Ill. App. 111.

4. Execution Sureties on Decree Against Principal — *Alabama*. — *Little v. Heard*, 16 Ala. 358; *Thompson v. Bondurant*, 15 Ala. 346; *Jenkins v. Gray*, 16 Ala. 100; *Poacher v. Weisinger*, 20

VIII. POWERS, DUTIES, AND LIABILITIES IN GENERAL — 1. Summary of Duties.

— The general duties of an executor or administrator are to bury the decedent, collect his effects, preserve them from waste, pay claims against the estate, and distribute the residue, if any, among those entitled; and to do all other things necessary as the representative of the personal estate of the decedent.¹

Ala. 102; Kirby *v.* Anders, 26 Ala. 466; Jewett *v.* Hoagland, 30 Ala. 716; Grace *v.* Martin, 47 Ala. 135; McGehee *v.* Lomax, 49 Ala. 131; Hudson *v.* Modawell, 64 Ala. 481; Payne *v.* Thompson, 48 Ala. 535; Stallworth *v.* Farnham, 64 Ala. 259; Steele *v.* Graves, 68 Ala. 17, 21; Martin *v.* Tally, 72 Ala. 23; Berry *v.* Perry, 81 Ala. 103.

It is held that this statute gives the right to issue execution against the sureties on a decree against the administrator, only in those cases where an action at law could be maintained on the bond. Steele *v.* Graves, 68 Ala. 17.

And it does not conclude the sureties, but they are entitled to test their liability by suit. Clarke *v.* West, 5 Ala. 117.

1. Duties in General. — Willis *v.* Willis, 9 Ala. 330; Feagan *v.* Kendall, 43 Ala. 628; Steele *v.* Knox, 10 Ala. 608; Stewart *v.* Stewart, 31 Ala. 207; Benford *v.* Daniels, 13 Ala. 667; Johnston *v.* Maples, 49 Ill. 101; Ward *v.* Tinkham, 65 Mich. 695; Powell *v.* Hurt, 31 Mo. App. 632; Schultz *v.* Pulver, 11 Wend. (N. Y.) 361.

Exclusive Powers and Duties. — The collection of assets and payment of debts and funeral expenses is the exclusive duty of the personal representative, and therefore a direction in a will that the trustees, to whom the testatrix gave all her estate for a charity after payment of debts and funeral expenses, convert the personalty into money and pay the debts and funeral expenses is void, but must be performed by the administrator with the will annexed, notwithstanding such direction. Drury *v.* Natick, 10 Allen (Mass.) 169.

Representative Character of Executors and Administrators. — An executor or administrator is the sole representative of the decedent's personal estate. Gold *v.* Bailey, 44 Ill. 491, 92 Am. Dec. 190; Harris *v.* Bryant, 83 N. Car. 568. But his representative character extends only so far as is necessary to wind up the decedent's business. Steele *v.* Knox, 10 Ala. 608. And his rights are no greater than those of the decedent. Whitworth *v.* Wofford, 73 Ga. 259.

An Administrator de Bonis Non represents the decedent, and not the original administrator. Forniquet *v.* Forstall, 34 Miss. 87; Searles *v.* Scott, 14 Smed. & M. (Miss.) 94.

Representation of Creditors. — In some jurisdictions the executor or administrator also represents the creditors of the decedent. Hangen *v.* Hachemeister, 114 N. Y. 566, 11 Am. St. Rep. 691; Bate *v.* Graham, 11 N. Y. 237. And in *Louisiana* it is held that an administrator represents the creditors only. Judson *v.* Connolly, 4 La. Ann. 169; Drouet *v.* Drouet, 26 La. Ann. 323.

In the Administration of Real Assets the executor or administrator represents the creditors and antagonizes the heirs. Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15; Wilburn *v.* McCalley, 63 Ala. 436. But when he asserts a claim to the realty or any part of it

in his own right he cannot at the same time represent the adversary rights of creditors or of heirs, if the estate be solvent. The interests are antagonistic. Corr *v.* Shackelford, 68 Ala. 241.

Ratifying Action Brought Without Authority. — An action brought in the name of the deceased in his lifetime, but without authority, may be ratified by the administrator. Mathewson *v.* Eureka Powder Works, 44 N. H. 289.

Discretionary Power under Will. — Where a will commits the matter entirely to the discretion of the executors, the courts will not undertake to control that discretion unless there is a manifest and flagrant refusal to exercise it, with a view to defeat the intent of the will. Gunter *v.* Gunter, 18 S. Car. 197.

Right to Vote Decedent's Stock. — An executor or administrator has the right to vote shares of stock standing in the name of the decedent on the books of a corporation, and no formal transfer is necessary to give this right. Matter of Cape May, etc., Nav. Co., 51 N. J. L. 78; Matter of North Shore Staten Island Ferry Co., 63 Barb. (N. Y.) 556. But see Frank *v.* Lewis Foundry, etc., Co., 41 Pittsb. Leg. J. (Pa.) 33.

Assignment of Widow's Dower. — An administrator is not authorized to procure an assignment of the widow's dower. Stevens *v.* Stevens, 2 Dana (Ky.) 429. But if he has power to sell the lands, he may make an agreement to assign a part thereof to the widow as dower in consideration of a release by her of her dower right in the residue. Harrow *v.* Johnson, 3 Metc. (Ky.) 582.

Satisfaction of Dower Out of General Funds. — An administrator cannot pay money to the widow out of the general funds of the estate in satisfaction of her dower right. Stock *v.* Parker, 2 McCord Eq. (S. Car.) 376.

Power to Waive Discharge in Bankruptcy. — An administrator cannot waive the decedent's discharge in bankruptcy. Parker *v.* Grant, 91 N. Car. 338.

Breaking up Domestic Establishment. — A reasonable time is allowed executors to break up the testator's domestic establishment and discharge his servants. Field *v.* Peckett, 29 Beav. 576.

Power to Exercise Decedent's Right of Election. — In *In re Cousins*, 30 Ch. Div. 203, the testator gave to his son the option of purchasing a hotel at a certain sum, and provided that if the son should decline to purchase at such price within a specified time after the decease of the survivor of the testator's widow and sister the trustees appointed by the will should sell the hotel, and the proceeds thereof should fall into the residue of the personal estate. It was held that the option of purchasing the hotel was a right personal to the son and could not be exercised after his death by his executors.

Acts Directed to Be Done Without Naming Any Person to Do Them must be done by the execu-

Duty to Make Speedy Settlement. — It is also his duty to settle up the estate of the decedent as soon as practicable.¹

Duty to Obey Instructions of Will. — And if the decedent left a will, it is the duty of the executor to obey the directions contained therein, in default of which he will be personally responsible for resulting losses.²

2. Degree of Diligence and Skill Required. — In the performance of his duties an executor or administrator must act with the highest fidelity and in the utmost good faith, but he is held to the exercise only of that degree of skill and diligence which an ordinarily prudent man bestows on his own similar private affairs. Nothing more than this can be required of him, and if his acts can stand the test of this rule he cannot be held liable for any loss that may be sustained.³

tor. *Dean v. Dean*, 7 T. B. Mon. (Ky.) 304; *O'Neal v. Beall*, 10 B. Mon. (Ky.) 273.

Inquisition and Condemnation of Real Estate on a Fieri Facias may be waived by the administrator. *Hunt v. Devling*, 8 Watts (Pa.) 403.

Old Transactions. — It is not the duty of an executor to inquire into transactions of the testator twenty years before his death. *Alliott v. Smith*, (1895) 2 Ch. 111.

1. Duty to Make Speedy Settlement. — *Walls v. Walker*, 37 Cal. 424, 99 Am. Dec. 290; *Webster v. Merriam*, 9 Conn. 225; *Sanderson v. Sanderson*, 17 Fla. 820.

The Period Allowed for Settling Estates is not a prescribed delay, but is intended to restrict delay. *Conner v. Ogle*, 4 Md. Ch. 425.

Liability for Delay. — If a personal representative unreasonably delays the settlement of the estate he is personally liable for any loss caused thereby. *In re Palms*, 44 Mich. 637; *Smith v. Slaughter*, 3 Heisk. (Tenn.) 565.

Request of Heirs Not Necessary. — An executor should not wait until requested by the heirs to proceed to complete the settlement of the estate, but it is his duty, without such request, to procure all orders and take all steps that may be necessary. *Davenport v. Richards*, 16 Conn. 320; *Warren v. Powers*, 5 Conn. 373; *Moore v. Holmes*, 32 Conn. 561; *Rowland v. Isaacs*, 15 Conn. 115.

2. Duty to Obey Instructions of Will. — "There is but one safe course for executors to pursue, and that is to implicitly follow the directions contained in the will." *Weigand's Appeal*, 28 Pa. St. 471.

"It is the duty of executors to administer the estate according to the provisions of the will, notwithstanding the duties thus imposed include such as are usually performed by trustees." *Webster v. Morris*, 66 Wis. 399, 57 Am. Rep. 278.

The Motive of an Executor in departing from the instructions contained in the will cannot affect his liability for losses caused by such departure. *Feemster v. Good*, 12 S. Car. 575.

Advisory Provisions. — In *Matter of Ogier*, 101 Cal. 381, 40 Am. St. Rep. 61, the will contained the following language: "I hereby select as the attorney of my estate John W. Mitchell, and direct my executrix to consult and employ him in all matters pertaining to the distribution of my estate and the requirements of this my last will." It was held that this did not constitute a selection which was binding on the executrix, but was simply an advisory provision which she could disregard if she

chose. See also *Foster v. Elsley*, 19 Ch. Div. 518; *Young v. Alexander*, 16 Lea (Tenn.) 108.

3. Measure of Diligence and Skill — Entire Good Faith and Reasonable Prudence and Care — *England*. — *Caffrey v. Darby*, 6 Ves. Jr. 494.

Alabama. — *Moore v. Randolph*, 70 Ala. 575; *Searcy v. Holmes*, 45 Ala. 225; *Gould v. Hayes*, 19 Ala. 438; *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590; *Lyon v. Foscoe*, 60 Ala. 468; *Baldwin v. Hatchett*, 56 Ala. 461; *Hutchinson v. Owen*, 59 Ala. 326.

California. — *Matter of Moore*, 96 Cal. 522.

Colorado. — *Hake v. Stotts*, 5 Colo. 140.

Connecticut. — *Potter's Appeal*, 56 Conn. 1, 7 Am. St. Rep. 272.

Indiana. — *Cooper v. Williams*, 109 Ind. 272.

Louisiana. — *Stafford v. McIntosh*, 39 La. Ann. 836.

Michigan. — *Loomis v. Armstrong*, 63 Mich. 355.

Mississippi. — *Berry v. Parkes*, 3 Smed. & M. (Miss.) 625; *Bailey v. Dilworth*, 10 Smed. & M. (Miss.) 404, 48 Am. Dec. 760.

Missouri. — *Powell v. Hurt*, 31 Mo. App. 632; *State v. Meagher*, 44 Mo. 356, 100 Am. Dec. 298; *Foster v. Davis*, 46 Mo. 268; *Clyce v. Anderson*, 49 Mo. 37; *Fudge v. Durn*, 51 Mo. 264; *Gamble v. Gibson*, 59 Mo. 585; *Merritt v. Merritt*, 62 Mo. 150; *Atterberry v. McDuffee*, 31 Mo. App. 603.

Nebraska. — *Dundas v. Chrisman*, 25 Neb. 495.

Nevada. — *Royce v. Hampton*, 16 Nev. 25.

New Jersey. — *Voorhees v. Stoothoff*, 11 N. J. L. 145; *Vanderpool v. Davenport*, 3 N. J. Eq. 121.

New York. — *Schultz v. Pulver*, 11 Wend. (N. Y.) 368; *Sheerin v. Public Administrator*, 2 Redf. (N. Y.) 421; *McRae v. McRae*, 3 Bradf. (N. Y.) 199; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619; *Hollister v. Burritt*, 14 Hun (N. Y.) 291; *Matter of Saunders*, 4 Misc. Rep. (N. Y. Surrogate Ct.) 28; *McCabe v. Fowler*, 84 N. Y. 314.

North Carolina. — *Williams v. Maitland*, 1 Ired. Eq. (36 N. Car.) 92; *Perry v. Maxwell*, 2 Dev. Eq. (17 N. Car.) 488; *Whitted v. Webb*, 2 Dev. & B. Eq. (22 N. Car.) 442; *Deberry v. Ivey*, 2 Jones Eq. (55 N. Car.) 370; *Holderness v. Palmer*, 4 Jones Eq. (57 N. Car.) 107; *Fisher v. Ritchey*, 64 N. Car. 172; *Finger v. Finger*, 64 N. Car. 183; *Kerns v. Wallace*, 64 N. Car. 187; *Cobb v. Taylor*, 64 N. Car. 193; *Fike v. Green*, 64 N. Car. 665; *Ramsay v. Hanner*, 64 N. Car. 668; *White v. Robinson*,

3. Burial of Decedent — *a. DUTY TO PROVIDE FUNERAL.* — One of the first duties of an executor or administrator is to bury the remains of the decedent ¹ in a manner suitable to his estate and station in life.²

Right to Body for Purpose of Burial. — Though there is no property in a dead body, the executors, according to some authorities, have a right to the possession of it for the purpose of burial, while other authorities hold that this right belongs to the decedent's next of kin.³

b. LIABILITY FOR FUNERAL EXPENSES. — Since it is the duty of a personal representative to bury the body of the decedent, it is generally held that he is liable in his representative capacity, and not individually, for the funeral

64 N. Car. 698; *Womble v. George*, 64 N. Car. 759.

Pennsylvania. — *Derbyshire's Estate*, 81 Pa. St. 18; *Thomas's Estate*, 5 Kulp (Pa.) 213; *M'Nair's Appeal*, 4 Rawle (Pa.) 148; *Curren's Estate*, 32 Leg. Int. (Pa.) 134, 11 Phila. (Pa.) 59.

South Carolina. — *Doud v. Sanders*, Harp. Eq. (S. Car.) 277; *Webb v. Bellinger*, 2 Desaus. (S. Car.) 482; *Taveau v. Ball*, 1 McCord Eq. (S. Car.) 456.

Texas. — *Noble v. Jones*, 35 Tex. 692.

Virginia. — *Kee v. Kee*, 2 Gratt. (Va.) 117; *Douglass v. Stephenson*, 75 Va. 747; *Elliott v. Carter*, 9 Gratt. (Va.) 541; *Davis v. Harman*, 21 Gratt. (Va.) 194; *Lingle v. Cook*, 32 Gratt. (Va.) 262; *Williams v. Skinner*, 25 Gratt. (Va.) 507; *Pidgeon v. Williams*, 21 Gratt. (Va.) 251; *Hale v. Wall*, 22 Gratt. (Va.) 424.

It has been observed by equity courts that two principles influence their course, with respect to the personal liability of executors and administrators for their official conduct: (1) That in order not to deter persons from undertaking these offices, the court is extremely liberal in making every possible allowance, and cautions not to hold executors or administrators liable upon slight grounds. (2) That care must be taken to guard against an abuse of their trust. *Powell v. Evans*, 5 Ves. Jr. 843; *Tebbs v. Carpenter*, 1 Madd. 290; *Raphael v. Boehm*, 13 Ves. Jr. 410. See also *Chase v. Lockerman*, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; *Gwynn v. Dorsey*, 4 Gill & J. (Md.) 453.

In Resisting Claims against the estate the administrator is bound to the same degree of diligence as in the prosecution of the causes of action accruing to him in his representative capacity. *Teague v. Corbitt*, 57 Ala. 529.

Liability for Neglect. — "The duties of an executor or administrator are active, and not passive. He cannot be permitted to neglect to do those things which are plainly required at his hands by law or the order of the court, and, when complaint is made of such neglect, excuse himself by alleging that such delay or omission was for the benefit of the estate." *In re Holladay*, 18 Oregon 168. Nor is he relieved from liability for mismanagement by a direction in the will that he shall not be personally liable. *Richardson's Estate*, 34 Leg. Int. (Pa.) 382, 12 Phila. (Pa.) 32.

Infailibility Not Required. — Executors and administrators are not insurers, and are not expected to be infallible.

Alabama. — *Nunn v. Nunn*, 66 Ala. 35.

Indiana. — *Rubottom v. Morrow*, 24 Ind. 202, 87 Am. Dec. 324.

Nevada. — *Matter of Millenovich*, 5 Nev. 161.

North Carolina. — *Deberry v. Ivey*, 2 Jones Eq. (55 N. Car.) 370; *Nelson v. Hall*, 5 Jones Eq. (58 N. Car.) 32; *Moore v. Eure*, 101 N. Car. 11, 9 Am. St. Rep. 17.

Pennsylvania. — *Matter of Bosio*, 2 Ashm. (Pa.) 437.

South Carolina. — *Mikell v. Mikell*, 5 Rich. Eq. (S. Car.) 220.

1. Duty to Bury Decedent — *England.* — *Williams v. Williams*, 20 Ch. Div. 659, 51 L. J. Ch. 385, 46 L. T. N. S. 275; 30 W. R. 438, 15 Cox C. C. 39.

California. — *Estate of Galland*, 92 Cal. 293.

Mississippi. — *Donald v. McWhorter*, 44 Miss. 124.

New Hampshire. — *Bell v. Briggs*, 63 N. H. 592.

New York. — *Matter of Erlacher*, 3 Redf. (N. Y.) 8.

Pennsylvania. — *Meyer's Bstate*, 43 Leg. Int. (Pa.) 108, 18 Phila. (Pa.) 42.

2. Funeral Must Be According to Station and Estate — *England.* — *In re M'Myn*, 33 Ch. Div. 575; *Edwards v. Edwards*, 4 Tyrw. 438, 2 Crompt. & M. 612; *Shelly's Case*, 1 Salk. 296; *Reeves v. Ward*, 2 Scott 395.

California. — *Matter of Weringer*, 100 Cal. 345.

Georgia. — *Palmes v. Stephens*, R. M. Charl. (Ga.) 56.

Mississippi. — *Donald v. McWhorter*, 44 Miss. 124.

New York. — *Matter of Erlacher*, 3 Redf. (N. Y.) 8.

North Carolina. — *Parker v. Lewis*, 2 Dev. L. (13 N. Car.) 21.

For a Full Discussion as to the extent to which an executor may incur funeral expenses and the various items, see *infra*, this title, *Accounting — Credits — Funeral Expenses*.

3. Right of Executor to Decedent's Body. — *Williams v. Williams*, 20 Ch. Div. 659, 51 L. J. Ch. 385, 46 L. T. N. S. 275, 30 W. R. 438, 15 Cox C. C. 39.

Right of Next of Kin as Against Executor or Administrator. — *Bogert v. Indianapolis*, 13 Ind. 134; *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249; *Griffith v. Charlotte*, etc., R. Co., 23 S. Car. 25, 55 Am. Rep. 1.

The Widow of the Decedent, though also administrator, has no right to the decedent's body after interment as against the next of kin. *Wynkoop v. Wynkoop*, 42 Pa. St. 293, 82 Am. Dec. 506. See also, as to the right to the body of the decedent, the title *Dead Body*, vol. 8, p. 834.

expenses.¹ But he may make himself liable in his individual capacity by a personal contract.²

4. Powers Before Probate or Grant of Letters—*a. EXECUTORS*—(1) *Common-law Rule*—(a) *In General*.—At common law an executor could exercise before probate all the powers pertaining to his office which did not require him to make profert. He could collect the assets, sell and dispose of them, pay debts, and assent to legacies; and the validity of such acts was not affected by his death before probate. This rule was founded on the principle that the title of an executor is derived from his appointment by the will, and that probate is only evidence of his right.³

(b) *Power to Sue*.—As a general rule an executor cannot sue before probate, because it is necessary to make profert of the certificate of probate or letters testamentary before he can declare.⁴ But he may commence an action and proceed with it to the point where profert is necessary;⁵ and he may sue before probate where the cause of action is founded on his actual possession, where it accrued to him, and not to the testator.⁶

1. Liability in Representative Capacity for Funeral Expenses.—Anonymous, 12 Mod. 256; *Lucy v. Walroud*, 3 Bing. N. Cas. 841, 32 E. C. L. 349, 5 Scott 46, 3 Hodges 215; *Trueman v. Tilden*, 6 N. H. 201; *Smith v. Teacle*, 8 Pa. Co. Ct. Rep. 150. But see *Murphy v. Naughton*, 68 Hun (N. Y.) 424, in which case it was held that the liability of an administrator for funeral expenses was only personal.

Promise to Pay Funeral Expenses Binds Estate.—*Hapgood v. Houghton*, 10 Pick. (Mass.) 154. See also *Adams v. Butts*, 16 Pick. (Mass.) 343. But see *contra*, *Ferrin v. Myrick*, 41 N. Y. 315, *reversing* 53 Barb. (N. Y.) 76.

Promise to Pay for Tombstone.—An administrator is liable only in his representative capacity on his agreement to pay for a tombstone for the decedent, unless the promise was made solely in his individual capacity. *Jackson v. Leech*, (Mich. 1897) 71 N. W. Rep. 846; *Laird v. Arnold*, 25 Hun (N. Y.) 4.

Funeral Ordered by Third Person.—If the funeral was ordered by and credit given to a third person the executor is not liable. *Lucas v. Hessen*, 17 Abb. N. Cas. (N. Y. C. Pl.) 271, 13 Daly (N. Y.) 347.

Purchase of Burial Lot.—It is the duty of an executor to purchase and improve a burial lot selected by the testator, where the will directed his burial lot to be improved, and it appeared that he had selected one, but had not purchased it. *Benison's Estate*, 9 Phila. (Pa.) 355, 31 Leg. Int. (Pa.) 196.

Burial of Legatee.—The expenses of the funeral of an indigent legatee are necessities which the executor may pay. *Wilson v. Staats*, 33 N. J. Eq. 524.

Effect of Void Letters.—Payment of funeral expenses by the administrator is valid though the letters are void. *Hurt v. Horton*, 12 Tex. 285.

2. Individual Liability—Personal Contract.—*Brice v. Wilson*, 8 Ad. & El. 349, note c, 35 E. C. L. 405, note c, holding that if an executor ratifies orders given by another person for an extravagant funeral, he may be sued by the undertaker individually, and not as executor, for the whole expense.

As to the Contractual Liability of executors and administrators for debts of their decedents generally, see *infra*, this section, *Payment of Decedent's Debts, and Contracts*.

3. Powers Before Probate—England.—*Woolley v. Clark*, 5 B. & Ald. 744, 7 E. C. L. 249; *Roe v. Summerset*, 2 W. Bl. 692; *Pinney v. Pinney*, 8 B. & C. 335, 15 E. C. L. 230; *Johnson v. Warwick*, 17 C. B. 516, 84 E. C. L. 516; *Smith v. Milles*, 1 T. R. 480; *Wankford v. Wankford*, 1 Salk. 306; *Brazier v. Hudson*, 8 Sim. 67; *Newton v. Metropolitan R. Co.*, 1 Dr. & Sm. 583, 8 Jur. N. S. 738, 5 L. T. N. S. 542; *Whitehead v. Taylor*, 10 Ad. & El. 210, 37 E. C. L. 95.

Canada.—*Robinson v. Coyne*, 14 Grant's Ch. (U. C.) 561; *Bryce v. Beattie*, 12 U. C. C. P. 409.

Connecticut.—*Marcy v. Marcy*, 32 Conn. 316. *Kentucky.*—*Gordon v. Woods*, 4 Bibb (Ky.) 476; *Mitchell v. Rice*, 6 J. J. Marsh. (Ky.) 625; *Aleck v. Tevis*, 4 Dana (Ky.) 243; *Gilbert v. Bartlett*, 9 Bush (Ky.) 54; *Wood v. Nelson*, 9 B. Mon. (Ky.) 604.

Maine.—*Hathorn v. Eaton*, 70 Me. 219. *Massachusetts.*—*Rand v. Hubbard*, 4 Met. (Mass.) 252.

Mississippi.—*Emanuel v. Norcum*, 7 How. (Miss.) 150.

New Hampshire.—*Strong v. Perkins*, 3 N. H. 517.

New Jersey.—*Thiefes v. Mason*, 55 N. J. Eq. 456.

South Carolina.—*Magwood v. Legge*, Harp. L. (S. Car.) 116; *Foster v. Brown*, 3 Rich. L. (S. Car.) 254.

Tennessee.—*Baldwin v. Buford*, 4 Yerg. (Tenn.) 16.

4. Executor Cannot Sue Before Probate.—1 Williams on Exrs. (7th Am. ed.) 252; *Gilbert v. Bartlett*, 9 Bush (Ky.) 54.

Profert—When Necessary.—See the title EXECUTORS AND ADMINISTRATORS, 8 ENCYC. OF PL. AND PR. 674.

5. May Commence Actions.—*Gordon v. Woods*, 4 Bibb (Ky.) 476; *Mitchell v. Rice*, 6 J. J. Marsh. (Ky.) 625; *Rand v. Hubbard*, 4 Met. (Mass.) 256; *Strong v. Perkins*, 3 N. H. 517.

6. Actions Founded on Executor's Possession.—In *Rand v. Hubbard*, 4 Met. (Mass.) 256, Shaw, C. J., said that an executor, before probate, "may commence an action, though he shall not declare; because when he declares he must make profert of his letters testamentary, if he sues as executor, or if the will is

(2) *Modern Rule.* — The common-law rule as to the powers of an executor before probate or the grant of letters testamentary has been greatly modified by statute in the *United States*. These statutes require an executor to qualify before the probate court by taking oath, and generally by giving a bond also, and until qualification his powers are usually restricted to the burial of the testator and to the performance of such acts as are necessary to preserve the estate; ¹ but the probate or letters testamentary, when granted, relate back to the testator's death and validate acts done by the executor before he qualified.²

part of the proof necessary to his title; but he may maintain trover before probate for goods of the testator taken out of his possession, for there the probate of letters testamentary is not necessary." See also *Gordon v. Woods*, 4 Bibb (Ky.) 476.

"For All Trespasses on the Goods or Chattels, and All Contracts in reference thereto, after the testator's death, and before probate, the executor can sue for and recover without producing letters testamentary. * * * So he may be sued by the creditors of the testator." *Baldwin v. Buford*, 4 Yerg. (Tenn.) 16.

1. *Common-law Doctrine Modified by Statute in the United States.* — *McDearmon v. Maxfield*, 38 Ark. 631; *Gilbert v. Bartlett*, 9 Bush (Ky.) 54; *Rand v. Hubbard*, 4 Met. (Mass.) 257; *Beste v. Burger*, 17 Abb. N. Cas. (N. Y. C. Pl.) 162; *Martin v. Peck*, 2 Yerg. (Tenn.) 298; *Killebrew v. Murphy*, 3 Heisk. (Tenn.) 546; *Monroe v. James*, 4 Munf. (Va.) 194. See also *supra*, this title, *Appointment and Tenure of Office* — 3. *Qualification of Executors and Administrators*.

The *Tennessee Statute* provides that "no person shall presume to enter upon the administration of any deceased person's estate, until he has obtained letters of administration or letters testamentary." *Killebrew v. Murphy*, 3 Heisk. (Tenn.) 546.

"It is well settled, under our law, that until after his qualification an executor stands upon the same footing with an administrator; and that until he has given bond, and been duly qualified, as required by law, the goods and chattels of the testator remain in custody of the law, and he can do no valid act relating to the administration thereof." *Fay v. Reager*, 2 Sneed (Tenn.) 203.

Rule in Alabama. — It is held in Alabama that the common-law rule that an executor could do before probate nearly all the acts which he could do afterwards, except to sue, has never been the law of that state. *Wood v. Cosby*, 76 Ala. 557.

Only *Pressing Necessity* will authorize an executor to intermeddle with an estate before letters testamentary have been granted. *Stagg v. Green*, 47 Mo. 500.

What Acts Are Necessary Before Probate. — The collection of money due the testator and the application of it to the payment of taxes and general expenses are necessary for the protection of the estate, and are validated by the subsequent issue of letters testamentary. *Conrad v. Archer*, (Supreme Ct.) 7 N. Y. St. Rep. 646.

In *Hull v. Cartledge*, 18 N. Y. App. Div. 54, a partnership agreement contained a provision that on the death of one of the partners the surviving partner should be at liberty to pur-

chase and take all the partnership assets, property, and business, on payment to the legal representatives of the deceased partner of the full value of his share, by executing and delivering to the legal representatives of the decedent bonds for the payment of the price in equal half-yearly instalments, with the privilege of paying in larger and more frequent instalments. It was held that the executors could, before probate, take the bonds provided for by the partnership agreement, as such act would be for the preservation of that portion of the decedent's estate.

Payment of Debts. — Executors are not chargeable with devastavit in paying the debts of the testator before they receive letters testamentary, where the act was done in good faith and with what then appeared to be reasonable prudence. *Denton v. Sanford*, 103 N. Y. 607.

Assignment for Benefit of Creditors. — Executors may assent to an assignment for the benefit of creditors made by the surviving partner of the testator, though the statute provides that "no executor named in a will shall, before letters testamentary are granted, have any power to dispose of any part of the estate of such testator, except to pay funeral charges, nor interfere with such estate in any manner further than is necessary for its preservation," since the executor, in assenting to such assignment, acts only as assignor with the surviving partner in passing title to the partnership property. *Beste v. Burger*, 17 Abb. N. Cas. (N. Y. C. Pl.) 162, *affirmed* 110 N. Y. 644, on authority of *Williams v. Whedon*, 109 N. Y. 333, 4 Am. St. Rep. 460.

Ratifying Acts Done Before Qualification. — In *Denton v. Sanford*, 103 N. Y. 607, it was held that executors were not guilty of devastavit where they paid for land purchased by the testator before his death, and took a deed, before they had received letters testamentary.

2. *Probate or Letters Testamentary Relate Back to Testator's Death — England.* — *Smith v. Milles*, 1 T. R. 480; *Rex v. Netherseal*, 4 T. R. 258; *Rogers v. James*, 7 Taunt. 147, 2 E. C. L. 147, 2 Marsh. 425; *Ingle v. Richards*, 6 Jur. N. S. 1178, 8 W. R. 697, 28 Beav. 366.

Arkansas. — *McDearmon v. Maxfield*, 38 Ark. 631.

Maine. — *Pinkham v. Grant*, 78 Me. 158.

Massachusetts. — *Dawes v. Boylston*, 9 Mass. 337, 6 Am. Dec. 72; *Wiggin v. Swett*, 6 Met. (Mass.) 197.

Missouri. — *Stagg v. Green*, 47 Mo. 500.

New Hampshire. — *Shirley v. Healds*, 34 N. H. 407; *Brown v. Leavitt*, 26 N. H. 493.

New York. — *Kaufman v. Schoeffel*, 46 Hun (N. Y.) 571, 113 N. Y. 635; *Joyce v. McGuire*, 2 N. Y. City Ct. 422; *Bellinger v. Ford*, 21 Barb. (N. Y.) 311.

b. ADMINISTRATORS — (1) In General. — The common-law doctrine as to the powers of executors before probate or qualification does not apply to administrators, because the title and powers of an administrator are derived solely from his appointment, and he has no authority until he has actually received the letters.¹

(2) *Doctrine that Letters Relate Back.* — It is well settled, however, that the title of the administrator to the property of his intestate relates back and takes effect from the time of the death of the decedent,² legalizing all the acts otherwise valid done by the administrator before his appointment,³ and vest-

Pennsylvania. — *Stockton v. Wilson*, 3 P. & W. (Pa.) 130.

South Carolina. — *Johns v. Johns*, 1 McCord L. (S. Car.) 132.

In *Carter v. Carter*, 10 B. Mon. (Ky.) 330, it was held that if a person nominated as executor of a will does acts appertaining to the duty of his office before qualifying, and afterwards qualifies, such acts are binding, not because of the nomination in the will, but because of his subsequent qualification.

1. Administrator's Title and Authority Derived from Letters. — *Woolley v. Clark*, 5 B. & Ald. 745, 7 E. C. L. 250; *Whitehead v. Taylor*, 10 Ad. & El. 270, 37 E. C. L. 95; *Dawes v. Boylston*, 9 Mass. 337, 6 Am. Dec. 72; *Wiggin v. Swett*, 6 Met. (Mass.) 197; *Rand v. Hubbard*, 4 Met. (Mass.) 257; *Shirley v. Healds*, 34 N. H. 407; *Johns v. Johns*, 1 McCord L. (S. Car.) 132.

A Person Entitled to Administer on an estate has the right in anticipation of such administration to do whatever is necessary to preserve the estate. *Taylor v. Woburn*, 130 Mass. 494.

2. Letters of Administration Relate Back to Time of Death — England. — *Morgan v. Thomas*, 8 Exch. 307, 17 Jur. 283, 22 L. J. Exch. 152; *Crossfield v. Such*, 8 Exch. 825; *Foster v. Bates*, 12 M. & W. 226, 1 Dowl. & L. 400, 7 Jur. 1093, 13 L. J. Exch. 88; *Whitehall v. Squire*, 1 Salk. 296; *Tharpe v. Stallwood*, 5 M. & G. 760, 44 E. C. L. 397; *Deal v. Potter*, 26 U. C. Q. B. 578; *Christie v. Clark*, 27 U. C. Q. B. 21, *affirming* *Christie v. Clarke*, 16 U. C. C. P. 544.

Alabama. — *Upchurch v. Norsworthy*, 15 Ala. 705.

Arkansas. — *McDearmon v. Maxfield*, 38 Ark. 631.

Georgia. — *Liptrot v. Holmes*, 1 Ga. 381.

Illinois. — *Globe Accident Ins. Co. v. Gerisch*, 163 Ill. 625, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 194.

Iowa. — *Haynes v. Harris*, 33 Iowa 516.

Maine. — *Pinkham v. Grant*, 78 Me. 158.

Maryland. — *Dempsey v. McNabb*, 73 Md. 433.

Massachusetts. — *Alvord v. Marsh*, 12 Allen (Mass.) 603; *Clapp v. Stoughton*, 10 Pick. (Mass.) 463; *Wonson v. Sayward*, 13 Pick. (Mass.) 404, 23 Am. Dec. 691; *Lawrence v. Wright*, 23 Pick. (Mass.) 128; *Dawes v. Boylston*, 9 Mass. 337, 6 Am. Dec. 72; *Jewett v. Smith*, 12 Mass. 309.

Michigan. — *Cullen v. O'Hara*, 4 Mich. 138; *Morton v. Preston*, 18 Mich. 71, 100 Am. Dec. 146; *Gilkey v. Hamilton*, 22 Mich. 283.

Missouri. — *Magner v. Ryan*, 19 Mo. 196; *Wilson v. Wilson*, 54 Mo. 213.

New Hampshire. — *Giles v. Churchill*, 5 N. H. 337; *Brackett v. Hoitt*, 20 N. H. 257.

New York. — *Ingram v. Young*, 3 Thomp. & C. (N. Y.) 491, 1 Hun (N. Y.) 487; *Allen v. Eighmie*, 9 Hun (N. Y.) 201; *Valentine v. Jackson*, 9 Wend. (N. Y.) 302; *Rattoo v. Overacker*, 8 Johns. (N. Y.) 126; *Rockwell v. Saunders*, 19 Barb. (N. Y.) 473; *Bellinger v. Ford*, 21 Barb. (N. Y.) 311; *Vroom v. Van Horne*, 10 Paige (N. Y.) 557, 42 Am. Dec. 94.

North Carolina. — *Whit v. Ray*, 4 Ired. L. (26 N. Car.) 14; *Badger v. Jones*, 66 N. Car. 305.

Pennsylvania. — *Leber v. Kauffelt*, 5 W. & S. (Pa.) 440; *Holcomb v. Roberts*, 57 Pa. St. 493.

South Carolina. — *M'Vaughters v. Elder*, 2 Brev. (S. Car.) 307; *Walker v. May*, 2 Hill Eq. (S. Car.) 23; *Miller v. Reigne*, 2 Hill L. (S. Car.) 592; *Cook v. Cook*, 24 S. Car. 206; *Witt v. Elmore*, 2 Bailey L. (S. Car.) 597; *Dealy v. Lance*, 2 Spears L. (S. Car.) 487.

Tennessee. — *Bell v. Speight*, 11 Humph. (Tenn.) 451.

Vermont. — *Bullock v. Rogers*, 16 Vt. 294.

See also Com. Dig., Administration, B. 10; Wentw. Off. Ex. (14th ed.) 115, 116; 2 Roll. Abr. 399, tit. Relation, (A), pl. 1; 544. tit. Trespass, (T), pl. 1.

Doctrine of Relation Applicable to Administrators De Bonis Non. — *Badger v. Jones*, 66 N. Car. 305; *Bell v. Speight*, 11 Humph. (Tenn.) 451.

Lapse of Time Before Appointment. — The heirs or next of kin of an intestate cannot acquire title to his property as against the administrator merely because they were in possession of it for a considerable time before the administrator was appointed. *Haynes v. Harris*, 33 Iowa 516; *Whit v. Ray*, 4 Ired. L. (26 N. Car.) 14.

3. Letters Legalize Acts Done Before Appointment. — *Curtis v. Vernon*, 3 T. R. 587; *Matter of Faulkner*, 7 Hill (N. Y.) 181; *Whitlock v. Bowery Sav. Bank*, 36 Hun (N. Y.) 460; *Cook v. Cook*, 24 S. Car. 206. See also the cases cited in note preceding.

Action on Contract Made Before Grant of Letters. — The rule that letters of administration relate back to the death of the intestate applies so as to enable the administrator to sue on a contract, made by him before such grant, for the sale of the good will of the intestate's business. *Christie v. Clark*, 27 U. C. Q. B. 21.

Contracts Validated by Subsequent Grant of Letters. — The granting of letters of administration validates an intermediate agreement made by the person to whom the letters were granted, in reference to the settlement of the intestate's estate. *Allen v. Eighmie*, 9 Hun (N. Y.) 201; *Ingram v. Young*, 3 Thomp. & C. (N. Y.) 491, 1 Hun (N. Y.) 487; *Bennett v. Lyndon*, 8 N. Y. App. Div. 387. See also *Bodger*

ing in him causes of action accruing between the granting of letters and the death of the intestate.¹ But the doctrine that letters of administration relate back to acts done between the death of the intestate and the taking out of letters of administration exists only in those cases where the act done was for the benefit of the estate.²

5. Powers of Executor Pending Contest of Will. — The power of an executor to act while the will is in litigation depends on the question whether he has received letters testamentary which have not been revoked or suspended. If a person named as executor has received letters testamentary on a will duly proved before a competent court, he may perform all the functions of his office, notwithstanding the pendency of litigation respecting the validity of the will, unless an administrator *pendente lite* has been appointed;³ but if letters have not been issued to the executor, or if they have been suspended by the appointment of an administrator *pendente lite*, the executor has no authority to represent the estate.⁴

v. Arch, 10 Exch. 333; *In re Watson*, 18 Q. B. Div. 116.

A Lease Made by an Executor Before Probate Is Valid. — *Roe v. Summerset*, 2 W. Bl. 692; *Patten v. Patten*, 1 Alcock & N. 493. But see *Bacon v. Simpson*, 3 M. & W. 87, in which it was said that a contract made before administration was granted to assign a leasehold of the intestate could not be sustained on the ground that the administrator was lawfully possessed of the term when the contract was made.

Collection of Claims. — The settlement of debts due the decedent by a person who is afterwards appointed administrator is binding on him when the letters are granted, *Alvord v. Marsh*, 12 Allen (Mass.) 603; though such person acts under an individual claim of right, as where the widow of the decedent drew out of a savings bank a deposit made by the decedent in his lifetime, *Whitlock v. Bowery Sav. Bank*, 36 Hun (N. Y.) 460.

And in *Priest v. Watkins*, 2 Hill (N. Y.) 225, 38 Am. Dec. 584, it was held that where a note belonging to the estate of an intestate was paid to his widow, and she with another afterwards took out letters of administration, the letters related back to the time of the intestate's death and legalized the payment.

1. Causes of Action Accruing After Death of Intestate. — In *Tharpe v. Stallwood*, 6 Scott N. R. 715, 5 M. & G. 760, 44 E. C. L. 397, 1 Dowl. & L. 24, 7 Jur. 492, 12 L. J. C. P. 241, it was held that an administrator may maintain trespass for the seizure of goods of the intestate after his death and before the granting of letters of administration. "It would be strange indeed," said Tindal, C. J., in this case, "if an administrator might sue for a trespass committed in the lifetime of his intestate, and for one committed after the grant of the letters of administration, but not for one committed in the intermediate time." See also *Deal v. Potter*, 26 U. C. Q. B. 578; *Barnett v. Guildford*, 11 Exch. 19, 1 Jur. N. S. 1142, 24 L. J. Exch. 281; *Searson v. Robinson*, 2 F. & F. 351; *Jahns v. Nolting*, 29 Cal. 507; *Rockwell v. Saunders*, 19 Barb. (N. Y.) 473; *Hayden v. Roe*, 66 Wis. 288.

He may also sue for the price of goods sold by an agent of the intestate after his death and prior to the granting of administration.

Foster v. Bates, 12 M. & W. 226, 1 Dowl. & L. 400, 7 Jur. 1093, 13 L. J. Exch. 88.

Money Belonging to the Estate of a Decedent may be recovered by an administrator as money had and received to his use, where the defendant, a stranger, had, before administration was granted, applied it to the intestate's debts or funeral expenses. *Welchman v. Sturgis*, 13 Q. B. 552, 66 E. C. L. 552.

2. Doctrine of Relation Applicable Only to Acts Beneficial to Estate. — *Morgan v. Thomas*, 8 Exch. 302, 17 Jur. 283, 22 L. J. Exch. 152; *Leber v. Kauffelt*, 5 W. & S. (Pa.) 440.

In *Dutcher v. Dutcher*, 88 Hun (N. Y.) 221, it was held that an administratrix, who was the intestate's widow, was entitled to recover possession of the property of the estate from a person to whom, before her appointment, she had sold it in consideration of an agreement for her support.

3. Pending Litigation. — *Bradford v. Boudinot*, 3 Wash. (U. S.) 122.

Powers Pending Contest of Will. — The same rule applies pending an appeal by an executor from a judgment vacating a decree of probate and revoking letters testamentary. *Irwin v. Hanthorn*, 1 Pa. Super. Ct. Rep. 149, 37 W. N. C. (Pa.) 520.

Caveat After Probate in Common Form. — After probate granted in common form, where there is an executor who acts, or an administrator with the will annexed appointed, his office is intended to be continued during a controversy as to the will, and he has all the powers and is subject to all the liabilities of an administrator or executor, except that his right to dispose of the estate according to the provisions of the will is suspended until the final determination of the suit. Like a collector, he may sue and be sued, and by leave of court may sell property for the payment of debts, but he cannot pay legacies or exercise the special powers given by the will. *Syme v. Broughton*, 86 N. Car. 153.

4. Executor Without Authority Pending Contest as to Probate. — *Matter of Flandrow*, 92 N. Y. 256, affirming 28 Hun (N. Y.) 279. Compare *American Bible Soc. v. Oakley*, 4 Dem. (N. Y.) 450.

Appeal from Decree of Probate. — In *Brown v. Ryder*, 42 N. J. Eq. 356, an administrator *pendente lite* was appointed pending a contest as

6. Right to Advice and Instructions of Court. — In case of doubt or difficulty as to his powers and duties, the executor or administrator may apply to a court of equity for instructions, or for a construction of the will, in order to avoid injustice to himself or injury to the estate.¹ This jurisdiction has long been exercised,² but it is said that its extent and limits are not clearly fixed.³ It is derived from the jurisdiction of courts of equity in cases of trust arising in the settlement of estates,⁴ and may be exercised by courts of probate only when expressly or by necessary implication conferred on them by statute.⁵

7. Duty to Defend Will. — There is a diversity of opinion as to whether it is the duty of an executor or an administrator with the will annexed to defend the will when it is contested. Some authorities impose this duty on him,⁶ while others hold that an executor should interfere to uphold the will only at the request of the persons beneficially interested.⁷

to the probate of the will. The will was admitted to probate and the executors qualified, and afterwards an appeal was taken from that decree. It was held that the effect of the appeal was to suspend the powers of the executors and to revive the powers of the administrator *pendente lite*, and that the executors had no power to act pending the appeal.

1. Advice of Court in Case of Difficulty or Doubt — *England.* — *Buckle v. Atleo*, 2 Vern. 37.

Connecticut. — *Crosby v. Mason*, 32 Conn. 482.

Georgia. — *Miles v. Peabody*, 64 Ga. 729; *Mechanics, etc., Bank v. Harrison*, 68 Ga. 463.

Illinois. — *Baker v. Bradsby*, 23 Ill. 632.

Who May Ask Advice of Court. — The court will not give instructions to an executor or administrator merely on the application of a legatee named in the will, or the executor of such legatee. *Miller v. Cooch*, 5 Del. Ch. 161.

It Is Always a Matter of Discretion with the court whether it will entertain such applications, and they ought not to be favored except where great interests are involved, and a decision in the ordinary course of litigation would be attended with great inconvenience, delay, and expense. *Crosby v. Mason*, 32 Conn. 482.

Circumstances Rendering Instructions Proper. — In *Sanford v. Thompson*, 18 Ga. 554, it was held that an administrator might ask a court of equity for instructions where the estate was so situated as to require a determination of the question whether the administration was to be in accordance with the law of the domicil, or the law of another state.

In *James v. Spann*, (S. Car. 1892) 14 S. E. Rep. 955, 35 S. Car. 614, the estate consisted of a small amount of personalty and a considerable amount of realty, which the testator had undertaken to dispose of by specific as well as residuary devises among a large number of persons; and his accounts as committee of a lunatic, extending over a long period of time, as well as his accounts as administrator of another estate, had never been adjusted. It was held that these things, together with the fact that there seemed to have been disputes as to some of the devises, tended to show that the application of the plaintiff for the aid of the court in administering the estate of his testator according to the terms of his will was warranted.

So also an executor, or administrator with the will annexed, when he is embarrassed in

the performance of his duty because of doubt as to the meaning of the will, may file a bill for a construction of the will in advance of his action on his own construction, so as to avoid the hazard of litigation. *Rexroad v. Wells*, 13 W. Va. 812. But he cannot ask the court for its opinion as to his past conduct, or as to the future rights of a legatee. *Tayloe v. Bond*, Busb. Eq. (45 N. Car.) 5. Nor will a court of equity take the place of counsel to act as general legal adviser to the administrator. *Clay v. Gurley*, 62 Ala. 14.

Suits by Executors and Administrators to Construe Will. — See the title *WILLS*.

2. Jurisdiction Well Established. — *Tayloe v. Bond*, Busb. Eq. (45 N. Car.) 5.

3. Limits of Jurisdiction Not Clearly Defined. — *Clay v. Gurley*, 62 Ala. 14.

4. Source of Jurisdiction. — *Treadwell v. Cordis*, 5 Gray (Mass.) 341; *Horton v. Cantwell*, 108 N. Y. 255.

5. Jurisdiction of Probate Courts. — *Swasey v. Jaques*, 144 Mass. 135, 59 Am. Rep. 65; *Chadwick v. Chadwick*, 6 Mont. 566.

6. Executor Required to Resist Contest of Will. — *Fenner v. McCan*, 49 La. Ann. 600; *Compton v. Barnes*, 4 Gill (Md.) 55, 45 Am. Dec. 115; *Mariner v. Bateman*, 2 Law Repos. (4 N. Car.) 464; *Ralston v. Telfair*, 2 Dev. & B. Eq. (22 N. Car.) 414; *John v. Tate*, 7 Humph. (Tenn.) 388; *Bennet v. Bradford*, 1 Coldw. (Tenn.) 471; *Bradford v. Boudinot*, 3 Wash. (U. S.) 122.

See also *infra*, this title, *Accounting* — *Credits* — *Expenses of Administration*, where the duty of the executor in this respect is incidentally discussed in connection with his right to credit for disbursements in supporting the will.

7. Executor Not Required to Resist Contest of Will. — *Andrews v. His Administrators*, 7 Ohio St. 143; *Mumper's Appeal*, 3 W. & S. (Pa.) 441; *Boyer's Appeal*, 13 Pa. St. 569; *Neal's Estate*, 18 W. N. C. (Pa.) 85; *Yardley v. Cuthbertson*, 16 W. N. C. (Pa.) 461, 108 Pa. St. 395, 56 Am. Rep. 218; *Yerkes's Appeal*, 99 Pa. St. 401; *Titlow's Estate*, 163 Pa. St. 35; *Brown v. Vinyard*, Bailey Eq. (S. Car.) 461. But see *Brown v. Gibson*, 1 Nott & M. (S. Car.) 326.

In *Kelly v. Davis*, 37 Miss. 76, it was held that when a will is contested by the heirs the executor is not obliged to defend it, but may give notice of the proceeding to the legatees; and that if the executor defends he takes the

8. Maintenance and Care of Decedent's Family. — The maintenance and care of the decedent's family ordinarily form no part of the duty of an executor or administrator, and he has no right to make any expenditures out of the assets of the estate for that purpose.¹

9. Payment of Decedent's Debts — *a. DUTY TO PAY DEBTS.* — It is the duty of an executor or administrator to pay all the debts of the decedent, if he has sufficient assets for that purpose, and his duty in this respect exists without reference to any collateral security that the creditors may hold.²

b. LIABILITIES IN RESPECT TO DEBTS — (1) *Liability to Estate.* — If the executor or administrator pays an invalid claim negligently or with knowledge that it is disputed, he is personally liable for the amount so paid,³ but a payment under an order of court, in the absence of fraud, is not a breach of duty, and the executor or administrator is not liable for the amount paid, though the claim was invalid.⁴ Nor is he liable for the payment of invalid claims if they were such as any judicious man, managing his own affairs, might have settled.⁵ So, too, if he neglects to pay, or delays the payment of, the debts of the decedent, in consequence of which the estate suffers loss, he is personally liable for the loss so sustained.⁶

risk of establishing the validity of the will as the condition of being indemnified against the expense of the proceeding.

For a Full Discussion of the duties of an executor with reference to the probate and contest of the will, see the titles PROBATE AND LETTERS OF ADMINISTRATION; WILLS.

1. Maintenance and Care of Decedent's Family. — *Willis v. Willis*, 9 Ala. 330; *Kelley v. Helmkamp*, 40 Ill. App. 35; *Washburn v. Hale*, 10 Pick. (Mass.) 429; *Ripley v. Sampson*, 10 Pick. (Mass.) 371; *Mitchell v. Harrison*, 32 Tex. 331. But see *Billington's Estate*, 3 Rawle (Pa.) 48.

In *Menifee v. Ball*, 7 Ark. 520, it was held that administrators are not guardians of the minor children of the decedent. The court said: "Administrators are merely legal trustees of the creditors and heirs of the intestate. They are not the guardians of the decedent's children, and cannot incur a fiduciary liability on their account. Indeed, it would be a breach of trust for them to expend any of the effects of the estate for their benefit. The care of the children is entirely out of their province. That duty devolves upon their guardians."

Allowance of Expenditures. — Expenditures made by an administrator for the education and support of the minor children of the decedent may, in a suit in chancery by the heirs against the administrator, be allowed by the chancellor in the exercise of his discretion. *Martin v. Campbell*, 35 Ark. 137.

Authority Given by Will. — If the will gives discretion to the executors to apply the income of a legacy to the maintenance and education of the legatee, the exercise of such discretion cannot be controlled by the court. *Foreman v. McGill*, 19 Grant's Ch. (U. C.) 210.

Keeping Estate Together. — When the decedent's estate is kept together under an order of court the administrator has no power to maintain the family establishment and support the family out of the estate, but the expenses of each member should be charged against his share of the estate. *Hinson v. Williamson*, 74 Ala. 180.

Use of Furniture. — An executor has no right to leave the testator's furniture in the family

mansion for the use of the family, where the will did not provide for maintaining or keeping the family in the mansion, but directed that all the movable property should be sold. *Graydon v. Graydon*, 25 N. J. Eq. 561, *reversing*, 23 N. J. Eq. 229.

See also *infra*, this title, *Accounting — Credits — Disbursements — Payments to or for Benefit of Legatees and Distributees.*

2. Duty to Pay Debts of Decedent. — *Brainerd v. Cowdrey*, 16 Conn. 7; *Chorn v. Chorn*, 98 Ky. 627; *Meissonier v. Laurent*, 14 La. Ann. 14; *Hoss's Succession*, 42 La. Ann. 1022; *Emery v. Owings*, 6 Gill (Md.) 191.

Duty to Pay Debts Promptly. — The personal representative should pay the debts promptly in order to stop the running of interest thereon. *Hoss's Succession*, 42 La. Ann. 1022.

As to the time within which debts should be paid, see *Hawley v. James*, 5 Paige (N. Y.) 318; *Carroll v. Bosley*, 6 Yerg. (Tenn.) 220, 27 Am. Dec. 460.

As to the rights of creditors generally, see the title DEBTS OF DECEDENTS, vol. 8, p. 1003.

3. Personal Liability for Paying Invalid Claim. — *Matter of Saunders*, 4 Misc. Rep. (N. Y. Surrogate Ct.) 28; *Hottenstein's Appeal*, 2 Grant's Ch. (Pa.) 301.

Duty to Resist Unfounded Claims. — While it is the duty of a personal representative to pay all the valid claims against the estate of the decedent, it is also his duty to defend the estate which he represents against unfounded claims. *Teague v. Corbitt*, 57 Ala. 529.

But mere negligence in the defense of a suit will not render an administrator liable unless it appears that the defense ought to have prevailed. *Hoad v. Perry*, 1 T. B. Mon. (Ky.) 256.

Allowing Recovery of Judgment — Presumption of Assets. — If an administrator permits judgment to be taken against him, it will be presumed that he has in hand sufficient assets to satisfy it. *Banks v. Speers*, 97 Ala. 560.

4. Payment of Invalid Claim under Order of Court. — *Cameron v. Morris*, 83 Tex. 14.

b. Kee v. Kee, 2 Gratt. (Va.) 117.

6. Failure to Pay Debts — Permitting Land to Be Sold. — In *McPhadden v. Bacon*, 13 Grant's

(2) *Liability to Creditors* — (a) *In General* — If the payment of debts is unreasonably delayed while the estate is solvent, and afterwards it becomes insolvent, the personal representative is liable to the creditors.¹

(b) *Liability Arising Out of Devastavit* — *aa. IN GENERAL.* — If the assets of a decedent's estate are lost by the neglect or misconduct of the executor or administrator, or are wasted or misappropriated by him to such an extent that the claims of creditors are left unsatisfied, he becomes personally liable to the creditors whose remedies against the estate have been thus defeated.²

bb. DISREGARDING PRIORITIES IN PAYMENT OF DEBTS. — It is the duty of an executor or administrator to pay the debts of the decedent in the order of their priority, as prescribed by law; and if he pays an inferior debt, leaving any debt of a preferred class unpaid, such payment constitutes a devastavit in case of a deficiency of assets, so as to render him personally liable both at law and in equity to the preferred creditor who is injured thereby,³ unless the payment was made without notice of the superior debt.⁴

Ch. (U. C.) 591, the executors allowed judgment to be taken against them for a debt of the testator, under which the land of the testator was sold, though one of the executors was indebted to the estate in a larger amount. The court held that the executors were liable for the difference between the actual value of the land and the amount realized on the sale. Chancellor Van Koughnet said: "It is a wholesome lesson to teach executors that if, having assets of the estate out of which debts can be paid, they neglect to make such payment and allow the lands to be sold, they may be made liable for any loss occasioned thereby." See also *Farys v. Farys*, Harp. Eq. (S. Car.) 261.

1. *Unreasonable Delay in Payment of Debts — Subsequent Insolvency of Estate.* — *Smith v. Slaughter*, 3 Heisk. (Tenn.) 565.

2. *Liability Arising Out of Devastavit.* — *Merchant v. Driver*, 1 Saund. 307; *Leonard v. Simpson*, 2 Bing. N. Cas. 176, 29 E. C. L. 297; *Palmer v. Waller*, 1 M. & W. 689; *Blackmor v. Mercer*, 2 Saund. 402; *Thomson v. Searcy*, 6 Port. (Ala.) 393; *Peaslee v. Kelley*, 38 N. H. 372.

Negligence in Collecting Debt Due the Estate. — In *Seighman v. Marshall*, 17 Md. 550, it was held that an executor incurred a personal liability for the debts of the estate by reason of his negligence in the collection of the assets of the estate. See also *infra*, this title, *Management and Care of Estate — Collection of Debts*.

3. *Disregarding Priorities in Payment of Debts — Liability to Preferred Creditors* — *England.* — 2 Black. Com. 511.

Alabama. — *Jackson v. Wood*, 108 Ala. 209; *Pryor v. Davis*, 109 Ala. 117; *Clark v. Guard*, 73 Ala. 456.

Indiana. — *Cunningham v. Cunningham*, 94 Ind. 557; *State v. Brown*, 80 Ind. 425.

Kentucky. — *Hutchcraft v. Tilford*, 5 Dana (Ky.) 353; *Place v. Oldham*, 10 B. Mon. (Ky.) 400; *Logan v. Troutman*, 3 A. K. Marsh. (Ky.) 66; *Stephens v. Barnett*, 7 Dana (Ky.) 257; *Jeeter v. Durham*, 6 J. J. Marsh. (Ky.) 228.

Maryland. — *Webster v. Hammond*, 3 Har. & M. (Md.) 131.

Massachusetts. — *Cobb v. Muzzey*, 13 Gray (Mass.) 58.

Mississippi. — *Gay v. Lemle*, 32 Miss. 309; *Black v. Barton*, 6 Smed. & M. (Miss.) 239; *Randolph v. Singleton*, 12 Smed. & M. (Miss.) 439; *Harris v. Fisher*, 5 Smed. & M. (Miss.) 74.

New York. — *St. John's Estate*, Tuck. (N. Y.) 126; *Matter of Oosterhoudt*, 15 Misc. Rep. (N. Y. Surrogate Ct.) 566, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 346, note 2; *Smith v. Cornell*, 111 N. Y. 554.

North Carolina. — *Coggins v. Flythe*, 113 N. Car. 102; *Moye v. Albritton*, 7 Ired. Eq. (42 N. Car.) 62; *McNair v. Ragland*, 1 Dev. Eq. (16 N. Car.) 520.

South Carolina. — *Swift v. Miles*, 2 Rich. Eq. (S. Car.) 147.

Texas. — *Evans v. Taylor*, 60 Tex. 422; *Clifford v. Campbell*, 65 Tex. 243.

Virginia. — *McCormick v. Wright*, 79 Va. 524; *Nimmo v. Com.*, 4 Hen. & M. (Va.) 57, 4 Am. Dec. 488.

Mistake. — The fact that the payment of the inferior debt is by mistake does not affect the liability of the executor to a superior creditor. *Moye v. Albritton*, 7 Ired. Eq. (42 N. Car.) 62.

Subsequent Failure of Assets — Relief in Equity. — In *Hinton v. Kennedy*, 3 S. Car. 459, it was held that where an executor pays simple contract creditors out of their order, the assets being at the time amply sufficient for the payment of all debts, equity will relieve him from the legal consequences to superior creditors from such a technical devastavit where, without any fault on his part, the assets are subsequently lost.

Duty to Plead Superior Debt. — It is the duty of an executor to plead the existence of a superior debt of which he has notice, and his failure to do so renders him liable to the same extent that his payment of the inferior debt would have done. *Hutchcraft v. Tilford*, 5 Dana (Ky.) 353; *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279.

As to the Order of Payment of Debts, see the title DEBTS OF DECEDENTS, vol. 8, p. 1033 *et seq.*

4. *Payment Without Notice of Superior Debt.* — *Harman v. Harman*, 2 Show. 492; *Hutchcraft v. Tilford*, 5 Dana (Ky.) 353; *Pope v. Wickliffe*, 7 T. B. Mon. (Ky.) 412; *Mayo v. Bentley*, 4 Call (Va.) 528.

Debts of Record — Constructive Notice. — The executor was bound at common law to take

But the Payment of One or More Creditors of Any Class to the exclusion of the others of the same class was not a devastavit at common law. The executor or administrator had the right to make such preference without incurring any liability to the creditors excluded from participation.¹ By statute, however, a ratable payment is generally required.²

cc. PAYMENT OF LEGACIES AND DISTRIBUTIVE SHARES. — It is also a devastavit rendering the executor or administrator liable to creditors if he pays legacies or distributive shares, leaving debts unpaid, and a deficiency of assets results.³

Failure of Assets Retained for Payment of Debts. — The rule in regard to the liability of the executor or administrator to creditors in case he pays legacies or distributive shares without paying the debts of the estate is very strict, and he is not relieved from liability by the fact that at the time of such payment he retained sufficient assets to pay all claims against the estate. He is still liable to the creditors though the assets so retained subsequently failed through no fault on his part.⁴

Want of Notice of Debt. — So, too, the executor or administrator is liable at common law irrespective of whether or not he had notice of the claims of the creditors at the time of the payment to the legatee or the distributee.⁵ But

notice of debts of record. *Hutchcraft v. Tilford*, 5 Dana (Ky.) 353; *Stephens v. Barnett*, 7 Dana (Ky.) 257; *Place v. Oldham*, 10 B. Mon. (Ky.) 400; *Webster v. Hammond*, 3 Har. & M. (Md.) 131; *Mayo v. Bentley*, 4 Call (Va.) 528; *Nimmo v. Com.*, 4 Hen. & M. (Va.) 57, 4 Am. Dec. 488.

1. Preference of Creditors Over Others of Same Class. — *Jackson v. Wood*, 108 Ala. 209; *McNeill v. McNeill*, 36 Ala. 109, 76 Am. Dec. 320; *Gay v. Lemle*, 32 Miss. 309; *Neal v. Baker*, 2 N. H. 477. See also the title DEBTS OF DECEDENTS, vol. 8, p. 1055.

2. Ratable Payment to Creditors of Same Class. — See the title DEBTS OF DECEDENTS, vol. 8, p. 1003.

3. Payment of Legacies and Distributive Shares Before Payment of Debts — Executor or Administrator Liable to Creditors — *England*. — *Richards v. Browne*, 3 Bing. N. Cas. 493, 32 E. C. L. 219; *Davis v. Blackwell*, 9 Bing. 6, 23 E. C. L. 244; *Jewsbury v. Mummery*, L. R. 8 C. P. 56; *In re Birch*, 27 Ch. Div. 622; *Jefferys v. Jefferys*, 19 W. R. 464, 24 L. T. N. S. 177.

Alabama. — *Thrash v. Sumwalt*, 5 Ala. 13; *Dean v. Portis*, 11 Ala. 104; *Williamson v. Mason*, 18 Ala. 87; *Whitfield v. Woolf*, 51 Ala. 202; *Handley v. Hefflin*, 84 Ala. 600.

Connecticut. — *Phelps v. Swan*, Kirby (Conn.) 428.

Georgia. — *McIntosh v. Hambleton*, 35 Ga. 94, 89 Am. Dec. 276; *Sharp v. Bonner*, 36 Ga. 421; *Janier v. Huguley*, 91 Ga. 791.

Indiana. — *Fleece v. Jones*, 71 Ind. 340.

Kentucky. — *Jeeter v. Durham*, 6 J. J. Marsh. (Ky.) 228; *Johnson v. Fuquay*, 1 Dana (Ky.) 514.

Missouri. — *North v. Priest*, 81 Mo. 561.

North Carolina. — *McKinder v. Littlejohn*, 1 Ired. L. (23 N. Car.) 66.

Ohio. — *Western Reserve Bank v. McIntire*, 40 Ohio St. 528.

Pennsylvania. — *Thomas v. Riegel*, 5 Rawle (Pa.) 266.

Virginia. — *Cookus v. Peyton*, 1 Gratt. (Va.) 431; *Lewis v. Overby*, 31 Gratt. (Va.) 601; *Edmunds v. Scott*, 78 Va. 720; *Lewis v. Mason*, 84 Va. 731; *Morrison v. Lavell*, 81 Va. 519.

See also *infra*, this title, *Distribution of Estate*.

Contingent Liabilities are within the rule stated in the text. *Pearson v. Archdeaken*, 1 Alcock & N. 23. See also *Hawkins v. Day*, Amb. 160; *Newcastle, etc., Banking Co. v. Hymers*, 22 Beav. 367; *Eeles v. Lambert*, Style 37; *Smith v. Day*, 2 M. & W. 684.

Effect of Settlement of Accounts in Equity. — It has been said that where an executor or administrator had settled his accounts in equity, he was discharged from further liability to creditors, who were left to their remedy against the legatees and distributees. *Knatchbull v. Fearnhead*, 3 Myl. & C. 122. See also *Low v. Carter*, 1 Beav. 426; *Manning v. Leighton*, 66 Vt. 56.

4. Failure of Assets Retained. — In *Janier v. Huguley*, 91 Ga. 791, it was held that the fact that corporate stocks retained by the executor at the time of his partial distribution of the estate exceeded the outstanding debts, but subsequently depreciated so as to be insufficient to satisfy the creditors, did not relieve him from personal liability to them.

In *McIntosh v. Hambleton*, 35 Ga. 94, 89 Am. Dec. 276, it was held that the fact that the assets retained by the administrator were lost by reason of the result of the civil war in the way of abolition of slavery (part of the assets retained having consisted of slaves) and the serious depreciation of the other assets did not relieve the administrator from liability.

The Fact that the Assets Turned Over to the Legatee Would Have Been Lost if Retained by the executor is immaterial as regards his liability to creditors. This rule was applied where the executor turned over slaves to legatees, and the slaves were subsequently emancipated by the federal government. *Morrison v. Lavell*, 81 Va. 519.

5. Want of Notice of Claim No Defense. — *Davis v. Blackwell*, 9 Bing. 5, 23 E. C. L. 243; *Hill v. Gomme*, 1 Beav. 540; *Knatchbull v. Fearnhead*, 3 Myl. & C. 122; *Jefferys v. Jefferys*, 19 W. R. 464, 24 L. T. N. S. 177; *Norman v. Baldry*, 6 Sim. 621; *Smith v. Day*, 2 M. & W. 684; *Whitfield v. Woolf*, 51 Ala. 202; *Johnson*

he is not liable to a creditor who misled him so as to induce him to pay out the assets to legatee and distributees,¹ though it seems that mere delay to assert his claim on the part of the creditor will not have such effect.² In modern times the rigor of the law in this respect has been greatly modified. The *English* statute authorizes distribution of an estate after the publication of notice to creditors to present their claims, without liability to creditors whose claims were not presented within the time specified;³ and in the *United States* similar statutes or the statutes of nonclaim bar claims unless presented within a certain time.⁴ The liability of executors and administrators for debts of which they had no notice at the time of making payments to legatees and distributees is also modified by statutes which authorize them, after a certain time, to distribute the estate on taking from the legatees and distributees refunding bonds which stand in the place of the assets distributed.⁵

(c) **Liability Arising Out of Contract** — *aa. IN GENERAL.* — An executor or administrator, being a person under no disability, may, by his own contract, render himself liable for any of the debts of the decedent;⁶ and he is bound individually, and not otherwise, by his promise to pay a debt of the decedent, though he promised to pay "as executor or administrator,"⁷ because he has

v. Fuquay, 1 Dana (Ky.) 514. But see *Chelsea Water-works v. Cowper*, 1 Esp. N. P. 277.

1. **Executor Misled by Creditor.** — *Richards v. Browne*, 3 Bing. N. Cas. 493, 32 E. C. L. 219; *In re Birch*, 27 Ch. Div. 622; *Jewsbury v. Mummery*, L. R. 8 C. P. 56; *Miller v. Harrison*, 34 N. J. Eq. 374.

Conduct Held Insufficient to Relieve Executor from Liability. — The fact that a creditor wrote to an executor that he looked to him personally for payment of his claim on account of his previous conduct in the administration of the estate will not preclude him from claiming that the executor became personally liable therefor by his subsequent payment of legacies. *Richards v. Browne*, 3 Bing. N. Cas. 493, 32 E. C. L. 219.

In *Jefferys v. Jefferys*, 19 W. R. 464, 24 L. T. N. S. 177, the rule that an executor was liable to pay the amount of a legacy to any creditor of the testator whose claim is unsatisfied was applied in a case in which the creditor had given the testator what purported to be a release and which the executor *bona fide* believed to be valid, and though the creditor did not question the validity of the release until after the executor had paid the legacy.

2. **Delay in Asserting Claim.** — *In re Birch*, 27 Ch. Div. 622; *In re Baker*, 20 Ch. Div. 230. Compare *Richards v. Browne*, 3 Bing. N. Cas. 493, 32 E. C. L. 219; *Chelsea Water-works v. Cowper*, 1 Esp. N. P. 275.

In *Davis v. Blackwell*, 9 Bing. 5, 23 E. C. L. 243, it was held that a delay of six months in presenting a claim would not relieve the executor from personal liability incurred by his payment of a legacy.

3. **English Statute.** — 22 & 23 Vict., c. 35, §§ 27, 28.

4. **American Statutes.** — See the title DEBTS OF DECEDENTS, vol. 8, p. 1062 *et seq.*

If a Creditor Delays Presenting His Claim Until the Estate Is Fully Administered, the personal representative is not liable to him. *Brown v. Forsche*, 43 Mich. 492.

5. **Refunding Bonds.** — See *infra*, this title, *Distribution of Estate — Indemnity and Protection of Executor or Administrator — Refunding Bonds*.

6. **Liability Arising Out of Contract — England.** — *Goring v. Goring*, Yelv. 10; *Childs v. Monins*, 2 Brod. & B. 460, 6 E. C. L. 228; *Trewinian v. Howell*, Cro. Eliz. 91; *Reech v. Kennegal*, 1 Ves. 126; *Wheeler v. Collier*, Cro. Eliz. 406.

Arkansas. — *Perry v. Cunningham*, 40 Ark. 185.

Louisiana. — *Winthrop v. Jarvis*, 8 La. Ann. 434; *Beatty v. Tete*, 9 La. Ann. 130.

North Carolina. — *Sleighter v. Harrington*, 2 Murph. (6 N. Car.) 332.

Pennsylvania. — *Shaeffer v. McKinstry*, 8 Watts (Pa.) 258.

Vermont. — *Willard v. Brewster*, Brayt. (Vt.) 104.

Acceptance of Order. — In *Perry v. Cunningham*, 40 Ark. 185, it was held that the acceptance by an administrator of an order drawn on him by a creditor of the estate, though conditioned to pay as soon as accruing rents of the estate would permit, rendered the administrator personally liable.

Renewal of Note. — If an executor renews a note of the testator he is personally liable on it, and must look to the estate for his indemnity if he pays it. *Brown v. Farnham*, 55 Minn. 27; *Yerger v. Foote*, 48 Miss. 62; *Studebaker Bros. Mfg. Co. v. Montgomery*, 74 Mo. 101.

7. **Promise to Pay as Executor.** — In *Bradley v. Heath*, 3 Sim. 543, it was held that a memorandum on the back of an account, rendered by a creditor against an estate "Mr. G. [the creditor] having consented to wait for the payment of the within account, * * * we, as the executors of Mr. B., engage to pay Mr. G. interest for the same, at five per cent. per annum, until the same is settled," was held to bind the executors personally to pay the debt with interest. See also *Barry v. Rush*, 1 T. R. 691; *Beatty v. Tete*, 9 La. Ann. 130; *Winthrop v. Jarvis*, 8 La. Ann. 434; *Walker v. Patterson*, 36 Me. 273.

Appending Descriptive Words to Signature. — The mere fact that an executor or administrator, in executing an obligation, appends to his signature words descriptive of his representative character does not prevent personal liability from attaching.

no power to bind the estate by contract.¹ He may, however, limit his liability by promising to pay out of the estate, in which case he incurs no individual liability beyond the amount of assets which come or should have come into his hands.²

bb. REQUISITES OF CONTRACT TO BIND EXECUTOR OR ADMINISTRATOR—(aa) *Necessity of Writing*.—It is generally held that a promise by an executor or administrator to pay a debt of the decedent must, in order to bind him individually, be in writing, in accordance with the statute of frauds.³

(bb) *Necessity of Consideration*.—It is essential, in order that the promise of an executor or administrator to pay a debt of the decedent may render him personally liable, that the promise be supported by a sufficient consideration, as in case of other contracts,⁴ even though the contract is in writing so as to comply with the statute of frauds,⁵ unless it is under seal, from which a consideration may be presumed.⁶

(cc) *What Constitutes Sufficient Consideration*.—As a General Rule any benefit inuring to the executor or administrator or detriment suffered by the creditor will constitute a sufficient consideration for the personal promise of the executor or administrator to pay the claim of the creditor.⁷

England.—Childs v. Monins, 2 Brod. & B. 460, 6 E. C. L. 228.

Georgia.—Harrison v. McClelland, 57 Ga. 531.

Louisiana.—Russell v. Cash, 2 La. 185.

Missouri.—Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101; Stirling v. Winter, 80 Mo. 141.

South Carolina.—McGrath v. Barnes, 13 S. Car. 328, 36 Am. Rep. 687.

Tennessee.—East Tennessee Iron Mfg. Co. v. Gaskell, 2 Lea (Tenn.) 742; Boyd v. Johnston, 89 Tenn. 284.

Virginia.—Snead v. Coleman, 7 Gratt. (Va.) 300, 56 Am. Dec. 112.

1. No Authority to Bind Estate by Contract.—See *infra*, this section, *Contracts*.

2. Limiting Liability—Promise to Pay Out of Estate.—Childs v. Monins, 2 Brod. & B. 460, 6 E. C. L. 228; Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101; Allen v. Graffius, 8 Watts (Pa.) 397. But see Perry v. Cunningham 40 Ark. 185.

3. Writing Necessary under Statute of Frauds.—Rann v. Hughes, 7 Bro. P. C. 550, 7 T. R. 346, note a; Hamilton v. Terry, 11 C. B. 954, 73 E. C. L. 954; Greening v. Brown, Minor (Ala.) 353; Harrington v. Rich, 6 Vt. 666.

Original Undertaking.—In Kershaw v. Whitaker, 1 Brev. (S. Car.) 9, it was held that a promise by an executor to pay rent, in consideration of the release of a distress for the rent, was an original undertaking, and therefore not within the statute of frauds.

For a Full Discussion of this subject, see the title FRAUDS, STATUTE OF.

4. Consideration for Promise of Executor Essential.—*England*.—Rann v. Hughes, 7 Bro. P. C. 550, 7 T. R. 346, note a; Trewinian v. Howell, Cro. Eliz. 91; Banes's Case, 9 Coke 94; Pearson v. Henry, 5 T. R. 6.

Alabama.—Hester v. Wesson, 6 Ala. 415.

Indiana.—Vogel v. O'Toole, 2 Ind. App. 196.

Kentucky.—Lair v. Miller, 2 Litt. (Ky.) 66; Rucker v. Wadlington, 5 J. J. Marsh. (Ky.) 238.

Louisiana.—Winthrop v. Jarvis, 8 La. Ann. 434; Beatty v. Tete, 9 La. Ann. 130.

Maine.—Walker v. Patterson, 36 Me. 273.

Mississippi.—Byrd v. Holloway, 6 Smed. & M. (Miss.) 199.

New York.—Schoonmaker v. Roosa, 17 Johns. (N. Y.) 304; Troy Bank v. Topping, 9 Wend. (N. Y.) 273, 13 Wend. (N. Y.) 557; Ten Eyck v. Vanderpoel, 8 Johns. (N. Y.) 120.

Pennsylvania.—Sidle v. Anderson, 45 Pa. St. 464.

South Carolina.—Ciples v. Alexander, 2 Treadw. (S. Car.) 767.

Virginia.—Taliaferro v. Robb, 2 Call (Va.) 258; Snead v. Coleman, 7 Gratt. (Va.) 300, 56 Am. Dec. 112.

In Taliaferro v. Robb, 2 Call (Va.) 258, it was held that the mere fact that an executor wrote to a creditor of his testator that as soon as he was able to dispose of his crops he would pay his claim did not bind the executor personally in the absence of a showing of assets or forbearance on the part of the creditor.

Note Given by Executor.—An executor or administrator is not personally liable on a note given for a debt of his decedent, unless it is based on a sufficient consideration. Hester v. Wesson, 6 Ala. 415; Byrd v. Holloway, 6 Smed. & M. (Miss.) 199; Glenn v. Burrows, 37 Hun (N. Y.) 602; Troy Bank v. Topping, 9 Wend. (N. Y.) 273, 13 Wend. (N. Y.) 557; Ten Eyck v. Vanderpoel, 8 Johns. (N. Y.) 120; Schoonmaker v. Roosa, 17 Johns. (N. Y.) 304; Snead v. Coleman, 7 Gratt. (Va.) 300, 56 Am. Dec. 112.

For a Full Discussion as to the necessity of a consideration to support a promise to pay money, see the title CONSIDERATION, vol. 6, p. 667.

5. Consideration Essential Though Promise Is in Writing.—Rann v. Hughes, 7 T. R. 346, note a, 7 Bro. P. C. 550; Vogel v. O'Toole, 2 Ind. App. 196; Walker v. Patterson, 36 Me. 273.

6. A Bond by an executor to pay a debt of the decedent will render him personally liable irrespective of any further consideration. Barry v. Rush, 1 T. R. 691. See also the title CONSIDERATION, vol. 6, p. 682.

7. What Constitutes Consideration in General.—In Hamilton v. Inledon, 4 Bro. P. C. 4, it

The Existence of Assets in the hands of an executor or administrator will constitute a sufficient consideration for a promise on his part to pay a debt of the decedent so as to render him personally liable thereon.¹ And where the executor or administrator, in consideration of assets in hand, promises to pay a debt of the decedent, it has been held that his liability is not affected by the fact that the assets are subsequently exhausted in the payment of other debts.²

Forbearance on the Part of a Creditor of the estate is also a sufficient consideration for a promise by the executor or administrator to pay the claim, and will render him personally liable therefor, though there were no assets out of which the creditor might have made his debt.³ If, however, the supposed creditor

was held that where an attorney delivered up to the executor deeds which he was entitled to retain until his bill was paid, and where such deeds were of great use to the executor in several suits which he was carrying on, there was a sufficient consideration to render the executor personally liable on his promise to pay the bill, irrespective of whether there were assets or not.

The Surrender of a Note Executed by the Decedent is a sufficient consideration for a new note given by the executor, so as to render him personally liable thereon, though the note surrendered could not have been enforced.

Georgia. — *Harrison v. McClelland*, 57 Ga. 531.

Kentucky. — *Mosely v. Taylor*, 4 Dana (Ky.) 542.

Massachusetts. — *Wilton v. Eaton*, 127 Mass. 174; *Stebbins v. Smith*, 4 Pick. (Mass.) 97.

Missouri. — *Studebaker Bros. Mfg. Co. v. Montgomery*, 74 Mo. 101.

Tennessee. — *Erwin v. Carroll*, 1 Yerg. (Tenn.) 145.

Release of Third Person. — In *Mosely v. Taylor*, 4 Dana (Ky.) 542, it was held that the release of a third person who was also liable for the claim of the creditor was a sufficient consideration for the personal promise of the executor to pay the debt.

Delivery of Goods to Executor. — In *Wheeler v. Collier*, Cro. Eliz. 406, it was held that the delivery of further goods to the executor was a sufficient consideration for his personal promise to pay for goods delivered to his testator.

1. Possession of Assets Sufficient Consideration — *England.* — *Trewinian v. Howell*, Cro. Eliz. 91, *Reech v. Kennegal*, 1 Ves. 125; *Goring v. Goring*, Yelv. 10. See also *Hawkes v. Saunders*, 1 Cowp. 289; *Atkins v. Hill*, 1 Cowp. 284, citing *Camden v. Turner*, 5 Geo. I., C. B.; *Faxon v. Dyson*, 1 Cranch (C. C.) 441. Compare *Deeks v. Strutt*, 5 T. R. 690.

Indiana. — *Carter v. Thomas*, 3 Ind. 213.

New York. — *Troy Bank v. Topping*, 9 Wend. (N. Y.) 273, 13 Wend. (N. Y.) 557.

North Carolina. — *Sleigheter v. Harrington*, 2 Murph. (6 N. Car.) 332.

South Carolina. — *McGrath v. Barnes*, 13 S. Car. 328, 36 Am. Rep. 687.

Tennessee. — *Boyd v. Johnston*, 89 Tenn. 284.

Vermont. — *Willard v. Brewster*, Brayt. (Vt.) 104.

Virginia. — *Snead v. Coleman*, 7 Gratt. (Va.) 300, 56 Am. Dec. 112.

Basis of Doctrine. — In *McGrath v. Barnes*, 13

S. Car. 335, 36 Am. Rep. 687, *Willard, C. J.*, said: "The ground upon which the promise is held to be binding in law, when there are assets sufficient to pay the debt or legacy, is that the executor having sufficient assets for the purpose is bound, both morally and by virtue of his office, to pay the debt or legacy, and such duty is sufficient consideration to support a promise to pay, so that *indebitatus assumpsit* will lie upon it. The rule, so far as it regards the payment of the debts of an intestate, applies equally to administrators."

Presumption of Assets. — The giving of a note by an executor or administrator for a debt of the decedent is *prima facie* evidence of the existence of assets so as to render the note personally binding on him without proof of the actual existence of assets. *Childs v. Monins*, 2 Brod. & B. 460, 6 E. C. L. 228; *Thompson v. Maugh*, 3 Greene (Iowa) 342; *Troy Bank v. Topping*, 13 Wend. (N. Y.) 557; *Boyd v. Johnston*, 89 Tenn. 284; *Snead v. Coleman*, 7 Gratt. (Va.) 300, 56 Am. Dec. 112.

The Presumption May Be Rebutted, however, and when the absence of assets is shown by the executor or administrator the note imposes no personal liability on him. *McNulty v. Marcus*, 57 Ga. 507; *Troy Bank v. Topping*, 13 Wend. (N. Y.) 557 [*distinguishing Ten Eyck v. Vanderpoel*, 8 Johns. (N. Y.) 120; *Schoonmaker v. Roosa*, 17 Johns. (N. Y.) 301]; *Snead v. Coleman*, 7 Gratt. (Va.) 300, 56 Am. Dec. 112.

Or it may be shown that the assets were less than the debt, in which event the liability of the administrator will be proportionately reduced. *Boyd v. Johnston*, 89 Tenn. 284.

Or that the administrator was under a mistaken impression as to the extent of the assets in his hands, when he gave a note for a debt of the decedent. *Smith v. Paris*, 53 Mo. 274.

Claim Barred by Limitations. — In *McGrath v. Barnes*, 13 S. Car. 328, 36 Am. Rep. 687, it was held that though the claim was barred by the statute of limitations, and though the executor would not be entitled to reimbursement therefor from the estate, still his promise to pay the debt, where there are sufficient assets, will render him personally liable to the creditor. See also *Oates v. Lilly*, 84 N. Car. 643.

2. Subsequent Failure of Assets Immaterial. — *Sleigheter v. Harrington*, 2 Murph. (6 N. Car.) 332. See also *Banes's Case*, 9 Coke 94.

3. Forbearance by Creditor a Sufficient Consideration — *England.* — *Goring v. Goring*, Yelv. 10; *Fish v. Richardson*, Yelv. 55; *Scott v. Stephenson*, Lev. 71; *Scott v. Stevens*, 1 Sid. 89; *Bradley v. Heath*, 3 Sim. 543; *Childs v.*

had in fact no claim against the estate, forbearance on his part to sue, though at the request of the executor or administrator and in consideration of his personal promise to pay the debt, is not a sufficient consideration for such promise.¹

(3) *Extent of Liability.* — The personal liability of an executor or administrator for the debts of the decedent, in the absence of any express contractual liability, is based solely on the existence of assets, and cannot be extended beyond the amount of the assets of the estate which would have been applicable to the payment of the debts if the executor or administrator had properly and faithfully performed his duties.² This limitation of liability applies also, as a general rule, to executors *de son tort*.³

(4) *Effect of Individual Liability on Liability of Estate.* — A personal contract by an executor or administrator to pay a debt of his decedent does not necessarily discharge the liability of the estate, but the creditor may still enforce his claim against the estate.⁴

Monins, 2 Brod. & B. 460, 6 E. C. L. 228; *Rann v. Hughes*, 7 T. R. 346, note *a*; *Davis v. Reyner*, 2 Lev. 3; *Davis v. Wright*, 1 Vent. 120. See also *Porter v. Bille*, Freem. 125; *Maud v. Waterhouse*, 2 C. & P. 579, 12 E. C. L. 273; *Barber v. Fox*, 1 Vent. 159.

Iowa. — *Thompson v. Maugh*, 3 Greene (Iowa) 342.

Kentucky. — *Mosely v. Taylor*, 4 Dana (Ky.) 542.

New York. — *Troy Bank v. Topping*, 9 Wend. (N. Y.) 273, 13 Wend. (N. Y.) 557.

Virginia. — *Snead v. Coleman*, 7 Gratt. (Va.) 300, 56 Am. Dec. 112.

See also *Templeton v. Bascom*, 33 Vt. 132.

Illustration. — In *Childs v. Monins*, 2 Brod. & B. 460, 6 E. C. L. 228, the action was on a promissory note made by the defendants as executors, by which they severally and jointly promised to pay a certain sum on demand, together with lawful interest. It was held that the agreement to pay interest implied that the promise to pay was upon an agreement to forbear. This was based upon the idea that as the executor could not by law pay interest on the debts of his testator, the agreement to pay interest was to be regarded as something engaged on the part of the executor individually, and that it could only be ascribed to the motive of securing delay on the part of the creditor of the testator.

1. *Banes's Case*, 9 Coke 94; *Davis v. Rayner*, 2 Keb. 758.

2. **Individual Liability Limited to Amount of Assets** — *England*. — *Ramsden v. Jackson*, 1 Atk. 292; *Hancock v. Prowd*, 1 Saund. 336, note 10; *Noell v. Nelson*, 2 Saund. 226; *Harman v. Harman*, 2 Show. 492; *Harrison v. Beecles*, per Lord Mansfield, C. J., cited in *Erving v. Peters*, 3 T. R. 688; *Gorton v. Gregson*, 3 B. & S. 99, 113 E. C. L. 99; *Rees v. Morgan*, 5 B. & Ad. 1035, 27 E. C. L. 261.

United States. — *Dickson v. Wilkinson*, 3 How. (U. S.) 57; *Fairfax v. Fairfax*, 5 Cranch (U. S.) 19; *Siglar v. Haywood*, 8 Wheat. (U. S.) 675; *Boyce v. Grundy*, 9 Pet. (U. S.) 275; *Smith v. Chapman*, 93 U. S. 41.

Alabama. — *State Bank v. Hooks*, 2 Port. (Ala.) 271; *Skinner v. Frierson*, 8 Ala. 915.

Connecticut. — *Davis v. Weed*, 44 Conn. 569.

Georgia. — *Justices v. Sloan*, 7 Ga. 31; *Hendricks v. Mitchell*, 37 Ga. 230; *Whiddon v. Williams*, 98 Ga. 310.

Indiana. — *Phipps v. Addison*, 7 Blackf. (Ind.) 375.

Kentucky. — *Lair v. Miller*, 2 Litt. (Ky.) 66; *Miller v. Towles*, 4 J. J. Marsh. (Ky.) 255; *Rucker v. Wadlington*, 5 J. J. Marsh. (Ky.) 238; *Botts v. Fitzpatrick*, 5 B. Mon. (Ky.) 397.

Louisiana. — *Comstock's Succession*, 44 La. Ann. 427; *Morgan's Succession*, 23 La. Ann. 290.

Maine. — *Brown v. Whitmore*, 71 Me. 65.

Massachusetts. — *Newcomb v. Goss*, 1 Met. (Mass.) 333; *Hapgood v. Houghton*, 10 Pick. (Mass.) 154.

Michigan. — *Basom v. Taylor*, 39 Mich. 682.

Mississippi. — *Byrd v. Holloway*, 6 Smed. & M. (Miss.) 199.

New Jersey. — *Barracloiff v. Griscom*, 1 N. J. L. 224; *Sindle v. Kiersted*, 3 N. J. L. 484.

New York. — *People v. Judges*, 4 Cow. (N. Y.) 445; *Troy Bank v. Topping*, 13 Wend. (N. Y.) 557; *Brown v. King*, 63 Hun (N. Y.) 158.

Oregon. — *Brenner v. Alexander*, 16 Oregon 349, 8 Am. St. Rep. 301.

Pennsylvania. — *Hussey v. White*, 10 S. & R. (Pa.) 346.

Rhode Island. — *Carver v. Wells*, 17 R. I. 688.

South Carolina. — *Trimmier v. Thomson*, 19 S. Car. 252.

Tennessee. — *Massingale v. Jones*, 3 Hayw. (Tenn.) 36; *Mosier v. Zimmerman*, 5 Humph. (Tenn.) 62; *Apperson v. Harris*, 7 Lea (Tenn.) 323; *Nixons v. Bullock*, 9 Yerg. (Tenn.) 414; *Boyd v. Johnston*, 89 Tenn. 284; *Simons v. Page*, 96 Tenn. 718.

Virginia. — *Snead v. Coleman*, 7 Gratt. (Va.) 300, 56 Am. Dec. 112; *Mason v. Peter*, 1 Munf. (Va.) 437.

West Virginia. — *Gay v. Skeen*, 36 W. Va. 582.

Leases-Rent. — An executor of a lessee for years is, in the absence of other assets, liable *de bonis propriis* for the rent reserved, to the extent only to which he might, by the exercise of reasonable diligence, have derived profit from the premises. *Hopwood v. Whaley*, 6 C. B. 744, 60 E. C. L. 744, 6 Dowl. & L. 342, 12 Jur. 1088, 18 L. J. C. P. 43. See also the titles LANDLORD AND TENANT; LEASES.

3. See *infra*, this title, *Executors de Son Tort*.

4. **Estate Not Released by Personal Contract of Representatives to Pay Debt.** — *Faxon v. Dyson*, 1 Cranch (C. C.) 441.

c. **RIGHTS AND REMEDIES OF EXECUTOR OR ADMINISTRATOR**—(1) *Payment with Individual Funds—Reimbursement and Subrogation.*—If a personal representative pays the debts of the decedent with his own funds he is entitled to reimbursement out of the funds of the estate, whether he made the payment voluntarily or because he had bound himself personally for the debts.¹ But it is generally held that he is not entitled to subrogation to the rights of the creditor paid. The doctrine of subrogation applies only when the party advancing the money stands in the situation of a surety, or is compelled to make the payment to protect his own interests or rights.²

(2) *Improper Payments*—(a) **Recovery from Creditor.**—At Common Law an executor or administrator who had paid a debt of the estate could not recover it back from the creditor, though it afterwards appeared that the assets were insufficient to pay all the debts, and that there were unpaid debts of a prior class,³ unless the payment was made on the agreement of the creditor that, if the estate should prove insolvent, he would refund the excess over his *pro rata* share.⁴

But Where the Statutes Require a Ratable Distribution of the Assets it is held that an executor or administrator who pays a claim in full under the honest belief that the estate is solvent may, on the estate proving insolvent, recover back the difference between the amount so paid and the *pro rata* share to which the creditor was entitled in common with other creditors,⁵ if the creditor will not

In *Dunne v. Deery*, 40 Iowa 251, it was held that the personal note of an executor given for a legal claim against the estate will not, without more, discharge the estate. See also *Peter v. Beverly*, 10 Pet. (U. S.) 532; *Taylor v. Perry*, 48 Ala. 240; *Gillet v. Rachal*, 9 Rob. (La.) 276; *Douglas v. Fraser*, 2 McCord Eq. (S. Car.) 105. But see *Brown v. Lang*, 4 Ala. 50; *Steele v. Steele*, 64 Ala. 459, 38 Am. Rep. 15.

1. **Payment with Individual Funds—Reimbursement from Estate—England.**—*Banes's Case*, 9 Coke 94.

United States.—*Peter v. Beverly*, 10 Pet. (U. S.) 532.

Mississippi.—*Slaton v. Alcorn*, 51 Miss. 72; *Morris v. Lake*, 9 Smed. & M. (Miss.) 526, 48 Am. Dec. 724; *Reynolds v. Ingersoll*, 11 Smed. & M. (Miss.) 271.

Missouri.—*Hill v. Buford*, 9 Mo. 869.

New Jersey.—*Pursel v. Pursel*, 14 N. J. Eq. 514.

New York.—*Matter of Bolton*, 146 N. Y. 257 [citing *Erwin v. Loper*, 43 N. Y. 521; *Hood v. Hood*, 85 N. Y. 561; *Glacius v. Fogel*, 88 N. Y. 434; *Matter of Powers*, 124 N. Y. 361; *Matter of Gantert*, 136 N. Y. 109; *Cahill v. Russell*, 140 N. Y. 402].

South Carolina.—*Douglas v. Fraser*, 2 McCord Eq. (S. Car.) 105.

See also *Lyon v. Vick*, 6 Yerg. (Tenn.) 42.

2. **No Right to Subrogation.**—*McNeill v. McNeill*, 36 Ala. 109, 76 Am. Dec. 320; *Slaton v. Alcorn*, 51 Miss. 72; *Blank's Appeal*, 3 Grant's Cas. (Pa.) 192. But see *contra*, *Lewis v. Nichols*, 38 Tex. 54. See also the title SUBROGATION.

3. **Creditor Not Compelled to Refund at Common Law.**—In *Walker v. Hill*, 17 Mass. 380, *Jackson, J.*, said that "the reason [of the rule] is that the only ground on which the executor could demand the repayment would have been a good defense against the original claim, and would have excused him from paying the debt." See also *Foskett v. Wolf*, 19 Ill. App.

33; *Lawson v. Hansborough*, 10 B. Mon. (Ky.) 147; *Brooking v. Farmers' Bank*, 83 Ky. 431.

Exception.—It seems that the case where an executor has recovered money from a stranger and paid it out to creditors, and that money is afterwards recovered back from him on a writ of error or other like process, is an exception to the rule. And a decree against an executor for money so recovered and paid out was made with "liberty to sue such creditors as through mistake he [the executor] has paid, to make them refund." *Pooley v. Ray*, 1 P. Wms. 355.

4. **Agreement by Creditor to Refund.**—*Beardsley v. Marsteller*, 120 Ind. 319. See also *Gorman v. Nairne*, 12 Ala. 338.

5. **Statutory Rule—Recovery of Overpayments under Mistake as to Solvency of Estate.**—*Boles v. Jessup*, 57 Ark. 469; *Morris v. Porter*, 87 Me. 510; *Walker v. Bradley*, 3 Pick. (Mass.) 261; *Bliss v. Lee*, 17 Pick. (Mass.) 83; *Heard v. Drake*, 4 Gray (Mass.) 514; *Walker v. Hill*, 17 Mass. 380; *Rogers v. Weaver*, 5 Ohio 536.

In *Parker v. Daughtry*, 111 Ala. 529, it was held that where an administrator transferred goods in satisfaction of a claim against the estate, he could not, on the estate proving insolvent, recover the value of the goods. This decision was based on the ground that the suit on the contract affirmed its validity and the administrator could not repudiate some of its terms while seeking to enforce others.

In *Boles v. Jessup*, 57 Ark. 469, an administrator reported by mistake more assets than he had, and was ordered to pay claims accordingly; afterwards he filed a report showing that he had paid, in obedience to such order, claims in excess of the assets, and he was permitted to recover the difference between the amount paid the creditors and their *pro rata* share of the actual assets.

Recovery Limited to Amount of Excess.—A recovery of the entire amount paid to the creditors cannot be had, but the recovery will be

be put in a worse position than he was before,¹ and the executor or administrator was not negligent in failing to ascertain the insufficiency of the assets.²

The Right Belongs Exclusively to the Executor or Administrator, and an unpaid creditor cannot recover his *pro rata* share of an overpayment from the creditor who has been overpaid.³

The Reason of the Rule permitting a recovery probably is that such a payment is a payment under a mistake of fact,⁴ though a different reason has been assigned for it.⁵

(b) **Recovery from Legatees and Distributees.** — Where an executor or administrator pays away the assets of the estate to legatees and distributees, without notice of debts, it seems that at common law he could not recover from the legatees or distributees the amounts paid to them; but a recovery under such circumstances was allowed in equity, and in modern practice a recovery in an action at law is permitted in some jurisdictions. But as a general rule the executor or administrator is enabled to protect himself by means of refunding bonds.⁶

10. Power to Waive Statute of Limitations — *a.* **GENERAL STATUTE** — (1) *Waiver by Failure to Plead.* — It is held in *England* and in some of the *United States* that an executor or administrator is not obliged to plead the general statute of limitations in actions on claims against the estate, if they are otherwise justly due, but that it is discretionary with him to interpose the bar of the statute.⁷ But according to some authorities any person who has an

limited to the difference between the amount paid and the *pro rata* share which the creditor would have been entitled to receive. *Morris v. Porter*, 87 Me. 510.

Payment by Debtor of Estate. — The fact that the payment is made by a debtor of the estate at the request of the administrator is immaterial. The administrator is as much entitled to recover in such case as if he had received the money and paid it out himself. *Heard v. Drake*, 4 Gray (Mass.) 514, *distinguishing Austin v. Henshaw*, 7 Pick. (Mass.) 46.

If the Representative Incurred No Liability to Other Creditors on account of the overpayment, as where it was made after the time limited by law for the presentation of claims, he is not entitled to recover. *Colegrove v. Robinson*, 11 Met. (Mass.) 238.

1. Doctrine Does Not Operate to Prejudice of Creditor. — In *Brooking v. Farmers' Bank*, 83 Ky. 431, it was held that if an administrator pays a debt in full and the estate subsequently proves insolvent, he cannot recover the excess over such creditor's *pro rata* share, when sureties for the debt were released without the fault of the creditor, though Gen. Stat. *Kentucky*, c. 39, art. 2, § 42, expressly provides that where an administrator pays to a creditor an undue proportion of his claim he can recover it back. See also *Morris v. Porter*, 87 Me. 510.

2. Negligence in Failing to Ascertain Insufficiency of Assets. — *Lawson v. Hansborough*, 10 B. Mon. (Ky.) 147.

3. Overpayment Not Recoverable by Other Creditors. — *Johnson v. Molsbee*, 5 Lea (Tenn.) 444.

4. Reason of Rule — Payment under Mistake of Fact. — *Colegrove v. Robinson*, 11 Met. (Mass.) 238; *Rogers v. Weaver*, 5 Ohio 536; *Johnson v. Molsbee*, 5 Lea (Tenn.) 444.

If There Was No Mistake of Fact in paying more than the *pro rata* share to which the creditor was entitled, the executor or administrator cannot recover it back from him. *Egbert v. Rush*, 7 Ind. 707; *Beardsley v. Marsteller*, 120

Ind. 319. See also *Adams v. Smith*, 19 Nev. 259.

Mistake of Law. — In *Mansfield v. Lynch*, 59 Conn. 320, it was held that where creditors were paid in full, under the mistaken belief that certain claims asserted against the estate were invalid, but such claims were subsequently enforced, thereby rendering the estate insolvent, the excess paid to the other creditors over their *pro rata* share could be recovered. But see *Mayhew v. Stone*, 26 Can. Sup. Ct. Rep. 58.

For a Full Discussion as to the right to recover voluntary payments, see the title PAYMENT.

5. In *Morris v. Porter*, 87 Me. 510, Wiswell, J., said: "This right of action is based upon the equitable doctrine that such creditor has received money which in equity and in good conscience belongs to the estate, for the purpose of making a just and equal distribution among all the general creditors, which is the cardinal principle of the laws relating to the administration and settlement of decedents' estates."

6. Recovery from Legatees and Distributees. — See *infra*, this title, *Distribution of Estate — Indemnity and Protection of Executor or Administrator*. See also the titles LEGACIES AND DEVISES; SUCCESSION.

7. Rule that General Statute May Be Waived — England. — *Norton v. Frecker*, 1 Atk. 526; *M'Culloch v. Dawes*, 9 D. & R. 40, 22 E. C. L. 385; *Hill v. Walker*, 4 Kay & J. 166; *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Williamson v. Naylor*, 3 Y. & Coll. 210, note a, by Lord Lyndhurst; *In re Rownson*, 29 Ch. Div. 358.

United States. — *West v. Smith*, 8 How. (U. S.) 402; *Fairfax v. Fairfax*, 2 Cranch (C. C.) 25, 8 Fed. Cas. No. 4,613.

Alabama. — *Pollard v. Secars*, 28 Ala. 484, 65 Am. Dec. 364; *Ex p. Perryman*, 25 Ala. 70; *Hall v. Darrington*, 9 Ala. 502; *Knight v. Godbolt*, 7 Ala. 304.

Delaware. — *Chambers v. Fennemore*, 4 Harr. (Del.) 368.

interest in the estate as creditor, legatee, etc., may plead the statute without the concurrence of the executor or administrator.¹ In other states it is held that it is the duty of the personal representative to interpose the bar of the statute on every claim not properly asserted within the statutory period;² and in some jurisdictions an administrator may waive the bar of the statute of limitations where it attached after the debtor's death, though he may not do so if it attached before.³

Kentucky. — *Payne v. Pusey*, 8 Bush (Ky.) 564.

Maryland. — *Miller v. Dorsey*, 9 Md. 317; *Semmes v. Young*, 10 Md. 242.

Massachusetts. — *Scott v. Hancock*, 13 Mass. 164; *Thayer v. Hollis*, 3 Met. (Mass.) 369.

Missouri. — *Stiles v. Smith*, 55 Mo. 363.

New Hampshire. — *Hodgdon v. White*, 11 N. H. 208.

New Jersey. — *Pursel v. Pursel*, 14 N. J. Eq. 514.

North Carolina. — *Barnawell v. Smith*, 5 Jones Eq. (58 N. Car.) 168; *Leigh v. Smith*, 3 Ired. Eq. (38 N. Car.) 442, 42 Am. Dec. 182.

Pennsylvania. — *Matter of Smith*, 1 Ashm. (Pa.) 352; *Fritz v. Thomas*, 1 Whart. (Pa.) 66, 29 Am. Dec. 39; *In re McFarland*, 4 Pa. St. 149; *Ritter's Appeal*, 23 Pa. St. 95; *Biddle v. Moore*, 3 Pa. St. 178; *Steel v. Steel*, 12 Pa. St. 67.

South Carolina. — *Walter v. Radcliffe*, 2 Desaus. (S. Car.) 577.

Tennessee. — *Puckett v. James*, 2 Humph. (Tenn.) 565; *Langham v. Baker*, 5 Baxt. (Tenn.) 701; *Brown v. Porter*, 7 Humph. (Tenn.) 373; *Bates v. Elrod*, 13 Lea (Tenn.) 156; *Batson v. Murrell*, 10 Humph. (Tenn.) 301, 51 Am. Dec. 707.

In *King v. Cassidy*, 36 Tex. 531, Walker, J., said: "As a general rule, it is the duty of executors and administrators to plead the statutes of limitation, wherever the defense lies, against all claims presented for allowance by the estates which they represent. But this rule is by no means inflexible, and the court should not allow an administrator to make such a defense where its manifest operation would be to cut off the rights of the estate against third parties."

Rule Well Settled. — In *Leigh v. Smith*, 3 Ired. Eq. (38 N. Car.) 442, 42 Am. Dec. 182, Nash, J., said: "It is well settled, both in England and this country, that the executor may or may not, at his pleasure, plead the statute of limitations. It is indeed more prudent that he should do so, but he cannot be compelled to plead it by a legatee."

In *Matter of Smith*, 1 Ashm. (Pa.) 352, King, P., said: "Until this argument, I conceived the law to be indisputable that it was in the discretion of the executor to plead the statute of limitations or otherwise. The whole current of authority is one way. 4 Bacon Abr. 429; 1 Eq. Ca. Abr. 395; 11 Vin. 269; Prec. in Chan. 100; *Smith v. Porter*, 1 Binn. (Pa.) 212."

Confession of Judgment. — An executor may confess judgment for a *bona fide* debt, though it is barred by the statute of limitations. *Woods v. Irwin*, 141 Pa. St. 278, 23 Am. St. Rep. 282.

Unconscionable Defense Not Required. — In *Halliburton v. Carson*, 100 N. Car. 99, 6 Am. St. Rep. 565, Smith, C. J., in speaking of the

statute of limitations, said that the law does not require an executor to make his testator "sin in his grave" by setting up an unconscionable defense.

Debt Judicially Declared to Be Barred. — Though an executor may pay a debt barred by the statute of limitations, he is guilty of devastavit if he pays a claim against the estate after it has been judicially declared by a court of competent jurisdiction to be barred. *Midgley v. Midgley*, (1893) 3 Ch. 282.

1. Right of Legatees, etc., to Plead Statute. — *Shewen v. Vanderhorst*, 1 Russ. & M. 347; *Partridge v. Mitchell*, 3 Edw. Ch. (N. Y.) 180; *Kendrick's Estate*, 15 Abb. N. Cas. (N. Y. Surrogate Ct.) 189; *Warran v. Paff*, 4 Bradf. (N. Y.) 260; *Sharpe v. Freeman*, 45 N. Y. 802; *Visscher v. Wesley*, 3 Dem. (N. Y.) 301; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360; *Bloodgood v. Bruen*, 8 N. Y. 362; *Bucklin v. Chapin*, 1 Lans. (N. Y.) 443; *Burnett v. Noble*, 5 Redf. (N. Y.) 69; *Butler v. Johnson*, 111 N. Y. 211.

If the Estate Is Insolvent a creditor may plead the statute in *Pennsylvania*. *Kittera's Estate*, 17 Pa. St. 423.

2. Rule that General Statute May Not Be Waived — *Arkansas.* — *Rogers v. Wilson*, 13 Ark. 507; *Rector v. Conway*, 20 Ark. 79.

California. — *Vrooman v. Li Po Tai*, 113 Cal. 302.

Florida. — *Patterson v. Cobb*, 4 Fla. 481.

Louisiana. — *Sevier v. Gordon*, 21 La. Ann. 373; *Matter of Romero*, 38 La. Ann. 947.

Mississippi. — *Byrd v. Wells*, 40 Miss. 711; *Henderson v. Ilsley*, 11 Smed. & M. (Miss.) 9, 49 Am. Dec. 41.

Montana. — *In re Mouillerat*, 14 Mont. 245.

New York. — *Bucklin v. Chapin*, 1 Lans. (N. Y.) 443; *Burnett v. Noble*, 5 Redf. (N. Y.) 69; *Bloodgood v. Bruen*, 8 N. Y. 362; *Butler v. Johnson*, 111 N. Y. 204; *Matter of Kirkpatrick*, 9 Misc. Rep. (N. Y. Surrogate Ct.) 228; *Matter of Oosterhoudt*, 15 Misc. Rep. N. Y. Surrogate Ct. 566. But see *Broome v. Van Hook*, 1 Redf. (N. Y.) 444.

Virginia. — *Smith v. Pattie*, 81 Va. 654; *Tunstall v. Pollard*, 11 Leigh (Va.) 1.

West Virginia. — *Van Winkle v. Blackford*, 33 W. Va. 573.

But see *West v. Smith*, 8 How. (U. S.) 412; *Bishop v. Harrison*, 2 Leigh (Va.) 532.

Where a Claim Is Apparently Barred, but the administrator knows facts which render the statute inapplicable, he is not required to plead the statute of limitations, by virtue of the provision of Code *Virginia*, 1873, c. 128, § 7, that an administrator shall have no credit after paying a claim against the estate, if he knows facts by which a recovery could be prevented. *Radford v. Fowlkes*, 85 Va. 820.

3. Waiver as to Debts Barred After Debtor's Death. — In *Georgia* this is the rule under the

(2) *Authorization by Testator or Heirs.* — Independently of the rule as to the general authority of an executor or administrator to waive the statute, however, such authority may be conferred on him by the testator, though the provision of the will in regard thereto does not constitute a new promise by the testator such as will take the debt out of the statute; or he may be authorized by the heirs to waive the statute.¹

(3) *Waiver Not Binding on Realty or Heirs.* — If the personal estate of the decedent is not sufficient to pay all the debts, the personal representative cannot waive the statute so as to render the real estate subject to the payment of the claim, or affect in any way the right of the heirs to the benefit of the statute.²

(4) *Waiver as to Individual Claims.* — The decisions are not uniform as to whether the power of a personal representative to waive the statute of limitations extends to claims in his own favor. In *England* and in some of the states of the Union this question has been decided in the affirmative, but the preponderance of authority in the *United States* is that the personal representative cannot waive the bar of the statute as to individual claims.³

(5) *Waiver by Acknowledgment or Promise to Pay.* — The authorities are conflicting as to whether a debt against which the statute has run may be revived by the executor or administrator by an acknowledgment or promise to pay, so as to preclude him or his successor from afterwards pleading the statute. It is held in *England* that the debt is thereby revived, and this doctrine

statute. *Ray v. Strickland*, 89 Ga. 840; *Castellaw v. Guilmartin*, 54 Ga. 299. See also *Byrd v. Wells*, 40 Miss. 711.

The distinction between debts barred before the decedent's death and those barred after his death is not recognized in *England*. *Hill v. Walker*, 4 Kay & J. 166.

1. *Testamentary Authority to Waive Statute.* — A direction in a will to "disregard the statute of limitations as to the principal" in the payment of debts authorizes the payment of a debt barred by the statute of limitations. *Campbell v. Shotwell*, 51 Tex. 27.

A direction in a will to pay all "just debts" does not remove the bar. *Peck v. Botsford*, 7 Conn. 172, 18 Am. Dec. 92; *Rogers v. Rogers*, 3 Wend. (N. Y.) 503, 20 Am. Dec. 716.

Nor does a direction to pay all the "just" debts of the testator preclude the executor from pleading the statute of limitations. *Smith v. Porter*, 1 Binn. (Pa.) 209.

Consent of Heirs to Waiver of Statute. — A claim, however, may be relieved of the bar of the statute of limitations by the consent of the heirs to its payment and the promise of the executor to do so. *Spicer v. Raplee*, 4 N. Y. App. Div. 471.

2. *Waiver of Statute Cannot Subject Realty to Claim.* — *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15; *Pollard v. Secars*, 28 Ala. 484, 65 Am. Dec. 364; *Thayer v. Hollis*, 3 Met. (Mass.) 369; *Scott v. Hancock*, 13 Mass. 162; *Matter of O'Rourke*, 12 Misc. Rep. (N. Y. Surrogate Ct.) 248; *Bevens v. Park*, 88 N. Car. 456. See also *infra*, this title, *Sale of Real Estate under Order of Court*.

Waiver Not Binding on Heir. — In *Moore v. White*, 6 Johns. Ch. (N. Y.) 360, it was held that an acknowledgment by the personal representative of a debt which is barred by limitation would not bind the real assets or affect the right of the heir to plead the statute.

3. *Rule Permitting Waiver as to Individual Claims.* — *Clinton v. Brophy*, 10 Ir. Eq. Rep. 139; *Sharman v. Rudd*, 4 Jur. N. S. 527; *Hill v. Walker*, 4 Kay & J. 166; *In re Rowson*, 29 Ch. Div. 362; *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Knight v. Godbolt*, 7 Ala. 304; *Glenn v. Glenn*, 41 Ala. 571; *Trimble v. Fariss*, 78 Ala. 260; *Baker v. Bush*, 25 Ga. 594, 71 Am. Dec. 193; *Payne v. Pusey*, 8 Bush (Ky.) 564.

Claim Assigned to Administrator. — In *Matter of Robbins*, 7 Misc. Rep. (N. Y. Surrogate Ct.) 264, it was held that the running of the statute was interrupted by a part payment, though the claim was afterwards assigned to the administrator.

Debt Barred After Decedent's Death. — In some states a personal representative may retain a debt due him from the decedent's estate, if the statute had not run against it during the decedent's lifetime. *Sanderson v. Sanderson*, 17 Fla. 820; *Semmes v. Young*, 10 Md. 242; *Piper v. Clark*, 18 N. H. 415; *McLaughlin v. Newton*, 53 N. H. 531; *Preston v. Cutter*, 64 N. H. 461.

Rule Forbidding Waiver as to Individual Claims. — *Matter of Robbins*, 7 Misc. Rep. (N. Y. Surrogate Ct.) 264; *Rogers v. Rogers*, 3 Wend. (N. Y.) 503, 20 Am. Dec. 716; *Burnett v. Noble*, 5 Redf. (N. Y.) 69; *Batson v. Murrell*, 10 Humph. (Tenn.) 301, 51 Am. Dec. 707; *Byrn v. Fleming*, 3 Head (Tenn.) 658; *Wharton v. Marberry*, 3 Sneed (Tenn.) 603; *Hamner v. Hamner*, 3 Head (Tenn.) 398; *Shields v. Alsup*, 5 Lea (Tenn.) 508; *Cann v. Cann*, 40 W. Va. 138.

Even When Payment of Claims Barred by Limitation Is Authorized by the Will, it is held in *Tennessee* that the personal representative cannot waive the statute against a claim in his own favor. *Williams v. Williams*, 15 Lea (Tenn.) 438.

has been followed in some of the states of the Union.¹ In other states the opposite rule has been adopted, and it is held that an acknowledgment or promise to pay does not preclude the personal representative from pleading the statute, even though his power is admitted to pay the debt after it is barred.²

Personal Liability on Promise to Pay Barred Debt.—Though a promise by an executor or administrator to pay a debt of the decedent after the statute of limitations has run against it may not be effective to charge the estate, it may nevertheless operate to charge him personally.³

1. Rule that Acknowledgment or Promise to Pay Removes Bar—England.—*Tullock v. Dunn*, R. & M. 416, 21 E. C. L. 478; *Atkins v. Tredgold*, 2 B. & C. 23, 9 E. C. L. 12; *Briggs v. Wilson*, 5 De G. M. & G. 12; *Browning v. Paris*, 5 M. & W. 120.

Alabama.—*Newhouse v. Redwood*, 7 Ala. 598; *Hall v. Darrington*, 9 Ala. 502; *Townes v. Ferguson*, 20 Ala. 147; *Pollard v. Scars*, 28 Ala. 484, 65 Am. Dec. 364; *Martin v. Ellerbe*, 70 Ala. 340.

Delaware.—*Chambers v. Fennemore*, 4 Harr. (Del.) 368.

Kentucky.—*Northcut v. Wilkinson*, 12 B. Mon. (Ky.) 408; *Head v. Manners*, 5 J. J. Marsh. (Ky.) 257.

Maryland.—*Quynn v. Carroll*, 10 Md. 197; *Semmes v. Young*, 10 Md. 242.

Massachusetts.—*Baxter v. Penniman*, 8 Mass. 133; *Emerson v. Thompson*, 16 Mass. 429. See the criticism of these two cases in *Henderson v. Ilsley*, 11 Smed. & M. (Miss.) 9, 49 Am. Dec. 41.

New Hampshire.—*Hodgdon v. White*, 11 N. H. 208; *Brewster v. Brewster*, 52 N. H. 52.

2. Rule that Acknowledgment or Promise to Pay Does Not Remove Bar—Florida.—*Patterson v. Cobb*, 4 Fla. 481.

Louisiana.—*Dickson v. Compton*, 24 La. Ann. 83.

Mississippi.—*Bingaman v. Robertson*, 25 Miss. 501; *Trotter v. Trotter*, 40 Miss. 704.

Missouri.—*Cape Girardeau County v. Harbison*, 58 Mo. 90.

New Hampshire.—*Amoskeag Mfg. Co. v. Barnes*, 49 N. H. 312; *Wait v. Holt*, 58 N. H. 467.

New York.—*Matter of Dunn*, 5 Dem. (N. Y.) 124; *Balz v. Underhill*, 19 Misc. Rep. (N. Y. Supreme Ct.) 215; *Bloodgood v. Bruen*, 8 N. Y. 362; *Barry v. Lambert*, 98 N. Y. 300, 50 Am. Rep. 677; *Matter of Kendrick*, 107 N. Y. 104; *Butler v. Johnson*, 111 N. Y. 204; *Schutz v. Morette*, 146 N. Y. 137. But see *Johnson v. Beardslee*, 15 Johns. (N. Y.) 3.

North Carolina.—*Oates v. Lilly*, 84 N. Car. 643; *Grady v. Wilson*, 115 N. Car. 344, 44 Am. St. Rep. 461.

Pennsylvania.—*Fritz v. Thomas*, 1 Whart. (Pa.) 66, 29 Am. Dec. 39; *Reynolds v. Hamilton*, 7 Watts (Pa.) 420; *Clark v. Maguire*, 35 Pa. St. 259.

South Carolina.—*Moore v. Porcher*, Bailey Eq. (S. Car.) 195.

Tennessee.—*Peck v. Wheaton*, Mart. & Y. (Tenn.) 361.

Texas.—*Moore v. Hardison*, 10 Tex. 467; *Moore v. Hillebrant*, 14 Tex. 312, 65 Am. Dec. 118.

Virginia.—*Smith v. Pattie*, 81 Va. 654.

Opposing Authorities Reviewed and Criticised.—In *Henderson v. Ilsley*, 11 Smed. & M.

(Miss.) 9, 49 Am. Dec. 41, the court reviewed at length many of the authorities which were relied on to establish a contrary doctrine, and reached the conclusion that what was stated in these cases was mere dictum. In regard to the case of *Emerson v. Thompson*, 16 Mass. 429, the court said that the decision was on the authority of *Baxter v. Penniman*, 8 Mass. 133, but that in truth no such question was raised in the latter case.

Revival of Debt Depends on Power to Contract.

—In *Patterson v. Cobb*, 4 Fla. 481, *Thompson, J.*, said: "In the *United States* the decisions on the point have not been uniform, the earlier cases following the *English* precedents holding that an executor was not bound to set up the bar of the statute of limitations, where he had reason to believe that the debt was originally just, and had not been paid, and that his promise to pay would remove the bar; but it is believed from a careful review of the decisions that the weight of authority is the other way—that the executor has not power to bind the estate by an acknowledgment or a new promise. See *Fisher v. Tucker*, 1 McCord Eq. (S. Car.) 175; *Peck v. Botsford*, 7 Conn. 180, 18 Am. Dec. 92; *Richmond, Petitioner*, 2 Pick. (Mass.) 567; *Rogers v. Rogers*, 3 Wend. (N. Y.) 517, 20 Am. Dec. 716; *Thompson v. Peter*, 12 Wheat. (U. S.) 565. Certainly the decisions quoted seem to be based on grounds more consonant to reason and justice and the principles of law. It seems idle to assert as a principle of law that an executor cannot bind the estate by any contract, and yet permit him by a new promise to charge the estate with a debt extinct by operation of a statute."

In *Cape Girardeau County v. Harbison*, 58 Mo. 90, the court said: "In *Bell v. Morrison*, 1 Pet. (U. S.) 351, and other leading cases, while it is agreed that the suit is properly founded on the original demand, yet the authority to take an indebtedness out of the statute by a new promise or acknowledgment is shown to be dependent upon the power to make a new contract, 'springing out and supported by the original consideration.' It is impossible to find any such power conferred, even inferentially, upon executors or administrators in *Missouri*. It follows that an administrator cannot, by his own promise or acknowledgment, prevent the statute of limitations from running in favor of a debt contracted by his intestate. A dictum in *Wiggins v. Lovering*, 9 Mo. 263, was doubtless induced by the learned judge's familiarity with the doctrine then current, as derived from foreign sources."

3. Personal Liability on Promise to Pay Barred Debt.—*Oates v. Lilly*, 84 N. Car. 643; Mc-

(6) *Interrupting Running of Statute.* — If the bar of the statute has not accrued at the time of the decedent's death, the personal representative may, in the absence of any statutory regulation, stop the running of the limitation, either by part payment, or by a promise to pay, or by such acknowledgment of the debt as will imply a promise to pay.¹

(7) *Waiver by Joint Executor or Administrator* — (a) **Rule in England.** — The question whether an acknowledgment by one of several executors or administrators is sufficient to interrupt the running of the statute of limitations as against all has been decided differently in different jurisdictions. In England the subject is now regulated by Lord Tenterden's Act (9 Geo. IV., c. 14, § 1), which provides that the promise shall affect only the executor or administrator making it.²

Grath v. Barnes, 13 S. Car. 328, 36 Am. Rep. 687. See also *supra*, this section, *Payment of Decedent's Debts*.

As to the requirements of a promise to bind the executor or administrator personally, see the title FRAUDS, STATUTE OF.

1. **Part Payment Interrupts Running of Statute.** — Foster v. Starkey, 12 Cush. (Mass.) 324; Heath v. Grenell, 61 Barb. (N. Y.) 190; McLaren v. McMartin, 36 N. Y. 88, 3 Abb. Pr. N. S. (N. Y.) 345; Matter of Robbins, 7 Misc. Rep. (N. Y. Surrogate Ct.) 264.

Acknowledgment or Promise to Pay Interrupts Running of Statute — England. — Briggs v. Wilson, 5 DeG. M. & G. 12; McCulloch v. Dawes, 9 D. & R. 40, 22 E. C. L. 385; Tullock v. Dunn, R. & M. 416, 21 E. C. L. 478.

United States. — Thompson v. Peter, 12 Wheat. (U. S.) 565.

Alabama. — Townes v. Ferguson, 20 Ala. 147. *Connecticut.* — Peck v. Botsford, 7 Conn. 172, 18 Am. Dec. 92.

Florida. — Patterson v. Cobb, 4 Fla. 481. *Kentucky.* — Head v. Manners, 5 J. J. Marsh. (Ky.) 255.

Louisiana. — Sevier v. Gordon, 21 La. Ann. 373.

South Carolina. — Walter v. Radcliffe, 2 Desaus. (S. Car.) 577.

Texas. — Park v. Prendergast, 4 Tex. Civ. App. 566; Suhre v. Benton, (Tex. Civ. App. 1894) 25 S. W. Rep. 822; Daniel v. Harvin, 10 Tex. Civ. App. 439.

Sufficiency of Promise or Acknowledgment. — In Oakes v. Mitchell, 15 Me. 360, Shepley, J., said: "In determining what language will be sufficient to raise a new promise, there is a distinction between those who are acting for themselves and those who are acting in trust for others, which must be regarded. Declarations or acknowledgments from which a new promise might be inferred if made by the debtor himself, when made by an executor or administrator will not be sufficient to charge the estate. There must be a clear agreement or promise to pay."

A Mere General Request for delay, or the simple assurance that the debt is good, made by the personal representative, will not stop the running of the statute of limitations. Langham v. Baker, 5 Baxt. (Tenn.) 701.

Inserting a Note in the Inventory which is signed and verified by the executor is a sufficient acknowledgment of the indebtedness by the executor. Morrow v. Morrow, 12 Hun (N. Y.) 386; Clark v. Van Amburgh, 14 Hun (N. Y.) 557.

In Townes v. Ferguson, 20 Ala. 147, an acknowledgment in the following words was held sufficient: "The account is a good one, but I cannot pay it before January, at which time I will be receiving money for the hire of negroes."

In McWhirter v. Jackson, 10 Humph. (Tenn.) 209, an indorsement on an account: "The within account is accepted, and will be paid when means sufficient come to my hands," was held sufficient.

Statutory Regulation. — In *West Virginia*, by statute, an acknowledgment or promise to pay made by the personal representative does not stop the running of the statute against debts of the decedent. Van Winkle v. Blackford, 33 W. Va. 573.

See also other local statutes in the United States.

2. **Rule in England — Lord Tenterden's Act Governs.** — See Shreve v. Joyce, 36 N. J. L. 44, 13 Am. Rep. 417, where the English decisions are concisely reviewed by Bedle, J., as follows: "Very little can be gathered from the English books on this subject, as the whole matter is controlled by the Act of 9 Geo. IV., c. 14, § 1, known as Lord Tenterden's Act, which provides that the promise shall be in writing, and then, that the promise shall only affect the executor making it. Previous to that act, the law had not been sufficiently declared by the English courts to regard it as settled. In Tullock v. Dunn, R. & M. 416, 21 E. C. L. 478, Lord Chief Justice Abbott (afterwards Lord Tenterden, and the author of the act referred to), at nisi prius, in nonsuiting the plaintiff, remarked that 'the promise by one only is not enough to entitle the plaintiff to recover; there ought to be a promise by both.' Afterwards, in the case of McCulloch v. Dawes, 9 D. & R. 40, 22 E. C. L. 385, the same chief justice, sitting in King's Bench, held, under the facts of that case, that there was not sufficient evidence to raise a promise by one executor, but did not question the effect of it upon the other, had it been made. In Scholey v. Walton, 12 M. & W. 509 (after the Act of 9 Geo. IV.), which was an action by the payee of a note against the defendants as surviving executors, it was decided, on the question of an alleged payment by the deceased executor (the act referred to leaving the effect of a payment undisturbed), that what was claimed as a payment was not made in a representative character; but Baron Parke, in referring to the case of Tullock v. Dunn, R. & M. 416, 21 E. C. L. 478, remarked that it seemed to him

(b) **Rule in United States.** — In the United States the authorities are very conflicting. In some states it is held that a promise by one of several joint representatives has the same effect as though made by all.¹ This rule has been questioned in *New York*, and the contrary opinion intimated,² while in other states it has been held that a promise by one of several representatives does not bind all.³

b. SPECIAL STATUTE. — Besides the general statute of limitations there is a special statute, generally known as the statute of nonclaim, which provides that claims against decedents' estates can be enforced against the personal representatives only within a certain time, varying from a few months to several years; and this statute a personal representative has no authority to waive, whatever may be the rule as to his authority to waive the general statute.⁴

11. Submission to Arbitration — *a. POWER TO SUBMIT TO ARBITRATION.* — Executors and administrators have the power at common law, as incidental to their power to pay the debts of the estate and collect those due to it, to submit to arbitration any matter relating to the estate, whether in favor of or against it, and the award is binding on the estate.⁵

that that case was founded in justice and good sense, and ought to be followed. That, however, was a mere dictum in the cause. Abinger, C. B., seemed differently inclined, so far as it can be gathered from his opinion. Some little other dicta may be found, but the only direct adjudication upon the subject in the English courts is the case of *Tullock v. Dunn*, and that has only the force of a *nisi prius* decision."

1. Rule in United States — Promise by One Binds All. — *Head v. Manners*, 5 J. J. Marsh. (Ky.) 257; *Hord v. Lee*, 2 T. B. Mon. (Ky.) 131; *Northcut v. Wilkinson*, 12 B. Mon. (Ky.) 408; *McCann v. Sloan*, 25 Md. 575; *Emerson v. Thompson*, 16 Mass. 431; *Shreve v. Joyce*, 36 N. J. L. 44, 13 Am. Rep. 417.

2. Rule Questioned in New York. — *Johnson v. Beardslee*, 15 Johns. (N. Y.) 3; *Hammon v. Huntley*, 4 Cow. (N. Y.) 494; *Cayuga County Bank v. Bennett*, 5 Hill (N. Y.) 236.

In *Heath v. Grenell*, 61 Barb. (N. Y.) 190, it was said that it seems that one of several administrators cannot revive or restore a stale demand by a promise or part payment. See also *Forsyth v. Ganson*, 5 Wend. (N. Y.) 558, 21 Am. Dec. 241; *M'Intire v. Morris*, 14 Wend. (N. Y.) 90.

3. Rule that Promise by One Does Not Bind All. — *Peck v. Botsford*, 7 Conn. 172, 18 Am. Dec. 92; *Fritz v. Thomas*, 1 Whart. (Pa.) 66, 29 Am. Dec. 39; *Reynolds v. Hamilton*, 7 Watts (Pa.) 420; *Forney v. Benedict*, 5 Pa. St. 225; *Clark v. Maguire*, 35 Pa. St. 259.

4. Special Statute Cannot Be Waived — *United States*. — *Miner v. Aylesworth*, 18 Fed. Rep. 199.

Massachusetts. — *Brown v. Anderson*, 13 Mass. 201; *Thompson v. Brown*, 16 Mass. 172; *Emerson v. Thompson*, 16 Mass. 429; *Heath v. Wells*, 5 Pick. (Mass.) 140, 16 Am. Dec. 383; *Waltham Bank v. Wright*, 8 Allen (Mass.) 122; *Scott v. Hancock*, 13 Mass. 162.

Mississippi. — *Nagle v. Ball*, 71 Miss. 330; *Woods v. Elliott*, 49 Miss. 168.

Missouri. — *Wiggins v. Lovering*, 9 Mo. 262; *Stiles v. Smith*, 55 Mo. 363.

New Hampshire. — *Amoskeag Mfg. Co. v. Barnes*, 48 N. H. 25; *Sugar River Bank v.*

Fairbank, 49 N. H. 131; *Hall v. Woodman*, 49 N. H. 295; *Probate Judge v. Ellis*, 63 N. H. 366.

Tennessee. — *Brown v. Porter*, 7 Humph. (Tenn.) 373; *Puckett v. James*, 2 Humph. (Tenn.) 565; *Langham v. Baker*, 5 Baxt. (Tenn.) 701; *Allen v. Shanks*, 90 Tenn. 359; *Alvis v. Oglesby*, 87 Tenn. 184.

Failure to Plead Special Statute — Effect as to Heirs. — The failure of an executor or administrator to plead the special statute will not bar or preclude the heirs from pleading it on the settlement with the executor or administrator. *Stillman v. Young*, 16 Ill. 318; *Nowell v. Nowell*, 8 Me. 225.

5. Power at Common Law to Submit to Arbitration — *England*. — *Pearson v. Henry*, 5 T. R. 6; *Worthington v. Barlow*, 7 T. R. 449; *Barry v. Rush*, 1 T. R. 691; *Love v. Honeybourne*, 4 D. & R. 814, 16 E. C. L. 222.

Canada. — *Reid v. Reid*, 26 U. C. C. P. 247.

United States. — *Strodes v. Patton*, 1 Brock. (U. S.) 228; *Lyle v. Rodgers*, 5 Wheat. (U. S.) 394.

Alabama. — *Jones v. Deyer*, 16 Ala. 221; *Woolfork v. Sullivan*, 23 Ala. 548, 58 Am. Dec. 305; *Jones v. Blalock*, 31 Ala. 180.

Connecticut. — *Netleton v. Buckingham*, 1 Root (Conn.) 149; *Alling v. Munson*, 2 Conn. 691; *Bennett v. Pierce*, 28 Conn. 315.

Delaware. — *Lank v. Kinder*, 4 Harr. (Del.) 457.

Georgia. — *Merchants' Bank v. Taylor*, 21 Ga. 334.

Kentucky. — *Overly v. Overly*, 1 Metc. (Ky.) 117; *Logsdon v. Roberts*, 3 T. B. Mon. (Ky.) 256.

Maine. — *Kendall v. Bates*, 35 Me. 357.

Massachusetts. — *Chadbourn v. Chadbourn*, 9 Allen (Mass.) 173; *Coffin v. Cottle*, 4 Pick. (Mass.) 454; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Whitney v. Cook*, 5 Mass. 139; *Dickey v. Sleeper*, 13 Mass. 244.

Mississippi. — *Bailey v. Dilworth*, 10 Smed. & M. (Miss.) 404, 48 Am. Dec. 760.

New Jersey. — *Crum v. Moore*, 14 N. J. Eq. 436, 82 Am. Dec. 262; *McKeen v. Oliphant*, 18 N. J. L. 442.

New York. — *Wood v. Tunncliff*, 74 N. Y. 38.

Statutory Rule. — The power to submit to arbitration is also conferred by statute, both in *England* and in the *United States*. The English statute provides that executors may submit to arbitration any debt, account, claim, or thing whatever relating to the testator's estate, "without being responsible for any loss occasioned by any act or thing so done by him or them in good faith,"¹ while the American statutes generally require the sanction of the probate court.²

Distinction Between Claims Against and in Favor of Estate. — In some states it is held that personal representatives have no power to submit to arbitration claims against an estate, thus distinguishing between claims against an estate and claims in favor of it. The distinction arises out of the requirement of local statutes that all claims against estates of decedents shall be presented to and allowed by the probate court.³

Effect of Statutes. — The common-law power in regard to submitting to arbitration matters concerning the estates of decedents is not affected or impaired in any way by the statutes. The purpose and effect of the statutes are to relieve executors and administrators from individual liability for any injury to the estate that might result from the arbitration.⁴

b. EFFECT OF SUBMISSION. — The early cases seem to hold that an executor or administrator, by submitting a claim against the estate to arbitration, thereby admits that he has assets in his hands;⁵ but the modern rule is to the contrary,⁶ unless by the terms of the submission the executor or admin-

Ohio. — *Childs v. Updyke*, 9 Ohio St. 333.

Pennsylvania. — *Grace v. Sutton*, 5 Watts (Pa.) 540; *Peters's Appeal*, 38 Pa. St. 239; *Harris v. Hayes*, 6 Binn. (Pa.) 422.

Rhode Island. — *Parker v. Providence, etc., Steamboat Co.*, 17 R. I. 376, 33 Am. St. Rep. 869.

South Carolina. — *Swicard v. Willson*, 2 Treadw. (S. Car.) 218.

Texas. — *Yarborough v. Leggett*, 14 Tex. 677.

Vermont. — *Powers v. Douglass*, 53 Vt. 471, 38 Am. Rep. 699; *Dickinson v. Dutcher*, Brayt. (Vt.) 104.

Virginia. — *Wheatley v. Martin*, 6 Leigh (Va.) 62; *Nelson v. Cornwell*, 11 Gratt. (Va.) 724.

West Virginia. — *Wamsley v. Wamsley*, 26 W. Va. 45.

Wisconsin. — *Wood v. Treleven*, 74 Wis. 577.

Hawaii. — *Matter of Vida*, 1 Hawaiian 89.

Source of Power. — The power of an executor or administrator to submit to arbitration results from his power to settle all claims in favor of or against the estate which he represents. *Nelson v. Cornwell*, 11 Gratt. (Va.) 724.

Deputy Sheriff. — When the administration of an estate has been committed to the sheriff, the deputy sheriff has no power to submit to arbitration a suit to which the decedent was a party in his lifetime, and which has been revived in the name of the sheriff. *Thompson v. Thompson*, 6 Munf. (Va.) 514.

1. Statutory Rule in England. — Stat. 23 & 24 Vict., c. 145, § 30; Stat. 44 & 45 Vict., c. 41.

2. Statutory Power in the United States. — *Kent* — *Overly v. Overly*, 1 Metc. (Ky.) 117.

Maryland. — *Browne v. Preston*, 38 Md. 373.

Massachusetts. — *Bacon v. Crandon*, 15 Pick. (Mass.) 79.

Mississippi. — *Reed v. Wiley*, 5 Smed. & M. (Miss.) 394; *Regan v. Stone*, 7 Smed. & M. (Miss.) 104.

New Jersey. — *McKeen v. Oliphant*, 18 N. J. L. 442.

New York. — *Woodin v. Bagley*, 13 Wend. (N. Y.) 453; *Tracy v. Suydam*, 30 Barb. (N. Y.) 110; *White v. Story*, 43 Barb. (N. Y.) 124.

Ohio. — *Anderson v. Baker*, 15 Ohio St. 173; *Childs v. Updyke*, 9 Ohio St. 333.

Pennsylvania. — *Peters's Appeal*, 38 Pa. St. 239.

Vermont. — *Powers v. Douglass*, 53 Vt. 471, 38 Am. Rep. 699; *Noyes v. Phillips*, 57 Vt. 229.

West Virginia. — *Wamsley v. Wamsley*, 26 W. Va. 45.

See also the various local codes and statutes in the United States.

3. Rule Forbidding Arbitration of Claims Against Estate. — *Clark v. Hogle*, 52 Ill. 427; *Reitzell v. Miller*, 25 Ill. 67. But see *Wood v. Tunnicliff*, 74 N. Y. 38.

Rejected Claims. — In *Yarborough v. Leggett*, 14 Tex. 677, it was held that arbitration was not the proper mode for the establishment of a rejected claim against an estate, because of the statute which provides that if a claim shall be rejected by the administrator the holder of such claim may, within three months after such rejection, bring suit against the executor or administrator for the establishment thereof in any court having jurisdiction of the same.

4. Common-law Power Not Affected by Statute. — *Logsdon v. Roberts*, 3 T. B. Mon. (Ky.) 250; *Overly v. Overly*, 1 Metc. (Ky.) 117; *Chadbourne v. Chadbourne*, 9 Allen (Mass.) 173; *Wood v. Tunnicliff*, 74 N. Y. 38; *Powers v. Douglass*, 53 Vt. 471, 38 Am. Rep. 699.

5. Rule that Submission Is Admission of Assets. — *Barry v. Rush*, 1 T. R. 691; *Riddell v. Sutton*, 5 Bing. 200, 15 E. C. L. 416; *Tallman v. Tallman*, 5 Cush. (Mass.) 325.

6. Rule that Submission Is Not Admission of Assets. — *Pearson v. Henry*, 5 T. R. 6; *Worthington v. Barlow*, 7 T. R. 449; *Sumner v. Wil-*

istrator undertakes to pay the award.¹

c. **EFFECT OF AWARD** — (1) *Effect as Between Parties.* — Since it is within the power of an executor or administrator to submit to arbitration matters relating to the estate, an award made under such a submission is binding on the parties and on the estate, and is enforceable by or against either.²

(2) *Effect as Between Personal Representatives and Estate.* — At common law an executor or administrator acted at his peril in submitting claims to arbitration. Though the parties to the submission and the estate were bound by the award, the persons interested in the estate were not bound, and if the estate was injured by the award, either because it was for more than was really due in case of a claim against the estate, or for less than was due in case of a claim in favor of the estate, the personal representative was individually liable for the amount of the loss.³

12. Compromise, Composition, and Release of Claims — a. **THE POWER** — (1) *At Common Law.* — At common law an executor or administrator could compromise, compound, or release claims in favor of or against the estate represented by him; and this power was subject only to a personal liability to make good the loss in case, on final settlement, it should be adjudged that the compromise was fraudulently or improvidently made.⁴

liams, 8 Mass. 162, 5 Am. Dec. 83. See also *Love v. Honeybourne*, 4 D. & R. 814, 16 E. C. L. 222; *Matter of Joseph*, 1 Russ. & M. 496; *Spivy v. Webster*, 2 Dowl. P. C. 46.

1. **If the Executor, in His Submission, Binds Himself** and his heirs to perform the award, he will be bound whether he has assets or not. *McKeen v. Oliphant*, 18 N. J. L. 442.

2. **Award Binding on Parties and Estate** — *England.* — *Worthington v. Barlow*, 7 T. R. 449; *Pearson v. Henry*, 5 T. R. 6; *Barry v. Rush*, 1 T. R. 691.

Kentucky. — *Overly v. Overly*, 1 Metc. (Ky.) 117.

Massachusetts. — *Coffin v. Cottle*, 4 Pick. (Mass.) 454.

New Jersey. — *Crum v. Moore*, 14 N. J. Eq. 436, 82 Am. Dec. 262.

South Carolina. — *Swicard v. Willson*, 2 Treadw. (S. Car.) 218.

Personal Liability to Creditor for Amount of Award. — The authorities tend to establish the rule that executors are personally bound by a covenant to abide by and perform an award contained in a submission entered into by them, though in form they covenanted as executors, unless from the other parts of the submission it appears that their intention was to bind themselves only to pay out of the assets in due course of administration. *Barry v. Rush*, 1 T. R. 691; *Worthington v. Barlow*, 7 T. R. 449; *Love v. Honeybourne*, 4 D. & R. 814, 16 E. C. L. 222; *Childs v. Monins*, 2 Brod. & B. 460, 6 E. C. L. 228; *King v. Thom*, 1 T. R. 489; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Ferrin v. Myrick*, 41 N. Y. 315; *Wood v. Tunnichliff*, 74 N. Y. 38.

3. **Personal Representative Individually Liable if Estate Is Injured by Award.** — *Wheatley v. Martin*, 6 Leigh (Va.) 62; *Nelson v. Cornwell*, 11 Gratt. (Va.) 724.

If a Smaller Sum Should Be Awarded in Favor of the Executor or Administrator than he would be entitled to recover at law, he may be held to account for the deficiency to the heirs or other persons interested in the effects of the testator or intestate.

England. — *Worthington v. Barlow*, 7 T. R. 449; *Pearson v. Henry*, 5 T. R. 6; *Barry v. Rush*, 1 T. R. 691; *Goring v. Goring*, Yelv. 10; *Armitage v. Metcalf*, 1 Ch. Cas. 74; *Yard v. Eland*, 1 Ld. Raym. 368.

United States. — *Strodes v. Patton*, 1 Brock. (U. S.) 228.

Massachusetts. — *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Coffin v. Cottle*, 4 Pick. (Mass.) 454.

New Jersey. — *Crum v. Moore*, 14 N. J. Eq. 436, 82 Am. Dec. 262.

South Carolina. — *Swicard v. Willson*, 2 Treadw. (S. Car.) 218.

If There Was No Culpable Error on the part of the executor or administrator in submitting a claim to arbitration, it is said to be doubtful whether he would be held liable. *Overly v. Overly*, 1 Metc. (Ky.) 117.

4. **Common-law Power to Compromise or Compound Claims** — *England.* — *Blue v. Marshall*, 3 P. Wms. 381; *Legh v. Holloway*, 8 Ves. Jr. 213; *De Cordova v. De Cordova*, L. R. 4 App. 692.

Alabama. — *Waring v. Lewis*, 53 Ala. 615; *Van Hoose v. Bush*, 54 Ala. 342; *Baldwin v. Hatchett*, 56 Ala. 461; *Moses v. Clark*, 46 Ala. 229; *Jones v. Blalock*, 31 Ala. 180; *Butler v. Gazzam*, 81 Ala. 491.

California. — *Moulton v. Holmes*, 57 Cal. 337.

Illinois. — *Short v. Johnson*, 25 Ill. 489.

Maine. — *Chase v. Bradley*, 26 Me. 531.

Massachusetts. — *Chadbourn v. Chadbourn*, 9 Allen (Mass.) 173; *Bean v. Farnam*, 6 Pick. (Mass.) 269.

Mississippi. — *Martin v. Tarver*, 43 Miss. 517.

Missouri. — *Jacobs v. Jacobs*, 99 Mo. 427.

New Hampshire. — *Wyman's Appeal*, 13 N. H. 18; *Exeter Bank v. Gordon*, 8 N. H. 81.

New Jersey. — *Rogers v. Hand*, 39 N. J. Eq. 270.

New York. — *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349; *Chouteau v. Suydam*, 21 N. Y. 179; *Wood v. Tunnichliff*, 74 N. Y. 38; *Murray v. Blatchford*, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537.

(2) *By Statute.* — The authority of executors and administrators to compromise and compound debts and claims has been the subject of statutory enactment both in *England* and the *United States*. The first English statute on the subject was Lord Cranworth's Act, section 30 of which made it lawful for executors to compound or compromise all claims relating to the testator's estate without being responsible for any loss occasioned thereby. This statute, however, applied only to persons acting under a will or codicil executed after August 28, 1860, or under a will or codicil affirmed or revived by a codicil after that date.¹ Section 30 of Lord Cranworth's Act was repealed in 1881 by a statute which provided that an executor or trustee might compromise or compound or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust; and this statute applies to executorships and trusts constituted or created either before or after the commencement of the act.² The statutes in the *United States* authorizing executors and administrators to compromise claims in favor of or against estates represented by them generally require them first to obtain the consent or approval of the probate court, and provide that they shall not be liable in

Pennsylvania. — *Pusey v. Clemson*, 9 S. & R. (Pa.) 204; *Hufnagle's Estate*, 23 Pittsb. Leg. J. (Pa.) 121.

Rhode Island. — *Parker v. Providence, etc., Steamboat Co.*, 17 R. I. 380, 33 Am. St. Rep. 869.

South Carolina. — *Geigers v. Kaigler*, 9 S. Car. 401.

Tennessee. — *Alexander v. Kelso*, 3 Baxt. (Tenn.) 311.

West Virginia. — *Richardson v. Donehoo*, 16 W. Va. 686.

This Power Is Exclusive and cannot be exercised by the persons beneficially interested in the estate. *Lewis v. Brooks*, 6 Yerg. (Tenn.) 167.

Settlement with Surviving Partners. — The administrator of a deceased partner may make a settlement with the surviving partners; and the settlement is binding on the decedent's minor children if made in good faith. *Hoyt v. Sprague*, (U. S. Cir. Ct. 1879) 8 Rep. 616; *Holmes's Appeal*, 79 Pa. St. 279; *Grim's Appeal*, 105 Pa. St. 375.

The Measure of Responsibility in making a compromise is that the personal representative must exercise such care and skill as a prudent man uses in the management of his own affairs. *Jacobs v. Jacobs*, 99 Mo. 427; *Matter of Vida*, 1 Hawaiian 89.

A Special Administrator has no authority to compromise a disputed claim, but if he does so in good faith, and those interested in the estate are present at the settlement of his accounts and acquiesce in his action, they will be estopped from afterwards setting up his want of authority. *Foster v. Stone*, 67 Vt. 336.

Duty to Make Compromises and Compositions. — It is not only within the power of an executor or administrator to compromise or compound claims, but it is also his duty to do so if the interests of the estate require it. *Leland v. Manning*, 4 Hun (N. Y.) 7; *Matter of Scott*, 5 N. Y. Leg. Obs. 378.

Power to Release Claims. — *Brightman v. Keighly*, Cro. Eliz. 43; *Waring v. Lewis*, 53 Ala. 615; *Van Hoose v. Bush*, 54 Ala. 342; *Baldwin v. Hatchett*, 56 Ala. 461; *Moses v. Clark*, 46 Ala. 229; *Butler v. Gazzam*, 81 Ala.

491; *Chase v. Bradley*, 26 Me. 531; *Sherbourne v. Goodwin*, 44 N. H. 271. But see *Scott v. Scott*, 61 Ill. App. 103.

The old and strict rule of law was that an administrator could not release a debt without being responsible for it, but this rule has been relaxed in equity as between the administrator or executor and the legatees or next of kin. *De Diemar v. Van Wagenen*, 7 Johns. (N. Y.) 404.

Joint Debtors. — In *Indiana* an administrator may, in good faith and for a sufficient consideration, release one of the makers of a joint note. *Latta v. Miller*, 109 Ind. 302.

Release of Mortgage. — An executor or administrator has power to release a mortgage given to secure a debt due the estate. *Baldwin v. Hatchett*, 56 Ala. 461; *Ely v. Scofield*, 35 Barb. (N. Y.) 330. But see *Monroe v. De Forest*, 53 N. J. Eq. 264, as to the release of a mortgage given to secure a debt for which the testator was surety.

One of Two Executors may satisfy a mortgage belonging to the estate without the concurrence of the other executor. *Weir v. Mosher*, 19 Wis. 311.

A Release by an Administrator of a Mortgage Given by Himself to the decedent is ineffectual where the purpose of the release was to enable him to give another mortgage on the property for a loan to be made to himself individually, and the lender knew the facts. *Eastham v. Landon*, 17 Wash. 48, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 202, 203.

Liability for Claim Released. — If an executor, acting in good faith, but under a mistake as to the rights of the estate, agrees to surrender a lease for less than it is worth, he is not liable; but if he executes a release after discovering his mistake, he is liable. *People v. Pleas*, 2 Johns. Cas. (N. Y.) 376.

Novation. — An executor has power to make novation, under the general rule of law that he who can receive payment may novate. *Turnbull v. Freret*, 5 Martin N. S. (La.) 703. But see *Scott v. Atchison*, 38 Tex. 384, holding that a personal representative cannot make a novation without an order of court.

1. Stat. 23 & 24 Vict., c. 145.

2. Stat. 44 & 45 Vict., c. 41, § 37.

respect to any compromise made after obtaining such consent or approval.¹

The Effect of These Statutes is not to confer on executors and administrators any powers that they did not possess at common law, or to abrogate their authority in this respect as it existed at common law, but merely to afford them additional protection from liability when acting in the manner prescribed.² In some jurisdictions, however, the statutes limit the power to make compromises by declaring that it may be done only with the consent of the probate court;³ but notwithstanding such provision it is held that there are cases in which a compromise may be made without leave of court.⁴

(3) *By Will or from Beneficiaries.* — The authority to compromise claims may be conferred on the personal representative by will or by the persons beneficially entitled to the estate.⁵

b. WHEN COMPROMISE OR COMPOSITION IS PROPER. — While the power of a personal representative to compromise and settle claims existing either in

1. Statutory Authority in United States — *Alabama.* — *Butler v. Gazzam*, 81 Ala. 491.

Arkansas. — *Wilks v. Slaughter*, 49 Ark. 235.

California. — *Hartigan v. Southern Pac. R. Co.*, 86 Cal. 142; *Moulton v. Holmes*, 57 Cal. 337.

Illinois. — *Washington v. Louisville, etc., R. Co.*, 34 Ill. App. 658.

Kansas. — *Etna L. Ins. Co. v. Swayze*, 30 Kan. 118.

Maine. — *Chase v. Bradley*, 26 Me. 531.

Michigan. — *In re Beecher*, (Mich. 1897) 72 N. W. Rep. 11.

Mississippi. — *Berry v. Parkes*, 3 Smed. & M. (Miss.) 625.

Missouri. — *Jacobs v. Jacobs*, 99 Mo. 427.

Montana. — *Mulville v. Pacific Mut. L. Ins. Co.*, 19 Mont. 95.

Nevada. — *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376.

New York. — *Matter of Richardson*, 2 Conolly (N. Y.) 276.

Rhode Island. — *Parker v. Providence, etc., Steamboat Co.*, 17 R. I. 376, 33 Am. St. Rep. 869.

South Carolina. — *Geigers v. Kaigler*, 9 S. Car. 401.

Virginia. — *Kee v. Kee*, 2 Gratt. (Va.) 116; *Boyd v. Oglesby*, 23 Gratt. (Va.) 674.

See also the various local codes and statutes in the United States.

In Rhode Island the statute does not contain the requirement that the consent or approval of the court shall be obtained. *Parker v. Providence, etc., Steamboat Co.*, 17 R. I. 376, 33 Am. St. Rep. 869.

Public Administrator. — The *Montana* statute giving authority to executors and administrators to compromise claims applies to the public administrator as well as private administrators. *Mulville v. Pacific Mut. L. Ins. Co.*, 19 Mont. 95.

2. Effect of Statutes in General — *Alabama.* — *Woolfork v. Sullivan*, 23 Ala. 548, 58 Am. Dec. 305; *Van Hoose v. Bush*, 54 Ala. 342.

Arkansas. — *Wilks v. Slaughter*, 49 Ark. 235.

California. — *Moulton v. Holmes*, 57 Cal. 337.

Maine. — *Chase v. Bradley*, 26 Me. 531.

Massachusetts. — *Chadbourn v. Chadbourn*, 9 Allen (Mass.) 173.

New Hampshire. — *Wyman's Appeal*, 13 N. H. 18.

New York. — *Chouteau v. Suydam*, 21 N. Y. 179.

Rhode Island. — *Parker v. Providence, etc., Steamboat Co.*, 17 R. I. 381, 33 Am. St. Rep. 869.

Virginia. — *Nelson v. Cornwell*, 11 Gratt. (Va.) 724.

Liability for Negligence Rendering a Compromise Necessary is not affected by an order of court authorizing the executor to make the compromise. *Fraley v. Thomas*, 98 Ga. 375.

3. Leave of Court Essential in Some Jurisdictions. — *Markel v. Spitzer*, 28 Ind. 488; *Pierce v. Batten*, 3 Kan. App. 396; *Smith v. Pate*, (Tex. Civ. App. 1897) 43 S. W. Rep. 312.

4. When Consent of Court May Be Dispensed With. — An action to recover damages for negligence causing the death of the intestate may be compromised by the administrator without leave of court, since any amount that might be recovered would not constitute assets of the estate, but would belong to the family of the intestate, as provided by the statute relating to actions for wrongful death. *Washington v. Louisville, etc., R. Co.*, 34 Ill. App. 658, 136 Ill. 49.

Matters in Litigation. — In *Denney v. Parker*, 10 Wash. 218, it was held that the requirement of the statute that the authority of the Probate Court should be obtained to compromise claims does not apply to a matter in litigation, whether the litigation involved the real estate or not.

5. Compromise May Be Authorized by Will. — *Ilse v. Ilse*, (Ky. 1887) 6 S. W. Rep. 120.

Effect of Testamentary Power. — Authority given in a will to the executors to compound and compromise debts due to the testator. "upon the terms which in their judgment may be best for the interest" of the estate, does not relieve them from the exercise of sound judgment and discretion, and their judgment must be exercised with an eye single to the best interests of the testator's estate. *Buerhaus v. De Saussure*, 41 S. Car. 457.

A Dower Right May Be Compounded where the executors have power under the will to sell the real estate. *Eagle v. Emmet*, 4 Bradf. (N. Y.) 117, 3 Abb. Pr. (N. Y.) 218.

Authority to Settle Disputed Claims given by the distributees of the estate includes the authority to compromise, and does not constitute the personal representative an arbitrator. *Black's Appeal*, 25 Pa. St. 238.

favor of or against the estate rests on his title to the assets and his authority to discharge obligations, the propriety of the exercise of the power is governed by the necessities of each particular case, and a compromise or composition made pursuant to his common-law authority will be approved by the court, or leave of court to make a compromise or composition will be granted under the statute, only when it appears that it was or will be necessary or beneficial to the estate.¹ Thus, a debt due the estate may be compromised or compounded if the debtor is insolvent,² or if there is doubt as to the validity of the debt though the debtor is solvent;³ and it has been held proper to make a compromise with a person who had assets of the estate in his hands, for the purpose of getting possession of such assets.⁴ But a compromise of a claim due to the estate is not proper when the claim is amply secured;⁵ nor will credit be allowed for money paid to prevent the estate from being sued on what the executor or administrator considers an unjust and unfounded claim.⁶

c. WHAT CLAIMS MAY BE COMPROMISED OR COMPOUNDED. — The authority to compromise and compound extends, as a general rule, to debts, demands, choses in action, and claims of every kind, whether in favor of or against the estate.⁷

1. Compromise Must Be for Benefit of Estate. — *Blue v. Marshall*, 3 P. Wms. 381; *Berry v. Parkes*, 3 Smed. & M. (Miss.) 625; *Bailey v. Dilworth*, 10 Smed. & M. (Miss.) 404, 48 Am. Dec. 760; *Gulledge v. Berry*, 31 Miss. 346; *Wyman's Appeal*, 13 N. H. 18; *Kee v. Kee*, 2 Gratt. (Va.) 116.

In *Verdier v. Simons*, 2 McCord Eq. (S. Car.) 385, it was said that an executor or administrator will be justified in compromising a claim only in a clear case of necessity where great risk would be run of losing all or a great part unless a compromise were made.

Benefit to Executor. — In *Stott v. Lord*, 8 Jur. N. S. 240, 31 L. J. Ch. 391, 10 W. R. 284, 5 L. T. N. S. 817, it was held that a compromise made by one of three executors against the will of his co-executors did not bind the estate and would be set aside at the instance of the co-executors, where the effect of it was to relieve the executor by whom it was made from a liability which he was under to the estate jointly with the creditor.

Mere Belief of One of the Executors that a compromise would be advantageous is not sufficient to justify an order authorizing it, but the facts and circumstances leading to that conclusion should be stated. *Matter of Richardson*, 2 Connolly (N. Y.) 276.

An Extension of Time Granted to a Debtor without any part payment or security is not within the *New York* statute giving executors and administrators power to compromise debts. *Matter of Loper*, 2 Redf. (N. Y.) 545.

2. Insolvency of Debtor Justifies Composition. — *Patten's Estate*, Tuck. (N. Y.) 56.

Composition with Solvent Debtor. — In *Gulledge v. Berry*, 31 Miss. 346, it was held that the power of an executor or administrator to compromise or compound claims does not authorize him to take property in payment of a debt due the estate, if the debtor was solvent, and that such a payment will not discharge the debtor.

3. Doubt as to Validity of Debt Justifies Compromise. — *Patten's Estate*, Tuck. (N. Y.) 56; *Berrien's Estate*, 16 Abb. Pr. N. S. (N. Y. Surrogate Ct.) 23; *Shepard v. Saltus*, 4 Redf. (N. Y.) 232.

In *Howell v. Blodgett*, 1 Redf. (N. Y.) 323, it was held that a debt due an estate could not be compromised unless the debtor was insolvent; but this case was expressly *disapproved* in *Berrien's Estate*, 16 Abb. Pr. N. S. (N. Y. Surrogate Ct.) 23, and *Shepard v. Saltus*, 4 Redf. (N. Y.) 232.

4. Compromise to Obtain Possession of Assets. — *Kee v. Kee*, 2 Gratt. (Va.) 116.

5. No Authority to Compound Debts Secured by Mortgage. — *Buerhaus v. De Saussure*, 41 S. Car. 457.

But if the Security Is Doubtful, and the administrator, acting for the best interests of the estate, releases it in consideration of the promise of a third person to pay one-half of the amount due, it is held that such a contract is lawful and may be enforced against the promisor. *Mosman v. Bender*, 80 Mo. 579.

6. Unfounded Claim Against Estate. — *Tuttle v. Robinson*, 33 N. H. 119.

Effect of Legacy to Claimant. — In *Rogers v. Hand*, 39 N. J. Eq. 270, it was held that the executors were justified in the exercise of good faith and discretion in compromising a claim for services alleged to have been rendered by the claimant as the testator's housekeeper, she having threatened to bring suit against them, though the testator had left a legacy to the claimant, but such legacy was not in satisfaction of her claim.

7. Claims of All Kinds May Be Compromised. — See cases cited *supra*, this section, under *Composition, and Release of Claims — The Power*.

Claims Against an Estate cannot be compromised in *Michigan*, because of the statutory provision that all claims against an estate must be proved. *Fish v. Morse*, 8 Mich. 34; *Clark v. Davis*, 32 Mich. 154; *Barry v. Davis*, 33 Mich. 515; *Durfee v. Abbott*, 50 Mich. 283; *White v. Ledyard*, 48 Mich. 264; *Greece v. Helm*, 91 Mich. 450. But this rule is modified by a recent statute (Act Feb. 11, 1897) which provides for the compromise, with the approval of the judge of probate, of contingent claims on account of the liability of the claimant as surety for the decedent, claims for support, to perform work for another for the

d. VALIDITY AND EFFECT OF COMPROMISE OR COMPOSITION. — If an executor or administrator, in making a compromise or composition, acts fairly and in good faith, and with due regard to the interests of the estate, the beneficiaries will be bound by it, and he will be protected;¹ but he is liable for the whole amount of the debt if the compromise was unnecessarily or improvidently made,² or if he was guilty of collusion with the debtor.³

e. DIFFERENCE BETWEEN COMPROMISE OR COMPOSITION AT COMMON LAW AND UNDER STATUTE. — There is a difference, as regards the effect, between a compromise or composition made in the exercise of the common-law authority and one made with the consent of the probate court under the statute, in that the burden of proving good faith and diligence, or that the act

nonperformance of which the estate will be liable, or to pay rent during a lease. *In re Beecher*, (Mich. 1897) 72 N. W. Rep. 11.

Legacies. — Under the *English* statute (23 & 24 Vict., c. 145, § 30) it is held that the power of an executor to compromise claims relating to the estate of the testator is not confined to claims outside the will, but applies also to the claim of a legatee. *In re Warren*, 53 L. J. Ch. 1016, 51 L. T. N. S. 561, 32 W. R. 916.

Action Brought by Decedent. — In *Grece v. Helm*, 91 Mich. 450, it was held that a compromise by an administrator of an action for damages brought by the intestate and pending at the time of his death was proper where there were no goods or chattels to be collected and no property of the estate except the claim in litigation, and such claim was an uncertain one, and there was no money or other property of the estate to meet the expenses of the suit then pending.

Compromise of Action Against Executor. — An executor may compromise a lawsuit brought against him. He has the right to buy the peace of the estate which he represents and extinguish even doubtful claims against it, provided he acts discreetly and in good faith. *Meeker v. Vanderveer*, 15 N. J. L. 392.

Claim for Death by Wrongful Act. — A personal representative has power to compromise an action brought by him to recover damages for negligence causing the death of the decedent. *Hartigan v. Southern Pac. R. Co.*, 86 Cal. 142; *Henchey v. Chicago*, 41 Ill. 136; *Washington v. Louisville, etc., R. Co.*, 34 Ill. App. 658, 136 Ill. 49. Or he may compromise such a claim without suing. *Parker v. Providence, etc., Steamboat Co.*, 17 R. I. 376, 33 Am. St. Rep. 869.

1. Beneficiaries Bound by Compromise or Composition Made in Good Faith. — *Rogers v. Hand*, 39 N. J. Eq. 270; *Boyd v. Oglesby*, 23 Gratt. (Va.) 674.

Liability for Claims Compromised or Compounded. — If debts inventoried as worthless are compounded, the personal representative is not chargeable with more than he collects, unless there is evidence of bad faith or serious error of judgment. *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349.

Collectible Claims. — In *Roberts v. Johns*, 24 S. Car. 580, a compromise made soon after the war was sustained though it afterwards appeared that the whole amount might have been collected.

Composition After Levy of Execution — Liability for Sheriff's Fees. — In *Matlock v. Gray*, 4 Hawks (11 N. Car.) 1, administrators who com-

pounded a claim after an execution issued by them had been levied, but before sale, were held individually liable to the sheriff for his fees.

Lapse of Time. — A compromise of a doubtful claim at fifty cents on the dollar in Confederate money in 1863 was held not to be devastated twenty years afterwards, where the administrator acted in good faith. *Turpin v. Chesterfield Coal, etc., Min. Co.*, 82 Va. 74.

Taking Note for Part of Debt. — An administrator cannot compromise a judgment due the estate by taking the note of the judgment debtor for a sum less than the amount for which the judgment was rendered. *Siddall v. Clark*, 89 Cal. 321. See also *Kemp v. Kemp*, 11 La. 19.

What Constitutes a Compromise. — The action of an administrator in canceling a note on payment of about one-sixth of its face value cannot be sustained as a compromise, where the whole amount was admitted to be due, nothing having been said about a compromise, and there being not even a suggestion that the maker was insolvent. *Jones v. Jones*, 118 N. Car. 440. But it is a valid compromise to accept an amount less than the debt under an agreement that it shall be in full satisfaction of the debt. *Wilks v. Slaughter*, 49 Ark. 235.

A Transfer of a Portion of the Undivided Assets of the estate in compromise of a pending action violates the statute prohibiting private sales by executors and administrators, and is therefore void. *Bogan v. Camp*, 30 Ala. 276.

2. Liability When Compromise Is Unnecessary. — A compromise made by an executor without judicial sanction renders him liable for the amount of the claim if he does not show that the maker was insolvent, or that he was not legally liable on the note. *Fridge v. Buhler*, 6 La. Ann. 272.

If an executor or administrator compounds or releases debts or actions for less than he ought, he will be liable as for a devastavit. *Richardson v. Donehoo*, 16 W. Va. 686.

Payment to Debtor for Accepting Service. — In *Edwards v. Williams*, 39 S. Car. 86, it was held that an agreement by an administrator, made in his individual name with an insolvent debtor, that if the debtor would accept service so as to give priority of lien to the estate, he (the administrator) would assign to the debtor a certain part of the amount collected on the judgment, was not binding on the distributees, who were infants.

3. Collusion with Debtor. — *Verdier v. Simons*, 2 McCord Eq. (S. Car.) 385.

was beneficial to the estate, rests on the personal representative where he exercises his common-law authority, while an order of the probate court, legally obtained and complied with, is an absolute protection to him.¹

13. Set-off of Debts. — A personal representative has power to allow a set-off, if the debtor of the estate also holds a claim against it which he could plead as a set-off in an action against him on the debt,² and some of the authorities limit the right of set-off to cases where there was a mutuality of demand between the decedent and the debtor.³ According to this rule, a claim against an estate is not subject to be set off against a debt owing by the claimant to the executor or administrator,⁴ nor can an individual debt of the executor or administrator be set off against a debt due the estate.⁵ On the other hand, there are authorities which hold that the power to allow a set-off is not limited to cases where there was a mutuality of demands between the debtor and the decedent, but that a debt of the decedent may be set off against a claim in favor of the estate accruing after the decedent's death,⁶ or that an individual debt may be set off against a debt due the estate.⁷

1. Exercise of Common-law Power — Personal Representative Must Show Propriety. — *Van Hoose v. Bush*, 54 Ala. 342; *In re Quinn*, (Surrogate Ct.) 9 N. Y. Supp. 550.

Negligence Rendering Compromise Necessary. — An order of the court authorizing an executor to compromise a claim does not relieve him from liability for negligence which rendered the compromise necessary. *Fraley v. Thomas*, 98 Ga. 375.

Compromise under Statute Imposes No Liability. — See *supra*, this division of this section, *The Power — By Statute.* — But in *New York* a compromise effected under the statute does not deprive any party interested in the estate from showing on final settlement of the accounts that the debt or claim was fraudulently or negligently compromised. *Matter of Richardson*, 2 Connolly (N. Y.) 276.

For a General Discussion of the compromise and composition of claims, see also titles ACCORD AND SATISFACTION, vol. 1, p. 408; COMPOSITION WITH CREDITORS, vol. 6, p. 376; CONSIDERATION, vol. 6, p. 667.

2. Personal Representative May Allow Set-off. — *Ely v. Com.*, 5 Dana (Ky.) 401. In this case it was held that a set-off of simple contract debts might be allowed against debts of superior dignity. The court said that it was "unjust, and shocking to the sense of mankind, that a debtor to a testator or intestate, at his death, should be compelled to pay his debt, when a debt was due to him of equal or greater amount, which he might never be able to coerce from the executor or administrator."

Set-off Against Debt Barred by Limitation. — In *Broome v. Van Hook*, 1 Redf. (N. Y.) 444, it was held that an executor who had allowed dividends due the estate to be retained in satisfaction of a debt due from the testator was not chargeable with the amount of such dividends, though the debt satisfied was barred by the statute of limitations.

Setting Off Debt Against Legacy. — An executor may set off a debt against a legacy given to the debtor, if the estate is solvent. *Brunn v. Schuett*, 59 Wis. 260, 48 Am. Rep. 499. See also *infra*, this title, *Distribution of Estate — Mode of Payment — Retainer of Debts Due from Legatee or Distributee.*

Protection of Estate. — Where the decedent

was surety for a creditor of the estate, it is the duty of the administrator not to pay both the debt due the creditor and the surety debt, but to set off one against the other. *Moorhead's Appeal*, 32 Pa. St. 297.

3. Mutuality Between Decedent and Debtor. — "The rule, in a word, both of the text books and the reports, is that an executor, sued in his official character, may set off only those claims which his testator himself might have pleaded and which are due by his estate." *Cotton's Estate*, 6 Pa. Dist. Rep. 205 [citing 3 *Williams on Executors* 1952; *Bradshaw's Appeal*, 3 *Grant's Cas. (Pa.)* 109; *Carter's Appeal*, 10 Pa. St. 144; *Robinson's Estate*, 12 *Phila. (Pa.)* 170, 35 *Leg. Int. (Pa.)* 490].

In an action on a note for the price of property sold at an administrator's sale, the defendant cannot set off the debt due him by the decedent. *Harte v. Houchin*, 50 Ind. 327.

A debt contracted by the decedent cannot be set off against one contracted with his administrator in favor of the estate, because it interferes with the course of administration and may defeat and postpone payment of other creditors. *Bizzell v. Stone*, 12 Ark. 378; *Bishop v. Dillard*, 49 Ark. 285.

4. Claim Against Estate Not Subject to Set-off Against Individual Debt of Claimant to Executor or Administrator. — *Dudley v. Griswold*, 2 *Bradf. (N. Y.)* 24; *Mead v. Merritt*, 2 *Paige (N. Y.)* 402.

5. Individual Debts of Executor or Administrator Cannot Be Set Off for Debt Due Against Estate. — *Wisdom v. Becker*, 52 Ill. 342; *Parker v. Daughtry*, 111 Ala. 529.

6. Rule Allowing Set-off of Post-mortem Claims. — A personal representative cannot be compelled to set off claims accruing after the decedent's death, but he has the right, and his agreement to do so is binding. *Dickenson v. McDermott*, 13 Tex. 248.

7. Set-off of Individual Debt Against Claim Due Estate. — *Nettles v. Elkins*, 2 *McCord Eq. (S. Car.)* 182.

In *Miller v. Franklin Bank*, 1 *Paige (N. Y.)* 444, the public administrator was allowed to set off, against a deposit made by him as public administrator, a debt due from him to the bank in which the deposit was made, because

14. Confession of Judgment. — An executor or administrator, by virtue of his authority to pay any debt that may be proved against the estate, has the power to bind it by confessing judgment on any debt of the decedent,¹ even though, it has been held, the debt is barred by the statute of limitations;² but the estate is not bound by a confession of judgment on any new indebtedness which the executor or administrator has himself created.³

Preferring Creditors by Confession of Judgment. — In the absence of statutory restrictions an executor or administrator, by confessing judgment in favor of a creditor, may give him a preference over other creditors of the same class.⁴

15. Contracts — *a. CONTRACTS MADE BY EXECUTOR OR ADMINISTRATOR*

— (1) *Contracts to Pay Money* — (a) **New Consideration** — *aa. GENERAL RULE.* — The rule is well settled that an executory contract of an executor or administrator, if made on a new and independent consideration, moving between the promisee and the executor or administrator as promisor, is his personal contract, and does not, in the absence of authority given by statute or by the will of the decedent, bind the estate, though the consideration moving from the promisee is such that the executor or administrator could properly have paid from the assets and been allowed for on the settlement of his accounts.⁵ So

he could have recovered the deposit in his individual capacity.

But if the administrator is insolvent, a set-off of an individual debt against a debt due the estate will be set aside, where the other party had due notice of the administrator's insolvency. *Thomas v. Gage*, Harp. Eq. (S. Car.) 197.

1. Confession of Judgment Binds Estate. — *Bennett v. Fulmer*, 49 Pa. St. 155; *Hunt v. Devling*, 8 Watts (Pa.) 403.

"An executor or administrator can, in the exercise of his judgment, pay a debt proved against the estate. If he may pay the debt it is difficult to see why, when suit is brought, he may not agree that judgment may be taken." *Per Park, C. J.*, in *Brown v. Brown*, 56 Conn. 249, 7 Am. St. Rep. 307.

Confession of Judgment Presumed to Be Honest until Impeached. — *Powell v. Myers*, 1 Dev. & B. Eq. (21 N. Car.) 502.

2. Debt Barred by Limitation. — It is not a fraud in law for an executor or administrator to confess judgment on a *bona fide* debt of the decedent, though it is barred by the statute of limitations. *Woods v. Irwin*, 141 Pa. St. 278, 23 Am. St. Rep. 282. See also *supra*, this section, *Power to Waive Statute of Limitations*.

3. Estate Not Bound by Judgment Confessed on Debt Created by Executor or Administrator. — *Schmidt's Estate*, 17 Pa. Co. Ct. Rep. 314, 5 Pa. Dist. Rep. 17; *Loud v. Bull*, 1 Whart. (Pa.) 238.

4. Preference of Creditors by Confession of Judgment — *England.* — *Littleton v. Cross*, 3 B. & C. 317, 10 E. C. L. 93; *Parker v. Dee*, 3 Swanst. 531, note; *Prince v. Nicholson*, 5 Taunt. 665, 1 E. C. L. 228; *Goodfellow v. Burchett*, 2 Vern. 299; *Waring v. Danvers*, 1 P. Wms. 295; *Vibart v. Coles*, 24 Q. B. Div. 364; *In re Radcliffe*, 7 Ch. Div. 733.

United States. — *Wilson v. Wilson*, 1 Cranch (C. C.) 255.

Kentucky. — *Gregg v. Com.*, 9 Dana (Ky.) 343.

New York. — *Mactier v. Lawrence*, 7 Johns. Ch. (N. Y.) 206.

Virginia. — *Mayo v. Bentley*, 4 Call (Va.) 528.

Right to Prefer Abolished by Statute. — *Columbus Watch Co. v. Hodenpyl*, 61 Hun (N. Y.) 557, 135 N. Y. 430.

For a Full Discussion as to priority of judgments confessed by executors and administrators, see the title DEBTS OF DECEDENTS, vol. 8, p. 1003.

5. No Power to Bind Estate by Original Contract — *England.* — *Farhall v. Farhall*, L. R. 7 Ch. 123; *Barry v. Rush*, 1 T. R. 691; *Jennings v. Newman*, 4 T. R. 348; *Brigden v. Parkes*, 2 B. & P. 424; *Hawkes v. Saunders*, 1 Cowp. 289; *Wigley v. Ashton*, 3 B. & Ald. 101, 5 E. C. L. 238.

Canada. — *Campbell v. Bell*, 16 Grant's Ch. (U. C.) 115.

United States. — *Thompson v. Canterbury*, 2 McCrary (U. S.) 332; *Kelley v. Kelley*, 84 Fed. Rep. 420.

Alabama. — *Wade v. Pope*, 44 Ala. 690; *Christian v. Morris*, 50 Ala. 585; *Matthews v. Matthews*, 56 Ala. 292; *Wilburn v. McCalley*, 63 Ala. 436; *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15; *Vanderveer v. Ware*, 65 Ala. 606; *Daily v. Daily*, 66 Ala. 266; *Vann v. Vann*, 71 Ala. 154; *Foxworth v. White*, 72 Ala. 224; *Hinson v. Williamson*, 74 Ala. 180; *Lyon v. Hays*, 30 Ala. 430; *McEldery v. McKenzie*, 2 Port. (Ala.) 33, 27 Am. Dec. 643; *Colvin v. Owens*, 22 Ala. 782.

Arkansas. — *Underwood v. Milligan*, 10 Ark. 254; *Pike v. Thomas*, 62 Ark. 223, 54 Am. St. Rep. 292.

California. — *Sterrett v. Barker*, 119 Cal. 492

Connecticut. — *Taylor v. Mygatt*, 26 Conn. 190.

Florida. — *May v. May*, 7 Fla. 207, 68 Am. Dec. 431.

Georgia. — *McFarlin v. Stinson*, 56 Ga. 396.

Louisiana. — *Espinola v. Blasco*, 15 La. Ann. 426.

Maine. — *Davis v. French*, 20 Me. 21, 37 Am. Dec. 36; *Baker v. Moor*, 63 Me. 443.

Massachusetts. — *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Kingman v. Soule*, 132 Mass. 285; *Luscomb v. Ballard*, 5 Gray (Mass.) 405, 66 Am. Dec. 374.

Michigan. — *Smith v. Brennan*, 62 Mich. 349, 4 Am. St. Rep. 867.

inflexible is the rule denying to personal representatives the power to bind by any original contract the estates committed to their charge, that its application is not affected by the fact that the contract was made, or the debt incurred, for the benefit of the estate.¹

Minnesota. — *Brown v. Farnham*, 55 Minn. 27; *Ness v. Wood*, 42 Minn. 427.

Mississippi. — *Sims v. Stilwell*, 3 How. (Miss.) 176.

Missouri. — *Smarr v. McMaster*, 35 Mo. 349; *Stirling v. Winter*, 80 Mo. 141.

New Hampshire. — *Thomson v. Smith*, 64 N. H. 412.

New Jersey. — *Johnston v. Morrow*, 28 N. J. Eq. 327.

New York. — *Parker v. Day*, 155 N. Y. 383; *Ferrin v. Myrick*, 41 N. Y. 315; *Seaman v. Whitehead*, 78 N. Y. 306; *Wetmore v. Porter*, 92 N. Y. 76; *Reynolds v. Reynolds*, 3 Wend. (N. Y.) 244; *Demott v. Field*, 7 Cow. (N. Y.) 58; *Myer v. Cole*, 12 Johns. (N. Y.) 349; *Schmittler v. Simon*, 101 N. Y. 554, 54 Am. Rep. 737; *Pinney v. Johnson*, 8 Wend. (N. Y.) 500; *Stedman v. Feidler*, 20 N. Y. 437; *Austin v. Munro*, 47 N. Y. 366; *Delaware, etc., R. Co. v. Gilbert*, 44 Hun (N. Y.) 201; *Matter of Kirkpatrick*, 9 Misc. Rep. (N. Y. Surrogate Ct.) 228; *Hertzfield v. Parkes*, 19 N. Y. Wkly. Dig. 238; *Clapp v. Clapp*, 44 Hun (N. Y.) 451; *Thompson's Estate*, Tuck. (N. Y.) 13; *Cary v. Gregory*, 38 N. Y. Super. Ct. 127.

North Carolina. — *McKay v. Royal*, 7 Jones L. (52 N. Car.) 426; *Hailey v. Wheeler*, 4 Jones L. (49 N. Car.) 160; *Beaty v. Gingles*, 8 Jones L. (53 N. Car.) 302; *Tyson v. Walston*, 83 N. Car. 90; *McLean v. McLean*, 88 N. Car. 394; *Morehead Banking Co. v. Morehead*, 116 N. Car. 410.

Ohio. — *Thomas v. Moore*, 52 Ohio St. 200; *Lucht v. Behrens*, 28 Ohio St. 231, 22 Am. Rep. 378.

Pennsylvania. — *Grier v. Huston*, 8 S. & R. (Pa.) 402, 11 Am. Dec. 627; *Seip v. Drach*, 14 Pa. St. 352; *Dougherty v. Stephenson*, 20 Pa. St. 214; *Williamson's Appeal*, 94 Pa. St. 236; *Orne v. Ritchie*, 12 Phila. (Pa.) 231, 34 Leg. Int. (Pa.) 382; *Oram's Estate*, 9 Phila. (Pa.) 358, 31 Leg. Int. (Pa.) 244; *Masterson v. Masterson*, 5 Rawle (Pa.) 137; *Beeson v. McNabb*, 2 Pa. St. 422.

South Carolina. — *Pinckney v. Singleton*, 2 Hill L. (S. Car.) 343; *Nehbe v. Price*, 2 Nott & M. (S. Car.) 328; *Jones v. Jenkins*, 2 McCord L. (S. Car.) 494; *M'Beth v. Smith*, 2 Treadw. (S. Car.) 676; *Cook v. Cook*, 24 S. Car. 204; *O'Neill v. Abney*, 2 Bailey L. (S. Car.) 317.

Tennessee. — *Patterson v. Craig*, 1 Baxt. (Tenn.) 291.

Texas. — *McKinney v. Peters*, Dall. (Tex.) 545; *Price v. McIver*, 25 Tex. 769, 78 Am. Dec. 558; *McMahan v. Harbert*, 35 Tex. 451; *Mullins v. Yarborough*, 44 Tex. 14.

Vermont. — *Rich v. Sowles*, 64 Vt. 408; *Lovell v. Field*, 5 Vt. 218.

Virginia. — *Fitzhugh v. Fitzhugh*, 11 Gratt. (Va.) 300, 62 Am. Dec. 653; *Childress v. Morris*, 23 Gratt. (Va.) 802.

Purchase of Property for Estate. — An executor cannot bind the estate of the testator for the price of property which is not absolutely necessary for its preservation. *Harding v. Evans*, 3 Port. (Ala.) 221, 29 Am. Dec. 255; *Van Zandt*

v. Myers, 7 N. Y. Wkly. Dig. 390; *Harrell v. Witherspoon*, 3 McCord L. (S. Car.) 486; *Lovell v. Field*, 5 Vt. 218.

Promise to Continue Liability. — An administrator cannot bind the estate by a promise that it shall continue liable to indemnify a surety on a note given by the decedent's partner and signed by the surety on the decedent's promise to indemnify him. *Kingman v. Soule*, 132 Mass. 285.

Extending Time of Payment of Decedent's Debts. — An executor has authority to contract for an extension of the time of payment of the testator's note to a time beyond the period limited for the presentation of claims against estates. *North v. Walker*, 2 Mo. App. 174, 66 Mo. 453.

Extending Time of Payment of Surety Debt. — A personal representative has the power to consent that additional time shall be given to the principal in an obligation on which the decedent was surety, because such an arrangement may be for the benefit of the decedent's estate. *Smarr v. McMaster*, 35 Mo. 349.

As to Extending Time of Payment of debts due the decedent, see *infra*, this title, *Management and Care of Estate — Collection of Debts*.

Necessaries for Infant Devises. — Contracts for necessities for infant devisees are no exception to the general rule that an executor cannot bind the testator's estate by contract. *Roscoe v. McDonald*, 91 Mich. 270.

Liabilities Assumed in Order to Collect Debts. — In *Barlow v. Myers*, 24 Hun (N. Y.) 286, it was held that an agreement by an executrix to purchase the property of a firm indebted to the testator, in order to collect a debt, and binding herself as executrix to pay all the firm debts, did not bind the estate.

A Judgment by Bond and Warrant executed by an administrator does not bind the estate, because it is not a confession of judgment alone, but the bond is a personal obligation. *Pinney v. Johnson*, 8 Wend. (N. Y.) 500.

Agreement to Allow Set-off. — An agreement by an administrator that a debt contracted by the decedent may be set off against one contracted by himself in favor of the estate does not bind the estate. *Bishop v. Dillard*, 49 Ark. 285. See also *supra*, this section, *Set-off of Debts*.

A Personal Representative May Be Allowed on Accounting for the payment of obligations incurred by him, though he had no power to bind the estate therefor by contract. *Matthews v. Matthews*, 56 Ala. 292.

For a General Discussion of the liability of the estates of decedents for obligations incurred by their personal representatives, see the title *DEBTS OF DECEDENTS*, vol. 8, p. 1003.

1. Benefit to Estate. — *Harding v. Evans*, 3 Port. (Ala.) 221, 29 Am. Dec. 255; *Doolittle v. Willet*, 57 N. J. L. 398; *Van Zandt v. Myers*, 7 N. Y. Wkly. Dig. 390; *Harrell v. Witherspoon*, 3 McCord L. (S. Car.) 486; *Lovell v. Field*, 5 Vt. 218.

An Agreement by an Administrator to Pay Usurious Interest does not bind the estate, though

The Only Effect of Such Contracts, as a general rule, is to render the executor or administrator individually liable, and no judgment on them can be recovered against him in his representative capacity,¹ unless by a special stipulation in the contract he relieves himself of individual liability;² and this is not effected by the mere fact that in the contract he designates himself in his representative capacity.³

The Validity of the Contract, in order to charge the executor or administrator personally, depends on substantially the same considerations as apply to the contracts of other persons.⁴

bb. CONTRACTS FOR SERVICES—(*aa*) *In General*.—The authority of a personal representative to employ such persons as it may seem necessary for him to employ, to enable him to perform his duties to the estate which he represents, and to pay for their services out of the funds of the estate in his hands, is undoubted; but it is generally held that such a contract of employment does not create any obligation on the estate, and that the only remedy of the persons

made to prevent a sale of property on foreclosure. *Williams v. Troop*, 17 Wis. 463.

1. Individual Liability of Personal Representatives on Their Contracts—*Alabama*.—*Wade v. Pope*, 44 Ala. 690; *Christian v. Morris*, 50 Ala. 585; *Matthews v. Matthews*, 56 Ala. 292; *Wilburn v. McCalley*, 63 Ala. 436; *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15; *Vanderveer v. Ware*, 65 Ala. 606; *Daily v. Daily*, 66 Ala. 266; *Vann v. Vann*, 71 Ala. 154; *Foxworth v. White*, 72 Ala. 224; *Hinson v. Williamson*, 74 Ala. 180; *Greening v. Sheffield*, Minor (Ala.) 276; *McEldery v. McKenzie*, 2 Port. (Ala.) 33, 27 Am. Dec. 643; *Johnson v. Gaines*, 8 Ala. 791; *Kirkman v. Benham*, 28 Ala. 501.

California.—*Matter of Page*, 57 Cal. 238.

Connecticut.—*Coe v. Talcott*, 5 Day (Conn.) 92.

Maine.—*Baker v. Fuller*, 69 Me. 152.

Massachusetts.—*Luscomb v. Ballard*, 5 Gray (Mass.) 405, 66 Am. Dec. 374.

New York.—*Chouteau v. Suydam*, 21 N. Y. 179; *Schmittler v. Simon*, 101 N. Y. 554, 54 Am. Rep. 737.

Pennsylvania.—*Fehlinger v. Wood*, 134 Pa. St. 517.

South Carolina.—*Harrell v. Witherspoon*, 3 McCord L. (S. Car.) 486.

Wisconsin.—*McLaughlin v. Winner*, 63 Wis. 126, 53 Am. Rep. 273.

See also cases cited *supra*, this division of this section, *General Rule*, note *No Power to Bind Estate by Original Contract*.

Reason of Rule.—In *Duval v. Craig*, 2 Wheat. (U. S.) 45, Judge Story said: "An agent or executor who covenants in his own name, and yet describes himself as agent or executor, is personally liable, for the obvious reason that the one has no principal to bind, and the other substitutes himself for his principal."

Forthcoming Bonds.—An executor may give a forthcoming bond for property levied on under an execution against the testator issued during the testator's lifetime, but he will be bound on it personally, and not in his representative capacity. *Thompson v. Ross*, 26 Miss. 198.

And a refunding bond executed by him in order to procure a distributive share belonging to his intestate is likewise binding on him personally. *Maxwell v. Craft*, 32 Miss. 307.

2. Stipulation Against Personal Liability.—*Livermore v. Rand*, 26 N. H. 85; *Foland v. Dayton*, 40 Hun (N. Y.) 563; *Morehead Banking Co. v. Morehead*, 116 N. Car. 473; *Beattie v. Latimer*, 42 S. Car. 313.

3. Designation of Representative Capacity Does Not Preclude Individual Liability—*England*.—*Childs v. Monins*, 2 Brod. & B. 460, 6 E. C. L. 228; *King v. Thom*, 1 T. R. 489.

Iowa.—*Dunne v. Deery*, 40 Iowa 251.

Massachusetts.—*Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87.

Mississippi.—*Sims v. Stilwell*, 3 How. (Miss.) 176; *Woods v. Ridley*, 27 Miss. 119.

Missouri.—*Rittenhouse v. Ammerman*, 64 Mo. 197, 27 Am. Rep. 215; *Studebaker Bros. Mfg. Co. v. Montgomery*, 74 Mo. 101.

New York.—*Schmittler v. Simon*, 101 N. Y. 554, 54 Am. Rep. 737; *Darling v. Powell*, 20 Misc. Rep. (N. Y. Supreme Ct.) 240; *Genet v. De Graaf*, 27 N. Y. App. Div. 238.

Pennsylvania.—*Tassey v. Church*, 4 W. & S. (Pa.) 346.

Tennessee.—*Boyd v. Johnston*, 89 Tenn. 284; *Patterson v. Craig*, 1 Baxt. (Tenn.) 291.

Vermont.—*Rich v. Sowles*, 64 Vt. 408.

The Intent of the Administrator is to be considered in determining whether he binds himself individually. Thus, it was held that where an administrator, in compromising a claim against the decedent's estate, appended the word "administrator" to his signature, he should be allowed to show that no assets of the decedent came into his hands. *Wyatt v. Davidson*, 1 Shannon Tenn. Cas. 613.

4. As to the Validity and Requisites of Contracts in General see the titles *CONSIDERATION*, vol. 6, p. 667; *CONTRACTS*, vol. 7, p. 88; and *supra*, this section of this title.

Consideration of Note.—An administrator's note recited to be for value received by the decedent and his heirs is void for want of consideration. *Ten Eyck v. Vanderpoel*, 8 Johns. (N. Y.) 120.

Void Contracts.—A contract by which an executor agrees to pay to another all the money over a certain sum, by way of commissions for services in obtaining a purchaser of property sold by order of the Probate Court, is against public policy. *Danielwitz v. Sheppard*, 62 Cal. 339.

employed is against the personal representative individually.¹

(bb) *Employment of Counsel.* — This principle is applicable to the employment of attorneys and counsel, but the authorities are not as uniform in denying to the executor or administrator the power to bind the estate by such contracts of employment as they are in regard to other classes of employment.²

In Texas it is held that an administratrix of a community estate owned by

1. *Contracts for Services in Settlement of Estate — Individual Liability — Alabama.* — Matthews v. Matthews, 56 Ala. 292; Daily v. Daily, 66 Ala. 266; Wade v. Pope, 44 Ala. 690; Vann v. Vann, 71 Ala. 154.

Arkansas. — McDaniel v. Parks, 19 Ark. 671. California. — Matter of Page, 57 Cal. 238.

Connecticut. — Brown v. Eggleston, 53 Conn. 117.

Louisiana. — Schmidt's Succession, 16 La. Ann. 256.

Maine. — Baker v. Fuller, 69 Me. 152.

Maryland. — Lee v. Lee, 6 Gill & J. (Md.) 316.

Missouri. — Tyler v. Priest, 31 Mo. App. 284. New Hampshire. — Livermore v. Rand, 26 N. H. 85.

New York. — Matter of Halsey, 13 Abb. N. Cas. (N. Y. Surrogate Ct.) 353, 2 Dem. (N. Y.) 577; Platt v. Platt, 105 N. Y. 488; Foland v. Dayton, 40 Hun (N. Y.) 563; Martin v. Platt, 51 Hun (N. Y.) 429; Douglass v. Leonard, (C. Pl.) 17 N. Y. Supp. 591.

Ohio. — Thomas v. Moore, 52 Ohio St. 200.

Pennsylvania. — Maffet's Estate, 7 Kulp (Pa.) 153.

Virginia. — Daingerfield v. Smith, 83 Va. 81.

See also cases cited in the next succeeding note, *Rule that Employment of Counsel Does Not Bind Estate.*

As to Allowance on Accounting of payments for services rendered, see *infra*, this title, *Accounting.*

Services Performed Without Executor's Assent.

— Where services have been performed without the executor's assent, before his appointment, and under a contract with another executor named in the will, or with a special administrator, the executor is not liable either personally or in his representative capacity. Luscomb v. Ballard, 5 Gray (Mass.) 403, 66 Am. Dec. 374.

A Lien on the Estate cannot be created by the executor or administrator for services rendered by a third person to the estate. McMahon v. Allen, 4 E. D. Smith (N. Y.) 519.

In South Carolina it has been held that a person who has rendered services to the estate under a contract with the executor may, in case the executor is insolvent, be subrogated to the rights of the executor and demand payment out of the estate, if the executor would be entitled to do so on paying the debt himself. Henshaw v. Robertson, Bailey Eq. (S. Car.) 311.

2. *Rule that Employment of Counsel Does Not Bind Estate — Arkansas.* — Tucker v. Grace, 61 Ark. 410; Pike v. Thomas, 62 Ark. 223, 54 Am. St. Rep. 292.

California. — Matter of Page, 57 Cal. 238; Gurnee v. Maloney, 38 Cal. 85, 99 Am. Dec. 352.

Colorado. — Lusk v. Patterson, 2 Colo. App. 306.

Illinois. — Barker v. Kunkel, 10 Ill. App. 407.

Mississippi. — Clopton v. Gholson, 53 Miss. 466.

Missouri. — Garnett v. Carson, 11 Mo. App. 290.

New Hampshire. — Wait v. Holt, 58 N. H. 467.

New York. — Austin v. Munro, 47 N. Y. 360; Platt v. Platt, 105 N. Y. 488, *modifying and affirming* 42 Hun (N. Y.) 592; Mygatt v. Willcox, 1 Lans. (N. Y.) 55, 45 N. Y. 306, 6 Am. Rep. 90; Matter of Halsey, 13 Abb. N. Cas. (N. Y. Surrogate Ct.) 353, 2 Dem. (N. Y.) 577; Parker v. Day, 9 N. Y. Misc. Rep. (Buffalo Super. Ct.) 208; Genet v. De Graaf, 27 N. Y. App. Div. 238.

North Carolina. — Kessler v. Hall, 64 N. Car. 60.

Ohio. — McBride v. Brucker, 3 Ohio Cir. Dec. 7, 5 Ohio Cir. Ct. Rep. 12; Mellen v. West, 3 Ohio Cir. Dec. 46, 5 Ohio Cir. Ct. Rep. 89; Hurd v. Wheeling, etc., R. Co., 4 Ohio N. P. 404, 6 Ohio Dec. 545; Thomas v. Moore, 52 Ohio St. 200.

"An attorney employed by the administrator of an estate has no claim against the estate, although his services may have inured to the benefit of the estate. He must look for compensation to the administrator who employed him." Tucker v. Grace, 61 Ark. 410 [*citing* Underwood v. Milligan, 10 Ark. 254; Bomford v. Grimes, 17 Ark. 567; Yarborough v. Ward, 34 Ark. 208; McKay v. Royal, 7 Jones L. (52 N. Car.) 426; Bowman v. Tallman, 2 Robt. (N. Y.) 385; Matter of Page, 57 Cal. 238].

"It is well settled that executors who employ attorneys in respect to the affairs of their estate are personally liable for such services, and cannot be made liable in their representative capacity. Claims for such services, therefore, are not claims against the estate, but claims against the executors personally." Matter of O'Brien, 5 Misc. Rep. (N. Y. Surrogate Ct.) 136 [*citing* Willcox v. Smith, 26 Barb. (N. Y.) 328; Ferrin v. Myrick, 41 N. Y. 315; Mygatt v. Willcox, 1 Lans. (N. Y.) 55].

Prosecuting Suit Commenced by Decedent. — An administrator is personally liable for the fees of counsel employed by him to prosecute a suit commenced by the decedent in his lifetime. Livermore v. Rand, 26 N. H. 85.

Procuring Letters of Administration. — A contract employing an attorney to procure letters of administration was held personally binding on the promisor, and not limited by its terms to his capacity as administrator, where he named himself individually as party of the first part, and signed his name in the same manner, though in the body of the contract he promised to pay the stipulated amount "as such co-administrator." Argo v. Blondel, 100 Iowa 353.

As to the employment of counsel on a con-

herself and the decedent may bind the estate by a contract to pay an attorney a contingent fee for collecting a doubtful claim in favor of the estate, because the powers of the survivor of the community are much greater than those of ordinary administrators.¹

In Arkansas a personal representative is authorized by statute to employ counsel in certain cases by leave of court.²

In Michigan an executor or administrator is authorized to take legal advice when necessary, and to bind the estate for reasonable attorney's fees under the statute providing for the allowance of "all necessary expenses in the care, management, and settlement of the estate, * * * together with all extra expenses."³

And in Louisiana it is held that an executor may bind the estate by the employment of counsel to defend a contest of the testator's will.⁴

cc. BORROWING MONEY. — As a general rule, an executor or administrator has no power to bind the estate represented by him, by borrowing money for its use, unless he is authorized to do so by the will or by an order of the court of probate;⁵ and if, without such authority, he procures a loan, he becomes personally liable to the lender for the sum loaned, according to the rule stated above, but the lender has no claim which he can enforce against the estate, except so far as the executor or administrator may have mortgaged or pledged assets of the estates as security.⁶

dd. MAKING OR INDORSING BILLS AND NOTES. — An executor or administrator cannot impose any liability on the estate by making, drawing, accepting, or indorsing any bill or promissory note, though he has authority to indorse negotiable instruments for the purpose of transferring the decedent's title, when a transfer is necessary or proper. But such indorsement operates no further, so far as the estate is concerned, than to effect a transfer of title, and any liability which may arise on the indorsement is the personal liability of the executor or administrator.⁷

test of the will, see *supra*, this section, *Duty to Defend Will*.

1. Power of Administrator of Community to Bind Estate. — *James v. Turner*, 78 Tex. 241; *Portis v. Cole*, 11 Tex. 157.

2. The Arkansas Statute Provides that "when it shall become necessary, in the opinion of the court, for an executor or administrator to employ an attorney to prosecute any suit brought by or against such executor or administrator, the * * * attorney's fees shall be paid as expenses of administration." *Wassell v. Armstrong*, 35 Ark. 267.

3. Michigan Statute. — *Jackson v. Leech*, (Mich. 1897) 71 N. W. Rep. 846.

4. Employment of Counsel to Defend Will. — *Fenner v. McCan*, 49 La. Ann. 600.

5. No Authority to Bind Estate for Borrowed Money. — *Farhall v. Farhall*, 41 L. J. Ch. 146, L. R. 7 Ch. 123, 20 W. R. 157; *Glenn v. Burrows*, 37 Hun (N. Y.) 602, (Supreme Ct.) 7 N. Y. Supp. 180; *Merchants' Nat. Bank v. Weeks*, 53 Vt. 115, 38 Am. Rep. 661. Compare *Williamson's Appeal*, 94 Pa. St. 231, holding that where money borrowed by an executor or administrator has been used in discharging debts of the estate, the lender is entitled to repayment out of the estate.

Power to Borrow Money — Order of Court Necessary. — *White Sulphur Springs First Nat. Bank v. Collins*, 17 Mont. 433; *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376; *Matter of Millenovich*, 5 Nev. 189; *Glenn v. Burrows*, 37 Hun (N. Y.) 602, 7 N. Y. Supp. 180, *affirmed with-*

out opinion 119 N. Y. 660; *Morehead Banking Co. v. Morehead*, 116 N. Car. 410.

Borrowing Money When in Funds. — In *Guthrie v. Wheeler*, 51 Conn. 207, the personal representative borrowed money to pay the debts of the estate, though there were funds of the estate on deposit in a savings bank. The court held that this act was unauthorized, saying: "The safest and therefore the best investment a man can make is to pay his debts, and especially is this true of an estate in process of settlement."

Borrowing Money to Redeem Pledged Property. — It is not the duty of an executor or administrator to pledge his own property or use his own credit in order to borrow money to redeem pledged property of the estate. *In re Holladay*, 18 Oregon 168.

Purchasing Securities to Evade Taxation. — In *Wheelwright v. Rhoades*, 11 Abb. N. Cas. (N. Y. Supreme Ct.) 382, 28 Hun (N. Y.) 57, it was held that it was not lawful or proper for a personal representative to borrow money on the credit of the estate for the sole purpose of purchasing securities exempt from taxation, in order to hold them until the time for assessing property for taxation had passed, thereby to evade taxation.

6. Mortgage or Pledge to Secure Loan. — See *infra*, this title, *Management and Care of Estate — Mortgage or Pledge by Executors and Administrators*.

7. Making or Indorsing Bills and Notes Imposes No Liability on Estate — *England*. — *Aspinall v.*

cc. EXCEPTIONS TO GENERAL RULE — (aa) Funeral Expenses. — The expenses of a decedent's funeral are considered a debt of the estate, and not of the personal representative, though ordered by him, and he is not liable on his agreement to pay therefor, unless he contracted solely in his individual capacity.¹

(bb) Expenses Incidental to Administration. — It has been held that an exception to the rule denying to personal representatives the power to bind estates by contract exists in the case of incidental charges in the due course of administration.²

(cc) Statutory Authority to Contract. — In some jurisdictions executors and administrators are authorized by statute to bind the estates in their hands by contracts for certain purposes, but the authority under such a statute extends

Wake, 10 Bing. 55, 25 E. C. L. 27; Childs v. Monins, 2 Brod. & B. 460, 6 E. C. L. 228.

Alabama. — Kirkman v. Benham, 28 Ala. 501; Christian v. Morris, 50 Ala. 585.

Arkansas. — Perry v. Cunningham, 40 Ark. 185.

Indiana. — Cornthwaite v. Rockville First Nat. Bank, 57 Ind. 268.

Iowa. — Winter v. Hite, 3 Iowa 142; Dunne v. Deery, 40 Iowa 251; Tryon v. Oxley, 3 Greene (Iowa) 289; Thompson v. Maugh, 3 Greene (Iowa) 342.

Kentucky. — Ellis v. Merriman, 5 B. Mon. (Ky.) 297.

Louisiana. — Louisiana Mut. Ins. Co. v. Walters, 25 La. Ann. 562; Winthrop v. Jarvis, 8 La. Ann. 434; Beatty v. Tete, 9 La. Ann. 130; Hestres v. Petrovic, 1 Rob. (La.) 119; Flower v. Swift, 5 Martin N. S. (La.) 529; Gillet v. Rachal, 9 Rob. (La.) 276; Livingston v. Gaussen, 21 La. Ann. 286, 99 Am. Dec. 731; Russell v. Cash, 2 La. 185.

Maine. — Davis v. French, 20 Me. 21, 37 Am. Dec. 36; White v. Thompson, 79 Me. 207; Walker v. Patterson, 36 Me. 273.

Minnesota. — Germania Bank v. Michaud, 62 Minn. 459.

Mississippi. — Yerger v. Foote, 48 Miss. 62; Woods v. Ridley, 27 Miss. 119; Sims v. Stilwell, 3 How. (Miss.) 176.

Missouri. — Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101; Stirling v. Winter, 80 Mo. 141; Rittenhouse v. Ammerman, 64 Mo. 197, 27 Am. Rep. 215.

Montana. — White Sulphur Springs First Nat. Bank v. Collins, 17 Mont. 433.

New York. — Schmittler v. Simon, 101 N. Y. 554, 54 Am. Rep. 737; Thompson v. Whitmarsh, 100 N. Y. 35; Bover v. Marshall, (Supreme Ct.) 5 N. Y. St. Rep. 431; Taft v. Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; Hills v. Bannister, 8 Cow. (N. Y.) 31; Troy Bank v. Topping, 9 Wend. (N. Y.) 273, 13 Wend. (N. Y.) 557; Buckland v. Gallup, 40 Hun (N. Y.) 61; Bingham v. Marine Nat. Bank, 41 Hun (N. Y.) 377; Delaware, etc., R. Co. v. Gilbert, 44 Hun (N. Y.) 201; Matter of Callister, 88 Hun (N. Y.) 87; Darling v. Powell, 20 Misc. Rep. (N. Y. Supreme Ct.) 240.

North Carolina. — Morehead Banking Co. v. Morehead, 122 N. Car. 318; McLean v. McLean, 88 N. Car. 396; Kerchner v. McRae, 80 N. Car. 219; Hall v. Craige, 65 N. Car. 51; Kessler v. Hall, 64 N. Car. 60; Sleigheter v. Harrington, 2 Murph. (6 N. Car.) 332.

Ohio. — Curtis v. National Bank, 39 Ohio St. 579.

Pennsylvania. — Farmers' Nat. Bank v. Griel, 12 Lanc. L. Rev. (Pa.) 28.

South Carolina. — McGrath v. Barnes, 13 S. Car. 328, 36 Am. Rep. 687; Johnson v. Clarke, 15 S. Car. 72.

Tennessee. — King v. Thom, 1 T. R. 489; East Tennessee Iron Mfg. Co. v. Gaskell, 2 Lea (Tenn.) 742; Allen v. Shanks, 90 Tenn. 359; Boyd v. Johnson, 89 Tenn. 284.

Texas. — Caldwell v. Young, 21 Tex. 800; Gregory v. Leigh, 33 Tex. 813.

Vermont. — Merchants' Nat. Bank v. Weeks, 53 Vt. 115, 38 Am. Rep. 661.

Virginia. — Snead v. Coleman, 7 Gratt. (Va.) 300, 56 Am. Dec. 112.

As to Transfer of Title by Indorsement, see *infra*, this title, *Management and Care of Estate — Sale and Transfer of Personal Property — Negotiable Instruments.*

Where an Executor Assigns a Certificate of Deposit belonging to the estate, and the bank fails before the maturity of the certificate, the assignee cannot recover from the estate. Grafenreid v. Kundert, 23 Ill. App. 440.

A Guaranty by an Executor of a note transferred by him in payment of a debt due from the estate to the transferee is not binding on the estate. Johnston v. Union Bank, 37 Miss. 526.

Authority to Sell and Reinvest given to the executor by the will does not authorize him to bind the estate by making notes. Boggs v. Wann, 58 Fed. Rep. 681.

1. Liability for Funeral Expenses. — See *supra*, this section, *Burial of Decedent.*

2. Power to Incur Debts for Incidental Expenses of Administration. — Farley v. Hord, 45 Miss. 96. In Guerry v. Capers, Bailey Eq. (S. Car.) 159, O'Neill, J., said: "As a general guide, it may be laid down that whenever the trustee, if he had paid the debt out of his own funds, would be in advance to the trust estate, and would be entitled to be reimbursed out of it, his creditor may, if the trustee is insolvent, be allowed to take his place, and be paid out of the estate, to the same extent. This constitutes, however, the only exception to the general rule which we are prepared to recognize."

In Todd v. Martin, (Cal. 1894) 37 Pac. Rep. 872, a claim for services in taking care of the decedent's live stock was said to be "analogous to a claim for funeral expenses paid by a person other than the administrator or executor, which, at common law, are a charge against the estate, though not strictly a debt due from the decedent."

only to the cases provided for.¹

(*dd*) *Testamentary Authority to Contract*. — Power may be given to an executor by the will to bind the estate by contract.²

(*ee*) *Promise in Consideration of Assets*. — A promise by an executor or administrator to pay a debt of the decedent in consideration of assets is a promise in his representative capacity and will support a judgment *de bonis testatoris* or *de bonis decedentis*.³

(*b*) *Obligation of Decedent as Consideration*. — A personal representative may bind the estate by a promise the consideration of which is a clear and just liability on the part of the estate,⁴ but his authority in this respect is limited to the amount of assets in his hands, and he can in no case bind the heir or devisee.⁵

Account Stated. — Within this principle, an executor or administrator may be

1. Statutory Authority to Bind Estate by Contract. — *McKinney v. Peters*, Dall. (Tex.) 545; *Price v. McIver*, 25 Tex. 769, 78 Am. Dec. 558; *McMahan v. Harbert*, 35 Tex. 451; *Mullins v. Yarrowborough*, 44 Tex. 14.

Plantation Supplies. — The authority conferred by statute on executors and administrators to carry on the plantation of the decedent authorizes them to incur debts for supplies advanced for that purpose. *Reinstein v. Smith*, 65 Tex. 247; *Primm v. Mensing*, 14 Tex. Civ. App. 395.

The Alabama Statute provides that "any executor or administrator, by authority of the Probate Court, given on his application, may, in his representative capacity, give his note, bond, or bill for the purpose of extending or settling a debt of the decedent, or settling a debt contracted by such representative, for articles or for work and labor for the estate; and for such note, bond, or bill the estate is liable, and the executor or administrator is not personally liable" *Wilburn v. McCalley*, 63 Ala. 436.

The Connecticut Statute (Sess. Laws 1882, p. 146), provides as follows: "In all cases in which any person shall have a legal claim against any executor, administrator, guardian, or trustee, growing out of moneys paid or services rendered for the estate in the hands of such executor, administrator, guardian, or trustee, and which should justly be paid out of such estate, an action at law may be brought by such claimant against such executor, etc., and if such claim shall be found to be a just one, and one which ought equitably to be paid out of such estate, judgment may be rendered in favor of such claimant to be paid wholly out of the estate." *Brown v. Eggleston*, 53 Conn. 110.

The Mississippi Statute provides that an administrator may complete a crop commenced by the decedent, and that the surplus after paying the expenses shall be assets, and it is held that this statute authorizes an administrator to contract debts for necessities and bind the estate to the extent of the crop to be made. *Ward v. Harrington*, 29 Miss. 238; *Emanuel v. Norcum*, 7 How. (Miss.) 150.

2. Testamentary Authority to Bind Estate by Contract. — *Wade v. Pope*, 44 Ala. 690. See also *Murrell v. Wright*, 78 Tex. 519.

In *Yerkes v. Richards*, 153 Pa. St. 646, 34 Am. St. Rep. 721, 37 W. N. C. (Pa.) 69, reversing 11 Lanc. L. Rev. (Pa.) 308, it was held that the estate is liable for a breach of contract on the

part of the executor or administrator on a sale of real estate which he had purchased on foreclosure of a mortgage, taken by him under a power to invest on mortgage and bond.

Where a Plantation Is Carried On by an Executor under a will which merely gives him authority to carry on the plantation, he has no power to encumber the corpus of the estate by contracting debts for plantation supplies. *Ward v. Harrington*, 29 Miss. 238.

Terms of Will. — A direction in a will that the executor shall manage the estate as the testator had been "in the habit of doing" does not authorize him to bind the estate for the services of an overseer or the purchase of work animals. *Wade v. Pope*, 44 Ala. 690. See also *Vann v. Vann*, 71 Ala. 154.

3. Promise in Consideration of Assets. — *Courtney v. Hunter*, 1 Cranch (C. C.) 265; *Faxon v. Dyson*, 1 Cranch (C. C.) 441; *Dixon v. Ramsay*, 1 Cranch (C. C.) 472. But see *Carter v. Thomas*, 3 Ind. 213.

4. Contracts in Consideration of Obligations of Decedent — *England*. — *Ashby v. Ashby*, 7 B. & C. 444, 14 E. C. L. 77; *Dowse v. Coxe*, 3 Bing. 20, 11 E. C. L. 12; *Powell v. Graham*, 7 Taunt 580, 2 E. C. L. 580.

Kentucky. — *Rucker v. Wadlington*, 5 J. J. Marsh. (Ky.) 238.

Massachusetts. — *Hapgood v. Houghton*, 10 Pick. (Mass.) 154.

Mississippi. — *Steele v. McDowell*, 9 Smed. & M. (Miss.) 193.

New York. — *Schmittler v. Simon*, 101 N. Y. 557, 54 Am. Rep. 737.

Pennsylvania. — *Allen v. Graffius*, 8 Watts (Pa.) 397.

Vermont. — *Willard v. Brewster*, Brayt. (Vt.) 104.

An agreement by an administrator to sell property of the estate and pay a stipulated sum to the widow, who by an ante-nuptial contract was entitled to receive from the decedent's estate sufficient to enable her to resume housekeeping, is enforceable in the absence of fraud. *Grider v. Rodes*, 5 Bush (Ky.) 277.

In *Brown v. Evans*, 15 Kan. 88, Valentine, J., said: "We know of no good reason why an estate should not be held liable for promises made by the administrator where in law he has the right to make such promises, or where in law it is his duty, without a promise, to do just what he has promised to do."

5. Power to Bind Estate Limited to Assets in Hand. — *Grottenkemper v. Bryson*, 79 Ky. 353.

sued in his representative capacity on an account stated, since the original liability is that of the decedent, and the effect of the account stated was merely to reduce the amount of the indebtedness to a certainty.¹

Promise to Pay Extinguished Debt. — But the obligation of a decedent which will support a promise by his executor or administrator so as to bind the estate must be a subsisting one, and therefore it is generally held that debts of the decedent barred by the statute of limitations cannot be revived against the estate by the promise of the executor or administrator to pay them.²

Ratification of Void Transaction. — On the same principle the executor or administrator has no power to ratify void transactions of the decedent.³

(2) *Contracts Other than to Pay Money.* — In regard to contracts other than those which require the payment of money, such as contracts to sell or transfer property, or to do any other act within the scope of his powers and duties, the general rule is that the personal representative may bind the estate.⁴

b. CONTRACTS MADE BY DECEDENT — (1) *Power and Duty to Perform in General.* — The obligation of an executor or administrator to perform contracts made by his testator or intestate in his lifetime is not restricted to the payment of money, but he is bound by other contracts which he can fairly and sufficiently execute, although he is not named therein; and if he fails to perform, he may be compelled to pay damages out of the estate for the breach.⁵

1. **Account Stated.** — *Ashby v. Ashby*, 7 B. & C. 441, 14 E. C. L. 77; *Hagood v. Houghton*, 10 Pick. (Mass.) 154; *Kingman v. Soule*, 132 Mass. 285; *Schutz v. Morette*, 146 N. Y. 137; *Gregory v. Hooker*, 1 Hawks (8 N. Car.) 394, 9 Am. Dec. 646.

2. **Power to Revive Debts Barred by Limitation.** — See *supra*, this section, *Power to Waive Statute of Limitations*.

3. **Personal Representative Cannot Ratify Void Transaction of Decedent.** — *Smith v. Brennan*, 62 Mich. 349, 4 Am. St. Rep. 867.

4. **Agreement to Release Mortgage.** — In *Sanford v. Story*, 15 Misc. Rep. (N. Y. County Ct.) 536, it was held that an administrator could bind the estate by a contract to release a mortgage.

Agreement to Sell Property of Estate. — An executor who is empowered by the terms of the will to sell the testator's real estate may enter into an executory contract for such sale, and performance of the contract may be enforced in equity at the suit of the purchaser. *Bostwick v. Beach*, 103 N. Y. 414.

Agreement to Assign Judgment. — In *Johnston v. Wallis*, 41 Hun (N. Y.) 420, *affirmed* 112 N. Y. 230, it was held that an executor who had made an executory contract to assign a judgment belonging to the estate could be compelled to perform the contract. The court said: "That an executor in some cases may bind the trust is settled. * * * As the executor is the legal owner of the property, and his duty is to sell and convert it, I think his executory contract, if not improvident, will bind the estate."

Agreement to Convey Land in Contemplation of Order of Sale. — A bond executed by an administrator for the conveyance of the decedent's real estate in contemplation of a sale under an order of court is void, and not enforceable either at law or in equity, because it is contrary to the policy of the law relating to the sale by personal representatives of the real estate of decedents. *Logan v. Gigley*, 9 Ga.

114; *Overseers of Poor v. Overseers of Poor*, 3 Cow. (N. Y.) 299; *Herrick v. Grow*, 5 Wend. (N. Y.) 579. So also a contract by an executor to enable a purchaser to obtain the property for less than its value is void. *Tufts v. Tufts*, 3 Woodb. & M. (U. S.) 456.

Agreement to Convey Land in Payment of Debt. — An administrator cannot bind the estate by an agreement with a creditor to convey land belonging to the estate to the creditor in payment of a debt. *Hazlett v. Burge*, 22 Iowa 531.

Agreement to Locate Land Certificate. — *Halbert v. De Bode*, (Tex. Civ. App. 1894) 28 S. W. Rep. 58; *Halbert v. Carroll*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1102; *Williams v. Howard*, 10 Tex. Civ. App. 527.

Agreement to Extend Time of Payment of Debts. — It has been held that an executor or administrator may make a valid agreement to extend the time of the payment of debts due the estate. *Underwood v. Sample*, 70 Ind. 446; *Berry v. Parkes*, 3 Smed. & M. (Miss.) 625; *Campbell v. Linder*, 50 S. Car. 169. But see *contra*, *Maddock v. Russell*, 109 Cal. 417; *Landry v. Delas*, 25 La. Ann. 181.

5. **Contracts of Decedent Binding on Personal Representative** — *England*. — *Wentworth v. Cock*, 10 Ad. & El. 42, 37 E. C. L. 33; *Siboni v. Kirkman*, 1 M. & W. 418.

California. — *Janin v. Browne*, 59 Cal. 44; *McCann v. Pennie*, 100 Cal. 547.

Illinois. — *Smith v. Wilmington Coal Min., etc., Co.*, 83 Ill. 498.

New Jersey. — *Petrie v. Voorhees*, 18 N. J. Eq. 285; *Chapman v. Holmes*, 10 N. J. L. 35.

Ohio. — *Jackson v. O'Brannin*, 14 Ohio St. 177.

Tennessee. — *Oliver v. Morgan*, 10 Heisk. (Tenn.) 329.

As to the liability of an estate on the contracts of the decedent generally, see the title DEBTS OF DECEDENTS, vol. 8, p. 1003.

Duty to Perform Contracts. — In *Cooper v. Jarman*, 12 Jur. N. S. 956, 15 W. R. 142, it was

But if the contract is such that it cannot be properly performed by any person other than the decedent, as where personal taste or skill is involved, it is not binding on the executor or administrator.¹

The Contracts of Infants are generally binding on their personal representatives to the same extent that the infants themselves were bound, and the personal representative of a deceased infant may affirm or disaffirm a contract by the decedent as the interest of the estate may require.²

held that administrators ought not to refuse to carry out a contract made by the intestate merely because the effect of the breach would be to increase the personal estate.

An Executor Need Not Wait to Be Sued before performing the testator's obligations. He may act voluntarily, and where he does so in good faith, and with reasonable care and prudence, he incurs no liability. *Denton v. Sanford*, 103 N. Y. 607.

Delivery of Goods Sold by Decedent. — Where the decedent had sold timber which had been cut and was still lying on his land, and part of it had been delivered to the buyer, it was the duty of the executors to complete the delivery, and they were liable to an action in their representative capacity for refusing to do so. *Parker v. Barlow*, 93 Ga. 700.

The Covenants in a Lease are binding on the executor of the lessee. *Winston v. Franklin Academy*, 28 Miss. 118, 61 Am. Dec. 540.

Building Contracts made by a decedent in his lifetime are binding on and may be completed by his personal representative. *Cooper v. Jarman*, 12 Jur. N. S. 956, 15 W. R. 142; *Quick v. Ludborrow*, 3 Bulst. 29; *Janin v. Browne*, 59 Cal. 37; *Bambrick v. Webster Grove Presb. Church Assoc.*, 53 Mo. App. 225; *Russell v. Buckhout*, 87 Hun (N. Y.) 46; *Riblet v. Wallis*, 1 Daly (N. Y.) 360; *Pringle v. M'Pherson*, 2 Desaus. (S. Car.) 524.

And the liabilities of the original contract attach to the work done by administrators in completing it so as to render money due under it subject to the claim of a subcontractor for work done for the intestate. *Reicke v. Saunders*, 3 Mo. App. 566; *Horton v. Carlisle*, 2 Disney (Ohio) 184.

But an executor does not bind the estate for the price of materials purchased to complete an unfinished contract of the testator, if he used such materials in his (the executor's) own business. *Oram's Estate*, 9 Phila. (Pa.) 358, 31 Leg. Int. (Pa.) 244. Nor can he bind the estate by a new contract to complete a building which the decedent had contracted to erect. *Chicago Lumber Co. v. Tomlinson*, 54 Kan. 770.

Contracts for Services. — An administrator may retain an employee hired by the decedent, where the services of the employee are necessary for the protection of the estate. *Matter of Miner*, 46 Cal. 564.

Ratification of Act of Third Person. — An executor or administrator may ratify the acts of a third person done in the decedent's name, where the decedent could have ratified them if living. *Seaver v. Weston*, 163 Mass. 202.

The Right to Reject a heater placed in the house of a decedent under a contract that he might reject it if it did not prove satisfactory may be exercised by his personal representa-

tive, where the decedent died before he had an opportunity of testing the heater. *Adams Radiator, etc., Works v. Schnader*, 155 Pa. St. 394, 35 Am. St. Rep. 893, 32 W. N. C. (Pa.) 281.

1. Contracts Involving Personal Taste or Skill are not binding on the personal representatives. To this effect is the dictum of Barons *Lyndhurst and Bailey*, as to the preparation of a book for publication. *Marshall v. Broadhurst*, 1 Tyrw. 348. So also as to a contract to instruct an apprentice, *Baxter v. Burfield*, 2 Stra. 1266; *Gilman v. Wilber*, 1 Dem. (N. Y.) 547; and as to a contract to obtain letters patent for an invention, to manage the business of placing the invention, and to advance the funds requisite, etc., *Marvel v. Phillips*, 162 Mass. 399, 44 Am. St. Rep. 370; or any obligation to be performed personally, *Shultz v. Johnson*, 5 B. Mon. (Ky.) 497; *Siler v. Gray*, 86 N. Car. 566; unless it can be performed by the personal representative as well as by the decedent, *Janin v. Browne*, 59 Cal. 37.

When Contract Does Not Require Exercise of Personal Skill. — In *Empire Paving, etc., Co. v. Prather*, 58 Mo. App. 487, it was held that where a grant of an exclusive right to use a patent for a term of years required the grantee to pay a stipulated royalty and contained a covenant by him that the royalty would amount to a certain sum per year, but did not provide for his personal services in using the patented process, the obligation to pay royalty did not terminate at the death of the grantee, but was enforceable against his estate.

2. Contracts of Deceased Infants — Affirmance by Executor or Administrator. — *Bedford v. Clay*, 3 Dana (Ky.) 226.

Under the *Missouri* statute (Rev. Code 1845, art. 3, §§ 36, 39) it was held that an executor or administrator could be required by an order of the Probate Court to execute a deed confirming a deed executed by his testator or intestate during minority, where such testator or intestate verbally ratified his deed after becoming of age. *Ferguson v. Bell*, 17 Mo. 347.

The Right of an Administrator to Disaffirm, on the ground of infancy, contracts made by his intestate is coextensive with, but no greater than, the right which the intestate would have if living. *Hangen v. Hachmeister*, 49 N. Y. Super. Ct. 34, 16 N. Y. Wkly. Dig. 552.

What Operates as Affirmance of Infant's Contract. — The sale by an administrator of goods purchased by his intestate, an infant, is not an affirmance of the purchase so as to render the administrator liable for the value of the goods, but he may, notwithstanding such sale by him, plead infancy in an action on a note given by the infant to the seller. *Counts v. Bates*, Harp. L. (S. Car.) 464.

See generally the title INFANCY.

As Between the Representative and the Beneficiaries of the Estate, the former may, in his discretion, as a general rule, perform or rescind any personal contract of the decedent, as may be for the best interests of the estate,¹ unless the matter is regulated by statute.² If he elects to enforce them, and loss results, the rule at law is that he must bear such loss; but if he makes any profits, they will belong to the estate. It seems, however, that this rule of liability is changed in those jurisdictions in which the personal representative may be authorized by order of the court to carry out the contracts of the decedent.³ In the *United States* an executor or administrator is not generally held liable in equity for losses resulting from carrying out the contracts of the decedent, where he acted in good faith.⁴

(2) *Contracts Relating to Sale or Purchase of Real Estate* — (a) *Contracts to Sell Real Estate.* — A contract made by a decedent for the sale of real estate which could have been enforced against him in his lifetime operates as a conversion of such realty into personal property.⁵ Therefore, the rights and interests of the decedent under the contract pass to the executor or administrator, and he may enforce it against the vendee,⁶ and in some jurisdictions he is authorized to complete the contract by executing a deed to the vendee.⁷

(b) *Contracts to Purchase Real Estate.* — An executory contract made by a decedent for the purchase of real estate confers no rights or duties on the executor or administrator except in cases where the real estate of the decedent is neces-

1. Discretion as to Performance. — *Roach v. Ames*, 80 Ky. 6; *Gray v. Hawkins*, 8 Ohio St. 449, 72 Am. Dec. 600.

An Ordinary Contract of Lease of a Farm may be completed by the administrator of the lessee, or he may give up the contract and let the estate respond in damages, at his election; but if the lease is valuable, he should realize on it. *Walker's Estate*, 6 Pa. Co. Ct. Rep. 515.

2. Performance under Order of Court. — In *Illinois* it is provided by statute that all contracts made by a decedent may be performed by his executor or administrator, when so directed by an order of the court. *Smith v. Wilmington Coal Min., etc., Co.*, 83 Ill. 498.

3. Losses Incurred in Performance of Contracts. — *Smith v. Wilmington Coal Min., etc., Co.*, 83 Ill. 498.

Negligence in Performing Contract. — In *Gridley v. Balston*, Quincy (Mass.) 65, it was held that no action will lie against an executor as such for his negligence in carrying out a consignment made to the testator in his lifetime as the agent of the plaintiff.

4. Rule in Equity — Acts Done in Good Faith — *Illinois.* — *Smith v. Wilmington Coal Min., etc., Co.*, 83 Ill. 498.

Kentucky. — *Roach v. Ames*, 80 Ky. 6.
New Jersey. — *Meeker v. Vanderveer*, 15 N. J. L. 392.

New York. — *Gilman v. Wilber*, 1 Dem. (N. Y.) 547.

Pennsylvania. — *Getz's Estate*, 12 Phila. (Pa.) 143, 35 Leg. Int. (Pa.) 384.

5. See the title CONVERSION AND RECONVERSION, vol. 7, p. 463.

6. Enforcement of Contract Against Vendee of Decedent. — *Miller v. Miller*, 25 N. J. Eq. 354.

For a Full Discussion of the enforcement of contracts of sale against the vendee of a decedent, see the title SPECIFIC PERFORMANCE.

7. Contracts to Convey Land — Performance by Executor or Administrator of Vendor — *Iowa.* — *Fulwider v. Peterkin*, 2 Greene (Iowa) 522.

North Carolina. — *Lindsay v. Coble*, 2 Ired. Eq. (37 N. Car.) 602; *White v. Hooper*, 6 Jones Eq. (59 N. Car.) 152.

Pennsylvania. — *Wetherill v. Seitzinger*, 9 W. & S. (Pa.) 177; *Park v. Marshall*, 4 Watts (Pa.) 382.

Tennessee. — *Bartlett v. Watson*, 3 Sneed (Tenn.) 287; *Hale v. Darter*, 5 Humph. (Tenn.) 79; *Carter v. Parrot*, 1 Overt. (Tenn.) 237; *Den v. Mayfield*, 5 Hayw. (Tenn.) 121.

Texas. — *Jones v. Taylor*, 7 Tex. 240, 56 Am. Dec. 48; *Estes v. Browning*, 11 Tex. 237, 60 Am. Dec. 238.

The Georgia Statute of 1799, authorizing executors and administrators to complete contracts to convey land, merely gave them the right, but was not imperative. *Chance v. Beall*, 20 Ga. 142.

In *Washington* executors and administrators are authorized to execute deeds to the vendees of their decedents pursuant to contracts of sale. *Hyde v. Heller*, 10 Wash. 586.

A Confirmatory Deed may be executed by a personal representative where the decedent had made a deed during minority and ratified it after becoming of full age, but died without executing a confirmatory deed. *Ferguson v. Bell*, 17 Mo. 347.

Leave of Court is required by statute in some jurisdictions to authorize an executor or administrator to convey land which the decedent had obligated himself by bond for title to convey, and if he executes a deed without such an order it is void. *Adams v. Harris*, 47 Miss. 144.

So, too, in *Pennsylvania*, leave of court must be obtained before an executor can deliver a deed executed by the decedent in his lifetime. *Karman v. Hooper*, 3 W. & S. (Pa.) 253.

An Administrator Pendente Lite may convey land in execution of a contract of the decedent proved under the *Pennsylvania* Act of 1792. *Park v. Marshall*, 4 Watts (Pa.) 382.

sary for the payment of his debts, or so far as the decedent's promise to pay the purchase money may constitute a debt which the executor or administrator may be required to pay;¹ but if he has not sufficient assets to pay the purchase money, he is authorized, as a general rule, with the consent of the court, to agree with the vendor to rescind the contract.² But this right of rescission exists only when the contract is executory. If it had been executed by a conveyance to the decedent, the heirs alone have the right to rescind.³ If, however, the decedent had the right under the contract to have the purchase money refunded because he was dissatisfied with the property, such right may be enforced by his personal representative.⁴

16. Liability for Tortious or Negligent Acts. — Executors and administrators can create no liability against the estates represented by them by any tortious or wrongful act. Their torts are their individual acts, for which the only remedy of the person injured is against them individually;⁵ and the rule is the same whether the injury results from intentional wrong or negligence.⁶

1. Executor or Administrator Not Ordinarily Entitled to Enforce Performance of Contract to Convey Land to Decedent. — *Carpenter v. Fopper*, 94 Wis. 146. See also the title SPECIFIC PERFORMANCE.

2. Rescission of Contract by Executor or Administrator. — *Hamner v. Holmes*, 12 Kan. 526; *Hunt v. Thorn*, 2 Mich. 213; *Howard v. Babcock*, 7 Ohio (pt. ii.) 73; *Pennock v. Freeman*, 1 Watts (Pa.) 401.

A court of equity will not, after the lapse of many years, disturb a contract of rescission, on the application of the heirs of the vendee, where the administrator acted in good faith in making the contract of rescission, and it might reasonably be considered beneficial to the heirs. *Ludlow v. Cooper*, 4 Ohio St. 1.

3. No Authority to Rescind if Conveyance Had Been Made to Decedent. — *Bender v. Bean*, 52 Ark. 132; *Campbell v. Kuhn*, 45 Mich. 513, 40 Am. Rep. 479.

4. Right to Return of Purchase Money under Contract. — *Fuller v. Dempster*, (Pa. 1887) 11 Atl. Rep. 670.

5. Torts of Executor or Administrator Create Only Personal Liability — *Alabama*. — *Daily v. Daily*, 66 Ala. 266.

California. — *Eustace v. Jahns*, 38 Cal. 3; *Sterrett v. Barker*, 119 Cal. 492.

Georgia. — *Parker v. Barlow*, 93 Ga. 700.

Indiana. — *Mills v. Kuykendall*, 2 Blackf. (Ind.) 47; *Rose v. Cash*, 58 Ind. 278; *Rodman v. Rodman*, 54 Ind. 444; *Hankins v. Kimball*, 57 Ind. 42; *Cornthwaite v. Rockville First Nat. Bank*, 57 Ind. 268; *Hendrix v. Hendrix*, 65 Ind. 329; *Holderbaugh v. Turpin*, 75 Ind. 84, 39 Am. Rep. 124; *Evans v. Hardy*, 76 Ind. 527; *Davis v. Schmidt*, (Ind. App. 1892) 31 N. E. Rep. 840.

Louisiana. — *Louque v. Saloy*, 45 La. Ann. 1386.

Maine. — *Plimpton v. Richards*, 59 Me. 115.

New York. — *Van Slooten v. Dodge*, 145 N. Y. 327, reversing 76 Hun (N. Y.) 55.

Pennsylvania. — *Moulson's Estate*, 1 Brews. (Pa.) 296.

Texas. — *Cock v. Carson*, 38 Tex. 284; *Crayton v. Munger*, 9 Tex. 285.

This rule has been applied in a variety of cases. Thus it is held that executors or administrators are personally liable for libels published by them. *Rielle v. Benning*, Mon-

treau L. R. 4 Super. Ct. 219, 11 Leg. N. (Quebec) 415. For infringements of patent rights. *Thompson v. Canterbury*, 2 McCrary (U. S.) 332. For abuse of process. *Lamore v. Cox*, 32 La. Ann. 246; *Mell v. Barner*, 135 Pa. St. 151. For false representations on the sale of property of the estate. *Huffman v. Hendry*, 9 Ind. App. 324; *Riley v. Kepler*, 94 Ind. 308; *Fritz v. McGill*, 31 Minn. 536; *Dunlap v. Robinson*, 12 Ohio St. 530; *Westfall v. Dungan*, 14 Ohio St. 276.

Advice to Widow. — An executor is not bound to give the widow of his testator any advice as to accepting or electing against the will; but if he consents to do so, he must exercise good faith and reasonable diligence. Hence, if the executor fraudulently induces the widow not to dissent from her husband's will within the time required by law, the proceedings assigning her year's support are binding on him. *Bolin v. Barker*, 75 N. Car. 47.

Penalty for Bringing Diseased Animals into State. — An administrator who sells diseased or infected animals under an order of the Probate Court is not guilty of a violation of the *Wisconsin* statute (Laws 1885, c. 467) making it an offense for any person to bring infected or diseased animals into the state, or, after the proclamation by the governor, to receive in charge and transport and convey the same within the state, and also making the offender liable to persons injured thereby. *Newell v. Clapp*, 97 Wis. 104.

6. Negligence. — *Boston Beef Packing Co. v. Stevens*, 12 Fed. Rep. 279.

In *Mason v. Rhinelander*, 8 Ben. (U. S.) 163, executors were held liable for injuries sustained by a canal boat through faulty construction of a bulkhead belonging to the estate.

In *Belvin v. French*, 84 Va. 81, executors to whom real estate was devised in their representative capacity for certain purposes were held individually liable to a person who was injured by falling into a coal hole in a sidewalk in front of the premises, which they negligently failed to keep properly covered.

In *Donohue v. Kendall*, 50 N. Y. Super. Ct. 386, it was held that executors who assume control of leased premises belonging to the estate are liable for injuries to a tenant caused by neglect to keep the stairways to a tenement house in repair, though they could not have

17. Liability for Taking Property of Third Persons. — If an executor or administrator, as such, receives money or takes possession of property to which the estate has no right, he is liable to an action by the real owner for its recovery. The authorities are uniform in holding this, and they generally hold that he incurs personal liability, but there is some diversity as to whether his liability is only personal or whether he also becomes liable in his representative capacity. The *English* courts, adhering to the principle that an executor or administrator has no power to create any new liability on the estate, hold that he becomes liable in his individual capacity alone, though the money or property is applied to the purposes of the estate, and some of the decisions in the *United States* are to the same effect.¹

Liability in Representative Capacity. — But other authorities have adopted a more equitable rule, and hold that if an executor or administrator has applied to the use of the estate money or proceeds of property belonging to third persons he is liable in his representative capacity,² and that the person injured may elect whether he will hold the executor or administrator liable personally or in his representative capacity;³ while some cases hold that under certain cir-

been compelled to take possession, and had no power to make repairs at the expense of the estate.

1. Individual Liability for Taking Property of Third Persons — *England*. — *Pooley v. Ray*, 1 P. Wms. 355; *Pickering v. Stamford*, 2 Ves. Jr. 582; *Ashby v. Ashby*, 7 B. & C. 444, 14 E. C. L. 77.

Alabama. — *Daily v. Daily*, 66 Ala. 256.

Arkansas. — *McCustian v. Ramey*, 33 Ark. 142.

Iowa. — *Herd v. Herd*, 71 Iowa 497; *Adkinson v. Breeding*, 56 Iowa 26.

Massachusetts. — *Cronan v. Cotting*, 99 Mass.

334. *Mississippi*. — *Smith v. Jeffreys*, (Miss. 1894) 16 So. Rep. 377.

New Jersey. — *Sibbit v. Lloyd*, 11 N. J. L.

163. *Pennsylvania*. — *Seip v. Drach*, 14 Pa. St. 352.

Virginia. — *Martin v. Stover*, 2 Call (Va.)

514. In *Newsum v. Newsum*, 1 Leigh (Va.) 94,

19 Am. Dec. 739, it was held that if an administrator sells a chattel, whereof his intestate died possessed, but which in truth belonged of right to another, and applies the proceeds to the payment of his intestate's debts in due course of administration, without any notice of the right or claim of the true owner, he is personally liable to the true owner for the value in trover brought by the owner against him.

Wrongful Taking of Property in Possession of Devisee. — Executors who enter on land which is in the peaceable possession of a devisee, and forcibly take possession of a crop which was growing on the land at the time of the testator's death, and carry it away, are liable to the devisee for the value of the property so taken. *Rough v. Womer*, 76 Mich. 375.

Property Taken under Order of Court. — The liability of an executor or administrator for taking the property of a third person as property of the decedent's estate is not affected by the fact that he acted under an order of court. If any person has a better title or a better right of possession than the executor or ad-

ministrator, he cannot be divested of it by an order of the Probate Court, and the question as to whether the property belongs to the estate of the decedent and whether such estate was entitled to its possession is open to all the courts in which it may be put at issue. *Crescent City Ice Co. v. Stafford*, 3 Woods (U. S.) 94.

2. Liability in Representative Capacity — Money Applied to Use of Estate — *United States*. — *De Valengin v. Duffy*, 14 Pet. (U. S.) 282; *Baring v. Putnam*, 1 Holmes (U. S.) 261.

California. — *Schlicker v. Hemenway*, 110 Cal. 579.

Iowa. — *Simpson v. Snyder*, 54 Iowa 557.

Kentucky. — *Montgomery v. Armstrong*, 5 J. J. Marsh. (Ky.) 175.

Maine. — *Call v. Houdlette*, 70 Me. 308.

Pennsylvania. — *Gaffney's Estate*, 146 Pa. St. 49.

Tennessee. — *Milly v. Harrison*, 7 Coldw. (Tenn.) 191.

This rule was recognized in *Wall v. Kellogg*, 16 N. Y. 385, in which case it was held that where executors, under a power of sale, convey land of which their testator was in equity a mere trustee, they are liable as executors to the person having the equitable title to the land for the damages sustained in consequence of the sale.

See also *Clayton v. Boyce*, 62 Miss. 390, in which case Cooper, J., said: "That administrator had no authority to receive anything other than the money of the estate of his intestate. If he received more than this he is responsible as an individual, but not in his representative capacity, unless it be also shown that the money was actually appropriated to the use of the estate."

If an Administrator Collects Rents Without Authority and spends them in paying the debts of the estate, he is liable in his representative character to the party rightfully entitled. *Crowder v. Shackelford*, 35 Miss. 321; *Conger v. Atwood*, 28 Ohio St. 134, 22 Am. Rep. 362.

3. Election as to Personal or Representative Liability. — *De Valengin v. Duffy*, 14 Pet. (U. S.) 282. See also *Herd v. Herd*, 71 Iowa 497.

cumstances no personal liability is incurred, but that the executor or administrator can be charged only in his representative capacity.¹

IX. MANAGEMENT AND CARE OF ESTATE — 1. In General — a. CUSTODY AND PRESERVATION OF ESTATE — (1) General Principles. — It is the duty of an executor or administrator to preserve the estate in his hands and protect it from loss, and he has power to do whatever may be necessary for that purpose. He is not, however, a guarantor of the safety of the property, but he must act with such prudence and diligence as are generally observed by prudent men of intelligence and discretion in regard to their own affairs.²

(2) *Management of Estate for Benefit of Heirs.* — It is not his duty, nor has he the authority, to manage the estate for the benefit of the heirs, or to engage in business with the property of the estate.³

1. When Not Personally Liable. — In *Grier v. Huston*, 8 S. & R. (Pa.) 402, 11 Am. Dec. 627, it was held that an administrator to whom money has been paid by mistake, and who appropriated it to the payment of the decedent's debts, without notice of the mistake, was not liable to an action against him personally for its recovery if the estate was insolvent.

The case of *Call v. Houdlette*, 70 Me. 312, was an action for money had and received. The facts were as follows: The plaintiff and the defendant's intestate were joint owners of a brig which had been let to a third person. The intestate, being in possession of the bill of lading, brought an action on it in his own name to recover the freight. The action was pending at his death, and the defendant appeared as administrator, prosecuted the action to judgment, collected the money, and paid it out for the benefit of one Whitmore, to whom the intestate had assigned the claim before he died. Thereupon the plaintiff sued the defendant for his share of the freight, and the question involved was whether the action would lie against the defendant in his individual capacity. It was held on these facts that he was liable only in his representative capacity, and not individually. Peters, J., delivering the opinion of the court, said: "The defendant cannot be personally liable to the plaintiff for money collected in his name as administrator, unless he was notified not to pay it over before he did pay it over, or unless he acted fraudulently in withholding it from the plaintiff. It must be borne in mind that the defendant was not an intermeddler or a trespasser. His possession was in no sense a wrongful one." And again: "If the defendant in good faith paid over the money or allowed it to be appropriated for the benefit of the estate he represented, without notice not to pay it over, he is not personally liable therefor."

2. Preservation of Estate — Ordinary Care Required. — *Cooper v. Williams*, 109 Ind. 270; *Messmore v. Stone*, 6 Ky. L. Rep. 596; *Fudge v. Durn*, 51 Mo. 264; *Cornwell v. Deck*, 8 Hun (N. Y.) 122, *affirming* 2 Redf. (N. Y.) 87; *King v. Talbot*, 40 N. Y. 76; *McCabe v. Fowler*, 84 N. Y. 314.

Surety Debts — Assent to Extension of Time. — The general power of an administrator to preserve the estate includes authority to assent to an extension of the time of payment of a debt for which the decedent was surety. *Smarr v. McMaster*, 35 Mo. 349.

Taking Security for Debts. — An executor or administrator may, without an order of court, take a mortgage to secure a debt due the estate. *Walling v. Lewis*, 119 Ind. 496. See also *infra*, this section, *Personal Property — Collection of Debts*.

Insuring Debtor's Life. — In *Garner v. Moore*, 3 Drew. 277, 24 L. J. Ch. 687, an executor without special authority applied the testator's assets for several years in insuring the life of a debtor of the estate. He then dropped the policy without consulting the persons beneficially interested, and without applying for the direction of the court in an administration suit then pending. It was held that he was liable for the whole sum that would have been recovered if he had kept up the policy.

Employing Laborers. — When necessary for the preservation of the estate, an administrator may hire and board hands. *Powell v. Powell*, 23 Mo. App. 365.

As to contracts for services, see also *supra*, this title, *Powers, Duties, and Liabilities in General — Contracts*.

Medical Attendance for Slaves. — In *Bomford v. Grimes*, 17 Ark. 567, it was held that an administrator had authority to employ medical attendance for slaves belonging to the estate. By analogy this decision would probably be applicable to the employment of a veterinary surgeon to attend a sick animal belonging to the estate of the decedent.

Property Specifically Bequeathed. — It is the duty of the personal representative to get in and preserve things which are specifically bequeathed, so that they may be delivered to the legatees in kind. *Hayes v. Hayes*, 45 N. J. Eq. 461.

Discretion as to Manner of Keeping Assets. — In *Matter of Welch*, 110 Cal. 605, it was said that the court of probate has no power to direct an administrator where and how he shall keep the assets of the estate.

3. No Duty to Manage Estate for Benefit of Heirs. — *Brenham v. Story*, 39 Cal. 179; *McMahan v. Harbert*, 35 Tex. 451.

Speculation with Assets Forbidden. — *Kellar v. Beclor*, 5 T. B. Mon. (Ky.) 573; *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376.

Engaging in Trade. — Executors or administrators embarking the property of the estate in trade become personally liable on their contracts. *Wightman v. Townroe*, 1 M. & S. 412; *Griffin v. Bland*, 43 Ala. 542; *Johnson v. Kellog*, (Supreme Ct.) 8 N. Y. St. Rep. 413, 26 N. Y. Wkly. Dig. 467; *Matter of Sharp*, 5 Dem.

(3) *Confusion of Trust Property with Individual Property.* — An executor or administrator, being considered as a trustee for the creditors, legatees, and next of kin, is expected and required to preserve the property of the decedent separate and apart from his own, and to give it an earmark, that it may be known and readily traced. And if he does so, the court will do everything that can be done to protect and assist him; but if he fails in this duty, and the property of the estate is so mingled or confused with his own property that it cannot be identified, it is a technical conversion, rendering him personally liable in case of loss, without regard to the question whether the loss was caused by any fault of his.¹ But it is not fraud *per se* to mingle private and official funds.²

(4) *Insurance.* — He is not obliged to insure the decedent's property against fire, or to continue insurance procured by the decedent in his lifetime.³

(N. Y.) 516; Callaghan v. Hall, 1 S. & R. (Pa.) 241.

They are chargeable with all the assets which come into their hands, including profits, but they are not allowed credit for disbursements, even though they acted in perfect good faith. *Merritt v. Merritt*, 62 Mo. 150; *Prescott's Estate*, Tuck. (N. Y.) 430; *Lucht v. Behrens*, 28 Ohio St. 231; *Matter of Wood*, 1 Ashm. (Pa.) 314; *Hooper v. Hooper*, 29 W. Va. 276.

It Is a Well-settled Principle in equity that wherever a trustee, or one standing in a fiduciary character, deals with the trust estate for his own personal profit, he shall account to the *cestuis que trust* for all the gain which he has made. If he uses the trust money in speculations, dangerous though profitable, the risk will be his own, but the profit will inure to the *cestuis que trustent*. *Barney v. Saunders*, 16 How. (U. S.) 535; *Dowling v. Feeley*, 72 Ga. 557.

And the Cestuis Que Trustent Have the Right to Elect whether they will hold the personal representative accountable for the interest which he might lawfully have made with reasonable diligence, or for the profits actually realized. *Billingslea v. Glenn*, 45 Ala. 540; *Matter of Holbert*, 39 Cal. 597; *Johnson v. Hedrick*, 33 Ind. 129; *Powell v. Cooper*, 42 Miss. 221; *McGeary's Estate*, 33 Pittsb. Leg. J. (Pa.) 405.

1. Duty to Keep Trust Property Separate. — *England.* — *Wankford v. Wankford*, 1 Salk. 306; *Freeman v. Fairlie*, 3 Meriv. 39.

United States. — *Trecothick v. Austin*, 4 Mason (U. S.) 29.

Colorado. — *Hake v. Stotts*, 5 Colo. 140.

Maryland. — *Neale v. Hagthorpe*, 3 Bland (Md.) 551.

New York. — *Kellett v. Rathbun*, 4 Paige (N. Y.) 102.

See also *infra*, this section, *Deposit of Funds*.

"Executors and trustees must be made to understand that it is their duty to keep the funds of their trust separate and distinct from their other funds and business; that they should upon no consideration use the trust money themselves, or permit it to be mingled with their own moneys or property. In no other way can they save themselves from trouble, litigation, and censure. If they neglect this obvious duty, they have no reason to complain if they meet with trouble and expense, and sometimes with heavy loss." *Case v. Abeel*, 1 Page (N. Y.) 393.

Effect of Mingling Assets. — When an executor mingles assets of the estate with his own property so that they can no longer be distinguished, the property in such assets is of necessity altered and vested in the executor individually. They become converted, or, technically speaking, "administered," and the executor remains accountable for their value. *Rorke v. McConville*, 4 Redf. (N. Y.) 291; *Prescott v. Morse*, 62 Me. 447; *Cox v. Wills*, 49 N. J. Eq. 130; *Henderson v. Henderson*, 58 Ala. 582; *Union Bank v. Smith*, 4 Cranch (C. C.) 509.

Application of Rule. — In *Key v. Boyd*, 10 Ala. 154, an executor loaned money of the estate to one Hall, and took a note executed by one Holt, secured by a mortgage from Holt to Hall. When the note became due Hall took it up and gave the executor a note for a larger amount, secured by a mortgage from Holt on property then supposed to belong to him; but the title afterwards failed. The first note was surrendered by the executor in part payment for the larger one. It was held that the executor was liable for the amount lost by the failure of the mortgage security, because he had mingled assets of the estate with his individual funds. See also *Rolain v. Darby*, 1 McCord Eq. (S. Car.) 472, in which case it was held that money paid to an executor on account of a sale, for a gross sum, of goods consisting partly of property of the estate and partly of his individual property would be presumed to have been on account of the property belonging to the estate.

2. Mingling Private and Official Funds Not Fraud Per Se. — *Goodwin v. American Nat. Bank*, 48 Conn. 567.

3. Not Required to Insure Property of Estate. — *Bailey v. Gould*, 4 Y. & Coll. 221; *Dorch v. Dortch*, 71 N. Car. 224.

Precautions Against Loss by Fire. — In *Rubottom v. Morrow*, 24 Ind. 202, 57 Am. Dec. 324, it was held that while an administrator is not obliged to insure the decedent's property, he ought to take such precautions against loss by fire as prudent men are, under similar circumstances, accustomed to exercise to indemnify themselves against the like casualty.

Burden of Proving Negligence. — In *Johnson's Estate*, 11 Phila. (Pa.) 83, 32 Leg. Int. (Pa.) 218, it was held that where it was sought to charge the executor with negligence in not insuring, the burden of proof rested on the party charging such neglect of duty to prove

But he has authority to insure, and to pay premiums accruing after the decedent's death on policies taken out by the decedent, in order to protect the estate in his hands; and this authority extends to real estate if the realty is necessary for the payment of debts.¹

(5) *Payment of Taxes* — (a) *Taxes on Personal Property*. — Personal property belonging to the decedent's estate is generally taxable to the personal representative, and it is therefore the duty of the personal representative to pay the taxes on it.²

(b) *Taxes on Real Estate* — *aa. TAXES ACCRUING BEFORE OWNER'S DEATH*. — Taxes on real estate which accrue during the lifetime of the owner constitute a debt of the estate which the personal representative must pay.³

bb. TAXES ACCRUING AFTER OWNER'S DEATH — (*aa*) *General Rule*. — But the general rule is otherwise as to taxes accruing on real estate after the death of the owner. These the personal representative is not required to pay, because the title to the real estate of the decedent descends to and vests in his heirs, and the personal representative owes no duty to the heirs in regard to the protection of the real estate.⁴

(*bb*) *Real Estate Required for Payment of Debts*. — When the real estate of a decedent is required for the payment of his debts, the personal representative, in order to protect the title for that purpose, has authority to pay taxes accruing after the decedent's death.⁵

the affirmative and make out their case, both as to the facts and the law, and it was said that no law had been cited establishing it as the executor's duty to insure.

Liability on Decedent's Covenant to Insure. — In *Fry v. Fry*, 27 Beav. 146, 28 L. J. Ch. 593, it was held that executors were not personally liable for not having kept up insurance on property leased by their testator, though the lease contained a covenant that the lessee should insure. In this case the insurance expired on March 25, and the lessee died two days later, without having paid the premium, and the house was burned on May 26 following.

1. Authority to Insure. — *Cornwell v. Deck*, 2 Redf. (N. Y.) 87.

Payment of Premiums by Personal Representative. — It is proper for the personal representative to pay assessments levied under a policy after the death of the testator, where the policy by its terms makes the assessments liens on the property insured. *Tuttle v. Robinson*, 33 N. H. 104; *Cornwell v. Deck*, 2 Redf. (N. Y.) 87.

Insurance of Real Estate. — An administrator of an insolvent estate has an insurable interest in buildings belonging to it. *Trade Ins. Co. v. Barracloft*, 45 N. J. L. 549, 46 Am. Rep. 792; *Matter of Van Houten*, 18 Misc. Rep. (N. Y. Surrogate Ct.) 524; *Herkimer v. Rice*, 27 N. Y. 163; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

As to insurable interest of personal representatives, see also the title *INSURANCE*.

Real Estate Devised to Executors. — Where real estate is devised to the executors they have an insurable interest in it by virtue of the trust. *Phelps v. Gebhard F. Ins. Co.*, 9 Bosw. (N. Y.) 404.

Statutory Authority to Insure. — It is now provided by statute in *England* that it shall be lawful for, but not obligatory upon, an executor or administrator to insure against loss or damage by fire any buildings or other in-

surable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and to pay the premiums for such insurance out of the income thereof, or out of the income of any other property, without obtaining the consent of any person who may be entitled wholly or partly to such income. Statute 51 & 52 Vict., c. 59, § 7.

2. Taxes on Personal Property Payable by Personal Representative — *Connecticut*. — *Cornwall v. Todd*, 38 Conn. 443.

Iowa. — *McGregor v. Vampel*, 24 Iowa 436.

Massachusetts. — *Cook v. Leland*, 5 Pick. (Mass.) 236.

Michigan. — *Herrick v. Big Rapids*, 53 Mich. 554.

New Jersey. — *State v. Holmdel Tp.*, 39 N. J. L. 79; *State v. Jones*, 39 N. J. L. 650.

New York. — *Williams v. Holden*, 4 Wend. (N. Y.) 223; *People v. Ogdensburgh*, 48 N. Y. 390.

Oregon. — *Johnson v. Oregon City*, 2 Oregon 327.

Tennessee. — *Gallatin v. Alexander*, 10 Lea (Tenn.) 475.

3. Taxes Accruing on Real Estate Before Owner's Death. — *Henderson v. Whiting*, 56 Ind. 131; *Findley v. Taylor*, 97 Iowa 420; *Bowers v. Williams*, 34 Miss. 324; *Larour v. Larour*, 2 Redf. (N. Y.) 69; *Griswold v. Griswold*, 4 Bradf. (N. Y.) 216.

4. No Duty to Pay Taxes Accruing on Realty After Owner's Death. — *Moody v. Hemphill*, 71 Ala. 169; *Phelps v. Funkhouser*, 39 Ill. 401; *Henderson v. Whiting*, 56 Ind. 131; *Stone v. Wood*, 16 Ill. 177; *Fessenden, Appellant*, 77 Me. 98.

And the same rule applies to special tax bills accruing before the owner's death on account of public improvements. *Motier's Estate*, 7 Mo. App. 514.

5. Realty Required for Payment of Debts. — In *Bowers v. Williams*, 34 Miss. 324, the court

(cc) *Real Estate in Possession of Personal Representative.* — He may also pay taxes on real estate of which he is lawfully in possession.¹

(dd) *Testamentary Direction to Pay Taxes.* — And the duty to pay taxes on real estate may be imposed on a personal representative by a direction contained in the will under which he is acting.²

(e) *Property Mortgaged to Estate.* — It is the duty of an executor or administrator to pay taxes on property mortgaged to the estate when the mortgagor neglects to pay them.³

(d) *Liability for Nonpayment of Taxes.* — If an executor or administrator neglects to pay taxes which it is his duty to pay, he is responsible for any loss that may result from his neglect;⁴ but the duty to pay taxes, and the corresponding liability for neglect to do so, depend on whether the personal representative has or ought to have money with which to do it.⁵

(6) *Redemption of Property of Estate.* — If the property of an estate to which the executor or administrator is entitled by law or under the will of the deceased owner is sold or forfeited under any law or process, or by reason of nonperformance of the conditions contained in any mortgage, pledge, or other contract respecting it, the executor or administrator has the same right of redemption that the decedent would have had.⁶

(7) *Deposit of Funds* — (a) *Duty and Propriety.* — The duty of the personal representative to keep safely the funds of the estate in his hands involves the necessity of a temporary deposit of funds until they can be paid out or distributed in the course of the administration, or until they can be invested, in those cases where the personal representative is required to invest. As a general rule there is no absolute requirement of law that funds of the estate shall be deposited in a bank or other repository where money is usually placed for safe keeping, but the duty of the personal representative in such matters is governed by the rule that he must exercise the care and prudence that ordinarily prudent men exercise in regard to their own affairs; and this is the measure of his responsibility if he fails to deposit the funds of the estate in a safe place.⁷

said: "Under our law, land is subject to the payment of debts, and can be sold under certain restrictions for that purpose. It is as much a fund which the administrator is bound to protect, if he entertain a well-founded belief that a sale may be necessary, as personal estate itself. The power to sell, even under the restrictions of the law, carries with it the power to protect the title; and if redemption, or the payment of taxes, be necessary for this purpose, he can, of course, apply the funds of the estate in this way, and receive credit therefor in his settlement with the court."

If an Estate Is Insolvent it is proper and prudent for the executor or administrator to preserve the real estate by paying taxes on it. *Matter of Van Houten*, 18 Misc. Rep. (N. Y. Surrogate Ct.) 524.

1. *Real Estate Taken Charge Of by Administrator.* — In *Lewis v. Carson*, 16 Mo. App. 342, it was held that when an administrator, with the consent of the devisees, has taken charge of the real estate of the deceased, it is his duty to pay the taxes thereon.

As to the power of an independent executor to pay taxes on land in his possession, see *Moore v. Bryant*, 10 Tex. Civ. App. 131.

2. *Testamentary Direction to Pay Taxes — Liability for Default.* — *Tickel v. Quinn*, 1 Dem. (N. Y.) 425. See *infra*, this section, *Liability for Nonpayment of Taxes.*

3. *Taxes on Property Mortgaged to Estate.* — *Whittaker v. Wright*, 35 Ark. 511.

4. *Liability for Statutory Penalty.* — An executor who fails to pay taxes when he has funds for that purpose is chargeable with the amount of the penalty imposed by law for the nonpayment of taxes. *Matter of Herteman*, 73 Cal. 545; *Stubbs v. Stubbs*, 4 Redf. (N. Y.) 170; *Palmer's Estate*, 2 Del. Co. Rep. (Pa.) 180. See *supra*, this section, *Testamentary Direction to Pay Taxes.*

The exercise of ordinary prudence, however, relieves executors from liability for loss resulting from the nonpayment of taxes within the specified time. *McKee's Estate*, 30 Pittsb. Leg. J. (Pa.) 392.

Real Estate Lost by Neglect. — A personal representative is liable for the value of real estate which is lost in consequence of his neglect to pay taxes. *Matter of Herteman*, 73 Cal. 545.

5. *Not Liable for Nonpayment Unless He Had Funds.* — *Thompson v. Thompson*, 77 Ga. 602.

6. *Redemption of Property of Estate.* See the titles CHATTEL MORTGAGES, vol. 5, p. 945; EQUITY OF REDEMPTION, *ante*; EXECUTIONS, *ante*; PLEDGE AND COLLATERAL SECURITY; TAXATION.

7. *Duty to Deposit Funds.* — *Matter of Scudder*, 21 Misc. Rep. (N. Y. Surrogate Ct.) 179

Statutory Requirements — In Louisiana, by statute, it is made the duty of personal representatives to deposit funds of the estate in bank.¹

In New York the surrogate may compel personal representatives to deposit the funds in a trust company, where they disagree as to an investment, or are of doubtful responsibility;² and temporary administrators and public administrators are especially charged by statute with the duty of depositing funds of the estate.³

(b) **Selection of Depositary.** — Ordinary care must be exercised in selecting a depositary in whose keeping the funds of the estate will be safe.⁴ And though ordinarily a domestic bank should be chosen, it is not necessarily a breach of duty to deposit the funds in a bank in another state;⁵ and deposits may be made in savings banks as well as in ordinary banks of deposit.⁶

(c) **Loss of Funds Deposited — Failure of Depositary** — *aa.* IN GENERAL. — If an executor or administrator, in his representative capacity, deposits funds of the estate in a bank in good standing, and nothing occurs to indicate that the affairs of the bank are in such condition as would lead a reasonably prudent man to withdraw the funds, he is not liable for the loss thereof, though resulting from the subsequent failure of the bank;⁷ but he is liable if there was no

[citing *King v. Talbot*, 40 N. Y. 76; *McCabe v. Fowler*, 84 N. Y. 318].

Failure to Deposit Funds renders the executor or administrator liable for their loss, if his conduct was negligent under the circumstances. *Tarver v. Torrance*, 81 Ga. 261, 12 Am. St. Rep. 311; *Cornwell v. Deck*, 8 Hun (N. Y.) 122. But if he was not guilty of negligence in keeping the funds about his person or in his house, instead of depositing them in bank, he is not liable for their loss by theft, fire, or other casualty. *State v. Meagher*, 44 Mo. 356, 100 Am. Dec. 298; *Fudge v. Durn*, 51 Mo. 264; *Greenwell v. Crow*, 73 Mo. 638; *Stevens v. Gage*, 55 N. H. 175, 20 Am. Rep. 191; *Furman v. Coe*, 1 Cal. Cas. (N. Y.) 96; *Montgomery v. Coldwell*, 14 Lea (Tenn.) 29.

"His Duty Is to Deposit such funds in bank; and this duty is satisfied, apart from statutory limitations, if the bank, at the time of deposit, is in good reputation, and if there is nothing in way of public rumor subsequently occurring which would lead a good business man to withdraw his funds." *Wharton on Neg.*, § 519. See also *infra*, this section, *Loss of Assets*.

1. **Louisiana Statute.** — The Louisiana statute of 1837 makes it the duty, under penalty, of an executor or administrator to deposit the funds of the estate in a chartered bank of the state, or branch bank, allowing interest on deposits, if there be one in the parish where the executor or administrator resides and the succession is open. And it is held that the object of the statute is not so much the safety of the funds as to render them productive. *Peytavin's Succession*, 7 Rob. (La.) 478; *Mt. Carmel Church v. Farrelly*, 34 La. Ann. 533.

2. **New York Statute Compelling Deposit.** — *Matter of Gilman*, 41 Hun (N. Y.) 561; *In re O'Connor*, (Surrogate Ct.) 1 N. Y. Supp. 110.

3. **Requirement that Temporary Administrator Shall Deposit Funds.** — *Livermore v. Wortman*, 25 Hun (N. Y.) 341; *Harrington v. Libby*, 6 Daly (N. Y.) 259; *Haskin v. Teller*, 3 Redf. (N. Y.) 316.

Requirement that Public Administrator Shall Deposit Funds. — *Lockhart v. Public Administrator*, 4 Bradf. (N. Y.) 21.

4. **Selection of Depositary — Ordinary Care Required.** — *Barney v. Saunders*, 16 How. (U. S.) 535; *Sheerin v. Public Administrator*, 2 Redf. (N. Y.) 421.

Executors are justifiable in depositing money belonging to the estate with the same persons to whom the testator in his lifetime intrusted his money, though they are not bankers. *Dorchester v. Effingham*, Tamlyn 279.

Deposit in State Treasury. — In *Morton v. Smith*, 1 Desaus. (S. Car.) 123, where an executor without leave of court deposited funds of the estate in the state treasury, and loss was sustained in consequence of the depreciation of the certificates issued by the state for the money so deposited, it was contended that the executor should be charged with the loss. The court said that "although the executor had not the sanction of this court for depositing the money in the state treasury, yet as in all probability if he had retained the money in his hands, as he had been directed to do, it would have perished there (as the paper currency of the country did during the war), and the money totally lost, it would be very hard on the executor to punish him and make him liable where he acted for the best."

5. **Deposit in Foreign Bank.** — *Moore v. Eure*, 101 N. Car. 11, 9 Am. St. Rep. 17.

Deposits Made by Decedent in Foreign Bank. — A personal representative may allow funds to remain on deposit in a foreign bank where they were placed by the decedent. *Denegre v. Denegre*, 33 La. Ann. 694; *Woodley v. Holley*, 111 N. Car. 380.

6. **Deposit in Savings Bank.** — *Guthrie v. Wheeler*, 51 Conn. 216.

7. **Failure of Depositary — No Liability When Due Care Was Exercised** — *England.* — *Swinfen v. Swinfen*, 29 Beav. 211; *Johnson v. Newton*, 11 Hare 160.

United States. — *Ex p. Jones*, 4 Cranch (C. C.) 185.

Colorado. — *State v. Walsen*, 17 Colo. 170.

Indiana. — *Norwood v. Harness*, 98 Ind. 134, 49 Am. Rep. 739.

New Jersey. — *Jacobus v. Jacobus*, 37 N. J. Eq. 17; *Cox v. Roome*, 38 N. J. Eq. 259.

necessity for making the deposit,¹ or if he deposits money when he should have paid it over forthwith,² or if he made the deposit under an agreement that it should remain for a long time,³ or if the bank was reputed of doubtful solvency, and by the exercise of reasonable diligence the personal representative might have known it.⁴ But the consent of the beneficiaries to the deposit will relieve the personal representative from liability for loss.⁵

bb. DEPOSIT IN INDIVIDUAL NAME. — An executor or administrator is personally liable for the loss of funds of the estate by the failure of the bank in which he had deposited them, if the deposit was made in his individual name, though he believed the bank to be solvent and safe, and it was in good standing and credit at the time when the deposit was made.⁶ And his liability for the loss of funds so deposited is independent of any question of negligence or intention in making the deposit in such form;⁷ nor is it material that he had at the time no money of his own deposited in the bank,⁸ or that he informed the bank, at the time of the deposit, that the funds belonged to the estate.⁹

The Principle Involved is that such an act is of itself a conversion of the funds.¹⁰

cc. DEPOSITS MADE BY DECEDENT. — When funds deposited in bank by a decedent are permitted to remain by the personal representative, he is not liable for loss arising from the insolvency of the bank, unless he was guilty of negligence in not withdrawing the deposit.¹¹

New York. — *People v. Faulkner*, 107 N. Y. 488.

North Carolina. — *Moore v. Eure*, 101 N. Car. 11, 9 Am. St. Rep. 17.

Pennsylvania. — *Seidler's Estate*, 5 Phila. (Pa.) 85, 19 Leg. Int. (Pa.) 149; *Law's Estate*, 144 Pa. St. 499.

South Carolina. — *Fitzsimons v. Fitzsimons*, 1 S. Car. 400; *Twitty v. Houser*, 7 S. Car. 153. *Washington.* — *Matter of Kohler*, 15 Wash. 613.

In *Maryland* it has been held that if an executor deposits money in bank without an order of court, and the bank fails, he is liable for the loss. *Bacon v. Howard*, 20 Md. 191.

Liability for Interest on Funds Lost by Failure of Depository. — See *infra*, this title, *Accounting*.

1. *Unnecessary Deposit.* — *Darke v. Martyn*, 1 Beav. 525.

2. *Deposit When Distribution Should Have Been Made.* — *Harlow v. Mills*, 58 Hun (N. Y.) 391, 128 N. Y. 650.

3. *Deposit on Time.* — *Baskin v. Baskin*, 4 Lans. (N. Y.) 90.

4. *Bank of Doubtful Solvency.* — *Norwood v. Harness*, 98 Ind. 143, 49 Am. Rep. 739.

In *Matter of Scudder*, 21 Misc. Rep. (N. Y. Surrogate Ct.) 179, an administrator was held liable where funds of the estate were lost by the failure of the bank in which he deposited them, where he was an officer of the bank and had the active management of it, and knew when he made the deposit that the bank must eventually fail.

5. *Deposit with Consent of Parties Interested.* — *Wilks v. Groom*, 2 Jur. N. S. 681, 25 L. J. Ch. 724, 3 Drew. 584; *Matter of Maxwell*, 23 Abb. N. Cas. (N. Y. Surrogate Ct.) 23, 1 Connolly (N. Y.) 230.

6. *Deposit in Individual Name — Liability for Loss.* — *Ditmar v. Bogle*, 53 Ala. 169; *Allen v. Leach*, (Del. 1894) 29 Atl. Rep. 1050; *Corya v. Corya*, 119 Ind. 503; *Lagarde's Succession*, 20 La. Ann. 148; *Milmo's Succession*, 47 La. Ann. 126; *McAllister v. Com.*, 30 Pa. St. 536; *Williams v. Williams*, 55 Wis. 300.

Mingling Funds of Estate with Individual

Funds. — If an executor or administrator pays the money of the estate into a banker's, not on any distinct account, but mixing it with his own money, he is answerable for the loss sustained by the failure of the banker. *Wren v. Kirton*, 11 Ves. Jr. 377; *Fletcher v. Walker*, 3 Madd. 73; *Massey v. Banner*, 4 Madd. 413, 1 Jac. & W. 241; *Robinson v. Ward*, R. & M. 274, 21 E. C. L. 438, 2 C. & P. 59, 12 E. C. L. 28.

7. *Liability Not Dependent on Negligence.* — *Com. v. McAlister*, 28 Pa. St. 480, 30 Pa. St. 530.

Liability Not Affected by Intent. — The good faith or intention of the administrator in depositing the funds of the estate in his own name does not in any way affect the liability if they are lost by the insolvency of the bank, but he is liable though he made the deposit for the express purpose of keeping it separate from his individual funds. *Matter of Arguello*, 97 Cal. 196.

8. *Where Personal Representative Had No Individual Funds in the Bank.* — *Matter of Arguello*, 97 Cal. 196; *Summers v. Reynolds*, 95 N. Car. 404.

9. *Notice to Bank of Trust Character of Funds.* — *Horner v. Horner*, 66 Mo. App. 531.

10. *Conversion.* — *Union Bank v. Smith*, 4 Cranch (C. C.) 509; *Ivey v. Coleman*, 42 Ala. 409; *Ditmar v. Bogle*, 53 Ala. 169. But see *Atterberry v. McDuffee*, 31 Mo. App. 603, in which case it was held that a *bona fide* deposit of funds in a bank in the executor's own name will protect him against loss which occurs, not on account of the form of the deposit, but by the failure of the bank, where it clearly appears that the money belonged to the estate and was not mingled with the individual money of the executor. See also *Kirby v. State*, 51 Md. 383; *State v. Cheston*, 51 Md. 352; *Crane v. Moses*, 13 S. Car. 561.

11. *Deposits Made by Decedent.* — *Churchill v. Hobson*, 1 P. Wms. 241; *Swinfen v. Swinfen*, 29 Beav. 211; *Rowth v. Howell*, 3 Ves. Jr. 565;

dd. FAILURE TO PAY OUT FUNDS ON DEPOSIT. — If an executor or administrator deposits money of the estate in a bank and allows it to remain on deposit after the time when it should have been distributed, and the money is lost by the failure of the bank, he is liable for the loss.¹

(8) *Investments and Loans* — (a) *Duty to Invest Funds of Estate.* — It is not one of the ordinary duties of an executor or administrator, *virtute officii*, to invest funds of the estate for the purpose of producing income, as is the case with other trustees,² and he has no right, nor is he required by law, to do so, if he has the opportunity of paying the funds over to creditors or those entitled to distribution;³ but he will not be permitted to keep the funds idle and unproductive in his hands, and if for any reason he is unable for a considerable time to disburse them in the usual course of administration it is his duty to invest them.⁴ Circumstances may exist, however, which will justify an executor or

Norwood v. Harness, 98 Ind. 134, 49 Am. Rep. 739; McCabe v. Fowler, 84 N. Y. 314; Hanbest's Appeal, 92 Pa. St. 482.

In Cook v. Barnes, (Ky. 1897) 43 S. W. Rep. 682, an executor was held not liable for the loss of money deposited in bank by his testator, where the latter directed him to draw it out gradually in order to avoid embarrassing the bank, and business men advised him that if he attempted to draw it out all at once the bank would suspend and he would lose the deposit, and it appeared that he withdrew considerable sums until he became too ill to attend to business, and the bank meantime failed.

1. *Failure to Pay Out Funds on Deposit* — *Louisiana.* — Mandeville v. Arnoult, 9 Rob. (La.) 447.

Minnesota. — Wood v. Myrick, 17 Minn. 408.

Nevada. — McNabb v. Wixom, 7 Nev. 163.

New York. — Matter of Knight, 21 Abb. N. Cas. (N. Y. Supreme Ct.) 388. See also Harlow v. Mills, 58 Hun (N. Y.) 391, 128 N. Y. 650.

North Carolina. — Woodley v. Holley, 111 N. Car. 380.

Where Funds Are Deposited Awaiting Opportunity for Investment as directed by the will, the personal representative is not liable for loss by the failure of the bank before withdrawal. Matter of Maxwell, 1 Conolly (N. Y.) 230.

Where Funds Are Deposited to Await the Termination of Litigation regarding them, the personal representative is not liable for their loss. Twitty v. Houser, 7 S. Car. 153.

2. *Investment of Funds Not One of Primary Duties.* — In Clark v. Knox, 70 Ala. 607, 45 Am. Rep. 93, it was said that "unlike a guardian or other trustee, whose duty it is to make interest, and who is, therefore, *prima facie* chargeable with it, the executor or administrator is not charged with that duty, and has not, ordinarily, powers which will enable him to make interest. His whole duty is performed if he keeps safely the funds coming to his hands, not appropriating them to his own uses, or deriving profit from the use of them, and accounting for them properly in the due and regular course of administration as prescribed by law, involving others in no loss by unreasonable delay in the settlement of his accounts." See also Lee v. Lee, 2 Vern. 548; Gerald v. Bunkley, 17 Ala. 170; State v. Johnson, 7 Blackf. (Ind.) 529; Kellar v. Beelor, 5 T. B. Mon. (Ky.) 578; Karr v. Karr, 6 Dana

(Ky.) 3; Chambers v. Kerns, 6 Jones Eq. (59 N. Car.) 280.

By Early English Cases it was held that an executor or administrator was under no obligation to invest unemployed funds of the estate in his hands for the purpose of producing income for the estate, but that he could use the funds if he saw fit, even for his own advantage, without becoming liable for interest. Ratcliffe v. Graves, 1 Vern. 197; Adams v. Gale, 2 Atk. 106.

3. *Funds Subject to Immediate Disbursement or Distribution — No Right or Duty to Invest.* — Candee v. Skinner, 40 Conn. 464; Guthrie v. Wheeler, 51 Conn. 214; Sanderson v. Sanderson, 17 Fla. 820; Wadsworth v. Connell, 104 Ill. 369; Thornton v. Smiley, 1 Ill. 34; Webb v. Conn. Litt. Sel. Cas. (Ky.) 475; Carrol v. Connet, 2 J. J. Marsh. (Ky.) 203; Jennings v. Davis, 5 Dana (Ky.) 133; Mathis v. Mathis, 18 N. J. L. 59; Jacot v. Emmett, 11 Paige (N. Y.) 142; Dortch v. Dortch, 71 N. Car. 224; *In re Spellier's Estate*, 17 Pa. Co. Ct. Rep. 286, 4 Pa. Dist. Rep. 678.

"The safest and therefore the best investment a man can make is to pay his debts, and especially is this true of an estate in process of settlement." Guthrie v. Wheeler, 51 Conn. 207.

If There Are Debts to Be Paid the administrator has no right to lend the money of the estate, and if he does so without an order of the probate court he is guilty of waste. State v. Johnson, 7 Blackf. (Ind.) 529.

If Payment of the Fund in Hand May Be Required at Any Time by legatees or distributees, no duty to invest rests on the executor or administrator. Jacot v. Emmett, 11 Paige (N. Y.) 142.

After an Order to Render Account, the executor or administrator has no authority to invest; but if he does so, and the investment appears to be to the advantage of the estate, he may be ordered to bring it into court, and it will be treated as money. Widdowson v. Duck, 2 Meriv. 494. See also Bethell v. Abraham, L. R. 17 Eq. 24.

The Administrator of a Deceased Guardian has no authority to invest funds belonging to the ward. Moorehead v. Orr, 1 S. Car. 304.

4. *Duty to Invest Unemployed Funds* — *England.* — Littlehales v. Gascoyne, 3 Bro. C. C. 73; Franklin v. Frith, 3 Bro. C. C. 433; Perkins v. Baynton, 1 Bro. C. C. 375; Byrchall v. Bradford, 6 Madd. 13; Newton v. Bennet, 1

administrator in keeping the funds unemployed in his hands. Thus it may be necessary for him to keep on hand a considerable sum to meet expenses of administration or contingent liabilities, such as litigated claims, or where payment to the persons entitled may be demanded at any time.¹ And if a probability appears that there will be considerable delay before the funds can be paid over, and the personal representative is in doubt as to his duty in the premises, he should apply to the court for leave to invest.²

If Personalty Is Bequeathed for Life or Years, with remainder over, it is the duty of the executor to invest it for the benefit of the legatee,³ unless it was the inten-

Bro. C. C. 359; Lowry v. Fulton, 9 Sim. 115.

Florida. — Eppinger v. Canepa, 20 Fla. 262; Moore v. Felkel, 7 Fla. 44.

Illinois. — Hough v. Harvey, 71 Ill. 72.

Maryland. — Chase v. Lockerman, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; Thomas v. Frederick County School, 9 Gill & J. (Md.) 115; Mickle v. Cross, 10 Md. 362; Ing v. Baltimore Assoc., 21 Md. 426; Smithers v. Hooper, 23 Md. 285; Gwynn v. Dorsey, 4 Gill & J. (Md.) 453; Lyles v. Hatton, 6 Gill & J. (Md.) 122; *Ex p.* Shipley, 4 Md. 493.

Missouri. — Matter of Davis, 62 Mo. 450; Garesche v. Priest, 9 Mo. App. 270, 78 Mo. 126.

New Jersey. — King v. Berry, 3 N. J. Eq. 261; Frost v. Denman, 41 N. J. Eq. 47; Woodruff v. Ward, 35 N. J. Eq. 467; Frey v. Demarest, 17 N. J. Eq. 71; Hetfield v. Debaud, 54 N. J. Eq. 371.

New York. — Dunscomb v. Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504; De Peyster v. Clarkson, 2 Wend. (N. Y.) 78; Ogilvie v. Ogilvie, 1 Bradf. (N. Y.) 356; Matter of Black, 6 Dem. (N. Y.) 331; Schieffelin v. Stewart, 1 Johns. Ch. (N. Y.) 620; Manning v. Manning, 1 Johns. Ch. (N. Y.) 527; Matter of Mapes, 5 Dem. (N. Y.) 446; Matter of Woodworth, 5 Dem. (N. Y.) 156.

Pennsylvania. — Walthour v. Walthour, 2 Grant's Cas. (Pa.) 102; Vogdes's Estate, 6 Pa. Co. Ct. Rep. 441, 23 W. N. C. (Pa.) 471.

South Carolina. — *Ex p.* Glenn, 20 S. Car. 64; Wright v. Wright, 2 McCord Eq. (S. Car.) 194; Brown v. Vinyard, Bailey Eq. (S. Car.) 460; Jones v. West, 2 Hill L. (S. Car.) 561, note b; Davis v. Wright, 2 Hill L. (S. Car.) 560; Dixon v. Hunter, 3 Hill L. (S. Car.) 204.

Vermont. — Perkins v. Hollister, 59 Vt. 348.

Virginia. — Leake v. Leake, 75 Va. 792.

See also cases cited *infra*, this title, *Accounting* — *Charges* — *Interest* — *When Interest Is Chargeable*.

If There Is No Probability that Early Payment Will Be Required it is the duty of the executor or administrator to invest the funds in his hands. Frey v. Demarest, 17 N. J. Eq. 71.

If the Residence of a Distributee Be Unknown, and cannot be ascertained on reasonable inquiry, it is the duty of the personal representative, after a reasonable time (one year in *Pennsylvania*), to invest the fund. Walthour v. Walthour, 2 Grant's Cas. (Pa.) 102; Vogdes's Estate, 23 W. N. C. (Pa.) 471, 6 Pa. Co. Ct. Rep. 441; Miles's Estate, 12 Pa. Co. Ct. Rep. 383.

Investment for Improper Purpose. — An executor or administrator has no right to borrow money in order to make a temporary investment in securities exempt from taxation, with

the intent to dispose of such securities after the assessment period has passed, and then to repay the borrowed money. Wheelwright v. Rhoades, 11 Abb. N. Cas. (N. Y. Supreme Ct.) 382, 28 Hun (N. Y.) 57.

Investment Committed by Will to Beneficiaries of Estate. — Where a will provides that the testator's widow may "put the balance of his money into safe hands and take security," the executor has no authority to interfere with her in regard to the investment of the funds. Ballantyne v. Turner, 6 Jones Eq. (59 N. Car.) 224.

Investments Should Be Made in the Name of the Executor or Administrator as such, in order that they may be readily converted into money if necessary for the payment of the decedent's debts. Carter v. Cutting, 5 Munf. (Va.) 223.

1. Circumstances Relieving from Duty to Invest. — This subject is fully discussed in connection with the liability of personal representatives for interest on unemployed funds in their hands. See *infra*, this title, *Accounting* — *Charges* — *Interest* — *When Interest Is Chargeable* — *Unemployed Funds*.

2. Application for Leave to Invest. — *Ex p.* Walsh, 26 Md. 495; Hetfield v. Debaud, 54 N. J. Eq. 371; Frey v. Demare t, 17 N. J. Eq. 71; Lockhart v. Public Administrator, 4 Bradf. (N. Y.) 21; Dortch v. Dortch, 71 N. Car. 224.

3. Bequest for Life or Years — Duty to Invest — *England.* — Brown v. Gellatly, L. R. 2 Ch. 751; Mackenzie v. Taylor, 7 Beav. 467.

Georgia. — Chisholm v. Lee, 53 Ga. 611.

Maryland. — Evans v. Iglehart, 6 Gill & J. (Md.) 171.

Massachusetts. — Kinmonth v. Brigham, 5 Allen (Mass.) 270; Sargent v. Sargent, 103 Mass. 297.

New Jersey. — Jones v. Stites, 19 N. J. Eq. 324.

New York. — Calkins v. Calkins, 1 Redf. (N. Y.) 337; Spear v. Tinkham, 2 Barb. Ch. (N. Y.) 211.

North Carolina. — Jones v. Simmons, 7 Ired. Eq. (42 N. Car.) 178; Peacock v. Harris, 85 N. Car. 146.

Pennsylvania. — Breneman v. Frank, 28 Pa. St. 475.

Rhode Island. — Sarle v. Probate Ct., 7 R. I. 270.

Tennessee. — Woods v. Sullivan, 1 Swan (Tenn.) 507.

Wisconsin. — Golder v. Littlejohn, 30 Wis. 344.

In general, a person having a life interest in a residue has a right to call on the executor to convert into money all personal property of a perishable or speculative character, everything, in short, not consisting of proper securi-

tion of the testator that the property so bequeathed should be enjoyed *in specie*.¹

Administrators with the Will Annexed. — Where a will directs the executor to invest the funds of the estate, the duty of making the investment is imposed on the executor as such, and passes to an administrator with the will annexed.²

Special Administrators are not required, nor is it their duty, to invest funds in their hands, because they are mere depositaries charged with the duty of keeping safely the money belonging to the estate until the appointment of a general administrator or the qualification of an executor.³

(b) **Time for Making Investments.** — The general rule is that an executor or administrator must invest the funds in his hands within a reasonable time after the expiration of the period allowed for the settlement of the estate.⁴

What Constitutes Reasonable Time depends on the circumstances, taking into consideration the amount to be invested and the character of investment required. In some jurisdictions a year has been allowed,⁵ while in others six months or less has been considered sufficient time to allow for finding proper securities.⁶

(c) **Character of Investments** — *aa.* **RULE IN ABSENCE OF REGULATION BY STATUTE OR WILL** — (*aa.*) *Government Securities.* — Government securities have generally been favored by the courts both in *England* and in the *United States*, as affording ample security and a reasonable income.⁷

ties for money, so that it may be properly invested. *Wightwick v. Lord*, 6 H. L. Cas. 217.

So also where the residuary bequest for life, or for a limited term, embraces articles not necessarily consumed in the using, such as furniture, books, plate, etc., as well as property which must be consumed, unless the will contains indications of an intention, on the part of the testator, that the legatee for life should enjoy the property, or some particular parts thereof, in its then state, as a specific bequest for life. *Spear v. Tinkham*, 2 Barb. Ch. (N. Y.) 211 [*citing* *Mills v. Mills*, 7 Sim. 501; *Randall v. Russell*, 3 Meriv. 193; *Collins v. Collins*, 2 Myl. & K. 703; *Alcock v. Sloper*, 2 Myl. & K. 699; *Bethune v. Kennedy*, 1 Myl. & C. 114; *Pickering v. Pickering*, 4 Myl. & C. 289].

1. **Bequest for Life to Be Enjoyed in Specie.** — If it can be gathered from the will that the testator intended that the legatee for life should enjoy the property in its then condition, the bequest is specific, and the legatee is entitled to the possession and enjoyment of the property thus specifically bequeathed, although the bequest be made in general terms, and without any particular designation of the property. *Golder v. Littlejohn*, 30 Wis. 341, *citing* *Howe v. Dartmouth*, 7 Ves. Jr. 137; 2 Hare & Wal. L. Cas. 262. See also *Morgan v. Morgan*, 14 Beav. 72; *Healey v. Toppan*, 45 N. H. 243, 86 Am. Dec. 159, and cases cited; *Covenhoven v. Shuler*, 2 Paige (N. Y.) 122, 21 Am. Dec. 73; *Evans v. Iglehart*, 6 Gill & J. (Md.) 192; *Woods v. Sullivan*, 1 Swan (Tenn.) 507.

2. **Investment Directed by Will — Administrator with Will Annexed.** — *Hall v. Cushing*, 9 Pick. (Mass.) 395; *Matter of Post*, 2 Connolly (N. Y.) 243; *Robinson v. Ostendorff*, 38 S. Car. 66.

As to the powers and duties of administrators with the will annexed in general, see *infra*, this title, *Administrators with the Will Annexed*.

3. **Special Administrators Not Required to Invest.** — *Baskin v. Baskin*, 4 Lans. (N. Y.) 90.

4. **Time for Making Investment — General Rule.** — *Johnson v. Newton*, 11 Hare 160; *Parry v. Warrington*, 6 Madd. 156; *Frey v. Demarest*, 17 N. J. Eq. 71; *Taveau v. Ball*, 1 McCord Eq. (S. Car.) 456; *Carter v. Cutting*, 5 Munf. (Va.) 224; *Dromgoole v. Smith*, 78 Va. 665.

5. **One Year Allowed to Invest.** — In *Parry v. Warrington*, 6 Madd. 156, one year was considered a reasonable time in which to comply with a direction to invest fifty thousand pounds in the purchase of real estate as directed by the will. So, too, in *Johnson v. Newton*, 11 Hare 160, it was held that one year was not too long for finding and buying suitable land and examining and deciding on the title. See also *Halsted v. Meeker*, 18 N. J. Eq. 136; *Ogilvie v. Ogilvie*, 1 Bradf. (N. Y.) 356; *Matter of Black*, 6 Dem. (N. Y.) 331; *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231.

6. **Six Months Allowed to Make Investments.** — *Nunn v. Nunn*, 66 Ala. 35; *Voorhees v. Stoothoff*, 11 N. J. L. 145; *Lent v. Howard*, 89 N. Y. 169; *Halsted v. Hyman*, 3 Bradf. (N. Y.) 426; *Gilman v. Gilman*, 2 Lans. (N. Y.) 1; *Dunscumb v. Dunscumb*, 1 Johns Ch. (N. Y.) 508, 7 Am. Dec. 504; *Manning v. Manning*, 1 Johns. Ch. (N. Y.) 527.

Public Securities — Thirty Days Allowed. — In *Gilman v. Gilman*, 2 Lans. (N. Y.) 1, executors were directed to invest in public securities. It was held that thirty days was a reasonable time in which to procure such securities, which are at all times obtainable in the market.

7. **Investment in Government Securities Favored.** — *England.* — *Vigrass v. Binfield*, 3 Madd. 62; *Walker v. Symonds*, 3 Swanst. 1; *Howe v. Dartmouth*, 7 Ves. Jr. 150; *Holland v. Hughes*, 16 Ves. Jr. 111; *Tebbs v. Carpenter*, 1 Madd. 290; *Browne v. Cross*, 14 Beav. 105; *Hood v. Clapham*, 19 Beav. 90; *Stewart v. Sanderson*, L. R. 10 Eq. 26.

New Hampshire. — *Wheeler v. Perry*, 18 N. H. 307.

New Jersey. — *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508; *Vreeland v. Schoonmaker*, 16 N. J. Eq. 512; *Tucker v. Tucker*, 33 N. J. Eq. 235.

(bb) *Real Estate*. — Another class of securities that are favored by the courts are loans secured on real estate;¹ though in *England* the decisions do not seem to have been uniform prior to the statute authorizing such investments.²

The Purchase and Improvement of Land, however, is not an investment which an executor or administrator is authorized to make under the rule permitting him to invest in real-estate security.³

Woodruff v. Lounsberry, 40 N. J. Eq. 545; *Halsted v. Meeker*, 18 N. J. Eq. 140.

New York. — *Ormiston v. Olcott*, 84 N. Y. 339; *King v. Talbot*, 40 N. Y. 76; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Mills v. Hoffman*, 26 Hun (N. Y.) 594; *Valentine v. Valentine*, 3 Dem. (N. Y.) 597; *Brown v. Chesterman*, (Supreme Ct.) 30 N. Y. St. Rep. 537; *Baker v. Disbrow*, 3 Redf. (N. Y.) 348.

Pennsylvania. — *Cridland's Estate*, 132 Pa. St. 479.

West Virginia. — *Key v. Hughes*, 32 W. Va. 184.

In *Mills v. Hoffman*, 26 Hun (N. Y.) 594, the court said: "From our examination of the authorities and the cases referred to we have come to the conclusion that as a general rule it is the duty of trustees to invest funds held by them in government or state securities, or in bonds and mortgages on unencumbered real estate; that, while this rule is not arbitrary and inflexible, so as to admit of no possible exceptions, it is the basis upon which trustees should usually act; that in any event the trustee is bound to employ such diligence, care, and prudence in the management of the trust as diligent, careful, prudent men of discretion and intelligence generally employ in their own like affairs; and that for a neglect to make use of such diligence, care, and prudence the trustee becomes liable." See also *Adair v. Brimmer*, 74 N. Y. 539; *Clark v. St. Louis, etc., R. Co.*, 58 How. Pr. (N. Y. Supreme Ct.) 21; *In re Foster*, 15 Hun (N. Y.) 387; *Bates v. Underhill*, 3 Redf. (N. Y.) 365; *Judd v. Warner*, 2 Dem. (N. Y.) 104; *Goodwin v. Howe*, 62 How. Pr. (N. Y. Supreme Ct.) 134.

1. *Investment on Real-estate Security Favored* — *England*. — *Pocock v. Reddington*, 5 Ves. Jr. 800; *Brown v. Litton*, 1 P. Wms. 141; *Knight v. Plymouth*, Dick. 120; *Lyse v. Kingdon*, 1 Coll. 184; *Stickney v. Sewell*, 1 M'yl. & C. 8; *Phillipson v. Gatty*, 7 Hare 516.

New Jersey. — *Wilson v. Staats*, 33 N. J. Eq. 524; *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508; *Vreeland v. Schoonmaker*, 16 N. J. Eq. 512.

New York. — *King v. Talbot*, 40 N. Y. 76; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Matter of Butler*, 1 Connolly (N. Y.) 58.

South Carolina. — *Ex p. Calmes*, 1 Hill Eq. (S. Car.) 112.

In *Missouri*, while real estate is regarded as among the safest securities that can be taken, it is held that an executor or administrator has no authority to invest on such security without first obtaining an order of court. *Garesche v. Priest*, 9 Mo. App. 270, affirmed 78 Mo. 126; *Gamble v. Gibson*, 59 Mo. 585.

What Constitutes Real-estate Security. — In *Judd v. Warner*, 2 Dem. (N. Y.) 104, it was held that the bonds of a horse-car company secured by a mortgage on its road were not a

real-estate security in which executors might invest, because the company did not own the land on which the tracks were laid, but only had an easement in it.

Loan to Devisee on Security of His Interest. — An executor may lend money of the estate to a devisee on the security of his interest in the estate. *Delafield v. Schuchardt*, 2 Dem. (N. Y.) 435.

2. *Real-estate Security Formerly Disapproved in England*. — *Barry v. Marriott*, 2 De G. & Sm. 491, 12 Jur. 1043; *Vigrass v. Binfield*, 3 Madd. 62; *Tebbs v. Carpenter*, 1 Madd. 290; *Collis v. Collis*, 2 Sim. 365; *Pocock v. Reddington*, 5 Ves. Jr. 799; *Howe v. Dartmouth*, 7 Ves. Jr. 150; *Holland v. Hughes*, 16 Ves. Jr. 111; *Darke v. Martyn*, 1 Beav. 525; *Watts v. Girdlestone*, 6 Beav. 188; *Fowler v. Reynal*, 3 Macn. & G. 500; *Ex p. Geaves*, 8 De G. M. & G. 291; *Trafford v. Boehm*, 3 Atk. 444; *Ex p. Cathorpe*, 1 Cox 182; *Ex p. Johnson*, 1 Moll. 128; *Norbury v. Norbury*, 4 Madd. 191; *Widowson v. Duck*, 2 Meriv. 494; *Brown v. Litton*, 1 P. Wms. 141.

"Formerly the only fund in which an executor might properly invest the unemployed money of the testator was the 3 $\frac{1}{2}$ per cent. consols, *i. e.*, the fund adopted by the Court of Chancery, and an executor investing in such security was held by the court not to be liable for any fall which might take place, although if he invested in any other fund which afterwards sank in value he was held liable for such depreciation even in the absence of any *mala fides* on his part." 3 *Williams on Executors* (7th Am. ed.) 1710.

3. *Purchase and Improvement of Land Not Authorized as Investment*. — *Richardson v. McLemore*, 60 Miss. 315; *Hardee v. Cheatham*, 52 Miss. 41; *Baker v. Disbrow*, 3 Redf. (N. Y.) 348, 18 Hun (N. Y.) 29.

No Power to Purchase Real Estate. — In *Baker v. Disbrow*, 3 Redf. (N. Y.) 348, the court said: "Among the doctrines well settled is that of the duty of trustees, when directed to invest upon real estate or other good and sufficient security, to make such investments upon bond and mortgage, or in government securities. On this subject it is sufficient to refer to the cases of *Ackerman v. Emott*, 4 Barb. (N. Y.) 626, and *King v. Talbot*, 40 N. Y. 76. Certainly the purchase of real estate is not authorized by the will. It cannot be considered a 'security.'"

Productive Real Estate. — And even when directed to invest the funds of the estate in "productive real estate," the executors have no authority to purchase vacant lots and erect thereon brick dwelling houses. *Holcomb v. Holcomb*, 11 N. J. Eq. 281.

Erecting Buildings on land of the estate so as to make it productive is not an investment within a provision of a will that a certain sum shall be kept invested by the executor. *Mat-*

(cc) *Foreign Investments.* — As a general rule, an executor or administrator has no right to invest the funds of the estate in securities out of the jurisdiction in which he was appointed, and if he does so he is personally responsible for the safety of the fund.¹ But investments on foreign security may be made when directed by the will,² or where the beneficiaries consent.³

(dd) *Personal Security.* — In England it was held by some of the early cases that an executor or administrator might properly lend funds of the estate on mere personal security, if the borrower was of unquestioned solvency at the time;⁴ but the rule established by these cases was repudiated by later decisions.⁵

In the United States it has uniformly been held improper, in the absence of authority given by statute or by will, to lend on personal security.⁶

ter of Moore, 95 Cal. 34; *Rose v. Rose*, 6 Dem. (N. Y.) 26.

Purchase of Real Estate Authorized by Will. — *Holmes v. Pickett*, 51 S. Car. 271.

A direction to invest in "productive real estate" is not ratified by purchasing a parcel of land which can be used only for the manufacture of brick. *Holcomb v. Holcomb*, 11 N. J. Eq. 281.

1. Foreign Investments Prohibited. — *Cook v. Cook*, 34 Fed. Rep. 249; *Contee v. Dawson*, 2 Bland. (Md.) 264. And see *Freeman v. Freeman*, 4 Redf. (N. Y.) 211.

Statement of the Rule. — In *Ormiston v. Olcott*, 84 N. Y. 339, Finch, J., said: "The rule should not be made arbitrary and inflexible, and so rigid as to admit of no possible exceptions, for it is merely an outgrowth or consequence of the broader and admitted proposition that the duty of a trustee in making investments is to employ such diligence and such prudence as, in general, prudent men of discretion and intelligence in such matters employ in their own like affairs. * * * While, therefore, we are not disposed to say that an investment by a trustee in another state can never be consistent with the prudence and diligence required of him by the law, we still feel bound to say that such an investment, which takes the trust fund beyond our own jurisdiction, subjects it to other laws, and the risk and inconvenience of distance and of foreign tribunals, will not be upheld by us as a general rule, and never unless in the presence of a clear and strong necessity or a very pressing urgency." As to when a "pressing urgency" exists, see *Denton v. Sanford*, 103 N. Y. 607.

Effect of Foreign Investment. — Where an executrix invested in English consols it was held that the American legatee, on attaining his majority, could maintain an action against the executrix as such for the purpose of impeaching the fairness, propriety, and legality of such transfer and investment. *Graveley v. Graveley*, 20 S. Car. 106.

2. Foreign Investments Directed by Will. — In *Burrill v. Sheil*, 2 Barb. (N. Y.) 457, it was held that where the testator directed an investment of a certain amount to be made in England, the court of the domicile of the testator at the time of his death has no power to divert the investment from that country, except with the assent of all parties interested therein. See also *Contee v. Dawson*, 2 Bland (Md.) 264. But see *Perronneau v. Perronneau*, 1 Desaus. (S. Car.) 521. And see *infra*, this section, *Character of Investments Regulated by Will*.

3. Foreign Investment with Consent of Beneficiaries. — *Freeman v. Freeman*, 4 Redf. (N. Y.) 211.

4. Personal Security Allowed by Early English Cases. — *Churchill v. Hobson*, 1 P. Wms. 241, 1 Salk. 318; *Bromfielf v. Wytherley*, Pre. Ch. 505; *Harden v. Parsons*, 1 Eden 145.

In the case of Sir Ed. Hale and the Lady Car, in chancery, 1637, referred to in *Walker v. Symonds*, 3 Swanst. 64, the lord keeper said that if a person intrusted with others' money lets it out to such as are trusted and esteemed by others to be men of worth and ability, if any loss happens he shall not bear the loss.

5. Rule Allowing Personal Security Repudiated in England. — *Holmes v. Dring*, 2 Cox 1; *Wilkes v. Steward*, Cooper 6; *Powell v. Evans*, 5 Ves. Jr. 844; *Vigrass v. Binfield*, 3 Madd. 62; *Morrissey v. Foley*, 2 Moll. 346; *Evans v. Flight*, 2 Jur. 818. See also *Webster v. Spencer*, 3 B. & Ald. 360, 5 E. C. L. 316; *Walker v. Symonds*, 3 Swanst. 63; *Bacon v. Clark*, 3 Myl. & C. 294; *Bateman v. Davis*, 3 Madd. 98.

In *Adye v. Feuillateau*, 3 Swanst. 84, note, 1 Cox 24, it was held that a personal representative could not justify a loan of trust funds on personal security on the ground that such had been the practice of the decedent in his lifetime. See also *Styles v. Guy*, 1 Macn. & G. 423.

Temporary Investment. — Where an executor has trust money in his hands which he is authorized to invest in public funds or on real estate security, he is justified, pending the necessary delay in completing a contemplated mortgage security, in investing the money in exchequer bills; but where he deposits such bills in the hands of a broker, and they are misappropriated by such broker, the executor is personally liable. *Matthews v. Brise*, 6 Beav. 239.

At Present the matter is regulated by statute in England. See *infra*, this section, *Character of Investments Regulated by Statute*.

6. Rule in United States — Personal Security Not Allowed — Alabama. — *Gerald v. Bunkley*, 17 Ala. 170.

Indiana. — *State v. Johnson*, 7 Blackf. (Ind.) 529.

Illinois. — *Johnston v. Maples*, 49 Ill. 101.

New Hampshire. — *Probate Judge v. Mathes*, 60 N. H. 433.

New Jersey. — *Vreeland v. Schoonmaker*, 16 N. J. Eq. 512; *Sherman v. Lanier*, 39 N. J. Eq. 249; *Crane v. Howell*, 35 N. J. Eq. 374; *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508.

New York. — *Bogart v. Van Velsor*, 4 Edw.

(*see*) *Other Species of Investments.* — Shares of Stock of Private Corporations, such as bank shares, manufacturing and trading companies' shares, or the stock or shares of any other private corporation, are considered by the *English* authorities as personal security within the rule forbidding an executor or administrator to invest funds of the estate on personal security.¹ In the *United States* the authorities are not uniform as to this question. In some jurisdictions the courts have followed the English rule,² while in others such investments are generally permitted;³ and where such investments are permitted, the representative

Ch. (N. Y.) 718; *Matter of Cant*, 5 Dem. (N. Y.) 269; *Matter of Vandevort*, 8 N. Y. App. Div. 341; *Smith v. Smith*, 4 Johns. Ch. (N. Y.) 281; *Lefever v. Hasbrouck*, 2 Dem. (N. Y.) 567; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Jones v. Hooper*, 2 Dem. (N. Y.) 14; *Smith v. Collamer*, 2 Dem. (N. Y.) 147.

Pennsylvania. — *Wilson's Appeal*, 115 Pa. St. 95, 35 Pittsb. Leg. J. (Pa.) 179; *Pim v. Downing*, 11 S. & R. (Pa.) 66.

In *Lacey v. Davis*, 4 Redf. (N. Y.) 402, a loan by executors to a church, taking its note, without security, was held an improper investment.

Though There Are Several Obligors, that will not take the case out of the rule forbidding loans on personal security. *Clark v. Garfield*, 8 Allen (Mass.) 427.

Personal Security Authorized by Will. — A loan on personal security was held to be authorized by a will which directed the executor to invest "in bank stock or otherwise." *Pope v. Matthews*, 18 S. Car. 444.

Loan to Beneficiary on Interest in Estate. — An executor or administrator may lend funds of the estate to a beneficiary on his interest. *Delafield v. Schuchardt*, 2 Dem. (N. Y.) 435.

Thus it has been held proper for an administrator to make a loan to the husband of one of the next of kin, taking his note that it was to be accepted as part payment of the wife's distributive share. *Moye v. Petway*, 76 N. Car. 327.

1. Investing in Stock of Private Corporations Not Allowed in England. — *Powell v. Cleaver*, 7 Ves. Jr. 142, note *a*; *Howe v. Dartmouth*, 7 Ves. Jr. 150; *Baud v. Fardell*, 7 De G. M. & G. 633; *Mills v. Mills*, 7 Sim. 501; *Hancom v. Allen*, Dick. 498; *Peat v. Crane*, 2 Dick. 499, note.

2. Rule in United States — Investment in Stocks of Private Corporations Not Allowed in Some Jurisdictions. — *Indiana.* — *Gilbert v. Welsch*, 75 Ind. 557.

New Jersey. — *Tucker v. Tucker*, 33 N. J. Eq. 235; *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508; *Halsted v. Meeker*, 18 N. J. Eq. 136; *Lathrop v. Smalley*, 23 N. J. Eq. 192.

New York. — *Leitch v. Wells*, 48 N. Y. 585; *King v. Talbot*, 40 N. Y. 76, *affirming* 50 Barb. (N. Y.) 453; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Mills v. Hoffman*, 26 Hun (N. Y.) 594; *Lacey v. Davis*, 4 Redf. (N. Y.) 402.

Pennsylvania. — *Worrell's Appeal*, 9 Pa. St. 508; *Ihmsen's Appeal*, 43 Pa. St. 431; *Nyce's Estate*, 5 W. & S. (Pa.) 254, 40 Am. Dec. 498; *Pary's Appeal*, 34 Pa. St. 100; *In re Ogle*, 5 Pa. St. 15; *Rush's Estate*, 12 Pa. St. 375; *Barton's Estate*, 1 Pars. Eq. Cas. (Pa.) 24; *Stanley's Appeal*, 8 Pa. St. 431; *Hemphill's Appeal*, 18 Pa. St. 303; *Pleasant's Appeal*, 77 Pa. St. 356; *McCahan's Appeal*, 7 Pa. St. 56; *Angue's*

Estate, 2 Phila. (Pa.) 137, 13 Leg. Int. (Pa.) 221; *Seidler's Estate*, 5 Phila. (Pa.) 85, 19 Leg. Int. (Pa.) 149; *Gaw's Estate*, 34 Leg. Int. (Pa.) 66, 12 Phila. (Pa.) 4; *Shields's Estate*, 14 Phila. (Pa.) 307, 38 Leg. Int. (Pa.) 261; *Jack's Appeal*, 94 Pa. St. 367; *Pleasanton's Appeal*, 99 Pa. St. 362; *Eyster's Appeal*, 16 Pa. St. 372; *Fahnestock's Appeal*, 104 Pa. St. 46.

In *New York* it seems at one time to have been allowed. *Brown v. Campbell*, Hopk. (N. Y.) 233.

In *Pennsylvania* investment in the shares of stock of private corporations is expressly forbidden by the Constitution, § 69. *Angue's Estate*, 2 Phila. (Pa.) 137, 13 Leg. Int. (Pa.) 221. But a distinction has been drawn between a loan on preferred and one on common stock of a private corporation, the court holding that as to the former there was a lien on the income secured by the real estate of the corporation, and it was therefore a proper investment; while as to the latter, such a loan was held to be a breach of trust, since the common stock of a private corporation is not secured, and is subject to fluctuation in value by influences over which the executor or administrator has no control. *In re Ogle*, 5 Pa. St. 15; *Rush's Estate*, 12 Pa. St. 375.

Municipal Bonds. — In *New Jersey* an executor has no right, without authority from a competent court, to invest the funds of the estate in municipal bonds. *Tucker v. Tucker*, 34 N. J. Eq. 292, 33 N. J. Eq. 235.

Under a Direction in a Will to invest in bonds of the United States or the state of Pennsylvania, or of the city of Philadelphia, or any of the incorporated districts in the county of Philadelphia, or "in any public stocks or securities bearing an interest," it was held that the executors were authorized to invest in the bonds of the Lehigh Coal and Navigation Company, a private corporation owning a canal and coal mines. The words "public stocks or securities," it was said, must be understood in their popular sense, and include the bonds of such a corporation, because, though technically a private one, it was incorporated not merely for purposes of private gain, but for a great public object, and its bonds were the subject of investment in the stock market and in public estimation. *Rush's Estate*, 12 Pa. St. 375.

3. Investment in Shares of Stock Allowed in Some Jurisdictions. — *Hammond v. Hammond*, 2 Bland (Md.) 306; *Gray v. Lynch*, 8 Gill (Md.) 403; *Murray v. Feinour*, 2 Md. Ch. 418; *McCoy v. Horwitz*, 62 Md. 183; *Smyth v. Burns*, 25 Miss. 422; *Peckham v. Newton*, 15 R. I. 321.

In *Massachusetts*, by a usage of more than half a century, approved by a uniform course of judicial decision, it has come to be regarded as too firmly settled to be changed, except by

should select good dividend-paying stock.¹

Deposit in Bank on a Time Certificate, drawing interest, is also held to be within the rule prohibiting loans on personal securities.²

Engaging in Business or Trade.—An executor or administrator is not ordinarily allowed to employ the funds of the estate in business or trade, and if he does so it will be regarded as his individual venture so far as losses suffered or obligations incurred are concerned.³

bb. CHARACTER OF INVESTMENTS REGULATED BY STATUTE—(*aa. Rule in England.*—In England the investment of the funds of a decedent's estate by his executor or administrator is now regulated by the Trust Investment Act, prescribing with great particularity the securities in which the investments may be made in the absence of testamentary directions concerning the matter.⁴ This statute is made retrospective by express provision, and applies not only to trusts created after the passage of the act, but also to trusts created before its passage;⁵ but

the legislature, that all that can be required of a trustee to invest is that he shall conduct himself faithfully and exercise a sound discretion, such as men of prudence and intelligence exercise in the permanent disposition of their own funds, having regard not only to the probable income, but also to the probable safety of the capital; and that a trustee is not precluded from investing in the stocks of banking, insurance, manufacturing, or railroad corporations, within or without the state. *Harvard College v. Amory*, 9 Pick. (Mass.) 446; *Kinmonth v. Brigham*, 5 Allen (Mass.) 270; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *Bowker v. Pierce*, 130 Mass. 262.

In *New Hampshire* and *Vermont* investments honestly and prudently made, in securities of any kind that produce income, appear to be allowed. *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609; *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *Barney v. Parsons*, 54 Vt. 623, 41 Am. Rep. 358.

Promissory Notes Secured by Corporation Stocks pledged as collateral have been held a proper investment. *Lovell v. Minot*, 20 Pick. (Mass.) 116. See also *Tucker v. Tucker*, 33 N. J. Eq. 235; *Woodruff v. Ward*, 35 N. J. Eq. 467; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349.

1. Dividend-paying Stock Should Be Selected.—*Hunt*, Appellant, 141 Mass. 515; *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333. See also *Ihmssen's Appeal*, 43 Pa. St. 431.

"Safety Is the Primary Object to Be Secured in an investment of this kind, and the trustee is not chargeable with an income that cannot be realized without hazard to the fund. And we think, therefore, that an investment is not to be deemed safe without evidence that it is so, and that the trustee ought to be able to point out some ruling feature to distinguish it from a mere venture. If he invests in property, it ought to be property which yields an actual income, and which has a valuation, in the general sense of the community, founded on that income, and not upon remote eventualities and a succession of contingencies." *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333.

2. Deposit on Interest in Bank Not Allowed.—*Darke v. Martyn*, 1 Beav. 525; *Gibbins v. Taylor*, 22 Beav. 344. But see *Lansing v. Lansing*, 45 Barb. (N. Y.) 182, holding that where an executor or administrator is unable to procure desirable real-estate securities for

investments, he may be allowed to deposit the fund in a savings bank. See also *Matter of Maxwell*, 1 Connoly (N. Y.) 230, 23 Abb. N. Cas. (N. Y.) 23.

Where the fund, the income of which is directed by the will to be paid to a certain beneficiary, is so small that it cannot with advantage be invested otherwise, the executor is justified in depositing it in a savings bank. *Collyer v. Collyer*, 43 Hun (N. Y.) 638, 6 N. Y. St. Rep. 693.

Difference Between Deposit and Loan.—It cannot be doubted that there is a difference in fact and in law between a deposit of money in a bank and an investment or loan to a bank, and that such an investment or loan, being one on personal security, subjects the personal representative to liability for loss by reason of insolvency of the bank, or otherwise. *Baer's Appeal*, 127 Pa. St. 360.

As to the duties and liabilities of an executor or administrator with reference to deposit of funds in bank, see *supra*, this section, *Deposit of Funds*.

3. Investment in Trade or Business Not Allowed—*England.*—*Ex p. Garland*, 10 Ves. Jr. 110; *Docker v. Somes*, 2 Myl. & K. 655; *Wedderburn v. Wedderburn*, 2 Keen 722; *Ex p. Richardson*, 3 Madd. 138.

Connecticut.—*Alsop v. Mather*, 8 Conn. 587, 21 Am. Dec. 703.

Illinois.—*Field v. Colton*, 7 Ill. App. 379.

New Jersey.—*McKnight v. Walsh*, 23 N. J. Eq. 136.

New York.—*Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619.

Ohio.—*Lucht v. Behrens*, 28 Ohio St. 231.

See also *infra*, this section, *Continuing Decedent's Business*.

4. The English Statute on the subject in the Trust Investment Act of 1889, 52 & 53 Vict., c. 32, § 3.

What Are Government or Parliamentary Stocks.—"In order to come within the description 'government or parliamentary stock or funds,' within the meaning of the statute, a fund ought to be either managed by Parliament, or paid out of the resources of the British government, or at least guaranteed by that government." *Brown v. Brown*, 4 Kay & J. 704.

5. Retrospective Effect of Trust Investment Act of 1889.—*Hume v. Lopes*, (1892) App. 112, affirming *In re Dick*, (1891) 1 Ch. 423.

this was not the case with the former statute regulating investments (Lord St. Leonard's Act).¹

(bb) *Rule in the United States — Securities Designated by Statute.* — In the United States, as a general rule, the selection of securities in which an executor or administrator may invest the funds of an estate is more or less regulated by statute. In some states the statutes specifically name the classes of securities in which the investment may be made, leaving it to the court, ordinarily, to control the matter in each case, within the limitations imposed by the statute.²

Securities Designated by Court. — In other states no securities are named by the statutes, but the selection is committed to the court.³

cc. *CHARACTER OF INVESTMENTS REGULATED BY WILL.* — The testator has full power to direct and control the investment of the funds of his estate,⁴ and he may authorize investments in securities other than those specified in the statutes regulating the subject or adopted by the court in the absence of statutory regulation;⁵ but the direction must be in the will or in writing to justify the executor in following it.⁶

Where the Will Specifies the Security on which the money shall be invested, the power of the personal representative is limited thereby, and any deviation

1. *Lord St. Leonard's Act Not Retrospective.* — Lord St. Leonard's Act (22 & 23 Vict., c. 25) was not retrospective and did not authorize an executor to invest a fund settled before the passage of that act in securities specified in it as proper, but which had previously been considered improper. *In re Miles's Will*, 5 Jur. N. S. 1236; *Dodson v. Sammel*, 6 Jur. N. S. 137.

2. *Securities Designated by Statute.* — In *Florida* the statute provides that investments by executors and administrators shall, under the direction of the court, be "upon such mortgage security or in United States or state bonds, or stocks, as said court shall allow." Rev. Stat. Fla. (1892), § 1936. See also *Moore v. Felkel*, 7 Fla. 44; *Moore v. Hamilton*, 4 Fla. 112; *Sanderson v. Sanderson*, 17 Fla. 820.

The *Georgia* statute authorizes executors and administrators to make investments "in stocks, bonds, or other securities issued by this state, or (by leave of the ordinary)" in certain other designated securities. *Crawford v. Tribble*, 69 Ga. 519; Code Ga. 1895, §§ 3432, 3435.

The *Pennsylvania* statute provides that investments shall be made "in the stock or public debt of the United States, or in the public debt of this commonwealth, or in the public debt of the city of Philadelphia, or on real securities," or in "bonds or certificates of debt now or hereafter to be created and issued according to law by any of the counties, cities, school districts, or municipal corporations of this commonwealth." Bright, *Purd. Dig.* 1894, pp. 593, 594, §§ 121, 122; *Corporation, etc., v. Wallace*, 3 Rawle (Pa.) 109; *Shields's Estate*, 14 Phila. (Pa.) 397, 38 Leg. Int. (Pa.) 261. And the Constitution expressly forbids investments in the bonds or stocks of private corporations. Const. Pa., § 69. This provision of the Constitution of Pennsylvania was held to forbid investments in stock of the Bank of the United States. *Hemphill's Appeal*, 18 Pa. St. 303; *Angue's Estate*, 2 Phila. (Pa.) 137, 13 Leg. Int. (Pa.) 221; *Nyce's Estate*, 5 W. & S. (Pa.) 254, 40 Am. Dec. 498. See also statutes in other jurisdictions.

3. The *Maryland* statute provides that the Orphans' Court may, either of its own motion or on application, order an executor or administrator to invest "in bank or other incorporated stock, or in any other good security." *O'Hara v. Shepherd*, 3 Md. Ch. 306. See also *Gray v. Lynch*, 8 Gill (Md.) 410; *Hammond v. Hammond*, 2 Bland (Md.) 306; *Evans v. Iglehart*, 6 Gill & J. (Md.) 171.

The phrase "other good security" in this statute is held to include gas stock. *McCoy v. Horwitz*, 62 Md. 183.

The *New Jersey* statute provides for investment in such securities as the Orphans' Court may direct. It does not limit the court as to securities, but it expressly authorizes executors, etc., to invest in the bonds of the state. *Tucker v. Tucker*, 33 N. J. Eq. 237. Under this statute the courts generally confine themselves to real and government securities. *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Tucker v. Tucker*, 33 N. J. Eq. 235; *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508; *Woodruff v. Ward*, 35 N. J. Eq. 467. See also the *Florida* cases in the note preceding. Compare statutes in other jurisdictions.

4. *Power to Regulate Investment by Will.* *Denike v. Harris*, 84 N. Y. 89.

5. *Testator May Authorize Investment in Any Securities.* — *Contee v. Dawson*, 2 Bland (Md.) 264; *Burrill v. Sheil*, 2 Barb. (N. Y.) 457; *Pennsyl's Appeal*, (Pa. 1888) 15 Atl. Rep. 719; *Holmes v. Pickett*, 51 S. Car. 271; *Pope v. Mathews*, 18 S. Car. 444.

Power of Court to Approve or Disapprove Investments Made under Direction in Will. — In *Jones v. Hooper*, 2 Dem. (N. Y.) 14, it was held that a statute empowering the surrogate "to direct and control the conduct of executors" and "to administer justice in all matters relating to the affairs of deceased persons" gave power to such court to approve or disapprove investments made by personal representatives under directions contained in the will.

6. *Direction Must Be in Will or in Writing.* *Harvard College v. Amory*, 9 Pick. (Mass.) 446; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *Bowker v. Pierce*, 130 Mass. 262.

from the direction contained in the will is at his own risk,¹ unless the executor is unable to find the security of the sort specified in the will,² or the securities so specified are unsafe when the executor comes to perform his duty.³

If No Positive Instructions Are Given as to the investment of the trust funds, but the will simply directs that they shall be kept properly invested, the executor is held to the exercise of that sound discretion and good judgment which a prudent man ordinarily exercises in the management of his own like affairs.⁴ Ordinarily such a direction is construed to mean that the securities selected shall be such as would be required if the will contained no direction on the subject, unless an absolute discretion is given to the executor.⁵

But a Loan on Personal Security is not authorized by a provision directing the executor to invest in such suitable manner as may be for the best interests of the estate, to be determined by the executor.⁶

Unwritten Direction Held Not Sufficient. — *Malone v. Kelley*, 54 Ala. 532. See also *Ward v. Kitchen*, 30 N. J. Eq. 31.

1. Specification of Securities in Will Binds Executor. — *Brewster v. Demarest*, 48 N. J. Eq. 559. See also *infra*, this section, *Liabilities of Executor or Administrator*.

A direction in a will that the executor shall apply a certain bequest "according to his discretion and as necessity may require, to the use and benefit" of the legatee named, and that should the executor "deem it advisable so to do, he may invest the whole or any part of this amount in the purchase of land for the use of my said daughter," vests no discretion in the executor except to pay over the money as the legatee might need it, or to invest it in land for her benefit. *McFarland v. McKay*, 74 N. Car. 258.

2. If the Executor Is Unable to Find a Security of the kind specified in the will, he may adopt such investments as a prudent and intelligent man would do in managing his own affairs. *Lansing v. Lansing*, 1 Abb. Pr. N. S. (N. Y. Supreme Ct.) 280, 45 Barb. (N. Y.) 182, 31 How. Pr. (N. Y.) 55. Compare *King v. Talbot*, 40 N. Y. 76.

Application to Court for Instructions. — In *Holcombe v. Holcombe*, 13 N. J. Eq. 413, it was held that it was the duty of the executor, in the exercise of due diligence in the management of the estate, as soon as it was ascertained that the investment directed by the will could not be made, or within a reasonable time thereafter, to apply to the court for directions as to what investment he should make.

3. Unsafe Securities Designated by Will. — In *Perry v. Smoot*, 23 Gratt. (Va.) 241, the executors were directed to invest certain funds in Virginia state stocks and bonds, in trust for a named legatee. The testator died during the period of reconstruction after the late civil war. The executors, fearing to make the investment directed by the will, chose rather to retain the moneys, paying the *cestui que trust* six per cent. interest, she agreeing to this and receiving the interest. It was held that the executors had only exercised sound discretion and were not liable.

4. General Directions to Invest Safely — Discretion as to Security. — *Gray v. Lynch*, 8 Gill (Md.) 405; *Ihmsen's Appeal*, 43 Pa. St. 431.

In *Emery v. Batchelder*, 78 Me. 233, the executors were directed to "keep securely invested" a certain legacy, in order to produce

a certain income. They invested in United States bonds, paying a premium. Objection was made to the investment on account of the high premium that was paid. The investment was held to be a proper one and was not to be disturbed.

Review of Discretion. — A beneficiary under a will directing the executors to make investments "in their discretion" may resort to a court of equity for a determination as to whether the discretion has been exercised soundly and honestly. *Holcomb v. Holcomb*, 11 N. J. Eq. 281.

Application to Court for Instructions. — When the will merely directs that the funds shall be loaned on "good and sufficient securities," it seems that the executor should apply to the court for an order, in the absence of a statutory designation of securities. *M'Call v. Peachy*, 3 Munf. (Va.) 288. See also *Ihmsen's Appeal*, 43 Pa. St. 431.

Setting Apart Investment Made by Decedent. — If there are stocks belonging to the estate which would constitute a proper investment if made by the executor, he may set them apart at their market value as an investment under a direction in the will that he should invest and keep invested a certain sum "if the same has not been already invested." *Grinnell v. Baker*, 17 R. I. 41.

The Use of the Funds in Trade has been held to be authorized by a direction that they may be "employed," without any specification as to the security in which they may be employed. *Dickenson v. Player*, Cooper's Pr. Cas. 178.

The Safety of the Fund Must Be Regarded, and the discretion of the executor in the selection of securities is not enlarged in this respect by a provision that the investment is to be "according to his best skill and judgment." *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333.

5. A General Direction to invest in good securities means the investment in such securities as are regarded by the court for the investment of trust funds. *Gilbert v. Welsch*, 75 Ind. 557; *Smyth v. Burns*, 25 Miss. 422; *Ward v. Kitchen*, 30 N. J. Eq. 31; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Leitch v. Wells*, 48 N. Y. 585.

6. Loan on Personal Security Not Authorized by General Discretion Given the Executor. — *Lefever v. Hasbrouck*, 2 Dem. (N. Y.) 567; *Matter of Cant*, 5 Dem. (N. Y.) 269 [*citing King v. Tal-*

Discretion Given to Executor by Will. — If it was the evident intention of the testator that the choice of securities should be in the discretion of the executor, he is not restricted to the securities required by statute in ordinary cases.¹

dd. CONFEDERATE STATES BONDS. — As to the investment of funds in the bonds issued by the Confederate states, the cases are not uniform. Soon after the beginning of the civil war, most of the Southern states sanctioned such investments by special legislation, and several of those states held that where an executor or administrator invested in such bonds Confederate money received by him in due course of administration, he was not liable for its consequent loss;² and confined his liability to those cases only where he so invested money of the United States.³ But other courts, especially the courts of the United States, held that the illegality and impropriety extended to all such investments, irrespective of whether the money used was Confederate money or money of the United States, and that an order of court as provided by the statute permitting such investments could not legalize them.⁴

(d) **Mingling Trust Funds with Individual Funds.** — Though as a general rule it is the duty of the executor or administrator to keep the trust funds separate from his individual funds,⁵ yet if he is unable to procure a safe and profitable

bot, 40 N. Y. 76; *Adair v. Brimmer*, 74 N. Y. 539].

In *Wilkes v. Steward*, Cooper 6, it was held that a loan on personal security was not authorized by a direction to lay out a legacy in the funds "or such other good security as they could procure and think safe."

1. Discretion Given to Executor by Will. — *Barker's Estate*, 159 Pa. St. 519, *affirming* 13 Pa. Co. Ct. Rep. 419.

2. Investment of Confederate Money in Confederate Bonds Authorized. — *Alabama.* — *Dockery v. McDowell*, 40 Ala. 476; *Dickie v. Dickie*, 80 Ala. 57. *Compare* *Powell v. Boon*, 43 Ala. 459.

Georgia. — *Moses v. Moses*, 50 Ga. 9.

Mississippi. — *Trotter v. Trotter*, 40 Miss. 704. But see *Bailey v. Fitz-Gerald*, 56 Miss. 578, *overruling* the case of *Trotter v. Trotter*, 40 Miss. 704, and *following* the doctrine laid down in *Horn v. Lockhart*, 17 Wall. (U. S.) 579, that investments in Confederate bonds, being acts which gave aid and comfort to the enemies of the United States, were void.

North Carolina. — *Drake v. Drake*, 82 N. Car. 443.

South Carolina. — *Brabham v. Crosland*, 25 S. Car. 525; *Koon v. Munro*, 11 S. Car. 155; *West v. Cauthen*, 9 S. Car. 45; *Hinton v. Kennedy*, 3 S. Car. 459; *Finch v. Finch*, 28 S. Car. 164, 13 Am. St. Rep. 665; *Manning v. Manning*, 12 Rich. Eq. (S. Car.) 410.

Tennessee. — *Dietz v. Mitchell*, 12 Heisk. (Tenn.) 676.

Virginia. — *Mills v. Mills*, 28 Gratt. (Va.) 442; *Leake v. Leake*, 75 Va. 792; *Perry v. Smoot*, 23 Gratt. (Va.) 241; *Waller v. Catlett*, 83 Va. 200; *Jones v. Jones*, 86 Va. 848; *Douglass v. Stephenson*, 75 Va. 749; *Lingle v. Cook*, 32 Gratt. (Va.) 262.

Necessity of Obtaining Leave of Court. — Under some of the statutes it was necessary for the executor or administrator to obtain leave of court before he could properly invest in Confederate bonds. *Oglesby v. Howard*, 43 Ala. 144; *Williams v. Campbell*, 46 Miss. 57; *Coffin v. Bramlitt*, 42 Miss. 194; *Frazier v. Frazier*, 77 Va. 775; *Sharpe v. Rockwood*, 78

Va. 24; *Carter v. Dulaney*, 30 Gratt. (Va.) 194.

3. Investment of Money of United States in Confederate Bonds Not Allowed. — *Sprowl's Succession*, 21 La. Ann. 544; *Crickard v. Crickard*, 25 Gratt. (Va.) 470; *Leake v. Leake*, 75 Va. 801; *Sharpe v. Rockwood*, 78 Va. 24; *Carter v. Dulaney*, 30 Gratt. (Va.) 192; *Ferguson v. Epes*, 77 Va. 499. *Compare* *Fultz v. Brightwell*, 77 Va. 742.

But where the executor offered to pay the guardian of the minors their shares in Confederate money, and he refused payment in that currency, and the executor invested in a Confederate States bond for the benefit of the legatees, it was held that the investment did not relieve him from liability. *Workman v. Bolling*, 2 S. Car. 458.

4. Rule Disallowing Investment in Confederate Bonds. — *Horn v. Lockhart*, 17 Wall. (U. S.) 570, *affirming* 1 Woods (U. S.) 628; *Head v. Starke*, Chase's Dec. (U. S.) 312, *sub nom.* *Head v. Talley*, 3 Am. L. T. 155; *Lamar v. Micou*, 112 U. S. 452; *Glasgow v. Lipse*, 117 U. S. 327; *Opie v. Castleman*, 32 Fed. Rep. 511; *Bailey v. Fitz-Gerald*, 56 Miss. 578, *overruling* *Trotter v. Trotter*, 40 Miss. 704; *Copeland v. McCue*, 5 W. Va. 264.

Reason of Rule. — "The bonds of the Confederate States were issued for the avowed purpose of raising funds to prosecute the war then waged by them against the government of the United States. The investment was, therefore, a direct contribution to the resources of the Confederate government; it was an act giving aid and comfort to the enemies of the United States; and the invalidity of any transaction of that kind, from whatever source originating, ought not to be a debatable matter in the courts of the United States. No legislation of Alabama, no act of its convention, no judgment of its tribunals, and no decree of the Confederate government could make such a transaction lawful." *Horn v. Lockhart*, 17 Wall. (U. S.) 570.

5. See *supra*, this section, *Custody and Preservation of Estate — Confusion of Trust Property with Individual Property.*

investment with the amount in his hands, he may supplement it with personal funds or with the funds of others legitimately obtained.¹

(e) **Temporary Investments.** — In *England* a personal representative is sometimes allowed to invest trust funds temporarily in securities other than those specially designated by law, but he must have the approval of the court.²

(f) **Sufficiency of Security.** — Since the objects to be secured by the investment are the safety of the fund and an income from it, it is manifestly the duty of the executor or administrator, where he has any discretion in the matter, to select such securities as will answer these purposes. In case investment in the stocks of private corporations is authorized, he should select good dividend-paying stocks.³

If Real Estate Is the Security to Be Taken, it is the duty of the executor or administrator to ascertain its value, its nature and location, the validity of the title, the terms of the mortgage by which the loan is to be secured, and the availability of the property for the protection and ultimate realization of the fund;⁴ and this duty he cannot ordinarily delegate to others,⁵ though he may take the opinion of competent persons as to the value of the property offered as security, for the purpose of forming his own judgment.⁶

The Proportion between the amount to be loaned and the value of the property to be taken as security is not fixed by any absolute rule, but generally a margin of from one-half to one-third is required, depending on the nature of the property.⁷

1. **Mingling Trust Funds with Other Funds in Making Investment.** — *Barry v. Lambert*, 98 N. Y. 300, 50 Am. Rep. 677.

2. **Temporary Investments.** — *Matthews v. Brise*, 6 Beav. 239; *Sowerby v. Clayton*, 8 Jur. 597, 3 Hare 430.

3. **Sufficiency of Security — Dividend-paying Stock.** — *Hunt, Appellant*, 141 Mass. 515; *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *Ihmsen's Appeal*, 43 Pa. St. 431.

4. **Duty to Ascertain Value and Availability of Real Estate as Security.** — *Macleod v. Annesley*, 16 Beav. 607; *Norris v. Wright*, 14 Beav. 306; *Ames v. Parkinson*, 7 Beav. 379; *Stickney v. Sewell*, 1 Myl. & C. 8; *Wilson v. Staats*, 33 N. J. Eq. 524; *Perrine v. Petty*, 34 N. J. Eq. 193; *King v. Talbot*, 40 N. Y. 76.

Real Estate of Speculative Value. — An investment by executors in mortgage bonds of a mining corporation is improper where the value of the mortgaged real estate is speculative, though the money loaned was intended to be used in improving and developing it. *Adair v. Brimmer*, 74 N. Y. 539.

The Peculiarity of the Tenure, provided the security is sufficient, is not a sufficient reason for saying that the personal representative has committed a breach of trust, and where a power is expressly given to invest in land, the executor is not precluded from investing it in leaseholds in Ireland, perpetually renewable with a head rent, this being the common tenure there. *Macleod v. Annesley*, 16 Beav. 604.

5. **Duty to Ascertain Value Cannot Be Delegated.** — *Macleod v. Annesley*, 16 Beav. 607.

6. **Taking Expert Opinion as to Value.** — "The criterion of value [for executors loaning on real estate] is the opinion or estimate of men of ordinary prudence who would deem it safe to make a loan of the like amount of their own money on the same property." *Bogart v. Van Velsor*, 4 Edw. Ch. (N. Y.) 718.

"The ordinary course of business does not justify the employment of a valuator for any other purpose than obtaining the data necessary in order to enable the trustees to judge of the sufficiency of the security offered. They are not in safety to rely upon his bare assurance that the security is sufficient, in the absence of detailed information which would enable them to form, and without forming, an opinion for themselves. At all events, if they choose to place reliance upon his opinion without the means of testing its soundness they cannot, should the security prove defective, escape from personal liability, unless they prove that the security was such as would have been accepted by a trustee of ordinary prudence, fully informed of its character, and having in view the principles to which I have already adverted." *Learoyd v. Whiteley*, L. R. 12 App. 734.

7. **Proportion Between Amount of Loan and Value of Property.** — "It has been laid down that in the case of ordinary agricultural land the margin ought not to be less than one-third of its value; whereas in cases where the subject of the security derives its value from buildings erected upon the land, or its use for trade purposes, the margin ought not to be less than one-half. I do not think these have been laid down as hard and fast limits up to which trustees will be invariably safe, and beyond which they can never be in safety to lend, but as indicating the lowest margins which in ordinary circumstances a careful investor of trust funds ought to accept. It is manifest that in cases where the subjects of the security are exclusively or mainly used for the purposes of trade, no prudent investor can be in a position to judge of the amount of margin necessary to make a loan for a term of years reasonably secure until he has ascertained not only their present market price but their intrinsic value, apart from those trading

A First Lien on Real Estate is generally required, and the risk of lending money on a junior mortgage is not considered a rightful exercise of that sound discretion which an executor or administrator is bound to use, though good faith and prudence on his part are to be considered in measuring his liability.¹

(g) **Change of Investments.** — After the funds of a decedent's estate have been regularly invested, the executor or administrator has no right to change them by substituting one security for another,² unless authorized to do so by an order of court,³ or by statute,⁴ or by the terms of the decedent's will.⁵

considerations which give them a speculative and it may be a temporary value." *Learoyd v. Whiteley*, L. R. 12 App. 734.

Two-thirds of the Value should be advanced only on property of a permanent value, as freehold land, and not on houses or buildings; and still less on buildings used in a trade, and whose value depends on the absence of competition in that trade. *Stickney v. Sewell*, 1 Myl. & C. 8. See also *Bogart v. Van Velsor*, 4 Edw. Ch. (N. Y.) 218.

"Ordinarily, in the absence of all evidence of facts showing the contrary, a loan or advance, not exceeding in amount two-thirds of the value of the real estate conveyed by the mortgage, is regarded as prudent; and the trustee is not responsible for loss which may ensue from the subsequent deterioration in value of the premises." *Foscue v. Lyon*, 55 Ala. 440 [*citing Perry on Trusts*, § 457; 3 Lead. Cas. Eq. 450-453; *In re Ogle*, 5 Pa. St. 15; *Macleod v. Annesley*, 16 Beav. 600; *Stickney v. Sewell*, 1 Myl. & C. 9].

1. Loans on Junior Mortgages Not Allowed. — *Matter of Holbert*, 48 Cal. 627; *Hanscom v. Marston*, 82 Me. 288; *Mattock v. Moulton*, 84 Me. 545; *Sherman v. Lanier*, 39 N. J. Eq. 249; *Crane v. Howell*, 35 N. J. Eq. 374; *Gilmore v. Tuttle*, 32 N. J. Eq. 611; *Wilson v. Staats*, 33 N. J. Eq. 524; *Jones v. Hooper*, 2 Dem. (N. Y.) 14; *In re Stephens*, (Supreme Ct.) 2 N. Y. Supp. 36; *Lacey v. Davis*, 4 Redf. (N. Y.) 402; *Savage v. Gould*, 60 How. Pr. (N. Y. Supreme Ct.) 228; *Matter of Blauvelt*, 2 Connolly (N. Y.) 458; *Matter of Petrie*, 5 Dem. (N. Y.) 352 [*citing Matter of Cant*, 5 Dem. (N. Y.) 269; *King v. Talbot*, 40 N. Y. 76; *Adair v. Brimmer*, 74 N. Y. 539; *Lockhart v. Reilly*, 1 De G. & J. 464; *Norris v. Wright*, 14 Beav. 291; *Drosier v. Brereton*, 15 Beav. 226; *Westover v. Chapman*, 1 Coll. 177; *Savage v. Gould*, 60 How. Pr. (N. Y. Supreme Ct.) 234; *Singleton v. Lowndes*, 9 S. Car. 465; *Stickney v. Sewell*, 1 Myl. & C. 8; — *Walker*, 5 Russ. 7; *Tuttle v. Gilmore*, 36 N. J. Eq. 617].

Unpaid Taxes are not incumbrances within a provision of a will that the funds of the estate shall be invested in bonds and mortgages "on unencumbered real estate." *Crabb v. Young*, 92 N. Y. 56.

2. No Authority to Change Investments as a General Rule. — *Witter v. Witter*, 3 P. Wms. 100; *Underwood v. Stevens*, 1 Meriv. 712; *Hanscom v. Marston*, 82 Me. 288; *Ward v. Kitchen*, 30 N. J. Eq. 31; *Baldwin's Appeal*, 81 Pa. St. 441; *Billington's Appeal*, 3 Rawle (Pa.) 55. Compare *Jones v. Atchison*, etc., R. Co., 150 Mass. 304; *Miller v. Proctor*, 20 Ohio St. 442; *Contee v. Dawson*, 2 Bland (Md.) 264.

If the Fund Invested Should Be Returned to the executor without fault on his part, he

would have the power, and would be bound, to provide for its reinvestment, where the will directed him to invest the fund and hold it in trust for certain purposes for a certain time. *Gray v. Lynch*, 8 Gill (Md.) 405.

Where moneys had, before the repeal of the usury laws, been invested in first-class security at the legal rate, the executors are not called upon, at the risk of being charged with the extra interest, to call in those moneys and reinvest them at the higher rate. *Smith v. Roe*, 11 Grant's Ch. (U. C.) 311.

3. Change of Investments by Order of Court. — When changes or reinvestments are necessary for the safety of the fund, or when the interests of the beneficiaries require it, the court may order the funds to be withdrawn and reinvested, and the executor or administrator may buy and sell in order to carry such order into effect. *Allen v. Graves*, 3 Bush (Ky.) 491; *Mason v. Bank of Commerce*, 90 Mo. 452.

A Life Tenant has the right to require that unproductive securities be sold and the proceeds invested so as to produce income. *Christian's Estate*, 13 Pa. Co. Ct. Rep. 283.

4. Statutory Authority to Change Investments. — In *England* it is expressly provided by statute that an executor or administrator may from time to time vary the investments under his control. Trust Investment Act of 1889, 52 & 53 Vict., c. 32; *In re Dick*, (1891), 1 Ch. 423, *sub nom.* *Hume v. Lopes*, (1892) App. 112.

In *Maine* power is given by statute to the court of equity to determine "the expediency of making changes and investments of property held in trust." *Richardson v. Knight*, 69 Me. 285.

See also the statutes in other jurisdictions.

5. A Power Given by the Will to Change Investments of the personal estate from time to time, in such manner as may be thought most advantageous for the estate, should be exercised in regard to all unproductive or depreciating securities; and it is the duty of the executor to dispose of stock which is constantly depreciating and wholly unproductive, at less than par, if the interest of the estate, in his judgment, demands it. *Stephens v. Milnor*, 24 N. J. Eq. 358.

Propriety of Exercising Power — Burden of Proof. — Where an executor or administrator changes an investment without an order of court, he takes on himself the onus of proving entire *bona fides*, and that, under the circumstances, there was reasonable ground to believe that the fund would be benefited. *Washington v. Emery*, 4 Jones Eq. (57 N. Car.) 32.

Consent of Beneficiaries. — Where a testator gives the income of a fund to his widow during life or widowhood, providing that "while my wife lives or remains my widow, no change in

(h) **Liabilities of Executor or Administrator** — *aa. FAILURE TO MAKE INVESTMENTS.* — If an executor or administrator fails to perform his duty to invest the funds in his hands, he is chargeable with interest from the time when they should have been invested;¹ and if they are lost in consequence of his dereliction, he will be required to make the loss good to the estate.²

The Beneficiaries Have the Option, however, in case the executor or administrator fails to invest the fund, or invests it on security other than that authorized by law or by the will, of charging him either with the amount of the fund or with the value of the securities which he might have purchased with it.³

bb. LOSS OR DEPRECIATION OF INVESTMENTS — (*aa*) *Investments Made Without Authority.* — It has been seen that it is not one of the ordinary duties of the executor or administrator to lend out or invest the funds of the estate in his hands,⁴ and therefore if he does so in a case where he is not thereto authorized by law or by the will under which he is acting, and any loss results in consequence, he is individually liable for the amount of the loss, and his liability is not dependent on any question of good faith on his part.⁵

(*bb*) *Investments in Unauthorized Securities.* — It has been observed that a testator may always prescribe the securities in which the funds of his estate shall be invested, and that in some jurisdictions the matter is regulated either by statute or by the practice of the courts.⁶ It is accordingly held that if the executor or administrator acts strictly in compliance with the law or orders of court, he incurs no personal liability in case the investments result in loss.⁷

any investment to be made without her consent," a waiver by the widow of her personal rights under the will does not give the executors the right to change the investment without her consent. *Plympton v. Plympton*, 6 Allen (Mass.) 178.

A Power to Vary Securities is important, as showing that the testator did not intend the funds of the estate to remain on perishable security. *Morgan v. Morgan*, 14 Beav. 85.

1. **For a Full Discussion** of the liabilities of an executor or administrator for interest because of his failure to invest funds in his hands, see *infra*, this title, *Accounting* — *Charges* — *Interest*.

2. **Liability for Losses Resulting from Failure to Invest** — *England.* — *Watts v. Girdlestone*, 6 Beav. 188; *Byrne v. Norcott*, 13 Beav. 336; *Robinson v. Robinson*, 1 De G. M. & G. 256; *Fletcher v. Walker*, 3 Madd. 73; *Macdonnell v. Harding*, 7 Sim. 178; *Munch v. Cockerell*, 9 Sim. 339; *Lowry v. Fulton*, 9 Sim. 115; *Bate v. Scales*, 12 Ves. Jr. 402; *Moyle v. Moyle*, 2 Russ. & M. 710; *Ryder v. Bickerton*, 3 Swanst. 80, note; *Styles v. Guy*, 1 Macn. & G. 422; *Trafford v. Boehm*, 3 Atk. 440; *Lyse v. Kingdon*, 1 Coll. 184.

United States. — *In re Thorp*, 2 Ware (U. S.) 294, 23 Fed. Cas. No. 14,002.

Alabama. — *Owen v. Peebles*, 42 Ala. 338.

California. — *Matter of Holbert*, 48 Cal. 627.

Illinois. — *Hough v. Harvey*, 71 Ill. 72.

Maryland. — *Chase v. Lockerman*, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; *Miller v. Miller*, 73 Md. 442.

New York. — *Garniss v. Gardiner*, 1 Edw. Ch. (N. Y.) 128; *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 620; *Bates v. Underhill*, 3 Redf. (N. Y.) 365; *Matter of Macdonald*, 4 Redf. (N. Y.) 321.

North Carolina. — *Shipp v. Hettrick*, 63 N. Car. 329; *Peacock v. Harris*, 85 N. Car. 146.

Pennsylvania. — *Weigand's Appeal*, 28 Pa. St. 471; *Astons's Estate*, 5 Whart. (Pa.) 228.

Virginia. — *Handly v. Snodgrass*, 9 Leigh (Va.) 484; *Lomax v. Pendleton*, 3 Call (Va.) 538.

Wilful Misconduct in not investing when ordered to do so subjects the executor or administrator to personal liability. *Crackelt v. Bethune*, 1 Jac. & W. 566.

3. **Use of Fund by Executor or Administrator — Option of Beneficiaries.** — *Robinson v. Robinson*, 11 Beav. 371; *Watts v. Girdlestone*, 6 Beav. 188; *Ames v. Parkinson*, 7 Beav. 379; *Byrchall v. Bradford*, 6 Madd. 235; *Robinson v. Robinson*, 1 De G. M. & G. 256; *Perry v. Smoot*, 23 Gratt. (Va.) 241.

4. See *supra*, this section, *Duty to Invest Funds of Estate*.

5. **Investments Made Without Authority — Executor or Administrator Personally Liable for Loss** — *England.* — *Waite v. Whorwood*, 2 Atk. 159; *Ratcliffe v. Graves*, 1 Vern. 196.

Alabama. — *Gerald v. Bunkley*, 17 Ala. 170; *Tomkies v. Reynolds*, 17 Ala. 109; *Walls v. Grigsby*, 42 Ala. 473; *Waring v. Lewis*, 53 Ala. 615.

California. — *Lacoste's Estate*, Myr. Prob. (Cal.) 67.

Connecticut. — *Guthrie v. Wheeler*, 51 Conn. 214.

Florida. — *Moore v. Hamilton*, 4 Fla. 112.

Illinois. — *Johnston v. Maples*, 49 Ill. 101.

Indiana. — *State v. Johnson*, 7 Blackf. (Ind.) 529.

Michigan. — *Ward v. Tinkham*, 65 Mich. 695.

Pennsylvania. — *Spellier's Estate*, 17 Pa. Co. Ct. Rep. 286, 4 Dist. Pa. Rep. 678.

6. See *supra*, this section, *Character of Investments*.

7. **Compliance with the Law or Order of Court — Representative Not Personally Liable.** — *Hutcheson v. Hammond*, 3 Bro. C. C. 147; *Brown v. Litton*, 1 P. Wms. 141; *Franklin v. Frith*, 3 Bro. C. C. 434; *Ex p. Champion*, cited in *Hutcheson v. Hammond*, 3 Bro. C. C. 147;

If, however, he disregards in this respect the provisions of the will or the rule of law obtaining in the particular jurisdiction, he takes the risk of any loss that may result,¹ without the right to any profit that he may make;² and if the trust funds are invested on several improper securities, the executor or administrator is not entitled to set off a gain on one against a loss on the other.³

Assent of Beneficiaries to Improper Investment. — It is optional with the beneficiaries of the estate to hold the personal representative liable for the amount of the fund which he has invested improperly, or to accept the investment as made;⁴ but where he relies on the consent of the beneficiaries to escape liability for an improper investment, he must show that such consent was given on fair representations and full knowledge of all the facts and circumstances attending the proposed investments.⁵

cc. CARE AND PRUDENCE IN MAKING INVESTMENTS. — So far as the selection of securities is committed to the executor or administrator, whether he is given unlimited discretion in the premises, or whether he is restricted to securities of certain kinds or classes, he is bound to exercise such diligence and prudence as in general prudent men of discretion and intelligence in such matters employ

Cooper v. Douglas, 2 Bro. C. C. 232; *Matter of Knight*, 12 Cal. 200; *Tucker v. Tucker*, 33 N. J. Eq. 235; *Vreeland v. Schoonmaker*, 16 N. J. Eq. 512; *Peacock v. Harris*, 85 N. Car. 146.

1. Investment in Unauthorized Securities — Executor or Administrator Personally Liable for Loss — England. — *Darke v. Martyn*, 1 Beav. 525; *Langston v. Ollivant*, *Cooper* 33.

California. — *Matter of Holbert*, 48 Cal. 627. *New Jersey.* — *Woodruff v. Lounsberry*, 40 N. J. Eq. 545, 42 N. J. Eq. 699; *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508; *Holcombe v. Holcombe*, 13 N. J. Eq. 413.

New York. — *Holden v. New York, etc., Bank*, 72 N. Y. 286; *Adair v. Brimmer*, 74 N. Y. 539; *Bohde v. Bruner*, 2 Redf. (N. Y.) 333. *North Carolina.* — *Jurney v. Cowan*, 67 N. Car. 393.

South Carolina. — *Womack v. Austin*, 1 S. Car. 421.

"The Security Must Be Such as the Court Will Approve, or the personal representative will be held liable for losses, notwithstanding his good faith." *Hancorn v. Allen*, Dick. 498; *Peat v. Crane*, 2 Dick. 499, note.

Good Faith and Diligence will not relieve from liability if the statute governing the investment of funds of the decedent's estate is not strictly followed. *Garesche v. Priest*, 9 Mo. App. 270, 78 Mo. 126.

If the Securities Are Such as the Court Would Have Approved on application by the probate court, the executor will not be held for any loss, though he made the investment without leave of court. *Bodley v. McKinney*, 9 Smed. & M. (Miss.) 339.

A Loan on Personal Security is a breach of trust rendering the personal representative liable if the sum loaned cannot be collected from the borrower. *Webster v. Spencer*, 3 B. & Ald. 360, 5 E. C. L. 316, 1 Eden 149, note; *Walker v. Symonds*, 3 Swanst. 63; *Bacon v. Clark*, 3 Myl. & C. 294; *Moore v. Felkel*, 7 Fla. 44; *Brewster v. Demarest*, 48 N. J. Eq. 559; *Sherman v. Lanier*, 39 N. J. Eq. 249; *Bohde v. Bruner*, 2 Redf. (N. Y.) 333. See also cases cited *supra*, this section, *Character of Investments — Personal Security*.

A Loan to a Coexecutor or Coadministrator without proper security is a breach of trust.

— *v. Walker*, 5 Russ. 7; *Gleadow v. Atkin*, 2 Crompt. & J. 548; *Warwick v. Richardson*, 10 M. & W. 284; *Stickney v. Sewell*, 1 Myl. & C. 8; *Brewster v. Demarest*, 48 N. J. Eq. 559; *Perrine v. Petty*, 34 N. J. Eq. 193.

This is so even if the will authorizes the executors to lend money on personal security. — *v. Walker*, 5 Russ. 7.

Loaning to a Firm of Which the Executor Is a Member Is Not a Proper Investment. — *Wilmerding v. McKesson*, 103 N. Y. 329; *In re Stephens*, (Supreme Ct.) 2 N. Y. Supp. 36.

A Deposit on Interest in Bank is not an authorized mode of investment, and on the failure of the bank the personal representative is liable for the loss. *Darke v. Martyn*, 1 Beav. 525; *Gibbins v. Taylor*, 22 Beav. 344. See also *supra*, this section, *Character of Investments*.

2. Executor Not Entitled to Profit from Unauthorized Investment. — *Phayre v. Perce*, 3 Dow. 128.

3. Set-off of Gain on One Improper Investment Against Loss on Another Not Allowed. — *Robinson v. Robinson*, 11 Beav. 371.

4. Election by Beneficiaries to Accept Improper Investment or to Hold Representative Liable — Alabama. — *Billingslea v. Glenn*, 45 Ala. 540.

California. — *Matter of Holbert*, 39 Cal. 597. *Florida.* — *Sanderson v. Sanderson*, 17 Fla. 820.

Indiana. — *Johnson v. Hedrick*, 33 Ind. 129. *Mississippi.* — *Powell v. Cooper*, 42 Miss. 221.

New York. — *King v. Talbot*, 40 N. Y. 76. *Pennsylvania.* — *McGeary's Estate*, 33 Pittsb. Leg. J. (Pa.) 405.

Virginia. — *Perry v. Smoot*, 23 Gratt. (Va.) 241.

What Constitutes Assent. — The action of the beneficiaries of an estate in approving a compromise between the executor and a municipal corporation in whose bonds the executor improperly invested the funds of the estate is not an assent to such improper investment so as to estop the beneficiaries from holding the executor liable because of the unlawful investment. *Woodruff v. Lounsberry*, 40 N. J. Eq. 545, affirmed 42 N. J. Eq. 699.

5. Consent Must Be Given with Full Knowledge of All the Facts. — *Ward v. Tinkham*, 65 Mich. 695.

in their own like affairs, and to act in good faith for the benefit of the estate. If these requirements are observed the executor or administrator is not responsible for the loss of the funds; but otherwise any loss must be borne by him personally,¹ unless the will relieves him from liability for losses caused by his negligence.²

But Mere Errors of Judgment, when there is no lack of good faith, are not sufficient to charge him.³

1. Measure of Liability — Good Faith and Ordinary Prudence — *England.* — Clough v. Bond, 3 Myl. & C. 490.

Alabama. — Harrison v. Mock, 10 Ala. 185; Foscue v. Lyon, 55 Ala. 440; Lyon v. Foscue, 60 Ala. 468; Nunn v. Nunn, 66 Ala. 38.

Illinois. — Corrington v. Corrington, 15 Ill. App. 393; Whitney v. Peddicord, 63 Ill. 249.

Maryland. — Gwynn v. Dorsey, 4 Gill & J. (Md.) 460; McCoy v. Horwitz, 62 Md. 183.

Massachusetts. — Bowker v. Pierce, 130 Mass. 262; Kinmonth v. Brigham, 5 Allen (Mass.) 277; Harvard College v. Amory, 9 Pick. (Mass.) 446.

Missouri. — Merritt v. Merritt, 62 Mo. 150.

New Hampshire. — French v. Currier, 47 N. H. 88; Ham v. Ham, 58 N. H. 70; Bell v. Sawyer, 59 N. H. 393.

New Jersey. — Perrine v. Vreeland, 33 N. J. Eq. 102, 596; Holcomb v. Holcomb, 11 N. J. Eq. 281.

New York. — Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619; Matter of Butler, 1 Connolly (N. Y.) 58; King v. Talbot, 40 N. Y. 76; Haight v. Brisbin, 100 N. Y. 219; Mills v. Hoffman, 26 Hun (N. Y.) 594; Atlantic Trust Co. v. Powell, 23 Misc. Rep. (N. Y. Supreme Ct.) 289; Savage v. Gould, 60 How. Pr. (N. Y. Supreme Ct.) 217.

North Carolina. — Dortch v. Dortch, 71 N. Car. 224; Nelson v. Hall, 5 Jones Eq. (58 N. Car.) 32.

Pennsylvania. — Calhoun's Estate, 6 Watts (Pa.) 185; Barker's Estate, 159 Pa. St. 519, affirming 13 Pa. Co. Ct. Rep. 419; Fahnestock's Appeal, 104 Pa. St. 46; Jack's Appeal, 94 Pa. St. 367.

Vermont. — Barney v. Parsons, 54 Vt. 623, 41 Am. Rep. 858.

Virginia. — Watkins v. Stewart, 78 Va. 111; Cooper v. Cooper, 77 Va. 198.

Where the Will Contains Alternate Directions, mentioning different securities on which the executor may loan, he cannot be held liable for loss resulting from investment in one of the classes of securities named in the will, though it would seem that he should select that class which would be the more readily approved by the court. Earlom v. Saunders, Ambl. 241.

Test of Value of Property. — The true test of the value of the property as security for a loan is the price which it would bring at forced sale. Perrine v. Petty, 34 N. J. Eq. 193.

Purchasing Bonds at High Premium and holding them until they are only worth par does not show such mismanagement on the part of the personal representative as will subject him to liability for the consequent loss. Valentine v. Valentine, 3 Dem. (N. Y.) 597; Cridland's Estate, 132 Pa. St. 479.

Stocks Turned Over to a Legatee and not satisfactory to him are not a proper investment for the executor to make. Matter of Herrick, (Surrogate Ct.) 32 N. Y. St. Rep. 1032.

Dividend-paying Stock should be selected when investment in shares of private corporations is allowed; and if it is at par when chosen, subsequent loss cannot be charged to the executor or administrator; but it has been held that if he invests in new stock paying no dividends, he is liable for any loss that may ensue. Hunt, Appellant, 141 Mass. 515; Ihmsen's Appeal, 43 Pa. St. 431; Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333. Compare Gray v. Lynch, 8 Gill (Md.) 405, holding that a direction to invest in "some safe and profitable stock" does not restrict the selection to stocks already existing, but that stocks of corporations about to be created may be taken.

Necessity of Purchasing at Foreclosure Sale in Order to Protect Estate. — In Crabb v. Young, 92 N. Y. 56, it was held that the fact that a mortgage taken to secure a loan made by an executor had to be foreclosed and the land bid in did not show such misconduct or negligence in taking the security as would establish liability under a clause that they were to be exempted from liability "for any loss or damage that may happen to my estate except the same shall occur or take place from their own wilful default, misconduct, or neglect." "Such a rule," it was said, "would require a trustee to forecast the future with infallible accuracy, and in case of failure to do so, make him responsible for the consequences, even though he exercised the greatest caution and prudence in making investments. Under such a rule no prudent man would or could safely undertake the management of a trust estate, and it would be difficult to obtain honest and reliable men to accept what is a very necessary but is often a thankless and troublesome duty."

2. Liability for Negligence Affected by Will. — In Crabb v. Young, 92 N. Y. 56, it was held, under a will providing that the executors should not be liable for any loss unless it occurred "from their wilful default, misconduct, or neglect," that the executors were not liable for loss resulting from imprudent and careless investments where the imprudence was not wilful, and their conduct not fraudulent.

3. Mere Errors of Judgment Do Not Render Representative Liable — *Illinois.* — Corrington v. Corrington, 15 Ill. App. 393; Whitney v. Peddicord, 63 Ill. 249.

New Jersey. — Woodruff v. Lounsberry, 40 N. J. Eq. 545.

Pennsylvania. — Jack's Appeal, 94 Pa. St. 367.

Virginia. — Cooper v. Cooper, 77 Va. 198; Jones v. Jones, 86 Va. 845.

A Presumption of Good Faith Arises where the executor or administrator has a personal interest in the fund invested.¹

Personal Supervision of Investments. — It is the duty of the executor or administrator to see personally that the investment is actually made, and to have possession of the securities himself.²

dd. **LOSS OF PREMIUMS.** — Where an executor or administrator is authorized to invest in one or more of several kinds of securities, he may, in the exercise of his sound discretion, adopt any that he deems best calculated to produce the most favorable results to the estate, and he will not be held charged with diminution of the principal caused by the loss of the premium on the securities in which he invested;³ and authority to pay such premiums is implied by a direction in the will to invest in securities which are at a premium.⁴

(i) **Investments Made by Decedent** — *aa.* **GENERAL PRINCIPLES.** — As to investments made by the decedent in his lifetime and coming into the hands of his executor or administrator, even though the investment be considered a safe and proper one at the time when it was made, the executor or administrator is not relieved from exercising supervisory care of it thereafter, but he is still bound to be watchful,⁵ to see that the interest is paid with a reasonable degree of promptness,⁶ and to keep himself informed and to take notice of those things affect-

1. Presumption of Good Faith — Interest of Personal Representative in Fund. — *Baud v. Fardell*, 7 De G. M. & G. 628; *Washington v. Emery*, 4 Jones Eq. (57 N. Car.) 32.

2. Personal Supervision of Investment. — In *Key v. Hughes*, 32 W. Va. 184, the executor applied to the cashier of a bank to purchase bonds, and, without seeing the bonds or knowing that they were in the bank, he paid the cashier for them, with the understanding that they were to be held at the bank subject to his order. The cashier paid him the interest as it matured on the bonds. It afterwards appeared that no bonds were in fact ever put on special deposit in the name of the executor, and he made no inquiry for them until the bank had failed. It was held that he was liable for the loss.

In *Challen v. Shippam*, 4 Hare 555, a personal representative deposited funds of the estate with his bankers, requesting them to invest in certain securities. The request was not complied with, and no further inquiry was made by the personal representative as to the disposition of the funds until about five months afterwards, when the bankers had become bankrupt. On these facts the personal representative was held liable for the loss.

3. Loss of Premium. — *Emery v. Batchelder*, 78 Me. 233; *Valentine v. Valentine*, 3 Dem. (N. Y.) 507; *Cridland's Estate*, 132 Pa. St. 479.

4. Direction to Invest in Securities at Premium. — *Brown v. Chesterman*, (Supreme Ct.) 9 N. Y. Supp. 187.

In *Wisner v. Kleinhans*, 69 Mich. 307, the executors were given by the testator's will a "sufficient sum of money in trust, to be by them * * * invested in the best government bonds to the amount of seventy-five thousand dollars." It was held that the testator meant that the executors should invest a sum sufficient to purchase bonds of the face value of seventy-five thousand dollars, though such bonds were then selling at a high premium.

Stocks and Bonds of New Corporations are not a proper investment where the success of the

business has not been established, and the corporation has no surplus or working capital, but is doing business wholly on credit.

Indiana. — *Tucker v. State*, 72 Ind. 242.

Maine. — *Mattocks v. Moulton*, 84 Me. 545.

Massachusetts. — *Dickinson*, Appellant, 152 Mass. 184.

New Hampshire. — *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333.

New York. — *Adair v. Brimmer*, 74 N. Y. 539.

Wisconsin. — *Simmons v. Oliver*, 74 Wis. 633.

Compare Gray v. Lynch, 8 Gill (Md.) 405.

5. Investments Made by Decedent — General Rule Stated. — *Matter of Butler*, 1 Connolly (N. Y.) 58.

"An Executor or Trustee Is Not a Guarantor for the safety of the securities which are committed to his charge, and does not warrant such safety under any and all circumstances, and against all contingencies, accidents, or misfortunes. The true rule which should govern his conduct is that he is bound to employ such prudence and such diligence in the care and management of the estate or property as in general prudent men of discretion and intelligence employ in their own like affairs." *McCabe v. Fowler*, 84 N. Y. 314.

Loans on Personal Security should be called in and the money invested in proper securities. *Lacy v. Stamper*, 27 Gratt. (Va.) 42. See also *infra*, this section, *Personal Property — Collection of Debts*.

Retaining Investments for Individual Purposes. — In *Ruckstuhl's Estate*, 17 Phila. (Pa.) 441, 42 Leg. Int. (Pa.) 56, it was held that where an executor retained securities in his charge which he had purchased during the lifetime of the decedent and at her request, using them for his individual purposes, he was liable for their loss.

6. Falling Behind and Neglect to Pay Interest is something to put the executor on inquiry as to the safety of the investment, and allowing such state to continue for more than four years is such negligence as will subject him to lia-

ing the investment which a man of fair judgment, care, and prudence would take and keep in consideration in making and caring for investments of his own moneys; and if he apprehends depreciation he should protect the estate by converting the securities.¹

bb. RETAINING AUTHORIZED INVESTMENTS. — If investments left by the decedent are in securities which the executor or administrator would be authorized to take, he may, if he acts in good faith and with a proper degree of care and prudence, retain them without becoming liable in case of loss or depreciation.²

cc. RETAINING UNAUTHORIZED INVESTMENTS. — If, on the other hand, the decedent left funds invested in securities which the executor or administrator would not be authorized to take, it is his duty within a reasonable time to convert them into money and invest according to law; and if instead of doing so he retains the unauthorized securities, he becomes personally responsible for the safety of the fund,³ unless he is authorized by the will to retain such investments,⁴

bility for interest lost to the estate thereby. *Matter of Butler*, 1 Connoly (N. Y.) 58.

1. Duty to Call in Doubtful Investments. — *Fry v. Fry*, 27 Beav. 144; *Powell v. Evans*, 5 Ves. Jr. 839; *Peat v. Crane*, 3 Dick. 499 note; *Hughes v. Empson*, 22 Beav. 181; *Eagleton v. Kingston*, 8 Ves. Jr. 466; *Grayburn v. Clarkson*, L. R. 3 Ch. 605; *Sculthorpe v. Tipper*, L. R. 13 Eq. 232; *Ward v. Kitchen*, 30 N. J. Eq. 31; *Judd v. Warner*, 2 Dem. (N. Y.) 104; *Lacey v. Davis*, 4 Redf. (N. Y.) 402; *Brown v. Campbell*, Hopk. (N. Y.) 233.

2. Retaining Authorized Securities — Not Liable When Acting in Good Faith — England. — *In re Brooks*, 76 L. T. N. S. 771; *Peat v. Crane*, 3 Dick. 499 note; *Robinson v. Robinson*, 1 De G. M. & G. 256; *Baud v. Fardell*, 7 De G. M. & G. 628. *Compare Knott v. Cottee*, 16 Beav. 82. *Massachusetts.* — *Bowker v. Pierce*, 130 Mass. 262.

Mississippi. — *Troup v. Rice*, 55 Miss. 278.

New Jersey. — *Halsted v. Meeker*, 18 N. J. Eq. 136; *Green v. Green*, 30 N. J. Eq. 451; *Ward v. Kitchen*, 30 N. J. Eq. 31; *Coddington v. Stone*, 36 N. J. Eq. 362; *Parker v. Glover*, 42 N. J. Eq. 559.

New York. — *Lacey v. Davis*, 4 Redf. (N. Y.) 402; *McRae v. McRae*, 3 Bradf. (N. Y.) 199; *Shumway v. Graves*, 13 N. Y. Wkly. Dig. 402.

North Carolina. — *Torrence v. Davidson*, 92 N. Car. 437, 53 Am. Rep. 419; *Patterson v. Wadsworth*, 89 N. Car. 407.

Pennsylvania. — *Stewart's Appeal*, 110 Pa. St. 410; *M'Nair's Appeal*, 4 Rawle (Pa.) 148.

Rhode Island. — *Grinnell v. Baker*, 17 R. I. 41.

South Carolina. — *Pope v. Mathews*, 18 S. Car. 453.

Virginia. — *Watkins v. Stewart*, 78 Va. 111.

When a Tenant for Life Is Entitled in Specie, the rule is that investments may remain, but debts, such as turnpike bonds, must be realized. *Holgate v. Jennings*, 24 Beav. 623.

3. Retaining Unauthorized Securities. — *Howe v. Dartmouth*, 7 Ves. Jr. 150; *Bullock v. Wheatley*, 1 Coll. 130; *Marsden v. Kent*, 5 Ch. Div. 598; *Matter of Macdonald*, 4 Redf. (N. R.) 321; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349; *Goodwin v. Howe*, 62 How. Pr. (N. Y. Supreme Ct.) 134; *Judd v. Warner*, 2 Dem. (N. Y.) 104; *Barker v. Smith*, 1 Dem. (N. Y.) 291.

If some of the securities improperly retained by the executor rise in value and others fall,

the beneficiaries may elect to accept the investment as to the former, and claim the enhanced value and income therefrom, and still reject the latter, and charge the executor with the loss. *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349.

What Is Reasonable Time to Convert Investments. — In *New York* it is held that eighteen months is a reasonable time in which to dispose of the decedent's investments and reinvest. *Matter of Gray*, 91 N. Y. 502; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 355; *Lockhart v. Public Administrator*, 4 Bradf. (N. Y.) 21.

Much is left to the discretion of the executor or administrator in regard to the time within which he should convert securities left by the decedent, and if, in the proper exercise of that discretion, he delays the conversion, he cannot be held liable for any loss arising from such delay. *Williamson's Estate*, 7 W. N. C. (Pa.) 82, 12 Phila. (Pa.) 64, 35 Leg. Int. (Pa.) 145.

In *Buxton v. Buxton*, 1 Myl. & C. 80, Lord Cottenham held that where an executor did not sell Mexican bonds until a year and a half after the death, but kept them in good faith, he ought not to be charged with the loss.

4. Authority Given by Will to Retain Decedent's Investments. — *Howe v. Dartmouth*, 7 Ves. Jr. 150; *Gray v. Siggers*, 15 Ch. Div. 74, 49 L. J. Ch. 819, 29 W. R. 13; *In re Norrington*, 13 Ch. Div. 654; *Ward v. Kitchen*, 30 N. J. Eq. 31.

The Provisions of the Will May Be Mandatory in respect to the continuation of investments by the executor. Thus, where the testator gave his widow the income of all his property "yielding income," it was held that she was entitled to the income of the funds as they stood at his death, and that the executors had no power to change them. *Boys v. Boys*, 28 Beav. 436. See also *Neville v. Fortescue*, 16 Sim. 333; *Crackelt v. Bethune*, 1 Jac. & W. 566.

But notwithstanding such a bequest, power is given by statute in *Maine* to convert the securities and reinvest the fund. *Richardson v. Knight*, 69 Me. 285.

What Constitutes Continuation of Investment. — In *Hogan v. De Peyster*, 20 Barb. (N. Y.) 100, the testator left it to the discretion of his executors to suffer such part of his estate as was then invested in bank stock to remain as they might deem it best for the interests of the tes-

or the matter is expressly regulated by statute.¹

(9) *Loss of Assets* — (a) *Liability in General.* — The Doctrine at Law as to the liability of an executor or administrator for the loss of assets of the estate in his hands was that when he had once become fully responsible by the actual receipt of the property, he could not discharge himself by showing that it had been lost by inevitable accident such as fire, robbery, and the like.²

The Doctrine in Equity, which has been adopted by the courts of probate, is that if an executor or administrator has acted for the benefit of the estate, used proper diligence, and acted with ordinary care and circumspection in the discharge of his trust, he will not be held answerable for losses which he could not have foreseen and which ordinary precaution could not have guarded against. The general principle which seems to run through all the authorities as to his liability recognizes the doctrine that if he acts honestly and prudently, though there be loss to or diminution of the estate, he will not be held liable,³ but if he has acted negligently or dishonestly and loss to the estate ensues, he is responsible for it.⁴

tator's family. At the time of his death the testator held shares of stock in the Bank of the United States. Afterwards the charter of that bank expired, and the "United States Bank" was chartered to take its place, and by arrangement between the two banks stock of the old concern was transferred to the new bank. It was held that the acceptance by the executors of the shares in the new bank in place of those in the old was not a new investment, and therefore the executors were not liable for the loss on the failure of the bank.

1. *The New Jersey Statute* (P. L. 1881, p. 130) provides that where an executor or trustee continues, in good faith, an investment made by the testator on bond and mortgage or in the bonds or shares of stock of any corporation, and such securities shall have come into the hands of the executor to be administered, and he, in the exercise of good faith and a reasonable discretion, may have (before the passage of the act) continued the investment, or may, after the passage of the act, continue the investment, he shall not be accountable for any loss by reason of such investment; provided, that the act shall not apply to cases where the deed of trust or will, or the court having jurisdiction of the matter, specially directs in what manner the trust fund shall be invested. *Parker v. Glover*, 42 N. J. Eq. 559.

2. *Doctrine at Law* — *Personal Representative Liable for Assets Lost Without Fault.* — *Crosse v. Smith*, 7 East 258.

3. *Doctrine in Equity* — *No Liability for Loss Not Caused by Fault or Negligence.* — *Massey v. Banner*, 1 Jac. & W. 248; *Christy v. McBride*, 2 Ill. 75; *Fudge v. Durn*, 51 Mo. 264; *Matter of Millenovich*, 5 Nev. 161; *Stevens v. Gage*, 55 N. H. 175, 20 Am. Rep. 191.

"The Court is Prompt to Protect an Administrator or trustee against loss resulting from an honest mistake, but will not relieve him of loss resulting from measures adopted solely with a view to his own interest." *Cooley v. Vansyckle*, 14 N. J. Eq. 496.

The Principles Involved in Regulating the Liability for Losses are (1) that in order not to deter persons from undertaking these offices the court is extremely liberal, and (2) that care must be had to guard against abuse. *Raphael v. Boehm*, 13 Ves. Jr. 470; *Powell v. Evans*, 5 Ves. Jr. 843.

Distinction Between Liability to Creditors and Liability to Legatee. — In *M'Nair's Appeal*, 4 Rawle (Pa.) 148, it was held that there is a distinction between the liabilities of executors with respect to creditors and those with respect to legatees, and that if the executors managed the estate in accordance with the ideas which the testator himself entertained of it, and did nothing but what there is reason to believe he would have approved, they are not responsible for losses to legatees. See to the same effect *Sadler v. Hobbs*, 2 Bro. C. C. 117; *Gibbs v. Herring*, Pre. Ch. 49; *Churchill v. Hobson*, 1 P. Wms. 243; *Westley v. Clarke*, 1 Eden 357, 1 P. Wms. 83, note; *Bacon v. Bacon*, 5 Ves. Jr. 331; *Brown's Appeal*, 1 Dall. (Pa.) 311; *Bruner's Appeal*, 57 Pa. St. 46.

4. *Loss Resulting from Neglect of Duty* — *Executor or Administrator Personally Liable.* — *Whitney v. Peddicord*, 63 Ill. 249; *Boggan v. Walter*, 12 Smed. & M. (Miss.) 666; *Vreeland v. Schoonmaker*, 16 N. J. Eq. 512; *Kier's Estate*, 27 Pittsb. Leg. J. (Pa.) 97; *Rice's Estate*, 38 Leg. Int. (Pa.) 452, 14 Phila. (Pa.) 325; *Davis v. Chapman*, 83 Va. 67, 5 Am. St. Rep. 251.

The Circumstances of Each Case must be considered in determining whether the executor or administrator has managed the estate in his hands as a prudent man would his own, so as to relieve him from liability for loss. *Bryan v. Mulligan*, 2 Hill Eq. (S. Car.) 360.

Liability as Bailee. — In the *United States* it is generally held that the liability of an executor or administrator for property of the estate in his hands is that of an ordinary bailee for hire. *Lehman v. Robertson*, 84 Ala. 489; *Carrico v. Brummel*, 5 Ky. L. Rep. 775; *State v. Meagher*, 44 Mo. 356, 100 Am. Dec. 298.

But in *England* it is held that he stands in the position of a gratuitous bailee. *Job v. Job*, 6 Ch. Div. 562.

Nonfeasance is as much neglect of duty as malfeasance, and an executor is chargeable with loss caused thereby. *Fisher v. Skillman*, 18 N. J. Eq. 229.

Replacing Chattels — *Election by Distributee.* — In the case of the loss of a slave it was held that the distributees might elect either to accept another slave that the administrators substituted instead of the one lost, or to charge them with his value. *Kavanaugh v. Thompson*, 16 Ala. 817.

Destruction or Larceny of Notes. — It is held, however, that the destruction or larceny of notes does not relieve an executor or administrator from liability for their amount, because he may sue on them as lost instruments, the debts represented by the notes not being extinguished by their loss or destruction.¹

(b) **Loss Resulting from Acts of Third Persons** — *aa. ACTS OF INDIVIDUALS* — (*aa*) *Theft*. The liability of an executor or administrator in case property of the estate is taken from his possession by thieves or robbers depends, as in other cases of loss, on the care exercised for its safety. If he was guilty of no negligence in keeping the funds or other assets in his personal possession instead of depositing them in a safe place, he will not be held accountable for the loss, but he is responsible only where there was neglect or misconduct on his part.²

(*bb*) *Conversion or Loss by Agent or Attorney*. — The necessity of employing agents or attorneys in the collection of assets involves the risk of loss to the estate by their misconduct, negligence, or nonfeasance, and if a loss be sustained from such cause the executor or administrator is not liable, if he exercised due prudence in the selection of the agent or attorney and his conduct was not otherwise negligent or improper.³

The Liability of the Executor for His Negligence Is Measured by the detriment sustained by the estate therefrom, and this is the value of the property, whether real or personal, at the date of the loss. *Wheeler v. Bolton*, 92 Cal. 159.

Property Never in Possession of Executor or Administrator. — An executor or administrator is *prima facie* liable only for such assets as come into his possession. *Wheeler v. Bolton*, 92 Cal. 159. But he may be charged with the value of property lost through his negligence, though he never had possession of it. *Tuttle v. Robinson*, 33 N. H. 104.

Loss of Real Estate. — In *California* the rule applicable to the loss of personal property by an executor or administrator applies also to real estate. Matter of *Herteman*, 73 Cal. 545; *Wheeler v. Bolton*, 92 Cal. 159.

Relinquishing Security. — If an executor delivers a mortgage to be canceled, and the debt is thereby lost, he is liable for it. *Fisher v. Skillman*, 18 N. J. Eq. 229.

1. Destruction or Larceny of Notes. — *Williams v. Cubage*, 36 Ark. 307.

2. Personal Representative Not Liable for Theft Without His Fault. — *Lehman v. Robertson*, 84 Ala. 489; *State v. Meagher*, 44 Mo. 356, 100 Am. Dec. 298; *Fudge v. Durn*, 51 Mo. 264; *Stevens v. Gage*, 55 N. H. 175, 20 Am. Rep. 191; *Furman v. Coe*, 1 Cai. Cas. (N. Y.) 96.

In *Jones v. Lewis*, 2 Ves. 240, *cited with approval* in *Job v. Job*, 6 Ch. Div. 562, Lord Hardwicke said: "If a trustee is robbed, that robbery properly proved shall be a discharge, provided he keeps them [the goods] so as he would keep his own. So it is as to an executor or administrator, who is not to be charged further than goods come to his hands; and for these not to be charged unless guilty of a devastavit; and if robbed, and he could not avoid it, he is not to be charged, at least in this court."

The Ground on Which These Decisions Rest is that the administrator is the representative of the deceased, and is to be regarded as a trustee engaged in administering a private trust, and not as a public officer. *State v. Powell*, 67 Mo. 395.

"What Is Common or Ordinary Diligence, or the lack of it, is more frequently a question of

fact than of law, and * * * 'in every community it must be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers, as well as the institutions, peculiar to the age; so that, although it may not be possible to lay down any very exact rule, applicable to all times and all circumstances, yet that may be said to be common or ordinary diligence, in the sense of the law, which men of common prudence generally exercise about their own affairs in the age and country in which they live.'" *Lehman v. Robertson*, 84 Ala. 489.

As to the Duty of Depositing Funds of the estate in bank, see *supra*, this section, *Deposit of Funds*.

Failure to Exercise Ordinary Care — Personal Representative Is Liable. — *Tarver v. Torrance*, 81 Ga. 261, 12 Am. St. Rep. 311.

It Is Inexcusable Negligence for an executor or administrator to retain money in his custody where it could be stolen, after the time required by law for paying it over to creditors or distributees. *Black v. Hurlbut*, 73 Wis. 126.

In *Foster v. Davis*, 46 Mo. 268, money belonging to the estate was taken from the executor's house by robbers. The occurrence took place during the civil war, in a community where violence and lawlessness were prevalent. For some time before the robbery the executor had kept the money buried in the ground, but it was not shown why it was taken from its safe hiding place and put in the executor's house. It was held that he was liable for the loss.

3. Liability for Acts of Agents and Attorneys — England. — *Kilbee v. Sneyd*, Moll. 186; *Edmonds v. Peake*, 7 Beav. 239.

Canada. — *Low v. Gemley*, 18 Can. Sup. Ct. Rep. 685, *affirming* *Montreal L. R.* 4 Super. Ct. 92.

United States. — *Green v. Hanberry*, 2 Brock. (U. S.) 403, 10 Fed. Cas. No. 5759.

California. — Matter of *Taylor*, 52 Cal. 477.

Illinois. — *Christy v. McBride*, 2 Ill. 75.

Kentucky. — *McRoberts v. Carneal*, (Ky. 1898) 44 S. W. Rep. 442.

Missouri. — *Julian v. Abbott*, 73 Mo. 580.

New Hampshire. — *Dodge v. Stickney*, 62 N. H. 330.

bb. LOSS RESULTING FROM ACTS OF POLITICAL AUTHORITIES — (aa) Confiscation. — An executor or administrator is not liable for property confiscated and taken out of his possession by the government.¹

(bb) Emancipation of Slaves. — The rule as to slaves lost by emancipation seems to be that the executor or administrator is not liable if he was guilty of no neglect of duty in not selling them.²

(c) Loss Resulting from Accidental Causes — aa. DEPRECIATION IN VALUE. — The general rule applicable to executors and administrators is that so long as they keep themselves within the line of duty, are actuated by good motives, and use ordinary care and diligence, they are not personally chargeable with the loss or depreciation of the property intrusted to them; but if they assume a discretion not confided to them, or transcend the authority defining their mode of action, they are, however pure their motives, bound to make good the losses which ensue.³

New York. — *McCabe v. Fowler*, 84 N. Y. 314.

Pennsylvania. — *Webb's Estate*, 165 Pa. St. 330, 44 Am. St. Rep. 666, 36 W. N. C. (Pa.) 571.

Tennessee. — *James v. Wingo*, 7 Lea (Tenn.) 148.

Virginia. — *Mills v. Talley*, 83 Va. 361.

In *Speight v. Gaunt*, L. R. 9 App. 1, affirming 22 Ch. Div. 727, it was held that an executor is justified in employing a broker to procure securities authorized by the will and in paying the purchase money to the broker, if he follows the usual and regular course of business adopted by ordinary prudent men in making such investments; and he is not liable if the broker, instead of applying the money as intended, misappropriates it to his own use.

Delegation of Authority to Collect Debts. — If an executor delegates his authority to another generally to collect the debts of the estate without authority in the will, he is liable for money misappropriated by such person. Thus, where the testator directed that his business should be carried on by one P., and the executor permitted him to get in the outstanding debts, it was held that the executor was liable for money collected by P. and not paid over. *Pistor v. Dunbar*, 1 Anstr. 107, 3 Rev. Rep. 561.

Permitting Attorney to Retain Funds Collected. — If an administrator permits an attorney to retain for several years money of the estate collected by him, without any effort to collect it from the attorney, and it is thereby lost, the administrator is liable. *Abercrombie v. Skinner*, 42 Ala. 633.

But where the collection was not made until after the death of the executor or administrator his estate is not liable for misappropriation by the attorney, the debtors having been solvent, and there having been no immediate necessity for the collection of debts. *Rayner v. Pearall*, 3 Johns. Ch. (N. Y.) 578.

The Employment to Bring Suit of a Person Not Authorized to Practice renders the executor personally liable for losses that result from such person's want of skill. *Wakeman v. Hazleton*, 3 Barb. Ch. (N. Y.) 148.

The Burden of Proof is not on the executor or administrator, where he employed an agent to collect money and the money collected has been lost by the agent's insolvency, to show that the loss was not attributable to his own default, but on the persons seeking to charge

him to prove that it was. *In re Brier*, 26 Ch. Div. 238.

Proceeds of Sale Lost by Insolvency of Commission Merchant. — In *Smith v. Smith*, 79 N. Car. 455, executors were held liable to creditors of the estate for the proceeds of cotton lost by the insolvency of the commission merchant to whom the executors had shipped it for sale, where previous unfair dealings on the part of the commission merchant, though he was not notoriously insolvent at the time of the last shipment, should have put the executors on their guard.

1. Confiscation. — In *Newton v. Bushong*, 22 Gratt. (Va.) 628, 12 Am. Rep. 553, the principle was recognized that an executor was not liable for property of the estate which was confiscated and seized by the government, though it does not seem to have been questioned in the case, the matter chiefly under discussion being whether confiscation by the Confederate government was within the principle. See also *Miller v. Cook*, 77 Va. 818, in which case it was held that an administrator should not be held liable for the shares of foreign legatees confiscated by the Confederate government and paid by the administrator to the Confederate States sequesteror "at the point of the bayonet," notwithstanding the decision in *Williams v. Bruffy*, 96 U. S. 176, that the sequestration laws of the Confederate States were void and did not forfeit money due to citizens of the United States residing outside the Confederate States.

2. Emancipation of Slaves. — In *Green v. Thompson*, 84 Va. 376, it was held that an administrator was not liable for the value of slaves lost by emancipation where the other personality in his hands was sufficient to pay the debts of the estate, the statute (Code 1849, c. 130, § 17) forbidding the sale of slaves unless the other personality of the estate should be insufficient to pay the debts. See also *Morgan v. Nelson*, 43 Ala. 586.

3. Depreciation in Value — England. — *Marsden v. Kent*, 5 Ch. Div. 598.

Mississippi. — *Williams v. Campbell*, 46 Miss. 57.

New Jersey. — *Dey v. Codman*, 39 N. J. Eq. 259; *McCully v. Lum*, 49 N. J. Eq. 552; *Matter of Barcalow*, 29 N. J. Eq. 282, reversed on another point in 36 N. J. Eq. 611.

North Carolina. — *Hagans v. Huffstetter*, 65 N. Car. 443.

bb. DESTRUCTION OF PROPERTY. — An executor or administrator is not liable for the destruction of property of the estate by fire or other casualty if he took such precautions to avoid it as a prudent man would take in regard to his own property.¹

cc. DEATH OF LIVE CHATTELS. — Loss in consequence of the death of live stock or slaves in the hands of an executor or administrator, resulting from natural causes, is not chargeable to him, where there was no dereliction of duty on his part in retaining possession of them until they died, instead of selling them.²

(10) *Waste of Assets* — (a) **Definition.** — A waste of assets, or *devastavit*, is any mismanagement of the estate and effects of a decedent, or any squandering or misapplication of the assets, contrary to the duty imposed on the executor or administrator, for which he shall answer out of his own property as far as he had or might have had assets of the decedent.³

(b) **What Constitutes Waste** — *aa. CONVERSION OF ASSETS.* — It is a waste or *devastavit* for an executor or administrator to dispose of the assets of the estate without consideration, or to use them for his individual purposes, unless there is a balance due him from the estate.⁴

Pennsylvania. — *Merkel's Estate*, 131 Pa. St. 584, 25 W. N. C. (Pa.) 469.

Virginia. — *Cooper v. Cooper*, 77 Va. 198; *Watkins v. Stewart*, 78 Va. 111.

Where an Administrator Holds Depreciated Currency it is his duty in good faith to use it to pay debts and administration expenses, and he is liable for any loss that may result from his neglect to perform such duty. *Rogers v. Tullios*, 51 Miss. 685. But he is not liable for not using such currency to pay debts where there was a probability that the estate might prove insolvent. *Tompkins v. Tompkins*, 18 S. Car. 1.

Delay in Expectation of Rise in Market. — If an executor, in the honest exercise of his discretion, delays selling goods or securities belonging to the estate in the expectation of a rise in the market, and in the meantime the market falls, he is not liable for the loss. *Marsden v. Kent*, 5 Ch. Div. 598; *Matter of Hosford*, 27 N. Y. App. Div. 427.

Delay Pending Litigation. — Delay of an executor in selling bank stock which was yielding a good income will not render him liable for depreciation where he acted in good faith on the advice of counsel and of the residuary legatee, while disputed claims against the estate were in litigation. *Pearson v. Gillenwaters*, 99 Tenn. 446.

1. **Destruction of Property.** — *Croft v. Lyndsey*, 2 Freem. 1; *Lawson v. Crookshank*, 2 Ch. Chamb. Rep. 426; *Montgomery v. Coldwell*, 14 Lea (Tenn.) 29.

As to protecting property from loss by fire, see also *supra*, this section, *Insurance; Deposit of Funds.*

2. **Death of Live Stock.** — *Matter of Fernandez*, 119 Cal. 579.

In *Sparrow's Succession*, 44 La. Ann. 475, it was held that where a final settlement was delayed for several years without fault of the administrator, the death, during such delay, of work animals attached to the succession plantation, and annually leased with it, would be attributed to natural causes rather than to dereliction of duty on the part of the administrator in failing to obtain an order of sale.

Death of Slaves. — *Morgan v. Nelson*, 43 Ala. 586; *Henry v. Graham*, 9 Rich. Eq. (S. Car.) 346.

3. **Definition of Waste or Devastavit.** — *Rothschild v. Wald*, 12 Ky. L. Rep. 685; *Ridgway v. Kerfoot*, 22 Mo. App. 661; *Matter of Oosterhoudt*, 15 Misc. Rep. (N. Y. Surrogate Ct.) 566, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 346, note 1. See also *Howe v. People*, 7 Colo. App. 535; *Beardsley v. Marsteller*, 120 Ind. 319; *Ayers v. Lawrence*, 59 N. Y. 192; *Steel v. Holladay*, 20 Oregon 70.

4. **Conversion to Individual Use.** — *Rogers v. Zook*, 86 Ind. 237; *Latta v. Miller*, 109 Ind. 302; *Fleece v. Jones*, 71 Ind. 340; *Prosser v. Leatherman*, 4 How. (Miss.) 237, 34 Am. Dec. 121; *Miller v. Helm*, 2 Smed. & M. (Miss.) 687; *Scott v. Searles*, 7 Smed. & M. (Miss.) 498, 45 Am. Dec. 317; *State v. Berning*, 74 Mo. 87.

Applying assets of the estate to the use of a firm of which the personal representative is a member is a conversion to his own use. *Miller v. Williamson*, 5 Md. 219.

Indebtedness of Estate to Executor or Administrator. — Where an executor is charged with having wrongfully transferred a note belonging to the estate, an inquiry must be made into the state of the assets, because if a balance equal to the amount of the note was due to the executor, the appropriation was not wrongful. *Ward v. Turner*, 7 Ired. Eq. (42 N. Car.) 73.

Transfer Without Consideration Is Devastavit. — *Krutz v. Stewart*, 76 Ind. 9.

Proceeds of Real Estate. — An executor or administrator is chargeable with waste if he appropriates to his own use the proceeds of real estate. *Austin v. Willson*, 21 Ind. 252; *Minot v. Norcorss*, 143 Mass. 326.

Taking Securities in Individual Name. — It is not an appropriation to his own use for an administrator to take securities in his own name for debts due the estate, if he had no fraudulent intent in so doing. *Syme v. Badger*, 92 N. Car. 706.

The Use of Assets by the Decedent's Widow for the support of the family is not a *devastavit*. *Brown v. Walter*, 58 Ala. 310.

Conversion Is Not Shown merely by the fact that the administrator is using the property of the estate, where he married the decedent's widow and there are infant children of her former marriage. *Branch Bank v. Wade*, 13

bb. PAYMENT OF DEBTS. — Other instances of waste occur where an executor or administrator pays debts of an inferior degree when he has notice that there are outstanding debts entitled to priority of payment,¹ or where he pays in full any debt which has no lien or priority to the exclusion of others, when the estate is insolvent,² or where he pays claims which by the exercise of due diligence he might have ascertained to be unjust and illegal.³

cc. PAYMENT OF OR ASSENT TO LEGACIES. — If an executor or administrator voluntarily pays or assents to legacies when there are outstanding debts, though he is ignorant of them, he is guilty of maladministration and is liable to creditors as for a devastavit in case the estate proves insufficient to pay the creditors in full.⁴

Payment of Legacy Before Revocation of Probate. — If the probate of a will is revoked, or if the will is adjudged invalid after payment of a legacy, the executor or the administrator with the will annexed will not be held liable as for waste.⁵

dd. MINGLING ASSETS WITH INDIVIDUAL PROPERTY. — An executor or administrator who mixes funds of the estate with his individual funds, so that the trust funds cannot be traced and identified, is chargeable with the value thereof, as for conversion.⁶

ee. MISMANAGEMENT OR SQUANDERING OF ASSETS GENERALLY. — Executors and administrators are likewise chargeable with waste if they sell property of the estate without authority, or contrary to their duty, or if by any other misconduct or neglect the estate suffers loss or diminution.⁷

Ala. 427. Nor is it shown merely by evidence that the administrator took property of the estate into his possession and used it in connection with his own property without an order of court, for part of the time, and declared that he intended to continue such use until the decedent's debts should be paid, when he would give the entire estate to the decedent's widow and child. *Morgan v. Nelson*, 43 Ala. 586.

1. *Payment of Debts.* — *Place v. Oldham*, 10 B. Mon. (Ky.) 400; *Logan v. Troutman*, 3 A. K. Marsh. (Ky.) 66; *Stephens v. Barnett*, 7 Dana (Ky.) 257; *Cobb v. Muzzey*, 13 Gray (Mass.) 58; *Matter of Oosterhoudt*, 15 Misc. Rep. (N. Y. Surrogate Ct.) 566, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 346, note 2; *Moye v. Albritton*, 7 Ired. Eq. (42 N. Car.) 62; *McNair v. Ragland*, 1 Dev. Eq. (16 N. Car.) 520; *Coggins v. Flythe*, 113 N. Car. 102; *Swift v. Miles*, 2 Rich. Eq. (S. Car.) 147.

The payment of inferior debts is not waste if sufficient assets are retained to pay those of superior degree. *Braxton v. Winslow*, 4 Call (Va.) 308.

And such payment is not a devastavit if the executor or administrator did not have notice that there were other debts of superior dignity. *Pope v. Wickliffe*, 7 T. B. Mon. (Ky.) 412.

As to the order of payment of debts, see the title *DEBTS OF DECEDENTS*, vol. 3, p. 1003.

2. *Payment in Full of Claim Against Insolvent Estate.* — *Gay v. Lemle*, 32 Miss. 309.

3. *Payment of Unjust and Illegal Claims Is Waste.* — *Beardsley v. Marsteller*, 120 Ind. 319; *Parsons v. Mills*, 2 Mass. 80.

4. *Mispayment of a Debt* renders the executor or administrator making it personally liable to creditors. *Van Voorhis's Appeal*, (Pa. 1887) 10 Cent. Rep. 412.

Payment of Debts Barred by Statute of Limitations. — See *supra*, this title, *Powers, Duties, and Liabilities in General—Power to Waive Statute of Limitations*.

4. *Premature Payment of or Assent to Legacy Is Devastavit.* — *Johnson v. Fuguay*, 1 Dana (Ky.) 514; *Cookus v. Peyton*, 1 Gratt. (Va.) 431.

This rule of the common law has been modified by statutes requiring claims against estates of decedents to be presented within a certain time, and allowing executors or administrators, after the lapse of such time, to pay legacies on taking refunding bonds from the legatees, without incurring any personal liability for claims that may be presented thereafter; but if an executor or administrator voluntarily pays or assents to a legacy before the expiration of such time, though he acts in ignorance of an outstanding debt which is afterwards presented within the time limited, he is guilty of a devastavit. *Whitfield v. Wolf*, 51 Ala. 202.

See also *infra*, this title, *Distribution of Estate—Effect of Distribution*.

5. *Payment of Legacy Before Revocation of Probate or Adjudication of Invalidity of Will.* — *Le Baron v. Fauntleroy*, 2 Fla. 276; *Poag v. Carroll*, Dudley L. (S. Car.) 1.

6. *Mingling Assets with Individual Property.* — *McElroy v. Thompson*, 42 Ala. 656; *Henderson v. Henderson*, 58 Ala. 582; *Cabot Bank's Appeal*, 26 Conn. 14.

What Constitutes Mingling of Assets. — In *Whitley v. Alexander*, 73 N. Car. 444, the administrator found among the assets of the estate a large quantity of leaf tobacco, which he rendered more valuable by manufacturing it. In the process of manufacture he mingled with it some of his own tobacco which he used as wrappers, and it was held that this was not such a mingling of the assets of the estate with his individual property as rendered him liable to creditors.

7. *Sale Without Authority.* — An executor or administrator is chargeable with the conversion of property to his own use where he sells or otherwise disposes of it without an order of court, though he believes it to be worthless.

(c) **Liability of Executor or Administrator for Acts of Third Persons.** — If a devastavit is committed by the husband of an executrix, and she survives him, she is chargeable with the loss suffered by the estate.¹ So, too, an executor or administrator is liable for a devastavit committed by his wife during coverture,² but he is not chargeable with the acts of a coexecutor or coadministrator or of his predecessor in office.³

(d) **Effect of Waste or Conversion** — *aa. LIABILITY OF EXECUTOR OR ADMINISTRATOR* — *(aa) Nature of Liability in General.* — While waste or conversion by an executor or administrator raises a *quasi*-contractual obligation on his part to the person injured, it has been held that no contract arises in such case within statutes conferring jurisdiction of actions on contracts express or implied.⁴

(bb) When Liability Attaches. — It is held that the liability of an executor or administrator attaches at the time he qualifies by taking the oath of office, in those cases where bonds of executors are dispensed with, or at the time of taking the oath and giving bond in other cases.⁵

(cc) To Whom Liability Exists. — An executor or administrator who converts property of the estate to his own use is liable to the creditors or heirs or other persons interested in the estate.⁶

But if a Legatee or Distributee Assents to a devastavit he cannot charge the executor or administrator therefor.⁷

Matter of Radovich, 74 Cal. 536, 5 Am. St. Rep. 466.

Collusive Sale. — Where an executor or administrator collusively sells goods of the decedent at less than their value when he might have obtained a better price, it is a devastavit, and he is liable for the real value, though the sale was under an execution issued against the executor or administrator in his representative capacity. *Skrine v. Simmons*, 11 Ga. 401.

Sale on Credit. — In some jurisdictions it is a devastavit for an executor or administrator to sell property of the estate on credit, and he is not relieved of liability by delivering to his successor in office notes taken from purchasers for the price of the property sold. *Foster v. Thomas*, 21 Conn. 290.

See also *infra*, this section, *Personal Property* — *Sale and Transfer of Personal Property*.

Permitting Sale under Execution. — It is waste for an executor or administrator to permit the property of the decedent to be sold under execution for an amount less than he might have sold it for at a previous time. *Dawes v. Winship*, 5 Pick. (Mass.) 97, note.

Gratuitous Bailments. — An executor or administrator has no right to make a gratuitous bailment of a chattel belonging to the estate, and if he does so both he and the bailee are guilty of conversion. *Lawson v. Lay*, 24 Ala. 184.

Failure to Pay Debts. — If an executor or administrator neglects to collect the personal estate of the decedent and to apply it to the decedent's debts, and in consequence thereof lands in the hands of an heir or devisee are subjected to the debts, the executor or administrator is liable to the heir or devisee in an action for waste. *Mitchel v. Lunt*, 4 Mass. 658.

Disregarding Judgment Directing Application of Assets. — A judgment against an administrator for money to be paid out of specified assets is conclusive as to the application of such assets, and it is waste for him to make any other application of it. *Davies v. Flewellen*, 29 Ga. 49.

A Person Who Is at the Same Time Administrator and Guardian commits waste by applying funds of the estate to the interests of the guardianship. *Stillman v. Young*, 16 Ill. 318.

1. Executrix Liable for Waste by Husband. — *Soady v. Turnbull*, L. R. 1 Ch. 494, 12 Jur. N. S. 612, 35 L. J. Ch. 784, 14 W. R. 955, 14 L. T. N. S. 813; *Mounson v. Bourne*, Cro. Car. 519; *Horsely v. Daniel*, 2 Lev. 161; *Bellew v. Scott*, 1 Stra. 440; *Adair v. Shaw*, 1 Sch. & Lef. 243; *Calhoun's Appeal*, 39 Pa. St. 218; *Bordley's Estate*, 3 Phila. (Pa.) 127, 15 Leg. Int. (Pa.) 134.

2. Executor or Administrator Liable for Waste by Wife. — *Smith v. Smith*, 21 Beav. 385; *Smith v. Jewett*, 40 N. H. 513; *Moone v. Henderson*, 4 Desaus. (S. Car.) 459.

3. Not Liable for Waste by Coexecutor or Co-administrator. — *Hargthorpe v. Milforth*, Cro. Eliz. 318; *Peter v. Beverly*, 10 Pet. (U. S.) 532; *Brazer v. Clark*, 5 Pick. (Mass.) 96; *Douglass v. Satterlee*, 11 Johns. (N. Y.) 21; *Matter of Demarest*, 1 Connolly (N. Y.) 200. See also the title *JOINT EXECUTORS AND ADMINISTRATORS*.

Not Liable for Waste by Preceding Administrator. — *Finn v. Hempstead*, 24 Ark. 111.

4. Nature of Liability — **Simple Contract Obligation.** — A person injured by a waste of assets becomes a simple contract creditor of the executor or administrator. *Charlton v. Low*, 3 P. Wms. 331.

Liability Not Contractual Within Statutes Conferring Jurisdiction. — *Wilson v. Long*, 12 S. & R. (Pa.) 58; *Sidle v. Anderson*, 45 Pa. St. 464.

5. Liability Attaches at Time of Qualification. — *Leach v. Jones*, 86 N. Car. 404.

6. To Whom Liable — **Heirs, Creditors, or Others Interested in Estate.** — *Evans v. Oakley*, 2 Tex. 182. This principle is recognized by all the cases involving waste committed by an executor or administrator.

7. Assent by Legatee or Distributee. — In *Colbert v. Daniel*, 32 Ala. 314, it was held that where an executor, acting with the assent of a legatee, under an erroneous construction of the will, divided the estate and allotted to the widow a larger share than she was entitled to

(*dd*) *Extent of Liability.* — If an executor or administrator wastes or misappropriates funds or property of the estate he is liable for the full amount or value thereof,¹ but his liability does not extend beyond this,² unless it is increased by statute.³ Nor can he be charged in respect to property of the existence of which he was ignorant, or which never came into his hands.⁴

bb. LIABILITY OF CONVERTED PROPERTY FOR INDIVIDUAL DEBTS OF EXECUTOR OR ADMINISTRATOR. — It has been held that whenever an executor or administrator has so dealt with the assets of the estate as to be responsible for a devastavit, or has used them in a manner inconsistent with his trust, they become liable to sale under execution for the individual debts of the executor or administrator. This seems to be the doctrine of the English cases, but it is doubtful whether it obtains in the *United States*, where the powers of personal representatives are more restricted by statute than in *England*.⁵

cc. ENFORCEMENT OF LIABILITY. — If an executor or administrator wastes or converts to his own use assets of the estate, the remedy of persons injured thereby is by an action against him on his bond,⁶ or against the persons to whom he has disposed of the assets, if such person received them with notice of the abuse by the executor or administrator of his fiduciary powers;⁷ and it has been held that an injunction will lie to prevent waste.⁸

b. CONTINUING DECEDENT'S BUSINESS — (1) *The Power.* — It is a well-settled general rule that the trade or business of a decedent is not transmitted to the personal representative, so as to enable him to carry it on, unless he is expressly authorized by the will or the articles of copartnership, or is so empowered to act by a decree of court.⁹

receive, such legatee could not charge the executor with a devastavit.

1. Executor or Administrator Chargeable with Full Value. — *Irby v. Kitchell*, 42 Ala. 438; *State v. Berning*, 74 Mo. 87.

The Appraised Value May Be Charged where an executor or administrator has converted the personality to his own use, unless he shows that such valuation is excessive. *Cole v. Leake*, 27 Miss. 767.

A Conversion Does Not Operate as a Partial Partition among the executor and other legatees so as to avoid the liability incurred by the executor in consequence of his wrongful act, where the will required payment of all the debts as a condition precedent to partition, and the appropriation by the executor was not in furtherance of an intent to make partition. *Drake v. Paige*, 127 N. Y. 562.

2. Liability Limited to Amount Converted. — An executor who has misappropriated funds of the estate can be held liable for no more than the proof shows to have remained in his hands. *Hayward v. Place*, (Supreme Ct.) 7 N. Y. Supp. 523.

3. Statutory Liability for Embezzlement. — In *Vermont* an executor or administrator, in case of embezzlement of assets of the estate in his hands, is chargeable with double their value. *Spaulding v. Cook*, 48 Vt. 145.

4. Property Not Known to Executor or Administrator. — *Jones v. Ward*, 10 Verg. (Tenn.) 160.

Property Never in Possession of Executor or Administrator. — *Conner v. Burd*, 1 Leg. Chron. (Pa.) 17.

5. Assets Liable for Individual Debts of Executor or Administrator When There Has Been a Devastavit. — This point was decided in *Williamson v. Branch Bank*, 7 Ala. 906, 42 Am. Dec. 617, on a review of the following English cases: *Whale v. Booth*, 4 Doug. 36, 26 F. C. L. 270, 4 T. R. 625, note *a*; *Farr v. Newman*, 4

T. R. 621; *Quick v. Staines*, 1 B. & P. 293; *Gaskell v. Marshall*, 5 C. & P. 31, 24 E. C. L. 200; *Fenwick v. Laycock*, 2 Q. B. 108, 42 E. C. L. 594.

But in the later case of *Branch Bank v. Wade*, 13 Ala. 427, it was held that the assets of an estate in the hands of an administrator cannot be taken under execution for his individual debts, though he has been guilty of a devastavit, if he has not actually converted the property to his own use.

6. Actions Against Executors or Administrators for Waste. — *Liddicoat v. Tiegrown*, 6 Colo. 47; *In re Richard*, 58 Ill. App. 91.

Buying Homestead with Funds of Estate. — An executor or administrator cannot defeat the rights of creditors by the form into which he converts the funds of the estate, and therefore he cannot, in an action to enforce his liability for conversion, claim as exempt a homestead purchased with funds of the estate. *Pierce v. Holzer*, 65 Mich. 263.

7. Recovery of Assets from Third Persons. — *Scott v. Tyler*, 2 Dick. 725; *Van Hoose v. Bush*, 54 Ala. 342; *Shelton v. Carpenter*, 60 Ala. 201; *Rogers v. Zook*, 86 Ind. 237.

If the transferee had reasonable ground for suspecting that there was a conversion, he is answerable for the assets. *Gottberg v. U. S. National Bank*, 131 N. Y. 595, 42 N. Y. St. Rep. 883; *Randel v. Dyett*, 38 Hun (N. Y.) 347. But a *bona fide* purchaser will be protected. *Brockenbrough v. Turner*, 78 Va. 438.

See, however, as to the right to recover from the transferee of an executor or administrator, *Evans v. Oakley*, 2 Tex. 182; *Moore v. Morse*, 2 Tex. 400.

8. Injunction Against Waste. — *Wightman v. Brown*, 1 Desaus. (S. Car.) 166.

9. No Authority to Carry on Decedent's Business. — *Collinson v. Lister*, 20 Beav. 356; *Barker v. Parker*, 1 T. R. 287; *Steele v. Knox*, 10 Ala.

Winding Up Business. — But a personal representative is not bound, as of course, to make an immediate conversion into money of the assets of the estate which were employed in trade by the decedent. He may in some cases carry out executory contracts made by the decedent, or complete the manufacture of articles commenced by him and left unfinished at his death, and he may within reasonable limits make purchases and incur liabilities, where such a course is demanded by the best interests of the estate.¹

(2) *Individual Liability.* — If a personal representative carries on the decedent's trade or business, even though directed by the will to do so, he is individually liable on his contracts, unless he acts under the direction of a court of equity.² If he carries on such trade or business without authority,

608; *Tompkins v. Weeks*, 26 Cal. 50; *Sparrow's Succession*, 39 La. Ann. 696; *Florsheim v. Holt*, 32 La. Ann. 133; *Lucht v. Behrens*, 28 Ohio St. 231; *Hooper v. Hooper*, 29 W. Va. 276.

The Court Has No Jurisdiction to authorize an administrator to carry on the trade of the intestate in a suit for administration instituted by the beneficiaries, where there are infants interested. *Land v. Land*, 43 L. J. Ch. 311.

Completing Crops. — All the rules applicable to carrying on a trade by a personal representative apply with full force to the continuance of a plantation, and it is not ordinarily the duty of the personal representative to carry on a farm or plantation. *Steele v. Knox*, 10 Ala. 608; *Hallock v. Smith*, 50 Conn. 127; *Sparrow's Succession*, 39 La. Ann. 696. See also *Casner's Estate*, 2 Kulp (Pa.) 474, where it was held that an administrator should sell immature crops on the ground, and not continue the farming.

Cultivating Plantation with Knowledge of Creditors and Legatees. — In *Wederstrandt's Succession*, 19 La. Ann. 494, it was held that an executor was entitled to be reimbursed for expenses incurred in carrying on the plantation, where he acted with the knowledge of the creditors and legatees.

As to the statutory authority to complete crops, see *infra*, this section, *Statutory Modification of Doctrine.*

When Will Gives Authority. — In *Kirkman v. Booth*, 11 Beav. 273, 13 Jur. 525, 18 L. J. Ch. 25, Lord Langdale, M. R., said that it is "a rule without exception that, to authorize executors to carry on a trade, or to permit it to be carried on, with the property of a testator held by them in trust, there ought to be the most distinct and positive authority and direction given by the will itself for that purpose."

A Testator May Leave It to the Judgment of his executors to carry on his business after his death. *In re Rumsey*, (Supreme Ct.) 18 N. Y. Supp. 402. See also *Kinmonth v. Brigham*, 5 Allen (Mass.) 270. And such discretion will not be interfered with by the court in the absence of misconduct, mismanagement, or improper motives. *Noble's Estate*, 20 W. N. C. (Pa.) 576.

Extent of Authority under Will. — When the will gives authority to the executor to carry on the testator's business, his authority is limited by the terms of the will, and persons dealing with him are chargeable with notice of such limitation. *Allegheny First Nat. Bank's Appeal*, (Pa. 1886) 7 Atl. Rep. 207; *Brabham v. Crosland*, 25 S. Car. 525.

Continuation of Business Authorized by Articles of Copartnership. — *Laughlin v. Lorenz*, 48 Pa. St. 275.

1. Difference Between Carrying On and Winding Up Business. — *Marshall v. Broadhurst*, 1 Cromp. & J. 405; *Edwards v. Grace*, 2 M. & W. 190; *Dakin v. Cope*, 2 Russ. 170; *Harding v. Evans*, 3 Port. (Ala.) 221, 29 Am. Dec. 255; *Matter of Sharp*, 5 Dem. (N. Y.) 516.

A Reasonable Discretion must be allowed a personal representative in closing up the business, and if, in order to wind it up successfully and convert the property to advantage, he continues it for a reasonable time and in good faith, and according to his best judgment, he cannot be charged with loss by the estate. *Garrett v. Noble*, 6 Sim. 504; *Collinson v. Lister*, 20 Beav. 356; *Gilman v. Wilber*, 1 Dem. (N. Y.) 547; *Bowker's Estate*, 12 Phila. (Pa.) 88, 35 Leg. Int. (Pa.) 192. See also *Vida's Estate*, 1 Hawaiian 89.

Winding Up Mercantile Business. — In *Cornwell v. Deck*, 2 Redf. (N. Y.) 88, it was held a fair exercise of discretion by an administrator to employ a clerk to continue the sale at retail of the stock of goods in the decedent's store, instead of making a forced sale.

Winding Up School. — In *Matter of Benedict*, 13 Abb. N. Cas. (N. Y. Surrogate Ct.) 67, *sub nom.* *Gilman v. Wilber*, 1 Dem. (N. Y.) 547, the decedent, who carried on a school, died in the middle of the school year for which contracts had been made with teachers and pupils. The executor was held not to be chargeable with the loss resulting from continuing the school until the close of the year. See also *supra*, this title, *Powers, Duties, and Liabilities in General — Contracts.*

Completing Manufacture of Unfinished Articles. — The administrator of a manufacturer may complete the manufacture of articles left unfinished by the decedent at his death. *Pitts v. Jameson*, 15 Barb. (N. Y.) 310; *Newton v. Poole*, 12 Leigh (Va.) 112.

2. Individual Liability for Debts Contracted — England. — *Barker v. Parker*, 1 T. R. 295; *Abbott v. Parfitt*, L. R. 6 Q. B. 346, 24 L. T. N. S. 469; *Ex p. Garland*, 10 Ves. Jr. 110; *Owen v. Delamere*, L. R. 15 Eq. 134, 27 L. T. N. S. 647; *Fairland v. Percy*, L. R. 3 P. & D. 217, 32 L. T. N. S. 407; *In re Morgan*, 18 Ch. Div. 93, 45 L. T. N. S. 183; *Lucas v. Williams*, 3 Giff. 150; *Wightman v. Townroe*, 1 M. & S. 412; *Labouchere v. Tupper*, 11 Moo. P. C. 198. *Alabama.* — *Wade v. Pope*, 44 Ala. 690. *Connecticut.* — *Taylor v. Mygatt*, 26 Conn. 184.

Georgia. — *McFarlin v. Stinson*, 56 Ga. 396.

he takes the risk of any loss that may occur, and this risk is taken without any corresponding benefit, because all profits that may be made belong to the persons beneficially entitled to the estate, while all losses suffered must be borne by him personally.¹ But when an executor carrying on the testator's business under directions contained in the will acts in good faith and according to the rules and methods usual in the business, he is not to be held accountable for losses.² So, too, when he continues the business with the consent of the beneficiaries of the estate,³ or even, it has been held, without authority, where the estate would otherwise suffer great loss.⁴

Maine. — *Davis v. French*, 20 Me. 21, 37 Am. Dec. 36.

Massachusetts. — *Sumner v. Williams*, 8 Mass. 199, 5 Am. Dec. 83.

Mississippi. — *Clopton v. Gholson*, 53 Miss. 466.

New Jersey. — *Wild v. Davenport*, 48 N. J. L. 129, 57 Am. Rep. 552; *Laible v. Ferry*, 32 N. J. Eq. 791.

New York. — *Stedman v. Feidler*, 20 N. Y. 446; *Austin v. Munro*, 47 N. Y. 360; *Munzor's Estate*, 4 Misc. Rep. (N. Y. Surrogate Ct.) 374; *Willis v. Sharp*, 113 N. Y. 586.

North Carolina. — *McKay v. Royal*, 7 Jones L. (52 N. Car.) 426.

Pennsylvania. — *In re Kalbfell*, 27 Pittsb. Leg. J. N. S. (Pa.) 280.

Tennessee. — *Morrow v. Morrow*, 2 Tenn. Ch. 549.

Vermont. — *Lovell v. Field*, 5 Vt. 218.

Virginia. — *Fitzhugh v. Fitzhugh*, 11 Gratt. (Va.) 300.

In *Austin v. Munro*, 47 N. Y. 360, Allen, J., said: "Contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, as for services rendered, goods or property sold and delivered, or other consideration moving between the promisee and the executors as promisors, are the personal contracts of the executors and do not bind the estate, notwithstanding the services rendered or goods or property furnished or other consideration moving from the promisee are such that the executors could properly have paid for the same from the assets, and been allowed for the expenditure in the settlement of their accounts. * * * The rule is too well established in this state to be questioned or disregarded, and any departure from it would be mischievous." This doctrine has since been reasserted in *Morgan v. Stevens*, 6 Abb. N. Cas. (N. Y. C. Pl.) 362; *Bloodgood v. Sears*, 64 Barb. (N. Y.) 71; *Stanton v. King*, 8 Hun (N. Y.) 4; *Murphy v. Hall*, 38 Hun (N. Y.) 529; *Wetmore v. Porter*, 92 N. Y. 76; *Barry v. Lambert*, 98 N. Y. 306, 50 Am. Rep. 677; *Matter of Sharp*, 5 Dem. (N. Y.) 516.

Debts Contracted by Decedent's Partner. — Executors of a deceased partner who permit the surviving partners to carry on the business do not thereby become liable as copartners as to transactions after the testator's death. *Richter v. Poppenhusen*, 9 Abb. Pr. N. S. (N. Y. Ct. App.) 263, 42 N. Y. 373, *affirming* 57 Barb. (N. Y.) 309, 39 How. Pr. (N. Y.) 82. But see *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619.

1. Not Entitled to Profits, Though Liable for Losses. — *Matter of Rose*, 80 Cal. 166; *Munzor's Estate*, 4 Misc. Rep. (N. Y. Surrogate Ct.)

374; *Shinn's Estate*, 166 Pa. St. 121, 36 W. N. C. (Pa.) 36.

Election by Heirs. — When an executor continues the testator's business without authority the heirs may elect to take the profits, if any, or they may insist on a return of the capital and interest. *Steele v. Knox*, 10 Ala. 608; *Heathcote v. Hulme*, 1 Jac. & W. 122; *McKnigh v. Walsh*, 23 N. J. Eq. 136. But see *Atherton's Estate*, 8 Kulp (Pa.) 150, in which it was held that an administrator would not be held accountable for losses incurred where he assumed the debts of the decedent's insolvent firm and purchased the firm assets, he having acted on advice of counsel, and for the purpose of protecting the decedent's estate.

Delay in Withdrawing Capital. — In *Vyse v. Foster*, L. R. 8 Ch. 309, 21 W. R. 207, 27 L. T. N. S. 774, it was held that mere delay by the executors in calling in a debt due to the testator from a firm of which some of the executors were members did not give the estate any right to share in the profits of the business. In this case the testator was a partner in a trade under articles by which, on the death of any partner, his share was to be taken by the survivors at a price to be ascertained as provided in the articles, and to be paid for by instalments. One of his executors was a partner in the business, and another of the executors afterwards became a partner. The amount due the testator's estate for his share of the concern was not paid, but was allowed for several years to remain in the hands of the firm, who treated it as a debt and allowed interest. One of the residuary legatees refused to accept payment on such terms, claiming that the estate was entitled to share in the profits of the business.

2. Not Accountable for Losses When Acting under Will in Good Faith. — *Boulle v. Tompkins*, 5 Redf. (N. Y.) 472; *Bowker's Estate*, 5 W. N. C. (Pa.) 493; *Allen v. Shanks*, 90 Tenn. 359.

3. Acting under Direction of Beneficiaries. — An administrator who, in a particular transaction, acts in good faith, under the direction of all the persons who are interested in the estate, is to be protected, in rendering his accounts in the Probate Court, from a claim, on the part of such persons, that he has not administered strictly according to law in respect to such transaction. He may prosecute or defend suits, compromise claims upon the estate, or deal with the assets in a particular way, not usual or strictly legal, as by continuing the property in business; and the persons by whose request or assent it has been done will not be permitted to charge him with maladministration. *Poole v. Munday*, 103 Mass. 174.

4. In Merritt v. Merritt, 62 Mo. 150, the tes-

(3) *Right to Indemnity.* — Though an executor who carries on his testator's business under powers conferred by the will is personally liable on his contracts made in the course of business, he has the right to resort for indemnity to the assets so directed to be employed.¹

(4) *Assets Applicable to Continuance of Business.* — The principle deducible from the cases seems to be that when a testator orders his business to be carried on after his death, *prima facie* only, the fund employed in the business before his death is answerable to the subsequent creditors; but that if, by clear and unambiguous language, he designates or orders to be set apart any other portion of the estate to be embarked in the trade, such creditors may also resort to the fund thus appropriated.²

tator had left one-half of his estate to his widow, who was also his administratrix, the estate including a hotel, furnished and in operation, which she could not dispose of, except at great sacrifice, until the lapse of a year or more. She continued the operation of the hotel, but without an order of the Probate Court, acting, however, in good faith. It was held that she was not interested in a speculation of her own, but was merely endeavoring to preserve the estate, and was therefore not liable for the loss.

1. Indemnity Out of Assets Employed. — *In re Johnson*, 15 Ch. Div. 548, 49 L. J. Ch. 745, 43 L. T. N. S. 372, 29 W. R. 168; *In re Gorton*, 40 Ch. Div. 536, (1891) App. 190; *In re Brooke*, (1894) 2 Ch. 600, 71 L. T. N. S. 398; *Foxworth v. White*, 72 Ala. 224; *Laible v. Ferry*, 32 N. J. Eq. 791; *Matter of Jones*, 103 N. Y. 621.

The Right to Indemnity Is Subject to All Equities between the executors and the estate, and therefore if the executor makes default he must, before he can claim his indemnity, make good his default to the estate. *In re Johnson*, 15 Ch. Div. 548, 43 L. T. N. S. 372; *Strickland v. Symons*, 22 Ch. Div. 666, 26 Ch. Div. 245, 48 L. T. N. S. 188, 31 L. T. N. S. 406; *In re Evans*, 34 Ch. Div. 597, 56 L. T. N. S. 768. But in order to deprive an executor of his indemnity there must be a default in the payment of money, and not merely a default in the rendering of accounts. *Kidd v. Kidd*, 70 L. T. N. S. 648.

2. Restriction to Capital Already Employed. — *Ex p. Richardson*, 3 Madd. 138; *M'Neillie v. Acton*, 4 De G. M. & G. 744; *Owen v. Delamere*, L. R. 15 Eq. 139; *Smith v. Smith*, 13 Grant's Ch. (U. C.) 81; *Lovell v. Gibson*, 19 Grant's Ch. (U. C.) 280; *Hardee v. Cheatham*, 52 Miss. 41; *Hagan v. Barksdale*, 44 Miss. 186; *Farley v. Hord*, 45 Miss. 102; *Ferry v. Laible*, 27 N. J. Eq. 146; *Boulle v. Tompkins*, 5 Redf. (N. Y.) 472.

In *Ex p. Garland*, 10 Ves. Jr. 110, Lord Eldon held that where the will directed a limited sum, beside the property actually employed in the business at the testator's death, to be paid by the executors for the purpose of carrying on his trade, the general assets beyond that fund were not liable.

This principle, that the testator may restrict the liability of his estate either to the fund already embarked or to such amount as he may intend to have embarked in the business, is also affirmed in *Thompson v. Andrews*, 1 Myl. & K. 116; *Jones v. Walker*, 103 U. S. 444; *Smith v. Ayer*, 101 U. S. 320; *Burwell v.*

Cawood, 2 How. (U. S.) 572; *Pitkin v. Pitkin*, 7 Conn. 307, 18 Am. Dec. 111.

In *Burwell v. Cawood*, 2 How. (U. S.) 560, Judge Story, adopting the reasoning of Lord Eldon in *Ex p. Garland*, 10 Ves. Jr. 110, remarks that "nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in that trade, would justify the court in arriving at such a conclusion from the manifest inconvenience thereof, and the utter impossibility of paying off the legacies bequeathed by the testator's will, or distributing the residue of his estate, without in effect saying at the same time that the payments may all be recalled if the trade should become unsuccessful or ruinous." These remarks are quoted with approval by Mr. Justice Field in *Smith v. Ayer*, 101 U. S. 320.

In accordance with the views of Judge Story it was held in *M'Neillie v. Acton*, 4 De G. M. & G. 744, 17 Jur. 1047, that a direction in a will that executors should continue the testator's trade or business of a coal proprietor during his then present interest in the mines, and should not be responsible for any loss to his estate by carrying on the trade or business, unless such loss should happen by or through their wilful neglect or default, did not authorize the employment in the trade of more of the testator's property than was employed in it at his decease.

In *Cutbush v. Cutbush*, 1 Beav. 184, where the testator had directed his widow to carry on his business until his youngest child should attain twenty-one years, and for that purpose had given her the entire use, disposal, and management of the capital, credits, stock, and effects which should be due, owing, or belonging to him in his trade at the time of his decease, and had authorized his executors to augment the capital employed therein, and, the executors having renounced, the widow had taken out administration, Lord Langdale decided that only the property above specified, and not the testator's general assets, was liable for the debts contracted by the widow in carrying on the trade.

Authority to Employ General Assets. — A provision which authorizes executors "to sell or make such other disposition of my real and personal estate as the safe conduct of such business shall seem to require" indicates an intention to subject the general assets to the

Difference Between Authority Given by Will and by Partnership Articles. — There is a difference between the powers of an executor when he continues the business of the testator under a direction in the will and when he acts pursuant to partnership articles, in that the authority given by the will extends only to the capital employed in the business, unless otherwise expressly provided, while a provision in the partnership articles that the business shall be carried on after the death of a partner by his personal representatives subjects the general assets of the deceased partner to liability for debts incurred in the business after his death.¹

(5) **Statutory Modification of Doctrine.** — In some jurisdictions it is provided by statute that the probate court may authorize the personal representative, when good cause therefor is shown, to carry on, for a limited time, the plantation or other business of the decedent.² As incidental to this statutory authority, a personal representative may employ the ordinary means which are necessary and proper to effectuate the express power.³

Completing Crops Commenced by Decedent. — Besides the authority given by statute to continue the business of a decedent on obtaining leave of the probate court, personal representatives are authorized in some states, without obtaining special permission therefor, to complete crops commenced by the decedent in his lifetime.⁴

Individual Liability under Statute. — The rule that a personal representative is individually liable on all contracts made by him in carrying on the decedent's business is not affected by obtaining leave of court under the statute to carry it on. He is individually liable as at common law, but the order of the court protects him to the extent of allowing him indemnity out of the assets of the estate.⁵

c. **SETTING ASIDE FRAUDULENT CONVEYANCES.** — As a general rule per-

debts of the business, and to authorize the executors to bind the general estate by their contracts. *Willis v. Sharp*, 113 N. Y. 586. See also *Davis v. Christian*, 15 Gratt. (Va.) 11.

Power to Mortgage Property for Purposes of Business. — Where a will directs that the business of the testator shall be carried on by the executor, the property, freehold or leasehold, which was used by the testator himself in the business may be mortgaged by the executor for the purpose of the business, but his power in this respect is limited to such property. *Devitt v. Kearney*, 13 Ir. L. Rep. 45; *Dimmock v. Dimmock*, 52 L. T. N. S. 494; *Travis v. Milne*, 9 Hare 141; *In re Cameron*, 26 Ch. Div. 19, 50 L. T. N. S. 339.

1. **Difference Between Authority Given by Will and by Partnership Articles.** — *Blodgett v. American Nat. Bank*, 49 Conn. 24.

2. **Statutory Authority to Continue Business for Limited Time.** — *Steele v. Knox*, 10 Ala. 608; *Craig v. McGehee*, 16 Ala. 41; *Gerald v. Bunkley*, 17 Ala. 170; *Stewart v. Stewart*, 31 Ala. 207; *Pickens v. Pickens*, 35 Ala. 442; *Harrison v. Harrison*, 39 Ala. 489; *Glenn v. Glenn*, 41 Ala. 571; *Hinson v. Williamson*, 74 Ala. 194; *Stephens v. James*, 77 Ga. 139; *Poullain v. Brown*, 52 Ga. 412; *McMahan v. Harbert*, 35 Tex. 452; *Reinstein v. Smith*, 65 Tex. 247.

Nature of Business. — The *Texas* statute which authorizes the executor to carry on the "plantation, manufactory, or business" of the testator is held to include a mercantile business. *Dwyer v. Kelteyer*, 68 Tex. 554.

3. *Hinson v. Williamson*, 74 Ala. 180; *Loeb v. Richardson*, 74 Ala. 311.

No Authority to Keep up the Family Establishment and support the family at the expense of the estate is given by such statute. *Hinson v. Williamson*, 74 Ala. 180.

4. **Completing Crops Commenced by Decedent.** — *Loeb v. Richardson*, 74 Ala. 311; *Tayloe v. Bush*, 75 Ala. 432; *Farley v. Hord*, 45 Miss. 96; *Percival v. Heribmont*, 1 McMull. L. (S. Car.) 59.

All the Plantations belonging to the decedent and cultivated by him at the time of his death are embraced by the Alabama statute. *Pinckard v. Pinckard*, 24 Ala. 250.

Loss of Crops. — An administrator is entitled to credit for his expenses in the performance of his duty to complete the crops commenced by the decedent, though the crops were destroyed by natural causes, so that the expenditures actually exceeded the proceeds. *Tayloe v. Bush*, 75 Ala. 432.

Acting Without Leave of Court. — In *Lawton v. Fish*, 51 Ga. 647, it was held that credit was properly allowed for money lost in running the decedent's plantation for the balance of the year, where the decedent died in February, after he had employed hands and made all necessary arrangements for running his plantation, though the executor acted without an order from the Court of Ordinary.

5. **Individual Liability Not Taken Away by Statute.** — *Stephens v. James*, 77 Ga. 139.

Order of Court Gives Right to Indemnity Out of State. — *Poullain v. Brown*, 52 Ga. 412.

Liability for Negligence. — An administrator is liable for loss incurred in keeping the estate together and carrying on the plantation, only when he has been guilty of gross negligence.

sonal representatives are bound by the acts of their decedents, and they have no authority, unless it is conferred on them by statute, to maintain suits to set aside conveyances made by their testators or intestates for the purpose of defrauding creditors; and such authority is not usually conferred on them by the statutes against fraudulent conveyances.¹ But it is held that if the fraudulent grantee renounces the deed or transfer, or if it is not consummated in the lifetime of the grantor or transferrer, and he dies in possession of the property, then it is assets of his estate and the personal representative may sue for its

Huson v. Wallace, 1 Rich. Eq. (S. Car.) 1. See also *Clarke v. Jenkins*, 3 Rich. Eq. (S. Car.) 318.

1. Personal Representative Bound by Acts of Decedent — England. — *Hawes v. Leader*, Cro. Jac. 270, Yelv. 196; *Steel v. Brown*, 1 Taunt. 381.

Alabama. — *Marler v. Marler*, 6 Ala. 367.

Kentucky. — *Stewart v. Dailey*, Litt. Sel. Cas. (Ky.) 212; *Gillespie v. Gillespie*, 2 Bibb (Ky.) 89.

New York. — *Osborne v. Moss*, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252.

Pennsylvania. — *Reichart v. Castator*, 5 Binn. (Pa.) 109, 6 Am. Dec. 402.

Rule that Fraudulent Conveyances Cannot Be Avoided at Suit of Personal Representative — England. — *Orlabar v. Harwar*, Comb. 348.

Alabama. — *Roden v. Murphy*, 10 Ala. 804; *Marler v. Marler*, 6 Ala. 367; *Walton v. Bonham*, 24 Ala. 513; *Adams v. Broughton*, 13 Ala. 731; *Davis v. Swanson*, 54 Ala. 277, 25 Am. Rep. 678.

Arkansas. — *Eubanks v. Dobbs*, 4 Ark. 173; *Jordan v. Fenno*, 13 Ark. 593; *Slocumb v. Blackburn*, 18 Ark. 319; *Anderson v. Dunn*, 19 Ark. 650.

Florida. — *Holliday v. McKinne*, 22 Fla. 153.

Georgia. — *Crosby v. De Graffenreid*, 19 Ga. 290; *Beale v. Hall*, 22 Ga. 431; *Anderson v. Brown*, 72 Ga. 713.

Illinois. — *Choteau v. Jones*, 11 Ill. 301, 50 Am. Dec. 460; *Howell v. Edmonds*, 47 Ill. 79; *Eads v. Mason*, 16 Ill. App. 545; *Harmon v. Harmon*, 63 Ill. 512; *White v. Russell*, 79 Ill. 155; *Beebe v. Sauter*, 87 Ill. 518; *Majorowicz v. Payson*, 153 Ill. 484.

Kentucky. — *Com. v. Richardson*, 8 B. Mon. (Ky.) 93.

Louisiana. — *Van Wickle v. Calvin*, 23 La. Ann. 205. In this case the question was whether an executor could sue to set aside a fraudulent conveyance made by the testator, and the court held that he could not, because the executor only represents the testator. The rule seems to be otherwise in this state in the case of administrators. See *infra*, this subsection, note, *Rule that Fraudulent Conveyances May Be Avoided at Suit of Personal Representative*.

Maryland. — *Kinnemon v. Miller*, 2 Md. Ch. 407; *Dorsey v. Smithson*, 6 Har. & J. (Md.) 61.

Mississippi. — *Gully v. Hull*, 31 Miss. 20; *Snodgrass v. Andrews*, 30 Miss. 472, 64 Am. Dec. 169; *Armstrong v. Stovall*, 26 Miss. 275; *Winn v. Barnett*, 31 Miss. 653; *Blake v. Blake*, 53 Miss. 182; *Partee v. Mathews*, 53 Miss. 140.

Missouri. — *McLaughlin v. McLaughlin*, 16 Mo. 242; *Brown v. Finley*, 18 Mo. 375; *George v. Williamson*, 26 Mo. 190, 72 Am. Dec. 203;

Hall v. Callahan, 66 Mo. 316; *Merry v. Fremon*, 44 Mo. 519.

South Carolina. — *Anderson v. Belcher*, 1 Hill L. (S. Car.) 246, 26 Am. Dec. 174; *King v. Clarke*, 2 Hill Eq. (S. Car.) 611; *Chappell v. Brown*, 1 Bailey L. (S. Car.) 528; *Thomson v. Palmer*, 2 Rich. Eq. (S. Car.) 32.

Texas. — *Willis v. Smith*, 65 Tex. 656; *Willson v. Demander*, 71 Tex. 603.

Virginia. — *Spooner v. Hilbish*, 92 Va. 333; *Backhouse v. Jett*, 1 Brock. (U. S.) 500; *Thomas v. Soper*, 5 Munf. (Va.) 28.

Fraudulent Confession of Judgment. — An administrator cannot question the validity of a judgment confessed by the decedent even on the ground that it was intended to defraud creditors. *Wise v. Hardin*, 5 S. Car. 325 [citing *Chappell v. Brown*, 1 Bailey L. (S. Car.) 532; *Anderson v. Belcher*, 1 Hill L. (S. Car.) 246, 26 Am. Dec. 174; *Tomlinson v. Tomlinson*, 10 Rich. L. (S. Car.) 404; *Vose v. Hannahan*, 10 Rich. L. (S. Car.) 472].

If an Administrator Is Also a Creditor of the Decedent, he may sue to set aside a fraudulent conveyance made by the decedent. *Winsmith v. Winsmith*, 15 S. Car. 611; *Werts v. Spearman*, 22 S. Car. 200; *Spooner v. Hilbish*, 92 Va. 333. See also *Osborne v. Moss*, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252; *Coltrafine v. Causey*, 3 Ired. Eq. (38 N. Car.) 246, 42 Am. Dec. 168; *Moody v. Fry*, 3 Humph. (Tenn.) 567.

Rule in Texas. — It was said in an early Texas case that if an administrator did not take proper measures to have a fraudulent conveyance made by his intestate set aside, he would be liable to the creditors of the estate for neglect of duty. *Danzey v. Smith*, 4 Tex. 411. This was afterwards held to be *obiter dictum*, and the rule was laid down that a personal representative could not impeach a conveyance by the decedent on the ground that it was fraudulent as to creditors. *Cobb v. Norwood*, 11 Tex. 556; *Avery v. Avery*, 12 Tex. 54, 62 Am. Dec. 513; *Connell v. Chandler*, 13 Tex. 5, 62 Am. Dec. 545.

In a later case the question was treated as unsettled. *Hunt v. Butterworth*, 21 Tex. 133, 73 Am. Dec. 223. But it was afterwards declared to be the settled rule that an executor or administrator could not impeach conveyances by the decedent on the ground that they were fraudulent as to creditors, because, it was said, property conveyed by a decedent in his lifetime "forms no part of his estate, and hence the administrator has no concern with it whatever. All the title of the grantor passed to his fraudulent grantee, subject only to the right of the defrauded creditor to have the conveyance set aside, so far as his debt is concerned, and the property made liable for its

recovery.¹ In many states of the Union, authority to sue to set aside a conveyance made by decedents in fraud of creditors has been conferred on executors and administrators directly by statute, or is accorded to them by virtue of the theory which prevails in some states that they represent also the creditors of their decedents;² but the rule is generally restricted to cases where there is a

payment." *Willis v. Smith*, 65 Tex. 656. See also *Wilson v. Demander*, 71 Tex. 603.

1. Fraudulent Conveyance Not Consummated in Lifetime of Grantor.—*Sharp v. Caldwell*, 7 Humph. (Tenn.) 415; *Hunt v. Butterworth*, 21 Tex. 133, 73 Am. Dec. 223; *Spooner v. Hilbish*, 92 Va. 333.

2. Rule that Fraudulent Conveyances May Be Avoided at Suit of Personal Representative—United States.—*Clapp v. Clark*, 49 Fed. Rep. 123.

California.—*Field v. Andrada*, 106 Cal. 107; *Murphy v. Clayton*, 114 Cal. 526; *Ohm v. Superior Ct.*, 85 Cal. 545, 20 Am. St. Rep. 245; *Forde v. Exempt Fire Co.*, 50 Cal. 299; *Hills v. Sherwood*, 48 Cal. 392.

Connecticut.—*Minor v. Mead*, 3 Conn. 289; *Booth v. Patrick*, 8 Conn. 106; *Andruss v. Doolittle*, 11 Conn. 283; *Freeman v. Burnham*, 36 Conn. 469; *Bassett v. McKenna*, 52 Conn. 439.

Indiana.—*Love v. Mikals*, 11 Ind. 227; *Garnier v. Graves*, 54 Ind. 188; *Martin v. Bolton*, 75 Ind. 295; *Johnson v. Jones*, 79 Ind. 141; *Cox v. Hunter*, 79 Ind. 590; *Jarrell v. Brubaker*, 150 Ind. 260.

Iowa.—*Cooley v. Brown*, 30 Iowa 470.

Louisiana.—*Judson v. Connolly*, 4 La. Ann. 169, 5 La. Ann. 400; *Sullice v. Gradenigo*, 15 La. Ann. 582. In these cases it was held that in Louisiana the administrator of an insolvent estate or a curator represents the creditors and may therefore sue to set aside the fraudulent conveyances made by the decedent. As to the rule in this state in regard to executors, see *supra*, this subsection, note, *Rule that Fraudulent Conveyances Cannot Be Avoided at Suit of Personal Representative*.

Maine.—*Caswell v. Caswell*, 28 Me. 232; *McLean v. Weeks*, 61 Me. 277; *Brown v. Whitmore*, 71 Me. 65; *Frost v. Libby*, 79 Me. 56.

Massachusetts.—*Gibbens v. Peeler*, 8 Pick. (Mass.) 254; *Holland v. Cruft*, 20 Pick. (Mass.) 321; *Chase v. Reddin*, 13 Gray (Mass.) 418; *Yeomans v. Brown*, 8 Met. (Mass.) 51; *Pease v. Pease*, 8 Met. (Mass.) 395; *Martin v. Root*, 17 Mass. 222; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Welsh v. Welsh*, 105 Mass. 229; *Gilson v. Hutchinson*, 120 Mass. 32; *Parker v. Flagg*, 127 Mass. 28.

Michigan.—*Morris v. Morris*, 5 Mich. 171; *Crittenden v. Basom*, 46 Mich. 33; *Kellogg v. Beeson*, 58 Mich. 340; *Walker v. Cady*, 106 Mich. 21.

New Hampshire.—*Abbott v. Tenney*, 18 N. H. 109; *Cross v. Brown*, 51 N. H. 486; *Pres-ton v. Cutter*, 64 N. H. 461.

New York.—*Babcock v. Booth*, 2 Hill (N. Y.) 181, 38 Am. Dec. 578; *Brownell v. Curtis*, 10 Paige (N. Y.) 210; *McKnight v. Morgan*, 2 Barb. (N. Y.) 171; *Bate v. Graham*, 11 N. Y. 237; *Barton v. Hosner*, 24 Hun (N. Y.) 497; *Harvey v. McDonnell*, 48 Hun (N. Y.) 409; *Matter of Hart*, 60 Hun (N. Y.) 516; *Lichten-berg v. Herdtfelder*, 103 N. Y. 302. But see

Osborne v. Moss, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252.

North Carolina.—*Rhem v. Tull*, 13 Ired. L. (35 N. Car.) 57; *Tuck v. Walker*, 106 N. Car. 285. The rule was otherwise in North Carolina until it was changed by statute. *Col-traine v. Causey*, 3 Ired. Eq. (38 N. Car.) 246, 42 Am. Dec. 168.

Ohio.—*Craig v. Jennings*, 31 Ohio St. 84; *Spoors v. Coen*, 44 Ohio St. 497; *Longley v. Sewell*, (C. Pl.) 4 Ohio Dec. 1. The rule was otherwise in Ohio until it was changed by statute. *Benjamin v. Le Baron*, 15 Ohio 517.

Oregon.—*King v. Boyd*, 4 Oregon 326.

Pennsylvania.—*Buehler v. Gloninger*, 2 Watts (Pa.) 226; *Stewart v. Kearney*, 6 Watts (Pa.) 453, 31 Am. Dec. 482; *Pringle v. Pringle*, 59 Pa. St. 281; *Bouslough v. Bouslough*, 68 Pa. St. 495.

Tennessee.—*Boxly v. McKay*, 4 Sneed (Tenn.) 286.

Vermont.—*Allen v. Mower*, 17 Vt. 61; *McLane v. Johnson*, 43 Vt. 48. The rule was otherwise in Vermont until it was changed by statute. *Martin v. Martin*, 1 Vt. 91, 18 Am. Dec. 675; *Peaslee v. Barney*, 1 D. Chip. (Vt.) 331, 6 Am. Dec. 743.

Wisconsin.—*Andrew v. Hinderman*, 71 Wis. 148; *Wheeler v. Single*, 62 Wis. 380.

In *Pennsylvania* there are decisions which seem to allow a recovery by an administrator where the estate is insolvent, because the administrator is in such case the representative of the creditors, and not of the intestate. *Buehler v. Gloninger*, 2 Watts (Pa.) 226; *Stewart v. Kearney*, 6 Watts (Pa.) 453, 31 Am. Dec. 482.

In *Rhode Island* an executor or administrator may sue to set aside fraudulent conveyances made by the decedent only when the property is needed for administration expenses. *Estes v. Howland*, 15 R. I. 127.

A **Special Administrator** may sue to set aside fraudulent conveyances made by the decedent. *Forde v. Exempt Fire Co.*, 50 Cal. 299.

A **Public Administrator** may sue to set aside fraudulent conveyances made by the decedent. *Hangen v. Hachemeister*, 53 N. Y. Super. Ct. 532; *Southard v. Benner*, 72 N. Y. 424.

It is the duty of an executor or administrator to sue for the recovery of any property which has been conveyed by the decedent in fraud of his creditors, as soon as he is satisfied that there will be a deficiency of assets to pay debts, and he is not required to wait until the deficiency is judicially ascertained. *Andrew v. Hinderman*, 71 Wis. 148.

Canceling Forged Mortgage.—An administrator may sue to cancel a forged mortgage under the *New York* statute (Laws N. Y. 1858, c. 314) authorizing executors and administrators to sue any person who shall have taken, received, or interfered in any manner with the property of the decedent. *National Bank*

deficiency of assets to pay debts,¹ and the surplus after the debts are paid goes to the grantee in the fraudulent deed.²

Action to Recover Value of Land Fraudulently Conveyed. — It is held that an executor or administrator may sue the fraudulent grantee for the value of the property, if he has aliened it, but if the grantee has not aliened it the remedy is by an action to set aside the fraudulent conveyance and subject the land to sale for the payment of debts.³

d. PARTNERSHIP ESTATES. — When a partnership estate is dissolved by the death of a partner, the general rule is that the legal title to the estate is in the surviving partner, and he is entitled to the exclusive possession and control for the purpose of winding up its affairs.⁴ Until the affairs of the

v. Levy, 127 N. Y. 549, *reversing* (Supreme Ct.) 2 N. Y. Supp. 162.

1. Limitation of Personal Representative's Authority — Deficiency of Assets — California. — *Ohm v. Superior Ct.*, 85 Cal. 545, 20 Am. St. Rep. 245; *Field v. Andrada*, 106 Cal. 107; *Murphy v. Clayton*, 114 Cal. 526.

Connecticut. — *Andruss v. Doolittle*, 11 Conn. 283.

Indiana. — *Hess v. Hess*, 19 Ind. 238; *Cox v. Hunter*, 79 Ind. 590; *Johnson v. Jones*, 79 Ind. 141.

Kentucky. — *Buford v. Shinkle*, 12 Ky. L. Rep. 686.

Louisiana. — *Judson v. Connolly*, 4 La. Ann. 169; *Carroll v. Castleman*, 47 La. Ann. 1364.

Massachusetts. — *Wall v. Provident Sav. Institution*, 3 Allen (Mass.) 96.

Michigan. — *Kellogg v. Beeson*, 58 Mich. 340.

New York. — *Dennison v. Ely*, 1 Barb. (N. Y.) 610; *Matter of Hart*, 60 Hun (N. Y.) 516.

Ohio. — *Doney v. Clark*, 55 Ohio St. 294.

Oregon. — *King v. Boyd*, 4 Oregon 326.

Pennsylvania. — *Pringle v. Pringle*, 59 Pa. St. 281; *Bouslough v. Bouslough*, 68 Pa. St. 495.

Tennessee. — *Boxly v. McKay*, 4 Sneed (Tenn.) 286; *Mulloy v. Young*, 10 Humph. (Tenn.) 298.

Vermont. — *McLane v. Johnson*, 43 Vt. 48.

Wisconsin. — *Wheeler v. Single*, 62 Wis. 380.

Who Are Creditors. — Under the *California* statute, in order to authorize an executor or administrator to sue to set aside a fraudulent conveyance made by the decedent, the debts must be established either by a judgment in favor of the creditor or by allowance by the Probate Court. *Field v. Andrada*, 106 Cal. 107. See also *Ohm v. Superior Ct.*, 85 Cal. 545, 20 Am. St. Rep. 245.

Insolvent Estates. — In some jurisdictions the right to maintain suits to set aside fraudulent conveyances is given to the personal representative of the fraudulent grantor only when the estate is insolvent. *Boxly v. McKay*, 4 Sneed (Tenn.) 286.

There Is a Distinction between the right to sue for property fraudulently conveyed and the right of action for property of which the decedent was defrauded. In the former case the personal representative has no right of action unless the assets are insufficient to pay debts, while in the latter it is maintainable irrespective of assets. *Curry v. Brockway*, 12 Daly (N. Y.) 17.

2. Surplus After Payment of Debts Goes to Grantee. — *McLean v. Weeks*, 61 Me. 277; *Allen v. Ashley School Fund*, 102 Mass. 262.

A Fraudulent Conveyance Will Not Be Set Aside Absolutely and Unconditionally, but the decree should permit the grantee, on payment of the claims and costs, to retain the property. *Reed v. Jourdan*, 109 Mich. 128.

3. Action to Recover Value of Land Fraudulently Conveyed. — *Doney v. Dunnicks*, 4 Ohio Cir. Dec. 380; *Doney v. Clark*, 55 Ohio St. 294.

4. Partnership Estate — Alabama. — *Andrews v. Brown*, 21 Ala. 437; *Little v. McPherson*, 76 Ala. 552.

Arkansas. — *Marlatt v. Scantland*, 19 Ark. 443.

California. — *Gray v. Palmer*, 9 Cal. 616.

Connecticut. — *Tillotson v. Tillotson*, 34 Conn. 335.

Florida. — *Territory v. Redding*, 1 Fla. 279.

Indiana. — *Holland v. Fuller*, 13 Ind. 195; *Anderson v. Ackerman*, 88 Ind. 481.

Maine. — *Dwinel v. Stone*, 30 Me. 384.

Massachusetts. — *Freeman v. Freeman*, 136 Mass. 260.

Michigan. — *Barry v. Briggs*, 22 Mich. 201; *Roberts v. Kelsey*, 38 Mich. 602; *Heath v. Waters*, 40 Mich. 457.

Missouri. — *Weise v. Moore*, 22 Mo. App. 530; *McGilway v. Clement*, 6 Mo. App. 598.

New York. — *Case v. Abeel*, 1 Paige (N. Y.) 393; *Evans v. Evans*, 9 Paige (N. Y.) 178.

Pennsylvania. — *Hanna v. Wray*, 77 Pa. St. 27; *Grim's Appeal*, 105 Pa. St. 375.

Surviving Partner Alone Can Sue and Be Sued. — *Osgood v. Spencer*, 2 Har. & G. (Md.) 133; *Daby v. Ericsson*, 45 N. Y. 786; *Murray v. Mumford*, 6 Cow. (N. Y.) 441; *Voorhies v. Baxter*, 1 Abb. Pr. (N. Y. Supreme Ct.) 43; *Walker v. Galbreath*, 3 Head (Tenn.) 315; *Roy v. Vilas*, 18 Wis. 169.

Surviving Partner Holds Estate as Trustee. — *Costley v. Towles*, 46 Ala. 660; *Farley v. Moog*, 79 Ala. 148, 58 Am. Rep. 585; *Renfrow v. Pearce*, 68 Ill. 125.

Failure of Surviving Partner to Act. — If the surviving partner gives no attention to the partnership matters, the executors of the deceased partner may take charge of the estate. *Hewes v. Baxter*, 48 La. Ann. 1303.

Surviving Partner Appointed Executor. — When the surviving partner is appointed executor of the deceased partner, his first duty is to settle the partnership estate. *Palicio v. Bigne*, 15 Oregon 142.

For a Full Discussion of the effect of the death of a partner, see the title PARTNERSHIP.

partnership are settled and the debts paid, the personal representative of the deceased has merely an equitable interest in the firm property,¹ and his only authority in the premises is to inquire into the condition of the assets² and enforce performance of the duty of the surviving partner to pay the debts and distribute the residue.³

Continuing Firm Business After Death of Partner. — The business of a firm may be continued by the surviving partner and the personal representative of the deceased partner, if authorized by the will of the decedent, by the articles of copartnership, or by a decree of court.⁴

Statutory Authority of Partner's Personal Representatives. — In some states the powers of executors and administrators in respect to partnership estates are extended by statute so far as to authorize them to take possession of and administer the partnership property unless the surviving partner gives bond for the faithful performance of his duty to wind up the concern.⁵

c. **TRUST ESTATES.** — Personal property held by a decedent in trust passes to his personal representative at common law on the same trusts on which it was held by the decedent,⁶ and not as assets of the estate.⁷

In England the personal representative of a trustee of personal property succeeds to all the powers and duties of the decedent with respect to the trust property, and must execute the trust, unless it was confided personally to the original trustee.⁸

1. Title of Personal Representatives. — The personal representatives of a deceased partner, having a mere equitable interest in the firm property until its affairs are settled, are not at law tenants in common with the surviving partner. *Pfeffer v. Steiner*, 27 Mich. 537.

2. Right to Inquire into Condition of Assets. — *Heath v. Waters*, 40 Mich. 457; *Jennings v. Chandler*, 10 Wis. 21.

3. Administrator May See that Debts Are Paid and Residue Distributed. — *Tompkins v. Weeks*, 26 Cal. 50; *Wilson v. Soper*, 13 B. Mon. (Ky.) 418, 56 Am. Dec. 573; *Loomis v. Armstrong*, 63 Mich. 355; *Grim's Appeal*, 105 Pa. St. 375.

An Accounting at the Proper Time Is the Only Remedy of the administrator of a deceased partner against the surviving partner. *Roberts v. Kelsey*, 38 Mich. 602.

4. Continuing Business After Death of Partner. — See *supra*, this section, *Continuing Decedent's Business*.

5. Personal Representative May Take Possession, Unless Surviving Partner Gives Bond. — *Boston, etc., Glass Co. v. Ludlum*, 8 Kan. 40; *Cook v. Lewis*, 36 Me. 340; *Putnam v. Parker*, 55 Me. 235; *Hill v. Treat*, 67 Me. 501; *Knott v. Stephens*, 3 Oregon 269.

Only When the Surviving Partner Has Failed to Give the Required Bond can the administrator of the deceased partner intermeddle with the partnership assets. *Teney v. Laing*, 47 Kan. 297; *Matney v. Gregg Bros. Grain Co.*, 19 Mo. App. 107.

Common-law Powers Not Affected by Statute. The statute does not take away the common-law right of the surviving partners to settle the partnership affairs, but only imposes certain conditions that were not required at common-law. *Kahn v. Johnson*, 18 Mo. App. 426.

Separate Administration of Partnership Estate. — When the administrator of a deceased partner assumes administration of the partnership estate under the statute, his duties in regard to it are distinct from his duties as administrator of the decedent's individual

property, and he must keep his accounts separate and make a settlement of each estate by itself. *Boston, etc., Glass Co. v. Ludlum*, 8 Kan. 40.

Additional Bond to Be Given by Personal Representative. — In some states the personal representative of a deceased partner is required to qualify specially by giving an additional bond before he will be permitted to take possession of the partnership property. *Teney v. Laing*, 47 Kan. 297; *Matney v. Gregg Bros. Grain Co.*, 19 Mo. App. 107.

Settlement with Surviving Partner. — See *supra*, this title, *Power, Duties, and Liabilities in General—Compromise, Composition, and Release of Claims*.

6. Representative's Title to Personalty Held by Decedent in Trust—England. — In *Goods of Beer*, 15 Jur. 160; *Wangford v. Wangford*, *Freem.* 520; In *Goods of Perry*, 2 *Curt. Ecc.* 655; *Hayton v. Wolfe*, *Cro. Jac.* 614, *Palm.* 153, *Hutt.* 30.

Alabama. — *Mauldin v. Armistead*, 14 *Ala.* 702; *Colburn v. Broughton*, 9 *Ala.* 351.

Maine. — *Knight v. Loomis*, 30 *Me.* 204.

New Jersey. — *Schenck v. Schenck*, 16 *N. J. Eq.* 174.

New York. — *Boone v. Citizens' Sav. Bank*, 84 *N. Y.* 83, 38 *Am. Rep.* 498, 9 *Abb. N. Cas.* (N. Y.) 146, *reversing* 21 *Hun* (N. Y.) 235.

North Carolina. — *Worth v. M'Aden*, 1 *Dev. & B. Eq.* (21 *N. Car.*) 199.

Virginia. — *Nichols v. Campbell*, 10 *Gratt.* (Va.) 561.

Wisconsin. — *King v. Lawrence*, 14 *Wis.* 238.

7. Property Held in Trust by Decedent Not Assets of Estate. — See *supra*, this title, *Assets—Trust Property*.

For a Full Discussion as to the effect of the death of the trustee before executing the trust, see the title *TRUSTS AND TRUSTEES*.

8. Duty of Representative as to Trust Estates Rule in England. — *Sharp v. Sharp*, 2 *B. & Ald.* 405; *Cole v. Wade*, 16 *Ves. Jr.* 45; *Bradford v. Belfield*, 2 *Sim.* 264; *Cooke v. Crawford*, 13

In the United States he does not succeed the decedent as trustee, but it is his duty to take possession of the trust property, settle the decedent's accounts as trustee, and turn over the property, when thereto ordered by the proper court, to the persons entitled to receive it.¹

f. DEALING WITH ESTATE FOR INDIVIDUAL BENEFIT — (1) *In General.* — It is the duty of an executor or administrator to act in relation to the estate in his hands solely for the benefit of his *cestuis que trustent*, and he is not permitted to derive any individual gain from his dealings with the estate, or to avail himself of his position, or of any information which he gets by it, to acquire any adverse interest in the estate, but all profits that may be made belong to and become a part of the estate.²

Sim. 91; Peyton v. Bury, 2 P. Wms. 626; In Goods of Beer, 15 Jur. 160; Wangford v. Wangford, Freem. 520; In Goods of Perry, 2 Curt. Ecc. 655; Hayton v. Wolfe, Cro. Jac. 614, Palm. 153, Hutt. 30; Mansel v. Mansel, Wilmot's Cas. 36; Hall v. Dewes, 1 Jac. 189.

1. *Duty of Representative as to Trust Estates* — *General Rule in United States* — *Alabama.* — Mauldin v. Armistead, 14 Ala. 702.

Arkansas. — Hill v. State, 23 Ark. 604.

California. — Luco v. De Toro, 91 Cal. 405.

Indiana. — Silvers v. Canary, 114 Ind. 129; Lucas v. Donaldson, 117 Ind. 139; Keister v. Howe, 3 Ind. 268.

Maine. — Knight v. Loomis, 30 Me. 204.

New Hampshire. — Gregg v. Gregg, 15 N. H. 190.

North Carolina. — Worth v. M'Aden, 1 Dev. & B. Eq. (21 N. Car.) 199; Mitchell v. Adams, 1 Ired. L. (23 N. Car.) 298.

Pennsylvania. — Brown v. Thompson, 156 Pa. St. 297; Baird's Appeal, 3 W. & S. (Pa.) 459.

Virginia. — Nichols v. Campbell, 10 Gratt. (Va.) 561.

Wisconsin. — King v. Lawrence, 14 Wis. 238.

But see Gulick v. Bruere, 42 N. J. Eq. 639; Schenck v. Schenck, 16 N. J. Eq. 174. See also *infra*, this title, *Representatives of Executors and Administrators*.

The action of the administrator of a guardian in entering up judgment on a bond given to the guardian as such will be sustained as in furtherance of the guardian's duty and for the protection of the *cestuis que trustent*, though strictly speaking the administrator had no title to meddle with it. But when his action goes beyond this, and he assumes to release the lien of the judgment in derogation of the interests of the *cestuis que trustent*, there is a patent defect of authority of which all persons dealing with him are bound to take notice. It is not material that the same person is plaintiff and releasor, because the record shows the right in which the judgment was entered and is notice that the plaintiff [the administrator] is not the successor in the guardianship. Brown v. Thompson, 156 Pa. St. 297.

2. *Personal Representative Cannot Deal with Estate for Individual Benefit* — *Kentucky.* — Faucett v. Faucett, 1 Bush (Ky.) 514; Kellar v. Beelor, 5 T. B. Mon. (Ky.) 573.

Michigan. — Loomis v. Armstrong, 49 Mich. 521; Ward v. Tinkham, 65 Mich. 695.

Mississippi. — Williams v. Stratton, 10 Smed. & M. (Miss.) 418; Glenn v. Thistle, 23 Miss. 42.

Missouri. — Gamble v. Gibson, 59 Mo. 585.

Tennessee. — Johnson v. Kay, 8 Humph. (Tenn.) 142.

"The Fundamental Principle, dictated no less by morality and practical honesty than by the law in regard to a trustee, whether executor or administrator or guardian, or in cases of an ordinary nature, is that he shall derive to himself no gain, benefit, or advantage by the use of the trust funds. Whatever of profit may be made, or may accrue, shall belong to and become parcel of the estate." Per Ewing, C. J., in Voorhees v. Stoothoff, 11 N. J. L. 145. See also McKnight v. Walsh, 24 N. J. Eq. 498.

Where a purchaser of land under an executory contract, by making permanent improvements, increased the value of the land, he had an equitable interest in it, and his administrator could not deprive his creditors of their right by paying the purchase money and taking a deed to himself from the vendor. Whiddon v. Williams, 98 Ga. 310.

Purchase of Claims Due Estate. — In Handlin v. Davis, 81 Ky. 34, it was held, in respect to the rule that an executor or administrator is not allowed to purchase or speculate on the estate confided to him for administration, that even where the subject is a doubtful claim, equity will not allow the administrator to profit by his purchase to the injury of the heir. But such contracts are not necessarily void. Such a transaction may be approved where it was for the benefit of the estate, or where full value has been paid in good faith.

Bonus Paid by Debtor of Estate. — In Gordon v. West, 8 N. H. 445, it was held that if an executor receives from a debtor of the estate a sum in excess of the amount of the debt as compensation for his trouble in effecting a settlement of the debt, or if he receives usurious interest on a debt due the estate, he is not chargeable with the amount so received, where he charges nothing to the estate for his time and trouble in arranging the business. But see Savage v. Gould, 60 How. Pr. (N. Y. Supreme Ct.) 217.

Premium on Gold Coin. — Premiums on gold coin sold by the executor belong to the estate, and cannot be appropriated by him to his own use. Gephart v. Strong, 20 Md. 522.

Purchase of Property of Estate. — An executor or administrator has no right to purchase property of the estate for his own benefit either at a sale made by himself or at a sale under execution or other process. Golson v. Dunlap, 73 Cal. 157; Clark v. Drake, 63 Mo. 354; Bechtold v. Read, 49 N. J. Eq. 111.

Even if the executor or administrator pur-

(2) *Dealing with Claims Against Estate* — (a) **Purchase at Discount.** — Under the rule forbidding executors and administrators to derive any benefit or profit from their dealings with the estate, they will not be permitted to make any profit for themselves by paying claims against the estate at a discount, or settling with creditors for less than the amount due, but the profit will in all cases inure to the benefit of the estate, and they will be allowed only the amounts actually paid to creditors.¹

In Some Jurisdictions it is expressly provided by statute that no executor or administrator shall purchase any claim against the estate he represents. It is held, however, that such purchases are not void, but will be sustained if made for the purpose of benefiting the estate, and if they actually prove beneficial to it.²

(b) **Payment with Individual Property or Funds.** — The same rule forbids an executor or administrator to make any profit for himself by paying debts of the estate with his individual property at an excessive valuation or by paying debts with his individual funds and taking the property of the estate at its appraised valuation.³

chases land from the heir, the presumption is against him, and on an allegation by the devisee to set aside such sale that the value of the land sold was several times the price paid, judgment will be rendered against the executor or administrator, if no evidence is given as to the value. *Golson v. Dunlap*, 73 Cal. 157. See also *infra*, this section, *Personal Property — Sale and Transfer of Personal Property*; *Real Property — Sale of Real Property*.

1. Representative Cannot Buy Claims Against Estate for Individual Profit — England. — *Ex p. James*, 8 Ves. Jr. 337; *Ex p. Lacey*, 6 Ves. Jr. 625.

Arkansas. — *Wolf v. Banks*, 41 Ark. 104.

Kentucky. — *Mitchum v. Mitchum*, 3 Dana (Ky.) 260; *Miller v. Towles*, 4 J. J. Marsh. (Ky.) 256.

Michigan. — *Owen v. Potter*, (Mich. 1898) 73 N. W. Rep. 977.

Mississippi. — *Anderson v. Duke*, 28 Miss. 87.

Nevada. — *Furth v. Wyatt*, 17 Nev. 180.

New York. — *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 409; *Evertson v. Tappen*, 5 Johns. Ch. (N. Y.) 497; *Hawley v. Mancius*, 7 Johns. Ch. (N. Y.) 174.

Wisconsin. — *Gillett v. Gillett*, 9 Wis. 194.

This Rule Is Very Stringent and applies even where the purchase was made by borrowing money at a high rate of interest and by the sale of the administrator's individual property, though the estate was thereby saved from insolvency. *Trimble v. James*, 40 Ark. 393.

Settlement of Claims at Discount. — If an administrator pays a dividend of an insolvent estate to a bank in its depreciated currency, or otherwise settles claims against the estate for less than the amount due, he is not entitled to the benefit of the amount thus saved, but it will belong to the estate. *Dahlgren v. Peale*, 24 Miss. 142; *Anderson v. Duke*, 28 Miss. 87.

Purchase of Pecuniary Legacy. — It is not in fraud of the rights of residuary legatees for an executor to purchase a pecuniary legacy, and he is therefore not accountable to the residuary legatees for any profit that he may make by the purchase. *Hale v. Aaron*, 77 N. Car. 371.

In *Peyton v. Smith*, 2 Dev. & B. Eq. (22 N.

Car.) 325, the administrator purchased at a discount an interest in a distributive share of the estate while a suit was pending therefor. The other next of kin alleged that he had paid too little, and claimed that the profit made on the purchase should result to them. But the court held that while such contracts are viewed with jealousy, whether the purchase ought to stand or not is exclusively a matter between the parties to the contract. "As to all others," said the court, "it must be understood as transferring the right which it professes to sell; and the price paid by the purchaser is a matter which concerns none but the parties."

2. Effect of Statutory Prohibition — Purchase Not Absolutely Void. — The *California* statute (Code Civ. Pro., § 1617) provides that "no administrator or executor shall purchase any claim against the estate he represents." Under this statute it is held that if an administrator, with the desire of protecting the estate against a sacrifice of its property under foreclosure of a mortgage, should, in case there were no funds of the estate in his hands, advance his own funds with which to relieve the property from such sacrifice, and take a transfer of the deed himself or to a third person, the Probate Court would be justified in allowing him, on settlement of his accounts, the amount so paid for the benefit of the estate, the transaction being an exercise of his duties as administrator rather than a "purchase" of the claim within the meaning of the statute. *Burnett v. Lyford*, 93 Cal. 114.

The Nevada Statute is in the same words as the *California* statute, and it is held that the purchase by an administrator of a mortgage against the estate will be sustained where he acted in good faith for the benefit of the estate and derived no individual profit, the statute being designed to protect the estates of deceased persons and prevent executors and administrators from taking advantage of their position to the injury of the estate. *Furth v. Wyatt*, 17 Nev. 180.

3. Payment with Individual Property at Excessive Valuation. — If an administrator pays debts of the estate with his own property at an excessive valuation, he will be credited

2. Personal Property — *a.* **TITLE AND RIGHT TO POSSESSION** — (1) *Devolution of Title to Decedent's Personality* — (*a*) **At Common Law.** — By the common law all the personal estate of a decedent passes to his executor or administrator, who is the personal representative of the decedent, and who alone has the legal title to the goods, chattels, choses in action, and all other personal property of the decedent. The children or next of kin have no legal interest in the specific chattels or rights of action of the decedent, but their right to the personal estate is limited to their respective distributive shares of the balance remaining after debts, funeral expenses, costs of administration, and legacies have been paid.¹

The Title of the Executor or Administrator Is Exclusive, he being the only representative recognized by law in regard to personal assets;² and even property specifically bequeathed vests in him subject to distribution, as in cases of intestacy.³

only with the actual value of such property. *Amos v. Heatherby*, 7 Dana (Ky.) 46.

Paying Debts with Individual Funds. — An executor or administrator will not be permitted to pay the decedent's debts with his own funds to the amount of the appraisement and take the property of the estate as his own, but it is his duty to sell and account for the amount realized on the sale. *Wilson v. Taylor*, 2 Hayw. & H. (C. C.) 334; *Hasett v. Glenn*, 7 Har. & J. (Md.) 17; *Dennis v. Dennis*, 15 Md. 73; *Hampton's Appeal*, 17 S. & R. (Pa.) 144; *Lindsay v. Lindsay*, 1 Desaus. (S. Car.) 150.

1. All Personality Passes to the Executor or Administrator at Common Law — *United States.* — *Hamner v. U. S.*, 13 Ct. of Cl. 7.

Alabama. — *Waring v. Lewis*, 53 Ala. 615; *Van Hoose v. Bush*, 54 Ala. 342; *Baldwin v. Hatchett*, 56 Ala. 461; *Moses v. Clark*, 46 Ala. 229; *Hutchinson v. Owen*, 59 Ala. 326; *Nelson v. Stollenwerck*, 60 Ala. 140; *Shelton v. Carpenter*, 60 Ala. 201; *Ferguson v. Morris*, 67 Ala. 389.

Connecticut. — *Taber v. Packwood*, 1 Day (Conn.) 151; *Roorbach v. Lord*, 4 Conn. 347; *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580; *Perkins v. Stone*, 18 Conn. 277; *Johnson v. Connecticut Bank*, 21 Conn. 156; *Woodhouse v. Phelps*, 51 Conn. 521; *Buckingham's Appeal*, 60 Conn. 143.

Georgia. — *Liptrot v. Holmes*, 1 Ga. 381.

Kansas. — *Lappin v. Mumford*, 14 Kan. 9.

Maryland. — *Salmon v. Clagett*, 3 Bland (Md.) 125.

Massachusetts. — *Goodwin v. Jones*, 3 Mass. 518, 3 Am. Dec. 173; *Dawes v. Boylston*, 9 Mass. 352, 6 Am. Dec. 72; *Clapp v. Stoughton*, 10 Pick. (Mass.) 468.

Michigan. — *Foote v. Foote*, 61 Mich. 181.

Missouri. — *Leakey v. Maupin*, 10 Mo. 368; *Smith v. Denny*, 37 Mo. 20; *Becraft v. Lewis*, 41 Mo. App. 546; *Rouggley v. Teichmann*, 10 Mo. App. 257.

New Hampshire. — *Shirley v. Healds*, 34 N. H. 407; *Stone v. Gilman*, 58 N. H. 135.

New Jersey. — *Hayes v. Hayes*, 45 N. J. Eq. 461.

Oregon. — *Weider v. Osborn*, 20 Oregon 307.

Pennsylvania. — *Bungard v. Miller*, (Pa. 1887) 8 Atl. Rep. 209.

South Carolina. — *Dial v. Gary*, 14 S. Car. 581, 37 Am. Rep. 737.

Tennessee. — *Peak v. Ligon*, 10 Yerg. (Tenn.) 469.

Virginia. — *Brockenbrough v. Turner*, 78 Va. 438.

Wisconsin. — *Scott v. West*, 63 Wis. 529; *Gundry v. Henry*, 65 Wis. 559.

Transportation of Property to Another State. — The title vested in an administrator appointed by the court of the decedent's domicile is not divested by the transportation of the property to another state for sale. *Crescent City Ice Co. v. Stafford*, 3 Woods (U. S.) 94.

Shares of Stock. — The personal representative of a deceased stockholder succeeds to all his rights in regard thereto and is entitled to receive, though he does not present, the certificate issued for the shares. *Brisbane v. Delaware, etc.*, R. Co., 25 Hun (N. Y.) 438.

Choses in Action pass to the personal representative, and the heirs can acquire no title except through him. *Jacobs v. Maloney*, 64 Mo. App. 270.

2. Title to Personality Is Exclusive — *Alabama.* — *Beattie v. Abercrombie*, 18 Ala. 9; *Vanderveer v. Alston*, 16 Ala. 494; *Kelly v. Kelly*, 9 Ala. 908, 44 Am. Dec. 469.

Missouri. — *Rouggley v. Teichmann*, 10 Mo. App. 257; *Becraft v. Lewis*, 41 Mo. App. 546.

New Hampshire. — *Shirley v. Healds*, 34 N. H. 407; *Stone v. Gilman*, 58 N. H. 135.

Pennsylvania. — *Bungard v. Miller*, (Pa. 1887) 8 Atl. Rep. 209.

West Virginia. — *Richardson v. Donehoo*, 16 W. Va. 686.

Distributees Can Derive Title Only Through Due Administration under the direction of the proper court, though the statute provides that the estate of a decedent, after all just debts and claims are paid, "shall descend to and be distributed" among the decedent's children, etc. The language of the statute, it is said, merely designates the ultimate rights of parties, and was never designed to interfere with the ordinary and approved mode of collecting debts due the estate through an administrator. *Leamon v. McCubbin*, 82 Ill. 263. See also *Clark v. Clark*, 76 Wis. 306.

Execution Issued After the Death of the Intestate on a judgment rendered against him in his lifetime cannot be levied on his goods in the hands of the administrator. *M'Mahon v. Glasscock*, 5 Yerg. (Tenn.) 304.

3. Title to Personality Specifically Bequeathed. — *Hayes v. Hayes*, 45 N. J. Eq. 461; *Melms v. Pfister*, 59 Wis. 186.

(b) **Modern Doctrine.** — The rule of the common law that the title to the decedent's personalty vests in the executor or administrator to the exclusion of all other persons, and that the distributees can derive title only through the executor or administrator, is subject to various modifications in the *United States*. In some states it is held that the legal title to the estate does not vest in him when the appointment of an administrator was unnecessary, but that in such case it vests directly in the heirs, while in other states it is held that the statutes of descents cast the title directly on the heirs.¹

(2) *When Title Vests in Representative* — (a) **Executors.** — Since the title of an executor is derived from the will, it vests in him at the moment of the testator's death.²

(b) **Administrators.** — The title of an administrator, on the other hand, is derived solely from the court by which his letters are granted, and therefore his title to the decedent's estate does not vest until the letters are granted;³

If a Chattel Is Bequeathed to the Person Who Is Also Appointed Executor, he holds it as executor until he signifies by some act his election to hold it as devisee. *Floyd v. Breckenridge*, 4 Bibb (Ky.) 14.

1. **Modification of Common-law Rule.** — The rule in *Mississippi* is stated by Smith, C. J., as follows: "The personal property of a decedent not disposed of by his will, 'descends to and is distributed among his heirs, in the same way and manner that real estate not divided [divided] descends' by the statute (Hutch. Dig. 624, § 52), subject, however, to the rights of the administrator. But his title exists only for special purposes, for the collection and preservation of the assets; for the payment of the debts, and for distribution. These duties require that the executor or administrator should be invested with the title requisite to their performance. Hence, notwithstanding the peculiar phraseology of the statute, it has always been held that he acquired, by the grant of administration, the legal title to the personalty; and, consequently, that distribution, or some equivalent act, is necessary to confer upon the distributees a complete and perfect title to the personal estate of the deceased. This principle has been, generally, observed with strictness by this court. *Browning v. Watkins*, 10 Smed. & M. (Miss.) 482; *Marshall v. King*, 24 Miss. 85. But we apprehend that in cases where neither moneys are to be collected, nor debts to be paid, and where it is not necessary for the purpose of distribution that an administrator should be appointed, and none is in fact appointed, the legal title to the personal estate should be held to vest, without distribution, under the statute, 'in the same way and manner' that the title to the real estate vests in the heir-at-law." *Andrews v. Brumfield*, 32 Miss. 113.

When Appointment of Administrator Is Unnecessary. — See *supra*, this title, *When Administration Is Necessary or Proper*.

In *California* and *Texas* the title to both real and personal property vests in the heirs, subject to the lien of the executor or administrator for the payment of debts and expenses of administration, with the right in the executor or administrator to present possession. *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Haynes v. Meeks*, 10 Cal. 120, 70 Am. Dec. 703; *Updegraff v. Trask*, 18 Cal. 459; *Meeks v. Hahn*, 20 Cal. 627; *Jahns v. Nolting*, 29 Cal.

510; *Matter of Woodworth*, 31 Cal. 604; *Chapman v. Hollister*, 42 Cal. 463; *Bayly v. Muehe*, 65 Cal. 349; *Thompson v. Duncan*, 1 Tex. 485; *Howard v. Republic*, 2 Tex. 311; *Graham v. Vining*, 2 Tex. 433; *Ansley v. Baker*, 14 Tex. 607, 65 Am. Dec. 136.

"Strictly speaking, perhaps, the legal title, even to the personal property of the decedent, does not vest in the executor or administrator under our system. But a special property in the real and personal estate vests in him charged with the trust, not only to apply it to the payment of claims presented, but, from the nature of the trust and his representative capacity, to do such acts in carrying out contracts of deceased as the law imposes upon him the obligation of performing." *Janin v. Browne*, 59 Cal. 37.

Under the Illinois Statute providing that the estate of an intestate "shall descend to and be distributed amongst" his heirs, children, etc., it has been held that the person solely entitled to administration may take possession of and sell the decedent's goods and chattels, and may recover the price from a purchaser. *Riley v. Loughrey*, 22 Ill. 98; *Cross v. Carey*, 25 Ill. 562. But see *Leamon v. McCubbin*, 82 Ill. 263.

In *Michigan* when debts, funeral expenses, and expenses of administration have been paid, the persons entitled to the estate may demand and recover their respective shares from the executor or administrator "or any person having the same." *McDermott v. Copeland*, 9 Fed. Rep. 536. See also *Brown v. Forsche*, 43 Mich. 497.

2. **Title of Executor Vests at Death of Testator.** — *Woolley v. Clark*, 5 B. & Ald. 744, 7 E. C. L. 249; *Roe v. Summerset*, 2 W. Bl. 692; *Shirley v. Healds*, 34 N. H. 407; *Johns v. Johns*, 1 McCord L. (S. Car.) 132; *Seabrook v. Williams*, 3 McCord L. (S. Car.) 371; *Scott v. West*, 63 Wis. 529.

The Law Knows No Interval between the testator's death and the vesting of the right in his representative. As soon as he obtains probate, his right is considered as accruing from that period. *Whitehead v. Taylor*, to Ad. & El. 210, 37 E. C. L. 95. See also *Com. Dig.*, tit. Administration (B) 9; *Bac. Abr.*, tit. Executors (E) 14; and *supra*, this title, *Powers, Duties, and Liabilities in General* — *Powers Before Probate or Grant of Letters*.

3. **Title of Administrator Vests When Letters Are Granted** — *England*. — *Murray v. East*

but for certain purposes the title of the administrator relates back to the time of death of the intestate.¹

(3) *Nature of Title*—(a) *In General*.—Though at common law an executor or administrator took the legal title to all of the decedent's personal property and chosed in action, and for many purposes was regarded as the owner thereof, having absolute control and power of disposal, he was not the owner for every purpose. He held title in a fiduciary character for the benefit of creditors, legatees, and distributees, and not for his own benefit,² and therefore the goods in his hands in his representative capacity were not subject to forfeiture on his attainder of treason or felony,³ or to seizure under execution for his individual debts,⁴ nor did they pass to his assignee in bankruptcy.⁵

India Co., 5 B. & Ald. 204, 7 E. C. L. 66; Woolley v. Clark, 5 B. & Ald. 744, 7 E. C. L. 249; Pratt v. Swaine, 8 B. & C. 285, 15 E. C. L. 219.

Alabama.—Snodgrass v. Cabiness, 15 Ala. 160.

Georgia.—Liptrot v. Holmes, 1 Ga. 381.

Indiana.—Smith v. Ferguson, 90 Ind. 229, 46 Am. Rep. 216.

New Mexico.—Perea v. Harrison, 7 N. Mex. 666.

South Carolina.—Poag v. Miller, Dudley L. (S. Car.) 11.

Between the Death of the Intestate and the Granting of Letters the legal title to personal property of the intestate is suspended and vested in no one. Salmon v. Clagett, 3 Bland (Md.) 125; Fay v. Reager, 2 Sneed (Tenn.) 203; Killebrew v. Murphy, 3 Heisk. (Tenn.) 546; Brown v. Bibb, 2 Coldw. (Tenn.) 434.

1. **Title of Administrator Relates Back to Death of Intestate.**—See *supra*, this title. *Powers, Duties, and Liabilities in General*—*Powers Before Probate or Grant of Letters*—*Doctrine that Letters Relate Back*.

2. **Title of Executor or Administrator Fiduciary in Character**—England.—Jennings v. Newman, 4 T. R. 347; Farr v. Newman, 4 T. R. 621; Howard v. Jemmet, 3 Burr. 1368.

United States.—Alston v. Cohen, 1 Woods (U. S.) 487.

Arkansas.—Hill v. Mitchell, 5 Ark. 608.

Connecticut.—Woodhouse v. Phelps, 51 Conn. 521.

Maine.—Dalton v. Dalton, 51 Me. 171.

Massachusetts.—Weeks v. Gibbs, 9 Mass. 76; Dawes v. Boylston, 9 Mass. 337, 6 Am. Dec. 72; Hutchins v. State Bank, 12 Met. (Mass.) 423; Clapp v. Stoughton, 10 Pick. (Mass.) 463.

Michigan.—Gilkey v. Hamilton, 22 Mich. 283; Hatheway v. Weeks, 34 Mich. 237; Foote v. Foote, 61 Mich. 181.

Mississippi.—Hall v. Hall, 27 Miss. 458.

New Hampshire.—Perry v. Hale, 44 N. H. 363; Wheeler v. Perry, 18 N. H. 311; Abbott v. Tenney, 18 N. H. 109; Shirley v. Healds, 34 N. H. 407, cited in 43 N. H. 325; Lane v. Thompson, 43 N. H. 320.

Pennsylvania.—McClintock's Appeal, 29 Pa. St. 360.

South Carolina.—Johns v. Johns, 1 McCord L. (S. Car.) 132; Seabrook v. Williams, 3 McCord L. (S. Car.) 371.

Wisconsin.—Scott v. West, 63 Wis. 529.

"The Interest Which an Executor, as Such, has in the personal estate of his testator is not the absolute title of an owner, else it might be

levied on for his personal debts; but he holds *in autre droit*—as the minister and dispenser of the goods of the dead. Wentw. Off. Ex. (14th ed.) 196; Pinchon's Case, 9 Coke 86b; Dalton v. Dalton, 51 Me. 171; Weeks v. Gibbs, 9 Mass. 76; Hutchins v. State Bank, 12 Met. (Mass.) 423. As soon as he is clothed with a commission from the Probate Court, the executor is vested with the title to all the personal effects which the testator possessed at the instant of his decease; but the title is fiduciary and not beneficial, Petersen v. Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298; and his office is not that of an agent, but of a trustee. Dalton v. Dalton, 51 Me. 171; Sumner v. Williams, 8 Mass. 198, 5 Am. Dec. 83; Shirley v. Healds, 34 N. H. 407." Carter v. Manufacturers' Nat. Bank, 71 Me. 448, 36 Am. Rep. 338.

Payment of the Testator's Debts with Individual Funds does not constitute the executor the absolute owner of property of the testator. Wilson v. Taylor, 2 Hayw. & H. (C. C.) 334; Haslett v. Glenn, 7 Har. & J. (Md.) 17; Dennis v. Dennis, 15 Md. 73; Weeks v. Gibbs, 9 Mass. 74; Hampton's Appeal, 17 S. & R. (Pa.) 144.

An Executor Cannot Deny the Title of His Testator to property of which he is in possession as executor. Maningault v. Holmes, Bailey Eq. (S. Car.) 283.

3. **Not Subject to Forfeiture by Attainder.**—"At common law the king, by attainder of treason, was not entitled to any chattels that the party had *en autre droit*, as executor or administrator." 1 Hale P. C. 251. See also Hawk. P. C., bk. 2, c. 49, § 9.

4. **Not Subject to Execution for Individual Debts.**—Farr v. Newman, 4 T. R. 621; M'Leod v. Drummond, 17 Ves. Jr. 168. But see Whale v. Booth, 4 T. R. 625, note *a*, in which it was held that the purchaser of the goods of a testator at a sale under execution against the executor for his individual debts took a good title. In this case, however, the executor also gave a bill of sale of the goods to the execution purchaser, so that the sale under the execution sale could not be distinguished from the sale by the executor. And see also Quick v. Staines, 1 B. & P. 293, in which case Eyre, C. J., said that the case of Whale v. Booth, 4 T. R. 625, note *a*, was "directly in the teeth of Farr v. Newman, 4 T. R. 621," but did not express an opinion on that point.

5. **Not Distributable in Bankruptcy Proceeding.**—Ex p. Garland, 10 Ves. Jr. 110; Howard v. Jemmet, 3 Burr. 1369.

But if a person who was entitled to admin-

This seems to be the established rule at common law, though it has been said that an executor or administrator is for every purpose the owner of the decedent's effects.¹

An Exception to the Common-law Rule that the executor or administrator takes no beneficial interest in the estate exists in some states by virtue of statutes which relieve an executor who is also residuary legatee from the necessity of returning an inventory on his giving bond to pay all the debts and legacies, under which statutes it is held that the executor, on giving such bond, becomes immediately the absolute owner of the estate in his own right.²

(b) **Residue After Payment of Debts and Legacies** — *aa.* **RULE IN ENGLAND AT COMMON LAW.** — From the earliest times in England until the enactment of stat. 1 Wm. IV., c. 40 (1830), it was the rule of law that if a testator appointed an executor without disposing of all his personal estate by his will, the executor was beneficially entitled to whatever surplus might remain after payment of funeral expenses, charges of administration, debts, and legacies; the appointment of the executor being considered as a gift to him of such surplus.³

istration failed to obtain letters, but took possession of the goods and retained them for a long time, it was held that they passed to his assignee in bankruptcy. *Kitchen v. Ibbetson*, L. R. 17 Eq. 46; *Fox v. Fisher*, 3 B. & Ald. 135, 5 E. C. L. 243; *Matter of Thomas*, 1 Phil. 159.

1. Cases Holding Executor or Administrator Owner for All Purposes. — In *Lacompte v. Sargent*, 7 Mo. 351, Judge Tompkins in delivering the opinion of the court, said: "No principle of law is more generally acknowledged than that the executor or administrator is, for every purpose, the owner of the moneys of his intestate which have come to his hands."

And in *Thomas v. Relfe*, 9 Mo. 377, this doctrine was acquiesced in. But the question was again considered in *Lessing v. Vertrees*, 32 Mo. 431, and the conclusion reached in the former cases was declared to be unsupported by the authorities. Bay, J., said: "It is true that at common law the legal property in the personal estate of the testator vests, on his death, in the executor, and for many purposes may be regarded as the owner. He may, for instance, maintain an action for a wrongful conversion of the property, or for any injury to the property, in his individual name, and for every purpose necessary to enable him to discharge the duties of his office he is regarded in law as the owner of the property. As a necessary incident to the nature of the office, he has a disposing power over the property; but that he is the owner for every purpose cannot be maintained upon either reason or authority."

Other Cases State the Proposition that "at common law, an executor or administrator had the same property in, and, of course, the same powers over, the personal effects of his decedent that such decedent had at and before his death." *Weyer v. Franklin Second Nat. Bank*, 57 Ind. 198, *quoted in Rogers v. Zook*, 86 Ind. 237. See also *Salmon v. Clagett*, 3 Bland (Md.) 125; *Neale v. Hagthorp*, 3 Bland (Md.) 551. But an examination of these cases shows that the question involved in each was the power of the executor to dispose of the property to a third person.

2. An Executor Who Is Residuary Legatee becomes absolute owner of the estate in his own

right on giving bond to pay debts and legacies. *Clarke v. Tufts*, 5 Pick. (Mass.) 337; *Durfee v. Abbott*, 50 Mich. 278; *McElroy v. Hatheway*, 44 Mich. 399; *Tarbell v. Whiting*, 5 N. H. 63; *Batchelder v. Russell*, 10 N. H. 39.

3. Right of Executor to Residue — **Rule at Common Law.** — Atty.-Gen. v. Hooker, 2 P. Wms. 340; *Southcot v. Watson*, 3 Atk. 228; *Urquhart v. King*, 7 Ves. Jr. 225. See also *Shelton v. Shelton*, 1 Wash. (Va.) 53, and *Wilson v. Wilson*, 3 Binn. (Pa.) 557, in which the rule is discussed at length and the English authorities are reviewed.

"According to the strict rules of law, there can be no undivided personal estate in a will where an executor is appointed, for he has all the personal estate, whether acquired before or after the will, in trust, first to pay the debts, and then the legacies; and if any remained, it was his own, unless the testator, by his provision for the executor, had excluded him from it, in which case he was trustee of the remainder for the next of kin." *Hays v. Jackson*, 6 Mass. 149.

The proposition that the appointment of an executor gives him everything not disposed of was said by Lord Eldon to be incorrect, but he takes only what the testator did not mean to dispose of. *Dawson v. Clarke*, 18 Ves. Jr. 247.

The Rule Is Also Recognized by all the cases cited in the notes to the next following subdivision, *Rule in Equity*.

Rule Formerly Applicable to Administrators. — *Bufford v. Holliman*, 10 Tex. 560, 60 Am. Dec. 223.

"Personal property was, by the common law, considered of so little value that no provision was made for its descent to the heirs at law of the owner. Indeed, up to 22 and 23 Charles II., the date of the passage of the statute of distributions, an administrator was entrusted exclusively to enjoy the residue of the intestate's effects after the payment of the debts and funeral expenses." *Hadley v. Kendrick*, 10 Lea (Tenn.) 525.

See also *Potts v. Smith*, 3 Rawle (Pa.) 361, in which case Kennedy, J., reviews the legislation in England from 13 Edw. I. to 22 and 23 Car. II., touching the disposition of the personality of an intestate.

bb. RULE IN EQUITY. — The courts of equity recognized this rule of law, but adopted the principle that where there were provisions in the will which appeared inconsistent with an intent that the executor should take the residue for his own benefit he would be held to take it as trustee for the next of kin.¹

Executor Made Trustee. — The presumption that the testator did not intend the executor to take the residue beneficially arises where the executor is appointed in trust, or the residue is bequeathed to him in trust;² and this is true even though no trusts are declared,³ or, if the trusts are declared, though they fail in whole or in part,⁴ or do not exhaust the entire residue.⁵

The Character of Trustee May Be Fixed on an executor by any words showing such an intent;⁶ and if one of several executors is made a trustee, such character

1. Rule in Equity — Intention of Testator Governs. — *Taylor v. Haygarth*, 14 Sim. 8; *Russell v. Clowes*, 2 Coll. 648; *Cradock v. Owen*, 2 Sm. & G. 241; *Johnstone v. Hamilton*, 11 Jur. N. S. 777.

Lord Hardwicke laid down the rule that "where a necessary implication or violent presumption appears that the testator, by naming executor, meant only to give the office of executor, and not the beneficial interest or property, he shall be considered as a trustee, and a resulting trust for next of kin of testator." *Cloyne v. Young*, 2 Ves. 91.

This language used by Lord Hardwicke in stating the rule was said in the case of *Elcock v. Mapp*, 3 H. L. Cas. 492, to be "too strong." In this case the lord chancellor said: "It seems to me that plain implication, or a strong presumption, would have been terms more consistent with the decisions and with principle. It is a question of intention, the law, where none is expressed, implying one in favor of the executors. And I think the result of the cases is not inaccurately stated by the late eminent American judge, Mr. Justice Story, who, in his work on Equity Jurisprudence, § 1208, observes: 'In equity, if it can be collected from any circumstance or expression in the will that the testator intended his executor to have only the office, and not the beneficial interest, such intention will receive effect, and the executor will be deemed a trustee for those on whom the law would have cast the surplus in case of a complete intestacy.' And in Toller's *Executors* 352, and in the more recent and extended work, *Williams on Executors* 1266, the law is stated to the same effect as in the words of Mr. Justice Story."

Appointment of Mercantile Firm. — In *De Mazar v. Pybus*, 4 Ves. Jr. 644, it was held that if the testator appointed a mercantile firm executors, they took merely an office and not a beneficial interest.

Appointment of Person Filling Certain Office. — In *Urquhart v. King*, 7 Ves. Jr. 225, the testatrix appointed as one of her executors "the Honorable Rufus King, minister plenipotentiary from the United States of North America aforesaid, or such other person who at the time of my death shall be minister plenipotentiary from the states of America to this kingdom." It was held that by such appointment the testatrix meant to confer the office only, and not a beneficial interest in the residue of her estate.

2. If Executors Are Appointed Expressly in Trust, they cannot take beneficially, for the trust is coextensive with the office of executor.

They take nothing but in trust; and if it is not declared for whom they are trustees, the law ascertains that the trust is for the next of kin. *Pratt v. Sladden*, 14 Ves. Jr. 193; *Dawson v. Clarke*, 18 Ves. Jr. 254; *Vezey v. Jamson*, 1 Sim. & S. 69.

What Constitutes Appointment of Executors in Trust. — The appointment of an executor vests in him all the personal estate of the testator, and if any part (after payment of the funeral expenses and debts) remains undisposed of by will, it vests in the executor beneficially; but where it sufficiently appears on the face of the will that the testator did not intend the executors to take the surplus, they are deemed trustees for those on whom the law would cast the surplus in case of a complete intestacy; and this is so whether the executors are expressly called executors in trust, or any other expressions occur showing the office only to be intended for them, and not the beneficial interest. Thus, where a testator, after giving a number of pecuniary legacies, some of which involved the performance of active trusts on the part of his "executors," appointed A, B, and C "executors and trustees of this my will," and the will contained a clause providing for abatement of the legacies in case of a deficiency, and no residuary gift, it was held that the executors were not beneficially entitled to the undisposed-of residue. *Dillon v. Reilly*, 9 Ir. L. Rep. 57.

If There Is Any Declaration that Executors Are But Trustees, the rule of the court of equity is that the residue will be considered as not disposed of. *Graydon v. Hicks*, 2 Atk. 16.

3. Failure to Declare Trusts. — An executor is not entitled to the residue for its own benefit if it is bequeathed to him in trust, though no trusts are declared by the will. *Dawson v. Clark*, 15 Ves. Jr. 414, 18 Ves. Jr. 254; *Vezey v. Jamson*, 1 Sim. & S. 69; *Taylor v. Haygarth*, 14 Sim. 8.

4. Failure of Trust to Take Effect. — *Johnstone v. Hamilton*, 11 Jur. N. S. 777.

5. Trust Not Exhausting Estate. — *Robinson v. Taylor*, 2 Bro. C. C. 589; *Dawson v. Clarke*, 18 Ves. Jr. 257; *Elcock v. Mapp*, 3 H. L. Cas. 492, 2 Phil. 793 [overruling the decree of the vice chancellor in *Mapp v. Elcock*, 15 Sim. 568, and the opinion of Sir W. Grant in *Dawson v. Clark*, 15 Ves. Jr. 409; *Southouse v. Bate*, 2 Ves. & B. 399]; *Read v. Stedman*, 26 Beav. 495; *Dacre v. Patrickson*, 1 Drew. 782; *Griffiths v. Hamilton*, 12 Ves. Jr. 298; *Pratt v. Sladden*, 14 Ves. Jr. 198; *Russell v. Clowes*, 2 Coll. 648.

6. Directing an Executor to Keep "a Proper Account" is sufficient to fix on him the character

attaches to all of them.¹

Giving Legacy to Sole Executor. — The presumption ordinarily arises that the testator did not intend the executor to have the residue where a legacy is given to a sole executor, because the intent to give him the entire residue is inconsistent with a gift of a part,² but in some cases it has been held that a presumption of an intent to exclude the executor from the residue may be negated by the condition of the person appointed executor or the nature of the legacy.³

Legacy to One or All of Several Executors. — It is well settled, however, that a legacy to one of several executors will not exclude either of them from the residue,⁴ unless it is given to him for his care and trouble, in which case all the executors are excluded,⁵ because if one of several executors is excluded, the exclusion applies to all.⁶

of trustee so as to raise the presumption that the testator did not intend him to take the residue beneficially. *Gladding v. Yapp*, 5 Madd. 56.

A Direction that Executors Shall Be Saved Harmless from all expenses, journeys, and charges they shall occasionally be put to in the execution of the will shows that the testator did not intend them to take the residue for their own benefit. *Dean v. Dalton*, 2 Bro. C. C. 634. To the same effect is *Saltmarsh v. Barrett*, 29 Beav. 474, 3 De G. F. & J. 279.

A Declaration that All of the Testator's Property Shall Pass by the will "according to law" is sufficient to constitute the executor a trustee for the next of kin as to the residue. *Cranley v. Hale*, 14 Ves. Jr. 307.

"**Heartily Requesting Them** to be so kind as to take on them the execution of the will," or any similar expression, is likewise sufficient. *North v. Purdon*, 2 Ves. 495; *Seley v. Wood*, 10 Ves. Jr. 71; *Giraud v. Hanbury*, 3 Meriv. 150.

The Appointment of an Executor "to See that My Will Is Put in Force" shows that the testator's purpose was to create an office only, and not to confer a beneficial interest. *Bradford v. Farrand*, 4 Russ. 87. See also *Barrs v. Fewkes*, 2 Hem. & M. 60.

1. If One Executor Is Made Trustee All Are Trustees. — *White v. Evans*, 4 Ves. Jr. 21; *Sadler v. Turner*, 8 Ves. Jr. 617.

2. Legacy to Executor Raises Presumption Against Right to Residue. — *Foster v. Munt*, 1 Vern. 473; *Holford v. Wood*, 4 Ves. Jr. 76; *Urquhart v. King*, 7 Ves. Jr. 225; *Martin v. Rebow*, 1 Bro. C. C. 154; *Middleton v. Spicer*, 1 Bro. C. C. 201; *Farrington v. Knightly*, 1 P. Wms. 545; *Newstead v. Johnston*, 2 Atk. 46; *Southcot v. Watson*, 3 Atk. 226; *Cradock v. Owen*, 2 Sm. & G. 241.

Legacy Given to Executor as One of a Class. — In *Abbott v. Abbott*, 6 Ves. Jr. 343, it was held that a legacy to each of four children of the testator's brother, one of whom was appointed executor, was within the rule that a legacy given to a sole executor raises the presumption that the testator did not intend him to take the residue for his own benefit.

Specific Legacy. — The presumption arises as well when the legacy is specific as in other cases. *Randall v. Bookey*, 2 Vern. 425; *Southcot v. Watson*, 3 Atk. 226; *Martin v. Rebow*, 1 Bro. C. C. 154; *Whitaker v. Tatham*, 7 Bing. 628, 20 E. C. L. 266, 5 M. & P. 628.

Appointment of Executor Unconnected with Legacy. — In *Langham v. Sandford*, 2 Meriv. 21, it was held that the fact that the appointment of the executor was subsequent to and unconnected with the gift to him does not affect the presumption against him, though there may be some doubt where the legacy was given by the will and the executor was appointed by a codicil.

A Bequest of a Reversionary Interest is said to be as much a legacy as a direct and immediate bequest, and it therefore excludes the executor from the right to the residue. *Seley v. Wood*, 10 Ves. Jr. 71; *Oldman v. Slater*, 3 Sim. 84.

As to a Bequest of a Contingent Reversionary Interest, see *Lynn v. Beaver*, T. & R. 63.

But a Legacy to the Executor's Wife or daughter will not be deemed a legacy to him so as to raise a presumption against him. *Fruer v. Bouquet*, 21 Beav. 33; *Cloyne v. Young*, 2 Ves. 91.

3. Appointment of Infant. — A presumption does not arise against an executor where he is an infant. *Williams v. Jones*, 10 Ves. Jr. 77.

Exceptive Bequest. — A gift which is only exceptive out of another legacy will not exclude an executor from his legal right, because there is no inconsistency between such a gift and an intent that the executor should take the residue. *Griffiths v. Rogers*, Pr. Ch. 231; *Newstead v. Johnston*, 2 Atk. 45; *Granville v. Beaufort*, 1 P. Wms. 114.

A Particular Legacy Given to an Executor for Life with remainder over does not raise a presumption against him. *Granville v. Beaufort*, 1 P. Wms. 114; *Joslin v. Brewet*, Bunb. 112. But see *Dicks v. Lambert*, 4 Ves. Jr. 725, *sub nom.* *Zouch v. Lambert*, 4 Bro. C. C. 326.

Legacy to Next of Kin as Well as Executor. — The effect of giving a legacy to an executor is not affected by the fact that legacies are also given to the next of kin. *Andrew v. Clark*, 2 Ves. 162; *Kennedy v. Stainsby*, 1 Ves. Jr. 66, note 1.

4. Legacy to One of Several Executors. — *Buffar v. Bradford*, 2 Atk. 220; *Griffiths v. Hamilton*, 12 Ves. Jr. 208; *Cloyne v. Young*, 2 Ves. 91; *Mason v. Hawkins*, 4 Bro. P. C. 1; *Colesworth v. Bangwin*, Pre. Ch. 323.

5. Legacy to One Executor for His Care and Trouble Excludes All. — *White v. Evans*, 4 Ves. Jr. 21; *May v. Lewin*, 2 P. Wms. 150, note 1; *Dawson v. Thorne*, 3 Russ. 235.

6. Exclusion of One Executor from Residue Applies to All. — *White v. Evans*, 4 Ves. Jr. 21.

Unequal Legacies to Several Executors. — Nor is any presumption against the right of executors to the residue raised by legacies to all of them, if the legacies are unequal.¹

Equal Legacies to Several Executors. — But if equal legacies are given to all of several executors, the rule is the same as in the case of a legacy to a sole executor, and a presumption arises that the testator did not intend them to have the residue.²

Intent to Dispose of Residue. — If a testator evidently intended to dispose of the residue, but his intention was not carried into effect, the executor cannot take it for his own benefit; and it is immaterial whether the failure to carry out such intention resulted from failure to make a residuary bequest or because the residuary bequest lapsed or was void.³

Parol Evidence. — Since the appointment of an executor operates as a bequest to him of the residue of the estate after payment of all charges, debts, and legacies, parol evidence is not ordinarily admissible to show that the testator intended otherwise, because its admission in such case would violate the well-known principle that a written instrument cannot be contradicted or varied by parol evidence.⁴

If the Will Shows an Intention on the part of the testator that the executor should not have the residue for his own benefit, it is not competent for the executor to contradict such intention by parol evidence.⁵

But if a Mere Presumption Against the Executor's Legal Right is raised by the will, he has the right to rebut that presumption by parol evidence;⁶ and when parol

Where there are two executors, if one becomes a trustee the other must be a trustee also. *Dawson v. Thorne*, 3 Russ. 235.

1. **Unequal Legacies to Several Executors.** — *Blinkhorn v. Feast*, 2 Ves. 27; *Bowker v. Hunter*, 1 Bro. C. C. 328; *Oliver v. Frewen*, 1 Bro. C. C. 590; *Griffiths v. Hamilton*, 12 Ves. Jr. 309; *Russell v. Clowes*, 2 Coll. 648; *Brasbridge v. Woodroffe*, 2 Atk. 69; *Re Knowles*, 49 L. J. Ch. 625, 43 L. T. N. S. 152, 28 W. R. 975.

2. **Equal Legacies to Several Executors.** — *Ommanney v. Butcher*, T. & R. 260; *Clennell v. Lewthwaite*, 2 Ves. Jr. 471; *Nisbett v. Murray*, 5 Ves. Jr. 149; *Taylor v. Haygarth*, 14 Sim. 8; *Saltmarsh v. Barrett*, 29 Beav. 474, 3 De G., F. & J. 279; *Gibbs v. Rumsey*, 2 Ves. & B. 294; *Petit v. Smith*, 1 P. Wms. 7; *Lloyd v. Stoddart*, Ambl. 152; *Nicholls v. Crisp*, Ambl. 769.

3. **Intent to Dispose of Residue.** — *Davers v. Dewes*, 3 P. Wms. 40; *Mordaunt v. Hussey*, 4 Ves. Jr. 117.

Failure to Carry Out Intention. — Where the testator professes to dispose of the residue, but fails to do so, the executor is not entitled to take it for his own benefit. *Oldham v. Carleton*, 2 Cox 399.

"There are many determinations," said Sir W. Grant, M. R., "that if the residue is intended to be given from the executors they cannot take it, though the bequest does not take effect; as where the testator gives it in the manner he shall appoint, and he makes no appointment; so, where a blank is left for the residuary legatees, the executors are not entitled, the intention being evident to give away the residue from them." *Dawson v. Clark*, 15 Ves. Jr. 409.

Lapse of Residuary Bequest. — The executor is not entitled to the residue where a residuary bequest was made to another, though it has lapsed. *Bennett v. Batchelor*, 3 Bro. C. C. 28.

Void Residuary Bequest. — The executor is not entitled to take the residue for his own benefit where a residuary bequest made to another is void. *Atty.-Gen. v. Tomkins*, Ambl. 216; *Dawson v. Clark*, 15 Ves. Jr. 409.

An Intent to Dispose of the Residue Appears where a blank is left for the name of the residuary legatee, *Cloyne v. Young*, 2 Ves. 91; *North v. Purdon*, 2 Ves. 495; *In re Bacon's Will*, 31 Ch. Div. 460; or where the residuary clause is partially obliterated by striking out the disposing part, *Mence v. Mence*, 18 Ves. Jr. 348. But merely leaving a blank space between the end of the will and the signature of testator does not show such intention. *White v. Williams*, 3 Ves. & B. 72.

So, too, such an intent appears where an unexecuted codicil refers to the will as not having disposed of the residue, and purports to dispose of it, except that blanks are left for names. *Nourse v. Finch*, 1 Ves. Jr. 344, 2 Ves. Jr. 78.

4. **Parol Evidence Not Admissible to Raise Presumption Against Executor.** — *White v. Williams*, 3 Ves. & B. 72.

5. **Intent to Exclude.** — "If the will contain express declarations that the executor is to be a trustee, evidence cannot be received against the effect of that declaration." *Gladding v. Yapp*, 5 Madd. 56.

A Legacy Given to the Executor for His Care and Trouble shows an intent to give the executor merely the office, and not a beneficial interest, and therefore parol evidence is not admissible to support his claim to the residue. *Langham v. Sanford*, 17 Ves. Jr. 443, 2 Meriv. 6; *Hall v. Hill*, 1 Dr. & W. 115; *Barrs v. Fewkes*, 11 Jur. N. S. 669.

6. **Presumptive Intent to Exclude Executor.** — If there be no express declaration of trust in the will, but only circumstances which afford an inference or presumption of a trust in the

evidence is given to rebut a presumption against an executor it may be opposed by parol evidence on the part of the next of kin.¹

cc. RULE IN ENGLAND UNDER STATUTE — Terms of Statute. — The common-law doctrine as to the right of executors to the residue of the testator's personalty after the payment of all legal charges, debts, and legacies has been greatly changed by statute in England. The statute recites the law as it theretofore existed, and provides that "when any person shall die, after the first day of September next after the passing of this act, having by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by courts of equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the statute of distributions, in respect of any residue not expressly disposed of, unless it shall appear, by the will or any codicil thereto, that the person or persons so appointed executor or executors was or were intended to take such residue beneficially;" and further, that "nothing herein contained shall affect or prejudice any right to which any executor, if this act had not been passed, would have been entitled, in cases where there is not any person who would be entitled to the testator's estate under the statute of distributions, in respect of any residue not expressly disposed of."²

Effect of Statute. — This statute has been held not to abrogate entirely the rule as it existed at common law, but merely to make alterations in certain particulars, as follows: (1) where the testator died after September 1, 1830; (2) where the testator, dying after that day, left next of kin; (3) where the testator, dying after that day, did not expressly dispose of the residue of his estate; and (4) where it does not appear from the will that the executor was intended to take the residue beneficially.

Where the Testator Died Before September 1, 1830, the statute does not apply.³

If the Testator Left No Next of Kin surviving him, the statute does not apply, and the executor is entitled to take the residue in the same manner as he would have done if the statute had not been passed.⁴

An Express Bequest of the Residue to the Executor also furnishes an exception to the application of the statute.⁵

executor, parol evidence is admissible to answer that inference or presumption. *Gladding v. Yapp*, 5 Madd. 59.

Such presumption arises when a legacy is given to the executor, *Clennell v. Lewthwaite*, 2 Ves. Jr. 465; *Langham v. Sanford*, 17 Ves. Jr. 435; *Lynn v. Beaver*, T. & R. 66; *Cloyne v. Young*, 2 Ves. 95; or when the residuary clause is left blank in a printed form, *In re Bacon's Will*, 31 Ch. Div. 460.

1. *Next of Kin May Give Parol Evidence* to contradict evidence given by an executor to rebut a presumption against him. *Cloyne v. Young*, 2 Ves. 91.

2. *English Rule Changed by Statute.* — Stat. 1 Wm. IV., c. 40.

3. *Death of Testator Before September 1, 1830 — Statute Not Applicable.* — This is by the express terms of the statute.

4. *Executor Not Excluded by Statute if Testator Left No Next of Kin.* — *Taylor v. Haygarth*, 14 Sim. 8; *Russell v. Clowes*, 2 Coll. 648; *In re Bacon's Will*, 31 Ch. Div. 460; *Hawkins v. Hawkins*, 7 Sim. 173; *Re Knowles*, 28 W. R. 975, 49 L. J. Ch. 625, 43 L. T. N. S. 152.

If the Testator Left No Next of Kin the question as to the right of the executor to the residue is exactly the same as it would have been if the testator had died before the passing of the act and had left next of kin. *Read v.*

Stedman, 26 Beav. 495; *Dacre v. Patrickson*, 1 Dr. & Sm. 182.

5. *Express Bequest of Residue to Executor.* — At first it was held in *Love v. Gaze*, 8 Beav. 472, that statute 1 Wm. IV., c. 40, applies when executors take by virtue of a bequest to them as well as when they take by virtue of their appointment as executors. "Before the act," said Lord Langdale, M. R., "where executors took under a bequest, innumerable questions of presumption have arisen, and the act was intended to relieve the profession and the public from these difficulties."

But in later cases the opposite conclusion was reached. Thus, Lord Romilly, in *Saltmarsh v. Barrett*, 29 Beav. 474, was of opinion that the statute did not apply where there was an express gift; and though Lord Justice Turner, when that case was on appeal (3 De G. F. & J. 279), expressed a doubt on the point, he desired to be understood as giving no distinct opinion on it.

And in *Williams v. Arkle*, L. R. 7 H. L. 606, Lord Cairns said: "The statute therefore has, of necessity, no application where there is an express gift of residue. In my opinion, the statute was intended to apply only in those cases where the rule or presumption of law could be held to operate, and that, where an express devise of residue is found, the mean-

Where an Intent Appears that the Executor Should Take Beneficially the statute does not operate to exclude him; but such intent must appear on the face of the will, and parol evidence is not admissible to show it.¹

dd. RULE IN UNITED STATES. — This rule of the common law, if ever in force in the United States, has long since been cut up by the roots by the statutes of distribution, which provide that all personal property not disposed of by the will shall be distributed as if it were intestate.²

(4) *Right to Possession of Personalty.* — An executor or administrator, being invested with the legal title, has the right to the possession of all of the decedent's personalty of every kind.³ He may sue any person to recover property belonging to the decedent's estate, or the value of such property, in any case where the decedent might have sued in his lifetime;⁴ and as a general rule the right and the power belong to the executor or administrator to the exclusion of the widow, next of kin, legatees, or creditors,⁵ and continue until distribu-

ing of that residuary bequest must be ascertained by the ordinary rules of construction."

1. *Intent that Executor Should Take Residue Beneficially.* — By the terms of the statute 1 Wm. IV., c. 40, the burden was cast on the executor to show a distinct intention in the will that he should take the residue beneficially. *Juler v. Julor*, 29 Beav. 34.

Parol Evidence Is Not Admissible in cases within the statute, because it requires the intention to appear by the will. *Love v. Gaze*, 8 Beav. 472; *Briggs v. Penny*, 3 De G. & Sm. 525.

2. *Rule in the United States — Executor Not Entitled to Residue.* — *Hays v. Jackson*, 6 Mass. 152; *Hill v. Hill*, 2 Hayw. (2 N. Car.) 298; *Wilson v. Wilson*, 3 Binn. (Pa.) 557; *Parris v. Cobb*, 5 Rich. Eq. (S. Car.) 450; *Paup v. Mingo*, 4 Leigh (Va.) 163, *approving* *Shelton v. Shelton*, 1 Wash. (Va.) 64, and *disapproving* a dictum in *Coleman v. M'Murdo*, 5 Rand. (Va.) 78.

3. *Executor or Administrator Entitled to Possession of All Decedent's Personalty — Alabama.* — *Upchurch v. Norsworthy*, 12 Ala. 532.

California. — *Harwood v. Marye*, 8 Cal. 580; *Lucas v. Todd*, 28 Cal. 182; *Jahns v. Nolting*, 29 Cal. 507.

Indiana. — *Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216.

Kentucky. — *Cook v. Burton*, 5 Bush (Ky.) 64.

Maryland. — *Cain v. Warford*, 7 Md. 282.

Michigan. — *Palmer v. Palmer*, 55 Mich. 293.

Missouri. — *Naylor v. Moffatt*, 29 Mo. 126.

Where the Next of Kin of a Decedent Took Possession of His Estate and divided it out among themselves, and sold some of it, it was held that equity could not protect them by restraining an administrator, regularly appointed, from recovering the property in actions at law. *Carter v. Greenwood*, 5 Jones Eq. (58 N. Car.) 410.

A Duly Qualified Administrator Is Entitled to the Assets of the estate wherever they may be; and if he has obtained possession of a bond belonging to the estate, no matter from whom, the obligor cannot, in an action brought against him on it, object that it is not properly in the administrator's custody. *Lucas v. Todd*, 28 Cal. 182.

Escheated Estate. — An administrator of an escheated estate is the proper custodian of the personalty belonging to it, and he cannot be compelled to turn it over to a receiver ap-

pointed to take charge of the estate, because such receiver is entitled to the custody of the real estate only. *Territory v. Forrest*, 1 Arizona 40.

Effect of Injunction Against Distribution. — An administrator's right to the possession of the decedent's personal property is not affected by an injunction against its distribution. *M'Cutchin v. M'Cutchin*, 8 Port. (Ala.) 151.

Effects Found on Person of Deceased Stranger. — In *Oregon* it is provided by statute (Hill's Code, §§ 1669-1675) that if money or other property be found on the body of a deceased stranger, the coroner must deliver it to the county treasurer, and that if it is claimed within six years by the legal representatives of the decedent, the County Court, on satisfactory proof, must order it to be paid to such representatives. Under this statute it is held that the administrator of such deceased stranger is not entitled to money found on his person and delivered to the county treasurer as required by the statute, unless the County Court first makes an order directing payment to him. *Chow v. Brockway*, 21 Oregon 441.

4. *Executor or Administrator May Sue for Possession.* — *Ham v. Henderson*, 50 Cal. 367; *Smith v. Ferguson*, 90 Ind. 233, 46 Am. Rep. 216; *Smith v. Grove*, 12 Mo. 51.

Property Left in Possession of the Residuary Legatee on his promise to pay specific legacies may be recovered by the executor if the residuary legatee fails to pay the legacies. *Carlisle v. Burley*, 3 Me. 250.

5. *Widow or Next of Kin Cannot Sue for Recovery of Assets.* — *Huddleston v. Huey*, 73 Ala. 215; *George v. Elms*, 46 Ark. 260; *Purcell v. Carter*, 45 Ark. 299; *Ferguson v. Barnes*, 58 Ind. 169; *Douglass v. McCarer*, 80 Ind. 91; *Pond v. Sweetser*, 85 Ind. 144; *Richardson v. Cooley*, 20 S. Car. 347.

Legatees Cannot Sue for Recovery of Assets. — *Upchurch v. Norsworthy*, 12 Ala. 532; *Hillman v. Schwenk*, 68 Mich. 297; *Guthrie v. Kerr*, 85 Pa. St. 303.

Creditors of Decedent Cannot Sue for Recovery of Assets. — *Jones v. McCleod*, 61 Ga. 602; *McCoy v. Payne*, 68 Ind. 327; *Carr v. Huette*, 73 Ind. 378; *Frost v. Libby*, 79 Me. 56; *McDonald v. O'Connell*, 39 N. J. L. 317.

A Creditor Has No Right to Take Possession of a decedent's personal property. *Bungard v. Miller*, (Pa. 1887) 8 Atl. Rep. 209.

tion is ordered or the debts and legacies are settled.¹

An Exception to this is where a sole distributee of an estate against which there are no debts has disposed of the personality. In such case the administrator is not entitled to recover possession.²

b. DISCOVERY OF ASSETS — (1) *By Bill in Equity*. — It frequently happens that an executor or administrator is embarrassed in the performance of his duty in regard to the collection of the assets of the estate by reason of his lack of knowledge of their existence or whereabouts. It is a well-settled doctrine of equity that he may, in all such cases, maintain a bill for a discovery against any person who, he has reason to believe, has in his possession or under his control any assets belonging to the estate.³

(2) *By Statutory Proceeding in Probate Court* — (a) *Statutory Remedy in General*. — Besides the usual remedies given to executors and administrators for the collection of the assets of the estates in their charge, they are authorized by statute in many jurisdictions to maintain summary proceedings in the probate court to obtain a disclosure by persons supposed to have in their possession or to have concealed property of the decedent, or to have embezzled funds belonging to the decedent.⁴

Transfer by Widow Before Letters Granted. — A gift by the decedent's widow of personal property belonging to the estate between the decedent's death and the granting of letters of administration does not confer on the donee either title or right to possession as against the administrator. *Jahns v. Nolting*, 29 Cal. 507.

Money Used by the Widow for the support of the family must be accounted for by her to the administrator. *Griffin v. Simpson*, 11 Ired. L. (33 N. Car.) 126.

1. **Right of Possession Continues until Settlement of Estate.** — *Curtis v. Sutter*, 15 Cal. 259; *Page v. Tucker*, 54 Cal. 121; *Grimmell v. Warner*, 21 Iowa 11.

2. **Personalty Disposed of by Sole Distributee.** — *Cooper v. Hayward*, (Minn. 1898) 74 N. W. Rep. 152. See also *supra*, this title, *When Administration Is Necessary or Proper*.

3. **Bill in Equity Lies for Discovery of Assets.** — *Pratt v. Northam*, 5 Mason (U. S.) 95, cited in *Pierpont v. Fowler*, 2 Woodb. & M. (U. S.) 23; *Grimes v. Hilliary*, 38 Ill. App. 246; *Gibbens v. Peeler*, 8 Pick. (Mass.) 254; *Simmons v. Simmons*, 33 Gratt. (Va.) 451.

Jurisdiction in Equity Is Not Divested by statutes authorizing a summary proceeding for discovery in the Probate Court. *Grimes v. Hilliary*, 38 Ill. App. 246.

In *Meyer v. Garthwaite*, 92 Wis. 571, it was held that a court of equity would take jurisdiction of a proceeding by an administrator to obtain discovery, notwithstanding a statute authorizing a summary proceeding in the Probate Court for that purpose, since that remedy was incomplete, because the statute provided only for the discovery and left the administrator to his action in another court.

4. **Discovery Authorized by Statute** — *Illinois*. — *Martin v. Martin*, 170 Ill. 18; *Dinsmoor v. Bressler*, 56 Ill. App. 207, 164 Ill. 211.

Iowa. — *Donover v. Argo*, 79 Iowa 574.

Maryland. — *Cannon v. Crook*, 32 Md. 482; *Hignutt v. Cranor*, 62 Md. 216.

Michigan. — *Wales v. Newbould*, 9 Mich. 45; *Manly v. Babbitt*, 99 Mich. 447.

New York. — *Smith's Estate*, 17 Abb. N. Cas. (N. Y. Surrogate Ct.) 73, *sub nom.* *Gaffney*

v. Public Administrator, 4 Dem. (N. Y.) 223; *Matter of Curry*, 25 Hun (N. Y.) 321.

Wisconsin. — *Saddington v. Hewitt*, 70 Wis. 240.

The *Illinois Statute* providing for summary proceedings against persons having in their possession decedents' property which they refuse to disclose or deliver up applies only to money or property remaining unchanged and *in specie*, and does not apply to collections made by an attorney under employment by the administrator. *Dinsmoor v. Bressler*, 164 Ill. 211.

If There Are Several Executors or Administrators all must join in asking for discovery. *Matter of Slingerland*, 36 Hun (N. Y.) 575.

Creditors or Other Persons Interested in the Estate, as well as the executor or administrator, are authorized to institute the proceeding in some jurisdictions. *Wade v. Pritchard*, 69 Ill. 279; *Brotherton v. Spence*, 52 Mo. App. 664; *Meinzer v. Bevington*, 42 Ohio St. 325.

And the executor or administrator may be compelled to make discovery where the statute provides that discovery may be had 'upon complaint made by the executor, administrator, * * * or other person interested in the estate, against any person.' *Meinzer v. Bevington*, 42 Ohio St. 325.

But under the *Missouri* statute, when the proceeding is instituted by a person other than the executor or administrator, such person cannot, after preliminary examination, file interrogatories where the executor or administrator refuses to do so. *Brotherton v. Spence*, 52 Mo. App. 664.

When Barred — Lapse of Time. — In *O'Dee v. McCrate*, 7 Me. 467, it was held that such proceeding was not barred by the lapse of thirty years since the transaction to be investigated.

Enforcement — Attachment for Refusal to Answer. — *Dinsmoor v. Bressler*, 164 Ill. 211; *Donover v. Argo*, 79 Iowa 574.

Trial of Issues. — In *Maryland* issue of law to be tried by a court of law may be required by either party. *Cannon v. Crook*, 32 Md. 482.

Assistance of Counsel. — The person cited may have the assistance of counsel. *Martin v. Clapp*, 99 Mass. 470.

(b) **Nature and Scope.** — It is generally held that this remedy is designed merely to aid in the discovery of property belonging to the estates of decedents as preliminary to a proper action for its recovery,¹ and not for the determination of any disputed question of ownership;² and it is uniformly held that it is not applicable as a mode of collecting debts.³

c. **COLLECTION OF ASSETS**—(1) *General Rule.* — As a general rule, an executor or administrator, immediately on assuming the duties of his office, must proceed to collect and get into his possession all the assets of the estate, in order that they may be preserved from loss and made available for the

1. As to the necessity of discovery in the cases provided for by these statutes, see the remarks of Scott, J., in *Moss v. Sandefur*, 15 Ark. 381.

Relief Restricted to Discovery. — In *Saddington v. Hewitt*, 70 Wis. 248, it was held that the object of the proceeding was to aid persons interested in the estate in discovering property belonging to the estate, as preliminary to the bringing of some proper action for its recovery, but not to furnish a mode of recovering such property. See also *Boston v. Boylston*, 4 Mass. 322; *Arnold v. Sabin*, 4 Cush. (Mass.) 46; *Martin v. Clapp*, 99 Mass. 470; *Wales v. Newbould*, 9 Mich. 45; *Perrin v. Calhoun Circuit Judge*, 49 Mich. 342; *Perrin v. Lepper*, 49 Mich. 347.

"If property is discovered, there is no remedy to enforce its delivery or restoration to the estate. * * * After its discovery another action must be brought for its recovery, in a court of general jurisdiction, either at law or in equity, as the exigency of the case may require." *Meyer v. Garthwaite*, 92 Wis. 571.

If an Executor or Administrator Is Not Ignorant of Facts necessary to enable him to list property of the decedent, or to identify or locate it, the proceeding cannot be maintained, since discovery is not required if the property is not concealed. *Simms v. Guess*, 52 Ill. App. 543.

Compelling Delivery of Property. — In some jurisdictions provision is made for compelling the surrender or delivery of such money or other property belonging to the decedent's estate as should be discovered. *Moss v. Sandefur*, 15 Ark. 381; *Fox v. Van Norman*, 11 Kan. 214; *Knittel's Estate*, 12 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 1, 5 Dem. (N. Y.) 371; *Matter of Stewart*, 77 Hun (N. Y.) 564.

But a decree that possession of the property discovered be delivered to the representative of the decedent can be made only where it clearly appears that such possession is wrongfully withheld. *Smith's Estate*, 17 Abb. N. Cas. (N. Y. Surrogate Ct.) 78, *sub nom.* *Gaffney v. Public Administrator*, 4 Dem. (N. Y.) 223; *Matter of Curry*, 25 Hun (N. Y.) 321.

Documents. — An administrator may require disclosure as to documents showing that the decedent had an interest in any property, but the person in possession of such documents cannot be required, without compensation, to give the administrator a list describing them if he (the administrator) has been permitted to examine them. *Manly v. Babbitt*, 99 Mich. 441.

Identical Property Owned by Decedent. — In some jurisdictions it is held that the proceeding can be maintained only where the identical assets are still in the hands of the person

proceeded against. *Dameron v. Dameron*, 19 Mo. 317; *Howell v. Howell*, 37 Mo. 124; *Stewart v. Glenn*, 58 Mo. 481; *Hook v. Dyer*, 47 Mo. 214.

It was so held under a former statute in *Illinois*. *Williams v. Conley*, 20 Ill. 643. But under a later statute it is held that the proceeding is not limited to property remaining *in specie*, but includes also property received by the person cited, before the decedent's death, and converted by him either before or after such death. *Dinsmoor v. Bressler*, 164 Ill. 211.

2. *Ex p.* *Casey*, 71 Cal. 272; *Howell v. Fry*, 19 Ohio St. 556.

And if the statute provides for a trial of the right of property in such summary proceeding it will be held unconstitutional as depriving litigants of the right to a trial by jury. *Matter of Beebe*, 20 Hun (N. Y.) 462.

Determination of Ownership. — In *Matter of Knittel*, 5 Dem. (N. Y.) 371, 12 Civ. Pro. Rep. (N. Y.) 1, it was held that a proceeding to discover assets could not be maintained against the president of a savings bank as to a deposit alleged to have been made for the benefit of the decedent, since the only question that could be raised would be what amount the bank was liable to pay over and to whom.

In *New York* the jurisdiction of the surrogate in a proceeding to discover assets is ousted by the filing of a verified answer claiming ownership of the property in question. *Public Administrator v. Elias*, 4 Dem. (N. Y.) 139; *Matter of Lynch*, 83 Hun (N. Y.) 39; *Basch's Estate*, 24 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 264.

But in *Missouri* the proceeding is applicable not only where the assets are concealed or embezzled, but also where they are openly held under claim of title. *Eans v. Eans*, 79 Mo. 53.

3. **Summary Proceeding Not Designed for Collecting Debts** — *Illinois.* — *Williams v. Conley*, 20 Ill. 643.

Maryland. — *Gibson v. Cook*, 62 Md. 256.

Massachusetts. — *Boston v. Boylston*, 4 Mass. 322; *Arnold v. Sabin*, 4 Cush. (Mass.) 46; *Martin v. Clapp*, 99 Mass. 470.

Michigan. — *Wales v. Newbould*, 9 Mich. 45; *Perrin v. Calhoun Circuit Judge*, 49 Mich. 342; *Perrin v. Lepper*, 49 Mich. 347.

New York. — *Matter of Stewart*, 77 Hun (N. Y.) 564.

Wisconsin. — *Saddington v. Hewitt*, 70 Wis. 248.

In *Dinsmoor v. Bressler*, 164 Ill. 211, it was held that such remedy was not applicable as against an attorney whom the administrator had employed to collect money due the estate.

payment of debts and distribution among those entitled; ¹ and if he is negligent in this particular, or is guilty of fraud, whereby third persons are allowed to appropriate money or other assets of the estate, he is liable to creditors, distributees, or others who may be injured. ² But he is not bound in all cases to litigate the decedent's title to goods found in his possession at his death, but which are claimed by third persons. He may exercise a discretion in the matter, and if he surrenders the goods he cannot be held liable for the value except on proof of negligence or fraud. ³ In some jurisdictions, however, he is not required to take possession any further than may be necessary to pay debts, funeral expenses, expenses of administration, legacies, etc. The residue over and above the amount necessary for such purposes may be set off to the persons entitled, and they may then proceed directly against the persons in possession. ⁴

(2) *Collection of Debts* — (a) *Duty and Authority to Collect* — *aa. IN GENERAL.* — It is the duty of a personal representative, and he has authority accordingly, to collect or secure all outstanding debts due to the estate of his testator or intestate. ⁵

1. *Duty to Get Assets into Possession* — *England.* — *Hayward v. Kinsey*, 12 Mod. 573; *Stodden v. Harvey*, Cro. Jac. 204; *Cobbett v. Clutton*, 2 C. & P. 471, 12 E. C. L. 221.

United States. — *Hanson v. Cox*, 1 Hayw. & H. (C. C.) 167.

Alabama. — *Milam v. Ragland*, 19 Ala. 85, 25 Ala. 243.

New Jersey. — *Hayes v. Hayes*, 45 N. J. Eq. 461.

New York. — *O'Connor v. Gifford*, 117 N. Y. 275.

South Carolina. — *Sebring v. Keith*, 2 Hill L. (S. Car.) 340.

Virginia. — *Miller v. Jeffress*, 4 Gratt. (Va.) 472.

Money Taken by Third Person for Safe Keeping. — An administrator may bring an action for money had and received against a person who took possession of the decedent's cash with a view to its safe keeping, though the administrator was present and made no objection when the money was taken. *Sebring v. Keith*, 2 Hill L. (S. Car.) 340.

2. *Failure to Collect Assets* — *Liability of Representative.* — "So rigorous is the rule requiring an executor to take possession of the whole of his testator's personal effects and make an account of it, so that it may be applied in due course of administration, that in a case where a testator had directed that certain sealed parcels should be delivered by his executor, unopened, to the persons to whom they were directed, it was held that the executor could not safely obey the direction of his testator, for if he should be called to make an inventory, he could not make it on oath without knowing what the parcels contained, and if he should make delivery of the parcels, he would, by delivery, assent to them as legacies, and then, if there should not be sufficient assets to pay debts, he would be guilty of devastavit." *Hayes v. Hayes*, 45 N. J. Eq. 461, citing *Pelham v. Newton*, 2 Lee Ecc. 40.

Allowing the Residuary Legatee to Take Possession of the effects of the estate and convert them to his own use, when the executor knew of an outstanding claim against the estate, renders him liable to the claimant who afterwards recovered a judgment on his claim, though he believed that there would be no re-

covery on the claim and was so advised by counsel. *O'Connor v. Gifford*, 6 Dem. (N. Y.) 71.

But if the claim against the estate was only contingent and the executor did not have notice of it, he does not incur any liability in not recovering from the residuary legatee supposed assets which the residuary legatee claimed as a gift from the decedent. *Matter of O'Connor*, (Supreme Ct.) 21 N. Y. St. Rep. 891 [*reversing* (Surrogate Ct.) 20 N. Y. St. Rep. 140, *sub nom.* *O'Connor v. Gifford*, 6 Dem. (N. Y.) 71], affirmed 117 N. Y. 275.

Allowing the Collection of a Bond by a person to whom the decedent had assigned it for collection, and permitting the assignee to retain the proceeds, constitute a devastavit by the administrator, though the assignee claimed the proceeds as his own under an alleged gift *causa mortis*. *Miller v. Jeffress*, 4 Gratt. (Va.) 472.

3. *Discretion as to Litigating Claims to Property.* — *Chappell v. Brown*, 1 Bailey L. (S. Car.) 528.

4. *Qualification as to Duty to Take Possession* — **Rule in Michigan.** — *McDermott v. Copeland*, 9 Fed. Rep. 536.

The *Michigan* statute does not make it imperative on the administrator to take possession of the intestate's personalty; it only empowers him to do so, and it is not expected that he will disturb the possession of the decedent's family except so far as the proper discharge of his duties may require. *Brown v. Forsche*, 43 Mich. 497. See also *Howard v. Patrick*, 38 Mich. 795. He may take possession if he thinks proper, or if the Probate Court so orders. *Streeter v. Paton*, 7 Mich. 341; *Marvin v. Schilling*, 12 Mich. 356; *Jones v. Billstein*, 28 Wis. 221.

5. **The Duty to Collect the Debts** is an elementary principle and requires no citation of authorities to support it.

Duty Extends to All Debts. — *Butler v. Sisson*, 49 Conn. 588; *Schluter v. Bowery Sav. Bank*, (Supreme Ct.) 1 N. Y. Supp. 655.

The Fact That There Was But One Fund due to the estate when the letters of administration were taken out does not limit the authority of the administrator to the collection of that fund. *Sweed's Estate*, 10 Pa. Co. Ct. Rep. 403.

It precedes the duty to pay the debts of the estate,¹ and continues until the estate is settled or the personal representative is discharged.²

Incidental Powers. — As incident to the authority to collect debts, a personal representative may maintain suits and actions, compromise or compound claims, submit them to arbitration, and do all other things that may be necessary in the premises.³

Necessity of Collecting Debts. — It has been held that a personal representative has no right to recover debts unless due and proper administration of the estate renders it necessary.⁴

bb. AUTHORITY ORDINARILY EXCLUSIVE. — Since the title to all the personal property of a decedent is vested in his personal representatives, they alone ordinarily have authority to sue for the recovery of debts; but to this rule there are some exceptions.⁵

Claims Against the United States may be received by the personal representative of the claimant at any place designated by the government for payment. *Davis v. Chapman*, 83 Va. 67, 5 Am. St. Rep. 251.

Life Insurance. — It is the duty of an administrator to collect life insurance, though it may not be applicable to the payment of debts. *Kelley v. Mann*, 56 Iowa 625.

Debts Due from Heirs. — The administrator has the right to collect debts due to the estate from the decedent's heirs. *Towles v. Towles*, 1 Head (Tenn.) 601.

Representative of Both Debtor and Creditor Estate. — Where the same person is representative of both debtor and creditor estate, he may, out of funds in his hands belonging to the one, pay a debt due him as representative of the other. *Caskie v. Harrison*, 76 Va. 85; *Green v. Thompson*, 84 Va. 376.

Securing Debts. — An administrator has the right to take security from a failing debtor, though he is obliged to make a further advance to the debtor in order to obtain the security. *Torrence v. Davidson*, 92 N. Car. 437, 53 Am. Rep. 419.

1. *France's Estate*, 16 W. N. C. (Pa.) 351.

2. **May Receive Debts until Estate Is Closed.** — *Brannock v. Stocker*, 76 Ind. 573; *Keane v. Goldsmith*, 14 La. Ann. 349.

3. **Power to Sue.** — See the title *EXECUTORS AND ADMINISTRATORS*, 8 ENCYC. OF PL. AND PR. 652.

A Bill to Prevent the Removal or Destruction of Assets may be maintained by a special administrator, since he has authority to collect debts. *Briarfield Iron Works Co. v. Foster*, 54 Ala. 622.

An Administrator Pendente Lite may sue for debts of the estate of the decedent. *Kaminer v. Hope*, 18 S. Car. 561.

Power to Issue Execution. — An administrator may issue execution on a judgment in favor of the decedent without first reviving the judgment by *scire facias*. *Mavity v. Eastridge*, 67 Ind. 211; *Armstrong v. McLaughlin*, 49 Ind. 370; though he also has the right to have the judgment revived. *Armstrong v. McLaughlin*, 49 Ind. 370; *Wyant v. Wyant*, 38 Ind. 48.

Power to Submit to Arbitration. — See *supra*, this title, *Powers, Duties, and Liabilities in General* — *Submission to Arbitration*.

Compromise and Composition of Claims. — See *supra*, this title, *Powers, Duties, and Liabilities in General* — *Compromise, Composition, and Release of Claims*.

4. **Right to Collect — Necessity.** — Unless there are unpaid creditors or unpaid administration expenses, the personal representative has no right to recover assets. *Toch v. Toch*, 81 Hun (N. Y.) 410.

5. **Rule that Authority Is Exclusive — Arkansas.** — *Worsham v. Field*, 18 Ark. 447.

Indiana. — *Walpole v. Bishop*, 31 Ind. 156.

Louisiana. — *Dunbar v. Thomas*, 14 La. 332.

South Carolina. — *Kaminer v. Hope*, 9 S. Car. 253.

Texas. — *Lacy v. Williams*, 8 Tex. 182; *McIntyre v. Chappell*, 4 Tex. 187; *Moore v. Morse*, 2 Tex. 400; *Evans v. Oakley*, 2 Tex. 182.

In *Drury v. Natick*, 10 Allen (Mass.) 169, it was said that the collection of debts is an exclusive duty of the personal representative, notwithstanding a direction in the will that the assets should be collected and debts and funeral expenses paid by the trustees to whom the testatrix gave all her estate in trust for a charity after payment of debts and funeral expenses.

Payment to Widow of Next of Kin — Debtor Not Discharged. — In *Eisenbise v. Eisenbise*, 4 Watts (Pa.) 134, it was held that a debtor cannot discharge himself of a debt by payment to the guardian of the deceased creditor's children. See also *McCustian v. Ramey*, 33 Ark. 141.

In *Holt v. U. S.*, 29 Ct. of Cl. 56, it was held that payment by the government to the widow of a deceased postmaster on account of salary due him at the time of his death did not affect the right of his administrator to recover the amount of such salary, notwithstanding the practice of the post office department to make such payments.

But in *Hannah v. Lankford*, 43 Ala. 163, it was held that an executor could not recover from the maker of a note where he had previously paid the note to the sole legatee when the estate was not in debt, and there was no pending administration.

Exceptions to Rule that Authority Is Exclusive. — The heirs of a decedent may sue for and recover debts due to the estate when the estate is not in debt. *Mitchell v. Dickson*, 53 Ind. 110; *Westerfield v. Spencer*, 61 Ind. 339; or where by collusion with the debtor the personal representative refuses to sue. *Mason v. Spurlock*, 4 Baxt. (Tenn.) 554; *Simpson v. Simpson*, 7 Humph. (Tenn.) 275.

So, too, it has been held that a judgment creditor of a decedent may sue to compel the

cc. DUTY PARAMOUNT TO INDIVIDUAL INTERESTS. — This duty to the estate is paramount to the individual interests of the personal representative. If there is any conflict between his duty and his individual interests, he must give preference to the estate; nor has he any right to make any profit for himself out of the claims.¹

dd. FOREIGN DEBTORS. — Though an executor or administrator has no power as a general rule to sue in a foreign jurisdiction,² it is his duty to collect debts due from foreign debtors to the extent of his ability to do so;³ and this he may do either by receiving voluntary payment from the debtor, or by suing him if he (the debtor) comes within the jurisdiction, or by taking out ancillary letters of administration in the jurisdiction where the debtor resides,⁴ or by

sale of premises mortgaged to the decedent by the executor, where the mortgage is the only asset and the executor refuses to pay it. *Raynor v. Gordon*, 16 Hun (N. Y.) 126.

But mere refusal by the personal representative to sue is not sufficient to entitle a residuary legatee or next of kin to sue the debtor. Special circumstances must be shown as ground for such action. *Yeatman v. Yeatman*, 7 Ch. Div. 210, 47 L. J. Ch. Div. 6, 37 L. T. N. S. 374.

1. Duty to Estate Paramount. — When the same person is indebted both to the decedent's estate and to the personal representative individually, it is the duty of the personal representative to secure the claim of the estate in preference to his own claim. *Zweidinger's Estate*, 29 Pittsb. Leg. J. (Pa.) 63; *Evans's Estate*, 1 Pa. Super. Ct. Rep. 37.

Taking Judgment for Debt Due Estate and to Executor or Third Person. — If an executor includes a debt due to himself individually, or to another person, in a judgment taken by confession from a debtor of the estate, the money received on such judgment must be first applied to the satisfaction of the debt due the estate. *Kirkman v. Benham*, 28 Ala. 501.

Cannot Take Debts to Individual Use at Appraised Value. — An administrator has no right to take debts due the estate at the appraised value, but his responsibility is that of reasonable diligence in collecting them. *Weed v. Lermond*, 33 Me. 492.

See also cases cited *supra*, this section, *Dealing with Estate for Individual Benefit.*

2. Suing in Foreign Jurisdiction. — See the title FOREIGN EXECUTORS AND ADMINISTRATORS.

3. Duty to Collect Debts. — *Matter of Ortiz*, 86 Cal. 306, 21 Am. St. Rep. 44; *Schultz v. Pulver*, 11 Wend. (N. Y.) 361, *affirming* 3 Paige (N. Y.) 182.

4. Powers of Executor or Administrator with Respect to Foreign Debts. — In *Klein v. French*, 57 Miss. 662, the powers of an executor or administrator with reference to debts due from nonresidents are stated as follows: He may receive voluntary payment from and even sue a debtor residing in a foreign jurisdiction, if he shall voluntarily come within the state; when there are no debts in the jurisdiction where the foreign debtor resides, and no ancillary administration has been granted there, the principal administrator may, in such foreign state, receive a voluntary payment from the debtor, which will be a good acquittance to him, even if an ancillary administrator should be afterwards appointed; and if the

principal administrator have possession of a note payable to his intestate or bearer, he may, as the lawful holder and bearer of such note, sue on it in a foreign jurisdiction.

An Administrator Is Always Bound to Use Such Care and Diligence as a good business man would exercise in the management of his own property, in order to collect claims against debtors of the estate, whether resident or non-resident. *Moore's Estate*, Tuck. (N. Y.) 41.

Notes Payable to Bearer may be sued on by the executor or administrator in the foreign jurisdiction where the maker resides, but the action is in his own right, as the real owner of the notes, and not in his representative capacity. *Robinson v. Crandall*, 9 Wend. (N. Y.) 425.

A Judgment Recovered by an Executor or Administrator in the court of his domicile may be sued on by him in a foreign jurisdiction, because by the recovery of the judgment the debt becomes due to him personally and he may sue on it in his own name. *Biddle v. Wilkins*, 1 Pet. (U. S.) 686; *Barton v. Higgins*, 41 Md. 539; *Talmage v. Chapel*, 16 Mass. 71.

Voluntary Payment by Foreign Debtor. — Executors and administrators have authority to collect debts due from foreign debtors, if voluntarily paid, and give good acquittances therefor.

United States. — *Mackey v. Cox*, 18 How. (U. S.) 104; *Wilkins v. Ellett*, 9 Wall. (U. S.) 740, 108 U. S. 256.

Connecticut. — *Marcy v. Marcy*, 32 Conn. 308; *Selleck v. Rusco*, 46 Conn. 370.

Kansas. — *Denny v. Faulkner*, 22 Kan. 89.

Maryland. — *Citizens Nat. Bank v. Sharp*, 53 Md. 521.

Mississippi. — *Klein v. French*, 57 Miss. 662.

New Hampshire. — *Luce v. Manchester*, etc., R. Co., 63 N. H. 589; *Gove v. Gove*, 64 N. H. 503.

New York. — *Williams v. Storrs*, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389; *Parsons v. Lyman*, 20 N. Y. 103; *Petersen v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 268.

Pennsylvania. — *Shakespeare v. Fidelity Ins., etc., Co.*, 97 Pa. St. 173.

"Where there are no debts owing by the estate in the jurisdiction where the foreign debtor resides, and no ancillary administration has been granted there, the principal administrator may, in such foreign state, receive a voluntary payment from the debtor, which will be a good acquittance to him, even if an ancillary administrator should be subsequently

selling and transferring the claim to a third person so as to enable the transferee to sue in his own name in the courts of the foreign jurisdiction.¹

ee. PERFORMANCE OF DUTY — (aa) Promptness and Diligence. — A personal representative is required to proceed promptly with the collection of debts, to make reasonable efforts to collect, and to report promptly the collections as they are made.² No definite time is prescribed within which collections must be

appointed." *McCully v. Cooper*, 114 Cal. 258 [citing *Wilkins v. Ellett*, 108 U. S. 256; *Reynolds v. McMullen*, 55 Mich. 568, 54 Am. Rep. 386; *Klein v. French*, 57 Miss. 662; *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 15 Am. St. Rep. 494; *Gray's Appeal*, 116 Pa. St. 256]. See also *Trecothick v. Austin*, 4 Mason (U. S.) 16; *Selleck v. Rusco*, 46 Conn. 370; *Putnam v. Pitney*, 45 Minn. 242; *Williams v. Storrs*, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389; *Vroom v. Van Horne*, 10 Paige (N. Y.) 549, 42 Am. Dec. 94.

The jurisdiction of the state where property belonging to a foreign decedent is held or where debtors reside is not violated, nor its tribunals condemned, by a voluntary delivery or payment to the foreign representative of such decedent. *Parsons v. Lyman*, 20 N. Y. 112. Compare *Pond v. Makepeace*, 2 Met. (Mass.) 114.

But if a Domestic Administrator Is Appointed, the foreign administrator has no authority to collect the debt, and a voluntary payment to him would be no bar to a subsequent suit brought by the domestic administrator to recover the same debt. *Equitable L. Assur. Soc. v. Vogel*, 76 Ala. 441, 52 Am. Rep. 344. See also *Reynolds v. McMullen*, 55 Mich. 578, 54 Am. Rep. 386.

"The Doctrine of the English Courts is that such payment or surrender affords no protection against the claim of a domestic administrator subsequently appointed. *Hatchett v. Berney*, 65 Ala. 46, citing *Wharton's Conflict of Laws*, § 626. See also *Story's Conflict of Laws*, § 515a.

Statutory Restriction. — Under the *Alabama Code of 1876*, §§ 2637-2640, authorizing a foreign executor or administrator to maintain suits and recover or receive property in Alabama upon condition that, before judgment or receipt of the property, an authenticated copy of his letters shall be filed in the office of the probate judge, etc., it was held that a voluntary delivery of property to the foreign representative would not be valid at law as against the domestic administrator subsequently appointed, but that, in a proper case, relief could be had against the latter in equity. *Hatchett v. Berney*, 65 Ala. 39, cited with approval in *Ferguson v. Morris*, 67 Ala. 389.

But in Tennessee it is held that an administrator has no authority to receive payment from a foreign debtor and to discharge the debt. *Young v. O'Neal*, 3 Sneed (Tenn.) 55; *Swancy v. Scott*, 9 Humph. (Tenn.) 327.

As to the right to take out ancillary letters, see the title *FOREIGN AND ANCILLARY ADMINISTRATORS*.

1. Sale and Transfer of Claims Against Foreign Debtors. — The power of an executor or administrator to realize on debts due from nonresidents by transferring the evidences of debt

rests on the principle that letters granted at the domicile of the decedent vest in the executor or administrator by operation of law the entire personal estate, wherever situate, and the title so derived will be recognized by comity in the courts of another state. *Matter of Cape May*, etc., Nav. Co., 51 N. J. L. 78.

As to the power to transfer choses in action, see *infra*, this section, *Sale and Transfer of Personal Property — Sale of Choses in Action*.

2. Must Act Promptly. — *McCargar v. McKinnon*, 15 Grant's Ch. (U. C.) 361; *Feagan v. Kendall*, 43 Ala. 628; *Myers v. Myers*, 98 Mo. 262; *Harker v. Irick*, 10 N. J. Eq. 269; *Hollister v. Burritt*, 14 Hun (N. Y.) 291; *Matter of Hosford*, 27 N. Y. App. Div. 427; *Matter of Keener v. Finger*, 70 N. Car. 35; *State v. Sluder*, 70 N. Car. 55.

The Indiana Statute provides that every executor or administrator shall proceed with diligence to collect the debts and demands due the estate of a deceased, and that if he fails to do so he may be sued on his bond by any creditor, heir, legatee, surviving or succeeding executor or administrator, coexecutor, or coadministrator of the same estate. *Condit v. Winslow*, 106 Ind. 142. See also *Miller v. Steele*, 64 Ind. 79.

When Debts Rest on Personal Security it is especially important that prompt action should be taken for their collection. *Powell v. Hurt*, 31 Mo. App. 632.

The Duty to Collect Debts Begins immediately after making the inventory. *France's Estate*, 16 W. N. C. (Pa.) 351.

Request from Distributees to Collect Not Necessary. — *Harrington v. Keteltas*, 92 N. Y. 40.

Reasonable Efforts to Collect Must Be Made — *Kentucky*. — *Moore v. Beauchamp*, 4 B. Mon. (Ky.) 74.

Mississippi. — *Conwill v. Livingston*, 61 Miss. 641.

Missouri. — *Myers v. Myers*, 98 Mo. 262.

New York. — *Harrington v. Keteltas*, 92 N. Y. 40; *Shultz v. Pulver*, 3 Paige (N. Y.) 182, 11 Wend. (N. Y.) 361; *Ginochio v. Porcella*, 3 Bradf. (N. Y.) 277.

South Carolina. — *Glover v. Glover*, McMull. Eq. (S. Car.) 153; *O'Dell v. Young*, McMull. Eq. (S. Car.) 155.

Attempts to Collect — Filing or Enrolling Judgment. — An administrator is not required to file or enrol a judgment in the county where the debtor owns no property at the time, merely because he might finally subject secreted property to the judgment. *Conwill v. Livingston*, 61 Miss. 641.

Duty to Report Collections Promptly. — *Jacoway v. Dyer*, 50 Ark. 217; *Johnston v. Maples*, 49 Ill. 101.

The debtor is not required to see that the administrator properly reports the amount paid in his settlements with the Probate Court, and a settlement which does not include money paid

made, but the general rule is that reasonable time will be allowed.¹

Extending Time of Payment. — Whether an executor or administrator may extend the time of payment of debts due the estate seems to be the subject of some diversity of opinion. This question is decided in the affirmative by some cases,² while others are to the contrary.³

(bb) *Actions Against Debtors.* — If debts are not paid within a reasonable time, it is the duty of the personal representative to enforce payment by an action.⁴

Uncollectible Debts. — But he is under no obligation to attempt collection of debts where the attempt will fail, and the only result will be to burden the estate with fruitless expense.⁵

(cc) *Foreclosure of Mortgages.* — A personal representative has authority to foreclose by entry and possession, or by executing a power of sale, or otherwise, mortgages belonging to the decedent's estate, and he is charged with the duty, as well as invested with the authority; but he is allowed the reasonable discretion of an ordinarily prudent man in the choice of time and occasion, though he is chargeable with negligence if any loss is sustained in consequence of his failure to foreclose, or delay until the mortgaged property has so depreciated that the full amount of the debt secured cannot be realized.⁶

by a debtor will not prevent the debtor from showing such payment in a subsequent suit against him by the administrator *de bonis non*. *Van Liew v. Barrett, etc., Beverage Co.*, 144 Mo. 509.

1. Reasonable Time Allowed for Collections. — *Moffatt v. Loughridge*, 51 Miss. 211; *Matter of Gray*, 91 N. Y. 502; *Cox's Estate*, 8 Montg. Co. Rep. (Pa.) 161.

One Year is presumed as a general rule to be sufficient. *McCargar v. McKinnon*, 15 Grant's Ch. (U. C.) 361; *Merkel's Estate*, 131 Pa. St. 584, 25 W. N. C. (Pa.) 469.

2. Rule that Executor or Administrator May Extend Time of Payment. — *Underwood v. Sample*, 70 Ind. 446; *Campbell v. Linder*, 50 S. Car. 169.

If the Debt Is Doubtful, the representative may extend the time of payment and get new security. *Berry v. Parkes*, 3 Smed. & M. (Miss.) 625.

3. Rule that Executor or Administrator Cannot Extend Time of Payment. — *Maddock v. Russell*, 109 Cal. 417; *Landry v. Delas*, 25 La. Ann. 181.

4. Must Sue Debtors Within Reasonable Time. — *Morris v. Morris*, 9 Heisk. (Tenn.) 815.

Failure to Bring Suit against a debtor of the estate within a reasonable time is a devastavit. *James v. Wingo*, 7 Lea (Tenn.) 148; *Morris v. Morris*, 9 Heisk. (Tenn.) 815. See also *Lee v. Chase*, 58 Me. 432; *Cross v. Brawn*, 51 N. H. 486.

Discretion as to Time of Suing. — The personal representative is not, however, obliged in all cases to sue a debtor immediately, but he has a fair discretion as to the time within which suit should be brought, and therefore a delay by which loss occurs is not necessarily a wilful neglect or default for which he is liable. *In re Owens*, 47 L. T. N. S. 61; *McCargar v. McKinnon*, 15 Grant's Ch. (U. C.) 361. And it was so held where the debtor continued in good credit, *Keller's Appeal*, 8 Pa. St. 288, 49 Am. Dec. 516; though the administrator delayed suing for a period of fourteen months, *Dean v. Rathbone*, 15 Ala. 328.

More Failure to Sue is not conclusive as to lack of diligence. *Peytavin's Succession*, 7 Rob. (La.) 477.

Failure to Sue at First Term of Court. — In *Gwynn v. Dorsey*, 4 Gill & J. (Md.) 453, an administrator took a bond with one surety for the price of property sold under order of court. It did not appear at the time that the security was improper. The bond was not paid at maturity, and the administrator did not sue until the second term of court thereafter, when he obtained judgment and issued execution which was returned *nulla bona*. It was held that he was not liable for negligence in not suing at the first term.

Delay by Request of Life Tenant. — The good faith of an executor in not suing a debtor of the estate may be shown by evidence that he was requested by the life tenant not to sue. *Orr v. Orr*, 34 S. Car. 275.

Delay Until Debts Are Barred by Limitation. — In *Thomas v. White*, 3 Litt. (Ky.) 184, 14 Am. Dec. 56, it was held that an administrator was not liable for loss occasioned by delay in suing until recovery was barred by the statute of limitations, unless his default was wilful, or he acted in bad faith, or was guilty of fraud or gross negligence.

5. Not Required to Sue on Bad Debts. — *Matter of Millenovich*, 5 Nev. 161; *Martin v. Jefcoat*, 10 Rich. Eq. (S. Car.) 118; *Matter of Cator*, 14 Lea (Tenn.) 408.

Indemnity as to Costs. — An executor has a right to require indemnity as to costs before suing on a very doubtful claim. *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74.

When Debts are Barred by Limitation or the Debtor Is Bankrupt the administrator is not bound to sue. *Pool's Succession*, 14 La. Ann. 688; *Patterson v. Wadsworth*, 89 N. Car. 407.

6. Power to Foreclose Mortgages. — *Gibson v. Bailey*, 9 N. H. 168; *Copper v. Wells*, 1 N. J. Eq. 10.

A Power of Sale Contained in a Mortgage may be executed by the personal representative of the deceased holder of the mortgage without order of the court. *Chilton v. Brooks*, 71 Md. 445.

Discretion as to Time and Occasion of Foreclosing. — *Ormiston v. Olcott*, 84 N. Y. 339, *reversing* 22 Hun (N. Y.) 270.

Failure to Enforce Mortgage Security. — If an

Power to Buy In Property at Foreclosure Sale. — When a personal representative forecloses a mortgage belonging to the decedent's estate, he may bid in the mortgaged property at the foreclosure sale when it is necessary to do so in order to save the estate from loss.¹

(dd) *Receiving Payment* — aaa. **General Rule.** — As a general rule an executor or administrator has no authority to receive anything but money in payment of debts due the estate.²

bbb. **Taking Property in Payment.** — There are authorities, however, which hold that he may take property in satisfaction of a debt if it is necessary to do so in order to save the debt,³ though this has been doubted.⁴

ccc. **Taking Notes or Securities in Payment.** — Though personal representatives have authority to compromise and compound claims existing in favor of the estate, and debts due it, it is generally held that they cannot relieve themselves of liability if they take notes or other securities in satisfaction of debts due the estate.⁵

ddd. **Allowance of Set-off.** — Where a debtor of an estate also holds claims against it, the executor or administrator may, if the estate is solvent, set off one against the other.⁶

administrator fails to foreclose a mortgage and loss results to the estate, he must show a satisfactory reason for his failure. *Willis v. Willis*, 16 Ala. 652.

Failure to Foreclose Second Mortgage. — An executor is not bound to foreclose a second mortgage where it appears that the first mortgage was foreclosed, and an insufficient sum realized on the sale to pay it in full. *Matter of Thomson*, (Supreme Ct.) 14 N. Y. St. Rep. 615.

Redemption of Prior Mortgage. — An administrator has no right to pay off a prior mortgage in order to let in a junior mortgage held by the estate, and if loss thereby ensues he is answerable for it. *Tompkins v. Weeks*, 26 Cal. 50.

Delay in Foreclosing — Depreciation of Security. — In *Booker v. Armstrong*, 93 Mo. 49, an executor was held guilty of negligence where he made no effort to foreclose the mortgage until the debt secured was barred by the statute of limitations, and in the meantime the land so depreciated in value that the full amount of the debt could not be realized out of it, the maker of the note having been insolvent during the whole time.

Evidence of Authority to Foreclose. — The right to execute a power of sale in a mortgage as administrator of the mortgage is not shown by the mere recital in the deed that the mortgagee was dead, and that the grantor had been appointed administrator, but those facts must be shown by some other evidence than such recitals. *Taylor v. Lawrence*, 148 Ill. 388.

1. Bidding In Land at Foreclosure Sale. — *Dusing v. Nelson*, 7 Colo. 185; *Stevenson v. Polk*, 71 Iowa 278; *Briggs v. Chicago*, etc., R. Co., 56 Kan. 526; *Sojourner v. Fournay*, 35 La. Ann. 918; *Holcomb v. Holcomb*, 11 N. J. Eq. 281.

2. General Rule — Payment Must Be in Money. — *Parham v. Stith*, 56 Miss. 465.

3. Purchase of Land to Secure Payment of Debt. — *Hughes v. Hatchett*, 55 Ala. 539. See also *Dusing v. Nelson*, 7 Colo. 185; *Holcomb v. Holcomb*, 11 N. J. Eq. 281; *Clark v. Clark*, 8 Paige (N. Y.) 152, 35 Am. Dec. 676; *Matter of Butler*, 1 Connolly (N. Y.) 58; *Oeslager v. Fisher*, 2 Pa. St. 467; *Billington's Appeal*, 3

Rawle (Pa.) 48; *Chase v. Irvin*, 87 Pa. St. 286; *Bean v. Mercer*, 1 Chest. Co. Rep. (Pa.) 335; *Hillard's Estate*, 8 Luz. Leg. Reg. (Pa.) 137.

In *Trotter v. Shippen*, 2 Pa. St. 358, it was held that an apparently solvent executor may discharge a debt due the estate by receiving goods from the debtor for his own private use.

Where the Debtor Is Insolvent the personal representative cannot receive property from him in payment of the debt, and a payment so made will not discharge the debtor. *Gulledge v. Berry*, 31 Miss. 346.

4. Authority to Take Property in Payment of Debts Doubted. — It is doubtful, to say the least, whether an administrator, without leave of the Probate Court, can take real estate in payment of an indebtedness to the estate. *Allison v. Graham*, 67 Iowa 68.

And in *Weir v. Tate*, 4 Ired. Eq. (39 N. Car.) 264, the court said: "*Prima facie*, an executor cannot take land in the payment of debts, and his purchases are upon his own account unless at the election of those entitled to the estate."

5. Taking Notes or Securities in Payment — Power to Bind Estate. — An administrator has power to exchange a bond belonging to the estate for a note, and to release a lien by which the bond is secured on land. *Stribling v. Splint Coal Co.*, 31 W. Va. 82.

In *Texas* it is held that without an order of court an administrator cannot receive notes and accounts of third persons in discharge of a debt due the estate. *Trammell v. Swan*, 25 Tex. 474.

Taking Notes or Securities in Payment — Personal Liability. — If an executor accepts a bill of exchange in payment of a promissory note held by him as executor, and loss results therefrom, he is personally liable. *Parham v. Stith*, 56 Miss. 465.

Exchange of Securities. — If an executor satisfies a first mortgage and takes other securities in lieu of it, he is personally chargeable with the amount of the debt. *Baldwin's Appeal*, 81 Pa. St. 441.

6. Set-off of Debts. — See *supra*, this title. *Powers, Duties, and Liabilities in General — Set-off of Debts.*

see. **Taking Depreciated Currency in Payment.** — The powers, duties, and liabilities of executors and administrators in regard to receiving depreciated currency in payment of debts due the estate have been considered in cases involving payment in Confederate money and the currency of state banks issued under the system prevailing before the civil war. It was held at first that Confederate money was the written obligation of rebels, issued by them to enable them to carry on war against their government, and that it therefore never had any legal existence or value, and could not be recognized as receivable in extinguishment of a debt or obligation to be enforced by the tribunals of this country;¹ but the courts soon adopted the view that personal representatives should not be held individually liable for debts collected in Confederate money in those parts of the country where it was the only currency in circulation, though it afterwards became worthless in their hands by the overthrow of the government by which it was issued,² and in some of the Southern states it is provided by statute that executors and administrators shall have credit for Confederate money collected by them in good faith and still in their hands at the close of the war.³

Necessity of Receiving Depreciated Currency. — A personal representative is not warranted in receiving a debt due to the decedent's estate in a greatly depreciated currency, unless there be something in the condition of the debt, or in the state of the demands of creditors or legatees of the estate, or otherwise, which makes it to the interest of the estate that the debt should be so received.⁴

Set-off of Debts Against Legatee. — *Brunn v. Schuett*, 59 Wis. 260, 48 Am. Rep. 499.

See also *infra*, this title, *Distribution of Estate* — *Mode of Payment* — *Retainer of Debts Due from Legatee or Distributee*.

1. Former Rule — Payment in Confederate Money Not Valid. — *Lagarde's Succession*, 20 La. Ann. 148; *Cockburn v. Wilson*, 20 La. Ann. 39; *Shaw v. Coble*, 63 N. Car. 377; *Trammel v. Philleo*, 33 Tex. 395.

In *Kleberg v. Bonds*, 31 Tex. 611, it was held that where an administrator received Confederate money in payment of a debt due the estate and surrendered the evidence of debt, the transaction would not be viewed by the court as an executed contract, but that the debt still remained due and might be collected by process of law.

2. Present Rule — Payment in Confederate Money Valid. — *Glasgow v. Lipse*, 117 U. S. 327; *McKenzie v. Anderson*, 2 Woods (U. S.) 357; *Kerns v. Wallace*, 64 N. Car. 187; *Cobb v. Taylor*, 64 N. Car. 193; *Ramsay v. Hanner*, 64 N. Car. 668; *Whitley v. Alexander*, 73 N. Car. 444; *West v. Cauthen*, 9 S. Car. 45; *Dietz v. Mitchell*, 12 Heisk. (Tenn.) 676.

3. Statutory Authority to Receive Confederate Money. — *Glenn v. Glenn*, 41 Ala. 571; *Campbell v. Miller*, 38 Ga. 304, 95 Am. Dec. 389; *Trotter v. Trotter*, 40 Miss. 704; *Williams v. Williams*, 43 Miss. 430.

4. A Personal Representative Is Individually Liable if he collects debts in depreciated currency unless there be something in the condition of the affairs of the estate to justify it.

United States. — *Opie v. Castleman*, 32 Fed. Rep. 511; *Lipse v. Spear*, 4 Hughes (U. S.) 535.

Alabama. — *Ivey v. Coleman*, 42 Ala. 409; *Oglesby v. Howard*, 43 Ala. 144.

Kentucky. — *Brewer v. Vanarsdale*, 6 Dana (Ky.) 207.

North Carolina. — *Depriest v. Patterson*, 92 N. Car. 402. Compare *Covington v. Lattimore*, 88 N. Car. 407.

South Carolina. — *Fitzsimons v. Fitzsimons*, 1 S. Car. 400.

Virginia. — *Moss v. Moorman*, 24 Gratt. (Va.) 97; *Williams v. Skinner*, 25 Gratt. (Va.) 507.

See also *Cabell v. Cox*, 27 Gratt. (Va.) 182; *Tosh v. Robertson*, 27 Gratt. (Va.) 270; *Young v. Cabell*, 27 Gratt. (Va.) 761.

"The Test of the Right of the administrator to receive, in satisfaction of the debts of the estate, a currency in common use but not having the quality of a legal tender," says Willard, C. J., "is the necessity of the administration; one element of this necessity being the existence of debts capable of affecting prejudicially the assets of the estate unless satisfied, and the other would be just ground to apprehend loss of assets by allowing unsecured debts to remain outstanding. As it regards the payment of legacies and distributive shares, it is evident that either the express consent of persons entitled thereto, or such facts and circumstances as would give rise to a presumption of such consent, would warrant the reception of such currency when only required for purposes of that description. It is clear that in either of these cases, as well as when money is needed to defray current or extraordinary expenses of the administration, the administrator would be authorized to receive such currency at the rate at which it passed from hand to hand in the community as money, unless there should be reason to conclude that it could not be advantageously employed at such valuation for the purposes of the administration. In the cases supposed it might wholly defeat the end proposed, for the administrator to insist that currency should be used in such transactions at its value according to a gold standard." *Koon v. Munro*, 11 S. Car. 139. See also *Koon v. Munro*, 18 S. Car. 374.

In *Wilson v. Powell*, 75 N. Car. 468, an executor was held liable for the amount of a debt

Measure of Accountability. — The measure of the accountability of an executor or administrator who receives Confederate money in payment of debts due the estate is the actual value at the time of the collection, and not the face value, of such money.¹

(b) **Liability for Failure to Collect** — *aa. LIABILITY FOR DEBTS AS ASSETS IN HAND.* — The debts due to the estate of a decedent are not considered assets in the hands of the executor or administrator until collected;² but after a reasonable time has elapsed the presumption arises that he did collect such as were not inventoried as desperate, or ought to have done so, and he can exonerate himself only by showing that the failure is not the result of lack of diligence on his part.³

bb. LOSS BY FAILURE TO COLLECT — (*aa. General Rule.* — If any debts are not collected, the question of the liability of the personal representative for the loss resulting to the estate depends on his conduct in the premises. If he has acted in good faith, and with the prudence and diligence which the law requires, and has been guilty of no mismanagement, he is not liable.⁴ If, on

due from a solvent firm of which he was a member, where he received payment in Confederate money when he knew that it could not be used to pay debts of the estate, and it finally became worthless in his hands.

A Sufficient Excuse for collecting debts in Confederate money cannot be made out where the executor might have made the collections in good money before the war, but failed to do so. Lockhart *v.* Horn, 1 Woods (U. S.) 628.

1. Measure of Accountability — Actual Value at Time of Receipt — *Alabama.* — Watson *v.* Stone, 40 Ala. 451, 91 Am. Dec. 484; Cummings *v.* Bradley, 57 Ala. 224; Anderson *v.* Wynne, 62 Ala. 329.

Arkansas. — Jones *v.* Graham, 36 Ark. 383.

Georgia. — Campbell *v.* Miller, 38 Ga. 304, 95 Am. Dec. 389.

Louisiana. — Womack's Succession, 29 La. Ann. 577; Herron's Succession, 32 La. Ann. 835.

Mississippi. — Williams *v.* Campbell, 46 Miss. 57.

South Carolina. — Koon *v.* Munro, 11 S. Car. 129; Hyatt *v.* McBurney, 18 S. Car. 199.

Tennessee. — Burford *v.* Memphis Bulletin Co., 9 Heisk. (Tenn.) 691; Morris *v.* Morris, 9 Heisk. (Tenn.) 814; Rockhold *v.* Blevins, 6 Baxt. (Tenn.) 115.

Virginia. — Staples *v.* Staples, 24 Gratt. (Va.) 225; Wayland *v.* Crank, 79 Va. 602.

But if instead of disbursing the Confederate money collected, the personal representative retained it and disbursed his own money, he will not be allowed credit for the Confederate money so retained. Currie *v.* McNeill, 83 N. Car. 176.

Application to Individual Debts. — If an administrator receives Confederate money in payment of debts owing the estate, he must, if he is a creditor of the estate, apply the same currency to the discharge of his own debt. Dickie *v.* Dickie, 80 Ala. 57.

2. Debts Not Assets in Hand Until Collected. — Noell *v.* Nelson, 1 Vent. 96; Giles *v.* Dyson, 1 Stark. 32, 2 E. C. L. 22; Townsend *v.* Munger, 9 Tex. 300.

An executor is not to be charged with the debts due to the estate of his testator at the time when they become due, but only at the time when he actually received them, unless they were lost by his negligence or improper

conduct. Cavendish *v.* Fleming, 3 Munf. (Va.) 198.

3. Presumption as to Collection. — Brazeale *v.* Brazeale, 9 Ala. 491; Moffatt *v.* Loughridge, 51 Miss. 211.

Where an Administrator Inventories a Debt as Doubtful or Desperate, he will not be charged with it except upon proof that he has, or might have, collected it. Finch *v.* Ragland, 2 Dev. Eq. (17 N. Car.) 137; Gay *v.* Grant, 101 N. Car. 206.

4. Not Liable Unless Derelict — *Alabama.* — Douthitt *v.* Douthitt, 1 Ala. 594; Duffee *v.* Buchanan, 8 Ala. 27.

California. — Matter of Moore, 96 Cal. 522.

Illinois. — Rowan *v.* Kirkpatrick, 14 Ill. 1.

Mississippi. — Conwill *v.* Livingston, 61 Miss. 641.

North Carolina. — Keener *v.* Finger, 70 N. Car. 35; Gay *v.* Grant, 101 N. Car. 206; Moore *v.* Eure, 101 N. Car. 11, 9 Am. St. Rep. 17.

Pennsylvania. — Dabney's Appeal, 120 Pa. St. 345.

Tennessee. — Dietz *v.* Mitchell, 12 Heisk. (Tenn.) 676.

West Virginia. — Estill *v.* McClintic, 11 W. Va. 399.

Although it is generally true that an executor who, by taking an inferior security or unreasonably extending time of payment, brings a loss upon his testator's estate renders himself personally liable, yet where manifest fidelity, diligence, and ordinary judgment have been displayed, a court of chancery will be reluctant to enforce the rigid rules which, for the protection of estates, have been established as to the responsibility of executors. The executor of a person who has been extensively engaged in trade must of necessity be allowed a reasonable latitude of discretion in the winding up of his affairs. Hunter *v.* Bryant, 2 Wheat. (U. S.) 32, reversing 3 Wash. (U. S.) 48.

Proof of Negligence. — A failure to collect is not alone sufficient to charge an executor with neglect of duty. Woolley *v.* Baldwin, 101 N. Y. 688, 5 N. E. Rep. 573; Matter of Thomson, (Supreme Ct.) 14 N. Y. St. Rep. 615; Torrence *v.* Davidson, 92 N. Car. 437, 53 Am. Rep. 419; Patterson *v.* Wadsworth, 89 N. Car. 407.

The Mere Fact that a Debt Might Have Been Collected is not sufficient to charge the personal

the other hand, a failure to make collections resulted from neglect on his part in the performance of his duties, he is personally liable for the amount so lost.¹

Loss Resulting from Delay.—If a personal representative does not proceed promptly with the collection of debts, and in the meantime they become uncollectible by reason of the insolvency of the debtors, or other supervening cause, he is chargeable with negligence which renders him individually liable for the amount of the debts so lost,² unless he can show some valid reason for

representative with its loss, but he is chargeable if the loss resulted from his delay. *Anderson v. Piercy*, 20 W. Va. 282.

Lapse of Time Taken in Connection with the Smallness of the Debt will be considered in determining whether an executor is chargeable with the amount of uncollected debts. *McCargar v. McKinnon*, 17 Grant's Ch. (U. C.) 525.

Insufficiency of Bail Bond.—An administrator is not responsible for the sufficiency of a bail bond taken by the sheriff from the defendant in an action by the administrator, though the administrator expressly accepted the bond. *Charleton v. Sloan*, 64 N. Car. 702.

Debt Created by Executor.—If a debt due the estate was created by the executor, and he is unable to collect it, he must show that he acted as a prudent man would have done in the transaction of his own affairs, and that he made reasonable and timely efforts to collect the debt. *Moore v. Beauchamp*, 4 B. Mon. (Ky.) 74. See also *Cason v. Cason*, 31 Miss. 578.

Illegality Not Asserted by Debtor.—The liability of an administrator for notes taken for the price of slaves is not affected by a provision of the state constitution declaring void notes given for the price of slaves, where the makers of the notes made no such defense. *Roberts v. Adams*, 2 S. Car. 337.

Discretion Given by Will.—In *Ratcliffe v. Winch*, 17 Beav. 217, an executor sued a debtor of the estate about one year after the testator's death, and recovered judgment, but did not issue execution until a year later, when bankruptcy ensued and the debt was lost. The executor, being authorized by the will to compound or allow time for the payment of debts, was held not liable for the loss of such debt.

Failure to Foreclose Mortgage.—See *supra*, this section and subsection, *Foreclosure of Mortgages*.

1. Liability for Loss Resulting from Negligence—California.—*Matter of Sanderson*, 74 Cal. 199.

Georgia.—*Hall v. Carter*, 8 Ga. 388.

Indiana.—*Condit v. Winslow*, 106 Ind. 142; *Miller v. Steele*, 64 Ind. 79.

Maryland.—*Seighman v. Marshall*, 17 Md. 550.

Massachusetts.—*Mitchel v. Lunt*, 4 Mass. 654.

Mississippi.—*Banks v. Machen*, 40 Miss. 256.

Missouri.—*Myers v. Myers*, 98 Mo. 262.

New Jersey.—*Holcomb v. Holcomb*, 11 N. J. Eq. 282, 476.

New York.—*Leggett v. Leggett*, 24 Hun (N. Y.) 333; *Matter of Hosford*, 27 N. Y. App. Div. 427.

North Carolina.—*Keener v. Finger*, 70 N. Car. 35; *State v. Sluder*, 70 N. Car. 55.

Pennsylvania.—*Buerkle's Estate*, 28 Pittsb. Leg. J. (Pa.) 398; *Haines's Estate*, 6 Luz. Leg. Reg. (Pa.) 131.

South Carolina.—*Gates v. Whetstone*, 8 S. Car. 244, 28 Am. Rep. 284.

Tennessee.—*Davis v. Jackson*, (Tenn. 1897) 39 S. W. Rep. 1067.

Virginia.—*Chapman v. Shepherd*, 24 Gratt. (Va.) 377; *Sterling v. Wilkinson*, 83 Va. 791.

The Difficulty of Collecting Debts does not excuse an executor for not collecting them. *In re Alexander*, 13 Ir. Ch. Rep. 137.

Failure to Appear in Action.—An administrator is not chargeable with negligence in not appearing in an action brought by him on a life-insurance policy of the decedent, where the decedent's heirs appeared, claiming that they were entitled to the insurance as against a third person who claimed it under an assignment from the decedent. *Meyeringh v. Wendt*, 86 Iowa 465.

Failure to Present a Claim to the Debtor's Assignee for Benefit of Creditors is laches which renders the personal representative liable for the loss of the claim. *Wilson v. Staats*, 33 N. J. Eq. 524.

Loan of Notes and Bonds Belonging to Estate.—In *Cason v. Cason*, 31 Miss. 578, it was held that an administrator was liable for failure to collect notes and bonds due the estate, unless he could show that by the use of the greatest diligence the money could not have been collected, where it appeared that the administrator, without legal authority and without any necessity for so doing, had loaned such notes and bonds to third persons.

Liability to Creditors.—An administrator is chargeable at the suit of a creditor with any separate debts due the decedent which may have been lost by the negligence of the administrator in failing to collect them. *Seighman v. Marshall*, 17 Md. 550.

Extent of Liability.—An executor is not liable for more than he was able to collect. *Henderson's Succession*, 24 La. Ann. 435.

Interest.—An administrator who fails to collect a debt is chargeable not only with the amount of the debt, but also with interest on it. *Banks v. Machen*, 40 Miss. 256.

For a Full Discussion of the liability of a personal representative for interest on the funds of the estate, see *infra*, this title, *Accounting—Charges—Interest*.

2. Loss Resulting from Delay—Individual Liability—England.—*Caney v. Bond*, 6 Beav. 486, 12 L. J. Ch. 484.

Alabama.—*Feagan v. Kendall*, 43 Ala. 628; *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598; *Munden v. Bailey*, 70 Ala. 63.

California.—*In re Sanderson*, (Cal. 1887) 13 Pac. Rep. 497.

Florida.—*Sherrell v. Shepard*, 19 Fla. 300.

his delay or failure to act.¹ The authorities do not lay down any more definite rule as to the time within which collections should be made than that it must be within a reasonable time, and what is a reasonable time necessarily depends on the facts and circumstances of each particular case.²

Proof of Neglect. — A personal representative cannot be charged with the loss of a debt on the ground of negligence in not collecting it, unless the neglect is proved,³ and the burden of proof is on the person who seeks to charge the executor or administrator, if the debt was one left by the decedent, and did not arise out of any transaction on the part of the executor or administrator, as in the case of a note taken for the price of property sold by him.⁴

Degree of Negligence Necessary to Impose Individual Liability. — The cases generally hold that an executor or administrator is not liable for failure to collect debts unless the failure was the result of gross negligence.⁵

(bb) *Excusing Failure to Collect* — *aaa. In General.* — Failure to collect a debt does not render the personal representative liable for the amount where he had no knowledge of its existence,⁶ or where the loss was the result of mistake, if the personal representative acted in good faith and under advice of counsel;⁷ but

Kentucky. — *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528.

Missouri. — *Powell v. Hurt*, (Mo. 1891) 16 S. W. Rep. 669.

New Jersey. — *Cooley v. Vansyckle*, 14 N. J. Eq. 496; *Stark v. Hunton*, 3 N. J. Eq. 300.

New York. — *Mills v. Hoffman*, 26 Hun (N. Y.) 594, reversed on other grounds in 92 N. Y. 181.

North Carolina. — *Wilson v. Lineberger*, 88 N. Car. 416.

Pennsylvania. — *Long's Estate*, 6 Watts (Pa.) 46; *Charlton's Appeal*, 34 Pa. St. 473; *Shaffer's Appeal*, 46 Pa. St. 131.

South Carolina. — *Jennings v. Weeks*, 1 Rice L. (S. Car.) 452.

Delay Until Debtor's Property Is Exhausted by Other Creditors. — *Matter of Millard*, 2 Connolly (N. Y.) 91.

An Executor or Administrator Is Liable for a Loss by the Insolvency of a Debtor when he has failed to exercise the care that a prudent man would exercise in the conduct of his own affairs. He must use all reasonable diligence in collecting the assets of the estate, and the burden of proof is on him to show that the debt due the estate could not have been collected by the exercise of proper diligence. *Booker v. Armstrong*, 93 Mo. 49.

1. Matters Excusing Delay. — Delay at the request of a life tenant excuses loss resulting from such delay. *Orr v. Orr*, 34 S. Car. 275.

Delay by Administrator After Discovery of Will. — In *Hartsfield v. Allen*, 7 Jones L. (52 N. Car.) 439, an administrator was held not liable for a debt lost by delay in collecting it until the debtor became insolvent, where the administrator was informed that a will had been discovered, but the will was not produced for probate until after the insolvency.

Proof of Payment to Decedent. — In *Pate v. Oliver*, 104 N. Car. 458, a judgment in favor of the decedent had been docketed for seventeen months before his death, but he made no effort during that time to enforce it. His administrator did not move in the matter for three years, when he applied for leave to issue execution on the judgment. The debtor proved on the hearing of the motion that he had paid

the debt to the decedent. It was held that the administrator was not chargeable with laches.

2. Instances of Unreasonable Delay. — In *Norwood v. Duncan*, 10 Martin (La.) 708, it was held that if an executor suffers three years to elapse without taking any steps to recover a debt, and afterwards gives further credit, taking a mortgage in his own name for the aggregate of the debt and another due himself, he becomes liable for the debt.

In *Lafon v. His Executors*, 3 Martin N. S. (La.) 707, neglect for four years to pursue a debt was held sufficient to render the executor liable for the debt.

3. Neglect Must Be Proved. — *Deas v. Spann*, Harp. Eq. (S. Car.) 176.

4. Burden of Proving Neglect — *Choses in Action Left by Decedent.* — *Ivey v. Coleman*, 42 Ala. 409; *Sheppard v. Gill*, 49 Ala. 162.

As to choses in action received from a predecessor, see *Adkins v. Hutchings*, 79 Ga. 260.

In *California* the statute provides that a personal representative shall not be responsible for debts uncollected, if it appears to be without his fault. *Matter of Sanderson*, 74 Cal. 199.

5. Gross Negligence Necessary to Impose Individual Liability — *Mississippi.* — *Smith v. Hurd*, 8 Smed. & M. (Miss.) 682.

New York. — *Ruggles v. Sherman*, 14 Johns. (N. Y.) 446.

Pennsylvania. — *Charlton's Appeal*, 34 Pa. St. 473.

Texas. — *Townsend v. Munger*, 9 Tex. 300.

Virginia. — *M'Connico v. Curzen*, 2 Call (Va.) 358, 1 Am. Dec. 540.

See also *Brandon v. Judah*, 7 Ind. 545.

6. Ignorance of Existence of Claim Excuses Failure to Collect. — *Jones v. Ward*, 10 Yerg. (Tenn.) 161. So also as to a legacy left to the intestate in his lifetime. *Malinda v. Gardner*, 24 Ala. 719.

7. Loss by Mistake. — *King v. Morrison*, 1 P. & W. (Pa.) 188.

Acting on Advice of Attorney. — *Bowen v. Montgomery*, 48 Ala. 353.

If an executor *bona fide* and on reasonable grounds believes that he could not recover, he is not liable for failure to sue. *In re Roberts*, 76 L. T. N. S. 479.

the burden is on him to show a fair reason why he did not commence proceedings to collect a debt.¹

bbb Insolvency of Debtor. — An executor or administrator is not responsible for failing to collect a debt where the debtor was insolvent, unless he failed to exercise the care and diligence required of him by law.²

d. SALE AND TRANSFER OF PERSONAL PROPERTY — (1) *Authority to Sell* — (a) **At Common Law** — *aa. IN GENERAL.* — Executors and administrators have absolute power at common law over the decedent's personal property, and may sell and dispose of it in the same manner and with like effect as the decedent himself might do if living;³ but this authority can be exercised only

1. Failure to Collect—Burden of Proof. — Booker *v. Armstrong*, 93 Mo. 49; *O'Conner v. Gifford*, 117 N. Y. 275.

2. Insolvency of Debtor Excuses Failure to Collect. — *Brooks v. Brooks*, 12 S. Car. 463; *Glover v. Glover*, McMull. Eq. (S. Car.) 153; *O'Dell v. Young*, McMull. Eq. (S. Car.) 155; *Mitchell v. Trotter*, 7 Gratt. (Va.) 136; *Nelson v. Page*, 7 Gratt. (Va.) 160.

In *Powell v. Hurt*, 108 Mo. 507, reversing 31 Mo. App. 632, this rule was applied to a case where the makers of the notes to the testator were insolvent in fact when the note was made, though their credit was good until their failure, nearly three years after the testator's death, and it was held (three of the four judges dissenting) that the executors were not liable, though there was evidence that the makers, if pressed for payment when the note fell due, would have paid it out of certain trust funds in their hands.

Neglect to Litigate a Doubtful Claim does not render an administrator liable for the loss of the claim except on proof of negligence or fraud. *Martin v. Jefcoat*, 10 Rich. Eq. (S. Car.) 118.

If an executor has reasonable grounds to believe that a suit to collect a debt will be ineffectual, and he is so advised by his counsel, his failure to sue will not render him liable in the absence of bad faith. *O'Conner v. Gifford*, 117 N. Y. 275.

Giving an Extension of Credit to debtors who were solvent during the lifetime of the executor, but became insolvent after his death, does not render the executor's estate liable for loss so incurred. *Doud v. Sanders*, Harp. Eq. (S. Car.) 277.

Proof of Insolvency. — The testimony of the executors that certain notes which came to their hands were not collectible, that the makers were insolvent when the notes were received, and that they so remained, makes a *prima facie* case for the executors. *Bailey v. Penick*, 10 Ky. L. Rep. 239.

3. Power of Disposal Absolute at Common Law — *England.* — *Nugent v. Gifford*, 1 Atk. 463; *Mead v. Orrery*, 3 Atk. 235; *Whale v. Booth*, 4 T. R. 625, note a; *Humble v. Bill*, 2 Vern. 444; *Scott v. Tyler*, 2 Dick. 725; *M'Leod v. Drummond*, 14 Ves. Jr. 360, 17 Ves. Jr. 154; *Hill v. Simpson*, 7 Ves. Jr. 166; *Bonney v. Ridgard*, 1 Cox 145; *Miles v. Durnford*, 2 De G. M. & G. 641, 13 Eng. L. & Eq. 123; *Andrew v. Wrigley*, 4 Bro. C. C. 138; *Keane v. Roberts*, 4 Madd. 357; *Sanders v. Richards*, 2 Coll. 568; *Hayner v. Forshaw*, 11 Hare 93; *Ball v. Harris*, 8 Sim. 485; *Russell v. Plaipe*, 18 Beav. 21.

United States. — *Smith v. Ayer*, 101 U. S. 320.

Alabama. — *Beattie v. Abercrombie*, 18 Ala. 9; *Waring v. Lewis*, 53 Ala. 615; *Van Hoose v. Bush*, 54 Ala. 342; *Baldwin v. Hatchett*, 56 Ala. 461.

Connecticut. — *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580; *Johnson v. Connecticut Bank*, 21 Conn. 156; *Buckingham's Appeal*, 60 Conn. 159.

Illinois. — *Makepeace v. Moore*, 10 Ill. 474.

Indiana. — *Weyer v. Franklin Second Nat. Bank*, 57 Ind. 198; *Rogers v. Zook*, 86 Ind. 237.

Iowa. — *Marshall County v. Hanna*, 57 Iowa 372.

Maine. — *Crooker v. Jewell*, 31 Me. 306; *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338.

Maryland. — *Salmon v. Clagett*, 3 Bland (Md.) 125; *Neale v. Hagthorpe*, 3 Bland (Md.) 551; *Allender v. Riston*, 2 Gill & J. (Md.) 86.

Massachusetts. — *Clark v. Blackington*, 110 Mass. 369; *Shaw v. Spencer*, 100 Mass. 392, 1 Am. Rep. 115, 97 Am. Dec. 107.

Mississippi. — *Booyer v. Hodges*, 45 Miss. 78.

Missouri. — *Overfield v. Bullitt*, 1 Mo. 749; *Smarr v. McMaster*, 35 Mo. 349.

New Jersey. — *Hayes v. Hayes*, 45 N. J. Eq. 461.

New York. — *Sutherland v. Brush*, 7 Johns. Ch. (N. Y.) 17, 11 Am. Dec. 383; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; *Hertell v. Bogert*, 9 Paige (N. Y.) 52; *Sherman v. Willett*, 42 N. Y. 146; *Leitch v. Wells*, 48 N. Y. 585.

North Carolina. — *Gray v. Armistead*, 6 Ired. Eq. (41 N. Car.) 74; *Bradshaw v. Simpson*, 6 Ired. Eq. (41 N. Car.) 243; *Polk v. Robinson*, 7 Ired. Eq. (42 N. Car.) 235; *Tyrrell v. Morris*, 1 Dev. & B. Eq. (21 N. Car.) 559.

Ohio. — *Jelke v. Goldsmith*, 52 Ohio St. 499.

Pennsylvania. — *Petrie v. Clark*, 11 S. & R. (Pa.) 377.

Tennessee. — *Sneed v. Hooper*, *Cooke* (Tenn.) 200, 5 Am. Dec. 601; *Hadley v. Kendrick*, 10 Lea (Tenn.) 525; *McAlister v. Montgomery*, 3 Hayw. (Tenn.) 98; *Johnson v. Kay*, 8 Humph. (Tenn.) 142.

Vermont. — *Mead v. Byington*, 10 Vt. 116.

Virginia. — *Knight v. Warborough*, 4 Rand. (Va.) 566; *Hunter v. Lawrence*, 11 Gratt. (Va.) 111, 62 Am. Dec. 640.

Wisconsin. — *Williams v. Ely*, 13 Wis. 1, *Munteith v. Rahn*, 14 Wis. 210.

For the states in which the common-law rule has been changed by statute, see *infra*, this section, *Statutory Sales under Order of Court*.

while the personal representative is in office, because his title to the assets is divested as soon as he ceases to be executor or administrator.¹

The Principle on which the power of disposal rests is that in many cases it is necessary for the executor or administrator to sell in order to perform the duties of his office, and no one would buy from him if liable afterwards to be called to account.²

bb. SALE IN SATISFACTION OF DECEDENT'S DEBTS. — Under the general authority of the executor or administrator to sell the personal property of the dece-

"An executor or administrator is, in equity, regarded as a trustee; but then, in equity, as well as at law, an administrator is considered, in general, as the absolute owner of the assets of the deceased, whether they be legal or equitable, or choses in action. The exercise of the powers of unqualified ownership to a certain extent is indispensably necessary to enable him to execute his trust, and to discharge his duty to advantage, and also to prevent the general inconvenience of implicating and entangling third persons in inquiries as to the application he may propose to make of the money produced by the conversion of the assets. A fair purchaser for a valuable consideration is in no way bound to see to the application of the purchase money by an executor. He cannot have the means of knowing the debts of the deceased, and is, therefore, absolved from all inquiry respecting them. Upon these general principles, not even a creditor of the deceased is permitted to follow the assets so aliened; for the demand of a creditor is only a personal demand against the executor in respect of the assets come to his hands, but no lien on the assets. And a specific or residuary legatee can stand upon no higher ground, in this respect, than a creditor." *Salmon v. Clagett*, 3 Bland (Md.) 169.

The Power to Sell Is an Incident of the Office of the personal representative, and determines with the office; hence a sale made after the official title has become divested by removal or otherwise confers no title on the purchaser. *Whorton v. Moragne*, 62 Ala. 201.

A Sale for Payment of Debts may be made by an executor though the testator has by his will provided a fund for that purpose. *Tyrell v. Morris*, 1 Dev. & B. Eq. (21 N. Car.) 559.

Giving Away Assets. — An executor or administrator has no power to make a valid gift of any part of the estate, *Powers v. Powers*, 48 How. Pr. (N. Y. Super. Ct.) 389; even though he may consider it of no value, *Matter of Radovich*, 74 Cal. 536, 5 Am. St. Rep. 466.

This proposition is also supported by the principle that the estate of an executor or administrator in the property of the decedent is not beneficial, but fiduciary in character. See *supra*, this section, *Personal Property—Title and Right to Possession—Nature of Title*.

A Claim for Services Rendered by the Decedent in his lifetime is personal property which may be sold by the administrator. *Lappin v. Mumford*, 14 Kan. 9.

A Right of Action for Infringement of a Patent owned by a decedent may be transferred by his executor or administrator. *May v. Logan County*, 30 Fed. Rep. 250.

A Residue of Personal Property Which Is Given

for Life, with a remainder over, ought to be sold by the executor, and the interest on the amount of sales should be paid to the legatee for life, the principal being kept by the executor for the remainderman. *Smith v. Barham*, 2 Dev. Eq. (17 N. Car.) 420, 25 Am. Dec. 721; *Jones v. Simmons*, 7 Ired. Eq. (42 N. Car.) 178.

A Reversionary Interest in Chattels is not the subject of sale by an executor or administrator, though it may be subjected to the payment of debts by proceedings in equity. *May v. May*, 7 Fla. 207, 68 Am. Dec. 431.

The Interest of the Decedent in a Partnership of which he was a member at the time of his death may be sold by his executor or administrator to the surviving partner or to any one else. *Chambers v. Howell*, 11 Beav. 6; *Roys v. Vilas*, 18 Wis. 169; *Lawrence v. Vilas*, 20 Wis. 381.

Equitable Assets. — There is no difference in equity between the power of an executor to dispose of equitable and of legal assets. *Nugent v. Gifford*, 1 Atk. 463.

1. Authority Terminates with Office. — *Whorton v. Moragne*, 62 Ala. 201.

But a sale made while in office is not invalidated by the representative's subsequent removal, resignation, or discharge. *Price v. Nesbit*, 1 Hill Eq. (S. Car.) 445; *Benson v. Rice*, 2 Nott & M. (S. Car.) 577. See also *supra*, this title, *Appointment and Tenure of Office*, subdiv. 4. *c. Removal from Office or Revocation of Letters*.

Executor Not Qualifying. — Where a person named as executor did not qualify by giving bond as required by statute, a sale by him is void as against an executor who did qualify. *Monroe v. James*, 4 Munf. (Va.) 194.

2. This Principle is laid down by Lord Mansfield in *Whale v. Booth*, 4 T. R. 625, note *a*.

"It is of great consequence," said Lord Thurlow, "that no rule should be laid down here which may impede executors in their administration, or render their disposition of their testator's effects unsafe or uncertain to the purchaser." *Scott v. Tyler*, 2 Dick. 725.

"This General Power of Sale and Disposition flows from the nature of the interest which executors and administrators are said to have in the personal property of their testators and intestates. In quality their interest is not the absolute, proper, and general interest which every person has in his own goods, for they are seized in right of another merely, and as ministers or dispensers of the goods of the dead. But in quantity their interest is coextensive with that of the persons whom they represent. As an incident to such ownership they have, subject to the limitations above stated, the same absolute power of disposal and control." *Williams v. Ely*, 13 Wis. 7.

dent to pay debts, he may, in the absence of statutory restrictions, sell a chattel to a creditor of the decedent in satisfaction of the debt.¹

cc. SALE IN SATISFACTION OF DEBTS OF EXECUTOR OR ADMINISTRATOR. — It was formerly the rule of law that executors and administrators could make a valid sale of the personal property of the decedent in satisfaction of their individual debts,² but the rule in equity, which now obtains both in *England* and in the *United States*, is that they cannot sell in payment of their individual debts unless they are in advance to the estate.³

(b) *Statutory Sales under Order of Court.* — The common-law power of executors and administrators to sell and dispose of the personal property of their decedents has been variously restricted by statute in the *United States*, and in nearly all of the states is more or less the subject of statutory regulation. In some states the common-law power is entirely abrogated, and no sale can be made without first obtaining an order of court authorizing it,⁴ while in other

1. *Sale in Satisfaction of Decedent's Debts Authorized.* — *Hepworth v. Heslop*, 6 Hare 561; *Parker v. Daughtry*, 111 Ala. 529. And he need not wait for a judgment to be recovered against him by the creditor. *Smith v. Pollard*, 4 B. Mon. (Ky.) 69.

2. *Sale in Satisfaction of Individual Debts — Rule at Law.* — Toller on Executors 256, 257; *Whale v. Booth*, 4 T. R. 625, note a; *Farr v. Newman*, 4 T. R. 624; *Allender v. Riston*, 2 Gill & J. (Md.) 86.

Bayley, B., lays down the rule that an executor or administrator may make an effectual disposal of the assets "in consideration of a debt of his own and to discharge his own debt, if there be no fraud in the creditor in accepting of such disposal." *Doe v. Fallows*, 2 Crompt. & J. 481, 2 Tyrw. 460.

3. *Rule in Equity — No Power to Sell for Individual Debts.* — *Bonney v. Ridgard*, 1 Cox 145; *Keane v. Roberts*, 4 Madd. 357; *Watkins v. Cheek*, 2 Sim. & S. 205; *Wilson v. Moore*, 1 Myl. & K. 127; *Eland v. Eland*, 4 Myl. & C. 427; *Pannell v. Hurley*, 2 Coll. 241; *Cubbidge v. Boatwright*, 1 Russ. 549; *Downes v. Power*, 2 Ball. & B. 491; *Collinson v. Lister*, 20 Beav. 356; *Cole v. Muddle*, 10 Hare 186; *Haynes v. Forshaw*, 11 Hare 99; *Scott v. Tyler*, 2 Dick. 724, 2 Bro. C. C. 433; *Andrew v. Wrigley*, 4 Bro. C. C. 136; *Hill v. Simpson*, 7 Ves. Jr. 152; *M'Leod v. Drummond*, 17 Ves. Jr. 154; *In re Morgan*, 18 Ch. Div. 93; *Ricketts v. Lewis*, 20 Ch. Div. 745.

Under Special Circumstances, however, it has been held in equity that sales in payment of the individual debts of the executor or administrator were valid. *Nugent v. Gifford*, 1 Atk. 463; *Mead v. Orrery*, 3 Atk. 235.

Rule in Equity Followed by Courts of Law in England. — It is provided by the English Judicature Act that in all matters where there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail. Stat. 36 & 37 Vict., c. 66, § 25, subd. 11.

Rule of Equity Followed in the United States — Alabama. — *Williamson v. Branch Bank*, 7 Ala. 906, 42 Am. Dec. 617.

California. — *Horton v. Jack*, (Cal. 1894) 37 Pac. Rep. 652.

Maryland. — *Miller v. Williamson*, 5 Md. 219. *New York.* — *Colt v. Lasnier*, 9 Cow. (N. Y.) 327; *Clark v. Coe*, 52 Hun (N. Y.) 379.

North Carolina. — *Hendrick v. Gidney*, 114 N. Car. 543.

Pennsylvania. — *Martin's Appeal*, 13 W. N. C. (Pa.) 167; *Linton's Appeal*, 14 W. N. C. (Pa.) 450; *Garrard v. Pittsburgh, etc.*, R. Co., 29 Pa. St. 158; *Ellis's Appeal*, 8 W. N. C. (Pa.) 538; *Miller v. Ege*, 8 Pa. St. 352.

Virginia. — *Dodson v. Simpson*, 2 Rand. (Va.) 294; *Graff v. Castleman*, 5 Rand. (Va.) 195, 16 Am. Dec. 741.

Wisconsin. — *Weir v. Mosher*, 19 Wis. 311; *Stronach v. Stronach*, 20 Wis. 129.

An Executor or Administrator in Advance to an Estate may apply the assets of the decedent to his individual purposes. *Graff v. Castleman*, 5 Rand. (Va.) 195, 16 Am. Dec. 741.

See also *infra*, this section, *Purchase by Executor or Administrator.*

As to the Distinction in regard to Bonds or Notes taken by an executor or administrator for the price of property sold, see *infra*, this section, *Sale of Choses in Action.*

4. *Statutory Power of Sale — Order of Court Necessary — Alabama.* — *Ikelheimer v. Chapman*, 32 Ala. 676; *Lay v. Lawson*, 23 Ala. 377; *Woolfork v. Sullivan*, 23 Ala. 548; *Dearman v. Dearman*, 4 Ala. 521; *Hopper v. Steele*, 18 Ala. 828; *Reynolds v. Kirkland*, 44 Ala. 312; *Wyatt v. Rambo*, 29 Ala. 510, 68 Am. Dec. 89; *Waring v. Lewis*, 53 Ala. 615.

Arkansas. — *Winningham v. Holloway*, 51 Ark. 385.

California. — *Hill v. Den*, 54 Cal. 23; *Matter of Radovich*, 74 Cal. 536, 5 Am. St. Rep. 466; *In re Sanderson*, (Cal. 1887) 13 Pac. Rep. 497.

Georgia. — *Poullain v. Brown*, 82 Ga. 412; *Wright v. Zeigler*, 1 Ga. 324.

Maryland. — *Phippard v. Forbes*, 4 Har. & M. (Md.) 481; *Allender v. Riston*, 2 Gill & J. (Md.) 86; *Albert v. Baltimore Sav. Bank*, 1 Md. Ch. 407, 2 Md. 159; *Lark v. Linstead*, 2 Md. Ch. 162, 2 Md. 420; *Miller v. Williamson*, 5 Md. 219; *Mitchell v. Williamson*, 6 Md. 210; *Stewart v. Firemen's Ins. Co.*, 53 Md. 564; *Crow v. Hubard*, 62 Md. 560; *Brooks v. Bergner*, 83 Md. 352.

Mississippi. — *Bland v. Muncaster*, 24 Miss. 62, 57 Am. Dec. 162; *Gelstrop v. Moore*, 26 Miss. 206, 59 Am. Dec. 254; *Edmundson v. Roberts*, 2 How. (Miss.) 822.

Oregon. — *Weider v. Osborn*, 20 Oregon 307.

South Carolina. — *Jones v. McNeill*, 1 Hill L. (S. Car.) 84; *Saxon v. Barksdale*, 4 Desaus. (S.

states an order of court, though not necessary to give authority to sell, affords the executor or administrator protection from liability which he would otherwise incur,¹ and in others the mode of making the sale is particularly prescribed by statute, but no order of court is required to authorize it.² The statutory provisions requiring an order of sale before an executor or administrator can sell the personal property of the decedent and those authorizing the sale of real estate are usually parts of the same statutes, and the principles

Car.) 522; *Rhame v. Lewis*, 13 Rich. Eq. (S. Car.) 269.

Under a former statute in *South Carolina* (Executors' Law of 1789), providing that "when it should be requisite to make sale of the intestate's personal estate, for payment of debts, for a division, or to prevent the loss of perishable articles, application should be made to the court of the county, or ordinary, for an order for sale; whereupon the court or ordinary might grant or refuse such order, regulating the time, place, and credit to be given, in such manner as to do justice to all persons concerned therein," it was held that it was not necessary for an administrator to obtain such an order before he could make a valid sale of the decedent's personality. *Harth v. Heddlestone*, 2 Bay (S. Car.) 321.

A Sale Is Absolutely Void and passes no title to the purchaser if it is made without an order of court. *Pistole v. Street*, 5 Port. (Ala.) 64; *Fambro v. Gantt*, 12 Ala. 298; *Bragg v. Massie*, 38 Ala. 89, 79 Am. Dec. 82; *Ventress v. Smith*, 10 Pet. (U. S.) 161.

Sale to Make Distribution. — In *Georgia* an executor will be enjoined from selling the personality of an estate for the purpose of distribution when it can be divided in kind as well, and the ordinary fails to take the proper steps to bring this about. *McCook v. Pond*, 72 Ga. 150.

In *Mississippi* the authority to sell is restricted to cases where it is necessary for the payment of debts or for purposes of distribution. *Bland v. Muncaster*, 57 Miss. 62, 42 Am. Dec. 162.

In *Pennsylvania* it is provided by statute that on the marriage of a sole executrix she will be required to produce the securities of the estate, to be indorsed by the clerk, "Not to be assigned or satisfied without leave of the court." *Kayser's Estate*, 5 Pa. Dist. Rep. 738.

Sale of Annual Crops. — The *Georgia* statute requires an executor or administrator to obtain leave of the ordinary before selling any of the decedent's property except annual crops, which may be sent to market without such order. But the market contemplated by the statute is the domestic market, and where an administrator shipped cotton abroad in order to obtain a better price, and it was lost by the sinking of the ship, it was held that the administrator was liable for its value because of his unauthorized act. *Poullain v. Brown*, 82 Ga. 412.

Statute Applicable Only to Tangible Personality. — The *Alabama* statute requiring an executor or administrator to obtain an order of sale is construed to apply only to visible, tangible personal property, and to leave his power of disposal in respect to other personality as at

common law. *Reynolds v. Kirkland*, 44 Ala. 312; *Waring v. Lewis*, 53 Ala. 615; *Curry v. Peebles*, 83 Ala. 225; *Chandler v. Chandler*, 87 Ala. 300.

The same construction has been given to the *Oregon* statutes in *Weider v. Osborn*, 20 Oregon 307.

Sale Without License — Measure of Liability. — Even if an executor sells property without a license from the ordinary, he can be charged only with the value of the property and interest. *Dudley v. Sanborn*, 159 Mass. 185; *Wright v. Wright*, 2 McCord Eq. (S. Car.) 185.

1. These Statutes Are Merely Directory, and though a noncompliance with them may affect the accountability of the executor or administrator for the property sold or the proceeds of the sale, it will not affect the validity of the sale itself if made in good faith and otherwise unobjectionable. *Clark v. Blackington*, 110 Mass. 369; *Sherman v. Willett*, 42 N. Y. 146; *Harth v. Heddlestone*, 2 Bay (S. Car.) 321; *Mead v. Byington*, 10 Vt. 116.

Liability on Sale Without Order of Court. — The personal representative has the absolute power of sale of the personal property without the order of the court; but if the sale is for less than the appraised value he is liable for such value. *Williams v. Ely*, 13 Wis. 1; *Munteith v. Rahn*, 14 Wis. 210. See also *Harris's Succession*, 29 La. Ann. 743; *French v. Currier*, 47 N. H. 88.

In *Louisiana* the *Universal Legatee* of a succession, who has accepted it and who has also qualified as executrix, may, in her capacity as owner, make a valid sale of the property of the succession without an order of court authorizing her to act. *Wells v. Wells*, 30 La. Ann. 935.

2. Mode of Sale Prescribed Without Requiring Leave of Court. — *Weyer v. Franklin* Second Nat. Bank, 57 Ind. 198; *Williams v. Perrin*, 73 Ind. 57; *Rogers v. Zook*, 86 Ind. 237; *Citizens St. R. Co. v. Robbins*, 128 Ind. 449, 25 Am. St. Rep. 445; *Lappin v. Mumford*, 14 Kan. 9; *Thomas v. Pullis*, 56 Mo. 211; *Stagg v. Linnenfelter*, 59 Mo. 336; *Chandler v. Stevenson*, 68 Mo. 450.

Restrictive Effect of Statutes. — "The provisions of our statutes, and similar ones in other states, prescribing the manner and conditions of sale," says *Brewer, J.*, "are to be regarded rather as restrictions upon this otherwise absolute power than as original grants of power. The administrator who, independent of such provisions, could sell when he pleased, and upon such terms as suited him, responsible to the creditors and heirs only for reasonable fidelity in his trust, must now proceed in accordance with the regulations of the statute." *Lappin v. Mumford*, 14 Kan. 9.

which govern in regard to the sale of real estate are in the main applicable to sales of personality under order of court.¹

(c) **Testamentary Authority to Sell.**—A power of sale may be conferred on an executor by the will, in which event he acts in making the sale by virtue of the power so conferred, and not by virtue of his common-law power or pursuant to any authority derived from the probate court.²

Restrictions May Also Be Imposed by the will on the executor with reference to the sale of the testator's personality.³

(d) **Sale of Property Specifically Bequeathed.**—Chattels specifically bequeathed may be sold by an executor or administrator. This proposition is now well established,⁴

1. **For a Full Discussion** of sales of real estate by executors and administrators see *infra*, this title, *Sale of Real Estate under Order of Court*.

2. **Power of Sale Conferred by Will.**—Norris v. Harris, 15 Cal. 255; Matter of Durham, 49 Cal. 490; Jackson v. Williams, 50 Ga. 553; Smith v. Taylor, 21 Ill. 296.

Where a Will Authorizes the Sale of property to pay debts, without specifying the manner in which the sale shall be made, the executor may sell privately, and without previous advertisement or leave of the ordinary. Wright v. Zeigler, 1 Ga. 343.

Where a Will Directs the Sale of All the Testator's Property, but does not designate the person by whom the sale is to be made, it devolves on the executor by necessary implication, because whenever such a power is given by will the law casts it on the person who is appointed by the testator to execute the will, unless it is specially delegated to another. McCollum v. McCollum, 33 Ala. 711.

No Power to Sell Without Leave of the Probate Court is conferred by a provision in a will that "all the rest and residue of my estate, real and personal and mixed, I desire to be collected together by my executor and be used in the settlement of my just debts," because such a provision is no more than a dedication of the property to the uses to which the law itself would have devoted it, and leaves the executor with precisely the same rights in respect to it which he would have taken in the absence of the provision quoted. Chandler v. Chandler, 87 Ala. 300.

Under the Maryland Statute an executor cannot sell pursuant to a direction contained in the will without obtaining an order of the Orphans' Court, unless the words "without application to the Orphans' Court" are expressed in the will. Brooks v. Bergner, 83 Md. 352.

In Louisiana an executor cannot sell by private sale, where there are minor heirs, though he is authorized by the will to act extrajudicially. De Lemos v. Garcia, 1 Martin N. S. (La.) 324.

In Some Jurisdictions statutes authorizing the probate courts to order a sale of the personal property expressly except cases where the power to sell is given by will. McCollum v. McCollum, 33 Ala. 711.

Liability of Representative.—In Wilson's Appeal, 4 Penny. (Pa.) 432, it was held that an administrator was not liable where a bond taken by him for the price of property sold pursuant to the will proved uncollectible in

part, it appearing that he had realized as much for the estate as he could by any other course.

In Grayburn v. Clarkson, L. R. 3 Ch. 605, a testator entitled to shares in a company with unlimited liability directed his executors to convert his estate with all convenient speed. P., one of the three executors, died a year and five weeks after the testator. The shares were not converted, and about fifteen years afterwards the company was wound up, and the surviving executors, being placed on the list of contributories, paid a large sum out of the estate for calls. A bill was filed against the surviving executors, and the executors of P. to make them liable for the loss. P.'s executors did not answer, nor did they in evidence give any reason why conversion had not taken place within twelve months from the testator's death. It was held that P.'s estate was liable for all loss occasioned to the testator's estate by the omission to sell the shares within twelve months.

Disobeying the Directions in the Will to sell renders the executor liable for any loss that may result. Doyle's Estate, 2 Del. Co. Rep. (Pa.) 196.

3. **Power of Sale Restricted by Will.**—Smith v. Smith, 1 Desaus. (S. Car.) 304; Evans v. Evans, 1 Desaus. (S. Car.) 515. In the case last cited it was held that where the sale was made against the testator's directions, and without absolute necessity, the executor became personally responsible for any bad debts resulting; but the sale itself appears to have conferred a good title.

And in Tyrrell v. Morris, 1 Dev. & B. Eq. (21 N. Car.) 559, it was held that the fact that the testator had created a particular fund for the payment of his debts, of which the property sold was not a part, and that the purchaser had notice of the will, did not affect the validity of the sale.

4. **Chattels Specifically Bequeathed May Be Sold.**—Ewer v. Corbet, 2 P. Wms. 149; Langley v. Oxford, Amb. 17; M'Mullen v. O'Reilly, 15 Ir. Rep. 251; Elliott v. Merriman, Barn. 78; Andrew v. Wrigley, 4 Bro. C. C. 125; Allender v. Riston, 2 Gill & J. (Md.) 86; Hayes v. Hayes, 45 N. J. Eq. 461; Roys v. Vilas, 18 Wis. 169.

"If equity were otherwise, it would be a great hinderance to the payment of debts and legacies, and would lay an embargo upon all personal estates in the hands of executors and administrators; which would be attended with great inconveniences." Ewer v. Corbet, 2 P. Wms. 148.

In Garnett v. Macon, 6 Call (Va.) 308, Chief

though it was formerly questioned;¹ but ordinarily the exercise of this power is proper only when some necessity for it exists, as when the other personal property is insufficient for the payment of the decedent's debts,² or when a sale is necessary to protect the interests of the legatee.³

(e) **Sale of Choses in Action** — *aa.* IN GENERAL. — Executors and administrators take the full legal title to the choses in action of the estates committed to their charge, with authority to transfer them as fully as if they were the absolute owners, subject only to liability for improvidence in the exercise of their authority.⁴ And, though ordinarily choses in action should be collected,

Justice Marshall held that if a person purchased a chattel when he knew that it was specifically bequeathed, and that there were no debts, he would not take a good title as against the legatee.

1. **Rule Formerly Questioned.** — See *Hayes v. Hayes*, 45 N. J. Eq. 461. See also *Humble v. Bill*, 2 Vern. 444.

2. **Necessity of Sale — Payment of Debts.** — *Matter of McCarthy*, 26 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 397; *Saxon v. Barksdale*, 4 Desaus. (S. Car.) 522. See also *Psyche v. Paradol*, 6 La. 376.

Where chattels are bequeathed for life with a direction that they be sold after the termination of the life estate, the executor has no power to sell until the termination of the life estate without leave of court. *Duke v. Palmer*, 10 Rich. Eq. (S. Car.) 380.

In South Carolina an executor cannot, under the statute of 1789, sell a specific legacy, for payment of debts, without authority from the ordinary. *Saxon v. Barksdale*, 4 Desaus. (S. Car.) 522.

3. **Sale for Protection of Legatee's Interests.** — *Joslin v. Caughlin*, 26 Miss. 134.

4. **Executor or Administrator May Transfer Choses in Action** — *Alabama.* — *Baldwin v. Hatchett*, 56 Ala. 461; *Hutchinson v. Owen*, 59 Ala. 326; *Nelson v. Stollenwerck*, 60 Ala. 140; *Chandler v. Chandler*, 87 Ala. 300; *Winter v. London*, 99 Ala. 263.

California. — *Low v. Burrows*, 12 Cal. 181.

Connecticut. — *Beecher v. Buckingham*, 18 Conn. 120, 44 Am. Dec. 580; *Hough v. Bailey*, 32 Conn. 288.

Illinois. — *Makepeace v. Moore*, 10 Ill. 474; *Dwight v. Newell*, 15 Ill. 333; *Walker v. Craig*, 18 Ill. 125; *Hickox v. Frank*, 102 Ill. 660.

Indiana. — *Hamrick v. Craven*, 39 Ind. 241. *Iowa.* — *Marshall County v. Hanna*, 57 Iowa 372.

Kentucky. — *Trimble v. Lebus*, 94 Ky. 304.

Massachusetts. — *Clark v. Blackington*, 110 Mass. 369.

Mississippi. — *Owen v. Moody*, 29 Miss. 79; *Miller v. Helm*, 2 Smed. & M. (Miss.) 687; *Scott v. Searles*, 7 Smed. & M. (Miss.) 498, 45 Am. Dec. 317; *Searles v. Scott*, 14 Smed. & M. (Miss.) 94.

New Hampshire. — *Ladd v. Wiggin*, 35 N. H. 430, 69 Am. Dec. 551.

New York. — *Meeker v. Crawford*, 5 Redf. (N. Y.) 450; *Mahaney v. Walsh*, 16 N. Y. App. Div. 601.

North Carolina. — *Tyrrell v. Morris*, 1 Dev. & B. Eq. (21 N. Car.) 560; *Bradshaw v. Simpson*, 6 Ired. Eq. (41 N. Car.) 243; *Gray v. Armistead*, 6 Ired. Eq. (41 N. Car.) 74; *Rid-dick v. Moore*, 65 N. Car. 382.

Ohio. — *Jelke v. Goldsmith*, 52 Ohio St. 499. *South Carolina.* — *Reynolds v. Rees*, 23 S. Car. 445; *Chapman v. Charleston*, 30 S. Car. 549.

Virginia. — *Morris v. Duke*, 2 Patt. & H. (Va.) 462.

A Judgment Is Assignable by the judgment creditor's executor or administrator. *Dickson v. Crawley*, 112 N. Car. 629.

So a decree foreclosing a mortgage for non-payment of one of the instalments due under it, and finding a certain sum due and a certain sum to become due on account of the un-matured instalments, may be assigned by the mortgagee's administrator, and the assignment will carry with it the mortgage and the notes secured by it. *Brand v. Smith*, 99 Mich. 395.

Shares of Stock in a Foreign Corporation may be sold and transferred by the executor of the deceased owner. *Middlebrook v. Merchants' Bank*, 3 Keyes (N. Y.) 135; *Matter of Cape May*, etc., Nav. Co., 51 N. J. L. 78.

Contracts Relating to Land. — A contract for the construction of a railroad provided that the contractor should receive a conveyance of thirty sections of land on completion of each ten miles of road. On the death of the contractor before completing the construction of the road, it was held that his rights under the contract as to the uncompleted portion constituted a chose in action which his administrator could assign, but that as to the completed portion his right to a conveyance was real estate which the administrator could not sell except under an order of court as for a sale of lands. *Winslow v. Crowell*, 32 Wis. 639.

Notes Made Payable to an Executor or Administrator on account of money due the estate may be assigned by him. *Clark v. Moses*, 50 Ala. 326; *Nelson v. Stollenwerck*, 60 Ala. 140; *Payne v. Flournoy*, 29 Ark. 500; *Speelman v. Culbertson*, 15 Ind. 441; *Gayle v. Ennis*, 1 Tex. 184; *Lipscomb v. Ward*, 2 Tex. 277. Compare *Groce v. Herndon*, 2 Tex. 410; *Butler v. Robertson*, 11 Tex. 142; *Claiborne v. Yoeman*, 15 Tex. 44; *Rider v. Duval*, 28 Tex. 622.

Transfers Executed in Individual Name. — Shares of stock standing in the name of a decedent may be assigned by the executor or administrator in his individual name. *Leitch v. Wells*, 48 N. Y. 585; *Mahaney v. Walsh*, 16 N. Y. App. Div. 601. And such assignment carries with it a transfer of a cause of action for the conversion of the stock. *Mahaney v. Walsh*, 16 N. Y. App. Div. 601.

In *Harvey v. Van Cott*, 71 Hun (N. Y.) 394, the same point was decided in regard to the assignment of a life-insurance policy.

So also it was held in *Henke's Appeal*, (Pa. 1888) 14 Atl. Rep. 45, that executors could

rather than sold, circumstances may render a sale, even at a discount, beneficial to the estate; and of the existence of such circumstances the executor or administrator is to judge in the exercise of the discretion committed to him.¹

Transfers in Satisfaction of the Decedent's Debts may be made by an executor or administrator, and in some jurisdictions such transfers are expressly authorized by statute;² but the personal representative has no right to make such a transfer to the prejudice of other creditors of the estate, though it will be sustained as between himself and the transferee.³

Transfers in Satisfaction of Individual Debts, however, are not within the powers of an executor or administrator, for the same reasons that apply in case of the sale of other personal property.⁴

Leave of Court to Sell Choses in Action is required by statute in some jurisdictions, while in others statutes providing that executors and administrators shall not sell the property of the decedent without obtaining an order of the probate

assign certificates of state loans in their individual names. The mere fact, it was said, that the executors did not designate themselves as such when they were exercising their power to transfer the certificates can have no significance. It must be presumed that they were exercising some power which they possessed, and not that they were attempting to do what they had no authority to do.

See also *In re Venn's Contract*, 8 Reports 220, (1894) 2 Ch. 101, where it was held that a transfer of a lease executed by an executor in his individual name would be presumed to have been executed in the discharge of his executorial duties, though twenty-six years had elapsed since the lease had been granted to him as executor.

But where the administratrix, the widow of the decedent, transferred a judgment by executing an assignment in her individual name alone, it was held that only her dower interest in the judgment passed by the transfer. *Halsey v. Bush*, (Ky. 1895) 30 S. W. Rep. 4.

1. Propriety of Selling Choses in Action — Benefit to Estate. — "It is true, bonds, notes, bills, and accounts are not ordinarily sold, and in most cases ought not to be. They are regarded as personal property, in a sort of intermediate condition between goods and chattels and money, the standard of value; as it were, the former in process of reduction to the latter. Hence the interests of the estate are generally promoted by the collection, rather than the sale, of such property. But nevertheless they are personal property, and, as such, subject to sale." *Lappin v. Mumford*, 14 Kan. 9. See also *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580; *Trevelyan v. Lofft*, 83 Va. 141.

Sale at Discount. — In *Billington's Appeal*, 3 Rawle (Pa.) 48, it was held that where an administrator had sold real estate on credit more advantageously than it could have been sold for cash, and was subsequently pressed for money, he was justified in selling at a discount some of the securities taken for the price, the interest of the estate being thereby promoted.

Mining Stocks Which Are Only an Expense to the estate should be disposed of, unless it be quite evident that it would be for the interest of the estate to hold them. *Matter of Millenovich*, 5 Nev. 161.

2. Transfer in Payment of Debts — Statutory Authority. — The *Missouri* statute authorizes

an executor or administrator to assign any note or bond of the estate to any creditor, legatee, or distributee in discharge of the amount of his claim equal to the amount of the note or bond. *Cowgill v. Linville*, 20 Mo. App. 138. But it is held that this statute does not permit the assignment of a note to a person who is jointly liable with the estate on a note to a third person, because a joint obligor is not a creditor of the estate, though he may become such by paying the note to the third person. *Chandler v. Stevenson*, 68 Mo. 450.

3. Transfer in Payment of Debts — Prejudice to Other Creditors. — *Payne v. Flournoy*, 29 Ark. 500; *Whittaker v. Wright*, 35 Ark. 511; *Fritz v. Thomas*, 1 Whart. (Pa.) 66, 29 Am. Dec. 39; *James's Appeal*, 80 Pa. St. 54; *Stephens v. Cotterell*, 99 Pa. St. 188.

Transfer Valid as Between Administrator and Transferee. — *Neely v. Bair*, 157 Pa. St. 417.

4. Transfer in Payment of Individual Debts Not Authorized — Alabama. — *Shelton v. Carpenter*, 60 Ala. 201.

Delaware. — *Barwick v. White*, 2 Del. Ch. 284.

Indiana. — *Thomasson v. Brown*, 43 Ind. 203.

Mississippi. — *Miller v. Helm*, 2 Smed. & M. (Miss.) 687; *Scott v. Searles*, 7 Smed. & M. (Miss.) 498, 45 Am. Dec. 317.

North Carolina. — *Latham v. Moore*, 6 Jones Eq. (59 N. Car.) 167; *Hendrick v. Gidney*, 114 N. Car. 543.

Tennessee. — *Smartt v. Watterhouse*, 6 Humph. (Tenn.) 158.

Texas. — *Bledsoe v. White*, 42 Tex. 130.

Alien of Solvent Representative Held to Acquire Title. — Where the executor or administrator of the decedent is solvent, and, in payment of a debt of his own, alienates choses in action received by him as the price of property of the decedent which he has sold, it is held in *Thackum v. Longworth*, 2 Hill Eq. (S. Car.) 267, that the equities of the alienee are equal to the equities of the creditor's estate, and therefore that the legal title of the alienee will prevail. It is admitted that a different rule is applicable where the executor or administrator making such transfer is insolvent. But see *Fisher v. Bassett*, 9 Leigh (Va.) 110, 33 Am. Dec. 227; *Brockenbrough v. Turner*, 78 Va. 447.

court authorizing them to do so are construed to apply only to visible, tangible personality, and to leave the power to dispose of choses in action as it existed at common law.¹

bb. MORTGAGES. — A mortgage of real estate, being at present merely a security for a debt, is a personal asset of the deceased mortgagee's estate, and as such may be sold and assigned by the executor or administrator without obtaining leave of the probate court as is required when the real estate of a decedent is to be sold.²

cc. NEGOTIABLE INSTRUMENTS. — Negotiable bills and notes payable to a decedent are transferable by the executor or administrator by indorsement and delivery in the same manner as the decedent himself might have transferred them,³ and he has power, and may be compelled, to indorse a note delivered by the decedent in his lifetime under an agreement to indorse it;⁴ but it is necessary that the executor or administrator should both indorse and deliver a negotiable instrument in order to pass title to it, and therefore the mere delivery of a note which the decedent had indorsed before his death will not pass title unless the executor or administrator also indorses it.⁵

dd. FOREIGN DEBTS. — There is a sharp conflict of authority as to whether an executor or administrator may assign a claim against a nonresident so as to authorize the assignee to sue the debtor in the court of his domicile. One line of decisions holds that such assignments cannot be made; and the underlying

1. License to Sell Choses in Action Required by Statute — *Arkansas.* — *Winningham v. Holloway*, 51 Ark. 385.

California. — *Wickersham v. Johnston*, 104 Cal. 407, 43 Am. St. Rep. 118.

Georgia. — *Thompson v. Thompson*, 77 Ga. 692.

Louisiana. — *Nicholson v. Chapman*, 1 La. Ann. 222; *Burbank v. Payne*, 17 La. Ann. 15, 87 Am. Dec. 513.

Missouri. — *Stagg v. Linnenfelder*, 59 Mo. 336; *Weil v. Jones*, 70 Mo. 560.

In Ohio the authority of an executor or administrator to sell stocks, bonds, notes, rights of action, etc., is taken away by statute, except as to desperate claims and stocks and bonds necessary to be sold to pay debts. *Jelke v. Goldsmith*, 52 Ohio St. 499.

Rule that Statutes Requiring Order of Sale Do Not Apply to Choses in Action. See *supra*, this section, *Statutory Sales under Order of Court.*

2. Mortgage Subject to Sale by Executor or Administrator — *Maine.* — *Crooker v. Jewell*, 31 Me. 306; *Libby v. Mayberry*, 80 Me. 137.

Massachusetts. — *Burt v. Ricker*, 6 Allen (Mass.) 77. As to the former rule in Massachusetts, see *Blair, Appellant*, 13 Met. (Mass.) 126.

New Hampshire. — *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551.

North Carolina. — *Neil v. Newbern*, 1 Murph. (5 N. Car.) 133.

Wisconsin. — *Williams v. Ely*, 13 Wis. 1; *Cleveland v. Harrison*, 15 Wis. 670.

A conveyance of land absolute in form, but intended as security for a loan, is in effect a mortgage, and the executor of the lender, on assigning the note given for the loan, may also convey the land to the assignee. *Reeves v. Bolles*, 95 Ga. 402.

Under the Kansas Statute an administrator of a deceased holder of a mortgage given to indemnify the decedent as surety cannot, without authority from the Probate Court, assign

it to the creditor. *Pierce v. Batten*, 3 Kan. App. 396.

3. Negotiable Instruments — Executor or Administrator May Transfer by Indorsement and Delivery — *England.* — *Rawlinson v. Stone*, 3 Wils. 1, *sub nom.* *Robinson v. Stone*, 2 Stra. 1260.

Illinois. — *Makepeace v. Moore*, 10 Ill. 474.

Indiana. — *Crist v. Crist*, 1 Ind. 570, 50 Am. Dec. 481; *Thomas v. Reister*, 3 Ind. 369; *Hamrick v. Craven*, 39 Ind. 241; *Thomasson v. Brown*, 43 Ind. 203; *Krutz v. Stewart*, 76 Ind. 9; *Rogers v. Zook*, 86 Ind. 237; *Latta v. Miller*, 109 Ind. 302.

Mississippi. — *Andrews v. Carr*, 26 Miss. 578; *Owen v. Moody*, 29 Miss. 83; *Booyer v. Hodges*, 45 Miss. 78; *Miller v. Helm*, 2 Smed. & M. (Miss.) 687.

North Carolina. — *Grace v. Hannah*, 6 Jones L. (51 N. Car.) 94; *Wilson v. Doster*, 7 Ired. Eq. (42 N. Car.) 231.

Oregon. — *Weider v. Osborn*, 20 Oregon 307.

Rhode Island. — *Mackay v. St. Mary's Church*, 15 R. I. 121, 2 Am. St. Rep. 881.

Texas. — *Abercrombie v. Stillman*, 77 Tex. 589.

Vermont. — *Cahoon v. Moore*, 11 Vt. 604.

Certificates of Shares of Bank Stock which are transferable only on the books of the bank are not negotiable instruments within this rule. *Weyer v. Franklin Second Nat. Bank*, 57 Ind. 198. See also *Mechanics' Bank v. New York, etc., R. Co.*, 13 N. Y. 599, and the title STOCK.

4. Indorsement of Note Delivered by Decedent Without Indorsement. — *Watkins v. Maule*, 2 Jac. & W. 237; *Malbon v. Southard*, 36 Me. 147. See also the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 254.

5. Indorsement as Well as Delivery Necessary. — *Bromage v. Lloyd*, 1 Exch. 32; *Clark v. Sigourney*, 17 Conn. 511; *Taylor v. Surget*, 14 Hun (N. Y.) 116; *Clark v. Boyd*, 2 Ohio 56. See also the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 263 *et seq.*

considerations on which these cases rest seem to be that the personal representative's authority does not extend beyond the jurisdiction of the state in which he is appointed, and that to give effect to such assignments would really mean an administration in another state, to the possible detriment of resident creditors.¹ The weight of authority, however, affirms the power to make such assignments.²

(f) *Sale of Chattels Real.* — An executor or administrator may dispose absolutely of terms for years belonging to the decedent as well as other personalty.³ But he cannot give an option to purchase at a future time;⁴ and if there are

1. Rule Denying Authority to Assign Claims Against Nonresident. — *Stearns v. Burnham*, 5 Me. 261; *Goodwin v. Jones*, 3 Mass. 514, 3 Am. Dec. 173; *McCarty v. Hall*, 13 Mo. 480; *Matter of Ames*, 52 Mo. 290; *Dial v. Gary*, 14 S. Car. 573, 37 Am. Rep. 737.

2. Rule Asserting Authority to Assign Claims Against Nonresidents — United States. — *Harper v. Butler*, 2 Pet. (U. S.) 239.

Kentucky. — *Cope v. Daniel*, 9 Dana (Ky.) 415. *Mississippi.* — *Andrews v. Carr*, 26 Miss. 577; *Owen v. Moody*, 29 Miss. 79.

New Hampshire. — *Gove v. Gove*, 64 N. H. 503. It was formerly held in New Hampshire that a debt due from a nonresident could not be assigned by the executor or administrator. See *Thompson v. Wilson*, 2 N. H. 291. But this case has been overruled by *Luce v. Manchester, etc.*, R. Co., 63 N. H. 588, and *Gove v. Gove*, 64 N. H. 503.

New York. — *Petersen v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298.

North Carolina. — *Grace v. Hannah*, 6 Jones L. (51 N. Car.) 94; *Leake v. Gilchrist*, 2 Dev. L. (13 N. Car.) 73; *Riddick v. Moore*, 65 N. Car. 382.

Rhode Island. — *Mackay v. St. Mary's Church*, 15 R. I. 121, 2 Am. St. Rep. 881.

The case of *Mackay v. St. Mary's Church*, 15 R. I. 121, 2 Am. St. Rep. 881, was an action on negotiable notes indorsed to the plaintiff by administrators. *Stiness, J.*, delivering the opinion of the court, said: "The title to a negotiable instrument passes by indorsement, and if indorsed by an administrator, who is the representative of the deceased owner, in the proper settlement of an estate and without affecting the rights of other parties, why should its effect be limited to the boundaries of the state where the deceased lived? Not only would this limit the negotiability of the instrument, but it would cast upon an administrator the unnecessary burden of procuring letters of administration in another state simply to collect an admitted debt. Moreover, suppose the administrator, indorsee, and maker lived in the same state at the time of the indorsement, but that the maker subsequently removed to another state; could it be claimed that the indorsee would be barred from suing in the second state because his title came through an administrator who would himself be incapable of bringing suit in that state? Yet the elements of title, in the case supposed, would be the same as in the case in question. We see no reason why the residence of the maker should affect or control the plaintiff's title or his right to sue. The right of action is transitory; the holder of a note must collect of the maker where he can find him. If, there-

fore, as against the maker, the holder's title to a note is good, his right of action should be good also. We therefore hold that, in a case like this, in which no interests but those of the parties to the note are involved — and we say this without passing upon the effect of a transfer when there are creditors in this state — an administrator in another state may transfer a note upon which the indorsee may sue in this state."

3. Authority to Sell Chattels Real. — *Bac. Abr.*, tit. Leases, (1), 7; *Nugent v. Gifford*, 1 Atk. 463; *Andrew v. Wrigley*, 4 Bro. C. C. 125; *Seers v. Hind*, 1 Ves. Jr. 295.

Assignment of Leasehold to Individual Creditor. — In *Taylor v. Hawkins*, 8 Ves. Jr. 209, leasehold estates specifically bequeathed to the executor were by him assigned as security for his own debt, and it was held that the assignment was valid as against creditors of the estate, where there was no collusion between the executor and assignee.

Sale for Distribution. — An administrator is not bound to sell chattels real of his intestate merely to distribute the proceeds among the next of kin. *Bradley v. Flood*, 16 Ir. Ch. Rep. 236.

Sale by Administrator Durante Minoritate. — *Re Robinson, L. R. (Ir.)* 3 C. D. 429, it was held that an administrator *durante minore etate* had no power to sell leaseholds belonging to the decedent, if the sale was not necessary for the payment of debts.

Sale by Administrator Durante Absentia. — In *Webb v. Kirby*, 7 De G. M. & G. 376, 3 Jur. N. S. 73, 26 L. J. Ch. 145, it was held that although a sale of leaseholds by an administrator *durante absentia* will be good if the person entitled to administration is living at the time of the conveyance, it is not such a title as the court will force on a purchaser, in the absence of the certainty that the person entitled to administration was living. Lord Chancellor Cranworth said that even if this objection did not prevail, still he was of opinion that this was not a case for a decree for specific performance; it was a sale by a person who sold as representative of a surviving trustee for sale.

Effect of Pending Administration Suit. — The pendency of an administration suit, under the English practice, does not affect the power of sale, but the executor or administrator may sell at any time before a decree in the suit. *Neeves v. Burrage*, 14 Q. B. 504, 68 E. C. L. 504, 14 Jur. 177, 19 L. J. Q. B. 68. See also *Berry v. Gibbons*, L. R. 8 Ch. 717.

4. Executor Cannot Give Option to Purchase Leasehold. — *Oceanic Steam Nav. Co. v. Sutherland*, 16 Ch. Div. 236.

debts he has the right to sell a term for years, though it is specifically devised.¹ He may also, as a general rule, make under leases for any number of years less than the decedent's term.²

Effect of Covenant Against Subletting. — Authority to assign a lease or to sublet the premises may, however, be taken away by a restrictive covenant in the original lease by which the decedent's term was created, expressly naming the executors and administrators of the lessee therein.³ If, on the other hand, the restrictive covenant does not expressly name the executors and administrators of the lessee, it seems that their authority to assign is not affected.⁴

(2) *Manner and Terms of Sale* — (a) **Rule at Common Law.** — An executor or administrator having at common law complete title to the decedent's personality, with absolute power to dispose of it, may exercise that power either by public or private sale at such times and on such terms as to him may seem proper, in the absence of statutory restrictions, but as soon as the sale is made he becomes liable to account for the price.⁵

(b) **Modern Doctrine** — *aa.* **PUBLIC OR PRIVATE SALE.** — The manner of selling a decedent's property is generally more or less regulated by statute in the *United States*. By some of these statutes all sales, with certain exceptions, are

1. **Authority to Sell Term Specifically Devised.** — *Andrew v. Wrigley*, 4 Bro. C. C. 125.

2. **Authority to Underlet.** — An administrator having the legal estate in a leasehold may sublet, and the sublease will be supported in equity as well as in law, but it is an exceptional mode of dealing with the assets, and those who accept title in that way must take it subject to the question whether it is the best way of administering the assets. *Oceanic Steam Nav. Co. v. Sutherberry*, 16 Ch. Div. 236.

In *Keating v. Keating*, L.L. & G. temp. Sugd. 133, Sir E. Sugden said that many circumstances would justify an executor in equity in granting a lease instead of selling the premises, and he would sustain such a lease by an executor simply acting in a due administration of the assets, but that a person could not be permitted to hold a reversionary lease from an executor with full notice, without showing that such lease was properly granted in the due administration of the executor's office.

Right of Beneficiaries to Require Sale Instead of Lease. — In *Drohan v. Drohan*, 1 B. & B. 185, 12 Rev. Rep. 10, a lease for a term of years made by administrators was set aside where the persons entitled to distribution wished a sale instead of a lease, and the lessee took good notice that sale was required.

Effect of Devise in Trust to Sell. — In *Evans v. Jackson*, 8 Sim. 217, a devise of a term in trust to executors to sell was held to be *prima facie* inconsistent with granting a lease, though it was said that circumstances might exist to justify the executors in departing from the words of the trust.

3. **Effect of Covenant Against Subletting.** — If a lease contains a covenant forbidding the lessee, his executors and administrators, to sublet or assign without leave in writing, on pain of forfeiting the lease, the executor or administrator of the lessee cannot assign or sublet without such leave. So, too, if the lease contains a covenant that the lessee, his executors and administrators, shall not assign without leave, except by his or their last will, the executor cannot sell the leasehold to pay

the decedent's debts. *Roe v. Harrison*, 2 T. R. 425; *Lloyd v. Crispe*, 5 Taunt. 250, 1 E. C. L. 95.

In *M'Mullen v. O'Reilley*, 15 Ir. Rep. 251, a will contained a direction that no part of the testator's property should be sold or disposed of except the interest in a certain house, for ten years only, if thought advisable on the part of the executors, and he bequeathed the property to his son, who was a minor. The executors sold the whole interest in the house to A., who had notice of some restriction on the executor's power to sell. There were no debts. It was held, in a suit to impeach the sale, that the sale being a breach of trust, the purchaser was bound to prove that it was for full value.

4. **Authority Not Affected by Covenant that Lessee Shall Not Alien.** — *Seers v. Hind*, 1 Ves. Jr. 295.

Covenant Naming Executor but Not Administrator. — In *More's Case*, Cro. Eliz. 26, it was held that where the lease contained a covenant that the lessee, his executors or assigns, should not alien without the consent of the lessee, an assignment by the administrator of the lessee was a breach of the covenant, because the administrator was an assignee within its meaning.

5. **Manner and Terms of Sale Discretionary at Common Law.** — *Wier v. Davis*, 4 Ala. 442; *Johnson v. Kay*, 8 Humph. (Tenn.) 142.

As the Law Gives No Specific Directions as to the terms on which property shall be sold, the executor or administrator is of necessity invested with a sound discretion in regard thereto, and if he has exercised this discretion with fidelity and diligence he cannot be held liable. *Bradshaw v. Cruise*, 4 Heisk. (Tenn.) 260.

Liability for Price of Goods Sold. — At common law an executor or administrator becomes liable for the price immediately on the sale, whether he sells for cash or on credit. *Johnston's Estate*, 9 W. & S. (Pa.) 107; *Southall v. Taylor*, 14 Gratt. (Va.) 269. See also 2 Williams on Executors (7th Am. ed.) 121, and *supra*, this section, *Authority to Sell*.

required to be made at public auction, unless it is otherwise provided by the will of the decedent, or unless leave is given by the probate court to sell privately.¹

bb. TIME OF MAKING SALE. — In England the general rule seems to be that an executor or administrator must convert the personalty of the estate into money within a year after the decedent's death or the grant of letters, probably because an account may be required at the end of the year,² unless the will commits the matter entirely to the discretion of the executor;³ but it has often been held that the sale may be deferred beyond that time where the executor or administrator acts in good faith for the benefit of the estate, and with reasonable prudence.⁴

1. Public Sale Required by Statute. — *United States.* — *Gaines v. De La Croix*, 6 Wall. (U. S.) 719; *Ventress v. Smith*, 10 Pet. (U. S.) 161.

Alabama. — *Wier v. Davis*, 4 Ala. 442; *Dearman v. Dearman*, 4 Ala. 521; *Fambro v. Gantt*, 12 Ala. 298; *Bogan v. Camp*, 30 Ala. 276; *McArthur v. Carrie*, 32 Ala. 75, 70 Am. Dec. 529; *Beene v. Collenberger*, 38 Ala. 647; *Wilson v. Armstrong*, 42 Ala. 168, 94 Am. Dec. 635.

Florida. — *May v. May*, 7 Fla. 207, 68 Am. Dec. 431.

Georgia. — *Neal v. Patten*, 40 Ga. 363.

Indiana. — *Weyer v. Franklin Second Nat. Bank*, 57 Ind. 198.

Louisiana. — *Donaldson v. Hull*, 7 Martin N. S. (La.) 113.

North Carolina. — *Davis v. Marcum*, 4 Jones Eq. (57 N. Car.) 189; *Pate v. Kennedy*, 104 N. Car. 234; *Dickson v. Crawley*, 112 N. Car. 629.

Private Sale Authorized by Will. — In *Jackson v. Williams*, 50 Ga. 553, a testator directed his property to be sold on such terms as to notice and credit as his executors might, in their sound discretion, deem best. It was held that they had the power to sell either for credit or for cash, and on such notice as they, in their sound discretion, might deem best, but that in all other respects they were bound to comply with the law regulating the sale of a decedent's property. See also *Wright v. Zeigler*, 1 Ga. 343.

But if There Are Minor Heirs, an executor cannot sell at private sale in *Louisiana*, though he is authorized by the will to act extrajudicially. *De Lemos v. Garcia*, 1 Martin N. S. (La.) 324.

A Stock of Goods left by a decedent cannot be sold by the administrator in the usual course of the business under a statute providing that goods of a decedent may be disposed of by the administrator "at private sale, the terms and conditions of said sale being first made known to and approved by the court." *Tell City Furniture Co. v. Stiles*, 60 Miss. 849.

Private Sale of Shares of Stock. — Where executors have the administration of a succession composed entirely of stocks which have a market value, but fluctuate, and they sell such stocks at private sale, in small lots, for the interest of the succession, when a public sale would have had the effect of depreciating the value of the stock by putting on the market large amounts at one time, they will not be held responsible for the loss in value, estimated at the highest market quotations, when no demand has been made upon them by particular legatees or the universal legatees to

pay the legacies, and for this purpose to make a public sale of the stocks by an order of court. *Kaiser's Succession*, 48 La. Ann. 973.

Liability on Private Sale. — If an executor or administrator sells property at private sale when he should have sold it at public auction, he is chargeable with the amount that would have been realized if the sale had been made at public auction. *Hudson v. Hudson*, 5 Munf. (Va.) 180.

An Exception Is Made by the Georgia Statute as to annual crops, which may be carried to market, but this statute does not authorize a sale on the plantation where the crop was raised. *Neal v. Patten*, 40 Ga. 363.

Choses in Action Are Also Excepted from the operation of the statutes in some of the states regulating the sale of a decedent's personalty. See *supra*, this section, *Statutory Sales under Order of Court*, note *Statute Applicable Only to Tangible Personalty*.

An Administrator Is Not Liable for Losses, though he sold at private sale instead of at public auction, if he acted with due judgment and discretion, and in good faith. *Mead v. Byington*, 10 Vt. 116.

Penalty for Noncompliance with Statute. — In *North Carolina* the statute requires a public sale, for cash or on six months' credit, and if the executor fails to comply with its requirements he is liable to a penalty of two hundred dollars. *Pate v. Kennedy*, 104 N. Car. 234. The statute was not violated so as to subject the executor to the penalty where he gave a part of a standing crop for hauling the remainder to the crib. *McDaniel v. Johns*, 8 Jones L. (53 N. Car.) 414.

2. Sale Ordinarily Required Within One Year in England. — *Hughes v. Empson*, 22 Beav. 181; *Sculthorpe v. Tipper*, 26 L. T. N. S. 119.

3. Where a Testator Gives an Absolute Discretion to his executors to postpone the sale and conversion of his estate, they are not bound by the ordinary rule to convert the property within a year, even though some of the property consists of shares in an unlimited company. Nor will they be liable, in the absence of *mala fides*, for loss arising to the estate from the nonconversion. *In re Norrington*, 13 Ch. Div. 654, 28 W. R. 711.

4. Sale May Be Postponed Beyond End of Year in Proper Case. — *Buxton v. Buxton*, 1 Myl. & C. 80; *Marsden v. Kent*, 5 Ch. Div. 598, 46 L. J. Ch. Div. 497, 37 L. T. N. S. 49, 25 W. R. 522; *In re Hirst*, 13 W. R. 225, 11 L. T. N. S. 533. See also *Morgan v. Morgan*, 14 Beav. 72; *Garrett v. Noble*, 6 Sim. 504; *Bate v. Hooper*, 5 De G. M. & G. 338.

In the United States the rule seems, in the main, to be the same as in England, in the absence of statutory regulation. Some authorities hold that a sale of the personalty should be made within one year after the grant of letters,¹ but it is generally held that, while it is the duty of the executor or administrator to use reasonable diligence in converting the personal property into money, the law permits him to exercise a sound discretion as to the time when he will sell, and if he acts in good faith and with ordinary care and prudence he will not be held liable for losses or depreciation;² and where the will gives

1. Rule in United States — One Year Considered Reasonable Time for Selling Personalty. — Johnston's Estate, 9 W. & S. (Pa.) 107; Kennedy's Estate, 25 Pittsb. Leg. J. (Pa.) 135; Merkel's Estate, 131 Pa. St. 584.

2. Discretion as to Time of Selling. — Carter v. Manufacturers' Nat. Bank, 71 Me. 448, 36 Am. Rep. 338; Weston v. Ward, 4 Redf. (N. Y.) 415; Mickle v. Brown, 4 Baxt. (Tenn.) 468.

"There is, and there can be, no rigid and arbitrary standard by which to measure the reasonable time within which the discretion of an executor directed to convert an estate into money must operate. If, in some instances, the English cases indicate a disposition to fix upon one year, because at that date the executor may be compelled to account, in other instances such fixed or arbitrary standard appears to have been rejected. Hughes v. Empson, 22 Beav. 181; Buxton v. Buxton, 1 Myl. & C. 80; Garrett v. Noble, 6 Sim. 504; Bate v. Hooper, 5 De G. M. & G. 338; Morgan v. Morgan, 14 Beav. 72; Marsden v. Kent, 5 Ch. Div. 598. The better opinion derived from them would seem to be that each case must stand upon its own facts; that what would be a reasonable time in one instance might not be in another; and while the one year allowed to close the estate may sometimes mark the limit of discretion, and is always a circumstance to be considered, it is not necessarily conclusive. In this state, at all events, there is no arbitrary standard." Matter of Gray, 91 N. Y. 502.

Small Estate Owning Large Debts. — In Goodbear v. Gary, 1 La. Ann. 240, it was held that where a succession was small and much in debt, the executor should sell as soon as the inventory should be made, and that he would be personally charged with any expenses resulting from the delay, if he suffered more than a year to elapse before selling.

The Principle Involved in the rule leaving to the discretion of the executor the time when he will offer property for sale, taking into consideration its character and the surrounding circumstances, is well illustrated by the case of Bosio's Estate, 2 Ashm. (Pa.) 437. In that case the decedent died in the city of Philadelphia on December 20, 1826. One item of his personalty was an ostrich which he had been engaged in exhibiting. The ostrich was inventoried at three hundred dollars. The decedent's administrator sold all the other personalty at public auction, but did not put the ostrich up for sale publicly, though he attempted to dispose of it at private sale. He retained two persons (who had been employed for the same purpose by the intestate in his lifetime) to superintend the care and exhibition of the ostrich; and he exhibited it in Philadelphia, from December 22, 1826, until some time in the month of April, 1827, when it was re-

moved from Philadelphia for the purpose of exhibiting it in New York. It was taken as far as Frankford, in the county of Philadelphia, when it sickened and died, and was afterwards sold for forty-five dollars. It was held that the administrator was not chargeable with the value of the bird. The court said: "But four months elapsed between the taking of the inventory and the death of the bird; those four months were the most inauspicious in the year, either for its sale or exhibition; and the property was of that peculiar kind that few customers, even under favorable circumstances, could be anticipated. To have made a public sale immediately after the intestate's death would have been the almost certain means of sacrificing the property; and its postponement was, apparently at least, for the benefit of the estate. * * * The bird was a native of the warmest regions of the globe, care and danger always accompanying the keeping of it during a bleak North American winter; and the kind of adventurous spirits who, in general, are disposed to embark in the purchase of such a curiosity, in hopes of ultimate gain from its exhibition, would, in general, be desirous of buying in the spring, when they might have the chance of one season at least of successful experiment. The loss likely to be sustained by this estate shows the folly of such a winter purchase. Testing the conduct of this administrator by the principles of good faith and the obligations of ordinary prudence, I see nothing to find fault with. From the time he took possession of the bird, he continually offered it for sale, and declined closing with offers made him, only because they were entirely inadequate. It is true that his asking price was beyond the appraisement, yet it was beneath what his intestate actually paid for the property, and it does not appear that the price demanded was a fixed and absolute limit."

Hasty or Improvident Sale Not Required. — An executor or administrator is not required to sell hastily or improvidently if the situation or circumstances are of such a character as seriously to lessen the price for which the property ought to sell. Mickle v. Brown, 4 Baxt. (Tenn.) 468.

Where an Administrator Acts with Good Faith, and with that degree of caution which prudent men exhibit in the conduct of their own affairs, he is to be liberally dealt with, and will not be charged with a loss resulting from his failure to make an immediate sale of the decedent's personalty. Matter of Green, 37 N. J. Eq. 254; Weston v. Ward, 4 Redf. (N. Y.) 415; Bosio's Estate, 2 Ashm. (Pa.) 437; Stewart's Appeal, 110 Pa. St. 410.

Perishable Property ought to be sold without delay; and if the executor or administrator

the executor a discretion as to the time of sale, and he acts in good faith, he is not chargeable with loss resulting from selling at the time when he did, whether his judgment that such sale could then be made without a sacrifice was or was not reasonable.¹

If, on the Other Hand, He Is Guilty of Unreasonable Delay in selling, he becomes liable for the value of the property at the time when he should have sold it.²

cc. PLACE OF SALE. — Ordinarily no restrictions are imposed as to the place at which a decedent's property shall be sold, except so far as the general rule requiring the executor or administrator to act for the best interests of the estate imposes on him the duty of selecting a place at which the sale may be most advantageously made.³

dd. WHO MAY MAKE SALE. — As a general rule the sale is to be made by the executor or administrator,⁴ and if the will directs that property shall be sold, without naming the person to sell, the executor is the proper person to carry out the directions.⁵ While it is held that a personal representative cannot delegate his authority to sell the property of the decedent,⁶ he is not obliged to act personally, but may employ an agent or auctioneer to sell.⁷ In case of such employment, however, the sale is still his own act, and he is responsible for the negligence or defalcation of the agent, unless he used due and proper care in making the selection.⁸

ee. PRICE AND TERMS OF PAYMENT. — It is the duty of the executor or administrator, acting within the limitations imposed on him by statute, to sell the property in such manner and on such terms as to realize the best price obtainable,⁹ and if he fails in this duty he is personally liable to the persons interested in the estate for the difference between the amount received and the amount which he could have received.¹⁰

fails to do so, and retains it until it deteriorates in value, he is chargeable with its value at the time when it should have been sold. *Steele v. Knox*, 10 Ala. 608.

1. Time of Sale Committed to Discretion of Executor. — *Staples v. Staples*, 24 Gratt. (Va.) 225.

2. Unreasonable Delay — Holding for Rise in Market. — In *Pulliam v. Pulliam*, 10 Fed. Rep. 23, it was held that an executor should be held liable for losses by depreciation in value where he delayed selling property for several months in the belief that it would advance in price.

3. Place of Sale — Sending Goods to Foreign Market. — In *Bryan v. Mulligan*, 2 Hill Eq. (S. Car.) 361, it was held that a loss incurred by sending goods to a foreign market where they sold for less than they would have brought at the home market was not chargeable to the executor where he acted in good faith and in the reasonable expectation of realizing a better price in the foreign market. But see *Poullain v. Brown*, 82 Ga. 412, holding that where an executor sent a crop to a foreign market and it was lost in transit he was personally liable for its value.

4. Sale Generally Made by Executor or Administrator. — See cases cited *supra*, this section, *Authority to Sell*.

The Public Administrator, pending a contest as to the right to letters of administration, may be authorized to sell such portions of the assets in his charge as may be necessary for the preservation and benefit of the estate. *Public Administrator v. Burdell*, 4 Bradf. (N. Y.) 252.

5. General Direction to Sell Gives Authority to Executor. — *McCullum v. McCullum*, 33 Ala. 711.

The rule is the same where the will directs

that real estate be sold, but does not name the person to make the sale. See *infra*, this section, *Real Property — Sale of Real Property — Direction to Sell Without Designating Person*.

6. Authority to Sell Cannot Be Delegated. — *Neal v. Patten*, 47 Ga. 73.

7. Sale May Be Made by Agent. — *Campbell v. Owens*, 32 La. Ann. 265.

"There Can Be No Doubt that an Administrator May Appoint an Agent to do particular acts. He can employ an attorney. If he is authorized by the court to sell goods at public sale, he can appoint an auctioneer to sell them. If he is thus authorized to sell property at private sale, he can appoint an agent to negotiate the sale within the limits fixed by the court, which sale he might approve and report to the court for ratification." *Lewis v. Reed*, 11 Ind. 239.

8. Liability for Acts of Agent Appointed to Sell. — In *Smith v. Smith*, 79 N. Car. 455, executors who shipped cotton to an insolvent firm of commission merchants were held liable to the creditors of the estate, where the unfair dealings of the firm as to a former shipment were sufficient to put the executors on their guard, though the firm was reputed to be solvent. See also *supra*, this section, *Loss of Assets*.

9. Duty to Realize Best Price Obtainable. — *Pearson v. Moreland*, 7 Smed. & M. (Miss.) 600, 45 Am. Dec. 319.

10. Inadequate Price. — Executor or Administrator Personally Liable. — *Skrine v. Simmons*, 11 Ga. 401; *Matter of Saltus*, 3 Abb. App. Dec. (N. Y.) 243. And see *Rhame v. Lewis*, 13 Rich. Eq. (S. Car.) 269; *Hudson v. Hudson*, 5 Munf. (Va.) 180.

Commodities Receivable in Payment. — It would seem *ex vi termini* that only money may properly be received in payment for goods sold,¹ and it has been held that an executor or administrator is not authorized to receive other property in payment.²

Cash or Credit. — At common law the sale could be made on credit, but the representative assumed the entire risk of afterwards being unable to collect the price;³ but the doctrine of the common law has been considerably modified by statute.⁴

A Creditor Consenting to a Sale for an Inadequate Price cannot hold the administrator liable for the loss. *Cain v. Hawkins*, 5 Jones L. (50 N. Car.) 192.

Inadequacy of Price Did Not Appear where the administrator sold for seven hundred and fifty dollars a lease appraised at five hundred dollars, though a witness testified that he had offered one thousand dollars, but it appeared that the witness did not need the premises for his business, because he had just bought and moved into another place, and he testified on cross-examination that he did not have the money offered, and did not know how he could have become the purchaser if his offer had been accepted. *Dugan's Estate*, Tuck. (N. Y.) 338.

If the Sale Was Conducted Fairly, After Due Notice, and without connivance with the purchaser, the administrator cannot be charged with a devastavit because the widow purchased many articles at the sale at a nominal price, on account of the bystanders forbearing to bid against her. *Woody v. Smith*, 65 N. Car. 116.

Sale of Securities at Discount. — If an executor sells bonds belonging to the estate for less than their value, he thereby commits a devastavit, unless it appears that the interests of the estate manifestly required such a sale. Accordingly it was held that a sale of bonds at a discount of between eighteen and twenty per cent was unauthorized where the circumstances of the estate did not require it. *Pinckard v. Woods*, 8 Gratt. (Va.) 140.

But in another case it was held that an administrator was not liable for the loss to the estate caused by selling at a discount of twenty per cent. certificates of deposit in a bank which had suspended, but which resumed payment after the sale, where the sale was public and was fairly made. *Miller v. Hider*, 9 Colo. App. 50.

The sale of a good judgment for less than its face value renders the administrator liable for the difference. *Grant v. Reese*, 94 N. Car. 720.

Uncurrent Money. — An executor or administrator who sells uncurrent money at a discount will not be liable for more than he received, if he acted in good faith and with reasonable diligence. *Rice v. Hunt*, 7 Lea (Tenn.) 39.

Rescinding Sale for Insolvency of Purchaser. — If an administrator suspects that the parties to a note taken for the price of property sold by him are insolvent, he may rescind the sale and take back the property, but he must resell immediately, and he must collect from the first purchaser the value of the use of the property while in his possession. *Bland v. Hartsoe*, 65 N. Car. 204.

1. Sale Implies Money Price. — See the definition of the term under the title *SALES*.

Taking Depreciated Currency in Payment. — An executor or administrator is not liable for taking Confederate money in payment for property sold by him, where such money was the kind ordinarily received in payment of debts at the time. *Johnson v. Henagan*, 11 S. Car. 93.

For General Discussion of payments to executors and administrators in Confederate money, see *supra*, this section, *Collection of Debts — Taking Depreciated Currency in Payment*.

2. Taking Other Property in Payment Not Authorized. — *Columbus Ins. etc., Co. v. Humphries*, 64 Miss. 258; *Powers v. Powers*, 48 How. Pr. (N. Y. Super. Ct.) 389.

3. Cash or Credit. — In the absence of any restriction by statute or by the will, a sale is generally for cash, but it may be on reasonable credit in the discretion of the executor or administrator, though it is usually safer to sell for cash. *Bradshaw v. Cruise*, 4 Heisk. (Tenn.) 260; *Mickle v. Brown*, 4 Baxt. (Tenn.) 468.

And if the executor or administrator takes the purchaser's note payable to himself or order, this in law amounts to a receipt of the price and makes him chargeable with the property as an asset in possession. *Macbeth v. Macbeth*, 26 U. C. Q. B. 549.

4. Statutory Authority to Sell on Credit. — See the various local codes and statutes in the United States. See also *infra*, this section and subdivision, *Security for Price*.

In some jurisdictions it is made the duty of an executor or administrator to sell on credit, not exceeding a certain time, provided he deems it advantageous to the estate. *Perkins v. Crabtree*, 5 Ark. 475.

If an executor or administrator sells property of the decedent for cash, he ought to be charged therefor such sum as the property would have sold for on a reasonable credit, if the situation of the estate would admit of such credit. *Hudson v. Hudson*, 5 Munf. (Va.) 180.

Under the New York Statute a sale on credit can be made only when a sale is necessary in order to pay debts and legacies. *Matter of Woodbury*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 474.

Under the Indiana Statute authorizing a credit of twelve months, a sale on a credit of ten years is void. *Citizens' St. R. Co. v. Robins*, 128 Ind. 449, 25 Am. St. Rep. 445.

Liability for Sale on Credit. — An administrator is *prima facie* chargeable with the amount of a note taken by him for the price of property of the estate sold by him. *Stewart v. Stewart*, 31 Ala. 207.

A Negligent Failure to Collect a bond given for the price of property sold renders the ex-

ff. SECURITY FOR PRICE. — It is a very general requirement that when a sale is made on credit, the executor or administrator must take the buyer's note for the price, with one or more good sureties, or other sufficient security; ¹ and if he fails to do so, and the price is thereby lost to the estate, he is personally liable for it. ²

The Validity of the Sale, in case security for the price is not taken, depends, it would seem, on the terms of the statute. In *Alabama* it is held that the statute is directory only, and that the failure to observe it does not render the sale void. ³

Liability for Sufficiency of Surety. — The duty of the personal representative in respect to security for the price of goods of the estate sold by him on credit is not performed by complying with the mere form of the law in taking the purchaser's note with sureties. He must act honestly for the estate, exercising the same degree of care in obtaining sureties of financial ability that a pru-

ecutor liable for the amount of it. *Beeman's Succession*, 47 La. Ann. 1355.

Presumption as to Collection of Purchase Money. — An administrator is presumed to have collected the purchase money after the lapse of the proper time to enable him to do so, in an action for devastavit, if he has failed to make collection he must show it. *Gordon v. Gibbs*, 3 Smed. & M. (Miss.) 473; *Cole v. Leake*, 27 Miss. 767.

Taking Notes for Part of the Price of property sold instead of requiring cash payment in full does not impose any liability on an administrator where the amount paid in cash was held by the court to be the full cash value of the property. *Matter of Kibbe*, 57 Cal. 407.

1. Security Required When Sale Is on Credit — Alabama. — *Payne v. Pippey*, 49 Ala. 599; *Walls v. Grigsby*, 42 Ala. 473; *Betts v. Blackwell*, 2 Stew. & P. (Ala.) 373.

Arkansas. — *Perkins v. Crabtree*, 5 Ark. 475.

Florida. — *Sherrell v. Shepard*, 19 Fla. 300.

Illinois. — *Bowen v. Shay*, 105 Ill. 132.

Kentucky. — *Jones v. Commercial Bank*, 78 Ky. 413.

Mississippi. — *Gordon v. Gibbs*, 3 Smed. & M. (Miss.) 473; *Bodley v. McKinney*, 9 Smed. & M. (Miss.) 339.

New Jersey. — *Vreeland v. Schoonmaker*, 16 N. J. Eq. 512.

New York. — *King v. King*, 3 Johns. Ch. (N. Y.) 552; *Orcutt v. Orms*, 3 Paige (N. Y.) 459; *Hasbrouck v. Hasbrouck*, 27 N. Y. 182.

North Carolina. — *Davis v. Marcum*, 4 Jones Eq. (57 N. Car.) 189; *Pate v. Kennedy*, 104 N. Car. 234.

Pennsylvania. — *Johnston's Estate*, 9 W. & S. (Pa.) 108.

South Carolina. — *Stukes v. Collins*, 4 Desaus. (S. Car.) 207; *Massey v. Cureton*, Cheves Eq. (S. Car.) 181; *Roberts v. Adams*, 2 S. Car. 337. It was formerly held that there was no inflexible rule forbidding an executor or administrator to sell without security. *Taveau v. Ball*, 1 M'Cord Eq. (S. Car.) 456.

Tennessee. — *Bradshaw v. Cruise*, 4 Heisk. (Tenn.) 260; *Mickle v. Brown*, 4 Baxt. (Tenn.) 468.

See also the various local codes and statutes in the United States.

Security Is Required When a Sale Is Private as well as when it is made at public auction. *Bowen v. Shay*, 105 Ill. 132.

Reserving Lien on Property Sold. — In *Napier v. Wightman*, Spears Eq. (S. Car.) 357, it was held that an administrator had a purchase-money lien on the property sold by him which he could enforce as against the creditors of the purchaser, where it was agreed, on the failure of the purchaser to comply with the terms of sale, that the title to the property should remain in the administrator as security for the unpaid purchase money.

2. Personal Liability for Failure to Take Security — Alabama. — *Payne v. Pippey*, 49 Ala. 599; *Bett v. Blackwell*, 2 Stew. & P. (Ala.) 373.

Indiana. — *Citizens' St. R. Co. v. Robbins*, 128 Ind. 449, 25 Am. St. Rep. 445.

Kentucky. — *Jones v. Commercial Bank*, 78 Ky. 413.

New York. — *King v. King*, 3 Johns. Ch. (N. Y.) 552.

South Carolina. — *Peay v. Fleming*, 2 Hill Eq. (S. Car.) 97; *Smith v. Smith*, 1 Desaus. (S. Car.) 304; *Evans v. Evans*, 1 Desaus. (S. Car.) 515; *Stukes v. Collins*, 4 Desaus. (S. Car.) 207. See also the cases cited in the note immediately preceding.

It Is Gross Negligence for an administrator to sell property on credit and take no security other than the bond of the purchaser. *Roseman v. Pless*, 65 N. Car. 374. And he is liable for the purchase money without regard to the financial standing of the purchaser at the time of the sale. *Massey v. Cureton*, Cheves Eq. (S. Car.) 181.

The Fact that the Price Exceeded the Value of the goods sold will not relieve the administrator from liability, if he fails to take security as required by law. *Hasbrouck v. Hasbrouck*, 27 N. Y. 182.

Taking Security After Delivery of the Property to the Purchaser satisfies the requirement of the law, and therefore an administrator is not chargeable as for a failure to take the required security merely because he delivered the property to the purchaser and permitted him to remove it from the state before the security was given. *Dean v. Rathbone*, 15 Ala. 328. But if he is unable to obtain the security after delivering the property to the purchaser, he becomes liable for the price. *Betts v. Blackwell*, 2 Stew. & P. (Ala.) 373.

3. Sale Not Void for Failure to Take Security. — *Lay v. Lawson*, 23 Ala. 377.

dent man would exercise in his own affairs.¹ If he accepts insolvent sureties when he might, by the exercise of due care, have ascertained their condition, such dereliction renders him personally liable.² But he cannot be charged in case the sureties, at the time when they signed the note or bond, were solvent or in good repute financially,³ and he was not negligent in failing to collect before insolvency ensued,⁴ or an action on the note was successfully defended without fault on his part,⁵ unless the sale was unauthorized and improper,⁶ or the security was such as he had no right to take.⁷

Approval of Security. — As a general rule it is for the executor or administrator to determine the sufficiency of the security, and he is personally liable for any loss occasioned by his negligence or improper conduct in regard thereto, but in some jurisdictions approval by the court is necessary to protect him.⁸

What Security May Be Taken. — Though as a general rule an executor or administrator relieves himself of personal liability for the price of goods of the estate sold on credit, where he takes sureties of sufficient financial ability at the time when he accepted them, he cannot relieve himself of liability by taking nonresidents of the state,⁹ or a person who is the purchaser's partner in business;¹⁰ and in some jurisdictions the personal security afforded by sureties on the note of the purchaser is not allowed at all.¹¹

(3) *Purchase by Executor or Administrator* — (a) **General Rule.** — It is well settled as a general rule that an executor or administrator has no right, without the consent of the beneficiaries, to purchase property of the estate at a

1. Duty to See to Financial Ability of Sureties. — *Davis v. Marcum*, 4 Jones Eq. (57 N. Car.) 189; *Paul v. Kennedy*, 1 Grant's Cas. (Pa.) 399; *McGee's Estate*, 1 Phila. (Pa.) 443, 10 Leg. Int. (Pa.) 114.

2. Accepting Insolvent Sureties. — *Lindley v. State*, 116 Ind. 235.

3. Subsequent Insolvency of Sureties. — If the sureties become insolvent after the note is given, the executor or administrator is not personally liable, if he exercised due diligence in ascertaining their sufficiency. *Searcy v. Holmes*, 45 Ala. 225; *Gordon v. Gibbs*, 3 Smed. & M. (Miss.) 473; *Bodley v. McKinney*, 9 Smed. & M. (Miss.) 339; *Johnston's Estate*, 9 W. & S. (Pa.) 107. But it must appear that the insolvency occurred or was discovered after the note was given, and the executor cannot discharge himself from liability for the amount of the note merely by showing that the parties thereto "proved insolvent." He must also show that they were either solvent or reputed to be solvent when the note was given. *Stewart v. Stewart*, 31 Ala. 207.

Insolvency of the Sureties When the Note Was Taken shows *prima facie* that the administrator had neglected his duty and was guilty of a *devastavit*. *Curry v. People*, 54 Ill. 263.

4. Failure to Collect Before Insolvency of Parties. — See *supra*, this section, *Collection of Debts*.

5. A Successful Defense to a Note given for the price of property relieves the executor or administrator from liability, if it was not through his fault that the purchaser was able to defend, though the parties to the note were insolvent. *Stewart v. Stewart*, 31 Ala. 207.

6. If the Sale Was Unauthorized the executor is not relieved from liability by the fact that he took security and the sureties afterwards became insolvent. *Smith v. Smith*, 1 Desaus. (S. Car.) 304.

7. Taking Security Other than Is Authorized by the order of court is at the risk of the adminis-

trator, and he must bear any loss that ensues. *Peay v. Fleming*, 2 Hill Eq. (S. Car.) 97.

8. Approval by Court Required. — In *New York* the statute (Code Civ. Pro., § 2717) requires "approved security" where property is sold on credit, and this requirement is construed to mean that the approval must be by the surrogate. *Matter of Woodbury*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 474.

9. Nonresident Surety Not Sufficient. — *Roberts v. Adams*, 2 S. Car. 337.

10. Buyer's Partner in Trade as Surety. — In *Southall v. Taylor*, 14 Gratt. (Va.) 269, it was held that the partner in trade of the buyer was not such a person as the executor could properly take as surety on a note given for the price of the property sold.

11. Rule that Personal Security Is Not Sufficient. — In *Matter of Woodbury*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 474, the executor sold property of the decedent and took the note of the purchaser with an indorser, after satisfying himself that the note was good and such as business men would ordinarily exact in commercial dealings. Soon afterwards the maker of the note went into bankruptcy and the indorser became irresponsible. On his accounting, the executor claimed exemption from liability for the reason that the note was an "approved security" within the Code of Civil Procedure, § 2717, which provides for such security upon a sale by the executor or administrator of the personal property of the decedent. The court, however, held that the "approved security" required by the statute meant national and state bonds and mortgages on real estate, "because it [the sale on credit] is an investment for the time being of the assets of the estate, and courts have held rigidly to the rule that if trustees, without express authority in some legal form, invest in notes, stocks, or bonds, they will be held responsible for all losses occasioned by such investments."

sale thereof, whether the sale is made by himself or by his coexecutor or coadministrator.¹

A Purchase by an Executor or Administrator from a Third Person who was an actual bidder at the sale, but who was acting in collusion with the executor or administrator, or pursuant to an agreement or understanding with him, is merely an indirect purchase by him at his own sale, and is therefore subject to the same infirmity as if he had purchased in the first instance.²

1. Executors and Administrators Not Allowed to Purchase at Their Own Sales—*England*.—Hall v. Hellet, 1 Cox 134; Watson v. Toone, 6 Madd. 153.

Canada.—Yost v. Crombie, 8 U. C. C. P. 159.

Arkansas.—Wright v. Campbell, 27 Ark. 637.

Connecticut.—Filley v. Phelps, 18 Conn. 294.

Delaware.—Downs v. Rickards, 4 Del. Ch. 416.

Illinois.—Lockwood v. Mills, 39 Ill. 603; Miles v. Wheeler, 43 Ill. 123; Kruse v. Steffens, 47 Ill. 112.

Kentucky.—Churchill v. Akin, 5 Dana (Ky.) 481; Ely v. Com., 5 Dana (Ky.) 398.

Louisiana.—Baldwin v. Carleton, 15 La. 394.

Maryland.—Conway v. Green, 1 Har. & J. (Md.) 151; Scott v. Burch, 6 Har. & J. (Md.) 67.

Mississippi.—Pearson v. Moreland, 7 Smed. & M. (Miss.) 609, 45 Am. Dec. 319; McGowan v. McGowan, 48 Miss. 553.

New Hampshire.—Brackett v. Tillotson, 4 N. H. 208; Perkins v. Thompson, 3 N. H. 145; Currier v. Green, 2 N. H. 226.

New York.—Matter of Van Houten, 18 Misc. Rep. (N. Y. Surrogate Ct.) 524.

North Carolina.—Britton v. Browne, 2 Law Repos. (4 N. Car.) 447; Ryden v. Jones, 1 Hawks (8 N. Car.) 497, 9 Am. Dec. 660; Cannon v. Jenkins, 1 Dev. Eq. (16 N. Car.) 426; Villines v. Norfleet, 2 Dev. Eq. (17 N. Car.) 167; Ford v. Blount, 3 Ired. L. (25 N. Car.) 516; Tate v. Dalton, 6 Ired. Eq. (41 N. Car.) 562; Froneberger v. Lewis, 70 N. Car. 456; Froneberger v. Lewis, 79 N. Car. 426; Tayloe v. Tayloe, 108 N. Car. 69; Tomlinson v. Detestatus, 2 Hayw. (2 N. Car.) 284.

South Carolina.—Perry v. Dixon, 4 Desaus. (S. Car.) 504; Teague v. Dunlap, Harp. Eq. (S. Car.) 97; Britton v. Johnson, 2 Hill Eq. (S. Car.) 430; Edmonds v. Crenshaw, 1 M'Cord Eq. (S. Car.) 252.

West Virginia.—Newcomb v. Brooks, 16 W. Va. 32; Tiernan v. Minghini, 28 W. Va. 314.

"**This Doctrine Rests on the Ground**, well established in equity, that no trustee or person filling a fiduciary relation shall be allowed to make a profit to himself by the purchase, sale, or use of the property so intrusted to him." Yost v. Crombie, 8 U. C. C. P. 159.

An *in Foster v. Brown*, 3 Rich. L. (S. Car.) 254, it was said: "The entire control which the administrator has over his own sale, and the great temptation to fraud, has induced the courts to decide that the price at which he may purchase shall not be regarded as conclusive of the value. It is in the nature of an offer made by him which those entitled to the amount may accept, and if they do, he is

bound; but if they are able to show that the property is of greater value, he must account accordingly."

The General Rule Requiring Compliance with the Statutory Provisions on a sale by an executor or administrator of the assets of the estate, though somewhat relaxed in favor of innocent purchasers, is held to operate with full force against executors and administrators who purchase at their own sales. *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399.

Sale by Coexecutor.—One executor cannot make a valid agreement to purchase property of the estate at a valuation from his coexecutor without becoming liable for the profits, if any are made. *Gordon v. Finlay*, 3 Hawks (10 N. Car.) 239.

The Administrator's Attorney who prepares and files the petition and obtains the order for a sale of the decedent's property will not be allowed to purchase at the sale. *Payne v. Flournoy*, 29 Ark. 500.

2. Purchase Through Third Persons Prohibited—*United States*.—Michoud v. Girod, 4 How. (U. S.) 503.

California.—Jones v. Hanna, 81 Cal. 507.

Georgia.—Houston v. Bryan, 78 Ga. 181, 6 Am. St. Rep. 252.

Mississippi.—Pearson v. Moreland, 7 Smed. & M. (Miss.) 609, 45 Am. Dec. 319; McGowan v. McGowan, 48 Miss. 553.

New York.—Matter of Barlow, (Surrogate Ct.) 15 N. Y. St. Rep. 721; Matter of Bach, 2 Conolly (N. Y.) 490.

North Carolina.—Joyner v. Conyers, 6 Jones Eq. (59 N. Car.) 78.

Pennsylvania.—Painter v. Henderson, 7 Pa. St. 48.

"**It Would Be a Miserable Evasion** of the law if he could rightfully do this through the intervention of an agent." *Ford v. Blount*, 3 Ired. L. (25 N. Car.) 516.

"**The Rule Is One of Universal Application**; it is founded upon public policy, and should be rigidly enforced by courts, because it 'stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity.'" *Jones v. Hanna*, 81 Cal. 507 [citing *Michoud v. Girod*, 4 How. (U. S.) 555; *Saltmarsh v. Beene*, 4 Port. (Ala.) 283, 30 Am. Dec. 525; *Danielwitz v. Sheppard*, 62 Cal. 339; *Swanger v. Mayberry*, 59 Cal. 91; *Edwards v. Estell*, 48 Cal. 194; *Gardner v. Tatum*, 31 Cal. 370; *Dillon v. Allen*, 46 Iowa 299, 26 Am. Rep. 145; *Blasdel v. Towle*, 120 Mass. 447, 21 Am. Rep. 533; *Porter v. Jones*, 52 Mo. 399; *Slocum v. Wooley*, 43 N. J. Eq. 451; *Bowers v. Bowers*, 26 Pa. St. 74, 67 Am. Dec. 398].

The Husband of an Administratrix is in a fiduciary position, and cannot purchase from the administratrix or from a coadministratrix

Dealing with Purchaser Not Prohibited in Absence of Previous Understanding. — But an executor or administrator is not precluded from dealing with a purchaser of property at his sale where there was no understanding, express or implied, at the time of the sale, that the executor or administrator should share in the purchase.¹

The Fact that the Sale Was Made at Public Auction is immaterial, and the rule is held to apply to sales so made as well as to private sales,² though in some of the early cases a distinction was made in this respect.³

Adequacy of Price. — However fair the sale and adequate the price, the court will set aside a sale made by an executor or administrator to himself. The policy of the rule is to exclude the possibility of fraud, by making the prohibition absolute.⁴

(b) **Exceptions to General Rule** — *aa.* EXCEPTIONS ARISING OUT OF SPECIAL CIRCUMSTANCES. — The rule forbidding an executor or administrator to purchase property of the estate is not of universal application, but is subject to several exceptions.⁵ Thus, he may purchase with the consent of all the persons interested in the estate,⁶ or where he is himself a beneficiary of the estate,⁷ or he may take specific property to pay any indebtedness of the estate to himself for advances or otherwise.⁸

without the consent of all the *cestuis que trustent*. *Pepperell v. Chamberlain*, 27 W. R. 410; *Scott v. Gorton*, 14 La. 111, 33 Am. Dec. 576.

Agreement Between Executor or Administrator and Purchaser. — An executor or administrator cannot make any arrangement in trust or confidence with a purchaser, so as to obtain any profit or interest in the sale. *Jones v. Hanna*, 81 Cal. 507; *Lockwood v. Mills*, 39 Ill. 603; *McGowan v. McGowan*, 48 Miss. 553; *Pearson v. Moreland*, 7 Smed. & M. (Miss.) 609, 45 Am. Dec. 319.

1. Dealing with Purchaser Not Prohibited in Absence of Previous Understanding — *Arkansas*. — *Payne v. Flournoy*, 29 Ark. 500; *West v. Waddill*, 33 Ark. 575.

Kentucky. — *Smith v. Pollard*, 4 B. Mon. (Ky.) 66.

Maryland. — *Scott v. Burch*, 6 Har. & J. (Md.) 67.

Tennessee. — *Johnson v. Kay*, 8 Humph. (Tenn.) 142.

Virginia. — *Staples v. Staples*, 24 Gratt. (Va.) 225; *Wayland v. Crank*, 79 Va. 602.

2. Rule Applicable to Public Sales. — *Ryden v. Jones*, 1 Hawks (8 N. Car.) 497, 9 Am. Dec. 660. See also *infra*, this title, *Sale of Real Estate under Order of Court*.

3. Private and Public Sales Distinguished. — *Brannan v. Oliver*, 2 Stew. (Ala.) 47, 19 Am. Dec. 37.

On this point *Tucker, J.*, said in *Anderson v. Fox*, 2 Hen. & M. (Va.) 245, that the practice of executors and administrators purchasing at public sales made by themselves "has been too general in this country, and has prevailed too long, to be now drawn in question by analogy to the doctrines in England concerning trustees of lands or commissioners of bankruptcy;" but *Roane, J.*, was of the opinion that the question was not involved in the case, and it was not decided.

4. Rule Applies Though Sale Was Fair and Price Adequate. — *Downs v. Rickards*, 4 Del. Ch. 430; *Ryden v. Jones*, 1 Hawks (8 N. Car.) 497, 9 Am. Dec. 660; *Gordon v. Finlay*, 3 Hawks (10 N. Car.) 239; *Coppels's Estate*, 4

Phila. (Pa.) 378, 18 Leg. Int. (Pa.) 254; *Green v. Sargeant*, 23 Vt. 466, 56 Am. Dec. 88. But see *infra*, this section, *Exceptions to General Rule*.

5. Rule Is Subject to Exceptions. — *Yost v. Crombie*, 8 U. C. C. P. 159; *Williams v. Marshall*, 4 Gill & J. (Md.) 376.

6. Purchase with Consent of Persons Interested in Estate. — *Lyon v. Lyon*, 8 Ired. Eq. (43 N. Car.) 201; *Taylor v. Tayloe*, 108 N. Car. 69. See also cases cited *supra*, this section, *Purchase by Executor or Administrator* — *General Rule*.

7. If an Executor or Administrator Has an Interest in the Estate he may purchase at his own sale, if necessary to protect such interest. The principle involved in this exception is that if he has a personal interest in the estate, then he has also the right to protect it. *Brannan v. Oliver*, 2 Stew. (Ala.) 47, 19 Am. Dec. 37; *Saltmarsh v. Beene*, 4 Port. (Ala.) 283, 30 Am. Dec. 525; *McLane v. Spence*, 6 Ala. 897; *McCartney v. Calhoun*, 17 Ala. 301; *Payne v. Turner*, 36 Ala. 623; *Frazer v. Lee*, 42 Ala. 25; *Froneberger v. Lewis*, 79 N. Car. 426.

In South Carolina it is held that an administrator entitled to a share of the estate may lawfully purchase at his own sale to the extent of his interest. *Trimmier v. Trail*, 2 Bailey L. (S. Car.) 480.

8. Taking Property in Payment of Individual Claims Against Estate. — *Ely v. Com.*, 5 Dana (Ky.) 404; *Haddix v. Haddix*, 5 Litt. (Ky.) 204.

In *Yost v. Crombie*, 8 U. C. C. P. 159, *Drapeer, C. J.*, after referring to the general rule, said: "There are, however, many cases in which the executor may become the owner of the personal property of the testator (*Wentworth Off. of Exrs.* 31, 32, 89), as for example by retainer for his own debt, and there he may make election and declaration what part of the testator's goods, not exceeding the debt due to him, he will have to be his own, though there will be no alteration of the property without such election, by the mere act and operation of law. *Williams Exrs.* 936. The right, however, to retain is well established, and he is not obliged to sell the assets and pay

And in Some Jurisdictions it is held that he may become a purchaser at his own sale, if he makes the sale fairly and pays full value.¹

bb. EXCEPTIONS CREATED BY STATUTE. — In some jurisdictions executors and administrators are expressly authorized by statute, subject to certain restrictions, to purchase at sales of their decedents' property.²

(c) **Effect of Purchase** — *aa. EFFECT AS TO PERSONS INTERESTED IN ESTATE.* — If an executor or administrator purchases property of the estate, either directly or indirectly, the purchase is voidable in equity at the election of creditors or other persons interested in the estate, without regard to the fairness of his conduct or the adequacy of the price.³

But at Law a Different Rule Prevails. — It must not only appear that the person occupying the fiduciary relation has become the purchaser, but it must also appear that the sale was accompanied by fraud.⁴

The Sale Is Not Void, however, even in equity. It may be ratified by the per-

himself out of the money, but may retain the assets themselves. So if the testator's plate was pledged to its full value, the executors might redeem it with their own money and retain it (*Woodward v. Darcy*, Plowd. 184), and if they pay debts of the testator's with their own money they may retain his goods to the value as their own. The form of a sale by auction was no more than a mode of ascertaining the value of the goods which he took. And the creditor may test the matter as to whether the goods seized exceed in value the sum for which the plaintiff had a right to retain, by suggesting a devastavit, if there is not enough to satisfy his claim out of the remaining assets of the estate, which appears a more reasonable mode of proceeding than by interpleader in a case of this description."

And in *Churchill v. Akin*, 5 Dana (Ky.) 475, the court said: "As he has the right to retain property at its fair value, in payment of a debt due to himself from the estate, his purchase may be considered as an election to retain, where he has the right to retain; and on that ground his title might not be disturbed, but he would be held to account for the full value, at whatever nominal price he may have purchased."

1. Rule that Executor or Administrator May Purchase if He Acts Fairly and Pays Full Value.

— This rule was laid down in *South Carolina* by O'Neill, J., in *Stallings v. Foreman*, 2 Hill Eq. (S. Car.) 401, citing and reviewing at length the following cases: *Drayton v. Drayton*, 1 Desaus. (S. Car.) 557; *M'Guire v. M'Gowen*, 4 Desaus. (S. Car.) 486; *Perry v. Dixon*, 4 Desaus. Eq. (S. Car.) 504; *Edmonds v. Crenshaw*, 1 M'Cord Eq. (S. Car.) 252; *Trimmier v. Trail*, 2 Bailey L. (S. Car.) 484; *Ex p. Wiggins*, 1 Hill Eq. (S. Car.) 353. And such is now the statutory rule in *South Carolina*. See *infra*, this section, *Exceptions Created by Statute*.

In *Virginia* the same rule seems to have been announced as in *South Carolina*. In *M'Key v. Young*, 4 Hen. & M. (Va.) 430, the chancellor said: "There is nothing more common than for an executor to be a purchaser of his own sale of his testator's estate, and most commonly to the advantage of the legatees." See also *Anderson v. Fox*, 2 Hen. & M. (Va.) 245. But see *Staples v. Staples*, 24 Gratt. (Va.) 225, in which Moncure, Pres., said: "It is certainly well settled, as a general rule, that

a trustee for the sale of property cannot purchase it for his own benefit at his own sale, either directly by his own act, or indirectly by the interposition and agency of another; and that an executor is a trustee within the meaning of the rule."

2. Statutory Authority to Purchase. — *Linman v. Riggins*, 40 La. Ann. 761, 8 Am. St. Rep. 549; *Griswold v. Chandler*, 5 N. H. 492; *Clark v. Clark*, 65 N. Car. 655; *Finch v. Finch*, 28 S. Car. 164, 13 Am. St. Rep. 665; *Cunningham v. Cauthen*, 37 S. Car. 123. See also the local statutes.

3. Purchase Voidable at Election of Persons Interested in Estate — *United States*. — *Michoud v. Girod*, 4 How. (U. S.) 503.

Arkansas. — *Jones v. Graham*, 36 Ark. 383.

California. — *Boyd v. Blankman*, 29 Cal. 34, 87 Am. Dec. 146; *San Diego v. San Diego*, etc., R. Co., 44 Cal. 114.

Georgia. — *Shine v. Redwine*, 30 Ga. 780; *Anderson v. Green*, 46 Ga. 361; *Houston v. Bryan*, 78 Ga. 181, 6 Am. St. Rep. 252; *Mercer v. Newsom*, 23 Ga. 151.

Illinois. — *Thorp v. McCullum*, 6 Ill. 614; *Lockwood v. Mills*, 39 Ill. 602.

Kentucky. — *Blakey v. Blakey*, 3 J. J. Marsh. (Ky.) 674.

Massachusetts. — *Ives v. Ashley*, 97 Mass. 198; *Harrington v. Brown*, 5 Pick. (Mass.) 519. *Mississippi*. — *Pearson v. Moreland*, 7 Smed. & M. (Miss.) 609, 45 Am. Dec. 319.

Nevada. — *Furth v. Wyatt*, 17 Nev. 183.

New York. — *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Metropolitan El. R. Co. v. Manhattan R. Co.*, 14 Abb. N. Cas. (N. Y. C. Pl.) 253; *Boerum v. Schenck*, 41 N. Y. 182; *Matter of Bach*, 2 Connolly (N. Y.) 490.

North Carolina. — *Cannon v. Jenkins*, 1 Dev. Eq. (16 N. Car.) 426.

Pennsylvania. — *Lothrop v. Wightman*, 41 Pa. St. 297; *Grim's Appeal*, 105 Pa. St. 375. *Vermont*. — *Mead v. Byington*, 10 Vt. 116.

Virginia. — *Buckles v. Lafferty*, 2 Rob. (Va.) 292, 40 Am. Dec. 752. See also *Hudson v. Hudson*, 5 Munf. (Va.) 180.

Wisconsin. — *Stronach v. Stronach*, 20 Wis. 129.

Creditors have the same right as heirs to sue to set aside a purchase by the administrator at his own sale. *Grubbs v. McGlawn*, 39 Ga. 672.

4. Rule at Law — Sale Valid in Absence of Actual Fraud. — *Lockwood v. Mills*, 39 Ill. 602.

sons interested in the estate,¹ and it is valid as to them until it is set aside at their instance.²

bb. EFFECT AS TO THIRD PERSONS. — As to persons who have no interest in the estate, a sale by an executor or administrator to himself is valid and conclusive.³

1. Purchase May Be Ratified by Parties in Interest — *California*. — *Boyd v. Blankman*, 29 Cal. 36, 87 Am. Dec. 146.

Illinois. — *Williams v. Rhodes*, 81 Ill. 571.

Indiana. — *Hoover v. Malen*, 83 Ind. 195.

Louisiana. — *Wood v. Nicholls*, 33 La. Ann. 744; *Prothro v. Prothro*, 33 La. Ann. 598.

Massachusetts. — *Ives v. Ashley*, 97 Mass. 198; *Dudley v. Sanborn*, 159 Mass. 185 [citing *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23; *Yeackel v. Litchfield*, 13 Allen (Mass.) 417, 90 Am. Dec. 207; *Raphael v. Reinstein*, 154 Mass. 178].

Nevada. — *Furth v. Wyatt*, 17 Nev. 180.

North Carolina. — *Villines v. Norfleet*, 2 Dev. Eq. (17 N. Car.) 167; *Lyon v. Lyon*, 8 Ired. Eq. (43 N. Car.) 201.

Pennsylvania. — *Grim's Appeal*, 105 Pa. St. 375.

South Carolina. — *Trimmier v. Trail*, 2 Bailey L. (S. Car.) 480.

It Is a Ratification of a purchase by an executor or administrator at his own sale of property of the estate where the parties interested acquiesce in the purchase for a long time after they are capable of objecting, and are fully apprised of the facts of the case.

Alabama. — *Daniel v. Stough*, 73 Ala. 379.

Arkansas. — *Bland v. Fleeman*, 58 Ark. 84.

Georgia. — *Flanders v. Flanders*, 23 Ga. 249.

Kentucky. — *Morrisson v. Garrott*, (Ky. 1893) 22 S. W. Rep. 320.

Maryland. — *Williams v. Marshall*, 4 Gill & J. (Md.) 376.

Virginia. — *Todd v. Moore*, 1 Leigh (Va.) 457.

Where the parties interested accept a note given by the administrator for the price, *Mills v. Mills*, 57 Fed. Rep. 873, or where the executor or administrator accounts with them for the price, without any unfairness in the settlement, and with knowledge on their part of all the facts, *Petty v. Harman*, 1 Dev. Eq. (16 N. Car.) 191; *Villines v. Norfleet*, 2 Dev. Eq. (17 N. Car.) 167; *Tate v. Dalton*, 6 Ired. Eq. (41 N. Car.) 562, they thereby ratify the purchase.

2. Purchase by Executor or Administrator Good until Set Aside. — *Mercer v. Newsom*, 23 Ga. 151; *Mitchell v. Dunlap*, 10 Ohio 117.

This Rule Has Been Apparently Contradicted by some cases which characterize a purchase by an executor or administrator at his own sale as absolutely void, but on an examination of the language used in the opinions the meaning is clear that any one interested in the estate has an absolute right to have the sale set aside without the allegation or proof of any fraud or unfairness on the part of the executor or administrator. Thus in *Michoud v. Girod*, 4 How. (U. S.) 557, Mr. Justice Wayne, delivering the opinion of the court, said: "The purchase is void, and will be set aside at the instance of the *cestui que trust*, and a resale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court. We are aware that cases may be found in the reports of some

of the chancery courts in the United States, in which it has been held that an executor may purchase, if it be without fraud, any property of his testator, at open and public sale, for a fair price, and that such purchase is only voidable, and not void as we hold it to be. But with all due respect for the learned judges who have so decided, we say that an executor or administrator is, in equity, a trustee for the next of kin, legatees, and creditors, and that we have been unable to find any one well-considered decision, with other cases, or any one case in the books, to sustain the right of an executor to become the purchaser of the property which he represents, or any portion of it, though he has done so for a fair price, without fraud, at a public sale. Why should the rule be relaxed in the case of persons most frequently exposed to the temptations of self-interest, who may yield to it more readily than any others, with a larger impunity, if the day of equitable retribution shall ever come for those who have been defrauded? Is it not better that the cause of the evil shall be prohibited than that courts of equity shall be relied upon to apply the remedy in particular cases, by inquiring into all the circumstances of a case, whether there has or has not been fraud in fact?"

See also *Macarty v. Bond*, 9 La. 355, in which it was held that a sale to the administrator is absolutely null, and may be attacked by an opposing creditor without alleging that it was in fraud of his rights or to his injury.

3. Third Persons Cannot Question Validity of Sale. — *Richardson v. Jones*, 3 Gill & J. (Md.) 185; *Williams v. Marshall*, 4 Gill & J. (Md.) 376; *Harrington v. Brown*, 5 Pick. (Mass.) 521; *Jackson v. Van Dalfsen*, 5 Johns. (N. Y.) 43; *Lothrop v. Wightman*, 41 Pa. St. 297.

Within this principle a mortgagor cannot set up as a defense to an action to foreclose the mortgage that the plaintiff, as administrator of the mortgagee, assigned the mortgage to a third person, by whom it was at once assigned back to the plaintiff as an individual. *Read v. Knell*, 143 N. Y. 484, *affirming* 69 Hun (N. Y.) 541, and *citing* *Hawley v. Cramer*, 4 Cow. (N. Y.) 719; *Forbes v. Halsey*, 26 N. Y. 65, and *Harrington v. Brown*, 5 Pick. (Mass.) 519, in support of the doctrine that the assignment was not void, but merely voidable at the election of the next of kin of the deceased mortgagee.

Purchaser Cannot Question Authority to Sell. — Where an individual creditor of an administrator receives from him, in payment of the debt, chattels belonging to the estate, he cannot afterwards question the administrator's authority and claim that the debt has not been paid. *Frank v. Thompson*, 105 Ala. 211.

Creditor of Heir Cannot Question Authority to Sell. — Though a private sale by the administrator to himself may be avoided by the heirs or creditors of the decedent, it cannot be questioned by a creditor of one of the heirs. *Lothrop v. Wightman*, 41 Pa. St. 297.

cc. EFFECT AS TO EXECUTOR OR ADMINISTRATOR. — If an executor or administrator, in violation of his duty, purchases property of the estate at his own sale, the parties in interest may, at their option, have the sale set aside as against him or any one to whom he has transferred it with notice of the facts, and may require him to account for the profits; ¹ or he may be required to account for the value of the property and also for any profits that he may have realized from it. ² But the sale will not be set aside at the instance of the executor or administrator. The rule is intended solely for the protection of the beneficiaries of the estate. ³

(4) *Warranties and Representations* — (a) *Implied Warranty.* — The authorities are almost unanimous in holding that there is no implied warranty, either of title or soundness, on a sale of personal property by an executor or administrator, and that the maxim of *caveat emptor* applies to the fullest extent in such cases. ⁴

In South Carolina, however, it has been held that an executor or administrator impliedly warrants the title and soundness of chattels of the decedent sold by him. ⁵

(b) *Express Warranty.* — It has been said that the absolute power possessed by an executor or administrator to dispose of the personalty of his decedent gives him power, in making the sales, to bind the estate by an express warranty; but the weight of authority is to the effect that he cannot impose any liability

The Successor in Office of an Executor or Administrator is held to be within this rule, and he cannot attack the validity of a purchase, though the legatees may. *Price v. Nesbit*, 1 Hill Eq. (S. Car.) 445.

An Execution Against an Administrator levied on property bought by him at his own sale does not bind the property where the sale is afterwards set aside. *Teague v. Dunlap*, Harp. Eq. (S. Car.) 97.

1. Setting Aside Sale. — See *supra*, this section, *Effect as to Persons Interested in Estate.*

Accounting for Profits When Sale Is Set Aside. — *Whotton v. Toone*, 5 Madd. 54.

In *Re Norrington*, 13 Ch. Div. 654, 28 W. R. 711, an executor to whom the testator gave all his property in trust to sell purchased the testator's business at a valuation made, and it was held that the sale should be set aside, and that the executor should account for the profits made since the sale, with just allowances.

In *Churchill v. Akin*, 5 Dana (Ky.) 481, where an administrator retained slaves of the decedent in satisfaction of what he supposed was a just claim against the decedent, but which was in fact unfounded, it was held that the sale should be deemed nugatory, and that the slaves were still a part of the decedent's estate, and the administrator was chargeable only with the amount of their hire.

2. Liability for Value. — *Whitley v. Alexander*, 73 N. Car. 444.

In *Stiles v. Burch*, 5 Paige (N. Y.) 132, it was held that the executor or administrator may be charged with the full value of the property at the time of the sale, with interest, or with the present value and the net income from the time of the sale.

If He Resells at a Profit, he must account for the difference between the price which he paid and the price at which he resold. *Ford v. Blount*, 3 Ired. L. (25 N. Car.) 516; *Matter of Turner*, 1 Hawaiian 266.

If the Property Becomes Worthless in His Hands, as in the case of emancipated slaves, he is

liable for the value at the time of the sale. *McDonald v. Jacobs*, 85 Ala. 64.

Property Fluctuating in Value. — In *Barker v. Smith*, 1 Dem. (N. Y.) 290, an executor sold to himself, at private sale, shares of stock belonging to the estate. On his accounting, the parties in interest being disposed to sanction the purchase, the executor was held liable for the market value of the stock on the day of the sale, with interest.

3. Representative Cannot Avoid His Own Purchase. — *McClure v. Miller*, Bailey Eq. (S. Car.) 107, 21 Am. Dec. 522.

4. No Implied Warranty on Sale by Executor or Administrator — *Alabama.* — *Ricks v. Dillahunt*, 8 Port. (Ala.) 133; *Pool v. Hodnett*, 18 Ala. 752.

Connecticut. — *Bartholomew v. Warner*, 32 Conn. 98, 85 Am. Dec. 251.

Illinois. — *Bingham v. Maxcy*, 15 Ill. 295.

Maryland. — *Mockbee v. Gardner*, 2 Har. & G. (Md.) 176.

Mississippi. — *Mellen v. Boarman*, 13 Smed. & M. (Miss.) 100; *Joslin v. Caughlin*, 26 Miss. 134; *Cogan v. Frisby*, 36 Miss. 178; *George v. Bean*, 30 Miss. 147; *Hutchins v. Brooks*, 31 Miss. 430.

Texas. — *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Thompson v. Munger*, 15 Tex. 523, 65 Am. Dec. 176.

The maxim *caveat emptor* applies as well to an executor who purchases with the consent of the persons interested in the estate as to all buyers of chattels. *Parker v. Leathers*, 2 Jones Eq. (55 N. Car.) 249.

5. Warranty of Soundness and Title Implied in South Carolina. — *Eastland v. Longshore*, 1 Nott & M. (S. Car.) 194; *Duncan v. Bell*, 2 Nott & M. (S. Car.) 153; *O'Neill v. Abney*, 2 Bailey L. (S. Car.) 317.

The Liability on an Implied Warranty, according to the rule in *South Carolina*, is personal to the executor or administrator, *O'Neill v. Abney*, 2 Bailey L. (S. Car.) 317; though it may defeat or be a partial defense to an action

on the estate by means of such warranty, any more than he can by any other contract,¹ and if he expressly warrants a thing sold he merely incurs a personal liability,² though the breach of warranty is available as a defense in an action against the purchaser for the price.³

(c) **False Representations and Fraud.**—In case a sale is induced by the fraud or false representations of the executor or administrator he becomes liable to the purchaser for the resulting damage,⁴ or the purchaser may set up the fraud or false representations as a defense to an action against him for the price.⁵

against the purchaser for the price, *Prescott v. Holmes*, 7 Rich. Eq. (S. Car.) 9.

1. No Authority to Bind Estate by Express Warranty.—*Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Ray v. Virgin*, 12 Ill. 216; *Welch v. Hoyt*, 24 Ill. 117; *Huffman v. Hendry*, 9 Ind. App. 324; *Hutchins v. Brooks*, 31 Miss. 430. See also *Tiedeman on Sales*, § 277.

"Nothing is better settled than this, that unless the executor be specially thereunto authorized by the will, no warranty by an executor or administrator, on a sale of the property of the estate, can bind the estate, however solemn the form or deliberate the act of warranty may be. In such sales the executor or administrator acts simply as a trustee; he can sell nothing but the interest of the estate he represents in the thing sold; and as between the estate and the purchaser the rule of *caveat emptor* is rigidly applied, and the effect of the warranty is, at most, to lay the foundation of a claim to rescind the contract of sale *in toto*, and place the purchaser and the estate *in statu quo*, or to constitute a ground of action against the executor or administrator personally." *Per Brinkerhoff, J.*, in *Westfall v. Dungan*, 14 Ohio St. 276 [citing *The Monte Allegre*, 9 Wheat. (U. S.) 645; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Mellen v. Boarman*, 13 Smed. & M. (Miss.) 100; *George v. Bean*, 30 Miss. 151; *Lockwood v. Gilson*, 12 Ohio St. 526; *Dunlap v. Robinson*, 12 Ohio St. 530; *Thompson v. Munger*, 15 Tex. 523, 65 Am. Dec. 176; *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735].

Authority to Bind Estate by Express Warranty Asserted.—This authority was asserted in *Craddock v. Stewart*, 6 Ala. 77. In that case, however, the question was whether a breach of express warranty was a defense to an action for the price, and the liability of the estate to the purchaser was not involved. But in a later case the rule was laid down that an administrator who warrants the soundness of chattels of the estate sold by him binds himself personally. *Stoudenmeier v. Williamson*, 29 Ala. 558.

2. Personal Liability on Express Warranty.—*Aven v. Beckom*, 11 Ga. 1; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Ray v. Virgin*, 12 Ill. 216; *Westphal v. Carter*, 1 Misc. Rep. (N. Y. City Ct.) 403.

The liabilities of executors and administrators on express warranties made by them are also discussed in other parts of this title. See *infra*, this section, *Sale of Real Property—Warranty by Executor*; and *infra*, this title, *Sale of Real Estate under Order of Court—Title, Rights, and Liabilities of Purchaser—Rule of Caveat Emptor*.

Reimbursement for Liability Incurred.—In

White v. White, 3 Dana (Ky.) 374, it was held that where an administrator sold slaves with a general warranty of soundness, which it was the practice of the purchaser of such property to require, and the slaves proved unsound, and a recovery was had against him on the warranty, he would be allowed the sum recovered of him out of the assets in his hands.

Authority of Auctioneer.—An auctioneer has no authority to make a warranty binding on the executor. *Blood v. French*, 9 Gray (Mass.) 197.

3. Breach of Warranty Available as Defense to Action for Price.—*Peden v. Moore*, 1 Stew. & P. (Ala.) 71, 21 Am. Dec. 649; *Craddock v. Stewart*, 6 Ala. 77.

4. Personal Liability for Fraud or False Representations.—*Riley v. Kepler*, 94 Ind. 308; *Huffman v. Hendry*, 9 Ind. App. 324; *Hutchins v. Brooks*, 31 Miss. 430.

5. Fraud or False Representations as Defense to Action for Price.—*Rice v. Richardson*, 3 Ala. 428; *Craddock v. Stewart*, 6 Ala. 77; *Riddle v. Hill*, 51 Ala. 224.

"If the administrator makes representations which he knows to be untrue, for the purpose of deceiving the purchaser, who is thereby deceived, without that degree of negligence on his part which will throw the responsibility of the deception upon himself, we hold that he may show that fraud in defense to the note. This does not dispense with the application of the rule *caveat emptor* to such sales. I know of no case where that rule has ever been so applied as to excuse a fraud. The utmost vigilance may often be unable to guard against the practices of the fraudulent. As has been repeatedly decided by this court, in the absence of fraud the purchaser at such sales must not only look out for the title, but for the quality of the article which he purchases. Nor can the administrator bind the estate by a warranty of either. If he assumes to do so, he would be personally responsible upon such warranty. This is carrying the doctrine of risk to the purchaser and immunity to the estate far enough. To go farther, and sanction the practice of a fraud, would tend to drive all prudent men from such sales, which would prove a serious detriment to estates." *Ray v. Virgin*, 12 Ill. 216. See also *Welch v. Hoyt*, 24 Ill. 117; *Newell v. Clapp*, 97 Wis. 104. Compare *Hutchins v. Brooks*, 31 Miss. 430; *George v. Bean*, 30 Miss. 147.

False Representations by Auctioneer.—"The right to make such defense is not destroyed by the mere fact that such fraud was not perpetrated by the administrator himself, but by the auctioneer employed by him to make the sale, whilst in the very act of making the sale. For it is well settled that no one can hold an

(5) *Validity of Sale* — (a) *General Rule.* — The logical consequence of the common-law doctrine, that an executor or administrator has absolute authority to dispose of the personal property of the decedent is that the exercise of the authority operates to transfer the title to the purchaser, and the title so acquired is not affected by any improper motive on the part of the executor or administrator in making the sale, or by his subsequent conversion or waste of the purchase money, unless the purchaser colluded with him; ¹ but if the purchaser deals with the executor or administrator fraudulently or collusively, for the purpose of aiding him in the accomplishment of a devastavit, the sale may be set aside for the fraud, and the property followed by creditors or others

interest obtained through the fraud of another any more than if the fraud were committed by himself. In legal contemplation it is as much against conscience to attempt to avail one's self of the iniquity of an agent after it is known, as if there had been preconcert," and it is immaterial that the agent was not authorized by the administrator to make the representation which deceived the purchaser, and which induced him to bid on the property for the price of which the note sued on was given. *Atwood v. Wright*, 29 Ala. 346 [citing *Bowers v. Johnson*, 10 Smed. & M. (Miss.) 169; *Meadows v. Smith*, 7 Ired. Eq. (42 N. Car.) 7; *Harris v. Delamar*, 3 Ired. Eq. (38 N. Car.) 219; 2 White & T. L. Cas. (pt. ii.) 64].

1. *Bona Fide Purchaser Takes Good Title* — *England.* — *Chandler v. Thompson*, Hob. 266. *Alabama.* — *Killam v. Castley*, 52 Ala. 86; *Waring v. Lewis*, 53 Ala. 615; *Van Hoose v. Bush*, 54 Ala. 342; *Baldwin v. Hatchett*, 56 Ala. 461.

Connecticut. — *Hough v. Bailey*, 32 Conn. 288.

Georgia. — *King v. King*, 37 Ga. 205.

Illinois. — *Walker v. Craig*, 18 Ill. 116.

Indiana. — *Weyer v. Franklin Second Nat. Bank*, 57 Ind. 198.

Massachusetts. — *Hutchins v. State Bank*, 12 Met. (Mass.) 421; *Shaw v. Spencer*, 100 Mass. 392, 1 Am. Rep. 115, 97 Am. Dec. 107.

New York. — *Leitch v. Wells*, 48 N. Y. 585; *Dillaye v. Commercial Bank*, 51 N. Y. 345.

Ohio. — *Jelke v. Goldsmith*, 52 Ohio St. 499.

Pennsylvania. — *Petric v. Clark*, 11 S. & R. (Pa.) 377, 14 Am. Dec. 636.

South Carolina. — *Pulliam v. Byrd*, 2 Strobb. Eq. (S. Car.) 134.

Tennessee. — *Johnson v. Kay*, 8 Humph. (Tenn.) 142.

Virginia. — *Staples v. Staples*, 24 Gratt. (Va.) 225; *Jones v. Clark*, 25 Gratt. (Va.) 642; *Lingle v. Cook*, 32 Gratt. (Va.) 262. See also *Knight v. Yarrowborough*, 4 Rand. (Va.) 566.

"A Bare Act of Sale of the assets by the executor is a sufficient indemnity to the purchaser, if there be no collusion." *Per Chancellor Kent in Sutherland v. Brush*, 7 Johns. Ch. (N. Y.) 17, 11 Am. Dec. 383.

And it is immaterial that the sale was not necessary to pay debts. *Stamps v. Beaty*, Hard. (Ky.) 345; *Anderson v. Irvine*, 6 B. Mon. (Ky.) 232.

A Sale Is Prima Facie Consistent with the Duty of the executor or administrator, and therefore is presumed to be valid until it is shown that the purchaser acquired the property by a

known breach of trust on the part of the executor or administrator. *Marshall County v. Hanna*, 57 Iowa 372; *Gibbs v. Flour City Nat. Bank*, 86 Hun (N. Y.) 103; *Price v. Nesbit*, 1 Hill Eq. (S. Car.) 445; *Pulliam v. Byrd*, 2 Strobb. Eq. (S. Car.) 134; *Knight v. Yarrowborough*, 4 Rand. (Va.) 566; *Williams v. Ely*, 13 Wis. 7.

Sale by Infant Administrator. — An infant who was appointed administrator may, on attaining his majority, sue to set aside a sale of the decedent's property, made by him during infancy, in order to avoid liability to the purchaser on account of the sale made under such void appointment. *Knox v. Nobel*, 77 Hun (N. Y.) 230, 23 Civ. Pro. Rep. (N. Y.) 429.

The Fact that the Testator Had Provided a Particular Fund for the payment of debts, of which the property sold was not a part, and that the purchaser had notice of the will, will not affect the validity of the sale. *Tyrell v. Morris*, 1 Dev. & B. Eq. (21 N. Car.) 559.

Chattels Specifically Bequeathed. — As to the title acquired by the purchaser of chattels which have been specifically bequeathed, see *supra*, this section, *Sale and Transfer of Personal Property* — *Sale of Property Specifically Bequeathed*.

If the Will Authorizes the Sale of the Testator's Property to Pay Debts, but does not specify the manner, the executor may dispose of it at private sale, and without previous advertisement or leave of the Court of Ordinary; and the purchaser at such private sale will acquire a good title, even as against the creditors of the testator, provided that the purchase is *bona fide*, and without fraud on the part of the purchaser. *Wright v. Zeigler*, 1 Ga. 343.

A Sale in Satisfaction of a Debt due from the decedent to the purchaser is not subject to repudiation by the executor or administrator, on the estate afterwards proving insolvent and being so declared. *Parker v. Daughtry*, 111 Ala. 529.

A Private Sale is held to be void in *Alabama*, and the administrator cannot enforce payment of the purchase money. *Fambro v. Gantt*, 12 Ala. 298; *Wilson v. Armstrong*, 42 Ala. 168, 94 Am. Dec. 635; *Beene v. Collenberger*, 38 Ala. 647.

Effect of Revocation of Administrator's Letters. — A sale made by an administrator is not invalidated by the subsequent revocation of the letters of administration. *Benson v. Rice*, 2 Nott & M. (S. Car.) 577. See also *supra*, this title, *Appointment and Tenure of Office*, subdiv. 4. c. *Removal from Office or Revocation of Letters*.

having an interest in the estate, or the purchaser may be held liable for the value of the property.¹

Evidence of Fraud or Collusion on the part of the purchaser is afforded by the fact that he received the property in satisfaction of a debt due him from the executor or administrator individually, or that it sold at an inadequate price, or that the circumstances were such as to charge the purchaser with notice that the executor or administrator was selling for his own benefit and not for the benefit of the estate.²

1. Setting Aside Sale — Collusion Between Purchaser and Executor or Administrator — *England.* — *Whale v. Booth*, 4 T. R. 625, note *a*.

United States. — *Smith v. Ayer*, 101 U. S. 320.

Georgia. — *Rogers v. Fort*, 19 Ga. 94.

Maryland. — *Allender v. Riston*, 2 Gill & J. (Md.) 86.

Massachusetts. — *Shaw v. Spencer*, 100 Mass. 393, 1 Am. Rep. 115, 97 Am. Dec. 107.

Michigan. — *Pierce v. Holzer*, 65 Mich. 263.

Tennessee. — *Parker v. Gilliam*, 10 Yerg. (Tenn.) 394; *Smartt v. Watterhouse*, 6 Humph. (Tenn.) 158.

Virginia. — *Dodson v. Simpson*, 2 Rand. (Va.) 294.

Wisconsin. — *Williams v. Ely*, 13 Wis. 7.

Notes Transferred for Illegal Purposes May Be Recovered from the transferee, if he had notice of the wrongful purpose of the transfer. *Barwick v. White*, 2 Del. Ch. 284; *Makepeace v. Moore*, 10 Ill. 474; *Miller v. Williamson*, 5 Md. 219; *Miller v. Helm*, 2 Smed. & M. (Miss.) 687; *Scott v. Searles*, 7 Smed. & M. (Miss.) 493, 45 Am. Dec. 317; *Booyer v. Hodges*, 45 Miss. 73.

2. Evidence of Collusion — Sale for Individual Debts. — A sale by an executor or administrator in payment of or as security for his own debt is sufficient notice to the purchaser that the transaction is not for the benefit of the estate, but for the benefit of the executor or administrator individually, and such a transaction is always held collusive and fraudulent. *Jelke v. Goldsmith*, 52 Ohio St. 499, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 288, 299. See also *Smith v. Ayer*, 101 U. S. 320; *Williamson v. Branch Bank*, 7 Ala. 906, 42 Am. Dec. 617; *Killam v. Costley*, 52 Ala. 86; *Van Hoose v. Bush*, 54 Ala. 353; *Austin v. Willson*, 21 Ind. 252; *Carter v. Manufacturers' Int. Bank*, 71 Me. 448, 36 Am. Rep. 338; *Miller v. Helm*, 2 Smed. & M. (Miss.) 687; *Sherburne v. Goodwin*, 44 N. H. 279; *Colt v. Lasnier*, 9 Cow. (N. Y.) 320; *Bogert v. Hertell*, 4 Hill (N. Y.) 492; *Gray v. Armistead*, 6 Ired. Eq. (41 N. Car.) 74; *Bradshaw v. Simpson*, 6 Ired. Eq. (41 N. Car.) 243; *Dodson v. Simpson*, 2 Rand. (Va.) 294; *Graff v. Castleman*, 5 Rand. (Va.) 195, 16 Am. Dec. 741; *Davis v. Christian*, 15 Gratt. (Va.) 11; *Stronach v. Stronach*, 20 Wis. 129; 1 Leading Cas. in Equity, § 59 and note.

Inadequate Price. — The fact that the goods were sold at a gross undervalue is strong evidence of collusion, which, taken in connection with other circumstances, may afford good ground for setting the sale aside. *Scott v. Tyler*, 2 Dick. 725; *M'Mullen v. O'Reilly*, 15 Ir. Rep. 251; *Skrine v. Simmons*, 11 Ga. 401; *Heath v. Allin*, 1 A. K. Marsh. (Ky.) 442; *Joyner v. Conyers*, 6 Jones Eq. (59 N. Car.) 78.

Thus a sale by an administrator to his brother and copartner was set aside, it appearing to the court from the evidence that the sale was made at an undervalue so gross that it ought to be deemed fraudulent and void. *Rice v. Gordon*, 11 Beav. 265.

If by the fraudulent machinations of the administrator a sale be made for an inadequate price, and brought in for distributees, to the injury of creditors, it will be set aside, the purchaser having paid out no money. *Planters' Bank v. Neely*, 7 How. (Miss.) 80, 40 Am. Dec. 51.

Sale of Bonds at Discount. — In *Fisher v. Bassett*, 9 Leigh (Va.) 119, 33 Am. Dec. 227, an administrator took a bond to himself individually for a debt due to his intestate's estate, payable at a distant day, and then sold the bond at a discount of twenty-five per cent. to an assignee, who knew that the consideration of the bond was a debt due to the intestate's estate, but was informed, and so informed as to justify him in believing, that the administrator had acquired the full property in the bond in his own right. The burden of proof was then held to be on the assignee to show the fairness of the administrator's conduct, and if the administrator had not purchased the claim from the next of kin, or had not made such advances as to justify him in appropriating it to himself, the assignee could not in equity avail himself of the transfer. The sale of the bond at so large a discount was held in itself to be *prima facie* a devastavit, and the burden of proof was on the assignee to show that the necessities of the estate, and not those of the administrator, required the sacrifice.

Circumstances Indicating Fraud. — Where an executor parts with any portion of the assets of the testator under such circumstances as that the purchaser must be reasonably taken to know that they were sold, not for the benefit of the estate, but for the executor's own benefit, the result is that the purchaser holds the assets as if he were himself in respect of those assets the executor. *Walker v. Taylor*, 8 Jur. N. S. 681, 4 L. T. N. S. 845.

Thus the transaction was held fraudulent where an administrator *durante minore aetate* sold East India stock, and the buyer had full notice that it was the stock of the infant. *Munn v. East India Co.*, Finch 298.

In *M'Leod v. Drummond*, 17 Ves. Jr. 172; *Hill v. Simpson*, 7 Ves. Jr. 152, and *Keane v. Roberts*, 4 Madd. 357, the subject of a party dealing with the executor for the assets was fully discussed. The general principles furnished by these cases appear to be these: A party dealing with the executor is responsible if any way conniving at his breach of trust. As a general rule, he does not become a party to the fraud by buying or receiving the assets

Distinction Between Sale by Executor or Administrator and Sale by Trustee. — There is an important distinction as affecting the title of the purchaser between a sale by an executor or administrator and a sale by a trustee, in this, that sales by executors or administrators are ordinarily in the line of their duty, while trustees presumptively hold the trust property as an investment for the beneficiaries; and therefore mere knowledge that an executor or administrator is dealing with the assets of the estate is not sufficient to put a person dealing with him on the inquiry, or to raise a suspicion, as in the case of trustees.¹

(b) **Effect of Statutory Provisions.** — The various statutory provisions relating to sales of decedents' personal property by executors and administrators are of two general classes. In some jurisdictions the statutes are merely directory, not abrogating the common-law power of the executor or administrator to sell and give a good title to the purchaser, but only relieving him from liability for any loss sustained by the estate in consequence of a sale when he follows the statute, and making him liable, if he does not follow the statute, for what he would have realized if he had made the sale pursuant to its provisions.² In other jurisdictions the statutes are mandatory, and the sales are void if the statutes are not complied with, as if the executor or administrator sells without first obtaining an order of court, or if he sells at private sale when the statute requires the sale to be public.³

as a pledge for money advanced at the time. And as a general rule he is such party by buying or taking them in pledge, in satisfaction of an antecedent debt of the executor. There are exceptions to both rules. The party may know that the advances are intended for the private purposes of the executor, not those of the will. And in two cases, *Nugent v. Gifford*, 1 Atk. 463, and *Mead v. Orrery*, 3 Atk. 235, Lord Hardwicke supported a sale of assets for the private debt of the executor under special circumstances. See, however, as to these cases, Lord Eldon's remarks in *M'Leod v. Drummond*, 17 Ves. Jr. 163. See also *Taner v. Ivie*, 2 Ves. 466; *Scott v. Tyler*, Dick. 712; *Rogers v. Zook*, 86 Ind. 237; *Salmon v. Clagett*, 3 Bland (Md.) 125; *Miller v. Williamson*, 5 Md. 219; *Shaw v. Spencer*, 100 Mass. 393, 1 Am. Rep. 115, 97 Am. Dec. 107; *Colt v. Lasnier*, 9 Cow. (N. Y.) 320; *Wilson v. Doster*, 7 Ired. Eq. (42 N. Car.) 231; *Petrie v. Clark*, 11 S. & R. (Pa.) 377, 14 Am. Dec. 636; *Parker v. Gilliam*, 10 Yerg. (Tenn.) 394; *Atcheson v. Scott*, 51 Tex. 213.

A Note Which Names the Payee as Administrator of a decedent's estate is of itself sufficient to charge the transferee with notice that it was not the individual property of the payee. *Miller v. Helm*, 2 Smed. & M. (Miss.) 687.

1. Distinction Between Personal Representatives and Trustees — *United States*. — *Jaudon v. National City Bank*, 8 Blatchf. (U. S.) 430, affirmed *sub nom. Duncan v. Jaudon*, 15 Wall. (U. S.) 175.

Georgia. — *Nutting v. Thomason*, 46 Ga. 34; *Stinson v. Thornton*, 56 Ga. 377.

Maine. — *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338.

New Jersey. — *Prall v. Tilt*, 28 N. J. Eq. 479; *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98.

New York. — *Leitch v. Wells*, 48 N. Y. 585; *Gottberg v. U. S. Nat. Bank*, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 50.

Pennsylvania. — *Bayard v. Farmers', etc., Bank*, 52 Pa. St. 232.

2. Common-law Authority to Sell Not Abrogated by Statute. — The *North Carolina* statute providing that it shall be the duty of an executor or administrator to sell the property of the decedent publicly is held to be only directory, and not to repeal the common law, but if the executor or administrator fails to obtain as much at private sale as would have been gotten at public vendue, he will be bound to make good the deficiency out of his own pocket. *Tyrrell v. Morris*, 1 Dev. & B. Eq. (21 N. Car.) 559; *Cannon v. Jenkins*, 1 Dev. Eq. (16 N. Car.) 427; *Wynns v. Alexander*, 2 Dev. & B. Eq. (22 N. Car.) 59; *Dickson v. Crawley*, 112 N. Car. 629.

The Statutes Are Said to Be Merely Directory, and though a noncompliance with them may affect the accountability of the executor or administrator for the property sold or the proceeds of the sale, it will not affect the validity of the sale itself if made in good faith and otherwise unobjectionable. *Clark v. Blackington*, 110 Mass. 369; *Sherman v. Willett*, 42 N. Y. 146; *Garth v. Heddlestone*, 2 Bay (S. Car.) 321; *Mead v. Byington*, 10 Vt. 116.

3. Rule Requiring Sale to Be in Accordance with Statute. — Executors and administrators, in making sales of property, must comply with the statutory provisions authorizing them, in every essential direction; otherwise the interest of heirs and creditors will not be divested. *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Weyer v. Franklin Second Nat. Bank*, 57 Ind. 198.

Sale Without Order of Court Void. — *Riddle v. Hill*, 51 Ala. 224.

In some states an order of sale is required in the case of the sale of choses in action, and in such states the assignment or sale of a judgment by an administrator without an order of court is void. *Winningham v. Holloway*, 51 Ark. 385.

In *Washington* a sale of personal property without leave of the Probate Court may be ratified and rendered valid by the court if deemed to the advantage of the estate. So, too,

(6) *Rights and Liabilities of Purchasers* — (a) *In General.* — When the property of a decedent is sold by the executor or administrator, either by virtue of his common-law power or pursuant to statute, the purchaser takes an indefeasible title, though the sale was made for the individual benefit of the executor or administrator, and not for the benefit of the estate, unless the purchaser was guilty of collusion with him in such violation of duty.¹

But if the Purchaser Acts in Collusion with the executor or administrator, or if the sale is not made in compliance with the statute in those jurisdictions where the statutes regulating the subject are mandatory in their effect, the sale is

any one interested in the estate may ratify such sale to the extent of his interest. *Brewster v. Baxter*, 2 Wash. Ter. 135. See also *supra*, this section, *Sale of Choses in Action*.

A Sale Under a Void Order does not pass the title to the purchaser. *Riddle v. Hill*, 51 Ala. 224; *Beene v. Collenberger*, 38 Ala. 647; *Michel's Succession*, 20 La. Ann. 233.

An Order of Sale Is Void unless it is founded on an application by the executor or administrator reciting the facts required by the statute. *Wyatt v. Rambo*, 29 Ala. 510, 68 Am. Dec. 89; *King v. Kent*, 29 Ala. 542; *Ikelheimer v. Chapman*, 32 Ala. 676; *Hatcher v. Clifton*, 33 Ala. 301; *Hall v. Chapman*, 35 Ala. 553. See also *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399.

Private Sale. — In some states a sale is void if made privately instead of at public auction as the statute requires. *Gaines v. De La Croix*, 6 Wall. (U. S.) 719; *Ventress v. Smith*, 10 Pet. (U. S.) 161; *Dearman v. Dearman*, 4 Ala. 521; *Fambro v. Gantt*, 12 Ala. 298; *Wier v. Davis*, 4 Ala. 442; *McArthur v. Carrie*, 32 Ala. 75, 70 Am. Dec. 529.

In *Louisiana* a private sale made without an order of court is absolutely void. *Donaldson v. Hull*, 7 Martin N. S. (La.) 113.

In *Indiana* a private sale made without any necessity, without any authority other than that given by letters testamentary, and from which legatees or heirs have derived no benefit, is invalid, and no title passes to the purchaser. *Weyer v. Franklin Second Nat. Bank*, 57 Ind. 198; *Ramey v. McCain*, 51 Ind. 496.

Sale in Satisfaction of Decedent's Debts. — An executor or administrator has no power in some jurisdictions to sell or assign to a creditor of the decedent, in payment of the debt, a note belonging to the decedent's estate, until it is ascertained how much the creditor is entitled to receive, and such sale and transfer vests no title in him. This question was considered in *Payne v. Flournoy*, 29 Ark. 500. *Walker, J.*, delivering the opinion of the court, said: "She [the executrix] was a mere trustee, and derived all of her power and authority either from the provisions of the will or from the law. Under the statute she is required to take into her possession the whole of the estate of her testator, to charge herself with it, and annually to report to the Probate Court the whole amount of the estate which has come to her hands, the amount of cash collected, the amount paid in expenses, and the balance of cash on hand. The sum so ascertained by the court upon settlement is held as a common fund for the payment of the debts of the estate. All creditors are required to present

their claims to the court for allowance and classification. No claim is to be paid until thus presented and classed, and an order for payment made by the court, giving preference in payments to claims of prior right to satisfaction according to class. * * * The power of an executor or administrator to assign notes and bonds belonging to an estate, as provided in section 96, c. 4, Gould's Dig. 120, relates to the payment to creditors, legatees, and distributees whose claims have been allowed and classed and an order for their payment made, and is in effect a substitution of debts for money, should the creditor or distributee choose to receive them, and gives no power to sell, assign, or dispose of debts, part of a common fund, in payment of the debts of creditors, before, upon settlement, it is ascertained how much is due them. So far from conferring a general power to assign notes and bonds of estates, this enactment, conferring power for a special purpose, negatives the presumption that any such general power exists." See also *Whittaker v. Wright*, 35 Ark. 511, where this point was again decided.

Failure to Give Notice of Sale. — In *Halleck v. Moss*, 17 Cal. 339, it was held that a sale by executors of a testator's personality on insufficient notice was voidable, at least, if not void.

1. Title of Purchaser Valid in Absence of Collusion. — See *supra*, this section, *Authority to Sell*, and *Validity of Sale*.

The purchaser, on the discovery of an irregularity in the sale, must elect promptly whether to repudiate the transaction or not, and act consistently with his election. *Joslin v. Caughlin*, 30 Miss. 502.

Statute of Limitations. — A person who claims as purchaser from an administrator is protected by the statute of limitations against the administrator *de bonis non*, although the grant of the latter administration was within the statutory period next before the action brought. *Collins v. Bankhead*, 1 Strobb. L. (S. Car.) 25.

Claims of Third Persons Against Property Sold. — A *bona fide* purchaser of property from an executor who has power to sell is entitled to protection against the claims of third persons and may compel the executor, if he has assets, to pay the claims against the property. *Latrobe v. Tiernan*, 2 Md. Ch. 474.

Claims of Creditors. — A purchaser for value of assets of an estate from the executor who is also the residuary legatee takes title free from the claims of unsatisfied creditors, if he had no notice of debts or anything which made it improper for the executor to sell. *Graham v. Drummond*, (1896) 1 Ch 968.

either voidable at the instance of the parties in interest, or is absolutely void,¹ and in some cases the purchaser is held liable for the value of the property received by him.²

(b) *Application of Purchase Money.* — A purchaser of property sold by an executor or administrator, if he buys in good faith, and is guilty of no fraud, is not charged with the duty of seeing that the purchase money is applied to proper purposes, though the executor or administrator was acting in bad faith, and with the intention of converting the proceeds of the sale to his own use.³

(7) *Resale.* — If the sale is invalid, or if the property is withdrawn because the required price was not offered, the executor or administrator may again offer it for sale without obtaining a new order of court.⁴

e. MORTGAGE OR PLEDGE BY EXECUTORS AND ADMINISTRATORS — (1) *Authority to Mortgage or Pledge.* — Executors and administrators have authority, unless restricted by statute, to mortgage or pledge the personal property of their decedents for the purpose of raising money or securing debts; and this author-

1. *Title of Purchaser Invalid if Sale Was Collusive or Unauthorized.* — See *supra*, this section, *Purchase by Executor or Administrator*, and *Validity of Sale*.

2. *A Person Who Obtains the Testator's Effects* at a nominal price by collusive dealing with the executor is liable for the full value of the property received. *Hadley v. Kendrick*, 10 Lea (Tenn.) 525.

Purchase in Satisfaction of Individual Debts of Executor or Administrator. — In *Horton v. Jack*, (Cal. 1894) 37 Pac. Rep. 652, it was held that a person to whom an executrix transferred property in payment of her individual debt is liable for the value thereof on his refusal to return it, though the executrix was also sole legatee.

But in *Brockenbrough v. Turner*, 78 Va. 438, it was held that where a creditor of a solvent executor received from him, in payment of an individual debt, bonds which had been given for the price of lands of the estate, of which the executor had become a part owner, and the bonds so received amounted to less than the executor's share of the estate, there was no collusion in any devastavit by the executor.

Right of Purchaser under Void Sale. — A sale of personality made by an administrator without an order of court, or under an order void for want of jurisdiction, estops the administrator making it from a recovery of the property sold. *Pistole v. Street*, 5 Port. (Ala.) 64; *Fambro v. Gantt*, 12 Ala. 298; *Hopper v. Steele*, 18 Ala. 828; *Bragg v. Massie*, 38 Ala. 89, 79 Am. Dec. 82. Compare *Weir v. Davis*, 4 Ala. 442. But it seems that the successor in office of the administrator who made the sale may recover the property from the purchaser. *Beene v. Collenberger*, 38 Ala. 647.

3. *Purchaser Not Required to See to Application of Purchase Money* — *England.* — *Scott v. Tyler*, 2 Dick. 721; *Bonney v. Ridgard*, 1 Cox 146; *Humble v. Bill*, 2 Vern. 445; *Ewer v. Corbet*, 2 P. Wms. 149; *Watts v. Kancy*, Toth. 141; *Norton v. Norton*, Toth. 227; *Ward v. Ward*, 4 Ir. Ch. Rep. 215.

Maryland. — *Allender v. Riston*, 2 Gill & J. (Md.) 86.

New York. — *Gibbs v. Flour City Nat. Bank*, 86 Hun (N. Y.) 103; *Leitch v. Wells*, 48 N. Y. 585; *Bogert v. Hertell*, 4 Hill (N. Y.) 492.

Pennsylvania. — *Pennsylvania Ins. Co. v. Austin*, 42 Pa. St. 257.

Tennessee. — *Hadley v. Kendrick*, 10 Lea (Tenn.) 525.

Virginia. — *Davis v. Christian*, 15 Gratt. (Va.) 11.

"The Purchaser Is Not Bound to See to the Application of the Money, and cannot be made liable, unless he is fixed with notice, as by showing that the proceeds are applied to a debt of his own, which would not only fix him with notice, but make him a participator in the fraud, or by showing in some other way, that he had actual notice of the intended misapplication. Putting him on inquiry, or constructive notice, will not do." *Gray v. Armistead*, 6 Ired. Eq. (41 N. Car.) 74.

"His title becomes complete by sale and delivery; what becomes of the price is of no concern to him." *Per Lord Thurlow in Scott v. Tyler*, 2 Dick. 725.

Even Though the Sale Is in Bad Faith on the part of the executor or administrator, and with the intent and for the purpose of converting the proceeds of the sale to his own use, the purchaser is not required to see to the proper application of the purchase money, but he will be protected in his purchase, in case he acts in good faith, and without notice of the bad faith and wrongful intention of the executor or administrator. *Jelke v. Goldsmith*, 52 Ohio St. 499; *Ashton v. Atlantic Bank*, 3 Allen (Mass.) 217; *Sherburne v. Goodwin*, 44 N. H. 271; *Dodson v. Simpson*, 2 Rand. (Va.) 294.

Knowledge on the Part of the Purchaser of the existence of a claim for a legacy or a debt against the estate generally does not charge him with the duty of seeing to the application of the purchase money. *Keen v. James*, 39 N. J. Eq. 534; *Leitch v. Wells*, 48 N. Y. 585; *Wood's Appeal*, 92 Pa. St. 392, 37 Am. Rep. 694.

4. *Resale.* — Where the sale is invalid by reason of irregularity, another sale may be made without getting a new order to sell from the Probate Court. *Robbins v. Wolcott*, 27 Conn. 234.

Where succession property at first offering fails to bring the required price, no additional order of the court is required to authorize the administrator to readvertise and sell. *Campbell v. Owens*, 32 La. Ann. 265.

ity rests on the same principles, is governed by the same rules, and is subject to the same limitations in general, as apply to sales.¹

(2) *Validity of Mortgage or Pledge.* — Though an executor or administrator mortgages or pledges assets of the estate for his individual purposes, and not for the benefit of the estate, or subsequently misappropriates the proceeds, the rights of the mortgagee or pledgee are not affected thereby if he had no notice of the fact, or any reason for suspecting it. He is not obliged to

1. Executor or Administrator May Mortgage or Pledge Personal Property — *England.* — *Vane v. Rigden*, L. R. 5 Ch. 663, 39 L. J. Ch. 797, 18 W. R. 1092; *Farhall v. Farhall*, L. R. 7 Ch. 123, 20 W. R. 157; *Russell v. Plaice*, 18 Beav. 21, 18 Jur. 254, 23 L. J. Ch. 441; *Mead v. Orrery*, 3 Atk. 239; *McLeod v. Drummond*, 17 Ves. Jr. 154; *Child v. Thorley*, 16 Ch. Div. 151; *Berry v. Gibbons*, L. R. 8 Ch. 747, 21 W. R. 754, 29 L. T. N. S. 88; *Cruikshank v. Duffin*, L. R. 13 Eq. 555, 41 L. J. Ch. 317, 20 W. R. 354, 26 L. T. N. S. 121.

United States. — *Smith v. Ayer*, 101 U. S. 320.

Maine. — *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338.

North Carolina. — *Tyrell v. Morris*, 1 Dev. & B. Eq. (21 N. Car.) 559; *Wilson v. Doster*, 7 Ired. Eq. (42 N. Car.) 231.

Rule Well Settled. — In *Vane v. Rigden*, L. R. 5 Ch. 663, Sir W. M. James said: "It seems to me to be settled on principle, as well as by authority, that an executor has full right to mortgage as well as to sell, and it would be very inconvenient and very disastrous if the executor were obliged immediately to convert into money by sale every part of the assets of the testator. It is a very common practice for an executor to obtain an advance from a banker for the immediate wants of the estate by depositing securities. It would be a strange thing if that could not be done. If the executor can give a preference to a creditor by paying money to him, it appears impossible to say that he cannot give the preference by mortgaging the assets to him, which would be the same thing in effect as if he mortgaged to a stranger to raise the money and paid the money to the creditor." But see *Merchants' Nat. Bank v. Weeks*, 53 Vt. 115, in which case Redfield, J., said that an administrator has no legal power or right to borrow money and pledge the property of the estate in payment. See also *Ford v. Russell*, Freem. (Miss.) 42, in which case Chancellor Buckner made the general remark that "it is certain that the executor, as such, possesses no power to pledge the estate of his testator for the loan of money." Virgin, J., however, commenting on this case in *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338, said: "If the learned chancellor meant that an executor has no authority to pledge the assets of his testator for a contemporaneous advance of money for the use of the estate — for a purpose connected with the administration of the assets — he is not sustained by the great current of modern authority."

Equitable Assets may be mortgaged as well as legal assets. *Nugent v. Gifford*, 1 Atk. 463.

Choses in Action belonging to a decedent's estate may be mortgaged or pledged by the executor or administrator, and a mortgage or

pledge may be effected either by an actual assignment or by a deposit. *Scott v. Tyler*, 2 Dick. 724; *Vane v. Rigden*, L. R. 5 Ch. 667.

Mortgage of Leasehold to Raise Money for Repairs. — An administrator has no power to mortgage leaseholds of the intestate in order to raise money for repairing the property, where the leases do not contain covenants requiring the lessee to repair, and such a mortgage will be set aside as against a mortgagee who has notice of the purpose for which the money was raised. *Ricketts v. Lewis*, 20 Ch. Div. 745, 51 L. J. Ch. 837, 46 L. T. N. S. 368, 30 W. R. 609.

Mortgage with Power of Sale. — In *Russell v. Plaice*, 18 Beav. 21, it was held that an executor or administrator mortgaging property of a decedent might give the mortgagee a power of sale, and that giving such power is not in violation of the maxim *delegatus non potest delegare*. In reference to the application of this maxim the master of the rolls said: "The power which the executor or administrator possesses of making a valid mortgage appears to me to include in it a power to give all that is properly incidental to that species of alienation. An executor who sells property of his testator necessarily gives the purchaser a power of selling the property bought, because such a power is incidental to and inseparable from the estate conferred upon him by the conveyance. The power of sale given to a mortgagee must, I think, be considered, not as the delegation of a power intrusted to the executor, which is a power to sell for the benefit of his *cestui que trust*, but as the creation of a new power to sell, not for the benefit of the persons interested in the testator's estate, but for the benefit of the person interested in the mortgage; that is, a power to render the mortgage effectual; and I think that the right to create this power is incidental to the authority of the executor to mortgage. If this were withheld, the persons interested in the assets would be injured, because in that case a mortgage could not be effected, unless on terms less advantageous than could be obtained if the person advancing his money obtained the same security as if he was dealing with the absolute owner of the estate."

Effect of Pending Administration Suit. — The pendency of an administration suit, under the English practice, does not affect the power, if a receiver has not been appointed or an injunction granted. *Berry v. Gibbons*, L. R. 8 Ch. 747. See also *Neeves v. Burrage*, 14 Q. B. 504, 68 E. C. L. 504, 14 Jur. 177, 19 L. J. Q. B. 68.

Power Restricted by Statute. — In some jurisdictions executors and administrators have no power to mortgage the assets of the estate except as permitted by statute. *Boeger v. Langenberg*, 42 Mo. App. 7.

inquire the object of the executor or administrator, and is not liable for the misappropriation of the money.¹ But if he had notice, actual or constructive, that the executor or administrator was committing a breach of trust, he acquires no better title as against the estate than the executor or administrator himself:²

1. Mortgagee or Pledgee in Good Faith Not Affected by Breach of Trust.—*Lowry v. Commercial, etc., Bank*, Taney's Dec. (U. S.) 310; *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338; *Miller v. Williamson*, 5 Md. 219; *Gottberg v. U. S. National Bank*, 26 Abb. N. Cas.) N. Y. Supreme Ct.) 50.

Even a Pledge by an Executor Made for Other Purposes than those connected with the discharge of his duties under the will, the pledgee having no knowledge or notice of the wrong, but taking the property in good faith, will be sustained, for he is not bound to see to the disposition of the proceeds received. *Smith v. Ayer*, 101 U. S. 320.

Where a Bank in Good Faith Lent Money to an Executor on his individual note, secured by a pledge of stock belonging to the estate, and on his statement that the loan was for the purposes of the estate, the pledge was held valid, so that the stock could not be recovered without refunding the loan. *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338.

2. Notice of Breach of Trust Defeats Rights of Mortgagee or Pledgee.—*Collinson v. Lister*, 7 De G. M. & G. 634, 2 Jur. N. S. 75, 25 L. J. Ch. 38; *Ricketts v. Lewis*, 20 Ch. Div. 745, 51 L. J. Ch. 837, 46 L. T. N. S. 368, 30 W. R. 609; *Wilson v. Doster*, 7 Ired. Eq. (42 N. Car.) 231; *Graff v. Castleman*, 5 Rand. (Va.) 195, 16 Am. Dec. 741.

When Pledgee Has Notice of Abuse of Trust.—The distinction between a case where the pledgee of assets belonging to the estate of a decedent has notice that the executor or administrator is abusing his trust, and a case where he is led to believe that the executor or administrator is acting legitimately in the exercise of his representative authority, is clearly shown by the cases of *Prall v. Hamil*, 28 N. J. Eq. 66, and *Prall v. Tilt*, 27 N. J. Eq. 393, affirmed by 28 N. J. Eq. 479. In the case first cited (*Prall v. Hamil*, 28 N. J. Eq. 66) the executrix, who was the widow of the testator, assigned to the defendants shares of stock belonging to the testator's estate, as collateral security for the payment of any indebtedness of two of the testator's sons to the defendants thereafter to be incurred. The will, after making certain provisions for the testator's children, gave to the widow the entire balance of the estate during her widowhood, with power of sale and reinvestment; at her death it was to go to the children. The will also authorized the executrix to advance in a certain contingency ten thousand dollars to each of the two sons whose debt was secured by the assignment of the shares of stock. The defendants knew at the time of the assignment that the stock belonged to the estate. The court held that though the defendants might have thought that the executrix had the legal right to pledge the stock to them as security for credit to be given to the sons, that was not enough to protect the defendants, because they knew that the executrix was disposing of the stock, not in the due course of administra-

tion, but was pledging it to secure credit for her sons in their private business, and that it was their duty to inquire as to her authority. The second case (*Prall v. Tilt*, 27 N. J. Eq. 393, affirmed by 28 N. J. Eq. 479) arose out of the administration of the same estate. The two sons referred to in the preceding case obtained credit with another person by pledging shares of stock as collateral security, representing that the stock in question was the property of the firm composed of the two sons, and had been acquired by them on account of their interest in the estate. The executrix delivered to the son who negotiated the business her power of attorney in blank to transfer the stock, and thus corroborated his statement that the stock was owned by himself and his brother. The pledgee had no means of prosecuting an inquiry as to the truth of the representation and accepted the stock as security, and in good faith made advances on it. In this case it was held that the pledgee had a valid lien on the stock.

Another illustrative case is *Moore v. American L. & T. Co.*, 115 N. Y. 65. In this case the executor applied to the defendant for a loan, offering as security certain shares of stock belonging to the estate. The application was rejected on the ground that the executor did not have the consent of the persons who were named in the will as his coexecutors, though the defendant was advised that the acting executor alone could bind the estate. The application was then abandoned. Afterwards the executor's lawyer called on the defendant in reference to the matter, and in the course of the conversation with the defendant's officers it was suggested that if the stock were transferred to one of the members of the decedent's family, the loan could be arranged. Thereupon the stock was transferred to S., a legatee under the will, and an application was made by her for the loan with the stock as security. The loan was made accordingly, and the joint note of the executor and S. was taken by the defendant. S. paid nothing for the stock so transferred to her. It was held that the loan was not made to the executor, but to S., and that it at once concerned the defendant to see that the money was properly applied to the use of the estate; and that until that was done, the defendant dealt at its own peril, because it knew from the face of the proceeding that the proper application of the proceeds of the loan, if actually intended, depended on the will and consent of S., and was not at all at the sole option of the executor.

There Must Be Direct Evidence that the executor or administrator was acting for a purpose not connected with the administration of the estate, and such evidence is not furnished by the fact that the transaction was in the executor's individual name and that the pledgee could have ascertained by inquiring that the securities pledged were held by the executor as such. *Gottberg v. U. S. National Bank*, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 50.

and the fact that the mortgage or pledge was given to secure an individual debt of the executor or administrator establishes the wrongful character of the transaction, and charges the mortgagee or pledgee with notice thereof.¹ A *bona fide* pledgee, however, from a person to whom the executor had pledged assets to secure his individual debt, is not affected by the fraudulent dealing between the executor and the first pledgee of which he had no notice.²

f. PERSONAL PROPERTY SUBJECT TO LIENS OR CHARGES. — Where a decedent leaves personal property subject to a lien or charge, it is the duty of the executor or administrator to pay the amount of such lien or charge and release the property, if it is for the benefit of the estate to do so, and he has funds in his hands sufficient for that purpose. This duty he is bound to

Equal Equities. — In *In re Morgan*, 18 Ch. Div. 93, 50 L. J. Ch. 834, 45 L. T. N. S. 183, 30 W. R. 223, affirming 50 L. J. Ch. 651, 44 L. T. N. S. 796, 29 W. R. 733, an executor, six years after the death of the testator, surrendered a lease belonging to the testator, and took a renewed lease, including additional property and at an increased rent, in his own name. He afterwards deposited the lease as security for money advanced to him, which he applied to his own purposes. The renewed lease contained no mention of the surrender, and the mortgagee did not know that the borrower was an executor, or that he was not the beneficial owner of the lease. He did not, however, make any inquiry into the title. An action was afterwards brought to administer the testator's estate, and a consent order was made for the sale of the leasehold property, without prejudice to any right, the mortgagee giving up the lease to facilitate the sale. He claimed to be paid the amount due to him by the executor out of the proceeds of sale. It was held that the lease was in equity part of the testator's estate, and that the equity of the estate, being prior to the equity of the mortgagee, must prevail against it.

1. Mortgage or Pledge to Secure Individual Debt Invalid on Its Face — *England.* — In *re Scott's Contract*, (1895) 1 Ch. 596.

Indiana. — *Nugent v. Laduke*, 87 Ind. 482.

Maryland. — *Williamson v. Morton*, 2 Md. Ch. 94; *Miller v. Williamson*, 5 Md. 219.

New York. — *Clark v. Coe*, 52 Hun (N. Y.) 379.

Pennsylvania. — *Odd Fellows Sav. Bank's Appeal*, 123 Pa. St. 356, 23 W. N. C. (Pa.) 85; *Wood v. Ellis*, 31 Leg. Int. (Pa.) 140, 10 Phila. (Pa.) 138, affirmed 8 W. N. C. (Pa.) 538; *Martin's Appeal*, 13 W. N. C. (Pa.) 167; *Linton's Appeal*, 14 W. N. C. (Pa.) 450.

Wisconsin. — *Weir v. Mosher*, 19 Wis. 311; *Stronach v. Stronach*, 20 Wis. 129.

A Mortgage or Pledge to Secure an Individual Debt is not absolutely void, but is only voidable at the instance of the persons interested in the estate. *Boeger v. Langenberg*, 42 Mo. App. 7.

A Pledge of Assets to Secure Payment of a Debt of a Third Person is on its face an application of the assets in a manner wholly inconsistent with the duty of the executor or administrator, and the pledgee is a party to the breach of trust; and therefore the pledge will be considered at least *prima facie* as a fraudulent application of the assets as against all who have a claim on them, as creditors or next of kin of

the decedent. *Salmon v. Clagett*, 3 Bland (Md.) 125.

The fact that an executor pledged assets of the estate to secure a debt due to the pledgee by a mercantile firm, of which the executor was a member, is sufficient, in contemplation of law, to notify them that he was about to commit a *devastavit*, and they are charged with knowledge of all the limitations which the will as well as the law imposes on the executor. *Smith v. Ayer*, 101 U. S. 320; *Miller v. Williamson*, 5 Md. 219.

If the Pledgee Has Reason to Believe that a pledge of assets is not made for the benefit of the estate, but for the borrower's private use, he cannot hold such assets as security for money advanced by him. *Le Baron v. Long Island Bank*, 53 How. Pr. (N. Y. Supreme Ct.) 286.

Property Bequeathed to Executor. — A mortgage given by an executor as a security for his own debt, on assets of his testator which have been absolutely bequeathed to him, is not valid, if the mortgagee has notice that debts of the testator remain unpaid. *Hall v. Andrews*, 20 W. R. 799, 17 L. T. N. S. 195.

2. Pledge by Fraudulent Pledgee. — In *Wood's Appeal*, 92 Pa. St. 379, 37 Am. Rep. 694, the executor pledged stock to his broker to secure his individual indebtedness, and delivered certificates, accompanied by a blank bill of sale and an irrevocable power of attorney. The broker pledged the certificates to a third person, who advanced money on them, believing *bona fide* the stock to have been sold to the broker. On a bill filed by the remaining executors to recover the stock, it was held that there could be no recovery until the advances had been paid, because by commercial usage a certificate of stock accompanied by an irrevocable power of attorney, filled up or in blank, is in the hands of a third party presumptive evidence of ownership in the holder; and the executor having by this means invested the broker with apparent ownership, his coexecutors, as against the *bona fide* pledgee, could not assert title. "The fact that the legal title to the stock was known to have previously been in the executor, and that the title of the holder appeared on its face to have been derived from him in his representative capacity, will not raise a suspicion or put a purchaser on inquiry, for the reason that it is the executor's primary duty to dispose of the assets and settle the estate. * * * The same principle which applies in the case of an absolute owner applies in the case of an ex-

exercise with care, prudence, and diligence, and for a failure to do so he becomes personally liable.¹

3. Real Property — a. TITLE AND RIGHT TO POSSESSION — (1) Common-law Rule. — At common law the real estate of which a decedent died seized descends or passes directly to his heir or devisee. The executor or administrator is the representative of the personalty only, and no title or right of possession or interest in the real estate passes to him, unless the will either expressly or by necessary implication gives him the land or the right of possession or the usufruct.² A devise, however, that the executor shall sell the land or that the land shall be sold by the executor gives him, according to the preponderance of authority, only a naked power of sale, and does not vest in him the title or

executor who invests the holder with apparent ownership."

1. Duty to Pay Off Liens or Charges on Personal Property. — *Pryor v. Davis*, 109 Ala. 117; *Erle v. Lane*, 22 Colo. 273; *Chorn v. Chorn*, 98 Ky. 627.

2. No Title or Right to Realty at Common Law Unless Given by Will — United States. — *Brush v. Waré*, 15 Pet. (U. S.) 93.

Alabama. — *Lucas v. Doe*, 4 Ala. 679; *Leavens v. Butler*, 8 Port. (Ala.) 380; *Terry v. Ferguson*, 8 Port. (Ala.) 500; *Chighizola v. Le Baron*, 21 Ala. 406; *Hall v. Hall*, 47 Ala. 290; *Cockrell v. Coleman*, 55 Ala. 583; *Calhoun v. Fletcher*, 63 Ala. 574; *Cruikshank v. Luttrell*, 67 Ala. 318; *Lee v. Downey*, 68 Ala. 98; *Nelson v. Murfee*, 69 Ala. 598; *McKay v. Broad*, 70 Ala. 377; *Tyson v. Brown*, 64 Ala. 244.

Connecticut. — *Lockwood v. Lockwood*, 2 Root (Conn.) 409.

Illinois. — *Phelps v. Funkhouser*, 39 Ill. 401; *Smith v. McConnell*, 17 Ill. 135, 63 Am. Dec. 340; *Walbridge v. Day*, 31 Ill. 379, 83 Am. Dec. 227; *Bennett v. Whitney*, 22 Ill. 449.

Indiana. — *Rubottom v. Morrow*, 24 Ind. 202, 87 Am. Dec. 324; *Hankins v. Kimball*, 57 Ind. 42; *Hendrix v. Hendrix*, 65 Ind. 329.

Massachusetts. — *Dean v. Dean*, 3 Mass. 258; *Boylston v. Carver*, 4 Mass. 598; *Henshaw v. Blood*, 1 Mass. 35; *Gibson v. Farley*, 16 Mass. 280; *Stearns v. Stearns*, 1 Pick. (Mass.) 157; *Hathaway v. Valentine*, 14 Mass. 501; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Willard v. Nason*, 5 Mass. 240.

New Hampshire. — *Lane v. Thompson*, 43 N. H. 320.

North Carolina. — *Perkins v. Presnell*, 100 N. Car. 220; *Floyd v. Herring*, 64 N. Car. 409; *Wombie v. George*, 64 N. Car. 759.

Pennsylvania. — *Merkel's Estate*, 131 Pa. St. 584.

Rhode Island. — *Draper v. Barnes*, 12 R. I. 156.

South Carolina. — *Crosland v. Murdock*, 4 McCord L. (S. Car.) 217; *Perry v. Brown*, 1 Bailey L. (S. Car.) 45.

Tennessee. — *Vance v. Fisher*, 10 Humph. (Tenn.) 211.

Wisconsin. — *Jones v. Billstein*, 28 Wis. 221.

See also *Matlock v. Nave*, 28 Ind. 35, holding that a resulting trust in lands cannot be enforced by an administrator unless it is shown that land is needed to pay debts; *Lothrop v. Board of Public Works*, 41 Mich. 724, holding that an administrator cannot make a statutory plat; *Scudder v. Ames*, 89 Mo. 496;

In re Huckstep, 5 Mo. App. 582, and *Kaime v. Harty*, 73 Mo. 316, holding that an executor has no power to dedicate land of the estate to public use unless there be some provision in the will or an order or decree of a court of competent jurisdiction authorizing it; and *Stoops's Estate*, 31 Pittsb. Leg. J. (Pa.) 34, holding that an executor or administrator has no right to receive the rents of real estate.

"Upon the Death of One Seized of a Heritable Estate in Lands, the Title Descends Eo Instanti, and vests in the heir at law, if there be no will giving it a different direction; * * * with the title, there also passes to the heir at law the right to the possession and after-accurring rents and profits, subject to the statutory power of the personal representative to take possession and claim rents accruing, or to let to rent, or to obtain an order and sell, for the purposes of administration." *Calhoun v. Fletcher*, 63 Ala. 574.

A Sale of a Decedent's Land under Execution issued on a judgment against the administrator is void and gives the purchaser no title, because the administrator had no title which the sale could affect. *Lepage v. McNamara*, 5 Iowa 124.

The Title to Real Estate Vests in the Heir subject to administration. *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *State v. Probate Ct.*, 25 Minn. 22; *Barrett v. Barrett*, 31 Tex. 344.

No Lien Can Be Created by an Administrator by erecting buildings on land; but if he makes such erection the mechanic has a lien on the building, and may sell and remove it. *Weathersby v. Sinclair*, 43 Miss. 189.

Testamentary Provisions in General. — Where a will gives to the executor and another person one-half each of all the income of the estate during the life of such other, and directs that the estate be managed without division, the executor has the right and duty to collect all the rents and pay the one-half to the person entitled. *Madigan v. Burns*, 58 N. H. 12.

But a will empowering the executor to oversee and take charge of the testator's farm until his son should become of age, and to manage all the property as the testator could do were he alive and present, does not authorize the executor to occupy the farm, with his family, until the son arrives at age. *Burgess v. Green*, 7 Bush (Ky.) 263.

Nor is an executor authorized to change boundary lines by a direction that he shall do, as executor, all the business pertaining to the estate. *Lagow v. Glover*, 77 Tex. 448.

any right to the possession of the land,¹ even if there is a further direction in the will that he pay the testator's debts out of the proceeds,² though it has been held that such a devise carries the title;³ but the title and right to possession vest in the executor if the land is devised to him to sell, or if the will otherwise expressly or by necessary implication gives him the land or its usufruct.⁴

1. Devise that Executor Shall Sell Gives Only Naked Power — *England*. — *Yates v. Compton*, 2 P. Wms. 308; *Lancaster v. Thornton*, 2 Burr. 1027.

United States. — *Beadle v. Beadle*, 2 McCrary (U. S.) 586.

California. — *Auguisola v. Arnaz*, 51 Cal. 435.

Delaware. — *Lockwood v. Stradley*, 1 Del. Ch. 298, 12 Am. Dec. 97.

Indiana. — *Doe v. Lanius*, 3 Ind. 441; *Thompson v. Schenck*, 16 Ind. 194.

Kentucky. — *Baird v. Rowan*, 1 A. K. Marsh. (Ky.) 214.

Mississippi. — *Cohea v. Jemison*, 68 Miss. 510.

Missouri. — *Compton v. McMahan*, 19 Mo. App. 494.

New York. — *Jackson v. Schaubert*, 7 Cow. (N. Y.) 187, 2 Wend. (N. Y.) 13; *Smith v. Chase*, 90 Hun (N. Y.) 99.

South Carolina. — *Haskell v. House*, 1 Treadw. (S. Car.) 106, 3 Brev. (S. Car.) 242; *King v. Ferguson*, 2 Nott & M. (S. Car.) 588; *Baldwin v. Cooley*, 1 S. Car. 256.

"Against this weight of authority," says Mr. Sugden, after a review of the cases, "there is merely an *obiter dictum* of Hale's, Chief Baron [in *Barrington v. Atty.-Gen.*, Hard. 419], that it had been held that if a man devises that his lands shall be sold by his executors for payment of his debts, that will give the executors an interest as well as if he had devised his lands to his executors to be sold. But he did not refer to the case in which this point was decided. The case, however, was not only in opposition to former opinions, but has been completely overruled." 1 Sugden on Powers 131. See also 4 Kent's Com. 320; *Doe v. Shutter*, 8 Ad. & El. 905, 35 E. C. L. 559; *Knocker v. Bunbury*, 6 Bing. N. Cas. 306, 37 E. C. L. 394; *Jameson v. Smith*, 4 Bibb (Ky.) 307; *Marsh v. Wheeler*, 2 Edw. Ch. (N. Y.) 156; *Bradshaw v. Ellis*, 2 Dev. & B. Eq. (22 N. Car.) 20, 32 Am. Dec. 686; *Hope v. Johnson*, 2 Yerg. (Tenn.) 123.

Executors Who Are Merely Given a Power in Trust to sell real estate have no care or responsibility in respect thereto; neither have they any right to the rents and profits thereof nor to the possession thereof. Matter of Martens, 16 Misc. Rep. (N. Y. Surrogate Ct.) 245.

Right to Protect Possession. — An administrator with the will annexed, being in possession of lands therein directed to be sold, may maintain a caveat to prevent any other person from obtaining a patent for the same. *Archer v. Sadler*, 2 Hen. & M. (Va.) 370.

What Constitutes Naked Power of Sale. — A devise that "all the rest and residue of my estate, both real and personal, be sold by my executors, and that the money arising from such sale * * * be appropriated" to certain purposes, gives the executors a naked power of sale, and does not vest them with the

legal title to the land. *Haskell v. House*, 3 Brev. (S. Car.) 242.

In *Chighizola v. Le Baron*, 21 Ala. 406, the testator devised to his children a certain portion of his real estate and all of his personal estate, "to be distributed when required, at mature age or majority, in equal parts." It was contended by the executor that the authority given him to make distribution conferred on him by necessary implication the right to the possession of the land until the time for distribution arrived, but the court held that he took merely a naked power.

"The Distinction is between a devise to executors to sell, as if the testator say, 'I devise my land to my executors to be sold;' and a devise that the executors shall sell, as where the testator says, 'I devise, or direct, that my lands be sold by my executors.' In the first case the fee passes to the executors; in the last, the fee passes to the heir, to be divested whenever the power is executed by the executors." *Ware v. Murph*, Rice L. (S. Car.) 54, 33 Am. Dec. 97.

2. A Direction to Pay Debts Out of the Proceeds does not operate to vest in the executor any estate in land which is the subject of a devise that the executor shall sell. *King v. Ferguson*, 2 Nott & M. (S. Car.) 588; *Ware v. Murph*, Rice L. (S. Car.) 54, 33 Am. Dec. 97. But see *Corby's Estate*, 5 Kulp (Pa.) 160; *Peck's Estate*, 5 Kulp (Pa.) 204.

3. In Pennsylvania a power given to executors to sell real estate vests in them the estate in the land as fully as if it had been devised to them to be sold. *Shippen v. Clapp*, 36 Pa. St. 89. Compare *Myers's Estate*, 9 Phila. (Pa.) 310, 29 Leg. Int. (Pa.) 356, holding that a naked authority to sell real estate does not impose upon the executor the duty of collecting the rents.

If Necessary in Order to Carry Out the Provisions of the Will, the executor will take the legal title to testator's real estate. *Morton v. Barrett*, 22 Me. 257, 39 Am. Dec. 575; *Deering v. Adams*, 37 Me. 264. See also *Hanson v. Brewer*, 78 Me. 195.

4. Devise of Land to Executors to Sell Vests Title in Them — *Alabama*. — *Patton v. Crow*, 26 Ala. 426; *Chighizola v. Le Baron*, 21 Ala. 406.

Illinois. — *West v. Fitz*, 109 Ill. 425.

Kentucky. — *Baird v. Rowan*, 1 A. K. Marsh. (Ky.) 214.

Massachusetts. — *Gerard v. Buckley*, 137 Mass. 475; *Packard v. Marshall*, 138 Mass. 301.

Missouri. — *Compton v. McMahan*, 19 Mo. App. 494.

In New York, however, under the statute relating to uses and trusts, a general devise to executors in trust to sell and convey does not operate to vest the title in them. *Chamberlain v. Taylor*, 105 N. Y. 185; *Stewart v. Hamilton*, 37 Hun (N. Y.) 19; *Butler v. Bloomfield*, 15 N. Y. Wkly. Dig. 245.

(2) *Modification of Common-law Rule* — (a) **General Principles.** — The common-law rule denying to executors and administrators all interest in or right to the possession of the real estate of their testators or intestates has been materially altered by legislation both in *England* and in the *United States*. Real estate has long since been made assets for the payment of the debts of the deceased owner where the personalty is insufficient,¹ and various statutes have been enacted in furtherance of this object.²

(b) **Statutory Right to Possession of Realty** — *aa. IMMEDIATE RIGHT TO POSSESSION.* — In *England* the law governing the devolution of title to real estate has been radically changed by a recent statute, known as the Land Transfer Act, which provides that where real estate is vested in any person without a right in any other person to take by survivorship, it shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives as if it were a chattel real vesting in them, and that such real estate shall be administered in the same manner as if it were personal estate.³

In *Some States of the Union* the right to the possession of the real estate of decedents is given to their personal representatives until the estates are settled.⁴ It is even held in some states that there is no distinction between real and personal property in regard to the title of the executor or administrator.⁵

bb. CONDITIONAL RIGHT TO POSSESSION. — In other states the right is given to executors and administrators to take possession of the real estate only when it is needed for the payment of debts, legacies, etc.,⁶ or when no heir or devisee

Devise to Executors in Trust. — In *Matter of Martens*, 16 Misc. Rep. (N. Y. Surrogate Ct.) 245, the testator devised his real estate to his executors in trust for certain purposes and gave them full power of sale. Under this provision of the will it was held that the persons named as executors took the legal title to the real estate, but that the title was in them as trustees, and not as executors. See also *Putnam Free School v. Fisher*, 30 Me. 523 [citing *Josselyn v. Hutchinson*, 21 Me. 339; *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537, 20 Am. Dec. 621; *Kellogg v. Blair*, 6 Met. (Mass.) 322; *Jackson v. Merrill*, 6 Johns. (N. Y.) 185, 5 Am. Dec. 213; *Fox v. Phelps*, 17 Wend. (N. Y.) 393; *Morrison v. Sample*, 6 Binn. (Pa.) 94].

Authority to Collect Income. — If an administrator with the will annexed is given authority to collect the income of real estate, he may recover in ejectment against a tenant holding over. *Lewis v. Sheerer*, 1 Luz. L. Obs. (Pa.) 122.

1. **Realty Subject to Payment of Deceased Owner's Debts.** — See *supra*, this title, *Assets*.

2. **Statutory Authority to Lease or Sell Realty for Payment of Debts.** — See *infra*, this section, *Lease of Real Property*, and *infra*, this title, *Sale of Real Estate under Order of Court*.

3. **English Statute.** — 60 & 61 Vict., c. 65.

4. **Rule that Executor or Administrator Has Immediate Right to Possession** — *United States*. — *Meeks v. Vassault*, 3 Sawy. (U. S.) 206, 16 Fed. Cas. No. 9393.

California. — *Harwood v. Marye*, 8 Cal. 580; *Grover v. Hawley*, 5 Cal. 485; *Curtis v. Herriek*, 14 Cal. 117, 73 Am. Dec. 632; *Curtis v. Sutter*, 15 Cal. 259; *Meeks v. Hahn*, 20 Cal. 620; *Cunningham v. Ashley*, 45 Cal. 485; *Harper v. Strutz*, 53 Cal. 655; *Crosby v. Dow* 1, 61 Cal. 557.

Connecticut. — *Remington v. American Bible Soc.*, 44 Conn. 512.

Florida. — *Sanchez v. Hart*, 17 Fla. 507.

Minnesota. — *Miller v. Hoberg*, 22 Minn. 249.

Montana. — *In re Higgins*, 15 Mont. 474.

Oregon. — *Butler v. Smith*, 20 Oregon 126.

Texas. — *Thompson v. Duncan*, 1 Tex. 485; *Howard v. Republic*, 2 Tex. 311.

Washington. — *Ward v. Moorey*, 1 Wash. Ter. 104; *Balch v. Smith*, 4 Wash. 497.

Possession Relates Back. — When an administrator takes possession of the real estate of his decedent his possession relates back to the time of the decedent's death. *Noon v. Finnegan*, 29 Minn. 418.

5. **No Distinction Between Realty and Personalty as to Representative's Title.** — *Janin v. Browne*, 59 Cal. 37; *Thompson v. Duncan*, 1 Tex. 485; *Howard v. Republic*, 2 Tex. 311; *Graham v. Vining*, 2 Tex. 433; *Ansley v. Baker*, 14 Tex. 607, 65 Am. Dec. 136; *Bufford v. Holliman*, 10 Tex. 560, 60 Am. Dec. 223.

6. **Conditional Right to Possession — Necessity for Payment of Debts, Legacies, Etc.** — *Alabama.* — *Lee v. Downey*, 68 Ala. 98; *Stovall v. Clay*, 108 Ala. 105. See also *McCully v. Chapman*, 58 Ala. 325.

Arkansas. — *Menifee v. Menifee*, 8 Ark. 9; *Carnall v. Wilson*, 21 Ark. 62, 76 Am. Dec. 351; *Culberhouse v. Shirey*, 42 Ark. 25; *Kiernan v. Blackwell*, 27 Ark. 235; *Sisk v. Almon*, 34 Ark. 391; *Stewart v. Smiley*, 46 Ark. 373.

Michigan. — *Streeter v. Paton*, 7 Mich. 341; *Kline v. Moulton*, 11 Mich. 370; *Marvin v. Schilling*, 12 Mich. 356; *Holbrook v. Campau*, 22 Mich. 283; *Campau v. Campau*, 25 Mich. 127; *Rough v. Womer*, 76 Mich. 375.

As to the law of *Michigan* in this particular before the enactment of the statute, see *Thayer v. Lane*, Walk. (Mich.) 200.

Nebraska. — *Cooley v. Jansen*, (Neb. 1898) 74 N. W. Rep. 391.

Nevada. — *Gossage v. Crown Point Gold*, etc., Min. Co., 14 Nev. 153.

is present to take charge of it,¹ or when by order of court the executors or administrators are expressly authorized to take possession,² or when other special circumstances exist;³ but in order to exclude the heir or devisee they

Vermont. — *Alexander v. Stewart*, 50 Vt. 87.

Wisconsin. — *Jones v. Billstein*, 28 Wis. 221; *Filbey v. Carrier*, 45 Wis. 469; *Flood v. Pilgrim*, 32 Wis. 376; *Edwards v. Evans*, 16 Wis. 181; *Volk v. Stowell*, 98 Wis. 385.

"While the Executor Has the Right to the Possession, that right is given in contemplation that it may become necessary to exercise it in the settlement of the estate for the purpose of the payment of claims against the estate. Hence it is that the duty of the executor is not made imperative to exercise the right in all cases, but is only permissible when the necessity arises for its exercise; and until such occasion does arise the heir or devisee who has entered upon the enjoyment of his property and estate ought not to be and cannot be lawfully disturbed. In other words, the right is given to the executor, and only accompanies the necessity for its exercise." *Rough v. Womer*, 76 Mich. 375.

A Necessity that the Administrator Should Take Possession of Land occupied by the defendant, who was one of the testator's heirs, for his (the administrator's) own protection, was shown by the following facts: The defendant was in possession of the land under a lease which was to terminate at the testator's death. The testator had bequeathed all his personalty to the defendant and had devised his realty to his other heirs, but the defendant continued in possession under an agreement that the administrator should have authority to withhold from the defendant's share of the estate on final distribution the amount of rent due and to become due, and such share was declared by the agreement to be security for the rent. The will was disallowed and appeal was taken from the disallowance. The defendant was in default in payment of rent, and his share of the personalty was insufficient to pay the rent if the disallowance of the will should be affirmed. *Wilmarth v. Reed*, 83 Mich. 44.

Such a Necessity Is Not Shown merely by proving that the estate of the intestate is liable for the payment of funeral expenses, and not showing also that there was not a sufficiency of personal property for paying the same, or some good reason why the administrator should make a division of the land or its proceeds among the heirs. *Holt v. Anderson*, 98 Ga. 220.

"Until the Decree of Insolvency, the heirs are to be considered as in the rightful possession of the premises. After the decree the administrator is entitled to the possession; his title commences at the date of the decree. The position that the title of the administrator to the real estate relates back from the decree of insolvency to the death of the intestate, twenty-three years in this case, would hardly seem to be reasonable, nor is it sustained by the authorities." *Lane v. Thompson*, 43 N. H. 320 [citing *Drinkwater v. Drinkwater*, 4 Mass. 358; *Gibson v. Farley*, 16 Mass. 280; *Brckett v. Tillotson*, 4 N. H. 208; *Bean v. Moulton*, 5 N. H. 450; *Sparhawk v. Allen*, 25 N. H. 266,

Bergin v. McFarland, 26 N. H. 533; *Gregg v. Currier*, 36 N. H. 200].

Whenever the Administration Is Closed and the land surrendered to the heirs, or after such a lapse of time as to show that the lands are not required for the purposes of administration, the heirs or their grantees, being in possession, cannot be disturbed by the administrator. *Cushman v. Jordon*, 13 Vt. 597; *Cox v. Ingleston*, 30 Vt. 258; *Roberts v. Morgan*, 30 Vt. 319.

Right to Possession After Partition. — An administrator does not lose possession of land or the right to expel an intruder by reason of having, previously to the intrusion complained of, caused the lands of his intestate to be partitioned in kind among the heirs at law, the parcel in controversy not having been taken possession of by the heir to whom it was assigned, and the administrator not having parted with his possession to any one, but on the contrary having made arrangements with a stranger to occupy the lands as his tenant for the current year, and the intrusion consisting of an entry by the alleged intruder when the administrator's tenant was about to enter and would have entered but for being excluded by the intruder. *Carter v. Darnell*, 94 Ga. 656.

If the Personal Representative Has Paid All the Debts, and the lands are the only assets, he is entitled to possession as against the heir as long as the administration remains unsettled. *McCullough v. Wise*, 57 Ala. 623.

Duty to Take Possession. — The *Minnesota* statute giving executors and administrators the right to possession of the real estate does not oblige them to take possession unless it is necessary in settlement of the estate. *Paine v. First Div. St. Paul, etc., R. Co.*, 14 Minn. 65.

To What Realty Rule Applies. — The statute giving right of possession of lands to the executor or administrator refers to such lands only as belonged to and were left by the decedent, and not to lands bid in by the administrator or executor at a sale under execution or mortgage foreclosure. As to land so bid in he has the same right of possession as to personalty. *Kunzie v. Wixom*, 39 Mich. 384.

Under the Statutes of Washington the legal title to land of a decedent vests in his executor or administrator for the purpose of passing title to purchasers under a contract for its sale made by the decedent. *Hyde v. Heller*, 10 Wash. 586. See also the title *SUCCESSION*.

1. Rule in Indiana — Absence of Heirs. — *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Hendrix v. Hendrix*, 65 Ind. 329; *Kidwell v. Kidwell*, 84 Ind. 224.

If the Heirs Are Present to take charge of the real estate the executor or administrator has no authority to take possession of it. *Compant v. Randall*, 4 Ind. 55; *Indianapolis First Nat. Bank v. Hanna*, 12 Ind. App. 240.

2. Rule in Kentucky — Possession Authorized by Order of Court. — *Ellis v. Wren*, 84 Ky. 254.

3. Rule in Rhode Island — Pendency of Appeal from Decree Granting Letters Testamentary. — In Rhode Island the statute provides that when

must be in actual possession of the land.¹

cc. RIGHT TO POSSESSION DENIED. — In some states, on the other hand, no right is given to executors and administrators to take possession of their decedents' real estate, but the only authority conferred on them in reference to the real estate is to sell, lease, or mortgage it for the payment of debts under an order of court first obtained for that purpose, when the personal property is insufficient.²

dd. NATURE OF POSSESSORY RIGHT. — The statutory right of executors and administrators to take possession of their decedents' real estate is only temporary and limited to the purposes of administration,³ but it includes the right to receive the rents,⁴ and gives them a qualified interest in the land,⁵ with all the rights and powers ordinarily incident to the right of possession.⁶ It may, however, be taken away after the administrator has entered into pos-

an appeal from a decree granting letters testamentary is pending, the executor shall have power to collect the rents of the real estate of the testator and to bring suit for the possession of the real estate. *Scott v. Monks*, 16 R. I. 225.

1. Actual Possession Necessary to Exclude Heir. — *Masteron v. Girard*, 10 Ala. 60; *Harkins v. Pope*, 10 Ala. 493; *Martin v. Williams*, 18 Ala. 190; *Chighizola v. Le Baron*, 21 Ala. 406; *Smith v. King*, 22 Ala. 558; *Branch Bank v. Fry*, 23 Ala. 770; *Golding v. Golding*, 24 Ala. 122; *Russell v. Erwin*, 41 Ala. 292; *McCulough v. Wise*, 57 Ala. 623; *Calhoun v. Fletcher*, 63 Ala. 574; *Cox v. Ingelston*, 30 Vt. 258. See also *Jones v. Billstein*, 28 Wis. 221.

Statute Not Retroactive. — Statutes giving to executors and administrators the right to the possession of their decedents' real estate do not apply to administration pending when the statutes were passed, unless it is expressly so provided. *Phillips v. Gray*, 1 Ala. 226; *Smith v. King*, 22 Ala. 558; *Van Fleet v. Van Fleet*, 49 Mich. 610.

2. Rule Denying Right to Possession of Realty — *Colorado*. — *Rupp v. Rupp*, (Colo. App. 1898) 52 Pac. Rep. 290, and cases cited.

Illinois. — *Walbridge v. Day*, 31 Ill. 379, 83 Am. Dec. 227; *Phelps v. Funkhouser*, 39 Ill. 401; *Gridley v. Watson*, 53 Ill. 186; *Shoemate v. Lockridge*, 53 Ill. 503; *Smith v. McConnell*, 17 Ill. 135, 63 Am. Dec. 340; *Le Moyne v. Quimby*, 70 Ill. 399; *Ryan v. Duncan*, 88 Ill. 141.

Indiana. — *Compere v. Randall*, 4 Ind. 55; *Indianapolis First Nat. Bank v. Hanna*, 12 Ind. App. 240. The general rule in Indiana that an executor or administrator has no right to the possession of the decedent's real estate is subject to an exception in case the heirs are not present to take charge of it. *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Hendrix v. Hendrix*, 65 Ind. 329.

Iowa. — *Little v. Sিনnett*, 7 Iowa 324; *Gray v. Myers*, 45 Iowa 158; *Hodgin v. Toler*, 70 Iowa 21; *Gladson v. Whitney*, 9 Iowa 267.

Kentucky. — *Wilson v. Unselt*, 12 Bush (Ky.) 216.

Maine. — *Crocker v. Smith*, 32 Me. 244.

Massachusetts. — *Drinkwater v. Drinkwater*, 4 Mass. 358; *Gibson v. Farley* 16 Mass. 280.

Michigan. — *Thayer v. Lane*, Walk (Mich.) 200; *Campbell*, Appellant, 2 Dougl. (Mich.) 141.

Mississippi. — *Crowder v. Shackelford*, 35 Miss. 321; *Bullock v. Sneed*, 13 Smed. & M.

(Miss.) 293; *Glenn v. Thistle*, 23 Miss. 42; *Rucker v. Dyer*, 44 Miss. 591.

Missouri. — *Burdyne v. Mackey*, 7 Mo. 374.

New York. — *Hillman v. Stephens*, 16 N. Y. 278; *Breevort v. McJimsey*, 1 Edw. Ch. (N. Y.) 551; *Griffith v. Beecher*, 10 Barb. (N. Y.) 432.

North Carolina. — *Floyd v. Herring*, 64 N. Car. 409; *Womble v. George*, 64 N. Car. 759.

Pennsylvania. — *McManus's Estate*, 14 Pa. Co. Ct. Rep. 379, 3 Pa. Dist. Rep. 183, 34 W. N. C. (Pa.) 222; *Merkel's Estate*, 131 Pa. St. 584, 25 W. N. C. (Pa.) 469; *Shisler's Estate*, 20 W. N. C. (Pa.) 334.

South Carolina. — *Charleston Bank v. Inglesby*, Spears Eq. (S. Car.) 399.

West Virginia. — *Laidley v. Kline*, 8 W. Va. 218.

The Colorado Statute provides that the executor or administrator of a decedent may take possession of, sue for, and recover the rents of real estate belonging to the estate, but it is held that this statute gives him no right to the possession of the land. *Rupp v. Rupp*, (Colo. App. 1898) 52 Pac. Rep. 290. See also *Filmore v. Reithman*, 6 Colo. 130; *Keeler v. Trueman*, 15 Colo. 145; *McKee v. Howe*, 17 Colo. 542.

3. Possession of Executor or Administrator Only Temporary and Limited. — *State v. Probate Ct.*, 25 Minn. 22; *Hanner v. Silver*, 2 Oregon 336; *King v. Boyd*, 4 Oregon 326; *Easterling v. Blythe*, 7 Tex. 210, 56 Am. Dec. 45.

The Right to Possession Ceases when the debts are paid or the estate is settled. *Phillips v. Slensher*, 3 Pin. (Wis.) 457; *Flood v. Pilgrim*, 32 Wis. 376.

Possession Not Proprietary. — The right of possession of an executor or administrator is only in the nature of a power, and not a proprietary interest. *Lothrop v. Board of Public Works*, 41 Mich. 724. Nor is it a chattel interest which the administrator could dispose of as such. *Kline v. Moulton*, 11 Mich. 370; *Campau v. Campau*, 19 Mich. 116, 25 Mich. 127.

4. Right to Possession Includes Right to Rents. — *Menifee v. Menifee*, 8 Ark. 9.

5. Right to Possession Gives Interest in Land. — A statute giving the right to the possession of the decedent's land to an executor or administrator gives him such an interest in the land as to entitle him to redeem a mortgage or to compel a release of a satisfied mortgage. *Enos v. Sutherland*, 11 Mich. 538.

6. Incidental Rights and Powers. — Executors and administrators may, by virtue of their general statutory authority, institute an action for the recovery of timber cut and removed

session as well as before, being purely a statutory right,¹ and it is subject to the rights of the decedent's widow and family to dower and homestead.²

b. SALE OF REAL PROPERTY — (1) *Doctrine at Common Law.* — Since at common law executors and administrators have no title to or interest in the real property of their decedents by virtue of their office, they can transfer none by a sale, unless authorized by statute or by the will of the deceased owner.³

(2) *Power of Sale Given by Will* — (a) *Express Power of Sale.* — A testator may, by his will, confer on his executor the power to sell his real estate for the payment of debts or for any other purpose to which the testator wishes the proceeds of his real estate to be applied.⁴ Such a power may either be given by

from the land of the testator, and no special authorization from the Probate Court is requisite in such cases. *Halleck v. Mixer*, 16 Cal. 574.

They are necessary parties to all suits affecting the real estate. *Harwood v. Marye*, 8 Cal. 580; *Curtis v. Sutter*, 15 Cal. 259. But they cannot shift the location of a land certificate unless authorized by the Probate Court. *Jones v. Lee*, (Tex. Civ. App. 1892) 20 S. W. Rep. 863, 86 Tex. 25. Compare *Jones v. Lee*, 86 Tex. 25. Nor can they bind heirs by consenting to a proceeding for laying out a highway over the lands of the estate by which the heirs are divested of their title. *Rush v. McDermott*, 50 Cal. 471.

1. *Repeal of Statute After Possession Has Been Taken.* — *Campau v. Campau*, 25 Mich. 127.

2. *Right of Possession Subject to Dower and Homestead.* — *Calhoun v. Fletcher*, 63 Ala. 574; *Banks v. Speers*, 97 Ala. 560; *Menifee v. Menifee*, 8 Ark. 9; *Carnall v. Wilson*, 21 Ark. 62, 76 Am. Dec. 351; *Culberhouse v. Shirey*, 42 Ark. 25; *Butler v. Smith*, 20 Oregon 126; *McManany v. Sheridan*, 81 Wis. 538.

3. *Executors or Administrators Have No Power to Sell Real Estate at Common Law* — *United States.* — *Ware v. Brush*, 1 McLean (U. S.) 533; *Brush v. Ware*, 15 Pet. (U. S.) 93; *Hamilton Bank v. Dudley*, 2 Pet. (U. S.) 492.

Arkansas. — *Hill v. Mitchell*, 5 Ark. 608; *Burgauer v. Laird*, 26 Ark. 256.

California. — *Hill v. Den*, 54 Cal. 6.

Colorado. — *Filmore v. Reithman*, 6 Colo. 120.

Georgia. — *Ashburn v. Ashburn*, 16 Ga. 213; *Dayne v. McArthur*, 94 Ga. 577.

Illinois. — *Stillman v. Young*, 16 Ill. 318.

Kentucky. — *Montague v. Carneal*, 1 A. K. Marsh. (Ky.) 352; *Banks v. Johnson*, 4 J. J. Marsh. (Ky.) 649; *Buckner v. Cromie*, 5 Bush (Ky.) 603.

Maine. — *Stevens v. Burgess*, 61 Me. 89.

Michigan. — *Frost v. Atwood*, 73 Mich. 67, 16 Am. St. Rep. 560.

Mississippi. — *Gelstrop v. Moore*, 24 Miss. 205, 59 Am. Dec. 254; *Edmundson v. Roberts*, 2 How. (Miss.) 822.

Montana. — *Broadwater v. Richards*, 4 Mont. 80.

New Hampshire. — *Ticknor v. Harris*, 14 N. H. 272, 40 Am. Dec. 186.

New Jersey. — *Lippincott v. Lippincott*, 19 N. J. Eq. 121.

Ohio. — *Hoyt v. Day*, 32 Ohio St. 109.

South Carolina. — *Perry v. Brown*, 1 Bailey L. (S. Car.) 45.

Texas. — *Bartley v. Harris*, 70 Tex. 181.

Virginia. — *Litterall v. Jackson*, 80 Va. 604.

Conveyance of Land in Satisfaction of Decedent's Debts. — An executor or administrator has no power to make a contract with a creditor of the estate by which the creditor is to receive land of the estate in satisfaction of the claim. *Hazlett v. Burge*, 22 Iowa 531.

Conveyance in Payment of Attorney's Fees. — An administrator has no power to convey land of his intestate to an attorney in payment of attorney's fees; nor will an approval of such conveyance by the Probate Court render it valid. *Teal v. Terrell*, 48 Tex. 491.

A Military Warrant or the Certificate on which the warrant was obtained cannot be sold by an executor unless power is given to him by the will to do so. *Ware v. Brush*, 1 McLean (U. S.) 533.

An Apparent Exception to the rule is where an executor who is also the residuary devisee has given bond to pay debts and legacies. In such case he may sell the real estate of the deceased without license, but in so doing he acts not by virtue of his office as executor, but as the absolute owner of the property. *Clarke v. Tufts*, 5 Pick. (Mass.) 337.

Terms for Years. — Leaseholds and other terms for years, being chattel interests, are not within the rule that executors and administrators cannot sell and convey real estate. See *supra*, this section, *Sale and Transfer of Personal Property*.

4. *Sale of Land Authorized by Will* — *Leave of Court Not Necessary* — *Arkansas.* — *Ludlow v. Flournoy*, 34 Ark. 451.

California. — *Norris v. Harris*, 15 Cal. 236; *Payne v. Payne*, 18 Cal. 291; *Larco v. Casaneuava*, 30 Cal. 560; *Matter of Delaney*, 49 Cal. 76; *Matter of Durham*, 49 Cal. 490.

Michigan. — *Tracy v. Murray*, 49 Mich. 35.

Oregon. — *Northrop v. Morquam*, 16 Oregon 173.

Texas. — *Rogers v. Jones*, 13 Tex. Civ. App. 453.

It was formerly questioned whether under the *California* statute an executor with power in the will to sell real estate might sell without the preliminary proceedings required for the sale of real estate of deceased persons to pay debts. *Gregory v. Haynes*, 13 Cal. 591. But it is now settled that he may. See *California* cases, *ubi supra*.

In *Maryland* a power of sale given by the will does not dispense with the necessity of obtaining leave of the Orphans' Court to make the sale, unless it is so provided in the will. *Brooks v. Bergner*, 83 Md. 352.

Removal of Executor — *Subsequent Appointment as Administrator with Will Annexed.* — An

the will in express terms or it may be implied from the duties imposed by the will on the executor;¹ and the necessity or propriety of a sale may be committed to the judgment of the executor, or the power may be peremptory;² but the object of the power must be specified in or clearly ascertainable from the will.³ When the will gives power to the executor to sell land in case of a deficiency of assets, he must sell under the power and not under the statute authorizing sales by leave of the probate court.⁴

executor who was removed for becoming a nonresident, and was afterwards appointed administrator with the will annexed, on returning to the state may still execute a power of sale given by the will. *Hetzell v. Easterly*, 66 Barb. (N. Y.) 450.

If the Validity of the Will Is in Controversy, and it has been admitted to probate without notice to the heirs and upon insufficient testimony, a sale of the decedent's real estate under a power contained in the alleged will may be restrained. *Galbreath v. Everett*, 84 N. Car. 546.

Dissent of Widow from Will. — The fact that the widow of the testator dissents from the will does not affect a power of sale given to the executor for the purpose of paying the testator's debts. *Gaunt v. Tucker*, 18 Ala. 27.

Necessity of Qualifying as Executor. — If the legal estate is devised to the executors merely for the purpose of sale and conveyance, they may make the conveyance in order to fulfil the trust imposed on them, and it is not absolutely necessary that they should qualify fully as executors. *Hogan v. Wyman*, 2 Oregon 302, approved in *Brown v. Brown*, 7 Oregon 299.

Revocation — Contract by Testator to Sell. — A power of sale given by the will is not revoked by a contract made by the testator to sell the land. *Douglass v. Dickson*, 11 Rich. L. (S. Car.) 418.

In *Chesman v. Cummings*, 142 Mass. 65, the testator gave his executors power to sell and convey his real estate. Afterwards he conveyed the real estate to trustees for certain purposes with power to sell. Later he made a codicil to his will, giving an additional legacy and in other respects confirming the will. It was held that the executors had power to sell.

1. Power of Sale May Be Either Express or Implied. — *Skinner v. Wood*, 76 N. Car. 109; *Council v. Averett*, 95 N. Car. 131. As to implied powers of sale, see the next succeeding subdivision of this section, *Implied Power of Sale*.

An Express Power of Sale was held to be conferred on the executors by the following clause of the will: "I hereby direct that the place on which I live be sold as soon after my decease as the times will warrant, either publicly or privately, so as to make the best of it. Should it be thought best by my executors to divide it into small lots and sell at public sale, my will is that after the lots are tried at public sale and the amount ascertained, that the whole property be set up together and sale made in the best possible manner." *Gray v. Henderson*, 71 Pa. St. 368. See also *Dennis v. Jones*, 1 Dem. (N. Y.) 80.

2. Discretionary Power of Sale. — Where a will directs the estate to be sold, "if an equal, valid, and satisfactory division thereof, in part or in whole, cannot otherwise be made," the

executors are given a discretion as to the necessity of sale, and their judgment is conclusive if exercised in good faith. *Bunner v. Storm*, 1 Sandf. Ch. (N. Y.) 357.

An executor may be compelled to exercise a discretionary power of sale. *Wilcox v. Quinby*, (Supreme Ct.) 20 N. Y. Supp. 5; *Haight v. Brisbin*, 95 N. Y. 132. But see *Morris's Estate*, 16 Phila. (Pa.) 344, 41 Leg. Int. (Pa.) 115 [*citing* *Wagner's Appeal*, 38 Pa. St. 122; *Naglee's Estate*, 52 Pa. St. 154; *Williams's Appeal*, 73 Pa. St. 249; *Wilson's Appeal*, 1 W. N. C. (Pa.) 321; *Peterson's Estate*, 13 Phila. (Pa.) 265, 36 Leg. Int. (Pa.) 392; *Storey's Estate*, 16 Phila. (Pa.) 339, 41 Leg. Int. (Pa.) 94].

Peremptory Power of Sale. — A power to sell land to pay debts and legacies is peremptory. *Rutherford v. Clark*, 4 Bush (Ky.) 32. So also where the testator directed his executors to sell and convert his property into money for division among the legatees, within one year after the decease of his wife. *Ross v. Roberts*, 2 Hun (N. Y.) 90, 4 Thomp. & C. (N. Y.) 318.

If a will positively directs a sale it is not rendered discretionary by a further direction that the executors shall lay out the proceeds "to the best advantage" for the children. *Muldrow v. Fox*, 2 Dana (Ky.) 81.

3. Object of Power Must Be Specified. — To create a valid power of sale, it is indispensable that the object or objects to be benefited by its execution shall be specified in or be clearly ascertainable from the instrument by which the power is attempted to be created. *Sweeney v. Warren*, 127 N. Y. 426, 24 Am. St. Rep. 468.

4. Sale Must Be under Power, if Given by Will, and Not under Statute. — In *Matter of Davids*, 5 Dem. (N. Y.) 14, it was held that a sale would not be ordered by the court on an application under the statute to sell for the payment of debts where the will gave the executor a power of sale for that purpose. The surrogate said: "It would seem to be unjust, unreasonable, and improper for the court to permit such a proceeding, as it could benefit no one, and would be burdening the estate with expenses to the injury of those interested. Why should it confer a power with which the executors have already been clothed by the will? If they were to sell under that power, they could bring the proceeds into court, under the provisions of the code, and they would be distributed as if they were derived from such a sale as the petitioners here seek." See also *Matter of Rosenfield*, 5 Dem. (N. Y.) 251.

"Whenever an Executor Has a Power under a Will to sell real estate, no license of any court is necessary to, or can give any additional validity to, any sale and conveyance which he may make. And it is considered a good reason, for refusing such license, that the power already exists." *Going v. Emery*, 16 Pick. (Mass.) 107, 26 Am. Dec. 645.

Incidents to Power of Sale. — Where the title to land, as well as a power of sale, is given to executors, it is held that they can make an agreement to assign a part to the widow for dower, in consideration of her releasing the residue, which, in the absence of collusion, will bind the heirs as well as creditors.¹ And it seems that the executor may also, as incidental to the power of sale, create easements, such as the right to use part of the property as a street, when the most advantageous mode of exercising the power is by dividing the property into building lots.²

Limitation of Power. — The executor's power to sell may be limited to specified purposes, or on the happening of certain contingencies, or to be exercised at the request or on the consent of third persons.³

What Property May Be Sold. — A power of sale should designate the property to be sold, but it may by implication be extended to property other than that to which it expressly relates.⁴ It is not operative, however, as to land of which the testator was disseized at the time of his death;⁵ but it cannot be defeated by the fact that the title of the heir or devisee has been divested by an attachment against him or otherwise.⁶

1. Incidents to Power of Sale — Assignment of Dower. — *Harrow v. Johnson*, 3 Metc. (Ky.) 578.

2. Power to Create Easements. — In *Earle v. New Brunswick*, 38 N. J. L. 47, it was held that executors having a general power of sale could plot the property into building lots for the use of the purchaser of the lots.

In *Matter of Opening Sixty-seventh St.*, 60 How. Pr. (N. Y. Supreme Ct.) 265, it was said that, while it is no doubt true that the legal appropriation or dedication of real estate for the purposes of streets or public places may be made only by the sanction or authority of the owner of the fee, yet the executors in the case at bar were given by the will of the owner of the fee authority to sell of a broad and unlimited character, allowing that to be done as their judgment might indicate it to be proper and advantageous to his estate; and as the property was valuable for the occupancy and use of persons desiring to improve it, being situated in a part of a city where it was available for building lots, and as it could be sold for that purpose only by providing some means of access to the lots, the executors had authority to lay out streets through the property for the purpose of providing such means of access.

But see *contra*, *Bloomfield v. Ketcham*, 25 Hun (N. Y.) 218, where it was held that executors who had merely a naked power in trust to sell could not, when conveying, create easements therein, such as the right to use a part of the property as a street.

3. Power of Sale for Specified Purposes. — Where the testator gave his executors "full power to sell and convey any part or all of my real estate and personal property, and to reinvest the proceeds thereof in such manner as they may think to be for the best interests of my estate," it was held that the power was not restricted by implication to sales for investment, but was a general power, and authorized a sale for purposes of distribution as directed by the will. *Manier v. Phelps*, 15 Abb. N. Cas. (N. Y. Supreme Ct.) 123.

Power of Sale on Happening of Contingency. — If a power of sale is given on the happening of a certain contingency, it cannot be exer-

cised on the happening of a different contingency. *Snedekers v. Allen*, 2 N. J. L. 32. Nor does the happening of the contingency authorize the sale of the whole property when the power contemplates the sale of only a part. *Walker v. Murphy*, 34 Ala. 591.

Power to Sell if Necessary. — If the power is not to be exercised except in case of an imperative necessity, it cannot be exercised merely because it would be to the advantage of the estate. *Moale v. Cutting*, 59 Md. 510.

In *Etchborne v. Auzeais*, 45 Cal. 121, the testator devised his entire estate, real and personal, to his executors in trust for his heirs, and gave them power to sell for the payment of debts, expressing a desire that his homestead should not be sold unless necessary, but that it should be used by his wife and children as a home. It was held that the executors had authority to sell the homestead if it should become necessary.

Power to Sell at Request or on Consent of Third Person. — If the request of the majority of the persons interested in the estate is required before the power of sale can be exercised, and some are dead, a majority of the entire original number is still necessary. *Crane v. Bolles*, 49 N. J. Eq. 373.

If the Person Whose Consent Is Required Dies Before the Power Is Exercised, it may nevertheless be exercised if the intention of the testator is plain. *Phillips v. Davies*, 92 N. Y. 199.

4. Property to Be Sold Should Be Designated by Will. — *Gill v. Grand Tower Min., etc., Co.*, 92 Ill. 249.

Sale of Land Not Designated. — Where the will gives power to the executor to sell only lands situate in certain counties to pay the testator's debts, and such lands are insufficient for that purpose, the executor cannot, without an order of court, sell lands in other counties to make up the deficiency. *Kinney v. Knoebel*, 51 Ill. 112.

Power Extended by Implication to Property Not Designated. — *Bates v. Woodruff*, 123 Ill. 205.

5. Power Not Operative as to Lands of Which Testator Was Disseized. — *Poor v. Robinson*, 10 Mass. 131.

6. Power Not Defeated by Divestiture of Title of Heir or Devisee. — A power of sale given to an

(b) **Implied Power of Sale** — *aa. IN GENERAL.* — An executor has implied authority to sell the real estate of the testator whenever it appears from the whole purview of the will to have been his intention that it should be sold and the proceeds applied to the purposes to which the executor alone may apply them.¹

Necessity of Power. — As a general rule an executor takes a power of sale by implication only when it is necessary in order to carry out the provisions of the will, and not merely because it would be of advantage to the estate.²

bb. DIRECTIONS AS TO PAYMENT OF DEBTS AND LEGACIES — **Express Direction.** — Where a testator directs the payment of debts and legacies with the proceeds of real estate, or otherwise manifests an intent that the proceeds of his real estate should be so used, the executor takes a power of sale by implication;³ but a power of sale is not implied solely from a direction that the executor pay debts and legacies.⁴

Devise to Executor. — A power of sale is also implied where real estate is devised to the executor for any purpose which is within the scope of his functions as such, or which require a sale, or where the residue is devised to him after a direction to pay debts.⁵

executor cannot be defeated by the levy on the land of an attachment or execution against the devisee. *Smyth v. Anderson*, 31 Ohio St. 144; *Allison v. Wilson*, 13 S. & R. (Pa.) 330.

1. Implied Power of Sale — Intention of Testator Governs. — *Doe v. Hughes*, 6 Exch. 223.

"**The Intention Is to Be Collected from All the Parts of the Will**, and it must be clear, or else the heir at law shall not be disinherited." *Oates v. Cooke*, 3 Burr. 1684. See also *Anthony v. Rees*, 2 Comp. & J. 75, in which Baron Bayley said: "It is clear that we are bound to look at all the parts of the will to see whether a provision which may at first appear absolute be not qualified by some subsequent clause;" and he added: "When trustees are directed to do anything for the performance of which the legal estate is requisite, then they are to have the legal estate."

"**No Precise Form of Words Is Necessary** to the creation of a power; if the intention to confer the power is apparent, to enable the executor to execute the trusts of the will, the power will be implied." *Winston v. Jones*, 6 Ala. 550, quoted with approval in *Blount v. Moore*, 54 Ala. 360.

Such Intent Does Not Appear where the will creates for a fixed period a trust amounting to a direction that the real estate, and not its proceeds, shall be held for the beneficiaries. *Matter of Roe*, 119 N. Y. 509; nor from the words, "until the sale and conveyance of said premises by my executor as hereinafter provided," contained in a devise of the use of the premises referred to, there being no further provision in regard to a sale, *Cahill v. Brennan*, 68 Hun (N. Y.) 540; nor where the will directs the application of the property to uses to which the law would apply it, *Chandler v. Chandler*, 87 Ala. 300.

Blending Realty and Personality into One Fund. — An implied power of sale is given to the executor where the testator blends the proceeds of real estate into one fund with the personality for the purposes of distribution or accumulation, or even where there is no direction to distribute. *Winston v. Jones*, 6 Ala. 550; *Putnam Free School v. Fischer*, 30 Me. 523; *Belcher v. Belcher*, 38 N. J. Eq. 126; *Myers' Appeal*, 62 Pa. St. 107; *Gray v. Henderson*, 71 Pa. St. 368.

Appointment of Independent Executor. — A power of sale may be implied from the existence of debts when the administration of the estate is withdrawn from the Probate Court by the appointment of an independent executor under the *Texas* statute. *Masterson v. Stevens*, (Tex. Civ. App. 1896) 37 S. W. Rep. 364. See also *infra*, this title, *Independent Executors*.

2. Power of Sale Implied if Necessary to Carry Out Will. — *Blount v. Moore*, 54 Ala. 360; *Van Winkle v. Fowler*, 52 Hun (N. Y.) 355.

"**The General Rule** is that if a sale of the real estate is necessary to carry out the purposes of the testator, the power to make the sale will be given by implication, as otherwise the intention of the testator might be defeated. In those cases it will be presumed that the testator, having in view a duty imposed upon the executors of his will, intended that they should sell his real estate, and omitted, through mistake or otherwise, to confer express power." *Livingston v. Murray*, 39 How. Pr. (N. Y. Super. Ct.) 102.

It has been said, however, that such power is not created by implication "because necessary or convenient to enable the executors to execute the directions of the will." *Per* Chancellor Zabriskie, in *Seeger v. Seeger*, 21 N. J. Eq. 90.

Power of Sale Not Implied When Not Necessary to Carry Out Will. — *Mathewson's Petition*, 12 R. I. 145. See also *Potter v. Brown*, 11 R. I. 232.

Power of Sale Not Implied Merely Because Beneficial to Estate. — *Roe v. Vingut*, 21 Abb. N. Cas. (N. Y. Supreme Ct.) 404, 117 N. Y. 204.

3. Power of Sale Implied from Direction to Pay Debts with the Proceeds of Land. — *Meakings v. Cromwell*, 2 Sandf. (N. Y.) 512; *Skinner v. Wood*, 76 N. Car. 100.

Where the Will Treats the Entire Estate as Personality, and directs all gifts to be paid in money, it gives the executors power to sell. *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278.

4. Power of Sale Not Implied Merely from Direction to Pay Debts. — *Hill v. Den*, 54 Cal. 6; *Huse v. Den*, 85 Cal. 390; *Owen v. Ellis*, 64 Mo. 77.

5. Power of Sale Implied from Devise to Executor After Payment of Debts. — *Blatch v. Wilder*, 1 Atk. 420; *Brown v. Brown*, 7 Oregon 285.

Devise After Payment of Debts. — But the executor does not take an implied power of sale where land is devised to another after payment of the testator's debts.¹

Bequests Exceeding Personality. — Neither is such a power to be implied from the mere fact that the bequests under the will exceed the amount of the testator's personality.²

Charging Debts on Real Estate — Rule in England. — It was formerly held in England that where a will charged the testator's debts on the real estate, the executor took an implied power of sale for the purpose of paying the debts.³ This rule, however, was unanimously denied by a decision of the Barons of the Exchequer, but their decision was not followed in later cases,⁴ and it is now provided by statute in England that where the testator has charged his real

A Devise to the Executor for Purposes Naturally Devolving on Him gives him an implied power to sell the property devised. *Vaughan v. Farmer*, 90 N. Car. 611.

Power of Sale Implied from Residuary Devise to Executors After Direction to Pay Debts. — *Coogan v. Ockershausen*, 55 N. Y. Super. Ct. 286.

A Devise to the Executors for Purposes Requiring Sale Gives Power of Sale. — *Stewart v. Hamilton*, 37 Hun (N. Y.) 19.

But it has been held in *California* that executors have no authority to sell real estate under a will devising property to them in trust, but not authorizing any sale otherwise than by a direction to pay the debts of the testator. *Hill v. Den*, 54 Cal. 6, *sub nom.* *Huse v. Den*, 85 Cal. 390.

1. Power of Sale Not Implied from Devise to Third Person After Debts Are Paid. — *Colyer v. Finch*, 5 H. L. Cas. 905; *Corser v. Cartwright*, L. R. 7 H. L. 731; *West of England*, etc., *Bank v. Murch*, 23 Ch. Div. 138; *Dunn v. Keeling*, 2 Dev. L. (13 N. Car.) 283.

2. Giving Legacies in Excess of the Amount of Personal Property. — *Cahill v. Brennan*, 68 Hun (N. Y.) 540.

3. Charging Debts on Real Estate — Former Rule in England. — 1 *Williams on Executors* (7th Am. ed.) 780.

4. Former Rule in England Denied. — In *Doe v. Hughes*, 6 Exch., 223, 20 L. J. Exch. 148, *Parke, B.*, said: "Not a single authority is to be found which says that a simple charge of the estate with the payment of the debts does more than make a charge upon the estate in the hands of the devisee, if the estate is devised, or upon the estate in the hands of the heir at law, if the estate devolves upon him by the law of inheritance. The only authority which bears the aspect of giving the executor an implied power to sell, under such circumstances, is the dictum of Vice-Chancellor Shadwell, in *Forbes v. Peacock*, 11 M. & W. 637, which was twice before him, and also before this court. On one of those occasions the vice-chancellor is reported to have said: 'If a testator charges his real estate with the payment of his debts, that *prima facie* gives his executor power to sell the estate, and to give a good discharge for the purchase money. That was all I decided on the argument of the demurrer.' If that be correctly reported, it would imply that the vice-chancellor was of opinion that a simple charge of the estate with payment of debts, without more — without any terms in the will indicating an intention on

the part of the testator that the estate should be sold — was an implied authority given to the executor to sell. But that would be a solitary authority, because there is none other to be found that goes to the same extent. But the vice-chancellor is merely stating what he had decided before, when the case of *Forbes v. Peacock*, 11 M. & W. 637, was first before him. The proposition he is there reported to have stated is quite distinct from that referred to; because it is perfectly clear that he there gave his opinion upon the supposition (the will, in that case, authorizing the sale of the property) that the testator meant it to be sold, and that the executor was the proper person to carry that intention into effect."

Charging a Legacy on Land Devised does not give the executors an implied power of sale. *Bennett v. Rebbeck*, 8 Reports 376, 63 L. J. Ch. 596, 71 L. T. N. S. 74, 42 W. R. 473.

A Contrary Opinion was expressed by Sir J. Romilly in *Wrigley v. Sykes*, 21 Beav. 337, 2 Jur. N. S. 78, 25 L. J. Ch. 458, and *Greetham v. Colton*, 34 Beav. 615. In the case last cited the learned judge said: "It has been held by the vice-chancellor of England, Sir Lancelot Shadwell, by Lord Cottenham, by Sir John Leach, and by Lord Justice Knight Bruce, that a general charge of debts on land enables the executors to sell the land, and to make a good title. I should be very sorry to do anything to weaken that decision; I myself so held in *Robinson v. Lowater*, 17 Beav. 592, after referring to the opposite case at law of *Doe v. Hughes*, 6 Exch. 223, and the lord justices affirmed my decision (5 De G. M. & G. 272). Therefore, independently of my own decision, so confirmed, the uniform course in equity has been to compel purchasers to take a title from executors, where there has been a general charge of debts, which gives them an implied power of sale."

And in *Colyer v. Finch*, 5 H. L. Cas. 905, 3 Jur. N. S. 25, 26 L. J. Ch. 65, Lord Chancellor Cranworth said that "where there is a general charge of debts, and no legal estate given, it may be that as against the heir at law the executors may sometimes, perhaps always, possess impliedly a power to convey the legal estate in order to raise the money to satisfy the charge." See also *Shaw v. Borrer*, 1 Keen 559; *Elliot v. Merriman*, Barn. 78; *Robinson v. Lowater*, 17 Beav. 592, 5 De G. M. & G. 272; *Hodkinson v. Quinn*, 1 Johns. & H. 309; *Sabin v. Heape*, 27 Beav. 553; *Cook v. Dawson*, 29 Beav. 123, 3 De G. F. & J. 127.

estate with the payment of debts, and he has not devised the estate so charged to trustees, his executors shall have power to sell it.¹

Rule in the United States. — It is generally held in the United States that under the statutory system of administering the property of decedents for the payment of their debts no power of sale can be implied from a mere charge of debts on the real estate.²

cc. DIRECTIONS AS TO DISTRIBUTION OF ESTATE. — Power to sell is implied where the will directs distribution of the estate, and a sale is necessary in order to effect a distribution, or it appears to have been contemplated by the testator that a sale should be made for that purpose.³ But a mere direction to the executor

1. **Statutory Rule in England — Charge of Debts on Land Gives Power of Sale.** — Statute 22 & 23 Vict., c. 35.

2. **Rule in United States — Power of Sale Not Implied from Mere Charge of Debts on Realty.** — *Owen v. Ellis*, 64 Mo. 77; *Snedekers v. Allen*, 2 N. J. L. 45; *Matter of Fox*, 52 N. Y. 530, 11 Am. Rep. 751, *affirming* 63 Barb. (N. Y.) 157; *Worley v. Taylor*, 21 Oregon 592, 28 Am. St. Rep. 774.

3. **Directing Executor to Divide or Distribute Estate.** — In *Davies v. Jones*, 24 Ch. Div. 190, 52 L. J. Ch. 720, 49 L. T. N. S. 624, the testator directed his debts to be paid, and set apart certain sums to provide annuities for his two sons. He then devised and bequeathed all his real and personal estate to his wife and his four daughters, to be equally divided between them, the share of his wife to be divided after her death between his four daughters or the survivors and their children. The testator's wife and one D. were appointed executors, to act jointly in carrying out all the intentions of the will, and to invest the daughters' shares for their benefit and the benefit of their children. It was held that the executors were authorized by the will to sell the real estate, Pearson, J., saying: "There were two things required: one was that the executors were to carry out all the intentions of the testator, and another was that they were to distribute the residue of the estate among the wife and daughters in the manner pointed out; consequently, the wife and daughters take nothing absolutely, and the only way in which I can give effect to the whole of the will is by saying that the executors must in the first place raise so much money as may be necessary for paying the testator's debts and funeral expenses, and after that they are to provide for the legacies, and then to have in their own hands whatever remains and to divide that between the wife and children in the manner directed by the will."

In *Winston v. Jones*, 6 Ala. 550, the testator, by his will, gave to his wife a life estate in one third part of his land, and a fifth part of his estate absolutely. He then recited that he had given to his daughter S. certain property in trust which he estimated at one dollar, and provided as follows: "It is my will and desire that after the payment of all my just debts, and allotting to my wife her portion, as hereinbefore directed, to add to the residue of my estate of every description the said sum of one dollar value of property, conveyed in trust for the use of my daughter S., and to divide the sum total after making such addition into seven parts; and I do hereby direct and re-

quire my executors, hereinafter named, to distribute and pay over the residue of my estate, both real and personal, in the following manner, to wit: after deducting from one of said seven parts the said sum of one dollar, conveyed for the use of my daughter, S., to pay over to said trustees the residue of said portion, to be held by them in like trust, for her use and benefit of her and her heirs, and to pay to * * * [each of the testator's other six children] one seventh part of the residue of my estate as aforesaid, or to their legal representatives respectively." It was held that the executors were given power by the will to sell the lands of the testator to enable them to make distribution. "The terms 'add to' and 'divide into seven parts,'" said Ormond, J., delivering the opinion of the court, "necessarily imply that there was some fund, similar in kind, with which the addition could be made, and which, when added to, would be susceptible of division into parts. But how could money be added to land, and the product be divided into equal parts? Again, these parts so obtained are to be paid over to the legatees severally. The use of these terms is quite persuasive that the prevailing idea in the testator's mind was that of a sum of money which might be added to, divided, and paid over."

In *Going v. Emery*, 16 Pick. (Mass.) 107, 26 Am. Dec. 645, it was held that an intent on the part of the testator that his executor should sell the real estate was shown by the following provision of the will: "I give and bequeath all the residue of my estate, both real and personal, of whatever name or nature soever, or wherever said property may be found, to the cause of Christ, for the benefit and promotion of true evangelical piety and religion. And I do order and direct my executor hereafter named and appointed to collect all the above last specified property, as soon as can be done consistently without sacrificing too much by forcing the sale thereof in an improper manner." See also *Haggerty v. Lanterman*, 30 N. J. Eq. 37; *Potter v. Adriance*, 44 N. J. Eq. 14; *Louderbough v. Weart*, 25 N. J. Eq. 399; *Maloney v. Hawkins*, 9 Lea (Tenn.) 663.

A Devise that All the Testator's Real Estate Shall Be Sold and the Proceeds Be Equally Divided Among All His Children was held to confer no power on the executor to sell, because, as stated by Merrimon, J., delivering the opinion of the court, "it was not to be sold, nor was it necessary to sell it, to pay debts of the testator, nor was it to be applied or distributed in the ordinary course of the duties of the executor, nor were the proceeds of the sale directed to constitute any part of a common fund

to distribute or divide the estate, consisting in whole or in part of realty, is not of itself sufficient to show an intent that the executor should have the power to sell.¹

dd. DIRECTIONS AS TO MANAGEMENT OR SETTLEMENT OF ESTATE. — Power to sell real estate is not conferred on the executor merely by giving him full and entire control of all the estate, or by authorizing him to settle the estate as he may deem best for the interest of the heirs.²

ee. DEVISE TO EXECUTORS TO INVEST. — A devise to an executor with directions to invest and pay over the income is generally held to give him implied power to sell real estate so devised in order to carry out the will;³ but it is always a question of the intention of the testator, and if from the general tenor of the will it appears that it was not intended by such direction to give power to the executor to sell, none will be implied.⁴

ff. DIRECTION TO SELL WITHOUT DESIGNATING PERSON. — If a testator directs his real estate to be sold, without declaring by whom the sale shall be made, the executor takes the power by implication, if he is charged by the will or by law with the duty of seeing to the application of the proceeds.⁵

to arise from the sale of real and personal property to be distributed or administered by the executor." Under such a devise the land vests in the devisees, to be sold and divided by them, or under the direction of the court. *Gay v. Grant*, 101 N. Car. 206.

1. **A Mere Direction to Distribute** the estate among the beneficiaries is not sufficient to authorize the executor to sell the real estate. Thus the authority was held not to be conferred by the following provision: "I give, devise, and bequeath all of my property, both real and personal, to my six children, as follows, that is to say: After the settlement and payment of all my just debts, then the residue of my estate, both real and personal, to be gathered into one general fund and divided into six equal parts, as follows: To my six children [naming them], each of them to receive a one-sixth share, which I give to them and to their heirs." *Smalley v. Smalley*, 54 N. J. Eq. 591.

If a Division Can Be Effected by Actual Partition, a power of sale for the purpose of partition is not implied. *Bijur v. Bijur*, 49 Hun (N. Y.) 235.

2. **Discretion to Manage and Control All Estate.** — Power to sell real estate is not implied from a provision giving the executors "full and entire control of all my effects," *Rakestraw v. Rakestraw*, 70 Ga. 806; or from a discretionary power "to settle my estate as they judge best for the interests of my heirs at law," *Skinner v. Wood*, 76 N. Car. 109; or from a direction to "manage" and "control" the estate, *Blanton v. Mayes*, 58 Tex. 422; or "to take charge of my entire estate and execute this my last will," *Alexander v. Wallace*, 8 Lea. (Tenn.) 569.

3. **Devise to Executors to Invest and Pay Over Income Implies Power of Sale.** — *Livingston v. Murray*, 39 How. Pr. (N. Y. Super. Ct.) 102; *Belcher v. Belcher*, 38 N. J. Eq. 126 [citing *Vanness v. Jacobus*, 17 N. J. Eq. 153; *Wurts v. Page*, 19 N. J. Eq. 365; *Haggerty v. Lanterman*, 30 N. J. Eq. 37; *Zabriskie v. Norris*, etc., R. Co., 33 N. J. Eq. 22]. But see *Seeger v. Seeger*, 21 N. J. Eq. 90, in which a direction to the executors to invest two-thirds of the testator's estate, and to use the interest and so

much of the principal as might be necessary for the education and maintenance of the testator's children, was held not to give the executors power by implication to sell the real estate.

4. **Power of Sale Not Implied from Direction to Invest.** — In *Cruikshank v. Parker*, 51 N. J. Eq. 21, the testator devised to his executors all the residue of his estate, real and personal, with power to sell, and directed them to divide it into four shares, three of which they were to pay over to three of the testator's children named in the will. The fourth share the executors were directed to "hold, retain, invest, and keep invested" for the testator's other child (Mrs. Paret), and to "collect and receive and pay or apply the rents, interest, and income arising therefrom" to her use for life. By the second codicil to the will the executors were directed to deduct from such fourth share the amount of the indebtedness to the testator of the beneficiary's husband, and the residue of such share was directed to be "held and invested and kept invested" for her by the executors, "who shall collect and pay or apply the interest and income thereof" to her use during her life. It was held that the direction to "invest and keep invested" the share of the fourth child did not authorize the executors to sell that part of the real estate which had been set apart as her share, but that it applied only to so much of that share as consisted of personality.

5. **Directing a Sale Without Naming the Person to Sell** — *England*, — *Elton v. Harrison*, 2 Swanst. 276, note a; *Carvill v. Carvill*, 2 Ch. Rep. 301; *Newton v. Bennet*, 1 Bro. C. C. 135; *Blatch v. Wilder*, 1 Atk. 420; *Tylden v. Hyde*, 2 Sim. & S. 238; *Forbes v. Peacock*, 11 M. & W. 630, 12 L. J. Exch. 460.

Alabama. — *Blount v. Moore*, 54 Ala. 360.

Illinois. — *Bates v. Woodruff*, 123 Ill. 205; *Rankin v. Rankin*, 36 Ill. 293, 87 Am. Dec. 205.

Indiana. — *Davis v. Hoover*, 112 Ind. 423.

Kentucky. — *Dean v. Dean*, 7 T. B. Mon. (Ky.) 309; *McCulloch v. Sanders*, 5 Ky. L. Rep. 517.

Maryland. — *Ogle v. Reynolds*, 75 Md. 145; *Magruder v. Peter*, 11 Gill & J. (Md.) 217.

(c) **Manner and Terms of Sale** — *aa. IN GENERAL.* — If the will or any statute directs the manner in which the sale is to be made, the executor is obliged to follow such directions,¹ unless they are of a merely advisory nature, in which case he

Massachusetts. — *Hale v. Hale*, 137 Mass. 168.

Michigan. — *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61.

Mississippi. — *Clark v. Hornthal*, 47 Miss. 434.

Nebraska. — *Schroeder v. Wilcox*, 39 Neb. 136.

New Jersey. — *Whitehead v. Wilson*, 29 N. J. Eq. 396; *Seeger v. Seeger*, 21 N. J. Eq. 90; *Chambers v. Tulane*, 9 N. J. Eq. 146.

New York. — *Loring v. Binney*, 3 How. Pr. N. S. (N. Y. Supreme Ct.) 143; *Officer v. Board of Home Missions*, 47 Hun (N. Y.) 352; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Bogert v. Hertell*, 4 Hill (N. Y.) 500; *Meakings v. Cromwell*, 2 Sandf. (N. Y.) 512, 5 N. Y. 136; *Dorland v. Dorland*, 2 Barb. (N. Y.) 63.

North Carolina. — *Vaughan v. Farmer*, 90 N. Car. 607; *Council v. Averett*, 95 N. Car. 131.

Pennsylvania. — *Lloyd v. Taylor*, 2 Dall. (Pa.) 223; *Silverthorn v. McKinster*, 12 Pa. St. 67.

South Carolina. — *Shoolbred v. Drayton*, 2 Desaus. (S. Car.) 246, 250; *Drayton v. Grimke*, Bailey Eq. (S. Car.) 392.

"Where a Power Is Given to Sell Property for the Purpose of Either Paying Debts or Legacies, or of converting them into a residuary fund, that power must from its nature belong to the executors. The estate, no doubt, in point of law, descends to the heir at law, subject to the power to sell; but the heir at law is not bound to make any distribution; that is the duty of the executors." *Forbes v. Peacock*, 11 M. & W. 630.

In *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252, the testator directed that so much of his real estate as should be necessary to furnish the sums bequeathed should be sold at public auction, when his children should attain full age, and the remainder be leased by his executors; and that when the youngest child arrived at full age, all his real estate and property, not otherwise disposed of, should be sold, and the proceeds, with the amount of the personal property, be divided among his children; but he did not say expressly who should make the sale. Chancellor Kent held that the power was given to the executors by implication. "The object of the power to sell," he said, "was to raise money for the legacies, which it is, of course, the duty of the executor to discharge; and the will regulates the sale by declaring it to be at public auction, which it would not have done if it was intended that the sale should not be made by the constituted agents of the will, but under the directions of this court. Indeed, taking the whole will together, I think it is a very necessary conclusion that the executors were the persons intended by the testator to execute the power to sell."

A Mere Direction that Land Shall Be Sold does not give, by implication, a power of sale to the person named as executor; but if the executor is directed by the will, or bound by law, to

see to the application of the proceeds of the sale, or if the proceeds, in the disposition of them, are mixed up and blended with the personality — which it is the duty of the executor to dispose of and pay over — then a power of sale is conferred on the executor by implication. *Lippincott v. Lippincott*, 19 N. J. Eq. 121 [*citing* 1 Sugden on Powers 134, 139; 1 Williams on Executors 580, 581; 2 Redfield on Wills 124; *Forbes v. Peacock*, 11 Sim. 152, 11 M. & W. 630, 12 Sim. 528; *Tylden v. Hyde*, 2 Sim. & S. 238; *Ward v. Devon*, *cited* in *Forbes v. Peacock*, 11 Sim. 160; *Robinson v. Lowater*, 17 Beav. 593, 5 De G. M. & G. 272; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Bogert v. Hertell*, 4 Hill (N. Y.) 492].

Thus, where a testator bequeathed an estate to his wife for life, and directed that after her decease the estate should be sold to the highest bidder at public auction, and the money arising from such sale be disposed of among certain persons named in his will, and he appointed his wife and another person executors, it was held that the power was not given by implication to the executors, because they had nothing to do with the produce of the sale, nor any power of distribution with respect to it. *Bentham v. Wiltshire*, 4 Madd. 44. See also *Patton v. Randall*, 1 Jac. & W. 189; *Allum v. Fryer*, 3 Q. B. 442, 43 E. C. L. 811; *Bell's Appeal*, 66 Pa. St. 498.

Sir Lancelot Shadwell, V. C., remarked in the course of the argument in *Forbes v. Peacock*, 12 Sim. 536, that he did not think Sir John Leach would have decided the case of *Bentham v. Wiltshire*, 4 Madd. 44, as he did, if he had seen the case of *Ward v. Devon*, *cited* in *Forbes v. Peacock*, 11 Sim. 160. In that case the will was in the following words: "Sell all off, both real and personal property, and divide the produce between my wife, Mary Ann Ward, and my sons and daughters, each to share alike. The law gives the house at Teddington to the youngest son, but it is my will to sell all. I appoint Mr. Robert Ward, my brother, and my wife, Mary Ann Ward, my executors." That was the whole of the will. The testator died seized in fee of freeholds and copyholds. The executors contracted to sell to the defendant, who insisted that they could not make a title; but it was held that the executors had power to sell.

In Pennsylvania it is provided by statute that "all powers, authorities, and directions relating to real estate contained in any last will and not given to any person by name or by description shall be deemed to have been given to the executors thereof; but no such power or direction shall be exercised or carried into effect by them, except under the control and direction of the Orphans' Court having jurisdiction on their accounts." *Gray v. Henderson*, 71 Pa. St. 368.

1. Manner and Terms of Sale — Directions of Will Must Be Followed. — *Schlicker v. Hemenway*, 110 Cal. 579; *Napier v. Napier*, 89 Ga. 48; *Pendleton v. Fay*, 2 Paige (N. Y.) 202; *Hetzel v. Barber*, 69 N. Y. 1.

may sell as in his judgment may seem best, notwithstanding the directions of the will; ¹ but if no directions are given by the will, the executor has a discretion to adopt the mode which he deems best.²

bb. TIME OF MAKING SALE—(*aa*) *When Time Is Prescribed by Will*—*aaa. In General.*—As a general rule, when the will directs the sale to be made within a specified time, and the proceeds to be applied to certain purposes, it is the duty of the executor to sell within such time; but it is altogether a question of testamentary intent, such a direction ordinarily being considered as merely directory, and a sale made after the time limited is valid, unless it appears from the will that the testator intended to limit the exercise of the power.³ But the executor should not sell while there is a cloud on the title to the land which affects its value, or while it is in the adverse possession of another.⁴

A Special Power to Sell must be exercised in the mode prescribed by the will. *Pendleton v. Fay*, 2 Paige (N. Y.) 202. See also *King v. Whiton*, 15 Wis. 684 [*citing Haskell v. House*, 3 Brev. (S. Car.) 242; *Paton v. Crow*, 26 Ala. 431; *Thomson v. Gaillard*, 3 Rich. L. (S. Car.) 418; *Fay v. Fay*, 1 Cush. (Mass.) 105; *Carlington v. Goddin*, 13 Gratt. (Va.) 601; *Waldron v. McComb*, 1 Hill (N. Y.) 111, 7 Hill (N. Y.) 335; *Allen v. De Witt*, 3 N. Y. 276; *Read v. Shaw*, 2 Sugden on Powers, Appendix No. 28].

Statutory Provisions.—It was formerly provided by statute in *New York* (2 Rev. Stat. N. Y. 109, § 56, repealed by Laws 1880, c. 245, that sales of property situate in the city of New York, by any executor, made for payment of debts and legacies, in pursuance of authority given by will, should be made in like manner as sales by orders of surrogates; and under this statute a sale for the purpose of distribution of the proceeds under the will could not be made except by auction. *Edgerton v. Conklin*, 25 Wend. (N. Y.) 224.

But the statute did not apply where the will authorized a different mode of sale, *e. g.*, if it authorized a sale at such time and manner as the executors might deem most advantageous. *McDermot v. Lorillard*, 1 Edw. Ch. (N. Y.) 273.

1. Advisory Directions.—In *Judevine v. Judevine*, 61 Vt. 587, the testator, after expressing the wish that his real estate should not be sacrificed by an immediate sale, and that certain timberlands should be held by the executors until the other real estate should be disposed of, "suggested" a mode of proceeding in order that his "wishes and ideas" might be carried out. It was held that the provision in regard to the timber land was advisory only, and that the executors might in their discretion effect a sale, notwithstanding the other real estate was undisposed of.

2. Manner and Terms Not Prescribed by Will—Discretion of Executor.—*Jelks v. Barrett*, 52 Miss. 315; *Buckingham v. Wesson*, 54 Miss. 526.

3. Direction to Sell Within Specified Time—England.—*Pearce v. Gardner*, 10 Hare 287; *Cuff v. Hall*, 1 Jur. N. S. 972.

California.—*Kidwell v. Brummagim*, 32 Cal. 436.

New Jersey.—*Chasmar v. Bucken*, 37 N. J. Eq. 415; *Marsh v. Love*, 42 N. J. Eq. 112.

New York.—*Mott v. Ackerman*, 92 N. Y. 539.

Pennsylvania.—*Miller v. Meetch*, 8 Pa. St. 419; *Shalter's Appeal*, 43 Pa. St. 83, 82 Am. Dec. 552.

In *Waldron v. Schlang*, 47 Hun (N. Y.) 252, it was said that a limitation of the time within which real estate shall be sold is inoperative, when it is evident that the intention of the testator was that all his property should be converted into money and divided in the manner directed by the will.

Intention of Testator Governs.—"The time when a power in trust for the sale of the testator's real estate can legally and properly be executed must, like every other disposition of property by will, depend upon the intention of the testator, to be ascertained upon an examination of everything contained within the four corners of the will, and with reference to the objects the testator had in contemplation by the execution of the power. It is not very strange, therefore, that we should find cases in the books on this subject which are apparently in conflict with each other, until they are analyzed in reference to this principle of carrying into effect the intention of the testator." *Edgerton v. Conklin*, 25 Wend. (N. Y.) 224.

Compelling Execution of Power.—If an executor fails to act pursuant to a direction that he shall sell real estate within a certain time, he may be compelled by a court of equity to sell, even after the lapse of such time. *Marsh v. Love*, 42 N. J. Eq. 112.

In Conflict with These Cases is *Daly v. James*, 8 Wheat. (U. S.) 531, where the direction was, in a certain event, to sell "within two years after the decease" of the testator's son. It was held by a divided court that the devise of the proceeds to be derived from the sale failed to take effect in consequence of the death of the devisees in the lifetime of the son, so that the contingencies upon which the power to sell depended never arose. After determining this point upon a full discussion, it is very briefly added that, whether the conclusion attained is correct or not, the sale was limited to two years after the decease of the son. But as to the effect of the limitation, see the dissenting opinion of Mr. Justice Johnson.

In *Richardson v. Sharpe*, 29 Barb. (N. Y.) 222, it was held that a power to sell within a certain time could not be exercised after the time specified had elapsed, but the decision in this case was based on special circumstances and it expressly recognized the principle that the question is governed by the intention of the testator as shown by the will. See also *Herb v. Walther*, 6 Pa. Dist. Rep. 687.

4. Sale Improper While There Is Cloud on Title.—*Matter of Ricaud*, 57 Cal. 421; *Peck v. Peck*, 9 Yerg. (Tenn.) 301.

bbb. Direction to Sell at Future Time or on Happening of Contingency. — If the will directs a sale to be made at a future time, or on the happening of a contingency, it is apparent that the power does not exist until the time arrives or the contingency happens, and if a sale is made prior thereto it is void,¹ unless the persons interested in the estate consent to a sale at a different time,² or the will gives authority to the executor, at his discretion, to sell at a time other than that named in the will.³

(*bb*) *When Time Is Not Prescribed by Will* — **aaa. In General.** — If no time for the sale is fixed by the will, it is discretionary with the executor when he will sell.⁴

1. Sale Cannot Be Made Before Time Prescribed — *England.* — *Smith v. Great Northern R. Co.*, 23 W. R. 126; *Mosley v. Hide*, 17 Q. B. 91, 79 E. C. L. 91; *Coxe v. Day*, 13 East 118; *Want v. Stallibrass*, L. R. 8 Exch. 175.

Canada. — *Henry v. Simpson*, 19 Grant's Ch. (U. C.) 522.

Alabama. — *Jones v. Morris*, 61 Ala. 518; *Massey v. Modawell*, 73 Ala. 421.

New Jersey. — *Booraem v. Wells*, 19 N. J. Eq. 87; *Hampton v. Nicholson*, 23 N. J. Eq. 423; *Isham v. Delaware, etc.*, R. Co., 11 N. J. Eq. 227; *Fairly v. Kline*, 3 N. J. L. 322, 4 Am. Dec. 414.

New York. — *Hetzel v. Barber*, 69 N. Y. 1; *Hall v. McLaughlin*, 2 Bradf. (N. Y.) 107.

North Carolina. — *Davis v. Howcott*, 1 Dev. & B. Eq. (21 N. Car.) 460.

Pennsylvania. — *Loomis v. McClintock*, 10 Watts (Pa.) 274.

Virginia. — *Jackson v. Ligon*, 3 Leigh (Va.) 161; *Raper v. Sanders*, 21 Gratt. (Va.) 60.

"It is a General Rule that a power cannot be exercised before the time in which it was the intention of the grantor of the power that it should be exercised. This was the principle assumed by Lord Coke, Co. Litt. 113a; and in *Coxe v. Day*, 13 East 118, it was adjudged that when a power of leasing was given to B, to be exercised after the death of A, it could not be exercised during the life of A. 4 Kent's Com. 334. *Vide also Blacklow v. Laws*, 2 Hare 40; *Johnstone v. Baber*, 8 Beav. 233, where the power of the court of chancery to decree a sale of real property in anticipation of the time appointed in the instrument creating the trust is expressly denied." *Rodman v. Munson*, 13 Barb. (N. Y.) 83.

Where a Will Directs the Executors to Sell After the Death of a Certain Person, a sale during the lifetime of such person is unauthorized and void. *Booraem v. Wells*, 19 N. J. Eq. 87.

Sale Need Not Be Immediately on Happening of Contingency. — Where executors are directed to sell on the happening of a certain event, they are not bound to sell as soon as the event happens, on any terms or for any price that may be offered, but they are to see that the price and terms are reasonably satisfactory, fair, and adequate, and that the property is not sacrificed needlessly for some nominal amount. *Hancox v. Mecker*, 95 N. Y. 528.

2. Consent of Beneficiaries. — Where a sale is directed on a contingency which is sure to happen, the executor may in some cases sell before it happens, if the beneficiaries consent. *Snell v. Snell*, 38 N. J. Eq. 119; *Kilpatrick v. Barron*, 125 N. Y. 751, 36 N. Y. St. Rep. 15.

In *Gast v. Porter*, 13 Pa. St. 533, it was held

that a power given to executors to sell at the death of the widow was well executed where the widow, for whose benefit the sale was postponed, joined as one of the executors in the deed, and that the fee would pass to the purchaser. The decision was put on the ground that the intention of the testator governed the case, and made it an exception to the general rule that a devise to executors to sell on a contingency cannot be executed until the contingency happens. See also *Styer v. Freas*, 15 Pa. St. 339.

But if the testator intended that no sale should be made before the time fixed by him, none can be made before that time, and neither the court nor the legislature can authorize a sale contrary to such intent. *Johnstone v. Baber*, 8 Beav. 233; *Bristow v. Skirrow*, 27 Beav. 590; *Blacklow v. Laws*, 2 Hare 40; *Ervine's Appeal*, 16 Pa. St. 256, 55 Am. Dec. 499.

3. Discretionary Power to Sell at Time Other than That Named in Will. — *Greer v. McBeth*, 12 Rich. Eq. (S. Car.) 254.

4. Time of Sale Discretionary with Executor When Not Fixed by Will. — *Muldrow v. Fox*, 2 Dana (Ky.) 83; *Haight v. Brisbin*, 96 N. Y. 132; *Dorland v. Dorland*, 2 Barb. (N. Y.) 63; *Wimbish v. Rawlins*, 76 Va. 48.

In *Jennings v. Teague*, 14 S. Car. 229, it was held, where power was given to the executor to sell real property "so soon as the value of property shall recover from the depression caused by the existing war," that the executor was the proper judge as to when it should be expedient to sell, and that his judgment should not be interfered with if there was no reason for supposing that he did not act in good faith.

In *Greer v. McBeth*, 12 Rich. Eq. (S. Car.) 254, the testator devised his real property to his widow and children until his youngest child should reach a certain age, when he directed it to be sold and the proceeds divided. He also authorized the executor, if he should deem it more beneficial, to sell before the youngest child reached the age designated, and divide the proceeds. It was held that the court would not interfere with the discretion of the executor, where he did not think it proper to make the sale before the time appointed.

Conveyance Before Probate. — The title, under a will giving a power of sale to the executor, vests on the testator's death, and a conveyance made before probate of the will is good, if the will be afterwards probated. *Wilson v. Wilson*, 54 Mo. 213. See also *supra*, this title, *Powers, Duties, and Liabilities in General—Powers Before Probate or Grant of Letters*.

Mere lapse of time will not ordinarily extinguish the power,¹ but it should be executed within a reasonable time, if the executor would avoid personal liability for loss.²

bbb. Direction to Sell for Specified Purposes. — If a sale is directed for a specified purpose, it must be made while the purpose exists, because the power to sell terminates with the purpose for which it was created.³

Power of Court to Order Immediate Sale. — A court of equity may order an immediate sale by an executor, though the direction in the will is that he shall sell the property as soon as convenient after the testator's death, and when in his judgment he shall consider it most advantageous. *Mehl v. Hilliker*, 20 N. Y. Wkly. Dig. 416.

1. Mere Lapse of Time, though not operative to extinguish the power of sale, may enable the heirs or devisees to prevent the execution of the power, and to take possession of the land and dispose of it as they may deem proper, should they consider that course more to their interest than a sale under the will. *Muldrow v. Fox*, 2 Dana (Ky.) 74.

The fact that the beneficiary of the estate dies before the executor has sold the property to pay the debts of the testator, as directed in the will, does not strip him of the power to perform that duty as executor, and force the creditor to resort to proceedings against the estate of such beneficiary. *McCown v. Terrell*, 9 Tex. Civ. App. 66.

2. Sale Should Be Made Within Reasonable Time. — *Matter of Gray*, 91 N. Y. 502; *Erie Dime Sav., etc., Co. v. Vincent*, 105 Pa. St. 315.

What Is a Reasonable Time, though regulated to a certain extent by the time when the executor may be required to account, is generally held to depend on the facts of each case. This question was considered at length in *Matter of Gray*, 91 N. Y. 502. *Finch, J.*, delivering the opinion of the court, said, at page 510: "There is, and there can be, no rigid and arbitrary standard by which to measure the reasonable time within which the discretion of an executor directed to convert an estate into money must operate. If, in some instances, the English cases indicate a disposition to fix upon one year, because at that date the executor may be compelled to account, in other instances such fixed or arbitrary standard appears to have been rejected. *Hughes v. Empson*, 22 Beav. 181; *Buxton v. Buxton*, 1 Myl. & C. 80; *Garrett v. Noble*, 6 Sim. 504; *Bate v. Hooper*, 5 De G. M. & G. 338; *Morgan v. Morgan*, 14 Beav. 72; *Marsden v. Kent*, 5 Ch. Div. 598. The better opinion derived from them would seem to be that each case must stand upon its own facts; that what would be a reasonable time in one instance might not be in another; and while the one year allowed to close the estate may sometimes mark the limit of discretion, and is always a circumstance to be considered, it is not necessarily conclusive. In this state, at all events, there is no arbitrary standard." He then laid down the rule that, where no modifying facts are shown to shorten or lengthen the reasonable time, the period of eighteen months may serve as a just standard; citing *Gillespie v. Brooks*, 2 Redf. (N. Y.) 355; *Lockhart v. Pub-*

lic Administrator, 4 Bradf. (N. Y.) 21; but "the test," he said, "must remain the diligence and prudence of prudent and intelligent men in the management of their own affairs."

Liabilities in Case of Delay. — Delay on the part of executors to sell lands directed by the will to be sold for the payment of debts will render the executors liable for rents and profits. *Emes v. Emes*, 11 Grant's Ch. (U. C.) 325.

3. Direction to Sell for Specified Purposes — Power Ceases with the Purpose. — *Jackson v. Jansen*, 6 Johns. (N. Y.) 73; *Harvey v. Brishbin*, 50 Hun (N. Y.) 376; *Sharpsteen v. Tillou*, 3 Cow. (N. Y.) 651; *Bruner v. Meigs*, 64 N. Y. 506; *Swift's Appeal*, 87 Pa. St. 502.

Until the Purpose for Which the Power Was Given Is Accomplished the power of sale continues, though the settlement of the personal estate has been completed. *Hoffman v. Hoffman*, 66 Md. 568.

If the Purposes Have Become Unattainable, the power to sell terminates the same as if they had ceased to exist. *Bates v. Bates*, 134 Mass. 111, 45 Am. Rep. 305; *Benedict v. Webb*, 98 N. Y. 460. And this is so though the purpose was defeated by the voluntary act of the person for whose benefit the power was given. Thus, where land subject to a power of sale is conveyed by the devisee, who was entitled to the entire proceeds in case of a sale, the power is extinguished. *Hetzl v. Barber*, 60 N. Y. 1.

In *Snider v. Snider*, 3 W. Va. 200, it was held that where the will provided for the sale of all the testator's real estate and gave the widow the interest on one-third of the proceeds, and the widow renounced the provision of the will and claimed dower, the executor had no right to sell, because the power was given in the expectation that the widow would accept and abide by the provisions made for her in the will, and with the purpose and intent that the land should be sold free from incumbrance and the proceeds of the sale disposed of as directed by the will.

When Purpose Ceases. — On the death of the widow, to provide for whose support a power of sale was given to the executor, the purpose and with it the power cease to exist. *Fidler v. Lash*, 23 W. N. C. (Pa.) 449.

So, too, a power to sell for payment of debts ceases when the debts have been otherwise paid. *Sweeney v. Warren*, 127 N. Y. 426, 24 Am. St. Rep. 468.

In *Ward v. Barrows*, 2 Ohio St. 241, it was held that a power given by will to sell and convey land becomes legally inoperative and ceases to exist when the estate is settled or all claims against it are presumptively satisfied by lapse of time, and no object of the testator remains to be attained. Judge Ranney, in delivering the opinion of the court in this case, said, at page 251: "In the construction

cc. PRICE AND TERMS OF PAYMENT. — It is the duty of an executor selling real estate under a power in the will, as in the case of other sales by executors and administrators, to realize the best price obtainable, and if he fails to do so he is personally liable for the loss sustained by the estate, or the sale may be set aside and a resale ordered.¹ The sale should ordinarily be made for a money consideration, and if the executor receives anything else in payment he is liable for the price.² If credit is given to the purchaser, proper security must be taken for the deferred payments. Frequently this matter is regulated by the will, and in some jurisdictions it is governed by statute.³

dd. DELEGATION OF POWER. — A power of sale given to an executor by the will is a personal trust and cannot be delegated by him to another person; but he may ratify a contract made by his agent, since by ratification he exercises all the personal qualities essential to the due execution of the trust.⁴ And it is

of these powers, as well as in all the other provisions of the will, the intent of the testator is to be regarded; and whenever it appears that the object for which the power is given has been accomplished, or has become impossible, the power itself ceases to exist."

1. Duty to Obtain Best Price. — *Fisher v. Skillman*, 18 N. J. Eq. 229. See also *supra*, this section, *Sale and Transfer of Personal Property — Price and Terms of Payment*.

If a Reasonable Price Is Bid when the property is offered for sale by the executor, he should accept it; otherwise he will not be allowed the cost of again offering the property for sale. *Nethercott v. Kelly*, 57 N. Y. Super. Ct. 27.

Inadequate Price — Liability of Executor. — If an executor acting under a power of sale negligently or in bad faith sells the lands for a price that is manifestly less than their true value, he will be charged with the difference between such price and the true value of the lands. *Matter of Corrington*, 124 Ill. 363; *Fisher v. Skillman*, 18 N. J. Eq. 229; *Brown v. Reed*, 56 Ohio St. 264; *Leslie's Appeal*, 63 Pa. St. 355.

And if He Makes a Collusive Sale for an inadequate price, the beneficiaries may either apply to have the sale set aside or may affirm the sale and charge the executor with the actual value of the property. *Matter of Vandvort*, 8 N. Y. App. Div. 341.

But in the absence of negligence or fraud he is not liable for selling at an extremely depreciated price, though he may have previously refused a much larger offer. *Dey v. Codman*, 39 N. J. Eq. 258; *Rolfe v. Van Sickle*, 40 N. J. Eq. 158.

And mere inadequacy of price, without fraud, will not vitiate the sale. *Kimball v. Lincoln*, 99 Ill. 578.

Inadequate Price — Resale. — In *California*, if a sum exceeding by at least ten per cent. the price obtained by the executor, exclusive of the expenses of a new sale, is offered by another person or can be obtained on a resale, the court may set aside the sale made by the executor and may direct the property to be resold. *Matter of Durham*, 49 Cal. 490; *Perkins v. Gridley*, 50 Cal. 97.

In *Pennsylvania* it is held that the Orphans' Court has no power to set aside a sale on the ground that the price was inadequate, where the will authorized either a public or a private sale, and the executor was not guilty of fraud. *Andrews' Estate*, 6 Pa. Dist. Rep. 24.

Compare the statutes in other jurisdictions; and see *infra*, this title, *Sale of Real Estate under Order of Court — Manner and Terms of Sale — Price and Terms of Payment — Inadequacy of Price*; and the same section, *Vacating and Setting Aside Sales — Grounds of Relief — Inadequacy of Price*.

2. Sale under Power Must Be for Money. — *Taylor v. Galloway*, 1 Ohio 232, 13 Am. Dec. 605.

Taking Judgment Against Third Persons in Payment. — In *Shippen v. Clapp*, 36 Pa. St. 89, it was held that if executors selling real estate under a power in the will accept in payment a judgment against a third person which is guaranteed by the purchaser, and it is lost by their neglect, the purchaser is discharged, and the executors are personally liable.

Taking Shares of Stock in Payment. — A power given to executors to sell land does not authorize them to sell the testator's coal lands for the purpose of organizing a mining company and to receive its stock in payment; and if they do so, they are chargeable with the sum for which the lands could have been sold, with interest. *Adair v. Brimmer*, 74 N. Y. 539.

3. Security Required in Sales on Credit. — See the various local codes and statutes in the United States.

Taking an Unsecured Note in payment for land sold under a power in the will is a devastavit for which the executor is personally liable. *Uldrick v. Simpson*, 1 S. Car. 283.

Effect of Taking Void Mortgage. — Where an executor who sold land under a power in the will took a mortgage to secure payment of the interest to the life tenant and the principal to the remaindermen, and the mortgage proved to be void because of defective execution, the executor was allowed to compel payment of the purchase money to himself. *McElroy v. Nucleus Assoc.*, 131 Pa. St. 393, 25 W. N. C. (Pa.) 262.

Depreciation of Mortgaged Property. — If property subject to a purchase-money mortgage taken by executors depreciates in value after the mortgage was taken, the executors are not liable, if they acted prudently. *Woodruff v. Lounsberry*, 40 N. J. Eq. 545. See also *Denton v. Sanford*, 103 N. Y. 607.

4. Power of Sale Cannot Be Delegated. — *Neal v. Patten*, 47 Ga. 73; *Floyd v. Johnson*, 2 Litt. (Ky.) 109, 13 Am. Dec. 255; *Berger v. Duff*, 4 Johns. Ch. (N. Y.) 368; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Black v. Erwin*,

also held that he may delegate the authority to execute the deed.¹

ee. NECESSITY OF CONFIRMATION. — In some jurisdictions the statutes require that a sale under a power in a will shall be reported to and confirmed by the court.²

(d) **Purchase by Executor** — *aa. GENERAL RULE.* — The general rule that executors and administrators will not be permitted either directly or indirectly to purchase property of the estate at sales made by themselves or by their coexecutors or coadministrators applies to sales of real estate made under a power given by the will as well as to other sales made by them.³

bb. EXCEPTIONS TO GENERAL RULE. — There are, however, some exceptions to the general rule. Thus, the executor may obtain leave of court to purchase at his own sale, and a purchase made by him under such circumstances will give him good title,⁴ or if one of the persons named as executors does not qualify, he is not precluded by the fact of his appointment from purchasing at a sale made by his coexecutor who qualified;⁵ and in some jurisdictions he may purchase at his own sale if it is made fairly and for full value.⁶

Harp. L. (S. Car.) 411; Terrell v. McCown, 91 Tex. 231.

"The office of executor and trustee to sell land is not necessarily blended, and * * * executors may act in a double capacity; first, as executors by virtue of their office, and second, as agents, or trustees under a warrant of attorney. If they act in the latter capacity, the trust imposed upon them is of a special and confidential character, and cannot be delegated." Hall v. Irwin, 7 Ill. 181.

Ratification by Executor of Sale Made by Agent. — Lewis v. Reed, 11 Ind. 239; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Terrell v. McCown, 91 Tex. 231.

There Seems to Be a Distinction, in respect to the authority of an executor to act by an agent or attorney, between a devise of an estate to the executors in trust to sell and a devise merely of a power of sale. In the first case it is held that he may act by attorney, while in the other case he may not. May v. Frazee, 4 Litt. (Ky.) 400, 14 Am. Dec. 159.

In Texas it is held that independent executors may lawfully employ agents to negotiate sales of land for them, O'Brien v. Gilleland, 79 Tex. 602; Armstrong v. O'Brien, 83 Tex. 635; McCown v. Terrell, 9 Tex. Civ. App. 66; though the control and discretionary power may not be delegated, and a deed made under a power of attorney from such executor would not be sufficient evidence of title, McCown v. Terrell, 9 Tex. Civ. App. 66.

1. Delegation of Authority to Execute Deed. — Terrell v. McCown, 91 Tex. 231.

2. Confirmation by Court Required in Some Jurisdictions. — Bennalack v. Richards, 116 Cal. 405; Carter v. Van Bokkelen, 73 Md. 175; Northrop v. Marquam, 16 Oregon 173.

The California statute does not apply when the real estate is devised to the executor in trust, with power to sell and convey without any order of court. Matter of Delaney, 49 Cal. 76; Matter of Williams, 92 Cal. 183; Matter of Pearsons, 98 Cal. 603; Bennalack v. Richards, 116 Cal. 405.

The Maryland statute is not applicable to sales under foreign wills. Smith v. Montgomery, 75 Md. 138.

3. Executor Not Allowed to Purchase at Sale under Power — *Delaware.* — Downs v. Rickards, 4 Del. Ch. 416.

Florida. — Price v. Winter, 15 Fla. 66.

Kentucky. — Darcus v. Crump, 6 B. Mon. (Ky.) 366.

Mississippi. — McGowan v. McGowan, 48 Miss. 553.

New Jersey. — Holcomb v. Holcomb, 11 N. J. Eq. 281; Scott v. Gamble, 9 N. J. Eq. 218; Williamson v. Johnson, 5 N. J. Eq. 537.

South Carolina. — M'Guire v. M'Gowen, 4 Desaus. (S. Car.) 487.

Wisconsin. — O'Dell v. Rogers, 44 Wis. 136.

See also *supra*, this section, *Sale and Transfer of Personal Property*; and *infra*, this title, *Sale of Real Estate under Order of Court*.

An Executor Who Purchases at His Own Sale and then Resells to a Bona Fide Purchaser is liable for the value of the property. Bechtold v. Read, 49 N. J. Eq. 111.

Indirect Purchase. — In People v. Stock Brokers' Bldg. Co., 92 N. Y. 98, it was held that where an executor, four days after selling property of his decedent, took a deed from the purchaser to himself, both deeds being recorded on the same day, there was presumptively but one transaction, in which the executor acted both as vendor and purchaser, and that the title conveyed was therefore voidable at the instance of the beneficiaries under the will.

Purchase by Attorney of Executor. — If the executor's attorney in regard to the affairs of the estate purchases at the executor's sale, the transaction may be set aside on that ground, at the option of the persons interested in the estate, unless it is shown that the sale was fair and for an adequate price. O'Dell v. Rogers, 44 Wis. 136.

In *Re Taylor Orphan Asylum*, 36 Wis. 534, it was held that where the attorney for the executors, to whom a power of sale was given, became the nominal purchaser, for want of a satisfactory bid, he holds the title in trust for the executors and cannot hold it for himself.

4. Purchase by Executor under Leave of Court. — Dundas's Appeal, (Pa. 1888) 12 Atl. Rep. 485.

5. Executor Not Qualifying May Purchase from Others. — Valentine v. Duryea, 37 Hun (N. Y.) 427.

6. In Virginia it has been held that the purchase is valid if the sale was fair and for an adequate consideration. Toler v. Toler, 2 Patt. & H. (Va.) 71.

cc. EFFECT OF PURCHASE BY EXECUTOR. — A purchase by an executor at his own sale made under a power is voidable at the option of the persons interested in the estate, but it is not void.¹

(e) **Warranty by Executor.** — A power of sale given by the will does not authorize an executor to bind the estate by covenants of general warranty, but if he makes such covenants, they operate as a personal obligation, unless the terms of the covenant indicate that he did not intend to bind himself personally.²

(f) **Title and Rights of Purchaser** — aa. IN GENERAL. — Generally speaking, a sale under a power contained in a will gives authority to the executor to transfer a valid title to a *bona fide* purchaser, and such title cannot be defeated by the fact that the executor was acting in violation of his trust, if the purchaser had no knowledge of it;³ but a sale can derive no aid from a power given by the

Under a Former Statute in Missouri an executor or administrator had a right to purchase at his own sale by paying not less than three-fourths of the appraised value. *Price v. Springfield Real-Estate Assoc.*, 101 Mo. 107, 20 Am. St. Rep. 595.

1. **Purchase by Executor Voidable but Not Void.** — *Painter v. Henderson*, 7 Pa. St. 48.

In *Patty v. Colin*, 1 Hen. & M. (Va.) 519, a purchase by an administrator *de bonis non* under a will containing a power of sale was set aside at the suit of slaves who were emancipated by the will, where the slaves were sold for the payment of the testator's debts, the proceeds of the real estate having proved insufficient for that purpose.

Where the Purchase Has Been Set Aside the executor will not be required to take the land at what it was worth at the time of the sale, but it will be sold for more if possible, and if not, his purchase will be confirmed. *Bailey v. Robinsons*, 1 Gratt. (Va.) 4, 42 Am. Dec. 540.

Where the Executors Had No Power to Sell, but, under the mistaken belief that they had, sold the real estate, and became the purchasers of a portion of it, it was held that the sale was void, and could not be enforced against them. *Drayton v. Drayton*, 2 Desaus. (S. Car.) 250, note.

2. **Executor Cannot Bind Estate by Warranty.** — *Ramsey v. Wendell*, 32 Hun (N. Y.) 482; *Bostwick v. Beach*, 31 Hun (N. Y.) 343; *Godley v. Taylor*, 3 Dev. L. (14 N. Car.) 178.

Special Warranty. — An executor selling the land of his testator by virtue of a power given by the will is not bound to convey with general warranty, without an agreement to that effect, but only with special warranty against himself and all persons claiming under him, notwithstanding a written agreement after the sale that he would make a good and indefeasible title to the purchaser, for such an agreement is to be understood in reference to the terms of the sale. *Grantland v. Wight*, 5 Munf. (Va.) 295.

Covenants of Warranty Bind Executor Personally. — *McDonald v. McDonnell*, 6 U. C. Q. B. (O. S.) 109; *Godley v. Taylor*, 3 Dev. L. (14 N. Car.) 178.

The liability of an executor on his covenants of warranty is not affected by the fact that the purchaser had notice of the will, under which the executor had no power to sell. *Wurdeman v. Robertson*, *Riley Eq.* (S. Car.) 115.

A Covenant to Warranty to the Extent of Assets is obligatory on the executor personally to that extent. *Nicholas v. Jones*, 3 A. K. Marsh. (Ky.) 387.

Personal Liability Excluded by Terms of Covenant. — A covenant in a deed by executors, to warrant and defend, "as executors are bound by law to do," is not a personal covenant. *Day v. Brown*, 2 Ohio 345. Nor is an executor individually bound by a covenant that he conveys as executor, and not otherwise, though it may not be binding on the estate. *Thayer v. Wendell*, 1 Gall. (U. S.) 37.

3. **Bona Fide Purchaser Ordinarily Takes Good Title.** — *Larue v. Larue*, 3 J. J. Marsh. (Ky.) 156; *Smith v. Henning*, 10 W. Va. 599.

"When a will directs the sale of real estate, if necessary, for the payment of all the testator's debts or legacies, a purchaser at any such sale, not being presumed to know, or to be able by reasonable diligence to know, the condition of the estate or the extent of its indebtedness, or of its assets, should be protected in his purchase whenever made in good faith, without notice, actual or constructive, of the latent fact that there was no necessity for the sale, and consequent want of authority to make it. If this were not so, prudent men would not bid a fair price at such sales." *Rutherford v. Clark*, 4 Bush (Ky.) 27.

If the Power of Sale Is for the Payment of Debts, the purchaser is not ordinarily bound to inquire whether there are any debts, in order to be protected in his purchase. *In re Tanqueray-Willaume*, 20 Ch. Div. 465; *Wright v. Zeigler*, 1 Ga. 324; *Smith v. Henning*, 10 W. Va. 596. But see *McCown v. Terrell*, 9 Tex. Civ. App. 66.

If, however, a sufficient time has elapsed since the testator's death (twenty years) to raise a presumption that all the debts have been paid, the purchaser should inquire whether any debts remain unpaid. *In re Tanqueray-Willaume*, 20 Ch. Div. 465.

But the rule laid down in *In re Tanqueray-Willaume*, 20 Ch. Div. 465, is said not to apply to the sale of leaseholds. *In re Whistler*, 35 Ch. Div. 561; *In re Venn's Contract*, 8 Reports 220.

If an Executor Sells More Land than Is Required for the purpose for which the power of sale was given, the title of the purchaser is not affected by that fact, unless he had notice of it. *Larue v. Larue*, 3 J. J. Marsh. (Ky.) 156, the court saying: "What debts Larue [the

will unless made under the power.¹ So, too, any statutory regulations applicable to the exercise of the power must be complied with in order to give the purchaser a complete title.²

bb. NONCOMPLIANCE BY EXECUTOR WITH TERMS OF WILL. — The question whether a sale is invalid because it was not made on the terms prescribed by the will seems to depend on the intention of the testator, and not to be governed by any absolute rule; and if the provision as to the terms of sale is not in the nature of a condition, but is merely directory, the sale is valid though the executor sells on other terms.³ If the will gives only a special power of sale, or a power to be exercised only on the happening of a certain event, which is a condition precedent, it is held that the purchaser must ascertain at his peril whether the sale is for the purpose contemplated by the will, or whether the condition has been fulfilled.⁴ If, however, it is left to the executor to determine whether the contingency has occurred, the title of the purchaser

testator] owed or how much land it was necessary to sell to pay them were matters of which the executors should judge, and upon which they alone were competent to decide. The testator reposed confidence in them, and gave them authority to act, and thereby strangers were invited to entertain confidence. It would, therefore, be unjust to permit strangers, who purchased in good faith, to sustain injury from the frauds of the executors."

If the Purchaser Has Notice of the Breach of Trust on the part of the executor, the deed is constructively fraudulent and does not divest the persons interested in the estate of their rights. *Huse v. Den*, 85 Cal. 390; *Luke v. Marshall*, 5 J. J. Marsh. (Ky.) 356; *Smith v. Henning*, 10 W. Va. 599.

Validity Against Creditors — Sale under Power for Payment of Legacies. — When a power is given to sell real estate for the payment of debts, a sale made under it is good against creditors; but this is not so when the power is given to sell for the payment of legacies. *Hannum v. Spear*, 2 Dall. (Pa.) 291.

Revocation of Probate After Sale. — The purchaser's title is not liable to be affected by the subsequent revocation of the probate of the will, though the sale is made before the time to appeal from the admission of the will to probate has elapsed; and this rule is not affected by a statute which provides that the probate of a will shall be conclusive until it is superseded, reversed, or annulled. *Reed v. Reed*, 91 Ky. 267.

1. Sale Not Made under Power Given by Will. — In Alabama Conference M. E. Church South v. Price, 42 Ala. 39, it was held that a sale made by an executor under an invalid order of court could not be sustained on the ground that the will gave him a power of sale. In this case the court said: "The law is unvarying and unbending, that no support is given to a sale by a power when it is plain that the sale was made without reference to the power." *Citing Sugden on Powers*, 424, § 20; 356, § 1, note 1; 2 Story's Eq. Jur. 895, § 1062a; *Doe v. Roake*, 2 Bing. 497, 9 E. C. L. 496; *Jones v. Curry*, 1 Wils. Ch. 24, 1 Swanst. 66; *Powell v. Loxdale*, 2 B. & Ald. 291; *Andrews v. Emmot*, 2 Bro. C. C. 297; *Nannock v. Horton*, 7 Ves. Jr. 391; *Bradly v. Westcott*, 13 Ves. Jr. 445; *Bennett v. Aburrow*, 8 Ves. Jr. 609; *Lowes v. Hack-*

ward, 18 Ves. Jr. 168; *Buckland v. Barton*, 2 H. Bl. 136; *Jones v. Tucker*, 2 Meriv. 533; *Doe v. Bird*, 11 East 49; *Wetherill v. Wetherill*, 18 Pa. St. 265; *Jones v. Wood*, 16 Pa. St. 25; *Hay v. Mayer*, 8 Watts (Pa.) 203, 34 Am. Dec. 453.

2. Statutory Regulations. — In some jurisdictions the sale must be confirmed by the court before the title will pass to the purchaser. See *supra*, this section, *Power of Sale Given by Will — Necessity of Confirmation*.

3. Departure from Terms Prescribed — Effect. — In *Richardson v. Hayden*, 18 B. Mon. (Ky.) 242, it was held that a sale would not be set aside because the executor, who was empowered to sell on a credit of twelve months, sold on a credit of six months, if there was no fraud and the price was adequate.

"The Intention of the Donor of the Power Is the Great Principle that governs in the construction of powers; and in furtherance of the object in view, the courts will vary the form of executing the power, and, as the case may require, either enlarge a limited to a general power, or cut down a general power to a particular purpose." 4 Kent's Com. 345 [*citing Sugden on Powers* 452, 453; *Talbot v. Tipper*, Skin. 427; *Tankerville v. Coke*, Mosely 146; *Hinchinbroke v. Seymour*, 1 Bro. C. C. 395; *Bristow v. Warde*, 2 Ves. Jr. 336]. But see *Hale v. Pew*, 25 Beav. 335.

A Special Power to Sell Must Be Exercised in the Mode Prescribed by the Will, and therefore if the will directs a sale at public auction to pay off legacies as they become due, a private sale made before the legacies become due is void. *Pendleton v. Fay*, 2 Paige (N. Y.) 202. See also *supra*, this section, *Sale of Real Property — Manner and Terms of Sale*.

4. Power of Sale for Special Purpose. — Where executors have no general authority to sell, but only for special purposes, to render a sale made by them valid it must appear to have been made for those purposes. *Floyd v. Johnson*, 2 Litt. (Ky.) 115, 13 Am. Dec. 255; *Hetzel v. Barber*, 69 N. Y. 1.

The question whether there was a valid execution of the power of sale was presented in the case of *Allen v. De Witt*, 3 N. Y. 276. In this case the testator authorized his executors to sell his real estate "in such parcels, at such times, and for such considerations" as they should judge proper for the purpose of discharging his debts and creating funds for the

will not be affected by any error of judgment on the part of the executor in making the determination.¹

cc. CONVEYANCE — RECITALS. — A conveyance made by an executor under a power of sale in the will need not recite the power,² or that the sale was made in the manner and on the terms directed by the will.³

dd. SETTING ASIDE SALE — SUBROGATION TO RIGHTS OF CREDITORS. — If a sale is set aside because made under a mistake by the executor as to his power, or for other invalidity, the purchaser is entitled to subrogation to the rights of creditors whose debts were satisfied out of the amount paid by him for the property,⁴ or he will be allowed a lien on the land for the amount paid, with interest, and a reasonable allowance for permanent and valuable improvements, not exceeding the value of the rents.⁵

ee. RULE OF CAVEAT EMPTOR. — It is generally held that it is the duty of a purchaser to inquire into the sufficiency of the testator's title and the authority of the executor to sell under the will, and that if the purchaser takes no covenants to cover defects of title, he is absolutely without relief, unless the executor has been guilty of such fraud as will vitiate the contract.⁶

support of his family, and he further directed that after his debts should have been paid, "the avails" of his property should be equally divided among all his children. The executors, before the testator's debts were paid, conveyed a parcel of the real estate, without consideration, to the husband of one of the testator's daughters for the purpose of enabling him to mortgage it to secure a debt which he owed to a third person. The conveyance was made under an agreement on the part of the husband that he would discharge the mortgage and reconvey the property to the executors, or, in default thereof, that it should be charged against his wife's distributive share in the estate. It was held that the conveyance could not be sustained as a division of the "avails" of the estate, first, because it was made before the testator's debts were paid, and, second, because the power required an absolute sale for a consideration fixed by agreement between the executors and the purchaser, which was to constitute a part of the avails of the estate, applicable to the payment of debts or the formation of a fund for the maintenance of the testator's family.

Conditional Power of Sale — Performance of Condition Precedent Must Be Shown. — *Griswold v. Perry*, 7 Lans. (N. Y.) 98; *Jennings v. Teague*, 14 S. Car. 238.

If the power is to sell the real estate or so much as with the personalty will be sufficient to pay debts, a sale can be made only in case there is a deficiency of assets, and then only to the extent of the deficiency. *Dike v. Ricks*, Cro. Car. 335.

But see *Coleman v. McKinney*, 3 J. J. Marsh. (Ky.) 246, in which case it was held that if power is given to an executor to sell land in case the personal estate is insufficient to pay the testator's debts, and he sells though the personal estate is sufficient, the title of the purchaser is nevertheless good.

1. Happening of Contingency to Be Determined by Executor. — *Jennings v. Teague*, 14 S. Car. 229.

2. Conveyance Need Not Recite Power of Sale. — *Doody v. Hollwedel*, 22 N. Y. App. Div. 456; *Allison v. Kurtz*, 2 Watts (Pa.) 185; *Holladay v. Holladay*, McMull. Eq. (S. Car.)

279; *Smith v. Henning*, 10 W. Va. 596 [citing 2 Perry on Trusts, § 511c; 4 Cruise Dig. 168; 4 Kent's Com. (6th ed.) 329, 334]; *Andrews v. Emmot*, 2 Bro. C. C. 300; *Bennett v. Aburrow*, 8 Ves. Jr. 609; *Lockwood v. Sturdevant*, 6 Conn. 373; *Bradish v. Gibbs*, 3 Johns. Ch. (N. Y.) 551; *Peace v. Spierin*, 2 Desaus. (S. Car.) 460.

3. Recitals Showing Compliance with Terms of Will Not Necessary. — *Turnipseed v. Hawkins*, 1 McCord L. (S. Car.) 272.

4. Setting Aside Sale — Subrogation of Purchaser to Rights of Creditor. — *Scott v. Dunn*, 1 Dev. & B. Eq. (21 N. Car.) 425, 30 Am. Dec. 174. See generally the title SUBROGATION.

5. Lien for Money Paid. — *Grant v. Lloyd*, 12 Smed. & M. (Miss.) 192.

6. Rule of Caveat Emptor. — *Brush v. Ware*, 15 Pet. (U. S.) 93; *Bond v. Ramsey*, 89 Ill. 29; *Syme v. Johnston*, 3 Call (Va.) 558; *Brock v. Philips*, 2 Wash. (Va.) 68.

The Purchaser Deals with the Executor as He Would with Any Other Vendor, and it is incumbent on him to examine the title for himself and point out any objections he may have to the title tendered him by the executor; and he cannot treat such sale as a judicial sale of property under the order of court, and object to confirmation there by reason of facts impairing or defeating the title. *Matter of Pearsons*, 98 Cal. 603.

Inquiry as to Executor's Power. — The purchaser is bound to know the contents of the will and the extent of the power of the executor. *Hill v. Den*, 54 Cal. 6; *Masterson v. Stevens*, (Tex. Civ. App. 1896) 37 S. W. Rep. 364.

The distinction in this respect between a sale of personalty by an executor and a sale of real estate under a power in the will is stated in *Brock v. Philips*, 2 Wash. (Va.) 68, as follows: "The executor by law has a right to the possession of slaves and of personal estate, and a right to sell them. But he has no right to sell lands, unless under a special authority. A purchaser, therefore, of land, from an executor, is bound to look for and to understand the extent of that power, and consequently the principle *caveat emptor* strictly applies in such a case."

ff. APPLICATION OF PURCHASE MONEY. — The general rule in regard to the application of the purchase money of real estate sold under a power in the will for trust purposes, or for the payment of debts generally, or for the payment of debts and legacies, is the same as in the case of other sales made by executors and administrators; namely, that it is not the duty of the purchaser to see to it.¹

But if the Debts Are Specific or Scheduled, it becomes the duty of the purchaser to see that the purchase money is applied in satisfaction thereof.²

If the Power Is Given to Sell for Payment of Legacies Alone the purchaser, according to the *English* rule, is responsible for such application of the purchase money;³

But see *Woods v. North*, 6 Humph. (Tenn.) 309, where the court said: "Persons who go to a public sale of a deceased person's estate are not in the habit of scrutinizing the provisions of the will to judge of the extent of the executor's power. They take it for granted that he has good right to sell all the property he offers to the bidders. Where he thus offers the property for sale, it is a representation that he has a right to sell, and by reason of his situation he gains the confidence of bidders, who are deceived thereby if he have no power to make the sale. Whether he intends corruptly to defraud the purchaser or not, the effect is the same, the bidder is deceived by the false representation, and ought to be relieved."

1. General Rule — Purchaser Not Bound to See to Application of Purchase Money — *England*.

— *Stroughill v. Anstey*, 1 De G. M. & G. 635.

Arkansas. — *Ludlow v. Flournoy*, 34 Ark. 451.

Georgia. — *Wright v. Zeigler*, 1 Ga. 324.

Illinois. — *Whitman v. Fisher*, 74 Ill. 147.

Missouri. — *Drumheller v. Haff*, 23 Mo. App. 161.

North Carolina. — *Hauser v. Shore*, 5 Ired. Eq. (40 N. Car.) 357.

See also 2 Story's Eq. Jur. 1134; 2 Sugden on Vendors (8th Am. ed.) 659.

The Reason of the Rule is that it might defeat a sale if the law obliged a purchaser to attend to the execution of a trust so indefinite as the payment of all debts, which he would have no means of ascertaining. *Hauser v. Shore*, 5 Ired. Eq. (40 N. Car.) 357.

"The cases are very few indeed, in American practice, where a power of sale is given in such a manner as to require the purchaser to look to the application of the purchase money. The risks attending such sales would greatly discourage purchasers, and the rule requiring purchasers to see to the application of the money has been rather relaxed than favored by the American authorities." *Ludlow v. Flournoy*, 34 Ark. 451.

Power to Sell and Invest Proceeds. — In *Doran v. Wiltshire*, 3 Swanst. 699, one tract of land was to be sold, and the trustees were to receive and lay out the money in other land, and, until a fit purchase could be made, they were to invest the money in public securities; and the chancellor held that a general trust to lay out money was a personal trust, and that it was impossible to suppose it could have been intended to confide it to any stranger who might happen to buy a part of the real property.

Power to Sell for Payment of Debts Generally or

Debts and Legacies. — When power is given to the executor to sell for the payment of debts generally or debts and legacies, a purchaser from him is not bound to see to the application of the purchase money, even if he has notice of the debts. *Stroughill v. Anstey*, 1 De G. M. & G. 635; *Balfour v. Welland*, 16 Ves. Jr. 156; *Page v. Adam*, 4 Beav. 269; *Gardner v. Gardner*, 3 Mason (U. S.) 178; *Andrews v. Sparhawk*, 13 Pick. (Mass.) 393; *Cadbury v. Duval*, 10 Pa. St. 265.

2. Power to Sell for Payment of Specific Debts — Purchaser Must See to Application of Purchase Money. — *Gardner v. Gardner*, 3 Mason (U. S.) 178; *Andrews v. Sparhawk*, 13 Pick. (Mass.) 393.

3. Power to Sell for Payment of Legacies Alone — Rule in England. — *Johnson v. Kennett*, 3 Myl. & K. 624.

Payment of Debts Before Sale. — Where the power was given to sell for the payment of both debts and legacies, but the debts had been paid at the time of the sale, and this was known to the purchaser, it was held by Lord Chancellor Lyndhurst that the rule applicable to a charge of legacies alone does not apply, because "the rule applies to the state of things at the death of the testator; and if the debts are afterwards paid, and the legacies alone are left as a charge, that circumstance does not vary the general rule." *Johnson v. Kennett*, 3 Myl. & K. 624.

There is no distinction between a case where the debts were paid after the death of the testator and before the sale by the executor, and a case where the testator left no debts. "The case must stand," said Lord St. Leonards, "upon one of two grounds: either that there are no debts within the knowledge of the purchaser, and then it is indifferent whether there were no debts at the death of the testator, or no debts at the time of the purchase, or, which is more satisfactory and open to no ambiguity, on the ground that when a testator, by his will, charges his estate with debts and legacies, he shows that he means to intrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them. It is by implication a declaration by the testator that he intends to intrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee; that intention does not cease because there are no debts; it remains just as much if there are no debts as if there are debts, because the power arises from the circumstance that the debts are provided for, there being in the very creation of

but the rule is otherwise in the *United States*.¹

(g) *Liabilities of Executor*. — An executor to whom a power of sale is given by the will is liable for any loss sustained by the estate if he fails to execute the power as directed, or if he fraudulently or negligently sells the property for less than its value, or if he is otherwise guilty of fraud or negligence in executing the power whereby the estate suffers loss.² He is also liable to the purchasers for any fraud practiced on them, but he does not incur personal liability because of a failure of title to the land sold.³

(3) *Statutory Authority to Sell*. — A material extension of the powers of executors and administrators has been effected by modern legislation providing for the sale, lease, or mortgage by them of the real estate of their decedents, under orders of the probate court, and in some jurisdictions authority has been conferred on them to sell without any order of court.⁴

c. LEASE OF REAL PROPERTY — (1) *Doctrine at Common Law*. — Executors and administrators have no power at common law, by virtue of their office, to lease the real property of which their decedents died seized of an estate of inheritance, for the same reasons that they cannot sell and convey it, namely,

the trust a clear indication amounting to a declaration by the testator that he means, and the nature of the trust shows that he means, that the trustees are alone to receive the money and apply it. In that way all the cases are reconcilable, and all stand upon one footing; namely, that if a trust be created for the payment of debts and legacies, the purchaser or mortgagee shall in no case be bound to see to the application of the money raised. This would be a consistent rule on which everybody would be able to act, authorized, too, by the words of the testator and drawing none of those fine distinctions which embarrass courts and counsel, and lead to litigation; and it is one to which I shall adhere as long as I sit in this court." *Stroughill v. Anstey*, 1 De G. M. & G. 635.

1. *Power to Sell for Payment of Debts Alone — Rule in the United States*. — In the United States a charge of legacies alone on real estate does not impose on the purchaser the duty of seeing to the application of the purchase money. *Andrews v. Sparhawk*, 13 Pick. (Mass.) 393.

And the Reason of This is said to be that "to hold a purchaser liable to see legacies paid would in fact involve him in the account of the debts which must be first paid." *Cadbury v. Duval*, 10 Pa. St. 265.

2. *Liabilities of Executor — Failure to Sell*. — An executor will be held personally liable for loss arising from his failure to sell land as directed by the will. *Haight v. Brisbin*, 100 N. Y. 219.

Sale for Inadequate Price. — If he fraudulently or negligently sells the land for less than its value he is personally liable for the deficiency. *Matter of Corrington*, 124 Ill. 363; *Fisher v. Skillman*, 18 N. J. Eq. 229; *Dey v. Codman*, 39 N. J. Eq. 258; *Rolfe v. Van Sickle*, 40 N. J. Eq. 158; *Brown v. Reed*, 56 Ohio St. 264.

Refusal to Accept Reasonable Price. — If he refuses to accept a reasonable offer, he is not entitled to an allowance for the cost of again offering the property for sale. *Nethercott v. Kelly*, 57 N. Y. Super. Ct. 27.

Taking Property or Securities in Payment. — An executor may also incur a personal liability by reason of his negligence or improper con-

duct in regard to the collection of the purchase money of real estate sold by him under a power in the will. Thus, he becomes personally liable if he takes an unsecured note for the price, *Uldrick v. Simpson*, 1 S. Car. 283; or if he takes shares of stock in payment, *Adair v. Brimmer*, 74 N. Y. 539; or if he accepts a judgment against a third person in payment and it is lost by his negligence, *Shippen v. Clapp*, 36 Pa. St. 89.

3. *Liability of Executor to Purchaser — False Representations*. — In *Pettijohn v. Williams*, 1 Jones L. (46 N. Car.) 145, it was held that where the executor of one tenant in common, having a power to sell the testator's interest in the property owned in common, referred the purchaser to the other tenant in common as one acquainted with the property, and such tenant committed a fraud in his representations of the qualities and condition of the property, such executor was personally liable for the fraud.

Liability for Failure of Title. — An executor who sells real estate under a power in the will does not become personally liable in case of failure of title. *Twitty v. Lovelace*, 97 N. Car. 54.

4. *Statutory Authority to Sell under Order of Court*. — See *infra*, this title, *Sale of Real Estate under Order of Court*.

Statutory Authority to Sell Without Leave of Court. — In *Illinois* it was provided by an early statute (Gale's Stat. 713) that where a decedent had purchased public land but had not obtained a patent before his death, because he had not completed the payments thereon, his executor or administrator might relinquish part and patent the residue, whenever that could be done agreeably to the acts of Congress; and an executor or administrator is also authorized to sell and assign a certificate of purchase of lands partially paid for, when such sale is necessary, in order to pay the debts of the deceased. *Prevost v. Walters*, 5 Ill. 37.

Private Act Authorizing Sale. — In *Culbertson v. Coleman*, 47 Wis. 193, it was held that a private act authorizing an executor to sell real estate of his testator was unconstitutional as depriving the heirs and devisees of their property without due process of law.

that a decedent's real property descends to his heirs or passes to the devisees under his will, and the executor or administrator takes no title or interest therein.¹

(2) *Power to Lease Given by Will.* — But a testator may, by his will, either in express terms or by implication, authorize his executor to lease his real property for the general purposes of administration, or for such other purpose as he may designate.²

(3) *Statutory Authority to Lease.* — In many jurisdictions executors and administrators are authorized by statute to lease the real estate of their decedents for short terms, restricted as a general rule to the period allowed for the settlement of the estate.³ When the authority is so conferred it must be

1. Executor or Administrator Cannot Lease Real Property at Common Law. — *Rutherford v. Clark*, 4 Bush (Ky.) 27; *Lee v. Lee*, 74 N. Car. 70; *Merkel's Estate*, 131 Pa. St. 584, 25 W. N. C. (Pa.) 469; *Bac. Abr.*, tit. Leases, 1, 7; *Taylor's Landl. & T.*, § 133. But he may do so if the heirs assent. *Stearns v. Stearns*, 1 Pick. (Mass.) 157.

2. Power Given by Will to Lease Realty — *United States*. — *Raynolds v. Hanna*, 55 Fed. Rep. 783.

Indiana. — *Duchane v. Goodtitle*, 1 Blackf. (Ind.) 117.

New York. — *Hedges v. Riker*, 5 Johns. Ch. (N. Y.) 163.

North Carolina. — *Hoyle v. Stowe*, 2 Dev. L. (13 N. Car.) 318.

Pennsylvania. — *Hauck v. Stauffer*, 31 Pa. St. 235.

Virginia. — *M'Call v. Peachy*, 3 Munf. (Va.) 288.

Lease of Mineral Lands — Mines Not Opened in Testator's Lifetime. — Where an executor is given full power to sell or lease lands of which the principal, if not the only, use to which they could be put is to mine coal therefrom, he has power to lease mines which were not opened in the testator's lifetime. *Raynolds v. Hanna*, 55 Fed. Rep. 783. See also *Daly v. Beckett*, 24 Beav. 114; *Eley's Appeal*, 103 Pa. St. 306.

Implied Power to Lease. — An executor has full authority to lease land devised to him in trust, with power to manage and control it, according to his own judgment and discretion, the same as the testator himself could do if living. *Raynolds v. Hanna*, 55 Fed. Rep. 783.

An Implied Power to Lease Land is given by a provision that the moneys arising from several enumerated sources, among which is the rent of his land, should be placed out at interest. *M'Call v. Peachy*, 3 Munf. (Va.) 293.

So, too, a devise to executors in trust for the testator's daughter for life, with "full power and authority to sell and dispose of so much of the real estate as may be necessary to fulfil the will," gives the executor authority to lease real estate. *Hedges v. Riker*, 5 Johns. Ch. (N. Y.) 163.

An Express Power to Lease a Part May Be Extended by Implication to all the testator's real estate. Thus, where the testator directed that his widow should cultivate as much of his land, during her life or widowhood, as she pleased, and that "the balance" should be rented out by his executors, it was held that the power of leasing extended to the whole estate, on the termination of the widow's estate

for life. *Hoyle v. Stowe*, 2 Dev. L. (13 N. Car.) 318.

A Mere Naked Power of Sale confers no authority on the executor to lease the real estate to which the power of sale relates. *Young's Estate*, 16 Pa. Co. Ct. Rep. 54, 4 Pa. Dist. Rep. 44. Nor is a power of sale to be implied from a provision of a will by which the only duty imposed on the executors in regard to the real estate is to divide it into three equal parts, and to make proper conveyances thereof to the trustees of the trusts created by the will. *Stevens v. Stevens*, 69 Hun (N. Y.) 332. But see *Hedges v. Riker*, 5 Johns. Ch. (N. Y.) 163, where a power to sell and dispose of real estate was held to authorize a lease under special circumstances.

Contract to Lease — Death of Executor Without Completing Contract. — Where an executor contracts to lease the real estate, under a power in the will, and dies before performance, his own estate is not liable for the breach. *Hauck v. Stauffer*, 31 Pa. St. 235.

Acknowledgment of Lease by Executrix. — A statute requiring the privy examination of a married woman as to the execution of certain instruments by her does not apply where she acknowledges after marriage a lease executed by her as executrix under the will of a former husband and while she was a *feme sole*. *Darden v. Neuse*, etc., *Steamboat Co.*, 107 N. Car. 437.

3. Power to Lease for Limited Period Given by Statute. — *Boynton v. McEwen*, 36 Ala. 348; *James v. Faulk*, 54 Ala. 184; *Turner v. Kelly*, 67 Ala. 173; *Cruikshank v. Luttrell*, 67 Ala. 318; *Martin v. Williams*, 18 Ala. 190; *Palmer v. Steiner*, 68 Ala. 400; *Doolan v. McCauley*, 66 Cal. 476; *Burbank v. Dyer*, 54 Ind. 392; *Smith v. Park*, 31 Minn. 70.

Under such statutes, any lease made for a definite term is subject to termination by the final settlement of the estate. *Doolan v. McCauley*, 66 Cal. 476; *Burbank v. Dyer*, 54 Ind. 392; *Smith v. Park*, 31 Minn. 70.

In Alabama, prior to the code, the administrator of an insolvent estate, failing to apply for an order to sell the real estate for the payment of debts, was guilty of a *devastavit*. The statutes then were imperative that he should obtain the order to sell, and of necessity prohibited a renting. *Long v. McDougald*, 23 Ala. 413; *Golding v. Golding*, 24 Ala. 122.

In Arkansas administrators have the right to rent land for the benefit of an estate, but the Probate Court has no power to order it. *Yarborough v. Ward*, 34 Ark. 204.

The Michigan Statute provides that "the ex-

exercised as the statute directs in regard to the manner and terms.¹

Leases under Order of Probate Court. — In some jurisdictions the provisions relating to the lease of the real estate of a decedent and to sales under order of the probate court are parts of the same general scheme and embodied in the same general enactments, and the rules governing the one are also applicable to the other.²

d. MORTGAGE OF REAL PROPERTY — (1) *Doctrine at Common Law.* — Since executors and administrators have no title to or interest in the real estate of their decedents at common law, it follows that they cannot mortgage it by virtue of any of the powers which pertain to their office.³

(2) *Power to Mortgage Given by Will.* — An executor may be given power by the will to mortgage the real property of the testator for the payment of debts, or for other purposes specified by the will.⁴

executor or administrator shall have a right to the possession of all the real as well as personal estate of the deceased, and may lease the same from year to year, * * * and may receive the rents, issues, and profits of the real estate until the estate shall have been settled, or until delivered over by order of the Probate Court to the heirs or devisees; * * * provided, that whenever, on application of the heirs or devisees, or any of them, it shall be made to appear to the said Probate Court that there are no debts or liabilities outstanding and unpaid against said estate, or that the personal estate of said deceased is amply sufficient for the payment of all claims or liabilities outstanding or allowed against the said estate, the said Probate Court shall thereupon, by order, deliver over the said real estate of said deceased to the heirs or devisees of said estate, although the said estate shall not then have been finally settled, and thereupon the right of the said executor or administrator to the possession of the real estate of said deceased, and to receive the rents, issues, and profits thereof, shall cease." *Grady v. Warrell*, 105 Mich. 310.

Kansas. — In *Black v. Dressell*, 20 Kan. 153, it was said that "such an act [authorizing executors or administrators to lease real estate] is foreign to the policy and purpose of administration, which aims to close up, not to continue, an estate."

1. Manner and Terms of Leasing — Provisions of Statute Must Be Followed. — *Martin v. Williams*, 18 Ala. 190.

Leasing at Auction. — In *Alabama* the statute requires the leasing of the real estate of a decedent by his executor or administrator to be at public outcry, and if this requirement is not observed the lease will not affect the rights of the heir or devisee. *Chighizola v. Le Baron*, 21 Ala. 406; *Martin v. Williams*, 18 Ala. 190.

But in *Louisiana* the statute does not require the administrator of a succession to lease its property at auction. *Richmond's Succession*, 35 La. Ann. 858.

Duty to Accept Highest Rent Offered. — In *Matter of Millenovich*, 5 Nev. 161, it was said that when an executor leases property belonging to the testator, it does not follow that he should lease to those who offer to pay the highest rent; but that the purposes for which the property is to be used, the responsibility of the lessee, the length of time for which he may

agree to lease, and many other circumstances of the kind must necessarily be taken into consideration.

Taking Security for Rent. — It was formerly provided by the *Alabama* statute (Code 1876, § 2446) that security should be taken from the lessee, but this requirement was dispensed with by the later statute (Code 1886, § 2102), because requiring security to be taken might prevent leasing except at a great sacrifice. *Patapsco Guano Co. v. Ballard*, 107 Ala. 710. 54 Am. St. Rep. 131.

2. Leases under Order of Probate Court. — *Indianapolis First Nat. Bank v. Hanna*, 12 Ind. App. 240; *Murphy v. Thomas*, 41 Miss. 429; *Lewis v. Carson*, 93 Mo. 587; *Eoff v. Thompson*, 66 Mo. 225; *Lass v. Eisleben*, 50 Mo. 122; *Rector v. Ranken*, 1 Mo. 371; *Ferguson v. Broome*, 1 Bradf. (N. Y.) 10. See also the various local codes and statutes in the United States.

For a Full Discussion of the questions relating to the power of executors and administrators to sell the real estate under order of the probate court, see *infra*, this title, *Sale of Real Estate under Order of Court*.

3. Executor or Administrator Cannot Mortgage Real Property at Common Law. — *Smith v. Hutchinson*, 108 Ill. 662; *Black v. Dressell*, 20 Kan. 153; *Smithwick v. Kelly*, 79 Tex. 564.

4. Power to Mortgage Given by Will — Payment of Debts. — A power given by will to mortgage the testator's real estate for the payment of his debts does not conflict with a statute providing that if the personal estate of a decedent shall be inadequate to satisfy his debts a sufficient portion of the real estate may be ordered to be sold for that purpose. *Ames v. Holderbaum*, 44 Fed. Rep. 224; *Iowa L. & T. Co. v. Holderbaum*, 86 Iowa 1.

Mortgage Given Pending Proceeding for Sale. — An executor has no power to mortgage real estate for the payment of debts while an application to sell it for that purpose is pending, and if he does so the mortgagee acquires no title as against the purchaser at the sale, but he is entitled to reimbursement of the amount paid out by him on the mortgage. *Dancy v. Duncan*, 96 N. Car. 111.

Mortgage by Executrix After Marriage. — In *Mutual L. Ins. Co. v. Shipman*, 108 N. Y. 19, the widow of the testator was appointed executrix of the will. The testator devised all his estate to her, and provided that any residue remaining at her death or remarriage

Mortgage for Individual Purposes. — An executor who is given power to mortgage real estate of the testator has no right to exercise such power for the purpose of securing an individual indebtedness, and if he does so the mortgagee acquires no rights under the mortgage.¹

Implied Power to Mortgage Realty. — The power need not be given expressly, but may be given by implication, and it will be implied wherever it appears from the terms of the will that such was the testator's intent.²

Implication from Power to Sell. — The weight of authority seems to be to the effect that a mere power to sell and convey real property does not include the power to mortgage it, though the contrary has been asserted;³ but if the power to sell was for the payment of debts, or of a specific charge, and

should go to his children. The will also gave power to her to mortgage the property for the purpose of carrying out the provisions of the will. It was held that under such a power she had authority to mortgage the estate after she had remarried, if the mortgage was given for the purpose of carrying out the will.

Successive Mortgages. — Where power to mortgage the testator's real estate is given to an executor, such power is not limited to the exercise of a single mortgage, but the executor may execute successive mortgages on the property. *Ames v. Holderbaum*, 44 Fed. Rep. 224; *Iowa L. & T. Co. v. Holderbaum*, 86 Iowa 1.

1. Mortgage to Secure Individual Debt of Executor Is Invalid. — *Clark v. Coe*, 52 Hun (N. Y.) 379.

Evidence as to Purposes of Mortgage. — In *Roarty v. McDermott*, 146 N. Y. 296, the executrix was authorized to sell or mortgage any part of the estate for the purpose of carrying out the provisions of the will, or whenever in her judgment it might be for the best interests of the estate. Acting under this power, she sold a parcel of real estate, receiving a part of the price in cash, and taking a mortgage to secure the balance. She used the cash payment to pay debts of the estate. Afterwards one of the testator's children, having become of age, was entitled to his share of the estate under the will. In order to raise the money to pay him his share, the executrix took back a conveyance of the lot which she had sold and canceled the mortgage given by the purchaser. She then mortgaged the lot to a third person for a sum sufficient to pay off the share of the child who had become of age, and gave a mortgage to the purchaser who had made the reconveyance for the amount of the cash payment which he had made, and which had been used for the payment of the testator's debts. The reconveyance to the executrix and the bond and mortgage given by her on such reconveyance to secure the cash payment which the purchaser had made were in her individual name. It was held that the whole transaction was for the purpose of raising money in order to carry out the will, and that the mortgage was not given to secure the personal bond or personal debt of the executrix, notwithstanding it was executed in her individual name.

2. Implied Power to Mortgage Realty. — Executors have implied power to mortgage the real estate of the testator in order to pay pressing claims against the estate, where all the residuary estate was devised to them, and full

power given to them by the will to settle the testator's accounts and to wind up his affairs, "and in so doing to make any sales and arrangements they shall judge expedient." *In re Jones*, 59 L. J. Ch. 31.

They also have power to mortgage real estate where they are directed to manage it in such a way as to make it as productive as possible, and to this end are given the power to sell and convey such parts of it as they in their discretion may deem necessary to accomplish the purpose in question. *Starr v. Moulton*, 97 Ill. 525.

Or where they are given authority, without the intervention of the court, to manage and control the estate in their discretion for the interest of the testator's children, and to "sell, exchange, and dispose of" it as they may deem necessary for such interest, the power to mortgage is implied. *Faulk v. Dashiell*, 62 Tex. 642.

The power may also be inferred merely from the expressed intention of the testator that his estate should be administered without the aid of any court. *Miller v. Borst*, 11 Wash. 260.

An Express Power May Be Extended by Implication to property other than that designated in the power. Thus, where a will gave power to the executors to join with the testator's copartner in the execution of any mortgages that might become necessary for the proper conduct of the firm business, "for the sale or mortgaging of firm's pine lands and stumpage, for the purpose of borrowing money for said business, and renewing and continuing any firm indebtedness," it was held that the will did not limit the authority to the mortgaging of the pine lands and stumpage. *Brown v. Morrill*, 45 Minn. 483.

3. Naked Power to Sell Does Not Include Power to Mortgage. — *Price v. Courtney*, 87 Mo. 387, 56 Am. Rep. 453; *Bloomer v. Waldron*, 3 Hill (N. Y.) 361; *Green v. Claiborne*, 83 Va. 386; *Perry on Trusts* (4th ed.), § 768.

In *Miller v. Mook*, 5 Ky. L. Rep. 327, it was held that an executor empowered by the testator to sell his home place, if necessary for the maintenance of his widow and children, and invest in a less expensive home, had no power to mortgage the home place to provide for the maintenance of the widow and children.

To the Contrary are *Williams v. Woodard*, 2 Wend. (N. Y.) 487; *Mills v. Banks*, 3 P. Wms. 9. In the case last cited Lord Macclesfield said: "A power to sell implies a power to mortgage, which is a conditional sale."

the property was devised subject thereto, a power to mortgage may be implied from the power to sell, unless the will shows a contrary intent.¹

Application of Proceeds. — The mortgagee is not required, in order to protect his rights under the mortgage, to see that the executor makes proper application of the proceeds of the mortgage.²

1. Power to Mortgage Implied from Power of Sale in Certain Cases. — *Stroughill v. Anstey*, 1 De G. M. & G. 635; *Hoyt v. Jaques*, 129 Mass. 286 [citing *Ball v. Harris*, 4 Myl. & C. 264; *Haldenby v. Spofforth*, 1 Beav. 390; *Page v. Cooper*, 16 Beav. 396; *Devaynes v. Robinson*, 24 Beav. 86; *Bloomer v. Waldron*, 3 Hill (N. Y.) 361].

Thus, it was held that power to mortgage real estate was given by a will by which the testator devised to his wife his entire estate, "giving her full power to sell and convey the same by deed (part or all of it), and the proceeds thereof are to be used for her comfort, and otherwise as she may think proper," and at her death the residue not specifically disposed of by her to be kept for the benefit of the testator's children. *Kent v. Morrison*, 153 Mass. 137.

In *Woods v. Woods*, 1 Myl. & C. 401, the testator devised all his property to his wife to sell for the payment of his debts. The next clause of the will was as follows: "Also I do constitute and make Elizabeth my wife, and Thomas Woods of Willingham, my executors, whom I do appoint to sell and dispose of all my estates and chattels, in such manner and form as they shall jointly agree upon; or not to sell, if it seems most advisable to keep them, or in any way that they shall think proper, so that every creditor have his money; and if sold, all overflush to my wife, towards her support and her family, if any there be, after paying my brother for his trouble and all other debts whatsoever." It was held that the will gave to the executors a discretion to mortgage as well as to sell for the payment of debts.

In *Ball v. Harris*, 4 Myl. & C. 264, the testator, after giving an annuity to his son, devised his estate to his executors in trust to permit his wife and daughter to receive the income after payment of the son's annuity, giving them also power to sell the real estate with the consent of the wife and daughter, and to invest the proceeds. It was held that the power to sell included a power to mortgage the real estate, and in reaching this conclusion Lord Cottenham said: "So long ago as the case of *Mills v. Banks*, 3 P. Wms. 1, in 1724, it seems to have been assumed as settled that 'a power to sell implies a power to mortgage, which is a conditional sale;' and no case has been quoted throwing any doubt upon that proposition. But this is not a mere power to sell; it is a trust to raise money out of the estate to pay debts. It would, indeed, be most injurious to the owners of estates charged if the trustee could effect the object of his trust only by selling the estate."

Power to Sell for Support of Family. — In *Lardner v. Williams*, 98 Wis. 514, 46 Cent. L. J. 306, it was held that power to mortgage real estate was given by a will which authorized the testator's widow to sell and dispose of it as she might deem best for the support of herself

and family, and carry on the business of the testator. The court said: "In so holding we are not to be understood as holding that a simple power of sale will authorize a mortgage. This is a question upon which the decisions are not uniform. See *Perry on Trusts* (4th ed.), § 768; 18 AM. AND ENG. ENCYC. OF LAW [1st ed.], tit. POWERS, p. 940, note 2."

"Where Power of Sale Is Given to Raise a Particular Charge Only, and the purpose can be answered better by mortgage than by sale, and that method is not violative of the intention of the grantor of the power, the former mode of raising the money should be preferred to the latter, for the obvious and sufficient reason that it is for the advantage of the estate that it should be adopted, and it is within the limits of the power intended to be conferred. It would be absurd, to say the least of it, to adhere so closely to the literal terms of the grant of power as to necessitate a sacrifice of the property, when by a reasonable construction that result could be avoided." *Loebenthal v. Raleigh*, 36 N. J. Eq. 169.

But a Power to Sell for the Purpose of Making a Division of the proceeds among the devisees does not authorize the executors to mortgage it to secure money borrowed by them. *Smith v. Hutchinson*, 108 Ill. 662.

A Power to Sell Real Estate and Invest the Proceeds does not authorize the executor to mortgage the land for the purpose of raising money, and the approval by the court of such proceedings will not render it valid, but the estate having received the money advanced on such mortgage will be required to repay it with legal interest. *Deery v. Hamilton*, 41 Iowa 16.

Intention to Convert Estate into Money. — In *Haldenby v. Spofforth*, 1 Beav. 390, the testator desired his trustees, as soon as convenient after his decease, to sell and dispose of all his real and personal estate; and he declared that the trustees' receipts should be good discharges to the purchasers who should not be answerable for the misapplication thereof; and they were to get in his personal estate and to pay, apply, and dispose of the money to be produced from the sale, and by the rents until the sale, in payment of his debts, and then in payment of certain sums of money, and to divide the residue among six persons. Lord Langdale said that the clear and manifest intention of the testator was to have a sale out and out, to have a complete conversion of his real estate, the produce of the real and personal estate to be disposed of as money, and that the terms of the will did not authorize a mortgage.

2. Mortgagee Not Required to See to Application of Proceeds. — *Ball v. Harris*, 4 Myl. & C. 264; *Iowa L. & T. Co. v. Holderbaum*, 86 Iowa 1.

The Principle on Which the Rule Rests, when the power is given for the payment of debts and legacies, is that the testator has shown his intention to be to intrust the trustees with

(3) *Power to Mortgage under Order of Probate Court.* — In some jurisdictions the statutes authorize the probate courts to grant leave to executors and administrators to mortgage the real estate of decedents for the payment of debts or other purposes, instead of selling it for such purposes, when the interests of the beneficiaries will be promoted thereby.¹ These provisions are generally a part of the statutes relating to sales under order of court, and the principles which govern the exercise of such power are in the main the same as in case of sales.²

c. EXONERATION OF ENCUMBERED PROPERTY — (1) *Incumbrances Created by Decedent* — (a) *Common-law Doctrine.* — At common law the personal representative of a decedent could be required at the instance of the heir or devisee to pay off incumbrances created by the decedent on real estate, because the personalty was the primary fund for the payment of debts and was considered as having had the benefit of the money represented by the incumbrance.³ But the testator may exempt the personal estate from liability.⁴

(b) *Statutory Doctrine.* — In England it is provided by statute that when any person shall die seized of or entitled to any estate or interest in land which shall at the time of his death be charged with the payment of any sum of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, but the land so charged, as between the different persons claiming through or under the deceased person, shall be primarily liable.⁵ This statute as origi-

the power of receiving and applying the money. *Stroughill v. Anstey*, 1 De G. M. & G. 635.

1. *Power to Mortgage Real Estate under Order of Court* — *California.* — *Thomas v. Parker*, 97 Cal. 456.

Louisiana. — *De Lerno's Succession*, 34 La. Ann. 38.

Michigan. — *Church v. Holcomb*, 45 Mich. 29; *Griffin v. Johnson*, 37 Mich. 87; *Cahill v. Bassett*, 66 Mich. 407.

New York. — *Ferguson v. Broome*, 1 Bradf. (N. Y.) 10.

Pennsylvania. — *Morgan's Appeal*, 110 Pa. St. 271; *Spencer v. Jennings*, 114 Pa. St. 618; *Hilton's Appeal*, (Pa. 1887) 9 Atl. Rep. 434; *Steffy's Appeal*, 76 Pa. St. 94; *Burton's Estate*, 4 Pa. Dist. Rep. 106, 16 Pa. Co. Ct. Rep. 289.

South Carolina. — *Spencer v. Godfrey, Bailey Eq.* (S. Car.) 468.

A *Temporary Administrator* cannot institute a proceeding to mortgage land for the payment of debts in *New York*. The statute only authorizes such a proceeding by the executor or administrator other than the temporary administrator, or by a creditor. *Duryea v. Mackey*, 151 N. Y. 204.

2. See *infra*, this title, *Sale of Real Estate under Order of Court*.

3. *Duty to Pay Off Incumbrances on Realty — Rule at Common Law* — *England.* — *Bond v. England*, 1 Jur. N. S. 918, 24 L. J. Ch. 671, 2 Kay & J. 44.

California. — *Phinney's Estate*, Myr. Prob. (Cal.) 239.

Illinois. — *Sutherland v. Harrison*, 86 Ill. 363.

Indiana. — *Newcomer v. Wallace*, 30 Ind. 216.

Massachusetts. — *Brown v. Baron*, 162 Mass. 56, 44 Am. St. Rep. 331; *Hewes v. Dehon*, 3

Gray (Mass.) 205; *Morse v. Bassett*, 132 Mass. 502; *Richardson v. Hall*, 124 Mass. 228; *Towle v. Swasey*, 106 Mass. 100; *Plimpton v. Fuller*, 11 Allen (Mass.) 139.

New Jersey. — *Slack v. Emery*, 30 N. J. Eq. 458; *Keene v. Munn*, 16 N. J. Eq. 398; *McLenahan v. McLenahan*, 18 N. J. Eq. 101.

Pennsylvania. — *Lennig's Estate*, 52 Pa. St. 135; *Fish's Estate*, 16 Phila. (Pa.) 373, 41 Leg. Int. (Pa.) 263; *Burton's Estate*, 15 Pa. Co. Ct. Rep. 367, 3 Pa. Dist. Rep. 755.

Rhode Island. — *Gould v. Winthrop*, 5 R. I. 319; *Wood v. Hammond*, 16 R. I. 98.

Vermont. — *Clapp v. Beardsley*, 1 Aik. (Vt.) 168, 1 Vt. 167.

Virginia. — *Dandridge v. Minge*, 4 Rand. (Va.) 397.

Unpaid Purchase Money with which the land is charged is payable out of the personalty to the exoneration of the land in the hands of the heir or devisees. *Lamport v. Beeman*, 34 Barb. (N. Y.) 239.

4. *Personalty Exempted by Will from Liability.* — *Morrow v. Bush*, 1 Cox 185; *Young v. Young*, 26 Beav. 522; *Forrest v. Prescott*, L. R. 10 Eq. 545; *Coventry v. Coventry*, 2 Dr. & Sm. 470.

For a Full Discussion as to the exoneration of the real estate by the personalty, see the titles LEGACIES AND DEVISES; SUCCESSION.

5. *English Statute.* — 17 & 18 Vict., c. 113, as amended by 30 & 31 Vict., c. 69, and 40 & 41 Vict., c. 34.

What Constitutes "Contrary or Other Intention." — It was held under this statute that a direction by a testator to pay debts out of his personal estate might be a sufficient indication of an intention on his part that the mortgaged land should not be primarily liable to the payment of the mortgage debt. *Stone v. Parker*, 1 Dr. & Sm. 212; *Smith v. Smith*, 3 Giff. 263;

nally passed included equitable mortgages and mortgages of copyhold estates,¹ but not leaseholds.²

In the United States the subject is more or less regulated by statute. Thus in some states the order in which a decedent's property shall be applied in payment of his debts is particularly prescribed, property devised being the last in order; in others it is provided that undevised real estate shall exonerate that which has been devised, if the personal property is not sufficient to pay all the debts; and in others it is provided that when property devised or bequeathed is taken for debts, the other devisees and legatees shall contribute ratably; but it is generally provided that the intention of the testator shall govern.³ The statutes providing for contribution among devisees and legatees give no preference to real estate when resort to property devised or bequeathed is necessary for the payment of debts, but proportionate contribution from each is required.⁴ In some jurisdictions the rights and duties of personal representatives with reference to the discharge of incumbrances on real estate are extended by statutes giving them powers over real estate which they did not possess at common law. Thus, if the real estate is required for the payment of debts, it is held to be as much the duty of the personal representative to pay legal charges that may accrue thereon as it is to pay any charges on the personal property in order to preserve and protect it while it remains in his custody.⁵ So, too, in some states express authority is conferred on him by statute to redeem the real estate which has been sold under execution or foreclosure of a mortgage.⁶

The New York Statute on this subject is similar to the *English* statute, and provides that the heir or devisee of land mortgaged by an ancestor or testator

Eno v. Tatham, 4 Gilf. 181, 32 L. J. Ch. 311; *Moore v. Moore*, 1 De G. J. & S. 603; *Rodhouse v. Mold*, 35 L. J. Ch. 67. But this was changed by the amendatory statute 30 & 31 Vict., c. 39, providing that such a direction should not be sufficient indication of an intention to exonerate the real estate.

Devise of One of Two Tracts Subject to Common Mortgage.—The fact that one of two tracts comprised in the same mortgage is specifically devised was held by Lord Romilly to make the estate which passed under the residuary devise primarily liable to the whole of the mortgage debt. *Brownson v. Lawrance*, L. R. 6 Eq. 1. But in *Sackville v. Smyth*, L. R. 17 Eq. 153, Jessel, M. R., refused to follow Lord Romilly's decision. See also *Gibbins v. Eyden*, L. R. 7 Eq. 371; *Hensman v. Fryer*, L. R. 3 Ch. 420; *In re Smith*, 33 Ch. Div. 195; *In re Newmarch*, 9 Ch. Div. 12.

Where Real and Personal Estate Are Included in the Same Mortgage, there is nothing in the statute to make the real estate primarily liable to bear the whole mortgage debt, but the intention of the mortgagor governs. *Trestrail v. Mason*, 7 Ch. Div. 655; *Leonino v. Leonino*, 10 Ch. Div. 460. See also *Bute v. Cunyng-hame*, 2 Russ. 275; *Lipscomb v. Lipscomb*, L. R. 7 Eq. 501; *De Rochefort v. Dawes*, L. R. 12 Eq. 540.

1. **Equitable Mortgages Included in 17 & 18 Vict., c. 113.**—*Pembroke v. Friend*, 1 Johns. & H. 132; *Coleby v. Coleby*, 12 Jur. N. S. 496. See also *Hepworth v. Hill*, 30 Beav. 476.

Copyholds.—*Piper v. Piper*, 1 Johns. & H. 91.
2. **Mortgages of Leaseholds Not Included in 17 & 18 Vict., c. 113.**—*Solomon v. Solomon*, 33 L. J. Ch. 473; *In re Wormsley*, 4 Ch. Div. 665.

By the amendment of 40 & 41 Vict., c. 34,

leaseholds were included. *In re Kershaw*, 37 Ch. Div. 674.

3. See the various local codes and statutes in the United States.

If It Appears to Have Been the Intention of the Testator that a mortgage of land devised should be paid out of his personal estate, the court of probate may compel the executor to pay it accordingly. *Matter of Heydenfeldt*, 105 Cal. 434.

4. **Proportionate Contribution from Both Realty and Personality.**—*Farnum v. Bascom*, 122 Mass. 282.

5. **Duty to Discharge Incumbrances on Realty Needed to Pay Debts.**—*Brown v. Evans*, 15 Kan. 92; *Young v. Tarbell*, 37 Me. 509.

In *Alabama* the executor or administrator may discharge incumbrances whenever such course is beneficial to the estate. *Patapsco Guano Co. v. Ballard*, 107 Ala. 710, 54 Am. St. Rep. 131; *McNeill v. McNeill*, 36 Ala. 110, 76 Am. Dec. 320.

In *Texas* it is provided by statute that a debt secured by a lien on real estate may be ordered to be paid out of the general assets when beneficial to the estate. *Mullins v. Yarbrough*, 44 Tex. 14.

6. **Statutory Authority to Redeem Land.**—*McCreedy v. Mier*, 64 Ill. 495; *Whismann v. Small*, 65 Ind. 120; *In re Holladay*, 18 Oregon 168.

As to Redemption of a Decedent's Land from mortgage or judicial sale, see also the titles *EQUITY OF REDEMPTION*, *ante*, p. 205; *EXECUTION*, *ante*, p. 604; *JUDICIAL SALES*.

Whether or not it is the duty of the personal representative, pursuant to the authority conferred on him, to redeem land which has been sold under execution or mortgage, depends on

shall have no right to call on the executor or administrator to pay the mortgage debt unless the will so directs.¹ It will be observed that this statute by its terms applies only to mortgages,² but it does not limit the mortgagee to a proceeding against the mortgaged property to recover his debt.³

(2) *Incumbrances Prior to Decedent's Title.* — If a decedent acquired property subject to incumbrances, the personal representative cannot be required to pay it off, because the debt secured is not a debt of the estate⁴ unless the decedent made himself liable personally.⁵

A Mere Assumption of the Debt by the decedent by a covenant in the conveyance to him, or other agreement with his grantor, is not sufficient to render him personally liable for the debt so as to make the personalty liable to exonerate the encumbered real estate. He is bound by such covenant or agreement to indemnify his grantor, but he is not liable thereon to the creditor. To impose such liability he must make a promise to or for the benefit of the grantor, with the intent that the primary obligation shall be shifted from the real to the personal fund.⁶

the circumstances of each case, and he is held to the exercise of reasonable discretion. *McCreedy v. Mier*, 64 Ill. 495.

1. **New York Statute.** — *House v. House*, 10 Paige (N. Y.) 158; *Johnson v. Corbett*, 11 Paige (N. Y.) 265; *Cumberland v. Codrington*, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492; *Rauchfuss v. Rauchfuss*, 2 Dem. (N. Y.) 271; *Hauselt v. Patterson*, 51 Hun (N. Y.) 321; *Mosely v. Marshall*, 27 Barb. (N. Y.) 42; *Cornwell v. Deck*, 2 Redf. (N. Y.) 87; *Stevens v. Stevens*, 2 Redf. (N. Y.) 265.

When Will Charges Mortgage Debt on General Estate. — In *Taylor v. Wendel*, 4 Bradf. (N. Y.) 324, it was held that a mortgage debt was not charged on the general estate by a provision in the will that the executor should pay the testator's debts.

2. **New York Statute Applicable Only to Mortgages.** — *Wright v. Holbrook*, 2 Robt. (N. Y.) 516, 32 N. Y. 587.

3. **Mortgagee Not Restricted to Remedy Against Mortgaged Property by New York Statute.** — *Rice v. Harbeson*, 2 Thomp. & C. (N. Y.) 4; *Wright v. Holbrook*, 2 Robt. (N. Y.) 516, 32 N. Y. 587.

A Direction by Will to Convert Real Estate into Money does not authorize the executors to pay off existing incumbrances, and if the result of such payments is disadvantageous, they are liable, though they acted in good faith and in expectation of advantage to the estate. *Matter of Gray*, 27 Hun (N. Y.) 455.

4. **Property Acquired by Decedent Subject to Incumbrances** — *England.* — *Pockley v. Pockley*, 1 Vern. 37; *Lawson v. Hudson*, 1 Bro. C. C. 58, affirmed 3 Bro. P. C. 424; *Ancaster v. Mayer*, 1 Bro. C. C. 454; *Waring v. Ward*, 7 Ves. Jr. 332; *Barry v. Harding*, 1 J. & L. 475, 7 Ir. Eq. Rep. 313; *Basset v. Percival*, 1 Cox 268; *Forrester v. Leigh*, Ambl. 173.

California. — *Matter of Knight*, 12 Cal. 200.

Illinois. — *Stiger v. Bent*, 111 Ill. 328.

Massachusetts. — *Creesy v. Willis*, 159 Mass. 249 [citing *Hewes v. Dehon*, 3 Gray (Mass.) 205; *Andrews v. Bishop*, 5 Allen (Mass.) 490].

New Jersey. — *Campbell v. Campbell*, 30 N. J. Eq. 415; *Mount v. Van Ness*, 33 N. J. Eq. 262; *McLenahan v. McLenahan*, 18 N. J. Eq. 101.

Pennsylvania. — *Hirst's Estate*, 12 Phila. (Pa.) 106, 35 Leg. Int. (Pa.) 222, affirmed *sub nom.* *Hirst's Appeal*, 92 Pa. St. 491.

5. **If the Decedent Makes the Debt Secured a Personal Obligation** of his own, it is payable by the personal representative like any other debt of the estate. *Parsons v. Freeman*, Ambl. 115; *Woods v. Huntingford*, 3 Ves. Jr. 131; *Butler v. Butler*, 5 Ves. Jr. 534; *Oxford v. Rodney*, 14 Ves. Jr. 417; *Hedges v. Hedges*, 5 De G. & Sm. 330, 21 L. J. Ch. N. S. 858, 16 Jur. 634; *Bagot v. Oughton*, 1 P. Wms. 348, Fortesc. 332, Sel. Ch. Cas. 20.

6. **Mere Assumption of Incumbrance Not Sufficient to Exonerate Realty** — *England.* — *Shafto v. Shafto*, cited in 2 P. Wms. 664, note 1; *Tankerville v. Fawcett*, 2 Bro. C. C. 57; *Tweddell v. Tweddell*, 2 Bro. C. C. 101; *Billinghurst v. Walker*, 2 Bro. C. C. 604; *Butler v. Butler*, 5 Ves. Jr. 534.

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New York. — *Cumberland v. Codrington*, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492.

Pennsylvania. — *Hirst's Estate*, 12 Phila. (Pa.) 106, 35 Leg. Int. (Pa.) 222, affirmed *sub nom.* *Hirst's Appeal*, 92 Pa. St. 491.

"**The Question Is** not whether the decedent assumed to pay the mortgage, and so made himself liable therefor, as between him and his grantor, but whether he, by direct action, made himself liable, in his personal estate, to the mortgagee; that is, as between him and the mortgagee, expressly made the debt his own." *Mount v. Van Ness*, 33 N. J. Eq. 265.

"**The Principle** which may be fairly extracted from the cases may be stated thus: When the decedent has purchased an estate, subject to an incumbrance which he has promised to pay, either by express words in the deed or by a direct contract with the vendor or mortgagee, or where he has himself created the incumbrance, the incumbrance as between his heirs and personal representatives will be paid out of the personalty. But where the words in the deed or contract simply import that the decedent intended to indemnify his vendor or mortgagee against the debt, in case the real estate was not sufficient to pay it, then the incumbrance must be paid out of the realty. In the

(3) *Charges Created under Power or Settlement.* — Where charges on real estate were created by the decedent under a power or a settlement, it is held that the personal estate cannot be called on to pay them.¹

various discussions which have arisen upon this subject in England and in this country, the question of intention has always been regarded as of paramount importance in determining the primary fund for payment. Where the intention speaks through the creation of the incumbrance or a direct promise to pay it, there can, of course, be no dispute. Whatever difficulty exists in the work of reconciling decisions apparently discordant will be found to have arisen from the attempt to extract from the acts or language of the decedent a meaning which did not properly belong to them. It may be safely assumed as a rule to which there is no exception, that where an intention on the part of the decedent to make the debt his own cannot be clearly shown, the incumbrance will remain a primary charge upon the real estate." *Hirst's Estate*, 12 Phila. (Pa.) 106, 35 Leg. Int. (Pa.) 222.

Illustrations. — In *Oxford v. Rodney*, 14 Ves. Jr. 417, the testator, after the purchase of land charged with a mortgage, made a direct covenant with the mortgagee to pay the mortgage debt, and it was held that his personal estate was liable.

In *Parsons v. Freeman*, cited in 2 P. Wms. 664, note 1, the personal estate was declared liable on the strength of an express promise to pay, where the testator expressly agreed with his vendor to pay to the mortgagee the amount of the mortgage.

In *Cumberland v. Codrington*, 3 Johns. Ch. (N. Y.) 261, 8 Am. Dec. 501, Chancellor Kent, after reviewing the English cases on the subject, said: "This series of cases which I have thus examined shows very conclusively that by the English equity system, as it has been declared and received for the last thirty or forty years, the purchase of the equity of redemption, * * * with a covenant of indemnity to W., the mortgagor, against the mortgage debt, did not make the debt his own, so as to render his personal assets the primary fund to pay it. The cases all agree that no covenant with the mortgagor is sufficient for that purpose. There must be a direct communication and contract with the mortgagee, and even that is not enough unless the dealing with the mortgagee be of such a nature as to afford decided evidence of an intention to shift the primary obligation from the real to the personal fund." And on p. 257 he said: "When a man gives a bond and mortgage for a debt of his own contracting, the mortgage is understood to be merely a collateral security for the personal obligation. But when a man purchases or has devised to him land with an incumbrance on it, he becomes a debtor only in respect to the land; and if he promises to pay it, it is a promise rather on account of the land, which continues, notwithstanding, in many cases, to be the primary fund. The same equity which in other cases makes the personal estate contribute to ease the land, as between the real and personal representatives, will here make the land relieve the personal estate. There is good sense and justice in the

principle, and I feel the force of the doctrine that it requires very strong and decided proof of intention before the court can undertake to shift the natural course and order of obligation between the two estates."

In *Pate v. Oliver*, 104 N. Car. 458, it was held that the whole conduct of the decedent showed an intention to complete his title to the property where he purchased the legal and equitable interests outstanding, and of his own motion obtained a decree of court which in effect made him equitable owner of the land charged with the amount of the incumbrances on the property, and that he thereby made the incumbrances his own personal debt.

In *Hoff's Appeal*, 24 Pa. St. 200, an express promise was founded by the court upon the words in the receipt indorsed on the deed to the testator, naming five thousand five hundred dollars, which, "with a certain mortgage debt or principal sum of eight thousand four hundred dollars, * * * and the interest due and to grow due thereon, to be paid by the said John Hoff, is in full consideration for the above granted premises." The testator afterwards agreed with the mortgagees to pay them an increased rate of interest. Woodward, J., laid down the rule as to intention thus: "If it [the estate] come by descent or devise, and the testator has done no act to make the debt his own, his devisee will take the estate *cum onere*, and the executors are not chargeable with the mortgage; and the rule is the same even where the testator has purchased the estate, if he have had no connection or contract or communication with the mortgagee, and have done no act to show an intention to transfer the debt from the estate to himself."

In *Lennig's Estate*, 52 Pa. St. 135, the testator owned a house on Walnut street, and gave a mortgage thereon for fifteen thousand dollars. He also purchased a house on Poplar street, subject to two mortgages, one of which, for twenty-five thousand dollars, remained unpaid at his death. The deed to the latter property stated the consideration thus: "In consideration of twenty thousand dollars * * * paid, etc., and of the assumption of the said F. Lennig of the two mortgages hereinafterwards particularly mentioned, being altogether the sum of fifty-seven thousand dollars." The receipt ran: "Received * * * twenty thousand dollars, the cash consideration therein mentioned, which, together with the assumption of the mortgage debts of twelve thousand dollars and twenty-five thousand dollars, is the full consideration of fifty-seven thousand dollars above mentioned." Here the personal estate was held chargeable with the three mortgages, on the ground, as to one, that the testator had himself created the debt, and as to the others, that he had expressly assumed them as a part of his purchase, and thereby made them his own.

1. *Charges Created under Power or Settlement Not Payable Out of Personality.* — *Ex p. Digby*, 1 Jac. 235; *Graves v. Hicks*, 6 Sim. 398, 4 L. J.

f. PURCHASE OF REAL PROPERTY BY EXECUTOR OR ADMINISTRATOR —
 (1) *Purchase of Property Belonging to Third Persons —* (a) **General Principles.** — An executor or administrator ordinarily has no right, in the absence of express authorization by will or an order of court, to lay out the funds of the estate in the purchase of real property.¹

As Between the Vendor and the Personal Representative who assumes to make such a purchase, it is considered as the individual contract of the representative, though he is named in his representative capacity, and it is enforceable by or against him only in his individual capacity.²

(b) **Purchase with Funds of Estate.** — As between the estate and the personal representative a trust results in favor of the estate, if the representative uses the trust funds in his hands in the purchase of real property without authority, whether the deed is made to him individually or as executor or administrator,³ unless it clearly appears that he was in advance to the estate for the amount used in the purchase.⁴

(c) **Purchase of Property Sold for Debts Due Estate.** — According to the weight of authority, where an executor or administrator, in collecting debts due the estate, causes the land of the debtor to be sold under a mortgage given to secure the debt, or under execution or other judicial process, and becomes himself the purchaser at the sale, he does not acquire an individual title, but he holds the land so purchased in trust for the estate,⁵ unless the beneficiaries of the estate elect to hold him to his purchase;⁶ and if he sells the property at an advance on the price paid by him he will be required to account for the profits of the transaction.⁷ But if he purchased in order to protect the estate from loss, and not in his own interest, he cannot be required to account for the land as so much money. It will be treated under such circumstances as

Ch. N. S. 239; *Ibbetson v. Ibbetson*, 12 Sim. 206; *Noel v. Henley*, Dan. 332; *Jenkinson v. Harcourt*, 1 Kay 688, 23 L. J. Ch. 785; *Langdale v. Briggs*, 2 Jur. N. S. 982, 8 De G. M. & G. 391, 26 L. J. Ch. 27.

1. **No Power Ordinarily to Purchase Real Property for Estate.** — *Wilson v. Mason*, 158 Ill. 304; *West v. Dean*, 8 Ohio Cir. Dec. 797; *Shelton v. Bone*, (Tex. Civ. App. 1894) 26 S. W. Rep. 224.

In *New York* executors and administrators are authorized by statute, with the approval of the Supreme Court, to acquire or exchange lands to straighten boundaries. Laws 1898, p. 924, c. 311.

2. **Only Individual Liability Incurred on Purchase by Executor or Administrator.** — *West v. Dean*, 8 Ohio Cir. Dec. 797.

Only Individual Right of Action on Purchase by Executor or Administrator. — *Shelton v. Bone*, (Tex. Civ. App. 1894) 26 S. W. Rep. 224. See also *supra*, this title, *Powers, Duties, and Liabilities in General — Contracts*.

3. **Real Property Purchased with Funds of Estate — Trust Results —** *Kansas*. — *Ellicott v. Barnes*, 31 Kan. 171; *Merket v. Smith*, 33 Kan. 66.

Kentucky. — *Clayton v. Clayton*, 11 Ky. L. Rep. 472.

Mississippi. — *Harper v. Archer*, 28 Miss. 212; *Shaw v. Thompson*, Smed. & M. Ch. (Miss.) 628.

Missouri. — *Harney v. Donohoe*, 97 Mo. 141.

New York. — *McLean v. Ladd*, 66 Hun (N. Y.) 347; *Evertson v. Tappen*, 5 Johns. Ch. (N. Y.) 497; *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388.

Pennsylvania. — *Wallace v. Duffield*, 2 S. & R. (Pa.) 521, 7 Am. Dec. 660.

See also *In re Ricker*, 14 Mont. 153; *Edmonds v. Crenshaw*, Harp. Eq. (S. Car.) 224.

4. **Executor or Administrator in Advance to Estate.** — *Buckingham v. Wesson*, 54 Miss. 526.

5. **Purchase of Land for Debts Due Estate — Becomes Trustee for Estate —** *United States*. — *Rafferty v. Mallory*, 3 Biss. (U. S.) 362.

Arkansas. — *Jones v. Graham*, 36 Ark. 383.

Colorado. — *Dusing v. Nelson*, 7 Colo. 185.

Indiana. — *Hoover v. Malen*, 83 Ind. 195.

Kansas. — *Briggs v. Chicago, etc., R. Co.*, 56 Kan. 526.

Kentucky. — *Jackson v. Roberts*, 95 Ky. 410.

Minnesota. — *Lewis v. Welch*, 47 Minn. 193.

Missouri. — *Mabary v. Dollarhide*, 98 Mo. 198, 14 Am. St. Rep. 639.

New York. — *Fellows v. Fellows*, 4 Cow. (N. Y.) 682; *Clark v. Clark*, 8 Paige (N. Y.) 152, 35 Am. Dec. 676; *Matter of Butler*, 1 Connolly (N. Y.) 58.

North Carolina. — *Falls v. Torrence*, 4 Hawks (11 N. Car.) 412.

Pennsylvania. — *Chase v. Irvin*, 87 Pa. St. 286; *Bean v. Mercer*, 1 Chest. Co. Rep. (Pa.) 335; *Hillard's Estate*, 8 Luz. Leg. Reg. (Pa.) 137.

South Carolina. — *Haynsworth v. Bischoff*, 6 S. Car. 159.

Texas. — *McCoy v. Crawford*, 9 Tex. 353.

See also *Willenborg v. Murphy*, 36 Ill. 344; *Thurston v. Kennett*, 22 N. H. 151.

6. **Election by Beneficiaries.** — *Jones v. Graham*, 36 Ark. 383; *Weir v. Tate*, 4 Ired. Eq. (39 N. Car.) 264.

7. **Accounting of Profits Realized on Resale.** — *Matter of Butler*, 1 Connolly (N. Y.) 58.

belonging to the estate, and on the accounting may be turned over in lieu of the money.¹

On the Other Hand, the right to make such purchase for his own benefit has been asserted.²

(2) *Purchase of Real Property Belonging to Estate* — (a) *Purchase from Heirs.* — An executor or administrator may purchase the interest of the heirs in real estate not needed for the payment of debts.³

(b) *Purchase at Judicial Sale.* — According to the rule of the common law that an executor or administrator is a trustee of the personal estate only, and owes no duty to the heirs, it is held in some jurisdictions that where realty belonging to a decedent's estate is sold under a mortgage, or an execution or other judicial process, the executor or administrator may purchase for himself,⁴ unless the sale was made in consequence of his default in not paying the debt for which the property was sold, when he had sufficient funds in his hands for that purpose,⁵ or where he was guilty of fraud.⁶ But it has also been held that the executor or administrator has no right to purchase at such sales.⁷

(c) *Purchase at Sale under Order of Court.* — Ordinarily an executor or administrator has no right to purchase real estate of the decedent at an administration sale made under an order of court. This question is fully discussed in another part of this article.⁸

(d) *Purchase of Outstanding Title.* — The rule that no one is permitted to purchase property in relation to which he has a duty to perform inconsistent with the character of purchaser forbids an executor or administrator to purchase an outstanding title to real property adverse to the decedent's title.⁹

(3) *Authority to Sell Property Purchased.* — The general rule is that if an executor or administrator, without authority, invests the funds of the estate in real property or becomes the purchaser of land sold for a debt due from the owner to the decedent, the funds so invested, or the debt for which the land

1. *Purchase to Protect Estate.* — *Perrine v. Vreeland*, 33 N. J. Eq. 102, 596; *Bowler's Estate*, 8 Pa. Co. Ct. Rep. 522; *Powell v. Stratton*, 11 Gratt. (Va.) 792.

2. *Dillinger v. Kelley*, 84 Mo. 561.

3. *Purchase from Heirs — Realty Not Required for Payment of Debts.* — *Barker v. Barker*, 14 Wis. 131. *Compare* *Handlin v. Davis*, 81 Ky. 34.

4. *Purchase at Judicial Sale — Iowa* — *Stevens v. Polk*, 71 Iowa 278.

Louisiana. — *Sojourner v. Fourney*, 35 La. Ann. 918.

New Jersey. — *Johns v. Norris*, 22 N. J. Eq. 102; *Earl v. Halsey*, 14 N. J. Eq. 332; *Den v. Hillman*, 7 N. J. L. 180.

New York. — *Hollingsworth v. Spaulding*, 54 N. Y. 636.

Pennsylvania. — *McMarius's Estate*, 14 Pa. Co. Ct. Rep. 379, 34 W. N. C. (Pa.) 222, 3 Pa. Dist. Rep. 183.

See also *Allan v. Gillet*, 21 Fed. Rep. 273; *Briant v. Jackson*, 99 Mo. 585; *Lippincott v. Bechtold*, 54 N. J. Eq. 407; *Huson v. Wallace*, 1 Rich. Eq. (S. Car.) 1. *Compare* *Dillinger v. Kelley*, 84 Mo. 561; *Clark v. Drake*, 63 Mo. 354.

5. *Sale Caused by Executor's Default.* — *Prindle v. Beveridge*, 7 Lans. (N. Y.) 225.

In *Campbell v. Johnston*, 1 Sandf. Ch. (N. Y.) 148, it was held that where executors, clothed with a power, in trust, to sell for the benefit of infant heirs, negligently permitted the land to be sold under a mortgage, and became the purchasers, the *cestuis que trustent*

might elect whether the sale should stand, or the land be resold, or a reconveyance to them be made.

6. *Fraud of Executor or Administrator.* — *Johns v. Norris*, 27 N. J. Eq. 485.

7. *Right to Purchase at Judicial Sale Denied.* — *Fleming v. Foran*, 12 Ga. 595.

In *New York* it has been held that if the personal property be insufficient to pay the debts, the executor or administrator becomes a trustee for the heirs and devisees, and will not be permitted to sell the land, under a judgment held by him, and become the purchaser. *Rogers v. Rogers*, 3 Wend. (N. Y.) 503, 20 Am. Dec. 716, *affirming* *Hopk. (N. Y.)* 515.

8. See *infra*, this title, *Sale of Real Estate under Order of Court.*

9. *Purchase of Outstanding Title Prohibited.* — *Culberhouse v. Shirey*, 42 Ark. 25; *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376; *North v. Barnum*, 10 Vt. 220, 12 Vt. 205; *Perkins v. Blood*, 36 Vt. 288; *Watkins v. Zwietusch*, 47 Wis. 513.

In *Glenn v. Thistle*, 23 Miss. 42, where the testator had bought land the title to which was wholly void, and not merely defective, the land being public land, it was held that the executor could purchase it for his own benefit when it was sold by the government, and it was immaterial that the vendor of the testator (supposing, but without any contract or agreement with the executor, that the latter was acting for the estate) assisted in clearing away pre-emption rights, and otherwise facilitated the executor in getting the title.

was taken, will not be thereby converted into realty, but the land will be treated as personalty in the hands of the executor or administrator and may be sold by him without leave of court in those jurisdictions where he is not required to obtain leave to sell personalty;¹ and the same rule applies where land is conveyed to the representative as security for a debt due the estate.² But it has been held that he has no authority to sell if the heirs elect to take the land instead of the proceeds of a sale of it.³ In some states an executor or administrator is required by statute to obtain a license to sell real estate which he had purchased at a sale for a debt due from the owner to the decedent,⁴ but it is held under such a statute that a sale without leave of court is only voidable, and not void.⁵

X. SALE OF REAL ESTATE UNDER ORDER OF COURT — 1. Power to Order Sale —

a. FOR PAYMENT OF DEBTS — (1) *At Common Law*. — In a previous part of this article has been stated the rule of the ancient common law, long since changed by statute both in *England* and the *United States*, that the real estate of a decedent was not assets available for the payment of his debts, except those of a certain quality, viz., debts due on bonds, covenants, or other specialties, in cases where the decedent bound himself and his heirs,⁶ unless the decedent made a will giving the executor a power of sale for the payment of debts, or devising the realty to him for that purpose.⁷ The liability of the heir, however, when expressly bound by his ancestor's specialties, was limited to the value of the real estate descended to him; and furthermore if, before an action was brought against him on a specialty debt of his ancestor, he aliened the realty descended, the creditor had no remedy. The result of these principles was that it was within the power of either the debtor or his heir to defeat specialty creditors; the one by disposing of his property by will, instead of allowing it to pass to his heir under the law of descents; and the other by aliening land descended to him before an action should be brought against him on his ancestor's obligations. To prevent this injustice, the British Parliament enacted the statute of 3 Wm. & M., c. 14. Afterwards this statute was repealed and re-enacted with additional provisions by 1 Wm. IV., c. 47. The latter statute, after reciting the mischief to be corrected, provided, in substance, that any testamentary disposition of real estate should be void as to any person with whom the testator should have entered into any bond, covenant, or other specialty binding his heirs; that the specialty creditor should have the right to sue the devisee or the heir, or both jointly; that no alienation by an heir who was answerable on his ancestor's specialties should affect the right of the specialty creditors to sue him thereon, saving that realty aliened *bona fide* before the actions were brought should not be subject to execution; and that a devisee who had aliened the land devised before an action had been brought against him under the act should be liable in the same manner as an heir. It will be observed that as yet real estate descended or devised was not specifically charged with the debts, but only a personal

1. Land Purchased by Executor or Administrator May Be Sold Without Leave of Court — *Maryland*.

— *Seldner v. McCreery*, 75 Md. 287.

Michigan. — *Williams v. Towl*, 65 Mich. 204.

Mississippi. — *Columbus Ins., etc., Co. v. Humphries*, 64 Miss. 258.

Missouri. — *Hogan v. Welcker*, 14 Mo. 177.

New Jersey. — *Wilson v. Staats*, 33 N. J. Eq. 524.

New York. — *Haberman v. Baker*, 128 N. Y. 253; *Lockman v. Reilly* 95 N. Y. 64 [reversing 29 Hun (N. Y.) 434, which reversed 10 Abb. N. Cas. (N. Y.) 351]; *Cook v. Ryan*, 29 Hun (N. Y.) 249; *Valentine v. Belden*, 20 Hun (N. Y.) 537.

2. Land Conveyed to Executor or Administrator as Security. — *Long v. O'Fallon*, 19 How. (U. S.) 116.

3. Election by Heirs to Take Land. — *Gumaer v. Barber*, 2 Lack. Leg. N. (Pa.) 237.

4. Authority from Court Required. — *Rafferty v. Mallory*, 3 Biss. (U. S.) 362; *Baldwin v. Timmins*, 3 Gray (Mass.) 302.

5. *Thomas v. Le Baron*, 10 Met. (Mass.) 403.

6. Real Estate Not Liable for Simple Contract Debts at Common Law. — See *supra*, this title, *Assets — Real Property Generally*.

7. Testamentary Power of Sale. — See *supra*, this title, *Management and Care of Estate — Real Property*.

liability was imposed on the heir or devisee to the amount of assets descended or devised, and this liability was limited to specialty debts.¹

(2) *Modern Rule in England*. — Then came the statute of 3 & 4 Wm. IV., c. 104, by which it was provided that any real estate of or to which a person should die seized or entitled, and which he should not have charged with or devised subject to the payment of his debts, should be assets to be administered in courts of equity for the payment of the just debts of such person, as well debts due on simple contract as on specialty.²

(3) *Rule in United States*. — Statutes have been enacted in all the states of the Union authorizing the sale of the real estate of decedents for purposes of administration;³ and this power, being purely statutory, exists only in the cases contemplated by the statute.⁴

1. For a Full Discussion of the liabilities of heirs and devisees for the debts of their ancestors or testators, see the titles LEGACIES AND DEVISES; SUCCESSION. See also the title DEBTS OF DECEDENTS, vol. 8, p. 1098.

2. *Modern English Rule — Real Estate Made Assets to Be Administered in Equity*. — 3 Williams on Executors (7th Am. ed.) 144, reciting the provisions of the statute of 3 & 4 Wm. IV. c. 104.

Recent Legislation in England has materially extended the powers of executors and administrators in dealing with real estate. It is now provided that all the real estate vested in any person without a right of survivorship in any other person shall, upon the death of the owner, notwithstanding any testamentary disposition made by him, devolve to and become vested in his personal representatives, as if it were a chattel real. It is further provided that all enactments and rules of law relating to the effect of probate or letters of administration, as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payments of costs of administration and other matters in relation to the administration of personal estates and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate, so far as the same are applicable, as if that real estate were a chattel real vesting in them, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the court, to sell or transfer real estate; and that in the administration of the assets of a person dying after the commencement of the act his real estate shall be administered in the same manner, subject to the same liabilities for debts, costs, and expenses, and with the same incidents, as if it were personal estate, except that the same order shall be observed as formerly obtained in regard to the application of real and personal assets towards the payment of debts, charges, and expenses. Stat. 60 & 61 Vict., c. 65.

3. *Power to Order Sale Given by Statute in United States*. — See the various local codes and statutes in the United States.

4. *Power to Order Sale Purely Statutory — Alabama*. — Wyman v. Campbell, 6 Port. (Ala.) 219, 31 Am. Dec. 677; Lee v. Campbell, 6 Port. (Ala.) 249; Couch v. Campbell, 6 Port. (Ala.) 262; Wiley v. White, 2 Stew. (Ala.) 331; Wiley v. White, 3 Stew. & P. (Ala.) 355; Bishop v.

Hampton, 15 Ala. 761; Pettit v. Pettit, 32 Ala. 288.

California. — Townsend v. Gordon, 19 Cal. 189; Haynes v. Meeks, 20 Cal. 288; Janes v. Throckmorton, 57 Cal. 368.

Delaware. — Vincent v. Platt, 5 Harr. (Del.) 164.

Indiana. — Weyer v. Franklin Second Nat. Bank, 57 Ind. 198; Raney v. McCain, 51 Ind. 496.

Michigan. — Eberstein v. Oswalt, 47 Mich. 254.

Mississippi. — Currie v. Stewart, 27 Miss. 52, 61 Am. Dec. 500; Laughman v. Thompson, 6 Smed. & M. (Miss.) 259.

Missouri. — Bompert v. Lucas, 21 Mo. 598; Jarvis v. Russick, 12 Mo. 63.

New York. — People v. Corlies, 1 Sandf. (N. Y.) 247; Corwin v. Merritt, 3 Barb. (N. Y.) 343; Bloom v. Burdick, 1 Hill (N. Y.) 139, 37 Am. Dec. 299.

Ohio. — Longley v. Sewell, 4 Ohio Dec. 1.

Oregon. — Wright v. Edwards, 10 Oregon 298.

A **Liberal Construction** is given to statutes regulating the rate of the real estate of decedents for the payment of their debts. Hudson v. Jurnigan, 39 Tex. 579.

Repeal of Statute. — "The administrator has no estate in the land, but a power to sell under the authority of the Court of Common Pleas. This is not an independent power, to be exercised at discretion, when the exigency in his opinion may require it; but is conferred by the court in a state of things prescribed by the law. The order of the court is a prerequisite, indispensable to the very existence of the power; and if the law which authorized the court to make the order be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate, but is the exercise of a legislative power which every legislature possesses. The mode of subjecting the property of a debtor to the demands of a creditor must always depend on the wisdom of the legislature." Hamilton Bank v. Dudley, 2 Pet. (U. S.) 492.

Debts Incurred Before Passage of Act. — A statute is not unconstitutional because it authorizes a sale to pay debts contracted before its enactment. No contractual obligations are violated by such a statute. Fitzhugh v. Fitzhugh, 6 B. Mon. (Ky.) 4; Sullivan v. Berry, 83 Ky. 198, 4 Am. St. Rep. 147.

But it is unconstitutional if it fails to provide a judicial proceeding to ascertain that

b. FOR OTHER PURPOSES. — The purposes for which a court of probate may order a sale of the land of a decedent are designated by the statute conferring the power. These vary more or less in different jurisdictions, and a reference to the statute on this point is necessary in each jurisdiction. Besides the power to order a sale for the payment of debts, many of the statutes authorize a sale for the purpose of making distribution among the heirs,¹ or to pay legacies when the personalty is insufficient for that purpose;² and some provide for a sale whenever it shall appear to be for the benefit of the estate or of those who are interested in it.³ But a sale by an executor or administrator cannot be ordered for a purpose not authorized by law.⁴

2. Jurisdiction — *a. COURTS OF PROBATE.* — As a general rule, jurisdiction to order a sale of the real estate of decedents is conferred exclusively on the courts of probate, or the courts exercising probate powers, whatever may be their designation,⁵ though in some states the courts of probate exercise

debts are due, because such a statute is an exercise of judicial power by the legislature. *Rozier v. Fagan*, 46 Ill. 404. See also *Lane v. Dorman*, 4 Ill. 238, 36 Am. Dec. 543.

For the same reason a statute which authorizes guardians of a minor heir to sell his lands and apply the proceeds to pay the ancestor's debts is unconstitutional. *Jones v. Perry*, 10 Verg. (Tenn.) 59, 30 Am. Dec. 430.

A Private or Special Act authorizing the sale of a decedent's realty for the payment of debts is constitutional, where it contains the usual provisions of a general statute for the same purpose. *Watkins v. Holman*, 16 Pet. (U. S.) 25; *Florentine v. Barton*, 2 Wall. (U. S.) 210; *Dubois v. McLean*, 4 McLean (U. S.) 486; *Kibby v. Chitwood*, 4 T. B. Mon. (Ky.) 91; *Shehan v. Barnett*, 6 T. B. Mon. (Ky.) 594; *Gannett v. Leonard*, 47 Mo. 205.

1. Sale for Purpose of Distribution. — *Field v. Goldsby*, 28 Ala. 218; *Pettit v. Pettit*, 32 Ala. 288; *Hamlet v. Johnson*, 26 Ala. 557; *Wilson v. Matheson*, 17 Fla. 630; *Norman v. Olney*, 64 Mich. 553.

In Mississippi it is held that the statute which authorizes a sale of the realty of a decedent to insure a more equal division among the heirs means that the application shall be made by one of the heirs, and not by the administrator, because an administrator can be empowered by the court of probate to sell the realty of his intestate in those cases only where the power is expressly or by necessary implication given by statute. *Washington v. McCaughan*, 34 Miss. 304.

In Connecticut the Probate Court has no power to order a sale of real estate because of any difficulty of division between joint devisees. *Ford v. Kirk*, 41 Conn. 11.

2. Sale of Real Estate to Pay Legacies. — *In New Hampshire* all legacies are so far charged on land by statute that in default of personal estate the executor, as in the case of debts, may obtain a license from the judge of probate to sell so much of the real estate as shall be sufficient for their payment. *Probate Judge v. Kimball*, 12 N. H. 169.

In Pennsylvania the Orphans' Court cannot decree a sale for the payment of legacies, though they have been advanced by the executor. *Torrance v. Torrance*, 53 Pa. St. 505.

See also the title LEGACIES AND DEVICES.

3. Sale for Benefit of Estate. — *Gillenwaters v. Scott*, 62 Tex. 670.

In Poor v. Boyce, 12 Tex. 440, a sale of real estate was allowed on the ground alone that there would be a great deal of litigation and expense necessary in order to recover it for the estate.

A Comprehensive Statute in this respect is that of *California*, which provides that "when a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration or legacies, or when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate and those interested therein that the real estate, or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate upon the order of the court." Code Civ. Pro. Cal., § 1536, as amended by Statutes 1893, p. 212. Compare other local statutes.

A Special Statute authorizing an administrator to sell merely for purposes of speculation has been held unconstitutional, as in derogation of the rights of the heirs which became vested on the death of the ancestor. *Brenham v. Story*, 39 Cal. 179.

Sale to Save Personalty. — The *Maryland* Statutes of 1818 and 1819 provide that a sale of real estate may, with the consent of those to whom the realty has descended, be ordered to save the personalty from sale. *Waring v. Waring*, 2 Bland (Md.) 673.

4. Power Limited to Purposes of Statute. — *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643.

In Newcomb v. Smith, 5 Ohio 447, it was held that an administrator had no authority to apply for or to execute an order of sale for the support of the minor heirs and the widow, the guardian alone being authorized to make application for that purpose.

5. Jurisdiction — Probate Courts — *Arkansas.* — *Apel v. Kelsey*, 47 Ark. 413.

Maine. — *Lebroke v. Damon*, 89 Me. 113.

Missouri. — *Priest v. Spier*, 96 Mo. 111.

New Hampshire. — *Jenness v. Robinson*, 10 N. H. 215; *Lebanon Sav. Bank v. Waterman*, 65 N. H. 88.

Pennsylvania. — *Miskimins' Appeal*, 114 Pa. St. 530.

Wisconsin. — *Reynolds v. Schmidt*, 20 Wis. 374.

In Nebraska jurisdiction is given to the Dis-

this jurisdiction concurrently with courts having law and equity powers.¹ Under some of the statutes the court from which the letters testamentary or of administration issued has exclusive jurisdiction.² Under others that court has concurrent jurisdiction with the court of the county in which the land is situate,³ and under others again, the court of the county in which the land is situate has exclusive jurisdiction.⁴ But it is generally held that a court cannot make a valid order for the sale of land in another state.⁵ And until

trict Court, or the judge thereof at chambers. *Stack v. Royce*, 34 Neb. 833.

In South Carolina jurisdiction is not expressly conferred on the Probate Court to order a sale of real estate for the payment of debts on the personalty proving insufficient, but it is held to be implied from the provisions of the constitution of the state, art. 4, § 20, declaring that "a court of probate shall be established in each county, with jurisdiction in all matters testamentary and of administration, in business appertaining to minors and the allotment of dower, in cases of idiocy and lunacy and persons *non compos mentis*," and from those of the statute making the real estate of a decedent assets in the hands of his administrator for the payment of his debts, if the exigencies of the estate render that course necessary. *McNamee v. Waterbury*, 4 S. Car. 156; *Scruggs v. Foot*, 19 S. Car. 274; *Shaw v. Barksdale*, 25 S. Car. 204.

In Wisconsin the jurisdiction of the County Court, as a court of probate, is exclusive, unless the county judge is legally disqualified from acting, and in that event the Circuit Court may grant the license. *Morgan v. Hammett*, 23 Wis. 30.

1. **Concurrent Jurisdiction of Probate Courts and Superior Courts.**—*Hays v. McNealy*, 16 Fla. 409; *Johnson v. Futrell*, 86 N. Car. 122.

2. **Jurisdiction of Court Granting Letters.**—*The Arkansas Statute* provides that the application must be made to the Probate Court of that county in which the administration is pending. *Gordon v. Howell*, 35 Ark. 381; *Apel v. Kelsey*, 47 Ark. 413.

The Illinois Statute of 1829, which is still in force (Starr & Curt. Annot. Stat. Ill., 1896, c. 3, § 99), required the application to be made to the court of the county in which the administration was granted. Under the former statute (1827) an application to the court in which the land was situate was authorized. *Smith v. Hileman*, 2 Ill. 323.

The Nebraska Statute provides that in order to obtain a license to sell the real estate of a decedent the executor or administrator shall present a petition to the District Court from which he received his appointment. *Stack v. Royce*, 34 Neb. 833.

In New York the Surrogate's Court of the county from which the letters testamentary or of administration issued has exclusive jurisdiction to decree the sale of a decedent's real estate, wherever it may be situate within the limits of the state. *Long v. Olmsted*, 3 Dem. (N. Y.) 581.

The Pennsylvania Statute provides that whenever it shall satisfactorily appear to the executor or administrator of the estate of a decedent that the personal estate is insufficient to pay all just debts, etc., he shall proceed without delay, in the manner provided by law,

to sell, under the direction of the Orphans' Court having jurisdiction of his accounts, so much of the real estate as shall be necessary to supply the deficiency. *Spencer v. Jennings*, 114 Pa. St. 618, 123 Pa. St. 184.

The Wisconsin Statute providing that the application shall be made to "the Probate Court having jurisdiction" obviously refers, it is said, to the Probate Court of the county where the deceased resided at the time of his death, and which had jurisdiction of the estate. *Reynolds v. Schmidt*, 20 Wis. 374.

3. **Concurrent Jurisdiction of Court of County in Which Land Lies.**—In Indiana the statute providing for the settlement of decedents' estates authorizes the executor or administrator to petition "the court having jurisdiction" for an order to sell real estate for the payment of debts, but it does not define or indicate in what county the petition shall be filed, and it is held that the court which granted the letters and the court of the county in which the land lies have concurrent jurisdiction to order the sale. *Williamson v. Miles*, 25 Ind. 55; *Jones v. Levi*, 72 Ind. 586.

In Louisiana it is held that property situated in one parish may be sold in a succession case in another parish by the sheriff of the parish where the succession is opened, under the order of the Parish Court. *Alexander v. Bourdier*, 43 La. Ann. 321; *Chaney v. Gray*, 7 Rob. (La.) 144; *Pierce's Case*, 9 Martin (La.) 461.

4. **Exclusive Jurisdiction of Court Where Land Lies.**—In New Jersey the Orphans' Court of the county in which the land lies has exclusive jurisdiction to order a sale; but when the land to be sold is not in the county in which the letters testamentary or of administration were granted, the executor or administrator must obtain from the court which granted his letters an order directing him to apply to the Orphans' Court of the county in which the land is situate, and that on the production of an authenticated copy of such order, that court may order, decree, and confirm the sale and conveyance of any such lands. *Hopkins v. Meir*, (N. J. 1890) 19 Atl. Rep. 264.

In North Carolina the proceeding must be brought in the county where the lands lie; but if the decedent had lands in more than one county, then the proceeding may be brought in any county in which he left lands. *Nantahala Marble, etc., Co. v. Thomas*, 76 Fed. Rep. 59.

5. **Land in Another State.**—*Wilkinson v. Leland* 2 Pet. (U. S.) 627; *Leavens v. Butler*, 8 Port. (Ala.) 380; *Nowler v. Coit*, 1 Ohio 519, 13 Am. Dec. 640. Compare *Allen v. Shanks*, 90 Tenn. 359.

Statutory Ratification of Sale under Foreign Decree.—In *Wilkinson v. Leland*, 2 Pet. (U. S.) 627, a person died in New Hampshire, seized

letters of administration are granted or a will is admitted to probate, so as to bring the estate within the jurisdiction of the proper court, it has no power to order a sale.¹

b. COURTS OF EQUITY. — Courts of equity have no inherent jurisdiction to decree a sale of lands for the payment of debts,² but it is conferred on them in some states.³

3. Who May Apply for Order of Sale — *a. PERSONAL REPRESENTATIVES OF DECEDENT.* — Since the right to apply for an order of sale is given by statute, the application must be made by one of the persons named in the statute, generally the executor or an administrator having general powers,⁴

of real estate in Rhode Island. His executrix proved the will in New Hampshire, and obtained a license from a probate court in that state to sell the real estate of the testator for the payment of debts. She sold the real estate in Rhode Island for that purpose, and conveyed the same by deed, giving a bond to procure a confirmation of the conveyance by the legislature of Rhode Island. The proceeds of the sale were appropriated to pay the debts of the intestate. It was held that a subsequent act of the legislature of Rhode Island confirming the title of the purchasers was valid.

1. Jurisdiction Does Not Attach Until Grant of Letters or Probate of Will. — *Whitesides v. Barber*, 24 S. Car. 373.

2. Jurisdiction Not Inherent in Courts of Equity. — *Springfield v. Hurt*, 15 Fed. Rep. 307; *McPike v. Wells*, 54 Miss. 136; *Hogan v. Kavanaugh*, 138 N. Y. 422.

3. Jurisdiction Conferred on Courts of Equity — *United States.* — *Richardson v. Penicks*, 1 App. Cas. (D. C.) 261; *Smythe v. Henry*, 41 Fed. Rep. 705.

Georgia. — *McGowan v. Lufborrow*, 82 Ga. 523, 14 Am. St. Rep. 178.

Kentucky. — *Rodgers v. Rodgers*, (Ky. 1895) 31 S. W. Rep. 139.

Maryland. — *Wyse v. Smith*, 4 Gill & J. (Md.) 295; *Tyson v. Hollingsworth*, 1 Har. & J. (Md.) 469.

Tennessee. — *Allen v. Shanks*, 90 Tenn. 359; *Waddell v. Waddell*, (Tenn. 1897) 42 S. W. Rep. 46; *Davis v. Davis*, 87 Tenn. 200.

Wisconsin. — *German Bank v. Leyser*, 50 Wis. 258.

4. Who May Apply in General. — *The Oregon Statute* authorizes only the executor or the administrator to make the application. *Levy v. Riley*, 4 Oregon 392.

In *South Carolina* the right of the executor or administrator to apply to the court of probate for an order to sell real estate for the payment of debts is derived from the constitution of the state, art. 4, § 20, declaring that "a court of probate shall be established in each county, with jurisdiction in all matters testamentary and of administration, in business appertaining to minors and the allotment of dower, in cases of idiocy and lunacy and persons *non compos mentis*," and from the statute making the real estate of a decedent assets in the hands of his administrator for the payment of his debts, if the exigencies of the estate render that course necessary. *McNamee v. Waterbury*, 4 S. Car. 156. See also *Scruggs v. Foot*, 19 S. Car. 274; *Shaw v. Barksdale*, 25 S. Car. 204.

The *Texas Statute* of 1840 authorized the ex-

ecutor or administrator to make the application. *Lynch v. Baxter*, 4 Tex. 440, 51 Am. Dec. 735; *Miller v. Miller*, 10 Tex. 319.

The statute of 1843 conferred authority on creditors, legatees, etc., to petition for a sale, without imposing any duty on the executor or administrator, but this was held not to prevent him from making the application. *Allen v. Clark*, 21 Tex. 404; *Lee v. King*, 21 Tex. 577; *Alexander v. Maverick*, 18 Tex. 193, *overruling* the dictum of Lipscomb, J., in *Miller v. Miller*, 10 Tex. 319.

The present statute in Texas provides that "it shall be the duty of the executor or administrator, as soon as he shall ascertain that it is necessary, to apply to the county judge, at some regular term of the court, for an order to sell so much of the real estate belonging to the estate he represents as he shall think to be sufficient to pay the local charges and claims against the estate." Rev. Stat. Tex. 1895, art. 2122.

In *Virginia* it is held that an executor or administrator cannot maintain a proceeding to sell land for the payment of a decedent's debts in the absence of any power given him by the decedent's will. The creditors must bring a creditors' bill to have the real estate sold. This decision is under the statute which provides that "all real estate of any person who may hereafter die, as to which he may die intestate, or which, though he die testate, shall not by his will be charged with or devised subject to the payment of his debts, or which may remain after satisfying the debts with which it may be so charged, or subject to which it may be so devised, shall be assets for the payment of the decedent's debts, and all lawful demands against his estate, in the order in which the personal estate of a decedent is directed to be applied," and that "such assets, so far as they may be in the hands of the personal representative of the decedent, may be administered by the court in the office whereof there is or may be filed, under the one hundred and twenty-first chapter, a report of the accounts of such representative, and of the debts and demands against the decedent's estate, or they may in any case be administered by a court of equity." *Peirce v. Graham*, 85 Va. 227, [*citing* *McCandlish v. Keen*, 13 Gratt. (Va.) 630; *Brewis v. Lawson*, 76 Va. 41; *Litterall v. Jackson*, 80 Va. 604]. See also *Beckham v. Duncan*, (Va. 1889) 9 S. E. Rep. 1002; *Daingerfield v. Smith*, 83 Va. 81; *Tennent v. Patton*, 6 Leigh (Va.) 196.

The *West Virginia Statute* (Code, c. 56, § 7, authorizes either the personal representative or a creditor to bring suit to sell a decedent's

but not a special administrator.¹

b. CREDITORS. — In some jurisdictions creditors may obtain an order from the probate court, or a decree in equity, compelling the personal representative to apply for an order of sale, if he fails to proceed of his own accord,² or they may recover the amount of their claims in an action against the executor or administrator and the sureties on his bond.³ In other jurisdictions the creditors are authorized by statute to make the application themselves, in the event of the failure or refusal of the personal representative to apply.⁴

c. OTHER PERSONS. — The statutes of some states authorize other persons than creditors and personal representatives to apply for an order for the sale of a decedent's real estate.⁵

4. Time for Making Application. — **a. STATUTORY LIMITATION.** — In some jurisdictions the statutes limit the time within which, after the will is proved or letters of administration are granted, an application for the sale of a decedent's real estate may be made,⁶ and it is ordinarily sufficient if the application

real estate, and provides that if the personal representative does not sue within six months after his qualification, then the creditor may sue; and it is held that this statute precludes the representative from suing after the six months have elapsed. *Reinhardt v. Reinhardt*, 21 W. Va. 76.

An Executor Who Is Also the Residuary Legatee, and who as such has given a bond conditioned to pay debts and legacies, cannot obtain a license to sell the real estate of his testator for the payment of debts and charges of administration. *Thayer v. Winchester*, 133 Mass. 447.

The Validity of the Appointment of the administrator cannot be questioned on an application by him for leave to sell the decedent's real estate. *Waldow v. Beemer*, 45 Neb. 626.

1. Special Administrator Cannot Apply for Sale of Land. — *Long v. Burnett*, 13 Iowa 28, 81 Am. Dec. 420.

2. Remedies of Creditors — Compelling Representative to Apply. — *Stratton v. McCandliss*, 32 Kan. 512; *Fike v. Green*, 64 N. Car. 665; *Pelletier v. Saunders*, 67 N. Car. 261; *Clement v. Cozart*, 109 N. Car. 173, 112 N. Car. 412; *Kitchenman's Estate*, 15 Phila. (Pa.) 519, 39 Leg. Int. (Pa.) 90. But see *Wilkinson's Estate*, 4 Luz. Leg. Reg. (Pa.) 119.

Bill in Equity Against Representative. — *Wilson v. Bynum*, 92 N. Car. 717.

A Foreign Creditor may file a bill against the personal representative to compel him to obtain an order to sell real estate, though there is realty in the state where such creditor resides. *Bird v. Key*, 8 Baxt. (Tenn.) 366.

3. Failure of Representative to Apply for Order of Sale — Liability on Bond. — See *supra*, this title, *Administration Bonds — Acts and Functions Covered by Bond*.

4. Creditors May Apply for a Sale of Real Estate — *Arkansas*. — *Williamson v. Furbush*, 31 Ark. 539; *Brown v. Hanauer*, 48 Ark. 277.

California. — *Matter of Coutts*, 87 Cal. 480.

Indiana. — *Whisnand v. Small*, 65 Ind. 120.

Louisiana. — *Dubuch v. Wildermuth*, 3 La. Ann. 407.

North Carolina. — *Wilson v. Pearson*, 102 N. Car. 299.

Pennsylvania. — *Erie Dime Sav., etc., Co. v. Vincent*, 105 Pa. St. 315.

South Carolina. — *McNamee v. Waterbury*,

4 S. Car. 156; *Shaw v. Barksdale*, 25 S. Car. 204; *Scruggs v. Foot*, 19 S. Car. 274.

West Virginia. — *Reinhardt v. Reinhardt*, 21 W. Va. 76.

Who Are Creditors — Claim for Funeral Expenses. — In *New York* it is held that a person who has a claim for funeral expenses is a creditor of the estate and not of the decedent, and cannot therefore apply for an order of sale for the payment of his claim. *Van Orden v. Krouse*, 89 Hun (N. Y.) 1; *Matter of Corwin*, 10 Misc. Rep. (N. Y. Surrogate Ct.) 196.

Creditors of the Executor whose claims are for services rendered to the estate during administration, as well as creditors of the decedent, are included in the *California* statute providing that "if the executor or administrator neglects to apply for an order of sale when it is necessary, any person may make application therefor, in the same manner as the executor or administrator." *Matter of Coutts*, 87 Cal. 480.

A Judgment Creditor, in *New York*, cannot apply for the sale of the land on which his judgment is a lien. *Butler v. Emmett*, 8 Paige (N. Y.) 12. But see *Code Civ. Pro. N. Y.*, 1898, § 2750, enumerating, as the persons who may apply for an order of sale, *inter alia*, "a person holding a judgment lien."

If the Administrator Has Paid Debts in Excess of Assets received, he may procure a sale of real estate to reimburse himself. *Pea v. Waggoner*, 5 Hayw. (Tenn.) 242. Compare *Sanders v. Sanders*, 2 Dev. Eq. (17 N. Car.) 262; *Williams v. Williams*, 2 Dev. Eq. (17 N. Car.) 69, 22 Am. Dec. 729, holding that he was entitled to reimbursement out of the real estate where he was compelled, without neglect on his part, to pay debts in excess of the assets received.

A Prima Facie Showing that one has a claim against the estate of a decedent is sufficient to enable him to maintain a proceeding for a sale of the real estate. *Martin's Estate*, 6 Pa. Dist. Rep. 58.

5. See various local codes and statutes in the United States.

A Life Tenant is not entitled to have the property sold for the payment of benefits assessed against it for public improvements, if the remaindermen object to the sale. *Van Dusen's Estate*, 11 Pa. Co. Ct. Rep. 201.

6. Time for Making Application Statutory Limitation. — In *New York* the application for

is made within the time prescribed, though the citation is returnable later;¹ but the right to an order of sale may be lost by delay in prosecuting the proceeding.²

b. RULE IN ABSENCE OF STATUTORY LIMITATION. — If no time is fixed by statute, the courts generally hold that it must be made within a reasonable time, to be determined by the court under the circumstances of the case; and after such time has elapsed leave to sell will not be granted, whether the property is still in the hands of the heirs or devisees or has been sold and conveyed by them to third persons.³ Some courts have adopted a period, by analogy

leave to sell must be made within three years after the letters of administration were granted. *Matter of Bingham*, 127 N. Y. 296; *Matter of Dodge*, 105 N. Y. 585; *Fitch v. Whitbeck*, 2 Barb. Ch. (N. Y.) 161; *Cornwall's Estate*, Tuck. (N. Y.) 250; *Ferguson v. Broome*, 1 Bradf. (N. Y.) 10; *Butler v. Emmett*, 8 Paige (N. Y.) 12; *Mead v. Jenkins*, 4 Redf. (N. Y.) 369; *U. S. Life Ins. Co. v. Jordan*, 5 Redf. (N. Y.) 207.

In *Indiana* the statute limiting to fifteen years all actions not limited by any other statute is held to apply to a proceeding to sell a decedent's real estate. *Witz v. Dale*, 129 Ind. 120; *Scherer v. Ingerman*, 110 Ind. 428; *Falley v. Gribbling*, 128 Ind. 110; *Cole v. Lafontaine*, 84 Ind. 446.

In *Michigan* a proceeding to sell a decedent's real estate for the payment of his debts must be brought within six years after his death. *McDaniels v. Walker*, 44 Mich. 93.

In *Wisconsin* the power of an administrator to obtain license and sell real estate of the deceased is limited to three years from his death. *Fisk v. Jenewein*, 75 Wis. 254.

In *New Jersey* an order of sale must be obtained within one year after the death of the decedent, in order to cut off any alienation or incumbrance by the heirs or devisees. If the order is not obtained within that time, a sale may nevertheless be made as against the heirs or devisees, but only such interest or title as they had at the time when the order was made can be sold under it. *Bockover v. Ayres*, 22 N. J. Eq. 13; *Skillman v. Van Pelt*, 1 N. J. Eq. 511; *Den v. Hunt*, 11 N. J. L. 1.

Compare statutes in other jurisdictions.

When Time Begins to Run. — The time limited by the *New York* statute begins to run from the time of the original granting of letters of administration, and not, in case of a change of administrators, from the time of granting letters to the one who made the sale. *Slocum v. English*, 62 N. Y. 494.

The Time that an Action Was Pending against the executor for the debt for which a sale is asked is held not to be included in the three years within which the statute requires the application for an order of sale to be made. *Matter of Bingham*, 127 N. Y. 296.

Until Letters Are Granted or a will is admitted to probate, the court has no authority to order a sale of land to pay debts. *Whitesides v. Barber*, 24 S. Car. 373.

Who Are Protected. — It is held in *New York* that the statutory limitation is designed only for the protection of *bona fide* purchasers, and does not apply so long as the land remains in the hands of the heirs or devisees. *Mead v. Jenkins*, 4 Redf. (N. Y.) 369; *Matter of Calla-*

ghan, 69 Hun (N. Y.) 161; *Slocum v. English*, 2 Hun (N. Y.) 78.

1. Citation Need Not Be Returnable Within Statutory Time. — *Topping's Estate*, 18 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 115.

2. Delay in Prosecuting Proceeding. — In *Allen v. Sanford*, (Supreme Ct.) 8 N. Y. Supp. 182, it was held that a failure to prosecute the proceeding for nine years after the petition was filed would defeat the right to an order of sale.

In *Montgomery's Estate*, 60 Cal. 645, an order of sale was duly granted, but for sufficient reasons no sale was made for four years, and the administrator then presented a second application for leave to sell. It was held that the second application in effect was a continuation of the proceedings had under the first petition, and that the statute of limitations did not apply.

3. Rule that Application Must Be Within Reasonable Time — *Arkansas*. — *Mays v. Rogers*, 37 Ark. 155; *Killough v. Hinton*, 54 Ark. 65, 26 Am. St. Rep. 19; *Roth v. Holland*, 56 Ark. 633; *Brogan v. Brogan*, 63 Ark. 405.

California. — *Wingerter v. Wingerter*, 71 Cal. 105; *Crosby's Estate*, 55 Cal. 574; *Matter of Arguello*, 85 Cal. 151.

Connecticut. — *Wooster v. Hunts Lyman Iron Co.*, 38 Conn. 261; *Griswold v. Bigelow*, 6 Conn. 258; *Ricard v. Williams*, 7 Wheat. (U. S.) 115.

Illinois. — *Dorman v. Lane*, 6 Ill. 143; *Unknown Heirs v. Baker*, 23 Ill. 484; *Rosenthal v. Renick*, 44 Ill. 202; *Bursen v. Goodspeed*, 60 Ill. 277; *Wolf v. Ogden*, 66 Ill. 224; *Bishop v. O'Conner*, 69 Ill. 431; *McKean v. Vick*, 108 Ill. 373; *McCoy v. Morrow*, 18 Ill. 519.

Iowa. — *McCrary v. Tasker*, 41 Iowa 255; *Wilson v. Stanton*, 58 Iowa 404; *Creswell v. Slack*, 68 Iowa 110; *Schlarb v. Holderbaum*, 80 Iowa 394.

Maine. — *Nowell v. Nowell*, 8 Me. 220; *Nowell v. Bragdon*, 14 Me. 320; *Smith v. Dutton*, 16 Me. 308.

Minnesota. — *State v. Probate Ct.*, 40 Minn. 296; *Culver v. Hardenbergh*, 37 Minn. 225.

Mississippi. — *Ferguson v. Scott*, 49 Miss. 500; *Yandell v. Pugh*, 53 Miss. 301.

Missouri. — *Gunby v. Brown*, 86 Mo. 253; *Barlow v. Clark*, 67 Mo. App. 340; *Weinerth v. Frendley*, 39 Mo. App. 333.

New Hampshire. — *Hall v. Woodman*, 49 N. H. 295; *Hatch v. Kelly*, 63 N. H. 29.

New Jersey. — *Liddel v. McVickar*, 11 N. J. L. 44, 19 Am. Dec. 369.

New York. — *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360; *Jackson v. Robinson*, 4 Wend. (N. Y.) 436. Since this decision the rule in *New York* has been changed by statute requiring the application to be made within three years

to the statute of limitations, or otherwise, after which an application will not be entertained,¹ unless special circumstances are shown which excuse the delay, and no equities of third persons intervene.²

after the grant of letters. See *supra*, this section, *Statutory Limitation*.

Pennsylvania. — Bindley's Appeal, 69 Pa. St. 295.

Rhode Island. — Mowry v. Robinson, 12 R. I. 152.

South Carolina. — Gregory v. Rhoden, 24 S. Car. 90.

Tennessee. — Raht v. Meek, 89 Tenn. 274; Carrigan v. Rowell, 96 Tenn. 185.

It is for the Court to Determine, in sound discretion, what is a reasonable time under the circumstances of the case, and to determine when the executor or administrator first discovered, or had grounds to suspect, the insufficiency of the personal estate, and whether he proceeded according to the requirements of the statute. Matter of Godfrey, 4 Mich. 308.

If a Sale Is Ordered, its validity is not affected by the fact that the application was not made within a reasonable time, though it would have been properly denied on that ground. Jackson v. Robinson, 4 Wend. (N. Y.) 436.

Settlement of the Administration is not necessary before the court can order a sale to pay claims held by the sureties on the administrator's bond, though a sale should not be ordered to pay such claims if the administrator is indebted to the estate. The court can determine from the administrator's accounts, before the administration is settled, whether the administrator is indebted to the estate. Deans v. Wilcoxson, 25 Fla. 980.

1. In Connecticut the period limited for writs of entry is adopted. Wooster v. Hunts Lyman Iron Co., 38 Conn. 261; Ricard v. Williams, 7 Wheat. (U. S.) 59.

In Illinois, by analogy to the statute of limitations relating to the lien of judgments, the period of seven years has been adopted as the proper time within which the application should be made. This may be regarded as the general rule. But if the delay is satisfactorily explained, the mere lapse of time will not bar an application for leave to sell land to pay debts. Judd v. Ross, 146 Ill. 40; McKean v. Vick, 108 Ill. 373; Furlong v. Riley, 103 Ill. 628; Moore v. Ellsworth, 51 Ill. 308; Reed v. Colby, 89 Ill. 104; Bishop v. O'Conner, 69 Ill. 431; Wolf v. Ogden, 66 Ill. 224; Bursen v. Goodspeed, 60 Ill. 277.

In Maine, in consequence of the limitation of suits against administrators to four years from the time of accepting the trust, if notice be given in manner provided by law, the courts generally, but not under all circumstances, refuse to grant license, unless application be made within a reasonable time after the termination of the four years. Smith v. Dutton, 16 Me. 308.

In Minnesota a period of ten years is adopted by analogy to the statute limiting the lien of judgments to that time. State v. Probate Ct., 40 Minn. 296. Formerly the limitation was fixed by statute in Minnesota at three years from the date of the decedent's death. Matter of Ackerman, 33 Minn. 54; Gates v. Shugrue, 35 Minn. 392.

2. Excuses for Delay — Pendency of Litigation.

— Litigation of claims against the estate excuse delay in applying for an order to sell the realty, because until the termination of the litigation the administrator would be wholly uncertain to what extent it would be necessary to sell the real estate. Moore v. Ellsworth, 51 Ill. 308. So, too, delay is excused by the pendency of a suit to remove a cloud on the decedent's title to the land, Macey v. Stark, 116 Mo. 481; Macey v. Pitillo, (Mo. 1893) 21 S. W. Rep. 1094; or by an injunction against the sale, Rogers v. Johnson, 125 Mo. 202.

Dealings with the Heirs. — A promise by the heirs to pay the debts after the termination of a life estate to which the land was subject is a sufficient excuse for delay in applying for a sale until that time. McCollister v. King, 10 Ill. App. 243.

But if the heir was an infant, and he conveyed the land in trust to secure the ancestor's debt, the deed of trust being given under an agreement with the creditor that it should be subject to ratification by the heir on his becoming of age, he is not thereby estopped to plead the statute of limitations in a proceeding by the creditor as administrator of the estate to sell the land for the payment of the debt after the heir has disaffirmed the transaction. Warren v. Hearne, 82 Ala. 554.

Delay for Benefit of Estate. — A showing that an earlier sale would have been at a great sacrifice will excuse delay by an administrator in applying for leave to sell. Conger v. Cook, 56 Iowa 117.

The fact that the land could not be sold advantageously because it was in the possession of the widow under an assignment as her dower excuses a delay until the widow's death in applying for leave to sell. Killough v. Hinton, 54 Ark. 65, 25 Am. St. Rep. 19; Bursen v. Goodspeed, 60 Ill. 280; Judd v. Ross, 146 Ill. 40.

So, too, where the delay was attendant on efforts to sell land in another state, in order that the necessity of selling the land in the state of the decedent's domicile might be avoided. Reed v. Reed, 94 Iowa 569.

Delay in Grant of Administration. — The delay of a creditor in applying for a sale of his deceased debtor's real estate is excused by the fact that no administrator had been appointed and that during the whole period of delay the person opposing the application had a prior right to a grant of letters. Matter of Howard, 11 Misc. Rep. (N. Y. Surrogate Ct.) 224.

In Lawrence's Appeal, 49 Conn. 411, the decedent, a citizen of New York, left real estate in Connecticut, where he also owed debts. In 1877, five years after the death of the decedent, the Connecticut creditors presented their claims to the executors in New York, and payment was refused. In 1880 they notified the acting executor that they would present a copy of the decedent's will for probate in Connecticut and ask for the appointment of an administrator with the will annexed. This was accordingly done, and leave was granted to the administrator with the will

5. Preventing Exercise of Power — a. PAYING OR SECURING DEBTS. — The power of the court to order a sale for the payment of debts, or the execution of an order made for that purpose, may be intercepted at any time by the payment of such debts by the heirs or devisees, or by giving bond with sureties to pay the debts.¹

b. POWER OF SALE IN WILL. — In some jurisdictions it is held that a power of sale given to the executor by the will deprives the court of its statutory authority to order a sale on the application of the executor or of an administrator with the will annexed, in those jurisdictions where such an administrator succeeds to a power of sale given to the executor; though a contrary rule is maintained by some authorities,² and sometimes the

annexed to sell the decedent's real estate in Connecticut. In answer to the contention that the creditors had, by their delay, forfeited their right to have the real estate sold, the court said: "The testator having left real estate in this state, his creditors here had the right to have it applied by his representative to the payment of their claims, and were never under any legal obligation to present them in the foreign forum of principal executorship. It was also their right to presume that the executor would voluntarily come into this jurisdiction, prove the will, give them the opportunity here to present their claims, and if approved to receive payment from the estate here; and upon this presumption, if they were willing to assume the risk of embarrassment in securing their rights because of intervening rights in others, they might in such waiting exhaust nearly the entire statutory limitation for proving the will here without subjecting themselves to a forfeiture of rights by laches."

If the delay of the creditors in applying for the appointment of the administrator has rendered a sale inequitable, it will be denied. It was so held where the creditors of a decedent delayed for seven years to apply for letters of administration, their neglect being unexplained, and in the meantime the personality, which was originally sufficient to pay all the debts, was spent by the heirs, and debts were incurred by them for which their creditors levied on the land descended. *Hatch v. Kelly*, 63 N. H. 29.

Delay in Settlement of Estate. — If the settlement of the estate is delayed by causes beyond the control of the court or the administrator, laches is not to be imputed to the administrator in not applying for an order of sale within that time. *Larzelere v. Starkweather*, 33 Mich. 96, *distinguishing Hoffman v. Beard*, 32 Mich. 219. See also *Matter of Arguello*, 85 Cal. 151; *Beniteau v. Dodsley*, 88 Mich. 152.

1. Preventing Sale — Payment of Amount of Debts. — *Bozza v. Rowe*, 30 Ill. 198, 83 Am. Dec. 184; *Hearsey v. Bates*, 36 La. Ann. 300.

Bond for Payment of Debts. — *In re Bagger*, 78 Iowa 171; *Jenness v. Robinson*, 10 N. H. 215; *Davison v. Burgess*, 31 Ohio St. 78.

Only Sales for Payment of Debts can be prevented by giving bond. Sales to carry out the will of a testator, or to make partition, cannot be so defeated. *Clarity v. Sheridan*, 91 Iowa 304; *In re Bagger*, 78 Iowa 171.

All the Heirs or Devisees need not join in the bond. The requirement of the statute is satisfied if some of them execute a bond with

sufficient sureties. *Jenness v. Robinson*, 10 N. H. 215.

Conditional Tender of Debts. — A tender of the debt by the heirs, coupled with a condition that the creditors assign the debt to them, will not prevent an order of sale. *Weill v. Clark*, 9 Oregon 387.

Who May Prevent Sale. — A person who had made an executory contract with the decedent for the purchase of standing timber has no interest in the land, and therefore has no right to pay the debts of the decedent so as to prevent a sale of the land. *Fletcher v. Livingston*, 153 Mass. 388.

Opportunity to Be Given to Heirs. — In *West Virginia* it is held that before the court can decree the sale of lands of a decedent for the payment of his debts, it must give the heirs reasonable time to pay the debts, and thus avoid the sale. *Hart v. Hart*, 31 W. Va. 688.

Bond Given After Order of Sale. — In *Davison v. Burgess*, 31 Ohio St. 78, it was held that, under the statute providing that bond might be given before an order of sale should be made, and that the effect should be to prevent the making of an order of sale, a bond given after a sale had been ordered was nevertheless valid and enforceable against the obligors.

2. Power of Sale in Will defeats the authority of the court to order a sale under the statute on the application of the executor. *Wilson v. Holt*, 83 Ala. 528, 3 Am. St. Rep. 768; *Brock v. Frank*, 51 Ala. 85; *Alabama Conference M. E. Church South v. Price*, 42 Ala. 49; *Wiley v. Wiley*, Phil. L. (61 N. Car.) 131. See *contra*, *Robinson v. Redman*, 2 Duv. (Ky.) 82; *McLean's Succession*, 12 La. Ann. 222.

If the will authorized the executor to sell the real estate for the purpose of division among the heirs, the Probate Court has no authority to order a sale for that purpose under the statute. *McCollum v. McCollum*, 33 Ala. 711.

Application by Administrator with Will Annexed. — Where an administrator with the will annexed succeeds to a power of sale given by the will to the executor, proceeding by such administrator for an order granting leave to sell cannot be maintained. *Wilson v. Holt*, 83 Ala. 528, 3 Am. St. Rep. 768; *Rollins v. Rice*, 59 N. H. 493; *Matter of Gantert*, 136 N. Y. 106.

In California a question was raised as to whether an order of sale was not necessary notwithstanding a power of sale given by the will, and it was held that the statute declaring that "no sale of any property of an estate shall

matter is regulated by statute.¹

c. OTHER MATTERS AFFECTING EXERCISE OF POWER. — It has been held that the granting of a license to sell real estate is within the discretion of the court, to be exercised on equitable principles.² Accordingly, under some circumstances the court may postpone making an order of sale, as where the pendency of another proceeding renders it uncertain what land may be offered for sale,³ or a sale may be enjoined, if grounds of equitable interference exist;⁴ and the pendency of an appeal from the order of sale may stay its operation.⁵ Then, again, the creditors, by their conduct, may lose their right to have the real estate sold;⁶ but they cannot be prejudiced by any acts

be valid unless made under order of the Probate Court" applies only to sales in cases not provided for by the will. *Payne v. Payne*, 18 Cal. 291 [cited in *Fallon v. Butler*, 21 Cal. 31, 81 Am. Dec. 140; *White v. Moses*, 21 Cal. 44; *Larco v. Casaneuava*, 30 Cal. 567].

In Maryland the power of the court to order a sale is affected by the provisions of the will only when it expressly gives power to the executor to sell "without application to the Orphans' Court." *Brooks v. Bergner*, 83 Md. 352.

If Land Is Expressly Charged with Debts or is devised subject to the payment of debts, it is held that a license to sell will not be granted. *Davis v. Hoover*, 112 Ind. 423; *Matter of Rosenfield*, 5 Dem. (N. Y.) 251; *Smith v. Coup*, 6 Dem. (N. Y.) 45.

But if the lands so charged are not sufficient to pay the debts, the court may order other lands left by the decedent to be sold. *Duncan v. Gainey*, 108 Ind. 579; *Kinney v. Knoebel*, 51 Ill. 112.

1. The New York Statute authorizes the Surrogate's Court to order a sale of real estate when it is not devised subject to an express charge of debts or is not subject to a valid power of sale for the payment of debts. *Matter of Heroy*, 67 Hun (N. Y.) 13, *sub nom.* *Bell's Estate*, 23 Civ. Pro. Rep. (N. Y. Supreme Ct.) 128; *In re Duffy*, (Supreme Ct.) 18 N. Y. Supp. 724; *Dennis v. Jones*, 1 Dem. (N. Y.) 80.

In *Matter of Heroy*, 67 Hun (N. Y.) 13, *sub nom.* *Bell's Estate*, 23 Civ. Pro. Rep. (N. Y. Supreme Ct.) 128, Mr. Justice O'Brien reviews the earlier cases on the subject, and reaches the conclusion that when the real estate is not "devised expressly charged with the payment" of debts, but is claimed to be subject to "a valid power of sale" for their payment, the test as to whether the power of sale operates to deprive the Surrogate's Court of jurisdiction to order a sale is not whether the power of sale in the will could be exercised for the payment of debts, but whether there is a power of sale in the will which must be exercised for the payment of debts. Continuing he says: "Therefore, though a power of sale may be general and unrestricted, which, if exercised, might render the proceeds of real estate, if an intention to that effect could be reasonably inferred from the will, subject to be applied to the payment of debts; such a discretionary power of sale, unexercised, and in the absence of any provision in the will for the payment of debts, or an expression of intention from which it could be inferred that the real estate must be sold for the payment thereof, is not sufficient to prevent creditors from enforcing payment

of their debt by compelling a sale of the real estate where all the jurisdictional facts are shown, and all the proceedings have been regular and in accordance with the code, as was concededly the position of the petitioners here."

Other Cases in which this question is considered are: *Coogan v. Ockershausen*, 11 Civ. Pro. Rep. (N. Y. Super. Ct.) 315; *Carman v. Brown*, 4 Dem. (N. Y.) 96; *Matter of Davids*, 5 Dem. (N. Y.) 14; *Rosenfield's Estate*, 10 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 202; *Matter of Dodge*, 40 Hun (N. Y.) 443.

2. Discretion of Court. — "It has often been decided that application for a license to sell real estate to enable the administrator to pay debts is an application to the discretion of the court, to be decided upon equitable principles, regard being had to all the circumstances of the case." *Livermore v. Haven*, 23 Pick. (Mass.) 116 [citing *Scott v. Hancock*, 13 Mass. 162; *Allen's Petition*, 15 Mass. 58].

3. Postponing Order of Sale. — In *Meadows v. Meadows*, 78 Ala. 240, it was held that action on an application to sell land should be deferred until the confirmation of the report of commissioners who had theretofore been appointed to lay off dower to the widow and who had made their report of allotment, because otherwise it could not be determined what land would be sold.

4. Injunction Against Sale. — If the recovery of the judgment or the allowance of the claim to be paid out of the proceeds of the sale was procured by fraud, the sale will be enjoined. *Rogers v. Wilson*, 13 Ark. 507; *Bienvenu v. Parker*, 30 La. Ann. 160; *Penn v. Penn*, 39 Mo. App. 282.

So, too, a sale for a debt which is barred by the statute of limitations may be enjoined at the suit of a grantee of the devise. *Butler v. Johnson*, 111 N. Y. 204, *affirming* 41 Hun (N. Y.) 206.

The Fact that the Debt Is Small and the heirs wish a division in kind will not justify a court of equity in interfering with the sale by injunction. *Johnson v. Holliday*, 68 Ga. 81.

5. Appeal from Order of Sale. — *Francis v. Daley*, 150 Mass. 381.

6. Loss of Right by Creditors. — In *Phelps v. Harris*, 61 Miss. 705, a creditor, with the consent of all concerned, took possession of the personalty, which was sufficient to pay all the debts, and undertook to satisfy his claim by the use of the personalty, instead of selling it as he had the right to do. The property having been destroyed while in the creditor's possession, it was held that his representatives could not have the land sold for the payment

of or agreements between the next of kin and heirs, though one of them is the personal representative of the decedent,¹ or by any disposition that the decedent may have made of his property, either by will, or, in some jurisdictions, by conveyances intended to defraud his creditors,² or by alienation by the heir or devisee within the period allowed by law for an application for an order of sale,³ or by the pendency of a suit to foreclose a mortgage on the land⁴ or for partition among the heirs.⁵

6. Requisites to Exercise of Power—*a. EXISTENCE OF CLAIMS AGAINST ESTATE*—(1) *For What Claims Sale May Be Ordered*—(a) **What Constitute Claims Against Estate in General.**—The question as to what constitute claims against the estate of a decedent has been treated in another part of this work.⁶

(b) **Debts Existing in Lifetime of Decedent.**—Local statutes generally prescribe what debts or claims authorize an order for the sale of a decedent's real estate.

of the debt. The principle here applied is that it would be inequitable to hold that a creditor, who, instead of enforcing his legal right, had made an arrangement with respect to the property of the estate to which he had the right to resort for payment, and relied on that for payment, instead of enforcing his legal remedy, could, when his own arrangement failed, afterwards fall back on his original legal right.

Laches of Creditor.—“Where the creditors, through their own laches, have failed to obtain payment of their debts out of funds first applicable to that object, such license ought not to be granted to the injury of the heir.” *Livermore v. Haven*, 23 Pick. (Mass.) 116.

Claims Barred by Limitation.—See *infra*, this section, *For What Claims Sale May Be Ordered*—*Debts Barred by Statute of Limitations.*

1. Occupation of Real Estate by Administrator.—In *Palmer v. Palmer*, 13 Gray (Mass.) 326, an application by the administrators for a license to sell real estate for the payment of the decedent's debts was resisted on the ground that one of the administrators had been in possession of the property since the decedent's death, receiving the rents and profits without accounting for them. The administrator in possession being one of the heirs of the decedent, it was held that his occupation was not a bar to the petition for leave to sell. The court said: “Strictly, an administrator has nothing to do with the real estate of his intestate, except to execute the power to sell it for the payment of debts, when it is necessary to do so, and he has obtained the requisite authority. But as, in practice, it is sometimes found that by an arrangement with the heirs he takes the profits of the whole or some part of it for the benefit of the estate, the statute requires him to account for what he may so receive, as assets in the course of administration. In the report in this case we do not find that any such agreement or arrangement was made. But whether it was made or not is a fact to be decided, if in dispute, upon the settlement of their administration account by the petitioners. If they have thus occupied the estate, in their capacity of administrators, they must account for the rents and profits which they have received; but if one of the heirs has been in possession, the fact that he is also one of the administrators will not impose upon him the obligation to account for profits which any of the heirs may rightfully take and retain, so long as their

title to the estate is not divested by a sale under authority of law.”

In *Proctor v. Proctor*, 105 N. Car. 222, the administrator applied for a license to sell real estate for the payment of debts. The application was resisted on the ground that the administrator had received the rents and profits of the real estate with which he was chargeable, and that therefore the personality was sufficient for the payment of the debts. The facts in regard to the receipt of the rents and profits, as alleged in the answer, were that the administrator, who was one of the heirs of his intestate, entered into an agreement with the defendants, the other heirs, whereby he obliged himself to live upon and take the rents of the land, support the surviving widow of the intestate, and pay the debts of the latter, and that he had received rents sufficient to pay the debts. The court held that such agreement did not affect the case, because the administrator did not receive the rents and profits in his representative capacity, and the creditors were entitled to have their debts paid without reference to and unaffected by agreements, whether for convenience or otherwise, between and among the next of kin and heirs.

2. Devise of Land Does Not Prevent Sale.—See *infra*, this section, *Property or Interests Subject to Sale*—*In General.*

Fraudulent Conveyances—Effect on Power to Order Sale.—See *infra*, this section, *Property or Interests Subject to Sale*—*Land Conveyed by Decedent in Fraud of Creditors.*

3. Alienation by Heir or Devisee.—See *infra*, this section, *Property or Interests Subject to Sale*—*Land Aliened by Heir or Devisee.*

4. Pendency of Foreclosure Suit.—See *infra*, this section, *Property or Interests Subject to Sale*—*Encumbered Property.*

5. Partition Suit Does Not Prevent Sale.—*Mead v. Jenkins*, 4 Redf. (N. Y.) 369.

In *Pennsylvania* the rule is otherwise under the statute providing that a decree for sale in partition shall discharge all liens on the property, including the decedent's debts. *Kennedy's Estate*, 17 Phila. (Pa.) 507, 42 Leg. Int. (Pa.) 446.

Partition by Heirs.—A partition by the heirs, made under an agreement among themselves, will not defeat a proceeding by the administrator to obtain an order of sale. *Rice v. Dickerman*, 47 Minn. 527.

6. What Constitute Claims Against Decedent's Estate.—See the title **DEBTS OF DECEDENTS**, vol. 8, p. 1007.

In some jurisdictions it is held that the statutes contemplate only debts which were in existence at the time of the decedent's death, and not any incurred by his executor or administrator.¹ But it is not necessary, in order to authorize a sale, that the debts should be due and payable at the time of death.²

(c) **Expenses of Administration, Costs and Commissions.** — In those jurisdictions where the power of sale is restricted to the purpose of paying debts which existed at the time of the decedent's death, no sale can be ordered for the payment of expenses of administration,³ costs or expenses incurred in litigation by the executor or administrator,⁴ or his commissions.⁵ In some jurisdictions, how-

1. Existence of Debts in Lifetime of Decedent Required. — *United States.* — *Dubois v. McLean*, 4 McLean (U. S.) 486.

Alabama. — *Beadle v. Steele*, 86 Ala. 413; *Owens v. Childs*, 58 Ala. 113.

Arkansas. — *Mays v. Rogers*, 52 Ark. 320.

Illinois. — *Walker v. Diehl*, 79 Ill. 473; *Fitzgerald v. Glancy*, 49 Ill. 465.

Louisiana. — *Burton v. Brugier*, 30 La. Ann. 478.

Maryland. — *Carnan v. Turner*, 6 Har. & J. (Md.) 65.

Massachusetts. — *Dean v. Dean*, 3 Mass. 258.

Mississippi. — *Moore v. Ware*, 51 Miss. 206; *Hollman v. Bennett*, 44 Miss. 322.

Missouri. — *Presbyterian Church v. McElhinney*, 61 Mo. 540; *Sturgeon v. Schaumburg*, 40 Mo. 482, 93 Am. Dec. 311; *Farrar v. Dean*, 24 Mo. 16; *Aubuchon v. Lory*, 23 Mo. 99.

The rule stated in the text was applied under the *Maryland* statute of 1785. *Carey v. Dennis*, 13 Md. 1. The present statute in Maryland provides for a sale to pay "the just debts of and claims against the decedent." Pub. Gen. Laws Md. 1888, art. 93, § 274.

Decedent's Infant Children. — A claim of an administratrix who is also the mother of the decedent's infant children, for their maintenance, is not a claim against the decedent for which his real estate may be sold under the statute. *Woodruff v. Cook*, 2 Edw. Ch. (N. Y.) 259.

A Legacy given in consideration of services rendered by the legatee to the testator, under an agreement made before the services were rendered that compensation should be made in that manner, is not a debt for which real estate may be sold under the statute. *Markley's Estate*, 20 Phila. (Pa.) 175, 48 Leg. Int. (Pa.) 498.

Debt Payable Out of Personalty at Debtor's Death. — Where, for a valuable consideration, one promises to pay a debt out of his personal estate at his decease, without a specific limitation to that estate alone, if, at his decease, the personal estate is insufficient to pay the debt, the creditor will not be precluded from resorting to the real estate. *Judy v. Louderman*, 48 Ohio St. 562.

Expenses of Lunacy Proceeding. — The expenses of a lunacy proceeding which were allowed against the lunatic's estate have been held not to be a debt for which a sale of his real estate will be ordered. *Young's Estate*, 8 Pa. Co. Ct. Rep. 4.

Contingent Liabilities. — If a claim is contingent and may never ripen into a debt, a sale of real estate in anticipation will not be ordered. *Kremer v. Bull*, (Ky. 1894) 26 S. W. Rep. 1099.

2. Debts Not Due at Time of Death. — *Carey v. Dennis*, 13 Md. 1; *Moore v. White*, 6 Johns. Ch. (N. Y.) 360.

3. Sale Not Allowed to Pay Expenses of Administration. — *Alabama.* — *Owens v. Childs*, 58 Ala. 113.

Massachusetts. — *Dean v. Dean*, 3 Mass. 258; *Drinkwater v. Drinkwater*, 4 Mass. 354.

Mississippi. — *Moore v. Ware*, 51 Miss. 206.

Missouri. — *Farrar v. Dean*, 24 Mo. 16.

New York. — *Cornwall's Estate*, Tuck. (N. Y.) 250.

Costs of General Administration should not, in favor of legatees, be thrown upon descended realty, but such costs only as are incident to the administration of the realty. *Harrison v. Harrison*, 21 W. R. 164.

In Arkansas a distinction seems to be drawn between a case where there are no debts and one where expenses are incurred in administering the estate to pay debts. Thus it is said that where there are no debts due by a decedent there can be no sale of lands of his estate to pay the expenses of an administration had thereon, and that in every case where an application is made to sell lands solely for the expense of administering the estate it must be made to appear that the expenses were incurred in the course of administering the estate, to pay debts due personally by the decedent. *Mays v. Rogers*, 52 Ark. 320.

And in *Stewart v. Smiley*, 46 Ark. 373, it was held that if the administration is continued after the debts are paid, an order of sale to pay the subsequent expenses of administration is erroneous.

4. Sale Not Allowed to Pay Costs Against Representative. — *Sanford v. Granger*, 12 Barb. (N. Y.) 392; *Hurd v. Callahan*, 9 Abb. N. Cas. (N. Y. Surrogate Ct.) 374; *Matter of Stowell*, 15 Misc. Rep. (N. Y. Surrogate Ct.) 533, 25 Civ. Pro. Rep. (N. Y.) 316; *Kavanagh v. Wilson*, 5 Redf. (N. Y.) 43; *Wood v. Byington*, 2 Barb. Ch. (N. Y.) 387.

Costs Granted on Refusing Probate of a Will cannot be paid out of the proceeds of a sale of real estate made under an order of court for the payment of debts. *Smith v. Meakim*, 2 Dem. (N. Y.) 129.

Costs Awarded Against a Surviving Partner in an action on a partnership debt are not a debt of the deceased partner for which his real estate may be sold under the *New York* statute. *Matter of Stowell*, 25 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 316, 15 Misc. Rep. (N. Y.) 533.

Sale Not Allowed to Pay Counsel Fees. — *Willcox's Estate*, 11 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 115, *sub nom.* *Matter of Woodard*, (Surrogate Ct.) 13 N. Y. St. Rep. 161; part of same decision reported under name of *Cook v. Woodard*, 5 Dem. (N. Y.) 97.

5. Sale Not Allowed to Pay Commissions of Representative. — *Beadle v. Steele*, 86 Ala. 413; *Hollman v. Bennett*, 44 Miss. 322.

ever, the rule is more liberal, and sales for the payment of such claims are allowed, as well as for the payment of claims which existed against the decedent personally.¹

(d) **Funeral Expenses.** — And in some states the court may order a sale of a decedent's realty for the payment of the funeral expenses.²

(e) **Statutory Allowances to Family.** — If the personal estate is not sufficient to pay the allowances made by statute for the support of the decedent's family, it is held in some states that the personal representative may obtain an order of court to sell the real estate for that purpose.³

(f) **Debts Barred by Statute of Limitations.** — The power of an executor or administrator to waive the bar of the statute of limitations as to claims against the estate which are otherwise justly due⁴ is limited to cases where the creditors

1. **Sale for Expenses of Administration Allowed** — *California.* — *Abila v. Burnett*, 33 Cal. 658; *Matter of Coutts*, 87 Cal. 480.

Indiana. — *Dunning v. Driver*, 25 Ind. 269; *Falley v. Gribbling*, 128 Ind. 110.

Maine. — *Stevens v. Burgess*, 61 Me. 89; *Smith v. Dutton*, 16 Me. 308; *Nowell v. Nowell*, 8 Me. 220.

Maryland. — *Griffith v. Frederick County Bank*, 6 Gill & J. (Md.) 424.

New Jersey. — *Personette v. Johnson*, 40 N. J. Eq. 173.

Pennsylvania. — *Cobaugh's Appeal*, 24 Pa. St. 143. *Compare* *Grice's Estate*, 11 Phila. (Pa.) 107, 32 Leg. Int. (Pa.) 448. See also *Grice's Estate*, 2 W. N. C. (Pa.) 211, 4 W. N. C. (Pa.) 208, holding that a sale for the purpose of paying the expenses of administration will not be ordered until a settlement of the account.

Washington. — *Ackerson v. Orchard*, 7 Wash. 377.

The *New Jersey Statute* does not in express terms authorize a sale of real estate for the payment of the expenses of administration, but it is held that such is its effect on a consideration of all its provisions. Thus there is a provision making a decedent's land liable for his debts, and providing for the sale thereof to pay so much of the debts as his personal property will not pay. Another section provides that when any rule to show cause why lands and real estate should not be sold for the payment of debts shall be obtained, the heirs or devisees of the intestate or testator, or any of them, may appear before the court at the time fixed for hearing, and enter into bond to the executor or administrator in such sum and with such sureties as the court shall approve, conditioned for the payment to the executor or administrator of so much money as may be required to pay the residue of the debts of the testator or intestate, and the just expenses and allowances for the settlement of the estate which shall remain after the personal estate shall be applied thereto, and to indemnify and save harmless the executor or administrator from any damages or costs to which he may individually be lawfully subjected by reason of the delay, and that thereupon the hearing of the rule and all proceedings thereunder shall stand adjourned until the amount of such deficiency shall be ascertained; and if the heir or devisee, on demand made of him or the sureties on the bond, shall refuse or neglect to pay to the executor or administrator the moneys required to pay the residue of the

debts, expenses, and allowances, the Orphans' Court shall order the bond to be prosecuted, or proceed to make such order for the sale of the lands and real estate whereof the testator or intestate died seized as might have been made if the bond had not been given. And another section provides for the application, by the Orphans' Court, of the money collected by suit upon the bond, or so much thereof as may be necessary for the purpose, to the payment of the residue of the debts, expenses, and allowances before mentioned, which shall remain unpaid after applying to the payment thereof the personal estate and the costs and damages of the executor or administrator individually, mentioned in the condition of the bond; so that the heir or devisee, in order to save his land from sale for the payment of the decedent's "debts," is required to pay not merely the residue of the debts of the decedent which shall remain after applying the personal estate thereto, but the residue of the debts and expenses of settling the estate which shall remain after such application of the personal estate thereto. These provisions, it is said, show that, in the mind of the legislature, the extent of the liability of the land was not to be limited to the debts, but embraced also the expenses of settling the estate. *Personette v. Johnson*, 40 N. J. Eq. 173.

Sale for Costs Against Representative Allowed. — In some jurisdictions a sale is allowed for costs of suit against the executor or administrator as part of the debt or claim for which the judgment was rendered. *Long v. Oxford*, 108 N. Car. 280; *Personette v. Johnson*, 40 N. J. Eq. 173.

Sale for Commissions of Representative Allowed. — *Personette v. Johnson*, 40 N. J. Eq. 173.

2. **Sale for Payment of Funeral Expenses.** — *Matter of Corwin*, 10 Misc. Rep. (N. Y. Surrogate Ct.) 196; *King's Estate*, 10 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 175, *Johnson's Petition*, 15 R. I. 438.

The Cost of a Monument or Headstone is part of the funeral expenses for the payment of which the real estate may be sold. *Laird v. Arnold*, 42 Hun (N. Y.) 136; *Owens v. Bloomer*, 14 Hun (N. Y.) 296.

3. **Sale to Pay Statutory Allowances to Family.** — *Miller v. Defoor*, 50 Ga. 566; *Ackerson v. Orchard*, 7 Wash. 377.

4. **Power of Representative to Waive Statute of Limitations.** — See *supra*, this title, *Powers, Duties, and Liabilities in General* — *Power to Waive Statute of Limitations*.

seek satisfaction of their claims out of the personalty, but no power exists to waive the bar of the statute so as to affect the rights of the decedent's heirs; and therefore a sale of real estate cannot be ordered to pay debts that are barred, and it is immaterial whether the case is within the general or special statutes of limitations.¹ And if the statute is not pleaded by the executor or administrator, the heir or any other person having an interest in the property may plead it.²

1. Debts Barred by Limitation—Sale Not Authorized—Alabama.—*Warren v. Hearne*, 82 Ala. 554; *Bond v. Smith*, 2 Ala. 660.

Maine.—*Nowell v. Nowell*, 8 Me. 220.

Maryland.—*Collinson v. Owens*, 6 Gill & J. (Md.) 4.

Massachusetts.—*Baxter v. Penniman*, 8 Mass. 133; *Scott v. Hancock*, 13 Mass. 162; *Brown v. Anderson*, 13 Mass. 201; *Richmond, Petitioner*, 2 Pick. (Mass.) 567; *Thompson v. Brown*, 16 Mass. 172; *Heath v. Wells*, 5 Pick. (Mass.) 140, 16 Am. Dec. 383; *Lamson v. Schutt*, 4 Allen (Mass.) 359; *Allen's Petition*, 15 Mass. 58; *Wellman v. Lawrence*, 15 Mass. 326; *Tarbell v. Parker*, 106 Mass. 347; *Robinson v. Hodge*, 117 Mass. 225. *Compare Palmer v. Palmer*, 13 Gray (Mass.) 326.

Michigan.—*Campau v. Gillett*, 1 Mich. 416, 53 Am. Dec. 73; *Howard v. Moore*, 2 Mich. 226; *Matter of Godfrey*, 4 Mich. 308; *Hoffman v. Beard*, 32 Mich. 218.

Mississippi.—*Ferguson v. Scott*, 49 Miss. 500; *Yandell v. Pugh*, 53 Miss. 295; *Ales v. Plant*, 61 Miss. 259.

New Hampshire.—*Hall v. Woodman*, 49 N. H. 295.

New York.—*Butler v. Johnson*, 111 N. Y. 204, *affirming* 41 Hun (N. Y.) 206; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360; *Mead v. Jenkins*, 4 Redf. (N. Y.) 369.

North Carolina.—*Bevens v. Park*, 88 N. Car. 456.

Pennsylvania.—*Pry's Appeal*, 8 Watts (Pa.) 253; *Moyer's Estate*, 11 Pa. Co. Ct. Rep. 528.

The Mississippi Statute provides that "all claims against the estate of a deceased person, whether due or not, shall be registered in the court in which the letters testamentary or of administration were granted, within one year after the first publication of notice to creditors to present their claims; otherwise the same shall be barred, and no suit shall be maintained thereon in any court, even though the existence of such claim may have been well known to the executor or administrator; provided, that creditors who have failed to present their claims shall not be barred as to any surplus that remains after the other debts, registered and allowed, have been fully paid, if they present and prove their claims before distribution of the estate." It was claimed that, by reason of this proviso, the holder of an unregistered claim could not only compel the payment of it out of any personalty in the hands of the administrator or of the heirs, but that he could compel the administrator to institute suit against the heirs for the sale of the realty which had descended to them, if the claim should be presented and proved before distribution of the estate. The court, however, held otherwise, *Chalmers, J.*, saying: "This construction of the proviso is inadmissible for several reasons. In the first place, it

is inconsistent with the legal phraseology employed. The word 'distribution' may, as was said in *Robinson v. Payne*, 58 Miss. 690, be applied to realty when the context shows that it was so intended, but no accurate lawyer, choosing his words with care, would speak of any portion of the lands which by law descend to the heirs or devisees of a decedent instantly with his death as constituting 'a surplus for distribution.' Such language in a carefully drawn code seems *ex vi termini* applicable to personalty only, unless the context plainly shows that it was intended to embrace realty also. There is no such context here. Again, this construction makes the proviso practically repeal the enacting portion of the section." *Ales v. Plant*, 61 Miss. 259, *cited in* *Nagle v. Ball*, 71 Miss. 330.

If the Debt Is Apparently Barred the administrator applying for a sale must show some fact taking it out of the operation of the statute. *Gilchrist v. Rea*, 9 Paige (N. Y.) 66.

If the Representative Pays a Debt Which Is Barred, he cannot afterwards procure an order for the sale of real estate to reimburse himself, but the heirs or other persons interested in the realty may still contest the debt, because the representative, by paying the debt, acquires, as against the real estate, only such rights as the creditor himself had. *Gilchrist v. Rea*, 9 Paige (N. Y.) 66. See also the opinion of *Dorsey, J.*, in *Collinson v. Owens*, 6 Gill & J. (Md.) 4.

2. Heir May Plead Statute.—In a proceeding to sell real estate for the payment of the decedent's debts the heir at law is the adversary party, with right to plead and make defense; and whatever would operate to defeat and bar the debt as a legal, subsisting demand, enforceable against the intestate, if living and sued, will defeat and bar it when the personal representative seeks to charge the descended lands. *Warren v. Hearne*, 82 Ala. 554.

"The Proceeding Is in Effect a Suit by the Creditors Against the Heirs, claiming satisfaction out of the estate which has descended to them for a debt due from the ancestor. It does not therefore rest with the administrator to say whether the bar of the statute of limitations shall be interposed or not; he is placed in an antagonist position to the heir, and cannot therefore make any admission which shall prejudice him. His power to meddle with the real estate is derived entirely from the statute; it is a special authority derived from the order of the court on proof of the allegation of the petition, and confers no power further than is necessary to execute the trust with which he is clothed for the benefit of the creditors. It is true that while acting within his appropriate sphere, as the representative of the deceased, he may decline to interpose the bar of the statute to defeat a just claim; but when he lays

(g) **Debts Secured on Real Estate.** — In the absence of statutory provisions on the subject, it seems that a sale may be ordered for the payment of debts which are secured by mortgage or otherwise on the realty of the decedent.¹

(h) **Taxes.** — Real estate may be sold to pay taxes levied on it so far as they are a claim against the estate which it is the duty of the executor or administrator to pay.²

(2) *Proof of Claims* — (a) **General Rule.** — Before a sale of real estate for the payment of debts will be ordered it is obviously necessary that the existence of valid claims against the estate should be established by legal evidence to the satisfaction of the court;³ and this requirement is not answered by the

down his character of representative of the deceased, and becomes a party litigant on behalf of the creditors, against the heirs, it would be a strange anomaly if he should be allowed to dictate the defense." *Bond v. Smith*, 2 Ala. 660. To the same effect are *May v. Parham*, 68 Ala. 253; *Fretwell v. McLemore*, 52 Ala. 124; *M'Broom v. Governor*, 6 Port. (Ala.) 32; *Thrash v. Sumwalt*, 5 Ala. 13; *Riser v. Snoddy*, 7 Ind. 442, 65 Am. Dec. 740; *Skidmore v. Romaine*, 2 Bradf. (N. Y.) 122; *Bevens v. Park*, 88 N. Car. 456.

The Recovery of a Judgment Against the Executor or Administrator on a debt which is barred by the statute of limitations does not prevent the heirs from pleading the bar of the statute in a proceeding to subject real estate to the debt. *Ferguson v. Broome*, 1 Bradf. (N. Y.) 10.

Nor does the recovery of a judgment against the executor before the debt is barred stop the running of the statute in favor of the heirs. *Raynor v. Gordon*, 23 Hun (N. Y.) 264. But see *contra*, *Henry v. Mills*, 1 Lea (Tenn.) 144.

Judgment Creditors of a Devisee may plead the statute though the devisee himself does not appear. *Raynor v. Gordon*, 23 Hun (N. Y.) 264.

A Fraudulent Grantee of a Decedent may plead the statute of limitations against a debt for the payment of which a sale of the land fraudulently conveyed is asked, because, though the deed is void as against the deceased grantor's creditors, "still," it is said, "the first questions to be determined are, Who are creditors? and, What claims are valid? and in determining these it surely cannot be contended that he occupies a worse position than his donor would do, or that he can be precluded from making any defense that would be open to her, were she now living and sued upon the claim." *Syme v. Riddle*, 88 N. Car. 463.

1. Sale to Pay Debts Secured by Mortgage. — *Marden's Estate*, Myr. Prob. (Cal.) 184; *Cargile v. Fernald*, 63 Mo. 304; *Day v. Graham*, 97 Mo. 398. Compare *Kautz's Estate*, 11 Pa. Co. Ct. Rep. 322; *Grice's Estate*, 11 Phila. (Pa.) 107, 32 Leg. Int. (Pa.) 448.

In *Marden's Estate*, Myr. Prob. (Cal.) 184, an application by the administrator to sell the land mortgaged for the payment of the mortgage debt was granted, and the reason given by the court was that otherwise the settlement of the estate might be delayed at the pleasure of the creditor.

A Judgment Creditor, in New York, cannot apply for a sale of the land on which his judgment is a lien. *Butler v. Emmett*, 8 Paige (N. Y.) 12. But see Code Civ. Pro. N. Y. 1898, § 2750, enumerating, as the persons who may apply for a sale, *inter alios*, "a person holding a judgment lien."

2. Sale to Pay Taxes. — *Sales v. Cosgrove*, (Ky. 1894) 25 S. W. Rep. 594; *Welsh v. Perkins*, 8 Ohio 52.

When Taxes Are a Claim Against Estate. — See the title DEBTS OF DECEDENTS, vol. 8, p. 1032.

Assessments for Public Improvements. — In *Van Dusen's Estate*, 11 Pa. Co. Ct. Rep. 201, it was held that a sale to pay for benefits assessed for public improvements could not be ordered at the instance of the life tenant, if the remaindermen objected.

3. Existence of Debts Must Be Proved. — *Alabama.* — *Quarles v. Campbell*, 72 Ala. 64; *Banks v. Speers*, 97 Ala. 560.

Illinois. — *Dorman v. Tost*, 13 Ill. 127; *Fridley v. Murphy*, 25 Ill. 146.

Indiana. — *Doe v. Anderson*, 5 Ind. 33; *Timmons v. Timmons*, 6 Ind. 8; *Martin v. Starr*, 7 Ind. 224.

Louisiana. — *Winn's Succession*, 30 La. Ann. 702.

Massachusetts. — *Chamberlin v. Chamberlin*, 4 Allen (Mass.) 184.

North Carolina. — *Brittain v. Dickson*, 104 N. Car. 547; *Smith v. Brown*, 99 N. Car. 377.

Tennessee. — *Estes v. Johnson*, 10 Humph. (Tenn.) 223.

Proof of All the Claims asserted against the estate is not necessary to authorize a sale. If the personalty is insufficient to pay undisputed claims, a sale may be ordered, though there are other claims which are disputed. *In re Rose's Estate*, 17 Pa. Co. Ct. Rep. 514.

Unjust Claims. — It may be shown in opposition to a petition to sell land for the payment of debts that the debts to be paid from the proceeds of the sale are fraudulent. *Hunter v. French*, 86 Ind. 320.

Testimony of Creditors. — A creditor of the decedent is a competent witness to prove his debt in a proceeding to sell the decedent's land for the payment of debts. *Chamberlin v. Chamberlin*, 4 Allen (Mass.) 184.

Under the *Alabama* statute it is held that the debts may be proved by the testimony of the creditors. The provision that on the hearing of the application "proof must be made by the depositions of disinterested witnesses" relates to the proof of the insufficiency of the personal estate. *Alford v. Alford*, 96 Ala. 385, *overruling* a dictum in *Quarles v. Campbell*, 72 Ala. 64, that the averment of the petition as to the existence of debts must be proved by the depositions of disinterested witnesses.

Reference to Prove Claims. — In *Harlammert v. Moody*, (Ky. 1894) 26 S. W. Rep. 2, it was held that a reference to prove claims before making an application for leave to sell the real estate was not necessary under Civil Code *Kentucky*, § 430, providing that an order shall

averments in a petition by an executor or administrator for a sale,¹ or by his oral admissions on the hearing,² or by the admissions of the guardian *ad litem* of the infant heirs.³ The sufficiency of the evidence, however, of the validity of a claim for the payment of which a sale of real estate has been ordered is not a jurisdictional fact, and the absence of the evidence from the record will not affect the validity of the order on appeal or subject it to collateral attack.⁴

(b) **Presentation and Allowance of Claims.** — It is generally held that presentation of claims to the executor or administrator and allowance by him are not necessary before an order can be obtained for the sale of the real estate,⁵ but a creditor may apply for an order of sale even though his claim may have been rejected by the executor or administrator,⁶ and the heir or devisee is

be made for creditors to prove their claims before a commissioner in an action for the settlement of a decedent's estate, since the preceding section authorizes the court to order a sale if it shall appear that the personalty is insufficient.

In *Cahill v. Bassett*, 66 Mich. 407, the court said that the report of commissioners upon claims is necessary only to enable the administrator to make payment of them without suit, and to enable the claimant to bring suit, if payment is wrongfully withheld, and that for the purpose of making the application to sell the real estate when the estate has no personal property, and is indebted, any other competent and sufficient proof may be made of the indebtedness as well as by the report of the commissioners.

Judgment Against Representative. — In *Massachusetts* it is held that a judgment against the personal representative or the report of a commission of insolvency establishing the debt is not necessary to the validity of a license granted to an executor, by the Probate Court, to sell real estate. *Tenney v. Poor*, 14 Gray (Mass.) 500.

But in *Pennsylvania* it is provided by statute (Act Feb. 24, 1834, § 36), that a creditor of a decedent cannot proceed in the Orphans' Court to compel a sale of the decedent's real estate for the payment of his claim until he has reduced it to judgment. *Hutchinson's Estate*, 10 Pa. Co. Ct. Rep. 592.

Necessity of Proof Before Order of Sale. — In *Iowa* it is held that the statute does not require proof of debts before an order of sale can be made, but that it is sufficient if they are proved and allowed after the decree, and at any time before the sale. *Little v. Sinnett*, 7 Iowa 324.

A Decree of Insolvency dispenses with the necessity of proving debts under the *Alabama* statute, the decree being a substitute for the proof ordinarily required. *Meadows v. Meadows*, 78 Ala. 240.

A Decree of Sale Is Conclusive evidence as to the existence of debts. *Chardavoyne v. Lynch*, 82 Ala. 376; *Bowen v. Bond*, 80 Ill. 351. See also *Stewart v. Madden*, 153 Pa. St. 445, 31 W. N. C. (Pa.) 509.

But see *Fenix v. Fenix*, 80 Mo. 27, holding that an order of sale is not conclusive as to the existence of debts, and that the heirs may oppose the confirmation of the sale on the ground that there were no debts.

1. Averments in Petition Not Sufficient Proof. — *Chamberlin v. Chamberlin*, 4 Allen (Mass.) 184.

2. Admissions of Executor or Administrator Not Sufficient Proof. — *Chamberlin v. Chamberlin*, 4 Allen (Mass.) 184.

On a Petition by a Creditor for a sale of the deceased debtor's real estate it has been held that an admission by the administrator of the validity of the claim casts the burden of disproving it on the person attacking it. *Jones v. Le Baron*, 3 Dem. (N. Y.) 37.

3. Admissions of Guardian Ad Litem. — If the heirs of the decedent are infants, the admissions of their guardian *ad litem* are not sufficient to prove the debt for which the sale is asked. Other evidence is required. *Hooper v. Hardie*, 80 Ala. 114; *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457; *Thompson v. Doe*, 8 Blackf. (Ind.) 336.

4. Sufficiency of Evidence Not a Jurisdictional Fact. — *Deans v. Wilcoxon*, 25 Fla. 980; *Harris v. Shafer*, (Tex. Civ. App. 1893) 21 S. W. Rep. 110; *Templeton v. Ferguson*, 89 Tex. 47.

5. Presentation and Allowance Not Required. — *Harlin v. Stevenson*, 30 Iowa 371; *Grayson v. Weddle*, 63 Mo. 523; *Overton v. Johnson*, 17 Mo. 446; *Mount v. Valle*, 19 Mo. 621; *Wood v. Byington*, 2 Barb. Ch. (N. Y.) 387. But see *contra*, *Williamson v. Furbush*, 31 Ark. 539; *Allen v. Hillman*, 69 Miss. 225.

Statute of Nonclaim. — As to the effect of a failure to present claims within the period required by the statutes of nonclaim, see *supra*, this section, *For What Claims Sale May Be Ordered — Debts Barred by Statute of Limitations*.

6. Rejection of Claims. — In *Turner v. Amsdell*, 3 Dem. (N. Y.) 19, the surrogate said: "The allowance or rejection of a claim by the executor has not the least relevancy in the matter whatever. Whether a claim presented bears the seal of his sanction, or whether it comes into court unfathered and unprotected by his magic power, it is treated the same. It must be run through the same hopper, must be proved, established before the surrogate, and that too, as I interpret the law, by common-law proof. Less proof than is necessary to justify a judgment in a justice's court, where defendant does not appear, will not suffice. So unimportant a factor is the executor in these proceedings that, where a judgment has been taken against him by default, in his representative capacity, it is of no significance or use whatever, and is subject to contest the same as an unliquidated demand." See also *In re Merchant*, (Supreme Ct.) 6 N. Y. Supp. 875; *Matter of Haxtun*, 102 N. Y.

not concluded by the allowance of claims.¹

(c) **Judgment Against Executor or Administrator.** — The authorities differ in regard to the effect, as against the heir or devisee, of a judgment recovered against the executor or administrator. It is generally held that such a judgment is only *prima facie* evidence, at the most, as against the heir or devisee,² unless he appeared in the action and was fully heard in defense of the claim.³ But some authorities hold that a judgment against an executor or administrator is not even *prima facie* evidence against the heir or devisee,⁴ while others hold it to be conclusive on him in the absence of fraud or collusion.⁵

(3) **Contest by Heirs or Devisees.** — It is well settled that on an application for a sale of the real estate of a decedent to pay debts, whether made by the personal representative or by a person claiming to be a creditor, the heirs or devisees may contest the validity of the demands asserted against the estate by proving any matter of defense, legal or equitable, that could have been set up by the decedent, if he were living, or by the personal representative;⁶ and

157, reversing 33 Hun (N. Y.) 364; Matter of Pfohl, 20 Misc. Rep. (N. Y. Surrogate Ct.) 627.

1. **Allowance Not Conclusive on Heir or Devisee.** — Scherer v. Ingberman, 110 Ind. 428. See *contra*, State v. Probate Ct., 25 Minn. 22, holding that the allowance of claims by the commissioners was conclusive on all persons interested in the estate. In this case the court said: "The proceeding before the commissioners is not an adversary suit between litigant parties, the creditor on one side, and the executor or administrator on the other, but is in the nature of a proceeding against the estate, which estate is, in theory, in the Probate Court, for the purpose of being administered by distribution among creditors, heirs, devisees, legatees, and next of kin. Though the proceedings on the part of the estate are conducted in the name of the executor or administrator, he is only a nominal party; the actual parties are those interested in the estate. We do not think it was intended that any party might neglect his opportunity to contest a claim before the commissioners or on an appeal, and then contest it on an application for its payment, but that the award of the commissioners, if not appealed from, and the judgment of the appellate court, in case of appeal, should be final and conclusive upon all parties interested in the estate, in all subsequent proceedings for its administration."

2. **Judgment Against Representative Only Prima Facie Evidence Against Heir or Devisee** — *England*. — Harvey v. Wilde, L. R. 14 Eq. 438, 41 L. J. Ch. 698, 27 L. T. N. S. 471.

Indiana. — Scherer v. Ingberman, 110 Ind. 428.

Kentucky. — Hopkins v. Stout, 6 Bush (Ky.) 375.

New Hampshire. — Nichols v. Day, 32 N. H. 133, 64 Am. Dec. 358.

New York. — Sanford v. Granger, 12 Barb. (N. Y.) 392; Kavanagh v. Wilson, 5 Redf. (N. Y.) 43. The rule in New York before the Act of 1843 was that a judgment recovered against the executor was no evidence of debt on an application to sell real estate. Baker v. Kingsland, 10 Paige (N. Y.) 366.

Pennsylvania. — Schmidt's Estate, (O. Ct.) 17 Pa. Co. Ct. Rep. 314, 5 Pa. Dist. Rep. 17.

Tennessee. — Bloom v. Cate, 7 Lea (Tenn.) 471.

Judgment by Confession. — A judgment entered on the offer of the executor or administrator is not even *prima facie* evidence of the debt in *New York*. The statute makes a judgment against the executor or administrator *prima facie* evidence only when it has been obtained on a trial or hearing on the merits. Kavanagh v. Wilson, 5 Redf. (N. Y.) 43.

3. **Appearance by Heir.** — In Nichols v. Day, 32 N. H. 133, 64 Am. Dec. 358, it was held that if the heir appeared in the action against the administrator and assumed the defense, he thereby became a party, and that the judgment was conclusive on him in a proceeding to sell the ancestor's land for the payment of the plaintiff's claim.

4. **Rule in Maryland.** — In Birely v. Staley, 5 Gill & J. (Md.) 432, 25 Am. Dec. 303, Dorsey, J., said that "the frequent decisions of the courts of this state have long since settled, so as to preclude all debate on the subject, that a judgment against an executor or administrator not only does not bind real assets, but that it is not even *prima facie* evidence of a debt where the real estate of a deceased debtor has been sold for the payment of all debts against him." Compare Gaither v. Welch, 3 Gill & J. (Md.) 259.

5. **North Carolina Rule.** — Long v. Oxford, 108 N. Car. 280; Proctor v. Proctor, 105 N. Car. 222; Speer v. James, 94 N. Car. 417; Smith v. Brown, 101 N. Car. 347; Tilley v. Bivins, 112 N. Car. 348; Bevers v. Park, 88 N. Car. 456.

6. **Heirs or Devisees May Contest Debts.** — Scherer v. Ingberman, 110 Ind. 428; Hopkins v. Stout, 6 Bush (Ky.) 375; Payne v. Pusey, 8 Bush (Ky.) 564; Matter of Renwick, 2 Bradf. (N. Y.) 80; Peck v. Wheaton, Mart. & Y. (Tenn.) 353; Neal v. M'Combs, 2 Yerg. (Tenn.) 10; Woodfin v. Anderson, 2 Tenn. Ch. 339; Bloom v. Cate, 7 Lea (Tenn.) 471.

The heir has the same uncontrolled discretion in resisting the payment of claims against the realty that the executor or administrator has in regard to the personalty; and the same right belongs to the devisee in this respect as to the heir. Bowen v. Gent, 54 Md. 570; Gaither v. Welch, 3 Gill & J. (Md.) 259.

The Grantee of a Devisee may enjoin a sale of land for a debt of the decedent which is barred by the statute of limitations. Butler v. John-

their rights in this particular are not affected, as a general rule, by the recovery of a judgment against the personal representative, or by any admissions on his part.¹

b. INSUFFICIENCY OF PERSONAL PROPERTY—(1) *General Rule*.—The primary fund for the payment of the debts of a decedent is the personal property left by him,² and therefore a resort to the realty for that purpose can be had only when the personal property is insufficient.³ It is competent,

son, 111 N. Y. 204, *affirming* 41 Hun (N. Y.) 206.

Statutes of Limitations and of Nonclaim.—See *supra*, this section, *For What Claims Sale May Be Ordered—Debts Barred by Statute of Limitations*.

1. See *supra*, this section, *Proof of Claims*.

2. Personality Is Primary Fund for Payment of Debts.—See the title DEBTS OF DECEDENTS, vol. 8, p. 1097.

3. Insufficiency of Personal Property—United States.—Corbet v. Johnson, 1 Brock. (U. S.) 77; Richardson v. Penicks, 1 App. Cas. (D. C.) 261.

Alabama.—Owens v. Childs, 58 Ala. 113; Garrett v. Bruner, 59 Ala. 513; Lee v. Downey, 68 Ala. 98; May v. Parham, 68 Ala. 253; Sharp v. Sharp, 76 Ala. 312; Banks v. Speers, 97 Ala. 560; Garner v. Toney, 107 Ala. 352.

California.—Stuart v. Allen, 16 Cal. 473, 76 Am. Dec. 551.

Connecticut.—Brown v. Lanman, 1 Conn. 467; Griswold v. Bigelow, 6 Conn. 264.

Florida.—Hays v. McNealy, 16 Fla. 409; Sloan v. Sloan, 25 Fla. 53.

Illinois.—Rowland v. Swope, 39 Ill. App. 514.

Indiana.—Newcomer v. Wallace, 30 Ind. 216; Edwards v. Haverstick, 47 Ind. 138.

Iowa.—Conger v. Cook, 56 Iowa 117.

Kentucky.—Trumbo v. Sorrenency, 3 T. B. Mon. (Ky.) 284, 16 Am. Dec. 103.

Louisiana.—Phelan v. Bird, 20 La. Ann. 355.

Maryland.—Macgill v. Hyatt, 80 Md. 253; Tyson v. Hollingsworth, 1 Har. & J. (Md.) 469; Griffith v. Frederick County Bank, 6 Gill & J. (Md.) 445.

Massachusetts.—Palmer v. Palmer, 13 Gray (Mass.) 326.

Michigan.—Beniteau v. Dodsley, 88 Mich. 152.

Minnesota.—State v. Probate Ct., 25 Minn. 22.

Mississippi.—Turner v. Ellis, 24 Miss. 173; Evans v. Fisher, 40 Miss. 643; Stigler v. Porter, 42 Miss. 449; Foley v. McDonald, 46 Miss. 238; Anderson v. Newman, 60 Miss. 532.

Missouri.—Pearce v. Calhoun, 59 Mo. 271.

New Hampshire.—Tilton v. Tilton, 41 N. H. 479.

New Jersey.—State v. Conover, 9 N. J. L. 338.

New York.—Bloom v. Burdick, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; Ferguson v. Broome, 1 Bradf. (N. Y.) 10; Taylor v. Taylor, 3 Bradf. (N. Y.) 54; M'Kay v. Green, 3 Johns. Ch. (N. Y.) 56; Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619; Moore v. Moore, 14 Barb. (N. Y.) 27; Topping's Estate, 18 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 115; Matter of Plopper, 15 Misc. Rep. (N. Y. Surrogate Ct.) 202; Hogan v. Kavanaugh, 138 N. Y. 417.

North Carolina.—Shields v. McDowell, 82 N. Car. 137; Blount v. Pritchard, 88 N. Car. 445; Sanderson v. Overman, 98 N. Car. 235; Speer v. James, 94 N. Car. 417; Syme v. Badger, 96 N. Car. 197; Clement v. Cozart, 107 N. Car. 695, 705.

Ohio.—Faran v. Robinson, 17 Ohio St. 242, 93 Am. Dec. 617.

Oregon.—Wright v. Edwards, 10 Oregon 298; Houck's Estate, 23 Oregon 10.

Pennsylvania.—Kelly's Estate, 11 Phila. (Pa.) 100, 32 Leg. Int. (Pa.) 412; Eddy's Estate, 12 Phila. (Pa.) 118, 35 Leg. Int. (Pa.) 234; Walker's Estate, 3 Rawle (Pa.) 229; Ramsey's Appeal, 4 Watts (Pa.) 71; Risk's Appeal, 110 Pa. St. 171; Hilton's Appeal, (Pa. 1887) 9 Atl. Rep. 434.

Rhode Island.—Wood v. Hammond, 16 R. I. 98.

Tennessee.—Maxwell v. Smith, 86 Tenn. 539; Whitmore v. Johnson, 10 Humph. (Tenn.) 610.

Texas.—Fortune v. Killebrew, 70 Tex. 437; Minter v. Burnett, 90 Tex. 245.

Utah.—Needham v. Salt Lake City, 7 Utah 319.

Virginia.—Elliott v. George, 23 Gratt. (Va.) 780; Foster v. Crenshaw, 3 Munf. (Va.) 514; Garnett v. Macon, 6 Call (Va.) 308.

West Virginia.—Laidley v. Kline, 8 W. Va. 218; Martin v. Rellehan, 3 W. Va. 480.

Contested Claims Against Estate.—The fact that some of the claims against the estate are contested is not a ground for refusing an order of sale, if the personality is insufficient to pay the uncontested claims. *Rose's Estate*, (O. Ct.) 17 Pa. Co. Ct. Rep. 514.

Contested Claims in Favor of Estate.—The grantee of a devisee cannot oppose an application for a sale of the land devised, on the ground that there is personality consisting of a claim against himself in favor of the estate, where he is litigating the validity of the claim. *Schroeder's Estate*, Myr. Prob. (Cal.) 7.

Doubtful Claims in favor of the estate are not to be considered in determining whether the assets are sufficient to pay the debts. *Bridge v. Swain*, 3 Redf. (N. Y.) 487.

Life Insurance Claimed by Widow.—In *Leverich's Succession*, 47 La. Ann. 1665, it was held that where the only personality of the succession was a life insurance policy, and this had been adjudged to belong to the widow, who was administering the estate as tutrix, she could obtain leave to sell the real estate for the payment of debts.

Admission of Assets—Judgment Against Representative.—An absolute judgment against an administrator in favor of a creditor of the decedent, though an admission of assets as between the administrator and the creditor, does not prevent the creditor from showing that there is in fact a deficiency of assets, in

however, for the law-making power to alter this rule, and to subject the lands of a decedent to the payment of his debts to the exclusion of his personalty.¹

Liability of Representative for Selling Unnecessarily. — If a sale is made for the payment of debts, and it afterwards appears that there was not a deficiency of personal property, the executor or administrator is liable to the heirs or devisees for the value of the land sold, in case he was guilty of gross negligence or fraud in procuring the order of sale.²

(2) *Deficiency Arising After Death.* — If the personalty which came into the hands of the executor or administrator was originally sufficient to pay all the debts of the decedent, but afterwards became insufficient, the question whether the real estate may be sold to make up the deficiency so occurring is one as to which authorities are not entirely in accord, and its solution depends on the interpretation given to the statutes authorizing such sales, regard being had to both the policy of the statutes and their terms. It seems to be settled that if the personalty becomes insufficient, after the death of the debtor, by reason of depreciation or losses for which neither the personal representatives nor the creditors are responsible, then the real estate may be sold.³ Even if the deficiency has resulted from a devastavit committed by the executor or administrator, it has been held that the real estate may be sold; and the reason assigned for this is that the loss must fall on either the creditors or the heir, and that it is right in such case that the heir should suffer the loss.⁴ But there are decisions to the contrary.⁵ The preponderance of authority,

order to enforce his claim against the real estate. *Gaither v. Welch*, 3 Gill & J. (Md.) 259.

An Administrator Cannot Distribute the Personal Estate to the persons entitled, and then have land devised to another person sold for the payment of debts for which the personalty was liable. *Snider v. Graham*, 8 Ohio Cir. Dec. 3.

1. Legislative Power to Regulate Subject. — "As it regards the question of power in the legislature, no objection is perceived to their subjecting the lands of the deceased to the payment of his debts, to the exclusion of his personal property. The legislature regulates descents and the conveyance of real estate. To define the rights of debtor and creditor is their common duty. The whole range of remedies lies within their province. They may authorize a guardian to convey the lands of an infant; and indeed they may give the capacity to the infant himself to convey them. The idea that the lands of an infant which descend to him cannot be made responsible for the payment of the debts of the ancestor, except through the decree of a Court of Chancery, is novel and unfounded. So far from this being the case, no doubt is entertained that the legislature of a state have power to subject the lands of a deceased person to execution in the same manner as if he were living. The mode in which this shall be done is a question of policy, and rests in the discretion of the legislature." *Watkins v. Holman*, 16 Pet. (U. S.) 63.

2. Liability of Representative for Selling Unnecessarily. — *Richardson v. Sage*, 57 Cal. 212; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62.

Measure of Damages. — If an administrator fraudulently obtains an order for the sale of the real estate of the decedent for the alleged purpose of paying debts, he is liable to the heirs for the value of the property sold as of the time of the filing of the bill against him. *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62.

3. Deficiency Arising After Death Without Fault of Representative or Creditors. — In *Evans v. Fisher*, 40 Miss. 643, an application by executors for leave to sell real estate for the payment of the testator's debts was opposed on the ground that the personalty was originally sufficient for that purpose, and that in such case a sale of the real estate was unauthorized. It appeared that the deficiency of assets resulted from the destruction of property by the armies during the civil war and the emancipation of the slaves by the federal government. The question presented was exhaustively considered, and the conclusion reached (*Harris, J., dissenting*) was that the sufficiency of the personal assets which the law contemplates as exonerating the real estate from the debts must be tested by the condition of the personalty as developed in the due course of administration, and when in that way the assets are to be applied to the payment of the debts.

4. Realty Subject to Sale Notwithstanding Devastavit. — *Conger v. Cook*, 56 Iowa 117.

5. Realty Not Subject to Sale When Deficiency Results from Devastavit. — "It is not enough for the court to find that there has been a sufficiency of personal assets left by the decedent, but at the time of filing the petition such assets have been wasted either by the petitioning administrator or executor, or by their predecessors in office. The heirs are not to be held as sureties for the faithful performance by the administrator of his duties, nor should their right be dependent upon his integrity or negligence." *Rowland v. Swope*, 39 Ill. App. 514.

Remedy on Bond. — In *Wyse v. Smith*, 4 Gill & J. (Md.) 295, the personal estate of the testator had become insufficient to pay his debts, in consequence of a devastavit committed by the executor, and an application on this state of facts by some of the creditors for a sale of the real estate to pay their claims was denied.

however, seems to establish the rule that creditors are not to be defeated by the neglect or misconduct of the personal representatives of the deceased debtor, but that a sale of the real estate, in case the personalty, originally sufficient for the payment of debts, has become insufficient by reason of a devastavit, will not be ordered until the creditors have exhausted their remedy against the executor or administrator and the sureties on his bond.¹

(3) *Sufficient Personalty in Another State.* — Where administration is taken out in a state in which there are creditors of the decedent and real estate

Martin, J., delivering the opinion of the court, said: "If personal assets come to the hands of the executor or administrator, sufficient to pay all the debts of the deceased, the creditor must look to that fund for the payment of his debts; and if those assets are wasted, his remedy is on the official bond of the executor or administrator. The real estate of the debtor is protected unless the personal assets are insufficient; and to authorize the chancellor to pass a decree to sell the real estate to pay the debts of the deceased, the bill must allege an insufficiency of personal assets for that purpose, and must sustain that allegation by proof, or the admission of the opposite party."

In *Kingsland v. Murray*, 133 N. Y. 170, the court construed the *New York* statute (Code Civ. Pro., § 2759), which provides that a decree for the sale of real estate can be made only where it is shown, *inter alia*, that "all the personal property of the decedent which could have been applied to the payment of the decedent's debts and funeral expenses has been so applied; or, that the executors or administrators have proceeded with reasonable diligence in converting the personal property into money and applying it to the payment of those debts and funeral expenses; and that it is insufficient for the payment of the same, as established by the decree." Earl, C. J., delivering the opinion of the court, said: "We think the meaning is reasonably free from doubt. If the decedent, at the time of his death, left sufficient personal property which could have been applied to the payment of his debts and funeral expenses, in the exercise of reasonable diligence on the part of his executors or administrators, then resort cannot be had to the statutes for the sale of his real estate for the payment of his debts. In that event the personal property is the fund for the payment of his debts, and the creditors must resort to that through the executors or administrators. If they waste or squander the personal property so that it becomes insufficient for the payment of the debts, the only resort of the creditors is to them to enforce their personal responsibility, and they cannot in that case cause the real estate to be sold under the statutes referred to. But if the personal property left by the decedent at the time of his death was insufficient to pay his debts, or if the executors or administrators proceed with reasonable diligence in applying it to the payment of his debts, and it proves insufficient for that purpose, then, and then only, a case is made for the sale of the real estate. So in the language of this section, before the surrogate can make a decree for the sale of the real estate the petitioner must establish that all the personal property of the decedent which could have been applied to the

payment of the decedent's debts and funeral expenses has been so applied."

The same point seems to have been decided in *Matter of Willard*, 2 Connoly (N. Y.) 112. But compare *Matter of Bingham*, 127 N. Y. 309.

In *Bennett v. Coldwell*, 8 Baxt. (Tenn.) 483, the court said: "If the administratrix has wasted the estate, and both she and her securities upon her administration bond are insolvent, the land of the heir cannot be made liable. The loss in such case must fall upon the creditor. The law does not make the heirs securities for the administrator, nor make their rights dependent upon the integrity or negligence of the administrator." See also *Young v. Wittenmyre*, 123 Ill. 303; *Kelly's Estate*, 11 Phila. (Pa.) 100, 32 Leg. Int. (Pa.) 412. In these cases, however, the applications were made either by the personal representative who committed the default, or by his successor in office.

1. Deficiency Resulting from Devastavit — Remedy on Bond Must Be Exhausted. — *May v. Parham*, 68 Ala. 253; *Ledyard v. Johnston*, 16 Ala. 548; *Banks v. Speers*, 103 Ala. 436, 114 Ala. 323; *Turner v. Ellis*, 24 Miss. 173; *Foley v. McDonald*, 46 Miss. 238; *Stigler v. Porter*, 42 Miss. 449; *Phelps v. Harris*, 61 Miss. 705; *Merritt v. Merritt*, 62 Mo. 150; *Carlton v. Byers*, 70 N. Car. 691; *Latham v. Bell*, 69 N. Car. 135; *Clement v. Cozart*, 107 N. Car. 695.

In *California* this point seems not to have been decided. *Haynes v. Meeks*, 20 Cal. 288.

If the Bond Has Been Lost, the sureties are unknown, and the original administrator has died insolvent, the administrator *de bonis non* may proceed for a sale of the real estate without first suing the personal representative of his predecessor for the devastavit. *Brittain v. Dickson*, 104 N. Car. 547.

Effect of Sale — Purchase by Executor. — In *Anderson v. Northrop*, 30 Fla. 612, it was held that if sufficient personal assets go into the hands of an executor fully to pay all the debts of the testator, then there is no necessity or authority in law for a sale of the estate's realty for the payment of debts; and if such executor, instead of applying the personal assets to the payment of debts, misapplies them to other purposes, and misappropriates them to his own uses, and afterwards procures an order for the sale of the realty for the payment of debts that should have been paid with the personalty, then, under such circumstances, such sale of the realty is a fraud in law as between such executors and the heirs at law, no matter how regular upon their face the proceedings for such sale may appear, and he should not be permitted to derive any benefit from such sale as purchaser of the property sold.

owned by him, the fact that he left sufficient personalty in another state to pay all his debts is no objection to an order for the sale of such realty,¹ unless the same person qualified as the representative of the decedent in both jurisdictions, and distributed the personalty in the jurisdiction where it was situate, without paying the creditors in the other jurisdiction.²

(4) *Proof of Deficiency*—(a) *In General*.—Before the sale of real estate to pay debts will be ordered, it must be shown affirmatively that the personal property is insufficient.³

(b) *Settlement of Accounts*.—It is generally held that a settlement of the accounts of an executor or administrator is not necessary before an order for the sale of real estate, if the insufficiency of the personalty to pay the decedent's debts is otherwise made to appear.⁴

1. *Personalty in Another State*.—Lawrence's Appeal, 49 Conn. 411; Gilchrist v. Cannon, 1 Coldw. (Tenn.) 581.

2. *If the Same Person Administers in Both Jurisdictions*, real estate in one jurisdiction cannot be sold to pay debts owing there, if the personalty in the other was sufficient. Young v. Wittenmyre, 123 Ill. 303, reversing 22 Ill. App. 496; Livermore v. Haven, 23 Pick. (Mass.) 116.

3. *Deficiency of Personal Assets Must Be Proved*.—Garrett v. Bruner, 59 Ala. 513; Tilton v. Tilton, 41 N. H. 479; Lichtenstein's Estate, 25 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 301, 16 Misc. Rep. (N. Y.) 667; Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619.

Proof Is Required even though the application is not contested. Garrett v. Bruner, 59 Ala. 513; Matter of Lichtenstein, 16 Misc. Rep. (N. Y. Surrogate Ct.) 667.

The Burden of Proof is on the petitioner, whether there is a contest of the application or not. Garrett v. Bruner, 59 Ala. 513; May v. Parham, 68 Ala. 253.

Disinterested Witnesses testifying to facts within their own knowledge are required by the Alabama statute. Quarles v. Campbell, 72 Ala. 64; Kent v. Mansel, 101 Ala. 334.

Presumption of Deficiency.—Where land has been sold under an order of court for the payment of debts it will be presumed that the personalty was insufficient. McNair v. Hunt, 5 Mo. 301.

Admissions of the guardian *ad litem* of infant heirs are not sufficient. Hooper v. Hardie, 80 Ala. 114.

A Single Witness is sufficient under the Alabama statute, though it provides that the insufficiency of the personal estate shall be proved by "witnesses" of a certain character; the statutory rule of construction being that the "singular includes the plural, and the plural the singular." Thompson v. Boswell, 97 Ala. 570 [overruling dictum of McClellan, J., in Stevenson v. Murray, 87 Ala. 442]; Garner v. Toney, 107 Ala. 352.

A Reference to a master to report as to the debts and assets is adopted in some jurisdictions as the mode of determining whether the personalty is insufficient to pay debts, and such report has sometimes been considered to be essential. Wade v. Fisher, 10 Heisk. (Tenn.) 490; Frazier v. Pankey, 1 Swan (Tenn.) 75. But where the reference and report would be a mere form and useless expense, as where there is but one debt, and a final settlement made by the administrator shows that the personal assets have been exhausted, they may

be dispensed with. Bloom v. Cate, 7 Lea (Tenn.) 471.

Appraisement of Personalty.—The Colorado Statute provides that the realty may be resorted to for the payment of debts whenever, after inventory and appraisement, it shall appear that the personal estate of any decedent is insufficient to discharge his debts; but it is held that the inventory and appraisement are not conditions precedent. The insufficiency of the personalty may be shown by other evidence. Nichols v. Lee, 16 Colo. 147.

The Nebraska Statute provides that if it shall appear by the petition for the sale that there is not sufficient personal estate in the hands of the executor or administrator to pay the debts outstanding against the deceased, and the expenses of administration, and that it is necessary to sell the whole or some portion of the real estate for the payment of such debts, the judge of the District Court shall thereupon make an order directing, etc. Stack v. Royce, 34 Neb. 833.

Debts of Administrator to Estate.—The debts due the decedent by the administrator are not to be considered in determining whether there is a sufficiency of personal assets for the payment of debts, if the administrator is insolvent. Matter of Georgi, 21 Misc. Rep. (N. Y. Surrogate Ct.) 419.

4. *Settlement of Accounts Not Necessary Before Order of Sale*.—Tabor's Succession, 33 La. Ann. 343; Palmer v. Palmer, 13 Gray (Mass.) 326; Brown v. Woody, 22 Mo. App. 253; Matter of Howard, 11 Misc. Rep. (N. Y. Surrogate Ct.) 224; Matter of Plopper, 15 Misc. Rep. (N. Y. Surrogate Ct.) 202; *In re Merchant*, (Supreme Ct.) 6 N. Y. Supp. 875; Forbes v. Halsey, 26 N. Y. 60; Weaver's Appeal, 19 Pa. St. 416; Gilchrist v. Cannon, 1 Coldw. (Tenn.) 581.

It was formerly held in *New York* that, on an application by executors or administrators to a surrogate for an order directing the real estate of a decedent to be sold for the payment of debts they must deliver to the surrogate a just and true account of the personal estate and debts of the decedent. This was the rule under 1 Rev. Laws 1813, p. 450, § 23, which provided that "when any executor or administrator, whose testator or intestate shall have died seized of any real estate, shall discover or suspect that the personal estate of such testator or intestate is insufficient to pay his or her debts, such executor or administrator shall, as soon as conveniently may be, make a just and true account of the said personal estate as far as he or she can discover the same,

(5) *Exhaustion of Personalty.* — In some jurisdictions it is essential that the personalty should have been exhausted in the payment of debts before an order of sale can be granted,¹ but in other jurisdictions this is not necessary.²

and deliver the said accounts to the judge of the Court of Probate, or to the surrogate of the county in which the probate of the will or administration of the estate of any such testator or intestate shall have been had, and request his aid in the premises; and the said judge or surrogate shall thereupon make an order directing all persons interested in such estate to appear before him at a certain day and place in the same order to be specified, not less than six weeks nor more than ten weeks after the day of making such order, to show cause why so much of the real estate whereof such testator or intestate died seized should not be sold as will be sufficient to pay his or her debts." *Jackson v. Robinson*, 4 Wend. (N. Y.) 436; *Corwin v. Merritt*, 3 Barb. (N. Y.) 341; *Schneider v. McFarland*, 4 Barb. (N. Y.) 139, 2 N. Y. 459; *Sanford v. Granger*, 12 Barb. (N. Y.) 392.

Under the *Pennsylvania Act* of 1811 it was held that an order of sale could not be granted until the account of the executor or administrator had been settled. *Rhoads's Estate*, 3 Rawle (Pa.) 420; *Fox v. Winters*, 4 Rawle (Pa.) 174; *Snyder v. Markel*, 8 Watts (Pa.) 416; *Freno's Estate*, 11 Phila. (Pa.) 42, 32 Leg. Int. (Pa.) 91, 1 W. N. C. (Pa.) 270.

"The Object of the Filing of These Accounts, lists, and inventories manifestly is to apprise the court of the condition of the estate, and to make it appear that the personal estate is exhausted, and that it is necessary to resort to the real estate to pay the petitioner's demand. Where this otherwise appears from the record, it is manifest that no prejudice results from the failure of the petitioner to coerce the administrator by attachment into a performance of his duty in this regard. Here the record conclusively shows that the personal estate was exhausted." *Brown v. Woody*, 22 Mo. App. 253.

In *Palmer v. Palmer*, 13 Gray (Mass.) 326, it was said that a license to sell would not be denied merely because the accounts of the administrator had not been settled, because the necessity of a sale might be apparent and the occasion for it pressing, however the account might be settled, as in the case of an insolvent estate. But in the case at bar, the court was of the opinion that the license should not be granted until the account, which was then pending, should be settled, it seeming expedient to delay action until that time.

In *West Virginia* it is held that generally the court should not decree the sale of the realty of a decedent to pay his debts until the accounts of the personal representative have been settled. *Laidley v. Kline*, 8 W. Va. 218; *Hart v. Hart*, 31 W. Va. 688.

1. *Rule that Exhaustion of Personalty Must Be Shown.* — *Hays v. McNealy*, 16 Fla. 409.

Under the *Florida Statute* it is held that unless the record shows that the personalty has been exhausted, the proceeding is *coram non judge* and void on collateral attack. *Sloan v. Sloan*, 25 Fla. 53.

Exhaustion of Personalty Actually Received. — In *New Jersey* it is held that in order to obtain

the order for a sale it is not necessary that all the personal estate should be collected and applied in payment of debts, but it is necessary that it should be ascertained by the court, upon examination, that the personal estate is insufficient, and that it should be made to appear that so much thereof as has come into the hands of the executor or administrator has been applied. *State v. Conover*, 9 N. J. L. 342; *Stiers v. Stiers*, 20 N. J. L. 52.

2. *Exhaustion of Personalty Held Not Necessary Before Sale.* — In *New York* it is held a matter of discretion with the court to grant a license to sell real estate to pay debts when the executor has not disposed of all the personal estate. *Moore v. Moore*, 14 Barb. (N. Y.) 27.

Either actual exhaustion of the personalty must appear, or that the representative has proceeded with reasonable diligence to convert the personalty into money and that it is insufficient. *Matter of Georgi*, 21 Misc. Rep. (N. Y. Surrogate Ct.) 419.

In *North Carolina* it is held that a license to sell may be granted even if there has been no application of the personal estate to the debts. *Blount v. Pritchard*, 88 N. Car. 445.

In *Shields v. McDowell*, 82 N. Car. 137, *Dillard, J.*, said: "The act, in requiring a statement of the value and application of the personal estate, does not require that the whole shall be applied before the application for license is made. Its terms will be complied with by an averment, as in this case of the amount and of the application of the assets so far as made, and then by easy computation it can definitely be seen what is on hand unapplied, and what the deficiency will be to meet the outstanding debts; and this is all that is needed to enable the court to pass on the necessity to sell the land. The insufficiency of the personal estate of a decedent to pay his debts is the essential fact that originates the duty in the personal representative to apply for a license to sell land for assets, and it equally gives rise to the jurisdiction and power in the Probate Court to grant it; and if such insufficiency exist, it matters not whether it is made to appear before or after an application of the whole fund."

In *Finger v. Finger*, 64 N. Car. 183, *quoted* in *Shields v. McDowell*, 82 N. Car. 140, the court said: "On a petition by an administrator to sell the lands of the deceased, he must satisfy the court either that the personal estate has been exhausted in the payment of the debts, and that others are due, or that it will clearly be insufficient for that purpose."

In some of the cases the expression is used that no authority exists to decree a sale of land for assets until the personal estate is exhausted, but on examination it appears that that language is not aptly used, as the petition disclosed that assets came or ought to have come to hand sufficient to pay the debts, but were diverted by devastavit, or distribution to the next of kin. *Wiley v. Wiley*, 63 N. Car. 182; *Bland v. Hartsoe*, 65 N. Car. 204; *Sanderson v. Overman*, 98 N. Car. 235.

7. Property or Interests Subject to Sale — a. IN GENERAL. — As a general rule all the real estate of a decedent and all interests that he may have had in real estate are subject to sale for the payment of his debts,¹ though he has disposed of them by will.² This includes undivided interests as well as property in which the decedent owned the entire estate,³ estates in remainder or

Under the Pennsylvania Statute an administrator is not bound to exhaust the personal estate before applying for an order of sale; but he must exhibit a proper inventory and appraisal. *Walker's Appeal*, 1 Grant's Cas. (Pa.) 431.

In Rhode Island the rule is that if the personal estate is manifestly insufficient to pay the debts, the executor need not exhaust the personalty before obtaining leave to sell. *Wood v. Hammond*, 16 R. I. 98.

The Tennessee Statute provides that "it shall be made to appear to the satisfaction of the court that the personal estate has been exhausted in the payment of *bona fide* debts." *Maxwell v. Smith*, 86 Tenn. 539; *Allen v. Shanks*, 90 Tenn. 359. But it is held that a sale may be ordered, if the insufficiency of the personalty for the payment of debts has been ascertained, notwithstanding it has not been actually applied. *Pearson v. Gillenwaters*, 99 Tenn. 446. So, too, if the personalty is not immediately available, a sale of real estate need not be delayed to pay debts in excess of the personalty. *Doherty v. Choate*, 16 Lea (Tenn.) 192.

1. All Real Estate Subject to Sale for Payment of Debts. — *Rockwell v. Sheldon*, 2 Day (Conn.) 305; *Stillman v. Young*, 16 Ill. 318; *Jackson v. Magruder*, 51 Mo. 55.

The Heirs Have Only a Residuary Interest in the real property of their ancestor, and it is considered as belonging to his estate for the purpose of a sale to pay his debts. *Matter of Smith*, 9 La. Ann. 107; *Lange's Succession*, 46 La. Ann. 1017.

The California Statute (Code Civ. Pro., § 1529) authorizes the sale under order of court of "mines or interests in mines" belonging to the estate of a decedent. *Matter of Byrne*, 112 Cal. 176.

The North Carolina Statute (Code 1883, § 1446) provides that the real estate of a decedent which may be sold for the payment of his debts shall include "all rights of entry and rights of action, and all other rights and interests in lands, tenements, and hereditaments, which he may devise, or by law would descend to his heirs." *Elliott v. Shuler*, 50 Fed. Rep. 454.

2. Land Devised Is Subject to Testator's Debts — *United States*. — *Wilkinson v. Leland*, 2 Pet. (U. S.) 627.

Alabama. — *Pearson v. Darrington*, 32 Ala. 227; *King v. Kent*, 29 Ala. 542.

Connecticut. — *Brainard v. Cowdrey*, 16 Conn. 501.

Indiana. — *Bennett v. Gaddis*, 79 Ind. 347; *Moncrief v. Moncrief*, 73 Ind. 591.

Missouri. — *Shaw v. Nicholay*, 30 Mo. 99; *Carrson v. Walker*, 16 Mo. 68.

Even a Devise on Condition that the devisee shall pay the testator's debts does not prevent the administrator from obtaining leave to sell real estate on the personalty proving insufficient. *Bennett v. Gaddis*, 79 Ind. 347.

A Different Rule Obtains in Michigan by virtue of a statute which provides that the devisees and legatees who shall, with the consent of the executor or otherwise, have possession of the estate given to them by the will before their liability to contribute towards the debts, etc., is determined, shall hold the same subject to that liability, and that "the Probate Court may, by decree for that purpose, settle the amount of the several liabilities, as provided in the preceding sections, and decree how much, and in what manner, each person shall contribute, and may issue execution as circumstances may require; and the claimant may also have a remedy in any proper action or complaint in law or equity." Under this statute it is held that a sale cannot be ordered where the devisee has taken possession of the land devised, but that contribution must be enforced by execution. *Atwood v. Frost*, 51 Mich. 360, 59 Mich. 409.

If the Land Was Devised to Two Persons, and on a deficiency of personal estate the administrator sells that only which was devised to one of them, the sale is not illegal, if the other devisee has paid his proportion of the deficiency. *Prescott v. Walker*, 16 N. H. 340.

3. Undivided Interests Are Subject to Sale. — *Greer v. Greer*, (Ky. 1889) 12 S. W. Rep. 152; *Lange's Succession*, 46 La. Ann. 1017.

If the Property Is Divisible it should be partitioned and sale made of the portion set off to the decedent's estate. If this is not done, the sale may be set aside at the instance of the other joint owner. He cannot be compelled under such circumstances to accept a *pro rata* share of the proceeds. *Greer v. Greer*, (Ky. 1889) 12 S. W. Rep. 152.

If the Decedent Owned an Undivided Half of a tract of land and the administrator sold a specified half of the tract it is held that whatever interest the heirs had in the part sold passes by the sale. *King v. Cabaniss*, 81 Ga. 661.

Community Property. — The widow's share of the community property cannot be sold under an order for the sale of the deceased husband's property to pay his debts. *Burton v. Brugier*, 30 La. Ann. 478.

The entire community property, and not merely the interest of the deceased spouse, is subject to sale for the payment of community debts under the *Washington* statute. *Ryan v. Fergusson*, 3 Wash. 356. See also *Moody v. Looscan*, (Tex. Civ. App. 1898) 44 S. W. Rep. 621.

Under the California statute, the entire community property is subject to the debts of the husband, and on his death may be sold by the executor or administrator for that purpose. *Sharp v. Loupe*, 120 Cal. 89.

If the Amount of the Decedent's Interest Is Uncertain it must be ascertained before an order of sale for the payment of his debts can be made. *Ryan v. McLeod*, 32 Gratt. (Va.) 367.

reversion as well as those in possession,¹ and lands acquired by the estate after death;² but no sale can be ordered as to property which the decedent held merely as trustee, without any beneficial interest.³

b. EQUITABLE INTERESTS. — It is generally held that equitable interests in real estate are subject to sale for the payment of debts.⁴ Thus the court may order the sale of property which was held in trust for the decedent,⁵ or an equity of redemption owned by him,⁶ or his interest as vendee in an executory contract of sale;⁷ though it has been held that a statute authoriz-

1. **Remainders and Reversions Are Subject to Sale.** — *Killough v. Hinton*, 54 Ark. 65, 26 Am. St. Rep. 19; *Trumbo v. Sorrencey*, 3 T. B. Mon. (Ky.) 284, 16 Am. Dec. 103; *Williams v. Ratcliff*, 42 Miss. 145.

2. **Land Acquired by Estate After Death Subject to Sale.** — *Matter of Haig*, 6 Dem. (N. Y.) 454, 14 Civ. Pro. Rep. (N. Y.) 357.

3. **Trust Property Not Subject to Sale.** — *Robinson v. Codman*, 1 Sumn. (U. S.) 121; *Coverdale v. Aldrich*, 19 Pick. (Mass.) 391.

Trust Property Not Assets. — See *supra*, this title, *Assets* — *Trust Property*.

4. **Equitable Interests Subject to Sale** — *Alabama*. — *Inman v. Gibbs*, 47 Ala. 305; *Vaughan v. Holmes*, 22 Ala. 593; *Jennings v. Jenkins*, 9 Ala. 285; *Evans v. Mathews*, 8 Ala. 99; *Perkins v. Winter*, 7 Ala. 855.

Michigan. — *Baxter v. Robinson*, 11 Mich. 520; *Woods v. Monroe*, 17 Mich. 238.

Missouri. — *Hand v. Motter*, 73 Mo. 457; *Valle v. Bryan*, 19 Mo. 424.

New York. — *Richmond v. Foote*, 3 Lans. (N. Y.) 244.

Ohio. — *Biggs v. Bickel*, 12 Ohio St. 49; *Avery v. Dufrees*, 9 Ohio 145.

The Equitable Title of one who had bought and paid for land, but had not received a deed at the time of his death, may be sold by his executor or administrator under an order of court. *Howell v. Jump*, 140 Mo. 441.

5. **A Resulting Trust May Be Sold** under the *Missouri* statute which provides that all the right, title, and interest which the deceased had in the premises sold, at the time of his death, shall pass to a purchaser under an administration sale. *Valle v. Bryan*, 19 Mo. 423.

Land Conveyed by Decedent in Trust. — In *Biggs v. Bickel*, 12 Ohio St. 49, it was held that where a debtor had conveyed land in trust for the payment of certain debts, the equitable interest of the grantor in such lands in the hands of the trustee was real estate which could be sold under an order of court for the payment of debts.

Land Conveyed to Third Person by Direction of Decedent. — In *Rhem v. Tull*, 13 Ired. L. (35 N. Car.) 57, it was held that where a debtor purchased and paid for land and caused it to be conveyed to his sons, it was not subject to sale, under an order of court for the payment of his debts, because such a case was not contemplated by the *North Carolina* statute which provides that: "The real estate liable to be sold under this act shall include all rights of entry, and rights of action, and all other rights and interests in lands, tenements, and hereditaments, which, by law, descend to the heirs of the deceased; and all lands which the deceased may have conveyed with intent to defraud his creditors; provided, that only such land shall be liable to be sold as would have been liable

to attachment or execution by a creditor of the grantor, in his lifetime."

6. **Equities of Redemption.** — See *infra*, this section, *Property or Interests Subject to Sale* — *Encumbered Property*.

7. **"An Executory Contract for the Purchase of Land** is regarded in the light of real estate, so far as to give the administrator no right to dispose of such a contract which he would not have to dispose of the land itself, had it been conveyed to his intestate during life." *Baxter v. Robinson*, 11 Mich. 520.

A Parol Contract for the purchase of land, which has been taken out of the statute of frauds, by part performance, is subject to sale for payment of the vendee's debts. *Richmond v. Foote*, 3 Lans. (N. Y.) 244.

Inchoate Right of Purchaser at Probate Sale. — In *Inman v. Gibbs*, 47 Ala. 305, it was held that where a sale of lands under an order of the Probate Court had been made and confirmed, the purchaser, though he had not paid the purchase money, had an interest in the land which, on his death, the court could order to be sold for the payment of his debts.

A Penal Bond to Make Title on the performance of certain conditions by the obligee does not create an equitable interest in the land which the probate court on the death of the obligee can order to be sold for the payment of his debts. Thus where a person who claimed to have a right of entry under the pre-emption laws of the United States executed a bond to the decedent in the penal sum of ten thousand dollars binding himself, on condition that the decedent would establish the claim and pay to the United States the purchase money for the land, to deliver to the decedent, his heirs and assigns, a good and sufficient deed of all his right and title to one-half of said land, it was held that the decedent did not take such an estate or interest in the land as could be sold by order of the Orphans' Court, though the condition of the bond was performed by the decedent. *Brown v. Chambers*, 12 Ala. 697.

A Purchaser at a Sheriff's Sale who dies before taking a deed is held to acquire no such interest in the premises as could be the subject of an administrator's sale. *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307.

Rescission of Contract. — If an executory contract for the sale of land is rescinded for non-payment of the purchase money after the death of the purchaser, his interest ceases and no sale can be ordered for the payment of his debts, though his heir, whom he left in possession of the land, obtained a deed to it from the vendor after the rescission. *Goodwin v. Nelin*, 2 Abb. App. Dec. (N. Y.) 258, 35 How. Pr. (N. Y.) 402.

Statutory Provisions. — In some instances the

ing the sale of the real estate of a decedent does not apply to an equitable interest under an executory contract of sale.¹

c. HOMESTEADS. — It is generally held that homestead property cannot be sold for the debts of the deceased owner, so long as the exemption continues in favor of his family, but that a sale can be ordered only when the exemption has ceased in accordance with the provisions of the law creating it; and that a sale made before that time is absolutely void.²

In Tennessee, however, it is held that the remainder interest in land subject to a homestead may be sold.³

d. ENCUMBERED PROPERTY. — The fact that the real estate of a deceased debtor is subject to incumbrances of any sort, such as mortgages, rights of dower, curtesy, etc., does not affect its liability to be sold under an order of court for the payment of debts,⁴ even though, in case of a mortgage, an

statutes expressly mention the interests of a vendee in a contract of sale in prescribing what property may be sold. *Baxter v. Robinson*, 11 Mich. 520; *Richmond v. Foote*, 3 Lans. (N. Y.) 244.

1. Interest of Vendee in Executory Contract Held Not Subject to Sale. — In *Hendrickson v. Hendrickson*, 41 N. J. Eq. 376, it was held that a statute authorizing the Orphans' Court to order the sale of lands, tenements, hereditaments, or real estate of a decedent, if necessary to pay his debts, did not include an equitable interest under a contract of sale.

2. Homestead Not Subject to Sale During Period of Exemption — *Arkansas.* — *Booth v. Goodwin*, 29 Ark. 633; *Alzheimer v. Davis*, 37 Ark. 316; *McCloy v. Arnett*, 47 Ark. 445; *Nichols v. Shearon*, 49 Ark. 75.

Illinois. — *Oettinger v. Specht*, 162 Ill. 179; *Hartman v. Schultz*, 101 Ill. 437.

North Carolina. — *Hinsdale v. Williams*, 75 N. Car. 430; *Gamble v. Watterson*, 83 N. Car. 573.

Ohio. — *Wehrle v. Wehrle*, 39 Ohio St. 365.

Texas. — *Yarboro v. Brewster*, 38 Tex. 397. See *Ions v. Harbison*, 112 Cal. 260.

An Exception to the rule stated in the text is where a sale is asked to pay the purchase money of the land, if there is no other property to be sold. The principle of this exception is that there is no exemption as against a claim for the purchase money of the homestead. *Fudge v. Fudge*, 23 Kan. 416; *Murphy v. De France*, 105 Mo. 53.

Another Exception is in regard to debts contracted before the right to the homestead exemption was given by statute. As to such debts the statute is held not to apply because it would impair the obligation of contracts. *Edwards v. Kearzey*, 96 U. S. 595.

Presumption. — And where a sale of a homestead is decreed it will be presumed that it was for an antecedent debt, such decree being entitled to the same presumptions in its favor as a judgment of a court of general jurisdiction. *Murphy v. De France*, 105 Mo. 53, *overruling* *Daudt v. Harmon*, 16 Mo. App. 203.

After the Period of Exemption Has Expired the land reverts to the estate and may then be ordered to be sold. *Taylor v. Thorn*, 29 Ohio St. 569. And at the expiration of that period the executor or administrator is entitled to an order of sale, if there are existing debts, and the purchaser at the first sale will be subrogated to the rights of creditors whose claims

were satisfied with the money paid by him. *Wehrle v. Wehrle*, 39 Ohio St. 365 [*citing* *Scott v. Dunn*, 1 Dev. & B. Eq. (21 N. Car.) 427, 30 Am. Dec. 177, note; *Springs v. Harven*, 3 Jones Eq. (56 N. Car.) 96; *Hudgin v. Hudgin*, 6 Gratt. (Va.) 320; *McGee v. Wallis*, 57 Miss. 638, 34 Am. Rep. 484; *Valle v. Fleming*, 29 Mo. 152, 77 Am. Dec. 557; *Schafer v. Causey*, 76 Mo. 365; *Herron v. Marshall*, 5 Humph. (Tenn.) 443, 42 Am. Dec. 444; *Caldwell v. Palmer*, 6 Lea (Tenn.) 652; *Riddle v. Roll*, 24 Ohio St. 572; *Endel v. Leibrock*, 33 Ohio St. 254; *Sidener v. Hawes*, 37 Ohio St. 532].

As to when homestead property is assets of the estate of the deceased owner, see *supra*, this title, *Assets* — *What Are Assets in General*.

3. Remainder in Homestead Subject to Sale. — *Lunsford v. Jarrett*, 2 Lea (Tenn.) 579.

4. Encumbered Property Subject to Sale — **Mortgages** — *Alabama.* — *Perkins v. Winter*, 7 Ala. 855; *Duval v. Planters'*, etc., Bank, 10 Ala. 636; *Bolling v. Jones*, 67 Ala. 508.

Illinois. — *Phelps v. Funkhouser*, 39 Ill. 401; *Le Moyne v. Quimby*, 70 Ill. 399; *Sebastian v. Johnson*, 72 Ill. 282, 22 Am. Rep. 144; *Kenley v. Bryan*, 110 Ill. 652.

Mississippi. — *Williams v. Stratton*, 10 Smed. & M. (Miss.) 418.

Missouri. — *Jackson v. Magruder*, 51 Mo. 55; *Hand v. Motter*, 73 Mo. 457.

Ohio. — *Bateman v. Morris*, 4 Ohio N. P. 397.

Pennsylvania. — *Fitzsimmons' Appeal*, 40 Pa. St. 422.

South Carolina. — *Shaw v. Barksdale*, 25 S. Car. 204.

Texas. — *Henry v. Drought*, 10 Tex. Civ. App. 379.

Washington. — *Ryan v. Fergusson*, 3 Wash. 356.

Mortgages Executed by the Heir on the property descended do not affect a proceeding to sell the property for the payment of the ancestor's debts. The only right of the mortgagees is against the surplus proceeds. *Escarraquell's Succession*, 36 La. Ann. 155.

Sale to Pay Debt Secured by Mortgage. — A sale may be ordered to pay a debt secured by a mortgage on the property sought to be sold. *Ryan v. Fergusson*, 3 Wash. 356.

In *Massachusetts* it was formerly provided by statute that an executor or administrator could sell real estate held in mortgage only in the manner prescribed for the sale of real estate owned by the decedent. *Ex p. Blair*, 13 Met.

action for foreclosure is pending;¹ but the rights of the incumbrancer will always be protected, either by selling subject to the incumbrance or by discharging it out of the proceeds of the sale.² The authorities differ as to whether or not the personal representative may proceed to clear the title of the property before selling. Some, construing strictly the powers given him in reference to the real estate, hold that he cannot involve the estate in litigation for the purpose of removing incumbrances, but that he must sell the property as he finds it.³ Others hold that the order of sale divests the title of the heir and invests the personal representative with the title so far as to enable him to remove incumbrances, in order that the sale may be made for the best interests of the creditors and the estate.⁴

e. INTEREST IN PUBLIC LANDS. — An interest in public lands acquired by an entry which has been paid for, but on which a patent has not been issued, or where the title is incomplete of record, is subject to the debts of the person who made the entry and paid the price, and may be sold therefor under an order of court after his death.⁵ So, too, headright certificates and final set-

(Mass.) 126. But in 1849 the law was changed (Stat. 1849, c. 47), and authority was given to sell a mortgage not foreclosed in the same manner that personalty is sold. *Burt v. Ricker*, 6 Allen (Mass.) 77. See also Pub. Stat. Mass., 1882, c. 133, § 9.

In *Doe v. Hanson*, 8 New Bruns. 427, it was held that a deed executed by the executor of a deceased mortgagee purporting to convey mortgaged land operates only as a transfer of the mortgage debt, unless the land was devised to the executor.

The general rule is, however, that a mortgage is personal property, and the executor or administrator may dispose of it in the same manner as other personalty belonging to the decedent. See *supra*, this title, *Assets—Real Property Generally—Mortgages*.

Real Estate Subject to Dower. — Real estate in which the widow of the deceased owner has a right of dower may be sold, subject to such right, for the payment of the decedent's debts. *Killough v. Hinton*, 54 Ark. 65, 26 Am. St. Rep. 19; *Kenley v. Bryan*, 110 Ill. 652.

In *Indiana*, since the Act of 1852, the sale of land in which the decedent's widow has a dower interest must be sold subject to that interest. *Hutchinson v. Lemcke*, 107 Ind. 121; *Hanlon v. Waterbury*, 31 Ind. 168; *Kent v. Taggart*, 68 Ind. 163; *Elliott v. Frakes*, 71 Ind. 412; *Armstrong v. Cavitt*, 78 Ind. 475; *Compton v. Pruitt*, 88 Ind. 171. See also *Flenner v. Travellers Ins. Co.*, 89 Ind. 164; *Nutter v. Hawkins*, 93 Ind. 260; *Matthews v. Pate*, 93 Ind. 443; *Pepper v. Zahnsinger*, 94 Ind. 88; *Clark v. Deutsch*, 101 Ind. 491; *Frakes v. Elliott*, 102 Ind. 47.

In *Minnesota* the one-third of the real estate which goes to the widow on the death of her husband is, for the purpose of paying his debts, held to be a part of his estate to be administered, so that a license to sell for that purpose the interest of the estate will cover the widow's third. *Scott v. Wells*, 55 Minn. 274.

As to priority between the dower right and the decedent's debts see the title **DOWER**, vol. 10, p. 153.

As to priority between the husband's right of curtesy and the debts of his deceased wife, see the title **CURTESY**, vol. 8, p. 526.

1. Pendency of Foreclosure Suit—Proceedings to Sell Not Affected. — *Bateman v. Morris*, 4 Ohio N. P. 397; *Fitzimmon's Appeal*, 40 Pa. St. 422; *Shaw v. Barksdale*, 25 S. Car. 204.

If the mortgaged premises have been sold under a decree of foreclosure, a sale by the mortgagor's administrator in a proceeding before the surrogate, commenced after a *lis pendens* was filed in the foreclosure suit, will be enjoined. The land having been already sold, another sale is unnecessary. The administrator should set up his rights, if any, to the surplus. *Breevort v. M'Jimsey*, 1 Edw. Ch. (N. Y.) 551.

2. Protection of Incumbrancers. — See *infra*, this section, *Disposal of Proceeds—Discharge of Incumbrances*. See also, in regard to this subject generally, the title **JUDICIAL SALES**.

3. Power to Remove Incumbrances Before Sale Denied. — *Phelps v. Funkhouser*, 39 Ill. 401; *Le Moyne v. Quimby*, 70 Ill. 399; *Sebastian v. Johnson*, 72 Ill. 282, 22 Am. Rep. 144.

4. Power to Remove Incumbrances Asserted. — *Williams v. Stratton*, 10 Smed. & M. (Miss.) 418.

In *Massachusetts* it is held that a bill in equity may be maintained by an executor or administrator to discharge a mortgage on the real estate of his decedent, before selling it under an order of court. *Mason v. Daly*, 117 Mass. 406. See also *Keith v. Molineux*, 160 Mass. 499.

In *Washington* it is in the discretion of the court to direct the executor or administrator to redeem mortgaged property or to order him to sell subject to the mortgage. *Ryan v. Fergusson*, 3 Wash. 356.

5. Interest under Entry Paid for but Not Completed by Patent. — *Woods v. Monroe*, 17 Mich. 238; *Avery v. Dufrees*, 9 Ohio 145.

If a Land Claim Has Been Confirmed by Act of Congress it may be sold for the payment of the debts of the claimant though he dies before the patent issues. *Jackson v. Astor*, 1 Pin. (Wis.) 137.

Confirmation of Mexican Grant. — In *McDonald v. Burton*, 68 Cal. 445, the decedent purchased a ranch, the vendor's title to which was derived from a Mexican grant. The decedent instituted a proceeding to have the grant confirmed by the United States Government. Pending this proceeding he died, and it was

tlement certificates may be sold;¹ and in some jurisdictions it is provided by statute that where a purchaser of public lands who has obtained a certificate of purchase shall die before a patent is issued, the certificate may be sold under an order of court for the payment of his debts,² though the land itself is not the subject of sale until a location and survey under the certificate have been made.³

After a Patent Has Been Issued, it is obvious that the title of the patentee is complete and the land patented becomes subject to sale.⁴

An Entry under the Pre-emption Laws of the *United States*, however, does not, before a patent is issued, create a claim which can be sold at the death of the pre-emptor, but the right to obtain a patent descends to his heirs free from his obligations,⁵ it being the policy of these laws to protect those who, in good faith, have settled on and improved portions of the public lands.⁶

A Voluntary Donation of land by the government to the heirs of a decedent on account of meritorious services performed in his lifetime is not an asset of his estate and cannot be sold for his debts.⁷

f. LAND HELD OR CLAIMED ADVERSELY BY THIRD PERSONS—(1) *In General*.—No general rule can be laid down as to whether land claimed by, or in the possession of, third persons adversely to the estate can be sold for the payment of a decedent's debts. In many jurisdictions local statutes govern, but independently of statutory regulation it seems that a sale may be ordered notwithstanding any doubt as to the decedent's title, or that an adverse claim of title has been asserted by a third person.⁸

continued in the name of his widow and children as his heirs, and the grant was finally confirmed, and they were so described in the order of substitution, in the decree of confirmation, and in the patent from the United States. It was held that the patent inured to the benefit of the estate and that the land was subject to sale for the payment of the decedent's debts.

1. *Headright Certificates*.—*Soye v. Maverick*, 18 Tex. 100.

Final-settlement Certificates.—*Strodes v. Patton*, 1 Brock. (U. S.) 228.

Fraudulent Certificates.—Land located under a fraudulent certificate cannot be sold by an administrator. *Roehl v. Pleasants*, 31 Tex. 45, 98 Am. Dec. 514.

2. *Land Certificate Subject to Sale by Statute*.—*Prevo v. Walters*, 5 Ill. 35; *Louden v. Martindale*, 109 Mich. 235.

In *Texas*, when a national road certificate is located and a patent issued, the certificate is merged in the land, and a sale of the certificate conveys no title to the land. *East v. Dugan*, 79 Tex. 329.

3. *Necessity of Locating Certificate Before Sale*.—*Harwood v. Wylie*, 70 Tex. 538.

4. *After a Patent Has Issued*, the land may be sold for the debts of the patentee on his death, it is said, notwithstanding a clause in the patent that the patentee shall not sell without permission from the President of the United States. *Sitzman v. Pacquette*, 13 Wis. 291.

5. *Pre-emption Claims Not Subject to Sale*—*Alabama*.—*Burns v. Hamilton*, 33 Ala. 210, 70 Am. Dec. 570; *Johnson v. Collins*, 12 Ala. 322.

California.—*Grover v. Hawley*, 5 Cal. 485.

Indiana.—*Hawkins v. Johnson*, 4 Blackf. (Ind.) 21.

Kansas.—*Coulson v. Wing*, 42 Kan. 507, 16 Am. St. Rep. 503; *Rogers v. Clemmans*, 26 Kan. 522.

Louisiana.—*Dean v. Wade*, 8 La. Ann. 85.

The Administrator Has No Right to Obtain a Patent in order to sell the land for the payment of debts, and a contract to advance money to him in order that he may procure the patent is void. *Cothran v. McCoy*, 33 Ala. 65.

Improvements made by the pre-emptor on the land are chattels real, which pass to his personal representative, and not to his heirs. *Pelham v. Wilson*, 4 Ark. 289.

6. *Policy of Pre-emption Laws*.—See *Lamb v. Davenport*, 18 Wall. (U. S.) 313; *Rector v. Gibbon*, 111 U. S. 276. See also the title PUBLIC LANDS.

7. *Voluntary Donation Not Subject to Sale*.—*Todd v. Masterson*, 61 Tex. 618.

The rule that land donated by the government to the heir of a person deceased in consideration of meritorious services performed by him does not constitute a part of the estate of the decedent, and therefore cannot be subjected to the payment of his debts, has been considered in another part of this article. See *supra*, this title, *Assets—Government Claims*.

8. *Doubtful Title*.—In *Valle v. Bryan*, 19 Mo. 423, the court said that there is no doubt as to the power to order a sale where the title is doubtful, though it is bad policy to do so.

In *Grider v. Apperson*, 38 Ark. 388, it was held that an application by creditors for an order to sell the real estate of a decedent would not be denied on the ground that the petitioners were suing for an undivided interest in the land, though the court might in its discretion suspend the proceeding until the litigation as to the title should be ended.

The Orphans' Court Cannot Try Title to land in a proceeding for a sale to pay debts, so far as to conclude third persons who may have an interest in it adverse to the estate. *Swackhamer v. Kline*, 25 N. J. Eq. 503; *Liddel v. McVickar*, 11 N. J. L. 44.

But this does not mean that the court may

If the Decedent Had Been Disseized, it is held that the land cannot be sold under an order of court.¹

But There Can Be No Disseizin of the Representative so as to prevent him from selling under an order of court, because, strictly speaking, he had no seizin.²

In Georgia it is provided by statute that an administrator cannot sell property held adversely to the estate, but that he must first obtain possession.³

But in Illinois the statute provides that if the land is occupied by third persons, they shall be made parties to the proceeding, and it is held that if they fail to set up any claim that they may have, they are estopped afterwards to assert it against the purchaser at the sale.⁴

(2) *Land Conveyed by Decedent in Fraud of Creditors.* — The power of an executor or administrator to sue to set aside fraudulent conveyances made by the decedent in his lifetime has been considered in another part of this article. It is there stated that some courts deny such power on the theory that the executor or administrator represents the decedent, and that consequently a deed by his testator or intestate is binding on him, while other courts, proceeding on the theory that the executor or administrator represents the creditors as well as the decedent, hold that he may maintain such an action.⁵ Similar considerations apply in regard to the sale under order of court, for the payment of debts, of land which a decedent had conveyed for the purpose of defrauding his creditors; and it is accordingly held in some jurisdictions that property which has been so conveyed is not subject to sale under an order of the probate court,⁶ while in other jurisdictions it is held that an order of sale

not ascertain the real estate of which the decedent died seized, so far as to enable it to inform purchasers what the administrator is ordered to sell. This power is necessarily implied in the duty cast upon the court by statute "to hear and examine the allegations and proofs of the executor or administrator and other persons interested," and in the power to order sale of all or part of the decedent's lands, according to the exigency of the case. Whether the decedent actually owned what the court orders to be sold is a question which purchasers may afterwards be compelled to settle in other tribunals. *Robison v. Furman*, 47 N. J. Eq. 307.

In North Carolina persons claiming an interest in the land a sale of which is asked may make an issue in the proceeding, and the court must pass on that issue before ordering a sale. *Perry v. Peterson*, 98 N. Car. 63.

Escheated Land. — In *Den v. O'Hanlon*, 21 N. J. L. 582, 20 N. J. L. 31, it was held that where a person dies without heirs his real estate is not subject to sale, because it, *eo instanti* and without office found, escheats to the state, and the statute providing for the sale of a decedent's lands to pay debts provides that the deed shall vest in the purchaser only such estate as the heirs or devisees were seized of at the time of making the order. But this does not mean that the rights of creditors will not be protected. It means only that the proceeding in the probate court is not their proper remedy. Compare *Hinkle v. Shadden*, 2 Swan (Tenn.) 46.

1. Lands of Which Decedent Was Disseized Not Subject to Sale. — *Thorndike v. Barrett*, 2 Me. 312.

2. Disseizin of Personal Representative. — "An administrator, as such, does not have the estate; he has no seizin, and therefore cannot be disseized. He has only a power given him by

statute, to be exercised for certain purposes in a certain manner, and if the decedent die seized, to hold that the power can be defeated by any subsequent disseizin would be to hold that the statute itself could be so defeated, which, it seems to us, would be not only against public policy, but absurd." *Knowles v. Blodgett*, 15 R. I. 463, 2 Am. St. Rep. 913.

Executors and administrators, selling under an order of court, are not within either the letter or the reason of the *Connecticut* statute providing that a conveyance of lands of which the grantor has been disseized shall be void. *Barnes v. Cutler*, 1 Root (Conn.) 489.

3. Statutory Rule in Georgia. — *Hall v. Armor*, 68 Ga. 449. See also *Davis v. Howard*, 56 Ga. 430; *Weitman v. Thiot*, 64 Ga. 11; *French v. Baker*, 95 Ga. 715.

4. Statutory Rule in Illinois. — *Bowers v. Block*, 129 Ill. 424.

5. Power to Set Aside Fraudulent Conveyances. — See *supra*, this title, *Management and Care of Estate* — *Setting Aside Fraudulent Conveyances*.

6. Fraudulent Conveyances — Power to Sell Denied. — *Beebe v. Sauter*, 87 Ill. 518. See also *M'Dowell v. Cochran*, 11 Ill. 31; *Choteau v. Jones*, 11 Ill. 319, 50 Am. Dec. 460; *Alexander v. Tams*, 13 Ill. 226; *White v. Russell*, 79 Ill. 155; *Le Moyne v. Quimby*, 70 Ill. 405.

Deed of Trust Reserving Power of Revocation. — It seems that a conveyance which, on its face, is not binding, even on the grantor, does not affect the right of the grantor's personal representative to sell the land for debts, even in a jurisdiction where the power of a personal representative to set aside the fraudulent conveyance of the decedent is denied. It was so held where a debtor conveyed his land in trust, reserving an absolute power of revocation, and it was considered immaterial whether the grantor exercised the power of

may be made notwithstanding the fraudulent conveyance,¹ and in some instances the statutes in terms authorize the sale of such property.²

(3) *Land Alienated by Heir or Devisee.* — The *English* rule, noted above, that if the heir or devisee of a deceased debtor aliened the land descended or devised before an action was brought against him for the debts of his ancestor or testator, the creditors were thereby deprived of their remedies,³ has been held applicable to statutory proceedings to sell a decedent's real estate for the payment of his debts.⁴ But the proceeding must, as a general rule, be instituted within a certain time,⁵ and if the heir or devisee within such time alienes the land descended or devised, the alienee takes it subject to the power of sale.⁶

revocation in his lifetime or not. *Alford v. Alford*, 96 Ala. 385.

In Case of a Fraudulent Mortgage the equity of redemption is subject to sale notwithstanding the application of the rule that a fraudulent conveyance is binding on the personal representative of the grantor. *Bolling v. Jones*, 67 Ala. 508.

1. Rule that Land Fraudulently Conveyed May Be Sold — *Indiana.* — *Bushnell v. Bushnell*, 88 Ind. 403.

Iowa. — *Harlin v. Stevenson*, 30 Iowa 371.

Maine. — *Brown v. Whitmore*, 71 Me. 65.

Massachusetts. — *Drinkwater v. Drinkwater*, 4 Mass. 354.

North Carolina. — *Rhem v. Tull*, 13 Ired. L. (35 N. Car.) 57; *Clement v. Cozart*, 109 N. Car. 173. Compare *Egerton v. Jones*, 107 N. Car. 284.

Ohio. — *Longley v. Sewell*, 4 Ohio Dec. 1.

2. Power to Sell Expressly Given by Statute. — *Brown v. Whitmore*, 71 Me. 65; *Rhem v. Tull*, 13 Ired. L. (35 N. Car.) 57; *Code N. Car.*, § 1446, quoted in *Elliott v. Shuler*, 50 Fed. Rep. 458, note; *Longley v. Sewell*, 4 Ohio Dec. 1.

3. See *supra*, this section, *Power to Order Sale* — *At Common Law*.

4. In New Jersey it was so held until the rule was changed by statute. *Den v. Hunt*, 11 N. J. L. 1.

The *Tennessee* Statute provides that "if an heir or devisee alien the land before action brought or process sued out, he shall be answerable for the ancestor's debts to the value of the land aliened." *Maydwell v. Maydwell*, 9 Heisk. (Tenn.) 571. Under this statute it is held that if an heir or devisee alienes the land before a proceeding is instituted to have it sold to pay the debts of the ancestor or testator, a *bona fide* purchaser from such heir or devisee takes a good title, and the creditor's remedy is against the heir or devisee. *Maxwell v. Smith*, 86 Tenn. 539; *Raht v. Meek*, 89 Tenn. 274; *Livingston v. Noe*, 1 Lea (Tenn.) 55; *Gibson v. Jones*, 13 Lea (Tenn.) 684; *Smith v. Thomas*, 14 Lea (Tenn.) 324.

5. As to the Time within which an application for leave to sell must be made, see *supra*, this section, *Time for Making Application*.

The *Rhode Island* Statute (Pub. Stat. R. I., c. 189, § 13) provides that no heir or devisee shall have power to alien or encumber the real estate of any decedent so as to affect the executor's or administrator's sale thereof, "within three years and six months after the probate of the will or grant of administration." *Dawley v. Probate Ct.*, 16 R. I. 694; *Johnson's Petition*, 15 R. I. 438; *Knowles v.*

Blodgett, 15 R. I. 463, 2 Am. St. Rep. 913; *Draper v. Barnes*, 12 R. I. 156. But see Pub. Stat. 1896, c. 218, § 28.

6. Alienation by Heir or Devisee — Power of Sale Not Defeated — *United States.* — *Watkins v. Holman*, 16 Pet. (U. S.) 25.

Alabama. — *Leavens v. Butler*, 8 Port. (Ala.) 380; *Bell v. Craig*, 52 Ala. 215; *Nelson v. Murfee*, 69 Ala. 598.

Arkansas. — *Howell v. Duke*, 40 Ark. 102.

Connecticut. — *Davis v. Vansands*, 45 Conn. 600.

Illinois. — *McCoy v. Morrow*, 18 Ill. 519.

Indiana. — *Weakley v. Conrad*, 56 Ind. 430.

Massachusetts. — *Drinkwater v. Drinkwater*, 4 Mass. 354; *Willard v. Nason*, 5 Mass. 240.

Michigan. — *Flood v. Strong*, 108 Mich. 561; *Armstrong v. Loomis*, 97 Mich. 577.

New Jersey. — *Den v. Hunt*, 11 N. J. L. 1; *Skillman v. Van Pelt*, 1 N. J. Eq. 511.

New York. — *Hyde v. Tanner*, 1 Barb. (N. Y.) 75; *Jewett v. Keenholts*, 16 Barb. (N. Y.) 193.

North Carolina. — *Murchison v. Whitted*, 87 N. Car. 465.

Ohio. — *Faran v. Robinson*, 17 Ohio St. 242, 93 Am. Dec. 617; *Stiver v. Stiver*, 8 Ohio 221.

Rhode Island. — *Mowry v. Robinson*, 12 R. I. 152; *Johnson's Petition*, 15 R. I. 438.

The *Purchaser* of land from the heir of a deceased debtor may require the administrator to resort first to unsold lands, if any, for the payment of the decedent's debts. *Howell v. Duke*, 40 Ark. 102.

Sale After Time Limited. — Land aliened by an heir after the time limited cannot be sold by the administrator to pay the ancestor's debts. *Murchison v. Whitted*, 87 N. Car. 465; *Badger v. Daniel*, 79 N. Car. 372.

Nor can the administrator sell land aliened by the heir within such time if the alienee, after the time has elapsed, has conveyed to a purchaser for value and without notice. *Murchison v. Whitted*, 87 N. Car. 465.

In New Jersey, if more than a year after the decedent's death elapses before an order of sale is obtained, the sale will pass only such interest as the heir or devisee had in the land at the time when the order was made. *Bockover v. Ayres*, 22 N. J. Eq. 13.

Consent of Administrator to Alienation by Heir. — In *Pell v. Farquar*, 3 Blackf. (Ind.) 331, it was held that an administrator consenting to a sale of the real estate by the heirs could not afterwards sell it for the payment of debts.

But see *Moncrief v. Moncrief*, 73 Ind. 587, in which case it was held that the consent of the administrator to a sale of land by the heir

(4) *Disseizin of Heir or Devisee*. — A disseizin of the heir or devisee does not affect the liability of the land to be sold for the debts of the ancestor or testator.¹

(5) *Land Sold for Partition*. — A sale of land in partition between the heirs of a decedent will not preclude a subsequent sale for the payment of the decedent's debts.²

(6) *Land Partitioned by Order of Court*. — In a jurisdiction where the title to land is passed to the heirs by partition made by the court of probate, it is held that the land so partitioned is placed beyond the power of the court and is not thereafter subject to sale under an order of the court.³

g. QUANTITY TO BE SOLD. — The quantity of property which the court may order to be sold is generally limited to so much as may be necessary, after the personalty is exhausted, to pay the decedent's debts; ⁴ but regard will be had to the interests of the estate as well as those of creditors, and the court may order the sale of all the real estate, instead of a mere sufficiency to pay debts, if that course is more beneficial to the estate.⁵

would not divest the creditor of his right to have his debt paid out of the proceeds of the land, and that this right might be enforced by an order for the sale of the land on the petition of the administrator as well as on the petition of the creditor. See also *Baker v. Griffith*, 83 Ind. 411. In this case it was held that where an administrator, having sufficient assets to pay all the debts of the estate, conveyed the real estate to the infant heir with the consent of the creditors, and the guardian of the heir, with the knowledge of the creditors, sold it under an order of court, it was still liable to be sold by an administrator *de bonis non* at the instance of the decedent's creditors. "A mere concurrence," said the court, "in the delivery to the guardian of land already belonging to the heirs, together with knowledge that the guardian had procured an order to sell the land for the benefit of the heirs, was not a waiver of any of the creditors' rights, and created no estoppel as to them."

What Constitutes Alienation. — A mortgage by the heir is alienation within the rule relating to the power of the executor or administrator to sell for the payment of debts land which has been aliened by the heir or devisee. *Den v. Jaques*, 10 N. J. L. 259; *Fonda v. Chapman*, 23 Hun (N. Y.) 119; *Jacocks v. Paterson*, 18 R. I. 751.

Where land descends to the child of a deceased debtor, and at the death of the child to its mother, an alienation by the mother is not an alienation by an heir of the deceased debtor. *Maydwell v. Maydwell*, 9 Heisk. (Tenn.) 571.

1. *Disseizin of Heir or Devisee* — **Land Still Subject to Sale.** — *Leavens v. Butler*, 8 Port. (Ala.) 380; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Willard v. Nason*, 5 Mass. 240.

2. **Land Sold in Partition** — **Subsequent Sale to Pay Debts.** — *Hall v. Partridge*, 10 How. Pr. (N. Y. Supreme Ct.) 188.

If the partition sale was made before the time within which an application for an order to sell for the payment of debts could be made, though the deed of the commissioner in the partition proceeding was executed afterwards, the land still remains subject to the payment of the ancestor's debts. The commissioner's deed in such case relates to the time of the sale. *McArtan v. McLaughlin*, 88 N. Car. 391.

3. **Land Partitioned by Order of Court.** — The rule stated in the text obtains in *Texas*. *Henderson v. Lindley*, 75 Tex. 185; *Lee v. Henderson*, 75 Tex. 190. See also *Bledsoe v. Beiler*, 66 Tex. 437; *Todd v. Willis*, 66 Tex. 704; *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643; *McFarland v. Hall*, 17 Tex. 690.

But a mere order for partition which has not been carried into effect does not prevent the court from ordering a sale to pay debts. *Lee v. Henderson*, 75 Tex. 190.

4. **Quantity to Be Sold** — **Sufficiency to Pay Debts.** — *Black v. Meek*, 1 Ind. 180; *Newcomer v. Wallace*, 30 Ind. 216; *Fralich v. Moore*, 123 Ind. 75; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23; *Wells v. Mills*, 22 Tex. 302.

The Missouri Statute provides that "if any person die and his personal estate shall be insufficient to pay his debts and legacies, his executor or administrator shall present a petition to the Probate Court stating the facts and praying for the sale of the real estate, or so much thereof as will pay the legacies and debts of such deceased person." *Priest v. Spier*, 96 Mo. 111.

Misapplication of Proceeds. — If enough land has been sold to pay all the debts, but some of the creditors who were parties to the proceeding were not paid, in consequence of the misappropriation of the proceeds of the sale, they cannot have other portions of the estate sold, because they should have seen to it that the proceeds were properly applied. *Clyburn v. Reynolds*, 31 S. Car. 91.

When a Sufficient Quantity Has Been Sold to realize the amount required to pay the debts, the authority of the administrator is exhausted and he cannot thereafter proceed under the order to sell other lands. *Wells v. Mills*, 22 Tex. 302.

5. **Sale in Excess of Amount Required to Pay Debts** — The Indiana Statute provides that if it shall be necessary to sell only a part of the real estate of an intestate, and it shall appear that by such partial sale the residue, or some specific part or piece thereof, would be greatly injured, the court may order a sale of the whole estate embraced in the petition, or of such part thereof as the court shall think necessary and most for the interest of all concerned therein. *Black v. Meek*, 1 Ind. 180.

An Undivided or Partial Interest, however, cannot be sold where the decedent owned the entire estate. The sale must cover the whole interest of the decedent in so much of the land as is offered.¹

8. Preliminaries to Making Sale — a. OATH. — The statutes in some states provide that before a license to sell may be granted, or before the sale may be made, the executor or administrator shall take an oath for the faithful performance of his duties in respect to the sale.²

b. SPECIAL SALE BOND — (1) Necessity of Bond. — The statutes providing for the sale of a decedent's real estate under an order of court ordinarily require the executor or administrator, before making the sale, to give bond for the proper application of the proceeds.³ But in some states the require-

In Kentucky an entire tract will be sold if a sale of the whole is for the best interests of all concerned, though a sale of a part only would have sufficed to pay the debts. *Turner v. Turner*, (Ky. 1896) 33 S. W. Rep. 1102.

In New York the statute vests in the surrogate a discretionary power to determine, where the real estate consists of houses or lots, or of a farm so situated that a part cannot be sold without manifest prejudice to the heirs or devisees, that the whole or a part thereof, although more than may be necessary to pay such debts, may be ordered to be sold, and if a sale of the whole real estate appears necessary it may be ordered accordingly; and his abuse of the discretion is not available to the purchasers. *Matter of Dolan*, 88 N. Y. 309.

In North Carolina the statute provides that "the court may decree a sale of the whole or any specific parcel of the premises, in such manner as to size of lots, place of sale, terms of credit, and security for payment of purchase money as may be most advantageous to the estate." *Tillett v. Aydlett*, 90 N. Car. 551.

1. Entire Interest of Decedent Must Be Sold. — The statutory authority to sell lands under license of courts of probate is a special power and confined to the case where the sale covers, so far as the land sold is concerned, the interest of which the decedent died seized. There is no power to sell any less interest than remains in his estate in such property. *Eberstein v. Oswalt*, 47 Mich. 254.

This principle was applied where an administrator bought an undivided interest of some of the heirs in the decedent's real property, and transferred part of it to the same heirs, thereby withdrawing it from the estate. *Daly's Appeal*, 47 Mich. 443.

So, too, the court cannot order a sale subject to incumbrances created after the death of the decedent. The entire interest owned by him at the time of his death must be sold. *Hewitt v. Durant*, 78 Mich. 186.

Nor can less than the decedent's entire interest be sold to protect a life estate created by the will of the decedent, however equitable such an arrangement might be. *Pelletreau v. Smith*, 30 Barb. (N. Y.) 494. See also *Braley v. Simonds*, 61 N. H. 369.

2. Oath Required Before Time and Place of Sale Are Fixed. — *Campbell v. Knights*, 26 Me. 224, 45 Am. Dec. 107; *Fowle v. Coe*, 63 Me. 245; *Parker v. Nichols*, 7 Pick. (Mass.) 111; *Hugo v. Miller*, 50 Minn. 105.

Oath Required Before Sale Is Made. — *Norman v. Olney*, 64 Mich. 553.

Form of Oath. — In Minnesota the statute pro-

vides that the administrator, before fixing the time and place of sale, shall take and subscribe an oath "in substance as follows: That in disposing of the estate * * * he will use his best judgment in fixing on the time and place of sale, and will exert his utmost endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested." *Hugo v. Miller*, 50 Minn. 105.

Failure to Take the Oath required by law renders the sale invalid, and no title passes to the purchaser. *Campbell v. Knights*, 26 Me. 224, 45 Am. Dec. 107.

Presumption of Regularity. — Where the record contains a certificate of the oath, it will be presumed that it was taken before the sale was made, though the record of the certificate and license was not made until several years afterwards. *Fowle v. Coe*, 63 Me. 245.

Correction of Date After Sale. — A clerical error in the date of the sale may be corrected by oral evidence on a collateral attack on the sale. *Norman v. Olney*, 64 Mich. 553.

3. Special Bond Required by Statute — California. — *Matter of Arguello*, 50 Cal. 308.

Delaware. — *Vincent v. Platt*, 5 Harr. (Del.) 164.

Florida. — *Bushnell v. Krum*, 32 Fla. 62.

Indiana. — *Warwick v. State*, 5 Ind. 350; *Foster v. Birch*, 14 Ind. 445.

Maine. — *Paine v. Paulk*, 39 Me. 15; *Austin v. Austin*, 50 Me. 75, 79 Am. Dec. 597. Formerly the rule in Maine was the same as the rule in Massachusetts; viz., that a special bond was required only when a sale of the whole estate, or of more than was necessary for the payment of debts, was considered advisable, to prevent the injury to the residue by means of such partial sale. *Hasty v. Johnson*, 3 Me. 282.

Minnesota. — *Babcock v. Cobb*, 11 Minn. 347.

Mississippi. — *Currie v. Stewart*, 26 Miss. 646; *Rucker v. Dyer*, 44 Miss. 591.

New Jersey. — *Ordinary v. Cooley*, 30 N. J. L. 179, 271.

New York. — *Jackson v. Holladay*, 3 Redf. (N. Y.) 379.

Pennsylvania. — *Stewart v. Moody*, 4 Watts (Pa.) 169; *Sawyers v. Hicks*, 6 Watts (Pa.) 76.

Wisconsin. — *Sitzman v. Pacquette*, 13 Wis. 291.

The California Statute requires a special bond to be given unless the penalty of the administration bond is equal to twice the value of the personal property remaining in or that will come into the possession of the executor or administrator, including the annual rents, profits.

ment of a bond is limited to cases where a sale is ordered of more real estate than is necessary for the payment of debts, and in other cases the general bond stands as security.¹

(2) *Requisites, Validity, and Effect of Bond.* — The requisites of the bond are prescribed by statute, and are usually the same as in the case of an ordinary administration bond, except so far as they may be affected by the limitations which the subject involves,² and mere technical defects will not generally invalidate the bond or the sale in respect to which it was given;³ but it is otherwise in case the objections are substantial.⁴

The *Liability of the Sureties* is limited by the terms of the bond as prescribed by law,⁵ and is not discharged by a return that the property was not sold for want of bidders,⁶ and they may be sued without first bringing

and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold. *Matter of Arguello*, 50 Cal. 308.

In *Indiana*, under the Revised Statutes of 1831, it was discretionary with the court to require an administrator to give an additional bond when applying for leave to sell real estate. *Salzer v. State*, 5 Ind. 202.

In *Kansas* a sale bond is required only when the court deems it necessary. The statute provides that "the court may require of any executor or administrator, if it deem it necessary before such sale, to give an additional bond to secure the further assets arising from the sale of the real estate." *Higgins v. Reed*, 48 Kan. 272.

Retrospective Operation of Statute. — The *Minnesota* statute requiring every administrator licensed to sell real estate to give bond for the proper application of the proceeds applies to all sales made after the statute took effect, though the license to sell was granted previously. *Babcock v. Cobb*, 11 Minn. 347.

1. *Sale of More Realty than Is Necessary to Pay Debts.* — *Tenney v. Poor*, 14 Gray (Mass.) 502; *Bennett v. Overing*, 16 Gray (Mass.) 267; *Norman v. Olney*, 64 Mich. 553; *Drake v. Kinsell*, 38 Mich. 232; *McClay v. Foxworthy*, 18 Neb. 295.

Within the principle of the statute which requires a sale bond only when more realty than is needed for the payment of debts is ordered to be sold, it is not a fatal defect that an administrator, on receiving a license to sell, gave no bond to account for the surplus proceeds, where the property brought no more than was needed for the payment of the debts. *Drake v. Kinsell*, 38 Mich. 232.

2. *Requisites in General.* — See the various statutes requiring special sale bonds to be given. See also *supra*, this title, *Administration Bonds*.

To Whom Payable. — In *Florida* the bond must be made payable to the governor of the state and his successors in office. *Bushnell v. Krum*, 32 Fla. 62.

In *Wisconsin*, where an application is made for the sale of lands in different counties, a proper bond given to the county judge to whom the application was made is sufficient. *Sitzman v. Pacquette*, 13 Wis. 291.

Amount of Penalty — Double Value of Property. — *Jackson v. Holladay*, 3 Redf. (N. Y.) 379.

Reducing Penalty Before Sale. — In *In re Winona Bridge R. Co.*, 51 Minn. 97, it was held that after appraisal of the property and before

the sale the court could approve a bond in a less penalty than was required by the order of sale.

Execution After Time Prescribed. — In *Corbell v. Zeluff*, 12 Gratt. (Va.) 226, the court was authorized to grant leave to an administrator to sell and convey the decedent's real estate on such terms as the court might deem expedient, having first required of the administrator a new bond with security conditioned to perform the decree of the court and to account for the proceeds of the sale. The statute further provided that if the administrator should refuse or neglect to give the bond for two months after passage of the statute, or if the court should deem it proper to appoint some other person to make the sale, it should have authority to do so. The administrator gave the bond after the two months had expired, and the court then made a decree authorizing the administrator to sell. It was held that there was a substantial compliance with the statute and that the bond was valid.

3. *Technical Defects.* — In *Burris v. Kennedy*, 108 Cal. 331, it was held that a sale was not invalid by reason of the fact that the bond recited the first decree of sale, which had been set aside, instead of the first decree under which the sale was made.

4. *Insufficiency of Sureties.* — A person interested in the estate may oppose the confirmation of the sale on the ground that the sureties on the sale bond are insolvent, where the order of sale required the administrator to execute an additional bond in a sum fixed, with two or more sufficient sureties. *Matter of Arguello*, 50 Cal. 308.

Want of Jurisdiction. — If the court was without jurisdiction to order the sale, the special bond is void, and the sureties are not liable on it. *Pettit v. Pettit*, 32 Ala. 288.

5. *Liability of Sureties.* — In *Alabama* the sureties are not liable for the waste or misapplication of the proceeds of sale by the principal unless the final decree directed the application to be made of them. *Pettit v. Pettit*, 32 Ala. 288.

Interest on Proceeds of Sale. — The sureties are liable for interest on the proceeds of the sale from the time that they were received by the executor or administrator. *Durfee v. Joslyn*, 101 Mich. 551.

6. *Returning Property Unsold for want of bidder* does not discharge the sureties from liability. They continue liable on a subsequent sale, even though the terms of sale may be altered. *Sawyers v. Hicks*, 6 Watts (Pa.) 76.

an action against the principal.¹

Effect on General Administration Bond. — When a special bond has been given, a question is presented as to whether the liability of the sureties on the special bond is exclusive or whether the sureties on the general administration bond are also liable. The affirmative of this question has been held in *Massachusetts*, while in other states it has been held that both sets of sureties are liable.²

(3) **Failure to Give Bond.** — The effect of the failure of the representative to give a special bond as required by law depends on the view taken of the nature of the proceeding in the particular jurisdiction. By some authorities the sale of real estate by an administrator is regarded as a matter of special jurisdiction, which can be exercised only on condition that everything has been done which the statute requires should be done preceding the sale, and where this view is taken it is held that if the bond is not given the sale is void; but the contrary has been held,³ and after a great lapse of time it will be presumed, for the purpose of supporting the sale, that the bond was given.⁴

c. APPRAISEMENT BEFORE SALE. — The statutes in some jurisdictions provide for an appraisement of the real estate to be sold,⁵ in order to inform

1. **Action Against Surety Without Suing Principal.** — *Stewart v. Moody*, 4 Watts (Pa.) 169.

2. **The Rule in Massachusetts** seems to be predicated on the terms of the general bond, which limited the responsibilities of the sureties thereon to the proceeds of real estate sold for the payment of debts or legacies. *Robinson v. Millard*, 133 Mass. 236.

In *Michigan* it is held that the special sale bond is only an additional security for the moneys coming into an administrator's hands, and does not supersede the general bond or affect it in any way; and the representatives of the estate are entitled to recover on both bonds, with the only limitation that they cannot recover more in both suits than the whole amount due from the administrator, and no greater sum on the special bond than has been realized from the sale of real estate under it. *Durfee v. Joslyn*, 92 Mich. 211.

In *Ohio*, also, it is held that the sureties on both bonds are liable, and that all may be sued jointly. *Kehnast v. Daum*, (C. Pl.) 4 Ohio N. P. 366, 6 Ohio Dec. 401.

3. **Sale Vitiating by Failure to Give Bond.** — *Clay v. Field*, 115 U. S. 260; *Bright v. Boyd*, 1 Story (U. S.) 478; *Babcock v. Cobb*, 11 Minn. 347; *Heth v. Wilson*, 55 Miss. 587; *Rucker v. Dyer*, 44 Miss. 591; *Washington v. McCaughan*, 34 Miss. 304; *Currie v. Stewart*, 26 Miss. 646, 27 Miss. 52, 61 Am. Dec. 500.

Sale Not Vitiating by Failure to Give Bond. — *Wyman v. Campbell*, 6 Port. (Ala.) 219, 31 Am. Dec. 677, *overruling* *Wiley v. White*, 3 Stew. & P. (Ala.) 355.

Failure Resulting from Oversight. — Failure to give a sale bond will not render the sale void where the administrator and court really supposed, though mistakenly, that the statute had been complied with, and the sale was regularly made, and afterwards confirmed by the court, and the money received faithfully accounted for, in which case everything had been accomplished that a bond could have accomplished. "The heirs have no equity. They have received the full benefit of the sale. A bond is only required to secure the heirs against the misappropriation of the sale

money." *Foster v. Birch*, 14 Ind. 445, *cited with approval* in *Jones v. French*, 92 Ind. 138.

In *Michigan* the statute which provides that a sale shall not be avoided because of any irregularity if it shall appear that the executor or administrator "gave a bond which was approved by the judge of probate, in case a bond was required upon granting a license," contemplates cases in which bonds are required by order of the judge of probate, and the title of an innocent purchaser is not affected by the fact that no bond was given, if none was required by the order. *Norman v. Olney*, 64 Mich. 553; *Drake v. Kinsell*, 38 Mich. 232.

4. **Presumption from Lapse of Time.** — *Stevenson v. McReary*, 12 Smed. & M. (Miss.) 9; *Saul v. Frame*, 3 Tex. Civ. App. 596.

5. **Appraisement of Realty.** — The *Arkansas Statute* provides that an executor or administrator, on obtaining an order for the sale of land for the payment of the debts of the estate, shall, before offering it for sale, have it appraised by three disinterested householders of the county in which it is situated. *Bell v. Green*, 38 Ark. 78.

The *Kansas Statute* requires that there be an appraisement before any sale, public or private, is made, and it provides that no private sale shall be made for less than three-fourths of the appraisement, but it places no limitation as to public sales. *Fudge v. Fudge*, 23 Kan. 416.

The *Louisiana Statute* requires an appraisement only in case the sale is to be made for cash. *Johnson v. Hamilton*, 2 La. Ann. 206.

The *Missouri Statute* provides that "before any executor or administrator should sell any real estate, or any interest therein, by order of the court, he should have it appraised by three disinterested householders of the county in which the land was situated." *Noland v. Barrett*, 122 Mo. 181, 43 Am. St. Rep. 572.

See also statutes in other jurisdictions.

Time for Making Appraisement. — The *Arkansas* statute provides that the appraisement shall be made on obtaining the order of sale and before offering the property for sale. *Bell v. Green*, 38 Ark. 78.

the court as to the value of the property, so as to furnish a basis for approving or disapproving the sale;¹ but it is generally held that this requirement is not jurisdictional, and that a sale is not rendered void by the fact that no appraisalment was made² or by irregularities in the appraisalment.³

The Appraisalment Should Be Signed by the appraisers.⁴

9. Manner and Terms of Sale — *a.* IN GENERAL. — The general rule is that when the statute or the order of sale prescribes the manner and terms of the sale, the executor or administrator must comply strictly with its provisions, and he has no discretion to exercise except as to the mode of conducting it so as to secure the best price.⁵ He cannot vary the terms, or impose any not contained in the statute or order of sale.⁶ But it is held that the failure of the administrator to fix the terms of sale in accordance with the statute does not render the sale void, so as to subject it to collateral attack.⁷

b. PUBLIC OR PRIVATE SALE. — The statutes usually provide that the

The *Missouri* statute does not provide when the appraisalment shall be made. The practice, however, seems to be to make it after the order of sale has been obtained, but it is held that it is merely an irregularity at the most to cause it to be made before the order of sale. *Noland v. Barrett*, 122 Mo. 181, 43 Am. St. Rep. 572.

Reappraisalment. — If the value of the property has changed since the appraisalment was made, the judge of probate may, in his discretion, order a reappraisalment to be made at any time before the sale. *Hood's Succession*, 33 La. Ann. 466; *Webb v. Keller*, 39 La. Ann. 55.

1. The Obvious Purpose of the provision requiring an appraisalment before sale is to advise the Probate Court of the value of the estate and assist it in exercising its judicial discretion in approving or disapproving the sale, and also to furnish *prima facie* evidence of value and the good faith of the administrator or executor and the purchaser. *Noland v. Barrett*, 122 Mo. 181, 43 Am. St. Rep. 572.

2. Failure to Make Appraisalment. — The sale of the real estate by an executor or administrator without having it appraised is an irregularity for which the sale may be set aside in a direct proceeding for that purpose, but it is not on this account absolutely void in a collateral proceeding, after confirmation by the Probate Court. *Noland v. Barrett*, 122 Mo. 181, 43 Am. St. Rep. 572 [citing 2 Woerner on Administration, § 476; *Bell v. Green*, 38 Ark. 78; *Apel v. Kelsey*, 47 Ark. 413; *Neligh v. Keene*, 16 Neb. 407].

"Though the statute requires an executor or administrator, upon obtaining an order of the Probate Court for the sale of land for the payment of the debts of the estate, before offering it for sale, to have the same appraised by three disinterested householders of the county in which it is situated, yet if he neglects to do so, and the sale is confirmed by the court, the sale would not be void, and could be set aside only on appeal from the order of confirmation or by a direct proceeding for that purpose, and could not be attacked or impeached in a collateral proceeding." *Bell v. Green*, 38 Ark. 78 [citing *Carter v. Engles*, 35 Ark. 205; *Montgomery v. Johnson*, 31 Ark. 74].

3. Sale Not Vitiating by Irregularities in the Appraisalment. — *Noland v. Barrett*, 122 Mo. 181,

43 Am. St. Rep. 572 [citing *Moore v. Wingate*, 53 Mo. 398; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *McVey v. McVey*, 51 Mo. 406; *Bobb v. Barnum*, 59 Mo. 394].

4. Signing Appraisalment. — The requirement that the appraisers should sign the appraisalment is satisfied by the signature of two where the law requires it to be made by three. *Moore v. Wingate*, 53 Mo. 398; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276.

Attaching Appraisalment to Affidavit. — The appraisalment is sufficient, though not signed by the appraisers, if it is attached to their affidavit of qualification, following immediately after the affidavit, and commencing "we appraise as follows." *McVey v. McVey*, 51 Mo. 406.

5. Manner and Terms — Order of Sale Must Be Strictly Followed — *Alabama.* — *Wiley v. White* 3 Stew. & P. (Ala.) 355.

Colorado. — *Filmore v. Reithman*, 6 Colo. 120; *Vance v. Maroney*, 4 Colo. 47.

Connecticut. — *Lockwood v. Sturdevant*, 6 Conn. 373.

Illinois. — *Reynolds v. Wilson*, 15 Ill. 394, 60 Am. Dec. 753.

Montana. — *Broadwater v. Richards*, 4 Mont. 80.

New York. — *Berger v. Duff*, 4 Johns. Ch. (N. Y.) 368.

Order of Sale Should Fix Terms. — *Baily's Appeal*, 32 Pa. St. 40.

6. No Power to Vary Terms of Sale. — *Cruikshank v. Luttrell*, 67 Ala. 318; *Reed v. Aubrey*, 91 Ga. 435.

The Terms Announced at the Sale bind the purchaser. *Backen v. Hamilton*, 18 La. Ann. 553; *Trichel v. Myers*, 18 La. Ann. 567.

Representative Cannot Impose Terms. — *Selb v. Montague*, 102 Ill. 446; *Foot v. Overman*, 22 Ill. App. 181; *Witherspoon v. Witherspoon*, 33 S. Car. 223; *McMaster v. Arthur*, 33 S. Car. 512; *Hamilton v. Pleasants*, 31 Tex. 638, 98 Am. Dec. 551.

An Apparent Exception to this is where property is subject to an easement which was not mentioned in the proceeding for a sale. In such a case the administrator may make the sale subject to the easement. *Overdeer v. Updegraff*, 69 Pa. St. 110.

7. Failure to Fix Terms According to Statute Not Ground for Collateral Attack. — *Halbert v. Martin*, (Tex. Civ. App. 1895) 30 S. W. Rep. 388.

sale shall be made at public auction,¹ but in some jurisdictions private sales are authorized under certain conditions,² or the statute is silent on the subject, thus committing the matter to the discretion of the court;³ and when the statute does not require a public sale, and the order does not direct in what way the sale shall be made, the executor or administrator may, at his discretion, sell privately.⁴ If real estate is sold at private sale under an order of court, notwithstanding the requirement of the statute that such sales shall be public, and the sale is confirmed by the court, the validity of the sale, it seems, depends on the question whether or not the court of probate is considered as a court of general jurisdiction.⁵

1. Public Sale Required by Statute—*United States*.—*Simmons v. Saul*, 138 U. S. 439.

Illinois.—*Reynolds v. Wilson*, 15 Ill. 394, 60 Am. Dec. 753.

Iowa.—*Thornton v. Mulquinne*, 12 Iowa 549, 79 Am. Dec. 548.

New York.—*Jackson v. Irwin*, 10 Wend. (N. Y.) 441. As to the former rule in New York, see *Hawley v. James*, 5 Paige (N. Y.) 476.

Pennsylvania.—*Jacoby v. McMahon*, 42 Pittsb. Leg. J. (Pa.) 446.

In *Burney v. Ludeling*, 47 La. Ann. 73, it was held that where a private sale was illegally made, the purchaser's title could not be confirmed by a subsequent administration sale, because it was not a *bona fide* proceeding to pay the debts of the succession.

See also the various statutes and codes in the United States.

Prospective Operation of Statute.—A statute requiring sales to be public which theretofore might be private applies only to sales ordered after the passage of the statute. *Jackson v. Irwin*, 10 Wend. (N. Y.) 441.

2. Private Sale Authorized.—**The California Statute** provides that the sale must be ordered to be made at public auction, unless in the opinion of the court it would benefit the estate to sell the whole or some part of such real estate at private sale, and that the court may, if the same is asked for in the petition, order or direct such real estate, or any part thereof, to be sold at either public or private sale, as the executor or administrator shall judge to be most beneficial for the estate. *Matter of Dorsey*, 75 Cal. 258.

The Connecticut Statute provides that the court may order the sale "in such manner as shall appear to said court to be most for the benefit of the estate," and under this statute it is held that the court may order the sale "either at public auction or private sale, as should be deemed to the best advantage." *Lawrence's Appeal*, 49 Conn. 411.

If the Court Errs in ordering a private sale, when a public sale should have been made under the circumstances of the case, the sale is not void. *Burris v. Kennedy*, 108 Cal. 331.

Who May Object to Petition for Private Sale.—Under the *California* statute providing that sales must be public unless in the opinion of the court it would be more beneficial to sell privately, the administrator cannot object to having the property sold at public auction on the ground that the private sale would be most beneficial to the estate and the creditors thereof. *Matter of Dorsey*, 75 Cal. 258.

3. Discretion of Court—Manner of Sale Not Prescribed by Statute.—In *Missouri* the statute provides that when there is a lack of sufficient assets to pay the purchase money of real estate purchased by the decedent, the court may order the executor or administrator to sell the right, title, and interest of the decedent therein, but it does not state whether the sale contemplated by its provisions shall be public or private; and consequently the method thereof seems to have been left in the first instance to the discretion of the court making the order, or, in the absence of any method being thus designated, then to the discretion of the administrator. *Hand v. Motter*, 73 Mo. 457.

If the Statute Does Not Direct that the sale be made at public auction, a private sale is authorized. In this respect a sale by legislative authority does not differ from one by private authority. *Dexter v. Harris*, 2 Mason (U. S.) 531.

4. Discretion of Representative—Manner of Sale Not Prescribed by Statute or Order.—*Hand v. Motter*, 73 Mo. 457.

5. Private Sale in Disregard of Statute—Validity.—In *Apel v. Kelsey*, 52 Ark. 341, 20 Am. St. Rep. 183, it was held that a private sale made under an order of court was not void when confirmed, because the Probate Court is one of general jurisdiction, and as such its judgments are proof against collateral attack. The court condemned this rule, but followed it because it had become a rule of property in *Arkansas*, and suggested that it should be changed by statute. *Sandels, J.*, delivering the opinion of the court, said: "The construction put upon the constitutional and statutory powers of the Probate Court has gone, we think, far beyond the intention of the framers of either constitution or statute. The accretions of power now far outweigh the original nucleus. But little further aggression is necessary to make the action of that court, in legal contemplation, infallible. This should not be. The specific powers granted these courts by law, pursued in the statutory method, are ample to accomplish the object of their being. The probate judges are not required to be, and usually are not, lawyers. In many instances they act without knowledge or consideration of the far-reaching effects of what they do. The most important interests, the guardianship of widows, children, and estates, are committed to their superintending care. Some possibly are dishonest, many are not wise or discriminating. Taking into account the magnitude of the property interests which they have in charge, these courts should be required to proceed in exact conformity to

c. TIME OF SALE. — If the time of sale is prescribed by statute, it must be made accordingly, and a sale made at any other time is without authority.¹ If no time is fixed either by law or by the order granting the license to sell, the sale must be made within the time that the license is operative,² and it is held that this requirement is satisfied if the sale is made within such period, though the deed is given afterwards.³ But a sale cannot be made after the authority of the executor or administrator has terminated.⁴

d. ADJOURNMENT OF SALE. — If for any reason a sale cannot be made at the time appointed, or cannot be made to advantage, as where the weather or other cause interferes with the attendance of bidders, the executor or administrator may adjourn it to another time.⁵

law, instead of being panoplied by the presumptions which attend the exercise of superior jurisdictions by other courts. When we see, day after day, the inheritance of infants squandered by the dishonesty or frittered away by the incompetency of administrators, and see these actions irrevocably legitimated by the approval of facile courts, we submit that it is time to call a halt. The courts are now powerless. Former interpretations of the law have become rules of property, and cannot be overturned without uprooting the titles to one-fourth of the property of the state."

As to the Validity of Sales against collateral attack in general, see *infra*, this section, *Validity of Sale*.

1. Time of Sale Fixed by Statute. — Tippet v. Mize, 30 Tex. 361.

In Georgia the sale must be made within sixty days after the order of sale (Acts 1887, p. 56), and the order should so direct; but if the sale is made within such time, the omission of such direction from the order will not affect the validity of the sale, if it is made within the sixty days. Title Guarantee, etc., Co. v. Holverson, 95 Ga. 707.

In Louisiana the law does not forbid the sale of succession property in the summertime, and it is in the discretion of the probate judge to order a sale in that season. Lehman v. Worley, 40 La. Ann. 620.

In Missouri the sale must be made on a day when a court of record is in session. Mobley v. Nave, 67 Mo. 546.

Extending Time of Sale. — The Minnesota statute provides for an extension of the time within which the sale may be made by an order entered of record and indorsed on the certified copy of the original order, but it is held that such indorsement is not essential to the validity of the order extending the time of sale, because the authority to sell is derived from the order, and not from the indorsement. Culver v. Hardenbergh, 37 Minn. 225.

Hour of Sale. — In some jurisdictions the hours of the day within which a sale may be made are fixed by statute. Thus the Illinois statute provides that sales must be made between the hours of ten o'clock in the forenoon and five o'clock in the afternoon. Reynolds v. Wilson, 15 Ill. 394, 60 Am. Dec. 753.

2. Time of Sale Limited by Duration of License. — Macy v. Raymond, 9 Pick. (Mass.) 285; Wellman v. Lawrence, 15 Mass. 326; Mason v. Ham, 36 Me. 573; Chadbourne v. Rackliff, 30 Me. 354; Marr v. Boothby, 19 Me. 150; Howard v. Moore, 2 Mich. 226.

No Time Is Fixed by a provision in an order

directing a sale that the administrators make a report of their doings at the next term of the court. Bowen v. Bond, 80 Ill. 351.

3. Delivery of Deed After Expiration of License. — A sale made while the license is still in force is not vitiated by the fact that the deed was not delivered until afterwards. Cooper v. Robinson, 2 Cush. (Mass.) 184; Jewett v. Jewett, 10 Gray (Mass.) 31; Osman v. Traphagen, 23 Mich. 80; Howard v. Moore, 2 Mich. 226.

Formerly the rule was otherwise in Massachusetts. Macy v. Raymond, 9 Pick. (Mass.) 285.

And in Maine the earlier rule in Massachusetts, holding that the deed must be delivered within the period that the license is in force, has been followed. Poor v. Larrabee, 58 Me. 543; Mason v. Ham, 36 Me. 573; Marr v. Hobson, 22 Me. 321; Marr v. Boothby, 19 Me. 150. But if the deed is executed and delivered within the proper time, it may be acknowledged afterwards. Poor v. Larrabee, 58 Me. 543.

The Policy of the Statute, it is said, was to compel the settlement of estates without unnecessary delay, but where the sale was made and the money paid within the time limited, the delay in executing the deed cannot delay the settlement. Howard v. Moore, 2 Mich. 237.

4. Termination of Representative's Authority. — The repeal of the statute under which the order was made abrogates the order, and consequently terminates the authority of the administrator to sell, and a sale made thereafter is void. Hamilton Bank v. Dudley, 2 Pet. (U. S.) 492; Ludlow v. Wade, 5 Ohio 494; Perry v. Clarkson, 16 Ohio 571.

In the same way the repeal of the law giving jurisdiction to the court to order a sale revokes the license, and the administrator cannot afterwards sell under it. Campau v. Gillett, 1 Mich. 416, 53 Am. Dec. 73.

5. Adjournment of Sale — Illinois. — Phelps v. Conover, 25 Ill. 309; Thornton v. Boyden, 31 Ill. 211.

Maine. — Fowle v. Coe, 63 Me. 245.

Massachusetts. — Norris v. Howe, 15 Mass. 175.

Michigan. — Beaubien v. Poupard, 118 Mich. 206.

Missouri. — Noland v. Barrett, 122 Mo. 181, 43 Am. St. Rep. 572.

New Jersey. — Hicks v. Willis, 41 N. J. Eq. 515.

South Carolina. — Lamb v. Lamb, Spears Eq. (S. Car.) 289, 40 Am. Dec. 618.

Wisconsin. — Sitzman v. Pacquette, 13 Wis. 291.

c. PLACE OF SALE. — In some jurisdictions the place of sale is fixed by statute, while in others it is left to the court ordering the sale.¹

f. NOTICE OF SALE — (1) *Necessity of Notice.* — When the sale is made at public auction notice of sale must be given as provided by the statute or as directed by the order of sale,² and sometimes notice is required when a private sale is authorized.³

(2) *Mode of Giving Notice* — (a) *Publication in Newspaper.* — The statutes generally provide that the sale shall be advertised in a newspaper for a designated period before the sale.⁴

The Selection of the Paper in which the publication is to be made is left to the court, subject to certain general restrictions, the purpose of which is to secure the selection of the paper through which the widest publicity will be given to the sale.⁵

"It might often occur, from the extremity of the weather, or from other unavoidable causes, that no bidders would appear at the time and place appointed by an administrator for the sale of the estate of his intestate. In such case it would be his duty to adjourn the sale." *Norris v. Howe*, 15 Mass. 175.

Adjournment by Attorney or Agent. — The adjournment of a sale is merely a ministerial act, and may be performed by the attorney or agent of the executor or administrator. *Hicks v. Willis*, 41 N. J. Eq. 515.

1. *Place of Sale Fixed by Statute.* — *Peters v. Caton*, 6 Tex. 554.

Place of Sale Fixed by Order. — In *Alabama* the statute requires the place of sale to be fixed by the order of sale, and the omission to comply with such requirement vitiates the sale. The executor or administrator has no power to select the place. *Bozeman v. Bozeman*, 82 Ala. 389; *Brown v. Brown*, 41 Ala. 215; *Cruikshank v. Luttrell*, 67 Ala. 318.

In *Georgia* the sale may be made, in the discretion of the ordinary, either in the county having jurisdiction of the administration or in the county where the land lies; but if land be sold without such special direction, the sale is not void. *Patterson v. Lemon*, 50 Ga. 231.

In *Texas* the probate judge has authority to order a sale of lands to be made at a place other than the court-house door of the county; but if the order of sale does not designate another place, the sale will be invalid if not made at the court-house door. *Peters v. Caton*, 6 Tex. 554.

Sale in Another County. — A sale of lands under a decree of the court of probate is not void because it was made in the county in which the administration was granted, instead of the county where the lands were situate. *Calloway v. Kirkland*, 50 Ala. 401, 57 Ala. 476.

See also the various local codes and statutes in the United States.

2. *Notice of Sale Required.* — *Simmons v. Saul*, 138 U. S. 439; *Thornton v. Mulquinne*, 12 Iowa 549, 79 Am. Dec. 548; *Thomas v. Le Baron*, 8 Met. (Mass.) 355.

Though a Power of Sale Is Given by the Will to be exercised by the executor without an order of court, yet where an order of court to make a private sale is obtained the notice required by the statute in such cases must be given. *Hellman v. Merz*, 112 Cal. 661.

If Notice Is Actually Given as required by law, it is immaterial that it was not required

by the order of sale. *Clark v. Hillis*, 134 Ind. 421.

Penalty for Noncompliance. — In *Illinois* an executor or administrator is subject to a penalty of five hundred dollars if he fails to give notice of sale as required by law. *Reynolds v. Wilson*, 15 Ill. 394, 60 Am. Dec. 753.

3. *Notice of Private Sale.* — The *California* statute provides that when a sale of real property is ordered to be made at private sale, notice of the same must be published in a newspaper for two weeks successively next before the day on or after which the sale is to be made. The notice must state a day on or after which the sale will be made. *Hellman v. Merz*, 112 Cal. 661.

See also statutes in other jurisdictions.

4. *Notice by Publication in Newspaper.* — *Hellman v. Merz*, 112 Cal. 661; *Lawrence's Appeal*, 49 Conn. 411; *Dayton v. Mintzer*, 22 Minn. 393.

Publication in More than One Newspaper. — A statute providing for the publication of notice of sale in "a daily paper" does not authorize publication in more than one paper. *Hautau's Succession*, 32 La. Ann. 54.

Defects in the Advertisement are cured by the approval of the report of sale. *Jackson v. Magruder*, 51 Mo. 55.

5. *The Connecticut Statute* requires the notice to be "published in a daily newspaper, or, if there be none, in a weekly newspaper published in the county where the court ordering the notice is held, and having a circulation in the probate district," and if the notice is actually published in a daily paper circulating in the district, the actual compliance with the law will validate a sale made under the notice, though the order merely directed publication "in a newspaper published in the county." *Lawrence's Appeal*, 49 Conn. 411.

The *California Statute* provides that the publication shall be made daily, or otherwise, as often during the prescribed period as the paper is regularly issued, except that the court or the judge thereof may order a less number of publications during the period; and under this statute it is held that the court may designate either a daily or a weekly newspaper in its discretion. *Matter of O'Sullivan*, 84 Cal. 444.

Failure to Designate by the order of sale the paper in which the notice shall be published, as required by the statute, is a mere irregularity which is cured by an order confirming

The Period of Publication required by the statute is generally a certain number of weeks before the sale,¹ and if it is made for a shorter time than the order directs, it is insufficient and invalidates the sale.² It must be completed, if the publications are weekly, within a week before the day appointed for the sale,³ and this, according to some authorities, is on the day of the last publication,⁴ while according to other authorities the period is considered as complete when a week has elapsed since the last publication, and the day appointed for the sale must be within the week thereafter.⁵ But when the publication is required to be made daily, the last publication should be on the day preceding the sale.⁶

The Number of Insertions is usually governed by the statute, and where publication for a given number of weeks is required it is generally held that the requirement is satisfied by one insertion a week, at intervals of one week, during the period prescribed.⁷

(b) Posting Notice. — In some jurisdictions the statutes require, in addition to the publication, that the notice shall be posted for a certain time in con-

the sale. *Furth v. U. S. Mortgage, etc., Co.*, 13 Wash. 73.

1. Publication for Four Weeks Required. — *Harris's Petition*, 14 R. I. 637.

At Least Four Weeks is the period required by the *New Jersey* statute. *Tappan v. Dayton*, 51 N. J. Eq. 260.

Publication for Three Weeks Required. — *Matter of Cunningham*, 73 Cal. 558; *Osgood's Estate*, Myr. Prob. (Cal.) 153; *Frothingham v. March*, 1 Mass. 247; *Dayton v. Mintzer*, 22 Minn. 393; *Wilson v. Thompson*, 26 Minn. 299; *Hartley v. Croze*, 38 Minn. 325.

Publication for Twenty Days before the sale, excluding that day, is required by the *Pennsylvania* statute. *Zech's Estate*, 15 Pa. Co. Ct. Rep. 622, 1 Lack. Leg. N. (Pa.) 142, 4 Pa. Dist. Rep. 250.

Publication for Two Weeks in case of a private sale is required by the *California* statute. *Matter of O'Sullivan*, 84 Cal. 444; *Hellman v. Merz*, 112 Cal. 661.

The Publication Must Be Continuous in the same paper during the entire period prescribed by law. *Townsend v. Tallant*, 33 Cal. 45.

2. Publication for a Shorter Period than the order directs will invalidate the sale. *Reynolds v. Wilson*, 15 Ill. 394, 60 Am. Dec. 753.

3. Weekly Publications. — *Wilson v. Thompson*, 26 Minn. 299; *Hartley v. Croze*, 38 Minn. 325; *Tappan v. Dayton*, 51 N. J. Eq. 260.

4. Period Completed on Day of Last Publication. — *Tappan v. Dayton*, 51 N. J. Eq. 260. In this case the publication, the last insertion of which was eight days before the day appointed for the sale, was held insufficient under a statute which requires that the notice of sale shall be published for at least four weeks successively, once a week, next preceding the time appointed for the sale. "The purpose of the requirement that the publication should fit closely upon the sale," said the ordinary, "is obviously to keep freshly in the public mind the pendency of the sale, and the mischief of the omission to publish within the last week may be twofold, in permitting the sale to be lost sight of, and, possibly, in impressing intending purchasers with the belief that it has been abandoned."

5. Period Complete on Expiration of Week After Last Publication. — Under the *Minnesota* statute

requiring the notice of sale to be published "for three weeks successively next before such sale" it is held that the period is completed one week after the last insertion. Thus where the sale was advertised for November 1, and the advertisement was published on October 6, 13, and 20, the publication was completed on October 27, and a sale made within one week after October 27 was valid. *Wilson v. Thompson*, 26 Minn. 299. See also *Hartley v. Croze*, 38 Minn. 325. In this case the notice of sale was published on the 23d and 30th days of May, and the 6th and 13th of June (but not thereafter), naming the 29th day of June as the day of sale, and on that day the sale was made. It was held that the sale was invalid because there was an interval of nine days between the completion of the last publication and the day of sale.

6. Daily Publication Is Complete on Day Before Sale. — *Osgood's Estate*, Myr. Prob. (Cal.) 153.

7. Number of Insertions. — Under a statute which requires that notice of the time and place of sale shall be published in a newspaper for "three weeks successively next before such sale," it is sufficient if there are three publications at the rate of one a week on regular publication days, separated by intervals of a week, though the paper is published daily. *Dayton v. Mintzer*, 22 Minn. 393.

Under the *California* Statute which provides that the publication shall be made daily or otherwise, as often during the prescribed period as the paper is regularly issued, except that the court or judge thereof may order a less number of publications during the period, one publication per week for the given number of weeks may be ordered, though a daily paper is selected. *Matter of Cunningham*, 73 Cal. 558.

Three Consecutive Insertions, the last one being five days before the day of sale, in a weekly paper were held sufficient under the *California* statute which requires notice of a private sale to be published "for two weeks successively next before the day on or after which the sale is to be made," and as often during the prescribed period as the paper is regularly issued. *Matter of O'Sullivan*, 84 Cal. 444. See also *Hellman v. Merz*, 112 Cal. 661.

spicuous places in the neighborhood where the land lies.¹

(3) *Requisites of Notice.* — The notice of sale must describe the property to be sold with sufficient certainty to identify it, so that a bidder will have no difficulty in ascertaining what is intended.² It must also state the time of the sale³ and the place where it is to be held.⁴ In some jurisdictions the terms of sale must also be stated,⁵ but this is not always required.⁶

(4) *Proof of Notice.* — Proof that notice was given as required by law may be made by affidavit or oath to that effect, and it is generally necessary that such proof should be perpetuated for the protection of the purchaser.⁷

1. **Posting Notice** — *California.* — Matter of O'Sullivan, 84 Cal. 444.

Massachusetts. — Frothingham v. March, 1 Mass. 247.

Michigan. — Averill v. Jackson City Bank, (Mich. 1897) 72 N. W. Rep. 15.

Minnesota. — Hartley v. Croze, 38 Minn. 325; Hugo v. Miller, 50 Minn. 105.

New York. — Matter of McFeeley, 2 Redf. (N. Y.) 541.

Wisconsin. — McCrubb v. Bray, 36 Wis. 333. See statutes in other jurisdictions.

In a City the notices must be posted in the ward where the land lies. Matter of McFeeley, 2 Redf. (N. Y.) 541.

2. **Description of Property.** — In Wyly v. Gazan, 69 Ga. 506, the order of sale described the land as the east half of a certain city lot, with the improvements and buildings thereon. The notice referred to the order of sale, and described the property as the "eastern half or three-quarters" of said lot, being of certain dimensions, "more or less." The part of the lot to be sold had been inclosed for many years. It was held that the description in the notice was sufficient.

In New England Hospital v. Sohler, 115 Mass. 50, the notice was as follows: "Executor's sale of real estate by order of the Probate Court. To be sold at public auction, the land and buildings situated on Warren street and Pleasant street, in the city of Boston, late the residence of Thomas Emmons, deceased, being numbered 21 on said Warren street, bounding northeasterly thereon, there measuring 39 feet 4½ inches, more or less, and number 6 Pleasant street, bounding southwesterly thereon 40 feet 9½ inches, running through from street to street; being bounded southerly by land of Warren Street Chapel on three lines 122 feet 6½ inches; northerly and easterly by land of Charles Rollins, Charles H. Parker, and unknown persons, about 140 feet; whole premises containing 5057 square feet, more or less." The numbers on Warren and Pleasant streets were so arranged that No. 21 Warren street was on the northeasterly side of that street, and No. 6 Pleasant street was on the southwesterly side of that street, and the estate described in the petition of the executors and sold by them extended from the southwesterly side of Warren street to the northeasterly side of Pleasant street. It was held that, notwithstanding the mistake as to the street numbers, the notice identified the premises to be sold so clearly that no one disposed to bid at the sale would have any difficulty in ascertaining what estate was meant.

The Fact that the Property Was Not Fully Described will not invalidate the sale, if bidders were not misled by it. Wadsworth's Succession, 2 La. Ann. 966. Compare Bradford v. McConihay, 15 W. Va. 732.

3. **Notice Must State Time of Sale.** — Blodgett v. Hitt, 29 Wis. 169.

In Wellman v. Lawrence, 15 Mass. 326, it was held that a notice of sale was fatally defective where it stated the time as "Friday the 17th" of the month, when in fact Friday was the 16th and the mistake was not corrected till the last publication, made on the day of the sale.

In Trousdale v. Trousdale, 35 Tex. 756, it was held erroneous to confirm a sale where the published advertisement designated a different day of sale from that on which the sale was actually made.

4. **Notice Must State Place of Sale.** — Blodgett v. Hitt, 29 Wis. 169.

The Massachusetts Statute provides that thirty days' public notice shall be given by the administrator, before making the sale, by posting up notifications of such sale in the town where the lands lie, as well as where the deceased person last dwelt, and in the two next adjoining towns, as also in the shire town of the county, or by a notification printed, three weeks successively, in such gazette or newspaper as the court that may authorize the sale shall order and direct. Thomas v. Le Baron, 8 Met. (Mass.) 363.

Merely Naming the Town in which the sale is to be made is not a compliance with a statute requiring the notice to state the "place" of the sale. Thus, it was held that a notice designating "Duluth, in said county of St. Louis," as the place of sale was insufficient. Hartley v. Croze, 38 Minn. 325.

5. **Terms of Sale Should Be Stated.** — Brubaker v. Jones, 23 Kan. 411.

6. **In Massachusetts** it is held that the law does not require an administrator to state the conditions of the sale in his advertisement. Paine v. Fox, 16 Mass. 129.

7. **Want of Proof** that notice of the sale was made as required by law is fatal to a title derived from an administrator's sale. Thornton v. Mulquinne, 12 Iowa 549, 79 Am. Dec. 548.

If the Affidavit of Publication Is Insufficient the purchaser may refuse to complete his purchase and may recover the amount of his deposit. Hellman v. Merz, 112 Cal. 661.

Proof of Posting. — Proof must be given that the places where the notices were posted were public places; and it is not sufficient to show merely that the notices were posted at a schoolhouse or on a road, as the court will not presume that these are public places within the meaning of the statute. Sowards v. Pritchett, 37 Ill. 517. Compare Hugo v. Miller, 50 Minn. 105. In this case the affidavit of posting was that the affiant, administrator, "posted

g. SALE IN PARCELS OR EN MASSE. — Whether the real estate of a decedent sold under an order of court should be offered in parcels or *en masse* is governed by the rule which applies to other judicial sales, that is, that while the sale should ordinarily be made in parcels, the executor or administrator conducting the sale must perform his office in such manner as will be for the best interests of all concerned, and he may sell in parcels or otherwise, as he may in good faith deem best.¹

h. WHO MAY MAKE SALE. — The statutes, as a general rule, authorize the granting of a license to sell only to the executor or administrator,² but in some jurisdictions commissioners or trustees may be appointed to execute the order of sale,³ and in others the sheriff may make

three copies of the notice in three of the most public places in the village of Duluth, within which village the land above described is, in St. Louis county and state of Minnesota; that the three most public places were as follows, to wit, one copy posted in a conspicuous place in the United States post office, one in a conspicuous place in the office of the village justice of said village, and one in a conspicuous place on a lamp post at the intersection of Superior street (the main street in said village) and First avenue east." Objection was made to this affidavit on the ground that the places of posting the notices were stated to be in three of the most public places in the village of Duluth, not in three of the most public places in the county, as required by statute; but it was held that the court having found that such places were three of the most public places in the county, and confirmed the sale, its determination could not be collaterally attacked.

Perpetuation of Proof. — The *Massachusetts* statute provides that "an affidavit of the executor or administrator, or of the person employed by him to give such notice, being filed and recorded with a copy of the notice in the registry of probate within one year after the sale, or such an affidavit made afterwards by any person and filed and recorded with such copy by permission of the court upon satisfactory evidence that the notice was given as ordered, shall be admitted as evidence of the time, place, and manner in which the notice was given." Pub. Stat. Mass., 1882, c. 134, § 13. See also statutes in other jurisdictions.

1. Sale in Parcels or En Masse. — In *Delaplaine v. Lawrence*, 3 N. Y. 301, an administrator sold in parcels land which was described in the order of sale as a single tract. The sale was sustained as within the authority of the administrator. The court said: "The whole tenor of the act relating to these sales evidently contemplates proceedings similar to those which take place upon other judicial sales. In all such sales it is the well-known duty of the officer conducting them to sell the property in such parcels as shall be best calculated to secure the greatest aggregate amount. * * * It was for him to determine, in the first instance, to what extent the property was susceptible of judicious division. Nothing short of palpable error or gross abuse of his discretion would justify the surrogate in arresting the sale upon this ground."

In *Osman v. Traphagan*, 23 Mich. 80, Graves, J., referring to the rule that ordinarily the sale should be in parcels, said: "The regulation to sell in parcels is a wise one, but

it ought not to be considered so fundamental as to make its nonobservance in every case absolutely fatal to the title under all circumstances. The situation of landed property is infinitely varied. In many instances blocks and other bodies of land are subdivided into contiguous lots or parcels by arbitrary lines, and the parts are so situated in reference to each other as naturally to lead to proceedings respecting separate or distinct parcels as though they were one. The chances for error through mistake or inadvertence in such a matter are very great. * * * The only safe and practicable course is to treat the omission to sell in parcels as a mere irregularity which cannot be resorted to to invalidate the sale when attacked collaterally." Citing *Cunningham v. Cassidy*, 17 N. Y. 276; *Wood v. Moorhouse*, 1 Lans. (N. Y.) 405.

It is no objection to an order of sale that it does not direct the property (a village plot) to be sold in parcels. The administrator may sell in parcels, and it is his duty to do so, though the order does not so direct. *Jackson v. Irwin, to Wend.* (N. Y.) 441.

An objection to a sale of separate parcels *en masse* is one which must be made in apt time, and it must be shown that the land brought less than it would have brought if divided. *Williams v. Rhodes*, 81 Ill. 571.

2. Sale Must Be Made by Executor or Administrator — *Indiana*. — *Whisnand v. Small*, 65 Ind. 120; *State v. Younts*, 89 Ind. 313.

Massachusetts. — *Crouch v. Eveleth*, 12 Mass. 503.

Mississippi. — *Alcorn v. State*, 57 Miss. 273.

Missouri. — *Jarvis v. Russick*, 12 Mo. 63; *Brown v. Woody*, 22 Mo. App. 253.

Oregon. — *Levy v. Riley*, 4 Oregon 392.

This was formerly the rule in *Connecticut*. *Swan v. Wheeler*, 4 Day (Conn.) 140. But the statute of that state now provides that "the Court of Probate may, on the written application of an executor, administrator, trustee of an insolvent debtor, or conservator, upon hearing after public notice, authorize another person to sell any property belonging to such estate ordered sold, and such person shall give a probate bond and pay to said executor, administrator, trustee, or conservator the sum for which such estate shall be sold." Gen. Stat. Conn. 1888, § 603.

3. Sale by Commissioners. — *Rodgers v. Rodgers*, (Ky. 1895) 31 S. W. Rep. 139; *Alcorn v. State*, 57 Miss. 273; *Roberts v. Roberts*, 65 N. Car. 27; *Ellett v. Reid*, 25 W. Va. 550.

Sale by Trustees. — In *Maryland* the statute provides that the Orphans' Court may appoint

the sale.¹ When the executor or administrator is required to make the sale, it is held that he must conduct it in person, and that he cannot delegate his authority;² but in some cases sales made by agents have been sustained.³

7. **PRICE AND TERMS OF PAYMENT** — (1) *In General*. — As a general rule the purchaser of the property of a decedent sold under an order of court can discharge his liability for the price only by payment of the amount due in money⁴ to the executor or administrator,⁵ though in some cases it has been held that where the sale was made for the payment of debts, a payment to a creditor was valid.⁶

(2) *Cash or Credit*. — On the sale of a decedent's real estate under an order of court, provision is generally made for the allowance of credit for a part of the purchase money,⁷ varying as to length of time in the different

a trustee to execute an order of sale, and that the administrator may be appointed such trustee. *Simpson v. Bailey*, 80 Md. 421.

1. **Sale by Sheriff**. — *Union Bank v. Powell*, 3 Fla. 175, 52 Am. Dec. 367; *Fontelieu's Succession*, 28 La. Ann. 638; *Dobard v. Bayhi*, 36 La. Ann. 134.

2. **Representative Cannot Delegate Authority**. — The law is said to be well settled that the authority of an executor or administrator to sell real estate cannot be delegated to another, but that it is his duty to be present and direct, superintend, and control the sale. *Sebastian v. Johnson*, 72 Ill. 282, 22 Am. Rep. 144; *Kellogg v. Wilson*, 89 Ill. 357; *Taylor v. Hopkins*, 40 Ill. 442; *Hicks v. Willis*, 41 N. J. Eq. 516. Compare *Nolan v. Jackson*, 16 Ill. 272.

He May Employ an Auctioneer, however, and a sale made by the auctioneer in the presence of the executor or administrator is the sale of the executor or administrator. *Kellogg v. Wilson*, 89 Ill. 357; *Sebastian v. Johnson*, 72 Ill. 282, 22 Am. Rep. 144; *Schwartz's Estate*, 12 Phila. (Pa.) 71, 35 Leg. Int. (Pa.) 153; *Vandever v. Baker*, 13 Pa. St. 121. Or he may act as auctioneer himself. *Lafiton v. Doiron*, 12 La. Ann. 164.

Sale by Agent Not Ground for Collateral Attack. — Though it may be a ground for refusing to confirm the sale that it was made by the agent of the administrator, and not by the administrator personally, yet this fact will not render the sale void on collateral attack. *Harris v. Shafer*, (Tex. Civ. App. 1893) 21 S. W. Rep. 110.

3. **In Arkansas** it is held to be no objection to a sale that it was made by the attorney in fact of the administrator, where there was no margin for the exercise of any special personal confidence reposed in the judgment and discretion of the administrator, because in such case the time, place, and manner of the sale, and terms of payment, and other matters connected therewith, had all been previously fixed by the order of court. *Sturdy v. Jacoway*, 19 Ark. 499. See also *Cheever v. Hora*, 22 Ga. 600; *Currier v. Green*, 2 N. H. 225.

In *Rugle v. Webster*, 55 Mo. 246, *Wagner, J.*, expressed a doubt as to whether the administrator could delegate his authority, but it was not found necessary to decide the point.

A Purchase by the Agent would be voidable, however, even if the administrator could properly appoint an agent to act for him in making the sale. *Bond v. Watson*, 22 Ga. 637.

4. **Mode of Payment — Money Required as General Rule**. — *Chandler v. Schoonover*, 14 Ind.

324; *Richards v. Adamson*, 43 Iowa 248; *Mitchell's Estate*, 1 Leg. Gaz. (Pa.) 74.

A Mortgage Note of a Third Person cannot be taken in payment. *Richards v. Adamson*, 43 Iowa 248.

A Bond on which the decedent was surety cannot be used in payment under an arrangement between the purchaser of the land and the holder of the bond, pursuant to which part of the land is conveyed to the holder of the bond as a consideration, thus securing the remainder of the property to the purchaser without any payment. *Scott v. Scott*, 42 La. Ann. 766. Compare *Nosworthy v. Blizzard*, 53 Ga. 668. In this case it was held that where the purchaser gave the value of the land, but paid for it in other property, and the administrator was a creditor of the estate to the amount of such value, and received such property in payment of his claim, the purchaser was entitled to protection in equity to the extent that his purchase was of value to the estate.

Payments in Depreciated Currency. — As to the validity and effect of payments in depreciated currency, see the titles MONEY; PAYMENT.

5. **Payment to Executor or Administrator**. — It is expressly provided by statute in *New Mexico* that the purchase money shall be paid to the executor or administrator. *Albuquerque First Nat. Bank v. Lee*, 8 N. Mex. 589.

In the Absence of a Statute on the subject, the rule would obviously be the same, since the sale converts the land into assets, the exclusive right to the possession of which is in the personal representative. See *supra*, this title, *Management and Care of Estate — Collection of Assets*.

6. **Payment to Creditor**. — *Oliver v. Bry*, 7 La. Ann. 590.

By Agreement with the Administrator the purchaser may discharge his note given for the price of the property by paying the amount of it to the creditors of the estate. *Pittman v. Pittman*, 59 Miss. 203.

7. **Sale May Be on Credit**. — *Spence v. Dasher*, 63 Ga. 430; *Reynolds v. Wilson*, 15 Ill. 394, 60 Am. Dec. 753; *Moffitt v. Moffitt*, 69 Ill. 641; *Citizens St. R. Co. v. Robbins*, 128 Ind. 449, 25 Am. St. Rep. 445; *Fitzimmons' Appeal*, 40 Pa. St. 422; *Gordon's Appeal*, 93 Pa. St. 361; *Baily's Appeal*, 32 Pa. St. 40.

Credit May Be Allowed in Louisiana unless the creditors demand that the sale be made for cash. *Hood's Succession*, 33 La. Ann. 466; *Norton v. Citizens' Bank*, 28 La. Ann. 354.

jurisdictions,¹ and the terms in this respect are ordinarily prescribed by the order of sale, which is conclusive as to the authority of the executor or administrator;² but in some jurisdictions payment of the price in cash is required,³ and if credit is given when a sale for cash is required, the executor or administrator becomes personally liable for the amount for which credit was given.⁴

(3) *Set-off of Claims Against Estate.* — If the purchaser is a creditor of the estate, or is entitled to share in it as a distributee or legatee, the amount of his claim, or the *pro rata* part in case he is not entitled to payment in full, may, as a general rule, be set off against the price of the property purchased by him,⁵ unless it is otherwise provided by law.⁶

Unless the Surrogate Directs Credit to be Given the sale must be made for cash in *New York*. *Maples v. Howe*, 3 Barb. Ch. (N. Y.) 611; *Code Civ. Proc. N. Y.*, § 2771.

Where the Law Directs a Sale on Credit a sale for cash is a mere irregularity. *Cassels v. Gibson*, (Tex. Civ. App. 1894) 27 S. W. Rep. 725.

1. **Length of Credit.** — In *Alabama* the statute provides that the sale may be on such credit as the court may direct, not exceeding two years. *Brown v. Brown*, 41 Ala. 215.

In *Arkansas* the credit to be given on a sale of real estate by an executor or administrator, for the payment of debts, is not limited by law to six months, as in other judicial sales, but is left to the sound discretion of the court. *Grider v. Apperson*, 38 Ark. 392.

In *Indiana* credit cannot be allowed for a longer period than one year, and if the administrator gives a longer credit the sale is void. *Citizens' St. R. Co. v. Robbins*, 128 Ind. 449, 25 Am. St. Rep. 445.

In *Illinois* the statute authorizing an administrator to sell real estate on a credit of not less than six nor more than twelve months applies only where the decree of the court gives no directions as to the sale. The court may order a longer or different credit to be given. *Moffitt v. Moffitt*, 69 Ill. 641.

Compare statutes in other jurisdictions.

2. **Terms Prescribed by Order of Sale.** — If a sale on credit is ordered and the executor or administrator sells for cash, the sale will be held void for want of an order of sale. *Smelser v. Blanchard*, 15 La. Ann. 254.

Authorized Sale on Credit. — If the order directs a sale for cash, and the administrator sells on credit, the sale depends for its validity on its ratification by the heirs or devisees or its confirmation by the court of chancery. *McCully v. Chapman*, 58 Ala. 325.

The Executor Has No Authority to Extend the Time of Payment, and if he does so he becomes personally liable for the price. *Kelley v. Helmkamp*, 40 Ill. App. 35.

3. **Sale for Cash Required.** — *Foster v. Thomas*, 21 Conn. 290.

Creditors may demand a sale for cash in *Louisiana*. *Thompson's Succession*, 42 La. Ann. 118; *Hood's Succession*, 33 La. Ann. 466.

If the Court Orders a Cash Sale, and the administrator takes in payment a release from the purchaser of a personal debt, the sale is voidable, not void. *Heath v. Layne*, 62 Tex. 686.

4. **Sale on Credit — Personal Liability.** — *Foster v. Thomas*, 21 Conn. 290; *Palmer, Appellant*, 1 Doug. (Mich.) 422; *Dillebaugh's Estate*, 4

Watts (Pa.) 177; *Henninger v. Boyer*, 10 Pa. Co. Ct. Rep. 506.

5. **Set-off of Claims Against Estate.** — *Ellett v. Reid*, 25 W. Va. 550.

Where the sale is made for the purpose of partition, the purchaser, being a creditor of the estate, may set off the amount of his claim against the purchase money. *Johns v. Race*, 48 La. Ann. 1170.

Agreement Between Purchaser and Administrator. — In *Norton v. Edwards*, 66 N. Car. 367, it was held that an agreement between the purchaser and the administrator, before the sale, that if the purchaser should buy the property he should be allowed credit on certain claims which he held against the decedent's estate, was not contrary to public policy and was not within the statute which provides that an administrator shall not be charged on a special promise to answer damages out of his own estate unless the agreement shall be in writing, because it was not an agreement to answer out of his own estate, but out of the estate of his intestate. This decision *distinguishes* the case of *Brandon v. Allison*, 66 N. Car. 532, in which it was decided that no set-off would be allowed in favor of the purchaser, there having been no previous agreement therefor, where there were other claims of equal dignity against the estate, and the assets were not sufficient to pay all; though it was also suggested that if there had not been other claims against the estate, or if the assets had been certainly sufficient to pay all, the set-off might have been allowed. *Compare* *Floyd v. Rust*, 58 Tex. 503.

A Claim Which Has Not Been Admitted by the administrator or otherwise established as a claim against the estate cannot be set off against the price of property purchased by the claimant. He must establish his claim in an appropriate proceeding. *Schwallenberg v. Jennings*, 43 Md. 554.

Set-off Against Purchaser's Share of Estate. — *Markle's Estate*, 17 Pa. Co. Ct. Rep. 337, 5 Pa. Dist. Rep. 47, 348.

An heir who purchases at a sale to pay debts cannot retain the price of the property. *Harris v. Harris*, 12 La. Ann. 10.

Where the Widow Is the Purchaser, she may give her receipt as against the allowances to which she is entitled out of the decedent's estate. *Kenley v. Bryan*, 110 Ill. 652.

As to the right of set-off generally, see *supra*, this title, *Powers, Duties, and Liabilities in General — Set-off of Debts*.

6. **Prohibition Against Allowance of Set-off.** — In *Texas* the terms of sale prescribed by law

(4) *Security for Price.* — When the sale is made on credit security must be taken for the deferred payments,¹ and in some jurisdictions the legal title must be retained, or a lien otherwise fixed on the land as security for the price.²

If the Executor or Administrator Fails to Take Security as required by law, he becomes, in effect, a surety for the price,³ but the validity of the sale is not ordinarily affected by his delinquency in this respect.⁴

(5) *Inadequacy of Price.* — It is the duty of the executor or administrator to sell for the best price that he can obtain; and it is held that if a sale has been made for an inadequate price, it was not fairly made, and that for this reason the court may set it aside.⁵ But the fact that the amount realized on the sale was less than the actual value of the property will not of itself render the sale void, especially if it was made at public auction, though the inadequacy of price may furnish evidence of fraud.⁶ Nor is this rule affected, in

forbid the executor or administrator to convey the land sold under an order of court in satisfaction of a claim held by the purchaser against the estate, but it is held that if he does so it is a mere irregularity which will not avoid the sale. *Perry v. Blakey*, 5 Tex. Civ. App. 331; *Hall v. Hall*, 11 Tex. 526. But there are some exceptions to this, as where the purchaser is the sole creditor of the estate. *Hall v. Hall*, 11 Tex. 526. See also *Claridge v. Lavenburg*, 7 Tex. Civ. App. 155; *Huddleston v. Kempner*, (Tex. Civ. App. 1894) 28 S. W. Rep. 236.

In *New Mexico* it is held that a creditor of the estate who purchases land of the decedent sold under an order of court cannot set off his claim against the purchase money, because the statute provides that the proceeds of the sale shall be paid to the executor or administrator, and it is immaterial whether the sale is made on the application of the executor or administrator or on the application of the creditor. *Albuquerque First Nat. Bank v. Lee*, 8 N. Mex. 589.

In *Arkansas*, also, the right to set off a debt of the decedent against the piece of property bought by the creditor at an administration sale is denied. *Bishop v. Dillard*, 49 Ark. 285.

1. *Security for Price.* — *Citizens' St. R. Co. v. Robbins*, 128 Ind. 449, 25 Am. St. Rep. 445.

This matter is generally regulated by local statutes, to which reference must be had in each jurisdiction.

Division Between Purchasers. — In *Rodgers v. Rodgers*, (Ky. 1895) 31 S. W. Rep. 139, it was held that it was not improper for the commissioner who sold the estate in one parcel to permit the purchasers to divide it between themselves and to convey to each his portion, taking from each his bond secured by mortgage on the parcel conveyed to him, because the amount of the purchase-money lien on each of the two parcels was exactly at the same rate per acre as if it extended over the whole, and each was less in proportion as it was transferred to the other tract; and, besides, one additional personal surety was secured by allowing the parties to give separate bonds for their separate purchases.

2. *Retaining Lien for Purchase Money.* — *Ketchum v. Creagh*, 53 Ala. 224; *Hoggatt v. Wade*, 10 Smed. & M. (Miss.) 143.

Personal Security for the purchase money is required in some jurisdictions, but this is merely in addition to the provision that a lien

on the land sold shall be retained until the purchase money is paid. *Ketchum v. Creagh*, 53 Ala. 224; *Bogart v. Bell*, 112 Ala. 412; *Hoggatt v. Wade*, 10 Smed. & M. (Miss.) 143.

3. *Failure to Take Security* — *Executor or Administrator Becomes Liable.* — *James v. Faulk*, 54 Ala. 184; *May v. Green*, 75 Ala. 162; *Palmer, Appellant*, 1 Dougl. (Mich.) 422.

Though the Court Confirmed the Sale on the report of the executor showing that he did not take security as required by law, he is not thereby relieved of his liability for the purchase money. *James v. Faulk*, 54 Ala. 184.

If the Purchase Money Is Lost by the neglect of the administrator in dealing with the security, as where he failed to record a mortgage for the purchase money, he is liable for the loss. *Bailey v. Boyce*, 5 Rich. Eq. (S. Car.) 187.

4. *Failure to Take Security* does not render the sale void. *Wilkerson v. Allen*, 67 Mo. 502.

Sureties on Bond for Price — *Irregularity in Sale.* — The surety on the bond of the adjudicatee at a succession sale on twelve months' credit is liable, though not all the forms of law were observed at the sale, such irregularities not having been sufficient to make the sale an absolute nullity, and having, to all appearances, been cured. *Quinn's Succession*, 34 La. Ann. 878.

5. *Sale for Inadequate Price Held an Unfair Sale.* — *Hirshfield v. Davis*, 43 Tex. 155.

There Must Be a Probability of a Better Price on a resale before the court is justified in setting aside the sale on the ground of the inadequacy of the price. *Allen v. Shepard*, 87 Ill. 314; *Horton v. Horton*, 2 Bradf. (N. Y.) 200.

Amount Obtainable on Resale. — It has been held that the court is justified in setting aside a sale for inadequacy of price when it is probable that on a resale an advance of ten per cent. of the amount of the first sale will be realized. *Griffin v. Warner*, 48 Cal. 383; *Perkins v. Gridley*, 50 Cal. 97; *Kain v. Master-ton*, 16 N. Y. 174; *Delaplaine v. Lawrence*, 3 N. Y. 301; *Campbell's Estate*, Tuck. (N. Y.) 240; *Wright v. McNatt*, 49 Tex. 425.

Liability of Executor or Administrator. — An administrator is not chargeable on account of the inadequacy of the amount for which the sale was made, if there was no objection to the confirmation of the sale. *Merkel's Estate*, 131 Pa. St. 584.

6. *Public Sale Not Void for Inadequacy of Price* — *Alabama.* — *Lowe v. Guice*, 69 Ala. 80.

case of a public sale, by a statute which requires an appraisement before any sale, and provides that no private sale shall be made for less than a certain proportion of the appraised value.¹ And an agreement between the purchaser and the personal representative that the purchaser would bid a certain sum if the personal representative would procure a license to sell has been held not to vitiate the sale.²

In Louisiana, if the sale is made for cash it must bring the appraised value of the property,³ and if no bid of that amount is made the property must then be sold on credit for whatever it may bring.⁴

10. Report and Confirmation of Sale—*a.* **NECESSITY.**—As a general rule a sale by an executor or administrator under an order of court, being a judicial sale,⁵

Illinois.—Kimball v. Lincoln, 99 Ill. 578.

Maine.—Fowle v. Coe, 63 Me. 245.

North Carolina.—Williams v. Johnson, 112 N. Car. 424, 34 Am. St. Rep. 513.

Pennsylvania.—Frey's Appeal, (Pa. 1887) 8 Atl. Rep. 585.

"The mere fact that these lands sold for a very small sum compared with their intrinsic value is not conclusive evidence of fraud. It is no fraud on the part of the demandant that others declined to bid, and that he purchased the premises for an inadequate consideration. Mere inadequacy of price is no reason for avoiding a fair sale at public auction." Webster v. Calden, 53 Me. 203.

When the proceeds of a sale made by an executor to pay debts are not greatly disproportionate to the debts, the sale will not be annulled. Lehmann's Succession, 41 La. Ann. 987.

Inadequacy of Price Held Ground for Setting Aside Sale.—Hardin v. Smith, 49 Tex. 420.

Inadequacy of Price Held Not to Prove Fraud.—Brown v. Brown, 64 Mich. 75; Matter of Bolton, 71 Hun (N. Y.) 32.

1. Appraised Value.—The *Kansas* statute which requires an appraisement of the property before any sale, public or private, is made, and provides that no private sale shall be made for less than three-fourths of the appraisement, imposes no limitation on the amount for which a public sale may be made. Fudge v. Fudge, 23 Kan. 416.

2. Agreement with Purchaser as to Price.—In Norman v. Olney, 64 Mich. 553, it was held that an administrator's sale was not vitiated by the fact that he had agreed with the purchaser to procure a license to sell if the purchaser would bid a certain amount per acre at the sale, it appearing that the price paid was the full value of the land, and there being no evidence that the sale was not made in good faith. Such agreements to bid, it was said, are often secured before sale by executors and others at judicial sales.

3. Appraised Value—Rule in Louisiana.—In Louisiana sales of succession property for cash, even to pay debts, must bring the full amount of the appraisement. Herrmann v. Fontelieu, 29 La. Ann. 502; Tabary's Succession, 31 La. Ann. 409. But see Valderes v. Bird, 10 Rob. (La.) 396; Stoltz's Succession, 28 La. Ann. 175.

If the Actual Value Is Realized, the sale is valid though it was made for less than the amount of the appraisement. Herrmann v. Fontelieu, 29 La. Ann. 502.

4. Sale on Credit.—When the sale is on

credit it may be made for whatever sum may be bid, without regard to the appraisement. Quinn's Succession, 34 La. Ann. 879; Hood's Succession, 33 La. Ann. 466; Fontelieu's Succession, 28 La. Ann. 638.

The requirement that property sold under execution or executory process must bring two-thirds of its appraised value does not apply to sales of succession property for the payment of debts. Herrmann v. Fontelieu, 29 La. Ann. 502; Fontelieu's Succession, 28 La. Ann. 638.

5. Sale under Order of Probate Court Is Judicial Sale—*United States.*—Grignon v. Astor, 2 How. (U. S.) 319; Thompson v. Tolmie, 2 Pet. (U. S.) 157.

Alabama.—Bland v. Bowie, 53 Ala. 152; McCully v. Chapman, 58 Ala. 325; Pryor v. Davis, 109 Ala. 117; Worthington v. McRoberts, 9 Ala. 297.

California.—Halleck v. Guy, 9 Cal. 181, 70 Am. Dec. 643.

Louisiana.—Lalanne v. Moreau, 13 La. 431; Howard v. Zeyer, 18 La. Ann. 407.

Mississippi.—Maynard v. Cocke, (Miss. 1895) 18 So. Rep. 374.

Missouri.—Noland v. Barrett, 122 Mo. 181, 43 Am. St. Rep. 572.

Nebraska.—Maul v. Hellman, 39 Neb. 322.

New York.—Delaplaine v. Lawrence, 3 N. Y. 301.

North Carolina.—Mason v. Osgood, 64 N. Car. 467.

Pennsylvania.—Moore v. Shultz, 13 Pa. St. 98, 53 Am. Dec. 446; Vandever v. Baker, 13 Pa. St. 121; Bickley v. Biddle, 33 Pa. St. 276.

Texas.—Lynch v. Baxter 4 Tex. 431, 51 Am. Dec. 735.

Hawaii.—Unauna v. Armstrong, 3 Hawaiian 705. Compare Kauwa v. Dowsett, 3 Hawaiian 625.

"Sales of lands under the decrees of the Court of Probate are essentially judicial. The court, not the personal representative, is the vendor. His only agency is that of an officer or special agent, designated by the law for special purposes, and clothed with special trusts. To the sale the maxim *caveat emptor* applies." Pryor v. Davis, 109 Ala. 117.

"An administrator's sale of real estate, under the orders of a probate court, in those states which require such sales to be reported to the court for its approval or rejection, is a judicial sale." Noland v. Barrett, 122 Mo. 181, 43 Am. St. Rep. 572.

In *Rhode Island* it is held that an administrator's sale is not a judicial sale. McGuinness v. Whalen, 16 R. I. 558, 27 Am. St. Rep. 763.

must be reported to the court for confirmation;¹ and until the sale is confirmed it is incomplete, and the purchaser acquires no title, either legal or equitable,² and incurs no liability on account of his bid.³ But the necessity of a report to and confirmation by the court is statutory, and unless the statute contains such a requirement the validity of the sale does not depend on its confirmation.⁴ And it is held that confirmation by the court is not necessary if there has been a confirmation by the parties *in pais*.⁵

b. TIME FOR REPORT AND CONFIRMATION. — The report of the sale is generally required to be made to the court at the next term after the sale,⁶ but a failure to comply with this requirement does not render the sale void.⁷

c. OBJECTIONS TO CONFIRMATION. — The confirmation of a sale rests in the sound discretion of the court on a consideration of all the attending facts and circumstances,⁸ and in the exercise of this discretion the court should not

1. Representative Must Make Report of Sale. — Smith *v.* Wert, 64 Ala. 34; Kelley's Estate, 1 Abb. N. Cas. (N. Y. Surrogate Ct.) 102; Matter of McFeeley, 2 Redf. (N. Y.) 541.

"All sales of lands made by a personal representative under a decree of the Court of Probate must be reported to the court for confirmation. Until confirmed the sale is *in fieri* — the highest bidder proposes to the court to buy the lands at a specified price, which the court may accept or reject." Lowe *v.* Guice, 69 Ala. 80 [citing Hutton *v.* Williams, 35 Ala. 503, 76 Am. Dec. 297; Fore *v.* McKenzie, 58 Ala. 115].

See also various local codes and statutes in the United States requiring reports of sales to be made to the court.

2. Confirmation Necessary to Pass Title — *Alabama*. — Bland *v.* Bowie, 53 Ala. 152; Cruikshank *v.* Luttrell, 67 Ala. 318; Comer *v.* Hart, 79 Ala. 389.

Arkansas. — Halliburton *v.* Sumner, 27 Ark. 460; Bell *v.* Green, 38 Ark. 78; Apel *v.* Kelsey, 47 Ark. 413.

California. — Dennis *v.* Winter, 63 Cal. 16; Horton *v.* Jack, 115 Cal. 29.

Indiana. — Williams *v.* Perrin, 73 Ind. 57.

Mississippi. — Maynard *v.* Cocke, (Miss. 1895) 18 So. Rep. 374; State *v.* Cox, 62 Miss. 786; Fearing *v.* Shafner, 62 Miss. 791; Brooks *v.* Kelly, 63 Miss. 616; Pool *v.* Ellis, 64 Miss. 555.

Missouri. — Henry *v.* McKerlie, 78 Mo. 416.

New York. — Stilwell *v.* Swarthout, 81 N. Y. 109.

North Carolina. — Mason *v.* Osgood, 64 N. Car. 467.

Pennsylvania. — Greenough *v.* Small, 137 Pa. St. 132, 21 Am. St. Rep. 859, 26 W. N. C. (Pa.) 567.

Texas. — Davis *v.* Stewart, 4 Tex. 223; Neill *v.* Cody, 26 Tex. 286; Littlefield *v.* Tinsley, 26 Tex. 353; Yerby *v.* Hill, 16 Tex. 377; Hirshfield *v.* Davis, 43 Tex. 155.

Under the New York Statute of 1819, a sale was void unless it was confirmed before conveyance to the purchaser, though it was made in good faith and the proceeds were applied to the debts of the decedent. Rea *v.* M'Eachron, 13 Wend. (N. Y.) 465, 28 Am. Dec. 471.

If the Representative Refuses to Report the sale for confirmation, the remedy of the purchaser is by motion for a rule to compel a report of the sale. Mason *v.* Osgood, 64 N. Car. 467.

3. Liability of Purchaser on Bid. — If the ad-

ministrator does not report the sale for confirmation, he cannot sue the purchaser for the price bid. Dowling *v.* Duke, 20 Tex. 181.

Compliance with Terms of Sale. — Until the sale has been confirmed the purchaser cannot be required to comply with the terms of the sale. Bradbury *v.* Reed, 23 Tex. 260; Neill *v.* Cody, 26 Tex. 286; Littlefield *v.* Tinsley, 26 Tex. 353.

4. Confirmation Not Necessary in Illinois. — Stow *v.* Kimball, 28 Ill. 93; Moffitt *v.* Moffitt, 69 Ill. 641; Moore *v.* Neil, 39 Ill. 256, 89 Am. Dec. 303.

5. Confirmation by Parties. — The requirement of a confirmation by the Probate Court of a sale ordered by it, and made, in order to complete it, was borrowed from the rule in chancery courts; and as a confirmation *in pais* of a sale by decree of a chancery court was equally efficacious with a decree of confirmation to validate and complete the sale, so it must be held as to sales made by order of a Probate Court. Johnson *v.* Cooper, 56 Miss. 608.

6. Report at Next Term of Court After Sale. — Johnson *v.* Cooper, 56 Miss. 608; Speck *v.* Wohlien, 22 Mo. 310; Strouse *v.* Drennan, 41 Mo. 289; Sims *v.* Gray, 66 Mo. 613; Wilkerson *v.* Allen, 67 Mo. 502; Delaplaine *v.* Lawrence, 3 N. Y. 301; Sankey's Appeal, 55 Pa. St. 491.

7. Failure to Report at Next Term — Effect. — In Johnson *v.* Cooper, 56 Miss. 608, it was held, *overruling* a dictum in Learned *v.* Matthews, 40 Miss. 210, that the fact that the sale made on the 24th of November, 1856, was not reported to the court at its next term, in December, but was made and confirmed at the January term, 1857, did not render the sale void.

In *Missouri* it was formerly held that a sale was absolutely void if the report and confirmation were at terms which were being held at the time when the sale was made. Mitchell *v.* Bliss, 47 Mo. 353; Strouse *v.* Drennan, 41 Mo. 289; Speck *v.* Wohlien, 22 Mo. 310. But a subsequent confirmation at the proper term was valid, because the previous confirmations were entirely inoperative. McVey *v.* McVey, 51 Mo. 406.

The Later Authorities, however, are to the effect that such irregularity renders the sale voidable. Henry *v.* McKerlie, 78 Mo. 416; Wilkerson *v.* Allen, 67 Mo. 502; Sims *v.* Gray, 66 Mo. 613; Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276.

8. Confirmation Discretionary with Court. — Bland *v.* Bowie, 53 Ala. 152; Eatman *v.* Eat-

confirm a sale if, in its opinion, the sale was not fair, or was not made in conformity with law.¹

Inadequacy of Price will not justify the court in refusing confirmation, unless it appears that a higher price could probably be obtained on another sale;² but in some jurisdictions the mere fact that a certain additional sum will, with reasonable certainty, be bid on another sale will authorize the court to refuse confirmation.³

d. PROOF OF CONFIRMATION.—The confirmation of the sale must be proved, ordinarily by the record,⁴ but where the statute does not require a formal order of confirmation it is sufficient if the approval of the court can be gathered from the whole record,⁵ and in some instances confirmation will be

man, 83 Ala. 478; *Davis v. Stewart*, 4 Tex. 223.

In *Alabama* the court can consider only three questions on an application for confirmation of a sale, viz., (1) whether the sale was fair, (2) whether the price was adequate, and (3) whether the sureties of the purchaser are sufficient. *Meadows v. Meadows*, 81 Ala. 451.

1. Fairness and Regularity of Sale.—*Cruikshank v. Luttrell*, 67 Ala. 318; *Davis v. Stewart*, 4 Tex. 223.

Lapse of Time Between Entry and Execution of Order of Sale.—If injury should result from lapse of time between the making and the execution of the order of sale, the court may refuse to confirm the sale, but it is held that no injury can result to the purchaser from such cause. *Bland v. Bowie*, 53 Ala. 152.

Injury to Exceptant.—In *Hazlett's Estate*, 137 Pa. St. 587, where confirmation was asked by the administrator, it was held by a divided court that it should be granted over the objection of a person who claimed to be a creditor, but who did not state the nature of his claim, or allege collusion between the administrator and the purchaser, though he offered to make a large advance bid, and the sale was made in great haste, being completed within a few minutes after the hour of sale stated in the advertisement.

Confirmation as to Part of Property Sold.—If one parcel has been fairly sold for an adequate price the court may confirm the sale as to such parcel, and at the same time may refuse confirmation as to another parcel which was sold for an inadequate price. *Delaplaine v. Lawrence*, 3 N. Y. 301.

2. Mere Inadequacy of Price Not Ground for Refusing Confirmation.—*Griffin v. Warner*, 48 Cal. 383; *Perkins v. Gridley*, 50 Cal. 97; *Allen v. Shepard*, 87 Ill. 314; *Horton v. Horton*, 2 Bradf. (N. Y.) 200; *Kain v. Masterton*, 16 N. Y. 174.

In *Hardin v. Smith*, 49 Tex. 420, it was held that it was erroneous to confirm the sale against the objection of the administrator, who opposed the confirmation on the ground that after selling the land, which was situated in another county, for twenty-eight cents per acre, he learned that it was worth from two to five dollars per acre.

In *New York* the rule as to inadequacy of price has been stated thus: That the sum bid must be disproportionate to the value of the property, and that at least ten per cent., exclusive of the expenses of a resale, may be obtained in addition to the sum bid. If the price bid is not disproportionate to the value

of the property, confirmation is not to be refused merely because another person is willing to pay the additional ten per cent., though such offer would be evidence tending to show that the sum bid was below the real value of the property. *Kain v. Masterton*, 16 N. Y. 174.

3. Probability of Better Price as Ground for Refusing Confirmation.—If a person other than the purchaser at the sale offers to pay ten per cent. more than the price of the bid, the court may refuse to confirm the sale. *Griffin v. Warner*, 48 Cal. 383; *Perkins v. Gridley*, 50 Cal. 97; *Matter of Burton*, 105 Cal. 353.

4. Confirmation Must Be Proved.—*Apel v. Kelsey*, 47 Ark. 413; *Neill v. Cody*, 26 Tex. 286.

5. Formal Order of Confirmation Not Required.—In *Camden v. Plain*, 91 Mo. 130, the court said: "There was no formal entry of the approval on the record proper of the court, nor is it necessary that there should have been; the approval is sufficiently shown by the entry on the judge's minutes, especially when taken in connection with the further facts that the approval is recited in the administrator's deed, the acknowledgment of which was taken in open court by the judge thereof on the same day that the entry was made on the minutes, and in his second annual settlement the administrator charges himself with the amount of the purchase money. It is sufficient if the approval can be gathered from the whole record." To the same effect are *Jones v. Manly*, 58 Mo. 559; *Grayson v. Weddle*, 63 Mo. 523; *Long v. Joplin Min.*, etc., Co., 68 Mo. 422; *Gilbert v. Cooksey*, 69 Mo. 42; *Henry v. McKelvie*, 78 Mo. 416; *Moore v. Davis*, 85 Mo. 464; *Carey v. West*, 139 Mo. 146; *Agan v. Shannon*, 103 Mo. 661.

Indorsement on Return.—In *Moody v. Butler*, 63 Tex. 210, it was held that an indorsement of confirmation on the return of the sale was sufficient, though the clerk neglected to enter it on the minutes. Such omission on the part of the clerk was a mere clerical oversight, which, it was said, should not be allowed to prejudice the purchaser.

Approval of Account of Proceeds.—An order approving the administrator's account of the proceeds of the sale implies that the sale from which the proceeds arose was confirmed. *Loyd v. Waller*, 74 Fed. Rep. 601.

The Approval of the Final Account of the Administrator and the Discharge of him and his Sureties constitute a substantial compliance with the law requiring an order of confirmation. *Ferguson v. Templeton*, (Tex. Civ. App. 1895) 32 S. W. Rep. 148.

presumed.¹

c. **EFFECT OF CONFIRMATION.**—There is some variety of opinion as to the effect of the confirmation of the sale. It is generally held that the order operates as an adjudication of the regularity of the sale,² and passes an equity to the legal title on compliance with the terms of sale,³ but it does not conclusively prove compliance with the terms of sale so as to give the purchaser an absolute right to a deed,⁴ nor does it impart validity to a void sale.⁵

Order to Convey to Purchaser.—Approval of the sale is shown by an order of the court directing the administrator to convey the premises to the purchaser. *Livingston v. Cochran*, 33 Ark. 294.

Any Recognition of the Sale by acts appearing of record is sufficient proof of the approval of the court. *Jones v. Manly*, 58 Mo. 559; *Grayson v. Weddle*, 63 Mo. 523; *Simmons v. Blanchard*, 46 Tex. 266; *Pendleton v. Shaw*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1002.

1. **Presumption of Confirmation.**—Where the record has been lost or destroyed confirmation may be presumed, after the lapse of a considerable time, from the payment of the purchase money, long-continued and quiet possession under the purchase, and informal deeds executed by the administrator. *Smith v. Wert*, 64 Ala. 34.

A presumption that the sale was confirmed will not be allowed unless it is first shown that the record cannot be produced. *Pace v. Fishback*, 10 Tex. Civ. App. 450.

2. **Confirmation Adjudicates Regularity of Sale.**—*Andrews v. Goff*, 17 R. I. 205; *Ferguson v. Templeton*, (Tex. Civ. App. 1895) 32 S. W. Rep. 148.

In *Culver v. Hardenbergh*, 37 Minn. 225, it was held that the order of confirmation passes on nothing but the acts of the executor or administrator making the sale, and the sufficiency of the bid.

3. **Confirmation Passes Equity to Legal Title.**—*Henry v. McKerlie*, 78 Mo. 416.

The confirmation of an administrator's sale vests the title to the land substantially in the purchaser, subject to the payment of the purchase money. The execution of a deed by the administrator is at most but the formal evidence of the title vested in the purchaser by the decree of the court. Therefore, where the purchaser has given a note for the price, he cannot resist a recovery on the ground that he had not received a deed. *Rock v. Heald*, 27 Tex. 523.

As Against Third Persons the confirmation of the sale relates back to the time of the sale and gives the purchaser an absolute title from that time, and therefore, where he leased the premises after the sale and before confirmation, he may maintain unlawful detainer against the lessee. *Halliburton v. Sumner*, 27 Ark. 460.

4. **Not Adjudication of Compliance with Terms of Sale.**—In *Wallace v. Nichols*, 56 Ala. 321, under a statute providing that the court must make an order confirming the sale whenever it is satisfied that the purchase money has been sufficiently secured, it was held that an order of confirmation did not adjudicate that the cash payment had been made or that the security for the balance was good. The court said: "The effect of the confirmation is only

a notification to the parties that the court approves the contract, and authorizes them to proceed in the execution of it, according to its terms. It does not in any manner operate on the title, nor exempt the land from the burden of being chargeable for the payment of the purchase money. The administrator's report that he had received payment of one-half of the price for which the land was sold would have the effect, doubtless, of making him and his sureties responsible therefor, in favor of the creditors and distributees of the estate. As to those parties, the duebill taken from the purchaser may be regarded as evidence, between him and the administrator, that the latter has in the hands of the purchaser a deposit of that sum. But all this does not operate to discharge the land in the possession of the latter from the payment of the money for which the duebill was given. That is prevented by the provisions of section 2096 of the Revised Code, which is as follows: 'After such confirmation, and when the purchaser has paid the whole of the purchase money, on his application, or that of the executor or administrator, the court must order a conveyance to be made to such purchaser, by such executor or administrator, or such other person as the court may appoint, conveying all right, title, and interest which the deceased had at the time of his death.' Until he had paid 'the whole of the purchase money' the purchaser could not insist on a conveyance of the legal title to him. The law holds it bound as a security that such payment shall be made."

Effect as to Subsequent Administrator.—A recital in an order of confirmation as to payment of the purchase money is not conclusive on a subsequent administrator seeking to enforce a vendor's lien on the land, because "the proceeding was not such a one as required a contest about the payment between the administrator and the purchaser; and if there had been one, the Probate Court had no jurisdiction to determine it conclusively. * * * The enforcement of the vendor's lien is not in abrogation of the decree of sale and the conveyance. The ascertainment of payment is incidental and collateral. It is an inference from the order to convey, which should not be made without it, just as the death of the person is supposed, and to some degree must be found, in the grant of letters of administration on his estate, or the probate of his will. * * * So the Probate Court, in ordering the sale of a decedent's land, must find that it belonged to him; but the finding is not conclusive, else, as the proceeding is *in rem*, it would be an adjudication of title in him, good against all the world." *Hudgens v. Cameron*, 50 Ala. 379.

5. **Void Sale Not Validated by Confirmation.**—*Farrar v. Dean*, 24 Mo. 16.

11. Validity of Sale—*a.* **EXISTENCE OF JURISDICTIONAL FACTS**—**(1) General Rule.**—Formerly courts of probate were considered courts of inferior and limited jurisdiction, and therefore every fact necessary to confer jurisdiction was required to appear of record, otherwise their orders and decrees, including those directing sales of the lands of decedents, were subject to collateral attack;¹ and they are still so considered in some jurisdictions,² at least to the extent of holding that the power to order such sales is a matter of special and limited jurisdiction which can be validly exercised only by acting in strict conformity with the statute.³ It seems, however, that the modern tendency is to regard such courts as of general jurisdiction in all matters relating to the settlement of the estates of decedents, and to indulge the same presumptions in favor of the validity of their orders and decrees as are accorded to the judgments and decrees of courts of law and equity,⁴ unless

In *Cunningham v. Anderson*, 107 Mo. 371, 28 Am. St. Rep. 417, it was held that a sale which was void because there was no order of publication of notice of the proceeding was not validated by an order confirming the sale.

1. Jurisdictional Facts Must Appear by the Record—*Alabama.*—*Sermon v. Black*, 79 Ala. 507; *Pettit v. Pettit*, 32 Ala. 288; *Bishop v. Hampton*, 15 Ala. 761, 19 Ala. 792; *Wyatt v. Rambo*, 29 Ala. 510.

California.—*Beckett v. Selover*, 7 Cal. 234, 68 Am. Dec. 237.

Connecticut.—*New Haven First Nat. Bank v. Balcom*, 35 Conn. 358.

Florida.—*Sloan v. Sloan*, 25 Fla. 53.

Kentucky.—*Singleton v. Cogar*, 7 Dana (Ky.) 479.

Massachusetts.—*Cutts v. Haskins*, 9 Mass. 543; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20, 16 Am. Dec. 372.

Mississippi.—*Crisman v. Beasley*, Smed. & M. Ch. (Miss.) 561; *Lowry v. McDonald*, Smed. & M. Ch. (Miss.) 620; *Planters Bank v. Johnson*, 7 Smed. & M. (Miss.) 449; *Gelstrop v. Moore*, 26 Miss. 206, 59 Am. Dec. 254; *Kempe v. Pintard*, 32 Miss. 324.

North Carolina.—*Harris v. Richardson*, 4 Dev. L. (15 N. Car.) 279; *Leary v. Fletcher*, 1 Ired. L. (23 N. Car.) 259.

2. Courts of Probate Regarded as Inferior Courts.—*Shelton v. Hadlock*, 62 Conn. 143; *Dorrance v. Raynsford*, 67 Conn. 1; *Whitesides v. Barber*, 24 S. Car. 373.

3. Strict Compliance with Statute Required.—In *Pettit v. Pettit*, 32 Ala. 304, Rice, C. J., said: "The jurisdiction of the Orphans' Court to decree a sale of land was derived solely from our statutes, and was a special and limited jurisdiction. Its decree for a sale was a nullity, unless its record disclosed every fact essential to its jurisdiction. No intendment that it had jurisdiction to decree a sale of realty was allowable."

In *Wright v. Edwards*, 10 Oregon 298, it was said that while the constitution provides that the County Court shall have the jurisdiction pertaining to probate courts, its authority to order the sale of real property of an intestate is derived wholly from the statute; and that unless the record shows the existence of the facts on which the statute authorizes the exercise of the power, an order of sale is void on collateral attack. Thus, it was held in this case that the order of sale was void because the petition, on the filing of which the statute

authorizes the court to order a sale, did not allege the facts specified in the statute. In such case it was said that the want of jurisdiction appears affirmatively on the record because there is an entire want of the facts prerequisite to jurisdiction, and that the distinction between inferior and superior courts can have no application.

"The authority of the Probate Court to order a sale of real property of an estate is derived entirely from the statute. It is a limited, and not a general, authority. It may be exercised in certain specially designated cases; it can be exercised in no other." *Haynes v. Meeks*, 20 Cal. 312 [citing *People v. Corlies*, 1 Sandf. (N. Y.) 247; *Corwin v. Merritt*, 3 Barb. (N. Y.) 343; *Bloom v. Bardick*, 1 Hill (N. Y.) 139, 37 Am. Dec. 299; *Currie v. Stewart*, 27 Miss. 55, 61 Am. Dec. 500; *Laughman v. Thompson*, 6 Smed. & M. (Miss.) 259; *Wiley v. White*, 3 Stew. & P. (Ala.) 355; *Townsend v. Gordon*, 19 Cal. 189].

Within This Principle it is held that if the petition fails to state the facts required by the statute the court does not acquire jurisdiction, and the order of sale and the sale made under it are void. *De Bardelaben v. Stoudenmire*, 48 Ala. 643.

4. Courts of Probate Regarded as Superior Courts—*United States.*—*Loyd v. Waller*, 74 Fed. Rep. 601.

Arkansas.—*Apel v. Kelsey*, 52 Ark. 341, 20 Am. St. Rep. 183; *Currie v. Franklin*, 51 Ark. 338; *Adams v. Thomas*, 44 Ark. 267; *Borden v. State*, 11 Ark. 519, 54 Am. Dec. 217; *Ex p. Marr*, 12 Ark. 87; *Bemett v. Owen*, 13 Ark. 177; *Sturdy v. Jacoway*, 19 Ark. 499; *George v. Norris*, 23 Ark. 121; *Thorn v. Ingram*, 25 Ark. 52; *Fleming v. Johnson*, 26 Ark. 421; *Montgomery v. Johnson*, 31 Ark. 74; *West v. Waddill*, 33 Ark. 575; *Mock v. Pleasants*, 34 Ark. 69; *Hall v. Brewer*, 40 Ark. 433.

California.—*Irwin v. Scriber*, 18 Cal. 499.

Delaware.—*Van Dyke v. Johns*, 1 Del. Ch. 93, 12 Am. Dec. 76.

Georgia.—*Tant v. Wigfall*, 65 Ga. 412; *Wood v. Crawford*, 18 Ga. 526.

Indiana.—*Hawkins v. Hawkins*, 28 Ind. 71.

Kansas.—*Higgins v. Reed*, 48 Kan. 273; *Howbert v. Heyle*, 47 Kan. 58.

Michigan.—*Schlee v. Darrow*, 65 Mich. 362.

Minnesota.—*Curran v. Kuby*, 37 Minn. 330; *Davis v. Hudson*, 29 Minn. 27.

Mississippi.—*Hanks v. Neal*, 44 Miss. 212.

Missouri.—*Bray v. Adams*, 114 Mo. 486;

the record shows that the jurisdictional facts did not exist.¹

(2) *Valid Grant of Probate or Administration.* — The first essential to the exercise of this statutory power is the probate of a will or a grant of administration, and if this has not been done, or if the grant of probate or of administration is void, an order or decree of sale is also void, and no title passes by a sale under it.² But the grant of letters of administration cannot be ques-

Murphy v. De France, 105 Mo. 53; Sherwood v. Baker, 105 Mo. 472, 24 Am. St. Rep. 399.

Nebraska. — Seward v. Didier, 16 Neb. 58.

Texas. — Bouldin v. Miller, 87 Tex. 359; Weems v. Masterson, 80 Tex. 45.

Every Reasonable Presumption should be indulged in after a great lapse of time to support titles acquired at administrator's sales made under orders of courts of competent jurisdiction. *Santana Live-Stock, etc., Co. v. Pendleton*, 81 Fed. Rep. 784.

In *Agan v. Shannon*, 103 Mo. 661, it was held that if there is nothing in the probate records affirmatively showing the contrary, it will be presumed that the order of sale was properly made, and that the order is of itself evidence of any fact necessary to give the power to make it.

In *Price v. Springfield Real-Estate Assoc.*, 101 Mo. 107, 20 Am. St. Rep. 595, it was claimed that, in order to sustain an administrator's sale, it devolved on the party claiming under it to show that the administrator filed a petition for the sale of the real estate, to produce an order of the court directing notice to be given to all parties in interest of the filing of such petition, and to show that the administrator caused the property to be appraised. "These objections," said Black, J., "are all based upon the proposition that the County Courts are courts of special and limited jurisdiction, and that all of these matters must be shown in support of the administrator's deed. Early cases are cited giving some support to the proposition, but the doctrine has long since been exploded. Formerly County Courts had, and Probate Courts now have, exclusive original jurisdiction in matters concerning the administration of estates of deceased persons. It is now well settled law that the orders and judgments of these courts are entitled to the same favorable presumptions and intendments that are accorded to the judgments of Circuit Courts. The proceedings of our Probate and County Courts are no more open to collateral attack than are the proceedings of any other courts." *Citing Camden v. Plain*, 91 Mo. 117; *Rowden v. Brown*, 91 Mo. 429.

In *Hurley v. Barnard*, 48 Tex. 83, it was held that an administrator's sale of lands for the payment of debts would be sustained on collateral attack though it appeared that no petition for a sale could be found on file; that the service of citation was waived; and that the debt for which the sale was made was not then due. See also *Saul v. Frame*, 3 Tex. Civ. App. 596; *Robertson v. Johnson*, 57 Tex. 64; *Alexander v. Maverick*, 18 Tex. 196, and *Davis v. Touchstone*, 45 Tex. 491, holding that where the order recited that it was made on the petition of the administrator it would be assumed that there was a petition, though it did not appear in the record.

And even independently of such recital, it is

held that the presumption must be indulged that the court acted regularly, and that an application for an order of sale was made. *Perry v. Blakey*, 5 Tex. Civ. App. 331 [*citing Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643; *Davis v. Touchstone*, 45 Tex. 490; *Hurley v. Barnard*, 48 Tex. 87].

If the Record Has Been Lost, it will be presumed that all the requirements of the statute were fulfilled. *Everett v. Newton*, 118 N. Car. 919.

1. Want of Jurisdiction Apparent of Record. —

Under the *Alabama* statute, which provides that when minors are interested in the estate, no order of sale shall be made unless the testimony of two disinterested witnesses has been taken in the probate court, as in chancery proceedings, showing the necessity of a sale, it is held that the order of sale and the sale made under it are void where the record shows that only one witness was examined. *Thompson v. Boswell*, (Ala. 1893) 12 So. Rep. 85 [*citing Pettus v. McClannahan*, 52 Ala. 55; *Robertson v. Bradford*, 70 Ala. 386; *Stevenson v. Murray*, 87 Ala. 442].

If the Property Sold Was a Homestead, and the record does not show any fact which would render it liable to sale, as, for instance, that the debts were incurred before the homestead right accrued, it has been held that there is a want of jurisdiction appearing on the face of the record and that the sale is void. *Howe v. McGivern*, 25 Wis. 525.

If the Record Is Silent as to any matter, it will nevertheless be presumed after the lapse of twenty years that the proceeding was regular. *Cox v. Davis*, 17 Ala. 714, 52 Am. Dec. 199; *Wallace v. Hall*, 19 Ala. 367; *Doe v. Riley*, 28 Ala. 164; *Field v. Goldsby*, 28 Ala. 218; *Matheson v. Hearin*, 29 Ala. 210; *Wyatt v. Scott*, 33 Ala. 313; *Austin v. Jordan*, 35 Ala. 642; *Worley v. High*, 40 Ala. 171.

Thus it is held that the existence of a sufficient petition when it was rendered will be presumed after such time. *Collins v. Johnson*, 45 Ala. 548.

2. Necessity of Duly Constituted Executor or Administrator — *United States.* — *Piatt v. McCullough*, 1 McLean (U. S.) 69.

Alabama. — *Allen v. Kellam*, 69 Ala. 442.

California. — *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656.

Michigan. — *Haug v. Primeau*, 98 Mich. 91; *Shipman v. Butterfield*, 47 Mich. 487; *Breen v. Pangborn*, 51 Mich. 29.

New York. — *O'Connor v. Huggins*, 113 N. Y. 511; *Bostwick v. Atkins*, 3 N. Y. 53.

South Carolina. — *Whitesides v. Barber*, 24 S. Car. 373.

Texas. — *Flenner v. Walker*, 5 Tex. Civ. App. 145.

Wisconsin. — *Jackson v. Astor*, 1 Pin. (Wis.) 137; *Frederick v. Pacquette*, 19 Wis. 541; *Sitzman v. Pacquette*, 13 Wis. 291.

tioned collaterally because of any error or irregularity in the proceeding, and therefore a sale cannot be collaterally attacked on the ground that the administrator was erroneously or improperly appointed, if the appointment was not absolutely void.¹

(3) *Application for Leave to Sell.* — The court has no power, as a general rule, to make an order of sale before an application or petition therefor containing proper averments has been presented by some person to whom the right to apply is given by the statute. In the absence of such application or petition an order of sale and the sale made under it are void on collateral attack,²

If No Administrator Has Been Appointed, an order of sale and all proceedings under it are void. Thus it was held that there was no appointment so as to give the court jurisdiction, where a conditional order was to the effect that the person named in it should become administrator on giving bond as required by law, and he never gave the bond, and no letters of administration were ever issued to him. *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656. See also *Callahan v. Fluker*, 49 La. Ann. 237.

If the Appointment of the Administrator Was Void because the necessary jurisdictional facts did not exist, as where the administration was not vacant at the time when such appointment was made, a sale by him is void. *Allen v. Kellam*, 69 Ala. 442. So, too, if the appointment was made on a petition which showed on its face that the petitioner was not one of the persons entitled to letters in the first instance, as next of kin, or in any other right, because such a petition does not confer any jurisdiction on the court to grant letters. *Haug v. Primeau*, 98 Mich. 91. Or where administration was granted on the estate of a living person who was supposed to be dead. *Springer v. Shavender*, 118 N. Car. 33, 54 Am. St. Rep. 708.

But if the administrator was the attorney of the heirs with a power of sale, and he procured letters of administration and sold under an order of court, instead of selling directly under the power, the heirs cannot question the validity of the sale, though the administration was void. *Grande v. Chaves*, 15 Tex. 550.

Administration Fraudulently Obtained—Knowledge of Purchaser. — A sale under a grant of administration obtained fraudulently and contrary to law confers no rights on a purchaser with notice of the fraud as against the heirs and others in the estate who are thereby defrauded. *McMahan v. Rice*, 16 Tex. 335.

If the Will Has Not Been Probated, the executor named in it cannot lawfully obtain an order of sale. *Rapt v. Matthias*, 35 Ind. 332; *Whitesides v. Barber*, 24 S. Car. 373.

So, too, the appointment of an administrator *de bonis non*, with the will annexed, before the probate of the will, is void, and therefore a sale of real estate pursuant to a license granted to such an administrator so appointed is also void. *Chase v. Ross*, 36 Wis. 267.

Appointment of Administrator After Application for Leave to Sell. — In *Rice v. Cleghorn*, 21 Ind. 80, a sale was held valid where the petition for leave to sell also asked the appointment of the petitioner as administrator, and the court by the same order made the appointment as prayed and granted leave to make the sale.

Abatement of Letters by Marriage of Administratrix. — If the letters of the administratrix

had abated by her marriage before the sale, it is void though approved by the ordinary. *Rumph v. Truelove*, 66 Ga. 480.

1. Invalidity of Appointment of Administrator. — In *Landford v. Dunklin*, 71 Ala. 594, the validity of a sale was questioned on the ground that the letters of administration were invalid because they were granted to the sheriff instead of to the general administrator of the county. The court held that though it was irregular to grant administration to the sheriff while there was a general administrator competent to act, still the irregularity did not render the grant void, but merely made it subject to revocation, and it could not be urged against the validity of the order of sale.

In *May v. Marks*, 74 Ala. 249, letters of administration had been granted to the sheriff *virtute officii*. After his term of office had expired, thereby terminating his authority as administrator, leave was granted on his application to sell the real estate of the decedent. It was held on these facts that while there was an error for which the order could have been reversed on appeal, it was not void, and therefore was not subject to collateral attack. See also *Ford v. Mills*, 46 La. Ann. 331; *Mills v. Herndon*, 77 Tex. 89; *Flenner v. Walker*, 5 Tex. Civ. App. 145.

2. Application or Petition Necessary to Give Jurisdiction — *Alabama.* — *McCartney v. Calhoun*, 11 Ala. 110; *Pettit v. Pettit*, 32 Ala. 288; *Robertson v. Bradford*, 70 Ala. 385; *Landford v. Dunklin*, 71 Ala. 594; *Gilchrist v. Shackelford*, 72 Ala. 7; *Sermon v. Black*, 79 Ala. 507. *California.* — *Burris v. Kennedy*, 108 Cal. 331; *Wills v. Pauly*, 116 Cal. 575; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656; *Matter of Spriggs*, 20 Cal. 121; *Haynes v. Meeks*, 20 Cal. 288; *Townsend v. Gordon*, 19 Cal. 188; *Gregory v. Taber*, 19 Cal. 397, 79 Am. Dec. 219; *Gregory v. McPherson*, 13 Cal. 562; *Matter of Byrne*, 112 Cal. 176.

Colorado. — *Vance v. Maroney*, 4 Colo. 47.

Idaho. — *Ethell v. Nichols*, 1 Idaho 741.

Illinois. — *Monahan v. Vandyke*, 27 Ill. 154.

Missouri. — *Teverbaugh v. Hawkins*, 82 Mo. 180.

Texas. — *Ball v. Collins*, (Tex. 1887) 5 S. W. Rep. 622.

The Filing of the Petition gives jurisdiction to the court to order a sale. *Doe v. Riley*, 28 Ala. 164; *Jackson v. Irwin*, 10 Wend. (N. Y.) 441.

The Averments in the Petition, and not the truth of the averments, govern in determining whether the court has jurisdiction. If the averments are sufficient, the jurisdiction of the court attaches, and the sale cannot be questioned collaterally on the ground that they are not true. *Fitch v. Miller*, 20 Cal. 352. *Pryor*

unless a contrary rule is established by statute.¹

(4) *Notice of Application.* — There is great diversity of opinion as to whether notice to the heirs or other persons interested in the estate of an application for leave to sell a decedent's real estate is necessary to the validity of the sale. An important element in the determination of this question is the view that the courts take as to whether a proceeding to obtain leave to sell is, under the statute authorizing it, a proceeding *in rem* or *in personam*. Many authorities hold that it is *in rem*,² while others hold that it is *in personam*.³ It is accordingly held in those jurisdictions where the proceeding is

v. Downey, 50 Cal. 388, 19 Am. Rep. 656. See also *De Bardelaben v. Stoudenmire*, 48 Ala. 643.

A Misstatement in the Petition of the amount of the decedent's debts will not invalidate the sale, if the debts actually due were such as to call for a sale. *Simonin v. Czarnowski*, 47 La. Ann. 1334.

Exception to General Rule. — In *Missouri* the court may order a sale of land for the payment of debts without any petition or order to show cause, when an annual settlement has been filed at the proper time. *Day v. Graham*, 97 Mo. 398. See also *Patee v. Mowry*, 59 Mo. 161; *Teverbaugh v. Hawkins*, 82 Mo. 183.

1. Under the Minnesota Statute, providing that an administrator's sale shall not be held void if it shall appear, among other things, that he was licensed to make the sale "by the Probate Court having jurisdiction," it was held that a petition for a license to sell was not essential to the validity of the sale. The clause "the Probate Court having jurisdiction" was construed as meaning the Probate Court which is designated by law to control the administration of the estate and whose jurisdiction has attached to the subject-matter by its appointment of the administrator. *Rumrill v. St. Albans First Nat. Bank*, 28 Minn. 202.

2. Rule that Proceeding Is in Rem — *United States*. — *Grignon v. Astor*, 2 How. (U. S.) 338; *Wilkinson v. Leland*, 2 Pet. (U. S.) 657.

Alabama. — *Wyman v. Campbell*, 6 Port. (Ala.) 219, 31 Am. Dec. 677; *Couch v. Campbell*, 6 Port. (Ala.) 262; *Perkins v. Winter*, 7 Ala. 855; *King v. Kent*, 29 Ala. 542; *Satcher v. Satcher*, 41 Ala. 26, 91 Am. Dec. 498; *Pettus v. McClannahan*, 52 Ala. 55; *Doe v. Riley*, 28 Ala. 164; *De Bardelaben v. Stoudenmire*, 48 Ala. 643.

Arkansas. — *Borden v. State*, 11 Ark. 519, 54 Am. Dec. 217; *Rogers v. Wilson*, 13 Ark. 507.

Maryland. — *Tongue v. Morton*, 6 Har. & J. (Md.) 21.

Massachusetts. — *Perkins v. Fairfield*, 11 Mass. 227.

Ohio. — *Sheldon v. Newton*, 3 Ohio St. 502; *Robb v. Irwin*, 15 Ohio 698; *Paine v. Mooreland*, 15 Ohio 442, 45 Am. Dec. 585; *Benson v. Cilley*, 8 Ohio St. 614.

Pennsylvania. — *McPherson v. Cunliff*, 11 S. & R. (Pa.) 432, 14 Am. Dec. 642.

Texas. — *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Poor v. Boyce*, 12 Tex. 440; *Dancy v. Stricklinge*, 15 Tex. 557, 65 Am. Dec. 179; *George v. Watson*, 19 Tex. 354.

Washington. — *Ryan v. Ferguson*, 3 Wash. 356; *Ackerson v. Orchard*, 7 Wash. 377.

The Argument in Support of this view is that

the administrator represents the estate, and has its property in his possession; that when the court appoints him it gives him possession and charge of all of the decedent's property; that it is optional with the legislature to provide for the sale of the personal or the real estate first; that in certain instances it has authorized the prior sale of the real estate; that a sale of the personal estate is made without notice of an application for an order, and even without any order, and that the same provision might have been made for the sale of the real estate; and that as the administrator has possession of the real estate as of other property, notice to other parties when required is to be regarded as directory, but as in no manner affecting the jurisdiction of the court in ordering the administrator to sell the property he has in his possession. *Mickel v. Hicks*, 19 Kan. 578, 27 Am. Rep. 161.

A Distinction has been drawn as to the manner of raising the question of the validity of the order of sale, the proceeding being regarded as *in rem* when collaterally assailed, but *in personam* when its regularity is presented on error or by appeal. *Garrett v. Bruner*, 59 Ala. 513.

3. Rule that Proceeding Is in Personam — *California*. — *Matter of Spriggs*, 20 Cal. 121; *Haynes v. Meeks*, 20 Cal. 288.

Illinois. — *Morris v. Hogle*, 37 Ill. 150, 87 Am. Dec. 243.

Iowa. — *Good v. Norley*, 28 Iowa 188.

Kansas. — *Mickel v. Hicks*, 19 Kan. 578, 27 Am. Rep. 161.

Mississippi. — *McPike v. Wells*, 54 Miss. 136. Compare *Summers v. Brady*, 56 Miss. 10.

Missouri. — *Shields v. Ashley*, 16 Mo. 471.

Montana. — *Broadwater v. Richards*, 4 Mont. 80.

New York. — *Sibley v. Waffle*, 16 N. Y. 185; *Bloom v. Burdick*, 1 Hill (N. Y.) 140, 37 Am. Dec. 299; *Sheldon v. Wright*, 5 N. Y. 518; *Rigney v. Coles*, 6 Bosw. (N. Y.) 486; *Corwin v. Merritt*, 3 Barb. (N. Y.) 341; *Dakin v. Hudson*, 6 Cow. (N. Y.) 222; *Schneider v. McFarland*, 2 N. Y. 459.

Wisconsin. — *Stark v. Brown*, 12 Wis. 572, 78 Am. Dec. 762; *Sitzman v. Pacquette*, 13 Wis. 291; *Gibbs v. Shaw*, 17 Wis. 197.

In *Matter of Spriggs*, 20 Cal. 121, quoted in *Broadwater v. Richards*, 4 Mont. 83, it was said that "the proceeding for the sale of the real estate of an intestate is in the nature of an action, of which the presentation of the petition is the commencement, and the order of sale is the judgment."

But it is not an action in the sense that it cannot be maintained until after the expiration of the time within which the statute forbids

regarded as *in rem* that the provisions of the statutes requiring notice of the application to be given are merely directory, that failure to give the notice, though erroneous, does not render the order of sale void, and that consequently the sale cannot be collaterally impeached because of such omission.¹ On the other hand, it is held that jurisdiction of the persons of the heirs or devisees is essential to a valid order of sale, the proceeding being regarded as *in personam*, and that failure to give such notice renders the order of sale and all proceedings under it absolutely void,² unless notice has been

an action to be brought against the heirs or devisees for the intestate's debts. *Skidmore v. Romaine*, 2 Bradf. (N. Y.) 122.

The Reasons Assigned for the opinion that the proceeding is *in personam* are that the administrator has no possession of the real estate except when specially ordered by the court; that the title and possession, and right of possession, pass immediately to the heirs, subject to be divested only by the special order directing a lease or sale; that as the heirs have the title, the possession, and right of possession, a proceeding to divest them of these must be, in the nature of things, adversary; that it is of ancient law that the title and possession of real estate pass to the heir, of personal to the executor or administrator; that an order to the latter to sell personal property may well be a proceeding *in rem*, as it is an order for the sale of that of which he has both the legal title and the possession, while an order to him to sell real estate, of which he has neither title nor possession, must in the nature of things be, as to those holding both title and possession, adversary. *Mickel v. Hicks*, 19 Kan. 578, 27 Am. Rep. 161.

1. Rule that Notice Is Not Jurisdictional—*Arkansas*.—*Rogers v. Wilson*, 13 Ark. 507; *Montgomery v. Johnson*, 31 Ark. 74.

Louisiana.—*Wright v. Steed*, 10 La. Ann. 238.

Texas.—*Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852; *Heath v. Layne*, 62 Tex. 691; *Hurley v. Barnard*, 48 Tex. 87; *George v. Watson*, 19 Tex. 368.

Washington.—*Ryan v. Fergusson*, 3 Wash. 356.

See also cases cited in the next preceding note but one, *Rule that Proceeding Is in Rem*.

Although It Is Erroneous to grant an order for the sale of real estate without first having given the notice required by the statute, the order is not void because it was made in a proceeding *in rem* for the sale of an estate, which by the statute is made assets in the hands of the administrator, and over which by petition the Probate Court has jurisdiction. *Rogers v. Wilson*, 13 Ark. 507.

2. Rule that Notice Is Jurisdictional—*Colorado*.—*Vance v. Maroney*, 4 Colo. 47.

Illinois.—*Gibson v. Roll*, 27 Ill. 88, 81 Am. Dec. 219; *Botsford v. O'Conner*, 57 Ill. 72; *Donlin v. Hettinger*, 57 Ill. 348; *Fell v. Young*, 63 Ill. 106; *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457.

Indiana.—*Babbitt v. Doe*, 4 Ind. 356; *Doe v. Anderson*, 5 Ind. 34; *Doe v. Bowen*, 8 Ind. 198; *Martin v. Starr*, 7 Ind. 224; *Hawkins v. Hawkins*, 28 Ind. 66; *Gerrard v. Johnson*, 12 Ind. 636; *Edwards v. Baker*, 145 Ind. 281.

Iowa.—*Good v. Norley*, 28 Iowa 188;

Boyles v. Boyles, 37 Iowa 592; *Little v. Sinnett*, 7 Iowa 324; *Van Horn v. Ford*, 16 Iowa 581; *Lees v. Wetmore*, 58 Iowa 170.

Kansas.—*Mickel v. Hicks*, 19 Kan. 578, 27 Am. Rep. 161.

Mississippi.—*Campbell v. Brown*, 6 How. (Miss.) 230; *Puckett v. McDonald*, 6 How. (Miss.) 269; *Root v. McFerrin*, 37 Miss. 17, 75 Am. Dec. 49.

New Hampshire.—*French v. Hoyt*, 6 N. H. 370, 25 Am. Dec. 464.

New York.—*Matter of Mahoney*, 34 Hun (N. Y.) 501; *Jenkins v. Young*, 35 Hun (N. Y.) 569; *John's Estate*, 21 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 326.

North Carolina.—*Perry v. Adams*, 98 N. Car. 167, 2 Am. St. Rep. 326.

See also cases cited in the next preceding note but one, *Rule that Proceeding Is in Personam*.

In *McPike v. Wells*, 54 Miss. 136, the conflict of the authorities is referred to as follows: "In many of the states the proceeding by the administrator to sell the lands of the intestate to pay debts is regarded as a proceeding *in rem*; and the decree confers authority, and the title passes, whether the heir has been notified or not. In those states, although the statutes, in some instances, require notice, that feature has been treated as directory merely. If not complied with, still the title would vest in the purchaser. The Supreme Court of the United States has repeatedly upheld such titles. But in this state, from the earliest times, the courts have held such proceedings to be personal suits against the heir, for the purpose of divesting the title descended (to which he may make full defense), and that the heir must therefore be served, actually or constructively, with the prescribed notice. It is only by virtue of the statute that the administrator can deal with the realty as assets."

In *Good v. Norley*, 28 Iowa 193, Beck, J., said: "There is great conflict among the authorities upon this question, many holding that proceedings of this character, to subject lands of minors and of intestates to sale, under order of courts of probate or courts exercising probate jurisdiction, are strictly *in rem*. It is so held in several instances under statutes which require notice to be given to parties interested, quite as explicitly as does the statute under which the proceedings were had which resulted in the sale of the land in controversy," and after citing a number of cases he continued: "In these cases the statutory requirement in regard to notice, when such requirements exist, are held to be directory, and not as providing for or regulating the process whereby the court acquires jurisdiction of the persons of the parties interested in the land."

waived,¹ or unless a failure to give the notice is within the curative statutes which have been enacted in some states.²

b. ERRORS OR IRREGULARITIES IN PROCEEDING. — It is well settled that when the facts giving the court jurisdiction in the premises appear, errors or irregularities in the proceeding may be corrected only by the proper appellate process. The order of sale is an adjudication of the existence of the requisite facts; and until the order is reversed by a reviewing court, it and all that may be done under it are valid and cannot be questioned in any collateral proceeding.³ And this is true whether the court ordering the sale is regarded as a

sought to be sold. It is, therefore, held that the omission of the notice, which is not a jurisdictional matter, at most, is but an error, and does not render the proceeding void as against a collateral attack, or defeat the title to property acquired thereby, in the hands of purchasers. On the other hand, it is held that, in like proceedings, jurisdiction of the persons of those interested in the land sought to be sold, as well as of the subject-matter, is necessary to the validity of the adjudication of the court under which the sale is made; and therefore, without the notice or process required by the statute, the order of the court and the sale made in pursuance thereof are void."

1. Waiver of Notice. — Under the *Indiana* statute providing that adult persons may waive the notice by filing their assent to the sale in writing, and that guardians may assent in like manner for their wards, it is held that the guardian of an insane person as well as the guardian of an infant may bind his ward by a waiver of notice. *Smock v. Reichwine*, 117 Ind. 194.

An application by the heirs to have the sale carried into effect is a waiver of an irregularity in giving notice of the application for leave to sell. *Butler v. Emmett*, 8 Paige (N. Y.) 12.

2. See *infra*, this section and subsection, *Curative Statutes*.

3. Errors or Irregularities Not Ground for Collateral Attack — *United States*. — *Cornett v. Williams*, 20 Wall. (U. S.) 2 26; *Thompson v. Tolmie*, 2 Pet. (U. S.) 165; *Berrian v. Rogers*, 43 Fed. Rep. 467.

Alabama. — *Wyman v. Campbell*, 6 Port. (Ala.) 219, 31 Am. Dec. 677; *Lee v. Campbell*, 6 Port. (Ala.) 249; *Couch v. Campbell*, 6 Port. (Ala.) 262; *Duval v. McLoskey*, 1 Ala. 708; *Perkins v. Winter*, 7 Ala. 855; *Duval v. Planters'*, etc., Bank, 10 Ala. 636; *Lyons v. Hamner*, 84 Ala. 197, 5 Am. St. Rep. 363; *Carter v. Waugh*, 42 Ala. 452; *Cox v. Davis*, 17 Ala. 714, 52 Am. Dec. 199; *Doe v. Riley*, 28 Ala. 164; *Field v. Goldsby*, 28 Ala. 218; *Matheson v. Hearin*, 29 Ala. 210; *King v. Kent*, 29 Ala. 542; *Satcher v. Satcher*, 41 Ala. 26, 91 Am. Dec. 498; *Snedicor v. Mobley*, 47 Ala. 517; *Arnett v. Bailey*, 60 Ala. 435; *Bibb v. Bishop Cobbs Orphan Home*, 61 Ala. 326; *Goodwin v. Sims*, 86 Ala. 102, 11 Am. St. Rep. 21; *Clancy v. Stephens*, 92 Ala. 577; *Thompson v. Boswell*, 97 Ala. 570.

Arkansas. — *Apel v. Kelsey*, 47 Ark. 413; *Mongtomery v. Johnson*, 31 Ark. 74; *Thorn v. Ingram*, 25 Ark. 52.

California. — *Ions v. Harbison*, 112 Cal. 260; *Zilmer v. Gerichten*, 111 Cal. 73; *Smith v. Biscailuz*, 83 Cal. 359; *Richardson v. Butler*,

82 Cal. 174, 16 Am. St. Rep. 101; *Phelan v. Smith*, 100 Cal. 171; *Dennis v. Winter*, 63 Cal. 16; *Halleck v. Moss*, 22 Cal. 266; *Burris v. Kennedy*, 108 Cal. 331; *Matter of Devincenzi*, 119 Cal. 498.

Connecticut. — *Brown v. Lanman*, 1 Conn. 467.

Georgia. — *Dean v. Central Cotton Press Co.*, 64 Ga. 670; *Tucker v. Harris*, 13 Ga. 1, 58 Am. Dec. 488.

Illinois. — *Harris v. Lester*, 80 Ill. 307; *Goodbody v. Goodbody*, 95 Ill. 456; *Iverson v. Loberg*, 26 Ill. 179, 79 Am. Dec. 364; *McCormack v. Kimmel*, 4 Ill. App. 121.

Indiana. — *Jones v. Levi*, 72 Ind. 586.

Iowa. — *Cheney v. McColloch*, 104 Iowa 249; *Bacon v. Chase*, 83 Iowa 521; *Myers v. Davis*, 47 Iowa 325; *Read v. Howe*, 39 Iowa 553; *Morrow v. Weed*, 4 Iowa 77, 66 Am. Dec. 122.

Kansas. — *Fleming v. Bale*, 23 Kan. 88; *Bryan v. Bauder*, 23 Kan. 95.

Kentucky. — *Johnson v. McDyer*, (Ky. 1888) 9 S. W. Rep. 778.

Maine. — *Decker v. Decker*, 74 Me. 465; *McLean v. Weeks*, 65 Me. 411.

Maryland. — *Simpson v. Bailey*, 80 Md. 421.

Massachusetts. — *Cowden v. Jacobson*, 165 Mass. 240.

Michigan. — *Howard v. Moore*, 2 Mich. 226; *Coon v. Fry*, 6 Mich. 506; *Marvin v. Schilling*, 12 Mich. 356; *Woods v. Monroe*, 17 Mich. 238; *Osman v. Traphagan*, 23 Mich. 80; *King v. Nunn*, 99 Mich. 590.

Minnesota. — *Curran v. Kuby*, 37 Minn. 330.

Missouri. — *Melton v. Fitch*, 125 Mo. 281;

Macey v. Stark, 116 Mo. 481; *Murphy v. De France*, 105 Mo. 53; *Camden v. Plain*, 91 Mo. 117; *Tutt v. Boyer*, 51 Mo. 425.

Nebraska. — *Trumble v. Williams*, 18 Neb. 144; *Seymour v. Ricketts*, 21 Neb. 240.

New Hampshire. — *Gordon v. Gordon*, 55 N. H. 399.

New York. — *Jenkins v. Young*, 43 Hun (N. Y.) 194.

North Carolina. — *Dickens v. Long*, 109 N. Car. 165; *McGlawhorn v. Worthington*, 98 N. Car. 199; *Ward v. Lowndes*, 96 N. Car. 367; *Edwards v. Moore*, 99 N. Car. 1; *McIver v. Stephens*, 101 N. Car. 255.

Oregon. — *Wright v. Edwards*, 10 Oregon 298; *Mitchell v. Campbell*, 19 Oregon 198.

Pennsylvania. — *Snyder v. Snyder*, 6 Binn. (Pa.) 496, 6 Am. Dec. 493.

Tennessee. — *Norville v. Coble*, 1 Lea (Tenn.) 465; *Griffith v. Philips*, 9 Lea (Tenn.) 417; *Ridgely v. Bennett*, 13 Lea (Tenn.) 210.

Texas. — *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852; *Rutherford v. Stamper*, 60 Tex. 447; *Dodd v. Templeman*, 76 Tex. 58;

court of general or limited jurisdiction.¹

c. AUTHORITY TO SELL—(1) *Order or Decree of Sale*.—The authority of an executor or administrator to sell the real estate of his decedent exists

Martin v. Robinson, 67 Tex. 368; *Tom v. Sayers*, 64 Tex. 339; *Moody v. Butler*, 63 Tex. 210; *Gillenwaters v. Scott*, 62 Tex. 670; *Willis v. Ferguson*, 59 Tex. 172; *Peterson v. Lowry*, 48 Tex. 408; *Poor v. Boyce*, 12 Tex. 440; *Evans v. Martin*, 6 Tex. Civ. App. 331; *Corley v. Goll*, 8 Tex. Civ. App. 184.

Washington.—*Hazelton v. Bogardus*, 8 Wash. 102.

Wisconsin.—*Jackson v. Astor*, 1 Pin. (Wis.) 137; *Melms v. Pfister*, 59 Wis. 168.

Adjudicating Existence of Jurisdictional Facts.—The sufficiency of the service of the notice of an application for leave to sell and other jurisdictional matters are within the jurisdiction of the court to determine, and its adjudication thereon is conclusive and cannot be questioned in a collateral proceeding. *Lees v. Wetmore*, 58 Iowa 170; *Shawhan v. Loffer*, 24 Iowa 217; *Pursley v. Hayes*, 22 Iowa 11; *Read v. Howe*, 39 Iowa 553; *Tharp v. Brennehan*, 41 Iowa 251; *Farmers' Ins. Co. v. Highsmith*, 44 Iowa 330.

The Necessity of the Sale for the payment of debts is established by the order of sale, because, having jurisdiction, it is to be presumed that the court satisfied itself by evidence of the necessity for the sale, and made its decree accordingly. *Jacocks v. Paterson*, 18 R. I. 751; *Posey v. Eaton*, 9 Lea (Tenn.) 500.

The representation of the insufficiency of the personal property for the payment of debts calls into exercise the power of the court to order a sale. The truth of the representation then becomes the subject of inquiry, and a license following such hearing necessarily involves an adjudication of the truth of the representation, and such adjudication is conclusive. *Comstock v. Crawford*, 3 Wall. (U. S.) 396.

Presumption of Regularity.—Where the purchaser has been in the peaceable possession of the premises for many years, and the records of the Probate Court have been destroyed, it will be presumed that the sale was regularly made. *Smith v. Wert*, 64 Ala. 34.

"Public Policy requires that all reasonable presumptions should be made in support of such sales, especially respecting matters *in pais*. The number of titles thus derived, and the too frequent inaccuracy of clerks and others concerned in effecting these sales, renders this necessary. If a different rule prevailed, purchasers would be timid, and estates consequently be sold at a diminished value, to the prejudice of heirs and creditors." *Wyman v. Campbell*, 6 Port. (Ala.) 219, 31 Am. Dec. 677.

See also *Massenburg v. Denison*, 71 Fed. Rep. 618, 30 U. S. App. 612; *Moore v. Greene*, 19 How. (U. S.) 69; *Gray v. Gardner*, 3 Mass. 399; *Winkley v. Kaime*, 32 N. H. 268; *Hazard v. Martin*, 2 Vt. 77; *Doolittle v. Holton*, 26 Vt. 588; *Townsend v. Downer*, 32 Vt. 183.

If the Records Have Been Destroyed, it will be presumed after many years that everything was regularly done. *White v. Jones*, 67 Tex. 638.

Failure to Have Attorney Appointed for Absent Heirs.—The Louisiana statute which makes it

the duty of the administrator to prove contradictorily with the attorney of absent heirs that the sale was advantageous and necessary is merely directory. It contains no prohibitory clause, and although its nonobservance might in certain cases subject the curator to damages at the suit of the absent heirs, it constitutes one of those informalities anterior to the judgment which cannot be inquired into collaterally. *Herriman v. Janney*, 31 La. Ann. 276; *Gibson v. Foster*, 2 La. Ann. 509.

The Incompetency of the Judge because of his relationship to the parties is waived by failure to object to it at the time, and the order of sale cannot afterwards be questioned on that ground. *Posey v. Eaton*, 9 Lea (Tenn.) 500.

Failure to Give Notice of the Sale as required by law does not furnish ground for attacking collaterally the validity of the sale. *Averill v. Jackson City Bank*, (Mich. 1897) 72 N. W. Rep. 15; *Schaale v. Wasey*, 70 Mich. 411.

Failure to Designate the Paper for Publication of a Notice of Sale, as required by the statute, is a mere irregularity which is cured by an order confirming the sale. *Furth v. U. S. Mortgage, etc.*, Co., 13 Wash. 73.

Failure to Serve Notice of the Application on the guardian of infant heirs is a mere irregularity, and therefore does not subject the sale to collateral attack where notice was served on the infant personally. *Coffin v. Cook*, 106 N. Car. 376.

Proceeding Against Minor.—It is at most only an irregularity that a proceeding to sell a decedent's real estate was brought by a minor devisee, where such minor became of age before the summons was served on him. *McIver v. Stephens*, 101 N. Car. 255.

Proof of Adequacy of Price.—A sale is not subject to collateral attack on the ground that the order confirming it did not recite that evidence was given as to the adequacy of the price. The statute not requiring the record to show that such evidence was given, the presumption is in favor of the regularity of the proceeding. *Capt v. Stubbs*, 68 Tex. 222.

Entering Return on Minutes.—The failure to enter the return of the sale on the minutes of the court is merely an irregularity. *Heath v. Layne*, 62 Tex. 687.

1. In *Brown v. Lanman*, 1 Conn. 467, the validity of an administrator's sale was questioned on the ground that the proceedings did not show on their face that the "debts and charges allowed by the court" exceeded the personal estate, and that, a court of probate being a court of limited jurisdiction, it must appear on the face of the proceedings that it had jurisdiction. It was held, however, that though such proceeding might be erroneous, and set aside on appeal, yet as the court had jurisdiction of the subject-matter and there was no fraud in the case, the order of sale was valid until set aside, and could not be collaterally called in question; and Chief Justice Swift, in delivering the opinion of the Court of Errors, asserted that even admitting that a judgment of sale could be set aside for irregularity, it would be no ground for vacating the

only by virtue of an order or decree of the proper court granting him leave to make the sale, and in the absence of such order or decree his acts are wholly void and no title passes to the purchaser.¹

(2) *Qualification of Person Making Sale.* — It has already been seen that in some jurisdictions the qualification of a personal representative, by giving an official bond and taking an oath of office, is a condition precedent to his authority to perform representative acts, and that all acts done without so qualifying are absolutely void; while in other jurisdictions all acts done under a grant of letters by the proper court are valid and binding, though the requirements of law as to qualification have not been complied with.² The view adopted in the particular jurisdiction respecting this matter governs as to the validity of a sale of real estate made under an order of the probate court before the representative has qualified.³ The requirement of a special qualification for the purpose of selling real estate under an order of court has been discussed in a preceding division of this section.⁴

d. EXECUTION OF ORDER OR DECREE. — In executing an order of sale, the personal representative or other person authorized thereby to make the sale must pursue strictly the authority so conferred on him; and if he fails to perform any of the acts required of him in executing the power, it is generally held that the sale is void.⁵ Thus the sale is void if it is made on terms or in a manner other than the order or decree directs,⁶ or if notice of the sale was not given as required by the statute or by the order of sale,⁷ unless the irregularities are cured by statute.⁸ But it is held that a sale is not void because of the failure of the executor or administrator making the sale to

title of a *bona fide* purchaser under it. He stated moreover that many instances of similar sales had occurred in that state and that the alleged defect in the proceedings had never been deemed a ground for annulling a conveyance. See also *Rigney v. Coles*, 6 Bosw. (N. Y.) 479; *Pelletreau v. Smith*, 30 Barb. (N. Y.) 494.

1. *No Authority to Sell Without Leave of Court.* — *Gilchrist v. Shackelford*, 72 Ala. 7; *Woods v. Legg*, 91 Ala. 511; *Gregson v. Tuson*, 153 Mass. 325; *Goforth v. Longworth*, 4 Ohio 129, 19 Am. Dec. 588; *Levy v. Riley*, 4 Oregon 392.

Failure of the Record to Show an Order of Sale is a fatal defect, and incapable of being supplied by anything else, whether consisting of notice of sale, report of sale, approval thereof, or administrator's deed. The order of sale in cases of this sort occupies the same relation to a sale by an administrator that a judgment or decree does to an execution sale by a sheriff. *Evans v. Snyder*, 64 Mo. 516; *Goforth v. Longworth*, 4 Ohio 129, 19 Am. Dec. 588. See also *supra*, this title, *Management and Care of Estate — Real Property*.

The Texas Statute provides in express terms that "no sale of any property belonging to an estate shall be made by an executor or administrator without an order of court authorizing the same." *Ball v. Collins*, (Tex. 1887) 5 S. W. Rep. 622.

Under the Louisiana Code, in force in 1813, a sale made by executors without an order of court after the lapse of one year from their appointment was absolutely void. *Gaines v. New Orleans*, 6 Wall. (U. S.) 642.

2. *Validity of Acts Done Before Qualification.* — See *supra*, this title, *Appointment and Tenure of Office — Qualification of Executors and Administrators*.

3. *In California* it is held that, until a bond has been given, the appointment of the representative is incomplete, and that a sale made by him is void, though it was ordered and approved by the Probate Court. *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656.

4. *Special Oath and Bond.* — See *supra*, this section, *Preliminaries to Making Sale*.

5. *Executing Order of Sale — Strict Compliance Required.* — *Wiley v. White*, 3 Stew. & P. (Ala.) 355; *Lockwood v. Sturdevant*, 6 Conn. 373; *Broadwater v. Richards*, 4 Mont. 80; *Chase v. Ross*, 36 Wis. 267; *McCrubb v. Bray*, 36 Wis. 333.

"Where particular forms are pointed out for the execution of a power, however immaterial they may appear in themselves, these forms are considered as conditions, the observance of which cannot be dispensed with." *Wyman v. Campbell*, 6 Port. (Ala.) 219, 31 Am. Dec. 677.

Sale of More than Necessary. — It has been held that where the license authorizes the administrator to raise a particular sum by the sale of land, and he sells an entire tract for more than the sum which he was authorized to raise, the sale is void. *Wakefield v. Campbell*, 20 Me. 393, 37 Am. Dec. 60; *Gregson v. Tuson*, 153 Mass. 325; *Adams v. Morrison*, 4 N. H. 166, 17 Am. Dec. 406; *Hodge v. Fabian*, 31 S. Car. 212, 17 Am. St. Rep. 25.

6. *A Sale on Different Terms* from the terms prescribed by the decree of the court is void. *McCully v. Chapman*, 58 Ala. 325. See also *supra*, this section, *Manner and Terms of Sale*.

7. *Failure to Give Notice Avoids Sale.* — *Hellman v. Merz*, 112 Cal. 661; *McCrubb v. Bray*, 36 Wis. 333. See also *supra*, this section, *Manner and Terms of Sale — Notice of Sale*.

8. *Irregularities Cured by Statute.* — See *infra*, this section and subsection, *Curative Statutes*.

perform acts required of him after the sale.¹

e. CURATIVE STATUTES. — In some jurisdictions statutes have been enacted for the protection of purchasers, declaring that no sale by an executor or administrator shall be avoided on collateral attack for any defect or irregularity except such as may be specified in the statute,² or limiting the time

1. Failure to Perform Acts Required After Sale. — Wyman v. Campbell, 6 Port. (Ala.) 219, 31 Am. Dec. 677.

Failure to Account for the Proceeds of the sale by the administrator will not affect the validity of the purchaser's title, but the administrator becomes liable on his bond. Decker v. Decker, 74 Me. 465. See also Lees v. Wetmore, 58 Iowa 170.

Intermediate Proceedings — Notice to Heirs. — A sale is not rendered void by the failure of the administrator to give notice to the heirs, either of the confirmation of the sale, or of the report of the payment of the purchase money, or of the order authorizing the administrator to make a conveyance. May v. Marks, 74 Ala. 249.

2. Curative Statutes. — The Indiana Statute provides that "in case any action shall be brought for the recovery of any real estate, sold by an administrator under the direction of the court, or if any other action be brought by which the validity of the sale shall be contested, such action shall not be maintained, nor such sale avoided, on account of any irregularity or defect in the proceedings, if it shall be made to appear: 1. That the sale was directed by a court of competent jurisdiction. 2. That the administrator took the oath and gave bond as required by law. 3. That notice of the time and place of sale was given in the manner prescribed by law. 4. That the premises were sold accordingly, and are held by one, or under one, who purchased them in good faith." Rice v. Cleghorn, 21 Ind. 87; Babbitt v. Doe, 4 Ind. 355.

The Massachusetts Statute provides that no sale by an administrator "by license of court," and no title under such sale, shall be avoided on account of any irregularity in the proceedings, if it appears, "first, that the license was granted by a court of competent jurisdiction; second, that the person licensed gave a bond which was approved by the judge of the Probate Court, if a bond was required upon the granting of the license; third, that the notice of the time and place of sale was given according to the order of the court; and, fourth, that the premises were sold by public auction in accordance with the notice, and are held by one who purchased them in good faith." Gregson v. Tuson, 153 Mass. 325.

The Michigan Statute provides that "in case of any action relating to any estate sold by an executor, administrator, or guardian, in which an heir or other person claiming under the deceased, or in which the ward or any person claiming under him, shall contest the validity of the sale, it shall not be avoided on account of any irregularity in the proceedings, provided it shall appear: 1st, that the executor, administrator, or guardian was licensed to make the sale by a court of competent jurisdiction; 2d, that he gave a bond which was approved by the judge of probate, in case any

bond were required by the court upon granting the license; 3d, that he took the oath prescribed in this chapter; 4th, that he gave notice of the time and place of sale; and 5th, that the premises were sold accordingly by public auction and are held by one who purchased them in good faith." Howard v. Moore, 2 Mich. 234; Norman v. Olney, 64 Mich. 553.

The Minnesota Statute (Gen. Stat. Minn. 1878, c. 57, § 54) provided that: "Whenever a sale of real estate, or any interest therein, has heretofore been made by any administrator, executor, or guardian in good faith, and the purchase money in fact paid, and any defects or irregularities have occurred in proceedings touching such sale which did not render such sale absolutely void, such defects and irregularities may be rectified, and the sale confirmed, by the District Court, * * * in the manner provided in this act." Hartley v. Croze, 38 Minn. 333. See Buntin v. Root, 66 Minn. 454; Gen. Stat. Minn. 1894, § 4612.

The Oregon Statutes provide that "all sales by executors and administrators of their decedents' real property in this state to purchasers for a valuable consideration which has been paid by such purchasers to such executors or administrators or their successors in good faith, and such sales shall not have been set aside by the County or Probate Court, but shall have been confirmed or acquiesced in by such County or Probate Court, shall be sufficient to sustain an executor's or administrator's deed to such purchaser for such real property; and, in case such deed shall not have been given, shall entitle such purchaser to such deed, and such deed shall be sufficient to such purchaser" to entitle such purchaser to "all the title that such decedent had in said real property; and all irregularities in obtaining the order of the court for such sale, and all irregularities in making or conducting the same by such executor or administrator, shall be disregarded;" and that "when any real estate has been heretofore or shall be hereafter sold by any executor or administrator, under or by virtue of any license or order of any County Court in this state, and said sale shall have been approved by said County Court, and the purchaser shall have paid the purchase money for the same, and said sale shall have been made in good faith in order to provide for payment of the claims against said estate, and the executor or administrator shall have failed or neglected to make or execute any deed conveying such real estate to such purchaser, or if from mistake or omission in said deed, or defect in its execution, the same shall be inoperative, and the period of five years shall have elapsed after the making of such a sale, then, in such case, all such sales shall be, and are hereby, confirmed and approved, notwithstanding any irregularities or infor-

within which the sale may be impeached;¹ and if those things which are regarded by the statutes as essential have been done, the sale is not subject to collateral attack, though there has been an omission of some things which should have been done.²

f. RATIFICATION OF INVALID SALE. — If the persons who are entitled to impeach the validity of the sale by virtue of their interest in the decedent's estate are under no disability, they may ratify or acquiesce in it; so as to preclude themselves from afterwards denying its validity.³ This may be effected by accepting the proceeds of the sale,⁴ or by delay for an unreasonable length of time in suing to set aside a sale which is voidable in equity;⁵ but it seems that if the sale was void, and that fact appears on the record of the proceeding in the probate court, the heirs are not estopped by mere lapse of time from recovering the land in an action at law against the purchaser or those claiming under him, so long as the defendant has not acquired a perfect title by adverse possession.⁶

malities in the proceedings prior to said sale." *Mitchell v. Campbell*, 19 Oregon 198.

The Wisconsin Statute provides in effect that in case of an action relating to any estate sold by an executor, administrator, or guardian, in which an heir or other person claiming under the deceased, or in which the ward or any person claiming under him, shall contest the validity of the sale, it shall not be avoided on account of any irregularity in the proceedings, provided it shall appear: 1, that the executor, administrator, or guardian was licensed to make the sale by the Probate Court having jurisdiction; 2, that he gave a bond which was approved by the judge of probate, in case a bond was required on granting a license; 3, that he took the oath prescribed in this chapter; 4, that he gave notice of the time and place of sale as in this chapter prescribed; and, 5, that the premises were sold accordingly, and the sale confirmed by the court, and that they are held by one who purchased them in good faith. *Chase v. Ross*, 36 Wis. 267; *Reynolds v. Schmidt*, 20 Wis. 379.

See also statutes in other jurisdictions.

Retrospective Operation of Statute. — Defects in the proceeding which are merely formal may be cured by retrospective statutes. *Smith v. Callaghan*, 66 Iowa 552. See also *Mitchell v. Campbell*, 19 Oregon 198.

Even the failure to file a petition may be cured by a retrospective statute. *Ackerson v. Orchard*, 7 Wash. 377.

Failure to Readvertise the property for an adjourned sale is not an objection which can be raised collaterally in *Illinois*. The statute imposes a penalty for the failure, but declares that such omission shall not be sufficient to defeat the sale. *Botsford v. O'Conner*, 57 Ill. 72.

1. The Louisiana Statute fixes a period of five years after which no proceeding can be maintained to impeach the validity of a sale because of informalities. *Linman v. Riggins*, 40 La. Ann. 761, 8 Am. St. Rep. 549.

2. Omission Cured by Statute. — In *Michigan* a sale is not invalidated by reason of the fact that the application for a license to sell was not verified, or that a guardian was not appointed for the infant heirs, or that the report of sale did not show at what price the land was sold. *Coon v. Fry*, 6 Mich. 506. See also *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47

Am. Dec. 41; *Howard v. Moore*, 2 Mich. 226; *Woods v. Monroe*, 17 Mich. 238; *Osman v. Traphagen*, 23 Mich. 80; *Hoffman v. Harrington*, 28 Mich. 90; *Harris v. Lester*, 80 Ill. 307.

3. Ratification of Invalid Sale — *Georgia*. — *Newton v. Beckom*, 33 Ga. 163.

Indiana. — *Comegys v. Emerick*, 134 Ind. 148, 39 Am. St. Rep. 245.

Louisiana. — *Prothro v. Prothro*, 33 La. Ann. 598; *Wood v. Nicholls*, 33 La. Ann. 744.

Maine. — *Decker v. Decker*, 74 Me. 465.

Massachusetts. — *Jennison v. Hapgood*, 7 Pick. (Mass.) 1, 19 Am. Dec. 258, 10 Pick. (Mass.) 77.

North Carolina. — *Roberts v. Roberts*, 65 N. Car. 27.

Ohio. — *Longworth v. Goforth*, *Wright (Ohio)* 192.

Pennsylvania. — *Grim's Appeal*, 105 Pa. St. 375.

Tennessee. — *Johnson v. Perkins*, 1 Baxt. (Tenn.) 367.

Vermont. — *Green v. Sargeant*, 23 Vt. 466, 56 Am. Dec. 88.

If the Creditors Ratify the Sale the proceeds of which, together with the other assets, are insufficient to pay their claims in full, the heirs cannot question the validity of the sale, because in such case they have no interest in the matter. *Highsmith v. Whitehurst*, 120 N. Car. 123.

4. Ratification by Accepting Proceeds of Sale. — *Myers v. Boyd*, 144 Ind. 496; *Palmerton v. Hoop*, 131 Ind. 23; *Axton v. Carter*, 141 Ind. 672; *Elliot v. Frakes*, 71 Ind. 412; *Lee v. Gardiner*, 26 Miss. 521; *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409, 45 Am. Dec. 310; *Jones v. Smith*, 33 Miss. 215; *Jacoby v. McMahon*, 174 Pa. St. 133; *Sager v. Mead*, 171 Pa. St. 349; *Bruch v. Lantz*, 2 Rawle (Pa.) 392, 21 Am. Dec. 458; *Beeson v. Beeson*, 9 Pa. St. 279.

Suing for the Purchase Money estops the plaintiff from afterwards denying the validity of the sale. *Johnson v. Perkins*, 1 Baxt. (Tenn.) 367.

5. Effect of Delay in Proceeding to Avoid Sale. — See *infra*, this section, *Vacating and Setting Aside Sales* — *Time for Bringing Suit*.

6. Lapse of Time — Effect on Right of Heirs to Recover at Law. — *McCulloch v. Wellington*, 21 Hun (N. Y.) 5, was an action of ejectment brought by the heirs of a decedent in 1879 to

12. Vacating and Setting Aside Sales — a. JURISDICTION — (1) Courts of Probate. — The court of probate, at any time before a sale of real estate pursuant to its order is confirmed, has power to set aside the sale;¹ but after the sale has been confirmed and the title passed to the purchaser, it is generally held that the probate court no longer has jurisdiction of the matter,² unless the sale was absolutely void, in which case the court may set aside its order of sale at any time.³

(2) *Courts of Equity.* — After the sale has been consummated the remedy of any person injured by any matter which was not adjudicated in the proceeding for the sale, and which does not render it absolutely void, is by a suit in equity to set the sale aside,⁴ or to charge the purchaser as a trustee in some equitable proceeding in which the validity of the sale may be tried.⁵

recover land which had been sold by the decedent's administrator under an order of the Surrogate's Court in 1833. The facts of the case were as follows: At the time of the sale, one of the plaintiffs, G., was four years old, and the other, F., was less than two years old. When G. was fifteen years old he went to sea and was absent for about twenty years, returning in 1865. He remained in the vicinity where the property was situated for about eight months, when he removed to and settled in another state. F. became of age in 1852, and during most of the time afterwards lived within a mile or two of the property in suit. There was no evidence that the plaintiffs had any knowledge of the defect in the proceeding in the Surrogate's Court. The defects appeared of record and were of such a character that the purchaser acquired no title under the sale. At the time when the ejectment suit was brought, the defendant's title, which was derived from the void administrator's sale, had not become complete by adverse possession. It was not claimed that the plaintiffs, by any acts or declarations, had voluntarily aided in creating the impression that the title acquired by the defendant was good. On these facts it was held that the plaintiff was not precluded by any principle of estoppel from recovering, though the defendant had been in possession for nine years and during that time had made valuable improvements.

1. Power of Probate Court to Vacate Sale. — The power of the Orphans' Court to set aside a sale of real estate made in pursuance of its own order is a matter that rests in the sound discretion of the court. *Bowers's Appeal*, 84 Pa. St. 311; *Herr's Estate*, 2 Pa. Dist. Rep. 737. See also *supra*, this section, *Report and Confirmation of Sale*.

2. Probate Court Cannot Set Aside Sale After Confirmation and Conveyance. — *Crombie v. Engle*, 19 N. J. L. 85; *Evans v. Singeltary*, 63 N. Car. 205. But see *Taylor v. Hosick*, 13 Kan. 518, holding that if the purchaser does not pay the purchase money, the Probate Court may set aside the sale after confirmation thereof and order a resale.

So, too, if the executor was himself the purchaser, by leave of court; but if the circumstances are such as afford grounds for suspicion of fraud, the Orphans' Court may vacate the sale, even after it has been confirmed, the deed delivered, and the purchase money paid, where the rights of third parties will not be affected. *Myer's Estate*, 9 Pa. Co. Ct. Rep. 439.

In Pennsylvania the time within which the Orphans' Court may set aside a sale made under its order is limited to ten years after the sale. *Grindrod's Estate*, 140 Pa. St. 161.

3. Setting Aside Void Order. — "It is well settled on authority that the Court of Probate, or any other court of record, whether of general or limited jurisdiction, may, on a proper application, vacate any final order or decree, void on its face, at any time subsequent to its rendition; but not for matters *dehors* the record, except in the event of the death of either party, when the order was made, or the judgment or decree rendered. If the judgment is not void on its face, and both parties were living at its rendition, the court cannot at a subsequent term vacate or alter it. The correction of clerical misprisions is then the extent of its authority." *Bland v. Bowie*, 53 Ala. 152, citing *Pettus v. McClannahan*, 52 Ala. 55. See also *Smitha v. Flournoy*, 47 Ala. 345.

4. Setting Aside Sale After Consummation — Equity Jurisdiction — Alabama. — *Fielder v. Childs*, 73 Ala. 567.

Maine. — *Decker v. Decker*, 74 Me. 465.

Michigan. — *Beaubien v. Poupard*, *Harr.* (Mich.) 206.

Mississippi. — *Smith v. Chew*, 35 Miss. 153.

North Carolina. — *McLaurin v. McLaurin*, 106 N. Car. 331.

Ohio. — *Caldwell v. Caldwell*, 45 Ohio St. 512; *Baker v. Lamkin*, 11 Ohio Cir. Ct. Rep. 103, 5 Ohio Cir. Dec. 54.

Equity Has Inherent Jurisdiction to set aside, on the ground of fraud, the orders and decrees of a court of probate. *West v. Waddill*, 33 Ark. 575.

Fraud Does Not Render the Sale Void, but only voidable, and until it is set aside on that ground by a court of competent jurisdiction it is binding. *Palmerton v. Hoop*, 131 Ind. 23.

As to the Effect of Fraud on contracts in general, see the title *FRAUD AND DECEIT*.

5. Charging Purchaser as Trustee. — In *Baumann v. Chambers*, (Tex. Civ. App. 1897) 42 S. W. Rep. 564, the court said that there are a number of decisions (citing them) which seem to hold that a sale to a nominal purchaser for the benefit of the administrator making the sale cannot be set aside unless the suit be brought by the proper parties directly for that purpose, in the proper court, and in a reasonable time, but that, while this is the rule, it is believed to be the law that such a purchaser may, in an equitable proceeding, be held to hold the property so bought subject to the

Exceptions to this, however, are found in some jurisdictions.¹

b. PERSONS ENTITLED TO RELIEF. — Only the parties in interest have any standing to invoke the aid either of the court of equity or the court of probate to set aside the sale.²

c. GROUNDS OF RELIEF — (1) *In General.* — When a sale is reported to the probate court, it may refuse to confirm it, and set it aside, if in the opinion of the court it was not made fairly or in conformity with the law, or did not bring an adequate price; and in this respect the court exercises a wide discretion.³

After Confirmation a court of equity will not set aside the sale on any ground the determination of which was involved in the order confirming the sale.⁴ Thus it is held that a sale for the payment of debts cannot be set aside in equity on the ground that there were no debts in fact or that they were not proved as required by law.⁵

rights of the real owners, and that such rights can be adjudged.

And in *Fisher v. Wood*, 65 Tex. 199, Stayton, J., commenting on the rule referred to above as laid down in *Rutherford v. Stamper*, 60 Tex. 450, said: "It was held that a District Court, in an action of trespass to try title, brought in the common form, with no averments which could invoke the equity powers of the court, could not set aside a sale made by an administrator at which he was indirectly the purchaser. This would seem to be necessarily true, for without the averment of such facts as will entitle a plaintiff to equitable relief, no such relief can be granted. It does not follow, however, from this, that upon proper averments a court of equity, while it leaves the legal title standing as directed to be made under the orders of the Probate Court, will not affect the fraudulent purchaser with a trust and compel him to hold the property as a trustee for those entitled to it. That a court of equity has this power there can be no question, and it matters not whether the fraud which calls it into operation occurred in procuring orders in probate through which sales were directed to be made and confirmed, or in the sales, or in the making of deeds in violation of the order of confirmation."

1. In New Jersey it has been held that when any person is entitled to have a sale made by an executor or administrator set aside he is not obliged to sue in equity, but may raise the question of the validity of the sale in an action of ejectment. *Den v. Wright*, 7 N. J. L. 175; *Den v. McKnight*, 11 N. J. L. 385; *Den v. Hammel*, 18 N. J. L. 74; *Obert v. Obert*, 12 N. J. Eq. 423. See also *Den v. Newark India Rubber Co.*, 24 N. J. L. 467, in which it is said that this rule is peculiar to New Jersey.

Contra in Mississippi. *Temples v. Cain*, 60 Miss. 478.

In Pennsylvania equity is administered by the courts of law, and in the form of common-law actions. See the title EQUITY, *ante*, p. 153. Hence, if a sale of real estate by an executor or administrator is voidable for any cause at the instance of persons interested in the estate, they may bring ejectment and try the question of the validity of the sale in that action. *Sager v. Mead*, 171 Pa. St. 349.

2. Only Parties in Interest Can Impeach Sale — *Indiana.* — *Murphy v. Teter*, 56 Ind. 545.

Massachusetts. — *Harrington v. Brown*, 5 Pick. (Mass.) 519.

Mississippi. — *Baines v. M'Gee*, 1 Smed. & M. (Miss.) 208.

Texas. — *Byars v. Thompson*, 80 Tex. 468; *Pearson v. Burditt*, 26 Tex. 157.

Wisconsin. — *Melms v. Pabst Brewing Co.*, 93 Wis. 153.

See also cases cited *infra*, this section, *Purchase by Executor or Administrator — Setting Aside Sale — By Whom.*

Persons Desiring to Purchase land which has been sold under an order of court have no interest in the estate, and therefore they cannot sue to set aside the sale on the ground of fraud, though they are willing to make an increased bid. *Terry v. Clothier*, 1 Wash. 475.

An Administrator De Bonis Non may apply to the Court of Probate to set aside a void sale of land made by his predecessor under an order of the court. *Smitha v. Flournoy*, 47 Ala. 345. And he may impeach his predecessor's sale on the ground of fraudulent collusion with the purchaser. *Pearson v. Burditt*, 26 Tex. 157.

But the Administrator Who Made the Sale cannot impeach the validity of the proceedings had by himself. *Linman v. Riggins*, 40 La. Ann. 761, 8 Am. St. Rep. 549.

3. **Grounds of Setting Aside Sale in Probate Court.** — See *supra*, this section, *Report and Confirmation of Sale.*

4. **Matters Adjudicated by Order of Confirmation.** — Unless facts and circumstances are shown of which the party complaining could not have availed himself in the Probate Court when the decree of confirmation was rendered, and which show that the adjudication was inequitable and that he was without fault or neglect, a court of equity cannot reopen the litigation which the decree was intended to close. *Lowe v. Guice*, 69 Ala. 80 [citing *Otis v. Dargan*, 53 Ala. 178; *Waring v. Lewis*, 53 Ala. 615].

To rescind a judicial sale some special ground must be laid — something which goes to the very substance of the contract, such as fraud, accident, mistake, or misconduct on the part of the purchaser or other person connected with the sale which has worked injustice to the party complaining. *Patterson v. Eakin*, 87 Va. 49.

5. **The Existence and Due Proof of Claims** are adjudicated by the order of sale and the con-

(2) *Inadequacy of Price.* — The probate court may, as a general rule, on the coming in of the report, set aside the sale on the ground that the price is inadequate; but this is subject to the qualification that the court must also be satisfied that a better price will be obtained on a resale, and the amount of the increase required is usually ten per cent. of the amount bid at the sale, exclusive of the expenses of a new sale.¹ In some jurisdictions the power of the probate court to vacate sales on this ground is governed by statute.²

A Court of Equity, however, has no power to set aside a sale on the sole ground that the price paid was inadequate, unless the inadequacy is so gross as to prove fraud, because the order of confirmation necessarily involved an adjudication of that question.³

(3) *Fraud.* — Courts of equity, by virtue of their power to relieve against fraud, may set aside a sale made under an order of a probate court for fraud

confirmation of the sale, and therefore cannot be questioned in a suit in equity to set aside the sale. *Lawson v. Moorman*, 85 Va. 880.

1. *Probate Court May Set Aside Sale for Inadequacy of Price.* — *Field v. Gamble*, 47 Ala. 443; *Perkins v. Gridley*, 50 Cal. 97; *Allen v. Shepard*, 87 Ill. 314; *Williams v. Perrin*, 73 Ind. 57; *Horton v. Horton*, 2 Bradf. (N. Y.) 200; *Kain v. Masterton*, 16 N. Y. 174; *Wright v. McNatt*, 49 Tex. 425.

The Price Was So Inadequate as to furnish ground for setting aside the sale, where land worth eight thousand dollars in gold was sold in February, 1865, for eighteen thousand one hundred and twenty dollars in Confederate currency, then equivalent to about three hundred and fifty dollars in gold. *Kitchell v. Jackson*, 44 Ala. 302.

Probability of Better Price. — Unless a guaranty or reliable assurance is given to the court that on another sale the property will bring a higher price than was bid, the refusal of the court to vacate the sale will not be disturbed on appeal. *Allen v. Shepard*, 87 Ill. 314.

When inadequacy of price is relied on as a reason for setting aside a judicial sale, there should be some guaranty or assurance given that on a resale the property will sell for a greater sum than the bid of the purchaser. The Orphans' Court may set aside a sale of real estate for mere inadequacy of price, but the inadequacy must be a material one, existing at the time of sale, and the application to set aside must be promptly made. *Herr's Estate*, 2 Pa. Dist. Rep. 737; *Breese's Estate* 2 Kulp (Pa.) 64.

Amount of Advance to Justify Vacating Sale. — A safe rule for ordinary cases is that an advance of at least ten per cent. over the price realized should be offered and secured before setting aside a sale for inadequacy of price. *Herr's Estate*, 2 Pa. Dist. Rep. 737; *Murphy's Estate*, 11 W. N. C. (Pa.) 419.

See also cases cited in the next succeeding note.

2. The California Statute provides that if the sum bid is disproportionate to the value of the property, and it appears that a sum exceeding such bid at least ten per cent., exclusive of the expense of a new sale, may be obtained, the court may vacate the sale. *Perkins v. Gridley*, 50 Cal. 97.

The Indiana Statute provides that if the court is satisfied that a sum exceeding the sum bid

at the sale at least ten per cent., exclusive of the expenses of a resale, can be obtained, the court may vacate the sale. *Williams v. Perrin*, 73 Ind. 57.

The New York Statute provides that if the surrogate shall be of opinion that the sum bid was disproportionate to the value, and that a sum exceeding such bid at least ten per cent., exclusive of the expenses of a new sale, may be obtained, he shall vacate such sale. *Dela-plaine v. Lawrence*, 3 N. Y. 301. See also *Horton v. Horton*, 2 Bradf. (N. Y.) 200; *Campbell's Estate*, Tuck. (N. Y.) 240.

Under this statute it is held that a sale will not be vacated simply on the ground that some one has been found who will bid the additional ten per cent., but it must also appear that the bid is disproportionate to the value of the property. It is said, however, that such an offer would be evidence that the sum bid was below the value, but it would be far from conclusive; because it is conceivable that a person who had missed the opportunity to purchase the property for which he had immediate and pressing use might find it to his interest to offer ten per cent. above or in addition to its fair value, in the hope of obtaining it. If the property is not sold at a sacrifice, but commands a fair and adequate price at the time of the sale, the law has performed its office, and right and justice are maintained between vendor and purchaser. *Kain v. Masterton*, 16 N. Y. 174.

3. Mere Inadequacy of Price Not Ground in Equity for Setting Aside Sale. — *Patterson v. Eakin*, 87 Va. 49. See also *Brown v. Brown*, 64 Mich. 75.

The decree of confirmation imports that the court did inquire into and determine that the lands were not sold for greatly less than their real value. The fact may be otherwise, but it is not open to contest by the parties having the opportunity to be heard before the court, unless fraud can be charged to their adversaries in procuring the decree, or unless it is shown that the decree was the result of accident, without fault or negligence on their part. *Lowe v. Guice*, 69 Ala. 80.

Inadequacy of Price as Proof of Fraud. — In *Neel v. Carson*, 47 Ark. 421, it was held that a sale should be set aside as fraudulent where the price paid by the purchaser was grossly inadequate, and he obtained the consent of the guardian of the infant heirs by paying him a consideration therefor.

therein committed by the purchaser or by the executor or administrator making the sale, if the purchaser or any one claiming title under him participated in or had notice of the fraud.¹ Thus it is a fraud for which a sale may be set aside to conceal from the heirs the fact that the executor or administrator purposes selling a particular parcel of land,² or to use any artifice or device to prevent competition in the bidding,³ or in any way to influence the sale for one's private advantage at the expense of the estate or of those who are interested in it.⁴ But it is not fraudulent for the administrator to agree to sell the

1. Fraud as Ground for Setting Aside Sale — *Alabama*. — Tillman v. Thomas, 87 Ala. 321, 13 Am. St. Rep. 42.

Arkansas. — Neel v. Carson, 47 Ark. 421; Adams v. Toomer, 44 Ark. 271.

California. — Bergin v. Haight, 99 Cal. 52.
New York. — Woodruff v. Cook, 2 Edw. Ch. (N. Y.) 259.

Texas. — McCampbell v. Durst, 15 Tex. Civ. App. 522.

"It is one of the honorable boasts of our system of equity jurisprudence that 'the infection of fraud will be made to vitiate even the most solemn transactions, and adjudications of courts form no exception to the salutary rule.'" Tillman v. Thomas, 87 Ala. 321, 13 Am. St. Rep. 42.

Participation by the Purchaser in the fraud of the executor or administrator making the sale, or notice of such fraud at the time of his purchase, is necessary to authorize setting aside the sale. Adams v. Thomas, 44 Ark. 267; Cascaden v. Cascaden, 140 Pa. St. 140; McCown v. Foster, 33 Tex. 241; Staples v. Staples, 24 Gratt. (Va.) 225.

Collusion between the administrator and the purchaser to effect a sale for less than the salable value of the land is a ground for setting it aside. McQueen v. McDaniel, (Ky. 1897) 38 S. W. Rep. 880.

A Vendee of the Purchaser is chargeable with notice of fraud in the sale where he knew that the sale was made to pay an individual indebtedness of the agent of the administrator to the purchaser, and a near relative of the infant beneficiaries of the estate told him that any one who bought the land was buying a lawsuit. Tillman v. Thomas, 87 Ala. 321, 13 Am. St. Rep. 42.

A Subsequent Purchaser Is Not Chargeable with Notice of fraud in that the property was sold to the judge of probate, where the deed to the judge was dated before he confirmed the sale. Woods v. Monroe, 17 Mich. 238.

A Second License to sell does not show or tend to show fraud in the sale under the first license. The second proceeding may have originated in a desire to remove doubts suggested as to the regularity of the original sale, but whether this was so or not, the first sale not being set aside, its validity could not be impaired by the second. Comstock v. Crawford, 3 Wall. (U. S.) 396.

2. Concealing Facts from Heirs. — It is fraud for an administrator to represent that he will sell only a certain parcel of land described in the petition, and afterwards surreptitiously to amend his petition so as to make it describe another parcel, and then designedly to keep the petition from the files for the purpose of concealing the amendment from the heirs. Jones v. French, 92 Ind. 140.

3. Preventing Competitive Bidding Renders Sale Voidable. — Ingalls v. Rowell, 149 Ill. 163; Anderson v. Pedigo, 126 Ind. 564.

"It is gross fraud for an administrator to collude with a purchaser, and by false statements prevent competing bids." Jones v. French, 92 Ind. 138.

This is the general rule in regard to all auction sales. See the title AUCTIONS AND AUCTIONEERS, vol. 3, p. 504.

Agreement Between Creditors that One Shall Buy for All. — In Murphy v. De France, 105 Mo. 53, it was held that it was not fraudulent for the attorneys of the creditors, whose claims exceeded the value of the decedent's real estate, the only property available for the payment of debts, to agree between themselves that they should not bid against each other, but that one should buy the land for the benefit of all, unless some one else should bid enough to pay all the debts.

The case of an attempt to prevent intending purchasers from bidding is distinguishable from a case where several persons, desiring to obtain distinct portions of a tract of land about to be sold at auction, agree that one of their number shall bid for the benefit of all, and in case he succeeds in making the purchase, shall divide the land according to their agreement. It is also distinguishable from those cases where one is deputed to bid as the agent of another, with specific directions as to how and how much he shall bid. Arrangements of this kind, entered into before the sale, are held to promote rather than stifle competition. Ingalls v. Rowell, 149 Ill. 163.

Purchase through Third Person. — Fraud is not shown by the fact that the purchase was effected through a third person, though the administrator was an employee of the real purchaser, a corporation to which the decedent was largely indebted, and though letters written by the president of the corporation expressed a desire to avoid publicity and to have the sale confirmed before an advance bid could be made, there being no evidence of dishonesty in the administration proceedings. Gray v. Quicksilver Min. Co., 68 Fed. Rep. 677.

4. Purchaser Administering by Agent. — A mere volunteer who institutes proceedings in probate on an estate in which he has no interest, for the ostensible purpose of paying the debts of such estate, but in fact to procure a sale of a part of the estate to himself, and, by procuring the appointment of his agent as administrator, directs, controls, and manages the proceedings in probate successfully to that end, has no standing in a court of equity. Such a sale is voidable, and will be set aside at the instance of any one injured thereby. Bergin v. Haight, 99 Cal. 55.

property for a certain sum in case no greater sum should be bid at the sale,¹ though it is said that it would be fraudulent to agree to sell at a fixed price without regard to the amount of the bid.² Nor can fraud be inferred from the mere fact that the purchaser was a near relative of the executor or administrator, though it is a circumstance to be considered.³

(4) *Purchaser in Fiduciary or Official Relation.* — The policy of the law forbids certain persons occupying an official or fiduciary relation to the estate to become the purchasers. Thus a probate judge is not permitted to purchase at a sale ordered by himself, because of the well-known maxim that no man is to be judge in his own cause, and if he does so the sale will be set aside.⁴

A Purchase by an Executor or Administrator at his own sale, without statutory authority, is considered fraudulent *per se*, and may be set aside in equity without proof of actual fraud or of injury to the complainant.⁵

The Attorney of the Executor or Administrator who conducts the proceeding for the sale has also been held to be within the rule of equity that no person intrusted with the management and direction of a sale, in such manner as to impose on him the duty of taking care that the property may be sold to the best advantage for all concerned, may become the purchaser, except at the risk of having the sale set aside at the option of those who are interested in the estate.⁶

Summons in Proceeding Written by Administrator. — Fraud in the sale is not shown merely by the fact that the administrator who instituted the proceeding for the sale wrote the summons therein. *Ward v. Lowndes*, 96 N. Car. 367.

Third Person Bidding for Purchaser at Request of Executor. — Fraud is not shown by the fact that the bid was made by a third person for the purchaser at the request of the executor, where the purchaser was absent at the time of the sale and had previously expressed his willingness to pay the amount of the bid. *Coffin v. Cook*, 106 N. Car. 376.

A Representation by the Attorney of the Creditor, made on the argument of the application for an order of sale, that he would make the property bring a certain sum, and a subsequent purchase by him at a much lower price, do not show fraud for which the sale should be set aside. *Murphy v. De France*, 105 Mo. 53.

1. Agreement to Sell at Fixed Price in Default of Higher Bid. — In *Hunt v. Frost*, 4 Cush. (Mass.) 54, it was held that an agreement by an administrator to sell the decedent's real estate to a certain person at a certain price, if no higher sum should be bid at the sale, was valid. Such an agreement, it was said, amounts to no more than a stipulation on the part of the administrator to offer the property for sale at auction at the agreed price, and, if no one should bid more, to sell it at that price to the person with whom he made the agreement.

2. Agreement as to Price Without Regard to Bids. — If an administrator should agree to sell the real estate of his intestate to a certain person at a fixed price, without regard to the amount that should be bid at the sale, such agreement would be fraudulent. *Per Shaw, C. J.*, in *Hunt v. Frost*, 4 Cush. (Mass.) 54. But see *Goodbody v. Goodbody*, 95 Ill. 456. In this case the administratrix, believing that she had authority to do so, agreed to sell the decedent's land to one F. for a certain sum. Afterwards she found that it would be necessary to have the land sold under an order of

court in order to divest the title of the infant heirs. It was then agreed that F. should buy the property at the agreed price without regard to the amount that should be bid at the sale. No bid was made at the sale equal to the sum agreed on, which was a liberal price. It was held that there was no fraud in fact in the transaction, and the court refused to set aside the sale at the suit of the heirs.

3. Sale to Relatives of Executor or Administrator. — The fact that the purchaser at the sale was the son of the administrator is a circumstance to be considered, with the others in the case, in determining the question of actual fraud in the sale; but the law will not infer fraud from it. *Cain v. McGeenty*, 41 Minn. 194.

Private Sale to Relatives of Administrator. — If an executor who is authorized to sell real estate of his testator at private sale sells it to his relatives for less than he might have obtained from others, for the purpose of favoring them to the injury of the legatees, the sale will be set aside. *Oberlin College v. Fowler*, 10 Allen (Mass.) 545.

4. The Probate Judge Disqualified as Purchaser. — *Livingston v. Cochran*, 33 Ark. 294. See also *Walton v. Torrey, Harr.* (Mich.) 259.

As to the disqualification of a judge by reason of interest, see the title JUDGE.

5. Purchase by Executor or Administrator. — See *infra*, this section, *Purchase by Executor or Administrator*.

6. Purchase by Attorney of Executor or Administrator. — The doctrine of equity that trustees cannot deal with the trust property for their own benefit precludes the attorney who represented the administrator in a proceeding for the sale of the decedent's real estate from becoming the purchaser thereof. It is the duty of the administrator to sell the lands to the best advantage. It is the duty of his attorneys to advise and aid him to that end. They are paid by the estate. Their interest as purchasers would prompt many men in that position to use means to depress the price. Although there is not the slightest ground to

So, Too, the Appraiser of the land sold has been held disqualified from becoming the purchaser at the sale.¹

d. TIME FOR BRINGING SUIT. — In some jurisdictions statutes have been enacted which expressly limit the time within which a suit may be brought to set aside a sale made by an executor or administrator.² But in those jurisdictions where there is no statute of limitations, suit must be brought within a reasonable time, to be determined by the facts of the particular case.³

suspect that they did so, or wished to do so, yet the policy must be preserved of forbidding persons in that position from purchasing at all. They should be held as trustees of the estate. *West v. Waddill*, 33 Ark. 588. See also *Gibson v. Herriott*, 55 Ark. 85, 29 Am. St. Rep. 17.

If the Executor Is Authorized by Statute to Purchase at his own sale, his attorney has the same privilege. *Grayson v. Weddle*, 63 Mo. 523.

1. Purchase by Appraiser. — In *Armstrong v. Huston*, 8 Ohio 552, a majority of the court were of opinion that the principle of exclusion from the right to purchase attached to every person to whose integrity and judgment was committed the execution of any step needful in making the sale, and therefore included the appraiser, because he is interposed between the buyer and seller to prevent sacrifices at undue prices. From this decision, *Hitchcock, J., dissented*, on the grounds that when the appraisers, of whom there are three, have made their return to the court, they have no further agency in the matter; that the trust, if any, is one which might by possibility be abused, if reposed in one; that it is not reasonable to suppose that all of them would violate their oaths because one of their number might desire to become the purchaser of the lands which they were about to appraise; that it is the policy of the law, and for the interest of all concerned, that competition should be encouraged at administrators' sales, as well as at all other sales made in pursuance of judicial proceedings, and finally he said: "It seems to me that an appraiser possesses nothing of that fiduciary character contemplated in the doctrine precluding trustees from purchasing."

2. Time for Instituting Proceeding — Statutory Limitation. — **The California Statute** provides that no action for the recovery of any real estate sold by an executor or administrator under an order of court can be maintained by an heir, etc., unless it be commenced within three years next after the final settlement of the executor or administrator. But if the sale was void for any reason, this limitation is not applicable, and the heirs may bring ejectment after the expiration of the three years. *Staples v. Connor*, 79 Cal. 14.

The Indiana Statute requires an action by the heirs, etc., to recover land sold by an executor or administrator under an order of court to be brought within five years after the confirmation of the sale. *Paimerton v. Hoop*, 131 Ind. 23.

The Michigan Statute provides that no action for the recovery of any estate sold by an executor or administrator shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be

commenced within five years next after the sale. *Watson v. Lion Brewing Co.*, 61 Mich. 595.

The Minnesota Statute provides that "in all cases when a Probate Court shall hereafter make an order ratifying and confirming a sale of the real estate of any deceased person, minor, or ward, made by any executor, administrator, or guardian, no proceedings shall be had to set aside or vacate such sale after the expiration of two years from the date and entry of such order of confirmation of said sale; and if said order of confirmation has been heretofore made, no proceedings shall be had to set aside and vacate said sale after the expiration of two years from the passage of this act, and the conveyances of the executor administrator, or guardian, made in pursuance of any such sale, shall not, after the expiration of said two years, be avoided by any court for any irregularity or omission in the proceedings before the sale, unless it shall appear that there was fraud in the acts of the judge of probate, executor, administrator, guardian, or purchaser, either or all, whereby injury results to the estate of such deceased person, minor, or ward." *Streeter v. Wilkinson*, 24 Minn. 288.

It is competent for the legislature to provide a reasonable limit within which such sales may be attacked for omissions or irregularities in the proceedings of administrators under license of the Probate Court having jurisdiction. *Rice v. Dickerman*, 47 Minn. 527 [citing *Spencer v. Sheehan*, 19 Minn. 341; *Smith v. Swenson*, 37 Minn. 1; *Streeter v. Wilkinson*, 24 Minn. 290; *Cooley's Const. Lim.* (6th ed.) 447].

The Mississippi Statute provides that no action shall be brought to set aside a sale on the ground of the invalidity thereof unless such action shall be commenced within one year after the sale. *Clay v. Field*, 115 U. S. 260. The statute is remedial and operates even against heirs who are infants or under other disability. *Morgan v. Hazelhurst Lodge*, 53 Miss. 665; *Hall v. Wells*, 54 Miss. 289; *Summers v. Brady*, 56 Miss. 10. But it protects no one who is not proved to have purchased the land in good faith and to have actually paid the purchase money, and therefore it is not applicable where the only consideration of the sale was the acquittance of a debt due to the purchaser from the decedent. *Clay v. Field*, 115 U. S. 260.

The Wisconsin Statute requires action to be commenced "within five years next after the sale." *Jones v. Billstein*, 28 Wis. 221.

As to the Limitation of Suits in Equity Generally, see the title LIMITATION OF ACTIONS.

3. Suit Must Be Brought Within Reasonable Time — *Alabama*. — *James v. James*, 55 Ala. 525.

Georgia. — *Etheredge v. Slayton*, 94 Ga. 496;

e. **BONA FIDE PURCHASERS.** — If land sold under an order of court has passed into the hands of *bona fide* purchasers without notice of any fraud or irregularities in the sale, they will be protected, especially where they have been in possession for a long time.¹

f. **RIGHTS AND LIABILITIES OF PURCHASER ON SETTING ASIDE SALE.** — The right of the purchaser, when the sale has been set aside, to be reimbursed the purchase money paid by him, and his liability to account for rents and profits accruing while he was in possession, are considered in another part of this title.²

13. Resale — *a.* **IN GENERAL.** — When a sale has been vacated because of inadequacy of price, the question arises as to whether the court must order a resale, or whether it can allow the purchaser to increase his bid, or can accept an advance bid made by a third person; and the rule in this regard varies in different jurisdictions.³ If no sale is made at the time appointed, for want of bidders or other cause, or if the sale made is invalid, it is generally provided by statute that the property may be again offered for sale.⁴

The Expense of a Resale must be borne by the administrator, where the first sale was set aside because the purchaser was misled by an announcement that

Slayton v. Etheredge, 99 Ga. 138; *Candler v. Clarke*, 90 Ga. 550; *Rudolph v. Underwood*, 88 Ga. 664; *Smith v. Granberry*, 39 Ga. 381, 99 Am. Dec. 464; *Grubbs v. McGlawn*, 39 Ga. 672; *Newton v. Beckom*, 33 Ga. 163; *Peterman v. Watkins*, 19 Ga. 153.

Illinois. — *Goodbody v. Goodbody*, 95 Ill. 456; *Sloan v. Graham*, 85 Ill. 26.

Indiana. — *Shaw v. Swift*, 1 Ind. 565.

Massachusetts. — *Ives v. Ashley*, 97 Mass. 198.

New Jersey. — *Smith v. Drake*, 23 N. J. Eq. 302.

Tennessee. — *Haynes v. Swann*, 6 Heisk. (Tenn.) 560.

Instances of Unreasonable Delay. — What will constitute unreasonable delay so as to preclude relief in a suit to set aside a sale made by an executor or administrator depends on the facts and circumstances of each particular case. Thus a little less than five years was held an unreasonable delay in *Williams v. Rhodes*, 81 Ill. 571; seven years (by analogy to the statute of limitations) in *Etheredge v. Slayton*, 94 Ga. 496; *Slayton v. Etheredge*, 99 Ga. 138, and *Candler v. Clarke*, 90 Ga. 550; thirteen years in *Fuller v. Little*, 59 Ga. 338, and *Geyer v. Snyder*, 69 Hun (N. Y.) 115; nineteen years in *Goodbody v. Goodbody*, 95 Ill. 456; twenty-four years in *Newton v. Beckom*, 33 Ga. 163; and twenty-six years in *Egan v. Grece*, 79 Mich. 629.

Instances of Reasonable Delay. — A delay of five years and seven months was held not unreasonable where the male heirs were not resident in the state at the time of the sale, and knew nothing of the facts invalidating the sale until a few days before their bill was filed; and of the three female heirs, two were invalids, and the other was a minor until a year or two before the filing of the bill. *Ingalls v. Rowell*, 149 Ill. 163.

See also *infra*, this section, *Purchase by Executor or Administrator — Validity and Effect — Ratification and Acquiescence.*

1. Protection of Bona Fide Purchasers — Lapse of Time. — *Newsom v. Wells*, 5 McLean (U. S.) 21. See also *supra*, this section and subsection, *Fraud.*

² See *infra*, this section, *Title, Rights, and Liabilities of Purchaser.*

³ **Necessity of Resale When Price Bid Is Inadequate.** — In Alabama, if confirmation is refused because of inadequacy of price, a resale must be ordered. The court cannot permit the purchaser to raise his bid to a price deemed adequate and then confirm it. *Field v. Gamble*, 47 Ala. 443.

In California, if a new bid, ten per cent. in advance of the original bid, is made, it is in the discretion of the court either to accept such bid and confirm the sale to the new bidder, or to order a resale. *Griffin v. Warner*, 48 Cal. 383; *Perkins v. Gridley*, 50 Cal. 97.

Time for Directing Resale. — Where a sale was vacated for inadequacy of the price bid, and the proceeding continued until the next term, when a resale was directed, it was held that such direction was valid, the proceedings being still *in fieri*. *Griffin v. Warner*, 48 Cal. 385. See also *Greffet v. Willman*, 114 Mo. 106.

⁴ **Failure to Effect Sale — Reoffer.** — *Burgett v. Apperson*, 52 Ark. 213; *Duncan v. Arment*, 3 La. Ann. 84; *Wanzer v. Eldridge*, 33 N. J. Eq. 511. See also various local statutes in the United States.

If a Sale Is Invalid, the administrator may have a second license to sell, even though he has applied the purchase money to the payment of the decedent's debts. In such case the administrator becomes liable to the purchaser at the first sale for money paid, and the purchaser will be treated as the assignee of the debts paid with his money. *Willson v. Bergin*, 28 N. H. 96. See also *Wheeler v. Wheeler*, 1 Conn. 51; *Moody v. Moody*, 11 Me. 247.

The Arkansas Statute, which provides that lands which have been offered by an administrator and not sold for want of a bid equal to two-thirds of their appraised value shall not be reoffered within twelve months, does not require a new order condemning the lands to sale. That judgment has already been entered in accordance with another provision of the statute, and the day fixed for its execution having passed, it only remains for the court to provide anew for its execution. *Burgett v. Apperson*, 52 Ark. 213.

the property, which was in fact subject to a mortgage, would be sold clear of incumbrances.¹

b. RESALE AT RISK OF DELINQUENT BIDDER.—If the purchaser fails to comply with the terms of sale, a resale may be made, and it is generally held that the delinquent purchaser is liable for any deficiency resulting on the resale,² unless the right to make such resale has been waived;³ but the resale should be made as soon as practicable.⁴

If an Administrator Authorized to Purchase at his own sale was the highest bidder,

1. Resale at Administrator's Expense — Misleading Purchaser.—Schwartz's Estate, 12 Phila. (Pa.) 71, 35 Leg. Int. (Pa.) 153.

2. Resale at Expense of Delinquent Bidder — Georgia.—Alexander v. Herring, 54 Ga. 200; Nally v. Nally, 74 Ga. 673, 58 Am. Rep. 458; Wells v. Harper, 81 Ga. 194, 12 Am. St. Rep. 310.

Louisiana.—Smith v. Kinney, 30 La. Ann. 332.

Maryland.—Schwallenberg v. Jennings, 43 Md. 554.

Massachusetts.—Cobb v. Wood, 8 Cush. (Mass.) 228.

Missouri.—Greffet v. Willman, 114 Mo. 106.

New Hampshire.—Willson v. Bergin, 28 N. H. 96.

Texas.—Dawson v. Miller, 20 Tex. 171, 70 Am. Dec. 380; Sybert v. McCowen, 28 Tex. 635.

"It appears to be just that sales by administrators should have the protection of the same rules which apply to sales at public auction by individuals; and no reason can be perceived why they should be placed in a worse position. They are a part of the administration of justice of the country, and it would appear that every security known to the law should be thrown around them. The rule has been long sanctioned, in regard to public sales, that where the vendee becomes bound for the purchase, as by having the article struck off to him as the highest bidder, and refuses to complete the purchase, the vendor may resell and hold the purchaser responsible, in case of a deficiency of the purchase money upon the resale, for the difference between the two sales." Mount v. Brown, 33 Miss. 566, 69 Am. Dec. 362.

The Measure of Damages, in an action by an executor or administrator against a bidder who failed to comply with the terms of the sale, is the sum necessary to be added to the amount bid at the second sale to put the administrator in the same position as if the defendant had fully complied with his bid. Alexander v. Herring, 54 Ga. 200.

This amount is fixed by statute in *Texas* at five per cent. on the bid made by the delinquent purchaser, and the deficiency in price on the second sale. Sybert v. McCowen, 28 Tex. 635.

The Full Difference between the amount bid on the first and second sales respectively may be recovered, though the amount bid at the second sale is sufficient to pay all of the decedent's debts and the charges of administration. Cobb v. Wood, 8 Cush. (Mass.) 228.

If the Advertised Terms of Sale Were Varied by an announcement made on the day of sale, and the purchaser fails to comply with his bid,

he cannot be held liable for the difference on a resale, unless it is clearly shown that he had actual knowledge of the altered terms before he made his bid. Daniel v. Jackson, 53 Ga. 87.

Effect of Intermediate Sale.—The liability of a delinquent bidder for the deficiency resulting on a resale is not affected by the fact that there had been an intermediate sale which was ineffective because the bidder at that sale did not comply with his bid. Sproull v. Seay, 74 Ga. 676.

Confirmation of the sale and an order to make a deed to the purchaser are necessary in *Texas* before he can be charged with a deficiency resulting on a resale. Bradbury v. Reed, 23 Tex. 258.

If the Administrator Fails to Resell on the default of the purchaser to comply with his bid, he thereby renders himself liable to the estate for the resulting loss. Fontenet v. Debailion, 8 La. Ann. 509.

An Exception to the rule that a resale on the failure of the purchaser to comply with his bid is at his risk and expense is found in *Rhode Island*. This decision is placed on the ground that an administrator's sale is not either a judicial sale or an official sale, and that there is no statute which imposes such liability. McGuinness v. Whalen, 16 R. I. 558, 27 Am. St. Rep. 763.

3. Waiver of Right to Resell.—In *Penn v. Willingham*, 84 Ga. 360, the advertised terms of sale required payment of the purchase money in cash. After the sale the executor allowed the purchaser to take possession of the land under an agreement that he should be allowed time for paying the price until the widow's claims for dower and her year's support should be settled. During this time the purchaser, at the executor's request, paid some of the charges against the estate. It was held on these facts that the executor waived his right to resell at the purchaser's risk, and that his only remedy was to sue the purchaser for the amount due.

Release of Purchaser.—If an administrator releases a purchaser from his bid, he cannot afterwards repudiate the agreement, resell the property, and recover of the purchaser the difference between the amounts bid at the two sales. Reynolds v. Dismuke, 48 Ala. 209.

4. The Resale Must Be as Soon as Practicable, where the administrator, on default of the purchaser, elects to resell and sue the purchaser for any deficiency that may result. Saunders v. Bell, 56 Ga. 442. See also Short v. Ramsey, 18 Tex. 397; Sybert v. McCowen, 28 Tex. 635.

Delay in Making the Resale will not discharge the liability of the delinquent bidder, if he caused the delay. Sproull v. Seay, 74 Ga. 676.

but reported that he was unable to sell for want of good and sufficient bids, and afterwards sold the property for less than his own bid, he is liable for the difference.¹

c. **NECESSITY OF ORDER TO RESELL.** — In accordance with local practice or express statutory provisions, a resale on the default of the purchaser, or when the sale is vacated by the court for inadequacy of price or for other cause, cannot be made in some jurisdictions without an order of court to that effect,² while in others the executor or administrator has power again to offer the property for sale under the original order of sale.³

14. Title, Rights, and Liabilities of Purchaser — *a.* **WHAT TITLE PASSES BY SALE.** — The general rule is that the purchaser acquires only the title which the decedent had at the time of his death,⁴ and the sale does not affect any individual right that the executor or administrator may have in the land sold,⁵ in the absence of any facts creating an estoppel,⁶ nor does it determine any question of title between the purchaser and a stranger in possession.⁷

1. Failure of Administrator to Comply with His Own Bid. — In *Matter of Meyer*, 177 Pa. St. 450, the administrator was authorized to purchase at his own sale. His was the highest bid, at thirty-six dollars and twenty-five cents per acre. Soon after the sale one Lowder offered to take the property at thirty-six dollars and fifty cents per acre. The administrator then prepared a report in accordance with such offer, but before it was presented to the court Lowder withdrew his offer, and the administrator then reported that he was unable to sell for want of good and sufficient bids. The property was again offered for sale and was sold for thirty dollars per acre. It was held that the administrator was liable for the difference between that amount and the amount bid by him.

2. Order of Sale Necessary on Default of Purchaser. — *Greenwalt v. McClure*, 7 Ill. App. 152; *Schwallenberg v. Jennings*, 43 Md. 554; *Banes v. Gordon*, 9 Pa. St. 426.

3. Order for Resale Not Necessary. — *Kibby v. Chitwood*, 2 T. B. Mon. (Ky.) 104; *Duncan v. Armant*, 3 La. Ann. 84; *Campbell v. Owens*, 32 La. Ann. 265; *Short v. Ramsey*, 18 Tex. 307; *Dawson v. Miller*, 20 Tex. 171, 70 Am. Dec. 380; *Sypert v. McCowen*, 28 Tex. 635.

4. Purchaser Acquires Only Such Title as Decedent Had — *Alabama*. — *Lindsay v. Cooper*, 94 Ala. 179, 33 Am. St. Rep. 105.

Georgia. — *McDaniel v. Edwards*, 56 Ga. 444.

Illinois. — *Walden v. Gridley*, 36 Ill. 523.

Mississippi. — *Cummings v. Johnson*, 65 Miss. 342.

New York. — *Van Vleck v. Enos*, 88 Hun (N. Y.) 348; *Matter of Dolan*, 88 N. Y. 309.

Pennsylvania. — *Bickley v. Biddle*, 33 Pa. St. 276; *Sackett v. Twining*, 18 Pa. St. 199, 57 Am. Dec. 599.

Texas. — *Nesbit v. Richardson*, 14 Tex. 656; *Guilford v. Love*, 49 Tex. 715.

Where the Decedent Was a Disseisor, and his title had not become complete by lapse of time (twenty years) at his death, but was completed by occupation on the part of his devisee for the balance of the twenty years, the purchaser at a sale by his administrator acquires a good title as against the devisee, though the license and sale were after the expiration of the twenty years, because the title of the decedent was good as against everybody except the person

disseized, and therefore the title acquired under the administrator's sale was good as against the devisee. *Peele v. Chever*, 8 Allen (Mass.) 89.

Land Conveyed to Decedent as Security. — If the only interest which the decedent had in the land was as mortgagee, the purchaser acquires only that interest. *Van Vleck v. Enos*, 88 Hun (N. Y.) 348.

Where an Equitable Title Is Sold, the purchaser takes it subject to all existing equities. *Herrington v. Williams*, 31 Tex. 448.

But if the Heirs Afterwards Acquire the Legal Title, they will hold it in trust for the purchaser. *Avery v. Dufrees*, 9 Ohio 145.

Community Property. — A valid sale of community land to pay community debts will pass both the title of the decedent and his surviving wife who died before the grant of administration. *Murchison v. White*, 54 Tex. 78. See also *Ryan v. Fergusson*, 3 Wash. 356.

5. Individual Rights of Administrator Not Acquired by Purchaser. — In *Dickerson v. Campbell*, 32 Mo. 544, land, the legal title to which was in the decedent, was ordered to be sold on the petition of a creditor for the payment of debts. The administrator made the sale and executed the deed pursuant to the order, but he gave notice at the sale that he claimed the land as his own. It was held that the sale did not divest the administrator of his individual claim to the land sold. See also *Wright v. De Groff*, 14 Mich. 164.

6. Estoppel of Administrator to Assert Individual Claim. — An administrator, under the following circumstances, was held to be estopped to assert an individual claim to land sold by him under an order of court: The administrator formerly owned the land in question, had sold it to the decedent by an executory contract, and had put him in possession. The decedent died without having paid the purchase money or received a deed. The administrator, on his appointment as such, procured an order for the sale of the land and sold it as the property of the decedent without giving any notice of his individual claim under the executory contract. *Cooper v. Lindsay*, 109 Ala. 338 [citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1]; *sub nom.* *Lindsay v. Cooper*, 94 Ala. 170, 33 Am. St. Rep. 105.

7. Land in Adverse Possession of Third Person. — If the land sold is in the possession of a

b. WHEN TITLE AND RIGHT OF POSSESSION VEST. — The purchaser acquires an inceptive interest in the property sold as soon as it is struck off to him at the sale.¹ On the confirmation of the sale he acquires an inchoate equity which becomes complete when he complies with the terms of the sale,² and he is then entitled to possession of the premises and to a conveyance of the legal title,³ but he does not acquire the legal title until a conveyance is executed, unless, under the statute regulating the subject, the payment of the purchase money and the confirmation operate as a transfer of the legal title.⁴ The mere fact of confirmation, however, does not entitle the purchaser to possession. He must first comply with the terms of sale.⁵

c. RIGHT TO RENTS AND PROFITS. — The purchaser is generally entitled to the rents and profits of the land sold from the time when he became entitled to possession.⁶

But Growing Crops sowed by the heirs of the decedent before the sale do not pass to the purchaser, though the proceeding to obtain leave to sell was pending when the crops were sowed.⁷

d. EFFECT OF IRREGULARITIES OR ERRORS IN PROCEEDING TO SELL. — The title acquired by a purchaser in good faith at an administrator's sale under an order of court cannot be affected by mere errors or irregularities preceding the order of sale, if the court had jurisdiction,⁸ or by fraud to which he

third person, the purchaser cannot sue in equity to restrain the occupant from exercising acts of ownership until his (the purchaser's) title has been established by an action at law. *McNamee v. Waterbury*, 4 S. Car. 156.

1. Inceptive Interest Acquired When Property Is Struck Off. — *Holmes's Appeal*, 108 Pa. St. 23.

2. Equitable Title Vests on Confirmation of Sale and Payment of Price. — *Alabama.* — *Ketchum v. Creagh*, 53 Ala. 224; *Dugger v. Tayloe*, 60 Ala. 504; *Cruikshank v. Luttrell*, 67 Ala. 318; *Gardner v. Kelso*, 80 Ala. 497.

Kentucky. — *McNew v. Williams*, (Ky. 1896) 36 S. W. Rep. 687.

Missouri. — *Sherwood v. Baker*, 105 Mo. 472, 24 Am. St. Rep. 399.

Pennsylvania. — *Erb v. Erb*, 9 W. & S. (Pa.) 147.

Texas. — *Harris v. Brower*, 3 Tex. Civ. App. 649.

Payment of the Whole Price is an essential condition of the right of the purchaser to take possession. *Lapene v. Badeaux*, 36 La. Ann. 194.

3. Right to Possession — Confirmation of Sale and Payment of Price. — *Long v. Joplin Min., etc., Co.*, 68 Mo. 422.

Right to Order for Possession. — The purchaser is not entitled to an order for the possession of the land if the defendants in the proceeding to sell were not in possession when the order of sale was made, and did not claim possession through any person who was in possession at the commencement of the proceeding. *Marcom v. Wyatt*, 117 N. Car. 129.

Right to Deed. — When a sale is made and confirmed and a deed is ordered and made, the purchaser is entitled to the possession of the deed on payment of the purchase money, and the administrator can impose no other condition. *Cockins v. McCurdy*, 40 Kan. 758.

Right of Purchaser to Compel Performance. — The successful bidder at an administrator's sale may compel a performance of the contract on the terms prescribed, if they are consonant with law. *Nesbit v. Richardson*, 14 Tex. 656.

Failure of Deed to Include All Land Sold. — If the deed does not include all the land sold to the purchaser, he has, as to the omitted portion, only an equitable right to have the deed reformed. *Nantahala Marble, etc., Co. v. Thomas*, 76 Fed. Rep. 59.

Possession under Void Sale. — A purchaser who goes into possession with the consent of the administrator is not a trespasser though the sale is void for want of an order of sale. *Burgauer v. Laird*, 26 Ark. 257.

4. See *infra*, this section, *Conveyance—Necessity of Deed*.

5. No Right to Possession Before Compliance with Terms of Sale. — *Bagley v. Stephens*, 78 Ga. 304.

6. Purchaser Entitled to Rents and Profits Accruing After He Becomes Entitled to Possession. — *Illinois.* — *Foote v. Overman*, 22 Ill. App. 181.

Kentucky. — *Ball v. Covington First Nat. Bank*, 80 Ky. 501.

Louisiana. — *Lapene v. Badeaux*, 36 La. Ann. 194.

Missouri. — *Page v. Culver*, 55 Mo. App. 606.

Pennsylvania. — *Law's Estate*, 7 Pa. Co. Ct. Rep. 605; *Engle v. Conrad*, 12 Montg. Co. Rep. (Pa.) 36.

When Purchaser Becomes Entitled to Possession. — See *supra*, this section and subsection, *When Title and Right of Possession Vest*.

7. Purchaser Held Not Entitled to Growing Crops. — *Barrett v. Choen*, 119 Ind. 56, 12 Am. St. Rep. 363; *Pearson v. Gillenwaters*, 99 Tenn. 446. But see *contra*, *Jewett v. Keenholts*, 16 Barb. (N. Y.) 193, holding that on the death of a debtor his debts become a lien on his real estate, and that any one who plants after his death does so at the risk of a sale to satisfy such lien.

8. Title of Purchaser Not Affected by Errors or Irregularities. — *United States.* — *Comstock v. Crawford*, 3 Wall. (U. S.) 396.

Connecticut. — *Bryan v. Hinman*, 5 Day (Conn.) 213.

was not a party;¹ nor, it has been held, will a subsequent reversal of the order of sale divest the purchaser's title.² The order of sale is conclusive as to the existence of all the facts necessary to be found before the order could properly be made, and the purchaser is not bound to look beyond it,³ except so far as to see that the record shows that the court had jurisdiction in the particular case.⁴

e. PROPERTY SUBJECT TO INCUMBRANCES.—Within the principle that the purchaser takes only such title as the decedent had, he is considered as making his bid with reference to any incumbrances existing at the time of the decedent's death, and he takes the title subject thereto,⁵ unless the statute

Illinois.—*Moore v. Neil*, 39 Ill. 256, 89 Am. Dec. 303; *Goodbody v. Goodbody*, 95 Ill. 456.

Louisiana.—*Wisdom v. Parker*, 31 La. Ann. 52.

Missouri.—*Wolf v. Robinson*, 20 Mo. 459.

North Carolina.—*Fowler v. Poor*, 93 N. Car. 466.

Texas.—*Edwards v. Halbert*, 64 Tex. 667.

Washington.—*Ackerson v. Orchard*, 7 Wash. 377.

A Mistaken Execution of the Order of Sale may create an equity in favor of the purchaser. Thus, it was held that where the timber on the land was sold separately from the land itself, the purchaser of the timber, having paid the price bid, acquired an equity which was enforceable against a subsequent purchaser of the land, affected with notice, whether or not the order of sale, as a strict matter of law, authorized a separate sale of the timber. *Gress Lumber Co. v. Leitner*, 91 Ga. 810.

1. Purchaser Not Affected by Fraud to Which He Was Not a Party.—*Adams v. Thomas*, 44 Ark. 267; *Cascaden v. Cascaden*, 140 Pa. St. 140.

2. Title Not Divested by Reversal of Order of Sale.—*Irwin v. Jeffers*, 3 Ohio St. 389.

3. Purchaser Not Bound to Look Beyond Order of Sale.—*Louisiana.*—*Sizemore v. Wedge*, 20 La. Ann. 124; *Duckworth v. Vaughan*, 27 La. Ann. 599; *Porter v. Hornsby*, 32 La. Ann. 337; *Macias's Succession*, 36 La. Ann. 444; *Belard v. Gebelin*, 47 La. Ann. 162; *Webb v. Keller*, 39 La. Ann. 55; *Linman v. Riggins*, 40 La. Ann. 761, 8 Am. St. Rep. 549; *Lehmann's Succession*, 41 La. Ann. 987. See also *Green v. Baptist Church*, 27 La. Ann. 563.

North Carolina.—*Fowler v. Poor*, 93 N. Car. 466.

Texas.—*Rindge v. Oliphint*, 62 Tex. 686; *Dancy v. Stricklinge*, 15 Tex. 557, 65 Am. Dec. 179; *Bartlett v. Coker*, 15 Tex. 478; *Alexander v. Maverick*, 18 Tex. 106; *Poor v. Boyce*, 12 Tex. 448; *George v. Watson*, 19 Tex. 354; *Peterson v. Lowry*, 48 Tex. 408; *Ferguson v. Templeton*, (Tex. Civ. App. 1895) 32 S. W. Rep. 148.

4. Record Must Show Jurisdiction.—The general proposition that the purchaser need not look beyond the order of sale is subject to this qualification; that the regularity of these orders will not be presumed against the record. That is, if the record discloses the fact that the court, in the exercise of its jurisdiction over the subject-matter, has transcended the limits prescribed, then the presumption is repelled, and the order is no protection to the purchaser. As, for instance, if the application which calls into exercise the power of the court

to order the sale of lands should disclose the fact that the purposes and objects for which the sale is asked are wholly foreign to that for which the court is authorized to make the order, then the purchaser would be chargeable with notice of the vice in the sale, and would not be protected by the presumption of the regularity of the order. *McNally v. Haynes*, 59 Tex. 583; *Templeton v. Falls Land, etc., Co.*, 77 Tex. 55.

What Constitutes Record.—The record to which the purchaser at an administrator's sale must look, and with the recitals of which he is chargeable, is the application for the sale, with the accompanying exhibits, if any, and the order of sale, and not all the records or papers of the administration, including exhibits, orders, accounts, and reports. *McNally v. Haynes*, 59 Tex. 583.

5. Sale Is Subject to Incumbrances as General Rule.—*Illinois.*—*McConnel v. Smith*, 39 Ill. 279; *Walden v. Gridley*, 36 Ill. 523; *Sebastian v. Johnson*, 72 Ill. 282, 22 Am. Rep. 144; *Kenly v. Bryan*, 110 Ill. 652.

Iowa.—*Sullivan v. Leckie*, 60 Iowa 326. *Compare Iowa L. & T. Co. v. Holderbaum*, 86 Iowa 1.

Michigan.—*Stebbins v. Field*, 43 Mich. 333.

Missouri.—*Jackson v. Magruder*, 51 Mo. 55.

New York.—*Matter of Haig*, 6 Dem. (N. Y.) 454, 14 Civ. Pro. Rep. (N. Y.) 357.

Pennsylvania.—*Grice's Estate*, 11 Phila. (Pa.) 107, 32 Leg. Int. (Pa.) 448; *Lewis's Estate*, 16 Phila. (Pa.) 367, 41 Leg. Int. (Pa.) 225; *Crosson's Appeal*, 125 Pa. St. 380.

Wisconsin.—*Edgerton v. Schneider*, 26 Wis. 385.

There is no authority in *New Jersey* for a provision in the order of sale that mortgages on the property be paid out of the proceeds of the sale. *Cool v. Higgins*, 23 N. J. Eq. 308.

Agreement with Purchaser as to Discharge of Incumbrances.—An agreement made by the administrator with the purchaser that the amount of a mortgage on the land sold should be paid out of the purchase money does not affect the lien of the mortgage, but the purchaser takes subject to it, where it was not referred to in the petition or order of sale and the mortgage was not made a party to the proceeding to sell. *Crum v. Meeks*, 128 Ind. 360.

In *Indiana* encumbered property is sold subject to the incumbrance, and the executor or administrator is required to take a bond from the purchaser, with sufficient sureties, conditioned that the purchaser will make all payments and indemnify the executor or administrator, and all persons interested in the estate of the deceased, against all liabilities of the

authorizes a sale free from incumbrances, and provides for a transfer of the lien of the incumbrance from the land to the proceeds of the sale,¹ or unless the circumstances are such as to render it inequitable that the purchaser should take subject to the incumbrance.²

The Dower Right of the Decedent's Widow is an incumbrance subject to which the sale is ordinarily made,³ though in some jurisdictions provision is made by statute for selling free from the right of dower and transferring the widow's claim to the proceeds.⁴

Incumbrances Created by the Heirs or Devisees of the deceased owner are, as a gen-

deceased on account of such land. Within this rule it has been held that where an administrator failed to take such bond on selling the residue of the decedent's real estate remaining after the assignment to the widow of her third, in consequence of which the purchaser refused to pay the mortgage on the land and the whole was sold on foreclosure, including that which had been assigned to the widow, the administrator became personally liable to her for the loss which she sustained. *Sparrow v. Kelso*, 92 Ind. 514.

See also *supra*, this section, *Property or Interests Subject to Sale — Encumbered Property*.

1. Sale Free of Incumbrances. — In some states the sale may be made free of the incumbrances, which are to be discharged out of the proceeds of the sale.

Georgia. — *Rhett v. Georgia Land, etc., Co.*, 64 Ga. 521; *Newson v. Carlton*, 59 Ga. 516; *Stallings v. Ivey*, 49 Ga. 274.

Indiana. — *McCallam v. Pleasants*, 67 Ind. 542; *Moody v. Shaw*, 85 Ind. 88; *Massey v. Jerauld*, 101 Ind. 270.

Minnesota. — *Culver v. Hardenbergh*, 37 Minn. 225.

Ohio. — *Stone v. Strong*, 42 Ohio St. 53; *De-frees v. Greenham*, 11 Ohio St. 486; *Miami Exporting Co. v. Holly, Wright (Ohio)* 226.

Pennsylvania. — *Cadmus v. Jackson*, 52 Pa. St. 295. *Compare Terry's Estate*, 13 Phila. (Pa.) 298, 36 Leg. Int. (Pa.) 461.

South Carolina. — *Cromer v. Boinest*, 27 S. Car. 436.

An *Indiana* statute authorized the court to order a sale subject to incumbrances or for the purpose of discharging. If the sale was made subject to incumbrances, the purchaser must pay them in addition to the amount of his bid; while, if the sale was made for the purpose of paying the incumbrances, the purchaser took a clear title and the incumbrances were transferred to the purchase money. *Foltz v. Peters*, 16 Ind. 244; *Clarke v. Henshaw*, 30 Ind. 144; *West v. Townsend*, 12 Ind. 434. But the sale divested only those liens for the payment of which the sale was made. *Henderson v. Whiting*, 56 Ind. 131.

In *Minnesota* it is provided by statute that the executor or administrator may apply the proceeds of a sale to the satisfaction of incumbrances on the property sold. *Culver v. Hardenbergh*, 37 Minn. 225.

Necessity of Making Lien Creditors Parties. — In *Ohio* the statute requires lien creditors of a decedent to be made parties to a proceeding to sell real estate for the payment of debts, and if any such creditor is not made a party his lien is not affected by the sale. *Holloway v. Stuart*, 19 Ohio St. 472.

2. Laches of the Incumbrancer may defeat his lien, in which case the sale will be free of the incumbrance. *Cramp's Appeal*, 81 Pa. St. 90.

Undisclosed Trust. — A sale under an order of court is not subject to an undisclosed trust in the land sold. *Rupp's Appeal*, 100 Pa. St. 531.

3. Sale Ordinarily Subject to Dower — *Alabama.* — *Clancy v. Stephens*, 92 Ala. 577.

Arkansas. — *Livingston v. Cochran*, 33 Ark. 294.

Indiana. — *Flenner v. Benson*, 89 Ind. 108; *Wimberg v. Schwegeman*, 97 Ind. 528.

Mississippi. — *Cummings v. Johnson*, 65 Miss. 342.

Nebraska. — *Motley v. Motley*, (Neb. 1898) 73 N. W. Rep. 738.

Even Though the Widow Herself Was the Administrator of her deceased husband, and made the sale as such, her right of dower is not divested by the sale. *Sip v. Lawback*, 17 N. J. L. 442.

If the Administrator of the Husband Was Also the Administrator of the Widow her interest being a fee simple in a certain part of her husband's real estate, it does not pass by the sale where it does not appear that the administrator, in making the sale, acted otherwise than as administrator of the husband. *Elliott v. Frakes*, 90 Ind. 389.

The Rule in Alabama is that the widow's right of dower does not pass by the sale, without her written consent, filed in the office of the judge of probate, though the dower right is not mentioned in the proceeding. *Clancy v. Stephens*, 92 Ala. 577.

Payments to the Widow in satisfaction of her dower right, pursuant to an agreement between her and the purchaser, will not be deducted from the amount of the purchaser's bid. *Weakley v. Gurley*, 60 Ala. 399.

At the Death of the Widow, after a sale of her deceased husband's real estate, the portion allotted to her as her dower passes to the purchaser, if it was included in the order of sale; otherwise such portion descends to the heirs of the deceased husband. *Cosily v. Tarver*, 38 Ala. 107.

4. Sale Free of Dower Authorized by Statute. — *Schmitt v. Willis*, 40 N. J. Eq. 515; *Rainey v. Biggart*, 4 Lea (Tenn.) 501.

In *New York* a sale pursuant to the statute vests in the grantee all the estate, right, and interest of the decedent in the real property so conveyed, at the time of his death, free from dower not assigned, but subject to all subsisting charges, by judgment, mortgage, or otherwise, which existed at the time of his death. *Van Vleck v. Enos*, 88 Hun (N. Y.) 348. See also the title DOWER, vol. 10, p. 122.

eral rule, cut off by a sale under order of court in the settlement of the decedent's estate, whether the sale is for the payment of the decedent's debts¹ or for the purpose of making distribution among the heirs;² though in some jurisdictions the heirs or devisees may, within a limited time after the death of their ancestor or testator, create incumbrances on the real estate, and the purchaser at an administration sale made thereafter will take the title subject to such incumbrances.³

Sale Subject to Incumbrances Not Legally Existing. — The fact that a sale is made subject to an alleged incumbrance which has no legal existence does not affect the title of the purchaser, if the sale was fair and free from fraud, but the remedy of the heirs, in case they are injured by such a sale, is against the executor or administrator.⁴

In Louisiana a distinction is made between incumbrances subject to which the decedent acquired the title and those created by him, in that the former are not affected by the sale, while the latter are transferred to the proceeds of the sale, and an unencumbered title passes to the purchaser.⁵ But it is held that the purchaser is bound for nothing beyond the amount of his bid, and that he may retain a sufficient amount of the purchase money to satisfy liens to which the property is subject in his hands.⁶

f. RULE OF CAVEAT EMPTOR. — The rule of *caveat emptor* is generally applied with the utmost rigor and strictness to sales by executors and administrators.⁷ The purchaser buys at his peril, and if there is any defect in the title or quality of the property he has ordinarily no remedy after confirmation of the sale,⁸ notwithstanding any warranties⁹ or representations made

1. Incumbrances by Heirs or Devisees Divested by Sale. — *Myers v. Pierce*, 86 Ga. 786.

2. Lien of Judgment Against Devisees Divested by Sale for Distribution. — *McDaniel v. Edwards*, 56 Ga. 444.

3. Sale Subject to Incumbrance by Heirs or Devisees. — As to when the sale is made subject to incumbrances created by heirs or devisees, see *supra*, this section, *Property or Interests Subject to Sale — Land Alienated by Heir or Devisee*.

4. Sale Subject to Incumbrances Not Legally Existing. — *Chancey v. Henry*, 89 Ga. 123.

5. Incumbrances Antedating the Decedent's Title. — *Field's Succession*, 3 Rob. (La.) 5; *Triche's Succession*, 29 La. Ann. 384.

Incumbrances Created by the Decedent. — *Leverich v. Prieur*, 8 Rob. (La.) 97; *Triche's Succession*, 29 La. Ann. 384; *Ynogoso's Succession*, 13 La. Ann. 559; *Harper v. Linman*, 26 La. Ann. 690.

6. Deducting Incumbrances from Purchase Money. — *Triche's Succession*, 29 La. Ann. 384.

Unpaid Taxes recorded against the land sold may be retained by the purchaser out of the purchase money. *Moore v. Moore*, 22 La. Ann. 226.

7. Rule of Caveat Emptor Applies — *Alabama*. — *Worthington v. McRoberts*, 9 Ala. 297; *Beene v. Collenberger*, 38 Ala. 647; *Watson v. Collins*, 37 Ala. 587; *Corbitt v. Dawkins*, 54 Ala. 282.

California. — *Halleck v. Guy*, 9 Cal. 181, 70 Am. Dec. 643.

Georgia. — *Colbert v. Moore*, 64 Ga. 502; *Jones v. Warnock*, 67 Ga. 484; *Wells v. Harper*, 81 Ga. 194, 12 Am. St. Rep. 310.

Illinois. — *Letcher v. Morrison*, 27 Ill. 209; *McConnel v. Smith*, 39 Ill. 279; *Bingham v. Maxey*, 15 Ill. 205; *Walden v. Gridley*, 36 Ill. 523; *Bishop v. O'Conner*, 69 Ill. 431; *Bond v.*

Ramsey, 89 Ill. 29; *Tilley v. Bridges*, 105 Ill. 336.

Iowa. — *Hale v. Marquette*, 69 Iowa 376.

Kansas. — *Headrick v. Yount*, 22 Kan. 344.

Michigan. — *Frost v. Atwood*, 73 Mich. 67, 16 Am. St. Rep. 560.

Mississippi. — *Joslin v. Caughlin*, 26 Miss. 134; *Storm v. Smith*, 43 Miss. 497. See also *Hutchins v. Brooks*, 31 Miss. 430; *George v. Bean*, 30 Miss. 147.

Missouri. — *Estes v. Alexander*, 90 Mo. 453.

Nebraska. — *Motley v. Motley*, (Neb. 1898) 73 N. W. Rep. 738.

Ohio. — *Arnold v. Donaldson*, 46 Ohio St. 73.

Pennsylvania. — *Smith v. Wildman*, 178 Pa. St. 245; *Bickley v. Biddle*, 33 Pa. St. 276; *Sackett v. Twining*, 18 Pa. St. 199, 57 Am. Dec. 599.

Texas. — *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Leach v. Millard*, 9 Tex. 551; *Thompson v. Munger*, 15 Tex. 523, 65 Am. Dec. 176; *Williams v. McDonald*, 13 Tex. 322; *Herrington v. Williams*, 31 Tex. 462; *Walton v. Reager*, 20 Tex. 103; *Doxey v. Burns*, 37 Tex. 719.

"The purchaser must take care — he buys at his own risk as to quality, quantity, and title. In the absence of fraud or misrepresentation, the law casts on him the duty of inquiry and examination as to the thing and the right and interest he purchases." *Corbitt v. Dawkins*, 54 Ala. 282.

8. Purchaser Without Remedy for Defective Title After Confirmation. — *Headrick v. Yount*, 22 Kan. 344; *Estes v. Alexander*, 90 Mo. 453; *Arnold v. Donaldson*, 46 Ohio St. 73. Compare *Matter of Lynch*, 33 Hun (N. Y.) 309, holding that in case the title to the land sold is defective the surrogate may, on the application of a purchaser, relieve him from his bid.

9. Warranty of Title. — An executor or ad-

by the executor or administrator,¹ unless fraud has been practiced,² or he has been misled by those who conducted the sale,³ or there was a mutual mistake of fact on the part of the purchaser and the administrator regarding the property.⁴ According to some authorities the application of this rule is not affected by the fact that the defects could not have been ascertained by inves-

ministrator has no authority to bind the estate by warranty of the title of real estate sold under an order of court.

Alabama. — Perkins v. Winter, 7 Ala. 855; Burns v. Hamilton, 33 Ala. 210, 70 Am. Dec. 570; Fore v. McKenzie, 58 Ala. 115.

Indiana. — Martin v. Beasley, 49 Ind. 280.

Iowa. — Hale v. Marquette, 69 Iowa 376.

Mississippi. — Hutchins v. Brooks, 31 Miss. 430.

Ohio. — Dunlap v. Robinson, 12 Ohio St. 530.

Texas. — Lynch v. Baxter, 4 Tex. 431, 51 Am. Dec. 735; Williams v. McDonald, 13 Tex. 322; Nesbit v. Richardson, 14 Tex. 656.

Vermont. — Prouty v. Mather, 49 Vt. 415.

Personal Liability of Executor or Administrator. — The only effect of a covenant of warranty in the deed of an executor or administrator is to render him personally liable thereon to the purchaser. Sumner v. Williams, 8 Mass. 162, 5 Am. Dec. 83; Arnold v. Donaldson, 46 Ohio St. 73; Prouty v. Mather, 49 Vt. 415.

But a covenant to warrant to the extent of assets, and if the land should be lost by any prior claim to refund the purchase money with interest, imposes no liability on the executor individually nor beyond the assets in his hands at the time of eviction. Manifee v. Morrison, 1 Dana (Ky.) 208.

And a covenant by an executor, in a conveyance of lands of his testator, expressed to be made in his capacity of executor, "and not otherwise," is not binding on him individually, even though it may not be binding on the estate of the testator. Thayer v. Wendell, 1 Gall. (U. S.) 37.

1. Representations. — The purchaser has no right to rely on any representations by the executor or administrator in regard to the title, but he must inquire for himself. Fore v. McKenzie, 58 Ala. 115; Estes v. Alexander, 90 Mo. 453; Walton v. Reager, 20 Tex. 103; Hawpe v. Smith, 25 Tex. Supp. 448.

False Representations made by the administrator at the sale that the property was unencumbered constitute an individual tort for which he is individually liable, but afford no defense to an action on notice given for the purchase money. Riley v. Kepler, 94 Ind. 308.

2. If Fraud Has Been Practiced by the executor or administrator in making the sale the rule of *caveat emptor* does not apply. Rice v. Burnet, 39 Tex. 177; Thompson v. Munger, 15 Tex. 523, 65 Am. Dec. 176.

"If a fraud is practiced on him [the purchaser], the sale is incomplete before confirmation, and he may make it ground of objection to confirmation. If the fraud is not discovered until after confirmation, in a proper case, a court of chancery would intervene for his relief." Fore v. McKenzie, 58 Ala. 115.

In Kingsbery v. Love, 95 Ga. 543, the order of sale authorized the administrator to sell

only the interest of the decedent, which was an equity of redemption, yet at the sale the auctioneer, acting for the administrator and in his presence, announced, in reply to a question from a person who contemplated bidding, that the land itself and not a paper was being sold. This person then announced that he would bid only for the land free from all incumbrances, and did so bid, the administrator then and there also announcing that he would pay off the debt secured by the deed out of the proceeds of the sale; and the property was knocked off to such bidder. It was held that although the administrator may have had no legal authority to make such an announcement, if the bidder was thereby misled and induced to believe that he was bidding for an unencumbered title, and his bids were accepted accordingly, these facts, in connection with a subsequent refusal by the administrator to comply with the terms of his announcement, constituted such a fraud upon the bidder as released him from completing his purchase and taking and paying for the land subject to the incumbrance, and he was not liable for the difference between the amount of his bid and the price for which the bond for titles, together with the interest of the intestate thereunder, was afterwards resold at his risk.

Mere Silence on the part of the administrator as to a defect of title known to him does not constitute a fraud which will vitiate the sale. Thompson v. Munger, 15 Tex. 528, 65 Am. Dec. 176.

3. Purchaser Misled by Persons Conducting Sale. — In Schwartz's Estate, 12 Phila. (Pa.) 71, 35 Leg. Int. (Pa.) 153, the purchaser was relieved from his bid on account of a statement by the auctioneer that the property would be sold clear of incumbrances, when in fact it was subject to a mortgage.

4. Mutual Mistake of Fact. — In McKay v. Coleman, 85 Mich. 60, the purchaser made a deposit to be forfeited in case he failed to pay the amount of his bid. After the sale it was discovered that a building which both the purchaser and the administrator supposed to be entirely on the lot sold was partly on the adjoining lot. Thereupon the purchaser refused to comply with his bid and demanded repayment of the amount of his deposit. It was held that he was entitled to be relieved from his bid and to a return of his deposit, because there was a mutual mistake of fact as to the condition of the property, and a wide difference in value between the property as it actually was and as it was understood by both parties to be.

A Mistake on the Part of the Purchaser Alone will not excuse him from complying with his bid, as where a lot was sold by the front foot and the purchaser made a mistake in what his bid would amount to. Alexander v. Herring, 54 Ga. 200.

tigation,¹ while others hold that the purchaser will be protected against defects in a title apparently good.²

In North Carolina the rule of *caveat emptor* is applied only when the decree directs the estate of the decedent in the property to be sold, and not when a particular piece of property is decreed to be sold.³

In South Carolina a purchaser at an administration sale cannot be compelled to complete his purchase unless the title is good to "a moral certainty."⁴

g. LIABILITY FOR PURCHASE MONEY. — The purchaser of land at an administration sale becomes liable on his bid only when the sale is confirmed by the court, and if he pays it before that time the payment is at his own risk, in case the court should refuse to confirm the sale.⁵

1. Strict Application of Rule of Caveat Emptor.

— In *Lindsay v. Cooper*, 94 Ala. 178, 33 Am. St. Rep. 105, the court said: "The purchaser buys at his peril; he takes upon himself the risks of any outstanding rights that could have been asserted against the decedent; and if by reason of the existence of such rights, whether known or not, or discoverable or not, he takes nothing by his purchase, he cannot complain. *Perkins v. Winter*, 7 Ala. 855; *Burns v. Hamilton*, 33 Ala. 210, 70 Am. Dec. 570; *Bland v. Bowie*, 53 Ala. 152; *Fore v. McKenzie*, 58 Ala. 115; *Lovelace v. Webb*, 62 Ala. 271. There are some expressions to be found in opinions handed down here, indicative of a doubt in the minds of the writers as to 'whether the rule of *caveat emptor*, which applies to judicial sales, will go further than to cover those defects which may be disclosed by an examination of the chain of title; or, at least, whether it would cover such secret equities as no ordinary diligence could discover.' *Wilson v. Holt*, 83 Ala. 539, 3 Am. St. Rep. 768. We do not share in this doubt. To give that limitation to the doctrine of *caveat emptor* would be to emasculate it altogether. To hold that the purchaser at an administrator's sale made under an order of the court of probate need only look out for defects disclosed by the proceeding in which the order is entered, and by the muniments of the intestate's chain of title, would be to put such purchaser upon the footing of a vendee from an individual, and to strip the fact that he buys at a judicial sale of all significance whatever; thus destroying the doctrine that he buys at his peril, and takes, not the estate the record and paper muniments indicate the intestate held, as would a vendee at private sale, but the interest only which was so held in point of extraneous fact. We cannot subscribe to the limitation suggested; but, on the contrary, adhere to the broad doctrine announced in the authorities cited, that the purchaser at such sale gets only such right, interest, or estate as resided in the intestate, the apparent title being qualified and limited by every fact or circumstance, whether *in pais* or of record, which would have constituted an outstanding equity against the decedent in his lifetime."

2. Rule of Caveat Emptor Held Not Applicable to Secret Defects. — In *Banks v. Ammon*, 27 Pa. St. 172, it was said that the rule of *caveat emptor* does not require the purchaser "to see what is not to be seen; that he is protected by the recording acts; and that secret defects in a title apparently good are for him no defects at all.

A purchaser at an administrator's sale does not necessarily take as under a quitclaim deed. He may be an innocent purchaser, and entitled to protection against prior conveyances by the intestate and secret trusts between him and others. *Lumpkin v. Adams*, 74 Tex. 96. See also *White v. Frank*, 91 Tex. 66, reversing (Tex. Civ. App. 1897) 39 S. W. Rep. 988.

In *Tubbs's Estate*, (O. Ct.) 7 Kulp (Pa.) 483, 1 Lack. Leg. N. (Pa.) 47, 4 Pa. Dist. Rep. 325, a sale was set aside where an old deed discovered after the sale was made disclosed that the decedent did not own the entire estate in the property, but only a small interest. The decision was placed on the ground that the purchaser was grossly deceived as to the decedent's title.

Title of Purchaser Not Affected by Prior Unrecorded Deed Executed by Decedent. — In *Barto v. Tompkins County Nat. Bank*, 15 Hun (N. Y.) 11, it was held that where land was sold as the property of the decedent, the record title being in him, the title of the purchaser was superior to a prior unrecorded deed executed by the decedent. In this respect, it was said, the administrator's sale had the same effect that a second deed from the decedent would have had if it had been first recorded. See also *Emerson v. Ross*, 17 Fla. 122.

3. Rule in North Carolina. — The rule laid down in North Carolina is that when the court orders the sale of a particular piece of land it offers to sell a good title and will not compel a purchaser to complete his purchase by payment of the price if it appears that a good title cannot be made, except when the sale is expressly or by implication stated to be merely of the estate of a person named, as on the foreclosure of a mortgage, or of some other certain and definite estate or right; and the test whether a good title or merely the estate of a named person, whatever it may turn out to be, is offered for sale must be found in the decree itself, and, where that is not clear, in the nature of the proceedings in which it is made. In the case of a sale by an executor or administrator the nature of the proceeding implies that a good title is offered, and it will be so deemed unless there be something in the decree for sale which forbids such an implication. *Shields v. Allen*, 77 N. Car. 375. To the same effect is *Edney v. Edney*, 80 N. Car. 81.

4. Rule in South Carolina. — *Monaghan v. Small*, 6 S. Car. 177.

5. When Liability for Purchase Money Attaches. — The purchaser is not under obligation to pay any portion of his bid until confirmation of the

Defects in the Title or Irregularities in the Sale will not affect the liability of the purchaser on his bid, if there was no fraud, because irregularities are cured by the order or decree of confirmation, and the rule of *caveat emptor* precludes the purchaser from objecting to the title.¹

Nor Can Illegality in the Appointment of the Executor or Administrator be raised by the purchaser at a succession sale under an order of court apparently regular.²

If the Sale Is Void for any reason, the purchaser may defend an action for the purchase money on the ground of failure of consideration;³ but it is held that a purchaser in possession cannot deny the authority of the executor or administrator to sell, in order to defeat a recovery of the purchase money.⁴

If Fraud Has Been Practiced on the purchaser by the executor or administrator making the sale, the purchaser may, on that ground, oppose its confirmation.⁵ If, however, the fraud is not discovered until the sale has been

sale, and a payment before confirmation is not binding on the estate or the heirs at law. The executor or administrator will hold the money, in such case, as a mere depository of the purchaser, and if it is wasted or misappropriated by him the purchaser must bear the loss. But if it is used in the payment of debts of the decedent, the purchaser will be subrogated to the rights of the creditor so paid. *Pool v. Ellis*, 64 Miss. 555 [citing *State v. Cox*, 62 Miss. 786; *Fearing v. Shafner*, 62 Miss. 791]. See the title SUBROGATION.

1. Defects in Title Not Ground for Relief of Purchaser — *Alabama*. — *Bolling v. Jones*, 67 Ala. 508; *Bland v. Bowie*, 53 Ala. 152.

California. — *Halleck v. Guy*, 9 Cal. 181, 70 Am. Dec. 643.

Georgia. — *Colbert v. Moore*, 64 Ga. 502; *Jones v. Warnock*, 67 Ga. 484.

Illinois. — *Tilley v. Bridges*, 105 Ill. 366.

Louisiana. — *Merrick v. North*, 28 La. Ann. 878.

Mississippi. — *Mellen v. Boarman*, 13 Smed. & M. (Miss.) 100.

Compare *Matter of Lynch*, 33 Hun (N. Y.) 309, 67 How. Pr. (N. Y.) 436, reversing *Wolfe v. Lynch*, 2 Dem. (N. Y.) 610, and holding that where the title is defective the surrogate may relieve a purchaser from his bid. See also *supra*, this section and subsection, *Rule of Caveat Emptor*.

"The purchaser at an administrator's sale cannot defend against the payment of the purchase money upon the ground that a paramount title is outstanding in another, by reason of which his purchase will be ineffective. It is only where he fails to get the title which is proposed to be sold that he may defend against the purchase price; and a sale by an administrator only purports to be of so much of the estate as by law is made assets for the payment of debts. If by the sale, therefore, the homestead right of the widow was defeated, the purchaser must pay the purchase price, because he gets the land. If the sale was ineffective to convey the homestead right, he is liable for the full amount of his bid, because the homestead right is in the nature of a paramount outstanding title, of which he should have taken notice at his peril." *Cummings v. Johnson*, 65 Miss. 342.

If the Purchaser Was Induced to Bid by the promise of the administrator not to enforce payment for a part of the land then held adversely to the estate, until possession of such

part could be given, such promise is binding, and payment of the purchase money for that part cannot be enforced if possession cannot be delivered. *Wright v. Underwood*, (Ky. 1888) 6 S. W. Rep. 437.

A Variance Between the Terms of Sale and the Bid made by the purchaser does not give him the right to have the confirmation of the sale set aside and the sale vacated. *Otis's Estate*, Myr. Prob. (Cal.) 222.

Mere Irregularities in the sale will not relieve the purchaser from his bid. *Byrne's Succession*, 38 La. Ann. 518. See also *supra*, this section and subsection, *Effect of Irregularities or Errors in Proceedings to Sell*.

2. Illegality in Appointment of Executor or Administrator. — *Lehmann's Succession*, 41 La. Ann. 987.

3. Payment of Price Not Enforceable if Sale Is Void. — *Campbell v. Brown*, 6 How. (Miss.) 230; *Laughman v. Thompson*, 6 Smed. & M. (Miss.) 259.

Even after judgment is recovered *nil dicit* against the purchaser, he will be relieved from liability if he afterwards discovers that the sale was void. *Miller v. Palmer*, 55 Miss. 323.

4. A Purchaser in Possession, when sued for the purchase money, cannot deny the authority of the executor or administrator to make the sale, but his remedy, in case the sale was unauthorized, is to compel the creditors, heirs, or devisees to elect the ratification and confirmation of the sale or its rescission. *McCully v. Chapman*, 58 Ala. 325. But see *Levy v. Riley*, 4 Oregon 392, holding that where the administrator became disqualified after the order of sale, the purchaser, having no knowledge of that fact, could maintain a suit in equity to enjoin the administrator from paying out the purchase money received from transferring a note given by the purchaser for the deferred payment.

5. Purchaser May Oppose Confirmation on Ground of Fraud. — *Fore v. McKenzie*, 58 Ala. 115.

Fraud Not Participated in by Administrator — Employment of Puffer. — In *East v. Wood*, 62 Ala. 313, it was held that the employment of a puffer by persons interested in the estate did not furnish a ground either for resisting an action on a note given for the purchase money or for rescinding the sale, the administrator having taken no part in the employment of the puffer. See also *Williams v. Bradley*, 7 Heisk. (Tenn.) 54.

confirmed, his remedy is in equity, and he cannot move the court of probate to vacate the sale.¹

h. REFUSAL OF PURCHASER TO PERFORM. — If the purchaser refuses to complete his purchase, the court may make an order compelling him to complete it,² or the property may be resold at his risk,³ notwithstanding defects in the title, or the existence of other matters in consequence of which the land is of less value than the purchaser supposed when he made his bid.⁴

If the Sale Is Voidable the purchaser may refuse to perform, and may recover any deposit or payment made by him on account of his bid.⁵

i. RIGHTS AND LIABILITIES OF PURCHASER ON AVOIDANCE OF SALE. — When a sale is set aside at the suit of a person interested in the estate of the decedent, the purchaser is entitled to a return of the purchase money paid by him and used in the payment of the debts of the decedent or distributed among those entitled to the land.⁶ And some authorities hold that the purchaser is entitled to subrogation to the rights of the creditors whose claims were paid out of the purchase money,⁷ though it has been denied that the

1. Fraud Discovered After Confirmation — Remedy in Equity. — *Fore v. McKenzie*, 58 Ala. 115; *Bland v. Bowie*, 53 Ala. 152.

Sale Made by Decedent. — In *Walton v. Reager*, 20 Tex. 103, it was said that a sale made by the decedent in his lifetime and unknown to both the administrator and the purchaser at the administrator's sale was a fraud on the purchaser; but in *Ward v. Williams*, 45 Tex. 617, this was declared to be a mere *obiter dictum*, and it was held that the mere fact that the records of the clerk's office in the county where the land was situate showed that the decedent conveyed the land in his lifetime, of which fact the purchaser had no actual knowledge, would afford no defense to an action for the purchase money.

2. Compelling Purchaser to Complete Purchase. — *Mannessier's Succession*, 44 La. Ann. 803; *Maul v. Hellman*, 39 Neb. 322.

The court ordering the sale has all the powers of a court of equity in regard to the subject, and may make an order requiring the purchaser to complete his purchase. *Hudson v. Coble*, 97 N. Car. 260.

3. Resale at Purchaser's Risk. — See *supra*, this section, *Resale*.

4. See *supra*, this section and subsection, *Rule of Caveat Emptor*.

5. Voidable Sale — Refusal to Comply with Bid. — *Hellman v. Merz*, 112 Cal. 661; *Tilton v. Pearson*, 67 Ill. App. 372; *Nash's Succession*, 48 La. Ann. 1573.

6. Reimbursement of Purchaser for Price Paid — *Alabama*. — *Robertson v. Bradford*, 73 Ala. 116; *Wilson v. Holt*, 83 Ala. 528, 3 Am. St. Rep. 768; *Ellis v. Ellis*, 84 Ala. 348.

Arkansas. — *Neel v. Carson*, 47 Ark. 421.

Indiana. — *Fisher v. Bush*, 133 Ind. 315.

Louisiana. — *Beard v. Cash*, 32 La. Ann. 121.

Mississippi. — *Grant v. Lloyd*, 12 Smed. & M. (Miss.) 191; *Gaines v. Kennedy*, 53 Miss. 103.

Missouri. — *Schaefer v. Causey*, 8 Mo. App. 142, 76 Mo. 365.

New York. — *John's Estate*, 21 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 326.

North Carolina. — *Shields v. Allen*, 77 N. Car. 375; *Highsmith v. Whitehurst*, 120 N. Car. 123.

Texas. — *Mayes v. Blanton*, 67 Tex. 245; *Brockenborough v. Melton*, 55 Tex. 493.

Wisconsin. — *Blodgett v. Hitt*, 29 Wis. 169; *Winslow v. Crowell*, 32 Wis. 639.

"Where money paid for the property of a decedent has been used to pay his debts, his heir cannot reclaim the property without first paying back, or tendering, the sum thus beneficially used to extinguish the ancestor's obligation." *Sharkey v. Bankston*, 30 La. Ann. 891 [citing *Daquin v. Coiron*, 6 Martin N. S. (La.) 675; *Andrews v. Ackerson*, 8 Martin N. S. (La.) 205; *Elliott v. Labarre*, 3 La. 541; *Foutelet v. Murrell*, 9 La. 299; *Brown v. Bouny*, 30 La. Ann. 175; *Beauregard v. Leveau*, 30 La. Ann. 302].

When a sale is set aside, the purchaser has no equity against the heirs for the purchase money paid by him, except so far as it has been paid to them or applied to their benefit. *Jayne v. Boisgerard*, 39 Miss. 796. See also *Nowler v. Coit*, 1 Ohio 519, 13 Am. Dec. 640.

Where the Payment Was in Confederate Money the purchaser was entitled to reimbursement to the extent to which such money was used in discharging the decedent's debts. *Martin v. Turner*, 2 Heisk. (Tenn.) 384.

The Deposit Made by a Purchaser on account of his bid will be returned to him where the sale is set aside for inadequacy of price. *Campbell's Estate*, Tuck. (N. Y.) 240.

Even a Fraudulent Purchaser is entitled to a return of so much of the purchase money paid by him as has been applied to the decedent's debts. *Neel v. Carson*, 47 Ark. 421. Compare *Meyer v. Farmer*, 36 La. Ann. 786.

7. Subrogation of Purchase to Rights of Creditors — *Connecticut*. — *Wheeler v. Wheeler*, 1 Conn. 51.

Indiana. — *Duncan v. Gainey*, 108 Ind. 579; *Jones v. French*, 92 Ind. 138.

Maine. — *Moody v. Moody*, 11 Me. 247.

Maryland. — *Young v. Twigg*, 27 Md. 620.

Mississippi. — *Hill v. Billingsly*, 53 Miss. 111; *Weaver v. Norwood*, 59 Miss. 665; *Pool v. Ellis*, 64 Miss. 555.

New Hampshire. — *Willson v. Bergin*, 28 N. H. 96.

North Carolina. — *Perry v. Adams*, 98 N. Car. 167, 2 Am. St. Rep. 326.

Tennessee. — *Martin v. Turner*, 2 Heisk. (Tenn.) 384.

Wisconsin. — *Blodgett v. Hitt*, 29 Wis. 169.

See generally the title SUBROGATION.

doctrine of subrogation applies to such a case.¹

If the Purchaser Was Put in Possession of the land, he will be required to account for the rents and profits during his occupancy,² but he is entitled to credit for all reasonable and proper disbursements.³

j. DUTY TO SEE TO APPLICATION OF PURCHASE MONEY.—It is not the duty of the purchaser to see to the proper application of the purchase money, and his rights cannot be prejudiced by any dereliction of the executor or administrator in this particular.⁴

k. VENDEES OF PURCHASER.—A *bona fide* vendee of a purchaser at an administration sale may acquire an indefeasible title, notwithstanding infirmities in the title of his grantor, the original purchaser. Thus, where the sale and conveyance to the original purchaser are regular in form, fraud on his part will not affect the title of his vendee who had no notice of it.⁵ And the fact that the administration was invalid will not defeat the title of a *bona fide* vendee of the purchaser under a conveyance made before the institution of a

The equities of a vendee who pays money on a contract of sale are as strong as those of a vendor who does not receive full payment for the land he sells. The principle which applies in such cases is closely analogous to the principle of subrogation. *Stults v. Brown*, 112 Ind. 370, 2 Am. St. Rep. 190.

Priority of Lien.—A purchaser entitled to subrogation to the rights of creditors who were paid with the purchase money does not acquire any priority of lien over other debts of the same class. *Duncan v. Gainey*, 108 Ind. 579.

1. Right of Subrogation Denied.—It has been held that the purchaser is not entitled to be subrogated to the rights of creditors where the sale is set aside, because that doctrine is confined to the relation of principal and surety, and guarantors, or to cases where a person, to protect his own junior lien, is compelled to remove one which is superior, and in cases of insurers paying losses. *Bishop v. O'Conner*, 69 Ill. 431 [*distinguishing* *Kinney v. Knoebel*, 51 Ill. 112; *McConnel v. Smith*, 39 Ill. 279]. See also *Frost v. Atwood*, 73 Mich. 67, 16 Am. St. Rep. 560; *Lieby v. Ludlow*, 4 Ohio 469. See generally the title SUBROGATION.

2. Purchaser in Possession Must Account for All Rents and Profits—*Arkansas*.—*Neel v. Carson*, 47 Ark. 421; *Burks v. Vaughan*, (Ark. 1892) 19 S. W. Rep. 754.

Illinois.—*Ebelmesser v. Ebelmesser*, 99 Ill. 541; *Coat v. Coat*, 63 Ill. 73; *Kruse v. Steffens*, 47 Ill. 112; *Miles v. Wheeler*, 43 Ill. 123.

Mississippi.—*Grant v. Lloyd*, 12 Smed. & M. (Miss.) 191.

New York.—*In re Ver Valen*, (Surrogate Ct.) 24 N. Y. Supp. 133.

Pennsylvania.—*Dilworth's Appeal*, 108 Pa. St. 92.

If the Purchaser Has Sold the Premises and made a profit thereby, he will be required to account for the amount so made. *In re Ver Valen*, (Surrogate Ct.) 24 N. Y. Supp. 133; *Sheetz's Estate*, 2 Woodw. (Pa.) 407; *Dilworth's Appeal*, 108 Pa. St. 92.

3. Credit Allowed for Repairs, Taxes, etc.—*Arkansas*.—*Neel v. Carson*, 47 Ark. 421.

Illinois.—*Miles v. Wheeler*, 43 Ill. 123; *Kruse v. Steffens*, 47 Ill. 112; *Coat v. Coat*, 63 Ill. 73; *Ebelmesser v. Ebelmesser*, 99 Ill. 541.

Louisiana.—*Oriol v. Moss*, 38 La. Ann. 770.

Missouri.—*Schaefer v. Causey*, 8 Mo. App. 142, 76 Mo. 365.

New York.—*John's Estate*, 21 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 326.

Ohio.—*Nowler v. Coit*, 1 Ohio 519, 13 Am. Dec. 640; *Longworth v. Wolfington*, 6 Ohio 9.

Auctioneer's Fees paid by a purchaser will be allowed him where the sale is set aside for inadequacy of price, but not any counsel fee on the proceeding to vacate. *Campbell's Estate*, Tuck. (N. Y.) 240.

The Cost of Examining the Title will be allowed the purchaser. *John's Estate*, 21 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 326. But see *Campbell's Estate*, Tuck. (N. Y.) 240; *Burdett v. Silsbee*, 15 Tex. 604.

Improvements—Fraud.—But no allowance will be made for improvements if the purchaser has been guilty of actual fraud. *Mulford v. Minch*, 11 N. J. Eq. 16, 64 Am. Dec. 472.

Amount of Allowance for Improvements.—Some authorities limit the amount which will be allowed for improvements to the value of the rents and profits or as an offset for damages claimed for withholding possession. *Huse v. Den*, 85 Cal. 390, 20 Am. St. Rep. 232; *Grant v. Lloyd*, 12 Smed. & M. (Miss.) 191; *Starkey v. Hammer*, 1 Baxt. (Tenn.) 438.

4. Purchaser Not Bound to See to Application of Purchase Money—*United States*.—*Greenway v. Roberts*, 2 Cranch (C. C.) 246, 10 Fed. Cas. No. 5790; *Garnett v. Macon*, 2 Brock. (U. S.) 185, 6 Call (Va.) 308, 10 Fed. Cas. No. 5245.

Iowa.—*Lees v. Wetmore*, 58 Iowa 170.

Ohio.—*Defrees v. Greenham*, 11 Ohio St. 486; *Muskingum Bank v. Carpenter*, 7 Ohio (pt. i.) 21. See also *Holloway v. Stuart*, 19 Ohio St. 472.

Texas.—*Blanton v. Mayes*, 72 Tex. 417.

Virginia.—*Meeks v. Thompson*, 8 Gratt. (Va.) 134, 56 Am. Dec. 134.

5. Vendee of Purchaser Not Affected by Purchaser's Fraud.—*Williams v. Swift*, 79 Ga. 708; *Martin v. Robinson*, 67 Tex. 368.

The sale may be voidable in the hands of the original purchaser, but valid in the hands of his vendee in good faith, for a valuable consideration and without notice of the infirmity. *Piatt v. St. Clair*, 7 Ohio (pt. ii.) 165.

Fraud Between the Administrator and His Immediate Vendee will not affect subsequent purchasers who are such *bona fide* and for value, and who derive title through the deed of the administrator, without any notice of the alleged fraud. *King v. Cabaniss*, 81 Ga. 661.

proceeding to set aside the administration;¹ but such vendee takes subject to all incumbrances affecting the original purchaser, if he is in any way chargeable with notice thereof.² And if the original purchaser at the time of the alienation by him had not obtained a conveyance of the legal title, he had only an equity and could transfer an equity only, subordinate to the legal title and burdened with every charge resting on him.³

15. Rights of Heirs and Devisees — Effect of Sale in General. — When land is regularly and legally sold by an executor or administrator under an order of court for the payment of the debts of the deceased owner or for distribution, and the property is regularly conveyed to the purchaser, the title of the heirs at law or devisees is thereby completely divested, without any right of redemption, and they must look to the proceeds in the hands of the executor or administrator.⁴

Fraudulent Sale. — If a sale has been made to pay fraudulent claims, but is in other respects regular and valid, so that the title of the purchaser cannot be impeached, the heirs, on discovering the fraud, are entitled to have the unpaid purchase money paid to them;⁵ or they may enjoin the sale on showing that the allowance of the claims for which the sale was asked was fraudulently procured, or that the claims were not subsisting obligations of the estate;⁶ or they may recover damages from the executor or administrator to the extent that they were injured by the sale.⁷

If a Sale Was Unnecessarily Made because the executor was indebted to the

1. Bona Fide Vendee Not Affected by Subsequent Avoidance of Administration. — *Halbert v. Young*, (Tex. 1887), 6 S. W. Rep. 747.

2. Vendee with Notice of Incumbrances. — In *Overdeer v. Updegraff*, 69 Pa. St. 110, real estate was sold subject to an easement of a right of way in the adjoining proprietors, and a reservation thereof was made in the deed, though the easement was not mentioned in the proceeding to obtain leave to sell. Before the deed was recorded, the plaintiff bought the property from the purchaser, and claimed to hold it free of the easement, on the ground that he purchased without notice thereof. It was held that if, by the use of reasonable diligence, the plaintiff could have inspected the deed, he had constructive notice of the reservation in it, because the deed formed an essential link in the chain of title and it was his duty to examine it; but apart from the constructive notice furnished by the deed, it was held that since the easement was continuous and apparent, the plaintiff, on that account, took his title subject to it.

3. Vendee of Purchaser Before Conveyance Made. — *Ketchum v. Creagh*, 53 Ala. 224 [citing *Shirras v. Caig*, 7 Cranch (U. S.) 34; *Vattier v. H'nde*, 7 Pet. (U. S.) 271; *Boone v. Chiles*, 10 Pet. (U. S.) 211].

If a Deed Has Been Made to the Purchaser by order of the court, though the statute expressly provides that the court shall make such an order only when the purchase money has all been paid, and the record shows that half of the purchase money was unpaid and not yet due, and that a note for such part was still outstanding, a vendee of the purchaser takes subject to a lien for the unpaid purchase money, though he bought in ignorance of the fact that the purchase money had not been paid. *Wallace v. Nichols*, 56 Ala. 321.

Vendee of Purchaser's Vendee. — In *Hudgens v. Cameron*, 50 Ala. 379, it was held that

where the record recited the payment of the purchase money and a deed had been made to the purchaser pursuant to an order of the court, a subsequent vendee of the property who was ignorant of the fact that the purchase money had not been paid took a good title, though his grantor, who was the vendee of the original purchaser, knew that the purchase money had not been paid.

4. Sale Divests Title of Heirs and Devisees. — *Cook v. Cook*, 67 Ga. 381.

If the Decedent Owned an Undivided Interest in land, and the administrator sold a specific part of it, the sale passes whatever interest the heirs had in the specific part sold. *King v. Cabaniss*, 81 Ga. 661.

No Redemption from Sale to Pay Debts. — *Love v. Williams*, 2 Lea (Tenn.) 226; *Maxwell v. Smith*, 86 Tenn. 539.

Right to Surplus Proceeds. — Though the sale divests the title of the heirs to the land, it does not affect their right to the surplus proceeds remaining after the accomplishment of the purpose for which the sale was made. *Sears v. Mack*, 2 Bradf. (N. Y.) 394, affirmed 17 N. Y. 445.

If One of Several Heirs Purchases, the title so acquired does not inure to the benefit of the others, but vests exclusively in him. *Aubuchon v. Aubuchon*, 133 Mo. 260.

5. Sale to Pay Fraudulent Claims — Heirs Entitled to Purchase Money. — *Whitlock v. McClusky*, 91 Ill. 582.

6. Injunction Against Wrongful Sale. — *Bienvenu v. Parker*, 30 La. Ann. 160; *Penn v. Penn*, 39 Mo. App. 282.

7. Damages for Wrongful Sale — Extent of Liability. — Where an executor or administrator fraudulently sells land belonging to the estate, the measure of damages will not be restricted to the price of the property at the time of sale; but he will be held liable for the enhanced value when the demand is made, with interest thereon. *Bell v. Bell*, 20 Ga. 250.

decedent to a greater amount than the debt for which the sale was made, the persons interested in the estate may recover from him the value of the land.¹

If Real Estate Is Sold to Save the Personalty, the heirs are considered as the purchasers of the personalty, and are entitled to it to the exclusion of the widow's claim to a third thereof.²

Rents and Profits Accruing Before Sale.—The rents and profits of real estate accruing between the death of the owner and the time when the title and right of possession of his heirs or devisees are divested by a sale made under an order of court generally pass to the heirs or devisees. The precise time at which their right ceases is not uniform under the authorities, but is variously stated as the day of the sale, the day of the confirmation of the sale, and the day of the delivery of the deed to the purchaser.³ An exception to the rule exists in those jurisdictions where the rents and profits of real estate pass to the executor or administrator as assets.⁴

Contribution Between Heirs.—If the portion of one of the heirs is sold for the payment of the decedent's debts, such heir may have contribution from the other heirs.⁵

16. Purchase by Executor or Administrator—*a. RIGHT TO BECOME PURCHASER*—(1) *General Rule.*—It is a well-settled principle of equity that an executor or administrator selling real estate under an order of court has no right to purchase it for himself, either directly⁶ or indirectly, through an

1. Unnecessary Sale—Executor or Administrator Liable for Value of Land Sold.—*Farys v. Farys*, Harp. Eq. (S. Car.) 261. See also *Schnell v. Schroder*, Bailey Eq. (S. Car.) 334; *Swift v. Miles*, 2 Rich. Eq. (S. Car.) 147; *Matthews v. Matthews*, McMull. Eq. (S. Car.) 410; *Bailey v. Boyce*, 5 Rich. Eq. (S. Car.) 187.

2. Sale of Realty to Save Personalty.—The rule stated in the text was the rule under the *Maryland* statutes of 1818 and 1819, which provide that the realty may be sold for this purpose with the consent of those to whom it descended; but the widow is entitled to dower in the realty or in the proceeds of the sale. *Waring v. Waring*, 2 Bland (Md.) 673.

3. Rents and Profits up to Day of Sale.—In *Maryland* it is held that the heirs are entitled to the rents and profits until the day of the sale. *Ritchie v. U. S. Bank*, 5 Cranch (C. C.) 605.

Rents and Profits until Confirmation of Sale.—In *Kentucky* it is held that the heirs or devisees are entitled to the rents and profits until the confirmation of the sale, at which time the right of possession passes to the purchaser. *Ball v. Covington First Nat. Bank*, 80 Ky. 501; *Taliaferro v. Gay*, 78 Ky. 498.

Rents and Profits until Delivery of Deed.—In *Pennsylvania* it is held that the heirs or devisees are entitled to receive the rents and profits of land sold under an order of court until the delivery of a deed to the purchaser. *Engle v. Conrad*, 12 Montg. Co. Rep. (Pa.) 36; *Law's Estate*, 7 Pa. Co. Ct. Rep. 605.

Crops Planted Before Sale.—The title and right of possession are in the heirs until a sale has been made, and therefore where an heir planted a part of the estate before an order of sale was applied for, but the crop did not mature until after the sale, he nevertheless had the right to harvest it and carry it away. *McDaniels v. Walker*, 44 Mich. 83. See also *Barrett v. Choen*, 119 Ind. 56, 12 Am. St. Rep. 363.

4. When Rents Pass to Heirs and When to Representative.—See *supra*, this title, *Assets*.

5. Contribution Between Heirs.—*Davis v. Vansands*, 45 Conn. 600. See also the title CONTRIBUTION AND EXONERATION, vol. 7, p. 358.

6. Representative Cannot Purchase at His Own Sale—United States.—*Price v. Morris*, 5 McLean (U. S.) 4, 19 Fed. Cas. No. 11,414.

Alabama.—*Calloway v. Gilmer*, 36 Ala. 354; *James v. James*, 55 Ala. 525; *Foxworth v. White*, 72 Ala. 224; *Fielder v. Childs*, 73 Ala. 567; *McMillan v. Rushing*, 80 Ala. 402.

Arkansas.—*Wright v. Campbell*, 27 Ark. 637; *Mock v. Pleasants*, 34 Ark. 63.

California.—*Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec. 146.

Georgia.—*Houston v. Bryan*, 78 Ga. 181, 6 Am. St. Rep. 252; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399.

Illinois.—*Miles v. Wheeler*, 43 Ill. 123.

Indiana.—*Potter v. Smith*, 36 Ind. 231; *Murphy v. Teter*, 56 Ind. 545; *Shaw v. Swift*, 1 Ind. 565.

Kentucky.—*Darcus v. Crump*, 6 B. Mon. (Ky.) 363.

Louisiana.—*Scott v. Gorton*, 14 La. 115, 33 Am. Dec. 578.

Maine.—*Decker v. Decker*, 74 Me. 465.

Massachusetts.—*Litchfield v. Cudworth*, 15 Pick. (Mass.) 23.

Michigan.—*Dwight v. Blackmar*, 2 Mich. 330, 57 Am. Dec. 130.

Mississippi.—*Bland v. Muncaster*, 24 Miss. 62, 57 Am. Dec. 162; *Temples v. Cain*, 60 Miss. 478.

Nevada.—*Matter of Millenovich*, 5 Nev. 161.

New Hampshire.—*Hoitt v. Webb*, 36 N. H. 158; *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316.

New Jersey.—*Bassett v. Shoemaker*, 46 N. J. Eq. 538, 19 Am. St. Rep. 435; *Smith v. Drake*, 23 N. J. Eq. 302; *Den v. Wright*, 7 N.

intermediary or agent,¹ or to acquire any interest in the property sold by him, either jointly with, or in the right of, a third person,² or to act as agent for

J. L. 175; *Mulford v. Bowen*, 8 N. J. Eq. 751, 9 N. J. Eq. 797.

New York. — *Terwilliger v. Brown*, 44 N. Y. 237; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252.

North Carolina. — *Froneberger v. Lewis*, 70 N. Car. 456.

Ohio. — *Barrington v. Alexander*, 6 Ohio St. 189.

Pennsylvania. — *Musselman v. Eshleman*, 10 Pa. St. 394, 51 Am. Dec. 493.

Texas. — *Hamblin v. Warnecke*, 31 Tex. 91; *Hardy v. De Leon*, 5 Tex. 246; *Fortune v. Killebrew*, 70 Tex. 437; *Wipff v. Heder*, 6 Tex. Civ. App. 685.

Vermont. — *Green v. Sargeant*, 23 Vt. 466, 56 Am. Dec. 88.

Virginia. — *Davies v. Hughes*, 86 Va. 909.

Compare Van Dyke v. Johns, 1 Del. Ch. 93, 12 Am. Dec. 76.

"No principle is more firmly established in the equity jurisprudence of this country than that a purchase by a trustee, for his own benefit, at a sale of the trust property, is voidable at the option of the *cestui que trust*, and will be set aside, if application for that purpose be made in a reasonable time; and it makes no difference in the application of the rule whether the purchase be direct or indirect, in person or through an agent, or by the medium of a person who subsequently reconveys to the trustee." *Calloway v. Gilmer*, 36 Ala. 354 [citing *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Cunningham v. Rogers*, 14 Ala. 147; *McCartney v. Calhoun*, 17 Ala. 301; *Andrews v. Hobson*, 23 Ala. 219; *Montgomery v. Givhan*, 24 Ala. 584; *Charles v. Dubose*, 29 Ala. 369; 1 *White & Tudor's Lead Cases* (3d ed.) 209, 212]. See also *supra*, this title, *Management and Care of Estate — Sale and Transfer of Personal Property; Real Property — Sale of Real Property*; and the titles JUDICIAL SALES; TRUSTS and TRUSTEES.

Purchase from Coadministrator. — The rule forbidding an executor or administrator to become a purchaser at his own sale includes a purchase by an administrator from his co-administrator. *Greene v. Holt*, 76 Mo. 677.

But a person who was appointed administrator jointly with another, but who never qualified or entered on the active discharge of the usual duties of an administrator, may purchase from his coadministrator. *Grayson v. Weddle*, 63 Mo. 523.

Coexecutor Not Acting in Reference to Sale. — The fact that the proceeding for the sale was conducted entirely by one of two executors does not affect the disability of the coexecutor to purchase at the sale. *Beeson v. Beeson*, 9 Pa. St. 279.

1. Purchase Through Third Person. — An executor or administrator has no more right to purchase at his own sale through a third person than he has to purchase directly, and if he does so the act will be fraudulent in law, and the sale may be set aside.

Alabama. — *Foxworth v. White*, 72 Ala. 224; *Harris v. Parker*, 41 Ala. 604.

California. — *Boyd v. Blankman*, 29 Cal. 19,

87 Am. Dec. 146; *Scott v. Umbarger*, 41 Cal. 410; *Guerrero v. Ballerino*, 48 Cal. 118.

Georgia. — *Houston v. Bryan*, 78 Ga. 181, 6 Am. St. Rep. 252; *Ridgeway v. Ridgeway*, 84 Ga. 25.

Illinois. — *Kruse v. Steffens*, 47 Ill. 112; *McConnel v. Gibson*, 12 Ill. 128; *Thorp v. McCulum*, 6 Ill. 627.

Indiana. — *Shaw v. Swift*, 1 Ind. 565.

Louisiana. — *Ambrose v. Marsh*, 27 La. Ann. 241.

Maryland. — *Conway v. Green*, 1 Har. & J. (Md.) 151; *Singstack v. Harding*, 4 Har. & J. (Md.) 186, 7 Am. Dec. 669.

Massachusetts. — *Blood v. Hayman*, 13 Met. (Mass.) 231.

Michigan. — *Sheldon v. Rice*, 30 Mich. 296, 18 Am. Rep. 136.

Mississippi. — *Baines v. M'Gee*, 1 Smed. & M. (Miss.) 208; *Pearson v. Moreland*, 7 Smed. & M. (Miss.) 609, 45 Am. Dec. 319.

Missouri. — *Clark v. Drake*, 63 Mo. 354.

New Jersey. — *Winter v. Geroe*, 5 N. J. Eq. 319; *Skillman v. Skillman*, 15 N. J. Eq. 388; *Smith v. Drake*, 23 N. J. Eq. 302.

New York. — *Stiles v. Burch*, 5 Paige (N. Y.) 132; *Woodruff v. Cook*, 2 Edw. Ch. (N. Y.) 259.

Ohio. — *Piatt v. Longworth*, 27 Ohio St. 159; *Glass v. Greathouse*, 20 Ohio 503.

Pennsylvania. — *Matter of Wallington*, 1 Ashm. (Pa.) 307; *Chronister v. Bushey*, 7 W. & S. (Pa.) 152; *Henninger v. Boyer*, 10 Pa. Co. Ct. Rep. 506.

South Carolina. — *Edmonds v. Crenshaw*, 1 McCord Eq. (S. Car.) 252.

Virginia. — *Bailey v. Robinson*, 1 Gratt. (Va.) 4, 42 Am. Dec. 540.

See also cases cited *infra*, this section, *Setting Aside Sale*.

2. Administrator Forbidden to Derive Any Benefit from Sale. — *Pearson v. Moreland*, 7 Smed. & M. (Miss.) 609, 45 Am. Dec. 319.

Purchase Jointly with Third Person. — If a third person unites with the executor or administrator in purchasing at the sale, it is voidable alike as to him and as to the executor or administrator, for, having joined with the executor or administrator in the commission of an act violative of his duty, and against the policy of the law, such third person must share the consequence. *McMillan v. Rushing*, 80 Ala. 402 [citing *Hunt v. Bass*, 2 Dev. Eq. (17 N. Car.) 292, 24 Am. Dec. 274; *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201, 24 Am. Dec. 556; 1 *Harc & Wall. L. Cas.* 214].

Taking Place of Delinquent Bidder. — If the purchaser to whom the land is struck off fails to comply with the terms of his purchase, the property should again be offered for sale. To permit the administrator to substitute himself for a delinquent purchaser would enable him to defeat all genuine competition by receiving the bid of an irresponsible man, and afterwards turn it to his own account by voluntarily assuming the place of such bidder, thus acquiring any advantage which the ownership of the property might confer. *Barrington v. Alexander*, 6 Ohio St. 189.

the purchaser.¹ And in some jurisdictions such purchases are the subject of express statutory prohibition.² But it seems that the rule is applicable only to persons who are in fact personal representatives of a decedent, and not to one who, being entitled to administer, procured the appointment of a third person,³ or who, though appointed administrator or nominated as executor,

A Purchase by a Firm of Which the Administrator Is a Member is a purchase by the administrator within the rule. *Griffith v. Maxfield*, 63 Ark. 548.

A Sale to the Wife of the Administrator is voidable under the rule, where he conveyed the land to her without waiting for a confirmation of the sale, and went into possession himself and enjoyed the rents and the profits of the sale of timber growing on the land. *Woodard v. Jagers*, 48 Ark. 248.

So, too, a sale to the administrator's wife through the agency of a third person, the consideration having been paid by the administrator out of his own means, is a settlement on his wife from which he will derive personal benefit. The policy of the law is to demand so strict an adherence to duty that no temptation to weigh self-interest against integrity can be placed in the trustee's way. *McGaughey v. Brown*, 46 Ark. 25.

But the Wife of an Executor who sells land under an order of court may, in good faith, become the purchaser at the sale, and derive a valid title to the real estate through such purchase. *Crawford v. Gray*, 131 Ind. 53.

Purchase by Husband of Administratrix.—In *Louden v. Martindale*, 109 Mich. 235, it was held that a purchase by the administratrix was not shown merely by the fact that her husband bid off the property at the sale made by her, at a low price, and about five months later conveyed it to her, it appearing that the sale was open and pursuant to the legal and usual advertisement.

To the Contrary see *Schaefer's Estate*, 10 Pa. Co. Ct. Rep. 100, holding that a purchase by the husband of the executrix making the sale is the same as if the executrix herself had purchased.

Agreement to Purchase for Decedent's Children.—An administratrix of her deceased husband did not acquire an interest in land sold by her, such as would render the sale voidable, where she agreed with the purchaser that he should hold the title until the children of the decedent became of age and then convey to them, and the heirs of the purchaser after his death conveyed the property to the administratrix individually in order that she might mortgage it for the payment of charges against it. *Larzelere v. Starkweather*, 38 Mich. 96.

1. Executor or Administrator Cannot Purchase as Agent.—*Neda v. Fontenot*, 2 La. Ann. 782; *Clark v. Drake*, 63 Mo. 354; *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316; *Piatt v. Longworth*, 27 Ohio St. 159.

2. Purchase by Representative Forbidden by Statute.—The California Statute provides that no executor or administrator shall purchase, directly or indirectly, any of the property of the estate represented by him. *Gray v. Quicksilver Min. Co.*, 68 Fed. Rep. 677.

The Michigan Statute forbids an executor or administrator to be interested in the purchase

of any part of the estate sold by him, and provides that all sales in violation of the statute shall be void. *Otis v. Kennedy*, 107 Mich. 312.

The Missouri Statute formerly provided that no executor or administrator should, "directly or indirectly, become the purchaser of such real estate at public sale at less than three-fourths of its appraised value." *Greene v. Holt*, 76 Mo. 677. And see *Price v. Springfield Real-Estate Assoc.*, 101 Mo. 107, 20 Am. St. Rep. 595. By the present statute the prohibition is absolute and unqualified. Rev. Stat. Mo. 1889, § 165.

The New York Statute provides that the executor or administrator making the sale "shall not, directly or indirectly, purchase or be interested in the purchase of any part of the real estate so sold," and that "all sales made contrary to the provisions of this section shall be void." *Terwilliger v. Brown*, 44 N. Y. 237.

The Texas Statute provides that it shall be unlawful for any executor or administrator to become the purchaser, either directly or indirectly, of any property of the estate sold by him, and if he does so, "upon the complaint in writing of any person interested in such estate" the sale may be set aside and declared void by the County Court. *Byars v. Thompson*, 80 Tex. 468.

The Provision of the Utah Statute is: "No executor * * * must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale." *Haight v. Pearson*, 11 Utah 51. See also *Ayres v. Jack*, 7 Utah 249.

The Wisconsin Statute provides that an executor or administrator selling real estate under an order of court "shall not, directly or indirectly, purchase or be interested in the purchase of any part of the real estate so sold," and that "all sales made contrary to the provisions of this section shall be void." *Melms v. Pabst Brewing Co.*, 93 Wis. 153.

3. Purchase by Person Procuring Appointment of Administrator.—In *Gray v. Quicksilver Min. Co.*, 68 Fed. Rep. 677, it was held that where an employee of a corporation which was a creditor of the decedent applied for and obtained letters of administration at the instance of the corporation, all the expenses being paid by it, the corporation was not the administrator of the estate, and therefore the purchase by the corporation at the administrator's sale of the decedent's real estate for the payment of debts was not a violation of the laws of *California*, which prohibit an executor or administrator, directly or indirectly, from purchasing any of the property of the decedent's estate. "If," said McKenna, J., "an employee of a corporation may have a separate individuality (a proposition seemingly plain), it follows, necessarily, that he may be an administrator of an estate, and keep his individuality; nor does it matter, in the aspect we are now considering, that he took the office at

did not qualify or enter on the duties of the office.¹

The Rule Is Based on Considerations of Policy which forbid a fiduciary from deriving any personal benefit from his dealings with the estate committed to his care.²

(2) **Exceptions to General Rule.**— Exceptions to the general rule forbidding executors and administrators to become purchasers of property of the estate sold by them are found in some jurisdictions.³

the request of the corporation, or that the latter advanced the expenses of the administration. Among those who were entitled to administration under the law (section 52 Prob. Act, page 448 Laws 1851) in force at the time of the administration of the Gray estate were creditors; and, by the same law (section 66), administration could be granted to any competent person, although not entitled, at the request of a person entitled. Such a request certainly did not confuse or confound the identity of the parties, and make him an administrator who was not so in fact, by irresistible inference of law. Nor can I conceive of any good which would be served by it; while it is easy to conceive the embarrassment, and even detriment, of it. If fraud, in fact, be committed, through means of the administration, as was done in *Herndon v. Kuykendall*, 58 Tex. 341 (cited by plaintiff's counsel), the remedy is obvious and ample."

1. Executor or Administrator Not Qualifying or Acting.— Where the statute requires a grant of letters testamentary before an executor is authorized to act as such, the mere nomination of a person in a will as executor thereof does not constitute him an executor so as to preclude him from purchasing land of the estate sold under an order of court. *Valentine v. Duryea*, 37 Hun (N. Y.) 427.

And the rule is the same as to a person who was appointed administrator with others, but who never qualified or performed any of the duties of the office. *Grayson v. Weddle*, 63 Mo. 523.

2. Rule Based on Sound Policy.— The courts hold, with great propriety and force of reasoning, that sound policy requires that persons in a fiduciary character should have no temptation to use trust property for their own benefit and to the injury of the *cestui que trust*. *Shakeley v. Taylor*, 1 Bond (U. S.) 142.

"**The Foundation of the Principle** is the equitable maxim that by no dealing with the trust estate shall a trustee acquire for himself personal, individual profit—the duty of exercising, for the benefit of the *cestui que trust*, all the rights, powers, knowledge, and advantages of every description which he may derive from his position—the necessity of removing all temptation to employ these for his own gain; and it must apply so long as the relation continues, and the relation of purchaser would be inconsistent with it." *James v. James*, 55 Ala. 525.

"**The Object of the Rule** is to protect the *cestui que trust* against fraud and injustice, and to remove from persons holding such relations all inducements and temptations to speculate upon or control for their own benefit property held by them in trust or confidence." *Gibson v. Herriott*, 55 Ark. 85, 29 Am. St. Rep. 17.

3. Exceptions to General Rule.— In Alabama an exception to the general rule forbidding

purchases by executors or administrators at their own sales of property of the estate was, at an early day, applied to an executor or administrator having an interest, purchasing chattels at his own sale, for full value, if the sale was fairly conducted. *Foxworth v. White*, 72 Ala. 224 [citing *Brannan v. Oliver*, 2 Stew. (Ala.) 47, 19 Am. Dec. 37; *Julian v. Reynolds*, 8 Ala. 680; *McLane v. Spence*, 6 Ala. 894; *McCartney v. Calhoun*, 17 Ala. 301; *Montgomery v. Givhan*, 24 Ala. 568; *Andrews v. Hobson*, 23 Ala. 219; *Charles v. Dubose*, 29 Ala. 367].

Whether the exception should be applied to sales of chattels only has not been decided; though it has been said that the court was not inclined to the limitation. *Calloway v. Gilmer*, 36 Ala. 358, cited in *Foxworth v. White*, 72 Ala. 224. See also *Ligon v. Ligon*, 84 Ala. 555.

Later cases in Alabama recognize the right of an executor or administrator to purchase real estate sold by him under an order of court, but he must give notice to the heirs of all proceedings subsequent to the sale, and the record must show that such notice was given. *Bolling v. Smith*, 108 Ala. 411; *Bogart v. Bell*, 112 Ala. 412; *Allison v. Allison*, 114 Ala. 392.

In Louisiana an administrator who is the surviving husband or wife, or the heir or legatee of the decedent, may purchase for his or her own benefit under the Act of March 28, 1840, No. 112. *Davidson v. Davidson*, 28 La. Ann. 269; *Linman v. Riggins*, 40 La. Ann. 761, 8 Am. St. Rep. 549. See also *Collins v. Hollier*, 13 La. Ann. 585. But not a creditor who administers on the estate. *Stanbrough's Succession*, 37 La. Ann. 275.

In Missouri executors and administrators are authorized by statute to purchase at their own sales, provided they give three-fourths the amount of the appraised value of the property. *Grayson v. Weddle*, 63 Mo. 523.

In New Jersey the executor or administrator may purchase at his own sale on obtaining permission from the court to do so. *In re Patterson*, (N. J. 1890) 20 Atl. Rep. 486.

In North Carolina, if the executor or administrator is the sole heir or devisee, he may be the purchaser. *Howell v. Tyler*, 91 N. Car. 207. See also *Froneberger v. Lewis*, 79 N. Car. 426.

In Pennsylvania the executor or administrator may purchase by leave of court. *Markle's Estate*, 11 Pa. Co. Ct. Rep. 13; *Myer's Estate*, 9 Pa. Co. Ct. Rep. 439. But it is still his duty to obtain the highest price that he can. *Hacker's Estate*, 7 Pa. Co. Ct. Rep. 202, 24 W. N. C. (Pa.) 318.

South Carolina.— In *Stallings v. Foreman*, 2 Hill Eq. (S. Car.) 401, it was held that an executor or administrator could purchase property at his own sale, the court being of the

b. RIGHT TO ACQUIRE TITLE OF PURCHASER. — The rule forbidding the personal representatives of a decedent to purchase at sales made by themselves does not prevent them from acquiring the title of one who purchased in good faith at the sale, provided there was no previous understanding between them; ¹ but such a transaction is always open to the suspicion that it was only an indirect purchase by the representative at his own sale, and every presumption of indirection must be repelled by clear and convincing evidence.²

Until the Sale Is Confirmed, however, it is incomplete, and a purchase by the executor or administrator from the vendee before confirmation is within the prohibition against purchasing at his own sale.³

c. VALIDITY AND EFFECT — (1) *In General.* — The cases are almost

opinion that in this respect such fiduciaries constitute an exception to the rule that "a trustee to sell cannot purchase."

The matter is now governed by a statute which expressly authorizes executors and administrators to purchase at sales of their decedents' property. *Finch v. Finch*, 28 S. Car. 164, 13 Am. St. Rep. 665.

In *Virginia* it has been said that executors or administrators may purchase at their own sales. *Toler v. Toler*, 2 Patt. & H. (Va.) 71. But later cases seem to be to the contrary. *Staples v. Staples*, 24 Gratt. (Va.) 225; *Wayland v. Crank*, 79 Va. 602; *Morgan v. Fisher*, 82 Va. 417.

In *Tennessee*, where the sale is made by a master, the executor or administrator may be the purchaser. There is no absolute incapacity to buy, but it is said that the court will look narrowly into his conduct, and will look with a jealous eye into any charge of fraud made on a proper proceeding. *Cooley v. Cooley*, (Tenn. 1896) 37 S. W. Rep. 1028; *Rogers v. Rogers*, (Tenn. 1896) 42 S. W. Rep. 70.

See also statutes in other jurisdictions.

A Statutory Prohibition Against Purchasing at a Private Sale does not, by implication, authorize the executor or administrator to purchase at a public sale, but in such case it has been held that the law stands, as to public sales, as if there had been no legislation on the subject. *Potter v. Smith*, 36 Ind. 231.

1. Executor or Administrator May Purchase from Bona Fide Purchaser — *Alabama.* — *James v. James*, 55 Ala. 525; *Foxworth v. White*, 72 Ala. 224.

Arkansas. — *West v. Waddill*, 33 Ark. 575.

California. — *O'Connor v. Flynn*, 57 Cal. 203; *Burris v. Adams*, 96 Cal. 664.

Iowa. — *Welch v. McGrath*, 59 Iowa 519.

Nevada. — *Matter of Millenovich*, 5 Nev. 161.

New Jersey. — *Wortman v. Skinner*, 12 N. J. Eq. 358.

North Carolina. — *Turner v. Shuffler*, 108 N. Car. 642.

Pennsylvania. — *Painter v. Henderson*, 7 Pa. St. 48.

South Carolina. — *Britton v. Lewis*, 8 Rich. Eq. (S. Car.) 271.

"An administrator is not precluded from ordinary business transactions with his fellow-citizens concerning property, or its proceeds, bought at a sale which he has conducted, provided there was no express or implied understanding at the time of the purchase that the administrator should share the benefit. Such dealings may be evidence to raise the suspicion

of fraud; and, taken in connection with other circumstances, may establish it; but they are not conclusive, nor, standing alone, sufficient." *West v. Waddill*, 33 Ark. 575.

Purchase under Execution Against Vendee. — In *Shakeley v. Taylor*, 1 Bond (U. S.) 142, real estate was sold under an order of court by the administrators and a deed given to the purchaser, as directed by the order of confirmation. The purchaser gave his note for the price. Afterwards the administrators sued on the note and recovered a judgment. Execution was issued on the judgment and the land was sold under it, one of the administrators becoming the purchaser. It was held that such purchase by the administrator was not within the principle on which purchases by administrators at their own sales are held void, for the reason that, though the name of the administrator was necessarily used in the suit on the purchase-money note, still he had no control over the execution sale, and could not, by any agency on his part, prevent the fullest competition, or by any device or management effect a purchase at an unfair price.

2. Purchase by the Representative from His Vendee. — *Foxworth v. White*, 72 Ala. 224.

Strong Presumption of Indirection and effort to evade the general principle necessarily attach. If the purchase was recent after the sale made by the executor or administrator, and the vendee was his near relative, there must be clear and convincing evidence of the absence of all concert or collusion, that the original sale was fair, and that the consideration was adequate. *James v. James*, 55 Ala. 525 [citing *Obert v. Obert*, 10 N. J. Eq. 98; *Johnson v. Kay*, 8 Humph. (Tenn.) 142].

An indirect purchase by an administrator at his own sale is not shown by the mere fact that ten months after the sale he purchased the property from the purchaser. *Painter v. Henderson*, 7 Pa. St. 48.

3. Purchase Before Confirmation. — *Bland v. Fleeman*, 58 Ark. 84 [citing *Woodard v. Jaggers*, 48 Ark. 250; *Gibson v. Herriott*, 55 Ark. 92, 29 Am. St. Rep. 17; *McGaughy v. Brown*, 46 Ark. 32].

Until Confirmation the sale is incomplete and the representative cannot purchase from his vendee, because his interest conflicts with his duty. His interest in case of such purchase is to have the sale confirmed at the lowest possible price, while his duty is to have the property bring the highest price. *O'Connor v. Flynn*, 57 Cal. 203. See also *Ridgeway v. Ridgeway*, 84 Ga. 25; *Terwilliger v. Brown*, 44 N. Y. 237.

unanimous in holding that a purchase by an executor or administrator at his own sale is not void, but is merely voidable at the option of those who may be interested in the estate.¹ Such purchases have been characterized as "void" in some instances,² but it generally appears on examination that the term was not used with strict legal accuracy.³

(2) *Ratification and Acquiescence.* — Since a sale is merely voidable, and not void, on the ground that the executor or administrator was interested as a purchaser, it follows that the persons who have the right to set the sale aside may ratify it;⁴ and a ratification may be effected by acts done with knowl-

1. Purchase Merely Voidable and Not Void —
Alabama. — Fielder v. Childs, 73 Ala. 567.

Arkansas. — McGaughey v. Brown, 46 Ark. 25.

California. — Boyd v. Blankman, 29 Cal. 19, 87 Am. Dec. 146.

Georgia. — Newton v. Beckom, 33 Ga. 163; Smith v. Granberry, 39 Ga. 381, 99 Am. Dec. 464.

Indiana. — Comegys v. Emerick, 134 Ind. 148, 39 Am. St. Rep. 245; Morgan v. Wattles, 69 Ind. 260; Murphy v. Teter, 56 Ind. 545; Carter v. Lee, 51 Ind. 292; Rice v. Cleghorn, 21 Ind. 80; Shaw v. Swift, 1 Ind. 565.

Louisiana. — Hicks v. Weems, 14 La. Ann. 639.

Massachusetts. — Harrington v. Brown, 5 Pick. (Mass.) 519; Ives v. Ashley, 97 Mass. 198.

Mississippi. — Bland v. Muncaster, 24 Miss. 62, 57 Am. Dec. 162; Baines v. M'Gee, 1 Smed. & M. (Miss.) 208; Temples v. Cain, 60 Miss. 478.

New Hampshire. — Remick v. Butterfield, 31 N. H. 70, 64 Am. Dec. 316.

New Jersey. — Den v. Newark India Rubber Co., 24 N. J. L. 467; Den v. McKnight, 11 N. J. L. 386.

New York. — Pease v. Creque, 15 N. Y. Wkly. Dig. 15.

Compare Forbes v. Halsey, 26 N. Y. 65; Terwilliger v. Brown, 44 N. Y. 241; Froneberger v. Lewis, 70 N. Car. 456; Melms v. Pabst Brewing Co., 93 Wis. 153.

The Term "Void" as Used in a Statute declaring that all sales made by executors or administrators shall be "void," if they shall purchase directly or indirectly or be interested in any part of the real estate sold, is construed to mean "voidable." Such a construction, it is said, would seem to accord better with sound policy and the purposes of the statute than one which, for a secret defect, would defeat the title of an innocent purchaser for value. And it is observed that the words "void" and "voidable" are not always used in statutes and reports with entire legal accuracy, and the word "void" is often construed as meaning only "voidable." Melms v. Pabst Brewing Co., 93 Wis. 153 [citing Endlich Interp. Stat., § 270; Allis v. Billings, 6 Met. (Mass.) 415, 39 Am. Dec. 744; Jackson v. Henry, 10 Johns. (N. Y.) 185, 6 Am. Dec. 328; Dix v. Van Wyck, 2 Hill (N. Y.) 522; Green v. Kemp, 13 Mass. 515, 7 Am. Dec. 169; Reading v. Weston, 7 Conn. 409]. See also Roulston v. Roulston, 64 N. Y. 652; People v. Stock Brokers' Bldg. Co., 92 N. Y. 98; McCrubb v. Bray, 36 Wis. 333. And see the title VOID AND VOIDABLE.

2. Purchase by Executor or Administrator Characterized as Void. — Michoud v. Girod, 4 How.

(U. S.) 503; Latham v. Barney, 14 Fed. Rep. 433; Carroll v. Cockerham, 38 La. Ann. 813; Terwilliger v. Brown, 44 N. Y. 237; Hardy v. De Leon, 5 Tex. 211; Wipff v. Heder, 6 Tex. Civ. App. 685.

In Perry on Trusts, § 224, it is said that if an executor or administrator purchases indirectly of himself through a third person, and takes a deed to himself through such third person, the sale will be void, or the estate will be held in trust by such administrator or executor for the heirs at law or other persons interested.

As to Minor Heirs the sale is said to be void, though it is only voidable as to those not under any disability. Gibson v. Herriott, 55 Ark. 85, 29 Am. St. Rep. 17.

3. Inaccurate Use of Term "Void." — In Boyd v. Blankman, 29 Cal. 19, 87 Am. Dec. 146, the court shows clearly that a purchase by an executor or administrator at his own sale is voidable only, and not void, and that the term "void" is often used inaccurately in this connection.

Caldwell v. Caldwell, 45 Ohio St. 512, was a bill in equity to compel an administrator to sell the decedent's lands. It appeared that an order of sale had been made by the Probate Court, that the administrator had sold the land in question under the order, and that he afterwards took a deed to himself from the purchaser, who had never paid anything on account of the purchase money. In the syllabus by the court it is said that the transaction was "void" and that the lands were still "unadministered." In another paragraph of the same syllabus, however, the court speaks of the right of a beneficiary to have the deeds to and from the purchase "set aside in order to obtain a resale of the lands;" and the decree recited that such deeds "are declared void and set aside, and the lands declared to be subject to administration."

4. Purchase May Be Ratified — Georgia. — Newton v. Beckom, 33 Ga. 163.

Indiana. — Comegys v. Emerick, 134 Ind. 148, 39 Am. St. Rep. 245.

Louisiana. — Prothro v. Prothro, 33 La. Ann. 598; Wood v. Nicholls, 33 La. Ann. 744.

Maine. — Decker v. Decker, 74 Me. 465.

Massachusetts. — Jennison v. Hapgood, 7 Pick. (Mass.) 1, 19 Am. Dec. 258, 10 Pick. (Mass.) 77.

North Carolina. — Roberts v. Roberts, 65 N. Car. 27.

Pennsylvania. — Grim's Appeal, 105 Pa. St. 375.

Vermont. — Green v. Sargeant, 23 Vt. 466, 56 Am. Dec. 88.

Compare Latham v. Barney, 14 Fed. Rep. 433.

edge of the facts,¹ or by long-continued acquiescence in the transaction.²

d. SETTING ASIDE SALE—(1) *By Whom*.—If an executor or administrator, in violation of his duty, becomes the purchaser, either directly or indirectly, of the property sold by him, it is a fraud in law, and any party in interest, heir, devisee, or creditor, has the right to bring a suit in equity and have the sale set aside without regard to the question of injury to him or of any actually fraudulent intent on the part of the executor or administrator.³

Some of the Heirs May Ratify the transaction while the others may repudiate it so far as their interests are concerned. Each one has an individual election. If the affirmance of the sale by some and the avoidance of it by others will produce great inconvenience on the final settlement of the estate, it will fall, where it ought, upon the administrator who has violated his trust and by his wrongful act caused the embarrassment. *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23 [*citing* *Houghton v. Hapgood*, 13 Pick. (Mass.) 154; *Grout v. Hapgood*, 13 Pick. (Mass.) 159; *Jennison v. Hapgood*, 14 Pick. (Mass.) 345].

The heirs or their assignees have an election to avoid or confirm the sale, and in doing this they are not bound to act jointly. Each one has an individual election. *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316. But they cannot affirm the sale as to part of the land and disaffirm it as to the residue. *Jennison v. Hapgood*, 10 Pick. (Mass.) 107.

When Ratification by Creditors Binds Heirs.—If the creditors have assented to a purchase by the administrator at his own sale, and the whole estate is sufficient in amount to pay only about fifty per cent. of the debts, the heirs cannot have the sale set aside. *Highsmith v. Whitehurst*, 120 N. Car. 123.

1. "**The Acceptance of the Purchase Money**, with full notice that the administrator was the purchaser, *per interpositam personam*, would unquestionably amount to a ratification of the sale. The court would not countenance a partial disaffirmance of the sale that would enable the *cestui qui trust* to hold on to the purchase money and at the same time recover the land." *Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec. 146, *citing* *Terrill v. Auchauer*, 14 Ohio St. 80. See also *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409, 45 Am. Dec. 310; *Jones v. Smith*, 33 Miss. 215; *Bruch v. Lantz*, 2 Rawle (Pa.) 392, 21 Am. Dec. 458; *Beeson v. Beeson*, 9 Pa. St. 279; *Wood v. Nicholls*, 33 La. Ann. 744.

2. **Acquiescence Presumed from Lapse of Time**.—*Newton v. Beckom*, 33 Ga. 163; *Fuller v. Little*, 59 Ga. 338; *Williams v. Rhodes*, 81 Ill. 571; *Sloan v. Graham*, 85 Ill. 26; *Geyer v. Snyder*, 69 Hun (N. Y.) 115.

When Acquiescence Begins.—The period of acquiescence is only to be computed from the period when the injured party acquired, or ought, in the ordinary course of affairs, to have acquired, a knowledge of the fraud. *Miles v. Wheeler*, 43 Ill. 123.

Burden of Proving Acquiescence.—In *Miles v. Wheeler*, 43 Ill. 123, it was held that where acquiescence by the heirs was alleged to sustain a sale by an administrator to himself the burden of proof was on the party making the allegation. It was accordingly held, in a suit brought in 1861 to set aside such a sale made in 1844, that a decree granting the relief asked

would not be disturbed on the ground that the complainants (the decedent's daughters) had acquiesced in the sale, where it appeared that the oldest one was only about twelve years old at the time, that they were taken to a distant state to reside and had since lived there, and the record contained no evidence showing when knowledge of the fraud first came to them. Under such circumstances the court was of the opinion that in view of the complainants' age, sex, and distant locality, knowledge of the facts could not be presumed.

The Length of Time which must elapse before acquiescence will be inferred is not the same in all cases, but depends in each case on the particular facts and circumstances involved. *Smith v. Drake*, 23 N. J. Eq. 302.

3. **Any Party in Interest May Set Aside Sale**—*United States*.—*Price v. Morris*, 5 McLean (U. S.) 4.

Alabama.—*Calloway v. Gilmer*, 36 Ala. 354; *Frazer v. Lee*, 42 Ala. 25; *James v. James*, 55 Ala. 525; *Foxworth v. White*, 72 Ala. 224; *Fielder v. Childs*, 73 Ala. 567; *Daniel v. Stough*, 73 Ala. 379.

Arkansas.—*McGaughey v. Brown*, 46 Ark. 25.

California.—*Guerrero v. Ballerino*, 48 Cal. 118.

Georgia.—*Newton v. Beckom*, 33 Ga. 163; *Smith v. Granberry*, 39 Ga. 381, 99 Am. Dec. 464; *Grubbs v. McGlawn*, 39 Ga. 672; *Houston v. Bryan*, 78 Ga. 181, 6 Am. St. Rep. 252.

Illinois.—*Kruse v. Steffens*, 47 Ill. 112; *Sloan v. Graham*, 85 Ill. 26; *Williams v. Rhodes*, 81 Ill. 571; *Ebelmesser v. Ebelmesser*, 99 Ill. 541.

Indiana.—*Shaw v. Swift*, 1 Ind. 565; *Axton v. Carter*, 141 Ind. 672; *Comegys v. Emerick*, 134 Ind. 148, 39 Am. St. Rep. 245.

Iowa.—*Read v. Howe*, 39 Iowa 553.

Louisiana.—*Hicks v. Weems*, 14 La. Ann. 639; *Carroll v. Cockerham*, 38 La. Ann. 813. Under the statute of this state, however, an administrator who is the surviving spouse in community or an heir or legatee of the decedent may purchase for his own benefit at the administrator's sale. *Fristoe v. Burke*, 5 La. Ann. 657; *Aicard v. Daly*, 7 La. Ann. 612; *Davidson v. Davidson*, 28 La. Ann. 269.

Maine.—*Decker v. Decker*, 74 Me. 465.

Massachusetts.—*Harrington v. Brown*, 5 Pick. (Mass.) 519; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 24; *Jennison v. Hapgood*, 7 Pick. (Mass.) 1, 19 Am. Dec. 258, 10 Pick. (Mass.) 77.

Michigan.—*Beaubien v. Poupard*, Harr. (Mich.) 206; *Dwight v. Blackmar*, 2 Mich. 330, 57 Am. Dec. 130.

New Hampshire.—*Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316; *Hoitt v. Webb*, 36 N. H. 158.

New Jersey.—*Huston v. Cassedy*, 13 N. J.

But the right is confined to the parties in interest, and the validity of the sale cannot be questioned by strangers;¹ nor can the personal representative or any one interested with him avoid the sale on such ground.²

(2) *Against Whom* — (a) *Executor or Administrator as Purchaser*. — It is obvious that, if the sale is voidable because the executor or administrator purchased at his own sale, it may be set aside as against him.³

(b) *Subsequent Purchasers*. — As against third persons who have succeeded to the title under a purchase by the executor or administrator, the sale may be set aside if such third persons knew the nature of the transaction, or if they had knowledge of facts sufficient to put them on inquiry.⁴ But if they were *bona fide* purchasers, without notice of the invalidity of their grantor's title, they will be protected.⁵

(3) *Jurisdiction*. — After a sale under an order of the probate court has been confirmed by that court, it has no power to set the sale aside, but the remedy of a person injured by the fraud of the executor or administrator in making the sale is usually by a proceeding in equity.⁶

(4) *Time for Bringing Suit*. — In the absence of any statutory provision as to the time within which suit must be brought to set aside a sale on the ground that the executor or administrator was the purchaser, the rule is that suit must be brought within a reasonable time, else the transaction will be

Eq. 228, 14 N. J. Eq. 320; *Smith v. Drake*, 23 N. J. Eq. 302.

North Carolina. — *Froneberger v. Lewis*, 70 N. Car. 456; *Tayloe v. Tayloe*, 108 N. Car. 69.

"If an administrator, by order of court, sell the lands of the deceased, as such administrator, to himself as an individual, either directly or indirectly through a third person, he cannot hold the title thereto against the heirs of the deceased, if they take proper steps to avoid it. The question is not one of fraud in fact, or actual fraud; such a sale is itself a fraud in law, or constructive fraud, which the law will not uphold, whatever may have been the motive in making it. The principle is founded in the doctrine of trusts, namely, that a trustee, as a trustee, cannot sell the property he holds in trust to himself as an individual, either directly or indirectly, and profit thereby, as against the *cestui qui trust*." *Morgan v. Wattles*, 69 Ind. 260.

Creditors may set aside a purchase by the administrator, though the sale was made for the payment of debts. *Grubbs v. McGlawn*, 39 Ga. 672; *Van Dyke v. Johns*, 1 Del. Ch. 93, 12 Am. Dec. 76; *Elting v. Briggs*, 68 Ill. App. 204. But they can avoid such a sale only when they show that they are in danger of being injured thereby on account of an insufficiency of assets. *Bland v. Muncaster*, 24 Miss. 62, 57 Am. Dec. 162; *Baines v. M'Gee*, 1 Smed. & M. (Miss.) 208.

Actual Fraud is not established by the fact that the administrator made an agreement to share in the profits or losses on a resale of the property, where it appeared that in making the sale he acted in good faith to procure the highest possible price for the estate and that the purchaser paid more than any one else was willing to pay. *Williams v. Rhodes*, 81 Ill. 571.

1. *Strangers Cannot Question Validity*. — *Harrington v. Brown*, 5 Pick. (Mass.) 519; *Bland*

v. Muncaster, 24 Miss. 62, 57 Am. Dec. 162; *Baines v. M'Gee*, 1 Smed. & M. (Miss.) 208; *Byars v. Thompson*, 80 Tex. 468; *Melms v. Pabst Brewing Co.*, 93 Wis. 153.

A Lessee of Property Purchased by an Administrator at his own sale cannot question the validity of the title so acquired in an action for rent. *Murphy v. Teter*, 56 Ind. 545.

2. *The Representative or Persons Interested with Him* cannot avoid a sale on the ground that the representative was the real purchaser. *McAnulty v. Hodges*, 33 Miss. 579; *Painter v. Henderson*, 7 Pa. St. 48; *Dubose v. James*, 6 McMull. Eq. (S. Car.) 55.

But the Heirs or Others Interested in the estate may elect to ratify the sale and hold the purchaser liable for the price. See *supra*, this section, *Ratification and Acquiescence*.

3. See *supra*, this division of this section, *Setting Aside Sale — By Whom*.

4. *Subsequent Purchasers*. — In *O'Connor v. Mahoney*, 159 Ill. 69, it was held that the title of a person who purchased from the vendee at an administrator's sale would be set aside at the instance of the heirs, where the vendee bid in the property for the benefit of the administrator and the subsequent purchaser had notice thereof.

A Subsequent Purchaser Is Put on Inquiry by the fact that the record shows that the attorneys of the administrator who made the sale were O'Brien & Graham, the Christian name of Graham not appearing in the record, and that the purchaser was Robert Graham. *Fisher v. Bush*, 133 Ind. 315.

5. *Bona Fide Purchasers Protected*. — *Read v. Howe*, 39 Iowa 553; *Otis v. Kennedy*, 107 Mich. 312; *Seudder v. Stout*, 10 N. J. Eq. 377; *Booraem v. Wells*, 19 N. J. Eq. 87; *Johns v. Norris*, 22 N. J. Eq. 102.

As to Who Are Bona Fide Purchasers in general, see the titles JUDICIAL SALES; VENDOR AND PURCHASER.

6. See *supra*, this section, *Vacating and Setting Aside Sales — Jurisdiction*.

deemed to have been acquiesced in.¹

(5) *Evidence of Indirect Purchase.* — Proof of an indirect purchase by the executor or administrator is generally afforded by the circumstances of the case. Thus it is strong evidence of indirection that soon after the sale the nominal purchaser conveyed his interest to the executor or administrator, especially if he paid nothing on account of the purchase money;² or that he was without means to make the necessary payments, no explanation of the transaction being given.³

The Relation Between the Purchaser and the Executor or Administrator are also significant as showing an indirect purchase of, or the acquisition of an interest in, the property by the executor or administrator.⁴

(6) *Accounting on Setting Aside Sale.* — When a sale has been set aside, the executor or administrator in possession will be required to account for the rents and profits of the premises, after deducting the amount of repairs, taxes, and other proper disbursements.⁵

1. Suit Must Be Brought Within Reasonable Time — *Alabama.* — James v. James, 55 Ala. 525.

Georgia. — Rudolph v. Underwood, 88 Ga. 664; Newton v. Beckom, 33 Ga. 163; Smith v. Granberry, 39 Ga. 381, 99 Am. Dec. 464; Grubbs v. McGlawn, 39 Ga. 672.

Illinois. — Sloan v. Graham, 85 Ill. 26.

Indiana. — Shaw v. Swift, 1 Ind. 565.

Massachusetts. — Ives v. Ashley, 97 Mass. 198.

New Jersey. — Smith v. Drake, 23 N. J. Eq. 302.

See also *supra*, this section and subsection, *Ratification and Acquiescence.*

2. Evidence of Indirect Purchase — Conveyance by Purchaser to Representative. — In *Coat v. Coat*, 63 Ill. 73, the administrator sold the land to one H., and reported to the court that H. had chosen to pay all the money down and that the administrator had chosen to accept it. It appeared that all that H. ever did with respect to the purchase of the land was to make the bid and receive the deed. He never paid any part of the purchase money nor gave any security for its payment, nor was he ever called on for the amount of his bid or any part of it. He never exercised any ownership or paid any taxes or received any rent, though the premises were an improved farm under rent to a tenant. After the time of the sale, the administrator received all the rents, paid all the taxes, put out an orchard, planted half a mile of hedge, and cultivated it and made other improvements. The only reason given by H. for not complying with the terms of the sale was that, on the day of the sale, he told the administrator that if he bid off the land he could not make the cash payment, and the administrator said it would make no particular difference, as a considerable amount of the proceeds would be coming to him. No explanation was attempted of the fact that the deed was given without payment of any part of the bid, or the giving of any security for its payment, or making any arrangement with respect to it. It was held on these facts that there was only the form of a sale to H., and that the real substance of the transaction was a purchase for the administrator.

In *Kruse v. Steffens*, 47 Ill. 112, the auctioneer at an administrator's sale bid off the land and knocked it down to himself as pur-

chaser, but he paid no part of the purchase money nor did he execute notes and give a mortgage on the land. After the sale the administrator conveyed the land to the auctioneer and at the same time took a deed from him. It was held that the effect of this transaction was precisely the same as if the administrator had conveyed the land to himself.

In *Lagger v. Mutual Union Loan, etc., Assoc.*, 146 Ill. 283, an administratrix sold land under an order of court to pay a claim due her from the decedent's estate. Her husband became the purchaser, but he paid nothing on account of the purchase money. The administratrix merely credited the amount of the bid on the amount due her from the estate, and reported the sale as having been made for cash. She then conveyed the property to her husband, who shortly afterwards conveyed it through a third person to her. It was held that these facts showed clearly that the husband acted for his wife (the administratrix) in bidding for the property, and that she was in effect a purchaser at her own sale.

See also *McNeill v. Fuller*, 121 N. Car. 209.

3. Purchaser Without Means to Make Payments. — In *Obert v. Obert*, 10 N. J. Eq. 98, it was held that the facts that the nominal purchaser was a man of no means, and that on the same day the administrator conveyed the property to him he reconveyed it to the administrator, were sufficient proof, without any explanation of the transaction, that the purchase was made through the nominal purchaser for the benefit of the administrator.

4. Sale to Clerk of Executor. — In *Davies v. Hughes*, 86 Va. 909, it was held that fraud on the part of the executor was shown where he sold property of the estate to his clerk, and the clerk, without any payment of the purchase money, afterwards conveyed to the executor.

Sale to Minor Child of Administrator. — The fact that the sale was made to the minor child of the administrator has been held sufficient to show an indirect purchase by the administrator, where the administrator paid the purchase money. *Culver v. Culver*, 11 N. J. Eq. 215.

See further *supra*, this section and subsection, *Right to Become Purchaser — General Rule.*

5. Accounting by Executor or Administrator in Possession. — *Miles v. Wheeler*, 43 Ill. 123; *Kruse v. Steffens*, 47 Ill. 112; *Coat v. Coat*, 63 Ill. 73; *Ebelmesser v. Ebelmesser*, 99 Ill. 541;

If He Has Sold the Premises to a *bona fide* purchaser, he will be required to account for any profit that he may have made on such sale,¹ and if third persons were cognizant of the transaction and participated in it, they are liable for the rents and profits.²

17. Conveyance—*a. NECESSITY OF DEED.*—The statutes relating to sales of the real estate of decedents under orders of court generally provide in express terms for the execution of deeds to the purchasers,³ but a deed may be contemplated by the statute, though not expressly provided for.⁴ It is accordingly held that until a conveyance has been made pursuant to law, the title to the land sold does not pass to the purchaser, but remains in the heirs or devisees.⁵ On the other hand, some authorities hold that the sale, or rather confirmation of the sale, operates to vest the legal title in the purchaser,⁶ and that the deed is merely evidence of title.⁷

b. AUTHORITY TO EXECUTE—(1) *Order or Decree to Convey*—(a) *Necessity.*—The authority to execute a conveyance of land sold by order of the probate court is generally regulated by statute. If the statute provides for the execution and delivery of a deed when it shall be directed by an order of the court, no authority to convey exists until such order is made, and a con-

Brackenridge *v.* Holland, 2 Blackf. (Ind.) 377, 20 Am. Dec. 123. See *supra*, this section, *Rights and Liabilities of Purchaser on Avoidance of Sale.*

The Allowances to be made on the accounting include reasonable and proper improvements which have been placed on the land, enhancing its value, payments to creditors out of the price bid, taxes, and other expenses; and if the aggregate of such allowances exceeds the rents and profits charged, the balance will be charged on the land. *Ebelmesser v. Ebelmesser*, 99 Ill. 541. See also *Fisher v. Bush*, 133 Ind. 315.

1. Resale to Bona Fide Purchaser—Accounting for Profit.—*In re Ver Valen*, (Surrogate Ct.) 24 N. Y. Supp. 133; *Sheetz's Estate*, 2 Woodw. (Pa.) 407.

The Measure of Liability of the administrator on transferring the property to a third person is its value at the date of his deed. *Dilworth's Appeal*, 108 Pa. St. 92.

2. Liability of Persons Participating in Fraud.—In *Howcott v. Collins*, 23 Miss. 398, an administrator, for his own benefit, bid off in the name of A the land sold under an order of court, and procured A to take a deed and then to convey the land to the wife of B, who was cognizant of the transaction. It was held that A and B, having participated in the fraud of the administrator, were equally liable with him for the rents and profits of the land, but that the wife of B, not being a party to the fraud, was not liable.

3. See the various local codes and statutes in the United States.

4. Deed Required by Implication from Terms of Statute.—*Shontz v. Brown*, 27 Pa. St. 123.

5. Rule that Deed Is Necessary to Pass Title—Alabama.—*Lightfoot v. Doe*, 1 Ala. 475; *Cruikshank v. Luttrell*, 67 Ala. 318; *Landford v. Dunklin*, 71 Ala. 594.

Kansas.—*Gridley v. Phillips*, 5 Kan. 349. *Mississippi.*—*Jelks v. Barrett*, 52 Miss. 315.

Missouri.—*Wohlen v. Speck*, 18 Mo. 561. *Pennsylvania.*—*Emerick's Estate*, 172 Pa. St. 191, 37 W. N. C. (Pa.) 395; *Strange v. Austin*, 134 Pa. St. 96; *Greenough v. Small*, 137

Pa. St. 132, 21 Am. St. Rep. 859; *Overdeer v. Updegraff*, 69 Pa. St. 110; *Leshey v. Gardner*, 3 W. & S. (Pa.) 314, 38 Am. Dec. 764; *Erb v. Erb*, 9 W. & S. (Pa.) 147; *Biggett's Estate*, 20 Pa. St. 17.

The Title Remains in the Heirs as Security for the purchase money until a conveyance is made pursuant to an order by which the payment of the purchase money is judicially ascertained. *Bogart v. Bell*, 112 Ala. 412.

If the Heir or Devisee Dies Before a Conveyance Is Made the title to the land sold, according to the rule stated in the text, will descend to his heirs as real estate. *Overdeer v. Updegraff*, 69 Pa. St. 110.

A Conveyance Made Without an Order of court does not divest the title of the heirs or devisees, and they may maintain ejectment notwithstanding such conveyance. *Doe v. Hardy*, 52 Ala. 291.

6. Rule that Deed Is Not Necessary to Vest Legal Title in Purchaser.—*Sturdy v. Jacoway*, 19 Ark. 499.

It Was Formerly the Rule in Texas that the title vested in the purchaser on confirmation of the sale, without a deed of conveyance. *McKee v. Simpson*, 36 Fed. Rep. 248. The present statute provides that "after a sale has been confirmed by a decree of the court, upon the purchaser complying with the terms of the sale, the executor or administrator shall execute and deliver to the purchaser a proper conveyance of the property purchased by him." Rev. Stat. Tex. 1895, art. 2146. And see *Burgess v. Millican*, 50 Tex. 397.

7. Deed Held Merely Evidence of Title Vested in Purchaser.—*Rock v. Heald*, 27 Tex. 523.

In an action by the heirs against the purchaser to recover possession of the land sold, it is not essential to the defense that the purchaser should show a deed. The fact of sale in accordance with the order and the payment of the purchase money are in proof, and would be sufficient for the defense, although no deed may have been made by the administrator and none was offered in evidence. *Bartlett v. Cocke*, 15 Tex. 471. See also *Miller v. Alexander*, 8 Tex. 36; *Sypert v. McCowen*, 28 Tex. 635.

veyance made without an order is inoperative to pass the legal title;¹ but the equitable title acquired by the payment of the purchase money will prevail against a stranger, though the deed was executed without an order of court.²

(b) **Who May Apply for Order.** — An application for an order directing a conveyance, when such order is necessary to give authority to convey, may be made either by the purchaser or by the executor or administrator.³

(c) **Notice of Application.** — If the application for an order to convey is made by the purchaser, notice must be given to the heirs of the decedent, though the statute does not provide for such notice;⁴ but notice is not required if the application is made by the executor or administrator.⁵

(d) **Power to Compel Conveyance.** — In case the executor or administrator wrongfully neglects or refuses to execute and deliver a deed, the probate court may compel him to do so at the instance of the purchaser.⁶

(2) *By Whom Made* — (a) **In General.** — As a general rule, the executor or administrator who made the sale is the proper person to execute the deed, though in some jurisdictions this function, as well as the conduct of the sale, may be performed by persons other than the executor or administrator.⁷

If the Administratrix Is a Married Woman it is not necessary that her husband should join with her in the execution of a deed of the real estate of her dece-

1. **Order to Convey Required by Statute.** — *Lightfoot v. Doe*, 1 Ala. 475; *Cummings v. McCullough*, 5 Ala. 324; *Bonner v. Greenlee*, 6 Ala. 411; *Perkins v. Winter*, 7 Ala. 855; *Wallace v. Hall*, 19 Ala. 367; *Doe v. Hardy*, 52 Ala. 291; *Landford v. Dunklin*, 71 Ala. 594; *Nelson v. Murfee*, 69 Ala. 508; *McCully v. Chapman*, 58 Ala. 325; *Tyson v. Brown*, 64 Ala. 244; *Cruikshank v. Luttrell*, 67 Ala. 318; *Ketchum v. Creagh*, 53 Ala. 224; *Van Hoose v. Bush*, 54 Ala. 342.

"Without the order of the court to execute the conveyance, the personal representative has no authority to execute a conveyance which will pass the title. The court is the vendor, not the personal representative, and may in its discretion appoint some other person than the representative to execute the conveyance. * * * It is settled by a long line of decisions in this court that under a sale of lands made in pursuance of an order or decree of the Court of Probate, the title of the heirs or devisees is not divested until a conveyance is executed by the order of the court. A conveyance executed without such order, in a court of law, is wholly inoperative." *Landford v. Dunklin*, 71 Ala. 606. See also *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297. Compare statutes in other jurisdictions.

2. **As Against a Stranger** a deed to the purchaser will not be held void because the payment of the purchase money was not reported to the court and an order obtained for the execution of the deed. *Wood v. Montgomery*, 60 Ala. 500.

3. **Who May Apply for Order to Convey.** — Under the *Alabama* statute an application for an order to convey may be made by the purchaser, or by his heirs or any person claiming under him, or by the executor or administrator who made the sale. *Ligon v. Ligon*, 84 Ala. 555.

4. **Application by Purchaser** — **Notice to Heirs Required.** — *Dugger v. Tayloe*, 60 Ala. 504. See also *Ligon v. Ligon*, 84 Ala. 555; *Anderson v. Bradley*, 66 Ala. 263; *Bolling v. Smith*, 108 Ala. 411.

5. **Application by Executor or Administrator** — **Notice Not Required.** — If the application is made by the executor or administrator, notice to the heirs is not required, because, the proceeding being *in rem*, they are considered as having notice of all proceedings which follow in the usual and regular course. *Ligon v. Ligon*, 84 Ala. 555.

6. **Probate Court May Compel Execution of Deed.** — *Anderson v. Bradley*, 66 Ala. 263; *Matter of Lewis*, 39 Cal. 306; *Peterman v. Watkins*, 19 Ga. 153; *Gridley v. Phillips*, 5 Kan. 349.

The former statute in *Alabama* authorizing the court to order a conveyance to be made to the "purchaser" was construed to mean the original vendee or buyer who acquired by his bid an estate in the land sold, and not a sub-purchaser or one who held under the original purchaser by transfer, sale, or release; but this statute was amended by the Act of March 1, 1881, so as to correct the defect and authorize the Probate Court to compel a conveyance to a subpurchaser. *Anderson v. Bradley*, 66 Ala. 263.

If the probate judge wrongfully refuses to execute a deed, mandamus will lie to compel him to execute it. *State v. Burnside*, 33 S. Car. 276.

7. **By Whom Deed Is to Be Made in General.** — See various local codes and statutes in the United States. As to who may make the sale, see *supra*, this section, *Manner and Terms of Sale—Who May Make Sale*.

If the Court, Without Authority, Appoints Commissioners to Sell, a deed by them is effectual to pass their title to the land sold, they being the heirs of the decedent. Having received the purchase money, they are estopped from setting up any claim to the land which they sold and conveyed as commissioners. *Berger v. Arnold*, (Tex. Civ. App. 1893) 24 S. W. Rep. 527.

If the Administrator Is the Purchaser by virtue of authority given by statute, the deed must be executed by a commissioner appointed by the court for that purpose. *Bolling v. Smith*, 108 Ala. 411; *Bogart v. Bell*, 112 Ala. 412.

dent sold by her under an order of court.¹

(b) **Administrator De Bonis Non.** — If an executor or administrator dies after making a sale, or his official character is terminated, and an administrator *de bonis non* is appointed, the weight of authority seems to be to the effect that the administrator *de bonis non* may execute a deed to the purchaser, by virtue of his authority to take up the administration at the point where his predecessor left off;² though the contrary has been decided.³

(c) **Agent of Executor or Administrator.** — The execution of the deed is an act which must be performed by the executor or administrator personally, and cannot be delegated to an agent or attorney.⁴

c. **TO WHOM MADE** — (1) *Purchaser.* — Ordinarily the deed is to be made to the purchaser, as in the case of other judicial sales.⁵

(2) *Assignee of or Person Designated by Purchaser.* — If the successful bidder does not wish the deed to be made to himself, it may be made to any person whom he may designate,⁶ or, if he has assigned his interest under his bid, the deed may be made to the assignee.⁷

d. **TIME FOR MAKING DEED.** — The time when the purchaser becomes entitled to receive a deed is generally regulated by statutes varying more or less in the different jurisdictions.⁸ If the sale was made for cash, it is obvious that payment of the purchase money is necessary to entitle the purchaser to a deed. But where a sale is on credit, the right of the purchaser to a deed before payment of the entire purchase money depends on the terms of sale authorized by law in the particular jurisdiction.⁹

1. **Deed by Feme Covert Administratrix.** — "When the law authorizes a married woman to act as an administratrix, it necessarily clothes her with power to perform all acts necessary to a complete performance of all the duties of the position. An administratrix is not only authorized, but required, when necessary, to petition the court for leave to sell real estate to pay debts, and when leave is granted, the law imposes the duty of making the sale; and it is not so unreasonable as to require the performance of the duty, and still leave it in the power of a person wholly disconnected with the trust to frustrate the requirements of the law." *Huls v. Buntin*, 47 Ill. 396.

2. **Rule that Administrator De Bonis Non May Execute Deed.** — *Peterman v. Watkins*, 19 Ga. 153; *Baker v. Bradsby*, 23 Ill. 632; *Gridley v. Phillips*, 5 Kan. 349.

An administrator *de bonis non* cannot be appointed for the sole purpose of correcting a defective deed executed by his predecessor, or to execute a deed which his predecessor had neglected to execute. *Grayson v. Weddle*, 63 Mo. 523; *Long v. Joplin Min., etc., Co.*, 68 Mo. 422.

3. **Authority of Administrator De Bonis Non to Execute Deed Denied.** — In *Mississippi* it is held that an administrator *de bonis non* has no authority to execute a deed of land which his predecessor sold under an order of court, but failed to convey to the purchaser, because, it is said, the powers of an administrator *de bonis non* are limited to the administration of the goods and chattels left unadministered by the first administrator, and the law commands and authorizes the administrator selling the land to make the deed, and has neither contemplated nor provided for a breach of that duty by clothing the successor with power to fulfil it at his own discretion. *Davis v. Brandon*, 1 How. (Miss.) 154.

4. **Deed Cannot Be Made by Agent or Attorney.** — *Gridley v. Phillips*, 5 Kan. 349.

In *Missouri* this question has been raised, but was not decided, though Wagner, J., delivering the opinion of the court, expressed a doubt as to whether the administrator could delegate to an agent or attorney his authority to execute the deed. *Rugle v. Webster*, 55 Mo. 246.

5. **Deed Ordinarily to Be Made to Purchaser.** — This is obvious, and requires no citation of authorities to sustain it.

6. **Deed to Person Designated by Purchaser.** — *McKee v. Simpson*, 36 Fed. Rep. 248; *Ward v. Lowndes*, 96 N. Car. 367; *Coffin v. Cook*, 106 N. Car. 376.

7. **Deed to Assignee of Purchaser.** — *Anderson v. Bradley*, 66 Ala. 263; *Pruitt v. Holly*, 73 Ala. 369; *Halleck v. Guy*, 6 Cal. 181, 70 Am. Dec. 643; *Hobson v. Ewan*, 62 Ill. 146; *Ewing v. Higby*, 7 Ohio (pt. i.) 198.

In *Alabama* the deed could be made only to the purchaser, and not to his assignee, prior to the Act of 1881. *Anderson v. Bradley*, 66 Ala. 263; *Pruitt v. Holly*, 73 Ala. 369. But by the Act of 1881 it was provided that the deed should be made to the "purchaser, or his heirs, or any other person holding under him, directly or derivatively." Code Ala. 1896, § 179.

A person in possession by virtue of an exchange with the purchaser which is void under the statute of frauds is not entitled to a deed, because he does not hold under the purchaser within the meaning of the statute. *Webb v. Ballard*, 90 Ala. 357.

8. **Time for Making Deed in General.** — See the various local codes and statutes in the United States. See also the title JUDICIAL SALES.

9. **Right to Deed Before Payment of Price in Full.** — In *Alabama* the court has authority to direct a conveyance to the purchaser only

Termination of Authority to Execute Deed.—The authority of an executor or administrator to execute a deed of land sold by him continues, as a general rule, until he has been discharged in the ordinary course of law.¹ But in some jurisdictions there is a definite limitation of the period within which the deed may be given, and after the expiration of such period it is held that no authority to convey exists.²

Delay in Executing and Delivering the Deed beyond the time when the purchaser, according to the terms of the sale, was entitled to receive it does not release him, where the delay was caused by objections to the confirmation of the sale.³

e. VALIDITY AND REQUISITES OF DEED—(1) *Recitals*—(a) **Recital of Authority to Convey.**—The deed must recite the authority of the executor or administrator to make the sale; that is, it must state that an order of sale was made by the proper court;⁴ but this rule does not require that the order

when the purchase money has been paid in full, and an order for a conveyance of title made before the payment of the purchase money is a nullity. *Corbitt v. Clenny*, 52 Ala. 480; *Wallace v. Nichols*, 56 Ala. 321.

In *North Carolina* it is held to be erroneous for the judge of probate to order the execution and delivery of a conveyance of the lands to the purchaser before the whole of the purchase money has been paid, but such error is not a ground on which the heirs can have the sale set aside in equity. *Hyman v. Jarnigan*, 65 N. Car. 96.

If the Administrator Becomes the Purchaser, as he is authorized to do in some jurisdictions, he has no right to a deed until he shows that he has paid the purchase money. *Bogart v. Bell*, 112 Ala. 412.

1. Termination of Authority to Execute Deed.—In *Warren v. Carter*, 92 Mo. 288, it was held that the authority of a public administrator to convey land belonging to an estate which he was administering, and sold by him under an order of court, was not terminated by an order that he turn over to his successor in office all the money and effects belonging to said estate, where it did not appear that he had made a final settlement or been discharged.

Execution of Deed After Term of Office Expires.—In *Texas*, where the period of administration is limited, it is said that if necessary for the rights of the purchaser, an administrator, though his term of office may have expired, may execute a formal conveyance of lands sold and paid for during his administration. *Bartlett v. Cocke*, 15 Tex. 471.

Though a Final Settlement Has Been Made, it is held in *Missouri* that if the administrator has not been discharged he may make a deed in completion of a sale made before the settlement. *Wilkerson v. Allen*, 67 Mo. 502.

2. Limitation of Period for Making Deed.—Where the statute limits the time that the license to sell shall remain in force (one year in *Maine* and *Massachusetts*), it is held that the authority to convey is limited to the same period, and that a deed given thereafter is void. *Marr v. Hobson*, 22 Me. 321; *Marr v. Boothby*, 19 Me. 150; *Mason v. Ham*, 36 Me. 573; *Macy v. Raymond*, 9 Pick. (Mass.) 285. But see *contra*, *Howard v. Moore*, 2 Mich. 226, followed in *Osman v. Traphagen*, 23 Mich. 80.

This Rule Was Questioned in a late *Maine* case on the ground that it was very technical and so liable to work positive injustice, but it

was followed because the court was of opinion that it was bad policy to overturn even a questionable decision when it had been long acquiesced in and many titles probably had been taken and transferred in pursuance of it. *Poor v. Larrabee*, 58 Me. 543.

The Rule Was Changed in Massachusetts by the Act of 1840, c. 97, providing that the sale shall be valid though the deed is not delivered within a year, if certain conditions are complied with. *Jewett v. Jewett*, 10 Gray (Mass.) 31.

Acknowledgment of the Deed within the time limited is not necessary, if the deed was executed and delivered within such time. *Poor v. Larrabee*, 58 Me. 543.

3. Delay Caused by Objections to Confirmation—Purchaser Not Released.—*Robb v. Mann*, 11 Pa. St. 300, 51 Am. Dec. 551.

4. Authority to Sell Must Be Recited.—*Griswold v. Bigelow*, 6 Conn. 258; *Lockwood v. Sturdevant*, 6 Conn. 373; *Watson v. Watson*, 10 Conn. 77.

"It is an established principle that the authority by virtue of which an administrator is empowered to sell and convey estate must appear on the deed of conveyance, and with such certainty that the act done shall visibly be warranted by the power conferred. * * * And although in some cases it has been held that the authority need not be referred to, when the act done is of such a nature that it can have no operation, unless by virtue of the power, * * * yet this principle has never been supposed applicable to the conveyances made by executors and administrators." *Lockwood v. Sturdevant*, 6 Conn. 385.

Formal Recitals of the authority to sell are not necessary. If it appears that the sale was by virtue of the order of the court, that is sufficient. *Coffin v. Cook*, 106 N. Car. 376.

The Recital of Authority Is Sufficient where it is in the following form: "I, Anne Bliss, of East Windsor, executrix of the last will and testament of Ebenezer Bliss, of said East Windsor, for and in consideration, * * * do, by these presents, and in conformity to an order of the honorable Court of Probate of the district of Hartford, dated the 24th day of March, 1786, me thereto directing and empowering, give, grant, bargain," etc. *Watson v. Watson*, 10 Conn. 85.

A Mistake in the Recital of the order of sale will not vitiate the deed if the order was sufficient. *Jones v. Taylor*, 7 Tex. 240, 56 Am. Dec. 48.

of sale should be set forth in full, unless it is so provided by statute,¹ nor is it necessary to recite the reasons on which the order of sale was based.²

The Date of the Order is not essential, and a misrecital or omission in this respect will not vitiate the deed if facts are stated which show that the sale was made under the true license.³

(b) **Recital of Grantor's Character.** — The deed should show on its face the character or capacity in which the grantor acts,⁴ but a recital that he acted as "administrator" instead of "executor," or *vice versa*, is merely an irregularity which cannot affect the validity of the deed.⁵

(c) **Recital of Consideration.** — The deed should state the consideration of the sale,⁶ but it is not necessary to state the amount of the nominal bid, where it was agreed between the purchaser and the administrator before the sale that the amount of any incumbrances on the land should be deducted from the amount which the purchaser should bid.⁷

(d) **Description of Property.** — The deed must describe the property sold with sufficient certainty to identify it, and the description in the deed must conform to the description in the petition for leave to sell; otherwise no title will pass to the purchaser.⁸

A Supplemental Order which does not affect the power to sell given by the original order, and does not relate to the substance of the original order, but only modifies it as to the credit to be given, need not be referred to in the administrator's deed. A reference to the original order is sufficient. *Moffitt v. Moffitt*, 69 Ill. 641.

What Law Governs. — The law in force when the sale was made governs in respect to the recitals which the deed should contain. *Hughes v. McDivitt*, 102 Mo. 77.

1. Order of Sale Need Not Be Set Out in Full. — *Thorp v. McCullum*, 6 Ill. 614; *Stryker v. Vanderbilt*, 27 N. J. L. 68; *Jones v. Taylor*, 7 Tex. 240, 56 Am. Dec. 48; *Langdon v. Strong*, 2 Vt. 234.

Formerly it was provided by statute in some jurisdictions that the deed should set out the order of sale in full. *Smith v. Hileman*, 2 Ill. 323; *Stryker v. Vanderbilt*, 27 N. J. L. 68.

In New York the statute formerly provided (1 Rev. L. 1801, p. 324, § 21) that the deed should set forth the order "at large." *Atkins v. Kinnan*, 20 Wend. (N. Y.) 241. But the present statute merely requires that the deed shall "briefly refer to the decree, the order to execute it, and the order of confirmation." Rev. Stat. N. Y. (Birdseye's 2d ed.), p. 1223, § 139; Code Civ. Pro. N. Y. 1891, § 2776.

2. Recital of Reasons for Ordering Sale Not Necessary. — *Watson v. Watson*, 10 Conn. 77, *disapproving* *Lockwood v. Sturdevant*, 6 Conn. 373.

3. Misrecital of Date of License. — In *Thomas v. Le Baron*, 8 Met. (Mass.) 355, it was held that a misrecital of the date of the license was merely a false description, and did not affect the validity of the deed where it contained other recitals controlling the false description and establishing the sale, with sufficient certainty, as having been made under the true license. See also *Stryker v. Vanderbilt*, 27 N. J. L. 68.

4. Recital of Grantor's Character. — The mere fact that the grantor appended to his signature the words "executor of" the testator, without any other description of the capacity in which he was acting, does not make the deed his as

executor only, but it will pass all his interest, whether as heir at law or devisee. *Mills v. Herndon*, 60 Tex. 353.

5. Misrecital of Grantor's Character or Capacity. — *Cooper v. Robinson*, 2 Cush. (Mass.) 184; *Norman v. Olney*, 64 Mich. 553. See also *Mobberly v. Johnson*, 78 Ky. 273.

6. Consideration Must Be Recited. — *Hughes v. McDivitt*, 102 Mo. 77.

7. Agreement to Deduct Incumbrances from Nominal Bid. — *Stebbins v. Field*, 43 Mich. 333.

8. Deed Must Describe Property Sold. — *Borders v. Hodges*, 154 Ill. 498; *Greene v. Holt*, 76 Mo. 677. See also the title JUDICIAL SALES, 12 ENCYC. OF PL. AND PR. 109.

Only the Property Described in the deed passes by it. *Bromberg v. Yukers*, 108 Ala. 577.

Description in Deed Must Conform to Petition for Sale. — *Blackwell v. Townsend*, 91 Ky. 609. *Compare* *Agan v. Shannon*, 103 Mo. 661.

A Deed Was Held Void for Uncertainty in Describing the land sold merely as "part of claim No. 2087, survey No. 440, in township 6, south of range 8 west, and part of claim No. 559, survey No. 696, in township 6 south, range 7 west, saving and excepting 73 $\frac{1}{100}$ acres off of claim No. 2087, survey 440, sold by Catherine Fisher, * * * by virtue of an order of the Probate Court made at the January term, 1869, sold to pay debts." *Borders v. Hodges*, 154 Ill. 498.

So, too, where the description was "three hundred and twenty acres of land, being a part of a league square, formerly owned by Luke Hoff, Sen., deceased, known as survey No. 1685, in township 52, ranges 1 and 2 west, being parts of lots No. 6 and 12 of said league square, as the same was divided among the heirs of said Luke Hoff." Such description did not show how much was in the lot, or in what part of the lots the tract intended to be sold was located. It was too much to be all located in lot No. 6, and not enough to comprehend all of lot No. 12. If it had been confined to lot No. 12, still there was nothing to identify the part of this lot to be covered by the three hundred and twenty acres. *Jones v. Carter*, 56 Mo. 403.

In another case the deed was held void for

(2) *Acknowledgment*. — The rules in regard to the acknowledgment of deeds conveying land sold under an order of the probate court are the same as apply to other conveyances, a treatment of which will be found in another part of this work.¹

(3) *Approval by Court*. — In some jurisdictions the statutes require the approval of the deed by the court in order to complete its validity.²

(4) *Delivery*. — The necessity of delivery of deeds of land sold under an order of court and the principles applicable thereto are the same as in the case of other deeds, a full discussion of which may be found in another part of this work.³

(5) *Effect of Informalities*. — Mere informalities or technical defects will not ordinarily invalidate the deed,⁴ and they may be cured by the subsequent execution of a deed in proper form,⁵ or the purchaser may have the deed reformed in equity.⁶

(6) *Presumption of Regularity*. — There is a presumption in favor of the validity and correctness of the deed, especially after the lapse of a considerable time.⁷

f. OPERATION AND EFFECT OF DEED — (1) *In General*. — By the execution and delivery of a deed, in accordance with the law regulating the subject, the title of the heirs or devisees is divested and passes to the purchaser.⁸ The

uncertainty where it described the land as a parcel of one thousand eight hundred acres, "being the upper part of the league and labor of land granted to the heirs of Mary Bird, situated on the waters of Pecan Bayou, in Travis." *Harris v. Shafer*, 86 Tex. 314.

1. *Acknowledgment of Deed*. — See the title ACKNOWLEDGMENTS, vol. I, p. 483. See also the title JUDICIAL SALES, 12 ENCYC. OF PL. AND PR. 106.

The Arkansas Statute provides that all deeds recorded before January 1, 1883, shall pass title though the acknowledgment is defective. *Cupp v. Welch*, 50 Ark. 294.

2. *Approval of Deed Required*. — *Leshey v. Gardner*, 3 W. & S. (Pa.) 314, 38 Am. Dec. 764; *Morton v. Sloan*, 11 Humph. (Tenn.) 278.

Approval Indorsed on a Deed executed pursuant to a special statute is sufficient, where it refers to the statute. *King v. Merritt*, 67 Mich. 194.

3. See the title DEEDS, vol. 9, p. 150; EXECUTION AND PROOF OF DOCUMENTS, *ante*.

4. *Informalities and Technical Defects*. — An administrator's deed is not invalid because it uses the words "probate judge" instead of "Probate Court," the two phrases being nearly synonymous. *Brubaker v. Jones*, 23 Kan. 411.

An erroneous recital as to the time and place of the sale may be disregarded, where the law does not require those facts to be stated in the deed. *Price v. Springfield Real Estate Assoc.*, 101 Mo. 107, 20 Am. St. Rep. 595.

Where the county in which the administration was pending was divided, and the court which ordered and confirmed the sale improperly transferred the proceeding to the new county, and the court of that county made the deed, it is nevertheless valid as against the heirs of the decedent, though the court of the new county had no jurisdiction. *McNew v. Williams*, (Ky. 1896) 36 S. W. Rep. 687.

Informalities, such as the lack of a seal or want of proper acknowledgment, do not invalidate the title of the purchaser. He still has

an equitable title under which he may defend an action of ejectment by the heirs. *Snider v. Coleman*, 72 Mo. 568. See also *Gilbert v. Cooksey*, 69 Mo. 42.

5. *Defects Cured by New Deed*. — In *Moody v. Hamilton*, 22 Fla. 298, it was held that where the commissioner making the sale failed to affix his seal, he could afterwards execute a deed in proper form without a further order of the court.

In *Rugle v. Webster*, 55 Mo. 246, a deed of land sold by an administrator was executed by his attorney, to whom he assumed to delegate his authority. Afterwards the administrator himself executed a deed. The court, assuming that the first deed was invalid because executed by an attorney of the administrator, held that the later one was valid and effectual, though the administrator at the time when he executed it had made his final settlement.

6. *Reformation in Equity*. — *Piatt v. St. Clair*, 7 Ohio (pt. ii.) 165. See also the title REFORMATION AND CANCELLATION OF INSTRUMENTS.

7. *Presumption of Regularity*. — *Price v. Springfield Real-Estate Assoc.*, 101 Mo. 107, 20 Am. St. Rep. 595; *Starr v. Brewer*, 58 Vt. 24. See also the title JUDICIAL SALES, in this work; and the title JUDICIAL SALES, 12 ENCYC. OF PL. AND PR. III.

8. *Operation and Effect of Deed — Transfer of Title*. — See *supra*, this section, *Title, Rights, and Liabilities of Purchaser — When Title and Right of Possession Vest*; and *supra*, this division of this section, *Conveyance — Necessity of Deed*.

The Deed Is Evidence of the Title of a remote purchaser in an action by the heirs to recover the land from him, if it embraces any portion of the land sued for, though the description contained in it does not correspond with the description of the land sued for. *Doe v. Riley*, 28 Ala. 164.

When an Administrator's Deed Is Produced as evidence of title, together with a certified copy of the order of sale, it is sufficient to establish

deed must be adapted to convey the estate which the decedent had in the land, and it is inoperative for that purpose if it is, in form, merely a release by the executor or administrator of his interest.¹

Covenants of Warranty or of Seizin, if any are inserted in the deed, do not bind the estate, because the executor or administrator has no authority in his representative capacity to give any warranty; but they operate only as a personal obligation of the executor or administrator executing the deed,² unless they refer to the representative character of the grantor.³

(2) *Deed as Evidence of Recitals Therein*. — The recitals of the deed are presumptive evidence, after the lapse of a considerable time, of the existence of the facts recited, where possession has been held under the deed,⁴ and in some jurisdictions it is expressly provided by statute that the deed shall be *prima facie* evidence of the facts recited.⁵

18. Disposal of Proceeds — *a. COSTS AND EXPENSES OF SALE*. — Generally the costs and expenses of the sale are to be satisfied out of the proceeds before they are applied to other purposes.⁶

b. DISCHARGE OF INCUMBRANCES. — In those jurisdictions where the sale divests liens to which the property sold is subject, the lien creditors are to be paid out of the proceeds according to the priority of their several liens in preference to the unsecured claims against the estate.⁷

c. DISTRIBUTION OF SURPLUS. — The sale of real estate under an order of

the title, without producing the letters of administration. *Roberts v. Martin*, 70 Ga. 196.

Variance Between Deed and Order of Sale. — If the order authorized the sale of only an undivided half of a lot, the deed will pass only that interest though it purports to convey the entire lot. *Pace v. Fishback*, 10 Tex. Civ. App. 450.

Limitation of Estate Conveyed. — In *Iseman v. McMillan*, 36 S. Car. 27, it was held that there is no authority for conveying the property sold for life, remainder over, unless it is so provided by order of court.

1. Deed Must Be Adapted to Convey Decedent's Estate. — A deed of release is entirely unadapted to the execution of the power confided to the administrator. The instrument intended by law must be such as is proper for the disposition of that which is the subject-matter of the power. As it can have no operation unless by virtue of the power, the law requires a resort to that power for the purpose of giving validity to the instrument. *Griswold v. Bigelow*, 6 Conn. 258.

2. Covenants of Warranty or Seizin Not Binding on Estate — *Connecticut*. — *Coe v. Talcott*, 5 Day (Conn.) 88.

Illinois. — *Vincent v. Morrison*, 1 Ill. 227.

Iowa. — *Hale v. Marquette*, 69 Iowa 376.

Maine. — *Mason v. Ham*, 36 Me. 573.

Massachusetts. — *Sumner v. Williams*, 8 Mass. 220, 5 Am. Dec. 83.

North Carolina. — *Godley v. Taylor*, 3 Dev. L. (14 N. Car.) 178.

Ohio. — *Dunlap v. Robinson*, 12 Ohio St. 530.

Vermont. — *Brown v. Van Duzee*, 44 Vt. 529; *Prouty v. Mather*, 49 Vt. 415.

Wisconsin. — *Mabie v. Matteson*, 17 Wis. 1.

See also *supra*, this section, *Title, Rights, and Liabilities of Purchaser* — *Rule of Caveat Emptor*.

3. Covenants Referable to Representative Character Not Personally Binding. — *Wright v. De Groff*, 14 Mich. 164; *Day v. Brown*, 2 Ohio

345; *Shontz v. Brown*, 27 Pa. St. 123; *Grantland v. Wight*, 5 Munf. (Va.) 295.

4. Deed as Evidence of Facts Recited — *Lapse of Time*. — *Baeder v. Jennings*, 40 Fed. Rep. 199. In this case it was held that where possession had been held under the deed for a long time (between forty and fifty years), a recital that an order of sale had been made was evidence of that fact. See also *White v. Jones*, 67 Tex. 638. Compare *Tucker v. Murphy*, 66 Tex. 355.

5. Statutory Provisions — *Deed Made Evidence of Facts Recited*. — *Cupp v. Welch*, 50 Ark. 294; *Camden v. Plain*, 91 Mo. 117; *Hoffman v. Wheelock*, 62 Wis. 434; *Chase v. Whiting*, 30 Wis. 544.

The *Michigan Statute* provides that after the lapse of ten years the deed shall be *prima facie* evidence of the regularity of the proceeding to sell. *Egan v. Grece*, 79 Mich. 629.

The *New Jersey Statute* of 1864, providing that deeds executed by officers or auditors in attachment, acting in pursuance of a decree, judgment, execution, or order of court, duly acknowledged, shall be *prima facie* evidence of the recitals therein, does not include those executed by an administrator or executor under an order of court. Executors and administrators are not officers within the meaning of the statute. *Baeder v. Jennings*, 40 Fed. Rep. 199.

See also the statutes in other jurisdictions.

6. Payment of Costs and Expenses Out of Proceeds of Sale. — *Higbie v. Westlake*, 14 N. Y. 281; *Murray's Estate*, 18 Cal. 686. Compare *Bayless v. People*, 56 Ill. App. 55.

7. Discharge of Incumbrances — *California*. — *Murray's Estate*, 18 Cal. 686.

Louisiana. — *Tureaud v. Gex*, 21 La. Ann. 253.

Missouri. — *Trent v. Trent*, 24 Mo. 307.

North Carolina. — *Pate v. Oliver*, 104 N. Car. 458.

Ohio. — *Holloway v. Stuart*, 19 Ohio St. 472. *Pennsylvania*. — *Arndt's Appeal*, 117 Pa. St. 120; *Maury's Estate*, 4 Pa. Dist. Rep. 752.

court operates to convert it into money only for the purposes for which the sale was made, and the surplus remaining after those purposes have been accomplished retains the character of real estate and is to be distributed accordingly.¹

XI. DISTRIBUTION OF ESTATE—1. Duty to Pay Legacies and Distributive Shares—*a. LEGACIES—*(1) *In General.*—After all the debts of and charges against the estate have been paid, it is the duty of the executor or administrator to pay or deliver the legacies given by the will,² and he should notify the legatees of their legacies and of his readiness to pay them.³

(2) *Assent of Executor.*—Inasmuch as the title to all the testator's personality vests in the executor, and he is responsible to creditors to the extent of the whole estate without regard to any directions in the will that it shall be applied to other purposes, the law imposes on every legatee, as a protection to the executor, the necessity of obtaining the executor's assent to the legacy before his duty to pay or deliver it becomes fixed.⁴

South Carolina.—Shell *v.* Young, 32 S. Car. 462.

Texas.—Toullerton *v.* Manchke, 11 Tex. Civ. App. 148.

A Vendor's Lien on property sold under an order of court is payable out of the proceeds in preference to all others. Toullerton *v.* Manchke, 11 Tex. Civ. App. 148.

Taxes assessed against the land sold are payable out of the proceeds. Brown *v.* Evans, 15 Kan. 88.

1. Surplus Passes as Real Estate—*Alabama.*—Williamson *v.* Mason, 23 Ala. 488.

Massachusetts.—Allen *v.* Ashley School Fund, 102 Mass. 262.

New Jersey.—Lerch *v.* Oberly, 18 N. J. Eq. 575.

North Carolina.—Denton *v.* Tyson, 118 N. Car. 542.

Ohio.—Griswold *v.* Frink, 22 Ohio St. 79.

Pennsylvania.—Bindley's Appeal, 69 Pa. St. 295; *Wale's Estate*, 11 Phila. (Pa.) 156, 33 Leg. Int. (Pa.) 409.

Rhode Island.—Tillinghast *v.* Holbrook, 7 R. I. 230.

Tennessee.—Read *v.* Bostick, 6 Humph. (Tenn.) 321.

If the Property Had Been Fraudulently Conveyed by the decedent, any surplus remaining after the payment of debts belongs to the fraudulent grantee as against the heirs of the decedent. Allen *v.* Ashley School Fund, 102 Mass. 262.

2. Duty to Pay Legacies Subordinate to Duty to Pay Debts.—Pullen *v.* Hutchins, 67 N. Car. 428; Evans *v.* Beaumont, 16 Lea (Tenn.) 713.

Even a Voluntary Bond must be paid before legacies. Lomas *v.* Wright, 2 Myl. & K. 769; Hales *v.* Cox, 32 Beav. 118; Dawson *v.* Kears-ton, 3 Sm. & G. 314; Cox *v.* Barnard, 8 Hare 310; Jones *v.* Powell, 1 Eq. Cas. Abr. 84; Gordon *v.* Small, 53 Md. 550.

Specific Legacies as well as others are subject to the rule subordinating them to the payment of debts. Spode *v.* Smith, 3 Russ. 511.

Property specifically bequeathed is not discharged from its liability for the testator's debts by the facts that there has come to the executor's hands property of the testator not specifically bequeathed more than sufficient to pay his debts, and that the specific legacy has been delivered by the executor to the legatee. Davies *v.* Nicolson, 2 De G. & J. 693.

Legacies Charged on Land.—An executor not expressly charged with the payment of legacies charged on land devised is under no duty to pay them. Robinson *v.* McIver, 63 N. Car. 645.

A Bequest on a Contingency cannot be paid or delivered by the executor until the contingency has happened. Price *v.* Sessions, 3 How. (U. S.) 624; Paige *v.* Sessions, 4 How. (U. S.) 122.

The Retention of Assets to satisfy a legacy bequeathed by the will under which the executor acts is an imperative legal duty in discharge of his official obligation, if there are sufficient assets to pay preferred claims. Ing *v.* Baltimore Assoc., etc., 21 Md. 426.

Admission of Assets—Bond to Pay Legacies.—An executor's bond "to pay debts and legacies" is a conclusive admission of sufficient assets for that purpose. Jones *v.* Richardson, 5 Met. (Mass.) 247; Colwell *v.* Alger, 5 Gray (Mass.) 67.

The Pendency of an Issue of Devastavit Vel Non suspends the power of the executor to proceed with the execution of the will so far as the provisions are inconsistent with the law relating to the distribution of intestate estates, and therefore the payment of legacies by him while such issue is pending is at his own risk. Kelly *v.* Davis, 37 Miss. 76.

3. Notification to Legatees.—Tilton *v.* American Bible Soc., 60 N. H. 377, 49 Am. Rep. 321; Wilcox *v.* McCarthy, 3 Bradf. (N. Y.) 284; Walthour *v.* Walthour, 2 Grant's Cas. (Pa.) 102.

An Executor Is Not Bound to Search Out a Legatee, but it is sufficient if he is always ready, when called on, to pay the legacy. Thompson *v.* Youngblood, 1 Bay (S. Car.) 248.

If It Is Uncertain Who Are Legatees because of an ambiguity in the will, it is the duty of the executor to file a bill for the purpose of having that question determined. Tilton *v.* American Bible Soc., 60 N. H. 377, 49 Am. Rep. 321.

4. Assent of Executor to Legacy Required—*England.*—Duppa *v.* Mayo, 1 Saund. 278, note 5. See also Swinb. on Wills, pt. 1, § 6.

United States.—McClanahan *v.* Davis, 8 How. (U. S.) 170.

Arkansas.—Refeld *v.* Bellette, 14 Ark. 148.

Georgia.—Suggs *v.* Sapp, 20 Ga. 100.

Maryland.—Wilson *v.* Rine, 1 Har. & J. (Md.) 138; Lark *v.* Linstead, 2 Md. Ch. 162.

The Effect of the Assent is to vest the legal title in the legatee, and he alone can thereafter recover it from any third person in whose possession it may be; ¹ and when once given, the assent is irrevocable, even though the assets prove insufficient for the payment of debts. ² But where the executor is the legatee, his assent to the legacy will not operate to transfer the title to himself to the detriment of creditors of the estate. ³

No Particular Form is prescribed by law by which the assent of the executor to a legacy may be given. It may be express, or it may be implied ⁴ from any act or expression on the part of the executor which clearly recognizes a present right in the legatee to receive the legacy. ⁵

Massachusetts. — Osgood v. Foster, 5 Allen (Mass.) 560.

New York. — Hudson v. Reeve, 1 Barb. (N. Y.) 89.

Virginia. — Hairston v. Hall, 3 Call (Va.) 218; Smith v. Townes, 4 Munf. (Va.) 191.

A Legacy Charged on Land need not be assented to to complete the legatee's rights. Tole v. Hardy, 6 Cow. (N. Y.) 333.

When Assent May Be Given. — It has been held that an executor may assent to a legacy before probate of the will. Gordon v. Woods, 4 Bibb (Ky.) 476; Aleck v. Tevis, 4 Dana (Ky.) 243.

But in those jurisdictions where the common-law rule that an executor derives his authority solely from the will and not in any measure from the probate court has been abrogated, it is held that assent cannot be given before probate. Gardner v. Gantt, 19 Ala. 666.

Assent to a legacy may be given before debts are paid. Edney v. Bryson, 2 Jones L. (47 N. Car.) 365; Thompson v. Schmidt, 3 Hill L. (S. Car.) 156.

Assent Compelled by Court of Equity. — The executor has no right to withhold his assent arbitrarily, and if he does so he may be compelled by a court of equity to give it. Crist v. Crist, 1 Ind. 570; Lark v. Linstead, 2 Md. Ch. 162; Decouche v. Savetier, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 478.

Assent Is Not Necessary in Equity to complete the legatee's title, and he may recover his legacy in that forum without the previous assent of the executor. Bonner v. Young, 68 Ala. 35.

1. Assent Passes Legal Title to Legatee. — Doe v. Guy, 3 East 120; Williams v. Lee, 3 Atk. 223; Nancy v. Snell, 6 Dana (Ky.) 152.

2. Assent Is Irrevocable. — Nancy v. Snell, 6 Dana (Ky.) 152; Onondaga Trust, etc., Co. v. Price, 87 N. Y. 542.

An executor who had delivered a specific legacy cannot withdraw his assent arbitrarily. Eberstein v. Camp, 37 Mich. 176.

3. Legacy to Executor — Effect of Assent. — Matter of Pye, 18 N. Y. App. Div. 306.

4. Assent May Be Either Express or Implied — *England.* — Elliott v. Elliott, 9 M. & W. 23.

United States. — McClanahan v. Davis, 8 How. (U. S.) 170.

Alabama. — George v. Goldsby, 23 Ala. 326; Murphree v. Singleton, 37 Ala. 412.

Indiana. — Crist v. Crist, 1 Ind. 570.

Kentucky. — Pirtle v. Cowan, 4 Dana (Ky.) 303.

South Carolina. — Thompson v. Schmidt, 3 Hill L. (S. Car.) 156.

Tennessee. — Chester v. Greer, 5 Humph.

(Tenn.) 26; Finch v. Rogers, 11 Humph. (Tenn.) 559.

5. Implied Assent — Illustrations. — Assent will be implied where a person applies to the executor to purchase the legacy and the executor refers him to the legatee, or where the executor purchases or offers to purchase the legacy. Pirtle v. Cowan, 4 Dana (Ky.) 303.

General Payments to or for the benefit of a legatee are not sufficient to raise an inference that the executor has assented to the legacy, in the absence of representations on the subject by the executor to the legatee. Thorne v. Thorne, (1893) 3 Ch. 196.

Retaining Legacy in Trust for Absent Legatee.

— An executor assents to a legacy to an absent legatee by holding it in trust for him under an order of court. Buffaloe v. Baugh, 12 Ired. L. (34 N. Car.) 201.

Delivery of a Specific Legacy to the legatee is equivalent to an assent.

United States. — McClanahan v. Davis, 8 How. (U. S.) 170.

Florida. — Lott v. Meacham, 4 Fla. 144.

Mississippi. — Hall v. Hall, 27 Miss. 458.

North Carolina. — Rea v. Rhodes, 5 Ired. Eq. (40 N. Car.) 148; Edney v. Bryson, 2 Jones L. (47 N. Car.) 365.

Virginia. — Lynch v. Thomas, 3 Leigh (Va.) 682; Frazer v. Bevill, 11 Gratt. (Va.) 9.

Allowing a Legatee to Retain Possession of the legacy taken before the testator's death is an assent to the legacy. Propst v. Roseman, 4 Jones L. (49 N. Car.) 130; Lowry v. Mountjoy, 6 Call (Va.) 55. See also Cole v. Milcs, 10 Hare 179; Richardson v. Gifford, 1 Ad. & El. 52, 28 E. C. L. 35; Andrews v. Hunneman, 6 Pick. (Mass.) 126; Eberstein v. Camp, 37 Mich. 176; Squires v. Old, 7 Humph. (Tenn.) 454.

Discharge of Executor Leaving Legatee in Possession. — In Vaughn v. Howard, 75 Ga. 285, it was held that the court would presume the assent of an executor to a legacy where he had been discharged and the legatee had been in possession of the property bequeathed for about ten years afterwards.

Assent to Part of Legacy. — An executor may assent to a part of a legacy, as where several different articles are bequeathed, without assenting to all. Elliott v. Elliott, 9 M. & W. 23.

An assent to a residuary bequest as regards a part of the residue is not an assent to the balance. Austin v. Beddoe, 3 Reports 580, 41 W. R. 619.

A Division of the Estate by executors who are residuary legatees is a reciprocal assent by them that each should take his legacy. Drayton v. Drayton, 1 Desaus. (S. Car.) 557.

(3) *Taking Security from Legatee for Life.* — It has been held to be the duty of an executor, before payment or delivery of a legacy to a person to whom it has been bequeathed for life, to take security from him that it shall be forthcoming at his death.¹ But this is not a rule of general application,² and in some jurisdictions the only duty of the executor to the remainderman is to take an inventory from the life legatee, admitting the receipt of the property bequeathed, and expressing that he holds it for life only, and that afterwards the remainderman is entitled.³

Assent to Legacy for Life. — When an executor assents to a legacy for life with remainder over, the assent extends also to such remainder, and his control over it ceases; and having nothing further to do he becomes so far *functus officio*, and the successive legatees must adjust their respective claims among themselves.

England. — *Stevenson v. Liverpool*, L. R. 10 Q. B. 81; *Adams v. Peirce*, 3 P. Wms. 11.

United States. — *McClanahan v. Davis*, 8 How. (U. S.) 170.

Alabama. — *Thrasher v. Ingram*, 32 Ala. 645; *Harkins v. Hughes*, 60 Ala. 316.

Florida. — *Lott v. Meacham*, 4 Fla. 144.

Georgia. — *Jordan v. Thornton*, 7 Ga. 517; *Parker v. Chambers*, 24 Ga. 518; *Akin v. Akin*, 78 Ga. 24; *King v. Skellie*, 79 Ga. 147; *McGlaw v. Lowe*, 74 Ga. 34.

Kentucky. — *Adie v. Cornwell*, 3 T. B. Mon. (Ky.) 276; *Boone v. Dykes*, 3 T. B. Mon. (Ky.) 529. See also *Simrall v. Graham*, 1 Dana (Ky.) 574.

Mississippi. — *Hall v. Hall*, 27 Miss. 458.

North Carolina. — *James v. Masters*, 3 Murph. (7 N. Car.) 110; *Ingrams v. Terry*, 2 Hawks. (9 N. Car.) 122; *Alston v. Foster*, 1 Dev. Eq. (16 N. Car.) 341; *Smith v. Barham*, 2 Dev. Eq. (17 N. Car.) 420, 25 Am. Dec. 721; *Burnett v. Roberts*, 4 Dev. L. (15 N. Car.) 81; *Saunders v. Gatlin*, 1 Dev. & B. Eq. (21 N. Car.) 86; *Conner v. Satchwell*, 4 Dev. & B. L. (20 N. Car.) 72; *Lewis v. Smith*, 4 Dev. & B. L. (20 N. Car.) 326; *McKoy v. Guirkin*, 102 N. Car. 23.

Virginia. — *Frazer v. Bevell*, 11 Gratt. (Va.) 9; *Bishop v. Bishop*, 2 Leigh (Va.) 484; *Lynch v. Thomas*, 3 Leigh (Va.) 693.

E Converso, an assent to a bequest in remainder implies a consent to the bequest of the preceding life estate. *King v. Skellie*, 79 Ga. 147.

Other Cases of implied assent are *Doe v. Maberley*, 6 C. & P. 126, 25 E. C. L. 313; *Paramour v. Yardley*, Plowd. 539; *Young v. Holmes*, 1 Stra. 70; *Barnard v. Pumfrett*, 5 Myl. & C. 70; *Hawkes v. Saunders*, 1 Cowp. 293; *Cray v. Willis*, 2 P. Wms. 531.

1. Taking Security from Life Legatee. — It has been held in *Connecticut* that where the legatee for life resided out of the state, it was the duty of the executors to demand security that the property should be forthcoming at her decease, and that, on failure to give such security, they should invest it and pay her the accruing income. *Clarke v. Terry*, 34 Conn. 176; *Hudson v. Wadsworth*, 8 Conn. 348.

2. In England the old practice of the Court of Chancery to require the legatee for life to give security for the protection of the remain-

deman was overruled by Lord Thurlow in *Foley v. Burnell*, 1 Bro. C. C. 279.

In New Jersey it is held that on the delivery of a legacy to the legatee for life, the executor may require security for the benefit of the remainderman, but he is not obliged to do so. *Matter of Ryerson*, 26 N. J. Eq. 43; *Dodson v. Sevars*, 52 N. J. Eq. 611.

In New York the law on this subject does not seem to be well settled. Thus in *Westcott v. Cady*, 5 Johns. Ch. (N. Y.) 334, the chancellor said: "Formerly the *cestui que trust*, or legatee entitled in remainder after an estate for life, was allowed to call upon the legatee for life, not only for an inventory, but for security that the goods should be forthcoming at his decease. * * * But the rule of practice has since been altered on that point." Some years later, in *Covenhoven v. Shuler*, 2 Paige (N. Y.) 122, the chancellor said: "The modern practice in such cases [cases of bequest for life with limitation over of specific articles] is only to require an inventory of the articles, * * * and security is not required unless there is danger that the articles may be wasted or otherwise lost to the remainderman." It would seem, however, from later decisions in New York, that under ordinary circumstances executors should not turn over property to one who has simply a life estate therein, when such property is given in remainder to another, without obtaining from the first taker security for the protection of the remainderman. *Tyson v. Blake*, 22 N. Y. 558; *Montfort v. Montfort*, 24 Hun (N. Y.) 120; *Livingston v. Murray*, 68 N. Y. 485. And in *Matter of Fernbacher*, 17 Abb. N. Cas. (N. Y. Surrogate Ct.) 339, 8 Civ. Pro. Rep. (N. Y.) 308, *sub nom.* *Fernbacher v. Fernbacher*, 4 Dem. (N. Y.) 227, 3 How. Pr. N. S. (N. Y.) 81, it was held that where the will indicates that it was the testator's design to intrust to the life beneficiary the full possession and control of the estate, the executors are warranted, unless there are special circumstances making such a course hazardous, in surrendering the principal of the estate to the care of the life tenant without requiring security. Compare *Flanagan v. Flanagan*, 8 Abb. N. Cas. (N. Y. Supreme Ct.) 413.

In Case of Real Danger that the property bequeathed for life may be lost, wasted, or secreted by the life tenant, security may always be required for the protection of the remainderman. *Foley v. Burnell*, 1 Bro. C. C. 279; *Conduitt v. Soane*, 1 Coll. 285; *Fiske v. Cobb*, 6 Gray (Mass.) 144; *Taggard v. Piper*, 118 Mass. 315; *Mortimer v. Moffatt*, 4 Hen. & M. (Va.) 503.

3. Inventory Taken from Legatee for Life. — *Evans v. Iglehart*, 6 Gill & J. (Md.) 171; *Weeks v. Weeks*, 5 N. H. 326.

b. DISTRIBUTIVE SHARES. — If a balance remains in the hands of the personal representative after the payment of all debts and charges, and also the legacies, in case the decedent left a will, he holds it for the benefit of the persons entitled by law to intestate property, but he cannot be compelled to pay it over until an order or decree of distribution has been made by the proper court; ¹ but if there is a balance in his hands which is properly distributable, it is his duty to apply for an order of distribution within a reasonable time. ²

2. By Whom Payment or Delivery May Be Made — *a.* **BY EXECUTOR OR ADMINISTRATOR.** — The payment of legacies or distributive shares can be made only by the executor or by an administrator with general powers, and not by a special or temporary administrator, ³ or by the executor of a deceased

1. Only Assets Remaining After Payment of Debts Are Subject to Distribution — *Alabama.* — Dean *v.* Portis, 11 Ala. 104.

Arkansas. — Haynes *v.* Bessellieu, 25 Ark. 499.

Georgia. — McIntosh *v.* Hambleton, 35 Ga. 95, 89 Am. Dec. 276.

Louisiana. — Union Bank *v.* McDonogh, 7 La. Ann. 232.

Pennsylvania. — Thomas *v.* Riegel, 5 Rawle (Pa.) 266.

South Carolina. — Swift *v.* Miles, 2 Rich. Eq. (S. Car.) 147.

Distribution Not Obligatory until Decreed — *England.* — Canterbury *v.* Robertson, 1 Crompt. & M. 691, 3 Tyrw. 390; Canterbury *v.* Tappin, 8 B. & C. 151, 15 E. C. L. 174.

United States. — Mackey *v.* Cox, 18 How. (U. S.) 100.

Arkansas. — McPaxton *v.* Dickson, 15 Ark. 41.

Illinois. — Neubrecht *v.* Santmeyer, 50 Ill. 74.

Maine. — Hanscom *v.* Marston, 82 Me. 288.

Massachusetts. — Choate *v.* Jacobs, 136 Mass. 297.

New Hampshire. — Hurlburt *v.* Wheeler, 40 N. H. 73.

New Jersey. — Ordinary *v.* Smith, 15 N. J. L. 92.

New York. — Matter of Smith, 1 Misc. Rep. (N. Y. Surrogate Ct.) 269.

South Carolina. — Ordinary *v.* Martin, 1 Brev. (S. Car.) 552.

Vermont. — Probate Ct. *v.* Kimball, 42 Vt. 320.

Duty to Seek Person to Whom Payment Is Ordered. — In Leland *v.* Kingsbury, 24 Pick. (Mass.) 315, it was held that where an administrator was ordered by a decree of distribution to pay money into the treasury of the commonwealth, it was his duty to make the payment as directed in the order without any demand on him; but the court said that this rule did not apply when payment was to be made to individuals, because the administrator may not know where to find them, and it is not his duty to travel over the country to find them. "If they wish to receive their distributive shares they must seek him; and if he holds himself in readiness to make the payments, in conformity with the decree, and makes them accordingly when demanded, he will discharge his whole duty."

If a Distributee Is Dead at the time when the administrator's accounts are settled, and no personal representative of his estate has been appointed, no decree for the payment of such distribution can be made. Matter of Lane, 2 Connolly (N. Y.) 266.

The Power to Distribute the effects of an estate is not affected by the fact that the administrator has obtained, but not carried into effect, an order for the sale of the personal estate; nor does the circumstance that the distributees, or some of them, have filed a bill to prevent the execution of such an order of sale operate as a bar to the exercise of the power to distribute the estate. Harrison *v.* Harrison, 9 Ala. 470.

Administrator of Absentee. — Where administration had been granted under the *Pennsylvania* statute (P. L. 1885, p. 155) on the estate of a person who had been absent and had not been heard of for twenty-five years, it was held that the administrator could not be compelled to make distribution without positive proof of the death of the absentee, even though an auditor, whose report had been confirmed absolutely, had reported in favor of distribution. Beck's Estate, 15 Pa. Co. Ct. Rep. 564, 4 Pa. Dist. Rep. 222.

Same Person Administrator of Two Estates. — Where the same person is administrator of two connected estates, and has in his hands funds of one estate, the right of distribution of which could not be affected by the other, he will be required to distribute such funds without regard to the other estate. Breckinridge *v.* Floyd, 7 Dana (Ky.) 456.

In New Jersey it has been held that the statute authorizes an order of distribution only in cases of intestacy, and that therefore the court cannot order distribution in the settlement of estates by executors. Matter of Eakin, 20 N. J. Eq. 481.

2. Duty to Apply for Order of Distribution. — Sanford *v.* Thorp, 45 Conn. 241.

3. A Special Administrator cannot make distribution of a decedent's estate. Matter of Welch, 106 Cal. 427.

An Administrator Pendente Lite has no power to make distribution. Wipenny's Estate, 11 Phila. (Pa.) 20, 32 Leg. Int. (Pa.) 50; Bradford's Case, 1 Browne (Pa.) 87.

The English Statute giving an administrator *pendente lite* most of the powers of a general administrator expressly withholds the power to make distribution. Stat. 20 & 21 Vict., c. 77, § 70.

Effect of Distribution by Special or Temporary Administrator. — In Bradford's Case, 1 Browne (Pa.) 87, it was held that where a temporary administrator distributed the estate to the persons who were entitled to receive it, he would not be compelled to refund it in order that it might be again paid to the same persons by an administrator by whom distribution should properly be made. "The Orphans' Court," it

executor, if his common-law power to administer the estate of the first testator has been abrogated by statute.¹

b. BY DISTRIBUTEES. — In another part of this article it has been shown that in some cases administration of an estate may be dispensed with, and when the conditions there stated exist the distributees may distribute the estate among themselves without the intervention of an administrator.²

3. To Whom Payment or Delivery May Be Made — *a.* IN GENERAL. — It is a general rule that executors and administrators must see, at their peril, that they pay legacies and distributive shares to persons legally authorized to receive them,³ and a literal compliance with the provisions of the will is not in all cases sufficient.⁴

Payment to Third Persons. — A valid payment of a legacy or distributive share may be made to a third person at the direction or request of the legatee or distributee, if he is under no disability.⁵

b. INFANTS. — Where an infant is a legatee or distributee, payment or

was said, "adopting the liberal principles of a court of chancery, will not withdraw money from the hands of a person entitled to receive it in order that it may be immediately paid over again by a rightful authority. * * * This principle is consonant to reason and justice; it avoids expense and a circuitous mode of proceeding."

1. Executor of Deceased Executor. — In *Matter of Moehring*, 154 N. Y. 423, a residuary legatee, after the death of the executor, applied for an order that the executor of such deceased executor pay over to the petitioner the residue of the estate to which she claimed to be entitled under the will. It was argued that the authority to make the order was given by two sections of the Code of Civil Procedure of New York, providing (section 2603) that when letters testamentary are revoked, the surrogate may require the executor to pay and deliver the estate into the Surrogate's Court, or to his (the executor's) successor in office, "or to such other person as is authorized by law to receive the same," and (section 2606) that where an executor dies, the Surrogate's Court has the same jurisdiction to compel his executor or administrator to account which it would have had against the deceased executor if his letters had been revoked, and also had jurisdiction to compel the executor or administrator to deliver over any of the trust property which has come into his possession or is under his control. The surrogate denied the application, and ordered that the estate be paid into court. The Court of Appeals, reviewing this decision, expressed the opinion that the executor of an executor was prohibited from administering the estate of the first testator by Code Civ. Pro., § 2643, which provides that if at any time, by reason of death, there is no executor or administrator with the will annexed qualified to act, the surrogate must, upon the application of a creditor of the deceased or a person interested in the estate, issue letters of administration with the will annexed; and the court said that it did not think that the phrase "such other person as is authorized by law to receive the same" includes legatees or creditors to whom the property will ultimately belong, but that this provision should be construed as relating to such other person as is authorized by law to receive it for the purpose of administration.

2. Voluntary Distribution by Distributees. — See *supra*, this title, *When Administration Is Necessary or Proper*.

3. To Whom Payment May Be Made — General Rule Stated. — *Newcomb v. Williams*, 9 Met. (Mass.) 535.

Payment to Wrong Person — Effect. — In *Garnier v. Lansford*, 12 Smed. & M. (Miss.) 558, it was held that where an administrator was directed to pay "the legal heirs of the estate," a payment by him was at his own risk, and if, in determining who were the legal heirs, he formed a wrong judgment, the rightful distributees were not to be prejudiced.

A Void Assignment of a Distributive Share does not protect the administrators in paying it to the assignee, though they acted in good faith. *Dorsheimer v. Rorback*, 23 N. J. Eq. 46, 25 N. J. Eq. 516.

Legacy to a Person "and His Family." — A legacy to a person, to be "divided between himself and his family," is discharged by payment to the person named. *Cooper v. Thornton*, 3 Bro. C. C. 96, 186. To the same effect is *Robinson v. Tickell*, 8 Ves. Jr. 142.

4. Literal Compliance with Will Not Always Sufficient. — In *Newcomb v. Williams*, 9 Met. (Mass.) 525, Shaw, C. J., in illustration of the rule stated in the text, said, at page 535: "Suppose legacies to persons named who are found to be infants, persons under guardianship, as *non compos*, or spendthrift; a payment to the infant, *non compos*, or spendthrift would be no valid discharge. So if a legacy be to a man and his heirs, and the legatee die, after the testator and before payment, a payment to the heir would not be legal; it must be to the personal representative. So we think payment to one named as trustee, but not qualified to act as such, would be no valid payment. He may have declined or resigned the trust, or neglected, on notice, to give bond, by which he shall be considered as having declined; or he may have been removed. * * * In any of these cases a payment to the trustee named in the will would be a payment by the executors in their own wrong, and no valid discharge."

5. Payment to Third Persons. — The payment of a legacy to a creditor of the legatee by the direction of the legatee is good. *Watson v. McClanahan*, 13 Ala. 57.

In *Cartmel v. Rench*, 2 J. J. Marsh. (Ky.)

delivery to the infant himself, or to his father or other relative on his account, without an order of court, will not discharge the executor or administrator from liability,¹ unless the infant, after attaining his majority, ratifies the payment;² but it must be made to the general guardian,³ or into court, in case there is no general guardian, or he is not properly qualified to receive it.⁴

c. MARRIED WOMEN. — At common law a legacy to a married woman was payable to her husband, and if the executor paid it to her he was still

it, an executor, at the request of several persons to whom certain property had been bequeathed, sold the property and took a note for the price. The legatees were indebted to the purchaser, and the executor indorsed the amount of the debt on the note. It was held that the transaction operated as a payment to the legatees, the executor having acted as their agent.

In *Banks v. Taylor*, 10 Abb. Pr. (N. Y. Supreme Ct.) 199, it was held that the payment of the expenses of real estate on the order of the heir, who was one of the next of kin, was a payment to him on account of his distributive share of the personality.

1. **Payment to Infant Legatee or Distributee Invalid.** — *Quinn v. Moss*, 12 Smed. & M. (Miss.) 365.

A Claim for Necessaries furnished to an infant distributee while he was without a guardian cannot be set off against his distributive share. *Standley v. Langley*, 25 Miss. 252. But see *Montamat's Succession*, 15 La. Ann. 332; *U. S. v. Ritter*, 3 Cranch (C. C.) 61.

Payment to the Father or Other Relative of an Infant legatee is not a good payment so as to discharge the executor or administrator.

England. — *Dagley v. Tolferry*, 1 P. Wms. 285, *sub nom.* *Dawley v. Belfry*, 1 Eq. Abr. 300, pl. 2, *sub nom.* *Dawley v. Ballfrey*, Gilb. Eq. Rep. 103; *Rotheram v. Fanshaw*, 3 Atk. 629.

Georgia. — *Williams v. Adams*, 94 Ga. 270.

Maine. — *Decrow v. Moody*, 73 Me. 100.

Massachusetts. — *Newcom v. Williams*, 9 Met. (Mass.) 525; *Miles v. Boyden*, 3 Pick. (Mass.) 213.

New Jersey. — *McKnight v. Walsh*, 23 N. J. Eq. 136.

New York. — *Whitlock v. Whitlock*, 1 Dem. (N. Y.) 160; *Houghton v. Watson*, 1 Dem. (N. Y.) 299; *Matter of Hobson*, 61 Hun (N. Y.) 504; *Genet v. Tallmadge*, 1 Johns. Ch. (N. Y.) 3.

Compare *Walsh v. Walsh*, 1 Drew. 64; *Lang v. Pettus*, 11 Ala. 37.

Payments to Father for Maintenance of Minor Child. — In *New York* the court cannot order the executors to pay to the father, as the natural guardian of his children, a sum for their suitable maintenance and education. A general guardian must be appointed to receive such payment. *Houghton v. Watson*, 1 Dem. (N. Y.) 299.

Even a Direction by the Testator, given on his deathbed by parol, that the legacy should be paid to the father of the infant legatee, was held not to authorize the executor to make the payment to the father. *Per* Lord Cowper, in *Dagley v. Tolferry*, 1 P. Wms. 285. But Lord Hardwicke expressed dissatisfaction with this decision and said that Lord Cowper "had a remorse of judgment" at the time he decided

it. *Philips v. Paget*, 2 Atk. 81. And contrary decisions are to be found in *Holloway v. Collins*, 1 Ch. Cas. 245, 1 Eq. Cas. Abr. 303, pl. 1; *Walsh v. Walsh*, 1 Drew. 64.

A Direction Contained in the Will that the executor shall pay the legacy to the father of the infant legatee is said to constitute the father a trustee for the legatee, so that the executor is justified in paying the legacy to him, under the rule that a bequest in trust is payable to the trustee, but this rule is applicable only when such direction is contained in the will. *Cooper v. Thornton*, 3 Bro. C. C. 96; *Robinson v. Tickell*, 8 Ves. Jr. 142.

2. Ratification by Infant After Attaining Majority. — *Cooper v. Thornton*, 3 Bro. C. C. 96.

3. Payment to General Guardian. — *Moore v. Hamilton*, 4 Fla. 112; *Landis v. Eppstein*, 82 Mo. 99; *Davis v. Crandall*, 101 N. Y. 311; *Toler v. Landon*, 3 Dem. (N. Y.) 337; *Genet v. Tallmadge*, 1 Johns. Ch. (N. Y.) 3.

Payment to the general guardian is not authorized if the executor is directed by the will to hold the legacy until the legatee comes of age. *Hinckley v. Harriman*, 45 Mich. 343.

In New York the executor or administrator is not authorized to pay the legacy or distributive share of an infant to the general guardian unless directed to do so by an order of the Surrogate's Court. *Lowman v. Elmira*, etc., R. Co., 85 Hun (N. Y.) 188.

Foreign Guardian. — A person appointed guardian to an infant in one state is not thereby entitled to receive from the administrator in another state the legacy or portion of the infant. *McLoskey v. Reid*, 4 Bradf. (N. Y.) 334; *Morrell v. Dickey*, 1 Johns. Ch. (N. Y.) 153.

4. Payment Into Court. — The *New York* statute provides that when a distributive share is payable to an infant the Surrogate's Court may, among other things, direct it to be paid to the general guardian on his depositing with the surrogate in his office a bond of the form and character there specified, but that if no direction is made by the Surrogate's Court as to its payment in some of the ways there described, it shall, by order of that court, be paid into said court by payment to the county treasurer, to be managed by him as therein directed; and under the provisions of this section an administrator has no right to pay a distributive share to a general guardian unless directed by the Surrogate's Court. *Lowman v. Elmira*, etc., R. Co., 85 Hun (N. Y.) 188.

If the General Guardian Fails to Give Security which is required as a condition for the payment to him of a legacy given to his ward, the personal representative will be directed to pay it into the Surrogate's Court as if there were no guardian. *Toler v. Landon*, 3 Dem. (N. Y.) 337.

liable to the husband, though he was not living with his wife;¹ but this doctrine has been abrogated both in *England* and the *United States* by statutes giving to married women the same rights of property as if they were unmarried.²

d. REPRESENTATIVES OF DECEASED LEGATEES AND DISTRIBUTEES. — When a person who is entitled to a legacy or distributive share dies, such share or legacy becomes payable to his personal representative, and payment to any other person will not discharge the executor or administrator³ unless such deceased legatee or distributee owed no debts and there is no executor or administrator of his estate, in which case payment to the distributees of his estate is valid.⁴

e. ABSENT OR UNKNOWN LEGATEES AND DISTRIBUTEES. — In case a legatee or distributee is absent or unknown, so that payment cannot be made to him, and there is no statute prescribing the duty of the executor or administrator in such contingency, it is said that his proper course is to apply to a court of equity for instructions.⁵

4. Time for Payment or Delivery — *a. IN GENERAL.* — In *England* the statute provides that the distribution of the estates of persons dying intestate shall not be made until after one year has fully elapsed after the intestate's death.⁶ By analogy to this statute, the courts have fixed the same time for the payment of legacies.⁷

In the *United States* local statutes generally regulate the time for the payment of legacies and distributive shares, and it varies more or less in the different jurisdictions; but ordinarily the executor or administrator is allowed one year after letters are granted to him to settle the estate before he is required to make distribution.⁸ The time so fixed by statute may, however, be extended

1. Legacy to Married Woman Payable to Husband at Common Law. — *Palmer v. Trevor*, 1 Vern. 261; *Stephens v. Totty*, Cro. Eliz. 908; *Green v. Otte*, 1 Sim. & S. 250.

2. Common-law Doctrine Abrogated by Statute. — See the title HUSBAND AND WIFE.

3. Payment to Personal Representative of Deceased Legatee or Distributee — *England.* — *Cooper v. Cooper*, L. R. 7 H. L. 53.

Alabama. — *McConico v. Cannon*, 25 Ala. 462.

Connecticut. — *Kingsbury v. Scovill*, 26 Conn. 349.

Iowa. — *Moore v. Gordon*, 24 Iowa 158.

Massachusetts. — *Foster v. Fifield*, 20 Pick. (Mass.) 67.

Missouri. — *Rouggley v. Teichmann*, 10 Mo. App. 257; *Hanenkamp v. Borgmier*, 32 Mo. 569.

New York. — Matter of *Hodgman*, 11 N. Y. App. Div. 344.

Tennessee. — *Puckett v. James*, 2 Humph. (Tenn.) 565.

4. Payment to the Distributee of a Legatee discharges the executor making the payment where such legatee died without leaving any debts and there was no executor or administrator of his estate. *Johnson v. Longmire*, 39 Ala. 143.

5. Absent or Unknown Legatees or Distributees — Application to Court for Instructions. — *Schouler on Executors*, § 484.

Where a Legatee Has Been Long Absent, sixteen years or more, without being heard from, chancery has in several instances made distribution, sometimes directing that the parties entitled to the legacy in such contingency should give security to refund in case the absent legatee should return. *Dixon v. Dixon*,

3 Bro. C. C. 510; *Bailey v. Hammond*, 7 Ves. Jr. 590.

The English Statute permits executors to pay legacies to absentees "beyond the seas" into the Bank of England. 36 Geo. III., c. 52, § 32.

6. Time for Distribution in England. — Statute of Distributions, 22 & 23 Car. II., c. 10, § 8, 2 Williams on Executors (7th Am. ed.) 843; Bac. Abr., tit. Executors and Administrators, (I), § 8.

7. Time for Payment of Legacies in England. — *Wood v. Penoyre*, 13 Ves. Jr. 333; *Pearson v. Pearson*, 1 Sch. & Lef. 11.

Payment of a legacy may be withheld by the executor during the year following the testator's death, though the will directs that it shall be paid within six months. *Brooke v. Lewis*, 6 Madd. 358; *Benson v. Maude*, 6 Madd. 15.

8. Time for Payment of Legacies and Distributive Shares in United States — Two Years Allowed. — *Way v. Priest*, 13 Mo. App. 555; Rev. Stat. Mo., 1889, § 238; *Turnage v. Turnage*, 7 Ired. Eq. (42 N. Car.) 127; Code N. Car. 1883, § 1510.

In *Mississippi* three years were formerly allowed in which to contest probate of a will, and payments by the executor to the legatees within that time were at his own peril. *Garnier v. Lansford*, 12 Smed. & M. (Miss.) 558. But the time is now limited to two years. Code Miss. 1892, § 1822.

Thirteen Months Allowed. — *Coward v. State*, 7 Gill & J. (Md.) 475; *State v. Wilson*, 38 Md. 338; 2 Pub. Gen. Laws Md. 1888, art. 93, §§ 101, 119.

One Year Allowed — *Alabama.* — See Code 1896, §§ 202, 260, 344. Prior to the code of

by the will of the testator,¹ but payment cannot be compelled within the time allowed by law, though an earlier payment is directed by the will.²

b. PAYMENTS WITHIN USUAL OR STATUTORY PERIOD. — The time accorded to executors and administrators by statute or by the practice of the courts before they can be called on to pay legacies and distributive shares is for their convenience and protection.³ Therefore, if they find that the condition of the estate justifies it, they may pay the legacies within such time,⁴ or they may make advances to legatees or distributees on account of the legacies or distributive shares,⁵ and in some jurisdictions advance payments, or

1896, the period was eighteen months. *Harrison v. Harrison*, 9 Ala. 470; *Williamson v. Mason*, 18 Ala. 87.

Illinois. — *Reynolds v. People*, 55 Ill. 328; *Curtis v. Brooks*, 71 Ill. 125.

Indiana. — *Fleece v. Jones*, 71 Ind. 340.

Massachusetts. — *Brooks v. Lynde*, 7 Allen (Mass.) 64. See also *Sullivan v. Winthrop*, 1 Sumn. (U. S.) 1.

New Hampshire. — *Perry v. Hale*, 44 N. H. 363.

New Jersey. — *Hoagland v. Schenck*, 16 N. J. L. 370.

New York. — *Davis v. Crandall*, 101 N. Y. 311; *Lawrence v. Embree*, 3 Bradf. (N. Y.) 364; *Cooke v. Meeker*, 36 N. Y. 15.

Pennsylvania. — *Bitzer v. Hahn*, 14 S. & R. (Pa.) 232.

Six Months Allowed. — The *Florida* statute provides that no distribution shall be required of any administrator until the expiration of six months from the taking out of letters of administration, nor shall administrators be compelled to make distribution until bond and security be given by the person entitled to the same to refund a due proportion of any debts or demands which may thereafter appear against the estate, and all costs which may be awarded in the same; provided, that such debt or demand shall appear within two years after granting the letter testamentary or letters of administration. *Sanderson v. Sanderson*, 17 Fla. 820.

When There Has Been a Final Settlement of the accounts of an executor or administrator, he may be required to distribute the estate, though the time within which the will, if any, may be contested has not expired. *Matter of Pritchett*, 51 Cal. 568, 52 Cal. 94.

But no distribution can be required before the final settlement, *Lafferty's Estate*, 4 Pa. Dist. Rep. 133, 16 Pa. Co. Ct. Rep. 206; unless special provision is made therefor by statute, *Abila v. Burnett*, 33 Cal. 658.

1. Extension by Will of Time for Distribution. — In *McKay v. McAdam*, 80 Hun (N. Y.) 260, it was held that a provision in a will that the executor should be "the sole and arbitrary judge of when it may be convenient for him to pay" a legacy, was merely for the convenience of the estate and did not empower him to postpone payment arbitrarily for an indefinite period.

Where a Discretion as to Time Is Given to the Executor, a court of equity will not ordinarily undertake to control it. Thus where a testator directed his executors "as soon as, in their judgment, the best interests of my estate shall warrant," to set aside a fund for the payment of an annuity, it was held that a court of equity would not compel them to set

aside the fund or to pay legacies which were postponed to the annuity fund, if there was no fraud or improper motive on the part of the executors in their delay. *Young's Estate*, 4 Pa. Dist. Rep. 293.

2. Direction to Pay Legacies Within Time Allowed by Law Not Binding on Executor. — *Brooke v. Lewis*, 6 Madd. 358; *Spencer's Petition*, 16 R. I. 25.

3. Time Allowed Is for Executor's Convenience. — *Garthshore v. Chalie*, 10 Ves. Jr. 13.

4. Authority to Pay Legacies Before End of Year. — *Pearson v. Pearson*, 1 Sch. & Lef. 12; *Garthshore v. Chalie*, 10 Ves. Jr. 13; *Livesey v. Livesey*, 3 Russ. 287; *Sullivan v. Winthrop*, 1 Sumn. (U. S.) 1; *Evans v. Iglehart*, 6 Gill & J. (Md.) 171; *Watts v. Watts*, 2 McCord Eq. (S. Car.) 77; *Wright v. Wright*, 2 McCord Eq. (S. Car.) 185.

In *Angerstein v. Martin*, 1 T. & R. 232, Lord Eldon said: "I know of no case which prevents executors, if they choose, from paying legacies or handing over the residue within the year; and if it is clear, *currente anno*, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing."

If There Are No Debts, it is the duty of the executor to pay legacies without waiting for the lapse of the statutory time allowed for settlement. *Turnage v. Turnage*, 7 Ired. Eq. (42 N. Car.) 127. But this is subject to the qualification that if an executor withdraws productive funds, in order to pay legacies before the lapse of the year when they become due, he is chargeable with the loss occasioned to residuary legatees. *McLoskev v. Reid*, 4 Bradf. (N. Y.) 334.

If the Estate Was Apparently Solvent, and there was no reason for suspecting that it was not actually so, immediate payment of a legacy to the widow as directed by the will does not render the executor liable to creditors. *In re Kay*, (1897) 2 Ch. 518, 66 L. J. Ch. 759, 46 W. R. 74.

5. Payments in Advance of Distribution. — An administrator may make the distribution *in pais*, without the order of any court, if he chooses to take the risk of paying the right amount to the right parties. *Biays v. Roberts*, 68 Md. 510.

An administrator may transfer a note belonging to the estate to a distributee, as an advance, but the transfer is at the administrator's risk in case the assets prove insufficient to pay debts. *Williams v. Ely*, 13 Wis. 1; *Hitchcock v. Merrick*, 15 Wis. 522.

See also *infra*, this title, *Accounting*, subdv. 7, a. (7) *Payments to or for Benefit of Legatees and Distributees*.

partial distribution before final settlement, may be compelled under certain circumstances.¹

c. **POSTPONING PAYMENT.** — Though, as a general rule, executors and administrators may be compelled to pay legacies and distribution of the estate at the expiration of the time allowed by law for the settlement, it is not so in all cases. Special circumstances may exist under which the payment of legacies and distributive shares may be postponed beyond the ordinary time.²

1. Payment Compellable Within Statutory Period. — In *Illinois* in the case of legatees, under a statute providing that "whenever it shall appear that there are sufficient assets to satisfy all demands against the estate, the Court of Probate shall order the payment of all legacies mentioned in the will of the testator," and that on the payment of legacies or dividends the legatees and distributees should give bond and security to refund the due proportion of any debt which might afterwards appear against the estate, it was held that the same rule should prevail in ordering an entire or partial distribution of the estates of intestates. *Reynolds v. People*, 55 Ill. 328, cited in *Curtis v. Brooks*, 71 Ill. 125.

In *New York*, when a person entitled to a legacy or other pecuniary provision under a will, or to a distributive share, needs it for his or her support or education, the executor or administrator may be required, before the expiration of the year after the granting of letters, to pay the legacy or distributive share, or so much as may be required, if, after such payment, there will remain in the hands of the executor or administrator money or property exceeding by one-third all known claims against the estate, exclusive of the legacy or distributive share in question and all debts and legacies already paid. *Hoyt v. Jackson*, 1 Dem. (N. Y.) 553; *Tuttle v. Heidermann*, 5 Redf. (N. Y.) 199; *Matter of Hoyt*, 31 Hun (N. Y.) 176. Compare *Matter of McGowan*, 28 Hun (N. Y.) 246.

The cases in which such advance payments may be ordered are such only as are provided for by statute, which are (1) when application is made during the pendency of proceedings for probate; (2) when application is made after the grant of letters testamentary and no appeal or proceeding for revocation is pending; (3) when application is made after probate and pending proceedings for revocation; (4) when application is made after a decree admitting to probate, and an appeal from such decree remains undetermined. *Riegelmann v. McCoy*, 1 Dem. (N. Y.) 86, *sub nom.* *Riegelmann's Estate*, 2 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 98.

In *North Carolina* the court may order distribution at any time and on such terms as it may deem proper. *Hobbs v. Craige*, 1 Ired. L. (23 N. Car.) 332; *Turnage v. Turnage*, 7 Ired. Eq. (42 N. Car.) 127. See also *Andres v. Powell*, 97 N. Car. 155.

In *California* the statute provides that partial distribution may be ordered before there has been a final settlement, if a year has elapsed since letters were issued, and the court finds that the estate "is but little indebted." In ordering such partial distribution the court may in its discretion require a refunding bond from each legatee or devisee. *Matter of Crocker*, 105 Cal. 368.

This statute does not give authority for decreeing partial distribution of an estate in the hands of a special administrator. *Matter of Welch*, 106 Cal. 427.

The requirement in regard to a finding that "the estate is but little indebted" is intended to be used relatively, and not absolutely, and merely refers to a "condition of things in which the debts are small when considered in connection with the value of the estate." *Matter of Crocker*, 105 Cal. 368.

In the *District of Columbia* the Orphans' Court is authorized to direct a partial distribution to those entitled and in need, even before the debts are paid, when it is satisfactorily shown that there is no reason to apprehend that the assets in hand will be nearly exhausted in the payment of debts. *Sterrett v. National Safe Deposit, etc., Co.*, 10 App. Cas. (D. C.) 131. See also *Ward v. Oates*, 42 Ala. 225; *In re Phillips*, 18 Mont. 311; *In re Foley*, (Nev. 1898) 51 Pac. Rep. 834.

2. Postponing Distribution — Litigation. — If the estate is not ready for distribution because the right to the assets is in litigation, the court has the power in its discretion to delay the distribution until the right is judicially determined and the balance for distribution is ascertained. *Matter of Ricaud*, 57 Cal. 421.

Where Actions Are Pending Against an Executor for amounts exceeding the assets in his hands, the court will not order payment of legacies, though a year has elapsed since the probate of the will. *Matter of Brewster*, 1 Connolly (N. Y.) 172.

Assets Received After Action by Creditor Is Barred. — The *Massachusetts* statute bars the claims of creditors who do not bring an action against the executor or administrator within two years after the time of his giving bond and notice of his appointment, except, *inter alia*, where assets come into his hands "after the expiration of two years." Under this statute it has been held that where the interest of an intestate in a partnership had been inventoried by the administrator, and sold by him, soon after his appointment, to the surviving partners, under an agreement that the price should be paid in certain notes and mortgages, which were not delivered until more than two years later, the receipt of the notes and mortgages was not within the exception of the statute, and therefore did not authorize a delay in the distribution of the estate for the purpose of allowing the administrator to retain assets sufficient to satisfy the claim of a creditor who had not brought his action within the two years. The notes were not new assets, but were only the proceeds of a chose in action which it was the duty of the administrator from the first to collect. *Sturtevant v. Sturtevant*, 4 Allen (Mass.) 122.

The Fact That There Are Uncollected Claims belonging to the estate is not sufficient cause for

d. DISTRIBUTION BARRED BY LAPSE OF TIME. — After the lapse of the statutory or prescriptive time within which it is necessary to institute a proceeding against an executor or administrator for an accounting, he cannot be compelled to make distribution, unless within such period he has done some act or made some admission to remove the bar of the lapse of time.¹

5. Mode of Payment — *a. IN GENERAL.* — It is not necessary in all cases that pecuniary legacies or distributive shares should be paid in cash. Any mode of payment may be adopted with the consent of the legatee or distributee. This is the general rule in regard to what constitutes payment.² Thus the investment of money in the name of a legatee has been held a payment of the legacy, *pro tanto*, so as to vest the title in him and pass to him the right to the accruing interest.³ So, too, a credit on a distributive share of the price of property purchased by the distributee at the administrator's sale is a valid payment.⁴

And Personalty May Be Distributed in Kind to the persons entitled, instead of converting it into money and making distribution in that manner, if the rights of the parties can be equitably adjusted.⁵

In Case of a Specific Bequest of a note to two persons in equal shares, if the legatees refuse to take it jointly, the executor may divide it by taking two notes each for one-half of the amount, payable to each of the legatees.⁶

Acts Not Effective as Payments. — On the other hand, it has been held that a distributive share was not paid merely by purchasing a bank draft for the amount

delaying distribution where the debts have all been paid and it is improbable that further collections can be made. *Bellinger v. Ingalls*, 21 Oregon 191.

1. Distribution Barred by Lapse of Time. — In *McCartney v. Bone*, 40 Ala. 533, it was held that the bar created by the presumption of a settlement after the lapse of twenty years from the time when an administrator could be called on to make distribution of the estate was not removed by the fact that within twenty years he had filed an account for a final settlement, on which a decree had been rendered.

As to the Time within which a proceeding for an accounting must be brought, see *infra*, this title, *Accounting — Release from Liability to Account*.

2. As to What Constitutes Payment in general, see the title *PAYMENT*.

3. Payment by Investing Funds in Legatee's Name. — *Sullivan v. Winthrop*, 1 Sumn. (U. S.) 1.

4. Crediting on Distributive Share Price of Property Purchased by Distributee at Administrator's Sale. — *Wilson v. Randall*, 37 Ala. 74 76 Am. Dec. 37. See also *supra*, this title, *Management and Care of Estate*, subdiv. 2. *d. (2) cc. Price and Terms of Payment*; same section, subdiv. 3. *b. (c) cc. Price and Terms of Payment*; section *Sale of Real Estate under Order of Court*, subdiv. 9. *i. (3) Set-off of Claims Against Estate*.

5. Distribution in Kind — Kentucky. — *Wood v. Wood*, 1 Metc. (Ky.) 512.

Maryland. — *Evans v. Iglehart*, 6 Gill & J. (Md.) 171.

North Carolina. — *Hester v. Hester*, 3 Ired. Eq. (38 N. Car.) 9.

Pennsylvania. — *Reed's Estate*, 82 Pa. St. 428.

Virginia. — *Hunter v. Lawrence*, 11 Gratt. (Va.) 111, 62 Am. Dec. 640.

Right of Legatee to Distribution in Kind. — If

a residuary legatee is willing to take his share in kind, he is entitled to do so; and the executors cannot refuse to make distribution on the ground that they have been unable to convert the securities into cash. *Reed's Estate*, 82 Pa. St. 428. See also *In re Richardson*, (1896) 1 Ch. 512.

Equality in Distribution. — The distributees must be equally dealt with in making distribution in kind. *Lowry v. Newsom*, 51 Ala. 570. But an exactly equal distribution in kind need not be made. The shares of the distributees may be equalized by payments in money. *Williams v. Holmes*, 9 Md. 281.

If, on final settlement of the accounts, the assets are partly gold and partly currency, each distributee should have his fair share of each kind. *Lowry v. Newsom*, 51 Ala. 570. See also *Tilsen v. Haine*, 27 La. Ann. 288.

Statutory Authority to Distribute in Kind. — In *Maine* specific distribution of personal property is authorized by statute in certain cases. *Rose v. O'Brien*, 50 Me. 188. Compare statutes in other jurisdictions.

Appointment of Distributors. — In *Davenport v. Richards*, 16 Conn. 310, it was held that the statute providing that when an estate is ready for distribution it shall be made by distributors appointed for that purpose was intended to apply to those cases only where the property to be distributed should consist, not of money, but of other property of which it would be necessary to determine the value, and which it is of course a part of the business of the distributors to do, in order properly to discharge their duty.

A Chose in Action may be transferred by an administrator to a distributee by parol. *Mitchell v. Mitchell*, 1 Gill (Md.) 66; *Balmer v. Sunder*, 11 Mo. App. 454.

6. Note Bequeathed to Two Persons. — *Davis v. Crandall*, 101 N. Y. 311. Compare *Clarke v. Sinks*, 144 Mo. 448.

of a distributive share and sending it to the distributee, who proceeded with due diligence to collect it, but the bank failed in the meantime and the draft was not paid; ¹ or by a deposit of the amount of the share in bank without notice to or the assent of the distributee; ² or by the individual note of the executor or administrator to the legatee or distributee, unless it is accepted as a payment and satisfaction. ³

b. LEGACY TO EXECUTOR. — An executor who is a legatee under the will may take his legacy without the formal delivery required in the case of legacies to other persons, ⁴ but he will be presumed to hold the money or property bequeathed to him until an election is made by him to take it as legatee. ⁵ Such election may be either express or implied, ⁶ and very slight circumstances are sufficient to imply an election. ⁷

c. RETAINER OF DEBTS DUE FROM LEGATEE OR DISTRIBUTEE — (1) *General Rule.* — If a legatee under a pecuniary bequest or a distributee is indebted to the estate, the amount of the debt may be retained from the legacy or distributive share, and the balance, if any, paid to the legatee or distributee in full of his claim; ⁸ and the same rule is applicable to the assignees of the

1. Purchase of Bank Draft for Distributive Share Not a Payment. — *State v. Wagers*, 47 Mo. App. 431.

2. Deposit of Distributive Share in Bank. — *Scott v. Fox*, 14 Md. 388.

3. Individual Note of Executor or Administrator. — In *Durling v. Neigh*, 15 S. & R. (Pa.) 114, it was held that the personal responsibility of the executor was not substituted for that of the estate by the giving of the executor's notes for the legacy and the execution of a receipt for the notes as in full of all demands against the estate "when paid."

Individual Note of Administrator to Guardian of Infant Distributee. — The individual note of an administrator to the guardian of an infant distributee for the amount of the infant's distributive share, payable to the guardian individually, cannot be claimed as a payment of such share. *Edwards v. Williams*, 39 S. Car. 86.

4. Formal Delivery of Legacy to Executor Not Necessary. — *Stuart v. Carson*, 1 Desaus. (S. Car.) 511.

An executor to whom a legacy is given by the will has no right to retain it to the exclusion of other legatees. *Gadsden v. Lord*, 1 Desaus. (S. Car.) 208; *Atcheson v. Robertson*, 4 Rich. Eq. (S. Car.) 39.

5. Election Necessary to Vest Title in Executor Legatee. — *Palmer v. Kemp*, 2 A. K. Marsh. (Ky.) 355.

Where an Administrator Who Is the Residuary Legatee pays all debts, legacies, and charges against the estate, the title to the remaining assets will at once vest in the residuary legatees under the will, without any formal transfer from themselves as administrators. *Matter of Mullan*, 145 N. Y. 98. See also *Blood v. Kane*, 130 N. Y. 518.

6. Election Express or Implied. — *Palmer v. Kemp*, 2 A. K. Marsh. (Ky.) 355.

7. What Constitutes Implied Election. — An election to take as legatee will be implied where property bequeathed to one of two joint executors was in the exclusive possession of the legatee executrix and was by her placed in the hands of a third person, with a direction to such third person not to let the property be taken away except on a written order from

her. *Palmer v. Kemp*, 2 A. K. Marsh. (Ky.) 355.

Where an executor is a legatee with others of a life estate in a number of slaves, and a division is made, and he afterwards sells them without naming himself as executor, it cannot be inferred that he sold as executor. *Boone v. Dykes*, 3 T. B. Mon. (Ky.) 529. See also *Stuart v. Carson*, 1 Desaus. (S. Car.) 500.

8. Retainer of Debts Out of Legacy or Distributive Share — England. — *Cherry v. Boulton*, 4 Myl. & C. 442; *Jeffs v. Wood*, 2 P. Wms. 129; *Courtenay v. Williams*, 3 Hare 539; *Ranking v. Barnard*, 5 Madd. 32; *Smith v. Smith*, 3 Giff. 263; *In re Watson*, (1896) 1 Ch. 925; *Sims v. Doughty*, 5 Ves. Jr. 243. See also *Aston v. Pye*, 5 Ves. Jr. 350, note *b*; *Elbank v. Montolieu*, 5 Ves. Jr. 737; *Willes v. Greenhill*, 29 Beav. 376; *Coates v. Coates*, 33 Beav. 249; *In re Binns*, (1896) 2 Ch. 584.

Alabama. — *Nelson v. Murfee*, 69 Ala. 598; *Miller v. Irby*, 63 Ala. 477; *Goodman v. Benham*, 16 Ala. 625.

Iowa. — *Bowen v. Evans*, 70 Iowa 368.

Maine. — *Webb v. Fuller*, 85 Me. 443.

Massachusetts. — *Blackler v. Boott*, 114 Mass.

24. *New Jersey.* — *Batton v. Allen*, 5 N. J. Eq. 99; *Denise v. Denise*, 37 N. J. Eq. 163; *Hill v. Bloom*, 41 N. J. Eq. 276; *Snyder v. Warbasse*, 11 N. J. Eq. 463; *Voorhees v. Voorhees*, 18 N. J. Eq. 223; *Brokaw v. Hudson*, 27 N. J. Eq. 135.

New York. — *Howland v. Heckscher*, 3 Sandf. Ch. (N. Y.) 526; *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 312; *Smith v. Kearney*, 2 Barb. Ch. (N. Y.) 533; *Matter of Bogart*, 28 Hun (N. Y.) 466; *Smith v. Murray*, 1 Dem. (N. Y.) 36. See also *Clarke v. Bogardus*, 12 Wend. (N. Y. 67, 2 Edw. Ch. (N. Y.) 387; *Wright v. Austin*, 56 Barb. (N. Y.) 17; *Close v. Van Husen*, 19 Barb. (N. Y.) 509.

North Carolina. — *Ramsour v. Thompson*, 65 N. Car. 628.

Ohio. — *Re Ellis*, (Probate Ct.) 5 Ohio N. P. 207.

Pennsylvania. — *Earnest v. Earnest*, 5 Rawle (Pa.) 213; *Strong v. Bass*, 35 Pa. St. 333; *Grard L. Ins., etc., Co. v. Wilson*, 57 Pa. St. 182.

legatee or distributee, or to persons otherwise succeeding to his interest.¹ This is often spoken of as a right of set-off, but it is said that, strictly speaking, it is a right of retainer.²

(2) *What Debts May Be Retained* — (a) *In General*. — Debts to the estate incurred after the death of the decedent may be retained as well as those which were owing to the decedent in his lifetime,³ but there must be an existing liability of the legatee or distributee to the estate in order to justify the with-

Rhode Island. — Fisher's Petition, 19 R. I. 53; *Armour v. Kendall*, 15 R. I. 193.

South Carolina. — Godbold v. Godbold, 13 S. Car. 601.

Vermont. — Tinkham v. Smith, 56 Vt. 187.

If a Debt Is Lost by Negligently Failing to Retain It from a bequest to the debtor, the executor is liable. *Re Shearer*, 13 Montg. Co. Rep. (Pa.) 98.

Specific Legacies. — A debt due from a legatee to the estate cannot be retained out of a specific legacy, because the two things cannot be measured one against the other. If in such case the right did exist, it would be not a right of retainer, but of lien. But this principle does not apply to a specific bequest of the profits of a business represented by moneys in the hands of the executors. *In re Taylor*, (1894) 1 Ch. 671.

In *Holmes v. McPheeters*, 149 Ind. 587, it was said that the right of retainer did vest on the principle of an equitable lien. But see *contra*, *Procter v. Newhall*, 17 Mass. 81.

Joint Indebtedness of Distributees. — Where three distributees were jointly indebted to the testator, and the administrator voluntarily paid one of them his distributive share out of the assets of the estate, without retaining a *pro rata* share of the debt, it was held that such payment operated as a credit on one-third of the debt. *Rudolph v. Underwood*, 88 Ga. 664.

The Fact that the Debtor Legatee Has Become a Bankrupt after the testator's death does not preclude the executor from retaining the amount of the debt. *In re Watson*, (1896) 1 Ch. 925; *Bousfield v. Lawford*, 1 De G. J. & S. 459. See also *Stammers v. Elliott*, L. R. 3 Ch. 195; *Armstrong v. Armstrong*, L. R. 12 Eq. 614; *In re Orpen*, 16 Ch. Div. 202; *In re Rees*, 60 L. T. N. S. 260.

But if the Bankruptcy Occurred During the Testator's Lifetime the executor cannot retain a debt due from the bankrupt to the testator, because the executor was never entitled to more than a dividend on the debt. *In re Hodgson*, 9 Ch. Div. 673; *Cherry v. Boulton*, 4 Myl. & C. 442.

1. Retainer Against Assignee of Legatee or Distributee. — *Keim v. Muhlenberg*, 7 Watts (Pa.) 79.

Retainer Against Next of Kin of Deceased Distributee. — A child who claims his father's share of his deceased grandfather's estate takes it subject to the deduction of any debts due from the father to the grandfather's estate. *Snyder v. Warbasse*, 11 N. J. Eq. 463; *Earnest v. Earnest*, 5 Rawls (Pa.) 213; *Girard L. Ins., etc., Co. v. Wilson*, 57 Pa. St. 182.

But a direct bequest by a grandfather to his grandchild is not subject to any deduction on account of a debt from the father of the legatee to the testator. *Thatcher v. Cannon*, 6 Bush (Ky.) 541.

Substituted Legatees. — A substituted legatee takes subject to the equities existing against the primary legatee, and therefore if the primary legatee was indebted to the testator the substituted legatee can take only the excess of the legacy over the debt. *Denise v. Denise*, 37 N. J. Eq. 163.

2. Set-off and Retainer Distinguished. — The right of an executor or administrator to retain a legacy or distributive share from a debtor to the estate and apply it to the indebtedness is not the technical right of set-off in actions at law. It is rather called, in the old cases, the right of retainer. It is an equitable right of its own nature, and not at all dependent upon any statute. *Webb v. Fuller*, 85 Me. 443.

"This Right Is Not One of Set-off", but is founded on the principle that the administrator or executor has an equitable lien on the share of the distributee or legatee until the latter has discharged the obligation which he owes to the estate. The heir or legatee, as the authorities affirm, is not, in accordance with justice or good conscience, entitled to be awarded and receive his share as long as he is a debtor to the estate, and thereby has in his own hands a part of the fund upon which the payment of his own share and the shares of others depend." *Holmes v. McPheeters*, 149 Ind. 587.

But see *Procter v. Newhall*, 17 Mass. 81. In this case *Wilde, J.*, denied the right on distribution to retain a debt due from a distributee to the estate. "The course," said the learned judge, "is to make an equal distribution; and the administrator, if he would avail himself of the right of set-off, may refuse to pay this distributive share; but this right of set-off does not constitute a lien on the estate."

3. A Debt to the Executor or Administrator in His Representative Capacity may be retained out of the legacy or distributive share of the debtor. An instance of this is where the legatee or distributee buys property of the estate at a sale thereof by the executor or administrator. *McGee v. Ford*, 5 Smed. & M. (Miss.) 769; *Mahon v. Bower*, 1 How. (Miss.) 275; or where he borrows money of the estate from the executor or administrator. *New v. New*, 127 Ind. 576; *Haskell v. Hill*, 169 Mass. 124.

A distributee who had given a note to the administrator for the price of property purchased at the administrator's sale may, on becoming administrator *de bonis non*, retain the note, which has come into his possession, towards his distributive share of the estate. *Miller v. Alexander*, 1 Hill Eq. (S. Car.) 25.

Where the Decedent Was Surety for a Distributee, and the surety debt was paid by the administrator after the decedent's death, he may retain from the share of the distributee the amount so paid. *Ramsour v. Thompson*, 65 N. Car. 628.

holding of any part of his legacy or distributive share.¹

(b) **Debts Barred by Statute of Limitations.** — In England the right of retainer is applied even to debts which are barred by the statute of limitations.² This is said to be based on the theory that the legacy or distributive share is subject to a lien for the amount of the debt.³

In the United States some of the courts follow the English doctrine in this respect,⁴ while others take the opposite view.⁵

(c) **Debts Discharged in Bankruptcy.** — Debts discharged in bankruptcy are, in respect to the matter under consideration, somewhat analogous to debts barred by the statute of limitations, and it is accordingly held in some jurisdictions that the discharge does not operate to extinguish the debt, but merely takes away the remedy, and that therefore the executor or administrator may retain such debts from the legacy to or distributive share of the bankrupt.⁶

(d) **Debts Due to Executor or Administrator Individually.** — An executor or administrator, in making distribution of the estate under the authority of the probate court, has no power to retain from a legacy or distributive share a debt due to him individually from the legatee or distributee, because the adjustment of the matters involved is not within the jurisdiction of that court.⁷ It seems,

1. **Disputed Claims** of the estate against a legatee are not the subject of retainer. Thus it was held that a claim for the rent of land formerly owned by the testator could not be set off against a legacy, where the legatee was in possession of the land under an adverse claim of title, and no facts were shown on which the rents would be directly recoverable at law. *West v. Smith*, 8 How. (U. S.) 402.

A Claim for the Care of Infant Distributees who were the decedent's children by a former husband cannot be retained by her second husband as administrator of her estate, where the care was bestowed on the infants before the second marriage, and no charge was made by her during her life. *Terry v. Hopkins*, 1 Hill Eq. (S. Car.) 1.

Debts of Husband of Distributee. — In *Yohe v. Barnet*, 1 Binn. (Pa.) 358, a debt of a distributee's husband was allowed to be retained out of the distributive share, on the principle that the husband was the owner of his wife's share. But see *Frauenfelt's Estate*, 3 Whart. (Pa.) 415; *Stewart v. Glenn*, 3 Heisk. (Tenn.) 581.

2. **Rule in England — Debts Barred by Limitation May Be Retained.** — *Higgins v. Scott*, 2 B. & Ad. 413, 22 E. C. L. 113; *Courtenay v. Williams*, 3 Hare 539; *Coates v. Coates*, 10 Jur. N. S. 532; *Rose v. Gould*, 15 Beav. 189; *Jeffs v. Wood*, 2 P. Wms. 128.

Distinction Between Legacies and Distributive Shares. — In *In re Cordwell*, L. R. 20 Eq. 644, counsel attempted to draw a distinction between legacies and distributive shares in respect to the right of retainer as to debts barred by the statute of limitations, but it was held by Sir James Bacon, V. C., that the rule was the same in both instances.

3. **English Theory of Lien.** — *Holt v. Libby*, 80 Me. 329.

In England no action at law can be maintained for a legacy, and the courts of equity have always assumed the right to impose the terms on which the beneficiary shall receive it. *Allen v. Edwards*, 136 Mass. 138.

4. **English Rule Followed in United States.** — *Holmes v. McPheeters*, 149 Ind. 587; *Garrett v. Pierson*, 29 Iowa 304; *Matter of Smith*, 14 Misc. Rep. (N. Y. Surrogate Ct.) 169; *Matter of Bogart*, 28 Hun (N. Y.) 466.

5. **English Doctrine Not Followed in United States.** — In *Holt v. Libby*, 80 Me. 329, *Peters, C. J.*, after considering the English doctrine, said: "This doctrine cannot be applicable in this state, and in most of the states, where a legacy is made by statute, if not by ancient practice, a legal claim. With us it is a distinct and independent legal claim. The estate is just as much of a debtor to the indebted legatee as the legatee is to the estate. Each has a legal right and remedy. And a statute-barred debt is no more recoverable by an estate than by any other creditor. To our minds, this is the better doctrine. Observation leads us to believe that a testator is more likely to intend to remit than to collect such debts, when nothing is declared of them by him in his will, especially debts against his children and relatives. In many instances such claims are covered by the dust of time and forgotten, though found by executors after the death of the testators. In many other instances the advances are intended as benefactions and gifts, conditioned upon some unforeseen circumstance arising to make it expedient to regard them as debts." See also *Wadleigh v. Jordan*, 74 Me. 483.

In *Massachusetts* it is held that a debt barred by the statute of limitations cannot be retained unless it clearly appears from the language of the will that the testator so intended. *Allen v. Edwards*, 136 Mass. 138.

Other American Cases holding that a debt barred by the statute of limitations cannot be retained out of a legacy or distributive share are *Harrod v. Carder*, 2 Ohio Cir. Dec. 274; *Matter of Murray*, 2 Pearson (Pa.) 473; *Drysdale's Appeal*, 14 Pa. St. 531; *Reed v. Marshall*, 90 Pa. St. 345; *Milne's Appeal*, 99 Pa. St. 483.

6. **Debts Discharged in Bankruptcy.** — The rule stated in the text obtains in *South Carolina*. *Wilson v. Kelly*, 16 S. Car. 216; *Sartor v. Beaty*, 25 S. Car. 293. Compare *Lee v. Eure*, 93 N. Car. 5; *Parker v. Grant*, 91 N. Car. 338.

For a Full Discussion of the effect of a discharge in bankruptcy, see the title *INSOLVENCY AND BANKRUPTCY*.

7. **No Retainer for Debts Due Executor or Administrator Individually.** — *Kidd v. Porter*, 13

however, that where the executor or administrator has become personally liable for the legacy or distributive share, the debt of the legatee or distributee is available as a set-off in an action or suit for its recovery;¹ but this principle does not apply to a debt due to the executor or administrator individually from a person who is entitled to receive a legacy or distributive share in a fiduciary capacity.²

(3) *Retainer from Proceeds of Real Estate.* — When land devised or descended has been sold for the payment of the decedent's debts, and a surplus remains for distribution, the question sometimes arises whether a debt of a devisee or heir may be retained out of his share of the surplus. The right of retainer under such circumstances has been allowed in some cases,³ while others, in view of the doctrine that the converted real estate retains its original character, so far as the heir or devisee is concerned, hold that the doctrine of retainer is not applicable.⁴

6. Effect of Distribution — *a. IN GENERAL.* — A payment by an executor or administrator to a legatee or distributee obviously operates as a satisfaction of the legacy or distributive share to the extent of the payment, and credit will be allowed in the administration account as against the legatee or distributee for the amount paid;⁵ and in case a legacy is due to the estate of a deceased legatee, payment to the sole distributee of the legatee is valid as against an administrator of the legatee's estate subsequently appointed, where that estate was not indebted and there was no administration on it at the time of the payment.⁶

The Rights of Third Persons may be affected by distribution. Thus, if a person surrenders personal property to an administrator, who distributes it among the next of kin of his intestate without objection from such person, he is

Ala. 91; *Bondurant v. Thompson*, 15 Ala. 202; *Bradshaw's Appeal*, 3 Grant's Cas. (Pa.) 109; *McLaughlin v. Barnes*, 12 Wash. 373.

1. Debt Due Executor or Administrator Individually — *Set off Against Personal Liability for Legacy or Distributive Share.* — *Hooper v. Hooper*, 32 W. Va. 526. See also *Bradshaw's Appeal*, 3 Grant's Cas. (Pa.) 109; *McLaughlin v. Barnes*, 12 Wash. 373.

2. The Debt of a Guardian of a Distributee to the administrator individually cannot be set off against the share of the distributee which has been decreed to be paid by the administrator to the guardian. *Shriver v. Garrison*, 30 W. Va. 456.

3. Retainer Allowed Out of Proceeds of Realty. — *Nelson v. Murfee*, 69 Ala. 598; *Fiscus v. Moore*, 121 Ind. 547, *modifying Ball v. Green*, 99 Ind. 75.

4. Retainer Not Allowed Out of Proceeds of Realty. — *La Foy v. La Foy*, 43 N. J. Eq. 206, 3 Am. St. Rep. 302; *Smith v. Kearney*, 2 Barb. Ch. (N. Y.) 533; *Sartor v. Beatty*, 25 S. Car. 293.

5. Effect of Payment in General — *Satisfaction of Legacy or Distributive Share.* — *Carroll v. Moore*, 7 Ala. 615; *Com. v. Shipman*, (Pa. 1886) 3 Cent. Rep. 257.

An Advance Payment to a legatee who died before the time arrived for the payment of legacies in the regular course is good as against his next of kin. *People v. Atkins*, 7 Ill. App. 105.

Payment to a Distributee Before a Decree of Distribution is good as against him, and on the subsequent entry of a decree the distributee cannot claim payment under it on the ground that the decree must precede the payment. *Com. v. Shipman*, (Pa. 1886) 3 Cent. Rep. 257.

Delivery to Trustee for Distribution. — In *Quince v. Nixon*, 6 Jones L. (51 N. Car.) 289, the widow of the intestate administered on his estate, and as a part thereof held a certain slave for six years, and then on her remarriage conveyed in her individual name such slave to a trustee in trust for herself and her daughter, they being the only next of kin of the intestate. It was held that the conveyance was conclusive to show that she ceased to hold the property as administratrix; that this act was a full administration as to it, and that after her death an administrator *de bonis non*, on her husband's death, took nothing in said slave.

When an Estate Is Divided and a Guardian Appointed for an infant legatee, the executors are no longer accountable for the future income of the estate. The guardian is entitled to the possession of it, and is to be regarded as in the receipt of the income. *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277, 29 Am. Dec. 72.

Joint Legatees. — The delivery to one of two joint legatees of the chattel bequeathed is good as against the other. *Villard v. Robert*, 1 Strobh. Eq. (S. Car.) 393.

As to Credit for Payments to legatees and distributees, see *infra*, this title, *Accounting* — *Credits* — *Payments to or for Benefit of Legatees and Distributees*.

6. Payment to the Sole Distributee of a Legatee discharges the executor making the payment from further liability, where the legatee's estate was not indebted, and an administrator of the legatee subsequently appointed cannot recover the amount of the legacy from the executor. *Johnson v. Longmire*, 39 Ala. 143.

estopped afterwards to assert any claim to the property as against the administrator.¹

But Payment to the Wrong Person does not discharge the administrator from liability to the persons actually entitled.²

b. PAYMENTS UNDER ORDER OR DECREE. — An order or decree of distribution is a complete protection to the executor or administrator in making the payment, and relieves him of all liability, though the assets afterwards prove insufficient to pay debts,³ unless he obtained such order or decree without disclosing to the court the existence of claims which were known to him.⁴

c. PAYMENTS BEFORE ORDER OR DECREE. — The consequence of making distribution to the legatees or distributees before an order or decree directing it is that the executor or administrator is chargeable with a devastavit in case any debts are left unpaid, and he becomes personally liable to the creditors,⁵

1. Effect of Distribution on Rights of Third Persons. — In *Pool v. Harrison*, 18 Ala. 514, the plaintiff surrendered to the defendant as administrator certain slaves which the defendant thereupon distributed, pursuant to an order of court, and without objection from the plaintiff, among the next of kin of the intestate. The court held that the plaintiff was estopped afterwards to assert any claim against the administrator on account of the slaves, and that it was immaterial whether the surrender was on the demand of the administrator or was voluntary, or whether the administrator had previously regarded the property as assets and returned it in his inventory or not. See also *Williams v. Harrell*, 8 Ired. Eq. (43 N. Car.) 123, 55 Am. Dec. 442.

2. Effect of Payment to Wrong Person. — See *supra*, this section, *To Whom Payment or Delivery May Be Made*.

3. Order of Distribution Protects Executor or Administrator Making Payment — *England*. — *Dean v. Allen*, 20 Beav. 1; *Waller v. Barrett*, 24 Beav. 413; *Addams v. Ferick*, 26 Beav. 384; *Bennett v. Lytton*, 2 Johns. & H. 155; *Smith v. Smith*, 1 Dr. & Sm. 384; *Dodson v. Sammell*, 1 Dr. & Sm. 175; *Knatchbull v. Fearnhead*, 3 Myl. & C. 126; *Williams v. Headland*, 4 Giff. 505; *England v. Tredegar*, L. R. 1 Eq. 344.

Kentucky. — *Fraser v. Page*, 82 Ky. 73; *Vandergrift v. Cone*, (Ky. 1896) 37 S. W. Rep. 60.

Pennsylvania. — *Ferguson v. Yard*, 164 Pa. St. 586; *Pierson's Estate*, 5 Pa. Dist. Rep. 424.

Effect of Decree After Payment. — In *Charlton's Appeal*, 88 Pa. St. 476, it was held that an administrator who has made voluntary payments is protected by a subsequent decree in favor of such payee. See *infra*, the next subdivision.

In *Massachusetts* it is held that a decree of the Probate Court allowing distribution of all the personal estate of a deceased person before the end of the two years of administration is void as to creditors prosecuting their claims within that period. *Allen, J.*, delivering the opinion of the court, says that there are but three instances in which the court is authorized to decree payment of any of the estate to the next of kin. The first is when the court orders a particular payment to be made upon security given. In that case the security takes the place of the estate paid, and the payment belongs to the account of final distribution, and not of administration. The next is the case of partial distribution. In that case, if claims of creditors disclosed after a partial distribution

should render the estate insolvent, grave questions might arise. The other case is the final distribution of the balance remaining on the settlement of the estate after the payment of all debts, and when no persons but the distributees are interested in the estate. It is the duty of the court to make such a decree when the final account of administration shows the balance which it is legally impossible that a creditor can come in to disturb; it may make such a decree when it seems improbable that such creditor will come in, but if he does appear, the decree will be void as to him. *Browne v. Doolittle*, 151 Mass. 595.

4. Decree Obtained with Knowledge of Existing Claims. — In *Whitney v. Pinney*, 51 Minn. 146, it was said that an administrator or executor cannot safely ignore the pendency of an action against him in his representative capacity, and on his own motion bring about a settlement of the estate and a distribution of its assets; and the court accordingly held that a final decree of distribution did not protect the administrator from liability on a judgment which had been recovered against him in his representative capacity, where the action was pending at the time when he petitioned for a settlement of his accounts and for a final decree, and he did not disclose to the court the fact that the action against him was pending.

5. Distribution Before Order or Decree — Personal Liability to Creditor — *Alabama*. — *Dean v. Portis*, 11 Ala. 104.

Arkansas. — *McPaxton v. Dickson*, 15 Ark. 41.

Connecticut. — *Phelp v. Swan*, Kirby (Conn.) 429.

Indiana. — *Fleece v. Jones*, 71 Ind. 340.

Kentucky. — *Johnson v. Fuquay*, 1 Dana (Ky.) 514.

Louisiana. — *Robson's Succession*, 19 La. Ann. 97.

Minnesota. — *Whitney v. Pinney*, 51 Minn. 146.

Missouri. — *North v. Priest*, 81 Mo. 561; *Bassett v. Slater*, 81 Mo. 75.

New York. — *Glacius v. Fogel*, 4 Redf. (N. Y.) 516.

North Carolina. — *McNair v. Ragland*, 1 Dev. Eq. (16 N. Car.) 520.

Pennsylvania. — *Campbell v. Reed*, 24 Pa. St. 498; *Carter v. Trueman*, 7 Pa. St. 315; *Robins's Estate*, 4 Pa. Dist. Rep. 277; *Swearingen v. Pendleton*, 4 S. & R. (Pa.) 389.

Virginia. — *Kippen v. Carr*, 4 Munf. (Va.) 119.

even though he was ignorant of the existence of any debts or claims at the time when he distributed the assets,¹ unless the claims have been barred by failure of the claimant to present them within the time limited therefor by law,² or lapse of time has operated as a waiver of the right of the creditor or

If an executor or administrator pays legacies or makes distribution without indemnity or impounding the assets, he will be liable to answer the damages *de bonis propriis*. *Simmons v. Bolland*, 3 Meriv. 547; *Hawkins v. Day*, Ambler 160, 1 Dick. 155; *Pearson v. Archdeaken*, 1 Alc. & Nap. 23; *Newcastle, etc., Banking Co. v. Hymers*, 22 Beav. 367; *Reeves v. Bell*, 2 Jones L. (47 N. Car.) 254; *McGlaughlin v. McGlaughlin*, 43 W. Va. 226.

Payment to the Surrogate, without an order to pay the money into court, is not a payment into court so as to discharge the administrator from liability to the distributees in case the surrogate does not pay the money over to them. *Matter of Te Culver*, 22 Misc. Rep. (N. Y. Surrogate Ct.) 217.

The Allowance of an Administrator's Account in which he credits himself with payments made without a decree of distribution to persons whom he mistakenly supposed to be the intestate's heirs will not save him from liability to the person actually entitled to the estate, but the account will be opened and the administrator charged with the amount so paid out by him. *Defriez v. Coffin*, 155 Mass. 203.

Taxes on the estate must be paid before legacies, and executors and administrators, before paying legacies, must see at their peril that there is no tax on the estate. *McMahon v. Sullivan*, 14 Abb. N. Cas. (N. Y. Supreme Ct.) 405, *sub nom.* *Matter of McMahon*, 67 How. Pr. (N. Y. Supreme Ct.) 152; *McMahon v. Brown*, 14 Abb. N. Cas. (N. Y.) 406, note; *McMahon v. Jones*, 14 Abb. N. Cas. (N. Y. Supreme Ct.) 406.

Where a tax was imposed before the estate was settled, it was held to be immaterial that proceedings for its collection were not begun until afterwards. The executor should have retained the necessary amount before distribution, and, having failed to do so, was personally liable. *Matter of McMahon*, 67 How. Pr. (N. Y. Supreme Ct.) 113.

Even Though Sufficient Assets Are Retained to Satisfy Creditors, payments to distributees before the payment of debts are at the administrator's peril. *McIntosh v. Hambleton*, 35 Ga. 95, 89 Am. Dec. 276. Compare *Anderson v. Irvine*, 7 B. Mon. (Ky.) 209.

Payment of Legacy to Self — Rights of Creditors. — In *McMillan v. Toombs*, 79 Ga. 143, it was held that an executor having notice of an outstanding debt against his testator cannot administer to himself, as devisee or heir at law, any portion of the realty in kind, so as to hold it free from the ordinary legal lien of a judgment *de bonis testatoris* subsequently rendered against him in favor of the creditor. The court said that this exact point had not theretofore been decided, but that the "former decisions furnish an atmosphere if not a light for the present ruling," and cited *Scranton v. Demere*, 6 Ga. 93; *Demere v. Scranton*, 8 Ga. 43; *Caldwell v. Montgomery*, 8 Ga. 106; *Johnson v. Lewis*, 8 Ga. 462; *Justices v. Moreland*, 20 Ga. 145; *Griffin v. Justices*, 22 Ga. 590;

Yerby v. Matthews, 26 Ga. 549; *Jones v. Parker*, 55 Ga. 11; *Castellaw v. Guilmartin*, 58 Ga. 305; *Wynn v. Bryce*, 59 Ga. 529; *Redd v. Davis*, 59 Ga. 823; *Jones v. Parker*, 60 Ga. 500; *Long v. Mitchell*, 63 Ga. 709; *Tift v. Collier*, 78 Ga. 194.

1. Debts Not Known to Executor or Administrator. — The mere circumstance of want of notice of a debt or claim against the estate of a decedent will not excuse the executor or administrator from the payment of it, if the assets were originally sufficient, though he, in ignorance of its existence, had *bona fide* handed over the assets to the legatees or persons entitled to distribution. *Chelsea Water-works Co. v. Cowper*, 1 Esp. N. P. 275; *Norman v. Baldry*, 6 Sim. 621; *Smith v. Day*, 2 M. & W. 684; *Knatchbull v. Fearnhead*, 3 Myl. & C. 122; *Hill v. Gomme*, 1 Beav. 540; *Cookus v. Peyton*, 1 Gratt. (Va.) 432.

This Rule Is Modified in England by a statute authorizing executors and administrators to advertise for creditors, and providing that after such advertisement they may "distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets, or any part thereof, so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets, or a part thereof, as the case may be." Stat. 22 & 23 Vict., c. 35, § 29.

Under this statute it is held that an executor who has distributed the assets of his testator, after issuing advertisements and taking the steps pointed out by the act, will have the same protection as if he had administered the estate under a decree of the court; and if he should have retained any legacies as trustee after appropriating them for the benefit of the *cestui que trust*, he will no longer be under any liability *qua* executor. *Clegg v. Rowland*, L. R. 3 Eq. 368; *Hunter v. Young*, 4 Exch. Div. 256.

But an executor with notice of a claim against his testator's estate is not discharged by the fact that the person entitled to make the claim has failed to send in particulars in answer to the statutory advertisement. *In re Land Credit Co. of Ireland*, 21 W. R. 135.

2. Nonpresentation of Claims by Creditors. — See the title DEBTS OF DECEDENTS, vol. 8, p. 1088.

In Suits for the Administration of Assets, a creditor who does not come in before the decree cannot hold the executor personally. Such creditor's only course is to prove his debt on paying the costs of the proceedings, and to be paid out of the residuary fund in court or in the hands of the executor; and if the residue has been paid out under the decree, his only remedy is to sue the legatees. *Gillespie v. Alexander*, 3 Russ. 136; *March v. Russell*, 3 Myl. & C. 41; *Hartwell v. Colvin*, 16 Beav.

claimant, by way of laches on his part, so as to preclude him from complaining of the insufficiency of the assets.¹

d. PAYMENT TO LEGATEE FOR LIFE. — Where a legacy for life, with or without remainder over, is paid or delivered by the executor to the life legatee, and a proper receipt or inventory is taken for the remainderman, there is a complete administration of the subject and the executor is discharged from all further liability in respect to it.²

e. OVERPAYMENT. — If an executor or administrator voluntarily pays a legatee, distributee, or creditor more than he is entitled to receive of the assets of the estate, or makes payment to some leaving unsatisfied the claims of others who have an equal or a preferred right, it is a devastavit, and the executor or administrator is liable to those whose claims are left unpaid,³ unless the payment is made under an order of court.⁴

140; *David v. Frowd*, 1 Myl. & K. 209; *Sawyer v. Birchmore*, 1 Keen 401; *Underwood v. Hatton*, 5 Beav. 36; *Seale v. Buller*, 2 Giff. 312.

1. Laches of Creditor or Claimant. — *Davis v. Blackwell*, 9 Bing. 5, 23 E. C. L. 243; *Richards v. Brown*, 3 Bing. N. Cas. 493, 32 E. C. L. 219; *Chelsea Water-works Co. v. Cowper*, 1 Esp. N. P. 275; *Norman v. Baldry*, 6 Sim. 621; *Smith v. Day*, 2 M. & W. 684; *Knatchbull v. Fearnhead*, 3 Myl. & C. 122; *Hill v. Gomme*, 1 Beav. 540. See also *Stroud v. Stroud*, 7 M. & G. 417, 49 E. C. L. 417; *In re Birch*, 27 Ch. Div. 622; *Jewsbury v. Mummery*, L. R. 8 C. P. 60; *March v. Russell*, 3 Myl. & C. 31; *Taylor v. Taylor*, L. R. 10 Eq. 477; *Davis v. Blackwell*, 9 Bing. 5, 23 E. C. L. 243, 2 M. & Scott 7.

2. Payment or Delivery to Legatee for Life — *Georgia*. — *Bates v. Woolfolk*, 5 Ga. 329.

Mississippi. — *Andrews v. Brumfield*, 32 Miss. 107.

New Jersey. — *Dodson v. Sevars*, 52 N. J. Eq. 611.

North Carolina. — *McKoy v. Guirkin*, 102 N. Car. 21.

Ohio. — *Posegate v. South*, 46 Ohio St. 391; *Flickinger v. Saum*, 40 Ohio St. 591. See also *Ratliff v. Warner*, 32 Ohio St. 334.

Even if There Is No Limitation Over on a bequest for life, payment or delivery to the legatee for life operates as a final and complete administration. *Bates v. Woolfolk*, 5 Ga. 329; *Andrews v. Brumfield*, 32 Miss. 107.

3. Overpayment — Executor or Administrator Becomes Liable to Persons Injured. — *Falls Bridge Turnpike Co. v. Adams*, 1 Hayw. & H. (C. C.) 95, 8 Fed. Cas. No. 4630; *Moffitt v. Varden*, 5 Cranch (C. C.) 658; *Maddox v. State*, 4 Har. & J. (Md.) 539; *Abbott v. Cole*, 5 Ohio 86; *Rogers v. Weaver*, 5 Ohio 536; *Rice v. Hunt*, 7 Lea (Tenn.) 33; *Hatcher v. Royster*, 14 Lea (Tenn.) 222.

"An overpayment made by the executor to any person entitled to a distributive share does not in any way diminish the amount of the estate which the law says is in the executor's hands for distribution. The law does not recognize any such overpayment, and does not, therefore, permit the executor to credit himself with the amount of the excess. In legal contemplation the sum is in the hands of the executor as assets of the estate which he must pay over to the parties entitled thereto." *Matter of Underhill*, 117 N. Y. 475.

Payment to Some Beneficiaries to Exclusion of Others. — If the executor deliver over the estate to the residuary legatee, without retaining a sufficient fund for other legacies, it will be a devastavit, and the legatees may recover against him. So if legacies are payable at a future day, he should retain enough to satisfy them when they become due. Regularly he should invest such a sum as will meet the payment at the day. So, if the legacy be an annuity, he should retain such a sum as, being invested, will by its annual interest meet the annual payments. *Stephenson v. Axson*, *Bailey Eq. (S. Car.)* 274.

Unknown Distributees. — An administrator is not relieved of liability by paying the whole estate to one of the distributees, though he is the only one known to the administrator to have any interest in the estate, because such payment is at his peril. *Lawrason v. Davenport*, 2 Call (Va.) 95.

Assent to Unequal Division. — By law, an administrator is bound to make equal distribution, and to deliver to each distributee his equal share of the estate; and if he withholds from one the whole or any part of his full share, it is no excuse that he has delivered it to another — no more than an undue application of the assets in the payment of debts would justify the neglect of any particular creditor; but if the distributees accept the shares awarded to them they are bound thereby though the division was unequal. *Sager v. Warley*, *Rice Eq. (S. Car.)* 26.

Payment of Legacy as Admission of Assets. — It has been held that whenever an executor pays a legacy the presumption is that he has sufficient assets to pay all, and the court will oblige him, if he is solvent, to pay the rest. *Orr v. Kaines*, 2 Ves. 194; *Lay v. Lay*, 10 S. Car. 208.

But see *Davis v. Newman*, 2 Rob. (Va.) 664, 40 Am. Dec. 764, in which *Allen, J.*, said: "I should not consider such a payment to one as conclusively establishing the executor's liability to all the rest, although the assets were deficient originally; because that would conflict with the spirit of our laws and adjudications." To the same effect is *Anderson v. Piercy*, 20 W. Va. 328.

4. If an Overpayment Is Made under an Order of Court the administrator cannot be held liable for the amount thereof. *Young v. Thrasher*, 48 Mo. App. 327. But see *Lewis v. Richardson*, 6 Rich. L. (S. Car.) 382.

7. Indemnity and Protection of Executor or Administrator — a. REFUNDING BONDS — (1) When Required. — In order that distribution of the estate may be made within the statutory period allowed for the presentation and payment of claims when the only obstacle is that claims may be afterwards presented, it is generally provided by statute in the *United States* that the executor or administrator may, on taking a sufficient bond from the legatees and distributees, pay their legacies or distributive shares within such statutory period;¹ but under the statutes authorizing refunding bonds when distribution is asked within such period none can be required after it has expired.²

In *Some States* bond may be required before the executor or administrator can be required to distribute the estate to legatees and distributees, whether the statutory period for the presentation of claims has or has not elapsed.³

In *Kentucky* there have been some changes in the law relating to refunding bonds. Formerly the statute required such bond in every case before payment of a legacy or distributive share could be compelled.⁴ Afterwards this statute was so modified as to make a bond necessary only when the legatee or distributee should be called on to give it.⁵

In *England* it was formerly the practice of the Court of Chancery to require

1. Refunding Bonds — Distribution Before Expiration of Time for Presentation of Claims —
Alabama. — *Johnston v. Fort*, 30 Ala. 78.

California. — *Matter of Crocker*, 105 Cal. 368.

Florida. — *Sanderson v. Sanderson*, 17 Fla. 820.

Mississippi. — *Murdock v. Washburn*, 1 Smed. & M. (Miss.) 546; *Allison v. Abrams*, 40 Miss. 747; *Mundy v. Calvert*, 40 Miss. 181; *French v. Davis*, 38 Miss. 167; *Packwood v. Elliott*, 43 Miss. 504. See also *Carmichael v. Browder*, 3 How. (Miss.) 252; *Crosby v. Covington*, 24 Miss. 619; *Keith v. Jolly*, 26 Miss. 131; *Richmond v. Delay*, 34 Miss. 83.

Missouri. — *State v. Stephenson*, 12 Mo. 178.

Rhode Island. — See *Steere v. Wood*, 15 R. I. 199.

The *California Statute* provides that the court may dispense with a refunding bond if it is satisfied that no injury can result to the estate. *Matter of Crocker*, 105 Cal. 368; *Matter of Levinson*, 98 Cal. 654.

2. *Chambers v. Wright*, 52 Ala. 444; *Keith v. Jolly*, 26 Miss. 131; *Fort v. Battle*, 13 Smed. & M. (Miss.) 133.

3. Refunding Bond Required Before Payment in Any Event — United States. — *Kirkpatrick v. Gibson*, 2 Brock. (U. S.) 388.

Connecticut. — *Davis v. Vansands*, 45 Conn. 600. In this case Shipman, J., said that he was satisfied from inquiry of some of the oldest and most experienced lawyers of the state that the statute had been practically disused for nearly fifty years.

Indiana. — *Mazelin v. Rouyer*, 8 Ind. App. 27; *Tapley v. McGee*, 6 Ind. 56; *Hayes v. Matlock*, 27 Ind. 49.

New Jersey. — *Coddington v. Bispham*, 36 N. J. Eq. 224; *Ordinary v. White*, 43 N. J. L. 22; *Cowell v. Oxford*, 6 N. J. L. 432.

Pennsylvania. — *Dougherty v. Snyder*, 15 S. & R. (Pa.) 84, 16 Am. Dec. 520; *Edgar v. Shields*, 1 Grant's Cas. (Pa.) 361; *Musser v. Oliver*, 21 Pa. St. 362; *Simpson's Appeal*, 109 Pa. St. 383; *Schaeffer's Appeal*, 119 Pa. St. 649; *Jones's Appeal*, 99 Pa. St. 124.

Tennessee. — *Morris v. Morris*, 9 Heisk. (Tenn.) 814; *Willeford v. Watson*, 12 Heisk. (Tenn.) 476.

Virginia. — *Clay v. Williams*, 2 Munf. (Va.) 105; *Sheppard v. Starke*, 3 Munf. (Va.) 29; *Rootes v. Webb*, 4 Munf. (Va.) 77.

Debts Known to Be Outstanding. — Payment to a legatee without a refunding bond will not be ordered even after a decree making distribution, if the executor shows that there are unpaid debts. *Freedley's Estate*, 5 Montg. Co. Rep. (Pa.) 134. Compare *Gunkel's Estate*, 6 Lanc. L. Rev. (Pa.) 217.

Presumption of Death as to Some of the Distributees. — A presumption of death as to some of the distributees is a ground for requiring refunding bond before ordering distribution among the others. *Meaher's Estate*, 10 Pa. Co. Ct. Rep. 221, 28 W. N. C. (Pa.) 275.

A Refunding Bond May Be Dispensed With where assets were transferred by an executor under the direction of the court and the executor is fully protected by a bond conditioned for the return of the assets in specie, *Christian's Estate*, 13 Pa. Co. Ct. Rep. 415; or when the time prescribed for the presentation of claims against the estate has expired, or they are presumed from lapse of time to have been paid, *Davis v. Vansands*, 45 Conn. 600; *Roberts v. Dale*, 7 B. Mon. (Ky.) 199; *Betts v. Van Dyke*, 40 N. J. Eq. 149; or where it is shown that there are no outstanding debts, *Chambers v. Wright*, 52 Ala. 444; *Muirgroyde v. Cleary*, 16 Lea (Tenn.) 539; or where it has become impossible to give a bond, *People v. Admire*, 39 Ill. 251; *Weir v. People*, 78 Ill. 192.

The *Virginia Statute*, authorizing administrators to require distributees to give bond to refund before distribution will be compelled, applies to executors, though they are not expressly named. *Kirkpatrick v. Gibson*, 2 Brock. (U. S.) 388.

4. Former Rule in Kentucky — Bond Required in All Cases. — *Vance v. Vance*, 5 T. B. Mon. (Ky.) 525; *Duncan v. Mizner*, 4 J. J. Marsh. (Ky.) 443; *Dye v. Claunch*, 5 J. J. Marsh. (Ky.) 661; *Webb v. Conn.*, Litt. Sel. Cas. (Ky.) 475.

5. Present Rule in Kentucky. — Gen. Stat. Ky. 1888, c. 39, art. 2, § 11. See *Fleming v. Jones*, 12 Bush (Ky.) 503; *Wilson v. Soper*, 13 B. Mon. (Ky.) 418, 56 Am. Dec. 573; Civ. Code of Ky. 1895, § 453.

legatees in all cases to give to the executor security to refund in case debts should afterwards appear;¹ but that practice has been discontinued.² The chancery court has the power to require security, however, when it is necessary for the protection of the executor against a contingent liability, and such security has frequently been required where there was an outstanding liability on covenants contained in leases held by the testator.³

(2) *Amount of Bond.* — If the amount of the bond which may be required is not fixed by statute, it is generally to be determined by the court in the exercise of its discretion.⁴

(3) *Who May Be Required to Give Bond.* — A refunding bond may be required from any person who is entitled to receive a legacy or distributive share, whether in his own right or in the right of another.⁵

(4) *Effect of Bond.* — The effect of the statutory refunding bond, so far as the executor or administrator is concerned, is generally to relieve him from liability to creditors or other persons interested in the estate in respect to the payments for which the bond was given, and to substitute the bond in the place of the assets distributed.⁶ As to third persons it operates as an indemnity against claims against the estate, and not against creditors of the legatees or distributees.⁷

(5) *Failure to Require Bond.* — The effect of a failure to require the bond to be given depends on the terms of the statute regulating the subject. In those jurisdictions where it is provided that the court on decreeing distribution shall require a bond of the distributees, a failure to comply with the provision, though erroneous, does not render the decree void as to the parties to the proceeding.⁸ But if the executor or administrator makes a voluntary

1. **Former Rule in England — Legatee Required to Give Refunding Bond in All Cases.** — *Chamberlain v. Chamberlain*, 1 Ch. Cas. 256; *March v. Russell*, 3 Myl. & C. 41; *Noell v. Robinson*, 2 Vent. 358.

2. **Former English Rule Abrogated.** — Anonymous, 1 Atk. 491; *March v. Russell*, 3 Myl. & C. 42.

3. **Security Against Contingent Liabilities.** — Where an executor has sold leaseholds belonging to the estate of the testator he may require the legatees to give refunding bonds before payment of their legacies out of the proceeds, in order that he may have indemnity against future liability on the covenants contained in the leases. *Cochrane v. Robinson*, 11 Sim. 378; *Dobson v. Carpenter*, 12 Beav. 370; *Dean v. Allen*, 20 Beav. 1; *Fletcher v. Stevenson*, 3 Hare 370; *Hickling v. Boyer*, 3 Macn. & G. 635; *Vernon v. Egmont*, 1 Bligh N. S. 554. Compare *Simmons v. Bolland*, 3 Meriv. 547.

But if there is little or no risk to the executor, security may be denied. *Brewer v. Pocock*, 23 Beav. 310.

If an Executor Assents Unconditionally to a Specific Bequest of a testator's leasehold estates, he is not entitled to an indemnity out of the testator's general estate in respect of his covenants contained in the leases. *Shadbolt v. Woodfall*, 2 Coll. 30.

4. **Amount of Bond — Determination by Court.** — *Kirkpatrick v. Gibson*, 2 Brock. (U. S.) 388.

5. **Guardian of Distributees Required to Give Bond.** — *Chandler v. Morrison*, 123 Ind. 254; *Keith v. Jolly*, 26 Miss. 131.

Trustee of Distributees Required to Give Bond. — *Simpson's Appeal*, 109 Pa. St. 383.

Assignee of Distributees Required to Give Bond. — *Davis v. Newton*, 6 Met. (Mass.) 537.

The Administrator of a Deceased Distributee may give a refunding bond so as to entitle him to receive his intestate's share of the estate. *Maxwell v. Craft*, 32 Miss. 307.

6. **Effect of Bond — Substitute for Assets.** — *Atherton v. Corliss*, 101 Mass. 40, cited in *Browne v. Doolittle*, 151 Mass. 595; *Schaeffer's Appeal*, 119 Pa. St. 640; *Maxwell v. Smith*, 86 Tenn. 539. See also *Badger v. Daniel*, 79 N. Car. 372; *Robinson v. Chairman*, 8 Humph. (Tenn.) 374; *Murgitroyde v. Cleary*, 16 Lea (Tenn.) 539; *Reid v. Huff*, 9 Humph. (Tenn.) 345.

Where a payment is made to a person under the supposition that he is entitled to receive it as a distributee, and he signs an agreement to refund in case any claim should come against the estate, only the administrator can sue on the agreement, because the promise is made to him. *Norwood v. O'Neal*, 112 N. Car. 127.

7. **Refunding Bond Not Indemnity Against Attaching Creditor of Legatee.** — *Desmond v. Fisher*, 152 Mass. 521.

8. **A Decree Is Erroneous** if it directs payment of a legacy without requiring a refunding bond of the legatee, though there was a confession of assets by the executor, and no express demand by him for a bond. *McRae v. Brooks*, 6 Munf. (Va.) 157; *Stovall v. Woodson*, 2 Munf. (Va.) 303; *Rootes v. Webb*, 4 Munf. (Va.) 77.

The Failure of the Court to Require the Bond is a mere informality, and it will not, in the absence of a seasonable objection, vitiate the judgment as to the parties in court. *Chapell v. Shuee*, 117 Ind. 481. And the executor or administrator cannot refuse to obey a decree of distribution on the ground that the court did not require a refunding bond. He is fully

payment to a legatee or distributee without taking a bond according to the statute, he is personally liable to creditors who may be prejudiced by the payment.¹

b. IMPOUNDING OR RETAINING ASSETS.—If a refunding bond is not given when properly required, a sufficient part of the assets may be retained and set apart as security.²

c. COMPELLING LEGATEES AND DISTRIBUTEES TO REFUND WITHOUT BOND.—The *English* authorities lay it down as a general rule that if an executor voluntarily pays a legacy, it is an admission of assets sufficient to pay all, and that he cannot compel the legatees to refund, in case the assets afterwards prove insufficient to pay the other legacies.³ But the right to compel a legatee to refund was allowed in equity where the legacy was paid under compulsion of a suit,⁴ or where debts of which the executor had no previous notice, and which he was obliged to pay, appeared after he had paid away the assets in legacies.⁵ In the *United States* the English rule that when an executor voluntarily pays a legacy he cannot afterwards compel the legatee to refund, unless it becomes necessary for the discharge of debts, or a refunding bond has been given, still prevails with but slight modifications in some jurisdictions.⁶ In other states of the Union the rule seems to be some-

protected by the decree. *Pierson's Estate*, 5 Pa. Dist. Rep. 424; *Ferguson v. Yard*, 164 Pa. St. 586. Compare *Walden v. Payne*, 2 Wash. (Va.) 1, holding that an executor is not bound by an order directing a division of the estate among the distributees without reserving enough to pay the debts or without taking refunding bonds.

1. Voluntary Payment—Personal Liability of Executor or Administrator to Creditor.—*Musser v. Oliver*, 21 Pa. St. 362.

Subsequent Confirmation of the Account of an executor who has voluntarily paid a legacy without taking a refunding bond does not relieve him from liability to the creditors for the amount of the payment. *Robins's Estate*, 180 Pa. St. 630, 4 Pa. Dist. Rep. 277.

A Probability of Ultimate Loss, if the administrator had retained the property instead of distributing it, does not affect his liability to creditors. Thus it was held that where the administrator delivered the decedent's slaves to the distributees without taking refunding bonds, he was not relieved of liability to creditors by the fact that the slaves might have been lost by emancipation if he had retained them. *Morrison v. Lavell*, 81 Va. 519.

2. Impounding or Retaining Assets in Default of Refunding Bond.—*Dobson v. Carpenter*, 12 Beav. 370; *Brewer v. Pocock*, 23 Beav. 310.

The contingent claims for which, by the *Maine* statute, funds are to be preserved by order of the judge of probate are those concerning which it is uncertain whether they will ever be converted into debts. *Greene v. Dyer*, 32 Me. 460.

A Claim by a Lessor for the administration of the estate of his lessee and to have sufficient part of the assets impounded to answer future possible breaches of covenant in the lease cannot be supported. *King v. Malcott*, 9 Hare 692.

Effect of Retainer—Admission of Liability.—An administrator who retains money in accordance with the provisions of the *Maryland* statute to meet claims not properly exhibited does not thereby acknowledge that anything is due, and is not precluded from disputing the

validity of a claim. *Pole v. Simmons*, 49 Md. 14.

3. Overpayment to Legatee—General Rule in England.—In *Orr v. Kaines*, 2 Ves. 194, Sir John Strange, M. R., stated as a general rule that "whenever an executor pays a legacy, the presumption is he has sufficient to pay all legacies; and the court will oblige him, if solvent, to pay the rest, and not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund." See also *Coppin v. Coppin*, 2 P. Wms. 296.

4. Legacy Paid under Compulsion of Suit—Executor May Compel Legatee to Refund.—*Newman v. Barton*, 2 Vern. 205; *Noell v. Robinson*, 2 Vent. 358; *Coppin v. Coppin*, 2 P. Wms. 296.

Remedy of Executor in Equity.—In *Johnson v. Johnson*, 3 B. & P. 162, Lord Alvanley, C. J., said: "If an executor, thinking that he has settled the affairs of his testator, pay the legacies, I have no difficulty in saying that a court of common law would not entertain an action for money had and received against a legatee, since such a court cannot take into consideration, as a court of equity would do, the mode in which the funds might have been applied."

5. Legatee Compelled to Refund if Debts Appear.—*Nelthorpe v. Biscoe*, 1 Ch. Cas. 136; *Doe v. Guy*, 3 East 120.

Payment of Legacies with Notice of Debts.—If an executor pays away the assets of legatees with notice of debts, he cannot afterwards compel the legatees to refund so as to enable him to meet such debts. But notice of a remote contingent liability on the part of a testator is not sufficient to prevent his executor from distributing his residuary estate; and if the executor distributes with such notice, and the liability afterwards ripens into a debt, he will be entitled to call on the residuary legatees to refund. *Jervis v. Wolferstan*, L. R. 18 Eq. 18, 43 L. J. Ch. 809, 30 L. T. N. S. 452; *Whittaker v. Kerlaw*, 45 Ch. Div. 320.

6. Rule in United States—English Rule Followed in Some Jurisdictions.—In *Anderson v. Piercy*, 20 W. Va. 282, Green, J., said, at page

what more liberal, and gives the right to executors and administrators to recover back from legatees or distributees any overpayments made to them under a mistake as to the sufficiency of the estate, or when unanticipated occurrences render it insufficient,¹ though no refunding bond was

328: "It may be regarded as the settled law in this state and in Virginia, as well as in England, that when an executor voluntarily pays a legacy, he cannot afterwards maintain a bill to compel a legatee to refund, unless it becomes necessary for the discharge of debts; and when the executor is under the impression that he can collect a large debt supposed to be due the estate, and it turns out that he is unable to do so, though the executor be not guilty of culpable negligence with reference to the debt, and is therefore not chargeable with the whole amount of the debt, yet if under his misapprehension with reference to the debt he pays any legatee more than he should pay, he cannot recover any part of what he has paid him, but such overpayment in this state and in Virginia will not be regarded as an admission of assets in his hands, so as to require him to pay to others more than what is coming to them of the amount actually received by him."

Extent of Relaxation of English Rule in Virginia and West Virginia.—In the later case of *Mc-Endree v. Morgan*, 31 W. Va. 521, the same learned judge had this question again under consideration, and he reached the conclusion that "the general spirit of the decisions in Virginia and West Virginia has relaxed much of the severity of the ancient English cases, when no fraud or misconduct is imputed to the executor," and that "there is no inflexible rule which refuses to an executor under any circumstances the right to recover back from a legatee an excess of advancements which may have been made to him, even when the deficiency was created by debts which appeared before the payment of the legacy, and the payment was voluntary; but in such case the executor will have to make a very strong case to rebut the almost conclusive presumption that he had a sufficiency of assets to justify the payment of the legacy, which arises from the mere fact that he has paid the legacy." But he says that to justify a departure from the general rule as laid down in the English cases, "the executor must show that in the execution of the will he has done everything which a prudent man ought to have done, and has done nothing that a cautious man ought not to have done; and it will not suffice to show that he has been guilty of no fraud, but has acted *bona fide* and with honest intentions." Citing *Jones v. Williams*, 2 Call (Va.) 103; *Burnley v. Lambert*, 1 Wash. (Va.) 312; *Gallego v. Atty.-Gen.*, 3 Leigh (Va.) 465, 24 Am. Dec. 650; *Miller v. Rice*, 1 Rand. (Va.) 438; *Davis v. Newman*, 2 Rob. (Va.) 664, 40 Am. Dec. 764; *Nelson v. Page*, 7 Gratt. (Va.) 160; *Anderson v. Piercy*, 20 W. Va. 282; *Shriver v. Garrison*, 30 W. Va. 456.

In *Davis v. Newman*, 2 Rob. (Va.) 664, 40 Am. Dec. 764, the court reviews the English and Virginia decisions bearing on the subject.

In *Nelson v. Page*, 7 Gratt. (Va.) 160, the court below decreed that legatees whom the executor had voluntarily overpaid should re-

fund, but the question whether an executor can recover of a legatee a surplus paid him on his legacy was not before the Court of Appeals, and therefore this case cannot be considered as overruling the earlier case of *Davis v. Newman*, 2 Rob. (Va.) 664, 40 Am. Dec. 764, cited *supra*.

Reimbursement Barred by Voluntary Payment Without Refunding Bond.—*Montgomery's Appeal*, 92 Pa. St. 202, 37 Am. Rep. 670.

1. Rule that Overpayment by Mistake May Be Recovered by Executor or Administrator.—*Alabama*.—*Alexander v. Fisher*, 18 Ala. 374; *Sellers v. Smith*, 11 Ala. 264.

Connecticut.—*Mansfield v. Lynch*, 59 Conn. 320; *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 264.

Illinois.—*Wolf v. Beaird*, 123 Ill. 585, 5 Am. St. Rep. 565.

Indiana.—*Stokes v. Goodykoontz*, 126 Ind. 535; *Smith v. Smith*, 76 Ind. 236.

Kentucky.—*Moore v. Moore*, 88 Ky. 683; *Caldwell v. Kinkead*, 1 B. Mon. (Ky.) 228.

Louisiana.—*Beatty v. Dufief*, 11 La. Ann. 74.

Massachusetts.—*Walker v. Hill*, 17 Mass. 380.

New Jersey.—*Harris v. White*, 5 N. J. L. 485.

Ohio.—*Rogers v. Weaver*, 5 Ohio 536.

Pennsylvania.—See *Good's Estate*, 150 Pa. St. 301.

Vermont.—See *French v. Winsor*, 36 Vt. 412.

The rule that voluntary payments cannot be recovered back has been held not to be applicable to the payment of legacies and distributive shares. *Cutright v. Stanford*, 81 Ill. 240; *Smith v. Smith*, 76 Ind. 236.

A Mistake of Fact only will entitle the executor or administrator to recover an overpayment in some jurisdictions. *Egbert v. Rush*, 7 Ind. 706; *Stokes v. Goodykoontz*, 126 Ind. 535; *Shriver v. Garrison*, 30 W. Va. 456.

A Mistake Either of Law or Fact is held sufficient to authorize the recovery of an overpayment in *Connecticut*. *Mansfield v. Lynch*, 59 Conn. 320.

Mistake Resulting from Neglect.—If the failure of the executor to ascertain the real state of the assets before paying legacies is the result of neglect or want of vigilance on his part, he cannot compel the legatees to refund, but such payments are at his own risk under the *Kentucky* statute. *Lawson v. Hansborough*, 10 B. Mon. (Ky.) 147. And he must show that he was free from neglect in not ascertaining before distribution that there were debts outstanding. *Donnell v. Cooke*, 63 N. Car. 227.

If the Assets Were Originally Sufficient, but were wasted by the executor, he cannot compel the legatees previously paid to refund. *Lupton v. Lupton*, 2 Johns. Ch. (N. Y.) 614. See also *Foster's Succession*, 4 La. Ann. 479.

Notice of Outstanding Claims against the estate at the time when an administrator voluntarily distributed the assets in his hands will bar his

taken; ¹ and the recovery may be had in some jurisdictions in an action at law. ²

d. REIMBURSEMENT FOR PAYMENTS OUT OF INDIVIDUAL FUNDS. — If an executor pays legacies out of his individual funds, he is entitled to reimburse himself out of the next money of the estate that comes to hand. ³

XII. ACCOUNTING — 1. Duty to Account — a. IN GENERAL. — It has been the rule since very early times that an executor or administrator shall render an account of his dealings with the estate when called on therefor by the appropriate authority. ⁴ This duty grows out of the relations of the parties,

right to call on the distributees for contribution. *Moore v. Lesueur*, 33 Ala. 237.

Specific Legacies. — Where a deficiency of assets appears after a specific legacy has been turned over to the legatee, the executor cannot maintain an action at law to recover back a *pro rata* part of such legacy to meet the deficiency. *Somervell v. Somervell*, 3 Gill (Md.) 276. But the Court of Chancery will interfere and make the legatee refund in the proportion required. *Doe v. Guy*, 3 East 120.

If, however, the executor was the residuary legatee, and it is not shown that the deficiency is greater than the amount accruing to him as residuary legatee, the specific legatee will not be required to refund. *White v. Easters*, 38 Ala. 154.

Reversal of Decree of Distribution. — Restitution will be ordered where the decree under which the administrator distributed the estate is afterwards reversed on appeal. *Heydenfeldt v. Superior Ct.*, 117 Cal. 348.

In New York it is said to be well settled that, where the executor volunteers to pay the whole or any portion of a legacy, and it subsequently appears that the assets are not sufficient to justify a payment to that extent, the loss must fall on the executor, and he cannot compel the legatee to refund; but it is held that this rule is not applicable in case a payment is not made voluntarily and on an assumption that there are assets sufficient, which assumption subsequently turns out to be erroneous. It was accordingly held that where a legacy was adjudged void after it had been paid, the executor could compel the legatee to refund. *Carter v. Board of Education*, 68 Hun (N. Y.) 435, 144 N. Y. 621.

1. Rule that Failure to Take Refunding Bond Does Not Bar Recovery. — *Smith v. Smith*, 76 Ind. 236; *Harris v. White*, 5 N. J. L. 485.

In *Saeger v. Wilson*, 4 W. & S. (Pa.) 501, it was held that as long as an administrator has in his hands a sum exceeding the amount of the overpayment he cannot recover the amount of the overpayment from the distributee. But see *Wolf v. Beard*, 123 Ill. 585, 5 Am. St. Rep. 565, holding that the overpayment may be recovered by the administrator for his own use, as well as for the use of the estate.

2. Overpayment Recoverable in Action at Law — Connecticut. — *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 264.

Illinois. — *Wolf v. Beard*, 123 Ill. 585, 5 Am. St. Rep. 565.

Massachusetts. — *Walker v. Hill*, 17 Mass. 380.

New Jersey. — *Harris v. White*, 5 N. J. L. 485.

Ohio. — *Rogers v. Weaver*, 5 Ohio 536.

In Maryland it is held that the remedy of an executor or administrator, when debts appear

after he has paid away the assets to legatees or distributees, is in equity, and that he cannot recover against them in a court of law. *Turner v. Egerton*, 1 Gill & J. (Md.) 430, 19 Am. Dec. 235; *Somervell v. Somervell*, 3 Gill (Md.) 276. Compare *Zollickoffer v. Seth*, 44 Md. 376.

3. Reimbursement for Payment Out of Individual Funds. — *Livesey v. Livesey*, 3 Russ. 287; *Chester County Hospital v. Hayden*, 83 Md. 104; *Snyder v. Warbasse*, 11 N. J. Eq. 463; *Lay v. Lay*, 10 S. Car. 208; *Watts v. Watts*, 2 McCord Eq. (S. Car.) 77; *Johnson v. Henagan*, 11 S. Car. 93.

In *Weiser's Appeal*, 18 Pa. St. 423, a distributive share of personality which was not disposed of by the testator's will was paid to the husband of the distributee on his giving a refunding bond. Afterwards a judgment was recovered against the executor on a bond on which the testator was a surety, and this judgment was paid by the executor with his own funds. The husband died insolvent. After the husband's death, his widow became entitled to a share of the proceeds of certain land under a devise thereof to one L., with a limitation over in case L. died without issue. It was held that the executor was not entitled to reimbursement out of the share of the proceeds of such land on account of the overpayment to the husband.

Unequal Payments to Legatees. — If advances made by an executor to legatees out of his own funds were in unequal proportions, he must equalize the payments to the legacies before he is entitled to reimbursement. *Lay v. Lay*, 10 S. Car. 208.

4. Duty to Keep Accounts. — "It is, and must be understood to be, the bounden duty of an executor," says Lord Eldon, "to keep clear and distinct accounts of the property which he himself is bound to administer." *Freeman v. Fairlie*, 3 Meriv. 43.

And he must be constantly ready with his accounts. This is one of his first duties. *Pearse v. Green*, 1 Jac. & W. 135.

An executor is bound to keep a correct account of the estate of his testator, and of all appointments or advancements made under the will, and to exhibit the same to any of the parties who may be interested therein and desire to see them. *Rhett v. Mason*, 18 Gratt. (Va.) 509.

This duty is imposed on administrators by statute 31 Edw. III., stat. 1, c. 11, by which the appointment of administrators was first authorized, and which provides that "they shall be accountable to the ordinaries as executors be in the case of testament." It was also stipulated in the bond required of administrators by statute 22 and 23 Car. II., c. 10, that an administrator should "make or cause

and is not contractual, even as to property purchased by the representative.¹

Representatives of Deceased Executor or Administrator. — On the death of an executor or administrator his personal representative is not only accountable for such of the assets of the first decedent as have come into his hands,² but he must also settle the accounts of his decedent as representative of the first decedent;³ but he is not accountable as representative of the original decedent.⁴

Executor Who Did Not Qualify. — If the person named in the will as executor

to be made a true and just account of his said administration." 1 Williams on Executors (7th Am. ed.) 614.

Executors Named as Trustees in the Will hold the property of the deceased as executors until distribution of the estate, and must account to the Probate Court for all property of the estate received by them. Dougherty v. Bartlett, 100 Cal. 496.

Estoppel to Deny Liability to Account. — Persons who have assumed to act as administrators under an appointment made by the Probate Court, and claim to have administered fully, are estopped to deny their liability to account accordingly. Damouth v. Klock, 29 Mich. 289.

1. Duty to Account Founded on Relation of Parties. — Berry v. Hart, 1 S. Car. 125.

2. Representative of Deceased Representative Must Account for Assets Received by Him. — Holland v. Prior, 1 Myl. & K. 245; Davenport v. Stafford, 14 Beav. 319; Ritchie v. Rees, 1 Add. Ecc. 144; Gale v. Luttrell, 2 Add. Ecc. 234.

3. Representative of Deceased Representative Must Settle His Decedent's Accounts. — *Arkansas.* — Wilson v. Hinton, 63 Ark. 145.

California. — Bush v. Lindsey, 44 Cal. 121; Wetzler v. Fitch, 52 Cal. 638.

Indiana. — Ray v. Doughty, 4 Blackf. (Ind.) 115.

Maine. — Nowell v. Nowell, 2 Me. 75.

Maryland. — Smithers v. Hooper, 23 Md. 273; Muncaster v. Muncaster, 23 Md. 286; Donaldson v. Raborg, 26 Md. 312, 28 Md. 34.

Massachusetts. — Storer v. Storer, 6 Mass. 390.

Mississippi. — Jarnagin v. Frank, 59 Miss. 393; Probate Judge v. Phipps, 5 How. (Miss.) 59; Byrd v. Holloway, 6 Smed. & M. (Miss.) 325; Steen v. Steen, 25 Miss. 513.

New York. — Wood v. Croke, 5 Redf. (N. Y.) 381; Spencer v. Popham, 5 Redf. (N. Y.) 425.

Pennsylvania. — Bowman's Appeal, 62 Pa. St. 166.

Vermont. — Nason v. Smith, 13 Vt. 170.

But see *In re Frost*, 12 New Bruns. 127; *Exp. Frost*, 11 New Bruns. 482; Reed v. Wilson, 73 Wis. 497; Curtis v. Lynch, 19 Ohio St. 392.

This was the practice of the English ecclesiastical courts. Nowell v. Nowell, 2 Me. 75 [citing Burns's Eccles. Law 427; Toller's Law of Executors 492].

And in some jurisdictions the duty to make such settlements is expressly imposed by statute. Thus in *New York* it is provided by Code Civ. Pro., § 2606, that "where an executor, administrator, guardian, or testamentary trustee dies, the Surrogate's Court has the same jurisdiction, upon the petition of his successor, or of a surviving executor, administrator, or guardian, or of a creditor, or person interested in the estate, or of a guardian's

ward, to compel the executor or administrator of the decedent to account, which it would have against the decedent if his letters have been revoked by a surrogate's decree." Crawford v. Crawford, 5 Dem. (N. Y.) 37; Matter of Bacon, 24 N. Y. Wkly. Dig. 194; Matter of Latz, 33 Hun (N. Y.) 618; Fithian's Estate, 11 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 211, 44 Hun (N. Y.) 457; Matter of Fithian, 1 Connolly (N. Y.) 187; Matter of Clark, 119 N. Y. 427; Matter of Wiley, 119 N. Y. 642, 23 N. E. Rep. 1054.

As to the former rule in New York, see *Montross v. Wheeler*, 4 Lans. (N. Y.) 99.

A Surviving Executor who has an individual interest in the estate may cite the executor of his deceased coexecutor to account under the *New York* statute. *In re Hodgman*, (Supreme Ct.) 10 N. Y. Supp. 491.

The executor of a deceased executor may be required to account for a debt due from the deceased executor to the original testator at his death as so much money in the hands of the deceased executor. *Matter of Butler*, 1 Connolly (N. Y.) 58. See also *Donaldson v. Raborg*, 28 Md. 34.

A proceeding for the settlement of the accounts of an administrator abates on his death and cannot be revived against his personal representatives, but they must account *de novo*. *Herbert v. Stevenson*, 3 Dem. (N. Y.) 236; *Wentworth v. Wentworth*, 12 Vt. 244.

The Oregon Statute does not make an administrator of a deceased administrator liable to file an account of the first administration where it does not appear that he received any of the assets of the first decedent. *Cross v. Baskett*, 17 Oregon 84.

Effect of Lapse of Time. — The personal representative of an administrator will not be compelled to file an account of his decedent's administration after such a lapse of time (in this case twenty-seven years) as will raise a presumption that the estate has been settled. *Finley's Estate*, 7 York Leg. Rec. (Pa.) 201.

An Administrator in the Third Degree cannot be required to account for the estate of the first decedent unless it appears that it came to his hands. *Barbour v. Robertson*, 1 Litt. (Ky.) 96.

The Husband of a Deceased Administratrix is required by statute in *Maryland* to render an account of her administration. *Gavin v. Carling*, 55 Md. 530.

4. Schenck v. Schenck, 3 N. J. L. 149; *Dakin v. Demming*, 6 Paige (N. Y.) 95.

In Pennsylvania the personal representative of a deceased administrator is not liable to a judgment creditor of the first decedent, but he is only liable to account to the administrator *de bonis non* for assets in the hands of the deceased administrator. *Drenkle v. Sharman*, 9 Watts (Pa.) 485.

does not qualify, he cannot be required to render an account.¹

Representative Who Has Been Removed or Discharged. — Though the jurisdiction of the probate court over an executor or administrator terminates for most purposes on his removal, he may nevertheless be required to come in and settle his accounts.² Formerly this could be done only at the instance of the next of kin, creditors, or others interested in the estate, but in modern practice it may be done at the instance of the administrator *de bonis non*.³

Executor to Whom Probate Was Refused. — If probate of a will is refused when propounded by the person named in it as executor, he is entitled to have his accounts settled in the same manner as other fiduciaries before being compelled to deliver up the estate.⁴

Executor or Administrator Acting in Another Capacity. — If an executor or administrator as such receives assets to which he is also entitled in another capacity, it will be presumed that he continues to hold them as executor or administrator, and he will be required to account for them in that capacity until they are transferred to himself in the other capacity.⁵

If an Infant Is Appointed Executor or Administrator, and he receives and disposes of assets of the estate, he cannot be required to account in respect to receipts during infancy.⁶

1. Executor Who Did Not Qualify. — *Wever v. Marvin*, 14 Barb. (N. Y.) 376, 7 How. Pr. (N. Y.) 182.

2. Removed Executor or Administrator May Be Required to Account. — *Sloan v. McKinney*, 19 Ala. 115; *Matter of Radovich*, 74 Cal. 536; *Gerould v. Wilson*, 16 Hun (N. Y.) 530, 81 N. Y. 573; *Dunford v. Weaver*, 21 Hun (N. Y.) 349, 84 N. Y. 445.

In Mississippi it has been held that after letters of administration have been revoked, the Probate Court has no longer authority or jurisdiction over the discharged administrator, and cannot therefore entertain a petition by him touching his administration account, to have additional items of credit allowed him therein; it is only while the relation of administrator exists that the Probate Court can adjudicate upon the administration. *Washburn v. Dorsey*, 8 Smed. & M. (Miss.) 214 [citing *Bell v. Suddeth*, 2 Smed. & M. (Miss.) 532; *Smith v. Hurd*, 7 How. (Miss.) 200]. But see *Denson v. Denson*, 33 Miss. 560.

In Missouri a resigning executor or administrator cannot make a final settlement until his successor is appointed, because the statute provides that he shall account to his successor. *Emmons v. Gordon*, 125 Mo. 636.

In New York the next of kin may require an accounting by an executor or administrator who has been removed, though his successor has not been appointed. *Gerould v. Wilson*, 81 N. Y. 573.

In South Carolina a bill for an accounting does not abate by the revocation of the administrator's letters and the appointment of his successor after a decree had been entered and a reference of accounts ordered, but the new administrator may be joined as a party to avoid multiplicity of suits. *Henderson v. McClure*, 2 McCord Eq. (S. Car.) 466.

In Texas it has been held that after an executor has resigned or been discharged the County Court has no authority to settle his accounts. *Ingram v. Maynard*, 6 Tex. 130; *Long v. Mooters*, (Tex. Civ. App. 1898) 45 S. W. Rep. 165.

An Administrator Who Has Been Discharged cannot be required to account at the instance of persons who claim to be the heirs of the decedent, though they attack a judgment homologating the administrator's account, but do not assail the order discharging him, and do not make a party defendant the person to whom the residue of the estate had been paid, as the sole heir of the decedent. *Baron v. Baum*, 44 La. Ann. 295.

A Special Administrator whose authority has been superseded by a grant of general letters may be cited to account; but the surrogate has no further control over him. *Lawrence's Estate*, Tuck. (N. Y.) 68.

3. See *infra*, this title, *Administrators De Bonis Non*.

4. Executor to Whom Probate Was Refused. — *Gilbert v. Bartlett*, 9 Bush (Ky.) 55.

5. Executor or Administrator Acting in Another Capacity. — In *Matter of Hobson*, 61 Hun (N. Y.) 504, affirmed 131 N. Y. 575, an administrator received among the assets of the decedent a bond secured by a mortgage, which, though payable to the decedent, was not owned by her absolutely, but was part of a trust estate in which she had a life interest. The administrator collected the money and was ordered to pay it over to a substituted trustee who had been appointed to take charge of the trust estate. Afterwards the administrator was appointed trustee of the trust estate. It did not appear that he had ever made any transfer, either directly or indirectly, of the bond and mortgage, or of the moneys received on it, to himself as trustee under this appointment, and it was held that in the absence of that proof, and in view of his continued action as administrator, the presumption was warranted that he still continued to hold the proceeds of the mortgage in that capacity. See also *Matter of Hood*, 104 N. Y. 103; *Graham v. Van Duzer*, 2 Redf. (N. Y.) 322; *Calver v. Calver*, 4 Redf. (N. Y.) 305; *Perkins v. Perkins*, 46 N. H. 110; *De Valengin v. Duffy*, 14 Pet. (U. S.) 282.

6. Infant Executor or Administrator. — Hind-

An Executor De Son Tort cannot be required to account in the probate court.¹

An Administrator Pendente Lite may be required to file an account, and on the termination of the litigation which was the occasion of his appointment it is his duty to settle his accounts and turn over the estate to his successor.²

Sureties on an Administration Bond cannot be required to account for the acts of their principal, and a decree against them for an accounting is extrajudicial and inoperative.³

Distinction Between Final and Intermediate Accounting.—There are two classes of settlements provided for by statute, differing from each other in the manner in which they are made and in their effect. Those of the first class are variously designated as *ex parte*, intermediate, or annual settlements. These are made *ex parte*, without notice to any one, and when allowed constitute only *prima facie* evidence that they are true and correct.⁴ To the second class belong what are known as final settlements. These are made after notice to all persons who have an interest in the estate, and the order or decree passing them has all the force and effect of a judgment.⁵

marsh v. Southgate, 3 Russ. 324; Stott v. Meanock, 31 L. J. Ch. 746, 10 W. R. 605.

1. Executor De Son Tort Not Accountable in Probate Court.—Power's Estate, 10 W. N. C. (Pa.) 208, 14 Phila. (Pa.) 289, 38 Leg. Int. (Pa.) 214; Peebles's Appeal, 15 S. & R. (Pa.) 39.

The Reason given for this is that an executor *de son tort* has acted only under usurped authority. Peebles's Appeal, 15 S. & R. (Pa.) 39.

Grant of Letters to Executor De Son Tort.—If a person who has made himself an executor *de son tort* subsequently takes out letters, the letters relate back, and he becomes liable to account in the probate court. Farrell's Estate, Tuck. (N. Y.) 110.

2. Administrators Pendente Lite.—Ro Bards v. Lamb, 89 Mo. 303; Webb's Estate, 20 W. N. C. (Pa.) 275.

3. Sureties on Administration Bond Cannot Be Required to Account.—Ross v. Chambers, 1 Bailey L. (S. Car.) 548; Teague v. Dendy, 2 McCord Eq. (S. Car.) 209.

4. Intermediate Accounting Not Conclusive—Alabama.—Willis v. Willis, 9 Ala. 330; Savage v. Benham, 11 Ala. 49; Smith v. Smith, 13 Ala. 329.

Kansas.—Musick v. Beebe, 17 Kan. 47.

Massachusetts.—Wiggin v. Swett, 6 Met. (Mass.) 198, 39 Am. Dec. 716.

Missouri.—Picot v. Biddle, 35 Mo. 29, 86 Am. Dec. 134; Baker v. Schoeneman, 41 Mo. 391; State v. Lankford, 55 Mo. 564; Folger v. Heidel, 60 Mo. 284; Seymour v. Seymour, 67 Mo. 303; West v. West, 75 Mo. 204; State v. Roeper, 82 Mo. 57.

New Jersey.—Liddell v. McVickar, 11 N. J. L. 44, 19 Am. Dec. 369.

Texas.—Ingraham v. Rogers, 2 Tex. 465.

Virginia.—Newton v. Poole, 12 Leigh (Va.) 142.

“There is a great difference between ordinary annual settlements and what is technically known as a final settlement. The former is simply a statement of the administrator that he has received such amounts and paid out such; and the approval finds that statement to be true. It is therefore in the nature of an adjudication, a judicial determination. But it is, so to speak, only a present adjudication, and *prima facie* correct—one made for the purpose of enabling the court to keep watch of the

estate, and to control the disposition of its assets and the payment of its debts. Unquestioned, it is accepted as an adjudication, and made the basis and starting point of further administration. But it may be challenged without appeal, and in the same court, and without motion for rehearing or any direct proceedings to set it aside; and any errors or mistakes in it may be corrected at any subsequent settlement. * * * These accounts are settled *ex parte*, and without even the pretense of notice by publication or otherwise to any parties interested. But the final settlement of an estate is a more stringent and less easily avoided adjudication. It is more emphatically a judgment. True, it may by the Probate Court be opened up, and the administration continued; but this requires a direct proceeding therefor. While generally *ex parte*, yet it can only be made upon notice.” *Per* Brewer, J., in Musick v. Beebe, 17 Kan. 47.

“A partial or annual account of an executor or administrator is usually an *ex parte* proceeding, and is only a judgment *de bene esse* and only *prima facie* correct, and, although not excepted to or appealed from, is open to subsequent correction or challenge.” Bliss v. Seaman, 165 Ill. 428 [citing Bond v. Lockwood, 33 Ill. 212; Long v. Thompson, 60 Ill. 27; Bennett v. Hanifin, 87 Ill. 31; 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 442].

5. Final Settlement Conclusive as to All Parties.—Musick v. Beebe, 17 Kan. 47; Winborne v. King, 35 Miss. 157; Bronson v. Ward, 3 Paige (N. Y.) 189; Burgwyn v. Daniel, 115 N. Car. 115.

What Constitutes Final Accounting.—A final accounting does not necessarily mean a lasting accounting, but a conclusive one; there may be several successive final accountings. Glover v. Holley, 2 Bradf. (N. Y.) 291.

In Burgwyn v. Daniel, 115 N. Car. 115, the account of an administrator, showing merely a balance struck and in his hands for the exigencies of the estate, and not for distribution, was entitled on its face “Annual Account.” It was so styled by the clerk in approving and filing it, and was recorded by him in his “Record of Accounts,” and not in the book entitled “Final Settlements.” It was held that such account was not a “final account.”

b. RELEASE FROM LIABILITY TO ACCOUNT — Want of Assets. — Notwithstanding the general rule that an executor or administrator must render an account of his administration, there are some exceptional circumstances which may excuse him. Thus, if no assets have come into his hands it is obvious that no account should be required.¹

Accounting Dispensed With by Agreement or Acquiescence. — It is always competent for the parties in interest to relieve the executor or administrator of his obligation in this respect.²

Accounting Dispensed With by Bond to Pay Debts and Legacies. — In some jurisdictions an executor who is also the residuary legatee under the will cannot be required to account where he has given bond with sureties to pay all of the testator's debts and all the legacies in the will.³

Executor or Administrator Acting in Different Capacity. — If an executor or administrator ceases to act as such, but continues to hold the estate in a different capacity, he is no longer under any obligation to account as executor or administrator.⁴

But where the account showed that all the debts and expenses of the estate had been paid and that there was a net balance which had been found "due the heirs" at a date more than a year previous, it was held to be a final account. *Vaughan v. Hines*, 87 N. Car. 445.

For a Full Discussion of the subject in regard to final and intermediate accountings, see the ENCYC. OF PL. AND PR., title PROBATE AND ADMINISTRATION.

1. Want of Assets. — *Thurlough v. Kendall*, 62 Me. 166; *Walker v. Hall*, 1 Pick. (Mass.) 20; *Re Hutchinson's Estate*, 9 Lanc. L. Rev. (Pa.) 24; *Perdue v. Dillon*, 89 Va. 182.

2. Accounting Dispensed With by Agreement of Parties. — The filing of an account by an executor or administrator is a matter with which the public has no concern, and with which the parties for whose benefit it is required by law may dispense, whether they be creditors or mere legatees or distributees. This may be done by express agreement, or by implication from long-continued acquiescence after the right to demand the account has fully accrued, where the parties entitled to it are of full age and under no legal disability, especially if, in the meantime, the one who subsequently asks for it has acted in a way calculated to mislead the person sought to be charged. *Harlan's Estate*, 3 Pa. Dist. Rep. 809, 16 Pa. Co. Ct. Rep. 51, 1 Lack. Leg. N. (Pa.) 122.

Acquiescence in Acts of Executor or Administrator. — If the beneficiaries of the estate concur in the misapplication of the assets by the executor or administrator, or if they acquiesce therein without original concurrence, they cannot afterwards compel him to account for such assets. *Sherman v. Parish*, 53 N. Y. 492; *Butterfield v. Cowing*, 112 N. Y. 486; *In re Washbon* (Supreme Ct.) 14 N. Y. Supp. 672.

3. Accounting Dispensed With by Bond to Pay Debts and Legacies. — *Clarke v. Tufts*, 5 Pick. (Mass.) 337; *McElroy v. Hatheway*, 44 Mich. 399; *Durfee v. Abbott*, 50 Mich. 278; *Copp v. Hersey*, 31 N. H. 317.

When such bond has been given, even the sureties on the bond cannot require an accounting. *McElroy v. Hatheway*, 44 Mich. 399.

In Maryland it was formerly provided by statute that "no executor shall be obliged to

exhibit any inventory or account, provided he will give bond * * * with condition for paying all just debts of and claims against the deceased, and all damages which shall be recovered against him as executor, and also all legacies bequeathed by the will." *State v. Boyd*, 2 Gill & J. (Md.) 365. But see Act of 1845, c. 291.

4. Administrator Acting in Different Capacity. — In *Vandever's Appeal*, 42 Pa. St. 74, where an administrator, after settling his accounts, invested the balance in his hands at the request of the persons entitled to receive it, to be held in trust for them, it was held that his obligation to account for such balance as administrator was ended.

When Executor Ceases to Act as Such. — In *Harris v. Ely*, 25 N. Y. 138, it was held that the right of a sole legatee to require an executor to account was not barred by a conveyance of all the property of the legatee to the executor to hold as trustee where no settlement of the accounts of the executor had been had. In this case the legatee was the widow of the testator, and in contemplation of marriage with one Ely she conveyed all her real and personal estate to the executor as her trustee to permit her "to occupy, possess, and enjoy all and singular the said property." In regard to this conveyance the court said: "The legal effect of the instrument as to the personal property was to prevent the marital rights of the husband she was about to marry from attaching; and that was, beyond doubt, the only operation it was intended to have. If it has a further effect to discharge the trustee or executor, it was aside from the design of the parties, and is the result of some technical principle operating to produce a result which was not contemplated. I think it has no such operation. The executor, as such, had a legal title to the estate of the deceased before the marriage articles were executed. He had no greater estate after they took effect. He held nothing as trustee under the marriage articles, until he had accounted with the legatee either by a voluntary arrangement or by a decree of the surrogate or some court having jurisdiction. Until that event he held the assets as executor, and not as trustee under the settlement. It was important to the legatee to

But He Is Not Relieved of Liability to account for assets received by him, by the fact that he has procured them to be charged to the account of his successor;¹ or by a provision in the decedent's will giving him absolute discretion in regard to the management of the estate and the investments thereof;² or by a settlement with the legatees out of court;³ or by the fact that the court has permitted him to retain the funds of the estate in his hands, on his paying interest for the use of it;⁴ or by the mere fact that proceedings in bankruptcy had been instituted against the decedent, and an assignee chosen, where it appears that the assignee did not accept the trust, that no assignment in bankruptcy was ever made, and that the proceedings had been practically abandoned.⁵

Lapse of Time — Statute of Limitations. — It is generally held that the statute of limitations does not run against the obligation of an executor or administrator to account, unless it is expressly made applicable to such a case, because his duty to account is continuous, and he cannot claim that his failure to do so at any moment of time sets the statute in motion, or casts on the persons interested in the estate the duty to demand an accounting; but their right to demand it runs with his duty, and may be asserted so long as his duty remains unperformed.⁶

ascertain the extent of the property which she had in the estate of the testator, so that it might be known what was in the hands of the trustee under the antenuptial settlement. This could only be ascertained by a settlement or an accounting. Suppose, before any settlement or accounting, the respondent had been removed, and an executor *de bonis non* had been appointed according to the statute, could there be any doubt but that the new executor would have been entitled to the assets not paid out to creditors or legatees? I think not. There was not, therefore, such a merger of titles, when the respondent became trustee, as to enable him to say that he did not any longer hold the assets as executor, but had become the owner of them in his character as trustee."

Administrator Constituted Trustee. — An administrator is not relieved from liability to account merely by the execution of a deed by the heirs to the widow, releasing to her, during her life, the net income of all the decedent's real and personal estate, "the whole to be under the direction of" the administrator, because the administrator retains his representative functions, and his liability to account continues, until the trust is actually established. *Probate Ct. v. Hazard*, 13 R. I. 1. See also *Matter of Read*, 41 Hun (N. Y.) 95.

1. Procuring Assets to Be Charged in Account of Successor. — *Stewart v. Moody*, 4 Watts (Pa.) 169.

2. Absolute Discretion given an executor with regard to the management of the estate and the investments thereof does not relieve him from the duty imposed on every executor of filing an account. Whether the investments he has made are good or bad can make no difference, as he is not to be responsible for any loss occasioned thereby; but those interested in the remainder have a right to know the amount of the estate remaining after the payment of debts and expenses, and how such amount is invested, though they may have no right to question the character of the investments. *Harrison's Estate*, 2 Pa. Dist. Rep. 108, 12 Pa. Co. Ct. Rep. 388.

A gift of the whole estate to the executor or

administrator with absolute power to manage or sell it does not release him from liability to account. *Solomon v. Tarver*, 79 Ga. 601.

Bequest of Estate to Executrix for Life. — An executrix is not relieved from liability to account by the fact that she is a residuary legatee for life under the will, which provides that she shall not be required to account to any one for the use of the property. In such case she occupies a dual relation to the administration, and her accounts as executrix are under the control of the court until the estate is administered and the residue turned over to her as legatee. *Ridgley v. People*, 163 Ill. 112.

Bequest of Entire Estate to Executor. — In *Brown's Estate*, 6 Pa. Dist. Rep. 163, it was held that an executor cannot be required to account where the will gave him the entire estate with the exception of the amount of a legacy, and authorized him to do as he pleased in regard to the estate, without accountability to any one, even leaving it to his discretion whether or not he would pay the legacy.

3. Settlement with Legatees Out of Court. — *Francez's Succession*, 49 La. Ann. 1732; *Stouvenel's Estate*, Tuck. (N. Y.) 241. See also *Rieben v. Hicks*, 4 Bradf. (N. Y.) 136.

4. Using Money by Leave of Court. — *Devore v. Pitman*, 3 Mo. 179.

5. Effect of Bankruptcy Proceeding Against Decedent. — *Newell v. West*, 149 Mass. 520.

6. Statute of Limitations Not a Bar — *California*. — *Matter of Sanderson*, 74 Cal. 199.

Illinois. — *Boyd v. Swallows*, 59 Ill. App. 635.

Kentucky. — *McLaughlin v. Daniel*, 8 Dane (Ky.) 184.

Louisiana. — *McGehee v. McGehee*, 41 La. Ann. 657. Under the former law of Louisiana the office of a curator terminated one year after the date of his appointment, and it was then held that the statute of limitations began to run against an action to compel an accounting at the expiration of such year. *Wilson v. McGreal*, 12 La. Ann. 357; *Deranco v. Montgomery*, 13 La. Ann. 513.

Maryland. — *Constable v. Camp*, 87 Md. 173.

In New York, however, a different rule obtains. The earlier cases in that state held that where the Surrogate's Court and the courts of law or equity have concurrent jurisdiction of a proceeding by a creditor, legatee, or distributee of a decedent to compel the executor or administrator to pay the debt, legacy, or distributive share, and there is a statute of limitation applicable to an action at law or a suit in equity for that purpose, such statute is, by analogy, applicable to a proceeding in the Surrogate's Court.¹ After the adoption of the code, prescribing the time within which all actions and special proceedings must be brought, it was held that a proceeding to compel an accounting by an executor or administrator is a "special proceeding," and that the statute of limitations begins to run against it at the time when the right to demand the accounting accrues.²

Texas. — *Main v. Brown*, 72 Tex. 505. In Texas, under the statute providing that any person interested in the administration of an estate may proceed after any lapse of time to compel a settlement when it does not appear from the record that the administration has been closed, no presumption of a settlement arises from lapse of time. *Blackwell v. Blackwell*, 86 Tex. 207.

Vermont. — No mere lapse of time can prevent the court from enforcing the settlement of an estate. Executors and administrators hold the property of the deceased as direct trustees for the persons entitled to it, and are liable to account to the probate court for the benefit of such persons until the estate is wholly administered. A period of limitation will not commence to run in favor of trustees of this character until the trust relation is terminated or repudiated. *Davis v. Eastman*, 66 Vt. 651, 68 Vt. 225 [citing *Kimball v. Ives*, 17 Vt. 430; *Bigelow v. Catlin*, 50 Vt. 408; *Drake v. Wild*, 65 Vt. 611].

After an Estate Is Settled by the passage of a final account, it is held that there is no such express subsisting and continuing trust as will relieve a court of equity from applying the statutory limitation of time in a proceeding by a beneficiary to compel the executor or administrator to account for the funds in his hands. *Biays v. Roberts*, 68 Md. 510.

1. Rule in New York — Limitation by Analogy. — *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 455; *Paff v. Kinney*, 1 Bradf. (N. Y.) 5; *Smith v. Remington*, 42 Barb. (N. Y.) 75; *Clock v. Chadeagne*, 10 Hun (N. Y.) 97; *House v. Agate*, 3 Redf. (N. Y.) 307; *Clark v. Ford*, 1 Abb. App. Dec. (N. Y.) 359; *Butler v. Johnson*, 111 N. Y. 205.

The Reason of the Rule as given by Chancellor Walworth is that the legislature never could have intended to give to a party the right to institute such a suit before a surrogate, after his remedy was barred by the statute of limitations in all other courts. *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 455.

2. Limitation of Special Proceeding Applicable to Accounting. — *Matter of Rogers*, 153 N. Y. 316; *Matter of Clayton*, 1 Connolly (N. Y.) 444; *Matter of Dunham*, 1 Connolly (N. Y.) 323; *Matter of Van Dyke*, 44 Hun (N. Y.) 394; *Matter of Hale*, 6 N. Y. App. Div. 411; *Matter of Kirkpatrick*, 9 Misc. Rep. (N. Y. Surrogate Ct.) 228; *Matter of Miller*, 15 Misc. Rep. (N. Y. Surrogate Ct.) 556.

In *Matter of Hale*, 6 N. Y. App. Div. 411, it was argued that where a surrogate *sua sponte*

orders that a citation issue requiring executors to file an intermediate account, the matter does not become a "special proceeding," but is merely the exercise of a power, and that it differs therein from a proceeding instituted by a person interested in the estate, in regard to the application of the statute of limitations; but the court held that both were governed by the same rule.

Part Payment of a Legacy will stop the statute of limitations from running against the right of the legatee to require the executor to account. *Matter of Campbell*, 21 Misc. Rep. (N. Y. Surrogate Ct.) 133.

If There Are Contingencies which must happen before the estate can be settled, the statute does not begin to run until the happening thereof. *In re Hodgman*, (Supreme Ct.) 10 N. Y. Supp. 491.

If the Use of the Estate Is Beneficial for Life the statute does not begin to run against the right of the remaindermen to require an accounting until the death of the life beneficiary. *Matter of Campbell*, 21 Misc. Rep. (N. Y. Surrogate Ct.) 133. And the rule is the same where the administrator is the life beneficiary. *Matter of Watson*, 64 Hun (N. Y.) 369.

In Conflict with Previous Decisions is the case of *Matter of Beyea*, 10 Misc. Rep. (N. Y. Surrogate Ct.) 198, based on the decision of the Court of Appeals in *In re Camp*, 126 N. Y. 377, and holding that the statute of limitations does not begin to run against an accounting by an executor or administrator until he has openly repudiated his trust. The surrogate said: "In *In re Camp*, 126 N. Y. 377, the Court of Appeals decided that a general guardian could be compelled to render an account sixteen years after his ward became of age, because the fund received by him as guardian was the property of another confided to his care, and in that sense he occupied the position of a trustee so as to prevent the running of the statute of limitations, even if it was not a trust in the usual legal sense of the term. There are some distinctions between the nature and duties of the office of an executor and an administrator and those of a general guardian, but I doubt if they be of such a character as to place them outside of the application of the decision in *In re Camp*, 126 N. Y. 377, when so broad a character, as to their duties to account, is given such officers. Executors and administrators are appointed to take the custody and care of the property of others im-
posed with certain duties and trusts which they must discharge in order to be relieved

Delay in Application for Accounting. — Though the general rule is that the statute of limitations does not run against the obligation of an executor or administrator to account, it does not follow that he will in no case be released by lapse of time. If a person entitled to an accounting delays for a great length of time to require it, his right may be barred by the presumption that the estate has been fully administered, or by the rule of equity which discounts stale claims.¹ The effect of the lapse of time in this respect, how-

either by their actual performance, or by the presumption of their having been performed; and it would seem that this presumption will not arise until such duties have been openly repudiated for the statutory period, and does not by the expiration of the statutory period after the time fixed for them to account. *Matter of Grandin*, 61 Hun (N. Y.) 219."

The effect given in *Matter of Beyea*, 10 Misc. Rep. (N. Y. Surrogate Ct.) 199, to *In re Camp*, 126 N. Y. 377, was not admitted, however, in the later case of *Matter of Miller*, 15 Misc. Rep. (N. Y. Surrogate Ct.) 556, in which the surrogate said: "While the duties pertaining to the office of a guardian of property and that of an executor or administrator may not be materially different respecting matters of accounting and liability to account, and it may, with much plausibility of argument, be contended that the rule of limitation applicable to one is alike applicable to the other, and that such rule should be the one applied in equity to trustees, seemingly laid down in *In re Camp*, 126 N. Y. 377, yet we are of the opinion that the court in that case did not intend to alter, modify, or change the rule of limitation made applicable to proceedings to compel payment of a distributive share or an accounting by an executor or administrator, established by the long and almost uniform line of decisions which we have cited. There is nothing in the language of the opinion which imports any such purpose, and no such intention should be presumed. This view of the case is strengthened by the fact that in the case of *Butler v. Johnson*, 111 N. Y. 204, the Court of Appeals (in an opinion also written by Peckham, J.), recognized and reiterated the rule that the six years' statute of limitations would bar a proceeding in Surrogate's Court against an executrix to compel the payment of a legacy; and it seems to us that we would not be warranted in presuming that the court intended to overrule the doctrine there recognized, without even referring to it. * * * It has several times been urged in our appellate courts that the provisions incorporated into the statute by the adoption of section 1819 of the Code of Civil Procedure, which provides that 'for the purpose of computing the time within which such an action must be commenced, the cause of action is deemed to accrue when the executor's or administrator's account is judicially settled, and not before,' has changed the rule of limitation governing special proceedings in Surrogate's Court of this nature. The opinions expressed by our judges upon the question have not been entirely harmonious. The section referred to relates exclusively to actions, and makes no reference to special proceedings instituted for the purposes mentioned. It will be observed, also, that this section does not change or alter

the period of limitation, but only prescribes the time from whence it is to be computed. The weight of authority seems to be to the effect that the rule of limitation applied by that section to an action does not affect the rule of limitation applied to a special proceeding in Surrogate's Court, and that the six years' statute is still a bar to such proceedings."

1. Accounting Excused by Lapse of Time. — In *Scurrah v. Scurrah*, 2 Curt. Ecc. 919, a petition for an account after a lapse of eighteen years was dismissed with costs, the court holding that, though lapse of time was no bar, yet a discretion existed under the circumstances of the case.

In *Higgins v. Higgins*, 4 Hagg. Ecc. 242, it was said: "The court cannot interfere in this matter. The testator died in 1815, and now, after an interval of seventeen years, an inventory and account have been called for; and I am of opinion the demand has been sufficiently complied with, for although this lapse of time is not an absolute bar to a disclosure of the deceased's assets, yet after a delay of so many years a full and particular inventory and account cannot be expected or required, and therefore a declaration has been substituted and produced." In *Thomson v. Thomson*, 1 Bradf. (N. Y.) 24, an application for an accounting was denied where letters had been issued more than thirty years before, and an inventory had been filed about seventeen years. The surrogate said: "If the party in interest has been contented to let the estate rest for more than a quarter of a century, it is not very unreasonable to suppose that she has been satisfied with what she supposed to be the course of administration. The whole policy of the law is against the enforcement of stale demands, when, from the mere fact of acquiescence, the party responsible for the discharge of a trust may have been led into a less careful preservation of vouchers and accounts than would otherwise have been the case, had the duty of accounting been insisted upon at an earlier period." To the same effect is *Leroy v. Bayard*, 3 Bradf. (N. Y.) 228, where it was held that the lapse of twenty-nine years was sufficient to excuse a formal account. See also *Constable v. Camp*, 87 Md. 173.

After the Lapse of Twenty Years from the confirmation of a final account, of an executor, he will not be compelled to file a new one, starting with the balance of the former account. *Hubley's Appeal*, 19 Pa. St. 138.

The well-settled rule is that a lapse of twenty years balances the account of all antecedent transactions, unless there has been some disability of the persons entitled to the account, or some act or admission of the party liable to account, showing that it remained unsettled in that time. *Weatherford v. Tate*, 2 Strobb. Eq. (S. Car.) 27.

ever, may be obviated either by the facts of the case or by evidence showing a subsisting right in the petitioner and a corresponding obligation on the part of the executor or administrator.¹ Thus, it has been held that lapse of time does not bar an accounting if it appears that there are assets in the hands of the executor or administrator,² or if no account has ever been filed.³

2. Jurisdiction in Matters of Accounting — *a. COURTS OF PROBATE.* — In England the statute which first provided for the appointment of executors and administrators provided that they should be accountable to the ordinaries,⁴ but their powers were very limited and inadequate, hence the assumption of jurisdiction in such matters by the court of equity, which will be noted below.⁵ Afterwards this jurisdiction was transferred to the court of probate,

Laches Will Be Attributed to the Heirs of a decedent where they neglected to institute proceedings for an accounting against the executor for more than forty years after he had qualified as such, when he and all the witnesses conversant with his acts as executor were dead, and the record and other evidences of the administration had been lost or destroyed. *Anderson v. Northrop*, 30 Fla. 612.

Acquiescence in Neglect to Account. — Legatees who delay for sixteen years to bring suit to compel an executor to render an account do not thereby acquiesce in his neglect. "If mere forbearance, under such circumstances, works a forfeiture of right upon the one hand, or may be set up as a shield upon the other," said Vice-Chancellor Bird, "then executors may always be assured of a guaranty against every act of negligence upon their part if they can only secure delay." *Young v. Schelly*, (N. J. 1891) 21 Atl. Rep. 1049.

A Delay of Eighteen Years was held insufficient to exempt an administrator from liability to account in. *Stephen's Estate*, 18 W. N. C. (Pa.) 286.

Stale Claims. — *Hercy v. Dinwoody*, 2 Ves. Jr. 87; *Deloraine v. Browne*, 3 Bro. C. C. 633; *Akins v. Hill*, 7 Ga. 573; *Parks v. Rucker*, 5 Leigh (Va.) 149; *Hayes v. Goode*, 7 Leigh (Va.) 452.

1. Proof of Existing Claim. — A creditor may have a citation for an accounting though more than twenty-one years have elapsed since letters were granted, if he establishes his claim by affirmative proof. *Blackman's Estate*, 2 Kulp (Pa.) 162.

Acknowledgment Within Prescriptive Period. — The lapse of twenty years does not release an executor or administrator from liability to account if there has been a recognition by him within that time of his obligation. *Werborn v. Austin*, 82 Ala. 498.

Accounting Prevented by Executor or Administrator. — In *Tiernan v. Minghini*, 28 W. Va. 314, it was held that the doctrine of laches and staleness did not apply so as to exempt an administrator or his representative from settling his administration accounts where he aided in producing the delay.

Right of Executor to Demand Settlement. — In *Morgan v. Morgan*, 48 N. J. Eq. 399, it was held that an executor was not guilty of negligence or laches in not presenting his account for settlement for nearly forty years after his appointment, under the following circumstances: The executor was one of the parties in interest under the will; the others were his mother, brothers, and sisters; they all lived

together at the homestead; all of them had acquiesced in the situation; and all were living when the executor filed his bill for a settlement. The principle involved in this case was that, while an executor will not be heard with favor where he has been guilty of great delay in presenting his accounts, yet great liberality will be accorded to him where the transactions relate to the family interests of both parties.

2. If There Are Assets in the hands of the executor or administrator he will be required to account for them, notwithstanding the lapse of time. But if he denies that he has assets, he may be subjected to a personal examination touching his administration and the existence of assets, real or personal. *Leroy v. Bayard*, 3 Bradf. (N. Y.) 228.

3. If No Account Has Ever Been Filed the executor may be cited to account, though twenty-five years have elapsed. *Nixon's Estate*, 14 Phila. (Pa.) 297, 38 Leg. Int. (Pa.) 224.

The same point was ruled in another case notwithstanding the lapse of thirty-three years. *Matter of Hoffman*, 2 Pearson (Pa.) 491.

4. Executors and Administrators Accountable to Ordinary. — Stat. 31 Edw. III., st. 1, c. 11. See also *Greenlee v. Hays*, 1 Overt. (Tenn.) 300.

5. Limitation of Powers of Ecclesiastical Courts. — The ecclesiastical courts had no power *ex officio* to cite an executor or administrator to account. *Canterbury v. Wills*, 1 Salk. 315; *Greenside v. Benson*, 3 Atk. 248. This could be done only at the instance of some one who was interested in the estate. *Philipson v. Harvey*, 2 Lee Ecc. 344; *Roberts v. Roberts*, 2 Lee Ecc. 399; *Wainford v. Barker*, 1 Ld. Raym. 232.

By statute 22 Car. II. executors and administrators were required to account without being cited for that purpose. *Canterbury v. Wills*, 1 Salk. 315.

Whether the ecclesiastical courts could entertain objections to an inventory after it had been exhibited therein was the subject of a division of opinion between those courts and the courts of common law. It was decided in the negative by the courts of common law. *Hinton v. Parker*, 8 Mod. 168; *Catchside v. Ovington*, 3 Burr. 1922; *Henderson v. French*, 5 M. & S. 406; *Griffiths v. Anthony*, 5 Ad. & El. 623, 31 E. C. L. 403. The Prerogative Court of Canterbury, on the other hand, always follows the practice of entertaining objections to inventories. *Telford v. Morison*, 2 Add. Ecc. 319. But even the ecclesiastical courts did not permit witnesses to be examined in order to falsify an inventory. *Telford v. Morison*, 2 Add. Ecc. 319.

and then to the probate division of the High Court of Justice, by statutes known respectively as the Probate Court Act and the Judicature Act;¹ and later the County Courts, within certain limits, were given concurrent jurisdiction with the High Court of Justice.²

In the United States jurisdiction in matters of accounting is generally conferred by statute on the courts of probate, or on the courts of law and equity to which probate powers are given in the states in which courts of probate have not been created *eo nomine*,³ and may be exercised *ex mero motu* whenever the exigencies of the case seem to require it, notwithstanding the statutory provision that accounts shall be rendered at stated intervals.⁴

Exclusive Jurisdiction of Courts of Probate. — In some states it is held that the jurisdiction of accountings by executors and administrators conferred on the probate courts is exclusive of all other tribunals, and that a court of equity can take jurisdiction only when its interference is necessary to protect the rights of the parties;⁵ while in other states it is held that courts of equity have concurrent jurisdiction with the courts of probate.⁶

1. Transfer of Jurisdiction to Court of Probate. — Stat. 20 & 21 Vict., c. 77; Stat. 36 & 37 Vict., c. 66.

2. Jurisdiction of County Courts in England. — The County Courts in England are given all the powers and authority of the High Court of Justice in proceedings by creditors, legatees, etc., in which the estate against or for an account or administration of which the demand may be made shall not exceed in amount or value the sum of five hundred pounds. Stat. 51 & 52 Vict., c. 43, § 67.

3. See the various local statutes.

Accounting Ordinarily Before Probate Court in United States. — The jurisdiction conferred on the surrogate to compel an executor to account for the proceeds of real estate sold by him under a power contained in the will extends to wills made before the enactment of the statute as well as those made afterwards. *Clark v. Clark*, 8 Paige (N. Y.) 152, 35 Am. Dec. 676.

The power given by statute to clerks of courts to homologate accounts and tableaux of distribution after thirty days' notice does not deprive the courts of the power, as previously exercised, to homologate such accounts and tableaux after ten days' notice. *Spivey's Succession*, 15 La. Ann. 248.

Removal of Administrator from State. — The jurisdiction of the domiciliary court to entertain a proceeding for an accounting is not affected by the fact that the administrator has been removed from the state. *McGehee v. McGehee*, 41 La. Ann. 657.

Only the Court Which Granted Letters testamentary or of administration can call the executor or administrator to account. *Boyce v. Davis*, 13 La. Ann. 554; *Dakin v. Hudson*, 6 Cow. (N. Y.) 221; *Seymour v. Seymour*, 4 Johns. Ch. (N. Y.) 409; *Foster v. Wilber*, 1 Paige (N. Y.) 537; *Smith v. Sheppard*, 2 Hayw. (3 N. Car.) 163; *George v. Lee*, 6 Humph. (Tenn.) 61.

4. Probate Court May Require Account Ex Mero Motu. — *Vincent v. Daniel*, 59 Ala. 602; *Harris v. Ely*, 25 N. Y. 138; *Witman's Appeal*, 28 Pa. St. 376; *Matter of Campbell*, 12 Wis. 369.

If an administrator neither renders his account within one year nor asks to have the time extended, the court may of its own motion cite him to account. *Matter of Campbell*, 12 Wis. 369.

Probate Court May Compel Accounting at Any Time. — *Reynolds v. People*, 55 Ill. 328; *Hall v. Grovier*, 25 Mich. 428; *Matter of Campbell*, 12 Wis. 369.

5. Exclusive Jurisdiction of Probate Court — Arkansas. — *Shegogg v. Perkins*, 34 Ark. 117; *McLeod v. Griffiths*, 45 Ark. 505; *Hankins v. Layne*, 48 Ark. 544. It was formerly held otherwise in Arkansas. See *Freeman v. Reagan*, 26 Ark. 373; *Haag v. Sparks*, 27 Ark. 594.

Connecticut. — *Pitkin v. Pitkin*, 7 Conn. 315, 18 Am. Dec. 111; *Bailey v. Strong*, 8 Conn. 281; *Beach v. Norton*, 9 Conn. 182; *Brush v. Button*, 36 Conn. 292; *Clement's Appeal*, 49 Conn. 519.

Illinois. — *Heustis v. Johnson*, 84 Ill. 61.

Iowa. — *Patterson v. Bell*, 25 Iowa 149; *Cowins v. Tool*, 36 Iowa 82.

Louisiana. — *Dupey v. Greffin*, 1 Martin N. S. (La.) 198; *Boyce v. Davis*, 13 La. Ann. 554.

Maine. — *Sturtevant v. Tallman*, 27 Me. 78.

Massachusetts. — *Jennison v. Hapgood*, 7 Pick. (Mass.) 1, 19 Am. Dec. 258; *Wilson v. Leishman*, 12 Met. (Mass.) 316; *Morgan v. Rotch*, 97 Mass. 396; *Cummings v. Cummings*, 143 Mass. 340.

Mississippi. — *Ragland v. Green*, 14 Smed. & M. (Miss.) 194; *Jones v. Irvine*, 23 Miss. 361; *Steen v. Steen*, 25 Miss. 513; *Capers v. McCaa*, 41 Miss. 479. But this is no longer the rule in Mississippi. In this state the courts of probate and the courts of equity have concurrent jurisdiction. *Buie v. Pollock*, 55 Miss. 309; *Clopton v. Haughton*, 57 Miss. 787.

Missouri. — *Miller v. Woodward*, 8 Mo. 169; *Powers v. Blakey*, 16 Mo. 437.

New Hampshire. — *Hurlburt v. Wheeler*, 40 N. H. 73.

North Carolina. — *Hunt v. Sneed*, 64 N. Car. 176; *Sprinkle v. Hutchinson*, 66 N. Car. 450; *Hutchinson v. Roberts*, 67 N. Car. 223.

Ohio. — *McDonald v. Aten*, 1 Ohio St. 293.

Pennsylvania. — *Whiteside v. Whiteside*, 20 Pa. St. 473; *Miller v. Com.*, 111 Pa. St. 321.

Vermont. — *Adams v. Adams*, 22 Vt. 50; *Merriam v. Hemmenway*, 26 Vt. 565; *Boyden v. Ward*, 38 Vt. 628; *Angus v. Robinson*, 62 Vt. 60; *Davis v. Eastman*, 66 Vt. 651.

6. Concurrent Jurisdiction of Courts of Probate and Courts of Equity. — See *infra*, this section and subsection, *Courts of Equity*.

b. COURTS OF EQUITY.—In England the court of equity at an early date assumed jurisdiction to compel executors and administrators to account, because of the inadequacy of the powers of the ecclesiastical courts in this respect,¹ and the usual mode of requiring an accounting is still by bill in equity.²

In the United States there are two lines of decisions in regard to the jurisdiction of equity over accounts of executors and administrators. In some states it is held that the ancient jurisdiction of courts of equity is not divested by the statutes which confer similar jurisdiction on the courts of probate, but that such statutes merely give the courts of probate concurrent jurisdiction with courts of equity, leaving it to the moving party to proceed in either court at his option.³ In other states it is held that the jurisdiction given by statute to the courts of probate is exclusive,⁴ and that equity can take cognizance of the matter only when some special ground of equitable interference exists.⁵

1. Jurisdiction of Equity to Compel Accounting.—Story's Eq. Jur., § 534; *Atkinson v. Henshaw*, 2 Ves. & B. 85.

2. English Practice.—Bill in Equity for Accounting.—3 Williams on Executors (7th Am. ed.) 588; Woerner on Administration, § 500.

In *Brooks v. Oliver*, Ambl. 406, an acting executor, to whom the produce of an estate in Antigua, belonging to an infant, was consigned, was directed to account annually by affidavit, on the authority of *Blair v. Drake*, decided February 11, 1755, by Lord Hardwicke.

An accounting was decreed against an executor who was the residuary legatee, though the testator directed that he should not be compelled by law to declare the amount of the residue. *Gibbons v. Dawley*, 2 Ch. Cas. 198. So, too, notwithstanding an account had already been taken and distribution decreed in the ecclesiastical court. *Bissell v. Axtell*, 2 Vern. 47.

In Order to Give Jurisdiction to the court of equity it should be alleged and proved that some willful default has been committed. *Coope v. Carter*, 2 De G. M. & G. 292.

3. Jurisdiction Given to Probate Courts Held Not Exclusive—Alabama.—*Harrison v. Harrison*, 9 Ala. 470; *Pearson v. Darrington*, 18 Ala. 348; *Gould v. Hayes*, 19 Ala. 438; *Stewart v. Stewart*, 31 Ala. 207; *Sellers v. Sellers*, 35 Ala. 235; *McNeill v. McNeill*, 36 Ala. 109; *Hooper v. Smith*, 57 Ala. 557; *Millsap v. Stanley*, 50 Ala. 319.

California.—*Clarke v. Perry*, 5 Cal. 60, 63 Am. Dec. 82; *Sanford v. Head*, 5 Cal. 298; *Deck v. Gerke*, 12 Cal. 433, 73 Am. Dec. 555.

Florida.—*Sanderson v. Sanderson*, 17 Fla. 820.

Georgia.—*Ewing v. Moses*, 50 Ga. 264.

Kansas.—*Shoemaker v. Brown*, 10 Kan. 383.

Kentucky.—*Saunders v. Saunders*, 2 Litt. (Ky.) 314; *Holland v. Lowe*, (Ky. 1897) 41 S. W. Rep. 9.

Maryland.—*State v. Dilley*, 64 Md. 314; *Hammond v. Hammond*, 2 Bland (Md.) 306.

Mississippi.—*Buie v. Pollock*, 55 Miss. 309; *Clopton v. Haughton*, 57 Miss. 787. Formerly the courts of probate had exclusive jurisdiction. See *Steen v. Steen*, 25 Miss. 513.

New Jersey.—*Salter v. Williamson*, 2 N. J. Eq. 480; *Merselis v. Mead*, 7 N. J. Eq. 557; *Frey v. Demarest*, 16 N. J. Eq. 236; *Meeker v. Maish*, 1 N. J. Eq. 198; *King v. Berry*, 3 N. J.

Eq. 44, 261; *Smith v. Moore*, 4 N. J. Eq. 485; *Van Mater v. Sickler*, 9 N. J. Eq. 483; *Clarke v. Johnston*, 10 N. J. Eq. 287.

New York.—*Seymour v. Seymour*, 4 Johns. Ch. (N. Y.) 409; *Whitney v. Monro*, 4 Edw. Ch. (N. Y.) 5; *Wager v. Wager*, 89 N. Y. 161; *Haddow v. Mundy*, 59 N. Y. 320; *Rogers v. King*, 8 Paige (N. Y.) 210; *Christy v. Libby*, 5 Abb. Pr. N. S. (N. Y. C. Pl.) 192, 35 How. Pr. (N. Y.) 119; *Nagle v. McGinniss*, 49 How. Pr. (N. Y. Supreme Ct.) 193; *McKenzie v. L'Amoureux*, 11 Barb. (N. Y.) 516.

Rhode Island.—*Daboll v. Field*, 9 R. I. 266.

Tennessee.—*Rankin v. Anderson*, 8 Baxt. (Tenn.) 240.

Wisconsin.—*Tryon v. Farnsworth*, 30 Wis. 577.

Effect of Statutes.—It is a general rule that a mere grant of jurisdiction to a particular court, without words of exclusion as to other courts previously possessing the like powers, will only have the effect of constituting the former a court of concurrent jurisdiction with the latter. *Shoemaker v. Brown*, 10 Kan. 383 [citing *Judah v. Brandon*, 5 Blackf. (Ind.) 506; *Martin v. Densford*, 3 Blackf. (Ind.) 297; *McNab v. Heald*, 41 Ill. 326; *Delafield v. Illinois*, 2 Hill (N. Y.) 159; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619].

The Object of the Statute giving jurisdiction to the Probate Court to settle accounts of executors and administrators was to afford in all ordinary cases a more easy, expeditious, and less expensive mode of closing up estates. Where there are no special reasons for going into equity the court of probate is the proper tribunal and should be selected by all parties for settling the accounts of executors and administrators, but there are constantly occurring cases where the limited authority of that court is entirely inadequate to reach the many difficulties that arise on the settlement of estates. *Salter v. Williamson*, 2 N. J. Eq. 480.

In Georgia the jurisdiction of equity over the settlement of the accounts of executors and administrators is expressly retained by statute. *Ewing v. Moses*, 50 Ga. 264.

4. Exclusive Jurisdiction of Courts of Probate.

See *supra*, this section and subsection, *Courts of Probate*.

5. Special Grounds of Equitable Interference.

In any case where the powers of the probate court are inadequate to afford complete relief, equity will take jurisdiction, though the pro-

c. COURTS OF LAW. — It is held that the accounts of an executor or administrator cannot be settled in an action at common law;¹ though it has been said that action at law against an executor or administrator by a creditor of a decedent involves an accounting where the defendant pleads *plene administravit* or no assets, because the plaintiff may show that assets were received by the defendant, who can then relieve himself of liability only by fully accounting for them.²

3. Who May Require Accounting. — The General Rule is that a judicial settlement of the accounts of an executor or administrator may be had at the instance of any person who has an interest in the estate of the decedent, or in the proper administration of it, but no one else has a standing to call for a settlement.³ It is not necessary that the interest alleged as the basis of the

bate court has exclusive jurisdiction of the matter. *Freeland v. Dazey*, 25 Ill. 294; *State v. Brutch*, 12 Ind. 381; *Patterson v. Bell*, 25 Iowa 149; *Cowins v. Tool*, 36 Iowa 82; *McDonald v. Aten*, 1 Ohio St. 293; *Cram v. Green*, 6 Ohio 429.

In *Davis v. Eastman*, 66 Vt. 651, the court said: "It is well understood that the exclusive jurisdiction of the settlement of estates is in the Probate Court, and that equity will not interfere in their settlement except to aid the Probate Court when its powers are inadequate to the ends of justice. It is emphatically required by the whole tenor of our decisions that the court of equity withhold its hand unless a necessity for its interference clearly appears. If it is still within the power of the Probate Court to complete the settlement of this estate, it must be left to do so."

If an Accounting Is Necessary Merely as Preliminary and ancillary to other relief which is properly the subject of equitable cognizance, an accounting may be had in the suit brought therefor, but this is not made to appear by an averment that "as preliminary and ancillary to the relief sought in behalf of" some of the plaintiffs against one of the defendants a judgment for accounting must be had in favor of all the plaintiffs against both of the defendants, because it is apparent from such averment that the accounting must be had before the other matter can be dealt with at all, and that for the purpose of the accounting alone were all the parties joined. *Hutchinson v. Roberts*, 67 N. Car. 223.

Where an Administration Has Been Closed, and the administrator discharged, or where such is the presumption from lapse of time, the administrator cannot be compelled to account in the Probate Court, but the remedy is in the District Court. *Portis v. Cummings*, 14 Tex. 139.

Void Settlement in Probate Court. — The fact that a settlement in the Probate Court is void because of fraud practiced therein will not authorize a court of equity to take jurisdiction. *Jennison v. Hapgood*, 7 Pick. (Mass.) 1, 19 Am. Dec. 258.

Refusal to Produce Books and Papers in Probate Court. — Equity will not take jurisdiction of an accounting merely because the administrator would not bring his intestate's books and papers into the Probate Court and was not examined on oath in the Probate Court. *Adams v. Adams*, 22 Vt. 50.

Jurisdiction of Federal Courts. — Though the re-

lation between persons interested in the estate of a decedent and the executor or administrator is in general that of *cestuis que trustent* and trustee, it does not extend so far as to give courts of equity, at least according to the practice of the federal courts, jurisdiction of a proceeding to compel an executor or administrator to account, but there must exist in addition fraud, maladministration, or nonadministration. *Walker v. Brown*, 58 Fed. Rep. 23. See also *Union Bank v. Vaiden*, 18 How. (U. S.) 503; *Green v. Creighton*, 23 How. (U. S.) 106; *Payne v. Hook*, 7 Wall. (U. S.) 425; *Lawrence v. Nelson*, 143 U. S. 215.

For a General Discussion of Equity Jurisdiction in probate matters, see ENCYC. OF PL. AND PR., title PROBATE AND ADMINISTRATION.

1. Accounting Not to Be Had in Action at Law. — *Tyler v. Wheeler*, 160 Mass. 206; *Ordinary v. Williams*, 1 Nott & M. (S. Car.) 587. See also *Wallis v. Gill*, 3 McCord L. (S. Car.) 475.

The Common-law Action of Account will not lie against an executor or administrator. *Curtis v. Curtis*, 13 Vt. 517; *Merriam v. Hemmenway*, 26 Vt. 565.

2. Woerner on Administration, § 499.

3. Parties in Interest Only Can Require Accounting. — *Riggs v. Cragg*, 89 N. Y. 479, 11 Abb. N. Cas. (N. Y.) 401; *Schlegel v. Winckel*, 2 Dem. (N. Y.) 232; *Reiley v. Duffy*, 4 Dem. (N. Y.) 366; *Smith v. Lawrence*, 11 Paige (N. Y.) 206; *Guild v. Peck*, 11 Paige (N. Y.) 475; *Becker v. Hager*, 8 How. Pr. (N. Y. Supreme Ct.) 68; *Woodruff v. Woodruff*, 17 Abb. Pr. (N. Y. Supreme Ct.) 165; *Beeber's Appeal*, (Pa. 1887) 8 Atl. Rep. 191; *Okeson's Appeal*, 2 Grant's Cas. (Pa.) 303; *Lightner's Estate*, 144 Pa. St. 273; *Koerner's Estate*, 45 Leg. Int. (Pa.) 5, 19 Phila. (Pa.) 10.

Matter of Right. — A citation by a person interested in the estate for an accounting is a matter of right. *Smith v. Black*, 9 Pa. St. 308.

A Married Woman who has an interest in an estate may require the executor or administrator to account without joining her husband in the proceedings. *Blackman's Estate*, 2 Kulp (Pa.) 162.

A Widow who elects not to take under her husband's will has such an interest in the personality as authorizes her to cite the executor to account. *Melizer's Appeal*, 17 Pa. St. 449.

A Receiver of an Executor Appointed in Supplementary Proceedings has not such an interest in the estate of the testator as entitles him to require the executor to account in order that the commissions due the executor may be ascer-

right to an accounting should be clear and undisputed. A *prima facie* showing that the petitioner had, at the time when his petition was filed, such an interest as the law requires is sufficient;¹ and this, according to some authorities, cannot be rebutted by any opposing evidence on the hearing of the application,² because the right of the petitioner cannot be litigated in such a proceeding.³ And this rule has been applied even where the petitioner had executed a release or assignment of his interest in or claim against the estate.⁴ A contingent interest in an estate, however, does not give the right to require an accounting in the absence of statutory authority.⁵

Creditors of a Decedent, by virtue of their right to have the assets of the estate

tained and applied to the judgment, because it cannot be said that any commissions are due until they have been ascertained on a proper accounting. *Worrall v. Driggs*, 1 Redf. (N. Y.) 449.

1. Prima Facie Showing of Interest Sufficient.—*Wever v. Marvin*, 14 Barb. (N. Y.) 376, 7 How. Pr. (N. Y.) 182; *Sayre v. Sayre*, 3 Dem. (N. Y.) 264; *Wistar's Estate*, 5 W. N. C. (Pa.) 128; *Toner's Estate*, 5 W. N. C. (Pa.) 386; *McKeown's Estate*, 8 W. N. C. (Pa.) 343; *McNeal's Estate*, 6 Kulp (Pa.) 271; *Disstons's Estate*, 14 Phila. (Pa.) 310, 38 Leg. Int. (Pa.) 270; *Bushong's Estate*, 14 Phila. (Pa.) 322, 38 Leg. Int. (Pa.) 412; *Lightner's Estate*, 144 Pa. St. 273. See also *Matter of Kipp*, 17 Misc. Rep. (N. Y. Surrogate Ct.) 491.

If the Petitioner's Standing Is in Doubt he will be given the benefit of the doubt and the executor will be ordered to account. *Kern's Estate*, 11 Lanc. L. Rev. (Pa.) 15.

A Mere Appearance of Interest in the estate on the part of the petitioner has been held sufficient to authorize an order for an accounting where the petition is duly verified, though the surrogate may in his discretion refuse it. *Thomson v. Thomson*, 1 Bradf. (N. Y.) 24.

2. A Duly Verified Allegation of Interest Is Sufficient to entitle the petitioner to an accounting, though his interest is disputed by the executor or administrator. *Matter of Fortune*, 14 Abb. N. Cas. (Albany Surrogate Ct.) 415; *Matter of Cowdrey*, 5 Dem. (N. Y.) 453.

3. The Validity of the Petitioner's Claim as a creditor of the decedent will not be considered on his application to compel the executor or administrator to account. *Monigle's Estate*, 1 W. N. C. (Pa.) 234; *Callender's Estate*, 1 W. N. C. (Pa.) 518. Compare *Becker v. Hager*, 8 How. Pr. (N. Y. Supreme Ct.) 68.

4. Release of Interest.—In *Kenny v. Jackson*, 1 Hagg. Ecc. 105, an account was ordered in the ecclesiastical courts at the instance of the residuary legatee, who had given a release to the executor, the court saying that it could not try the validity of the release, though it might be tested in the temporal courts, and that the account might be the means of discovering an unfair settlement.

In *Reiley v. Duffy*, 4 Dem. (N. Y.) 366, *sub nom.* *Matter of Duffy*, 3 How. Pr. N. S. (N. Y. Surrogate Ct.) 240, it was held that one who has an apparent interest in the estate may maintain a proceeding to compel the administrator to settle his accounts, though the petitioner had executed a release of his interest in the estate, where there was a sworn allegation that the release was invalid. Compare *Love's Estate*, 11 W. N. C. (Pa.) 324, holding that a

creditor who, with full knowledge of the condition of the estate, has accepted a *pro rata* share of the assets cannot cite the administrator to account.

Assignment of Interest.—In *Bonfanti v. Deguerre*, 3 Bradf. (N. Y.) 429, it was held that the right to an accounting would not be denied on the ground that the petitioner had assigned his interest in the estate, the validity of the assignment being denied by him.

5. Contingent Interests.—In *Keene's Appeal*, 60 Pa. St. 504, it was held that an interest so entirely contingent and uncertain that it may never have an actual existence does not give the right to require an executor to account, and that such right is not given by a statute (Act March 29, 1832, art. 1, § 57) providing that a proceeding to compel an accounting by an executor or administrator might be on the petition of any person interested, whether such interest be "immediate or remote." In this case the petitioner's interest was under a will by which the testator gave the interest on a fund to one E., remainder to her issue, but if she died without issue, the interest on the fund to be paid to the petitioner for life, and the fund to go to his issue absolutely. E. was married, but had no children, and the petitioner was also married, but had no children.

But the owner of a contingent interest in a decedent's estate is given the right to require the executor to account by the later *Pennsylvania* statute (Act April 17, 1869) entitled "An Act for the protection of contingent interests," which provides that "the owner of any contingent interests in the personal property of any decedent" may require the executor or administrator to make and exhibit an account of his trust. It was held under this statute that an executor could be required to account by a person to whom a fund was bequeathed in the event of the failure of issue of another person to whom the testator had given a part of the income for life, and to his issue, if any, the principal of the fund with the accumulated interest at his death. *Hartman's Appeal*, 90 Pa. St. 203; *Bushong's Estate*, 11 W. N. C. (Pa.) 107.

An interest dependent on a successful termination of a contest to set aside the will is within the *Pennsylvania* statute of April 17, 1869. *Stewart's Estate*, 7 Pa. Co. Ct. Rep. 603.

Every Person Entitled Either Absolutely or Contingently to share in a decedent's estate "or the proceeds thereof" is authorized by the *New York* Code (subdiv. 11 of § 2514) to require an executor or administrator to account. *Edwards v. Edwards*, 1 Dem. (N. Y.) 132.

applied to the payment of their claims, are directly interested in the estate, and therefore they or their personal representatives may call on the executor or administrator of the deceased debtor for an accounting.¹ Their right is not defeated by the fact that their claims were not presented within the time prescribed by the statute relating to the payment of claims, if the failure to present does not operate to bar entirely their right to payment.² And even where the claim is barred by the statute of limitations it has been held that the creditor may demand an accounting, evidently in view of the rule obtaining in some jurisdictions that personal representatives may waive the bar of the statute.³

Legatees and Distributees of a decedent obviously have an interest in the estate, and may therefore require an accounting by the executor or administrator,⁴ though they are not at the time entitled to a decree of distribution.⁵ In case of the death of a legatee or distributee, his personal representatives may require the executor or administrator of the principal estate to account,⁶ and

1. Creditors or Their Representatives May Require Accounting.—*Freeman v. Rhodes*, 3 Smed. & M. (Miss.) 329; *Maraist v. Guilbeau*, 31 La. Ann. 713; *McKeown v. Fagan*, 4 Redf. (N. Y.) 320; *Fryer's Estate*, 12 W. N. C. (Pa.) 408; *Witman's Estate*, 2 Woodw. (Pa.) 350; *Peter's Estate*, 1 Phila. (Pa.) 581, 12 Leg. Int. (Pa.) 358.

Who Are Creditors.—The creditors of a firm in which the estate of a testator has an interest cannot require the executor to account, because they are not creditors of the testator. *Frothingham v. Hodenpyl*, (Supreme Ct.) 16 N. Y. Supp. 341, 61 Hun (N. Y.) 627, *affirmed* 135 N. Y. 630.

The Indorsee of a Note Drawn by the Decedent may require his executor to file an account. *Fryer's Estate*, 12 W. N. C. (Pa.) 408.

As to the Effect of a Release or Assignment of a Claim on the right of the claimant to demand an accounting, see the next preceding note but one, *Release of Interest*.

Attorneys of a Creditor who has recovered a judgment against the administrator have, by virtue of their lien on the judgment, the right to institute a proceeding to compel the administrator to account. *Close v. Shute*, 4 Dem. (N. Y.) 546.

In New York a creditor's petition to require the executor or administrator of the debtor to account may be denied for "good cause" (Code Civ. Pro. N. Y. (1898), §§ 2724, 2726, 2727), but this is not shown by the fact that the petitioner's claim is disputed. *Matter of Callahan*, 66 Hun (N. Y.) 118, 139 N. Y. 51; *Cowdrey's Estate*, 5 Dem. (N. Y.) 453.

2. Failure to Present Claims.—In *O'Connor v. Gifford*, 6 Dem. (N. Y.) 71, *reversed* on other points in (Supreme Ct.) 3 N. Y. Supp. 337, 117 N. Y. 275, it was held that the right of a creditor to require an accounting was not affected by the fact that he did not present his claim as required by the *New York* statute (2 Rev. Stat., p. 89, § 39), providing that an executor shall not be liable to a creditor for moneys paid out on legacies, etc., where the creditor did not present his claim within six months from the publication of notice of letters testamentary being issued, the only effect of the statute being to limit a recovery, in the case the creditor should sue, to the assets remaining in the executor's hands unadministered at the commencement of the action.

For a Full Discussion as to the effect of non-presentation of claims, see the title DEBTS OF DECEDENTS, vol. 8, p. 1003.

3. Debts Barred by Limitation.—*Wainford v. Barker*, 1 Ld. Raym. 232; *Philpston v. Harvey*, 2 Lee Ecc. 344.

As to the power of an executor or administrator to waive the statute of limitations, see *supra*, this title, *Powers, Duties, and Liabilities in General*—*Power to Waive Statute of Limitations*.

4. A Legatee, Though Also an Executor of the Will, may require the sole acting executor to account. *Woodruff v. Woodruff*, 17 Abb. Pr. (N. Y. Supreme Ct.) 165. See also *Wright v. Wright*, 2 Desaus. (S. Car.) 242; *Bassett v. Warner*, 23 Wis. 673.

A Legatee in Remainder is entitled to an account during the continuance of the life estate. *Campbell v. Purdy*, 5 Redf. (N. Y.) 434; *Matter of Wood*, 5 Dem. (N. Y.) 345; *Lawrence's Estate*, 15 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 54; *Godwin v. Watford*, 107 N. Car. 168; *Albertson's Estate*, 1 W. N. C. (Pa.) 188.

An Infant Legatee who came of age since the last accounting may demand a further account. *Hood v. Hood*, 1 Dem. (N. Y.) 392.

Presumption of Payment of Legacy.—A legacy will be presumed to have been paid after the lapse of thirty-three years, and the legatee cannot thereafter require the executors to file an account. *Phillip's Appeal*, (Pa. 1888) 13 Atl. Rep. 906.

5. A Right to a Decree for Distribution is not essential to the right to require the executor to account, because the rendering an account by an executor or administrator, and the settlement of such account, including the decree to pay over, are not necessarily one proceeding. *Harris v. Elv*, 25 N. Y. 138.

6. Personal Representative of Deceased Legatee or Distributee May Require Accounting.—*Edwards v. Edwards*, 1 Dem. (N. Y.) 132; *Brooke's Estate*, 11 W. N. C. (Pa.) 124, 38 Leg. Int. (Pa.) 451, 14 Phila. (Pa.) 325; *Lacey's Estate*, 35 Leg. Int. (Pa.) 274, 12 Phila. (Pa.) 126; *Palethorp's Estate*, 14 Pa. Co. Ct. Rep. 288, 3 Pa. Dist. Rep. 144; *Dawson v. Dawson*, 2 Strobb. Eq. (S. Car.) 34.

The Executor of a Deceased Legatee has such an interest in the estate of the first testator as will entitle him to require the executor thereof

they alone succeed to such right, if the legatee or distributee died intestate;¹ but it has been held that if such legatee or distributee has disposed of his legacy or distributive share by will, his legatee has an interest in the principal estate by virtue of which he may require the representative thereof to account.²

The Executor or Administrator may institute a proceeding for the settlement of his own accounts,³ or he may call for a settlement by his coexecutor or coadministrator.⁴

4. Time of Rendering Accounts — Rule in England. — At common law an executor or administrator was not required to account at stated times, but only when cited for that purpose by the probate court at the instance of a person interested in the estate.⁵

to account. *Edwards v. Edwards*, 1 Dem. (N. Y.) 132.

Estoppel to Require Accounting. — The administrators of a deceased administrator who was also the next of kin of the first decedent, and to whom his coadministrator had turned over assets of the estate, cannot require such coadministrator to account for the assets so turned over. *Matter of Van Wert*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 563.

1. Only the Personal Representative of a Deceased Distributee or Legatee who has died intestate can cite the executor or administrator of the principal estate to account. *Lacey's Estate*, 35 Leg. Int. (Pa.) 274, 12 Phila. (Pa.) 126.

The Husband of a Deceased Legatee is not entitled to an account for the legacy except as her administrator. *Dawson v. Dawson*, 2 Strobb. Eq. (S. Car.) 34.

The Widow of a Legatee has no interest in the testator's estate which will entitle her to require the executor to account. *Lacey's Estate*, 35 Leg. Int. (Pa.) 274, 12 Phila. (Pa.) 126.

2. Legatee of Legatee or Distributee May Require Representative of Principal Estate to Account. — *Matter of Prout*, 52 Hun (N. Y.) 109.

Judgment Creditor of Heir May Require Accounting. — *Voinché v. Brouillette*, 50 La. Ann. 386. But see *Greiner's Estate*, 2 W. N. C. (Pa.) 292.

Attachment Creditor of Legatee or Distributee. — In *Manigle's Estate*, 11 Phila. (Pa.) 39, 32 Leg. Int. (Pa.) 83, it was held that an attachment creditor of a legatee or distributee may require the administrator to account. The court said: "As the attaching creditor succeeds to the rights of the legatee or distributee, subject to all the equities previously existing, we think he acquires, by operation of law, such an interest in the estate of the decedent as will entitle him to require the administrator to account."

A Receiver in Supplementary Proceedings against a judgment debtor legatee may require the executor to account. *Matter of Beyea*, 10 Misc. Rep. (N. Y. Surrogate Ct.) 198; *Matter of Rainey*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 367.

Purchaser of Distributive Share. — In *North Carolina* the purchasers of distributive shares for valuable consideration may proceed against the executors, under the Act of 1762, by a petition in their own names for an account. *Wright v. Lowe*, 2 Murph. (6 N. Car.) 354.

But notwithstanding an assignment or release by a legatee or distributee of his interest in the estate he has the right to demand an

accounting if he denies the validity of the assignment or release, because the probate court cannot try that question. *Kenny v. Jackson*, 1 Hagg. Ecc. 105; *Harris v. Ely*, 25 N. Y. 138; *Bonfanti v. Deguerre*, 3 Bradf. (N. Y.) 429; *Reilly v. Duffy*, 4 Dem. (N. Y.) 366, *sub nom.* *Matter of Duffy*, 3 How. Pr. N. S. (N. Y. Surrogate Ct.) 240. See also *Matter of Langevin*, 45 Minn. 429; *Starkey v. Sweeney*, (Minn. 1898) 73 N. W. Rep. 859.

3. Accounting on Petition of Executor or Administrator. — *Schlegel v. Winkel*, 2 Dem. (N. Y.) 232; *Smith v. Lawrence*, 11 Paige (N. Y.) 206; *Guild v. Peck*, 11 Paige (N. Y.) 475; *Riggs v. Cragg*, 11 Abb. N. Cas. (N. Y. Ct. App.) 401, 89 N. Y. 479, *reversing* 26 Hun (N. Y.) 89.

An Executor Who Is Also Appointed Trustee under the will is entitled on performance of all the duties required of him as executor to have his executorial accounts settled, and a decree entered discharging him as executor and directing a transfer to himself as trustee of the assets in his hands as executor, where the will contemplated a severance of the functions and duties as executor from those as trustee. *Matter of Emerson*, 59 Hun (N. Y.) 244.

A Temporary Administrator cannot have his accounts settled until letters testamentary have been issued and the executors brought in as parties to the proceeding. *American Bible Soc. v. Oakley*, 4 Dem. (N. Y.) 450.

Substituted Executor. — A person who is appointed by the will to complete the settlement of the estate after the death of the person named as executor has such an interest as entitles him to compel the executor to account, where the executor was legatee for life with remainder over, because an accounting is necessary to enable the beneficiaries under the will after the death of the executor to distinguish what remains of the estate from the other estate of the executor in which they would have no interest. *Ridgley v. People*, 163 Ill. 112.

4. Joint Executors. — Though an executor has no pecuniary interest in the estate of his testator, he has such an interest in it as will entitle him to require a settlement of the accounts of his coexecutors. *In re Rumsey*, 63 Hun (N. Y.) 635, 45 N. Y. St. Rep. 453. See also the title JOINT EXECUTORS AND ADMINISTRATORS.

5. Executor or Administrator Not Obligated to Account at Common Law Until Cited. — *Greenside v. Benson*, 3 Atk. 248.

In the United States it is generally provided by statute that administration accounts shall be presented for settlement within a certain time after the appointment of the executor or administrator, and at stated intervals thereafter until administration is completed. The requirements of the statutes vary considerably as to the time when the account must be presented for settlement, but they are uniform as to their policy, which is to furnish persons interested in the estate with full information as to its condition by more or less frequent settlements by the executor or administrator.¹ These statutes do not, however, limit the obligation of the executor or administrator to make such periodical settlements of his accounts, but the probate court may, on the application of any person who is interested in the estate, or of its own motion, require an accounting at any time.²

The Present Practice in England of obtaining an order of court requiring an executor or administrator to bring in an account is by summons. 3 Williams on Executors (7th Am. ed.) 663.

By the statute of 22 Car. II., a day for accounting was to be specified in the condition, which was left to the discretion of the ordinary. *Com. v. Bryan*, 8 S. & R. (Pa.) 128. And in the case of *Canterbury v. Willis*, 1 Salk. 172, 251, 315, Lord Holt declared it to be the unanimous opinion of the Court of King's Bench that the administrator is bound to settle his account by the time specified in the condition of the bond, though not cited or summoned.

1. Periodical Accounting in the United States.—The *Alabama* statute provides that a final settlement may be made at any time after eighteen months from the grant of letters, and it is held that after administration has been pending more than eighteen months it is *prima facie* the right of the distributees to call the personal representatives to a settlement, but that any special reason why this should not be done may be shown in defense by the administrator. *Hooper v. Smith*, 57 Ala. 557; *Austin v. Jordan*, 35 Ala. 642. But it cannot be compelled before the expiration of eighteen months. *Jackson v. Rowell*, 87 Ala. 685.

The *California* statute requires an executor or administrator to render a full account within thirty days after the expiration of the time mentioned in the notice to creditors. *Matter of Osborn*, 87 Cal. 1.

The *Colorado* statute provides for a settlement every six months. *Erle v. Lane*, 22 Colo. 273.

In *Indiana* a legal settlement cannot be made until the expiration of one year after letters of administration were issued and notice thereof given. *Shirley v. Thompson*, 123 Ind. 454.

The *Michigan* Comp. L., § 2985, requires "every executor or administrator to render his account of his administration within one year from the time of his receiving letters testamentary or of administration," unless, for the reason stated in the statute, the court gives further time. *Hall v. Grovier*, 25 Mich. 428.

In *New Jersey* it has been held that an executor or administrator may be cited to account, though he has declared the estate insolvent; and the citation may be made returnable before the expiration of the time limited for creditors to exhibit their claims. *Dun-an v. Barnes*, 20 N. J. L. 75.

The *New York* statute provides that the surrogate may order an executor or administrator to render an intermediate account where eighteen months have elapsed since his letters were issued. *Matter of Hale*, 6 N. Y. App. Div. 411; *Matter of Miller*, 15 Misc. Rep. (N. Y. Surrogate Ct.) 556; *In re Jones*, 1 Redf. (N. Y.) 263, 5 N. Y. Leg. Obs. 124.

Under this provision an executor may be required to account where it has been more than eighteen months since he rendered a previous account. *In re Reeves*, (Supreme Ct.) 14 N. Y. Supp. 454. And a judicial settlement of his accounts may be compelled where one year has elapsed since letters were granted. *Matter of Clayton*, 1 Connolly (N. Y.) 444, 17 Civ. Pro. Rep. (N. Y.) 68.

In *Hobbs v. Craige*, 1 Ired. L. (23 N. Car.) 332, it was held that the *North Carolina* statute making it obligatory on executors and administrators to settle the estate at the end of two years after their administration shall have begun did not authorize them to defer the settlement until that time without necessity, but they may be called to account by petition or bill, by the legatees or next of kin, before the expiration of such time.

In *Pennsylvania* an administrator may be cited to file a final account at the expiration of a year, and he will be compelled to do so unless he shows good cause to the contrary. *Brader's Estate*, 6 Luz. Leg. Reg. (Pa.) 243.

See also the statutes in other jurisdictions.

An Extension of Time to make a final settlement will not be granted at the instance of the administrator because of outstanding debts or unsettled accounts, where it has been seven years since letters of administration were granted. *Ditmar v. Bogle*, 53 Ala. 169.

2. Accounting May Be Required at Any Time.—*Reynolds v. People*, 55 Ill. 328; *Hall v. Grovier*, 25 Mich. 428; *Matter of Campbell*, 12 Wis. 369.

But a second account will not be ordered until the exceptions to the first account have been disposed of. *Matter of Harley*, 1 Phila. (Pa.) 511, 11 Leg. Int. (Pa.) 211.

In *Kentucky* it is provided by statute that an action may be brought to settle the estate at any time after the qualification of the executor or administrator. *Holland v. Lowe*, (Ky. 1897) 39 S. W. Rep. 834.

In *New Hampshire* the judge of probate cannot settle the account of an executor until he has given bond as required by law. *Tappan v. Tappan*, 24 N. H. 400.

Delay in Requiring Settlements. — As a general rule the statute of limitations does not run against the obligation of an executor or administrator to account, but it may be barred by lapse of time on equitable principles.¹

5. Failure to Account. — If an executor or administrator fails to keep and render accounts of his administration he will be held to strict proof that he has done his duty.² It is also a breach of his bond *ipso facto* which renders him and his sureties liable to an action.³ In addition to these consequences, various penalties are prescribed by the statutes of the several states to enforce prompt settlement of administration accounts, among which are the revocation of the letters of the delinquent executor or administrator, imprisonment until the duty is performed, and prosecution by indictment.⁴

6. Charges — *a.* **WHAT PROPERTY MUST BE ACCOUNTED FOR IN GENERAL.** — **The General Rule** is that an executor or administrator is chargeable on his accounting with all the assets of the decedent's estate received by him as the personal representative of the decedent, or lost by reason of his neglect to collect or take possession.⁵

1. Effect of Delay in Requiring Settlement. — See *supra*, this section, *Release from Liability to Account*.

2. Failure to Account — Strict Proof Required. — *Wellborn v. Rogers*, 24 Ga. 558; *Kee v. Kee*, 2 Gratt. (Va.) 116.

Justice will not be denied to an executor because he has neglected to settle his account for a long time, where he acted in good faith and derived no advantage from the delay. *Jones v. Williams*, 2 Call (Va.) 102.

Delay in Accounting — Liability for Interest. — An executor who is guilty of great delay in accounting is chargeable with interest on balances, with annual rests. *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93; *Matter of Sander-son*, 74 Cal. 199. See also *Pearse v. Green*, 1 Jac. & W. 135.

What Constitutes Refusal to Account. — It was held in an early case in *Maine* that an administrator is not to be considered as refusing to account for property of the intestate received by him until he has been cited by the Probate Court for that purpose. *Nelson v. Jaques*, 1 Me. 139.

3. Failure to Account Is Breach of Bond. — *Matter of Osborn*, 87 Cal. 1; *Clark v. Cress*, 20 Iowa 50; *Probate Ct. v. Chapin*, 31 Vt. 373. See also *supra*, this title, *Administration Bonds*.

Nominal Damages, at least, may be recovered in an action on an administration bond for failure of the executor or administrator to account as required by law. *Clark v. Cress*, 20 Iowa 50; *Jenkins v. Shields*, 36 Iowa 526.

In some jurisdictions it is held that only nominal damages can be recovered in an action on the bond for failure of the executor or administrator to render an account to the probate court when cited to do so. The reason given for this is that it cannot be known what amount the plaintiff is entitled to receive out of the estate, or whether he is entitled to recover anything until the estate has been settled, the amount of claims and assets and expenses of administration all ascertained; and that the jurisdiction to do all this is exclusively in the probate court. *Probate Ct. v. Chapin*, 31 Vt. 373.

4. Failure to Account Is Cause for Revoking Letters — *Alabama*. — *Hightower v. Moore*, 46 Ala. 466.

Indiana. — *Evans v. Buchanan*, 15 Ind. 438.

Louisiana. — *Collins v. Hollier*, 13 La. Ann. 585; *Brown v. Ventress*, 24 La. Ann. 187; *Ford v. Kittredge*, 26 La. Ann. 190.

North Carolina. — *Armstrong v. Stowe*, 77 N. Car. 360.

Pennsylvania. — *Simon's Estate*, 155 Pa. St. 215.

Wisconsin. — *Cutler v. Howard*, 9 Wis. 309.

See also *supra*, this title, *Appointment and Tenure of Office — Termination of Authority — Removal from Office or Revocation of Letters*.

Imprisonment. — In *Lobit v. Castille*, 14 La. Ann. 792, it was held that besides being subject to removal from office for failure to account, an executor or administrator may be imprisoned until he complies with the law.

Interest on Balance. — A further penalty is provided in *Louisiana* by a requirement that the executor or administrator, on removal for failure to settle his accounts, shall pay ten per cent. per annum interest on all sums for which he may be responsible, from the time when his account should have been settled. *Bass v. Chambliss*, 9 La. Ann. 376.

Indictment. — In *Tennessee*, Acts 1837, c. 125, §§ 2, 3, made it an indictable offense for an executor or administrator to neglect to settle his accounts for thirty days after he had been cited for that purpose. *State v. Parrish*, 4 Humph. (Tenn.) 285.

See also the various local codes and statutes in the United States.

5. Charges — General Rule Stated. — *Anderson v. Piercy*, 20 W. Va. 282.

For a Full Recital of the items which should be charged in the account, see *In re Jones*, 1 Redf. (N. Y.) 263.

All the Property of a Decedent received by the executor or administrator must be accounted for by him. *Scudder v. Ames*, 89 Mo. 496; *McLean's Estate*, 5 Kulp (Pa.) 207; *Osterhout's Estate*, 8 Lanc. L. Rev. (Pa.) 18.

When an administrator receives money which the party had no right to retain, but which from motives of policy the law would have refused to aid in recovering, he is nevertheless bound to account for it. *Smith v. Morgan*, 4 Ky. L. Rep. 829.

Property Not Received by the Executor or Administrator is sometimes chargeable against

Money or Property of Third Persons coming into the hands of an executor or administrator is not chargeable in the administration account, though it is received by him as assets of the estate,¹ and it is immaterial that the legal title to it was in the decedent, if the equitable title was in others.²

Property Received in Other than Representative Right. — Within the general rule stated above, that the personal representative of a decedent is to be charged with all the property of the decedent received by him in his representative

him in his account. Thus, he should be charged with the value of personal property lost through his negligence, though it never came to his possession. *Tuttle v. Robinson*, 33 N. H. 104.

In Case Any Loss Is Sustained by the devisees in consequence of the executor's neglect, he will be surcharged with the amount. *Finnery's Appeal*, 37 Pa. St. 323. See also *King v. Morrison*, 1 P. & W. (Pa.) 188; *Landis's Estate*, 4 Phila. (Pa.) 349, 18 Leg. Int. (Pa.) 110; *Ritter's Estate*, 32 Leg. Int. (Pa.) 29, 11 Phila. (Pa.) 12; *Allen's Estate*, 9 Pa. Co. Ct. Rep. 328, 48 Leg. Int. (Pa.) 16, 20 Phila. (Pa.) 101.

The Goodwill of a Decedent's Business is chargeable against the executor or administrator, if he appropriated it to his own use or negligently failed to obtain a purchaser. *In re Grimm*, 181 Pa. St. 233; *In re Buck*, 185 Pa. St. 57. See also *supra*, this title, *Assets—Goodwill of Decedent's Business*.

Shares of Stock Pledged by Decedent. — Where a testator had pledged shares of stock held by him in a loan association as collateral security for a loan made to him by the association and secured by a mortgage on his real estate, the executor is not chargeable with such shares because the estate and the creditors are benefited by the reduction of the mortgage debt by such pledge. *Matter of Van Houten*, 18 Misc. Rep. (N. Y. Surrogate Ct.) 524.

Property Not Owned by Decedent at Time of Death. — In *Shuttleworth v. Winter*, 55 N. Y. 624, the decedent, on leaving the country to be absent for a considerable time, placed in his wife's hands certain government bonds, giving her power to manage and control them. During his absence she sold the bonds and invested the proceeds in real estate in her own name. On his death the wife was appointed administratrix of his estate, and it was held that she was not accountable as such for the bonds, because the decedent owned no such personality at the time of his death.

Only Personal Property is contemplated by the statute of *Maine* (Stat. 1821, c. 51, § 28) which provides that an administrator shall render an account within six months after the report of the commissioners of insolvency. *Butler v. Ricker*, 6 Me. 268; *Eaton v. Brown*, 8 Me. 22.

Withdrawing Charges Made by Mistake. — If an executor or administrator by mistake or improvidently charges against himself money with which he is not properly chargeable, the court may permit him to withdraw the charge from the account. *Osmond's Estate*, 161 Pa. St. 543; *Qualter's Estate*, 147 Pa. St. 124.

An Administrator De Bonis Non is not required to account for all the property that came into the hands of his predecessor. *Higgs v. Garrison*, (Tex. Civ. App. 1894) 27 S. W. Rep. 34.

Presumption as to Ownership of Decedent. —

Notes in the possession of the executrix at the time of her death and payable to her will nevertheless be presumed to belong to the testator's estate where it appears that the executrix, who was also life tenant under the will had no other property than what was given her by the will. *Vreeland v. Westervelt*, 45 N. J. Eq. 572.

Proof of Receipt by Representative. — A recital in a petition for the probate of a will that a part of the estate left by the testator was money at interest "in the hands of" the executor is sufficient to sustain a finding that the money in question was received by the executor. *Raskin v. Robarts*, (Cal. 1894) 35 Pac. Rep. 763.

But proof that the decedent had received a sum of money some time before his death is not alone sufficient to justify charging the executor or administrator with it in his final account. *Matter of Ryalls*, 74 Hun (N. Y.) 205, 80 Hun (N. Y.) 459.

Wearing Apparel of a Testator will not be charged against the executor where it is not proved to have been converted to his use by him, and a sale of it was not necessary for the payment of debts and legacies. *M'Call v. Peachy*, 3 Munf. (Va.) 288. See also *Carrol v. Connet*, 2 J. J. Marsh. (Ky.) 204.

Advancements are not to be included in the account of an executor or administrator. *Black v. Whitall*, 9 N. J. Eq. 572, 59 Am. Dec. 423.

1. Money of Third Persons Received by Executor or Administrator. — In *Johnson v. Corbett*, 11 Paige (N. Y.) 265, it was held that where by mistake an executor or administrator receives money not due the estate, he is not chargeable with it as assets, because he is bound to refund it to the person by whom it was paid to him unless such person has waived his claim.

An administrator is not accountable to the estate for rents received by him from lands which did not belong to the decedent, but were wrongfully included in the inventory of the estate. *Cameron v. Cameron*, 15 Wis. 1, 82 Am. Dec. 652.

In *Matter of Collins*, 70 Hun (N. Y.) 273, it was held that where the testator gave an annuity to his wife, to pay which a sufficient sum was contributed by his children, in order to avoid a sale of real estate, the executor was not chargeable with the amount so contributed.

2. If the Equitable Title to Property Received by an Executor or Administrator Is in a Third Person, while the estate has only the legal title, the administrator is not chargeable with it in his administration account. *Sherman v. Dodge*, 28 Vt. 26. See also *supra*, this title, *Management and Care of Estate—In General—Trust Estates*; and *infra*, this title, *Representatives of Executors and Administrators*.

capacity, he is not chargeable in his administration account with any property, though belonging to the decedent, if he received it otherwise than as the personal representative.¹

The Time of the Receipt Is Immaterial, so long as the property received belonged to the decedent, and in that character came into the hands of the executor or administrator. Thus, it is held that he is chargeable with money or goods of the decedent which came into his possession during the decedent's lifetime.² So, too, he is chargeable with assets received before a grant of letters or probate of the will,³ or after final settlement⁴ or removal from office.⁵

1. Property Received in Other than Representative Right Not Chargeable in Account.—*Smith v. Smith*, 13 Ala. 329; *Key v. Jones*, 52 Ala. 238; *In re Gordon*, (Supreme Ct.) 15 N. Y. Supp. 502.

"Property that descends to heirs does not and cannot go to the executor or administrator. If by any means it comes into the possession of the individual who chanced to be the personal representative of the deceased, the remedy of the party entitled as heir is by a proper action at law, the form to be determined by the character and situation of the property." *Shumway v. Cooper*, 16 Barb. (N. Y.) 556.

In *Dexter v. Arnold*, 3 Mason (U. S.) 284, it was held that an administrator who was also the mortgagee of the real estate of his intestate, in his own right, was not liable to account, as administrator, for the money which he received on the sale of such property as mortgagee, though he sold it with a general warranty.

In *Matter of Kellogg*, 104 N. Y. 648, *affirming* 39 Hun (N. Y.) 275, an executor who was the testator's agent was at the time of the testator's death engaged in the collection of a claim for him, and received from the attorney employed to prosecute the claim a check for the amount thereof. The check was received at the office of the executor before the testator's death, but was not collected until afterwards. At the time when the check was received there was a balance due to the executor on his account as agent. The testator died insolvent. It was held that, when the money was drawn on the check, the payment related back to the delivery of the check, and that the executor was chargeable as such only with the balance due on his account as agent after the check had been entered thereon.

So Where an Executor Is Also Testamentary Guardian of the devisee, he is not chargeable on his accounting as executor with rents received by him as such guardian. *In re Betfels*, (Surrogate Ct.) 4 N. Y. Supp. 393.

Property Held in Two Capacities.—If an administrator holds property in two capacities he will be considered as holding it in the capacity in which he ought to hold in the particular case. *Carroll v. Bosley*, 6 Yerg. (Tenn.) 223, 27 Am. Dec. 460.

Purchase in Individual Right at Receiver's Sale.—In *Peters v. Carr*, 2 Dem. (N. Y.) 22, it was held that where an administratrix purchased property in her own name at a sale by a receiver of the decedent's property for the benefit of his creditors, but under such circumstances that she did not purchase as trustee to protect the property, the purchase did not inure for the benefit of creditors, and the administratrix could not be compelled to account.

Profits of Land Occupied by Executor.—In *Baker v. Baker*, 87 Va. 180, it was held that the occupation by an executor of the real estate of the testator was not in his representative capacity, and that therefore what he received from the land was not assets of the estate for which he was chargeable as executor.

Property Obtained by Undue Influence exercised by an administrator over the decedent in his lifetime is held not to be chargeable in the administration account, because the administrator did not receive it in his representative capacity. *Berryhill's Estate*, 61 Iowa 345. But see *Matter of Adams*, 2 Redf. (N. Y.) 66.

Income of Personality Collected Without Authority.—Where the "use and occupation" of the estate, real and personal, was given to the widow of the testator for life, and no direction was given to the executors in reference to it, it was held that they were not clothed with any express trust to receive and apply the income; that if they collected the income, they became individually liable for it; and that the Surrogate's Court had no jurisdiction to entertain an accounting therefor. *In re Goetschius*, 2 Misc. Rep. (N. Y. Surrogate Ct.) 278.

2. Property Received Before Death of Decedent.—*Matter of Ward*, 2 Redf. (N. Y.) 251; *Osterhout's Estate*, 8 Lanc. L. Rev. (Pa.) 18.

As to money received by an executor as agent of the testator in his lifetime, see *Titlow's Estate*, 11 Pa. Co. Ct. Rep. 625.

Property Received under Former Appointment.—Where one is appointed administrator in chief, and receives assets of the estate in that capacity, and after having been removed and another administrator appointed, is, upon the resignation of the intermediate administrator, again appointed, he is liable on the final settlement of his administration last assumed to account for the assets received by him under his first appointment, and which he has never delivered over to the intervening administrator *de bonis non*. *Willis v. Willis*, 16 Ala. 652.

3. Property Received Before Grant of Letters.—*McLean's Estate*, 5 Kulp (Pa.) 207.

4. Moneys Received After Final Settlement.—*Davenport v. Richards*, 16 Conn. 316; *Oswald's Appeal*, 3 Grant's Cas. (Pa.) 300.

A Supplementary Account may be ordered to charge the executor or administrator with assets received since the date of his final account. *Shaffer's Appeal*, 46 Pa. St. 131.

5. Money Received After Removal from Office.—In *Sloan v. McKinney*, 19 Ala. 115, it was held that where an administrator places claims of the estate in the hands of an attorney for collection, and after his removal receives the money from the attorney, he is chargeable with the amount on final settlement.

As to Chattels Specifically Bequeathed, it has already been seen that they are assets for the payment of debts,¹ and that the executor ordinarily has the same power to sell and convert them into money as he has over other chattels of the estate.² Therefore it is held that, in case of a deficiency of assets for the payment of debts, the executor is chargeable in his account with chattels specifically bequeathed,³ though in other cases it seems that they need not appear in the account.⁴

Administrator Incapable of Exercising Office.—If the person appointed administrator is incapable of exercising the office, it is held that he is accountable only for such property as actually came into his hands.⁵

b. THE INVENTORY.—The executor or administrator is chargeable in the first place with the amount stated in the inventory, which is the basis of the account. But the inventory is generally only *prima facie* evidence that assets of the kind and value recited in it have come into his hands, and is subject to correction either for or against him, by showing that the property inventoried did not belong to the decedent, or that it was not of the value stated.⁶

1. See *supra*, this title, *Assets*.

2. See *supra*, this title, *Management and Care of Estate*—*Personal Property*—*Sale of Property Specifically Bequeathed*.

3. **Chattels Specifically Bequeathed in Case of Deficiency of Assets.**—*Matter of Pye*, 18 N. Y. App. Div. 306.

4. **When Chattels Specifically Bequeathed Are Not to Be Charged.**—If specific chattels are bequeathed for life and they are left in the possession of the legatee, the executor is not bound to account for them. *Golder v. Littlejohn*, 30 Wis. 344.

Where it does not appear on the final accounting of an executor what has been done with articles specifically bequeathed, it will be presumed that they have been disposed of in accordance with the will. *Matter of Pollock*, 3 Redf. (N. Y.) 100.

Bequest for Life or Years.—Where the use or income of money or property is given by the will to a person for life, or for a term of years, such money or property is not chargeable to the executor as assets until the termination of the particular estate. *Brooks v. Hope*, 139 Mass. 351; *James v. Beesly*, 4 Redf. (N. Y.) 236; *Golder v. Littlejohn*, 30 Wis. 344.

Goods Bequeathed for Use of Family.—Where a testator directed that the new goods in his house, and those he had ordered from Europe, should be disposed of for the use of the family, in the same manner as if he were living, no account should be taken of them in the settlement of his estate. *Cary v. Macon*, 4 Call (Va.) 605.

5. **In Louisiana** a woman is incompetent to act as administratrix in certain enumerated cases, and it is held that her appointment is void if not within the statute, and that she can be required to account only for the property that has come into her hands. *Cason v. Cabrara*, 4 La. Ann. 538.

6. **Amount of Inventory Prima Facie Chargeable**—*Alabama*.—*Glover v. Hill*, 85 Ala. 41.

California.—*Matter of Sanderson*, 74 Cal. 199.

New Hampshire.—*Griswold v. Chandler*, 5 N. H. 492.

New Jersey.—*Vanpelt v. Veghte*, 14 N. J. L. 207.

New York.—*Matter of Mullon*, 74 Hun (N. Y.) 358, 145 N. Y. 98.

Pennsylvania.—*Reese's Appeal*, 116 Pa. St. 272; *Frey's Estate*, 6 Pa. Co. Ct. Rep. 84.

Vermont.—*Briggs v. Probate Decree*, *Brayt. (Vt.)* 103.

West Virginia.—*Hooper v. Hooper*, 29 W. Va. 276.

Wisconsin.—*Williams v. Ely*, 13 Wis. 1.

The Purpose of an Appraisement Is to Fix Some Basis on which to charge the executor or administrator with the trust property which comes into his hands. *Moffit v. Hereford*, 132 Mo. 513.

"The Inventory is the basis of the accounting." *In re Jones*, 1 Redf. (N. Y.) 263. See also *supra*, this title, *Inventory and Appraisal*.

All Chattels Inventoried by an executor or administrator must be accounted for by him, and his liability for any such chattels is not affected by the fact that they were included in the account of the administrator *de bonis non*, if they had not been delivered to the administrator *de bonis non*. *Fay v. Muzzey*, 13 Gray (Mass.) 53, 74 Am. Dec. 619.

In Case a Part of the Inventoried Value Is Lost, the inventoried value may nevertheless be charged, but credit may be asked for the amount of the loss. *McCully v. Lum*, 49 N. J. Eq. 552.

The Items of the Inventory are chargeable to the executor or administrator unless he can show that the property inventoried did not belong to the decedent at the time of his death, or can account for it in some other manner. *Hooper v. Hooper*, 29 W. Va. 276.

But in order to relieve the executor or administrator of accountability therefore it must clearly appear that such property was not assets. A doubtful right will not avail. *Briggs v. Probate Decree*, *Brayt. (Vt.)* 103.

Goods Appropriated by Executor or Administrator.—If an executor or administrator retains the goods of the decedent he is liable for their actual value though they were inventoried at less. *Stewart's Appeal*, 110 Pa. St. 410; *Niceley's Estate*, 3 Kulp (Pa.) 47; *Frey's Estate*, 6 Pa. Co. Ct. Rep. 84.

Statements by Administrator as to Value of Assets.—An administrator is not concluded by statements made by him as to the value of the decedent's interest in a firm of which the decedent was a member, and therefore he is not chargeable with the amount recited in his

In some cases, however, the inventory does not furnish even *prima facie* evidence of value,¹ while in other cases it is conclusive for the purpose of fixing the amount with which the executor or administrator is chargeable.²

If Any Property Was Omitted from the inventory or was received after the inventory was made, it also is to be charged against the executor or administrator.³

c. CHOSSES IN ACTION. — The general rule as to debts due to the estate of a decedent and other choses in action is that they are not chargeable against the executor or administrator until he has realized the money on them, unless they have been lost through his fault or neglect;⁴ but if he omits to sue delin-

statement where it was made in reliance on the estimate of another member of the firm, which afterwards proved to be incorrect. *Sherley v. Sherley*, 97 Ky. 512.

Sale for Less than Inventory Value. — The general rule is that an executor or administrator is liable only for the actual value of property sold by him, though he sells it for less than the inventory value. *Dudley v. Sanborn*, 159 Mass. 185; *Wright v. Wright*, 2 McCord Eq. (S. Car.) 185. But in some jurisdictions he is made liable by statute for the inventory value if he sells without first obtaining leave of court to make the sale. *Williams v. Ely*, 13 Wis. 1; *Munteith v. Rahn*, 14 Wis. 210.

As to Charges on Account of Sales, see *infra*, this section and subsection, *Sales by Executors and Administrators*.

Sale for More than Inventory Value. — If an executor or administrator sells property of the estate at a price in excess of the value stated in the inventory, he must account for the excess. *Matter of Radovich*, 74 Cal. 536; *Williams v. Ely*, 13 Wis. 1.

Inventory Filed After Petition for Final Settlement. — An executor cannot relieve himself of accountability for debts due the estate merely by filing a statement after the petition for final settlement that they are uncollectible. He should offer some evidence to show why the debts were not collected. *Stone v. Morgan*, 65 Miss. 247.

1. Bonds, Stocks, Notes, and Accounts have a face value which is their *prima facie* value, and if they are given a different value by the appraisers appointed by the executor or administrator, under the *Missouri* statute, such valuation is not *prima facie* evidence as between the executor or administrator and the distributees. *Moffitt v. Hereford*, 132 Mo. 513.

Debts Inventoried as "Doubtful" are not even *prima facie* chargeable. *Gay v. Grant*, 101 N. Car. 206.

2. Failure to Sell Within Reasonable Time. — If an executor or administrator does not sell the personalty within a reasonable time he may be charged with its appraised value. *Griswold v. Chandler*, 5 N. H. 492.

An executor is chargeable with the appraised value of personalty of the estate if he improperly neglects to sell it and uses it meanwhile for his own purposes. *Benson v. Bruce*, 4 Desaus. (S. Car.) 463.

Sale Without Leave of Court. — And in some jurisdictions he is made liable by statute for the value stated in the inventory if he sells the property without leave of court. *Williams v. Ely*, 13 Wis. 1; *Munteith v. Rahn*, 14 Wis. 210.

3. Assets Not Inventoried. — *Boston v. Boylston*, 4 Mass. 318; *Hooker v. Bancroft*, 4 Pick. (Mass.) 50; *Schick v. Grote*, 42 N. J. Eq. 352; *Halsted v. Hymann*, 3 Bradf. (N. Y.) 426; *Hubley's Appeal*, 19 Pa. St. 138.

Property Received After the Inventory Was Made or after a former accounting must be accounted for by the executor or administrator. *Hooker v. Bancroft*, 4 Pick. (Mass.) 50; *Schick v. Grote*, 42 N. J. Eq. 352; *Matter of Mullon*, 74 Hun (N. Y.) 358, 145 N. Y. 98; *Hubley's Appeal*, 19 Pa. St. 138.

The Burden of Proof is on the objecting party to show that there are more assets than are acknowledged by the inventory. *Matter of Mullon*, 145 N. Y. 98; *Bainbridge v. McCullough*, 1 Hun (N. Y.) 488.

4. Choses in Action Not Generally Chargeable Until Collected — *Alabama*. — *Douthitt v. Douthitt*, 1 Ala. 594; *Wilkinson v. Hunter*, 37 Ala. 268.

Mississippi. — *Smith v. Hurd*, 8 Smed. & M. (Miss.) 682; *Banks v. Machen*, 40 Miss. 256.

New York. — *In re Richardson*, 2 Misc. Rep. (N. Y. Surrogate Ct.) 288.

North Carolina. — *Hobbs v. Craige*, 1 Ired. L. (23 N. Car.) 332; *Worthy v. Brower*, 93 N. Car. 344.

Pennsylvania. — *Barclay v. Morrison*, 16 S. & R. (Pa.) 129; *McMahon's Estate*, 44 Leg. Int. (Pa.) 228, 18 Phila. (Pa.) 188.

South Carolina. — *Pettus v. Clawson*, 4 Rich. Eq. (S. Car.) 92; *Tompkins v. Tompkins*, 18 S. Car. 1.

Virginia. — *Cavendish v. Fleming*, 3 Munf. (Va.) 198; *Burnley v. Duke*, 1 Rand. (Va.) 113; *Fauber v. Gentry*, 89 Va. 312.

West Virginia. — *Reitz v. Bennett*, 6 W. Va. 417; *Evans v. Shroyer*, 22 W. Va. 581; *Hooper v. Hooper*, 32 W. Va. 526.

Regard Must Be Had to the Character of Debts due to a testator as sperate or desperate in determining whether they are assets to be accounted for by the executor or administrator; if they were sperate, whether or not they have been collected; and if they have been lost, whether it was by the fault of the executor or administrator. *Cooke v. Cooke*, 29 Md. 538. Compare *Daingerfield v. May*, 31 Md. 340.

Invalid Claims. — In *Matter of Bolton*, 71 Hun (N. Y.) 32, 141 N. Y. 554, it was held that an executor could not be charged with the amount of a deficiency judgment recovered by his testatrix as assignee of a mortgage executed by her husband for the sole purpose of defrauding his creditors, there having been no consideration either for the mortgage or for the assignment.

quent debtors, the burden is on him to show that he had a fair reason for so doing,¹ though it has been held that evidence of collectibility is necessary to charge him,² especially if the debts were inventoried as "desperate," or were received from a preceding executor or administrator.³ It has been held, however, that where an executor or administrator has returned a debt as sperate, it will constitute a proper item of charge against him, in the absence of evidence that it has not been paid,⁴ and in some jurisdictions the burden of proving that debts were uncollectible is cast on the executor or administrator by statute.⁵

A Note Which the Executor Could Have Collected, but did not collect, is chargeable against him. *Davis v. Jackson*, (Tenn. 1897) 39 S. W. Rep. 1067.

Claim Against Joint Debtor for Contribution.—Where an administrator pays a note made jointly by the decedent and another, he is chargeable with the half of the debt for which such other maker was presumptively liable, unless he shows that he had made all reasonable efforts to enforce a contribution, or that the other maker was not in fact liable to the decedent's estate on account of the payment of the note by the administrator. *Myers v. Myers*, 98 Mo. 262.

Insurance Policies on the Lives of Debtors of the Decedent are not chargeable against the executor as cash in hand or its equivalent. *In re Richardson*, 2 Misc. Rep. (N. Y. Surrogate Ct.) 288.

Mortgage Debt — Purchase by Administrator at Foreclosure Sale.—If an administrator forecloses a second mortgage belonging to the estate and purchases the mortgaged premises at the foreclosure sale at a price too small to satisfy costs and both mortgages, he is chargeable only with the amount of his bid, less the sum paid by him for costs and to satisfy the senior mortgage, and not with the full amount of the debt. *Matter of Mimer*, 46 Cal. 564.

Insolvency of Debtor.—An executor or administrator is not chargeable with a note which was uncollectible at the time when it was received by him and at all times afterwards because of the maker's insolvency. *Miller v. Simpson*, (Ky. 1886) 2 S. W. Rep. 171.

In *Little v. Cook*, 10 Lea (Tenn.) 715, it was held that the administrator could show that certain notes appearing in the inventory were not collectible because they were given for the price of property which the administrator had no authority to sell.

Sale of Notes.—If an executor or administrator is authorized by an order of court to sell notes belonging to the estate for their face value and interest, but instead of proceeding according to the order he sells for less, he is chargeable with the full amount, where it appears that the makers were solvent and that the notes were subsequently paid in full. *In re Glover*, 127 Mo. 153.

Discounting Time Notes.—In *Duhe's Succession*, 41 La. Ann. 209, it was held that on a settlement by an administrator with the tuitrix of the minor heirs, the administrator had no right to discount a six years' note given for the price of property of the estate for the purpose of reducing it to cash, though it was secured by first mortgage on the property sold, but that the correct course was to compute in-

terest on the note from its date to the date of filing the account, add it to the principal, take it as cash at that time, and deal with it accordingly.

If a Claim Is Compromised or Compounded by the executor or administrator where the debtor is apparently insolvent, the amount rebated from the claim will not be charged in the account. *In re Ricker*, 14 Mont. 153.

As to liability for failure in whole or in part to realize on claims of the estate against third persons, see also *supra*, this title, *Powers, Duties, and Liabilities in General — Compromise, Composition, and Release of Claims*; and *Management and Care of Estate*, subdiv. 2. c. (2) *Collection of Debts*.

1. The Burden of Proving Uncollectibility is on the executor or administrator where he fails to sue the debtor, because the usual course is for men to pay their debts, and solvency is presumed until the contrary is shown. *Stiles v. Guy*, 16 Sim. 230; *O'Conner v. Gifford*, 117 N. Y. 275; *Matter of Hosford*, 27 N. Y. App. Div. 427. In the case last cited Putnam, J., said, at page 434: "To excuse the executors from failing to institute legal proceedings to collect this note, they were compelled to show on the accounting that the note could not have been collected had an action been commenced thereon. It was not enough for them to produce evidence from which we might guess that legal proceedings would have been useless. They should have produced testimony which left no reasonable doubt in that regard."

2. Evidence of Collectibility Necessary.—*Barclay v. Morrison*, 16 S. & R. (Pa.) 129; *Hooper v. Hooper*, 32 W. Va. 526.

The Account Rendered under Oath is *prima facie* evidence of its truth. *Cavendish v. Fleming*, 3 Munf (Va.) 198.

3. Debts Inventoried as Doubtful are not even *prima facie* chargeable in the account. *Gay v. Grant*, 101 N. Car. 206.

Choses in Action Received from Predecessor.—The burden of proving that choses in action received by an administrator from his predecessor were collectible is on the party seeking to charge the administrator therewith. *Wilkinson v. Hunter*, 37 Ala. 268.

4. Evidence of Nonpayment Necessary — Debt Inventoried as "Sperate."—*Daingerfield v. May*, 31 Md. 340.

5. In California the statute provides that no executor or administrator is accountable for any debts due the decedent "if it appears that they remain uncollected without his fault;" and it is held that if it does not so appear to the court, the executor or administrator must be charged with the amount of a debt due the decedent as appraised in the inventory. *Matter of Sanderson*, 74 Cal. 199.

Foreign Debts. — As a general rule, an executor or administrator has authority to receive voluntary payment from and give acquittance to a nonresident debtor of the decedent, and the money so received is assets in his hands and should be charged in his account,¹ but he is not chargeable with such debts if he has not collected them, even though he has tried to do so;² and it has been held that though a nonresident debtor voluntarily pays the debt at his domicile and it is there disbursed by the executor or administrator to creditors of the decedent, he cannot be credited with such payments and should not be charged with the collection,³ or with money received for the rents of land in another state.⁴

Debts of Executor or Administrator. — The modern doctrine as to the effect of appointing a debtor of the decedent executor of his will or administrator of his estate is that payment of the debt is presumed to have been made, and the executor or administrator is chargeable in his account with the amount of the debt as cash in hand. This seems to be the invariable rule if he was solvent at any time during his term of office, and in some jurisdictions it is the rule without regard to any question of his solvency or insolvency.⁵

1. Foreign Debts if Collected Are Chargeable in the Account. — *McPike v. McPike*, 111 Mo. 216.

See also *supra*, this title, *Assets*; and *Management and Care of Estate*, subdiv. 2. c. (2) *Collection of Debts*.

2. Foreign Debts Not Collected Are Not Chargeable. — *Governor v. Williams*, 3 Ired. L. (25 N. Car.) 152, 38 Am. Dec. 712; *Bowman v. Carr*, 5 Lea (Tenn.) 571.

3. Money Collected and Disbursed in Foreign Jurisdiction. — *Jones v. Jones*, 39 S. Car. 247.

4. Rents of Land in Another State. — *Morrill v. Morrill*, 1 Allen (Mass.) 132. See also *Smith v. Smith*, 13 Ala. 329.

5. Debts of Executor or Administrator Generally Chargeable as Cash — *Alabama*. — *Childress v. Childress*, 3 Ala. 752; *Hampton v. Shehan*, 7 Ala. 298; *Daffee v. Buchanan*, 8 Ala. 27; *Purdum v. Tipton*, 9 Ala. 914; *King v. Shackelford*, 13 Ala. 435; *Whitlock v. Whitlock*, 25 Ala. 543; *Breitling v. Clarke*, 49 Ala. 459; *Seawell v. Buckley*, 54 Ala. 592; *Miller v. Irby*, 63 Ala. 477; *Wright v. Lang*, 66 Ala. 389.

California. — *Matter of Miner*, 46 Cal. 564.

Connecticut. — *Davenport v. Richards*, 16 Conn. 310.

Indiana. — *Condit v. Winslow*, 106 Ind. 142.

Kentucky. — *Webster v. Webster*, 7 Ky. L. Rep. 302; *Swart v. Reveal*, 16 Ky. L. Rep. 503.

Louisiana. — *Bayly's Succession*, 30 La. Ann. 75.

Massachusetts. — *Winship v. Bass*, 12 Mass. 203; *Sigourney v. Wetherell*, 6 Met. (Mass.) 558; *Stevens v. Gaylord*, 11 Mass. 269; *Ipswich Mig. Co. v. Story*, 5 Met. (Mass.) 313; *Kinney v. Ensign*, 18 Pick. (Mass.) 236; *Benchley v. Chapin*, 10 Cush. (Mass.) 176; *Mattoon v. Cowing*, 13 Gray (Mass.) 387; *Leland v. Felton*, 1 Allen (Mass.) 535; *Chapin v. Waters*, 110 Mass. 195.

New Hampshire. — *Norris v. Towle*, 54 N. H. 290; *Jones v. Chase*, 55 N. H. 234.

New Jersey. — *Harker v. Irick*, 10 N. J. Eq. 269.

New York. — *Soverhill v. Suydam*, 59 N. Y. 149; *Adair v. Brimmer*, 74 N. Y. 539; *Baucus v. Stover*, 89 N. Y. 1; *Matter of Consalus*, 95 N. Y. 340; *Burkhalter v. Norton*, 3 Dem. (N. Y.) 610; *Baucus v. Barr*, 45 Hun (N. Y.) 582, 107 N. Y. 624.

Ohio. — *McGaughey v. Jacoby*, 54 Ohio St. 487; *Perkins v. Scott*, 9 Ohio Cir. Ct. Rep. 207, 6 Ohio Cir. Dec. 226.

Oregon. — *U. S. v. Eggleston*, 4 Sawy. (U. S.) 199.

Pennsylvania. — *Matter of Piper*, 15 Pa. St. 533; *Bull's Appeal*, 24 Pa. St. 286; *Neustadt's Estate*, 4 W. N. C. (Pa.) 16, 34 Leg. Int. (Pa.) 126, 12 Phila. (Pa.) 8; *Kingan's Estate*, 24 Pittsb. Leg. J. (Pa.) 41.

South Carolina. — *Schnell v. Schroder*, Bailey Eq. (S. Car.) 334; *Griffin v. Bonham*, 9 Rich. Eq. (S. Car.) 71; *Jacobs v. Woodside*, 6 S. Car. 490; *Charles v. Jacobs*, 9 S. Car. 295; *Teague v. Dendv*, 2 McCord Eq. (S. Car.) 210; *Hall v. Hall*, 2 McCord Eq. (S. Car.) 269; *Field v. Pelot*, McMull. Eq. (S. Car.) 369.

Tennessee. — *Rader v. Yeargin*, 85 Tenn. 486.

Wisconsin. — *Robinson v. Hedgkin*, 99 Wis. 327; *Finch v. Houghton*, 19 Wis. 149.

A Special Administrator must, under the California statute (Code Civ. Pro., §§ 1415, 1417), charge himself in his account with the amount of his individual indebtedness to the decedent. *Matter of Armstrong*, 69 Cal. 239.

It is an acknowledged principle of law that when the obligation to pay money is united with the right to receive payment in the same person, the payment is to be considered as made. *Jay v. Martin*, 49 Ala. 192. To similar effect are *Benchley v. Chapin*, 10 Cush. (Mass.) 175; *Com. v. Gould*, 118 Mass. 307; *Winship v. Bass*, 12 Mass. 198; *Hazleton v. Valentine*, 113 Mass. 480; *Stevens v. Gaylord*, 11 Mass. 269; *Norris v. Towle*, 54 N. H. 290; *Soverhill v. Suydam*, 2 Thomp. & C. (N. Y.) 464; *Warner v. Knower*, 3 Dem. (N. Y.) 208; *Hall v. Pratt*, 5 Ohio 72.

If One of Several Executors is indebted to the decedent, and they file a joint account, such debt is chargeable against them as assets in hand. *Adair v. Brimmer*, 74 N. Y. 539. But see *James's Estate*, 3 Pa. Dist. Rep. 373.

The Debts of a Firm of Which the Executor or Administrator Is a Member is the debt of the executor or administrator within the rule. *Matter of Consalus*, 95 N. Y. 340.

Mortgage Debt of Executor or Administrator. — The rule that when a debtor of a decedent is appointed executor or administrator the debt

d. SALES BY EXECUTORS AND ADMINISTRATORS. — At common law an executor or administrator is chargeable with the proceeds of property of the estate sold by him, as so much cash in hand, whether he sells for cash or on credit.¹ This rule has been greatly changed in the *United States* by statutes prescribing the manner and terms of the sale of a decedent's personality, and making the executor or administrator who disregards the statutes accountable for the actual value of property sold by him, if any loss results from the sale, though he acted in good faith and with the sole object of benefiting the estate. But if the sale is made in the manner and on the terms prescribed by the statutes, and the executor or administrator acts honestly and with reasonable care and prudence, he incurs no liability in case the property does not bring its full value, or he is unable afterwards to collect the price.²

will be presumed to have been paid and will be considered as so much cash in his hands does not operate so far as to extinguish the lien of a mortgage given by him to the decedent to secure the debt. *Soverhill v. Suydam*, 59 N. Y. 140. See also *Utterback v. Cooper*, 28 Gratt. (Va.) 233.

Lost Note. — An executor will be charged in his account with the amount of his own note to the testator, set down in the inventory, and alleged to have been lost by the testator in his lifetime, where the existence, amount, and loss of the note are satisfactorily proved and there is nothing to raise the presumption that it was intentionally destroyed by the testator. *Clark v. Hornbeck*, 17 N. J. Eq. 430.

Trespass Committed Before Appointment. — Where a sheriff became administrator *de bonis non* after he had sold the decedent's property under a void execution and paid over the proceeds to the execution creditor, he is chargeable on his final settlement, at the instance of creditors of the decedent, with the amount for which the goods sold; because the levy of the void execution and the sale under it constituted a trespass for which the sheriff became liable to the first administrator either in an action of trespass or for money had and received, and inasmuch as he had not been charged when he was appointed administrator *de bonis non* the liability still continued. *Whitlock v. Whitlock*, 25 Ala. 543.

Contingent Liability. — The principle that the appointment of a debtor as administrator converts the debt into assets in his hands to be accounted for does not apply to one who is only conditionally liable to the estate. Thus, the appointment as administrator *de bonis non*, with the will annexed, of one who was surety on the bond of the previous executor was held not to make a debt due the estate from such executor assets in the hands of such administrator by reason of his suretyship. *Shields v. Odell*, 27 Ohio St. 398.

Money Due on Executory Contract of Purchase. — In *Chenery v. Davis*, 16 Gray (Mass.) 89, the administrator, before the death of his intestate, had made a contract to purchase a parcel of land from him, and had taken a bond for a conveyance, which was recorded. He took possession under his contract and made payments on the price from time to time. When he was appointed administrator he inventoried the unpaid portion of the purchase money as assets of the estate, and the heirs executed and tendered to him a deed of the land. It was

held that he was chargeable in his account with the unpaid amount of the purchase money, because his title to the land had become complete and nothing remained in the estate of the decedent except the right to the unpaid purchase money.

The Statute of Limitations does not run against a debt due from an executor or administrator to the decedent during the time between his appointment and the settlement of his accounts. *Wilson v. Rose*, 3 Cranch (C. C.) 371.

The Executor or Administrator May Always Contest His Indebtedness, even though the debt has been inventoried, but the burden of proof is on him.

Alabama. — *Dickie v. Dickie*, 80 Ala. 57.

New Jersey. — *Wood v. Tallman*, 1 N. J. L. 177.

New York. — *Everts v. Everts*, 62 Barb. (N. Y.) 577.

South Carolina. — *Black v. White*, 13 S. Car. 37.

Wisconsin. — *Lynch v. Divan*, 66 Wis. 490.

1. Liability for Price of Goods Sold — Rule at Common Law. — *Johnston's Estate*, 9 W. & S. (Pa.) 107; *Clarke v. Wells*, 6 Gratt. (Va.) 475; *Southall v. Taylor*, 14 Gratt. (Va.) 269.

2. Sales Without Leave of Court. — If an executor sells property of the estate without a license from the ordinary, as required by statute, he is chargeable with the value of the property, without regard to the price actually obtained. *Dudley v. Sanborn*, 159 Mass. 185.

And in some states the statute fixes the appraised value of property so sold as the measure of his liability. *Williams v. Ely*, 13 Wis. 1; *Munteith v. Rahn*, 14 Wis. 210. See also *Harris's Succession*, 29 La. Ann. 743; *French v. Currier*, 47 N. H. 88; *Brackett v. Tillotson*, 4 N. H. 208.

But the measure of accountability in case of an unauthorized sale is the loss sustained at the time, and if the executor afterwards purchases for himself the property so sold and several years later sells it at a profit, he is not chargeable with such profit. *Hiller v. Ladd*, 85 Fed. Rep. 703.

A Temporary Administrator Who Sold Without Leave of Court property alleged to belong to the decedent's estate may show on his accounting, where it is sought to charge him with its value, that the property did not in fact belong to the decedent, but to a firm composed of the decedent and the administrator.

c. INCOME, PROFITS, AND INCREASE OF PERSONAL PROPERTY. — Besides the property left by the decedent and coming into the hands of the executor

Matter of Grant, 27 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 21.

Sale on Credit. — In the absence of any statute on the subject, an executor or administrator is chargeable with the value of property sold by him if he takes purchasers' notes for the price. *Macbeth v. Macbeth*, 26 U. C. Q. B. 549; *Stewart v. Stewart*, 31 Ala. 207.

If an executor or administrator fails to take security as required by statute, or negligently or fraudulently takes insufficient security, where the sale is on credit, he becomes personally liable for the price, and he will be charged therewith on his accounting if he is unable afterwards to collect it. See *supra*, this title, *Management and Care of Estate*, subdiv. 2. *d.* *Sale and Transfer of Personal Property*.

Private Sale. — If an executor or administrator sells property at private sale when he should have sold at public auction, he is chargeable with what would have been realized if the sale had been made at public auction. *Hudson v. Hudson*, 5 Munf. (Va.) 180.

In *Kaiser's Succession*, 48 La. Ann. 973, it was held that where a succession is composed entirely of stocks which have a fluctuating market value, and the executors sell at private sale in small lots, in order to avoid depreciation in the value of the stocks by putting on the market a large amount at one time, they will not be held responsible for the loss in value estimated at the highest market quotation when no demand was made on them by the particular legatee or the universal legatee, and for this purpose no demand was made for public sale by an order of court.

Time of Sale. — Where an executor or administrator acts in good faith, and with that degree of caution which prudent men exhibit in the conduct of their own affairs, he will be liberally dealt with, and will not be charged with loss resulting from his failure to make an immediate sale of the decedent's personalty. *Matter of Green*, 37 N. J. Eq. 254; *Weston v. Ward*, 4 Redf. (N. Y.) 415; *Matter of Bosio*, 2 Ashm. (Pa.) 437; *Stewart's Appeal*, 110 Pa. St. 410.

If he is given discretion as to the time of sale, and he acts in good faith, he is not chargeable with the loss resulting from selling at the time he did, whether his judgment that the sale could then be made without sacrifice was reasonable or not. *Staples v. Staples*, 24 Gratt. (Va.) 225.

But if he is guilty of unreasonable delay in selling he becomes liable to the value of the property at the time he should have sold it. *Pulliam v. Pulliam*, 10 Fed. Rep. 23.

Or if sales are required to be made within a certain time, and he neglects without sufficient cause to sell within such time, he will be charged with the loss resulting therefrom. *Goodbear v. Gary*, 1 La. Ann. 240.

Goods Shipped for Sale in Foreign Market. — In *Poullain v. Brown*, 82 Ga. 412, it was held that where an administrator shipped goods of the estate abroad in order to obtain a better price, instead of selling them in the domestic market as required by statute, and the goods were lost

in transit, he was accountable for their value because of his unauthorized act.

But in *Bryan v. Mulligan*, 2 Hill Eq. (S. Car.) 361, it was held that a loss incurred by sending goods to a foreign market, where they sold for less than they would have brought at the home market, was not chargeable to the executor, where he acted in good faith and in the exercise of reasonable expectation of realizing a better price in the foreign market.

Inadequate Price. — If property of a decedent is sold fairly at public auction, and it is shown that there was competition on the sale, the executor is not chargeable with even a heavy loss. *Matter of Bolton*, 71 Hun (N. Y.) 32, 141 N. Y. 554.

If, however, an executor or administrator, in consequence of his failure to use due diligence, does not obtain the best price which he could have obtained, he is accountable for the difference.

Georgia. — *Skrine v. Simmons*, 11 Ga. 401.

Mississippi. — *Pearson v. Moreland*, 7 Smed. & M. (Miss.) 609, 45 Am. Dec. 319.

New Jersey. — *Schweitzer v. Bonn*, 55 N. J. Eq. 107.

New York. — *Matter of Saltus*, 3 Abb. App. Dec. (N. Y.) 243, 3 Keyes (N. Y.) 500.

Vermont. — *Woods v. Creditors*, 4 Vt. 256.

And see *Rhame v. Lewis*, 13 Rich. Eq. (S. Car.) 269; *Hudson v. Hudson*, 5 Munf. (Va.) 180.

And he is chargeable as for a devastavit if he sells bonds belonging to the estate for less than their value, unless the interests of the estate manifestly require it. *Pinckard v. Woods*, 8 Gratt. (Va.) 140.

But if he sells uncurrent money at a discount he will not be held liable for more than he received, if he acted in good faith and with reasonable diligence. *Rice v. Hunt*, 7 Lea (Tenn.) 39.

Successful Defense in Action for Price—Unsoundness of Goods Sold. — If an action for the price of goods sold is successfully defended as to a part of the demand because of the unsoundness of the goods, and not because of any fault or laches of the executor or administrator, he is not chargeable with the amount so lost. *Stewart v. Stewart*, 31 Ala. 207.

Price Lost by Defalcation of Agent. — If the price of property sold is lost by the negligence or defalcation of an agent employed by the executor or administrator who makes the sale, he is not liable unless he fails to use proper care in selecting the agent. *Smith v. Smith*, 79 N. Car. 455. See also *supra*, this title, *Management and Care of Estate* — *Loss of Assets*.

Receiving Payment in Depreciated Currency. — See *supra*, this title, *Management and Care of Estate*, subdiv. 2. *c.* (2) *Collection of Debts*.

Refusal of Purchaser to Complete Purchase. — If an executor does not compel the purchaser to comply with his bid, the executor will be charged with the amount of the bid. *Beeman's Succession*, 47 La. Ann. 1355.

Purchase by Executor or Administrator at His Own Sale. — If, in violation of his duty, an executor or administrator purchases property of

or administrator, all the income, profits, and increase thereof accruing or made after the death of the decedent are chargeable against the executor or administrator in his account,¹ and should be stated separately from the principal.²

the estate at his own sale, the parties in interest may, at their option, have the sale set aside as against him and any one to whom he has transferred with notice of the facts, and may require him to account for any profits that may have been made. *Whatton v. Toone*, 5 Madd. 54; *In re Norrington*, 13 Ch. Div. 654, 28 W. R. 711; *Lovell v. Briggs*, 2 N. H. 221; *Churchill v. Akin*, 5 Dana (Ky.) 481. But if the sale is not set aside, he is chargeable with the value of the property also. *Stiles v. Burch*, 5 Paige (N. Y.) 132; *Whitley v. Alexander*, 73 N. Car. 444.

Where an administratrix sells securities of the estate to herself, at public auction, for a price which is fair, but below the appraised value, and the beneficiaries elect to hold her for the value of the securities, she is chargeable only with the amount of her bid, because a fair auction sale is better evidence of value than the appraisal. *Dudley v. Sanborn*, 159 Mass. 185.

Where an executor purchased the testator's land at a sheriff's sale, and in consequence of his default the land, was resold at a loss, he was held to be chargeable with the difference. *Guier v. Kelly*, 2 Binn. (Pa.) 294.

1. Income and Profits Are Chargeable in Account. — *Atwater v. Barnes*, 21 Conn. 237; *Sanderson v. Sanderson*, 20 Fla. 292; *Evans's Estate*, 11 Phila. (Pa.) 113, 33 Leg. Int. (Pa.) 45; *Ziegler's Estate*, 4 Montg. Co. Rep. (Pa.) 17; *Davidson's Account*, 23 Pittsb. Leg. J. (Pa.) 155. See also 1 Story's Eq. Jur., § 465.

Interest received by an executor or administrator on moneys due the estate, or which in the proper performance of his duty he should have received, is chargeable against him. See *infra*, this section and subsection, *Interest*.

The Burden of Proving the Profits Realized is on the person who seeks to charge the executor or administrator. *Munzor's Estate*, 4 Misc. Rep. (N. Y. Surrogate Ct.) 374.

What Constitutes Income. — Dividends declared after the death are income. *Matter of Kernochan*, 104 N. Y. 618; *Cassaday's Estate*, 13 Phila. (Pa.) 365, 37 Leg. Int. (Pa.) 246. But such as were declared before his death are principal. *Matter of Kernochan*, 104 N. Y. 618. So, too, an option given by a corporation to its stockholders, of whom the decedent was one, to take additional stock on certain terms, *Moss's Appeal*, 83 Pa. St. 264, 24 Am. Rep. 164; *Biddle's Appeal*, 99 Pa. St. 278; and the increase on the face value resulting from a change of securities, *Matter of Gerry*, 18 Abb. N. Cas. (N. Y. Ct. App.) 178.

As to the Distinction Between Income and Principal, in general, see the titles DIVIDENDS, vol. 9, p. 679; INVESTMENTS; TRUSTS AND TRUSTEES.

"The Increase to the inventory for any cause, whether direct or indirect, whether it be 'the increase' of the flock, 'the increase' from interest, 'the increase' from selling at a higher price than the appraised value in the inventory, 'the increase' from any property not embraced in the inventory," is chargeable

against the executor or administrator in his account. *In re Jones*, 1 Redf. (N. Y.) 263.

Wool Clipped from Decedent's Sheep. — The value of wool from sheep which belonged to the intestate, clipped and sold after his death, is a proper item of charge. *Matter of Merchant*, 39 N. J. Eq. 506, *affirmed* 41 N. J. Eq. 349.

Bonus Received on Loan of Trust Funds. — If a borrower of funds of the estate pays the executor a bonus for making the loan, it inures to the benefit of the estate and will be charged against the executor. *In re Richardson*, 2 Misc. Rep. (N. Y. Surrogate Ct.) 288; *Savage v. Gould*, 60 How. Pr. (N. Y. Supreme Ct.) 217.

Renewal of Lease by Executor. — In *Fow's Estate*, 3 Pa. Dist. Rep. 316, the decedent had leased market stalls from the city, which she sublet to others at a profit. Her executrix, after her death, took a new lease in her own name, and continued to sublet to the same tenants. It was held that the executrix must account to the estate for all the profits made by her from the lease.

Premium on Gold. — If an executor or administrator receives money in gold or takes notes payable in gold for property of the estate sold by him at a time when gold was at a premium, he cannot afterwards, when gold is at par, be required to account for the amount of the premium. *Matter of Shipman*, 82 Hun (N. Y.) 108; *Kellogg v. Sweeney*, 46 N. Y. 291, 7 Am. Rep. 333; *Cunningham v. Cauthen*, 44 S. Car. 95.

Exchange of Paper Money for Gold. — In *Matter of Sanderson*, 74 Cal. 199, it was held that where an executor exchanged paper money (greenbacks) belonging to the estate for its equivalent in gold, which was then at a premium, for the purpose of satisfying a gold debt of the estate, and at the time of his accounting greenbacks and gold were of equal value, he should be charged only for the amount of the gold purchased. "If the executor," said McKinstry, J., "had paid the gold debt with five hundred dollars in greenbacks, the transaction would not have been refused the approval of the Probate Court for that reason alone. If, indeed, he had gold at his disposal, he should have paid the debt in gold. But if he had not, any sale of property he might have made would have produced either 'currency' or a proportional less amount in gold."

But he is chargeable with such premium if it appears that he actually received it. *Cunningham v. Cauthen*, 37 S. Car. 123.

And it was held in *Ex p. Glenn*, 20 S. Car. 64, that where an administrator received for the estate a sum of money in gold, then worth forty per cent. premium, and disbursed a part at such premium, he was chargeable with such premium on the amount received where he failed to show that he retained the balance for the estate purposes until it depreciated.

2. Income Should Be Stated Separately in Account. — *Atwater v. Barnes*, 21 Conn. 237; *Evans's Estate*, 11 Phila. (Pa.) 113, 33 Leg. Int. (Pa.) 45.

If He Is Required by Law to Employ the Property of the Estate So that It Will Yield a Profit, but neglects to do so, he will be charged with such as he should have made.¹

If Without Authority He Continues the Decedent's Business or Engages in Business with the Funds of the Estate, or uses them in his own business, he must account to the beneficiaries of the estate for all the profits that are made, or for interest on the funds employed, if no profits are made, without credit for any loss that may result. If, however, he acts pursuant to a decree of court, or under a direction contained in the will of the decedent, or a provision of the partnership articles where the decedent was a member of a firm, he is chargeable only with the profits made, and is not liable for loss if he acted in good faith and with reasonable prudence and judgment. And in modern times his liability in this respect is further modified by statutes authorizing him to carry on the decedent's business for a limited time.² He cannot be charged, however, with the property acquired in such business, because the business is his own, though the profits belong to the estate. His accountability is limited to the profits.³

Use of Personalty by Executor or Administrator. — If an executor or administrator uses the property of the estate for his own benefit he is chargeable with the value of such use.⁴

f. REAL ESTATE — (1) *In General*. — Since an executor or administrator does not succeed by virtue of his office to the title to the real estate of the decedent, he cannot be required to account for it. But land purchased by him with the funds of the estate, or at a sale to enforce payment of a debt due from the owner to the decedent, is generally held to be personal assets for which the executor or administrator must account.⁵

1. Hire of Chattels. — Under a statute of Arkansas making it the duty of the administrator to hire out the slaves of the estate, it was held that if he failed to do so he was accountable for a reasonable value for their services. *Welch v. Cole*, 14 Ark. 400.

Under a similar statute in Alabama it has been held that an administrator was not chargeable with the hire of a slave whom he did not hire out on account of the ill health of the slave, where it appeared that the administrator acted under the advice of a physician; nor with the hire of other slaves for a small part of the year, where he made unsuccessful efforts to hire them out for that time, employing them during the time that they were not hired in necessary work on the plantation. *Henderson v. Renfro*, 31 Ala. 101. See also *supra*, this title, *Management and Care of Estate — In General — Investments and Loans*.

2. Profits Made in Trade with Trust Funds. — *Munzor's Estate*, 4 Misc. Rep. (N. Y. Surrogate Ct.) 374; *Kenyon v. Olney*, (Supreme Ct.) 39 N. Y. St. Rep. 839; *Willis v. Sharp*, 113 N. Y. 586.

If an Executor Speculates with the Funds of the Estate, he is chargeable with whatever profits he may have realized. *In re Richardson*, 2 Misc. Rep. (N. Y. Surrogate Ct.) 288; *Haberman's Appeal*, 101 Pa. St. 329.

If an Executor Uses Funds of the Estate in His Own Business, or in the business of a firm of which he is a member, the beneficiaries may at their option charge him either with legal interest or with the profits realized from such use. *Matter of Myers*, 131 N. Y. 409.

See also *supra*, this title, *Assets — Property Accruing After Death*; and *Management and Care of Estate — In General — Continuing Decedent's Business*.

3. Property Acquired in Business. — *Willis v. Sharp*, 113 N. Y. 586; *Munzor's Estate*, 4 Misc. Rep. (N. Y. Surrogate Ct.) 374; *Kenyon v. Olney*, (Supreme Ct.) 39 N. Y. St. Rep. 839. In the case last cited the court said: "It is well settled that debts contracted by an administrator in continuing the business of the intestate would not bind the estate. * * * Nor would the product belong to the estate. The title or possession would not be in the estate, but in the party who run the business."

4. Use of Property by Executor or Administrator. — *Morgan v. Nelson*, 43 Ala. 586; *Matter of Saunders*, 4 Misc. Rep. (N. Y. Surrogate Ct.) 28; *Rainsford v. Rainsford*, Rice Eq. (S. Car.) 343. See also *infra*, this section and subsection, *Interest*.

5. Real Estate, as Such, Is Not a Proper Item with which to charge executors in their accounts. If there is real estate which they ought to dispose of to pay debts, they may be compelled, by an appropriate proceeding, to dispose of it. If they unreasonably neglect or delay to sell, and the value of the estate is thereby lessened, they may be charged with the damage. But with this exception, they are chargeable only with the personal estate, and the rents and profits, and proceeds of sales, of real estate which came into their hands. *King v. Whiton*, 15 Wis. 684.

Buildings Erected by Decedent on His Wife's Land. — An administrator cannot be held to account for the value of buildings erected on land belonging to the wife of the intestate, because there could have been no contract between the intestate and his wife during her coverture which would entitle the administrator to enter on the land and take the building. *Washburn v. Sprout*, 16 Mass. 449.

As to Chattel Interests in Real Estate, see

(2) *Proceeds of Real Estate.* — The rule that an executor or administrator is not accountable for the land of his decedent applies also to the proceeds of it when it has been sold, if the sale has not operated as a conversion of the property from real estate into personalty, though the fund actually came into his hands.¹ But the proceeds of a sale made by the executor or administrator are assets with which he is chargeable, if he made the sale for the payment of the decedent's debts, pursuant to an order of court, as provided by law, or under a power in the will,² unless the fund came into his hands, not in his capacity as executor or administrator, but as trustee under the will.³

If the Sale Is Void, however, for any reason, the proceeds cannot be charged on the settlement of the accounts of the executor or administrator.⁴

(3) *Rents and Profits of Real Estate* — (a) *General Rule.* — It is generally held that, in the absence of any special authority conferred by statute or by will, the rents and profits of the real estate of a decedent accruing after his death, though actually collected by the executor or administrator, are not to be considered as having come into his hands in the capacity of the decedent's personal representative, and therefore are not to be included in the administration accounts,⁵ though he may be required to account to the heirs or devisees

supra, this title, *Assets — Estates for Life or Years*.

A Lease owned by a decedent is to be charged at the price it would have produced if it had been sold at his death, and not according to an estimated rent, valued on the principle of annuities. *Cary v. Macon*, 4 Call (Va.) 605.

Real Estate Purchased by Executor or Administrator. — See *supra*, this title, *Assets — Land Purchased by Executor or Administrator*; and also *supra*, this title, *Management and Care of Estate — Real Property — Purchase of Real Property by Executor or Administrator*.

1. An Administrator Who Receives a Fund Which Is in Law Deemed Real Property, belonging to his intestate, is not accountable therefor as administrator, though he had included it in his inventory. *Matter of Woodworth*, 5 Dem. (N. Y.) 156.

Contract of Sale Made by Decedent. — In *Loring v. Cunningham*, 9 Cush. (Mass.) 87, the decedent made a contract to sell real estate, giving a bond to convey and receiving from the purchaser an obligation to take the property and pay the purchase money at the time stipulated. He also executed and acknowledged a deed conveying the property to the purchaser, but died before the time for the payment of the purchase money. When the time arrived the purchaser paid the money to the executor, who delivered the deed to him. It was held that the executor was bound to account for the money so received, because he received it on a personal obligation belonging to the estate.

Proceeds of Sheriff's Sale of Real Estate. — If the surplus proceeds of a sheriff's sale of a decedent's land are paid to the executor or administrator, he is chargeable therewith in his accounts. *Guier v. Kelly*, 2 Binn. (Pa.) 294.

2. Proceeds of Sales. — *Speed v. Nelson*, 8 B. Mon. (Ky.) 503; *Matter of Collins*, 70 Hun (N. Y.) 273; *Stagg v. Jackson*, 2 Barb. Ch. (N. Y.) 86, 1 N. Y. 206; *Glacius v. Fogel*, 88 N. Y. 434. See also *supra*, this title, *Assets — Real Property Generally*.

The surrogate may compel executors to account for the proceeds of real property sold

under a power in the will only when the sale was directed or ordered by the will. *Bloodgood v. Bruen*, 2 Bradf. (N. Y.) 8.

Sale of Timber. — Where an executor, with power to sell land, cut and sold timber from the land, and afterwards sold the land itself in pursuance of the will, it was held that he was chargeable with the value of the timber as well as of the land. *Gordon v. West*, 8 N. H. 445.

Even if the Testator's Title Was Defective, the executor is chargeable with the proceeds of the land sold, unless he shows that he is under a legal obligation to refund. *Jennison v. Hapgood*, 10 Pick. (Mass.) 77.

3. Proceeds of Real Estate Received by Executor as Trustee. — In *Aston's Estate*, 5 Whart. (Pa.) 228, the testator devised certain real estate to his executors with directions to sell it and divide the proceeds among persons named in the will. The auditor to whom the accounts of the executors were referred was of the opinion that this property belonged to the administration account, on the ground that an executor who disposes of real estate does it in his capacity of executor and receives the proceeds in the same character, but as to this it was held that he was in error, and that it was immaterial that the *cestuis que trustent* were also the residuary legatees under the will. See also *Jacobs v. Bull*, 1 Watts (Pa.) 370, 26 Am. Dec. 72.

4. Proceeds of Void Sale. — *Ashurst v. Ashurst*, 13 Ala. 781; *Pettit v. Pettit*, 32 Ala. 288; *Key v. Jones*, 52 Ala. 238; *Matter of Hodgman*, 11 N. Y. App. Div. 344; *King v. Whiton*, 15 Wis. 684.

5. Rents and Profits Accruing After Death of Owner — Alabama. — *Smith v. Smith*, 13 Ala. 329.

Maine. — *Kimball v. Sumner*, 62 Me. 305; *Brown v. Fessenden*, 81 Me. 525.

Massachusetts. — *Towle v. Swasey*, 106 Mass. 100.

Mississippi. — *Trotter v. Trotter*, 40 Miss. 704.

New Hampshire. — *Lucy v. Lucy*, 55 N. H. 9; *Gregg v. Currier*, 36 N. H. 200.

Pennsylvania. — *Fross's Appeal*, 105 Pa. St.

as their agent or trustee.¹

But This Rule Is Not of Universal Application, it being held in some jurisdictions that if, as a matter of fact, an executor or administrator does collect the rents and profits, though he had no legal right to do so, he will nevertheless be charged with them on the settlement of his accounts.²

(b) **Rents Collected under Statutory Authority.** — In some jurisdictions the rents and profits of a decedent's real estate are made assets by statute and must therefore be accounted for the same as other assets.³

258; *Watt's Estate*, 168 Pa. St. 430, 36 W. N. C. (Pa.) 372; *McKee's Estate*, 30 Pittsb. Leg. J. (Pa.) 392; *Stoops's Estate*, 31 Pittsb. Leg. J. (Pa.) 34; *Walker's Appeal*, 116 Pa. St. 419; *Hillard's Estate*, 8 Luz. Leg. Reg. (Pa.) 137; *Hill's Appeal*, 31 Pittsb. Leg. J. (Pa.) 375; *Graham's Estate*, 6 Kulp (Pa.) 269; *M'Coy v. Scott*, 2 Rawle (Pa.) 222, 19 Am. Dec. 640; *Matter of Hoffman*, 185 Pa. St. 315; *Montier's Estate*, 7 Phila. (Pa.) 491; *Miller's Estate*, 4 Pa. Dist. Rep. 408.

Compare Chisholm v. Barnard, 10 Grant's Ch. (U. C.) 479.

The Principle here involved is that rents and profits issuing out of real estate after the death of the owner are a part of the realty, and therefore pass to the heir or devisee, and not to the personal representative of the deceased owner. See *supra*, this title, *Assets — Real Property Generally*.

Special Circumstances may make an exception to this rule. Thus it has been held that an administrator would be required to account for rents of real estate received by him under an agreement with the heirs that he should manage the realty as administrator, though there was no express agreement to account. *Matter of Hoffman*, 185 Pa. St. 315.

So, too, it has been held that if an administrator has received the rent of real estate, and accounted for it in his annual accounts to the Probate Court as assets, he is estopped to deny that he had authority to receive it, and he will be accountable therefor as for assets rightfully received. *Crowder v. Shackelford*, 35 Miss. 321, citing *Satterwhite v. Littlefield*, 13 Smed. & M. (Miss.) 302.

1. Liability to Account as Trustee — Indiana. — *Rodman v. Rodman*, 54 Ind. 444.

Kansas. — *Head v. Sutton*, 31 Kan. 616.

Kentucky. — *Wilson v. Unsell*, 12 Bush (Ky.) 215.

Maine. — *Kimball v. Sumner*, 62 Me. 305.

Massachusetts. — *Newcomb v. Stebbins*, 9 Metc. (Mass.) 540.

Michigan. — *Byrne v. Hume*, 73 Mich. 392.

New Hampshire. — *Lucy v. Lucy*, 55 N. H. 9; *Gregg v. Currier*, 36 N. H. 200.

New York. — *Dana v. Western*, 2 Edm. Sel. Cas. (N. Y.) 391; *Calyer v. Calyer*, 4 Redf. (N. Y.) 305.

North Carolina. — *Scroggs v. Stevenson*, 100 N. Car. 354.

Pennsylvania. — *Walker's Appeal*, 116 Pa. St. 419; *Landis v. Scott*, 32 Pa. St. 495; *Robb's Appeal*, 41 Pa. St. 45; *Burns v. Cox*, 30 Leg. Int. (Pa.) 76, to Phila. (Pa.) 8.

Land Charged with Payment of Debts. — The fact that land is devised subject to the testator's debts does not render the executor chargeable with the rents. *In re Quinn*, (Surrogate Ct.) 9 N. Y. Supp. 550.

2. Rule that Executor or Administrator Is Chargeable with Rents Actually Received. — *Gamble v. Gibson*, 59 Mo. 585, 66 Mo. 518; *Dix v. Morris*, 66 Mo. 514; *Lewis v. Carson*, 93 Mo. 587; *Jennings v. Copeland*, 90 N. Car. 572; *Jewell v. Jewell*, 11 Rich. Eq. (S. Car.) 296; *Allen v. Shanks*, 90 Tenn. 359. See also *Campbell v. McCormick*, 1 Ohio Cir. Dec. 281.

Land in Another State. — Though an executor or administrator may be chargeable with rents collected by him, he cannot be charged with rents collected from lands in another state unless it appears that he had authority under the laws of such other state to collect rents. *McPike v. McPike*, 111 Mo. 216. See also *Smith v. Wiley*, 22 Ala. 396, 58 Am. Dec. 262; *Smith v. Smith*, 13 Ala. 329.

3. Statutory Liability to Account for Rents and Profits — Alabama. — *Smith v. Smith*, 13 Ala. 329; *Anderson v. McGowan*, 42 Ala. 280.

Arkansas. — *Menifee v. Menifee*, 8 Ark. 9.

California. — *Washington v. Black*, 83 Cal. 290.

Connecticut. — *Storer v. Hinkly*, 1 Root (Conn.) 182.

Georgia. — *Parker v. Chestnutt*, 80 Ga. 12.

Iowa. — *Dexter v. Hayes*, 88 Iowa 493.

Michigan. — *Howard v. Patrick*, 38 Mich. 795.

Wisconsin. — *Crow v. Day*, 69 Wis. 637.

Occupation by Administrator. — If an administrator, instead of renting out the decedent's real estate as required by the statute, occupies it himself, he is chargeable with a reasonable rent. *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590.

Occupation by Purchaser under Void Sale. — Where an administrator made an illegal sale of real estate, and put the purchaser in possession, it was held that he was not chargeable with the rents for the time that the land was so occupied, because it is only through the exercise of the statutory power to sell or rent that the land of a decedent or its rents and profits are assets. *Anderson v. McGowan*, 42 Ala. 280.

Failure to Collect Rents — Insolvency of Sureties on Lease. — If the sureties taken as required by statute on a lease made by an administrator prove insolvent, and the administrator is consequently unable to collect the rents, he will be charged with the amount thereof, unless he can show that he was not negligent in failing to ascertain that the sureties were insolvent, or unless the persons seeking to charge him had represented to him that the sureties were responsible. *Clark v. Eubank*, 80 Ala. 584.

In Massachusetts an executor or administrator is made accountable by the statute of 1789, c. 11, to the devisees or heirs for the rents and profits of real estate occupied by him. *Stearns v. Stearns*, 1 Pick. (Mass.) 157; *Newcomb v.*

(c) **Rents and Profits Passing to Executor under Will.** — The rents and profits of real estate may, by the will of the deceased owner, be made assets with which the executor or administrator is chargeable, either by a devise to him, or by a power of sale which operates as an immediate conversion of real estate into personalty, or by any other testamentary provision which gives the executor or administrator as such the right to receive the rents and profits.¹

Stebbins, 9 Met. (Mass.) 544; *Gibson v. Farley*, 16 Mass. 280; *Choate v. Arrington*, 116 Mass. 552. But it is said that this statute was designed to facilitate the settlement between the executors and the devisees, or the administrators and the heirs, where they had received rents and profits, so as to prevent disputes among them; and also in cases where the personal estate proved insufficient to pay debts, and the heirs, being unwilling to have the real estate sold, might wish the executor or administrator to collect and apply the rents and profits for that purpose. *Newcomb v. Stebbins*, 9 Met. (Mass.) 544; *Gibson v. Farley*, 16 Mass. 280. And it does not make an executor or administrator liable for the use or occupation of real estate for which he would not be liable otherwise. *Almy v. Crapo*, 100 Mass. 218.

In **New Hampshire** personal representatives are authorized to collect the rents and profits of land if the estate is insolvent, and they are chargeable with collections made under such circumstances. *Gregg v. Currier*, 36 N. H. 200. See also *Sparhawk v. Allen*, 25 N. H. 266; *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316.

1. Rents and Profits Passing to Executor under Will — *Alabama*. — *Smith v. King*, 22 Ala. 558. *New Jersey*. — *Brokaw v. Brokaw*, 41 N. J. Eq. 304.

New York. — *Stagg v. Jackson*, 2 Barb. Ch. (N. Y.) 86, 1 N. Y. 206; *Shumway v. Harmon*, 6 Thomp. & C. (N. Y.) 626; *Ingram v. Mackey*, 5 Redf. (N. Y.) 357; *Langlois's Estate*, 26 Abb. N. Cas. (N. Y. Surrogate Ct.) 226; *Lent v. Howard*, 89 N. Y. 169.

North Carolina. — *Blount v. Johnston*, Conf. Rep. (1 N. Car.) 551, 1 Murph. (5 N. Car.) 36.

Pennsylvania. — *Smith's Estate*, 6 Kulp (Pa.) 76.

South Carolina. — *Brooks v. Brooks*, 12 S. Car. 422.

If a Power of Sale Operates as an Immediate Conversion of the land into personalty, the executor is entitled to the rents and profits accruing before a conversion is actually effected by a sale, and must account therefor. *Langlois's Estate*, 26 Abb. N. Cas. (N. Y. Surrogate Ct.) 226. See also *Lent v. Howard*, 89 N. Y. 169.

But a Naked Power of Sale does not have this effect, and where a will gives to the executors such a power neither the title nor the right to the possession passes to the executors, and they are not chargeable for the failure to rent the same until the sale can be made. *Spruance v. Darlington*, (Del. 1894) 30 Atl. Rep. 663; *Hillard's Estate*, 8 Luz. Leg. Reg. (Pa.) 737; *Fross's Appeal*, 105 Pa. St. 258; *McKee's Estate*, 30 Pittsb. Leg. J. (Pa.) 392; *Stoops's Estate*, 31 Pittsb. Leg. J. (Pa.) 34; *Walker's Appeal*, 116 Pa. St. 419; *Dunn v. Renick*, 33 W. Va. 476. See also the cases cited *supra*,

this title, *Management and Care of Estate — Real Property — Title and Right to Possession*.

Will Effecting Immediate Conversion. — In *Stagg v. Jackson*, 2 Barb. Ch. (N. Y.) 86, affirmed 1 N. Y. 206, the testator devised all his estate to his executor in trust to sell, and until such sale to receive the rents and profits, and it was held that he should account for the rents and profits so received by him as well as the proceeds of sales made under the will. See also *Wright v. Methodist Episcopal Church*, Hoffm. Ch. (N. Y.) 202.

In *Shumway v. Harmon*, 6 Thomp. & C. (N. Y.) 626, the testator directed that his son should work the testator's farm as he was then doing on shares for a certain term, and that at the expiration of such term the farm and personal property should be sold by the executors and the amount received on the sale divided among his children. The court said: "At the time the power of sale thus became operative the conversion took place in law, and took with it all the incidents of the said property — all rents and profits as part of the trust fund to be distributed." Citing *Moncrief v. Ross*, 50 N. Y. 431; *Stagg v. Jackson*, 2 Barb. Ch. (N. Y.) 86.

In *Ingram v. Mackey*, 5 Redf. (N. Y.) 357, the will directed the executors, as soon after the testator's decease as practicable, and within a year after his death, to sell all his real estate for the best prices they could obtain, and to dispose of the proceeds as provided in the will. The executors took charge of the real estate and collected the rents thereof, but did not sell it within the year as directed by the will. It was held that the will operated as an equitable conversion of the real estate into personalty, and that the rents received by the executors should be accounted for by them as other personalty.

Tenement Houses — Rent of Apartment Occupied by Janitor. — In *Matter of Meikle*, 2 Connolly (N. Y.) 97, the testator devised his real estate, consisting in part of a tenement house, to his executors, to apply the rent to certain purposes. The executors, of whom the widow was one, permitted her to occupy rent free the same apartments that she and the testator had occupied before his death, in consideration of her performing the duties of janitor. It appeared that it was customary to furnish the janitor of a tenement house with an apartment in addition to wages. It was held that the executors were not chargeable with the rent of the apartment occupied by the widow.

Void Will. — If the rents were received under a provision of a will which is afterwards adjudged void, the administrator is not liable to account therefor before the surrogate, because the fund belongs to the heirs, and the administrator is to be called to account for the rents in a court of record. *Levy's Estate*, Tuck. (N. Y.) 148.

(d) **Land Occupied by Executor or Administrator.** — Where an executor or administrator himself occupies the real estate of his decedent he is chargeable on the settlement of his accounts with the value of the use and occupation or with the profits realized therefrom, in any case where he could have been charged under other circumstances.¹

Possession by Administrator as Purchaser. — If an administrator takes possession of the real estate under a purchase wrongfully made by him at his own sale, he may be charged with the rents and profits in excess of taxes and other necessary charges.²

Possession by Executor or Administrator in Autre Droit. — An executor or administrator who is entitled to possession of the decedent's realty as heir, devisee, or otherwise is not chargeable with the rents and profits where he occupies it without any arrangement with the other parties in interest.³

(e) **Land Occupied by Widow Before Assignment of Dower.** — In some jurisdictions a widow who is the administratrix of her deceased husband's estate cannot be charged with the rents and profits of the real estate occupied by her until her dower has been assigned.⁴

g. **FOREIGN ASSETS.** — Though an executor or administrator has no coercive power to collect assets in a foreign jurisdiction, yet if they come into his possession voluntarily, by payment or otherwise, he is bound to account for them.⁵

h. **INTEREST** — (1) *When Interest Is Chargeable* — (a) **General Principles.** — Originally executors and administrators were not chargeable in any event with

1. **Land Occupied by Executor or Administrator** — *Alabama.* — Clark v. Eubank, 80 Ala. 584.

California. — Smiley v. Van Winkle, 6 Cal. 605; Walls v. Walker, 37 Cal. 424, 99 Am. Dec. 290; Matter of Misamore, 90 Cal. 169.

Florida. — Eppinger v. Canepa, 20 Fla. 262.

Iowa. — Matter of Holderbaum, 82 Iowa 69.

Louisiana. — Beeman's Succession, 47 La. Ann. 1355.

New York. — Howard v. Heinerschit, 16 Hun (N. Y.) 177.

North Carolina. — Schuffler v. Turner, 111 N. Car. 297.

In Walls v. Walker, 37 Cal. 424, 99 Am. Dec. 290, it was held that an administrator occupying the real estate of his intestate becomes the tenant of the estate, and must not only account for the rental value of the land, but also for any profit that he may make, though he must bear any loss that he may sustain; and he must at all events pay the rental value of the land.

Amount Chargeable. — In Harrison v. Harrison, 39 Ala. 489, it was held that where an administrator who was also one of the heirs publicly offered the land of the decedent for rent, but without obtaining leave of court as required by law, and became himself the lessee, he would not be charged with a higher rent than the bid at the public letting. See also Clark v. Eubank, 80 Ala. 584, in which case it was held that the highest value of the rents testified to would not be charged where the administrator, acting in good faith, kept the estate together during the civil war, though he did not obtain leave of court to do so. In this case the court took into consideration the difficulties arising from the disturbed condition of the country at the time, and held that under the circumstances a strict and exact accounting should not be required.

Use of Real Estate with Consent of Heirs. — An administrator who pastures his own stock on the land of the decedent cannot be charged therefor on the settlement of his accounts, if the heirs who were in possession consented to such use of the land. McPike v. McPike, 111 Mo. 216. See also Brigham v. Elwell, 145 Mass. 520.

2. **Possession by Administrator as Purchaser at His Own Sale.** — Kruse v. Steffens, 47 Ill. 112.

3. **Executor or Administrator in Possession as Heir or Devisee Not Accountable for Rents and Profits.** — Almy v. Crapo, 100 Mass. 218.

4. **Occupation by Widow Administratrix Before Assignment of Dower.** — This is the rule in *Arkansas*. The widow, until her dower is assigned, is entitled to the rents and profits of the real estate as the decedent's widow, and not as administratrix. Mock v. Pleasants, 34 Ark. 63.

5. **Foreign Assets.** — Wilkins v. Ellett, 108 U. S. 258; Wyman v. Halstead, 109 U. S. 656; Van Bokkelen v. Cook, 5 Sawy. (U. S.) 587; Fox v. Tay, 89 Cal. 339; Fletcher v. Sanders, 7 Dana (Ky.) 345, 32 Am. Dec. 96; Sherwood v. Wooster, 11 Paige (N. Y.) 441; Parsons v. Lyman, 20 N. Y. 103; Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389; English's Estate, 16 W. N. C. (Pa.) 511.

But they are not to be accounted for unless they were received. Sherman v. Page, 85 N. Y. 123.

Where land in another state has been sold for the payment of debts by an administrator appointed there, the surplus does not constitute assets with which the domiciliary administrator should be charged, if it has not been received by him or any agent of his. Young v. Kennedy, 95 N. Car. 205.

See also the title **FOREIGN EXECUTORS AND ADMINISTRATORS**; and *supra*, this section, subdiv. 6. c. *Choses in Action*.

interest on the funds of the estate in their hands.¹ This doctrine, however, has long since been abrogated, and it is now well settled that such charges may be made;² but in the absence of statutory regulations it is only when some special circumstances exist which render it just and proper, as where the personal representative has received interest, or where he has kept the money dead in his hands for an unreasonable length of time. This rule has been reiterated many times.³

1. Executors and Administrators Not Originally Chargeable with Interest. — *Adams v. Gale*, 2 Atk. 106; *Child v. Gibson*, 2 Atk. 603; *Ratcliffe v. Graves*, 1 Vern. 197; *Bromfield v. Wytherley*, Prec. Ch. 505; *Darrel v. Eden*, 3 Desaus. (S. Car.) 241, 4 Am. Dec. 613. In the case last cited Chancellor Desaussure said: "The old cases did not allow interest against executors where they had moneys of the estate in their hands. So settled was this principle, that in the case of *Ratcliffe v. Graves*, 1 Vern. 197, it was said there were at least forty decided cases against the allowance of interests against executors. The court, however, in that case broke through the old rule and allowed interest. But the decree was reversed on appeal to the House of Lords. This continued to be the rule, and even as late as in the time of Lord Hardwicke interest was refused. In the case of *Adams v. Gale*, 2 Atk. 106, Lord Hardwicke said: 'As an executor may make use of money which is perpetually coming in by assets of the testator, and turn it to his own advantage, and as it is not improper for an executor to take it on his own account, where he is a responsible man and ready to answer debts and legacies when called on, therefore I do not think it right to allow interest for the note.'"

2. Former Rule Abrogated. — *Newton v. Bennett*, 1 Bro. C. C. 359; *Lowson v. Copeland*, 2 Bro. C. C. 156; *Powell v. Evans*, 5 Ves. Jr. 839; *Hill v. Simpson*, 7 Ves. Jr. 152.

The former rule was characterized by Chancellor Kent, in *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 624, 7 Am. Dec. 507, as a "blemish in the English jurisprudence." And the vice chancellor of England, in *Tebbs v. Carpenter*, 1 Madd. 290, speaks of it as an "extraordinary doctrine" which "modern cases have entirely overturned."

3. Interest Not Chargeable Except under Special Circumstances — *England*. — *Rocke v. Hart*, 11 Ves. Jr. 58; *Ashburnham v. Thompson*, 13 Ves. Jr. 402.

United States. — *Pulliam v. Pulliam*, 10 Fed. Rep. 53; *Dexter v. Arnold*, 3 Mason (U. S.) 284.

Alabama. — *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93.

California. — *Wheeler v. Bolton*, 92 Cal. 159.

Kentucky. — *Briggs v. Walker*, (Ky. 1897) 43 S. W. Rep. 479.

Massachusetts. — *Stearns v. Brown*, 1 Pick. (Mass.) 530.

Missouri. — *Madden v. Madden*, 27 Mo. 544; *Matter of Davis*, 62 Mo. 450; *Wolfort v. Reilly*, 133 Mo. 463.

New Hampshire. — *Griswold v. Chandler*, 5 N. H. 492; *Wendell v. French*, 19 N. H. 213.

Tennessee. — *Cannon v. Apperson*, 14 Lea (Tenn.) 553.

Virginia. — *Wood v. Garnett*, 6 Leigh (Va.)

271; *Granberry v. Granberry*, 1 Wash. (Va.) 246, 1 Am. Dec. 455.

"The General Rule has been not to charge executors with interest when their accounts are settled in ordinary course; and the reason is that they are not at liberty to risk the money belonging to the estate which they represent, and are to be always ready to pay it over, according to the directions of the will or the decree of the Probate Court. They ought not to be presumed to have made a profitable use of it; because it would be contrary to their duty to use it at all. This rule admits of an exception, when it shall appear that the executors have actually made use of the money; and this fact may be proved by direct testimony, or may be inferred from a long delay in settling their accounts, or in paying over balances in their hands after they have been demanded, and perhaps from other circumstances." *Wyman v. Hubbard*, 13 Mass. 232.

This general rule is also laid down in *Rowan v. Kirkpatrick*, 14 Ill. 1; *Whitney v. Peddicord*, 63 Ill. 249; *Overstreet v. Potts*, 4 Dana (Ky.) 139; *Stearns v. Brown*, 1 Pick. (Mass.) 530; *Lund v. Lund*, 41 N. H. 355, and cases cited; *Johnson v. Eicke*, 12 N. J. L. 316; *Voorhees v. Stoothoff*, 11 N. J. L. 145; *Garniss v. Gardiner*, 1 Edw. Ch. (N. Y.) 128; *Fox v. Wilcox*, 1 Binn. (Pa.) 194, 2 Am. Dec. 433; *Matter of Dyott*, 2 W. & S. (Pa.) 565; *Darrel v. Eden*, 3 Desaus. (S. Car.) 242, 4 Am. Dec. 613; *Cannon v. Apperson*, 14 Lea (Tenn.) 553; *Turney v. Williams*, 7 Verg. (Tenn.) 173.

Interest Is Not Chargeable as a Matter of Course on a balance in an administrator's hands, but he may show cause against it. *Wither's Appeal*, 16 Pa. St. 151; *Steele's Appeal*, 16 Pittsb. Leg. J. (Pa.) 20.

Statutory Provisions. — In some jurisdictions it is provided by statute that the court shall, at each settlement, exercise an equitable control in making executors and administrators account for interest received by them on debts due the estate, and for interest accruing on money belonging to the estate, loaned or otherwise employed by them. *Matter of Davis*, 62 Mo. 450.

The *Alabama* statute renders an executor or administrator *prima facie* chargeable with interest, though with the utmost diligence he may proceed in the administration of the estate, unless he denies on oath that he has used the funds of the estate. If such oath is made and is not controverted, it is the mandate of the statute that he shall not be charged with interest. The court has no discretion, and all inquiry into his liability is foreclosed. *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93; *Ivey v. Coleman*, 42 Ala. 409; *King v. Cabiness*, 12 Ala. 598.

But even if the exculpatory oath is made and not controverted, the executor or admin-

Theory as to Liability for Interest. — The idea seems formerly to have been entertained that the court, in the exercise of a *quasi*-criminal jurisdiction, would compel executors and administrators to pay interest as a penalty for a direct breach of trust,¹ but this has been disavowed by the more recent decisions, the result of which is to leave the practice of charging interest on the ground that the executor or administrator either has made or must be taken to have made interest by his use of the trust moneys.²

istrator is chargeable with interest if the circumstances of the case show that he has been guilty of any unreasonable or unnecessary delay in settling or distributing the estate, *Mims v. Mims*, 39 Ala. 716; *May v. Green*, 75 Ala. 162; *Eubank v. Clark*, 78 Ala. 73; or if it is shown that he either appropriated the funds to his own private use, or to some other illegal purpose, or kept them in his hands unemployed while outstanding debts against the estate were drawing interest, *Pearson v. Dartington*, 32 Ala. 227.

The *Illinois* statute provides that "all moneys, bonds, notes, and credits which any administrator or executor may have in his possession or control, as property of assets of the estate, at a period of two years and six months from the date of his letters testamentary or of administration, shall bear interest, and the executor or administrator shall be charged interest thereon from said period at the rate of ten per cent., or after two years and six months from any subsequent time that he may have discovered and received the same, unless good cause is shown to the court why such should not be taxed." *Matter of Schofield*, 99 Ill. 513.

Under the probate laws of *Texas* an administrator is not chargeable with interest on the funds in his hands unless interest is actually received by him. *Stonebraker v. Friar*, 70 Tex. 202. See also the statutes in other jurisdictions.

Chattels Retained in Specie. — In *New York* executors and administrators are not required to sell personal property not perishable, unless required to do so by the terms of the will, or it becomes necessary to enable them to pay debts or legacies, and therefore they are not chargeable with interest on the value of such articles retained by them. *Greeno v. Greeno*, 23 Hun (N. Y.) 478.

An Administrator Pendente Lite, because of his limited powers, is not chargeable with interest on the funds in his hands unless he has used them. *Com. v. Mateer*, 16 S. & R. (Pa.) 416.

The Burden of Proof, for the purpose of charging an executor or administrator with interest, is on those who seek to charge him, to show that he kept the funds an unreasonable length of time, or used them in his private business, or derived profit therefrom. *Walls v. Walker*, 37 Cal. 424, 99 Am. Dec. 290.

Where There Is an Apparent Reason or Necessity for Retaining the Money, the executor or administrator is not liable for interest unless it can be shown that he has received interest or has made use of the money for his own profit or advantage. *Mickle v. Cross*, 10 Md. 352.

A Distinction Exists in this particular between an executor or administrator and other fiduciaries in that it is the duty of such other fidu-

ciaries to make interest, and they are therefore *prima facie* charged with it, while an executor or administrator is not charged with that duty, and has not, ordinarily, powers which will enable him to make interest. *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93.

"Courts are more reluctant to charge executors and administrators than to charge trustees for suffering funds committed to them to remain unproductive." *Matter of Mapes*, 5 Dem. (N. Y.) 446.

Jurisdiction of Probate Court. — The Probate Court in *Missouri* has the same powers that courts of equity possess in relation to the interest to be charged against executors and administrators in favor of the estate. *Cruce v. Cruce*, 81 Mo. 676.

1. Former Theory as to Interest — Penalty for Breach of Trust. — *Saltmarsh v. Barrett*, 29 Beav. 474; *Pearse v. Green*, 1 Jac. & W. 140.

In *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520, Chancellor Walworth said, at page 525: "The mixing of the trust moneys with the trustee's own funds, and using them himself, or lending them to his friends temporarily, and under the expectation that the money would be promptly replaced before it was wanted for the purposes of the trust, is one of the most common causes of the loss of trust funds in the hands of executors, receivers, and guardians, and other trustees. And the safety of those whose property is necessarily placed in the hands of trustees makes it the imperative duty of the court to restrain and discourage such breaches of trust, by charging those who thus deal with the funds intrusted to their care, with interest."

2. Present Theory as to Interest — Money Made by Use of Trust Funds. — *Atty.-Gen. v. Alford*, 4 De G. M. & G. 843, 1 Jur. N. S. 361; *Burdick v. Garrick*, L. R. 5 Ch. 233; *Vyse v. Foster*, L. R. 8 Ch. 309; *Inglis v. Beaty*, 2 Ont. App. 453; *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507; *Turney v. Williams*, 7 Yerg. (Tenn.) 214. In this last case Green, J., referring to the case of *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507, said: "Chancellor Kent reviews the English cases upon this subject and lays down the rule that an executor or other trustee is not allowed to make gain or profit from the use of the funds committed to him in trust; that if he negligently suffer the moneys to lie idle he is chargeable with simple interest, but if he convert them to his own use he is chargeable with compound interest. And this is the only possible way of reaching the profits which the executor or other trustee may have made. If the moneys are retained a length of time in his hands, when the exigencies of the trust did not require it, the inference is irresistible that the fund has been so retained that it might be employed for the private benefit of the trust-

Discretion of Court. — In cases where the executor or administrator has not actually received interest or used the funds of the estate for his own purposes, but has permitted them to lie idle when they might have been productively employed for the benefit of the estate, it is a matter of discretion with the court, on consideration of all the circumstances of the case, whether interest shall be charged.¹ And this discretion will be exercised in the favor of the executor or administrator where it appears that he was acting in good faith in the endeavor fairly to perform the duties of his office.²

(b) **Interest Received or Which Should Have Been Received.** — If an executor or administrator has received any interest on the funds of the estate, it is obvious that he should account therefor.³ And he is also chargeable with interest accruing to the estate which should have been, but was not, collected by him.⁴

tee; and if, upon that presumption, he could not be charged with interest, an executor could easily make an estate worth more to himself than to the legatees, especially if they were young when the estate might come into his hands. Such a consequence could not be tolerated by any principle of justice."

1. **Discretion of Court** — *England*. — Litton v. Litton, 1 P. Wms. 543; Morris v. Dillingham, 2 Ves. 170; Tew v. Winterton, 1 Ves. Jr. 452. *California*. — Wheeler v. Bolton, 92 Cal. 159; Matter of Clary, 112 Cal. 292.

Iowa. — Matter of Gloyd, 93 Iowa 303.

Missouri. — Matter of Danforth, 66 Mo. App. 586.

Tennessee. — Pulliam v. Pulliam, 10 Fed. Rep. 53; Jones v. Ward, 10 Yerg. (Tenn.) 161.

2. **Executor or Administrator Acting in Good Faith.** — In Gwynn v. Dorsey, 4 Gill & J. (Md.) 460, it was said that "whenever an administrator manifestly intends fairly to do his duty, the rule should be not to hold him liable upon slight grounds." This principle was adopted in Chase v. Lockerman, 11 Gill & J. (Md.) 207, 35 Am. Dec. 277, where the court was considering how far executors were responsible for interest on money in their hands. And in King v. Berry, 3 N. J. Eq. 261, the court said that where the exact line of duty was not clear, and the executor has acted in good faith, under the advice of experienced counsel, and has not attempted to make any profit to himself, interest ought not to be charged against him. See also Bruere v. Pemberton, 12 Ves. Jr. 386.

3. **Interest Received by Executor or Administrator** — *England*. — Newton v. Bennet, 1 Bro. C. C. 359; Foster v. Foster, 2 Bro. C. C. 616; Atty.-Gen. v. Alford, 4 De G. M. & G. 843, 1 Jur. N. S. 361; *In re Stevens*, (1897) 1 Ch. 422. *Florida*. — Sanderson v. Sanderson, 20 Fla. 292.

Kentucky. — Quinn v. Stockton, 2 Litt. (Ky.) 343; Carrol v. Connet, 2 J. J. Marsh. (Ky.) 203.

Maryland. — Dalrymple v. Gamble, 68 Md. 156; Bentley v. Shreve, 2 Md. Ch. 215.

Massachusetts. — Williams v. American Bank, 4 Met. (Mass.) 317.

Missouri. — Smiley v. Smiley, 80 Mo. 44.

New Hampshire. — Lund v. Lund, 41 N. H. 355 [citing Griswold v. Chandler, 5 N. H. 497; Wendell v. French, 19 N. H. 205; Mathes v. Bennett, 21 N. H. 199].

New Jersey. — State v. Mayhew, 9 N. J. L. 70; Voorhees v. Stoothoff, 11 N. J. L. 145.

Pennsylvania. — English v. Harvey, 2 Rawle (Pa.) 305; Oswald's Appeal, 3 Grant's Cas.

(Pa.) 300; Matter of Dyott, 2 W. & S. (Pa.) 565.

South Carolina. — McClendon v. Gomillon, Dudley L. (S. Car.) 48.

Virginia. — M'Call v. Peachy, 3 Munf. (Va.) 288.

Interest Received After Final Settlement. — Though the decree of the ordinary settling the accounts of an administrator did not charge him with interest, by reason of the unproductiveness of the funds in his hands, yet if he actually receives it afterwards he may be compelled to account. Large's Estate, 4 W. N. C. (Pa.) 182; Oswald's Appeal, 3 Grant's Cas. (Pa.) 300; McClendon v. Gomillon, Dudley L. (S. Car.) 48.

An Exception to the General Rule is where a balance has been generally due the administrator, on his account, larger than the balance in his hands as administrator. In such case interest received by the administrator should not be charged against him. Mathes v. Bennett, 21 N. H. 188.

Presumption as to Receipt of Interest — Sale of Securities. — Where overdue coupon bonds are sold by executors they are chargeable with the last instalment of interest, unless it is shown that they sold the bonds with the overdue coupons attached. Buerhaus v. De Saussure, 41 S. Car. 457.

Usury. — In Gordon v. West, 8 N. H. 444, it was held that if an executor or administrator exacts usurious interest from a debtor of the estate he is not chargeable with such amount, because the exaction of usurious interest subjects one to a penalty, and since the beneficiaries are not liable to the penalty they should not have the usurious interest.

4. **Interest Not Collected.** — *In re Stephens*, (Supreme Ct.) 2 N. Y. Supp. 36.

If an Administrator Fails to Collect interest accruing on a loan made by him, he is not chargeable with the amount thereof, unless it was or could have been collected by him. Matter of Moore, 72 Cal. 335; Mathis v. Mathis, 18 N. J. L. 59.

And Until the Interest Is Actually Collected he is not ordinarily chargeable with it. Cavendish v. Fleming, 3 Munf. (Va.) 198; Dillard v. Tomlinson, 1 Munf. (Va.) 183. See also Finch v. Ragland, 2 Dev. Eq. (17 N. Car.) 137; Evans v. Smith, 84 N. Car. 146.

If the Executor or Administrator Is Indebted to the Estate he is chargeable with interest on his indebtedness. Calvert v. Holland, 9 B. Men. (Ky.) 458; Com. v. Bracken, (Ky. 1895) 32 S. W. Rep. 609. And the interest runs until the

(c) **Use of Funds by Executor or Administrator.** — The authorities are uniform in holding that if an executor or administrator employs the funds of the estate in his own business or for his own purposes, he will be charged with interest thereon,¹ and in some jurisdictions it is so provided by

debt is satisfied, even during the first year of the administration. *Clark's Appeal*, 2 Watts (Pa.) 405.

The mere fact that an executor has paid claims against the testator's estate does not stop the running of interest on his indebtedness to the estate, unless he shows that he paid such claim with his own money to the amount of his indebtedness. *Matter of Ackerman*, 40 N. J. Eq. 533.

1. Use of Funds by Executor or Administrator — *England.* — *Newton v. Bennet*, 1 Bro. C. C. 359; *Lowson v. Copeland*, 2 Bro. C. C. 156; *Powell v. Evans*, 5 Ves. Jr. 839; *Hill v. Simpson*, 7 Ves. Jr. 152; *Heathcote v. Hulme*, 1 Jac. & W. 122; *Holgate v. Haworth*, 17 Beav. 259; *Forbes v. Ross*, 2 Cox 115.

Canada. — *McLennan v. Heward*, 9 Grant's Ch. (U. C.) 178.

United States. — *McKenzie v. Anderson*, 2 Woods (U. S.) 357.

Alabama. — *Powell v. Powell*, 10 Ala. 900; *Ivey v. Coleman*, 42 Ala. 409; *Billingslea v. Glenn*, 45 Ala. 540.

California. — *Walls v. Walker*, 37 Cal. 424, 99 Am. Dec. 290; *Matter of Holbert*, 39 Cal. 597; *Matter of Gasq*, 42 Cal. 288; *Clark's Estate*, 53 Cal. 355; *Matter of Herteman*, 73 Cal. 545; *Matter of Hilliard*, 83 Cal. 423; *Matter of Moore*, 95 Cal. 34; *Miller v. Lux*, 100 Cal. 609.

Connecticut. — *Rowland v. Isaacs*, 15 Conn. 115.

Illinois. — *Whitney v. Peddicord*, 63 Ill. 249.

Indiana. — *Johnson v. Hedrick*, 33 Ind. 129, 5 Am. Rep. 191.

Iowa. — *Matter of Young*, 97 Iowa 218.

Kentucky. — *Weir v. Weir*, 3 B. Mon. (Ky.) 646; *Grigsby v. Wilkinson*, 9 Bush (Ky.) 91.

Maine. — *Paine v. Paulk*, 39 Me. 15.

Maryland. — *Chase v. Lockerman*, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277.

Massachusetts. — *Stearns v. Brown*, 1 Pick. (Mass.) 530.

Minnesota. — *St. Paul Trust Co. v. Kittson*, 62 Minn. 408.

Mississippi. — *Powell v. Cooper*, 42 Miss. 221; *Anderson v. Gregg*, 44 Miss. 170; *Rogers v. Tullos*, 51 Miss. 685; *Troup v. Rice*, 55 Miss. 278.

Missouri. — *Matter of Davis*, 62 Mo. 450; *Wolfert v. Reilly*, 133 Mo. 463.

New Hampshire. — *Griswold v. Chandler*, 5 N. H. 492; *Wendell v. French*, 19 N. H. 205.

New Jersey. — *King v. Berry*, 3 N. J. Eq. 261; *Frey v. Demarest*, 17 N. J. Eq. 71; *Frost v. Denman*, 41 N. J. Eq. 47; *Mathis v. Mathis*, 18 N. J. L. 59; *Aldridge v. McClelland*, 36 N. J. Eq. 288; *Male v. Williams*, 48 N. J. Eq. 33; *Hetfield v. Debaud*, 54 N. J. Eq. 371; *Fluck v. Lake*, 54 N. J. Eq. 638.

New York. — *In re Essex*, (Surrogate Ct.) 20 N. Y. Supp. 62; *Matter of Myers*, 131 N. Y. 409; *Kellett v. Rathbun*, 4 Paige (N. Y.) 102; *Jacot v. Emmett*, 11 Paige (N. Y.) 112; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520; *Brown v. Rickets*, 4 Johns. Ch. (N. Y.) 303, 8

Am. Dec. 567; *Manning v. Manning*, 1 Johns. Ch. (N. Y.) 527.

North Carolina. — See *Coggins v. Flythe*, 113 N. Car. 102.

Pennsylvania. — *Clauser's Estate*, 84 Pa. St. 51; *McGeary's Appeal*, (Pa. 1886) 5 Cent. Rep. 852; *Gilbert's Appeal*, 78 Pa. St. 266; *Kline's Estate*, 8 Lanc. L. Rev. (Pa.) 356; *Matter of Dyott*, 2 W. & S. (Pa.) 557; *Verner's Estate*, 6 Watts (Pa.) 250; *Patterson v. Nichol*, 6 Watts (Pa.) 379, 31 Am. Dec. 473; *McGeary's Estate*, 33 Pittsb. Leg. J. (Pa.) 405.

South Carolina. — *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec. 648.

Tennessee. — *Jameson v. Shelby*, 2 Humph. (Tenn.) 198; *Cannon v. Apperson*, 14 Lea (Tenn.) 553.

Vermont. — *Davis v. Eastman*, 68 Vt. 225.

Distribution Postponed by Will. — In *Matter of Young*, 97 Iowa 218, it was held that where an administrator with the will annexed used money of the estate in his own business, he was not relieved from accountability for interest by the fact that the will provided that distribution should not be made until the legatees attained majority, but did not direct that the funds should be invested meanwhile.

Even if the Distributees Are Unknown the administrator is chargeable with interest if he has used the funds. *McLennan v. Heward*, 9 Grant's Ch. (U. C.) 178.

Interest on Interest Collected. — In *Male v. Williams*, 48 N. J. Eq. 33, it was held that where the executors of the will put out at interest one thousand dollars, according to the testator's direction, and one of them collected all the interest, and applied it to his own use, he would be charged interest upon each one thousand dollars of interest from the time of its reception, whether it were had from interest upon principal or from interest upon previously capitalized or accumulated interest. See also *Rapalje v. Hall*, 1 Sandf. Ch. (N. Y.) 399.

Retaining Commissions Before Judicial Allowance. — If an executor or administrator applies to his own use funds of the estate, in satisfaction of his claim for commissions, before judicial allowance thereof, he is chargeable with interest on the amount so appropriated, even though he acted in good faith and under the advice of counsel. *Lacey v. Davis*, 4 Redf. (N. Y.) 402; *Wheelwright v. Rhoades*, 28 Hun (N. Y.) 57, 11 Abb. N. Cas. (N. Y.) 382; *Matter of Peyser*, 5 Dem. (N. Y.) 244.

Use of Money by Executor's Firm. — If an executor permits a firm of which he is a member to use the funds of the estate he is chargeable with interest. *Matter of Mairs*, 4 Redf. (N. Y.) 160; *Matter of Myers*, 131 N. Y. 409; *Cannon v. Apperson*, 14 Lea (Tenn.) 553.

Deposit in Bank to Individual Credit. — If a trader, who is executor, deposits funds of the estate in his own name at his banker's, it is said that he should be considered as employing it in his trade, because he must generally keep a balance at his banker's to answer the

statute.¹ This rule applies though the executor or administrator was at all times able to pay over the money whenever it should be demanded.²

The Principle on which the rule is founded is that equity will not permit a person holding a position of trust to use the trust property for his own advantage.³

Option as to Interest or Profits. — If by the use of the funds the executor or administrator realizes a profit, the persons interested in the estate have the option of charging him either with interest or with the profit that he has

purposes of his credit. *Rocke v. Hart*, 11 Ves. Jr. 58. See also *Matter of Mairs*, 4 Redf. (N. Y.) 160.

Deposit with Counsel. — An executor or administrator who deposits the funds of the estate with his counsel, but derives no profit from them, is not chargeable with interest. *Pratt's Estate*, 3 Lanc. L. Rev. (Pa.) 203.

A Trust Company which, as executor of a will, deposits with itself funds of the estate, and issues to itself as such executor certificates of deposit, will be considered as having used the funds in its business, and will be charged with interest accordingly. *St. Paul Trust Co. v. Kittson*, 62 Minn. 408.

Effect of Litigation as to Right to Funds. — Interest on money employed by an executor for his own use during a protracted litigation was properly charged against him though he was not ordered to loan it out. *Grigsby v. Wilkinson*, 9 Bush (Ky.) 91.

Effect of Periodical Settlements. — Periodical settlements made by an administrator showing that he did not have the funds of the estate invested do not relieve him of liability to account for interest on money used by him, where the settlements do not also show that he was using the money. *Matter of Young*, 97 Iowa 218.

Proof of Use of Funds. — In *Grant v. Edwards*, 93 N. Car. 488, it was held that a mere suspicion that an administrator had used the funds of the estate was not sufficient to justify a charge of interest against him.

It is sufficient, however, if there is strong presumptive evidence of such use, *Caldwell v. Kinkead*, 1 B. Mon. (Ky.) 231; or if it is alleged that the money of the estate was so used and the allegation is not denied, *White v. Clarke*, 7 T. B. Mon. (Ky.) 642; or if it appears by the state of the case or can reasonably be inferred from the facts therein stated that the executor had used the money in trade or by loan, or had mingled it with or used it in common with his own, *Lake v. Park*, 19 N. J. L. 108.

Proof of Benefit Derived by the executor or administrator is not necessary to charge him with legal interest on money of the decedent used by him, or mingled in his own business, when the settlement of the estate is unjustifiably delayed for an unreasonable length of time. *Matter of Hilliard*, 83 Cal. 423.

A Presumption Arises that an administrator *pendente lite* used the funds where he purchased the decedent's land at a sheriff's sale and occupied it, giving a receipt for the purchase money. *Com. v. Mateer*, 16 S. & R. (Pa.) 416.

The Use of the Money by the executor or administrator will be presumed where he keeps it for a long time. *Ivey v. Coleman*, 42 Ala.

409; *Hasler v. Hasler*, 1 Bradf. (N. Y.) 248; *Armstrong v. Walker*, 150 Pa. St. 585.

If No Profit Is Derived from the use of the funds the executor or administrator is nevertheless chargeable with interest, because he becomes in effect a borrower. *St. Paul Trust Co. v. Kittson*, 62 Minn. 408; *Mumford v. Murray*, 6 Johns. Ch. (N. Y.) 1.

And an additional reason for the charge in such case is that it prevents abuses by taking away all temptation to executors and administrators to use the trust funds in their private business. *St. Paul Trust Co. v. Kittson*, 62 Minn. 408.

1. The Arkansas Statute provides: "All interest received by executors and administrators shall be assets in their hands; and if they lend the money of the deceased or use it for their private purposes, they shall be charged with interest thereon for the use of the estate." *Howard v. Manning*, (Ark. 1898) 44 S. W. Rep. 1126.

The Missouri Statute provides that if executors and administrators "lend the money of the deceased, or use it for their own private purposes, they shall pay interest thereon to the estate." *Reilly v. Reilly*, (Mo. 1896) 34 S. W. Rep. 847. See also *Myers v. Myers*, 98 Mo. 262.

The New Jersey Statute provides that "in any case where executors, administrators, guardians, or trustees use the money of minors or others which shall come to their hands, they shall be accountable not only for the principal, but for the interest thereon." Gen. Stat. N. J., 1896, vol. 2, p. 2382; *Hetfield v. Debaud*, 54 N. J. Eq. 371.

The Pennsylvania Statute provides that "no executor or administrator shall be liable to pay interest but for the surplage of the estate remaining in his hands or power when his accounts are or ought to be settled and adjusted in said register's office; provided nothing herein contained shall be construed to exempt an executor from liability to pay interest where he may have made use of the funds of the estate for his own purpose previous to the time when his accounts are or ought to be settled as aforesaid." *Johnston's Appeal*, (Pa. 1887) 11 Atl. Rep. 78.

2. Ability to Pay Over, whenever it should be demanded, money of the estate used by the executor for his individual purposes, does not affect his accountability for interest thereon. *Clark's Estate*, 53 Cal. 355.

3. Principle Involved — Trustee Not Permitted to Use Trust Property for Individual Gain. — *Lowson v. Copeland*, 2 Bro. C. C. 156; *Powell v. Evans*, 5 Ves. Jr. 839; *Hill v. Simpson*, 7 Ves. Jr. 152; *Heathcote v. Hulme*, 1 Jac. & W. 122; *Davis v. Wright*, 2 Hill L. (S. Car.) 560.

"It is a favorite doctrine of the courts that

made,¹ but they must elect either to take the interest for the whole period or the profits for the whole period.²

(d) **Mingling Funds of Estate with Individual Funds.** — Where the funds of an estate in the hands of the executor or administrator are mingled with his individual funds, by depositing them to his individual credit in bank or otherwise, it is generally held that he is chargeable with interest, because it will be considered under such circumstances that he has used the money;³ though in some jurisdictions this rule does not obtain.⁴

a trustee shall not be permitted to make profit out of the trust funds." *Anderson v. Gregg*, 44 Miss. 170.

1. **Option as to Interest or Profits** — *England*. — *Wedderburn v. Wedderburn*, 22 Beav. 100; *Flockton v. Bunning*, L. R. 8 Ch. 323, note; *Heathcote v. Hulme*, 1 Jac. & W. 122.

Alabama. — *Harrison v. Harrison*, 39 Ala. 489.

California. — *Matter of Holbert*, 39 Cal. 597. *New Jersey*. — *King v. Berry*, 3 N. J. Eq. 261.

Pennsylvania. — *McGeary's Appeal*, (Pa. 1886) 5 Cent. Rep. 852, *affirming* 33 Pittsb. Leg. J. (Pa.) 405.

See also *supra*, this title, *Management and Care of Estate — Dealing with Estate for Individual Benefit*; and *supra*, this section, *Income, Profits, and Increase of Personal Property*.

2. **Option Must Be Exercised for Whole Period.** — *Heathcote v. Hulme*, 1 Jac. & W. 122.

3. **Mingling Funds of Estate with Individual Funds** — *England*. — *Williams v. Powell*, 15 Beav. 461, 16 Jur. 393; *Perkins v. Baynton*, 1 Bro. C. C. 375; *Melland v. Gray*, 2 Coll. 295.

United States. — *Union Bank v. Smith*, 4 Cranch (C. C.) 509; *Mades v. Miller*, 2 App. Cas. (D. C.) 455; *Hook v. Payne*, 14 Wall. (U. S.) 252.

Alabama. — *Ditmar v. Bogle*, 53 Ala. 169.

California. — *Matter of Stott*, 52 Cal. 403; *Clark's Estate*, 53 Cal. 355; *Matter of Hertenman*, 73 Cal. 545.

Michigan. — *Perrin v. Lepper*, 72 Mich. 454.

Mississippi. — *Rogers v. Tullios*, 51 Miss. 685; *Troup v. Rice*, 55 Miss. 278.

Missouri. — *Matter of Davis*, 62 Mo. 450.

Nebraska. — *Westover v. Carman*, 49 Neb. 397.

New Hampshire. — *Griswold v. Chandler*, 5 N. H. 492.

New Jersey. — *Hetfield v. Debaud*, 54 N. J. Eq. 371.

New York. — *Duncomb v. Duncomb*, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504; *Manning v. Manning*, 1 Johns. Ch. (N. Y.) 527; *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507; *Jacot v. Emmett*, 11 Paige (N. Y.) 142; *Spear v. Tinkham*, 2 Barb. Ch. (N. Y.) 211; *Garniss v. Gardiner*, 1 Edw. Ch. (N. Y.) 128; *Shakespeare v. Markham*, 10 Hun (N. Y.) 311; *U. S. Trust Co. v. Bixby*, 2 Dem. (N. Y.) 404, *sub nom.* *Myer's Estate*, 67 How. Pr. (N. Y. Surrogate Ct.) 170; *Kellett v. Rathbun*, 4 Paige (N. Y.) 102; *Matter of Crosby*, (Surrogate Ct.) 46 N. Y. St. Rep. 442; *Orser's Estate*, 4 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 120; *Matter of Butler*, 1 Connolly (N. Y.) 58. But see *Rapalje v. Hall*, 1 Sandf. Ch. (N. Y.) 399.

Vermont. — *McCloskey v. Gleason*, 56 Vt. 264.

Mere Readiness to Pay Over the fund when called for will not exempt the executor or administrator from liability for interest when he has mingled it with his own money; and in such case no demand is necessary to make him liable for interest. *Kerr v. Laird*, 27 Miss. 544. But see, *contra*, *Matter of Schofield*, 99 Ill. 513.

Deposit with Executor's or Administrator's Firm.

— If an executor or administrator deposits the funds of the estate with a firm of which he is a member, or otherwise mingles them with the funds of such firm, the presumption is that the funds were used in the business of the firm, and he will be charged with legal interest, though there is no evidence of actual fraud. *Matter of Stott*, 52 Cal. 403; *Matter of Mairs*, 4 Redf. (N. Y.) 160; *Clock v. Chadeagne*, 10 Hun (N. Y.) 97; *Cannon v. Apperson*, 14 Lea (Tenn.) 553. But see *Johnson v. Holifield*, 82 Ala. 123.

Deposit in Bank of Which Executor or Administrator Is Officer or Owner. — If an executor or administrator deposits funds of the estate in a bank of which he is owner or officer, he is chargeable with interest. *Matter of Babcock*, 2 Connolly (N. Y.) 82; *Matter of McKay*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 123.

In *Walker v. Dow*, 6 Dem. (N. Y.) 265, this rule was not applied. The administrator, who was a private banker, paying no interest in deposits, kept in his own bank the funds of the estate, which was small and difficult to settle, and it was held that he should not be charged with interest, when he acted in good faith and his compensation was small compared with his services as administrator. See also *Hess's Estate*, 69 Pa. St. 272, holding that a trustee who is a member of a firm of bankers may make a deposit with the firm in his own name as trustee without rendering himself chargeable with interest, although the firm made a profit on the deposit.

4. **Rule in Illinois.** — See *Matter of Schofield*, 99 Ill. 513, in which Craig, C. J., said: "The mere fact that an administrator mingles the trust funds with his own by depositing the money belonging to the estate in his own name, as he does his individual money, cannot be held a sufficient ground to charge the administrator with interest. We are aware of no law which requires an administrator to keep the funds belonging to the estate separate and distinct from his own funds, and in the absence of a legal requirement no liability can be incurred. It might, perhaps, be a good practice for an administrator to keep the trust funds entirely separate from his own funds, and where he deposits in a bank, open the account in his name as administrator; but so long as the administrator has the money belonging to the estate at his command, ready to answer

(e) **Unemployed Funds** — *aa. FUNDS RETAINED PENDING SETTLEMENT.* — A definite time, varying in the different jurisdictions, is generally allowed for the settlement of estates, and within this time an executor or administrator is not generally chargeable with interest, unless he has actually made it, or has used the money for his own purposes.¹

Delay in Making Settlement. — But it is his duty to prosecute the settlement of the estate with all reasonable diligence, in default of which he will be charged with interest on the presumption that he has used the funds.²

the order of the court, this is all that the law requires."

1. **Time Allowed for Settlement.** — In some jurisdictions one year is allowed to an executor for getting in the assets, paying claims, and settling his accounts, and he cannot be charged with interest for that time unless he has received interest or has used the money. *Boynton v. Dyer*, 18 Pick. (Mass.) 1; *Anderson v. Gregg*, 44 Miss. 170; *Verner's Estate*, 6 Watts (Pa.) 250; *Fox v. Wilcocks*, 1 Binn. (Pa.) 194, 2 Am. Dec. 433; *Burwell v. Anderson*, 3 Leigh (Va.) 348.

In *South Carolina* it is held that where questions of doubt prevent an executor or administrator from lending or paying out the money of the estate, he should not be charged with interest until the end of the year of his qualification. *Brooks v. Brooks*, 12 S. Car. 464. See also *Davis v. Wright*, 2 Hill L. (S. Car.) 560.

In *Alabama* eighteen months are allowed. *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93.

In *Maryland* thirteen months are allowed. *Gwynn v. Dorsey*, 4 Gill & J. (Md.) 453; *Lyles v. Hatton*, 6 Gill & J. (Md.) 122; *Thomas v. Frederick County School*, 9 Gill & J. (Md.) 115; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277.

In *Kentucky* two years are allowed. *Clark v. Newman*, (Ky. 1886) 1 S. W. Rep. 880; *Thrasher v. Lewis*, 13 Ky. L. Rep. 926.

In *Illinois* and *Tennessee* two years and six months are allowed. *Clifford v. Davis*, 22 Ill. App. 316; *Morris v. Morris*, 9 Heisk. (Tenn.) 815.

If There Was No Necessity for retaining the fund during such period, interest should be charged; and the petition of the executor or administrator to the Probate Court, in which he alleges that all the debts are paid, and asks permission to make distribution of a certain amount in his hands, which is granted, is sufficient proof to charge him with interest on the sum so ordered to be distributed, in case he fail to make distribution as ordered. *Brandon v. Hoggatt*, 32 Miss. 335; *Banks v. Machen*, 40 Miss. 256.

After the Lapse of Such Period, however, he is *prima facie* liable for interest on all money coming into his hands. *Clark v. Newman*, (Ky. 1886) 1 S. W. Rep. 880, 8 Ky. L. Rep. 515; *Boynton v. Dyer*, 18 Pick. (Mass.) 1; *Clark v. Hughes*, 71 Ala. 163; *May v. Green*, 75 Ala. 162; *Eubank v. Clark*, 78 Ala. 73; *Pickens v. Miller*, 83 N. Car. 543. And he can only relieve himself by showing an application of the money to the exigencies of the estate. *Wilson v. Wilson*, 3 Gill & J. (Md.) 24; *Lamb v. Lamb*, 11 Pick. (Mass.) 371; *Satterwhite v. Littlefield*, 13 Smed. & M. (Miss.) 302; *Anderson v. Gregg*,

44 Miss. 171; *Pace v. Burton*, 1 McCord Eq. (S. Car.) 247.

2. **Unreasonable Delay in Making Settlement** — *California.* — *Matter of Sanderson*, 74 Cal. 199. *Iowa.* — *Lommen v. Tobiasson*, 52 Iowa 665. *Maryland.* — *Lyles v. Hatton*, 6 Gill & J. (Md.) 122; *Comegys v. State*, 10 Gill & J. (Md.) 176; *Smithers v. Hooper*, 23 Md. 273.

Pennsylvania. — *Walker's Appeal*, 116 Pa. St. 419.

Tennessee. — *Turney v. Williams*, 7 Yerg. (Tenn.) 172.

If an Executor Is Not Ready with His Accounts when they are called for, it is a ground for charging him with interest. *Pearse v. Green*, 1 Jac. & W. 135.

A Presumption that the executor or administrator used the funds of the estate arises where there has been a long delay in making a settlement. *Wyman v. Hubbard*, 13 Mass. 232.

What Constitutes Unreasonable Delay. — "What will constitute unreasonable [unreasonable] delay in making a settlement, rendering the executor or administrator liable for interest, must depend upon the particular facts and circumstances of each case. The inquiry is whether, in view of these facts and circumstances, a prudent man, dealing with his own funds, for his own interest, would have retained the money unproductive, or would have appropriated it as it was *prima facie* to be appropriated. The pendency or the just anticipation of suits which, if the event of them was unfavorable, would seriously diminish the assets, complicating the accounts if there was a distribution, may be a good reason for delaying the settlement, and, during the period of reasonable delay, may justify keeping the moneys without a liability for interest; or, if the amounts involved in such suits are not large, compared with the assets, the keeping without a charge for interest of a sum sufficient to answer the judgments which may be rendered in them. Or, it may be that a part only of the assets has been reduced to money, leaving, without fault of the personal representative, a part uncollected, and it would not be prudent to subject the estate to the costs of a partial settlement and distribution. These and other causes developed by the particular facts of the case may excuse a delay in making settlement and relieve from liability for interest. But when no circumstances exist justifying the retention of the money unproductive, the personal representative must answer for interest. Diligence in making settlements and accounting to those entitled to receive it for the money received is as high a duty, as imperatively demanded by law, as diligence in the collection, or in reducing to money by appropriate proceedings, when a

bb. FUNDS RETAINED FOR PURPOSES OF ADMINISTRATION OR TO MEET CONTINGENCIES. — If it is necessary for an executor or administrator to keep money unproductive in his hands in order to meet the current expenses of administration, or to make payments which may be demanded at any time, or for other contingencies, he is not chargeable with interest on the amount so retained, even after the lapse of the time allowed for the settlement and distribution of the estate, unless he received interest or used the money himself.¹ Whether the

legal necessity exists for the reduction of the property, real or personal, subject to administration." *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93.

The Mere Fact of Delay in closing up an estate, though accompanied by demands of the executor for credits which the court properly disallowed, will not justify the court in charging interest. The principle deducible from the cases is that an executor or administrator is liable for interest when he has kept the beneficiaries out of the use of their money. Of this, delay is sometimes *prima facie* evidence, but it is not always so. *Dufour v. Dufour*, 28 Ind. 421.

If It Would Be Inequitable to Charge Interest under the circumstances such charge will not be made. Thus, where an administratrix who was the decedent's widow waived the allowance to which she was entitled out of the estate, and partly supported her son, who was two months old when his father died, until the son became of age, his share of the estate being insufficient for his support, and thereby expended more than any amount of interest that could be charged against her, it was held that as between herself and him she should not be charged with interest, though she filed no account until cited nearly twenty-nine years after her appointment. *Birkholm v. Wardell*, 42 N. J. Eq. 337.

The Conditions Existing During the Time Allowed for Settling the Estate are to be considered in determining whether the executor or administrator has been guilty of unreasonable delay in settling the estate. Thus the state of the country during the civil war, when business was almost entirely suspended, was held to relieve an administrator from the application of the ordinary rule. *Morris v. Morris*, 9 Heisk. (Tenn.) 814; *Brent v. Clevinger*, 78 Va. 12.

1. Funds Retained to Meet Exigencies of Administration — *United States*. — *Wade v. Wade*, 1 Wash. (U. S.) 477.

Maryland. — *Wilson v. Wilson*, 3 Gill & J. (Md.) 20.

Missouri. — *Booker v. Armstrong*, 93 Mo. 49.

New Jersey. — *Matter of Doremus*, 33 N. J. Eq. 234.

New York. — *Jacot v. Emmett*, 11 Paige (N. Y.) 142; *Burtis v. Dodge*, 1 Barb. Ch. (N. Y.) 77; *Matter of Black*, 6 Dem. (N. Y.) 331; *Minure v. Cox*, 5 Johns. Ch. (N. Y.) 441.

Pennsylvania. — *Davis's Appeal*, 23 Pa. St. 206; *Dietrich's Appeal*, 2 Watts (Pa.) 332; *Johnston's Appeal*, (Pa. 1887) 11 Atl. Rep. 78.

South Carolina. — *Pace v. Burton*, 1 McCord Eq. (S. Car.) 247; *Taveau v. Ball*, 1 McCord Eq. (S. Car.) 456; *McCaw v. Blewitt*, Bailey Eq. (S. Car.) 98; *Lafout v. Ricard*, Bailey Eq. (S. Car.) 487; *Darrell v. Eden*, 3 Desaus. (S.

Car.) 241, 4 Am. Dec. 613; *In re Glenn*, 20 S. Car. 64; *Burnside v. Robertson*, 28 S. Car. 583. *Tennessee*. — *Cannon v. Apperson*, 14 Lea (Tenn.) 553.

Virginia. — *Miller v. Beverheys*, 4 Hen. & M. (Va.) 415.

If the Funds Are Retained for Any Proper Purpose, the executor or administrator is not chargeable with interest for the time that they were so retained. *Lund v. Lund*, 41 N. H. 359.

In *Matter of Doremus*, 33 N. J. Eq. 234, an order of distribution was made in December, 1867. One of the distributees was absent, and his next of kin applied to the administrator for his share on the ground that he was presumed to be dead. The administrator refused to pay it over, and kept it on hand ready for payment until April, 1877, when he deposited it in a savings bank, where it drew interest at the rate of six per cent. About a year afterwards he drew it out of the bank and applied it to his own use. The distributee appeared in 1878. The administrator was charged with interest during the time that he had the money on deposit at interest and while he was using it, but not during the time that he held it ready for payment.

Current Receipts Exceeding Necessary Expenses. — But where the current receipts exceed the necessary expenses, and there appears to be no necessity for keeping a large balance on hand, the executor must invest the excess, otherwise he will be chargeable with the interest it might have earned. *Tebbs v. Carpenter*, 1 Madd. 290.

Retaining Unnecessary Amount. — If he keeps on hand more than is reasonably sufficient for current purposes he is chargeable with interest on the excess. *Frost v. Denman*, 41 N. J. Eq. 47.

Funds Held Pending Litigation. — Interest is not generally chargeable on funds held by an executor or administrator pending litigation concerning it, if he made no use of it himself. *Wade v. Wade*, 1 Wash. (U. S.) 477; *Taylor v. Minor*, 90 Ky. 544; *Matter of Selleck*, 111 N. Y. 284; *Matter of Black*, 6 Dem. (N. Y.) 331; *Clock v. Chadeagne*, 10 Hun (N. Y.) 97; *Matter of Howard*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 170; *Darrel v. Eden*, 3 Desaus. (S. Car.) 241, 4 Am. Dec. 613; *Pace v. Burton*, 1 McCord Eq. (S. Car.) 247. But see *Duncan v. Dent*, 5 Rich. Eq. (S. Car.) 7; *Oswald v. Givens*, Rich. Eq. Cas. (S. Car.) 320.

And in *Howard v. Schmidt*, Rich. Eq. Cas. (S. Car.) 452, Chancellor Johnston said that he considered "every trustee liable to interest pending the suit who does not pay into court or tender payment to the person who eventually shows that he rightfully demanded it."

Even if the executor or administrator was

necessity exists in any case must be determined on consideration of the particular facts involved,¹ but it must appear that the funds were actually kept in hand for the purposes in question,² and the burden of proving the necessity of so retaining them is on the accountant.³ But in case he finds himself with funds not needed for the purposes mentioned, it is his duty to report that fact to the court and to apply to the court for an order of distribution or for leave to pay the money into court, or for instructions in the premises.⁴

cc. AGREEMENT OF BENEFICIARIES. — The beneficiaries of an estate may agree that the executor or administrator shall not be charged with interest on the balance in his hands, and such agreement relieves him of liability for interest if he has always been willing and ready to pay the money over.⁵

dd. FAILURE TO DISTRIBUTE OR DISBURSE. — If, however, the time has arrived when the funds may properly be applied to the satisfaction of the claims of creditors, legatees, and distributees, and the executor or administrator neglects to make such application, he is chargeable with interest on the funds in his hands for the period that such condition of affairs existed, unless he has been prevented from so doing by circumstances for which he is not responsible.⁶

threatened with, expecting, or engaged in litigation, and was advised by counsel to retain the money on hand, he may be chargeable under special circumstances. *Doster v. Arnold*, 60 Ga. 316.

Where an Executor Is Liable to Be Called On at Any Time for the payment of a legacy, and there are no directions in the will to put it out at interest, he is not chargeable with interest thereon, unless it is made to appear that he has used the money in trade, or by loan, or has mingled it with his own or used it in common therewith. *Lake v. Park*, 19 N. J. L. 108.

Fund Held Pending Appointment of Trustee. — An executor is not chargeable with interest on a fund in his hands held by him until a suitable person is appointed as trustee to take charge of it. *Bishop's Estate*, 1 Lanc. L. Rev. (Pa.) 115.

Contest of Account. — In *Evans's Estate*, 11 Phila. (Pa.) 113, 33 Leg. Int. (Pa.) 45, it was held that where an executor or administrator ascertains from a contest of his account that the settlement will be long delayed, and does not distribute any portion of the estate, with the exception of a single legacy, it is his duty to invest the money in his custody, with the sanction of the court, so that it may be productive. Failing to do so, he is chargeable with interest.

1. Necessity of Retention Determined on Facts of Each Case — *Iowa*. — *Matter of Gloyd*, 93 Iowa 303.

New Jersey. — *Buckingham v. Ludlum*, 29 N. J. Eq. 350.

New York. — *Beacham v. Eckford*, 2 Sandf. Ch. (N. Y.) 116; *Johnson v. Hartshorne*, 52 N. Y. 173.

Pennsylvania. — *Gyger's Appeal*, 62 Pa. St. 73, 1 Am. Rep. 382.

South Carolina. — *Gee v. Humphries*, 49 S. Car. 253.

Vermont. — *Phelps v. Slade*, 10 Vt. 192.

If the claim was a doubtful one, and the executor might have had leave of court to invest the money till the decision of the claim, which was likely to be long pending, he is chargeable with the interest on the money actually in his

hands and unemployed. *Oswald v. Givens*, Rich. Eq. Cas. (S. Car.) 337.

Allowing money to remain unproductive for five years, the only reason for such action being the contingency of a recovery in a suit against the estate, the amount of which was, however, small as compared with the size of the estate, was held to be such negligence as would render the executor chargeable with interest. *Lloyd's Estate*, 82 Pa. St. 143.

2. Proof that Funds Were Actually Kept in Hand. — *Lafont v. Ricard*, Bailey Eq. (S. Car.) 487; *Brown v. Vinyard*, Bailey Eq. (S. Car.) 460; *McCaw v. Blewitt*, Bailey Eq. (S. Car.) 98.

3. Burden of Proof. — *Burnside v. Robertson*, 28 S. Car. 583; *McCaw v. Blewitt*, Bailey Eq. (S. Car.) 98; *Darrel v. Eden*, 3 Desaus. (S. Car.) 241, 4 Am. Dec. 613; *Morris v. Morris*, 9 Heisk. (Tenn.) 815; *Jones v. Ward*, 10 Verg. (Tenn.) 163.

4. Application for Order of Distribution. — *Walls v. Walker*, 37 Cal. 424, 99 Am. Dec. 290.

Application for Leave to Pay Money into Court. — *Hosack v. Rogers*, 9 Paige (N. Y.) 461.

An executor who keeps money in his hands instead of paying it into court when it is his duty to do so may be charged with interest. *McMillan v. McMillan*, 21 Grant's Ch. (U. C.) 369. But see *Dufour v. Dufour*, 28 Ind. 421.

In *Arkansas* it is the duty of an administrator to make a prompt report of his collections so that the court may direct what disposition shall be made of the money; and where he holds money collected for a considerable time before reporting it, he should be charged with interest on it from the date of its collection. *Jacoway v. Dyer*, 50 Ark. 217; *Howard v. Manning*, (Ark. 1898) 44 S. W. Rep. 1126.

But he incurs no liability by failure to make such reports if they are not required by any rule or order of court. *Dufour v. Dufour*, 28 Ind. 421.

5. Agreement by Beneficiaries that Interest Shall Not Be Charged. — *Barclay v. Cooper*, 42 N. J. Eq. 516.

6. Failure to Distribute or Disburse Funds — *England*. — *Atty.-Gen. v. Alford*, 4 De G. M. & G. 843; *Stackpoole v. Stackpoole*, 4 Dow. 209; *Blogg v. Johnson*, L. R. 2 Ch. 225; *Re*

ee. FAILURE TO INVEST OR RETAIN INVESTMENTS. — So, too, if he fails to invest money in his hands when it is his duty to do so, or to deposit it where it will

Jones, 49 L. T. N. S. 91; Gilroy *v.* Stevens, 51 L. J. Ch. 834, 46 L. T. N. S. 761, 30 W. R. 745; Williams *v.* Powell, 15 Beav. 461, 16 Jur. 393; Longmore *v.* Broom, 7 Ves. Jr. 124.

Alabama. — May *v.* Green, 75 Ala. 162; Eubank *v.* Clark, 78 Ala. 73.

Arkansas. — Jacoway *v.* Dyer, 50 Ark. 217.

Kentucky. — Grigsby *v.* Wilkinson, 9 Rush (Ky.) 95; Clark *v.* Newman, (Ky. 1886) 1 S. W. Rep. 880.

Maryland. — Thomas *v.* Frederick County School, 9 Gill & J. (Md.) 115; Chase *v.* Lockerman, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; Mickie *v.* Cross, 10 Md. 352; Ing *v.* Baltimore Assoc., etc., 21 Md. 426.

Mississippi. — Brandon *v.* Hoggatt, 32 Miss. 335; Banks *v.* Machen, 40 Miss. 256; Anderson *v.* Gregg, 44 Miss. 170; Satterwhite *v.* Littlefield, 13 Smed. & M. (Miss.) 302; Smith *v.* Hurd, 8 Smed. & M. (Miss.) 682.

Missouri. — Matter of Davis, 62 Mo. 450; Henry *v.* State, 9 Mo. 778.

New Hampshire. — Griswold *v.* Chandler, 5 N. H. 492; Wendell *v.* French, 19 N. H. 205; Lund *v.* Lund, 41 N. H. 355.

New York. — Matter of Childs, 5 Misc. Rep. (N. Y. Surrogate Ct.) 560; Willcox *v.* Smith, 26 Barb. (N. Y.) 316.

North Carolina. — Graham *v.* Davidson, 2 Dev. & B. Eq. (22 N. Car.) 155. In this case Gaston, J., said: "Interest, according to the usage of our courts, follows debt as its ordinary attendant. Therein we depart from the English rule, and probably this deviation has resulted from the circumstance that in this country money never lies idle, and he who holds from another what is his is presumed, until the contrary appears, to have laid it out in schemes of profit." But see Smith *v.* Smith, 101 N. Car. 461.

Pennsylvania. — Matter of Merrick, 1 Ashm. (Pa.) 305; Fow's Estate, 3 Pa. Dist. Rep. 316, 14 Pa. Co. Ct. Rep. 648; Merkel's Estate, 131 Pa. St. 584, 25 W. N. C. (Pa.) 469.

South Carolina. — Nettles *v.* McCown, 5 S. Car. 43; Taveau *v.* Ball, 1 McCord Eq. (S. Car.) 456.

Texas. — McKinney *v.* Nunn, 82 Tex. 44.

Hawaii. — Matter of Espinda, 9 Hawaiian 342.

If the Beneficiaries Are Equally Guilty of Laches in protracting the settlement, they cannot require interest to be charged against the executor or administrator. Forward *v.* Forward, 6 Allen (Mass.) 494; Riddle *v.* Riddle, 5 Rich. Eq. (S. Car.) 31. Nor can they do so if the delay was caused by litigation between them. Johnson *v.* Holifield, 82 Ala. 123; Bulows *v.* O'Neill, 4 Desaus. (S. Car.) 394.

If the Distributees Are of Age, and the administrator gives them notice that he is ready to pay over their shares, and is in fact so ready at all times, he is not chargeable with interest on the fund if he does not use it. McAlister *v.* Brice, McMull. Eq. (S. Car.) 275.

Even if the Beneficiaries Are Infants and no guardian has been appointed, the executor or administrator may be chargeable with interest on the funds kept idle in his hands. Sander-

son *v.* Sanderson, 20 Fla. 292; Flintham's Appeal, 11 S. & R. (Pa.) 16; Bitzer *v.* Hahn, 14 S. & R. (Pa.) 232. But see *contra* Sparhawk *v.* Buell, 9 Vt. 41; Cavendish *v.* Fleming, 3 Munf. (Va.) 198.

Failure of Distributees to Call for Fund. — An administrator is not chargeable with interest on money retained to pay the distributees, if they failed to call for it. Jacot *v.* Emmett, 11 Paige (N. Y.) 142; Burtis *v.* Dodge, 1 Barb. Ch. (N. Y.) 77; Hasler *v.* Hasler, 1 Bradf. (N. Y.) 248.

Absent Legatee. — In Clarke *v.* Canfield, 15 N. J. Eq. 119, it was held that executors were not chargeable with interest where they held a legacy for an absent legatee until the expiration of the seven years requisite to raise the presumption of his death, unless they used or made a profit out of the fund. See also Lake *v.* Park, 19 N. J. L. 108.

Unknown Beneficiaries. — Where distribution is not made because the beneficiaries are not known, the administrator is not chargeable with interest. Roper *v.* Burton, 107 N. Car. 526; especially if the court has refused to allow him to invest, *Ex p.* Walsh, 26 Md. 495. But see King *v.* Berry, 3 N. J. Eq. 261.

If There Is No One Legally Qualified to Receive the balance in an administrator's hands, and it is not incumbent on him to invest it, he is not chargeable with interest if he did not convert the money to his own use. Rowland *v.* Isaacs, 15 Conn. 122.

Interest Is Not Chargeable as a Matter of Course if legacies are not paid when the time for distribution arrives, unless the executors have made use of the fund or have been guilty of misconduct. Colt *v.* Colt, 53 Conn. 279.

Where Questions of Doubt prevent an executor from paying out moneys of the estate, he should not be charged with interest until the end of a year after his qualification. Brooks *v.* Brooks, 12 S. Car. 422.

Failure to Pay Debts. — An administrator is not chargeable with interest on the debts of the estate accruing during the administration and paid by him, if the assets were not immediately collectible. Billington's Appeal, 3 Rawle (Pa.) 48.

If an Administrator Neglects to Pay the Debts of the estate he is chargeable with interest on the annual balances. Walker's Appeal, 116 Pa. St. 419.

Payment of Legacies Before Debts. — An executor who pays a legacy to himself before discharging the debts of the estate is chargeable with interest thereon. Walker's Appeal, 116 Pa. St. 419.

Where the Parties Lived on Opposite Sides During the Civil War, the administrator was held not chargeable with interest during the period of the war. Dromgoole *v.* Smith, 78 Va. 665. See also McVeigh *v.* Bank of Old Dominion, 26 Gratt. (Va.) 202.

Funds Not Kept Ready for Distribution. — If an executor or administrator has had the money in his hands for a long time and has not kept it ready for distribution, he is chargeable with interest. Salisbury *v.* Colt, 27 N. J. Eq. 492; Kline's Estate, 8 Lanc. L. Rev. (Pa.) 356.

draw interest, and lets it lie idle, he is ordinarily chargeable with interest ¹

1. Failure to Invest — England. — Littlehales *v.* Gascoyne, 3 Bro. C. C. 73; Browne *v.* Southouse, 3 Bro. C. C. 107; Franklin *v.* Frith, 3 Bro. C. C. 433; Perkins *v.* Baynton, 1 Bro. C. C. 375; Newton *v.* Bennet, 1 Bro. C. C. 359; Byrchall *v.* Bradford, 6 Madd. 13; Moyle *v.* Moyle, 2 Russ. & M. 710; Forbes *v.* Ross, 2 Cox 115; Flanagan *v.* Nolan, 1 Moll. 84; Lowry *v.* Fulton, 9 Sim. 115; Hughes *v.* Empson, 22 Beav. 181; Stafford *v.* Fiddon, 23 Beav. 386; Johnson *v.* Prendergast, 28 Beav. 480; Hil-lard's Case, 1 Ves. Jr. 89; Younge *v.* Combe, 4 Ves. Jr. 101; Piety *v.* Stace, 4 Ves. Jr. 620; Longmore *v.* Broom, 7 Ves. Jr. 124; Ashburnham *v.* Thompson, 13 Ves. Jr. 402.

United States. — Barney *v.* Saunders, 16 How. (U. S.) 535.

Alabama. — Nunn *v.* Nunn, 66 Ala. 35.

Florida. — Eppinger *v.* Canepa, 20 Fla. 262.

Georgia. — Doster *v.* Arnold, 60 Ga. 316.

Illinois. — Hough *v.* Harvey, 71 Ill. 72.

Kentucky. — Johnson *v.* Beauchamp, 5 Dana (Ky.) 75.

Louisiana. — Saunder's Succession, 37 La. Ann. 769.

Maryland. — Ing *v.* Baltimore Assoc., etc., 21 Md. 426; Chase *v.* Lockerman, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; Thomas *v.* Frederick County School, 9 Gill & J. (Md.) 115; Mickie *v.* Cross, 10 Md. 362; Smithers *v.* Hooper, 23 Md. 285; Gwynn *v.* Dorsey, 4 Gill & J. (Md.) 453; Lyles *v.* Hatton, 6 Gill & J. (Md.) 122.

Massachusetts. — Elliott *v.* Sparrell, 114 Mass. 404.

Mississippi. — Cason *v.* Cason, 31 Miss. 579; Cole *v.* Leake, 27 Miss. 767; Brandon *v.* Hog-gatt, 32 Miss. 335.

Missouri. — Reilly *v.* Reilly, (Mo. 1896) 34 S. W. Rep. 847; Matter of Davis, 62 Mo. 450.

New Jersey. — Fluck *v.* Lake, 54 N. J. Eq. 638; King *v.* Berry, 3 N. J. Eq. 261; Frost *v.* Denman, 41 N. J. Eq. 47; Fowler *v.* Colt, 25 N. J. Eq. 202; Voorhees *v.* Stoothoff, 11 N. J. L. 145; Frey *v.* Demarest, 17 N. J. Eq. 71; Mc-Knight *v.* Walsh, 23 N. J. Eq. 136, 24 N. J. Eq. 498; Lathrop *v.* Smalley, 23 N. J. Eq. 192; Craig *v.* Manning, 8 N. J. Eq. 806; Jackson *v.* Jackson, 3 N. J. Eq. 113.

New York. — Dunscomb *v.* Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504; Minuse *v.* Cox, 5 Johns. Ch. (N. Y.) 441; De Peyster *v.* Clarkson, 2 Wend. (N. Y.) 78; Ogilvie *v.* Ogilvie, 1 Bradf. (N. Y.) 356; Matter of Black, 6 Dem. (N. Y.) 331; Schieffelin *v.* Stewart, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507; Man-ning *v.* Manning, 1 Johns. Ch. (N. Y.) 527; Matter of Mapes, 5 Dem. (N. Y.) 446; Matter of Woodworth, 5 Dem. (N. Y.) 156; Harrington *v.* Libby, 6 Daly (N. Y.) 259; Shepard *v.* Patterson, 3 Dem. (N. Y.) 183; Matter of Bab-cock, 2 Connolly (N. Y.) 82; Williamson *v.* William-son, 6 Paige (N. Y.) 298; Cogswell *v.* Cogswell, 2 Edw. Ch. (N. Y.) 231; Livermore *v.* Wortman, 25 Hun (N. Y.) 341; Shuttleworth *v.* Winter, 55 N. Y. 624.

North Carolina. — Pickens *v.* Miller, 83 N. Car. 543.

Pennsylvania. — Evans's Estate, 11 Phila. (Pa.) 113, 33 Leg. Int. (Pa.) 45; Fox *v.* Wil-cocks, 1 Binn. (Pa.) 194, 2 Am. Dec. 433; Rob-

inson's Estate, 2 Phila. (Pa.) 340, 14 Leg. Int. (Pa.) 292; Verner's Estate, 6 Watts (Pa.) 250; Lloyd's Estate, 82 Pa. St. 143.

South Carolina. — *Ex p.* Glenn, 20 S. Car. 64; Jenkins *v.* Fickling, 4 Desaus. (S. Car.) 369; Walker *v.* Bynum, 4 Desaus. (S. Car.) 555; Dun-can *v.* Dent, 5 Rich. Eq. (S. Car.) 7; Wright *v.* Wright, 2 McCord Eq. (S. Car.) 194; Brown *v.* Vinyard, Bailey Eq. (S. Car.) 460; Jones *v.* West, 2 Hill L. (S. Car.) 561, note *b*; Davis *v.* Wright, 2 Hill L. (S. Car.) 560; Dixon *v.* Hun-ter, 3 Hill L. (S. Car.) 204.

Vermont. — Riley *v.* McInlear, 61 Vt. 254; Perkins *v.* Hollister, 59 Vt. 348.

Virginia. — Garrett *v.* Carr, 3 Leigh (Va.) 407; Carter *v.* Cutting, 5 Munt. (Va.) 223; Leake *v.* Leake, 75 Va. 792.

Distant Legatees. — The mere fact that the legatees were at a distance and might call for their money when it was not in hand does not excuse an executor from investing the fund in hand, if there was no reason for expecting them to demand payment soon after the tes-tator's death. King *v.* Berry, 3 N. J. Eq. 261.

Unknown Distributees. — An executor who re-tains in his hands the share of a distributee whose residence is unknown is liable for in-terest thereon after the expiration of one year, if he neglects to invest it. Laua *v.* Kech, 11 Leg. Int. (Pa.) 31.

Where Questions of Doubt prevent an executor from lending out the funds, he is not charge-able with interest in *South Carolina* until the expiration of a year after his qualification. Brooks *v.* Brooks, 12 S. Car. 422.

Failure to Deposit at Interest. — An adminis-trator who received interest on all the funds of the estate deposited by him in bank is charge-able not only with the interest received on the money deposited, but also on that in his hands which he should have deposited. Dalrymple *v.* Gamble, 68 Md. 156.

Inability to Make Investment Designated by Will. — In *Worthington v. Owings*, 9 Gill (Md.) 195, the testator directed his executors to sell certain real estate, and as soon as the proceeds were collected to divide the same into eight equal parts, and "to hold one share in their hands for the separate use and maintenance of the testator's daughter E. and her children, or to invest the same in lands to be settled in trust for his said daughter E. and her heirs forever, for the sole use and maintenance and support of her and her children, and without the control of her husband," as to said ex-ecutors should seem most expedient. The executors retained the proceeds of the sale because, as they alleged, they were unable to invest them in land. It was held that they were chargeable with interest, because it was the intention of the testator that the bene-ficiaries should have only the interest or in-come of the fund, for the purpose of securing which the executors were directed to invest it in land or to use it themselves, if they preferred to do so, and inasmuch as they retained it and had the right to use it they should be charged with interest.

Retention of Funds under a Fair Claim of Right to them will not render the executor or admin-istrator chargeable with interest. Bruere *v.*

after the lapse of a reasonable time within which to make the investment;¹ but it is generally a matter of discretion with the court.² So, too, if an executor or administrator unnecessarily collects money which was drawing interest, and allows it to remain idle, he is chargeable with interest on the sum collected;³ but in some jurisdictions this rule is subject to the qualification that since the executor or administrator is charged with the duty of collecting the assets of the estate and is made liable for losses caused by his neglect of that duty, it is largely for him to determine the propriety of retaining any investments.⁴

(f) **Interest on Assets Lost or Wasted.**—The question whether an executor or

Pemberton, 12 Ves. Jr. 386; Hall v. Grovier, 25 Mich. 428.

Retention of Funds under an Agreement with Testator.—Where an executor is excused from making interest, and permitted to retain the funds without being charged with interest, by virtue of an agreement made with the testator in his lifetime, this being one of the conditions on which the executorship was accepted, the burden is on the one seeking to charge him with interest to prove that interest was made, or that the executor used the funds himself. Chesnut v. Strong, 1 Hill Eq. (S. Car.) 122, 2 Hill Eq. (S. Car.) 146. Compare Warner v. Knower, 3 Dem. (N. Y.) 208, in which the executor had made an agreement with the testator in his lifetime that he should pay four per cent. on all moneys in his hands, the will containing a clause referring to such agreement. It was held that the executor should pay four per cent. up to the time he qualified, and the legal rate thereafter.

1. Reasonable Time for Making Investments Allowed.—Nunn v. Nunn, 66 Ala. 35.

Six Months has been held sufficient time in which to dispose of money collected. Dunscomb v. Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504; Matter of McKay, 5 Misc. Rep. (N. Y. Surrogate Ct.) 124; Matter of Childs, 5 Misc. Rep. (N. Y. Surrogate Ct.) 560; Matter of Merrick, 1 Ashm. (Pa.) 305.

Where funds were kept on deposit at interest until about three months before the accounting, when the bank refused to pay interest any longer, the executor was held not chargeable with interest because he failed to invest the money in the meantime. Matter of Clark, 16 Misc. Rep. (N. Y. Surrogate Ct.) 405.

Delay in Making Investments caused by difficulty in finding proper securities does not render the executor liable for interest for the period of the delay. Herrick's Estate, (Surrogate Ct.) 12 N. Y. Supp. 105, (Supreme Ct.) 14 N. Y. Supp. 947, 59 Hun (N. Y.) 616.

Mere Neglect to Invest funds which the executor or administrator may be called on at any moment to pay over to the distributees is no ground for charging him with interest, if the money has been kept in bank or otherwise ready to be paid over if called for. Burtis v. Dodge, 1 Barb. Ch. (N. Y.) 77. Compare Baskin v. Baskin, 4 Lans. (N. Y.) 90; Minuse v. Cox, 5 Johns. Ch. (N. Y.) 448; Hasler v. Hasler, 1 Bradf. (N. Y.) 248.

Burden of Proof.—It is the duty of personal representatives holding funds for investment to use due diligence to keep them invested. A reasonable time is usually allowed for making such investments, after which they are

prima facie answerable for interest, and if they have retained money uninvested beyond such reasonable time the burden is on them, on an accounting, to explain or justify it. Lent v. Howard, 89 N. Y. 180; Dunscomb v. Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504.

2. Discretion of Court.—Matter of Gloyd, 93 Iowa 303.

3. Withdrawing Investments or Interest-bearing Deposits.—Taylor v. Gerst, Mosely 99; Matter of Bradley, 1 Connoly (N. Y.) 106; Shakespeare v. Markham, 10 Hun (N. Y.) 311; Lyendecker v. Eisemann, 3 Dem. (N. Y.) 72; Du Bois v. Brown, 1 Dem. (N. Y.) 317, *sub nom.* Matter of Brown, 65 How. Pr. (N. Y. Surrogate Ct.) 461; Van Dyke's Appeal, 183 Pa. St. 647; Verner's Estate, 6 Watts (Pa.) 250; Copely's Appeal, 82 Pa. St. 143.

4. Discretion of Executor or Administrator as to Withdrawing Investments.—In Matter of McQueen, 44 Cal. 584, it was held that an administrator who withdraws money belonging to the estate from a solvent bank, where it had been drawing and would have continued to draw interest, when he had sufficient money to pay the debts of the estate and expenses of administration without drawing it, does not thereby become chargeable with interest, provided he does not mingle the money withdrawn with his own, or use it for his own profit, or deposit it in a bank in his own name, or neglect to settle his account for a long time. The court said: "The statute contemplates that the executor or administrator shall reduce into his possession, with all reasonable dispatch, the property of the estate; and if he find money on deposit, even though the bank be one of admitted safety and of undoubted credit, he must be allowed to exercise his discretion in good faith as to the propriety of reducing the money into his actual possession, so as to be ready to meet any exigency in the affairs of the estate."

In Lund v. Lund, 41 N. H. 355, it was held that it was a reasonable precaution for an administrator to collect money which was drawing interest, where he had some apprehension that there might be debts outstanding or that a will might be found, and that he should not be charged with interest on the money so collected and kept in his hands where he was ready at all times to pay it over. See also Scudder v. Ames, 89 Mo. 496; Brooks v. Brooks, 12 S. Car. 422.

As to the duties and liabilities of executors and administrators generally in regard to investments, see *supra*, this title, *Management and Care of Estate—Investments and Loans*.

administrator is liable for interest on funds which have been lost to the estate by his acts or omissions, as well as for the principal amount so lost, is the subject of considerable diversity of opinion. It has generally been held in *England* and *Canada* that if a loss has occurred by the neglect to make collections or by payments to the wrong person by mistake, the executor or administrator is not chargeable with interest, because his liability in this respect attaches only as to money which he has actually retained.¹ In the *United States*, on the other hand, it is generally held that if funds of the estate are lost through the fault of the executor or administrator, either by failure to collect debts or by improper disbursements or investments, he is chargeable with interest on the amount lost as well as on the principal sum;² but the rule is not absolute, and in a number of cases it has been held that interest was not chargeable on funds which had been lost by the executor or administrator.³

1. Interest Not Chargeable on Funds Lost — Rule in England and Canada. — *Tebbs v. Carpenter*, 1 Madd. 290, *Lowson v. Copeland*, 2 Bro. C. C. 156; *Bruere v. Pemberton*, 12 Ves. Jr. 386; *Saltmarsh v. Barrett*, 29 Beav. 474, 8 Jur. N. S. 737, 31 L. J. Ch. 783, 10 W. R. 640, 5 L. T. N. S. 87; *Vanston v. Thompson*, 10 Grant's Ch. (U. C.) 542.

"The General Rule seems to be that the court contents itself with charging trustees with the principal only of what they might have received, but have not received, and does not, in addition, charge them with interest." *Per Spragge, V. C.*, in *Vanston v. Thompson*, 10 Grant's Ch. (U. C.) 542. But see *contra Pocock v. Reddington*, 5 Ves. Jr. 794; *Stiles v. Guy*, 16 Sim. 230, 1 Macn. & G. 422; *In re Hulkes*, 33 Ch. Div. 552.

In *Sovereign v. Sovereign*, 15 Grant's Ch. (U. C.) 559, it was held that executors may be charged with interest as well as principal in respect of sums lost through their misconduct, though the principal never reached their hands.

2. Interest Chargeable on Funds Lost — Rule in United States — Alabama. — *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598; *Moody v. Hemphill*, 71 Ala. 169.

California. — *Matter of Hilliard*, 83 Cal. 423; *Miller v. Lux*, 100 Cal. 609.

Connecticut. — *Clement's Appeal*, 49 Conn. 537.

Indiana. — *Lindley v. State*, 116 Ind. 235.

Kentucky. — *Amos v. Heatherby*, 7 Dana (Ky.) 48.

Louisiana. — *Bass v. Chambliss*, 9 La. Ann. 376.

Mississippi. — *Banks v. Machen*, 40 Miss. 256; *Crowder v. Shackelford*, 35 Miss. 321; *Cole v. Leake*, 27 Miss. 767.

Missouri. — *Julian v. Wrightsman*, 73 Mo. 569; *Garesché v. Priest*, 9 Mo. App. 270, 78 Mo. 126.

New Jersey. — *Mount v. Van Ness*, 35 N. J. Eq. 113; *Van Houten v. Post*, 32 N. J. Eq. 709.

Tennessee. — *Jones v. Ward*, 10 Yerg. (Tenn.) 161; *Deaderick v. Cantrell*, 10 Yerg. (Tenn.) 273, 31 Am. Dec. 576; *Torbet v. McReynolds*, 4 Humph. (Tenn.) 215; *Jameson v. Shelby*, 2 Humph. (Tenn.) 198; *Lowry v. McGee*, 3 Head (Tenn.) 269; *Governor v. McEwen*, 5 Humph. (Tenn.) 241.

Claims Paid to Self. — An executor or administrator is chargeable with interest on the amount of a claim improperly paid to himself. *Clement's Appeal*, 49 Conn. 537; *Cole v. Leake*, 27 Miss. 767.

When the Funds Mingled with His Own Are Lost, the executor or administrator is liable for interest though none was received. *Livermore v. Wortman*, 25 Hun (N. Y.) 341.

Chattels Delivered to Legatees. — In *Matter of Oosterhoudt*, 15 Misc. Rep. (N. Y. Surrogate Ct.) 566, it was held that an executor was not chargeable with interest on the value of personal property which he had delivered to the legatees, though he borrowed money with which to pay debts, because he was not entitled to credit for interest paid on the money borrowed.

3. Rule that Interest Is Not Chargeable on Funds Lost. — *Fulton v. Davidson*, 3 Heisk. (Tenn.) 614; *Morris v. Morris*, 9 Heisk. (Tenn.) 815; *German v. German*, 7 Coldw. (Tenn.) 180.

In *Wyckoff v. Van Siclen*, 3 Dem. (N. Y.) 75, an executor who had committed a devastavit, though held liable for the amount lost, was not charged with interest, because he had acted in good faith.

In *Pulliam v. Pulliam*, 10 Fed. Rep. 53, the question of the liability of an executor or administrator for interest on losses was considered at length, and many cases were cited. The conclusion reached was that, while the court should sedulously guard the beneficiaries against all wrongful conduct of the executor, and not allow him to take any benefit beyond a reasonable compensation fixed by the court, either directly or indirectly, he should not be so harshly dealt with by imposing penalties of interest where none is made, or could by any possible assumption of facts be presumed to have been made, as to deter prudent and responsible men from taking these trusts; each case must be governed "by its own circumstances." In regard to the case before the court, *Hammond, J.*, said: "All men are sometimes more or less negligent in their own as well as other people's affairs, and to visit these penalties upon them is calculated to drive the administration of estates into the hands of irresponsible men. I find this principle running through the cases, and it does seem to me enough to hold this executor liable for the principal sum lost by his negligence, without charging him with interest which it is obvious he has not made, as a fact, nor could have made under the circumstances."

Where the Neglect Has Been Merely Technical, and not wanton or wilful, or productive of profit to the executor, he is not chargeable with interest on losses. *Brinkley v. Willis*, 22 Ark. 1; *Wheeler v. Bolton*, 92 Cal. 159.

(2) *Rate of Interest.* — In England the rate of interest chargeable against an executor or administrator has been regulated by the decisions of the court of equity. In ordinary cases, where only neglect is imputable to him in not employing the funds for the benefit of the estate, either in compliance with the directions of the will or in accordance with his general duty, when the will contains no directions on the subject, the rate prescribed is four per centum.¹ The court may, however, charge more than four per centum in a proper case, as where the executor or administrator has used the funds in his own trade or business,² or where he has committed any other direct breach of trust which may render it proper to charge the greater rate.³

In Canada there are not separate rates of interest applicable to different cases as in England, but the legal rate, if any is prescribed by statute, will be charged whether the personal representative has been guilty of a direct breach of trust or of mere neglect.⁴

On Improper Payments Disallowed in the accounts, one is not readily charged with interest. *Clauser's Estate*, 84 Pa. St. 51.

If the Funds of the Estate Are Mingled with Individual Funds by the executor or administrator and are lost, he is chargeable with interest. *Westover v. Carman*, 49 Neb. 397. See also *supra*, this section and subsection, *Mingling Funds of Estate with Individual Funds*.

A Legatee Who Received the Benefit of a Misappropriation by the executor or administrator cannot require him to account for interest on the sum misappropriated. *American Mortgage Co. of Scotland v. Boyd*, 92 Ala. 139.

1. Rate of Interest in England — Four Per Cent. in Ordinary Cases. — *Rocke v. Hart*, 11 Ves. Jr. 58; *Mosley v. Ward*, 11 Ves. Jr. 581; *Dornford v. Dornford*, 12 Ves. Jr. 127; *Ashburnham v. Thompson*, 13 Ves. Jr. 402; *Tebbs v. Carpenter*, 1 Madd. 290; *Sutton v. Sharp*, 1 Russ. 151; *Melland v. Gray*, 2 Coll. 295; *In re Holkes*, 33 Ch. Div. 552; *Jones v. Foxall*, 15 Beav. 388; *Williams v. Powell*, 15 Beav. 461; *Atty.-Gen. v. Alford*, 4 De G. M. & G. 843, 1 Jur. N. S. 361.

The rule laid down as to the rate of interest will not be departed from for the general reason that the executor or administrator might have made more, because that possibility exists in every case. *Rocke v. Hart*, 11 Ves. Jr. 58.

2. Rate of Interest When Funds Are Used by Executor or Administrator. — It is the established rule in England that an executor or administrator who applies the funds of the estate in his hands to his own use is chargeable with interest at the rate of five per centum. *Mousley v. Carr*, 4 Beav. 49; *Rocke v. Hart*, 11 Ves. Jr. 58; *Treves v. Townshend*, 1 Bro. C. C. 384; *Heathcote v. Holme*, 1 Jac. & W. 134; *Robinson v. Robinson*, 1 De G. M. & G. 258.

The moment it is established that the property was used in his trade, it is taken for granted that the trade produced five per cent. at least, and it is for him to show that he made less. *Treves v. Townshend*, 1 Bro. C. C. 384.

Deposit to Individual Credit. — An executor who is a trader is considered as having used the funds where he deposited them in his own name with his banker, thus increasing the balance in his favor and thereby acquiring additional credit. *Rocke v. Hart*, 11 Ves. Jr. 58.

In Some Cases only four per centum has been charged though the executor was not only cul-

pable in not loaning out the money, but was supposed to have derived advantage himself. *Perkins v. Baynton*, 1 Bro. C. C. 375; *Browne v. Southouse*, 3 Bro. C. C. 107.

3. Neglecting to Discharge Debts. — Where an executor permits debts to run on when he has funds with which he could have paid them, he will be charged with interest at the rate which such debts bore, though it was greater than the ordinary rate. *Hall v. Hallet*, 1 Cox 134.

Money Unnecessarily Collected. — In *Mosley v. Ward*, 11 Ves. Jr. 581, it was held that, though the court does not usually give more than four per cent. where the money has been called in for the purposes of the will, and the balance only has been in his hands, yet if the executor calls it in without any purpose connected with the trust and holds the whole in his hands without attempting to lay it out, the court has the power to give five per cent.

Improper Sale of Securities. — In *Pocock v. Reddington*, 5 Ves. Jr. 794, the executor and trustee having been guilty of a breach of trust by selling out stock and dealing improperly with the money, the master of the rolls held that the *cestui que trust* had an option to have the stock replaced or the money produced by the sales, with interest at five per cent. or more, if more had been made by it, and the costs occasioned by the executor's misconduct. See also *Bate v. Scales*, 12 Ves. Jr. 402.

Direction in Will to Loan at Best Interest. — In *Forbes v. Ross*, 2 Bro. C. C. 430, 2 Cox 113, the testator directed his executors to lay out the money which would come to their hands at the best and utmost interest. The executors agreed that R., one of them, should take the money at four per cent. It was admitted that four per cent. was not the utmost interest that might have been made. It was also admitted that R. was a man of large property, and that the testator had been accustomed during his lifetime to lend him money at four per cent. It was held that R. should be charged with interest at the rate of five per cent.

4. Rate of Interest in Canada. — It was held in Canada, before the repeal of the usury laws, that when interest was chargeable against an executor or administrator it should be at the rate of six per centum. *Wiard v. Gable*, 8 Grant's Ch. (U. C.) 458; *In re Honsberger*, 10 Ont. Rep. 521.

But since the Repeal of the Usury Laws he is

In the United States an executor or administrator who negligently allows funds of the estate to lie idle in his hands is generally chargeable with the interest at the legal rate prevailing in the particular jurisdiction, or such as he might have obtained under the circumstances, not exceeding the legal rate.¹

If He Calls In Money Which Was Bearing Interest and keeps it dead in his hands, he is chargeable at the rate of interest which such money was yielding.²

As to Interest Accruing on Securities or Deposits belonging to the estate, he is chargeable with as much as he has actually received or would have received if he had acted with the proper degree of care and diligence.³

Failure to Settle Accounts as required by law subjects the executor or adminis-

chargeable at such rate as he could have realized, except that not less than six per centum will be charged if he uses the money himself. *Smith v. Roe*, 11 Grant's Ch. (U. C.) 311. See also *Felder v. O'Hara*, 14 Grant's Ch. (U. C.) 223.

1. Rate of Interest in United States—Legal Interest Generally Chargeable.—*United States*.—*Dillman v. Hastings*, 144 U. S. 136.

California.—*Clark's Estate*, 53 Cal. 355; *Merrifield v. Longmire*, 66 Cal. 180; *Matter of Eschrich*, 85 Cal. 98.

Illinois.—*Hough v. Harvey*, 71 Ill. 72; *Clifford v. Davis*, 22 Ill. App. 316; *Matter of Schofield*, 99 Ill. 513.

Missouri.—*Scudder v. Ames*, 89 Mo. 496.

New York.—*Warner v. Knower*, 3 Dem. (N. Y.) 208; *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507.

Different Rates of Interest cannot be applied to different degrees of negligence or misconduct in the United States, but the rate established by law governs in the absence of special arrangements. *In re Ricker*, 14 Mont. 153, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 426.

A Stipulation between the executors and a person objecting to the account, that "the executor shall be charged with interest on all unexpended balances," means that the interest shall be charged at the legal rate, and the fact that the executors deposited the moneys of the estate in a savings bank which allowed them but three and one-half per cent. does not necessarily relieve them from liability for interest at the legal rate. *Matter of Meikle*, 2 Connolly (N. Y.) 97.

Where the Court Exercises Equitable Control in making executors and administrators accountable for interest, it is improper to charge them at the highest rate without inquiring whether that rate is reasonable under the circumstances. *Howard v. Manning*, (Ark. 1898) 44 S. W. Rep. 1126. Nor can they be charged with more than the legal rate on money loaned by them, though the borrower agreed to pay more, unless the excess was paid. *White v. White*, 3 Dana (Ky.) 376.

More than the Legal Rate Is Not Chargeable though the administrator has realized the greater rate on money of his own. *Grant v. Edwards*, 92 N. Car. 442.

Current Rate.—Where an executor is directed by the will to put out money on security of a designated character, he is chargeable only with the current rate of interest paid on such security. *English v. Harvey*, 2 Rawle (Pa.) 305.

What Law Governs.—The rate of interest to be charged on a balance found to be in the hands of an executor or administrator is the rate existing by law at the time when such balance is struck. *Moore v. Felkel*, 7 Fla. 44.

If Money Is Allowed to Remain on Deposit Without Interest when it could have been deposited at interest, the executor or administrator will be charged with interest at the rate which he could have obtained. *Matter of Mapes*, 5 Dem. (N. Y.) 446.

Thus, where an executor deposits trust funds in a bank of which he is an officer, allowing them to remain for a considerable time, he will be charged with interest at the rate usually paid by the bank on such deposits. *In re Brewster*, 113 Mich. 561; *Matter of Babcock*, 2 Connolly (N. Y.) 82.

And the same rule has been applied where a collector disregarded the statutory requirements to deposit funds in a trust company, but without intentional misconduct, though he intermingled them with the moneys of his firm, it appearing that he did not realize any profit. *Livermore v. Wortman*, 25 Hun (N. Y.) 341.

Unauthorized Investments.—If an administrator fails to obey an order of court as to the investment of the funds, he should be charged with such interest as he might have received if the order had been complied with. *Williams v. Petticrew*, 62 Mo. 460.

2. Calling In Money at Interest.—*Dalrymple v. Gamble*, 68 Md. 156; *Matter of Scudder*, 21 Misc. Rep. (N. Y. Surrogate Ct.) 179.

3. Executor or Administrator Chargeable with Interest Actually Received.—*Clay v. Hart*, 7 Dana (Ky.) 17; *Williams v. Petticrew*, 62 Mo. 460. See also cases cited *supra*, this section, *When Interest Is Chargeable—Interest Received or Which Should Have Been Received*.

On Notes belonging to the estate interest is chargeable at the rate they bear. *Cason v. Cason*, 31 Miss. 578; *Stong v. Wilkson*, 14 Mo. 116; *Williams v. Petticrew*, 62 Mo. 460.

Money Deposited on Call.—Where an administrator deposited money on call in a trust company so as to be ready to pay it over, as he might be ordered to do at any time, he should be charged with interest only at the rate allowed by the trust company on such loans. *Haskin v. Teller*, 3 Redf. (N. Y.) 316.

Only Interest Actually Made will be charged where the executor or administrator has diligently and faithfully discharged his trust. *Karr v. Karr*, 6 Dana (Ky.) 3; *Voorhees v. Stoothoff*, 11 N. J. L. 145; *Com. v. Mateer*, 16 S. & R. (Pa.) 476.

trator, in some jurisdictions, to the penalty of paying a high rate of interest on the balance in his hands.¹

Interest on Funds Lost. — If money is lost under such circumstances as to render the executor or administrator liable therefor to the estate, he is chargeable, if at all, only at the legal rate, and not at the rate prescribed by statute for failure to account.²

Use of Funds by Executor or Administrator. — Where the executor or administrator uses the funds of the estate for his own benefit a more stringent rule is adopted, and he is charged with the highest rate of interest allowed by law,³ or, at the option of the beneficiaries of the estate, with whatever profits he may have realized from such use of the funds.⁴

(3) *Computation of Interest* — (a) *Period of Computation.* — Interest is not chargeable, as a general rule, during the period allowed by law for the settlement of the estate, unless the executor or administrator has received interest, or has used the money or credits of the estate for his own purposes;⁵ but after the expiration of that period the computation will begin, if he still retains the funds of the estate in his hands when he should have paid them

1. **Failure to Settle Accounts.** — In *Louisiana* it has been held that if an executor or administrator does not present his accounts for settlement once a year, he is chargeable with interest at ten per centum per annum. *Bass v. Chambliss*, 9 La. Ann. 376.

2. **Rate of Interest on Funds Lost.** — *Bass v. Chambliss*, 9 La. Ann. 376.

As to liability for interest on funds lost or wasted, see *supra*, this section, *When Interest Is Chargeable* — *Interest on Assets Lost or Wasted*.

3. **Use of Funds by Executor or Administrator — Highest Legal Rate Charged** — *United States*. — *McKenzie v. Anderson*, 2 Woods (U. S.) 357. *California*. — *Merrifield v. Longmire*, 66 Cal. 180; *Matter of Clary*, 112 Cal. 292.

Minnesota. — *St. Paul Trust Co. v. Kittson*, 62 Minn. 408.

Mississippi. — *Powell v. Cooper*, 42 Miss. 221.

Missouri. — *Matter of Davis*, 62 Mo. 450; *Williams v. Petticrew*, 62 Mo. 460; *Camp v. Camp*, 74 Mo. 192, 6 Mo. App. 563; *Cruce v. Cruce*, 81 Mo. 676.

New York. — *Matter of Myers*, 131 N. Y. 409; *Matter of Mairs*, 4 Redf. (N. Y.) 160.

Vermont. — *Perkin v. Hollister*, 59 Vt. 348.

The Supreme Court of the United States will not reverse a decree of the Circuit Court below as excessive because it allowed eight per cent. against an administrator who had mixed the administration funds with his own, and used them in speculation for his own profit, the law of the state of the administrator's domicile allowing interest at the rate of ten per cent. per annum. *Hook v. Payne*, 14 Wall. (U. S.) 252.

4. **Option to Charge Interest or Profits.** — See *supra*, this section, *When Interest Is Chargeable* — *Use of Funds by Executor or Administrator*.

5. **Interest Not Generally Chargeable During Period Allowed for Settlement** — *Alabama*. — *Harrison v. Harrison*, 39 Ala. 489.

Maryland. — *Chase v. Lockerman*, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277.

Massachusetts. — *Boynton v. Dyer*, 18 Pick. (Mass.) 1.

Mississippi. — *Brandon v. Hoggatt*, 32 Miss. 335; *Anderson v. Gregg*, 44 Miss. 171.

Pennsylvania. — *Verner's Estate*, 6 Watts (Pa.) 250; *Fox v. Wilcocks*, 1 Binn. (Pa.) 194,

2 Am. Dec. 433; *Wilson's Estate*, 1 Del. Co. Rep. (Pa.) 85.

South Carolina. — *DeSaussure v. McClenaghan*, 6 S. Car. 83; *Brooks v. Brooks*, 12 S. Car. 464.

Interest on a Sale Bill is not chargeable until the end of the year in which it becomes due. *Davis v. Wright*, 2 Hill L. (S. Car.) 560.

Receipt of Interest or Use of Funds. — Although the administrator is *prima facie* not responsible for interest during the interval allowed for getting in the assets, paying claimants, and settling his accounts, yet if it be proved that during that time he has received interest, or used the money or credits, he must pay interest. *Gwynn v. Dorsey*, 4 Gill & J. (Md.) 453; *Verner's Estate*, 6 Watts (Pa.) 250; *Matter of Mott*, 26 N. J. Eq. 509.

In *Tichenor v. Tichenor*, 43 N. J. Eq. 163, it was held that where an executor occupied the testator's real estate at a certain rent under an agreement with his coexecutor, but did not account for the rent, he should be charged with interest thereon from the time when it became due.

Interest from the Time of Receipt is chargeable on money held by the administrator for a long time (in this case two years) without accounting for it. *Jacoway v. Dyer*, 50 Ark. 217.

Rule in Alabama. — An Alabama statute (Clay's Dig. 198, § 28) made an administrator chargeable with interest from the time money of the estate came to his hands, unless he made oath that he had not used the funds. *Parker v. McGaha*, 11 Ala. 521; *Brazeale v. Brazeale*, 9 Ala. 491; *Hollis v. Caughman*, 22 Ala. 478. But if he made such oath and it was not controverted he was not chargeable with interest. *McCreeliss v. Hinkle*, 17 Ala. 459.

Interest Pending Suit for Distribution. — Interest may be charged during the pendency of a suit for distribution where the accountant did not bring the fund into court or show that he was ready to pay it over. *Moore v. Beauchamp*, 4 B. Mon. (Ky.) 71.

Period Allowed for Settlement. — See *supra*, this section, *When Interest Is Chargeable* — *Unemployed Funds*.

out or invested them for the benefit of the estate.¹

Debts Due to the Estate. — Interest is not chargeable from the day of maturity of debts which do not bear interest, regardless of whether or not they have been paid.²

If the Executor or Administrator Is Indebted to the Decedent, the rule that such debt is to be considered assets in his hands does not operate to stop the running of interest, but he is chargeable with interest until actual payment to the estate.³

When a Suit for an Accounting has been brought and a balance against the executor or administrator is found by the master, interest should be charged on such balance only from the date of the master's report, where it appears that the executor or administrator acted in good faith, but had misapprehended his duty as to the matters in respect to which he was found chargeable.⁴

Where a Will Is Set Aside and a bill is thereafter filed against the person who was acting as executor, for an accounting as to the funds in his hands, he is liable for interest, at least from the time when the bill for the accounting was filed.⁵

Time that Account Is in Process of Settlement or in Litigation. — Though it is the general rule, as noted above, that the computation of interest on the money in hand begins at the expiration of the period allowed for the settlement of the estate, it is held that if no negligence or improper conduct is imputable to the executor or administrator, interest will not be charged for the time that the account is before the accounting officer in process of settlement,⁶ or while

1. Interest Chargeable After Expiration of Period Allowed for Settlement. — *Gwynn v. Dorsey*, 4 Gill & J. (Md.) 453; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; *Ing v. Baltimore Assoc., etc.*, 21 Md. 432; *Smithers v. Hooper*, 23 Md. 285; *Boynton v. Dyer*, 18 Pick. (Mass.) 1; *White v. Ditson*, 140 Mass. 351, 54 Am. Rep. 473; *Gilman v. Gilman*, 2 Lans. (N. Y.) 1; *Matter of M'Call*, 1 Ashm. (Pa.) 357. See also cases cited *supra*, this section, *When Interest Is Chargeable — Unemployed Funds*.

Reasonable Time Allowed After Expiration of Time for Settlement. — In *Harrison v. Harrison*, 39 Ala. 489, it was held that on moneys not used by the executor or administrator for his private purposes, nor expended in the payment of debts, he is only chargeable with interest, in the absence of special circumstances, from the expiration of a reasonable time (in this case six months) after the lapse of the time within which it was his duty to dispose of the funds.

When Money Is Received After the Time Allowed for Settlement of the estate a reasonable time, generally six months, will be allowed before the charge of interest is to commence. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; *Matter of Merrick*, 1 Ashm. (Pa.) 305; *Worrell's Appeal*, 23 Pa. St. 44; *Dilliard v. Tomlinson*, 1 Munf. (Va.) 183; *Carter v. Cutting*, 5 Munf. (Va.) 223.

In *Barney v. Saunders*, 16 How. (U. S.) 544, three months was considered not too long to allow money to remain on deposit.

In *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 251, one year from the death of the testator was allowed to make an investment directed by the will.

To What Time Interest Is Computed. — Interest is generally chargeable up to the time when the account is filed, leaving any interest that

subsequently accrues to a further account, but the accounting officer may compute interest up to the time of the audit in order to settle the entire liability of the executor or administrator and dispense with the necessity of a further account. *Robinson's Estate*, 2 Phila. (Pa.) 340, 14 Leg. Int. (Pa.) 292, *sub nom.* *Mayberry's Appeal*, 33 Pa. St. 258.

Interest Is Chargeable to the Date of the Final Decree if the assets were invested at interest, though the executors charged themselves with the principal in their account. *Gable's Appeal*, 36 Pa. St. 395, 40 Pa. St. 231. See also *Pyle's Estate*, 3 Lanc. L. Rev. (Pa.) 55, 2 Chest. Co. Rep. 569.

2. Interest Not Chargeable on Debts from Day of Maturity if Not Paid. — *Dilliard v. Tomlinson*, 1 Munf. (Va.) 183. See also *Creuze v. Hunter*, 2 Ves. Jr. 165.

3. Debt of Executor or Administrator Draws Interest Until Actual Payment. — *Matter of Clark*, 58 Hun (N. Y.) 606, 34 N. Y. St. Rep. 523; *Rodenbach's Appeal*, 102 Pa. St. 572. See also *Clifford v. Davis*, 22 Ill. App. 316; *Young v. Thrasher*, 48 Mo. App. 327; *Matter of Ackerman*, 40 N. J. Eq. 533; *Good's Estate*, 150 Pa. St. 301; *Kline's Estate*, 8 Lanc. L. Rev. (Pa.) 356.

But where an administrator who is also a distributee satisfies a judgment against himself he is not chargeable thereafter with interest on such judgment. *Palmer's Estate*, 2 Del. Co. Rep. (Pa.) 180.

4. Interest Chargeable from Date of Master's Report — Bona Fide Misapprehension as to Duty. — *Norman v. Storer*, 1 Blatchf. (U. S.) 593. See also *Moore v. Beauchamp*, 4 B. Mon. (Ky.) 79.

5. Liability of Executor When Will Is Set Aside. — *Wood v. Nelson*, 10 B. Mon. (Ky.) 229.

6. Interest Is Not Chargeable While the Auditor Is Engaged in Settling the Account, if the

exceptions to the account are pending.¹

In Case of Unnecessary or Unreasonable Litigation, however, interest will be charged for the time that it was pending.²

(b) **Amount on Which Interest Is Computed — Annual Balances.** — In taking the account, the usual practice is to treat funds received during the current year as unproductive until its close, and to regard all expenditures, including compensation and commissions in the course of the year, as made before the balance is struck, and on the balance so struck to calculate the interest in such way as to avoid compounding it.³

(c) **Simple Interest.** — Only simple interest was originally chargeable against executors and administrators, and it is said that this method of computation is still the rule and that compounding interest is the exception.⁴ This is the

executor or administrator has not loaned or used the money during that time and has not been negligent in not investing it. *Merkel's Estate*, 131 Pa. St. 584.

1. **Pendency of Exceptions to Account.** — Interest is not chargeable during the pendency of exceptions to the account, because the balance could not be paid over until confirmation of the report, and consequently could not be said to have been vexatiously detained. *Hoopes v. Brinton*, 8 Watts (Pa.) 73.

But if the exceptions are pending for a long time, and the executor or administrator allows the funds to remain unproductive without asking the advice of the court, he should be charged with interest during such time. *Yundt's Appeal*, 13 Pa. St. 575, 53 Am. Dec. 496; *Bruner's Appeal*, 57 Pa. St. 46; *Evans's Estate*, 33 Leg. Int. (Pa.) 45, 2 W. N. C. (Pa.) 337, 11 Phila. (Pa.) 113; *Bile's Appeal*, 24 Pa. St. 335; *Merkel's Estate*, 131 Pa. St. 584.

2. **Unreasonable or Unnecessary Litigation.** — *Van Houten v. Post*, 32 N. J. Eq. 709, reversed on another point in 33 N. J. Eq. 344.

Appeal from Order or Decree Settling Account. — In *Galloway v. McPherson*, 76 Mich. 318, it was held that an executor should be charged with interest on the balance due from him pending an appeal taken by him from the disallowance of a disbursement which was clearly improper.

In *Wilson's Appeal*, (Pa. 1887) 11 Atl. Rep. 678, it was held that though the executor on appeal succeeded in reducing the balance found to be due, but there was still left a large balance against him, and he did not offer to distribute it, he should be charged with interest for the time that the appeal was pending.

3. **Amount on Which Interest Is Computed — Annual Balances** — *Alabama*. — *Powell v. Powell*, 10 Ala. 900.

Kentucky. — *Campbell v. Williams*, 3 T. B. Mon. (Ky.) 122.

Massachusetts. — *Boynton v. Dyer*, 18 Pick. (Mass.) 1.

Mississippi. — *Reynolds v. Walker*, 29 Miss. 250; *Crimp v. Gerock*, 40 Miss. 765; *Roach v. Jelks*, 40 Miss. 754.

New York. — *De Peyster v. Clarkson*, 2 Wend. (N. Y.) 78; *Vanderheyden v. Vanderheyden*, 2 Paige (N. Y.) 288, 21 Am. Dec. 86.

Pennsylvania. — *Lukens's Appeal*, 47 Pa. St. 356; *Callaghan v. Hall*, 1 S. & R. (Pa.) 241.

South Carolina. — *Pettus v. Clawson*, 4 Rich. Eq. (S. Car.) 92; *Walker v. Bynum*, 4 Desaus. (S. Car.) 555; *Jordan v. Hunt*, 2 Hill Eq. (S. Car.) 145; *Rowland v. Best*, 2 McCord Eq. (S.

Car.) 317; *Tompkins v. Tompkins*, 18 S. Car. 1. *Tennessee*. — *Jones v. Ward*, 10 Yerg. (Tenn.) 160.

Virginia. — *Burwell v. Anderson*, 3 Leigh (Va.) 348.

Balance Composed Partly of Interest. — Interest is chargeable on the balance of a settled account, though such balance is composed in part of items of interest. *Brinton's Estate*, 10 Pa. St. 408.

Excess over Distributive Share. — In *Miller v. Simpson*, (Ky. 1886) 2 S. W. Rep. 171, it was held that interest should be computed only on the excess of the estate over the distributive share of the administratrix, where she was removed because of the subsequent discovery of a will, but retained possession of the funds of the estate as executrix pending a contest in regard to the will, she not having been responsible for the delay.

Commissions Retained Without Authority. — If an executor or administrator retains commissions that have not been judicially allowed, he is chargeable with interest on the amount thereof. *Whitney v. Phoenix*, 4 Redf. (N. Y.) 180; *Freeman v. Freeman*, 4 Redf. (N. Y.) 211; *Matter of Peyser*, 5 Dem. (N. Y.) 244.

The Appraisement is presumed to be correct in determining the amount on which interest should be charged. *Matter of Myers*, 58 Hun (N. Y.) 173.

Balances Too Small to Invest. — Where the annual balances are too small to have been put at interest, and the executor has received no credit or profit from them, interest will be charged only on the accumulated balances.

Alabama. — *Brand v. Abbott*, 42 Ala. 499.

Massachusetts. — *Fay v. Howe*, 1 Pick. (Mass.) 527.

New York. — *Rapalje v. Hall*, 1 Sandf. Ch. (N. Y.) 399; *Gilman v. Gilman*, 2 Lans. (N. Y.) 1.

Pennsylvania. — *Lukens's Appeal*, 47 Pa. St. 356; *Graver's Appeal*, 50 Pa. St. 189.

Virginia. — *Wood v. Garnett*, 6 Leigh (Va.) 271.

Deductions After Computing Interest are sometimes made. Thus, where an executor's account showed that for more than thirty years there was in his hands a balance for which he should account to the legatees, less the expense of accounting, it was held that such expense should be deducted after and not before computing interest on the balance. *Matter of Barclow*, 36 N. J. Eq. 611.

4. **Only Simple Interest Chargeable as General Rule.** — *Fall v. Simmons*, 6 Ga. 272 [cited with

rule adopted in all cases of mere neglect in permitting the funds of the estate to lie idle, or of breach of duty which is only technical. Thus, if the executor or administrator fails to invest the funds or to deposit them where they will draw interest, when it is his duty to do so, but does not use them himself or in any way make a profit out of them, he is chargeable only with simple interest.¹ And he will be charged on this basis even in other cases, where he acted in good faith and the next of kin acquiesced in his acts for many years.²

(d) **Compound Interest.** — As stated above, when the principle was first established that an executor or administrator should be charged with interest in any case where he had realized a profit from the use of the trust funds, or where he had improperly failed to lay them out for the benefit of the estate, it was only with simple interest that he could be charged under any circumstances; but the principle has been extended in modern times, though apparently with reluctance, and it is now a well-settled general rule that compound interest is chargeable in all cases where the executor or administrator has been guilty of positive misconduct or wilful violation of duty.³

approval in *McKenzie v. Anderson*, 2 Woods (U. S.) 357; *Sheppard v. Starke*, 3 Munf. (Va.) 29; *Cavendish v. Fleming*, 3 Munf. (Va.) 198; *Carter v. Cutting*, 5 Munf. (Va.) 223.

1. **Only Simple Interest Chargeable in Cases of Mere Negligence.** — *Powell v. Powell*, 10 Ala. 900; *Wheeler v. Bolton*, 92 Cal. 159; *Darne v. Catlett*, 6 Har. & J. (Md.) 475; *King v. Berry*, 3 N. J. Eq. 261.

Mere Neglect to Invest is not a sufficient ground for charging an administrator with compound interest. *Lovett v. Thomas*, 81 Va. 245.

Mingling with Individual Funds. — If an executor or administrator mingles the funds of the estate with his individual moneys, but does not apply them to his own use, he is chargeable with only simple interest. *Berwick v. Halsey*, 4 Redf. (N. Y.) 18, 1 Month. L. Bul. (N. Y.) 8.

In *Perkins v. Hollister*, 59 Vt. 348, it was held that an executor was chargeable only with simple interest, though he mingled and loaned the funds of the estate with his own, when he did so in good faith, disclosing all the profits, and, without fault or want of prudence, suffered some losses, but claimed no deduction therefor and nothing for his services, when such interest exceeded what he actually received on the funds, and the funds had not been used in business, trade, or speculation. To the same effect is *Wheeler v. Bolton*, 92 Cal. 159.

2. **Bona Fide Acts — Acquiescence by Next of Kin.** — *Matter of Kennedy*, 2 Connoly (N. Y.) 216.

3. **Compound Interest — Positive Misconduct or Wilful Violation of Duty.** — *Raphael v. Boehm*, 11 Ves. Jr. 92; *Inglis v. Beaty*, 2 Ont. App. 453; *Wheeler v. Bolton*, 92 Cal. 159, and cases cited.

"On the subject of compounding interest on trustees, there is [not], and indeed could not well be, any uniform rule which could justly apply to all cases. When a trust to invest has been grossly and wilfully neglected; where the funds have been used by the trustees in their own business, or profits made of which they give no account, interest is compounded as a punishment, or as a measure of damage for undisclosed profits and in place of

them." *Per* Mr. Justice Grier, in *Barney v. Saunders*, 16 How. (U. S.) 535.

Only in Case of Gross Delinquency can an executor be charged with compound interest. *Thorn v. Garner*, 42 Hun (N. Y.) 507.

The language of the Supreme Court of Georgia, in *Fall v. Simmons*, 6 Ga. 272, *quoted with approval* in *McKenzie v. Anderson*, 2 Woods (U. S.) 357, aptly expresses the general rule on this subject: "Liability to pay simple interest is the rule; compounding is the exception. For example, if the trustee applies the fund to his own benefit in trade, or sells trust stocks and applies the proceeds to his own use, or refuses to follow the directions of the deed enacting the trust, as to investments, or conducts himself fraudulently in the management of the funds, and in all other instances depending upon like principles, chancery will direct the compounding of the interest."

It Is Only on Money Received by the executor or administrator, and not on money for which he is liable to the estate, that he can be charged with compound interest. *Sanderson v. Sanderson*, 20 Fla. 292.

The Theory on Which Compound Interest Is Charged is that, in the absence of evidence to the contrary, the executor or administrator will be presumed to have received profits to the amount from the use of the money, and not to punish him for the misconduct. *Atty.-Gen. v. Alford*, 4 De G. M. & G. 851; *Wightman v. Helliwell*, 13 Grant's Ch. (U. C.) 330; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520.

In *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507, Chancellor Kent said, at page 625: "It is certain that the allowance of compound interest is often essential to carry into complete effect the principle of the court, that no profit, gain, or advantage shall be derived to the trustee from his use of the trust funds. All the gain must go to the *cestui que trust*. This is the true equity doctrine. It secures fidelity and removes temptation; and it is the ground of this allowance of annual rests, in the taking of the account, where the executor has used the property and does not disclose the proceeds."

The remedy of compounding interest is "a convenient and potent remedy to draw from

Thus, the Use of the Funds of the Estate by the executor or administrator for his own private purposes is almost universally held to be a sufficient cause for charging him with compound interest.¹

Delay in Accounting for such a period as to amount to gross neglect of duty has been held to justify such a charge against the delinquent executor or administrator.²

Failure to Invest in accordance with the directions of the will for the purpose of accumulation may also authorize a charge of compound interest against the executor.³

delinquent trustees the actual or presumed profits derived from the use of trust funds." *Per* Harwood, J., in *In re Ricker*, 14 Mont. 188.

"The rule which makes an executor or other trustee chargeable with compound interest upon trust funds used by him in his own business is not adopted for the purpose of punishing him for any intentional wrongdoing in the use of such fund, but rather to carry into effect the principle enforced by courts of equity that the trustee shall not be permitted to make any profit from the unauthorized use of such funds. * * * The rule is intended to secure fidelity in the management of trust estates, and where, as in this state, the conventional rate of interest exceeds the statutory rate, the executor should in such cases be charged with legal interest, compounded annually, in order to fully reach the profit realized by him from the use of the trust fund." *Per* De Haven, J., in *Miller v. Lux*, 100 Cal. 609.

But see *Barney v. Saunders*, 16 How. (U. S.) 535, where Mr. Justice Grier says that "interest is compounded as a punishment or as a measure of damage for undisclosed profits."

"This Rule Is of Modern Growth," says Harrison, J., in *Wheeler v. Bolton*, 92 Cal. 172, "and is applied more frequently in this country than in England."

Administrators—Rule in England.—In *Matter of M'Call*, 1 Ashm. (Pa.) 357, it was said that in England the rule as to compounding interest is limited to executors, and that in that country "there is not a single reported case in which compound interest has been charged against an administrator."

1. Grounds for Charging Compound Interest—Individual Use of Funds—England.—*Burdick v. Garrick*, L. R. 5 Ch. 233; *Raphael v. Boehm*, 11 Ves. Jr. 92; *Williams v. Powell*, 15 Beav. 461.

Canada.—*Wiard v. Gable*, 8 Grant's Ch. (U. C.) 458; *Smith v. Roe*, 11 Grant's Ch. (U. C.) 311; *In re Honsberger*, 10 Ont. Rep. 521.

United States.—*McKenzie v. Anderson*, 2 Woods (U. S.) 357.

California.—*Merrifield v. Longmire*, 66 Cal. 180; *Matter of Hilliard*, 83 Cal. 427; *Miller v. Lux*, 100 Cal. 609; *Matter of Clary*, 112 Cal. 292.

Indiana.—*Johnson v. Hedrick*, 33 Ind. 129, 5 Am. Rep. 191.

Iowa.—*Matter of Young*, 97 Iowa 218.

Mississippi.—*Crowder v. Shackelford*, 35 Miss. 321; *Anderson v. Gregg*, 44 Miss. 170; *Troup v. Rice*, 55 Miss. 278.

Missouri.—*Matter of Davis*, 62 Mo. 450; *Williams v. Petticrew*, 62 Mo. 460; *Matter of Camp*, 6 Mo. App. 563, 74 Mo. 192.

New Jersey.—*Frey v. Demarest*, 17 N. J. Eq. 71; *Blauvelt v. Ackerman*, 20 N. J. Eq. 148; *McKnight v. Walsh*, 24 N. J. Eq. 498.

New York.—*Berwick v. Halsey*, 4 Redf. (N. Y.) 18, 1 Month. L. Bul. (N. Y.) 8; *Black's Estate, Tuck*, (N. Y.) 145.

Tennessee.—*Torbet v. McReynolds*, 4 Humph. (Tenn.) 215; *Turney v. Williams*, 7 Verg. (Tenn.) 172.

Vermont.—*McCloskey v. Gleason*, 56 Vt. 264; *Foster v. Stone*, 67 Vt. 336.

If an Executor Mingles Money of the Estate with His Own, and employs the joint fund for a series of years in conducting the business of farming, he will be charged on the settlement of his account with legal interest, to be compounded with annual rests. *Clark's Estate*, 53 Cal. 355; *Troup v. Rice*, 55 Miss. 278; *Berwick v. Halsey*, 4 Redf. (N. Y.) 18, 1 Month. L. Bul. (N. Y.) 8.

Securities Not Accounted For.—In *Lommen v. Tobiason*, 52 Iowa 665, it was held that where an administrator failed properly to account for notes which came into his hands, and furnished no data for reaching a strictly accurate result, he should be charged with compound interest.

Individual Claim to Fund.—In *Clement's Appeal*, 49 Conn. 519, an executor retained money of the estate in payment of a claim which he asserted was due him from the testator, but the claim was disallowed by the court. It was held that he was chargeable with simple interest only, but that compound interest should be charged thereafter.

So, too, if the executor or administrator voluntarily appropriates commissions without gross delinquency or intentional violation of duty, he is not chargeable with compound but only with simple interest. *Whitney v. Phoenix*, 4 Redf. (N. Y.) 180; *Freeman v. Freeman*, 4 Redf. (N. Y.) 211; *Matter of Peyser*, 5 Dem. (N. Y.) 244.

2. Delay in Accounting.—*Matter of Sanderson*, 74 Cal. 199; *Matter of Hilliard*, 83 Cal. 423; *Fall v. Simmons*, 6 Ga. 265; *Kenan v. Hall*, 8 Ga. 417; *Johnson v. Hedrick*, 33 Ind. 129, 5 Am. Rep. 191.

3. Failure to Invest for Purpose of Accumulation.—*Voorhees v. Stoothoff*, 11 N. J. L. 145; *Edmonds v. Crenshaw*, Harp. Eq. (S. Car.) 224; *Garrett v. Carr*, 1 Rob. (Va.) 268.

In *Raphael v. Boehm*, 11 Ves. Jr. 92, Lord Eldon said, at page 107: "Where there is an express trust to make improvement of the money, if he will not honestly endeavor to improve it, there is nothing wrong in considering him, as the principal, to have lent the money to himself upon the same terms upon which he could have lent it to others, and as often as he ought to have lent it, if it be prin-

Rule that Compound Interest Allowable in Any Case Doubted or Denied. — In some jurisdictions, however, it has been doubted and even denied that compound interest is chargeable under any circumstances.¹

Annual Rests. — Ordinarily the computation is made with annual rests.²

Semiannual Rests. — If, however, the method of making annual rests is not adequate in any case, as where the amounts are large and easy of investment, rests will be made semiannually.³

7. Credits — *a.* **DISBURSEMENTS** — (1) *General Rule.* — The general rule is that an executor or administrator shall have credit for all reasonable disbursements made by him in the performance of his duties and reasonably necessary thereto.⁴

cial; and as often as he ought to have received it and lent it to others, if the demand be interest, and interest upon interest."

No Duty to Invest Is Imposed on the Executor, so as to render him chargeable with compound interest, by a provision in the will giving him full power and authority to dispose, as he might think best, of any part or all of the property devised and bequeathed, and to make distribution from time to time among the testator's wife and children. *Peyton v. Smith*, 2 Dev. & B. Eq. (22 N. Car.) 325.

1. Power to Charge Compound Interest Doubted and Denied. — In *Pennsylvania* it is held that neither an executor nor an administrator can be charged with compound interest. *English v. Harvey*, 2 Rawle (Pa.) 305; *Matter of McCall*, 1 Ashm. (Pa.) 357; *Light's Appeal*, 24 Pa. St. 180; *Norris's Appeal*, 71 Pa. St. 106.

In *Norris's Appeal*, 71 Pa. St. 106, Paxson, J., said: "I know of no instance in which any man has ever yet paid compound interest by the judgment of a court of this state. It is true the Supreme Court, in the cases of *Hughes's Appeal*, 53 Pa. St. 500; *Matter of Harland*, 5 Rawle (Pa.) 323; *Light's Appeal*, 24 Pa. St. 180; *Springer's Estate*, 51 Pa. St. 342; *Dieterich v. Heft*, 5 Pa. St. 87, intimate that in cases of 'very gross delinquency' they might charge an accountant with compound interest. It is to be noted that they have had a number of such cases before them, and have never yet held an accountant to such a rule. The liability of an executor for interest in this state has been the subject of legislative enactment. By the 17th section of the Act of 29th March, 1832, *Purd.* 300, pl. 65, it is provided that 'the amount of interest to be paid in all cases by executors, administrators, and guardians shall be determined by the Orphans' Court, under all the circumstances of the case; but shall not in any case exceed the legal rate of interest for the time being.' It would seem difficult, in the face of this Act of Assembly, to charge compound interest, as such, in *Pennsylvania*. An accountant may be held to much more than compound interest by a surcharge of profits when he has used the money of the estate; and he may be punished for misconduct by disallowance of commissions, and in other ways, as the circumstances of the case require."

In *South Carolina* there has been considerable diversity of opinion as to charging compound interest. In *Black v. Blakely*, 2 McCord Eq. (S. Car.) 1, the court refused to charge compound interest. In *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec.

648, Chancellor Thompson said that he never did allow compound interest and never would under any circumstances; but this doctrine was disapproved on appeal in the same case and also in the case of *Wright v. Wright*, 2 McCord Eq. (S. Car.) 185, by Nott, J., who said that the rule in *South Carolina* was against allowing compound interest, but at the same time he declared that compound interest should be charged only in very special cases. In *Bowles v. Drayton*, 1 Desaus. (S. Car.) 489, 1 Am. Dec. 689, Chancellor Rutledge allowed compound interest, but this decision, as was afterwards remarked by Judge Nott in *Wright v. Wright*, 2 McCord Eq. (S. Car.) 185, was based on the express provision of the will. From the foregoing it will be observed that, while it has been said in some cases that compound interest should never be charged, the principle that such charge may be made under special circumstances is distinctly recognized.

2. Annual Rests. — *Burdick v. Garrick*, L. R. 5 Ch. 241; *Voorhees v. Stoothoff*, 11 N. J. L. 145; *McKnight v. Walsh*, 24 N. J. Eq. 498; *Adair v. Brimmer*, 74 N. Y. 539.

"What shall be the term of time at which it [interest] shall be compounded must depend upon the circumstances of each case — it may be semiannual, or annual, or at longer intervals." *Per Nisbet, J.*, in *Fall v. Simmons*, 6 Ga. 265.

3. Semiannual Rests. — *Barney v. Saunders*, 16 How. (U. S.) 535. See also *Raphael v. Boehm*, 11 Ves. Jr. 92.

4. Credit for Disbursements — General Rule — *Alabama.* — *Pearson v. Darrington*, 32 Ala. 227. *Maryland.* — *Edelen v. Edelen*, 11 Md. 415. *New York.* — *Glover v. Holley*, 2 Bradf. (N. Y.) 291.

North Carolina. — *Clarke v. Cotton*, 2 Dev. Eq. (17 N. Car.) 51; *Whitted v. Webb*, 2 Dev. & B. Eq. (22 N. Car.) 442.

Pennsylvania. — *In re Wilson*, 2 Pa. St. 325. *Virginia.* — *Nimmo v. Com.*, 4 Hen. & M. (Va.) 57, 4 Am. Dec. 488.

Disbursements for Which Credit Will Be Allowed are "unavoidable payments of money without which the estate of the testator cannot be collected and disposed of for the benefit of his creditors. Funeral charges, charges for the probate of the will or granting letters of administration, recording of inventories, accounts of sales, orders of sales, and the charges of suits legally brought for the benefit of the estate or of defending suits brought against them, and the like charges and disbursements are allowable; but expenses in travelling and remaining at court, and others

(2) *Expenses of Administration*—(a) *Right to Credit for Expenses*.—In the ordinary course of every administration it is necessary to meet various expenses, and credit is generally given to the executor or administrator in his account for such payments.¹ The leading considerations on which the right to credit is based are that the expenses were incurred in good faith in discharging the duties of the trust, were reasonable in amount, and were not made necessary by any fault of the executor or administrator.²

of a similar nature, are not allowable." *Stephenson v. Stephenson*, 3 Hayw. (Tenn.) 123.

Necessity and Propriety of Disbursements.—Credit will not be allowed for any disbursements unless they were necessary or proper to protect the personal estate or to carry out the will. *Johnson v. Henagan*, 11 S. Car. 93.

On this principle credit will not be allowed for the cost of removing and renovating the tombstone of the decedent's parents, *Bantz v. Bantz*, 52 Md. 686, or for disbursements on account of an appeal which was not for the protection or benefit of the estate, but which was prosecuted by the administrator for his own benefit and to relieve himself from accounting for the funds in his hands, *McClelland v. Bristow*, 9 Ind. App. 543.

Disbursements Before Letters Were Granted will not be allowed unless they were necessary and from the nature of the circumstances could not properly have been postponed. *Samuel v. Thomas*, 51 Wis. 549.

Revocation of Authority.—The right of an executor to credit for disbursements while acting in good faith under letters duly issued by a court of probate is not affected by the fact that the decree admitting the will to probate is afterwards reversed on appeal and the will declared void. *Comstock v. Hadlyme Ecclesiastical Soc.*, 8 Conn. 254, 20 Am. Dec. 100. See also *supra*, this title, *Appointment and Tenure of Office*, subdiv. 2. b. (7) *Validity and Effect of Appointment*, and the same section, subdiv. 4. e. (5) *Effect of Removal*.

Authority to Make Payment.—Credit will not be allowed on account of money paid out by an executor on the mere verbal request of the testator made on his deathbed, there being none of the requirements of a nuncupative will. *Kerr v. Butler*, 2 Desaus. (S. Car.) 279.

For a Full Recital of all the items of credit see *In re Jones*, 1 Redf. (N. Y.) 263.

1. Right to Credit for Expenses of Administration—*England*.—*In re Jones*, (1897) 2 Ch. 190; *Potts v. Leighton*, 15 Ves. Jr. 277; *Hide v. Haywood*, 2 Atk. 126.

Alabama.—*Pearson v. Darrington*, 32 Ala. 227.

Kentucky.—*Floyd v. Floyd*, 7 B. Mon. (Ky.) 292.

Maryland.—*Edelen v. Edelen*, 11 Md. 415.

Massachusetts.—*Edwards v. Ela*, 5 Allen (Mass.) 87.

New York.—*Glover v. Holley*, 2 Bradf. (N. Y.) 291; *Williamson v. Williamson*, 6 Paige (N. Y.) 298.

North Carolina.—*Clarke v. Cotton*, 2 Dev. Eq. (17 N. Car.) 51; *Whitted v. Webb*, 2 Dev. & B. Eq. (22 N. Car.) 442.

Pennsylvania.—*Kost's Appeal*, 107 Pa. St. 143; *In re Wilson*, 2 Pa. St. 325.

South Carolina.—*Wright v. Wright*, 2 Me-

Cord Eq. (S. Car.) 185; *Manigault v. Holmes*, *Bailey Eq. (S. Car.)* 283.

Virginia.—*Dromgoole v. Smith*, 78 Va. 665; *Nimmo v. Comm.*, 4 Hen. & M. (Va.) 57, 4 Am. Dec. 488.

See also the various local codes and statutes in the United States.

Effect of Bequest to Executor.—As to the effect on the right to credit for administration expenses of a bequest to the executor, see *Plater v. Groome*, 5 Md. 96.

2. Necessity of Expenditure.—If expenses have been unnecessarily incurred, credit will not be refused for that reason alone. The right to credit in such case depends on the good faith and prudence of the executor or administrator, and the burden is on him to show that he had good reason to believe at the time that the expenditures for which he claims credit were necessary for the benefit of the estate. *Robbins v. Wolcott*, 27 Conn. 234.

Expenses Incurred Through Neglect Not Allowed.—*Pannel v. Fenn*, Cro. Eliz. 348; *Robbins v. Wolcott*, 27 Conn. 234; *Jennison v. Hapgood*, 10 Pick. (Mass.) 77; *Brackett v. Tillotson*, 4 N. H. 208.

In *Matter of Quin*, 1 Connolly (N. Y.) 381, it was held that where executors refused a reasonable price for land which they were directed by the will to sell, instead of selling it to the highest bidder as they should have done, they were not entitled to credit for the expenses of offering it for sale a second time, or for insurance and taxes accruing after the time when it was first offered.

Good Faith.—In *In re Barber*, (Supreme Ct.) 12 N. Y. Supp. 538, the estate consisted of a savings-bank deposit of one thousand six hundred and seventy dollars, and there were no debts. In making up his account the administrator claimed credit for the expenses of various journeys, the purpose of which could have been accomplished by correspondence; ten dollars a day for fifty-four days searching for evidence and witnesses concerning the claim against the bank where the money was deposited; counsel fees amounting to twenty-five per cent. of the estate; all aggregating with his commissions three hundred and twenty-six dollars more than the entire estate. "This statement," said the court, "was of itself sufficient to awaken the suspicion, if not to produce the positive belief, that the administrator had flagrantly violated all the obligations of his trust, and to subject his own unsupported oath to discredit; for it can well be seen that the administration of the estate was so entirely plain as to render all unusual expenses entirely unnecessary."

In Amount the Claim Must Be Reasonable, and credit will not be allowed in any case for expenses which are unreasonably large. *Kennedy's Estate*, 25 Pittsb. Leg. J. (Pa.) 135.

(b) **What Are Expenses of Administration** — *aa. IN GENERAL.* — The matters as to which an executor or administrator may incur expenses and charge the estate are very numerous and of great variety, covering everything that is incident to the performance of his duty.¹ They include the expenses of recovering the estate and collecting and securing the debts due it,² compensation paid to appraisers,³ completing crops,⁴ preserving and keeping the estate,⁵ expenses

Benefit to Estate. — Expenses incurred by one of the next of kin in hunting up the others, though at the suggestion of the administrator, are not for the benefit of the estate, and therefore are not allowable as an expense of administration. *In re Glynn*, 57 Minn. 21.

Survey of Lines Between Lands Devised. — So, too, fees paid by an executor to a surveyor for designating the lines between parcels of land devised by metes and bounds will not be allowed. *McGougan v. Hall*, 21 S. Car. 600.

The Fact that the Administrator Was Interested in the Estate does not affect his right to credit for money necessarily expended in looking after the interests of the estate. *Williams v. Petticrew*, 62 Mo. 460.

Legacy in Lieu of Commissions and Charges. — The right to credit for expenses is not affected by a legacy or specific compensation given by the will in lieu of all "commissions and charges." *Pollen's Estate*, 1 Month. L. Bul. (N. Y.) 40.

Payment Essential to Right to Credit. — Credit will not be allowed for expenses incurred in the administration of the estate except so far as they have been actually paid by the accountant. *Matter of White*, 6 Dem. (N. Y.) 375; *Matter of Van Nostrand*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 396. But see *Matter of Coutts*, 87 Cal. 480. In this case *Patterson, J.*, said: "There is nothing in the statutes which requires payment of claims against the executor for services rendered or materials furnished the estate during administration, before they can be allowed in the settlement of his account. It would be a misfortune if there were. Where the representative of the estate has a doubt as to the legality of the claim, or the amount that should be paid for services rendered or materials furnished in the course of administration, it is proper for his own protection, as well as for the protection of the heirs, that the court should determine, after notice to all persons interested, whether the estate is liable at all, and if so, in what amount. *Citing Dwinelle v. Henriquez*, 1 Cal. 392; *Gurnee v. Maloney*, 38 Cal. 88, 99 Am. Dec. 352.

The Burden of Proof, when an objection to the account is made on the ground that the amount claimed for expenses is not reasonable, is on the person making the objection, where the executor produces a voucher which states facts showing that the expenditure was reasonable and necessary. *Matter of White*, 6 Dem. (N. Y.) 375.

The Expenses Must Be Itemized in the account, and it is improper to allow a gross sum under the head of "expenses of settling the estate." *Fairman's Appeal*, 30 Conn. 205; *Fow's Estate*, 14 Pa. Co. Ct. Rep. 648.

1. **Expenses of Administration** include all the expenses incidental to the proper performance of the duties of the office. *Sharp v. Lush*, 10 Ch. Div. 468.

Expenses incurred in attempting to administer are also included. *Matter of Simmons*, 43 Cal. 543.

Keeping up the Testator's Domestic Establishment for a reasonable time after his death is also allowable as an expense of administration. *Field v. Peckett*, 29 Beav. 576.

2. **Expenses of Recovering Estate or Collecting Debts.** — *Giles v. Dyson*, 1 Stark. 32, 2 E. C. L. 22; *Whitted v. Webb*, 2 Dev. & B. Eq. (22 N. Car.) 442; *Bowler's Estate*, 8 Pa. Co. Ct. Rep. 522, 20 Phila. (Pa.) 44, 47 Leg. Int. (Pa.) 298; *Nimmo v. Com.*, 4 Hen. & M. (Va.) 57, 4 Am. Dec. 488.

The Expenses of Collecting a Debt, however, for the price of property of the estate sold by the executor will not be credited to him where he neglected to take security as required by law. *Matter of Woodbury*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 474.

The Expense of Purchasing Land at a judicial sale is allowable as a credit where the purchase was necessary to enable the executor to collect a debt due the estate. *Bowler's Estate*, 8 Pa. Co. Ct. Rep. 522.

The Cost of Insuring the Individual Property of the executor which is security for a debt due from him to the estate cannot be allowed as an item of administration expense, where it was procured pursuant to an order of the Orphans' Court in the alternative that he should procure such insurance or file a bond with sureties. *Good's Estate*, 150 Pa. St. 307.

Property Specifically Bequeathed must be gotten in by the executor at the expense of the general estate. *Perry v. Meddowcroft*, 4 Beav. 204.

3. **Compensation Paid to Appraisers.** — *Matter of Rose*, 80 Cal. 166.

4. **Expense of Completing Crops** — *Alabama.* — *Naftel v. Osborn*, 96 Ala. 623. *Arkansas.* — *Bomford v. Grimes*, 17 Ark. 567.

Connecticut. — *Wattles v. Hyde*, 9 Conn. 10. *Louisiana.* — *Wederstrandt's Succession*, 19 La. Ann. 494; *Myrick's Succession*, 38 La. Ann. 611.

Maryland. — *Lee v. Lee*, 6 Gill & J. (Md.) 316; *Edelen v. Edelen*, 11 Md. 415; *Bantz v. Bantz*, 52 Md. 686.

Mississippi. — *Byrd v. Wells*, 40 Miss. 711. *Virginia.* — *Nimmo v. Com.*, 4 Hen. & M. (Va.) 57, 4 Am. Dec. 488.

5. **Expenses of Preserving Estate.** — *Smith v. Davis*, 51 Ark. 415; *Weaver v. Van Akin*, 71 Mich. 69; *Noyes v. Blakeman*, 6 N. Y. 567; *Matter of Fidelity Loan, etc., Co.*, 23 Misc. Rep. (N. Y. Surrogate Ct.) 211; *Wham v. Love*, Rice Eq. (S. Car.) 51.

Expenses incurred in taking care of the property, even before administration was granted, will be allowed. *Roberts v. Rogers*, 28 Miss. 152, 61 Am. Dec. 542.

Premiums Paid for Insurance on Personality will be allowed as a disbursement for the pro-

of sale,¹ and costs of advertising.² Traveling expenses are likewise allowed, as a general rule, but in some jurisdictions these expenditures must be paid by the executor or administrator out of his commissions.³ Credit has also

tection and preservation of the estate. *Cornwell v. Deck*, 2 Redf. (N. Y.) 87.

As to Duty to Insure see *supra*, this title, *Management and Care of Estate—Custody and Preservation of Estate—Insurance*.

As to premiums paid for insurance on real estate, see *infra*, this section, *Disbursements in Respect to Real Estate*.

Keeping of Live Stock.—In *Branham v. Com.*, 7 J. J. Marsh. (Ky.) 190, it was held that an administrator was entitled to credit for the expense of keeping a horse which could not be sold.

Maintaining Decedent's Favorite Horse.—But the expense of maintaining the decedent's favorite horse as long as he should live, if not provided for by the will, is not an expense for which credit can be allowed, though it was requested by the testator. *Matter of Teyn*, 2 Redf. (N. Y.) 306.

1. Expenses of Sale.—Credit will be allowed for money paid to an auctioneer for his services in selling the property of the estate, *Pinckard v. Pinckard*, 24 Ala. 250; *Sherrell v. Shepard*, 19 Fla. 300; *Garrett v. Garrett*, 2 Strobb. Eq. (S. Car.) 272, or to a broker in cases of sales requiring unusual exertion, *Balentine's Estate*, Myr. Prob. (Cal.) 86. But not for money expended by the executor or administrator for ardent spirits used at an auction of the goods of the deceased, though it was customary to furnish spirits on such occasions. *Griswold v. Chandler*, 5 N. H. 492.

If a Resale of Property Is Directed by the Court, credit will be allowed for expenses necessarily incurred in carrying out such direction. *Matter of Smith*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 269.

2. Printing Expenses—Advertisements.—An administrator who in the performance of his duty causes advertisements to be printed in newspapers should be allowed the charges of the printing. *Reynolds v. Reynolds*, 11 Ala. 1023; *Sherrell v. Shepard*, 19 Fla. 300.

3. Traveling Expenses Allowed—Alabama.—*Pinckard v. Pinckard*, 24 Ala. 250.

California.—*Matter of Rose*, 80 Cal. 166.

Illinois.—*Wingate v. Pool*, 25 Ill. 118.

New Hampshire.—*Wendell v. French*, 19 N. H. 205.

New Jersey.—*Dey v. Codman*, 39 N. J. Eq. 259. It was formerly held in New Jersey that traveling expenses must be defrayed by the executor or administrator out of his commissions. *Edgar v. Clevenger*, 3 N. J. Eq. 261.

North Carolina.—*Clarke v. Cotton*, 2 Dev. Eq. (17 N. Car.) 51.

South Carolina.—*Roberts v. Johns*, 24 S. Car. 589. But see *Snow v. Callum*, 1 Desaus. (S. Car.) 542.

But such allowance is restricted to expenses incurred in traveling on the business of the estate, and the executor or administrator is not entitled to credit for the expenses of a trip to another state to look after a suit brought by the heirs. *Purdy v. Purdy*, (Ky. 1897) 42 S. W. Rep. 89.

Journey Necessitated by Change of Residence.—

Where an executor removes from the state after undertaking the duties of his office, and afterwards comes into the state on the business of the estate, he is not entitled to credit for the traveling expenses so incurred. *Marsh v. Gilbert*, 2 Redf. (N. Y.) 465; *Matter of Dunn*, (Surrogate Ct.) 8 N. Y. St. Rep. 766; *Matter of Ingersoll*, 6 Dem. (N. Y.) 184.

But where he changes his residence from one county to another in the state where the will was admitted to probate, he is still within the provisions of the *Georgia* statute (Code, § 2593) which allows the actual disbursements of travel out of the county of the executor's residence, though the travel involved may be in going to the county having jurisdiction of the administration of the will and the same county in which the executor resided at the time when he was appointed and qualified. Inasmuch as a citizen has the right to change the county of his residence at will, every such change made in good faith is to be regarded as making the county to which he removes "his" county or the county of his residence. *Thomas v. Payne*, 88 Ga. 246.

Nonresident Executor Coming into State to Prove Will.—In *Everts v. Everts*, 62 Barb. (N. Y.) 577, it was held that traveling expenses, including board, would be allowed to a nonresident executor who necessarily came into the state to prove the will.

Attending Court as Witness.—An administrator is entitled to credit for traveling expenses necessarily incurred in taking a journey to be examined as a witness in a suit brought by him to foreclose a mortgage held by the estate. *Elliott v. Lewis*, 3 Edw. Ch. (N. Y.) 40.

Traveling Expenses Incurred in Administering Foreign Assets must be allowed out of such assets, and not out of those collected in the domiciliary jurisdiction. *Matter of Ortiz*, 86 Cal. 306, 21 Am. St. Rep. 44.

Unnecessary Traveling Expenses, as where nothing could be accomplished by the journey which could not have been done by correspondence, will not be allowed. *In re Barber*, (Supreme Ct.) 12 N. Y. Supp. 538.

Livery Bills, when necessarily incurred and reasonable in amount, will be allowed as traveling expenses. *Matter of Ingersoll*, 6 Dem. (N. Y.) 184.

The Use of the Executor's Horse and Wagon, however, will not be allowed for, because sound policy forbids that he should make any profit out of his dealings with the estate, and he would be subject to the temptation of making more frequent journeys if he were to be paid for the use of his horse. *Pullman v. Willets*, 4 Dem. (N. Y.) 536; *Matter of Ingersoll*, 6 Dem. (N. Y.) 184. But see *contra* *Sherrell v. Shepard*, 19 Fla. 300.

The Amount to be allowed for traveling expense is within the discretion of the probate court; and its action therein cannot be impeached in a court of equity, except where it appears that the probate court was imposed upon, or that the heirs were fraudulently mis-

been allowed for postage,¹ and the rent of an office in which to transact the affairs of the estate,² but not for the expense of obtaining a surety on the official bond.³

bb. EXPENSES OF PROBATE OF WILL AND GRANT OF LETTERS. — It is the duty of an executor, as the personal representative of the testator, to propound the will for probate, and for his reasonable expenses incurred in so doing, when the probate is not resisted, he is entitled to credit. So far there seems to be no difference of opinion.⁴ But if the probate is contested, or a proceeding is instituted to vacate it or to set the will aside, the right of the executor to credit for expenses incurred in the contest presents a question as to which

led or deceived in regard thereto, so that they were deprived of the opportunity to be heard in the probate court. *Smith v. Worthington*, 53 Fed. Rep. 977.

Specifying Purpose of Journey. — An item of traveling expenses should not be rejected *in toto* because the account does not disclose for what the expense was incurred, but it should be retired from the list of items, with leave to bring it forward with proper proofs in a future account. Matter of *Rose*, 80 Cal. 166.

Rule Denying Credit for Traveling Expenses. — Traveling expenses are not allowed in some jurisdictions, but must be paid by the executor or administrator out of his commissions. *Stephenson v. Stephenson*, 3 Hayw. (Tenn.) 123.

This was formerly the rule laid down in *New Jersey*. *Edgar v. Clevenger*, 3 N. J. Eq. 261. But it is now provided by statute in that state (Gen. Stat. 1896, vol. 2, p. 2380) "that on the settlement of the accounts of executors, administrators, guardians, or trustees under a will, their commissions, over and above their actual expenses, shall not exceed the following rates," and this is held to authorize the allowance of traveling expenses in addition to commissions. *Dey v. Codman*, 39 N. J. Eq. 258.

1. Postage Allowed as an Expense of Administration. — *Hipkins v. Bernard*, 4 Munf. (Va.) 83.

2. Office Rent has been allowed as an expense of administration where it was just and equitable and the circumstances of the estate were such as to require it. *Newell v. West*, 149 Mass. 520; *Bronson v. Bronson*, 48 How. Pr. (N. Y. Supreme Ct.) 481; *Hipkins v. Bernard*, 4 Munf. (Va.) 83.

It has been held that an executor's expenses in keeping up an establishment should not be disallowed *simpliciter*, but where there was a question whether traveling expenses were thereby economized an inquiry should be directed, with liberty to the executor to bring forward afterwards such claims as he might have to be recouped his expenses. *Browne v. Collins*, 21 W. R. 222.

3. Expense of Procuring Bondsmen Not Allowed. — *Jenkins v. Shaffer*, 6 Dem. (N. Y.) 59; *Eby's Estate*, 164 Pa. St. 249, 35 W. N. C. (Pa.) 160, *affirming* 12 Pa. Co. Ct. Rep. 601, 2 Pa. Dist. Rep. 326; *Pickering's Estate*, 4 Pa. Dist. Rep. 263; *Wilson's Estate*, 18 W. N. C. (Pa.) 483, 1 Pa. Co. Ct. Rep. 509; *Miller's Estate*, 13 Pa. Co. Ct. Rep. 137, 2 Pa. Dist. Rep. 410, 32 W. N. C. (Pa.) 232.

Additional Bond Required After Qualification. — In *Miller's Estate*, 13 Pa. Co. Ct. Rep. 137, 2

Pa. Dist. Rep. 410, 32 W. N. C. (Pa.) 232, a distinction was made between the ordinary administration bond which every executor or administrator is required to give before letters will be granted to him, and a bond to secure the performance of duties devolving on him in the course of the administration, such as the sale of real estate. In regard to this, *Ferguson, J.*, said: "In many cases it happens that, having entered upon the performance of his duties as executor or administrator, he has other duties thrust upon him, by virtue of his office, which he could not anticipate. For instance, an executor or administrator, under our Act of Assembly, must be appointed trustee to make sale of lands under proceedings in partition. This is a duty which the law imposes upon him. He could not foresee it when he took out letters, and therefore it cannot be said that he assumed the duty voluntarily. We think that in this and similar cases the cost of the security should be borne by the estate."

But in the later case of *Eby's Estate*, 164 Pa. St. 249, 35 W. N. C. (Pa.) 160, it was expressly decided that no such distinction could be made, and that the expense of procuring a surety on the bond required when the administrator was directed to sell real estate must be borne by him personally.

4. Expenses of Probate — Credit Allowed. — *United States.* — *Bradford v. Boudinot*, 3 Wash. (U. S.) 122.

Alabama. — *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590.

California. — *Abila v. Burnett*, 33 Cal. 658.

Iowa. — *Meeker v. Meeker*, 74 Iowa 352, 7 Am. St. Rep. 489.

Maryland. — *Compton v. Barnes*, 4 Gill (Md.) 55, 45 Am. Dec. 115.

Missouri. — *In re Soulard*, 141 Mo. 642.

New York. — *Douglas v. Yost*, 28 Abb. N. Cas. (N. Y. Supreme Ct.) 370.

Ohio. — *Andrews v. His Administrators*, 7 Ohio St. 143.

Rhode Island. — *Hazard v. Engs*, 14 R. I. 5.

Virginia. — *Wills v. Spraggins*, 3 Gratt. (Va.) 529.

See also *Phillips v. Phillips*, 81 Ky. 328; *Gilbert v. Bartlett*, 9 Bush (Ky.) 49; *Smith v. Moore*, 6 Me. 274; *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33; *Enloe v. Sherrill*, 6 Ired. L. (28 N. Car.) 212; *Scott's Estate*, 9 W. & S. (Pa.) 98.

Employment of Detective. — In *Matter of Lewis*, 35 N. J. Eq. 99, it was held that the charges of a detective whose services were of great value in establishing the will should be allowed as one of the expenses of probate.

the authorities are not uniform. Some hold that he is entitled to credit for such expenses,¹ while others take the view that the result of the contest does not affect the estate, and that therefore the expense of it must be borne, not by the estate, but by those who are interested in the contest.²

The Expenses of Obtaining Letters of Administration or of maintaining the right to the administration are allowed in some jurisdictions by analogy to the rule in regard to the expenses of probate,³ but it is generally held that no allowance will be made for the expenses of unsuccessful litigation as to the right to administer, or of opposing the probate of a will discovered after the letters of administration were granted.⁴

cc. COMPENSATION PAID TO AGENTS AND ASSISTANTS — Rule in England. — Generally speaking, an executor or administrator is not allowed to employ agents at the expense of the estate to perform those duties which by accepting the office he has taken on himself.⁵ But the very liberal rule is laid down that he may

1. Rule Allowing Credit for Expenses of Contest — *Alabama*. — *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590.

California. — *Abila v. Burnett*, 33 Cal. 658.

Iowa. — *Meeker v. Meeker*, 74 Iowa 352, 7 Am. St. Rep. 489.

Maryland. — *Compton v. Barnes*, 4 Gill (Md.) 55, 45 Am. Dec. 115.

Rhode Island. — *Hazard v. Engs*, 14 R. I. 5.

"Money Paid in Compromise of a Contest respecting the validity of a will is not a proper charge upon the estate, against the heirs. Generally, an executor is not bound to become a party to such an issue, unless those interested will indemnify him against the cost of the investigation. His duty is performed when, in good faith, and without reasonable grounds for doubting its validity, he propounds a paper purporting to be the will of the decedent. The costs and expenses of this should be charged against the estate. The parties to the issue, as they litigate for themselves, and not for the estate, are chargeable with the costs of an issue *devisavit vel non*. The test is whether the issue is individual or representative. The executor is entitled to costs when he acts out of regard for the interests of those eventually found to be entitled to the property. On settlement with the beneficiaries, they may be decreed to pay the executor who compromised to establish the will." *Raines v. Raines*, 51 Ala. 237. See to the same effect *Bolles v. Bacon*, 3 Dem. (N. Y.) 43.

Statutory Suit to Set Aside Will. — In *In re Soulard*, 141 Mo. 642, it was held that the rule that the expense of a contest in respect to the probate of a will is an expense of administration for which the executor is entitled to credit does not apply to a statutory suit to set aside a will which has been formally admitted to probate.

2. Rule Denying Credit for Expenses of Contest. — In some jurisdictions it is held that when the will is contested, the cost of the contest cannot be allowed as a credit to the executor, but must be paid by those interested in it, because the quantum of the estate of the personal representative is not affected whether there is a will or not. *Brown v. Eggleston*, 53 Conn. 110; *Andrews v. His Administrators*, 7 Ohio St. 151; *Mumper's Appeal*, 3 W. & S. (Pa.) 441; *Koppenhaffer v. Isaacs*, 7 Watts (Pa.) 170; *Yerkes's Appeal*, 99 Pa. St. 401; *Rankin's Appeal*, 10 W. N. C. (Pa.) 235, *re-*

versing Rankin's Estate, 9 W. N. C. (Pa.) 407; *Dietrich's Appeal*, 2 Watts (Pa.) 332. But see *Geddis's Appeal*, 9 Watts (Pa.) 284, in which case under peculiar circumstances the executor was allowed the expenses of defending the will. See also *Sheetz's Appeal*, 100 Pa. St. 197, holding that the right of an executor to the costs of an issue of *devisavit vel non* depends on the question whether the litigation was for the benefit of those entitled to the estate. *Brown v. Vinyard*, Bailey Eq. (S. Car.) 460.

If the will is admitted to probate the expenses incurred by the executor may be allowed out of the estate when the effect is to charge those who were benefited by the proceeding. *Mesick v. Mesick*, 7 Barb. (N. Y.) 120.

In *New York* it is within the discretion of the surrogate to allow costs out of the estate when probate of the will has been successfully contested. *Collyer v. Collyer*, 110 N. Y. 481, 6 Am. St. Rep. 405.

In *Illinois* it is held that moneys expended by an executor in defending a suit to contest the validity of a will, in behalf of the personal interests of the devisees named in the will, in which suit the will is set aside, are not proper credits to be allowed against the estate. *Shaw v. Moderwell*, 104 Ill. 65; *Moyer v. Swygart*, 125 Ill. 262. See also *infra*, this section, *Fees of Attorneys and Counsel; Costs*.

3. Contest as to Right to Administer. — Where the right to a controverted administration is successfully established the administrator is entitled to credit for the expenses of the controversy. The allowance in such case is by analogy to the allowance of the expense of successfully defending a will. *Ex p. Young*, 8 Gill (Md.) 285.

The Cost of a Stamp on the Administration Bond is a proper allowance to the administrator. *Edelen v. Edelen*, 11 Md. 415.

4. Contest of Will by Administrator. — It is no part of the duty of an administrator to contest the probate of a will produced after letters of administration have been granted, and he is not entitled to credit for expenses incurred in such contest. *Matter of Parsons*, 65 Cal. 240; *Dalrymple v. Gamble*, 68 Md. 156; *Edwards v. Ela*, 5 Allen (Mass.) 87. See also *infra*, this section, *Fees of Attorneys and Counsel — Probate of Will and Grant of Letters*.

5. Compensation Paid to Agents and Assistants — General Rule in England. — *Weiss v. Dill*, 3

employ an agent to collect the assets in cases where a provident person might do so in his own affairs, and that for the expenses so incurred he will be allowed credit in his accounts.¹ So, too, allowance will be made for the expenses of an accountant when justified by the nature of the accounts.²

Rule in United States. — In the United States executors and administrators are allowed compensation for their services, and therefore they are not, as a general rule, entitled to credit for money paid by them to third persons for any services in regard to the property or affairs of the estates in their hands which such compensation might reasonably be expected to cover.³

Special Circumstances. — But if any special circumstances exist which render it necessary or expedient, they may employ agents, collectors, clerks, bookkeepers, etc., at the expense of the estate,⁴ the question of the necessity or

Myl. & K. 26. In this case the master of the rolls, after laying down the general rule as stated in the text, said: "But there may be very special circumstances in which it may be thought fit to allow them such expenses as they may have incurred by the employment of agents. It is for the master to determine whether an executor who makes a claim for the employment of an agent ought to be allowed to charge his testator's estate with such a burden."

1. Employment of Collector Allowed in Proper Case. — 3 Williams on Executors (7th Am. ed.) 432.

It has been held that an allowance would be made for compensation paid to an agent employed to collect rents and manage real estate, though an annuity was given to the executor for his trouble. *Wilkinson v. Wilkinson*, 2 Sim. & S. 237. But see *Jones v. Mason*, 54 L. J. Ch. 600. The ground on which such allowance is made seems to be that "a man is not bound to be his own bailiff." *Bonithon v. Hockmore*, 1 Vern. 316.

As to the right of fiduciaries generally to employ agents, collectors, accountants, etc., see the title TRUSTS AND TRUSTEES.

The rule in *England* regarding such allowances is liberal because executors and administrators there are not allowed any compensation for their services. *Schouler on Executors* (2d ed.) 671, note 7.

2. Allowance for Accountant. — *Henderson v. M'Iver*, 3 Madd. 276.

3. General Rule in United States. — The general rule is that executors and administrators are not only bound to assume the responsibilities and exercise the discretions of their office, but must also perform, within reasonable limits, the actual manual labor requisite to the due execution of the trust, and the fact that they are busy men and have not as much time to give to the urgent business of estates as other individuals is not material. *Matter of Harbeck*, 81 Hun (N. Y.) 26.

The Ordinary Services for which commissions are allowed must be performed by the executor or administrator personally or at his own expense, and, therefore, if he employs another to perform them, he will not be allowed credit in his account for the resulting expenditure. *Matter of Moore*, 72 Cal. 335; *Miles v. Peabody*, 64 Ga. 729; *Gwynn v. Dorsey*, 4 Gill & J. (Md.) 453; *Fowler v. Lockwood*, 3 Redf. (N. Y.) 465; *Matter of Beach*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 27; *Hall v. Campbell*, 1 Dem.

(N. Y.) 415; *Matter of Carman*, 3 Redf. (N. Y.) 46; *Ward v. Ford*, 4 Redf. (N. Y.) 34.

Illustrations — Keeping Accounts. — No allowance will be made for payments to a clerk for keeping and rendering accounts, or preparing them for presentation to the probate court, because it is the duty of the executor or administrator to do that himself. *Matter of Quin*, 1 Connolly (N. Y.) 381; *Logan v. Logan*, 1 McCord Eq. (S. Car.) 1; *Teague v. Dendy*, 2 McCord Eq. (S. Car.) 207, 16 Am. Dec. 643; *Jenkins v. Hanahan*, Cheves Eq. (S. Car.) 129; *Matter of Vida*, 1 Hawaiian 89.

Collecting Testimony. — Nor will allowance be made for payments to a person employed to collect testimony. *Matter of Collyer*, 1 Connolly (N. Y.) 546; *Matter of Van Buren*, 19 Misc. Rep. (N. Y. Surrogate Ct.) 373.

Agent for Convenience of Debtors. — In *Pearson v. Darrington*, 32 Ala. 227, it was held that an administrator could not appoint an agent at any particular place, for the convenience of the debtors, to receive claims against the estate and give receipts.

The Services of a Broker employed to negotiate a loan for the benefit of the estate must be paid for by the executor or administrator and not by the estate. *Patterson v. McCarty*, 1 Penny. (Pa.) 491. But see *infra*, the third succeeding note, paragraph *Real-estate Agent*.

4. Special Circumstances May Authorize Employment — *Louisiana*. — *Schmidt's Succession*, 16 La. Ann. 256.

Massachusetts. — *Newell v. West*, 149 Mass. 520.

Missouri. — *Gamble v. Gibson*, 59 Mo. 585.

New York. — *McWhorter v. Benson*, Hopk. (N. Y.) 28; *Vanderheyden v. Vanderheyden*, 2 Paige (N. Y.) 287, 21 Am. Dec. 86; *Cairns v. Chaubert*, 9 Paige (N. Y.) 160; *Glover v. Holley*, 2 Bradf. (N. Y.) 291; *Matter of White*, 6 Dem. (N. Y.) 375; *O'Gara v. Clearkin*, 58 N. Y. 663; *Bohde v. Bruner*, 2 Redf. (N. Y.) 333; *Fowler v. Lockwood*, 3 Redf. (N. Y.) 465.

Virginia. — *Hipkins v. Bernard*, 4 Munf. (Va.) 83.

In General, when any necessary services are rendered to an estate at the instance of the executor or administrator, the expense thereof may be paid as an expense of administration, and credit for the amount allowed on settlement. *Yarborough v. Ward*, 34 Ark. 204.

Gratuitous Services. — In no case, however, will an executor be allowed credit for gratuitous services to the estate performed by an

expediency in each case being for the determination of the court.¹

Extraordinary Services. — For extraordinary services, and for such as in their nature require a degree of skill or appliances not within the command of ordinary persons, an executor or administrator may employ agents; and reasonable expenses incurred in this way for the benefit of the estate are a proper charge against it.²

agent. *Chisholm v. Barnard*, 10 Grant's Ch. (U. C.) 479.

Expense of Preparing Accounts Allowed under Special Circumstances. — The expense of an accountant to prepare the accounts for settlement will be allowed if the employment was necessary, owing to the nature of the accounts or because they were so voluminous that the executor or administrator could not prepare them himself. *Underhill v. Newburger*, 4 Redf. (N. Y.) 499; *Matter of Quin*, 1 Connolly (N. Y.) 381.

If Irregular and Disorderly Accounts Have Been Kept by the executor or administrator, no allowance will be made for the expense of preparing the account so far as it was occasioned by such irregularities and disorder, but only on the basis of the time which would have been required if the accounts had been properly kept. *Wilcox's Estate*, 11 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 115; *Matter of Woodard*, (Surrogate Ct.) 13 N. Y. St. Rep. 161.

The New York Statute authorizes the surrogate to make a *per diem* allowance, not exceeding a certain sum, in order to cover the expenses of preparing the account in a proper case, and it is held that no disbursement to a bookkeeper for making up an account can be allowed in addition to the amount specified by the statute. *Hall v. Campbell*, 1 Dem. (N. Y.) 415.

The Time Occupied in the Trial will be allowed for under this statute as "actual expenses." *Matter of Van Kleeck*, 2 Connolly (N. Y.) 14.

Discretion of Court. — Under the *New York* statute it is discretionary with the surrogate to make an allowance for the expenses of the accounting. *Matter of Collamer*, (Supreme Ct.) 5 N. Y. St. Rep. 196.

Accounts of Deceased Agent. — The power to grant an allowance to cover the expense of preparing the account of the executor or administrator does not apply to making up the accounts of a deceased agent of the testator or intestate, because the account of the agent must be made up by his personal representative. *Brown's Accounting*, 16 Abb. Pr. N. S. (N. Y. Surrogate Ct.) 457.

1. Necessity and Expediency a Question for the Court. — *Schmidt's Succession*, 16 La. Ann. 256.

It cannot be laid down as a universal rule that in no case should an administrator be allowed to employ a bookkeeper. "This may properly be left to the probate judge. He may allow it if proper. If the services were such as, under the circumstances, the administrator ought to have performed, and for which his commissions are intended to compensate him, such charge should be disallowed." *Matter of Moore*, 72 Cal. 335.

Illustrations. — In *Wells v. Disbrow*, (Supreme Ct.) 20 N. Y. Supp. 518, an executor was allowed credit for four hundred and forty-

seven dollars paid by him to a real-estate agent, being five per cent. of the rents of the testator's real estate, a building containing a store and apartments let to various persons, where the services performed by the agent were the collection of the rents and the payment of taxes, insurance, repairs, and incidental expenses of the building, and the commissions allowed to the executor for the twelve years of his services amounted to only two hundred and seventy-five dollars.

In *Fowler v. Lockwood*, 3 Redf. (N. Y.) 465, credit was allowed for the expenses incurred by the administrator in preparing his account for submission to the surrogate.

In *Meeker v. Crawford*, 5 Redf. (N. Y.) 450, the estate amounted to more than a million dollars, invested in various securities, and it was held that the employment of a clerk at a moderate salary (six hundred dollars per year) was calculated to be beneficial to the estate, and that the amount paid should be allowed as a reasonable charge.

In *Maffet's Estate*, 7 Kulp (Pa.) 153, it was held proper for executors to employ a superintendent and to furnish him with an office, where the estate was large and was composed of lands, coal mines, and stocks.

2. Extraordinary Services. — *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590; *Bechtold v. Read*, (N. J. 1893) 28 Atl. Rep. 264; *Teague v. Dendy*, 2 McCord Eq. (S. Car.) 207, 16 Am. Dec. 643.

Illustrations — Keeping Estate Together. — Services rendered by an administrator in keeping the estate together under an order of court are special and extraordinary. *Reese v. Gresham*, 29 Ala. 91.

An administrator who is keeping an estate together under a direction contained in the will is not entitled to credit for commissions paid by him to procure acceptances and advances by commission merchants, unless some peculiar circumstances made such acceptances and advances necessary. *Pearson v. Darrington*, 32 Ala. 227.

Employment of Overseer. — An executor, in finishing the growing crops of the deceased, is not bound to discharge the duties of an overseer, but he may employ and pay out of the assets in his hands as many overseers as are necessary for the completion and preservation of the crops. *Lee v. Lee*, 6 Gill & J. (Md.) 316; *Sullivan v. Tuck*, 1 Md. Ch. 65.

The Hire of Labor to work the plantation carried on by the executor or administrator will be allowed. *Byrd v. Wells*, 40 Miss. 711.

Real-estate Agent. — The payment of a commission to a broker employed to sell land in a case of great difficulty has been allowed. *Dey v. Codman*, 39 N. J. Eq. 259. See also *Armstrong v. O'Brien*, 83 Tex. 635; *Ballentine's Estate*, Myr. Prob. (Cal.) 86.

Expenses of Sale. — Credit will be allowed

dd. FEES OF ATTORNEYS AND COUNSEL—(aa) *General Principles Regulating Allowance.*—

An executor or administrator has the right, unless restricted by statute, to employ counsel whenever it is necessary or proper, to protect the estate, or to enable him to manage it properly, and on the settlement of his accounts he will be allowed credit, as part of the expenses of administration, for the reasonable charges paid by him for such services.¹

for money paid to an auctioneer for his services in selling the property of the estate. *Pinckard v. Pinckard*, 24 Ala. 250; *Sherrell v. Shepard*, 19 Fla. 300; *Garrett v. Garrett*, 2 Strobb. Eq. (S. Car.) 272. And also to a clerk at the auction sale. *Garrett v. Garrett*, 2 Strobb. Eq. (S. Car.) 272.

If the Employment Was Rendered Necessary by the Acts of the Executor, as where he left the state before he had completed his duties, he is not entitled to credit for payments to agents to complete what he left unfinished. *Matter of Ingersoll*, 6 Dem. (N. Y.) 184.

1. Reasonable Counsel Fees Allowed on Final Settlement—*Alabama*.—*Morgan v. Nelson*, 43 Ala. 586; *Harris v. Parker*, 41 Ala. 604; *Pinckard v. Pinckard*, 24 Ala. 250; *Holman v. Sims*, 39 Ala. 709.

California.—*Matter of Miner*, 46 Cal. 564; *Matter of Levinson*, 108 Cal. 450.

Kentucky.—*Chapline v. Moore*, 7 T. B. Mon. (Ky.) 166.

New Jersey.—*Matter of Wolfe*, 34 N. J. Eq. 223; *Dey v. Codman*, 39 N. J. Eq. 259.

New York.—*Matter of Bailey*, 47 Hun (N. Y.) 477; *Beekman's Estate*, 1 Month. L. Bul. N. Y.) 55; *Walton v. Howard*, 1 Dem. (N. Y.) 103.

North Carolina.—*Young v. Kennedy*, 95 N. Car. 265; *Hester v. Hester*, 3 Ired. Eq. (38 N. Car.) 9.

Pennsylvania.—*Merkel's Estate*, 131 Pa. St. 584, 25 W. N. C. (Pa.) 469; *Bingham's Estate*, 1 Leg. Gaz. Rep. (Pa.) 31; *Sterrett's Appeal*, 2 P. & W. (Pa.) 419.

Texas.—*Trammel v. Philleo*, 33 Tex. 395; *Johnson v. Hogan*, 37 Tex. 77.

Hawaii.—*Matter of Maikai*, 3 Hawaiian 522.

Counsel Fees Form Part of Expenses of Administration.—*Matter of Nicholson*, 1 Nev. 518; *Gammage v. Rather*, 46 Tex. 106.

Right to Employ Attorneys and Counsel.—See *supra*, this title, *Management and Care of Estate*.

"A fiduciary charged with the management of property, whether as executor or otherwise, has a right to employ counsel when necessary or proper to protect the estate, or to enable him properly to manage it, and the reasonable charges for such services will be paid out of the estate." *Kingsland v. Scudder*, 36 N. J. Eq. 284, citing *Matter of Wolfe*, 34 N. J. Eq. 223.

Allowance Not Dependent on Statutory Authority.—"Reasonable fees paid for necessary and beneficial legal services rendered to executors and administrators, in the settlement of large estates especially, though not expressly permitted by the statute, are frequently allowed by judges of probate." *Baker v. Moor*, 63 Me. 443.

Statutory Restrictions.—The *Arkansas* statute (Gould's Dig., c. 4, §§ 194-196; Gantt's Dig., §§ 195-197; Sandels & Hill's Dig., 1894, §§ 217-219) provides that where it shall become neces-

sary, in the opinion of the Probate Court, for any executor or administrator to employ an attorney to prosecute any suit brought by or against such executor or administrator, the attorney so employed shall receive as compensation for his services a certain percentage; that the same compensation may be allowed for defending suits when, in the opinion of the court, the employment of an attorney may be indispensably necessary to do justice to the estate, and that such attorney's fees shall be paid as expenses of administration; but that no attorney's fees shall be allowed any executor or administrator unless for the prosecuting or defending a suit under the direction of the court. Under this statute it has been held that "no allowance of fees shall be made unless for the prosecuting and defending suits under the direction of the court." *Tiner v. Christian*, 27 Ark. 306.

In a later case, however, it was said that "while the passage of this law has served a good purpose in restraining executors and administrators from incurring unnecessary expense in the administration of estates by employing attorneys when not actually needed, yet, in view of the exigencies often arising in the administration of estates, we are disposed to regard the statute as intended to be directory rather than as imperative and prohibitory, and we are of the opinion that whenever an emergency or overruling necessity arises in the administration of an estate, requiring the executor or administrator to act promptly, in order that the property of the estate may be protected and preserved from loss, such executor or administrator ought to act at once, without waiting for the order or direction of the Probate Court; for delays in such case might be injurious, if not disastrous to the interests of the estate." *Wassell v. Armstrong*, 35 Ark. 247. See also *Turner v. Tapscott*, 30 Ark. 312; *Reynolds v. New Orleans Canal, etc., Co.*, 30 Ark. 520; *Bell v. Welch*, 38 Ark. 139; *Tucker v. Grace*, 61 Ark. 410.

Insanity of Administrator.—The fact that the administrator was insane when he employed the attorney and paid his fees does not affect the right to credit for the amount paid for the attorney's services unless they were unnecessary. Notwithstanding the incapacity of the administrator to enter into a valid contract, said Smith, C. J., the services of the attorney not being officious, "it is but reasonable, as the trust estate had the benefit of them, that it should be charged therewith in reimbursement of the money advanced, and this upon the higher ground of the necessity of protecting the estate." *Young v. Kennedy*, 95 N. Car. 265.

Diminution of Fund for Payment of Preferred Debts.—Fees paid to counsel for services in attempting to collect debts due the estate will be allowed where the administrator acted in good faith, though the payment diminished the

The Burden of Proof as to all the facts necessary to establish the right to such credit is on the executor or administrator.¹

Selection of Attorney. — The right of the executor to select the attorney whom he would employ in the affairs of the estate cannot be controlled, even by the will of the decedent,² but it has been held that in case of the employment of the law partners of the executor or administrator, when he is himself a lawyer, he is not entitled to credit for the fees paid.³ It is also held by some authorities that credit will not be allowed for legal services rendered by the executor or administrator, but the rule in this particular is not uniform.⁴

Prudence and Good Faith in incurring the expense are essential to the right to credit. Therefore credit will not be allowed if litigation was improperly instituted by the executor or administrator,⁵ or was the result of his neglect

fund for the payment of preferred creditors, because the duty of the executor or administrator is not to any one class of creditors, but to all. *France's Estate*, 16 W. N. C. (Pa.) 350.

Fees Exceeding Amount Allowed by Law. — An executor or administrator ought to be credited in his administration account for fees paid to counsel, notwithstanding those fees were more than the law allowed. *Lindsay v. Howerton*, 2 Hen. & M. (Va.) 9.

Discretion of Court. — The allowance of counsel fees to an executor is a matter within the discretion of the judge before whom the account is settled; and the refusal of a judge, at an early stage of a cause, to make such allowance cannot control the judgment of the judge who hears the cause finally. *Brooks v. Brooks*, 12 S. Car. 463.

Effect of Bequest to Executor. — In *Plater v. Groome*, 5 Md. 96, the testatrix bequeathed to her executor, in further compensation for his trouble, and as a special and additional legacy to him, "all moneys, debts, bonds, notes, and other evidences of debt" in her possession at the time of her death, "he, however, first paying therefrom and thereout all debts of every kind" against her or her estate, and it was held that the counsel fees incurred in litigation relating to the probate of a codicil to the will should be paid out of the fund thus given to the executor. The court said: "The language employed by the testatrix to express her intention in regard to the application of this fund is very emphatic, for out of it all debts of every kind against her or her estate are to be first paid before the legatee is to have any portion thereof. Such a provision, we think, makes the fund as much applicable to the discharge of debts and costs attendant upon the administration as would be any fund directed to be appropriated toward the payment of debts without a bequest of the balance thereof to any particular legatee, or as would be any general residuum." See also *infra*, this section and subsection, *Amount of Allowance*.

1. Burden of Proof. — *Miller v. Simpson*, (Ky. 1886) 2 S. W. Rep. 171; *Matter of Hosford*, 27 N. Y. App. Div. 427; *Matter of Reeves*, 48 Hun (N. Y.) 606, 21 Abb. N. Cas. (N. Y.) 289; *St. John v. McKee*, 2 Dem. (N. Y.) 236; *In re Archer*, (Surrogate Ct.) 23 N. Y. Supp. 1041; *Journault v. Ferris*, 2 Dem. (N. Y.) 320; *Willson v. Willson*, 2 Dem. (N. Y.) 462; *Raymond v. Dayton*, 4 Dem. (N. Y.) 333; *In re Casey*, (Supreme Ct.) 6 N. Y. Supp. 608; *Johnson v. Henagan*, 11 S. Car. 93. See also *Billington's Appeal*, 3 Rawle (Pa.) 48.

As to proof of the value of the services, see *infra*, this section and subsection, *Amount of Allowance*.

2. Designation of Attorney by Will Not Binding on Executor. — *Young v. Alexander*, 16 Lea (Tenn.) 108.

3. Employment of Law Partner of Executor or Administrator. — *Burge v. Button*, 2 Hare 373, 12 L. J. Ch. N. S. 368; *Parker v. Day*, 155 N. Y. 383.

4. Legal Services Rendered by Executor or Administrator. — An application of the principle that credit will be allowed for counsel fees only when there has been an actual payment would seem to preclude an allowance for legal services rendered by an executor or administrator who is also a lawyer. But the right to an allowance in such case involves also the question of the right to compensation, and will be considered in another part of this article. See *infra*, this section, *Compensation of Executors and Administrators*.

5. Prudence and Good Faith — Alabama. — *Green v. Fagan*, 15 Ala. 335; *Morrow v. Allison*, 39 Ala. 70.

Connecticut. — *Robbins v. Wolcott*, 27 Conn. 234.

Illinois. — *Switzer v. Kee*, 69 Ill. App. 499. *New Jersey.* — *Aldridge v. McClelland*, 36 N. J. Eq. 288.

Pennsylvania. — *Bradley's Estate*, 11 Phila. (Pa.) 87, 32 Leg. Int. (Pa.) 257.

No allowance will be made for attorneys' fees paid by an executor or administrator when he engages in useless, unnecessary, or vexatious litigation concerning the estate in his hands, and more especially when such litigation is with those who are lawfully entitled to the funds he withholds. *Bendall v. Bendall*, 24 Ala. 295, 60 Am. Dec. 469.

But if an action is commenced in good faith and on sufficient cause, credit will be allowed for counsel fees. This rule was applied in a case where a bill was filed by the heirs and distributees to enjoin a suit by the administrator to sell the decedent's land for the payment of debts, and credit was allowed for counsel fees in the suit to sell the land, though that relief was obtained on a cross-bill filed by the administrator in the suit for the injunction. *Johnson v. Tomlinson*, 1 Shannon Tenn. Cas. 396.

Correction of Mistakes. — In *Bartlett v. Fitz*, 59 N. H. 502, it was held that where the proceedings to set off dower and homestead had, under the statute, at the instance of the administrator, were defective, and the defect was

or improper conduct.¹

Benefit to the Estate, actual or intended, is generally necessary to charge the estate with an expenditure of this character. Hence no allowance can be made for counsel fees paid on account of services which were not rendered for the benefit of the estate, or were not necessary under the circumstances,² or which were rendered for the individual benefit of the executor or administrator,³ or for the beneficiaries of the estate,⁴ or were otherwise foreign to the administration.⁵ But it is not necessary that the services should have actually

not due to any fault of the administrator, he was entitled to credit for fees paid to counsel for having mistakes corrected so that he could safely convey the residue of the land which he had sold under a license from the Probate Court.

Disregarding Advice of Counsel.—No allowance will be made for services in investigating a claim and preparing to sue on it, where the suit was not brought and the claim was lost, and the administrator shows no good reason for not following the advice of the attorney. *Munden v. Bailey*, 70 Ala. 63.

Resisting Obviously Just Claims against the estate is not an exercise of such prudence and good faith as will entitle an executor to an allowance for counsel fees. *Watt v. Downs*, 36 Tex. 116.

Necessity of Employment.—No allowance will be made for the fees of an attorney unless a proper regard for the interests of the estate rendered his employment necessary. *Matter of Peyser*, 5 Dem. (N. Y.) 244.

Thus, the person named as executor in a will is entitled to be reimbursed for outlays made in good faith in funeral expenses and in taking care of and preserving the estate, but the employment of counsel to prosecute an action in equity merely to obtain them is unnecessary, because the court may allow them at the settlement, and therefore he is not entitled to credit for the fees of an attorney employed for such purpose. *Phillips v. Phillips*, 7 Ky. L. Rep. 679.

If Litigation Is Continued After an Adverse Decision, expenditures for attorneys' fees incurred therein will be disallowed unless the administrator has reason for believing that the decision is erroneous and that the result of such further litigation would benefit the estate. *Gross v. Moore*, 14 N. Y. App. Div. 353.

1. Litigation Resulting from Fault of Executor or Administrator.—*Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93; *Schuck's Estate*, 30 Pittsb. Leg. J. (Pa.) 431.

Illustrations.—In *Matter of Holbert*, 48 Cal. 627, it was held that where the will directed the executor to keep the funds of the estate invested in securities of a certain character, and he disobeyed the direction, he should not be allowed for attorneys' fees in litigation resulting from such dereliction.

In *Bendall v. Bendall*, 24 Ala. 295, 60 Am. Dec. 469, an administrator was refused credit for the fees of counsel in a suit brought to enjoin the heirs from prosecuting a proceeding in the Probate Court to compel a partial settlement, where the suit was dismissed for want of equity.

Mutual Fault.—In a case where the litigation resulted from the mutual fault of the executor and the beneficiaries of the estate, the

executor was allowed credit for one-half of the amount paid by him for counsel and he was required to pay the other half personally. *Smith v. Kennard*, 38 Ala. 695.

In another case no credit was allowed where a part of the litigation was the result of the administrator's fault, but the vouchers presented by him were for the entire services of counsel in the suit. *Pearson v. Darrington*, 32 Ala. 227.

In *Polhemus v. Middleton*, 37 N. J. Eq. 240, an administrator was allowed credit for fees paid to counsel for defending an action brought to recover property which the administrator had sold with notice of the plaintiff's claim.

2. Unnecessary Services.—*Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93.

Services Not for Benefit of Estate.—In *Brandson v. Hoggatt*, 32 Miss. 335, it was held that an executor in Mississippi should not have credit for money paid by him to an attorney for drafting a release of the legatees' interest in real estate in Louisiana, as a condition to the enjoyment of the legacies, because that was not a part of the duty of the executor to be charged against the estate, but should have been done by the parties for whose benefit it was done.

Attendance of Counsel at Sale of Land.—In *McGregor's Estate*, 131 Pa. St. 359, a payment to counsel for attending a sale of land by the executor was disallowed in the absence of a showing that such attendance was necessary to the interests of the estate.

Services Necessitated by Neglect of Attorney.—In *Matter of Collyer*, 1 Connoly (N. Y.) 546, the administrator was denied credit for three hundred and fifty dollars paid to his attorney for services rendered in obtaining leave to amend the answer in an action against the estate, including an appeal from an order denying the motion, the purpose of the amendment being to plead the statute of limitations, where the attorney had been remiss in not pleading the statute in his answer.

3. Counsel Fees Paid for Services to Executor or Administrator Personally.—See *infra*, this section and subsection, *Services Affecting Personal Interests of Executor or Administrator*.

4. Counsel Fees Paid for Services to Beneficiaries of Estate.—See *infra*, this section, *Services Affecting Interests of Individual Beneficiaries*.

5. Services in Regard to Execution of Administration Bond.—An administrator cannot be allowed credit for fees paid to counsel for services in regard to the execution of his bond. *Matter of Collyer*, 1 Connoly (N. Y.) 546.

Proceeding for Final Distribution.—An executor is not entitled to credit for money paid to counsel for services in a proceeding for final distribution after his account had been con-

resulted beneficially to the estate. If litigation is undertaken in good faith and the executor or administrator is not guilty of negligence in ascertaining the facts and communicating them to his counsel, credit will be allowed for the counsel fees paid, though the result of the litigation was adverse to the estate.¹

Actual Payment by the executor or administrator of the charge of counsel is generally held to be a prerequisite of the allowance of credit therefor.²

(bb) *Matters as to Which Allowance May Be Made* — aaa. **Probate of Will and Grant of Letters.** — There is a difference of opinion as to whether an executor is entitled to credit for payments to counsel employed by him for the purposes of litigation arising over the probate of the will. It is held in some jurisdictions that the duty of an executor to procure the admission of the will to probate authorized him to employ counsel when the probate is contested and to charge the estate with expense incurred,³ while in other jurisdictions it is held that it is not the duty of the executor to defend the will, and that therefore he cannot charge the

firm, because he then held the balance merely as a stakeholder and not as executor. *Bracken's Estate*, 138 Pa. St. 104.

Services in Regard to Inventory. — No allowance can be made for money paid to counsel for services and advice in regard to the inventory, because the employment of counsel in that matter is considered unnecessary. *Pullman v. Willets*, 4 Dem. (N. Y.) 536; *Matter of Collyer*, 1 Connoly (N. Y.) 546.

Prosecuting Decedent's Murderer. — No allowance can be made for fees paid to counsel employed to prosecute a person charged with the murder of the intestate. *Lusk v. Anderson*, 1 Metc. (Ky.) 429.

Vindication of the Decedent's Character is not a matter in regard to which the administrator may employ counsel at the expense of the estate. *Woodard v. Woodard*, 36 S. Car. 118.

1. Unsuccessful Litigation — Good Faith and Diligence. — *Holman v. Sims*, 39 Ala. 709; *Polhemus v. Middleton*, 37 N. J. Eq. 240; *Ketler's Estate*, 14 W. N. C. (Pa.) 76; *Smith's Estate*, 11 Pa. Co. Ct. Rep. 448.

Failure to Recover a Judgment or to appeal from an adverse decision in an action by an administrator is not sufficient to deprive him of his right to fees paid to his counsel. *Moore v. Randolph*, 70 Ala. 575.

2. Credit for Counsel Fees Not Allowed Until Actual Payment — Alabama. — *Modawell v. Holmes*, 40 Ala. 391; *Bates v. Vary*, 40 Ala. 421; *Ditmar v. Bogle*, 53 Ala. 169; *Teague v. Corbitt*, 57 Ala. 529.

Louisiana. — *Holbert's Succession*, 3 La. Ann. 436; *Macarty's Succession*, 3 La. Ann. 517.

Massachusetts. — *Thacher v. Dunham*, 5 Gray (Mass.) 26.

Michigan. — *Jackson v. Leech*, 113 Mich. 391 (dissenting opinion of Hooker, J.)

New York. — *Clock v. Chadeagne*, 10 Hun (N. Y.) 97; *Matter of Spooner*, 86 Hun (N. Y.) 9; *Heather's Estate*, 15 Abb. N. Cas. (N. Y. Surrogate Ct.) 194, *sub nom.* *Shields v. Sullivan*, 3 Dem. (N. Y.) 296; *Matter of Van Nostrand*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 396; *Matter of O'Brien*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 136, *distinguishing* *Douglas v. Yost*, 64 Hun (N. Y.) 155; *In re Stephens*, (Supreme Ct.) 2 N. Y. Supp. 36.

Pennsylvania. — *Donnelly's Estate*, 3 Phila. (Pa.) 18, 15 Leg. Int. (Pa.) 4.

Notes Given by an Executor to His Counsel for services rendered in behalf of the estate do not constitute payment so as to entitle the executor to credit for the amount. *Matter of Bailey*, 47 Hun (N. Y.) 477.

An Exception to This Rule requiring actual payment before credit will be given exists in *California*, where it is held that it is not necessary that an administrator should have paid his attorney for legal services before an allowance can be made for their value. *Pennie v. Roach*, 94 Cal. 515.

3. Contest of Will — Rule Allowing Counsel Fees — Alabama. — *Raines v. Raines*, 51 Ala. 237.

Illinois. — *Shaw v. Camp*, 56 Ill. App. 23.

Kentucky. — *Phillips v. Phillips*, 81 Ky. 328, 5 Ky. L. Rep. 270; *Carter v. Carter*, 11 Ky. L. Rep. 518, 10 Ky. L. Rep. 355; *Miller v. Simpson*, (Ky. 1886) 2 S. W. Rep. 171.

Louisiana. — *Heffner's Succession*, 49 La. Ann. 407.

New York. — *Douglas v. Yost*, 28 Abb. N. Cas. (N. Y. Supreme Ct.) 370. *Compare* *Matter of Black*, 6 Dem. (N. Y.) 331.

Unsuccessful Defense. — In *Bratney v. Curry*, 33 Ind. 399, it was held that credit would be allowed for fees of counsel employed to resist a contest of the will, even though the decision was against the validity of the will.

Proceedings on Caveat. — In *Gorton v. Perkins*, 63 Md. 589, it was said to be "well settled that when a caveat is filed after a will has been admitted to probate and letters testamentary have been granted, the executor is entitled to an allowance for counsel fees, because it is his duty under such circumstances to defend the will thereby assailed." See also *Glass v. Ramsay*, 9 Gill (Md.) 456; *Compton v. Barnes*, 4 Gill (Md.) 55, 45 Am. Dec. 115.

Fees of Counsel Employed by Legatee. — If the counsel was not employed by the executor, but by a legatee, credit will not be allowed. *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590. See also *Taylor v. Minor*, 90 Ky. 544.

If the Executor Is Also a Beneficiary under the will, the fees of counsel employed to uphold the will against a contest may be apportioned between the estate and the executor individually. *Roll v. Mason*, 9 Ind. App. 651.

estate with the fees of counsel employed by him for that purpose; ¹ but credit will ordinarily be allowed if he acted in good faith and the estate was benefited by the proceeding.²

Contest of Will by Administrator. — An administrator is not entitled to credit for fees paid to counsel employed by him to contest the probate of a will, because such contest is no part of his duty, and affects only his right to administer.³

Procuring Letters and Litigating Right to Administer. — There is also a difference of opinion as to whether fees paid to counsel for services in procuring letters of administration are allowable as a credit in the administrator's account. Some authorities, by analogy to the practice of allowing executors for counsel fees expended in the successful defense of a will, hold that a like credit will be allowed to an administrator where his right to the administration is established after a contest, but not, as a general rule, if he fails to establish his right.⁴ On the other hand, it is held that the employment of counsel for the mere purpose of procuring letters of administration is a contract made in advance of any authority to deal with the estate, and that credit cannot be allowed for the

1. *Andrews v. His Administrators*, 7 Ohio St. 143; *Mumper's Appeal*, 3 W. & S. (Pa.) 441; *Brown v. Vinyard*, Bailey Eq. (S. Car.) 460.

2. **Benefit to Estate.** — In *Scott's Estate*, 9 W. & S. (Pa.) 98, the testator's will ordered that "the remainder of his real and personal estate be applied to the education of poor children of all denominations to read the Bible, the best of all books." The executors were empowered "to sell the real and personal property, and apply the same to the use above mentioned." The validity of the will was assailed, and the executor made an agreement with his counsel, by which he was to have one-fourth of the estate, if the will was established, and nothing if it was defeated. He succeeded, and the amount was paid to him. Afterwards, on settlement of the executor's account, this item was objected to. The proof showed that the services of the counsel could not have been obtained upon more favorable terms, if his fee was contingent. The court said: "The executor litigated, not for his own interest, but for the interest of the party who got the whole estate by the litigation, and now refuses to reimburse him his expenses. Devises might just as reasonably object to allow him the costs of an ejectment for recovering their land. The case is too plain for argument." See also *Yerkes's Appeal*, 99 Pa. St. 401; *Sheetz's Appeal*, 100 Pa. St. 197; *Geddis's Appeal*, 9 Watts (Pa.) 284.

Unsuccessful Defense of Forged Will. — In *Sheetz's Appeal*, 100 Pa. St. 199, an executor was refused credit for counsel fees where he unsuccessfully defended a forged will. But in *Whitaker's Estate*, 38 Leg. Int. (Pa.) 402, an allowance was made to an executor for expense incurred in resisting an attempt to set up a later forged will.

3. **Contest of Will by Administrator.** — *Edelen v. Edelen*, 11 Md. 415; *Dalrymple v. Gamble*, 68 Md. 156; *Edwards v. Ela*, 5 Allen (Mass.) 87.

An Administrator Pendente Lite has nothing to do, as such, with a contest for the establishment of the will, and cannot charge in his account fees paid to counsel employed by him in the proceeding. *Dietrich's Appeal*, 2 Watts (Pa.) 332.

4. **Application for Letters of Administration — Credit for Counsel Fees Allowed.** — *Ex p. Young*,

8 Gill (Md.) 286; *Matter of Van Nostrand*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 396.

Reversal of Order Granting Letters. — In *Barton's Estate*, 55 Cal. 87, it was held that an appeal from an order granting letters of administration involved only the question who should administer and thus receive the commissions, in which the estate was not at all interested, and that, therefore, where the order was reversed and letters were granted to the appellant, the superseded administrator was not entitled to an allowance for the attorney's fees expended by him in the contest.

Contest Between Executors. — Where there is a contest between executors, one of whom opposes the qualification of the others, the expenses of the contest are not chargeable against the estate. *Millenovich's Estate*, 5 Nev. 161.

Resisting Proceeding to Revoke Letters. — In *Matter of Jones*, 24 N. Y. Wkly. Dig. 333, it was held that where there was no finding of bad faith on the part of an administrator in resisting a proceeding in which his letters were revoked, an allowance would be made for the services of his counsel in the proceeding. But see *Matter of O'Brien*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 136, in which Surrogate Lansing, besides criticising the case of *Matter of Jones*, 24 N. Y. Wkly. Dig. 333, as "not found in any of the authorized reports," said: "We do not regard this case as an authority for the doctrine that where an executor has been guilty of misconduct in the execution of his office, and has been removed therefrom upon that ground, he can charge the costs of his unsuccessful defense upon the estate, since that question, according to the opinion of a majority of the court, was not in the case. But if the case in any possible view can be deemed an authority for such a proposition, it is so directly in conflict with right reason and with the established principles of equity applicable to the relation of trusts and trustees that I should unhesitatingly decline to follow it, especially in view of the fact that there are other decisions in the same court and in the Court of Appeals holding in unmistakable terms that only those expenses of counsel incurred in the interest of the estate, and not of the executor personally, should be paid by the estate."

fees paid to the counsel so employed.¹

bbb. Advice as to Duties. — In many cases it is necessary for an executor or administrator to employ counsel to advise him as to his duties and assist him in the discharge thereof, in order to protect both the estate and himself. This he always has the right to do, and the fees paid by him for such services are chargeable against the estate.²

ccc. Suits to Construe Will. — If there is any ambiguity as to the terms of the will, so that the executor or administrator with the will annexed cannot safely proceed under it, he may institute a proceeding to obtain a judicial construction of it, and the fees of his counsel in such proceeding will be allowed as expenses of administration; and if such a proceeding is instituted by the beneficiaries under the will, the executor or administrator with the will annexed may employ counsel to secure a construction which will effectuate the testator's intentions, and an allowance will be made for the expense so incurred.³

ddd. Prosecuting Suits on Behalf of Estate. — The prosecution of legal proceedings when necessary to collect debts or otherwise to enforce or secure the rights of the estate is a well-settled duty of the executor or administrator, and for this purpose he is entitled to have the services of counsel at the expense of the estate; nor is his right to credit for such expenditures affected by the fact

1. **Services of Counsel on Application for Letters.** — *Matter of Simmons*, 43 Cal. 543; *Wilbur v. Wilbur*, 17 Wash. 683. See also *Matter of Collyer*, 1 Connoly (N. Y.) 546.

In *Matter of Nicholson*, 1 Nev. 518, the court said: "If a person employs an attorney to procure his appointment as an administrator, that should not be a charge against the estate. The presumption is, he seeks the appointment because of some expected benefit or advantage to himself. The estate should no more pay his attorney than it should pay the attorney of an unsuccessful applicant for the same position."

2. **Advice and Assistance of Counsel.** — An executor or administrator may, as a rule, pay a reasonable sum to counsel to advise and aid him in the trust, graduated by the value of the estate and the character of questions likely to come up for solution, and for such expenditures he should be allowed a credit in his account.

Alabama — *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598; *Munden v. Bailey*, 70 Ala. 63; *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93.

Florida. — *Eppliager v. Canepa*, 20 Fla. 262, citing *McHardy v. McHardy*, 7 Fla. 301.

New Jersey. — *Hurlbut v. Hutton*, 44 N. J. Eq. 302.

New York. — *Matter of White*, 6 Dem. (N. Y.) 375.

North Carolina. — *Young v. Kennedy*, 95 N. Car. 265.

The duties which an executor or administrator performs "are sometimes delicate ones, and he may incur reasonable expenses in obtaining counsel, that he may himself pursue the proper line of duty. Professional aid, honestly and reasonably invoked for either of these objects, is not only permissible, it is praiseworthy." *Per Stone, J.*, in *Munden v. Bailey*, 70 Ala. 63.

Even After the Will Has Been Set Aside the court may allow reasonable attorney's fees to an executor where he had employed counsel in

the management of the estate. *Roll v. Mason*, 9 Ind. App. 651; *Nave v. Salmon*, 51 Ind. 159.

Obtaining Leave of the Probate Court to Erect a Monument on the lot where the decedent was buried is a matter as to which the administrator may employ counsel, and for the expense of such legal services he may have credit in his account. *Dudley v. Sanborn*, 159 Mass. 185.

Effect of Injunction Against Acting as Executor. — Charges for services rendered to the executors in the management of the estate or the conduct of its business while they were enjoined from transacting any business for the estate should not be allowed, since the charges were not for services to said executors to enable them to perform any acts or duties as executors of the estate. *Matter of O'Brien*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 136.

Advising Performance of Unlawful Acts. — In *Re Kalbfell's Estate*, 26 Pittsb. Leg. J. N. S. (Pa.) 394, it was held that no allowance would be made to an executor for fees paid to counsel for services in regard to the unlawful continuance of the testator's business.

Contrary to the Weight of Authority is the case of *Satterwhite v. Littlefield*, 13 Smed. & M. (Miss.) 302, in which it was held that no allowance could be made in *Mississippi* to an executor or administrator for money paid to counsel to advise him as to the performance of his duties, because such expenditures were intended to be covered by the commissions of not less than one per cent. nor more than seven per cent. allowed him by statute.

3. **Allowance of Counsel Fees in Suit by Executor or Administrator to Construe Will.** — *In re Simons*, 55 Conn. 239; *Beatty v. Cory Universal Soc.*, 39 N. J. Eq. 452; *Irving v. De Kay*, 9 Paige (N. Y.) 521; *Wetmore v. Parker*, 52 N. Y. 451; *Matter of Delaplaine*, 1 Connoly (N. Y.) 1.

Allowance of Counsel Fees in Suit by Beneficiaries to Construe Will. — *Matter of Hutchison*, 84 Hun (N. Y.) 563; *Matter of Washbon*, 60 Hun

that the litigation results adversely to the estate, if he acted in good faith and with due care and prudence.¹

ccc. **Resisting Claims Against Estate.** — It is also proper to employ attorneys and counsel at the expense of the estate to defend suits and actions which have been brought against it, and to examine the legality of claims presented against it, and to resist unjust or unfounded claims.²

fff. **Resisting Charges Against Self.** — No credit, however, can be allowed for fees of counsel paid by an executor or administrator on account of services rendered in contesting a proper charge against him; or defending a suit brought against him to recover or to secure the trust fund, whenever it appears that the complainant was justifiable in bringing the suit; or to compel him to perform his duty when he is in default.³ But if charges of misfeasance are found to be

(N. Y.) 576, 38 N. Y. St. Rep. 619; Bryson v. Nickols, 2 Hill Eq. (S. Car.) 113.

1. **Allowance of Counsel Fees in Suits on Behalf of Estate** — *Alabama*. — Pinckard v. Pinckard, 24 Ala. 250; Moore v. Randolph, 70 Ala. 575. *Arkansas*. — Turner v. Tapscott, 30 Ark. 312. *Connecticut*. — In re Simons, 55 Conn. 239. *Indiana*. — Roll v. Mason, 9 Ind. App. 651. *New York*. — Spencer v. Strait, 40 Hun (N. Y.) 463.

"The Duty to Collect necessarily involves the right to use all requisite means. * * * Collections cannot be enforced without suit, and suits cannot be brought without the aid of counsel and payment of the ordinary expenses; nor is the executor bound to pay these out of his own pocket, or to make himself personally liable therefor. Of course he must not act recklessly or bring suit for desperate claims or against hopelessly insolvent debtors; but, as in matters of this kind he cannot be expected to be able to judge for himself, if he act in good faith under the advice of counsel he will be protected." *France's Estate*, 16 W. N. C. (Pa.) 350.

Unsuccessful Action to Collect Assets. — An executor or administrator will be allowed counsel fees in an unsuccessful suit to collect assets of the estate, if he acted prudently and in good faith in suing. *Keller's Estate*, 14 W. N. C. (Pa.) 76; *Smith's Estate*, 11 Pa. Co. Ct. Rep. 448.

2. **Allowance of Counsel Fees for Defending Estate** — *Alabama*. — Green v. Fagan, 15 Ala. 335; Pinckard v. Pinckard, 24 Ala. 250.

California. — Matter of Simmons, 43 Cal. 543.

Connecticut. — In re Simons, 55 Conn. 239.

Delaware. — Davis v. Rawlins, 2 Harr. (Del.) 125.

Indiana. — Roll v. Mason, 9 Ind. App. 651.

Louisiana. — Stafford v. McIntosh, 39 La. Ann. 836.

Nevada. — Lucich v. Medin, 3 Nev. 93, 93 Am. Dec. 376.

New Jersey. — Polhemus v. Middleton, 37 N. J. Eq. 240.

New York. — Matter of Van Buren, 19 Misc. Rep. (N. Y. Surrogate Ct.) 373.

North Carolina. — Poindexter v. Gibson, 1 Jones Eq. (54 N. Car.) 44.

Pennsylvania. — Ammon's Appeal, 31 Pa. St. 311.

South Carolina. — Warden v. Burts, 2 McCord Eq. (S. Car.) 73.

Watching and Protecting the Interest of the Estate on Claims of creditors brought into the

master's office in an administration suit is a proper purpose for which to employ a solicitor, and credit will be allowed to the administrator for compensation paid by him to the solicitor for such services. *In re Babcock*, 8 Grant's Ch. (U. C.) 409.

Examining Validity of Claims Presented. — The employment of attorneys to examine a claim against the estate and to defend the estate if they come to the conclusion that it is improper is a just and necessary expenditure. *Matter of Van Buren*, 19 Misc. Rep. (N. Y. Surrogate Ct.) 373.

Defending Administrator's Title. — A fee paid by an administrator to a lawyer for defending the title of the administrator as such to property will be deemed money necessarily expended in the course of administration, and the administrator will be allowed credit for it. *Branham v. Com.*, 7 J. J. Marsh. (Ky.) 190.

The Defense of a Foreclosure Action in order to prevent the recovery of a deficiency judgment against the estate has been held to justify the allowance of credit for the fees of the attorney therein. *Matter of Van Buren*, 19 Misc. Rep. (N. Y. Surrogate Ct.) 373.

Resisting Obviously Just Claims against the estate is improper, and extravagant counsel fees therefor should not be allowed. *Watts v. Downs*, 36 Tex. 116.

In *Tate v. Tate*, 75 Va. 522, the executors were denied credit for the fees of counsel employed to defend claims against the estate as to which the executors afterwards confessed judgment, because if they were justified in confessing judgment, it was improper for them to employ counsel to resist the claims.

A Special Administrator appointed to defend a claim against the estate will not be allowed credit for counsel fees incurred on an appeal from an order allowing the claim, unless it appears that in taking the appeal he acted with reasonable prudence and in good faith. *Switzer v. Kee*, 69 Ill. App. 499.

3. **Contesting Proper Charges.** — *Anderson v. Anderson*, 37 Ala. 683; *Moses v. Moses*, 50 Ga. 9; *Beatty v. Cory Universalist Soc.*, 39 N. J. Eq. 452; *Fluck v. Lake*, 54 N. J. Eq. 638.

Improper Contests with Creditors and Distributees. — An administrator is not entitled to credit for payments for services of counsel in improper contests with creditors or distributees. If by his own conduct he necessitates the contest, he must bear the costs personally. *Pryor v. Davis*, 109 Ala. 117; *Harris v. Parker*, 41 Ala. 604; *Pinckard v. Pinckard*, 24 Ala. 250.

false the court will make an allowance for fees paid by the executor or administrator for services of counsel in defending him against such charges.¹

ggg. Services Affecting Personal Interests of Executor or Administrator. — If the services of counsel employed by an executor or administrator were rendered in reference to his personal interests alone as a beneficiary or otherwise, no allowance will be made for the fees paid therefor.²

hhh. Services Affecting Interests of Individual Beneficiaries. — Within the principle stated above that credit will not be allowed for the fees of counsel paid by the executor or administrator unless the services of the counsel were rendered for the benefit of the estate, no allowance will be made for the fees of counsel in litigation between beneficiaries of the estate or for services rendered to any individual beneficiary.³

Actions for Misconduct in Office. — In *Matter of Bailey*, 47 Hun (N. Y.) 477, it was held that credit would not be allowed for attorney's fees where the services rendered by the attorney were not for the protection or benefit of the estate, but were solely for the benefit of the executor, in actions brought against him for misconduct in the office of executor, though he succeeded in the litigation.

Suit to Recover or Secure Trust Fund. — *Lilly v. Griffin*, 71 Ga. 535.

Compelling Executor to Give Additional Security. — In *Matter of O'Brien*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 136, it was held that an executor was not entitled to credit for attorney's fees paid by him for services in unnecessarily resisting a proceeding to compel him to give additional security.

Action to Compel Distribution. — "An administrator should not be allowed credit for fees paid to counsel in the defense of an action to compel him to a final account with the next of kin, when he unreasonably, wilfully, and through dishonest and fraudulent motives, refused to account to them. This is so because, in such case, the purpose is not to promote and secure the just administration, final settlement, and distribution of the estate, but to promote selfish and sinister purposes of the administrator, personally. His purpose is not to promote, but to defeat, the right of those justly entitled to have the estate." *Allen v. Royster*, 107 N. Car. 278.

Resisting Premature Application to Compel Final Settlement. — Credit will be allowed for reasonable counsel fees in defending an application to compel a final settlement, made before the expiration of the time allowed therefor by law. *Williamson v. Mason*, 23 Ala. 488. See also *infra*, this section and subsection, *Preparation and Settlement of Accounts*.

1. Resisting False Charges — Credit Allowed for Attorney's Fees. — *Matter of Levinson*, 108 Cal. 450.

2. Legal Services for Exclusive Benefit of Executor or Administrator — Alabama. — *Anderson v. Anderson*, 37 Ala. 683; *Mims v. Mims*, 39 Ala. 716.

California. — *Chinmark's Estate*, Myr. Prob. (Cal.) 128.

Kentucky. — *Wakefield v. Gilleland*, 13 Ky. L. Rep. 845 (Ky. 1892), 18 S. W. Rep. 768; *Robbins v. Robbins*, 8 Ky. L. Rep. 54; *Wood v. Goff*, 7 Bush (Ky.) 65.

Pennsylvania. — *Jewell's Estate*, 11 Phila. (Pa.) 73, 32 Leg. Int. (Pa.) 169; *Stephen's Ad-*

peal, 56 Pa. St. 409; *Withers's Appeal*, 13 Pa. St. 582.

South Carolina. — *Villard v. Robert*, 1 Strobh. Eq. (S. Car.) 393.

Washington. — *Wilbur v. Wilbur*, 17 Wash. 683.

Illustrations — Contest of Claim by Executor Against Estate. — Thus, credit will not be allowed where the counsel fees were incurred in a contest as to the validity of a claim in favor of the executor against the estate. *Bell v. Funk*, 75 Md. 368.

Defending Suit to Reduce Bequest. — In *Hasley's Succession*, 27 La. Ann. 589, it was held that where the testator bequeathed the usufruct of his entire estate to the executrix, though he left forced heirs, and they brought suit to reduce such legacy to the amount which the testator had a legal right to dispose of under the circumstances, she was not entitled to credit for fees paid to counsel for defending the suit.

Defending Title to Land Conveyed by Testator. — An executor is not entitled to credit for counsel fees for successfully defending an action of ejectment brought against him as an individual after the death of the testator to recover land conveyed to the executor by the testator with general warranty, where no paramount title was shown or breach of warranty established. *Groff's Appeal*, 3 Penny. (Pa.) 245.

3. Litigation Between Beneficiaries. — *Matter of Marrey*, 65 Cal. 287; *In re Simons*, 55 Conn. 239; *Hughes's Succession*, 14 La. Ann. 876.

In *Roach v. Coffey*, 73 Cal. 281, the court said: "We think that it is the settled law of this state that an administrator cannot represent either side of a contest between heirs, devisees, or legatees contesting for the distribution of an estate. He cannot litigate the claims of one set against the other. His duty is to preserve the estate and distribute it as the court shall direct." *Citing Matter of Wright*, 49 Cal. 550; *Bates v. Ryberg*, 40 Cal. 465; *Matter of Marrey*, 65 Cal. 287.

Prosecuting Widow's Right of Dower. — Counsel fees paid for prosecuting the right of dower of the widow are personal to herself, and credit therefor is not allowable in the administrator's account. *Pinckard v. Pinckard*, 24 Ala. 250. See also *Matter of Smith*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 260.

Performance of Condition Annexed to Legacy. — Where property in Mississippi was given by the will to certain persons on condition that they would release by deed all their interest in

iii. **Preparation and Settlement of Accounts.** — The rule that an executor or administrator is entitled to the advice and assistance of counsel in the performance of his duties applies also to the preparation and settlement of his accounts; and it is accordingly held that when the employment of counsel is necessary in this particular, he is entitled to credit for the reasonable fees for the expense thereof including appeals from the order or decree of settlement.¹ But no

the testator's property in Louisiana, it was held that it was not the duty of the executor to have the release drawn, and therefore he was not allowed credit for the charge of an attorney employed by him to draw it. *Brandon v. Hoggatt*, 32 Miss. 335.

Litigation Respecting Particular Fund. — Where there has been litigation respecting a particular fund between the specific legatee, the residuary legatee, and the heir at law, the attorney's fees are chargeable against the fund in question and not against the estate generally. *Johnson v. Holifield*, 82 Ala. 123.

Counsel for Guardian ad Litem of Infants. — The fees of the counsel of the guardian *ad litem* of infant heirs is a proper charge against them only, and cannot be allowed as a credit in the account of the administrator. *Pinckard v. Pinckard*, 24 Ala. 250. But see *contra*, *Ford v. Ford*, 88 Wis. 122.

If the Services Were Rendered Partly in the Interests of the Beneficiaries and partly in the interest of the estate, the disbursements therefor will be disallowed so far as they were in the interests of the beneficiaries. *Matter of Smith*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 269; *Reesers' Appeal*, 100 Pa. St. 80.

Resisting Claim of Pretermitted Heir. — An allowance in the account for fees paid by an executor to an attorney for services in resisting the claim of a pretermitted heir cannot be granted, because an executor cannot represent either side in a contest respecting the distribution of the estate. *Matter of Jessup*, 80 Cal. 625.

Settlement with Some of Heirs. — Legal services in obtaining a settlement with some of the heirs for the benefit of others are not chargeable against the estate, but only against those benefited. *McGregor's Estate*, 131 Pa. St. 359.

1. Allowance of Counsel Fees for Services on Settlement of Account — Alabama. — *Pickens v. Pickens*, 35 Ala. 442; *Pryor v. Davis*, 109 Ala. 117.

Florida. — *Sanderson v. Sanderson*, 20 Fla. 292.

Missouri. — *Jacobs v. Jacobs*, 99 Mo. 427; *Reilly v. Reilly*, (Mo. 1896) 34 S. W. Rep. 847.

New York. — *Matter of Kenworthy*, 63 Hun (N. Y.) 165; *Matter of Hodgman*, 69 Hun (N. Y.) 484; *Hannahs v. Hannahs*, 68 N. Y. 610.

Pennsylvania. — *Greenwalt's Estate*, 9 Lanc. Bar (Pa.) 50; *Leow's Estate*, 6 W. N. C. (Pa.) 333; *Rankin's Estate*, 9 W. N. C. (Pa.) 407; *Martin's Estate*, 39 Leg. Int. (Pa.) 33, 15 Phila. (Pa.) 514. See also *Fox's Appeal*, 125 Pa. St. 518.

The General Rule is that executors who are obliged to employ counsel in the settlement of their accounts shall be allowed to charge to the estate the reasonable fees of counsel, and mere neglect to be prepared to render a final account at an earlier day cannot be regarded as sufficient of itself to constitute an exception

to the rule, if the neglect did not occasion the litigation for which the fees were charged. *Forward v. Forward*, 6 Allen (Mass.) 494.

Reason of Rule. — "If executors and administrators of estates who have faithfully discharged their duties, and, in the main, rendered a true account of their trust, are to be required at their own individual cost to defend their settlements, in protracted and expensive litigation, from every attack that may be made upon them, few responsible and competent persons will be found to take charge of estates for the modest compensation the law allows for the service." *Jacobs v. Jacobs*, 99 Mo. 427.

Whether There Is or Is Not Litigation on the settlement it is held that the executor or administrator is entitled to the aid and assistance of counsel, and to a credit for reasonable compensation paid therefor. *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598.

The Fact that Some of the Objections Were Sustained is not a ground for denying credit for the fees of counsel, where other objections were disallowed. *Matter of Meeker*, 45 Mo. App. 186.

Injunction to Prevent Settlement. — Counsel fees paid by an administrator in resisting an injunction to prevent the settlement of his accounts will be allowed. *Miller v. Simpson*, (Ky. 1886) 2 S. W. Rep. 171.

Settlement in Equity. — If a resort by an administrator to a court of equity for a settlement of his accounts is necessary, he is entitled to an allowance for reasonable counsel fees therein. *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93.

Appeal from Order or Decree of Settlement. — Counsel fees incurred by an administrator on an appeal taken by him from an order of the probate court settling his account will be allowed where he obtains a reversal of the order. *Matter of Moore*, 96 Cal. 522; *Matter of Kenworthy*, 63 Hun (N. Y.) 165. So, too, he will be allowed credit for counsel fees incurred in resisting an appeal from an order settling the account. *Matter of Rose*, 80 Cal. 166.

Legal Assistance in Preparing Account. — An executor is entitled to an allowance for a fee paid to an attorney for advice as to the form in which the account should be stated, because that is a matter with which the executor is not supposed to be conversant. *Pusey v. Clemson*, 9 S. & R. (Pa.) 204.

Appropriation of Funds by Administrator. — The fact that the services of counsel related chiefly to funds which had been appropriated by the administrator will not justify a denial of credit for the fees paid, where the court finds that the charges were reasonable, that the services rendered to the administrator were necessary for a proper accounting, and that the necessity was not created by the adminis-

allowance will be made for legal services rendered in the protection of the private interests of the executor or administrator in antagonism to the estate, or in unsuccessful contests with creditors or other persons interested in the estate, where such contests were occasioned by the personal representative's own conduct.¹

jjj. *Services Not of Professional Character.* — It is a well-settled principle that the right to employ attorneys and counsel at the expense of the estate is limited to matters which require professional skill, and in no case will credit be allowed for the charges of a lawyer for doing those things which the executor or administrator should have done himself, such as keeping the accounts or attending to the ordinary affairs of the estate.² But when the employment of both an agent and an attorney is necessary the same person may be employed in both capacities.³

trator's delay in settling the estate, nor by his appropriation of the funds. *Foster v. Stone*, 67 Vt. 336.

In New York it is provided by statute that the surrogate may in his discretion allow to an executor or administrator, on a judicial settlement of his account, or on an intermediate accounting, "such a sum as the surrogate deems reasonable, for his counsel fees and other expenses, not exceeding ten dollars, for each day occupied in the trial, and necessarily occupied in preparing his account for settlement, and otherwise preparing for the trial." Code Civ. Pro. N. Y., § 2562.

The purpose of this statute is to enable the executor or administrator to have legal advice and assistance whenever it is necessary to put his account in proper form, without expense or loss to himself. *Matter of Peyser*, 5 Dem. (N. Y.) 244. See also *Hawley v. Singer*, 3 Dem. (N. Y.) 589; *Hoes v. Halsey*, 2 Dem. (N. Y.) 577, 13 Abb. N. Cas. (N. Y.) 353.

But it is held that in order to justify a credit for such an item it must appear that the services rendered were beyond the ordinary preparation of the account or for trial. *Matter of Smith*, 26 Abb. N. Cas. (N. Y. Surrogate Ct.) 56, 19 Civ. Pro. Rep. (N. Y.) 302.

1. *Improper Contest with Creditors or Distributees.* — *Pryor v. Davis*, 109 Ala. 117.

Protection of Private Interests. — *Robbins v. Robbins*, (Ky. 1886) 1 S. W. Rep. 152.

Contesting a Proper Charge on the accounting is not a matter in regard to which credit will be allowed for counsel fees. *Anderson v. Anderson*, 37 Ala. 683; *Taylor v. Minor*, 90 Ky. 544.

2. *Services Not of a Professional Character — Credit Not Allowed.* — *Harbin v. Darby*, 28 Beav. 325, 6 Jur. N. S. 906, 29 L. J. Ch. 622; *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376; *Hurlbut v. Hutton*, 44 N. J. Eq. 302; *Raymond v. Dayton*, 4 Dem. (N. Y.) 333; *St. John v. McKee*, 2 Dem. (N. Y.) 236; *Journault v. Ferris*, 2 Dem. (N. Y.) 320; *Willson v. Willson*, 2 Dem. (N. Y.) 462; *Matter of Smith*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 269; *Matter of Swart*, (Supreme Ct.) 25 N. Y. St. Rep. 88.

It is not the policy of the law that liberal commissions should be allowed to executors and administrators for settling the estates of deceased persons, and at the same time attorneys be paid for doing the business. *Trammel v. Philleo*, 33 Tex. 395.

Illustrations — Collecting and Disbursing

Funds. — Receiving and disbursing the funds of the estate are duties for which commissions are given to the executor or administrator, and he will not be allowed credit for compensation paid to an attorney for performing such duties. *Matter of Arkenburgh*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 744; *Edmonds v. Crenshaw*, Harp. Eq. (S. Car.) 224.

Obtaining Evidence. — Nor will he be allowed credit for fees paid to counsel for obtaining evidence in actions brought against the estate. *Matter of Collyer*, 1 Connolly (N. Y.) 546.

Making Repairs. — Nor for having repairs made on the property belonging to the estate. *Matter of Arkenburgh*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 744.

Depositing Mortgage for Record. — Or for depositing mortgages belonging to the estate in the proper office for record. *McGregor's Estate*, 131 Pa. St. 359.

Miscellaneous. — Or for searching for the will, obtaining securities and papers of the decedent from a bank with which he had deposited them, preparing and publishing the notices to creditors, preparing and posting and serving notices of the making of the appraisal and inventory, attending to the making of the inventory, preparing and posting notices of sale, and attending and assisting at the sale. "All such services," said Surrogate Weiant, "the law contemplates shall be performed by the administrator or executor, and it is for such usual and ordinary services that the commissions allowed by statute are awarded. He cannot be permitted to take these commissions and then charge the estate with the compensation which may be earned by some one whom he has employed to do his work. If an executor or administrator sees fit to employ another to transact for him the usual and ordinary duties of his trust, and for which the commissions were designed as full compensation, the expense of procuring such services becomes his own debt, and cannot be charged to the estate." *Matter of Van Nostrand*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 306.

Absence of Executor or Inconvenience of Duty. — And the fact that the executor was absent or that it was convenient for him to have his attorney do such things will not justify charging the estate with the expense. *Matter of Arkenburgh*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 744.

3. *Same Person Employed Both as Agent and as Attorney.* — *Matter of White*, 6 Dem. (N. Y.) 375.

kkk. Retaining Fees. — Some authorities hold that no allowance can be made for a retaining fee paid by an executor or administrator to an attorney, because such fees are not paid for services rendered to the estate, but only to prevent the employment of the attorney by the adverse party.¹ But according to other authorities credit for retaining fees may be allowed.²

(cc) *Amount of Allowance.* — The right to credit for counsel fees is limited to such as are reasonable in amount, considering the value of the estate, the legal questions to be dealt with, and any other circumstances that may be material; and if the executor or administrator pays more than this, he will be allowed credit only for so much as is reasonable.³

1. Credit for Retaining Fees Denied. — *Matter of Collyer*, 1 Connoly (N. Y.) 546; *Pate v. Maples*, (Tenn. 1897) 43 S. W. Rep. 740.

2. Credit for Retaining Fees Allowed. — *Chisholm v. Barnard*, 10 Grant's Ch. (U. C.) 479; *Munden v. Bailey*, 70 Ala. 63.

3. Only Reasonable Amount Allowed. — *Pinckard v. Pinckard*, 24 Ala. 250; *Harris v. Parker*, 41 Ala. 604; *Matter of Moore*, 72 Cal. 335; *Matter of Arkenburgh*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 744; *Frith v. Campbell*, 53 Barb. (N. Y.) 325; *Cahill's Estate*, 38 Leg. Int. (Pa.) 270, 14 Phila. (Pa.) 309.

Where an executor has in good faith paid his solicitor's bill, and the amount is not unjust or unreasonable, it should be allowed. *McCargar v. McKinnon*, 17 Grant's Ch. (U. C.) 525.

Elements of Value — Amount of Estate and Character of Services. — *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598; *Munden v. Bailey*, 70 Ala. 63; *Reaves v. Davis*, 99 N. Car. 425.

In *Matter of Arkenburgh*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 744, the surrogate said: "In determining the amount to be allowed, I consider as the first and most important element the work actually performed. Second, the amount involved. Third, the standing and reputation and learning of the lawyer. Fourth, the result of the services."

In *Gross v. Moore*, 14 N. Y. App. Div. 353, the court said: "In judging of the value of legal services it is proper to consider the time occupied by them, the difficulty of the questions involved; the nature of the services rendered; the amount involved in the litigation; the professional standing of the counsel who claim pay for services, and, to some extent, the result which has been reached. It is apparent that the last consideration can bear little, if any, upon the amount of work which has been done, but yet it is always accepted as a proper element to be considered in reaching the value of the services which have been rendered; and for that reason, while it is entitled to but little weight, yet it must not be forgotten."

Illustrations. — In *Osborn's Succession*, 40 La. Ann. 615, it was held that not more than three hundred dollars would be allowed for services of counsel in settling a succession amounting to about six thousand dollars, in which there was little or no litigation.

In *Henry's Succession*, 45 La. Ann. 156, a fee of five thousand dollars was allowed out of a succession amounting to sixty-two thousand dollars, where the general management of the affairs of the succession devolved on the attorney in consequence of the infirmity of the

executor, though there was no difficult or intricate litigation.

In *Gross v. Moore*, 14 N. Y. App. Div. 353, it was held that not more than five thousand dollars should be allowed for services rendered on a contest of a will which involved the testamentary capacity of the testatrix, whose estate amounted to about one hundred thousand dollars, and the proceedings occupied twenty-two or twenty-three days in taking testimony in the surrogate's court and two or three days of oral argument after the testimony had closed, besides the preparation of briefs for the use of the surrogate, followed by an appeal from his decision.

In *In re Barber*, (Supreme Ct.) 12 N. Y. Supp. 538, it was held that an allowance of twenty-five per cent. for the collection of an estate consisting only of a savings bank deposit of one thousand six hundred dollars, with no debts, was unreasonably large.

In *Re Wolfe*, (Prob. Ct.) 4 Ohio N. P. 336, a fee of five hundred and fifty dollars was held reasonable, the estate amounting to twenty-three thousand dollars, where the attorney advised the administrator during the settlement, which lasted for four years, brought a proceedings to sell real estate, brought a suit to construe the will, and rendered other services.

In *McCullough's Estate*, 31 Oregon 86, it was held that a fee of two thousand dollars was reasonable where the attorney was employed to collect a doubtful claim of thirty thousand dollars, under a contract that if successful he should be paid a liberal fee, but that if unsuccessful only his actual expenses should be paid, and the amount collected was ten thousand dollars.

In *McGregor's Estate*, 131 Pa. St. 359, the following items were held excessive: Fifteen dollars for preparing the official bond and having it approved; sixty dollars in preparing a return of sale and obtaining two orders of sale therein; and twenty-five dollars for preparing a petition and obtaining an order amending a return.

Per Diem Charges. — In *Matter of Collyer*, 1 Connoly (N. Y.) 546, a charge of twenty dollars per day for attending sessions of a reference at which nothing was done but to adjourn was held excessive, and the charge was reduced to ten dollars per day for such days.

Fees Exceeding Amount in Controversy. — In *Holman v. Sims*, 39 Ala. 709, it was held that an executor should not be allowed credit for a fee of ten dollars paid to an attorney for prosecuting a suit to recover six dollars and fifty-

If More Counsel Are Employed than are necessary to perform the services required, credit will be allowed only to the extent of a reasonable compensation of a sufficient number to perform the required services.¹

Contingent Fees. — The rule that proper credit will be allowed for all disbursements made in good faith on behalf of the estate in the course of the administration is held to extend so far as to justify the representative in making contracts with counsel for fees contingent on the recovery of assets, and therefore estimated at a larger figure than would be proper where the compensation was certain and dependent on a contract which was enforceable in any event as against the representative.²

By Whom Fixed. — The determination as to what amount is reasonable does not rest with the executor or administrator, but is in the discretion of the court to which the account is presented for settlement, and with the exercise of this discretion the appellate court will not ordinarily interfere.³

five cents, where there was no principle involved affecting other causes, or other special circumstances which would justify the employment of counsel at an expense exceeding the amount in controversy.

And in *Gross v. Moore*, 14 N. Y. App. Div. 353, where credit was claimed for three thousand dollars paid to an attorney for defending an action against the estate to recover one thousand one hundred dollars under a contract made by the decedent, it was said that it seems somewhat absurd that an administrator should subject the estate to an expense amounting to nearly three times the sum in controversy, and that such a thing should not be permitted in the absence of some extraordinary circumstances.

Payment of Salary to Counsel. — In *Steel v. Holladay*, 20 Oregon 462, the payment of a salary of five thousand dollars a year was considered reasonable and proper, where the estate, amounting to five hundred thousand dollars, was largely in debt, and its affairs were so complicated as to occupy nearly the entire time of the attorney.

Payment of Excessive Fees — Partial Credit. — If an executor or administrator pays extravagant bills for legal services, he will not be allowed, on his accounting, more than a sum which would have reasonably compensated for the services. *Hurlbut v. Hutton*, 44 N. J. Eq. 302; *Matter of Bradley*, 1 Connolly (N. Y.) 106; *Gross v. Moore*, 14 N. Y. App. Div. 353.

Apportionment. — If an administrator, on the final settlement of the administration, engages with the heirs in an unsuccessful litigation as to items of debt or credit, the compensation should be apportioned so as not to charge the estate with the increase of compensation in consequence of the assistance and services rendered in such unsuccessful litigation. *Clark v. Eubank*, 80 Ala. 584.

Statutory Provisions. — The *New York* statute authorizes the surrogate to allow an executor or administrator on his accounting such a sum as the surrogate may deem reasonable for his counsel fees and other expenses, not exceeding ten dollars for each day occupied in the trial, and necessarily occupied in preparing his account for settlement and otherwise preparing for the trial; but it is held that such provision does not limit the amount which he may pay his counsel to the taxable costs, but

that additional amounts paid may be allowed on the accounting. *Douglas v. Yost*, 28 Abb. N. Cas. (N. Y. Supreme Ct.) 370; *Matter of Smith*, 26 Abb. N. Cas. (N. Y. Surrogate Ct.) 56, 19 Civ. Pro. Rep. (N. Y.) 302.

For a Full Discussion of the considerations involved in determining what constitutes a reasonable compensation for legal services, see the title *ATTORNEY AND CLIENT*, vol. 3, p. 419.

1. Unnecessary Number of Attorneys. — *Sparrow's Succession*, 40 La. Ann. 484; *Crowder v. Shackelford*, 35 Miss. 321; *Matter of Collyer*, 1 Connolly (N. Y.) 546; *McCullough's Estate*, 31 Oregon 86.

Several Counsel to Perform Different Parts of Service. — The rule against the employment of several counsel is said not to apply where different ones are employed to perform separate parts of the service demanded, though the fees are proportionately greater than if the entire service was rendered by one. *McCullough's Estate*, 31 Oregon 86.

Coexecutors and Coadministrators are not entitled to credit for the fees of separate counsel unless the employment of separate counsel was for the benefit of the estate. *McDaniel's Estate*, 9 Pa. Co. Ct. Rep. 232.

2. Contingent Fees. — *Mac Kie v. Howland*, 3 App. Cas. (D. C.) 461; *Filbeck v. Davies*, 8 Colo. App. 320; *Noel v. Harvey*, 29 Miss. 72.

The Amount which will be allowed depends on what is reasonable under the circumstances of each case. Thus, one-third of a desperate claim paid as a contingent fee has been allowed. *In re McFarland*, 4 Pa. St. 149.

In another case, where there was much difficulty in settling the estate, and it became necessary to institute several chancery suits, which were hotly contested for a number of years, and the prosecution of which required much time and labor, without which there would have been no recovery, one half of the amount collected was allowed. *Baker v. Baker*, 87 Va. 180.

The only question in such case to be considered is whether the services were necessary for the protection and interest of the estate, and whether the contract, under all the circumstances, was such as a prudent and cautious man would have entered into for himself. *Noel v. Harvey*, 29 Miss. 72.

3. What Is Reasonable Amount Determined by Court. — *Smith v. Worthington*, 53 Fed. Rep. 977; *Matter of Kasson*, 119 Cal. 489; *Matter of*

Evidence. — The burden of proving that the amount of the counsel fees for which credit is claimed is fair and reasonable rests on the executor or administrator,¹ and for this purpose the opinion of other lawyers is competent, but not controlling.²

ee. **COSTS.** — The principles which govern in regard to the allowance of credit for the fees of attorneys and counsel are applicable, generally speaking, to the costs incurred by a personal representative in the performance of his duties; that is to say, credit will be allowed for all costs incurred on the judicial settlement of his accounts,³ or in litigation reasonably undertaken by him on behalf of the estate, or in defending suits and proceedings brought against him, if they were not occasioned by his fault or neglect.⁴ But no allowance will be

Hutchinson, 84 Hun (N. Y.) 563; St. Clair's Appeal, (Pa. 1888) 15 Atl. Rep. 914.

Review of Decision Fixing Amount. — In Good's Estate, 150 Pa. St. 307, the court said: "The amount of fees to be allowed to counsel, always a subject of delicacy if not difficulty, is one peculiarly within the discretion of the court of first instance. Its opportunities of judging the exact amount of labor, skill, and responsibility involved, as well as its knowledge of the scale of professional compensation usual at the time and place, are necessarily greater than ours, and its judgment should not be interfered with except for plain error." See also *Miller v. Simpson*, (Ky. 1886) 2 S. W. Rep. 171; *Matter of Dorland*, 63 Cal. 281; *Freese v. Pennie*, 110 Cal. 467.

1. Burden of Proving Fairness and Reasonableness Is on Accountant. — *Munden v. Bailey*, 70 Ala. 63; *Matter of Arkenburgh*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 744; *In re Archer*, (Surrogate Ct.) 23 N. Y. Supp. 1041.

If the Evidence Does Not Establish the Value of the legal services to the satisfaction of the court, credit will be denied, but without prejudice to a further showing on the question. *McGregor's Estate*, 131 Pa. St. 359.

2. Evidence of Value — Opinion of Other Lawyers. — On the question of the value of an attorney's services rendered to an executor in and about the business of the estate, the opinion of other attorneys is competent, but never so far conclusive as to take the place of the independent judgment of the trial court, whose duty it is to pass on the question of value itself. *Matter of O'Brien*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 136. To the same effect are *Freese v. Pennie*, 110 Cal. 467; *Matter of Dorland*, 63 Cal. 281.

If a Fee Bill Has Been Agreed On by the members of the bar, fixing the value of various legal services, it will be accepted as proof of value rather than the opinion of only one member of the bar, because it represents the combined judgment and experience of those best able to pass on the various items. *Taylor's Estate*, 3 Pa. Dist. Rep. 691.

3. Credit Allowed for Costs of Accounting. — *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349; *Arthur v. Nelson*, 1 Dem. (N. Y.) 337; *Campbell v. Purdy*, 5 Redf. (N. Y.) 434; *Clock v. Chadeagne*, 10 Hun (N. Y.) 97; *Matter of Van Kleeck*, 2 Connoly (N. Y.) 14; *Hodgson's Estate*, 158 Pa. St. 151; *Reed's Estate*, 4 Montg. Co. Rep. (Pa.) 173; *Benedict's Estate*, 4 Lanc. L. Rev. (Pa.) 99.

Reducing Balance. — The costs of the audit are not chargeable against the executor or ad-

ministrator where the balance against him was reduced. *Smith's Appeal*, 47 Pa. St. 424.

Costs of Attempt to SurchARGE. — Costs are properly payable out of the estate where they were incurred in an unsuccessful attempt to surcharge the accounts of the administrator. *Hodgson's Estate*, 158 Pa. St. 151.

Even if the Administrator Is Surcharged he may be allowed the costs of an audit which would have been necessary in any event. *Merkel's Estate*, 131 Pa. St. 584.

The Fact that an Administrator Has Been Surcharged with Interest because he had kept the trust funds in his private bank does not preclude the allowance to him of the expenses of the accounting, where he had prepared his account in good faith and there was no concealment of facts. *Walker v. Dow*, 6 Dem. (N. Y.) 265.

Irregular Administration. — The costs of irregular administration proceedings, including the costs of appeal taken by the persons affected, will be ordered taxed against the administrators personally. *In re McFarland*, 10 Mont. 586.

Costs Occasioned by Errors of Judgment in making up the account, whereby it became necessary to file exceptions to the account and to have a hearing on the exceptions, will not be charged against the executor personally. *Re Griffith's Estate*, 1 Lack. Leg. N. (Pa.) 311.

Fees Prescribed by Statute. — In some jurisdictions the fees of officers and judges in matters relating to the settlement of estates are fixed by statute, and no allowance can be made to an administrator who pays fees in excess of the statutory amount. *Canfield v. Bostwick*, 21 Conn. 550; *Sherrell v. Shepard*, 19 Fla. 300; *Liddel v. McVickar*, 11 N. J. L. 44, 19 Am. Dec. 369; *Cooley v. Vansyckle*, 14 N. J. Eq. 496; *Pursel v. Pursel*, 14 N. J. Eq. 526.

Under the *New Jersey* statute, which allows a percentage of estates to surrogates for "auditing and reporting accounts," it is held that the mere transfer of a balance from a former account to a later one is not an auditing of such account. The court expressed its disapproval of the statute on the ground that it authorizes a "purely arbitrary exaction" and not compensation according to the value of the work done. *Matter of Heath*, 52 N. J. Eq. 807.

4. Credit Allowed for Costs and Disbursements of Suit — England. — *Vez v. Emery*, 5 Ves. Jr. 141; *Doyle v. Blake*, 2 Sch. & Lef. 243; *Loomes v. Stotherd*, 1 Sim. & S. 461; *Tipping v. Power*, 1 Hare 405; *Gaunt v. Taylor*, 2

made for the costs of litigation which did not relate to the affairs of the estate, or to the duties of the personal representative, but affected only his

Hare 413; *Newbegin v. Bell*, 23 Beav. 386; *Sanderson v. Stoddart*, 32 Beav. 155; *In re Love*, 29 Ch. Div. 348; *In re Jones*, (1897) 2 Ch. 190, 76 L. T. N. S. 454.

Canada. — *Story v. Dunlop*, 13 Grant's Ch. (U. C.) 375; *Griffith v. Paterson*, 20 Grant's Ch. (U. C.) 615.

Alabama. — *Moody v. Hemphill*, 71 Ala. 169; *Green v. Fagan*, 15 Ala. 335; *Hearrin v. Savage*, 16 Ala. 286; *Pearson v. Darrington*, 32 Ala. 227; *Harris v. Parker*, 41 Ala. 604.

California. — *Matter of Miner*, 46 Cal. 564; *Matter of Holbert*, 48 Cal. 627.

Delaware. — *Davis v. Rawlins*, 2 Harr. (Del.) 125.

Florida. — *Sherrell v. Shepard*, 19 Fla. 300.

Illinois. — *Colton v. Field*, 131 Ill. 398.

Maine. — *Crofton v. Ilsley*, 6 Me. 48.

Massachusetts. — *Forward v. Forward*, 6 Allen (Mass.) 494; *Greenwood v. McGilvray*, 120 Mass. 516; *Burns v. Fay*, 14 Pick. (Mass.) 8; *Pierce v. Saxton*, 14 Pick. (Mass.) 274.

Mississippi. — *Effinger v. Richards*, 35 Miss. 540.

Missouri. — *Wooldridge v. Draper*, 15 Mo. 470.

New Hampshire. — *Wendell v. French*, 19 N. H. 205.

New York. — *Hosack v. Rogers*, 9 Paige (N. Y.) 461.

North Carolina. — *Poindexter v. Gibson*, 1 Jones Eq. (54 N. Car.) 44; *Clapp v. Coble*, 1 Dev. & B. Eq. (21 N. Car.) 177.

Pennsylvania. — *Sterrett's Appeal*, 2 P. & W. (Pa.) 419; *Ammon's Appeal*, 31 Pa. St. 311; *France's Estate*, 16 W. N. C. (Pa.) 350.

South Carolina. — *Warden v. Burts*, 2 McCord Eq. (S. Car.) 73; *Knox v. Picket*, 4 DeSaus. (S. Car.) 92; *Davis v. Davis*, 2 Hill Eq. (S. Car.) 378; *Atcheson v. Robertson*, 4 Rich. Eq. (S. Car.) 39; *McKnight v. Wright*, 12 Rich. Eq. (S. Car.) 229.

Vermont. — *Wilson v. Bates*, 28 Vt. 765.

Illustrations — *Unsuccessful Suit to Collect Assets*. — *Chandler v. Chandler*, 87 Ala. 300; *Matter of Miller*, 4 Redf. (N. Y.) 302.

Suit for Construction of Will. — Credit will be allowed for reasonable expenses of a suit by the executor in the chancery court for the construction of the will, but not for the costs of an appeal taken by him from the decision therein, if it was unnecessary under the circumstances. *In re Groom*, (1897) 2 Ch. 407, 77 L. T. N. S. 154; *Beatty v. Cory Universalist Soc.*, 39 N. J. Eq. 452.

Application to Court for Instructions. — *Matter of Howe*, 1 Paige (N. Y.) 214; *Baxter v. Baxter*, 43 N. J. Eq. 82. *Compare Bryson v. Nickols*, 2 Hill Eq. (S. Car.) 113.

Defending Action to Set Aside Sale of Land. — *Rudolph v. Underwood*, 88 Ga. 664.

Action in Name of Third Person. — Credit for the costs of a suit, brought in good faith for the benefit of the estate, will not be denied because it was brought in the name of a third person, and not in the name of the executor or administrator. *Collins v. Hoxie*, 9 Paige (N. Y.) 81; *Grout v. Carver*, 15 Hun (N. Y.) 361.

Unsuccessful Appeal at Request of Next of Kin. — The costs of an unsuccessful appeal taken by an administrator will be allowed where he acted in good faith at the request of the next of kin, and the questions raised upon the appeal were sufficiently doubtful to warrant a hope that the judgment might be reversed. *Matter of Ritch*, 76 Hun (N. Y.) 36.

Criminal Prosecution Against Impostor. — In *Gerald v. Bunkley*, 17 Ala. 170, it was held that an administrator should be allowed the cost and expenses of instituting and conducting a criminal proceeding against one who was personating the decedent with such accuracy as to create an honest impression of his identity in the minds of many who had known the decedent intimately from his youth.

Failure to Exercise Sound Discretion in resisting a claim against the estate is not a ground for denying credit to the executor for the costs of the unsuccessful litigation, where he acted in good faith. *Grout v. Carver*, 15 Hun (N. Y.) 361.

In *New York* it is provided by statute that the costs of an action brought by or against an executor or administrator in his representative capacity shall be charged against the estate unless the court directs that he shall pay them personally. *Mullen v. Guinn*, 88 Hun (N. Y.) 128; *Matter of Smith*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 269.

In *Minnesota* the statute is the same as in *New York*. *Lough v. Flaherty*, 29 Minn. 296.

Action to Recover Overpayment. — An executor or administrator will not be allowed costs in an action brought by him to recover overpayment made by him to a creditor under a misapprehension as to the value of the estate, even though he sues in his representative capacity, because such an action is for the recovery of money improperly paid out by himself. *Wolf v. Beaird*, 123 Ill. 585, 5 Am. St. Rep. 565.

Witness Fees. — Credit will generally be allowed for the fees of witnesses called by an executor or administrator to testify on the settlement of the account. *Titlow's Estate*, 17 Pa. Co. Ct. Rep. 356, 5 Pa. Dist. Rep. 40.

But such allowance is within the discretion of the court. *Henderson v. Renfro*, 31 Ala. 101. And the amount of the allowance is usually limited to the statutory fees. Thus an administrator was refused credit for fifty dollars for one day's attendance of a physician as a witness, the *per diem* allowance to witnesses being two dollars. *Matter of Levinson*, 108 Cal. 450.

Actual Payment of the costs incurred is necessary before the executor or administrator will be allowed credit therefor in his account. *Thacher v. Dunham*, 5 Gray (Mass.) 26; *Jennison v. Hapgood*, 14 Pick. (Mass.) 345.

Release of Right. — A contract by an administrator to indemnify an heir at law of the decedent against the liability for all costs and charges of a suit brought by the administrator will operate to prevent the administrator from obtaining an allowance of the costs from the judge of probate, if such allowance would

individual interests or the rights or interests of particular beneficiaries.¹ Nor will credit for costs be allowed in case the litigation was occasioned by the fault of the executor or administrator, or was otherwise improper, or was negligently conducted by him.²

affect the heir or reach his distributive share of the estate. *Dunham v. Branch*, 5 Cush. (Mass.) 558.

1. Litigation Not Relating to Personal Representative's Duties—Real Estate.—If an executor or administrator is not charged with any powers or duties in regard to the real estate of the decedent, he cannot have credit for the expenses of controversies respecting it. *Hart v. Hart*, 2 Bibb (Ky.) 609.

Thus, an administrator is not entitled to credit for the expenses of litigation undertaken and conducted by him for the purpose of ejecting from land sold by him heirs or legatees in possession who set up an adverse claim after the sale, because the administrator is not bound to put the purchaser in possession. *Rudolph v. Underwood*, 88 Ga. 664.

Litigation Not Affecting Estate—Lunacy Proceeding Against Decedent's Widow.—An executor or administrator is not entitled to credit for the expenses of a lunacy proceeding against the decedent's widow paid by him. *Underhill v. Newburger*, 4 Redf. (N. Y.) 499.

Litigation as to Probate of Will or Right to Administration.—See case cited *supra*, this section, *Fees of Attorneys and Counsel—Probate of Will and Grant of Letters*.

Litigation Affecting Rights of Particular Beneficiaries.—An executor has no right to litigate the claims of legatees against each other at the expense of the estate. *Matter of Marrey*, 65 Cal. 287. See also *supra*, this section, *Fees of Attorneys and Counsel—Services Affecting Interests of Individual Beneficiaries*.

Litigation Affecting Individual Interests of Personal Representative.—If an executor or administrator engages in litigation for his individual benefit and in hostility to the estate, he cannot be allowed credit for the costs thereby incurred. *Jones v. Deyer*, 16 Ala. 227; *Mims v. Mims*, 39 Ala. 716; *Clement's Appeal*, 49 Conn. 530; *Cameron v. Cameron*, 15 Wis. 1, 82 Am. Dec. 652.

An action by an administrator is held to be in his individual right, so as to preclude him from an allowance of credit for the costs, if the cause of action accrued after the decedent's death. *Mullen v. Guinn*, 88 Hun (N. Y.) 128.

So, too, as to actions against an executor or administrator. Thus, credit was denied where the costs were incurred by an executor in defending an action brought against him by the testator's widow to recover dower in lands devised to her for life, but of which the executor had received the income after the testator's death. *Wilcox's Estate*, 11 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 115.

Suit in Foreign Jurisdiction.—Credit will not be allowed for sums expended by an administrator in behalf of the estate in a lawsuit in another state, where an administrator had been appointed in the state and had been made defendant in the action. If he "lost time" in going there, or paid out moneys for the defendant administrator in a litigation in that

state, that is the proper place to present his claim. *Brand v. Com.*, (Ky. 1893) 24 S. W. Rep. 604. Compare *In re Stevens*, (Supreme Ct.) 6 N. Y. Supp. 638; *Roberts's Estate*, 163 Pa. St. 408, 35 W. N. C. (Pa.) 250.

2. Litigation Occasioned by Fault of Executor or Administrator—Delay in Preparing Accounts.—If delay on the part of the executor or administrator in preparing or filing his accounts is the cause of proceedings against him, he is not entitled to credit for the costs. *Smith v. Roe*, 11 Grant's Ch. (U. C.) 311; *Beeler v. Hill*, 5 Dana (Ky.) 38; *Williams's Estate*, 15 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 270; *Gilman v. Gilman*, 2 Lans. (N. Y.) 1; *In re Goetschius*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 155; *Fox's Estate*, 5 Kulp (Pa.) 218; *Kleinfelter's Appeal*, 1 Pittsb. Rep. (Pa.) 376; *Luckenbach's Estate*, 1 Northam. L. Rep. (Pa.) 162; *Re Koehler's Estate*, 8 Kulp (Pa.) 529.

If an Executor or Administrator Attempts to Obtain a Final Discharge without fully accounting for all the assets, he is not entitled to credit for costs incurred in litigation with a creditor of the estate who objects to the account, though the creditor does not succeed as to all his objections. *Colton v. Field*, 131 Ill. 398.

Contests Occasioned by Fraud or Improper Conduct.—If a contest on the accounting is occasioned by the fraud or improper conduct of the personal representative, no allowance will be made for the costs thereof. *Matter of Harlan*, 3 Pa. L. J. 116, 1 Clark (Pa.) 451; *Price's Estate*, 81 Pa. St. 263, 3 W. N. C. (Pa.) 320.

Mismanagement of Estate.—If the proceedings on the audit have been protracted and the expenses increased by the improper management of the estate, the administrator will not be allowed the expenses so incurred. *Norris's Appeal*, 71 Pa. St. 106, 8 Phila. (Pa.) 198.

Contests Occasioned by Improper Charges.—So, too, credit for costs will be denied in case of a contest arising out of improper charges made against the estate. *Aldridge v. McClelland*, 36 N. J. Eq. 288; *Barhite's Appeal*, 126 Pa. St. 404, 24 W. N. C. (Pa.) 64.

Converting Balance Against Estate to Balance in Favor of Estate.—Where the account presented to the Orphans' Court showing a balance in favor of the executor was contested, and the report of the auditors to whom it was referred showed a balance against the executor, he was charged with the expenses of the reference. *Sterrett's Appeal*, 2 P. & W. (Pa.) 419; *McClintock's Appeal*, 71 Pa. St. 365.

Resisting Application for Accounting.—An executor is not entitled to credit for the costs of unsuccessfully resisting an application to compel him to give security and to account. *Hosack v. Rogers*, 9 Paige (N. Y.) 461. Nor where the misconduct of the executor made the proceeding necessary. *Matter of Matthewson*, 8 N. Y. App. Div. 8.

Failure to File Fiduciary Accounts of Decedent.—If an administrator neglects to file the accounts of the decedent as guardian he will be

In Case of a Special Accounting on the discharge of executors at their own request no allowance for the expenses will be made.¹

(3) *Debts of Estate* — (a) *In General*. — Since it is the duty of an executor or administrator to pay the debts of the estate in his charge, he is ordinarily entitled to credit for all disbursements made on that account, if the debts were justly due and the payments were made in good faith,² though he was

charged personally with the costs incurred by his neglect. *Stewart's Estate*, 6 W. N. C. (Pa.) 434.

The Costs of a Proceeding to Compel Distribution will not be allowed where the executor had failed to obey a decree of distribution previously made. *Warner's Estate*, 130 Pa. St. 359.

Refusal to Furnish Legatees with Information reasonably called for by them, in consequence of which suit is brought against the estate on an unfounded claim, is a sufficient ground for denying credit for costs to the executor. *Smith v. Roe*, 11 Grant's Ch. (U. C.) 311.

Delay in Setting Up Defenses to Claims. — If an executor neglects to set up at the proper time his defense to a claim against the estate, in consequence of which the claim is made the subject of a separate suit, the executor will not be allowed credit for the costs thereof, though the defense is sustained. *Donaldson v. Raborg*, 28 Md. 34.

Unnecessary Litigation — Resisting Claims Against Estate. — An executor or administrator is not entitled to credit for the costs of defending the estate against a just claim, *Clement's Appeal*, 49 Conn. 530; *In re Huntley*, 25 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 78, 13 Misc. Rep. (N. Y.) 375; *Armstrong's Estate*, 6 Watts (Pa.) 236; or resisting any claim when there is no fund out of which a judgment could be paid, if recovered, *Wilcox's Estate*, 11 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 115.

Failure to Pay Claims. — Where an action is brought against an administrator, on witnesses' certificates issued in a former action brought by him or his predecessor, and it appears that he had sufficient assets in his hands to pay the certificates at the time when the action on them was brought, he will not be allowed credit for the costs of such action. *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590.

Vexatious Litigation. — The costs of useless proceedings instituted merely to annoy the devisees will be charged against the executor personally. *Reeser's Estate*, 4 Pa. Co. Ct. Rep. 417.

Application to Court for Instructions. — No allowance will be made for the expenses of an application to the court for instructions where it was unnecessarily made. *Baxter v. Baxter*, 43 N. J. Eq. 82.

Unsuccessful Contests with Beneficiaries. — As a general rule an executor or administrator who maintains an unsuccessful contest with legatees or distributees is personally chargeable with the costs. *Moody v. Hemphill*, 71 Ala. 169; *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598.

Negligence in Defending Suits against the estate may render the executor or administrator personally chargeable with costs. *Carmichael v. Wilson*, 4 Bligh N. S. 146; *sub nom. Wilson v. Carmichael*, 2 Dow & Cl. 51.

Thus, an administrator was charged with costs where he failed to plead the statute of limitations in an action against the estate on a claim which the administrator had assigned to the plaintiff, though the claim was apparently barred, and made no objection to incompetent testimony offered at the trial. *Matter of Hill*, 2 Connolly (N. Y.) 25.

In another case the administrator had a good defense to a claim preferred against the estate, but neglected to interpose it, and suffered judgment to go against him. In consequence of such neglect he was compelled to resort to further proceedings to relieve himself of the judgment. It was held that the expense of the subsequent litigation was not a proper charge against the estate. *Green v. Fagan*, 15 Ala. 335.

1. Special Accounting by Executor on Discharge at His Own Request. — *In re Lamb*, (Supreme Ct.) 21 N. Y. Supp. 343.

2. Credit for Debts Paid — *United States*. — *Peter v. Beverly*, 10 Pet. (U. S.) 532. *Arkansas*. — *Ferguson v. Collins*, 8 Ark. 241.

Indiana. — *Leach v. Prebster*, 35 Ind. 415; *Reagan v. Long*, 21 Ind. 264.

Maryland. — *Owens v. Collinson*, 3 Gill & J. (Md.) 25; *Garrison v. Hill*, 81 Md. 206.

Mississippi. — *Woods v. Ridley*, 27 Miss. 119. *New Jersey*. — *Pursel v. Pursel*, 14 N. J. Eq. 514; *Vreeland v. Schoonmaker*, 16 N. J. Eq. 513.

South Carolina. — *Tompkins v. Tompkins*, 18 S. Car. 13.

Claims against the estate paid by the executor or administrator constitute properly a part of his account. If a claim paid by an executor or administrator is illegal and unfounded, the charge in the account is open to exception. *Vreeland v. Schoonmaker*, 16 N. J. Eq. 513.

Payments Made in Good Faith. — In *Freeman v. Freeman*, 2 Redf. (N. Y.) 137, it was said that "there is ordinarily some latitude to be given to administrators where they have paid debts in good faith, and the courts are disposed to favor them, even when they have mistakenly allowed a doubtful claim, on the ground that, acting in a representative capacity, they should not be made personally liable for mistakes." The rule, however, was held not applicable to the case before the court, where it appeared that the claimant was the administrator's wife, that the claim was for services alleged to have been rendered by her to the decedent, that at the time the services were alleged to have been rendered the married woman's law had not been passed, so that the claim, if any, accrued to her husband and not to her, and that the alleged claim had long been barred by the statute of limitations.

If, in the honest belief that an alleged debt is due, the executor or administrator pays it,

indebted to the estate at the time of the payment.¹

(b) **What Constitutes Payment.** — It is not essential that money should be paid or property delivered to the creditor in order to entitle the executor or administrator to credit as for a debt paid, but it is sufficient if the estate is discharged from liability by the substitution of the individual liability of the executor or administrator for that of the estate, under an agreement between him and the creditor,² or by a payment by a third person at the request of the executor or administrator, and on his agreement to repay the amount to such third person.³ So, too, payment may be made by crediting the amount of the debt on the price of property of the estate purchased by the creditor,⁴ or by set-off.⁵ But even when the claim of the creditor is satisfied by the payment of the amount to him by the executor or administrator, credit will not be allowed if the money was paid under such circumstances that the debt was not extinguished, but remains as a subsisting obligation in the hands of a third person.⁶

he should be allowed for it in his account. *Ritter's Appeal*, 23 Pa. St. 95.

Collusion with Claimant. — Credit will not be allowed if an executor or administrator collusively pays an invalid claim against the estate, *Matter of Hill*, 67 Cal. 238; or if without inquiry or examination he pays a claim against the estate when nothing is really due, *Stark v. Hunton*, 3 N. J. Eq. 300.

Negligence in Allowing Recovery of Judgment. — An administrator is not entitled to credit for the amount of a judgment recovered against and paid by him, if the recovery was suffered through his neglect in defending the suit. *Tague v. Corbitt*, 57 Ala. 529.

Doubtful Claims — Compromise. — Credit will be allowed as against legatees for a payment made in good faith, for the purpose of compromising a pending action, notwithstanding a former decision in favor of the estate, where the question was doubtful, and the pending action depended on new evidence. *Bruner's Appeal*, 57 Pa. St. 46. See also *supra*, this title, *Powers, Duties, and Liabilities in General — Compromise, Composition, and Release of Claims*.

Credit for Payment with Individual Means. — *Doty v. Cox*, 15 Ky. L. Rep. 68; *Woods v. Ridley*, 27 Miss. 119. Compare *Pearson v. Darrington*, 32 Ala. 227; *Sims v. Sims*, 30 Miss. 333.

Voluntary Payment. — An executor or administrator may pay a debt of his decedent, if it is confessedly just and due, without waiting to be sued, and ordinarily when he has funds of his decedent it is his duty to do so and to credit himself with such payment in his settlement. *Van Winkle v. Blackford*, 33 W. Va. 573.

Revocation of Letters Testamentary after a disbursement had been made as directed by the will does not affect the executor's right to credit. *Bloomer v. Bloomer*, 2 Bradf. (N. Y.) 339.

1. Indebtedness of Executor to Estate — Effect. — In *Titlow's Estate*, 11 Pa. Co. Ct. Rep. 625, it was held that credit would not be denied to an executor for the funeral expenses and expenses of the last illness of the testator's wife who died during the testator's lifetime, though at the time of the payment the executor was indebted to testator's estate. But see *contra*, *Sorrels v. Trantham*, 48 Ark. 386.

2. What Constitutes Payment — Assumption of Liability by Administrator. — *Lawrence v. Kitteridge*, 21 Conn. 577, 56 Am. Dec. 385. In this case a creditor of the decedent released his claim against the estate in consideration of the promise of the administrator that he would be personally responsible for it. On the settlement of the administrator's accounts he claimed credit for the amount of such debt, which was allowed over an objection made on the ground that the debt had not actually been paid. In disposing of the objection, the court pithily observed that "the estate owed the debt, and the administrator has satisfied it by substituting his own private responsibility, which the creditor has received as payment in full."

But this result does not follow from the mere fact that the administrator had given his individual note to a creditor of the estate, because such note does not operate to discharge the estate unless it was so agreed by the parties. *Woods v. Ridley*, 27 Miss. 119.

3. Payment by Third Person at Request of Executor or Administrator. — In *Morrow v. Peyton*, 8 Leigh (Va.) 54, it was held that where an agent employed by a creditor of the estate to collect the debt paid the amount of the debt to the creditor at the request of the administrator, and on his promise to repay to the agent the amount advanced, with interest, the administrator, having afterwards repaid the amount to the agent, is entitled to credit.

4. Payment by Credit on Purchase at Executor's Sale. — Where an executor credits the price of property of the estate purchased by a creditor on the amount of the debt, it is a payment for which the executor should have credit in his account. *Boyd v. Boyd*, (Ky. 1888) 9 S. W. Rep. 842.

5. Payment by Set-off. — A debt of the estate may be paid by setting it off against a debt due to the estate, but before the executor will be credited for such payment he must show that the set-off has actually been made. *In re Archer*, (Surrogate Ct.) 23 N. Y. Supp. 1041.

6. The Purchase of a Note Made by the Decedent does not operate as a payment so as to entitle the administrator to credit therefor, where he acted, in making the purchase, as the agent of the decedent's widow, though he used the funds of the estate for that purpose. But

(c) **Necessity of Presentation and Allowance Before Payment.** — Provision is generally made by statute in the *United States* for the presentation of claims to and allowance by the executor or administrator or the probate court, and the effect of the allowance of a claim by an order of court is to establish conclusively its amount and validity, and to authorize the executor or administrator to pay it in full or *pro rata*, according to the amount of assets.¹ Therefore he is entitled to credit where he pays a claim which has been duly allowed, unless he is guilty of fraud or bad faith.² If, however, he pays a claim which has not been allowed by the probate court, he does so at his own risk, as it may subsequently be disallowed on the settlement of his accounts either wholly or in part, because the estate was not liable or because the assets were insufficient to pay all claims in full;³ but he will be allowed credit for the amount paid or for the amount of the *pro rata* share to which the creditor was entitled, if it is shown on the settlement that the claim was valid.⁴ But if the statute makes the allowance by the probate court of claims against the estate of a decedent a prerequisite to the authority of the executor or administrator to pay them, he is not entitled to credit in case he pays a claim which

where he agreed with the holder of a note of the decedent, which was secured by mortgage, that he would sell the mortgaged property at private sale and pay the debt out of the proceeds of the sale, which was done, and on the final settlement the administrator charged himself with the entire proceeds of the sale, it was held on these facts that the note was paid, notwithstanding the statements of the administrator that he purchased it for the decedent's widow, and that he was therefore entitled to credit for it in his account. *Matter of Meeker*, 45 Mo. App. 186.

As to What Constitutes Payment and discharge of debts in general, see the titles NOVATION; PAYMENT.

1. Presentation of Claims. — See the title DEBTS OF DECEDENTS, vol. 8, p. 1062.

2. Claims Paid After Allowance by Probate Court — California. — *Deck v. Gherke*, 6 Cal. 666.

Maryland. — *Edelen v. Edelen*, 11 Md. 415; *Owens v. Collinson*, 3 Gill & J. (Md.) 25.

Mississippi. — *Sims v. Sims*, 30 Miss. 333; *Gray v. Harris*, 43 Miss. 421.

New Jersey. — *Pursel v. Pursel*, 14 N. J. Eq. 514.

Pennsylvania. — *Kost's Appeal*, 107 Pa. St. 143.

Texas. — *Lockhart v. White*, 18 Tex. 102.

Evidence of Fraud Must Be Clear and Positive to justify a denial of credit for the payment of a claim which has been passed by the Orphans' Court. *Garrison v. Hill*, 81 Md. 206.

Allowance of Claim by Fraud of Administrator. — An administrator is not entitled to credit for the payment of a fraudulent claim, though it was allowed by the Probate Court, if the allowance was procured by the bad faith and fraudulent collusion of the administrator. *Garr v. Harding*, 37 Mo. App. 24; *Dullard v. Hardy*, 47 Mo. 403; *Hurlbut v. Hutton*, 44 N. J. Eq. 302.

3. Payment Before Allowance Is at Risk of Executor or Administrator — Alabama. — *Gaunt v. Tucker*, 18 Ala. 27; *Pearson v. Darrington*, 32 Ala. 227; *Jenks v. Terrell*, 73 Ala. 238.

Illinois. — *Walker v. Diehl*, 79 Ill. 473; *Millard v. Harris*, 119 Ill. 185.

Michigan. — *Loomis v. Armstrong*, 49 Mich. 521.

Mississippi. — *Woods v. Ridley*, 27 Miss. 119; *Sims v. Sims*, 30 Miss. 333.

New York. — *Wilson v. Baptist Education Soc.*, 10 Barb. (N. Y.) 308; *Poughkeepsie Bank v. Hasbrouck*, 6 N. Y. 231; *Matter of Kellogg*, 104 N. Y. 648, 5 N. Y. St. Rep. 668.

North Carolina. — *Moye v. Albritton*, 7 Ired. Eq. (42 N. Car.) 62.

Pennsylvania. — *Hottenstein's Appeal*, 2 Grant's Cas. (Pa.) 301.

West Virginia. — *Surber v. Kent*, 5 W. Va. 96.

Debt Retained by Pledgee of Assets. — Where a decedent, during lifetime, assigned a life insurance policy as security for a debt, and the assignee, after the death of the assignor, collected the full amount of the insurance, as authorized by the terms of the assignment, and paid over the amount collected in excess of the debt secured, credit cannot be refused the executor on the ground that the debt so secured has not been presented as a claim against the estate, because a pledgee is not obliged to present his claim to the executor of the pledgor, unless he seeks a recovery against other property of the estate. *Matter of Galland*, 92 Cal. 293.

Mortgage Debts. — In *Pelton v. Johnson*, 52 Vt. 138, it was held that an administrator who purchased mortgage claims against the decedent, but did not present them for allowance, could not be credited therewith in his administration account, but must rely wholly on the property mortgaged.

4. Credit for Debts Paid Before Allowance — California. — *Matter of Galland*, 92 Cal. 293.

Massachusetts. — *Ames v. Jackson*, 115 Mass. 508.

Mississippi. — *Haralson v. White*, 38 Miss. 178.

Missouri. — *Hill v. Buford*, 9 Mo. 869.

New Jersey. — *Kinnan v. Wight*, 39 N. J. Eq. 501.

New York. — *Adair v. Brimmer*, 74 N. Y. 539; *Matter of Frazer*, 92 N. Y. 239.

North Carolina. — *Halliburton v. Carson*, 100 N. Car. 99, 6 Am. St. Rep. 505.

was not presented and allowed within the time limited, though it was a just and legal debt.¹

(a) **To What Amount Credit Is Allowed.** — It is not in all cases that credit will be allowed for the full amount of a debt paid, though it was justly due. In case the assets are insufficient to satisfy all the debts, the payment of any debt in full entitles the executor or administrator to credit for only the *pro rata* share to which the creditor was entitled.² So, too, if without authority he pays the whole amount of a debt to a creditor who has the right to recover only a part of it, credit will be allowed for such part only.³ It is also held that if the amount of a claim is increased at his suggestion and he pays it as increased, he will not be allowed credit for the amount of the increase.⁴ And if he satisfies the claim of a creditor by the payment of less than the amount due, he can have credit only for the amount actually paid, because it is an inflexible rule that in no case will an executor or administrator be permitted to make a profit for himself in any of his dealings with the estate.⁵

1. Rule Denying Credit for Claims Paid Without Allowance by Probate Court. — *Nichols v. Shearon*, 49 Ark. 75; *Bunnell v. Post*, 25 Minn. 376; *Commercial Bank v. Slater*, 21 Minn. 172; *Huebner v. Sesseman*, 38 Neb. 78.

"If," said Berry, J., delivering the opinion of the court in *Bunnell v. Post*, 25 Minn. 376, "an executor pays claims against the estate of his testator, such as are required to be submitted to commissioners, there is certainly no reason why he should stand in any better position, as respects such claims, than the creditors to whom he paid them would have stood if he had not paid them. Before they can be allowed against the estate, either upon the settlement of the executor's account or otherwise, they must have been presented to, and allowed by, commissioners; or, if disallowed by them, they must have been allowed upon the appeal provided by law. To hold otherwise would be to hold that the inflexible rule of law prescribed by the statute may be wholly disregarded at the pleasure of an executor. The reason for upholding the rule is just as strong where the claim has been paid by an executor as where it is retained by the original creditor. In both cases there is the same necessity that the claim shall be examined and adjusted by the authorized tribunal, and that it should be barred if not so examined and adjusted in the manner provided by law."

Under a similar statute in *Mississippi*, providing that if claims are not presented and allowed within the time prescribed "the same shall be barred," a different opinion has been expressed. "The rule to be deduced from the provisions of the statute in relation to the establishment of claims against estates of deceased persons," said Handy, J., "is plainly this: If an executor or administrator, having sufficient funds in his hands, pay a claim which is duly probated and allowed, *prima facie* he is entitled to an allowance for the same in his final account; but if he pay a claim not probated and allowed, *prima facie* he acts in his own wrong, and he will not be entitled to an allowance for it unless he adduce competent evidence before the court that the claim was just and valid, and that it remained unpaid at the time it was paid by him." *Sims v. Sims*, 30 Miss. 333. But in commenting on this case, the court in *Huebner v. Sesseman*,

38 Neb. 78, declares that the statement quoted was an *obiter dictum*.

2. Amount of Credit — Payment in Full of Claim Against Insolvent Estate. — *Pryor v. Davis*, 109 Ala. 117; *Jackson v. Wood*, 108 Ala. 209; *McNeill v. McNeill*, 36 Ala. 117; *Hearrin v. Savage*, 16 Ala. 286; *Byrd v. Jones*, 84 Ala. 337; *Taylor's Estate*, 4 Pa. Dist. Rep. 691, 17 Pa. Co. Ct. Rep. 166.

An administrator of an insolvent estate who during the first year of his administration pays debts in full is not entitled to credit, though he paid them without knowledge that the estate was insolvent. *Cobb v. Muzzey*, 13 Gray (Mass.) 57.

"The only right of the personal representative making such payments, as is settled by these authorities, is substitution or subrogation to the rights of the creditors whose claims he has discharged, taking the share of the assets to which they would have been entitled." *Pryor v. Davis*, 109 Ala. 117.

3. Payment of Whole Debt to Creditor Entitled to Part Only. — In *Walker v. Kerr*, 7 Tex. Civ. App. 498, it was held that if an administrator has paid out money to a creditor of the estate without authority of law, but the party upon whose claim such payment was made was entitled to only a *pro rata* share in such money, the administrator becomes subrogated to the rights of such creditor and is entitled to a credit to the extent of such creditor's *pro rata* share.

4. Increase of Claim at Suggestion of Administrator. — *Matter of Van Buren*, 10 Misc. Rep. (N. Y. Surrogate Ct.) 373, in which case it was said that administrators are not almoners of dead men's estates, and that it is no part of their duty to suggest or advise an increase of bills presented against their intestates.

5. Payment or Purchase at Discount. — An administrator can be allowed only what he actually paid for outstanding notes against the estate, though he purchased them with his own money. *Gillett v. Gillett*, 9 Wis. 194; *Chevallier v. Wilson*, 1 Tex. 161.

Payment with Individual Property. — An administrator who pays a debt of the estate with his individual property, estimated at more than its actual value, can have credit for only the actual value of such property. *Amos v. Heatherby*, 7 Dana (Ky.) 45.

(e) **For What Debts Credit Is Allowable** — *aa. GENERAL RULE.* — As a general rule an executor or administrator is entitled to credit for the payment of any claim against the estate arising out of any contract of or transaction by the decedent in his lifetime and which could be enforced against him if living, or for the discharge of any liability imposed on the estate after his death.¹ But it has been held that a debt which is in form the obligation of the executor or administrator, though it was contracted for the benefit of the decedent and at his request, is not a debt of the decedent which the executor or administrator may pay as such and take credit for in his account.²

bb. DEBTS BARRED BY STATUTE OF LIMITATIONS. — In some jurisdictions executors and administrators are allowed credit where they have paid debts which were barred by the statute of limitations, if such debts were otherwise justly due.³

See also *supra*, this title, *Management and Care of Estate* — *Dealing with Estate for Individual Beneficiary.*

1. What Constitute Claims Against Estate. — For a full discussion of this question, see the title *DEBTS OF DECEDENTS*, vol. 8, p. 1003.

Debts Contracted by Testator for Benefit of Executor. — In *Matter of Beach*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 27, it was held that though a note was given by the testator for the benefit of the executor, who was the testator's son, the executor was entitled to credit on paying it, where it appeared that it was the testator's intention to pay the note.

Payments for Benefit of Creditors of Estate. — In *Matter of Moore*, 96 Cal. 522, the administrator leased the decedent's ranch to one B. The season was very dry, and the ranch did not produce enough feed to keep B.'s cattle through the winter. The cattle were pastured on a farm belonging to the administrator, for which B. agreed to pay a certain sum. Of the sum agreed to be paid the administrator was entitled to half, and the tenant of his farm to the other half. B. failed to make the payment, and the administrator paid to his tenant the share of the agreed sum to which the tenant was entitled. It was held that the administrator was not entitled to credit for the sum so paid, because the cattle were pastured for B., and not for the benefit of the estate, and that the administrator, in paying his tenant, advanced the amount paid for the benefit of B., and was not entitled to look to the estate for its repayment.

Services Rendered by Employee of Decedent. — Where an employee of the decedent continued to perform the services for which he was employed until the expiration of his term of employment, with the assent of the administrator, and his services were necessary for the protection of the estate, credit will be allowed for his wages paid by the administrator. *Matter of Miner*, 46 Cal. 564.

Informal Judgment. — Executors will be allowed credit for payment of an informal judgment, where the debt on which the judgment was based is not disputed. *Tompkins v. Tompkins*, 18 S. Car. 1.

Lost Instruments. — An executor will be allowed credit for the amount paid on a note made by the decedent, though it is not shown that the payee surrendered it, if there is no proof that the note is in the hands of a *bona fide* holder, or that payment has been demanded of the executor within the time lim-

ited for the presentation of claims. *Matter of Benedict*, 13 Abb. N. Cas. (N. Y. Surrogate Ct.) 67, *sub nom.* *Gilman v. Wilber*, 1 Dem. (N. Y.) 547. Compare *Poughkeepsie Bank v. Hosbrouck*, 6 N. Y. 216.

Claims Founded on Illegal Consideration. — If a claim is founded on an illegal consideration or is otherwise tainted with illegality as in case of notes given for money lost at unlawful gaming, or debts affected with usury, the executor or administrator who pays them with notice of those facts will not be allowed credit. *Carter v. Cutting*, 5 Munf. (Va.) 223; *Smith v. Britton*, 2 Patt. & H. (Va.) 124. But credit will not be denied if the payment was made in ignorance of the fact that the debt was founded on a gaming consideration. *Coffee v. Ruffin*, 4 Coldw. (Tenn.) 437.

Claim of Preceding Executor or Administrator for Advances. — An administrator *de bonis non* who pays to a former administrator money advanced by him to discharge obligations of the estate is entitled to credit therefor. *Hearrin v. Savage*, 16 Ala. 286.

2. A Note Given by the Administrator during the decedent's lifetime, at her request, and on her promise to reimburse him for the amount by the sale of certain land, is not a debt of the decedent for the payment of which the administrator can be allowed credit on the settlement of his accounts in the Probate Court. "As administrator," said Hosmer, C. J., "he had no authority to make payment of the promissory note of another person than the deceased. It was no debt or claim on the estate; and a court of chancery, on suitable process, with the parties in interest before it, was the only tribunal that had cognizance of the matter in question, or that could impart a remedy adapted to the nature of the case. The jurisdiction of a court of probate is limited, and it would be vain to search after usage, principle, or analogy to warrant its interposition for the adjudication and settlement of the supposed equitable claim against the heirs of the deceased." *Watrous v. Chalker*, 7 Conn. 224.

3. Debts Barred by Limitation. — *Pursel v. Pursel*, 14 N. J. Eq. 514; *Halliburton v. Carr*, 100 N. Car. 99, 6 Am. St. Rep. 565. See also *supra*, this title, *Powers, Duties, and Liabilities in General* — *Power to Waive Statute of Limitations*.

Estoppel to Oppose Credit. — The heirs cannot oppose a credit for debts paid on the ground that at the time of payment they were barred

cc. DEBTS SECURED BY LIEN. — At common law, if a debt of a decedent was secured by a lien on his property, the creditor could have satisfaction out of the general assets or out of the specific property which was subject to the lien, and the executor or administrator on payment of the debt was entitled to credit for the amount paid; but to avoid the obvious hardship which this principle worked to unsecured creditors, equity adopted the rule of marshaling the assets.¹ The matter is now regulated in many jurisdictions by statutes which make the property subject to the lien the primary fund for the payment of the debt, and under such statutes the executor or administrator, on the payment of the debt out of the general assets, will be allowed credit only so far as the property subject to the lien was insufficient in amount.²

dd. DEBTS DUE TO EXECUTOR OR ADMINISTRATOR. — An executor or administrator who has a valid claim against the estate has the right to retain the amount from the assets in his hands and to take credit for it in his account.³

by the statute of limitations, where they had agreed with the creditors to make no objection to the payment of any just debts though they might be barred by the statute. *Radford v. Fowlkes*, 85 Va. 820.

1. Lien Debts — Out of What Fund Payable. — See the titles DEBTS OF DECEDENTS, vol. 8, p. 1003; LEGACIES AND DEVISES; MARSHALING ASSETS.

Land Acquired by Decedent Subject to Mortgage. — If the decedent acquired land subject to mortgage, the rule that the personal estate is bound to exonerate the realty does not apply unless he has made the mortgage debt directly and absolutely his own, or has in some other way manifested an intention to throw the burden on the personalty, and this is not affected merely by a clause in the deed conveying the land to the decedent that he assumes the mortgage debt. *McLenahan v. McLenahan*, 18 N. J. Eq. 101; *Campbell v. Campbell*, 30 N. J. Eq. 415; *Mount v. Van Ness*, 33 N. J. Eq. 262. Therefore the executor or administrator is not entitled to credit for the payment of such a debt; but in a case where the only person interested in the estate was the decedent's sole heir and next of kin, credit was allowed for payments on the mortgage debt, because, being for his benefit, he had no right to complain. *Birkholm v. Wardell*, 42 N. J. Eq. 337.

Redemption of Pledge in Foreign Jurisdiction. — In *Shinn's Estate*, 166 Pa. St. 121, 45 Am. St. Rep. 656, 36 W. N. C. (Pa.) 36, it was held that an administrator was entitled to credit for a sum paid by him to redeem collaterals pledged by the decedent in another state, where he took possession of the collaterals, which largely exceeded in value the amount of the obligation for which they were pledged, and sold them, thereby increasing the general fund.

2. Statutory Provisions. — In *Missouri* it is held that where a debt which had been allowed against the estate was secured by mortgage, and the administrator sold the equity of redemption, he should not be allowed credit for dividends afterwards paid by him on the debt, if he neglected to collect the amount of them from the purchaser of the equity of redemption, because the mortgaged land was primarily liable in the hands of the purchaser for the debt, and it was the duty of the administrator to enforce such liability. *In re Swan*, 54 Mo. App. 17.

But he will be allowed credit for money

paid to redeem mortgaged property, the value of which greatly exceeded the amount of the mortgage debt, where he acted in good faith and for the best interests of the estate, though without authority from the Probate Court. *Meeker v. Straat*, 38 Mo. App. 239.

A *New York* statute provided that debts secured by mortgage were payable out of the personalty only to the extent that the mortgaged property was insufficient, and therefore if the executor or administrator made a payment on a mortgage debt he was entitled to credit only to the extent that the security was insufficient. *Johnson v. Corbett*, 11 Paige (N. Y.) 265.

If the Estate Is Insolvent the effect of redeeming a mortgage is prejudicial to creditors in that it admits the widow to dower in the land discharged of the mortgage, and therefore, unless the administrator shows that special circumstances existed, which made a redemption apparently a prudent exercise of his discretion to redeem or to sell the equity of redemption, he will be allowed credit only for the difference between the amount paid to redeem and the amount to which the interests of the creditors were prejudiced by the redemption, though he acted in good faith. *Rossiter v. Cossit*, 15 N. H. 38.

3. Debts Due to Executor or Administrator. — For a full discussion of the right of an executor or administrator to retain out of the assets in his hands the amount of a debt due to himself from the estate, see the title DEBTS OF DECEDENTS, vol. 8, p. 1003.

Payments During the Lifetime of the Decedent made by the executor or administrator for the benefit of the decedent, or at his request, or money advanced to him and not intended as a gift, constitute a valid claim against the estate for which credit will be allowed in the account. *McPike v. McPike*, 111 Mo. 216; *Matter of Perry*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 149; *Matter of Cunningham*, 1 Hun (N. Y.) 214. But a claim for moneys so advanced will not be allowed when supported only by the affidavit of the executor. *Adams's Estate*, Tuck. (N. Y.) 109.

The Maintenance of the Decedent by the executor or administrator, likewise, will be allowed, though there was no express contract, if there was no such relation between the parties as to raise a presumption that it was gratuitous. *Wall's Appeal*, 38 Pa. St. 464. See also

cc. DEBTS CONTRACTED BY EXECUTOR OR ADMINISTRATOR. — Debts which have been contracted by an executor or administrator are governed by very different rules in regard to the remedy of the creditor on the one hand, and the rights and liabilities of the executor or administrator on the other hand. It has already been shown that the personal representative of a decedent has no authority to impose any obligation on the estate which did not exist at the time of the decedent's death.¹ But it does not follow, because obligations incurred by an executor or administrator in the discharge of his duties bind him personally, that he will be required to satisfy them out of his individual means, without indemnity from the estate. On the contrary, any debt contracted by him which was reasonable or necessary in the performance of the duties of his office will, when paid by him, be credited in his account, but it is only for such as were reasonable or necessary that credit is allowable.²

Debts Contracted in Continuing Decedent's Business. — Though debts contracted by an executor or administrator in continuing the decedent's business, when duly authorized to do so, are his personal obligations only, and do not generally form the basis of a recovery by the creditor against the estate, he is nevertheless entitled to credit when he has paid such debts.³

ff. TAXES. — Taxes on real estate assessed before the death of the decedent and taxes on personalty assessed either before or after his death are properly payable by the executor or administrator, and when so paid must be credited to him in his account.⁴

Geiger's Appeal, 24 W. N. C. (Pa.) 264; Myers v. Myers, Bailey Eq. (S. Car.) 23.

A Claim for Services rendered to the decedent by the executor will not be allowed where it appears that they were rendered without expectation of reward. Dye v. Kerr, 15 Barb. (N. Y.) 444.

Advances to Estate. — If an executor or administrator advances money for the use of the estate, credit may be given in his account for the amount. Pendergrass v. Pendergrass, 26 S. Car. 19; Watts v. Watts, 2 McCord Eq. (S. Car.) 77; Dunson v. Payne, 44 Tex. 540.

As to Interest on Advances, see *infra*, this section, *Interest*.

Set-off of Debts Due Estate. — An administrator who is both a debtor and creditor of the estate is not entitled to credit for the amount due him without first setting off against it the amount of his indebtedness to the estate. Sorrels v. Trantham, 48 Ark. 386.

1. Contracts Made by Executors and Administrators are generally binding on them only in their individual capacity, and impose no liability on the estate represented by them. See *supra*, this title, *Powers, Duties, and Liabilities in General* — *Contracts Made by Executor or Administrator*.

2. Debts Contracted by the Executor or Administrator will not be allowed unless they were either reasonable or necessary. *In re Casey*, (Supreme Ct.) 6 N. Y. Supp. 608.

A Note Given by an Administrator as such for a debt of the estate, though his individual obligation, will be credited to him on his accounting. Boyer v. Marshall, (Supreme Ct.) 5 N. Y. St. Rep. 431.

Renewal Notes. — Notes given by an executor to a bank in renewal of the testator's obligations to the bank, and subsequent renewal notes given from time to time until he could realize assets for the payment of debts, are still debts of the estate, and when paid credit

will be allowed for the payments. Peter v. Beverly, 10 Pet. (U. S.) 532.

3. Debts Incurred in Carrying On Decedent's Business. — Dowse v. Gorton, (1891) App. 190; Larrou v. Larrou, 2 Redf. (N. Y.) 69.

For a Full Discussion as to the rights and liabilities of an executor or administrator in continuing the decedent's business, see *supra*, this title, *Management and Care of Estate — Continuing Decedent's Business*.

4. Taxes on Real Estate. — See *infra*, this section, *Disbursements in Respect to Real Estate*. See also *supra*, this title, *Management and Care of Estate — Custody and Preservation of Estate*.

Credit for Taxes Paid on Personalty. — Chandler v. Chandler, 87 Ala. 300; Floyd v. Floyd, 7 B. Mon. (Ky.) 292; Matter of Steward, 90 Hun (N. Y.) 94; Williams v. Herrick, 18 R. I. 120.

In some jurisdictions taxes on personalty are assessable to the personal representatives of the deceased owner.

Connecticut. — Cornwall v. Todd, 38 Conn. 443.

Iowa. — McGregor v. Vapel, 24 Iowa 436.

Massachusetts. — Cook v. Leland, 5 Pick. (Mass.) 236.

Michigan. — Herrick v. Big Rapids, 53 Mich. 554.

New Jersey. — State v. Jones, 39 N. J. L. 650; State v. Holmdel Tp., 39 N. J. L. 79.

New York. — People v. Ogdensburgh, 48 N. Y. 390; Williams v. Holden, 4 Wend. (N. Y.) 223.

Oregon. — Johnson v. Oregon City, 2 Oregon 327.

Rhode Island. — Williams v. Herrick, 18 R. I. 120.

Tennessee. — Gallatin v. Alexander, 10 Lea (Tenn.) 475.

As to the Liability of executors and administrators to pay taxes, see also the title *TAXATION*.

If Funds Have Been Misapplied by the execu-

(4) *Funeral Expenses* — (a) *In General*. — The proper expenses of the funeral of a decedent are a charge on his estate which it is the duty of the executor or administrator to pay out of any assets in his hands, and for the amount so paid he is entitled to credit in his account, though the estate is insolvent.¹

(b) *Allowance Against Estates of Married Women*. — It is a well-settled rule of the common law that a husband is liable for the funeral expenses of his deceased wife, as an incident to his obligation to support her while living,² and that such expenses are not a charge on her estate unless made so by her will.³ It would seem to follow from this that the personal representative of a deceased

tor or administrator credit will not be allowed for taxes thereon paid by him. *Moody v. Hemphill*, 1 Ala. 169.

Taxes Paid on Exempt Property. — In *Farquharson v. Nugent*, 6 Dem. (N. Y.) 296, it was held that where a collateral inheritance tax on a legacy to an infant was paid by the executor with the knowledge and consent of the general guardian, he could not, on his accounting, be held liable therefor by a guardian *ad litem* on the ground that the legacy was not subject to the tax.

Penalties and Costs incurred by delay in paying taxes will be credited in the account, though the delay resulted from want of funds caused by the premature payment of other demands, it appearing that in making such premature payments the executor acted in good faith and under legal advice. *Schoeneich v. Reed*, 8 Mo. App. 356.

Mode of Payment. — Payment of a highway tax by the personal labor of the executor in working on the highway is equivalent to a payment in money and entitles him to credit for the amount. *Lansing v. Lansing*, 45 Barb. (N. Y.) 182, 1 Abb. Pr. N. S. (N. Y.) 280, 31 How. Pr. (N. Y.) 55.

1. *Credit for Funeral Expenses Paid* — *England*. — *Sharp v. Lush*, 10 Ch. Div. 468.

Maine. — *Fogg v. Holbrook*, 88 Me. 169.

Massachusetts. — *Cowden v. Jacobson*, 165 Mass. 240.

New York. — *Matter of Miller*, 4 Redf. (N. Y.) 302; *Matter of Smith*, 18 Misc. Rep. (N. Y. Surrogate Ct.) 139.

Pennsylvania. — *Maury's Estate*, 4 Pa. Dist. Rep. 752.

Tennessee. — *Loftis v. Loftis*, 94 Tenn. 232.

Funeral Benefits Paid by Fraternal Order. — Where an administratrix, after paying the funeral expenses, receives from a fraternal order of which the decedent was a member money exceeding the amount so expended, but which under the constitution and by-laws of the order was intended only to defray funeral expenses, it will be considered that the amount so received was a reimbursement to the administratrix of the sum expended by her, and therefore credit will not be allowed for the funeral expenses paid by her. *Matter of Brooks*, 5 Dem. (N. Y.) 326; *Leidenthal v. Correll*, 5 Redf. (N. Y.) 267.

2. *Husband Liable for Wife's Funeral Expenses* — *England*. — *Jenkins v. Tucker*, 1 H. Bl. 90; *Ambrose v. Kerrison*, 10 C. B. 776, 70 E. C. L. 776; *Bradshaw v. Beard*, 12 C. B. N. S. 344, 104 E. C. L. 344; *Bertie v. Chesterfield*, 9 Mod. 31; *Gregory v. Lockyer*, 6 Madd. 90.

Alabama. — *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598.

California. — *Matter of Weringer*, 100 Cal. 345.

Massachusetts. — *Durell v. Hayward*, 9 Gray (Mass.) 248, 69 Am. Dec. 284.

Michigan. — *Galloway v. McPherson*, 67 Mich. 546, 11 Am. St. Rep. 596; *Sears v. Giddey*, 41 Mich. 590, 32 Am. Rep. 168.

In *Matter of Weringer*, 100 Cal. 345, the court said: "At common law the husband was bound to bury his deceased wife in a suitable manner, and was bound to defray the necessary funeral expenses. Although the rule is not universal in this country, it prevails in most of the states. * * * The duty is one which is involved in the obligation of the husband to maintain the wife while living. He has the control of the body of his deceased wife, and must care for the same, and may select a proper place for the interment, regardless of the wishes of her parents or other relatives."

Insolvency of Husband. — If the husband of the decedent is insolvent, her estate may be charged with the funeral expenses. *Scott's Estate*, 15 Pa. Co. Ct. Rep. 316.

3. *Funeral Expenses of Married Woman Not a Charge on Her Estate*. — *Galloway v. McPherson*, 67 Mich. 546, 11 Am. St. Rep. 596.

Effect of Will in Charging Estate with Funeral Expenses. — In *In re M'Myn*, 33 Ch. Div. 575, a married woman, under the powers vested in her by a settlement, made a will appointing her husband one of the executors and bequeathing part of her property to him and the residue to others, but the will did not contain any charge of debts or funeral expenses. The husband paid the funeral expenses, and it was held that he was entitled to retain the amount thereof out of the estate. *Chitty, J.*, said on this point: "The law does not * * * cast upon the husband the burden of burying his wife at his own cost always. In most cases the husband takes all his wife's personal property by reducing it into possession during his lifetime. To call upon him to bury her out of his own moneys in a case like the present, where the wife exercised her power of appointment, and made the fund general assets for her creditors, but has omitted to mention her funeral expenses, would be too hard. I think, therefore, that the husband is entitled to retain the sums expended on her funeral."

Even a direction by will that the funeral expenses shall be paid out of the estate does not relieve the husband of the testatrix of liability to pay them out of his own means, if the estate of the testatrix was insufficient to pay her creditors in full. *Wheeler's Estate*, 4 Pa. Dist. Rep. 265, 36 W. N. C. (Pa.) 296.

married woman is not entitled to credit if he pays such expenses, and it has been several times so held, where the surviving husband was the executor or administrator;¹ but in some jurisdictions the rule is otherwise, and it has been held that a statute which declares that the estate of "every deceased person" shall be chargeable with funeral expenses applies to the estates of married women, and that where a husband who is the administrator of his deceased wife, pays the expenses of her funeral he is entitled to credit for the amount in his account.²

(c) **Amount Allowable.** — The amount which will be allowed for funeral expenses, in the absence of statutory or testamentary provisions, is governed by the value of the decedent's estate, his station in life, and the customs of people of the same station; but the expenditure must in all cases be reasonable, and if extravagant will be disallowed even as against the legatees and next of kin.³

1. **Credit Denied for Funeral Expenses of Married Woman — Husband as Executor or Administrator.** — *Matter of Weringer*, 100 Cal. 345; *Staples's Appeal*, 52 Conn. 425.

2. **Rule in New York — Estate of Married Woman Liable.** — *Kessler v. Hessen*, 19 Abb. N. Cas. (N. Y. City Ct.) 86; *McCue v. Garvey*, 14 Hun (N. Y.) 562; *Jackson v. Westerfield*, 61 How. Pr. (N. Y. Supreme Ct.) 399; *Freeman v. Coit*, 27 Hun (N. Y.) 447.

But a husband cannot charge the estate of his deceased wife with the expenses of her last illness. *Freeman v. Coit*, 27 Hun (N. Y.) 447.

Effect of Statutory Provisions. — The *Rhode Island* statute declaring that the estate of "every deceased person" shall be chargeable with funeral expenses entitles the administrator of a decedent, though her husband, to credit for funeral expenses paid by him. *Moulton v. Smith*, 16 R. I. 126, 27 Am. St. Rep. 728.

Compare statutes in other jurisdictions.

3. **Circumstances of Decedent and Position in Life — England.** — *In re M'Myn*, 33 Ch. Div. 575; *Edwards v. Edwards*, 4 Tyrw. 438, 2 Crompt. & M. 612; *Shelly's Case*, 1 Salk. 296; *Reeves v. Ward*, 2 Scott 395.

California. — *Matter of Weringer*, 100 Cal. 345.

Georgia. — *White v. Stephens*, R. M. Charl. (Ga.) 56.

Mississippi. — *Donald v. McWhorter*, 44 Miss. 124.

North Carolina. — *Parker v. Lewis*, 2 Dev. L. (13 N. Car.) 21.

Reasonable Expenses only are allowable, and what are reasonable must be determined by the facts of each case.

Connecticut. — *Fairman's Appeal*, 30 Conn. 205.

Nevada. — *Millenovich's Estate*, 5 Nev. 161.

New Jersey. — *Sullivan v. Horner*, 41 N. J. Eq. 299.

New York. — *Rappelyea v. Russell*, 1 Daly (N. Y.) 214; *Valentine v. Valentine*, 4 Redf. (N. Y.) 265; *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384; *Allen v. Allen*, 3 Dem. (N. Y.) 524; *Matter of Erlacher*, 3 Redf. (N. Y.) 8; *Matter of Mount*, 3 Redf. (N. Y.) 9, note; *Matter of Rooney*, 3 Redf. (N. Y.) 15.

Pennsylvania. — *Bradley's Estate*, 11 Phila. (Pa.) 87, 32 Leg. Int. (Pa.) 257; *Flintham's Appeal*, 11 S. & R. (Pa.) 16; *Metz's Appeal*, 11 S. & R. (Pa.) 204.

In *Bridge v. Brown*, 2 Y. & Coll. Ch. 181, out of an estate of twelve thousand pounds a charge of one hundred and forty-five pounds for funeral expenses was disallowed as unreasonable and the sum of one hundred pounds was allowed.

In *Bissett v. Antrobus*, 4 Sim. 512, the court refused to allow two thousand two hundred and ten pounds for the funeral expenses of a deceased nobleman whose personal estate was believed to be solvent at his death, but ultimately from unforeseen circumstances, proved to be insolvent.

In *Matter of Hildebrand*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 245, it was held that sixty dollars was a reasonable amount to expend for funeral expenses, though the decedent's estate was not sufficient to pay the widow's statutory exemptions.

"The Principal Inquiry [in determining the amount to be allowed for funeral expenses] should be, Is the expenditure for this purpose disproportioned to the means of the estate, or injurious to the interests of the creditors and family of the deceased? Whenever it is ascertained that the estate could well afford the expense, without materially affecting its funds or injuriously affecting the interests of creditors or of those who are to take and enjoy it after the death of the testator or intestate, there is no impropriety in allowing the administrator a credit for such expenditure." *Bendall v. Bendall*, 24 Ala. 295, 60 Am. Dec. 469.

Extravagant Expenditures. — An executor or administrator is not justified in incurring expenses of an extravagant nature, even as it respects legatees or next of kin entitled in distribution. *Stackpole v. Stackpole*, 4 Dow. 227; *Bradley's Estate*, 11 Phila. (Pa.) 87, 32 Leg. Int. (Pa.) 257; *McKenna's Estate*, 1 Leg. Gaz. Rep. (Pa.) 12.

Compliance with the Last Wishes of the Decedent as to the style and character of the funeral, if not extravagant or unreasonable, and if no injustice is done to creditors, violates no principle of law. *Donald v. McWhorter*, 44 Miss. 124. This principle was applied in *Bendall v. Bendall*, 24 Ala. 295. Thus, two hundred and ten dollars were allowed for a marble tomb where the estate amounted to about eight thousand dollars, with but few debts, and the decedent left neither widow nor children to be provided for.

Restriction of Amount by Statute. — In *Mary-*

In the Case of an Insolvent Estate the early rule was very strict. At first only the sum of forty shillings was allowable at law, but this was gradually enlarged to twenty pounds.¹ In equity the rule adopted was that a reasonable amount would be allowed, taking into consideration the decedent's condition in life, and this is generally followed unless the amount is fixed by statute.²

(d) **Items of Expense.** — The items making up the sum which will be allowed for funeral expenses are not limited to the strict cost of interment, but include many other things.³ Thus, credit will be allowed for a reasonable sum expended in purchasing clothes in which to bury the decedent;⁴ but not for the personal expenses of the executor or administrator, or for his time in attending the funeral;⁵ nor for a sum paid to an organization of which the decedent was a member, for parading at the funeral, where it did not appear that such organization required any payment for parading on such occasions;⁶ nor for a portrait of the decedent painted after his death.⁷

Transportation to Distant Place of Burial. — If the decedent died at a distance from the place where he or his family desired that he should be buried, the cost of transportation from the place of death to the place of burial will be allowed.⁸

Mourning Apparel for the family is generally allowed as an item of the funeral

and it is provided by statute that the allowance for funeral expenses shall not exceed the sum of three hundred dollars. *Matter of Butler*, 3 MacArthur (D. C.) 535.

Restriction of Amount by Will. — Though the will of the decedent provides that the funeral expenses shall not exceed a certain sum, credit will be allowed for a greater amount paid by the executor without knowledge of the limitation, where the several items were duly presented by the persons claiming them, and were approved and allowed by the executor and by the probate judge, and there is nothing to show that they were not reasonable and proper. *Matter of Galland*, 92 Cal. 293.

As to the Amounts of Particular Items for which credit will be allowed see *infra*, the next subsection, *Items of Expense*.

1. Insolvent Estates — Rule at Law. — At law, where a person dies insolvent the rule is that no more shall be allowed for a funeral than is necessary, at first only forty shillings, then five pounds, and at last ten pounds. *Stag v. Punter*, 3 Atk. 119.

In *Yardley v. Arnold*, C. & M. 434, 41 E. C. L. 239, twenty pounds were allowed.

"In strictness," said Lord Holt, "no funeral expenses are allowed in the case of an insolvent estate, except for the coffin, ringing the bell, and the fees of the parson, clerk, and bearers; but not for the pall or ornaments." *Shelly's Case*, 1 Salk. 296, cited in *Buller's Nisi Prius* 143; 2 Williams on Executors (7th Am. ed.) 166.

"Perhaps," observes Dr. Burn, "the expenses of the shroud and digging the grave ought to have been added." 4 Burn E. L. (8th ed.) 348, cited in 2 Williams on Executors (7th Am. ed.) 166, note d.

2. Insolvent Estates — Rule in Equity. — The rule adopted in equity which now prevails generally is that a reasonable sum will be allowed for funeral expenses, though the estate is insolvent. *Yardley v. Arnold*, C. & M. 434, 41 E. C. L. 239; *Hancock v. Podmore*, 1 B. & Ad. 260, 20 E. C. L. 382; *Edwards v. Edwards*, 4 Tyrw. 438, 2 Crompt. & M. 612; *Shelly's Case*, 1 Salk. 296; *Stag v. Punter*, 3

Atk. 119; *Scott v. Dorsey*, 1 Har. & J. (Md.) 233.

Amount Fixed by Statute. — In Louisiana it is provided that not more than two hundred dollars shall be expended for funeral expenses if the estate is insolvent. *Hearing's Succession*, 28 La. Ann. 149.

See also the codes and statutes of other states.

3. Expenses Not Limited to Cost of Interment. — *Donald v. McWhorter*, 44 Miss. 124.

"The term 'funeral' embraces not only the solemnization of interment, but the ceremonies and accompaniments attending the same. Such ceremonies are prompted by affection, and their character is to some extent determined by the religious faith and sentiments of the friends of the deceased, their extent and magnitude depending upon the condition of the estate and the station in life which had been occupied by the deceased, varying from the simple bier to the imposing catafalque, from the informal liturgical service or scriptural reading for the humble to the elaborate orisons funebres attending the obsequies of the renowned." *Matter of Wachter*, 16 Misc. Rep. (N. Y. Surrogate Ct.) 137.

Copy of Verdict of Coroner's Jury. — The cost of a copy of the verdict of the coroner's jury will be allowed, if it is necessary for the burial of the decedent. *Hasler v. Hasler*, 1 Bradf. (N. Y.) 248.

4. Credit for Cost of Burial Clothes. — *Steger v. Frizzell*, 2 Tenn. Ch. 369.

5. Personal Expenses and Time in Attending Funeral. — An administrator is not entitled to credit for car-fare or carriage hire for himself or members of his family, or for his time or services, in attending the funeral of a decedent who was his brother. *Lund v. Lund*, 41 N. H. 355.

6. Payment to Organization for Parading at Funeral. — *Matter of Reynolds*, 124 N. Y. 388.

7. Cost of Portrait of Decedent Not Allowed. — *McGlinsey's Appeal*, 14 S. & R. (Pa.) 64.

8. Transportation to Distant Place of Burial. — *Millenovich's Estate*, 5 Nev. 161; *Sullivan v. Horner*, 41 N. J. Eq. 299; *Hasler v. Hasler*, 1

expenses, because custom requires mourning to be worn at funerals as a mark of proper respect for the dead, and providing such apparel may be considered as a necessary part of the preparation for the funeral; but there are cases to the contrary.¹

Religious Ceremonies, also, when in accordance with the faith of the decedent and the custom of the family, are proper, and the expense of them, if reasonable, will be allowed.²

The Cost of a Burial Lot is allowable as an item of funeral expense, if reasonable in amount, regard being had to all the circumstances,³ and in some jurisdictions expenditures for this purpose are expressly authorized by statute.⁴ But the cost of improving the lot will not be allowed.⁵

Tombstones and Monuments to mark the graves of persons deceased, and to perpetuate their memory, have long been considered as items of funeral expenses which executors and administrators may pay and receive credit for in their accounts, if the cost be reasonable in amount.⁶ And in some jurisdictions it

Bradf. (N. Y.) 248; Carpenter's Estate, 16 Phila. (Pa.) 290, 40 Leg. Int. (Pa.) 416.

1. **Credit Allowed for Mourning Apparel.** — Pitt v. Pitt, 2 Lee Ecc. 508; Matter of Wachter, 16 Misc. Rep. (N. Y. Surrogate Ct.) 137; Allen v. Allen, 3 Dem. (N. Y.) 524; Matter of Wood, 1 Ashm. (Pa.) 314.

"The Wearing of Suitable Mourning Apparel is commonly regarded not only as a proper, but almost indispensable, mark of affection and evidence of grief; the distribution of a decedent's estate among his next of kin without providing therefor for the usual and conventional ceremonies in memory of the dead would seem not only parsimonious, but utterly repugnant to one's conception of justice and propriety." Matter of Wachter, 16 Misc. Rep. (N. Y. Surrogate Ct.) 137.

Where Mourning Was Furnished to a Part Only of the next of kin, credit was not allowed as against the others. Flintham's Appeal, 11 S. & R. (Pa.) 16.

Mourning Rings have been allowed under a discretion given to the executors by the will. Paice v. Canterbury, 14 Ves. Jr. 364. But see *contra*, Johnson v. Baker, 2 C. & P. 207, 12 E. C. L. 92; Macknet v. Macknet, 24 N. J. Eq. 296.

In *Griswold v. Chandler*, 5 N. H. 492, it was held that though an executor or administrator cannot be allowed for mourning apparel furnished to the heirs, he will not be held liable for money expended for such purpose, until he has had an opportunity to call on the heirs to account.

2. **Religious Ceremonies — Wake.** — Garvey v. McCue, 3 Redf. (N. Y.) 313; Johnson's Estate, 8 Pa. Co. Ct. Rep. 1. But see *White's Estate*, 13 Phila. (Pa.) 287, 36 Leg. Int. (Pa.) 451, in which credit for expenses of a "wake" was refused.

3. **Burial Lot — Credit Allowed For.** — Clemes v. Fox, 6 Colo. App. 377; Birkholm v. Wardell, 42 N. J. Eq. 337; Allen v. Allen, 3 Dem. (N. Y.) 524; Meyer's Estate, 43 Leg. Int. (Pa.) 108, 18 Phila. (Pa.) 42.

"The Right to Purchase a Lot in which to bury a deceased person rests on very similar principles to those which control the administrator's right to pay the funeral charges and the expenses which are immediately attendant upon the death and burial." Clemes v. Fox, 6 Colo. App. 377.

What Is Reasonable Cost of Burial Lot. — In *Matter of Erlacher*, 3 Redf. (N. Y.) 8, it was held that where the value of the estate was twenty-six hundred dollars, an expenditure of two hundred and seventy dollars was unreasonable, and an allowance of one hundred and thirty-five dollars was made.

In *Valentine v. Valentine* 4 Redf. (N. Y.) 265, the estate amounted to thirteen thousand dollars, and it was held that three hundred and fifty dollars was a reasonable sum to pay for a lot.

In *Chalker v. Chalker*, 5 Redf. (N. Y.) 480, an allowance of forty dollars was made out of an estate of twelve hundred dollars.

4. **Cost of Burial Lot Allowed by Statute.** — *Sweeney v. Muldoon*, 139 Mass. 304, 52 Am. Rep. 708.

5. **Cost of Improving Burial Lot Not Allowed.** — *Tuttle v. Robinson*, 33 N. H. 104; *Barclay's Estate*, 11 Phila. (Pa.) 123, 33 Leg. Int. (Pa.) 108.

Fencing Private Grounds. — In *Tuttle v. Robinson*, 33 N. H. 104, it was held that the cost of fencing a private burial ground in which the decedent and some of his family were buried was not an item of funeral expense for which credit could be allowed to the executor or administrator.

6. **Tombstones and Monuments — Credit Allowed to Reasonable Amount** — *Alabama.* — *Bendall v. Bendall*, 24 Ala. 295, 60 Am. Dec. 469.

California. — *Van Emon v. Superior Ct.*, 76 Cal. 589, 9 Am. St. Rep. 258; *Matter of Weringer*, 100 Cal. 345.

Connecticut. — *Fairman's Appeal*, 30 Conn. 209.

Illinois. — *Spire v. Lovell*, 17 Ill. App. 559.

Iowa. — *Lutz v. Gates*, 62 Iowa 513; *Crapo v. Armstrong*, 61 Iowa 697.

Massachusetts. — *Hapgood v. Houghton*, 10 Pick. (Mass.) 154; *Durkin v. Langley*, 167 Mass. 577.

Michigan. — *Matter of Kempf*, 53 Mich. 350.

New Jersey. — *Griggs v. Veghte*, 47 N. J. Eq. 179.

New York. — *Ferrin v. Myrick*, 41 N. Y. 315; *Wood v. Vandenburg*, 6 Paige, (N. Y.) 277; *Matter of Howard*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 170; *Owens v. Bloomer*, 14 Hun (N. Y.) 296; *Tickel v. Quinn*, 1 Dem. (N. Y.) 425; *Allen v. Allen*, 3 Dem. (N. Y.) 524; *Burnett v. Noble*, 5 Redf. (N. Y.) 69.

is provided by statute that an executor or administrator may erect an appropriate monument or tombstone and have credit in his account for the cost of it.¹

Changing Place of Burial. — It has been held that where the place of burial had become undesirable, an administrator will be allowed credit for the reasonable expense of disinterring the body of the decedent and reburying it in another place.²

Pennsylvania. — McGlinsey's Appeal, 14 S. & R. (Pa.) 64; Porter's Estate, 77 Pa. St. 43; Webb's Estate, 165 Pa. St. 330, 44 Am. St. Rep. 666, 36 W. N. C. (Pa.) 571; Titlow's Estate, 17 Pa. Co. Ct. Rep. 356, 5 Pa. Dist. Rep. 40; Meyer's Estate 43 Leg. Int. (Pa.) 108, 18 Phila. (Pa.) 42; *Re Griffith's Estate*, 1 Lack. Leg. N. (Pa.) 311; Benner's Estate, 3 Brews. (Pa.) 398; Barclay's Estate, 2 W. N. C. (Pa.) 447, 33 Leg. Int. (Pa.) 108, 11 Phila. (Pa.) 123.

Tennessee. — Cate *v.* Cate, (Tenn. 1897), 43 S. W. Rep. 365. *Compare* Spruance *v.* Darling-ton, (Del. 1894) 30 Atl. Rep. 663.

Credit will be allowed for the expense of a suitable tombstone over the decedent's grave, though the will contained no provision on the subject. Webb's Estate, 165 Pa. St. 330, 44 Am. St. Rep. 666.

Repairs to a Tomb, necessary to put it in a condition to receive the decedent's remains, will be allowed. Bell *v.* Briggs, 63 N. H. 592.

Monument to Decedent's Wife. — An executor is entitled to a credit for an appropriate monument to the decedent, but not for one to his wife. Sheetz's Estate, 2 Woodw. (Pa.) 407.

Reasonable Cost of Tombstones and Monuments. — The amount to be allowed for a tombstone or monument is generally regulated by the amount of the decedent's estate. Connelly's Estate, 28 Pittsb. Leg. J. (Pa.) 352. And see Gorman's Estate, 2 Kulp (Pa.) 61; Geiger's Estate, 12 W. N. C. (Pa.) 439; Hirst's Estate, 12 W. N. C. (Pa.) 323.

But it may be affected by other considerations. Thus, in Taylor's Estate, 3 Pa. Dist. Rep. 691, it was held that if the monument is such as to provoke comment on the contrast between it and the decedent's habits of life, it will not be allowed, though the decedent left a large estate.

Cost of Monument Fixed by Will. — In Bainbridge's Appeal, 97 Pa. St. 482, it was held that a testator had the right to appropriate the entire residue of his estate to the erection of a monument to his memory.

Expenditures Held Reasonable. — Expenditures for tombstones and monuments have been held reasonable in various cases as follows.

In Matter of Howard, 3 Misc. Rep. (N. Y. Surrogate Ct.) 170, where three hundred dollars was spent out of an estate amounting to six thousand dollars.

In Emans *v.* Hickman, 12 Hun (N. Y.) 425, where the estate was twelve hundred dollars and the monument cost one hundred and fifty dollars.

In Matter of Beach, 1 Misc. Rep. (N. Y. Surrogate Ct.) 27, where four hundred dollars was expended out of an estate of eight thousand dollars.

In Campbell *v.* Purdy, 5 Redf. (N. Y.) 434, two hundred dollars was held to be a reasonable sum for a monument to a person whose estate was worth twenty-six thousand dollars.

In Allen *v.* Allen, 3 Dem. (N. Y.) 524, where the decedent left several thousand dollars over and above his debts, one hundred and seventy-five dollars was allowed.

In Cannon *v.* Apperson, 14 Lea (Tenn.) 553, a monument costing six thousand dollars was considered reasonable where the testator left a very large estate, most of which he gave to charities, and directed a "suitable" monument to be erected to his memory.

Expenditures Held Not Reasonable. — In the following cases the amounts expended were held unreasonable and credit was refused:

In Burbridge *v.* Rogers, 7 Ky. L. Rep. 42, five hundred and seventy-five dollars, where the estate was insolvent.

In Matter of Shipman, 82 Hun (N. Y.) 108, two thousand dollars, where the estate was valued at seventeen thousand dollars. In this case the amount was reduced to one thousand dollars.

In Owens *v.* Bloomer, 14 Hun (N. Y.) 296, five hundred dollars, where the estate did not exceed eight thousand dollars.

In Matter of Erlacher, 3 Redf. (N. Y.) 8, six hundred and seventy dollars, out of an estate worth twenty-six hundred dollars. The amount allowed was two hundred and fifty dollars. *Compare* Matter of Mount, 3 Redf. (N. Y.) 9, note.

In Matter of Luckey, 4 Redf. (N. Y.) 95, fourteen hundred and fifty-five dollars, out of an estate amounting to twelve thousand dollars. In this case it was held that the sum of seven hundred dollars was reasonable.

In Burnett *v.* Noble, 5 Redf. (N. Y.) 69, the sum of seven hundred dollars was held unreasonable, and two hundred and fifty dollars allowed out of an estate of two thousand dollars, though the will directed the executor to erect "a suitable monument of a pattern and kind which he may approve of."

If an Estate Is Insolvent the cost of a tombstone or monument will not be allowed. Little *v.* Williams, 7 Ill. App. 67; Lund *v.* Lund, 41 N. H. 355; Moyer's Estate, 5 Kulp (Pa.) 167; *Re Villee's Estate*, 9 Lanc. L. Rev. (Pa.) 353.

1. Cost of Monument Allowed by Statute. — Sweeney *v.* Muldoon, 139 Mass. 304, 52 Am. Rep. 708; Tuttle *v.* Robinson, 33 N. H. 104; Bell *v.* Briggs, 63 N. H. 592; Matter of Shipman, 82 Hun (N. Y.) 108.

See also the codes and statutes of other states.

The *Massachusetts* statute authorizing an allowance for a monument does not require it to be erected on a lot which has been purchased with the decedent's money, but the monument may be erected on another lot to which the decedent's body has been removed. Dudley *v.* Sanborn, 159 Mass. 185.

2. Cost of Changing Place of Burial Allowed. — Allen *v.* Allen, 3 Dem. (N. Y.) 524. But see Watkins *v.* Romine, 106 Ind. 378, holding that

(5) *Expenses of Last Illness.* — The expenses of the last illness of a decedent, which include the cost of the medical and other attention rendered necessary by the nature of the disease and the situation of the patient, constitute a claim against the estate, and if paid by the executor or administrator credit will be given him in his account, under the general rule stated above.¹

Expenses Incident to Death. — Besides the funeral expenses and the expenses of the last illness of the decedent, there are sometimes expenses incident to his death which fall within neither class, but for which credit will be given to the personal representative if he has paid them.²

(6) *Interest.* — Credit will be given to an executor or administrator for interest paid by him on interest-bearing debts of the estate,³ unless he improperly permitted interest to accumulate.⁴

In Regard to Interest on Advances to the estate made by the executor or administrator out of his own funds, the rule is well settled that credit will be allowed if the advances were beneficial to the estate, and the necessity of making them was not occasioned by any neglect or delay on the part of the executor or administrator.⁵ But such claims are not favored, and in no case will they be

where the place of burial was suitable, and had been selected by the decedent, was near his home, and was the one where his first wife was buried, and where his children desired that he should be interred, the administratrix, who was the decedent's second wife, was not entitled to credit for the expense of removing the body to another place.

1. Expenses of Last Illness as Debt of Estate. — See the title DEBTS OF DECEDENTS, vol. 8, p. 1003.

2. Expenses Incident to Death. — In *Hasler v. Hasler*, 1 Bradf. (N. Y.) 248, it was held that credit would be allowed to an administrator for the expense of a special messenger to convey to the family of the decedent the news of his death, where he died at a distance from home, and the most prompt means for the communication of the intelligence were proper and requisite for the security of the estate, adequate preparation for the funeral, and the avoidance of expense consequent on delay.

Traveling Expenses of the Family Going to the place where the decedent was stricken with his last illness will be allowed. *Jennison v. Hapgood*, 10 Pick. (Mass.) 77.

3. Credit for Interest Paid. — *Peter v. Beverly*, 10 Pet. (U. S.) 532; *Trotter v. Trotter*, 40 Miss. 704; *Billington's Appeal*, 3 Rawle (Pa.) 48.

Interest in Excess of the Legal Rate will not be allowed in the absence of a written agreement by the decedent to pay interest at such rate. *Dunne's Estate*, 58 Cal. 543.

The Payment of Usurious Interest on money borrowed will be allowed where it was necessary to prevent a sacrifice of the property of the estate and the will gave extensive discretionary powers to the executor. *Coffee v. Ruffin*, 4 Coldw. (Penn.) 487.

Compound Interest will never be allowed in favor of executors and administrators. *Trimble v. James*, 40 Ark. 393; *Evertson v. Tappen*, 5 Johns. Ch. (N. Y.) 517; *Walker's Estate*, 3 Rawle (Pa.) 243. But see *Storer v. Storer*, 9 Mass. 37.

Interest on Mortgages of Real Estate. — Interest paid on a mortgage of the testator's real estate is a proper disbursement and will be credited in the account of the executor or ad-

ministrator, since the personalty is the primary fund for the payment of all the debts of a decedent. *Merkel's Estate*, 131 Pa. St. 584, 25 W. N. C. (Pa.) 469.

But if the mortgaged land is devised for life, the life tenant is obliged to pay the interest, and if the executor or administrator pays it he will not be credited with the amount so paid. *Geiger's Appeal*, 24 W. N. C. (Pa.) 264.

4. Improperly Permitting Interest to Accumulate. — If an executor or administrator neglects to pay an interest-bearing debt when he had or could have obtained funds, he will not be allowed credit for interest which accumulated on the debt after the lapse of a reasonable time within which he might have paid it. *Benagh v. Turrentine*, 60 Ala. 557; *Forward v. Forward*, 6 Allen (Mass.) 494; *In re Goetschius*, 2 Misc. Rep. (N. Y. Surrogate Ct.) 278.

In *Scott v. Dorsey*, 1 Har. & J. (Md.) 228, it was held that where an executor had assets with which to pay debts, he would not be allowed interest after twelve months from the death of the testator.

5. Credit Allowed for Interest on Money Advanced — *Georgia.* — *Crawford v. Tribble*, 69 Ga. 519.

Maine. — *Pettingill v. Pettingill*, 60 Me. 411. *Massachusetts.* — *Jennison v. Hapgood*, 10 Pick (Mass.) 77.

New Jersey. — *Liddel v. McVickar*, 11 N. J. L. 44, 19 Am. Dec. 369.

Pennsylvania. — *Callaghan v. Hall*, 1 S. & R. (Pa.) 241.

Vermont. — *Rix v. Smith*, 8 Vt. 365; *Evarts v. Nason*, 11 Vt. 122.

Canada. — *Menzies v. Ridley*, 2 Grant's Ch. (U. C.) 544.

"Interest is allowed, because it is natural justice that he who has the use of another's money should pay interest for it." *Per Pendleton, P.*, in *Jones v. Williams*, 2 Catl. (Va.) 102.

Advances to Pay Interest-bearing Debts. — *Biggar v. Eastwood*, 15 Ir. L. Rep. 219; *Stilwell v. Melrose*, 15 Hun (N. Y.) 378; *Mann v. Lawrence*, 3 Bradf. (N. Y.) 424; *Re Hobson's Estate*, 25 Pittsb. Leg. J. N. S. (Pa.) 456.

Advances to Redeem Mortgage. — An executor

allowed if the advances were not beneficial to the estate, or if the executor had funds of the estate in his hands or could have put himself in funds from the estate.¹

If Interest Is Charged on Money Received, the executor or administrator is entitled to credit for interest on the sums paid out by him.²

(7) *Payments to or for Benefit of Legatees and Distributees* — (a) *In General.* — It is held that in stating an administration account credit cannot be allowed for payments to legatees and distributees made without an order of court, because they have no right to share in the estate until it has been ascertained that all debts and charges have been paid.³

without assets who advances his own money to redeem land of the estate, mortgaged for less than its value, to prevent foreclosure, is entitled to interest on the money so advanced. *Jennison v. Hapgood*, 10 Pick. (Mass.) 102.

Interest on Costs paid by an executor pending a suit by or against the estate will not be allowed. *Gordon v. Trail*, 8 Price 416; *Lewis v. Lewis*, 13 Beav. 82. See also *McClelland v. Bristow*, 9 Ind. App. 543.

Advances for Repairs and Preservation of Estate. — Taxes, necessary expenses, and repairs are proper subjects for advances so as to entitle the executor or administrator to interest thereon. *Mann v. Lawrence*, 3 Bradf. (N. Y.) 424.

Simple Interest only is allowable on advances. *Trimble v. James*, 40 Ark. 393.

And if the effect of allowing interest on the balance of the account would be to give the executor or administrator compound interest, the allowance will be denied. *Walker's Estate*, 3 Rawle (Pa.) 243.

1. Interest on Advances Not Favored. — "As a general thing, the executor or administrator is deemed not entitled to interest on what is advanced by him beyond the funds of the estate in his hands, because it is in his power to reimburse himself from the estate at any time, and he is under no legal obligation to advance his own moneys for the benefit of the estate, but may supply himself from the estate as it is needed. But this rule is not of universal application; and where the advances made have been meritorious and beneficial, and the executor or administrator has not been guilty of unreasonable delay, interest is sometimes allowed." *Pettingill v. Pettingill*, 60 Me. 411, citing *Jennison v. Hapgood*, 10 Pick. (Mass.) 77; *Rix v. Smith*, 8 Vt. 365.

The General Policy is adverse to the allowance of interest. *Evarts v. Nason*, 11 Vt. 122.

"A charge of interest by an administrator will properly be viewed with caution, and the circumstances offered to sustain it will be examined with scrupulous care. But circumstances may exist which will not barely justify, but commend, an advance of money by the administrator, and entitle him to an allowance of interest." *Liddel v. McVickar*, 11 N. J. L. 44, 19 Am. Dec. 369.

Unnecessary Use of Individual Funds. — An executor who voluntarily pays debts out of his own funds cannot claim interest on amounts so paid, when he has assets in his hands at the time sufficient to pay them, which he has not chosen to convert into money. If he have not assets, and is compelled to resort to the land in a court of chancery to recover for overpayments, he is treated as a creditor, subro-

gated to the rights of creditors whose claims he may have paid, and is of course entitled to interest. *Billingslea v. Henry*, 20 Md. 282. See also *Storer v. Storer*, 9 Mass. 37; *McPike v. McPike*, 111 Mo. 216; *Booker v. Armstrong*, 93 Mo. 49.

Advances to Pay Distributive Shares. — Interest will not be allowed on advances to distributees in excess of their distributive shares. *Adair v. Brimmer*, 74 N. Y. 539.

2. Interest on Disbursements. — *Stewart's Appeal*, 110 Pa. St. 410.

3. Payments Without an Order of Distribution are purely personal and unofficial, and have no proper place in the executor's official accounts with the estate. *Hanscom v. Marston*, 82 Me. 288.

"An administration account properly settled shows nothing more than the general balance due the heirs after a reduction of the personal estate into cash or its equivalent, and the payments of the debts. Into that account the moneys paid to the distributees, or the advancement to one or more of the children, do not enter. They form no part of an administration account. A total disregard of this obvious distinction causes most of the perplexity which attends such settlements. After a final adjustment, the practice is to decree a distribution among the heirs according to law. It is a general decree; for the court do not undertake to ascertain who are the heirs, or what proportion each is entitled to. And it would be most dangerous to do so, and more especially when the only matter which is properly before them is to settle and adjust the general balance due from the administrator, and to ascertain the net proceeds of the personal estate to which the distributees are entitled. The administrator may annex a statement of the moneys paid to each of the heirs, so that it may appear that the apparent is not the real sum due. But this he is not bound to do. It constitutes no part of the decree, nor does it bind any human being, except, perhaps, the administrator himself. After the decree, however, the Orphans' Court may proceed to enforce payment, and where this is required by any of the parties interested, in order to do justice, it is necessary to investigate the state of the account of the administrator with each of the heirs; and it is plain that justice only can be done by keeping the accounts of each separate and distinct; for one may have received his whole share, another part, and a third nothing. In *Purviance v. Com.*, 17 S. & R. (Pa.) 31, it is held that the Orphans' Court has jurisdiction of the matter of distribution, and is bound to decree distribution on the petition

As Against the Legatees and Distributees, however, to whom such payments have been made, credit will be allowed when their rights can be adjudicated on the settlement,¹ but not to the prejudice of other parties in interest.²

(b) **Support of Decedent's Family.** — In the absence of statutory provisions on the subject, or any direction in the will, it is not the duty of the personal representative of a decedent to provide for the support of the widow and infant children, or for the education of the children; and therefore on the settlement of his accounts as such it is generally held that he is not entitled to credit for

of any one interested, though the usual mode, as is truly said, is by an action at common law. But before making this distribution, the Orphans' Court should require that such notice should be given to all the parties not before the court, as the nature of the case admits of. And this is necessary; for a final distribution of the estate requires great circumspection, and sometimes involves most interesting, doubtful, and perplexing questions; and hence the propriety of avoiding to confound it with a proceeding so entirely different, and intended for an entirely different purpose." *Rittenhouse v. Levering*, 6 W. & S. (Pa.) 190. See also *Robin's Estate*, 180 Pa. St. 630; *Matter of Smith*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 269; *McPaxton v. Dickson*, 15 Ark. 41.

The Rent of a Church Pew for the family paid by the executor or administrator cannot be allowed on the settlement of his account. *Milmo's Succession*, 47 La. Ann. 126; *Scott v. Monell*, 1 Redf. (N. Y.) 431.

1. Payment of Legacy or Distributive Share — Credit Allowable as Against Legatee or Distributee — *Alabama*. — *Dickie v. Dickie*, 80 Ala. 57; *Bailey v. Mundin*, 58 Ala. 104.

Arkansas. — *Martin v. Campbell*, 35 Ark. 137.

Kentucky. — *Trigg v. Daniel*, 2 Bibb (Ky.) 301; *Wood v. Lee*, 5 T. B. Mon. (Ky.) 50.

Louisiana. — *Broadaway's Succession*, 3 La. Ann. 591.

Massachusetts. — *Rice v. Smith*, 14 Mass. 431.

New York. — *Broome v. Van Hook*, 1 Redf. (N. Y.) 444; *Black's Estate*, Tuck (N. Y.) 145; *Hyland v. Baxter*, 98 N. Y. 610; *Tickel v. Quinn*, 1 Dcm. (N. Y.) 432; *Matter of Keef*, 43 Hun (N. Y.) 101, 6 N. Y. St. Rep. 587; *Matter of Rogers*, 10 N. Y. App. Div. 593.

North Carolina. — *Young v. Kennedy*, 100 N. Car. 393.

Pennsylvania. — *Piling's Estate*, 3 W. N. C. (Pa.) 252, 9 Phila. (Pa.) 353, 31 Leg. Int. (Pa.) 116.

Wisconsin. — *King v. Whiton*, 15 Wis. 684; *Lyle v. Williams*, 65 Wis. 231.

Support of Insane Child. — In *Matter of Morris*, 2 Connolly (N. Y.) 372, it was held that under the *New York* statute the surrogate could allow an administratrix credit for disbursements made by her for the support of the decedent's insane adult daughter, who was confined in an asylum.

Discretion of Probate Court. — In *Lawrence v. Security Co.*, 56 Conn. 423, it was held that an allowance for the support of a legatee during the settlement of the estate was in the discretion of the Probate Court, as one of the expenses attending the settlement.

Advances Made under Power in Will. — An executor who made advances to a legatee whose legacy was subject to be divested on a contingency which never happened is entitled to credit therefor in his account. *Barker's Estate*, 159 Pa. St. 518.

2. Prejudice to Other Parties in Interest. — *Paine v. Moffit*, 11 Pick. (Mass.) 496; *Cowdin v. Perry*, 11 Pick. (Mass.) 511; *Granger v. Bassett*, 98 Mass. 462; *North v. Priest*, 9 Mo. App. 586, 81 Mo. 561; *Lewis v. Carson*, 93 Mo. 587.

Until Payment of All Debts and Expenses of Administration no credit will be given for payments made by way of distribution to the next of kin. *Matter of Keef*, 43 Hun (N. Y.) 98, 6 N. Y. St. Rep. 587.

A Payment to a Distributee Without an Order of Court will be allowed in the administrator's account if it appear that the payment did not exceed the amount to which the distributee was entitled. *Young v. Thrasher*, 48 Mo. App. 327.

Indefinite Legatee — Unincorporated Society. — In *Parker v. Cowell*, 16 N. H. 149, it was held that where an executor paid a legacy to an unincorporated society which was clearly indicated by the will, he was entitled to credit as against the next of kin, though it was doubtful whether the society, for want of corporate existence, could have sued for the legacy.

A Legacy Charged on Land Devised should not be credited to the executor in his account with the estate. *Wetmore v. Ketchum*, 10 New Bruns. 408.

If the Interest of a Legatee Is Determinable on the happening of some future event before it vests in possession, and it is so determined after payment to the legatee, the executor or administrator cannot be given credit for the amount paid, as against those eventually entitled. *Dodd v. Winship*, 144 Mass. 461.

Payment to Creditor of Legatee. — A payment at the request of a legatee to a creditor of the legatee is equivalent to a payment to the legatee himself, and the executor or administrator is entitled as against him to credit for the amount paid. *Watson v. McClanahan*, 13 Ala. 57. But see *Matter of Smith*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 269.

An Overpayment to a legatee or distributee does not involve a disallowance of the entire sum paid, but credit may be given for so much of the payment as was proper. Thus, it has been held that where the will directed the executor to pay the income of a fund to a legatee for life, and the executor paid him a part of the principal, he was entitled to credit for so much of the sum paid as was interest. *Matter of Saltus*, 3 Abb. App. Dec. (N. Y.) 243, 3 Keyes (N. Y.) 500.

disbursements made for that purpose.¹ But the amount advanced will be allowed as against their shares of the estate on a settlement with them, or in any proceeding in which their rights can be adjudicated,² and in some juris-

1. Advances for Benefit of Widow and Infant Children — General Rule — *England.* — Giles v. Dyson, 1 Stark. 32, 2 E. C. L. 22.

Canada. — *In re Ryerson's Estate*, 29 Nova Scotia 81.

Alabama. — Willis v. Willis, 9 Ala. 330; Pearson v. Darrington, 32 Ala. 227; Parker v. McGaha, 11 Ala. 521.

Arkansas. — Patterson v. Philips, Hempst. (U. S.) 69; Sorrels v. Trantham, 48 Ark. 386; Harris v. Foster, 6 Ark. 388.

California. — Matter of Rose, 80 Cal. 166.

Indiana. — Sorin v. Olinger, 12 Ind. 29.

Louisiana. — Broadway's Succession, 3 La. Ann. 591; Verret v. Belanger, 6 La. Ann. 109.

Maine. — Treat v. Treat, 80 Me. 156.

Maryland. — Scott v. Dorsey, 1 Har. & J. (Md.) 227.

Massachusetts. — Washburn v. Hale, 10 Pick. (Mass.) 429; Brewster v. Brewster, 8 Mass. 131.

Mississippi. — Washburn v. Phillips, 5 Smed. & M. (Miss.) 600; Jones v. Coon, 5 Smed. & M. (Miss.) 751; Green v. Green, 3 Smed. & M. (Miss.) 266; Standley v. Langley, 25 Miss. 252; Price v. Mitchell, 10 Smed. & M. (Miss.) 179.

Missouri. — State v. Donegan, 83 Mo. 374, 12 Mo. App. 190.

New Hampshire. — Trueman v. Tilden, 6 N. H. 201.

New York. — Scott v. Monell, 1 Redf. (N. Y.) 443; Black's Estate, Tuck. (N. Y.) 145.

North Carolina. — Bland v. Hartsoe, 65 N. Car. 204; Latta v. Russ, 8 Jones, L. (53 N. Car.) 111.

Pennsylvania. — McKinney v. Watson, 8 S. & R. (Pa.) 347; Rittenhouse v. Levering, 6 W. & S. (Pa.) 190; Keenan's Estate, 6 Kulp (Pa.) 73.

Vermont. — Mead v. Byington, 10 Vt. 116.

Wisconsin. — Matter of Fitzgerald, 57 Wis. 508.

But see Darby v. Darby, 2 McCord Eq. (S. Car.) 451. In this case the administratrix, who was the decedent's widow, expended funds of the estate for clothing and necessary maintenance of the decedent's children, before the notice to creditors, and while the estate was deemed solvent. Chancellor DeSaussure allowed credit for the amount so expended, and in regard to the question presented for decision he said: "The situation of the executors and administrators is exceedingly embarrassing in many cases of estates in their hands. The deceased often leaves a good deal of property and a family accustomed to live in comfort on that property. The real situation of the estate as to the debts is not and cannot be known with any certainty for a considerable time. To refuse support to the family would be considered hard and unjust on mere apprehension of danger of insolvency. To make the requisite advances at the risk and responsibility of the executors and administrators is requiring more than can be reasonably expected in the common course of life. In this dilemma the sound principle would be to allow moderate and reasonable advances made

for the support of the family, in the *bona fide* expectation that the estate was solvent, and made prior to the application of creditors whose demands would make the estate insolvent."

An Executor Who Has the Management of the Real Estate as well as the personalty is entitled to credit in his account of the real estate for disbursements for the support of the testator's family. The distinction as to the two species of property is this: The executor holds the personal property for the payment of debts, and he is under no obligation to apply it to the use of the legatees or distributees while the debts remain unpaid; and even when all the known debts are paid, the legatees have no right to demand of him the surplus, or the application of it, to their use, without giving him a refunding bond. As to the rents and profits of the real estate, though they might in equity be charged with debts, in case the personal estate should prove inadequate, yet until the claim to charge them should be asserted by suit of the creditors, the heirs or devisees are entitled to them, without being accountable therefor to the creditors; and the executor receiving them is a trustee of, and bound to account for them to, the heirs and devisees. *Hobson v. Yancey*, 2 Gratt. (Va.) 73.

Authorization by Will. — Where the will expressly authorizes the executor to provide for the support and education of the testator's infant child, credit will be allowed for disbursements made on that account. *Trigg v. Daniel*, 2 Bibb (Ky.) 301.

Authority given to an executor by the will to advance money for the support of the testator's family does not authorize him to pay extravagant debts contracted by one of the testator's sons while at school, though such payment is necessary to save the son from disgrace and to preserve the standing of the family. *Jones v. Ward*, 10 Verg. (Tenn.) 160.

2. Credit for Advances to Family Allowed Against Distributive Shares. — *Munden v. Bailey*, 70 Ala. 63; *Sorrels v. Trantham*, 48 Ark. 386; *Brewer v. Vanarsdale*, 6 Dana (Ky.) 206; *Pettit's Appeal*, 39 Pa. St. 324. See also *Matter of Fitzgerald*, 57 Wis. 508.

Rule in Equity. — "It is a settled doctrine in equity that where an infant whose father is dead has an estate of his own, he may be maintained out of such estate by the person in whose hands it lies, and that where such person, even without previous sanction of the court, has applied property of the infant for such maintenance, he will, if his expenditures have been reasonable and proper, be exonerated from any liability therefor." *Browne v. Bedford*, 4 Dem. (N. Y.) 304 [citing *Hyland v. Baxter*, 98 N. Y. 610; *Matter of Kane*, 2 Barb. Ch. (N. Y.) 375; *Matter of Burke*, 4 Sandf. Ch. (N. Y.) 617; *Wilkes v. Rogers*, 6 Johns. (N. Y.) 566; *Willson v. Willson*, 2 Dem. (N. Y.) 462; *Voessing v. Voessing*, 4 Redf. (N. Y.) 360; *Gladding v. Follett*, 2 Dem. (N. Y.) 58; *Matter of Bostwick*, 4 Johns. Ch. (N. Y.) 100; *Beardsley v. Hotchkiss*, 96 N. Y. 201].

dictions this may be done on the settlement of the administration account in the probate court.¹ In order to authorize the allowance of credit for advances to infants, however, it must appear that the advances were reasonable and necessary under the circumstances, and that the money was applied to the purpose for which it was advanced.²

In California it is held that, on the settlement of an administrator's accounts as such, credit cannot be allowed for any disbursement for the benefit of a minor heir, but the administrator can claim such allowance only on his settlement with such heir. *Matter of Rose*, 80 Cal. 166.

Unless a Decree in Favor of the Distributees can be rendered on the settlement of an administrator with his successor, the accountant is not entitled to credit for expenditures for the maintenance of the infant distributees. *Benagh v. Turrentine*, 60 Ala. 557.

An Advancement to the Widow under an agreement that she should accept it as her share of the estate will be charged against her entire interest in the estate, though the agreement under which she received the money advanced was not legally binding on her, and was afterwards repudiated. *Matter of Moore*, 96 Cal. 522.

On Distribution of the estate, the administrator is entitled to credit for advances for the support of the widow and minor heirs, the amounts to be debited against their respective shares. *Broadaway's Succession*, 3 La. Ann. 591.

Lien for Advances. — In *Hammond v. Cronkright*, 47 N. J. Eq. 447, the will authorized the executrix to sell the testator's real estate, or any part of it, and to use for the support of the widow so much of the proceeds as might be necessary for that purpose. The residue of his estate the testator devised and bequeathed to the executrix, who was his daughter, and to three infant grandchildren. The executrix sold real estate sufficient for the purposes of the will, but instead of applying the proceeds thereto, made cash advances to the guardian of the infants. On the settlement of the accounts of the executrix it was held that such advances should not be credited therein, but should be treated as individual advances to the infants for which the executrix was entitled to a lien on the undivided shares of the infants in the land devised.

Separate Account for Each Child Not Necessary. — The claim of an administrator for the support and maintenance of the decedent's family will not be disallowed because a separate account was not made up for each infant, but an equal division of the expenses between them all will be made where the children were given a common home, were all treated alike, and the necessities were supplied from one common fund. *Shepard v. Stebbins*, 48 Hun (N. Y.) 247.

1. In New York the surrogate has power, on the settlement of an administrator's accounts, to allow, on equitable principles, sums advanced for the support and maintenance of an infant distributee. *Hyland v. Baxter*, 98 N. Y. 610.

In Louisiana an administrator who has made advances to a minor heir for his maintenance

and education is not obliged to sue the tutor, where there has been no separation of the interests of the minor and the adult heirs, but he may be allowed for such advances on the settlement of the succession accounts. *Sparrow's Succession*, 44 La. Ann. 475, 42 La. Ann. 500.

2. **Necessaries.** — Credit will be allowed an administrator for advances to purchase necessities for an infant distributee who has no guardian, according to her condition in life. *Pettit's Appeal*, 39 Pa. St. 324. See also *Billington's Appeal*, 3 Rawle (Pa.) 48.

Cash Payments to Infants. — An executor is not entitled to credit for cash paid to an infant legatee when it does not appear for what purpose the money was advanced, and a sufficient provision had been made for the support of such infant. *Matter of Butler*, 1 Connolly (N. Y.) 58.

A "Wedding Outfit" provided for a legatee by the executor was allowed against her share of the estate, where her mother was either unable or unwilling to supply her, and she had for a long time acquiesced in such payment on her account. *Matter of Butler*, 1 Connolly (N. Y.) 58.

Expenditures When Income Is Insufficient to Maintain Infants. — On a bill by distributees for a settlement of the administrator's account it has been held that credit should not be allowed for their support during infancy, the income of the estate being insufficient for that purpose, if they performed services for the administrator sufficient to pay for their maintenance, or if they were able to maintain themselves. *Henning v. Conner*, 2 Bibb (Ky.) 188. Compare *Tanner v. Davidson*, 3 Bibb (Ky.) 456. But under other circumstances credit will be allowed, though the principal was applied to the support of the infant. *Browne v. Bedford*, 4 Dem. (N. Y.) 304.

Where the Income Is Directed to Be Accumulated for the benefit of infants during their infancy, credit cannot be allowed to the executor for advances made by him without authority out of the income. *Shepard v. Patterson*, 3 Dem. (N. Y.) 183.

Ratification by a Legatee, after attaining his majority, of payments made to him during infancy establishes the right of the executor to credit therefor without regard to the necessity or propriety of the payments at the time when they were made. *Matter of Butler*, 1 Connolly (N. Y.) 58.

Application of Advances to Infant's Use. — Proof that the money advanced was paid to the mother of the infants and that it was expended in the support of herself and the children, without showing how much was devoted to their benefit, is not sufficient to entitle the administrator to any credit. Before credit will be allowed it must appear that the money was applied to their maintenance and educa-

Statutory Regulations.—In many jurisdictions the matter is regulated by statute. In some it is provided that the executor or administrator may apply reasonable amounts to the maintenance of the family.¹ In others property specified in kind or amount is appropriated by law to the immediate support of the widow and infant children, and the executor or administrator is required to set it apart and deliver or pay it over to them or for their benefit. Under such statutes it is obvious that, if the property so appropriated has been inventoried, credit will be allowed for it when it has been delivered or paid over as the statute requires.²

(c) **Funeral Expenses of Beneficiaries of Estate.**—It is generally held that an executor or administrator has no right to pay the funeral expenses of the widow of the decedent or other beneficiary of the estate, and that if he pays such expenses credit will not be given him in his account; but the rule is not always applied with strictness.³

(8) **Disbursements in Respect to Real Estate**—(a) **General Rule.**—The rule at common law is that no title to or interest in the real estate of a decedent passes to his personal representatives, unless by virtue of the will, and they have no right, therefore, to apply any part of the personal estate to the benefit of the realty, except so far as they may discharge the decedent's personal obligations which are charged on the real estate.⁴

tion. *Matter of Hobson*, 61 Hun (N. Y.) 504, affirmed 131 N. Y. 575.

An Administrator Who Is the Father of the Next of Kin of the decedent is not entitled to credit as against them for their board and education furnished by him, if it appears that he was able to support and educate them according to their station in life, and that they contributed by their labor to the support of the family. *Baines v. Barnes*, 64 Ala. 375. But see *contra* *Matter of Marx*, 5 Abb. N. Cas. (N. Y. Surrogate Ct.) 224.

1. **The Alabama Statute** provides that when an estate of a deceased person is solvent, and there are minors entitled to distribution therein who have no legal guardian, it shall be lawful for the administrator to defray, out of the assets of the estate, the necessary and reasonable expenses of the maintenance and education of such minors; and on the final settlement he shall be allowed credit for such expenses, to be charged against the share of such minors and deducted therefrom on any distribution of the estate. *Glover v. Hill*, 85 Ala. 41.

But no credit will be allowed for payments made to a person as the guardian of the infant next of kin where there is no evidence that such person was the guardian or that the money had been applied to the use of the infants. *Landreth v. Landreth*, 9 Ala. 430.

Before an administrator will be allowed for money expended in the maintenance of minors, he must show that there were assets remaining after the payment of debts and expenses which could properly be so applied, and that the disbursements were made in good faith, and were such as would have been sanctioned by a court of equity, had he occupied the position of guardian. *Wright v. Wright*, 64 Ala. 88.

In **Texas** the executor may apply a reasonable amount to the maintenance of infant beneficiaries. *Johnson v. Hogan*, 37 Tex. 77.

The **Vermont Statute** authorizes an administrator to make advances out of the estate for the support of the intestate's family who are

not more than seven years of age, and credit will not be allowed in any other case. *Mead v. Byington*, 10 Vt. 116.

In **Wisconsin** an administrator may be allowed credit for payments made by him for the support of the widow during the settlement of the estate. *King v. Whiton*, 15 Wis. 684; *Golder v. Littlejohn*, 30 Wis. 344.

2. **Statutory Allowances to Widow and Children.**—See the title ALLOWANCES, vol. 2, p. 156.

Necessity of Including Allowances in Inventory.—See *supra*, this title, *Inventory and Appraisal*—*What Property Inventoried*—*In General*.

Unless the Statutory Allowance Has Been Actually Paid credit therefor will not be allowed to the administrator. *Cooley v. Vansyckle*, 14 N. J. Eq. 496.

If the Amount Is Not Set Apart by Appraisers the burden is on the administrator to show that the amount paid by him was necessary and proper. *Simmons v. Byrd*, 49 Ga. 285.

3. **Funeral Expenses of Beneficiaries of Estate Not Generally Allowed.**—*Matter of Butler*, 1 Connoly (N. Y.) 58; *Schaeffer's Appeal*, 1 Pittsb. Leg. J. (Pa.) 358.

In *Wilson v. Staats*, 33 N. J. Eq. 524, credit was allowed for the funeral expenses of a legatee who was very poor and for whose support the testator bequeathed the income and if necessary the principal of a portion of his estate. The ground on which the decision was based was that the funeral expenses were necessities.

In *Matter of Butler*, 1 Connoly (N. Y.) 58, it was held that though an executor had no right to pay the funeral expenses of an infant legatee, yet, having done so, he would be given credit as against the administrator of the infant.

In *Sullivan v. Horner*, 41 N. J. Eq. 299, an administrator was allowed for funeral expenses of the decedent's wife, who perished in the same accident with her husband.

4. **Disbursements on Account of Realty—General Rule**—*Iowa*.—*Foteaux v. Lepage*, 6 Iowa 123.

Kansas.—*Reading v. Wier*, 29 Kan. 429.

Improvements and Repairs. — Within this rule no credit can be allowed for sums expended in improvements or repairs.¹

Insurance. — Nor can an allowance be made for the amount of premiums on insurance taken out by the executor or administrator on real estate.²

Taxes and Assessments. — On the same principle credit is not allowed for taxes levied on the land of a decedent after his death and paid by the executor or administrator, because the liability in such case is on the heir or devisee, and not on the decedent's estate;³ but if the taxes were levied before the death of the landowner, they constitute a debt for which he was personally liable, and the liability devolves on his personal representative, who may pay the amount due and take credit for it in his account.⁴

Maine. — *Kimball v. Sumner*, 62 Me. 305; *Fessenden, Appellant*, 77 Me. 98.

New York. — *Willcox v. Smith*, 26 Barb. (N. Y.) 316; *Deraismes v. Deraismes*, 72 N. Y. 154; *Matter of Selleck*, 111 N. Y. 284.

North Carolina. — *Young v. Kennedy*, 95 N. Car. 265.

Pennsylvania. — *Walker's Appeal*, 116 Pa. St. 419; *McKinney v. Watson*, 8 S. & R. (Pa.) 347; *Benner's Estate*, 3 Brews. (Pa.) 398.

As to Partnership Real Estate the rule is different, and the administrator is entitled to credit where he pays taxes, insurance, or repairs on such property, whether it lies in the state or not. *Scudder v. Ames*, 89 Mo. 496.

Payment on Order of Heir — Effect. — Disbursements on account of real estate, if made on the order of the heir, who is also one of the next of kin, operate as payments to him in his character as one of the next of kin. *Banks v. Taylor*, 10 Abb. Pr. (N. Y. Supreme Ct.) 199.

If the Same Person Is Both Administrator and Guardian, money expended by him in making improvements and repairs and paying taxes may be charged against his wards, but cannot be credited to him in his administration account. *Foteaux v. Lepage*, 6 Iowa 123.

1. Improvements and Repairs — Alabama. — *Cannon v. Copeland*, 43 Ala. 252.

Iowa. — *Foteaux v. Lepage*, 6 Iowa 123.

Massachusetts. — *Fay v. Muzzey*, 13 Gray (Mass.) 53, 74 Am. Dec. 619.

Missouri. — *Byrd v. Governor*, 2 Mo. 102; *In re Motier*, 7 Mo. App. 514.

New Hampshire. — *Brackett v. Tillotson*, 4 N. H. 208; *Lucy v. Lucy*, 55 N. H. 9.

New Jersey. — *Aldridge v. McClelland*, 36 N. J. Eq. 288.

New York. — *Cornwell v. Deck*, 2 Redf. (N. Y.) 87; *Stevens v. Stevens*, 2 Redf. (N. Y.) 265.

Improvements on Leasehold. — In *Ames v. Downing*, 1 Bradf. (N. Y.) 321, 8 N. Y. Leg. Obs. 317, it was held that credit would be allowed for reasonable repairs and improvements on leasehold property occupied by the parties in interest as a residence, the lease containing a renewal clause and a covenant for the repayment at the end of the term of the value of improvements made by the lessee.

The Increase in the Value of Real Estate resulting from the application of the assets to its improvement has been held a proper item of credit. *Morley v. Matthews*, 14 Grant's Ch. (U. C.) 551; *Byrd v. Governor*, 2 Mo. 102. See, however, *Fay v. Muzzey*, 13 Gray (Mass.) 53, 74 Am. Dec. 619, where it was held that an administrator should be charged with the value

of manure which was personal property, though he had spread it on the land and had sold the land for the payment of the decedent's debts.

In the Case of Partnership of which the decedent was a member, it has been held that credit will be allowed for expenditures made by an administrator in repairing the real property of the firm. *Scudder v. Ames*, 89 Mo. 496.

2. Insurance of Real Property — Credit Not Allowed. — *Burke v. Coolidge*, 35 Ark. 180; *Aldridge v. McClelland*, 36 N. J. Eq. 288.

In *Matter of Steward*, 90 Hun (N. Y.) 94, it was held that where the policy covered both real and personal property, and it did not appear how much of the premium was paid upon each kind of property, the allowance of credit for the premium paid would not be disturbed on appeal.

Insurance on Partnership Property. — Credit will be allowed for premiums paid by an executor for insurance on real property of a partnership of which the decedent was a member. *Scudder v. Ames*, 89 Mo. 496.

3. Taxes Levied on Land After Death of Owner — *Iowa.* — *Foteaux v. Lepage*, 6 Iowa 123.

New Hampshire. — *Lucy v. Lucy*, 55 N. H. 9.

New Jersey. — *Polhemus v. Middleton*, 37 N. J. Eq. 240.

New York. — *Cornwell v. Deck*, 2 Redf. (N. Y.) 87; *Matter of Benedict*, (Surrogate Ct.) 15 N. Y. St. Rep. 746.

North Carolina. — *Reeves v. McMillan*, 101 N. Car. 479; *Young v. Kennedy*, 95 N. Car. 265; *Hahn v. Mosely*, 119 N. Car. 73.

Pennsylvania. — *Smith's Estate*, 8 Pa. Co. Ct. Rep. 159.

The Heir or Devisee is liable for taxes levied on the land descended or devised. *Moody v. Hemphill*, 71 Ala. 169.

Partnership Property. — Taxes paid by an administrator on the real property of a partnership of which the decedent was a member will be allowed. *Scudder v. Ames*, 89 Mo. 496.

Credit as Against the Residuary Legatees will be allowed where the payment was made for their protection. *Duan v. Renick*, 33 W. Va. 476.

Remedy Against Heirs. — Though an executor or administrator is not entitled to credit in his account for the payment of taxes accruing after the owner's death, he may recover the amount from the heirs. *Howle v. Anderson*, (Ky. 1898) 44 S. W. Rep. 437.

4. Taxes Levied on Land Before Death of Owner. — *Bowers v. Williams*, 34 Miss. 324; *Matter of Steward*, 90 Hun (N. Y.) 94.

Local Statutes may change this rule. Thus,

Assessments for Local Improvements made after the death of the owner of the land assessed cannot be allowed as a credit if paid by the executor or administrator.¹ Whether credit will be allowed when the property was assessed before the owner's death depends on the terms of the statute authorizing such assessments. If the amount assessed is a debt of the owner of the land, the rule would seem to be the same as in the case of general taxes; but if no personal obligation is created, then in no event could such an assessment be considered as a debt of the estate to be paid by the personal representative.²

(b) **Real Estate in Charge of Executor or Administrator.** — In cases where an executor or administrator has charge of the real property of the decedent, either under the will or by virtue of the statutes relating to the administration of estates in the particular jurisdiction, it is his duty to do whatever may be necessary to protect the interests of the estate in regard to the real estate so in his charge, and therefore he is entitled to credit for his disbursements in the payment of insurance, taxes, or other charges, or for the making of necessary repairs or improvements;³ but authority to make such expenditures is not included in a

if taxes on land do not constitute a debt of the decedent by virtue of such a statute, they are not payable by the personal representatives of the deceased owner, though levied before his death. *Krueger v. Schlinger*, 19 Misc. Rep. (N. Y. Supreme Ct.) 221.

Including Land Owned by Third Person. — If the taxes paid were imposed on real estate of which only a part was owned by the decedent, and no evidence is given by which the taxes can be apportioned, no credit can be allowed for any part of the disbursement. *Matter of Selleck*, 111 N. Y. 284.

As to taxation of estates of decedents in general, see the title **TAXATION**.

1. Local Assessments After Death of Owner. — *In re Motier*, 7 Mo. App. 514.

2. Assessment Before Death of Owner. — Under the *California* statute the owner of the land is personally liable for the assessment, and the person owning the fee, or in the possession of the premises, or exercising acts of ownership for himself or as administrator or guardian, or the person in whom the legal title appears by recorded deeds to be, is to be deemed the owner for the purposes of the act. *Parker v. Bernal*, 66 Cal. 113.

Under the New York Statute, on the other hand, no personal liability is created by a local assessment. *Matter of Hun*, 144 N. Y. 472. In this case the difference between general taxes and local assessments is stated by O'Brien, J., as follows: "In the case of taxes imposed for the general purposes of government, there is a personal obligation upon the citizen to pay, which may be enforced by distress and sale of his goods and by other remedies in the courts, while local assessments, imposed under municipal authority, upon particular property benefited by the improvement, as distinguished from a general tax, are not, as we have seen, a general or personal charge, in the absence of some statute making them such, but are only in the nature of a lien upon the specific property assessed, and the proceedings for their collection are *in rem*." Citing *Wolf v. Philadelphia*, 105 Pa. St. 25; *Litchfield v. Vernon*, 41 N. Y. 123; *Peirce v. Boston*, 3 Met. (Mass.) 520. See also the title **SPECIAL ASSESSMENTS**.

3. Real Property in Charge of Executor or Administrator — *Alabama*. — *Gerald v. Bunkley*,

17 Ala. 170; *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590.

Arkansas. — *Armstrong v. Cashion*, (Ark. 1891) 16 S. W. Rep. 666.

California. — *Matter of Clos*, 110 Cal. 494.
Louisiana. — *Sparrow's Succession*, 40 La. Ann. 484.

Massachusetts. — *Little v. Little*, 161 Mass. 188; *Watts v. Howard*, 7 Met. (Mass.) 478.

Nevada. — *Millenovich's Estate*, 5 Nev. 161.

South Carolina. — *Myers v. Myers*, *Bailey Eq. (S. Car.)* 23; *Paimier v. Miller*, *Cheves Eq. (S. Car.)* 62, 34 Am. Dec. 602.

Land in Possession of Administrator. — Where an administrator is authorized by an order of court, pursuant to the *Alabama* statute, to keep the personal estate together for a specified period, and to cultivate the lands, he is entitled to credit for the reasonable expense of erecting necessary buildings. *Gerald v. Bunkley*, 17 Ala. 170.

Land in Possession of Widow as Equitable Life Tenant. — In *Dey v. Codman*, 39 N. J. Eq. 259, it was held that an executor would be allowed credit for repairs and improvements made by him on real estate devised to be held by the executor in trust for the use and occupation of the testator's widow, as long as she should live and remain his widow, though the widow, instead of occupying the property personally, leased it as equitable life tenant and received the rents and profits, which she applied to her own use.

Expenditures Made under Claim of Ownership. — In *Spruance v. Darlington*, (Del. 1894) 30 Atl. Rep. 663, it was held that where the widow of the testator received letters testamentary under a paper erroneously supposed to be the testator's last will, appointing her executrix and giving her certain real estate absolutely, and she, out of the rents of the real estate so given her, made repairs and improvements, she was not entitled to credit for such disbursements, because she did not make them as executrix, but with the rents of property of which she supposed she was the owner.

Repair or Improvement of Property Directed by Will to Be Sold. — Where a will directs the executor to sell real estate he is entitled to credit for all repairs made by him which were necessary to put it in such a condition that it could

naked power of sale.¹ It has also been held that where the real estate is necessary for the payment of the decedent's debts, the executor or administrator is entitled to credit for such expenditures as are necessary to render the property available for that purpose.² And in some jurisdictions the statutes give express authority to keep the real estate in repair.³

(9) *Expenses of Accounting.* — The general rule that an executor or admin-

be sold for a fair value, or rented until it could be sold. *Almy v. Probate Ct.*, 18 R. I. 612.

In *Vyse v. Foster*, L. R. 8 Ch. 309, 21 W. R. 207, 27 L. T. N. S. 774, the testator devised his real estate on the common trusts for sale, making his real and personal estate a mixed fund. The executors were advised that a part of the land might be advantageously sold in lots for building purposes, and that to develop its value it was desirable to build a villa on it. They accordingly built one at a cost of one thousand six hundred pounds out of the testator's personal estate. This villa had ever since been let at eighty pounds a year, most of the other land had been sold, and the evidence tended to show that the outlay had benefited the estate. It was held that as the executors had, in the *bona fide* exercise of their judgment, expended this sum as the best means of improving the estate, they could, at most, be disallowed only the amount of loss (if any) occasioned to the estate by the expenditure.

Character of Improvements. — Where an executor is directed by the will to keep the estate together, he will be allowed credit for such improvements made by him on the realty as the court would have ordered him to make. *Ex p. Palmer*, 2 Hill Eq. (S. Car.) 215.

Necessity of Improvements. — If improvements are made merely for the speculative purpose of increasing the value of the property, credit will not be allowed. *Matter of Moore*, 72 Cal. 335.

Repairs in Order to Realize Income. — Where it is provided by will that the testator's farm shall remain in the charge of the executors, to be controlled, worked, and conducted by them for a certain period, the rents to be paid by the executors to the testator's widow, the executors are authorized to make repairs to preserve the property and to obtain a proper income therefrom, and they will be allowed credit for money paid by them for repairs, if there is no proof that the repairs were unnecessary. *Matter of Smith*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 269.

Taxes Paid on Realty in Charge of Executors or Administrators — Credit Allowed. — *Ambleton v. Dyer*, 53 Ark. 224; *Matter of Smith*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 269; *Matter of Perry*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 149.

The Virginia Statute provides that the land of a decedent shall be charged to the estate until it can be properly charged to the heir or devisee, and that while so charged the taxes are payable out of the personal estate. *Dillard v. Dillard*, 77 Va. 820.

Payment After a Sale of the Realty by the executor or administrator does not entitle him to credit. *Ambleton v. Dyer*, 53 Ark. 224; *Rudolph v. Underwood*, 88 Ga. 664.

Direction to Pay Taxes Out of Income. — Where a will gave the executor the management and

control of the testator's farm and directed the rents to be paid to his widow for life, she to pay out of the rents the taxes on the farm, it was held that the executor, having paid the taxes out of the general fund, was not entitled to credit therefor, unless it appeared that there was insufficient income from the property to pay the taxes. *Matter of Smith*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 269.

Taxes on Land in Another State will not be allowed where the executor had not taken out letters of administration there. *Jennison v. Haggood*, 10 Pick. (Mass.) 77.

Insurance. — The cost of insurance procured by an executor or administrator on the real property in his charge will also be credited to him in his account. *Pinneo v. Goodspeed*, 120 Ill. 524; *Matter of Nicholson*, 1 Nev. 518; *Matter of Smith*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 269.

Policy Issued in Name of Third Person. — The fact that the policy was issued in the name of the factor of the estate does not affect the administrator's right to credit for the premium paid by him. *Sparrow's Succession*, 40 La. Ann. 434. But it has been held that if the policy was issued in the name of the decedent's widow, the executor is not entitled to credit for the premium paid by him. *Re Griffiths's Estate*, 1 Lack. Leg. N. (Pa.) 311.

In New York an allowance for insurance premiums paid by an executor or administrator for insurance on real property is not allowed unless it was effected under the belief that the estate was insolvent. *Cornwell v. Deck*, 2 Redf. (N. Y.) 87.

Amount of Allowance. — In *Matter of Moore*, 88 Cal. 1, it was held that if an administrator authorized by the court to expend a designated sum in repairs on the decedent's real property exceeds such sum, he will nevertheless be given credit for the whole amount expended, if it was reasonable and necessary under the circumstances. See also *Millenovich's Estate*, 5 Nev. 161, holding that where an executor, acting in good faith and in the exercise of ordinary discretion, expended more than the real value of repairs which he was authorized to make, credit would be given to him for the whole sum expended.

1. **Repairs Not Authorized by Naked Power of Sale.** — *Hopper v. Adece*, 3 Duer (N. Y.) 235.

As to the incidental authority of an executor under a power of sale, see *supra*, this title, *Management and Care of Estate — Real Property — Title and Right to Possession*.

2. **Real Property Necessary for Payment of Debts.** — *Matter of Van Houten*, 18 Misc. Rep. (N. Y. Surrogate Ct.) 524.

3. **Statutory Provisions.** — The *California* statute (Code Civ. Pro., § 1452) requires executor to "keep in good, tenantable repair all houses, buildings, and fixtures." *Matter of Clos*, 110 Cal. 494.

istrator is entitled to credit for all expenses properly incurred in the settlement of the estate applies to the ordinary costs and expenses of settling his accounts. The various items of expense incident to the accounting have already been considered in other parts of this section.¹

b. ASSETS DELIVERED TO SUCCESSOR OR ASSOCIATE. — An executor or administrator who has resigned or been removed is entitled to credit on his accounting for assets delivered by him to his successor in office.² And when he is also a trustee under the will he may have credit as executor for funds transferred to himself as trustee under an order of distribution.³

A Delivery of Assets to a Coexecutor, however, by whom they are misappropriated, is held to establish no right to credit for such assets.⁴

c. LOSSES OR DECREASE OF ASSETS. — In case any loss is sustained by the estate by depreciation, failure to make collections, or otherwise, credit will be allowed in the administration account for the amount of the loss, if it was not the result of any neglect or improper conduct on the part of the personal representative.⁵

1. Expenses Incident to Accounting. — See *supra*, this section, *Credits — Compensation Paid to Agents and Assistants; Fees of Attorneys and Counsel — Preparation and Settlement of Accounts; Costs.*

Private Settlement with Heirs. — Expenses incurred by an administrator in attempting to make a private settlement with the heirs will not be allowed. *Clarke v. Clay*, 31 N. H. 393.

2. Credit for Assets Delivered to Successor. — *Cameron v. Cameron*, 15 Wis. 1, 82 Am. Dec. 652.

Assets Delivered to Successor Before Qualification. — The fact that the new administrator had not qualified at the time when the retiring executor paid over to him the funds on hand does not affect the right of the executor to credit for the amount so paid over and duly charged by the new administrator to himself. *Allen v. Shriver*, 81 Va. 174.

Improper Investments by Retiring Executor or Administrator. — In *Thayer v. Kinsey*, 162 Mass. 232, it was held that where an executor on his resignation delivered to the succeeding administrator *de bonis non* shares of stock in which he had invested funds of the estate, and the administrator retained the shares until they had become worthless, meanwhile collecting dividends and voting at stockholders' meetings, the executor who was not responsible for the depreciation of the shares was entitled to credit for their value at the time when he transferred them to the administrator *de bonis non*, though the investment in the shares was improper in the first instance.

3. Transfer to Self as Trustee. — *In re Higgins*, 15 Mont. 474.

4. Delivery to and Misappropriation by Coexecutor. — *Croft v. Williams*, 88 N. Y. 384; *Sterrett's Appeal*, 2 P. & W. (Pa.) 419. See also *Brown's Appeal*, 1 Dall. (Pa.) 311; *M'Nair's Appeal*, 4 Rawle (Pa.) 148; *Verner's Estate*, 6 Watts (Pa.) 250. But see *Clarke v. Cotton*, 2 Dev. Eq. (17 N. Car.) 51.

5. Credit Allowed for Losses. — *State v. Meagher*, 44 Mo. 356, 100 Am. Dec. 298; *Foster v. Davis*, 46 Mo. 268; *Williams v. Petticrew*, 62 Mo. 460; *Woodruff v. Lounsberry*, 40 N. J. Eq. 545; *Furman v. Coe*, 1 Cai. Cas. (N. Y.) 96; *Hoke v. Hoke*, 12 W. Va. 427.

"The first credit is for articles perished or lost." *In re Jones*, 1 Redf. (N. Y.) 263.

As to Liability for Losses in General, see *supra*, this title, *Management and Care of Estate — Loss of Assets.*

Loss by Ordinary Wear and Tear of chattels bequeathed for life, while in the hands of the life legatee, entitles the executor or administrator to credit therefor. *In re Goetschius*, 2 Misc. Rep. (N. Y. Surrogate Ct.) 278.

Uncollected Debts. — If debts which have been charged to the executor or administrator prove uncollectible and their loss is not attributable in any way to his fault or neglect, he is entitled to credit for the amount. *Stong v. Wilkson*, 14 Mo. 116; *In re Jones*, 1 Redf. (N. Y.) 263; *Cline's Appeal*, 106 Pa. St. 617.

But credit for uncollected debts will not be allowed where the loss was the result of negligence, as in case of failure to sue the debtors within a reasonable time, though there was no bad faith, *Harris v. Parker*, 41 Ala. 604; *Frazier v. Cavanaugh*, 4 Ky. L. Rep. 711, or where the claim which was lost had not been charged to the executor or administrator as part of the assets of the estate, *Mahon v. Bower*, 1 How. (Miss.) 275.

Nor will credit be allowed on account of the insolvency of the obligor in a note where the administrators did not produce the note and had made two settlements without claiming credit for it. *Amos v. Heatherby*, 7 Dana (Ky.) 49.

As to the liability of the personal representative in case he fails to collect debts due the estate, see also *supra*, this title, *Management and Care of Estate — Collection of Debts.*

Losses on Sales. — In case loss results on a sale of property of the estate, the executor or administrator is entitled to credit for the amount thereof, if it was not caused by his neglect or misconduct. *Ex p. Jones*, 4 Cranch (C. C.) 185. But he must show that the loss was without his fault, in order to entitle him to such credit. *Underhill v. Newburger*, 4 Redf. (N. Y.) 499. See also *supra*, this title, *Management and Care of Estate — Sale and Transfer of Personal Property.*

Losses Resulting from Continuing the Decedent's Business will in a proper case be allowed as a credit in the account, as where the executor or administrator carried on the business in good faith, at the request of all the

d. COMPENSATION OF EXECUTORS AND ADMINISTRATORS — (1) Right to Compensation — (a) In General. — At common law the rule is well settled both in the courts of equity and in the courts of law that an executor or administrator is not entitled to any compensation for his personal trouble and loss of time in the performance of his duties.¹

persons interested in the estate. *Poole v. Munday*, 103 Mass 174.

So, too, he is entitled to credit for such losses if he continued the business under a direction contained in the decedent's will, or a provision in articles of partnership, or under an order of court. See *supra*, this title, *Management and Care of Estate — Continuing Decedent's Business*.

And it has been held that where the decedent's interest in a partnership could not have been converted into money without considerable loss, the administratrix (the decedent's widow) was not chargeable with losses resulting from allowing the surviving partner to continue the business on paying interest on the value of the decedent's share. *Browne v. Bedford*, 4 Dem. (N. Y.) 304.

But where the business was highly speculative in character and the administrator continued it without consultation with the creditors and without an order of court, but merely on the advice of the next of kin, and heavy losses resulted, he was not allowed credit. *Shinn's Estate*, 166 Pa. St. 121, 45 Am. St. Rep. 656, 36 W. N. C. (Pa.) 36.

Loss of Investments. — If money invested by an executor or administrator is lost without his fault, and he acted in good faith in making the investment, and had authority to do so, he will be given credit for the amount of the loss, otherwise credit will not be allowed. See *supra*, this title, *Management and Care of Estate — Investments and Loans*.

Depreciation of Values. — If the market value of a commodity belonging to the estate falls while in the hands of the executor or administrator, he is not liable for the former value if his failure to obtain it was not caused by his negligence or misconduct. *Clary v. Sanders*, 43 Ala. 287.

Depreciated Currency. — Where currency depreciates in value while in the hands of a personal representative, he is entitled to credit for the amount of the loss, if he acted in good faith and was not negligent in not disbursing it before the depreciation occurred. *Coggins v. Flythe*, 113 N. Car. 102; *Turbeville v. Flowers*, 27 S. Car. 331. And where it becomes worthless in his hands, without his fault, he will be credited with the whole amount, if it has been charged to him. *Pitts v. Singleton*, 44 Ala. 363; *Jones v. Graham*, 36 Ark. 383. Or if it has not been charged, it may be left out of the account altogether. *Pitts v. Singleton*, 44 Ala. 363.

For a Full Discussion of the liability of fiduciaries for depreciated currency in their hands see the title *MONEY*.

If Property Has Perished since the administration was granted the appraised value thereof will be credited to the administrator. *Edelen v. Edelen*, 11 Md. 415.

Property Claimed and Recovered by Third Persons. — Where property with which an administrator has charged himself is afterwards

recovered by third persons, the administrator is entitled to credit for it. *Jacoway v. Dyer*, 50 Ark. 217.

Losses Caused by Neglect. — An executor or administrator who has once actually received funds of a decedent cannot discharge himself from accounting for them by showing that they were lost by his own neglect. "This proposition," said Pitney, V. C., "seems so self-evident as to require no authority to support it." *Lindsley v. Dodd*, 53 N. J. Eq. 69.

The Cause of the Loss must be stated in the account, because the surrogate is to pass on the sufficiency of the excuse offered, that is, whether the loss was without the fault of the executor or administrator. *In re Jones*, 1 Redf. (N. Y.) 263.

Deductions from Excessive Charges Made by Decedent. — In *M'Call v. Peachy*, 3 Munf. (Va.) 288, it was held that where charges in accounts left by the decedent for collection were unusually extravagant the executor or administrator should be credited for deductions made by him from such accounts, unless it was proved that in making the deductions he acted fraudulently or disadvantageously for the estate.

1. Compensation Not Allowed at Common Law — England. — *Robinson v. Pett*, 3 P. Wms. 249; *Scattergood v. Harrison*, Mosely 130; *Brock-sopp v. Barnes*, 5 Madd. 90.

Maryland. — *Gaines v. Reutch*, 64 Md. 521.
New Jersey. — *Warbass v. Armstrong*, 10 N. J. Eq. 263.

New York. — *Manning v. Manning*, 1 Johns. Ch. (N. Y.) 527.

North Carolina. — *Boyd v. Hawkins*, 2 Dev. Eq. (17 N. Car.) 329.

South Carolina. — *Logan v. Logan*, 1 McCord Eq. (S. Car.) 1; *Charleston College v. Willingham*, 13 Rich. Eq. (S. Car.) 201; *Jones v. Jones*, 39 S. Car. 247, citing 7 AM. AND ENG. ENCYC. OF LAW [1st ed.] 437, note 1.

Tennessee. — *Bryant v. Puckett*, 3 Hayw. (Tenn.) 252.

"It is an established rule that a trustee, executor, or administrator shall have no allowance for his care and trouble, the reason of which seems to be for that on these pretenses, if allowed, the trust estate might be loaded and rendered of little value. Besides, the great difficulty there might be in settling and adjusting the quantum of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust or not." *Per Lord Talbot*, in *Robinson v. Pett*, 3 P. Wms. 249.

An Agent, named executor, is not entitled to charge commission on business done subsequent to the testator's death. *Sheriff v. Axc*, 4 Russ. 33.

Carrying on Testator's Business. — The rule denying compensation to executors for their personal services applies to the continuance of

In England the common-law rule in this regard is still in force.¹

In Some of the British Provinces and Colonies the common-law rule has been abolished and compensation is now allowed.²

In the United States the common-law rule has long since been abrogated by usage or by statute, and a fair compensation for the services which executors and administrators are required to perform is now allowed in all the states of the Union³ except *Delaware*, where the common-law rule seems never to have been changed.⁴

Special or Temporary Administrators. — The right to compensation is not limited

the testator's business by the executor, *Burden v. Burden*, 1 Ves. & B. 170; *Stocken v. Dawson*, 6 Beav. 371, unless the will provides that he shall have compensation, *Willis v. Kibble*, 1 Beav. 559. But see *Forster v. Ridley*, 4 De G. J. & S. 452, in which an allowance was made to an executor who continued the testator's business at the request of the next of kin.

Executor Acting as Agent or Auctioneer. — So, too, it is held that no allowance will be made to an executor for acting as agent or auctioneer to the estate after the testator's death. *Sheriff v. Axe*, 4 Russ. 33; *Hovey v. Blake-man*, 4 Ves. Jr. 596; *Kirkman v. Booth*, 11 Beav. 273. Compare *Mathison v. Clarke*, 3 Drew. 3.

It is discretionary with the court, however, to appoint executors consignees with the usual profits. *Marshall v. Holloway*, 2 Swanst. 432; *Morison v. Morison*, 4 Myl. & C. 216.

1. Rule in England Same as at Common Law. — 3 Williams on Executors (7th Am. ed.) 425; *Perry on Trusts*, §§ 432, 904; *Walker's Comp. Law of Executors* 281.

2. Compensation Allowed in Canada. — *McMillan v. McMillan*, 21 Grant's Ch. (U. C.) 369; *Thompson v. Freeman*, 15 Grant's Ch. (U. C.) 384; *Torrance v. Chewett*, 12 Grant's Ch. (U. C.) 407; *Chisholm v. Barnard*, 10 Grant's Ch. (U. C.) 481; *Hoover v. Wilson*, 24 Ont. App. 424.

In India the courts, in order to induce proper persons to accept the office, adopted a rule allowing commissions on assets collected there. The matter is now governed by the Indian Act, No. 2 of 1874, section 56 of which provides that no person other than the administrator-general, acting officially, shall receive or retain any commission or agency charges for anything done as executor or administrator under any probate or letters of administration, or letters *ad colligenda bona* granted by the Supreme Court or High Court of Judicature at Fort William, in Bengal, since the passing of Act No. 7 of 1849, or by either of the Supreme or High Courts of Judicature at Madras or Bombay, since the passing of Act No. 2 of 1850, or by any court of competent jurisdiction within the meaning of sections 187 and 190 of the Indian Succession Act, 1865. 3 Williams on Executors (7th Am. ed.) 430. See *Chetham v. Audley*, 4 Ves. Jr. 72; *Freeman v. Fairlie*, 3 Meriv. 24.

If an executor in India collects part of the assets there, and then comes to England, and has the remainder remitted to him by his agent, he is entitled to commission on that part only which he collects in India. *Campbell v. Campbell*, 13 Sim. 168.

In the West Indies, also, compensation is allowed where the representative resides and performs his duties there. 3 Williams on Executors (7th Am. ed.) 431.

Other Colonies. — In *New South Wales* (Charter of Justice, dated 13th October, 1823, § 17), *South Australia* (Administration and Probate Act, 1891, § 63), and *Queensland* (Probate Act, 1867, § 6), such commission or percentage as shall be just and reasonable for their pains and trouble; in *Victoria* (Administration and Probate Act, 1890, § 26), *New Zealand* (Administration Act, 1879), and *Tasmania* (Deceased Persons' Estates Act, 1874, § 26), not exceeding five per cent. At the *Cape of Good Hope* and in other colonies there are incorporated companies who act as executors and charge commissions. See *Letterstedt v. Broers*, L. R. 9 App. 371; *Hiddingh v. Denysen*, L. R. 12 App. 624; *Walker's Comp. Law of Executors* 283.

3. Compensation Allowed in United States — *United States*. — *Nicholls v. Hodges*, 1 Pet. (U. S.) 562.

Alabama. — *Phillips v. Thompson*, 9 Port. (Ala.) 664; *Carroll v. Moore*, 7 Ala. 615; *Ivey v. Coleman*, 42 Ala. 409.

Georgia. — *Burney v. Spear*, 17 Ga. 223; *Williamson v. Wilkins*, 14 Ga. 416.

Kentucky. — *Terrell v. Rowland*, 86 Ky. 67; *Carroll v. Connet*, 2 J. J. Marsh. (Ky.) 205; *Jennings v. Davis*, 5 Dana (Ky.) 134; *Logan v. Troutman*, 3 A. K. Marsh. (Ky.) 66; *Fauntleroy v. Lyle*, 5 T. B. Mon. (Ky.) 266.

Louisiana. — *Fowler's Succession*, 7 La. Ann. 207.

Minnesota. — *St. Paul Trust Co. v. Kittson*, 62 Minn. 408.

Nevada. — *Matter of Nicholson*, 1 Nev. 518.

New Hampshire. — *Marston v. Marston*, 21 N. H. 492; *Gordon v. West*, 8 N. H. 444; *Wendell v. French*, 19 N. H. 205; *Lucy v. Lucy*, 55 N. H. 9; *Stewart v. Harriman*, 56 N. H. 25, 22 Am. Rep. 408.

New Jersey. — *Warbass v. Armstrong*, 10 N. J. Eq. 263; *State Bank v. Marsh*, 1 N. J. Eq. 288.

North Carolina. — *Boyd v. Hawkins*, 2 Dev. Eq. (17 N. Car.) 329.

Virginia. — *Dromgoole v. Smith*, 78 Va. 665.

See also the various local codes and statutes in the United States.

In *New York*, before the Act of April 15, 1817, an executor was not entitled to any compensation for his services. That act authorized the Court of Chancery to make an allowance to executors for their services according to a fixed rate. *McWhorter v. Benson*, Hopk. (N. Y.) 28.

4. Rule in Delaware. — *State v. Platt*, 4 Harr. (Del.) 154.

to such personal representatives as have original and general powers, but is extended to those also who act under a special or limited appointment.¹

Administrator Acting under Irregular Appointment. — It has been held that a person who, during the war of the Revolution, in a part of the country occupied by the British army, took out such authority to act as administrator as was then to be obtained from a British board of police, which was the only semblance of civil authority in that region, would be allowed compensation, though he did not take out regular letters of administration on the subsequent re-establishment of the civil authorities.²

Executor Acting under Void Will or Void Letters Testamentary. — So, too, an executor who has rendered services in good faith, while acting under a decree admitting the will to probate, is entitled to compensation for such services, though the will is afterwards adjudged to be void;³ but it is held that he is not entitled to an allowance for his services where he acted as executor under void letters testamentary.⁴

Death or Revocation of Authority. — An executor or administrator who dies or whose authority is revoked is nevertheless entitled to compensation for the services actually performed by him.⁵

Executor Tenant for Life. — And the fact that the use of the entire estate is bequeathed to the executor for life has been held not to defeat his right to compensation.⁶

Period for Which Compensation May Be Allowed. — As long as the estate is in the hands of the executor or administrator, subject to accountability to the Probate Court, he is entitled to an allowance for his services, though he holds it for the benefit of the legatees or distributees.⁷

1. Special Administrators Entitled to Compensation. — *Wright v. Wilkerson*, 41 Ala. 267; *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93; *Wilson v. Wilson*, 3 Gill & J. (Md.) 20; *Green v. Sanders*, 18 Hun (N. Y.) 308; *Egan's Estate*, 7 Misc. Rep. (N. Y. Surrogate Ct.) 262.

Though only the expenses of special administrators are provided for by statute, it is held that they are within the equity of the statute giving commissions to executors and administrators. *Green v. Sanders*, 18 Hun (N. Y.) 308; *Matter of Duncan*, 3 Redf. (N. Y.) 153.

An Administrator Pendente Lite, as to services performed by him, is entitled to the same compensation as are other administrators. *In re Handfield*, 16 Mo. App. 332; *Hawkins v. Cunningham*, 67 Mo. 415.

A Natural Tutrix, administering in that capacity the succession of her husband, is entitled to administrator's commissions. *Forstall's Succession*, 39 La. Ann. 1052; *De Lerno's Succession*, 34 La. Ann. 40.

2. Administration under Authority of Military Board of Police — Compensation Allowed. — *Lloyd v. Cannon*, 2 Desaus. (S. Car.) 232.

3. Executor Acting under Void Will. — *Comstock v. Hadlyme Ecclesiastical Soc.*, 8 Conn. 263, 20 Am. Dec. 100; *Wood v. Nelson*, 10 B. Mon. (Ky.) 230.

4. Person Acting as Executor under Void Letters Testamentary. — *Matter of Frey*, 52 Cal. 658, in which case the letters were void because they were issued to Jacob Frey under an order which directed that they should be issued to Joseph Frey.

5. Compensation in Case of Death or Revocation of Authority. — *Ord v. Little*, 3 Cal. 287; *Brown's Succession*, 27 La. Ann. 331; *Poin-dexter's Succession*, 19 La. Ann. 22; *Rice's*

Succession, 14 La. Ann. 317; *In re Handfield*, 16 Mo. App. 332.

When an Executor Dies without having collected any part of the assets, neither he nor his representative is entitled to commissions on the part not collected. They belong to the administrator *de bonis non* who shall collect them. *McKnight v. Walsh*, 23 N. J. Eq. 136. See also *Matter of Baker*, 35 Hun (N. Y.) 272; *Matter of Allen*, 29 Hun (N. Y.) 7; *Hall v. Hall*, 78 N. Y. 535.

Resignation of Executorship. — In *Frazier v. Cavanaugh*, 4 Ky. L. Rep. 711, it was held that the compensation of an executor who had resigned leaving half the estate undistributed should not on that account be reduced by half.

The Missouri Statute provides that executors and administrators whose letters are revoked, or who die, shall receive such compensation as the Probate Court may deem just and proper. *In re Handfield*, 16 Mo. App. 332.

In New York an administrator whose letters have been revoked is entitled only to half commissions for receiving the fund. No allowance will be made for turning over the assets to his successor. *Lyendecker v. Eisemann*, 3 Dem. (N. Y.) 72.

6. Bequest to Executor for Life. — *Blount v. Hawkins*, 4 Jones Eq. (57 N. Car.) 161.

7. Compensation Allowed as Long as Estate Is Held by Representative. — *Richardson v. True*, 28 Vt. 676.

In *Schinz v. Schinz*, 90 Wis. 236, an executor who was a trustee under the will was allowed compensation during the whole time that the estate was in his hands as executor, though if he had qualified as trustee he would have held the estate in that capacity.

(b) **Time When Allowance Will Be Made.** — In some jurisdictions it is held that credit for the amount to which an executor or administrator is entitled for his services will be allowed only on the settlement of his final account,¹ while in others the allowance may be made at an intermediate or annual accounting,² and he has no right to appropriate any of the assets to the payment of his compensation before it has been judicially allowed,³ but he may retain possession of sufficient funds to satisfy his claim until it has been passed on by the court.⁴ Even on the final accounting he will not be allowed his commissions in full, if the final distribution of the estate is not to be made until a considerable time after such settlement. In that event the court will reserve, until the distribution is made, so much of the commissions as are allowable therefor.⁵

(c) **What Law Governs.** — The compensation of an executor or administrator is dependent on the law in force when the services were rendered, not on the law existing when he was appointed or when he made his settlement.⁶

1. Rule Allowing Credit Only on Final Accounting. — *Matter of Rose*, 80 Cal. 166; *Dunne's Estate*, 58 Cal. 549; *Matter of Miner*, 46 Cal. 564; *Ord v. Little*, 3 Cal. 287; *Sparrow's Succession*, 42 La. Ann. 500.

This was formerly the rule in *Mississippi*. *Merrill v. Moore*, 7 How. (Miss.) 271, 40 Am. Dec. 60. But the allowance may now be made on partial or annual settlements, *Powell v. Burrus*, 35 Miss. 605, or on making a decree for distribution, *Crowder v. Shackelford*, 35 Miss. 321. But the right to commissions does not accrue until the performance of the duties for which they are allowable; and if the executor does not actually administer the estate, he is entitled to no commissions. *Rucker v. Lambdin*, 12 Smed. & M. (Miss.) 230.

As to Sums Received and Distributed, however, before the final settlement, the executor or administrator should be paid his commissions, his right to the residue being reserved for his final account. *Sparrow's Succession*, 40 La. Ann. 484; *Meyer's Succession*, 44 La. Ann. 871.

2. Rule Allowing Credit on Intermediate Accounting. — *Collins v. Tilton*, 58 Ind. 374; *Powell v. Burrus*, 35 Miss. 605; *Freeman v. Freeman*, 4 Redf. (N. Y.) 211; *Matter of Selleck*, 111 N. Y. 285. See also *Stewart's Appeal*, 110 Pa. St. 410; *Parker's Estate*, 64 Pa. St. 307; *Callaghan v. Hall*, 1 S. & R. (Pa.) 241.

In Montana it was held that an executor or administrator, where the conditions require the continuance of the administration over a period of years, can lawfully be allowed, at the close of each year, on the annual account, the commission provided by statute for the executor or administrator on moneys of the estate actually disbursed during the preceding year, by way of compensation for the care and management of the estate. *In re Ricker*, 14 Mont. 153. Compare *In re Dewar*, 10 Mont. 426.

If Annual Rests Are Made for the purpose of charging the executor with interest, commissions should be computed and deducted at each rest. *Vanderheyden v. Vanderheyden*, 2 Paige (N. Y.) 287, 21 Am. Dec. 86.

Successive Accountings. — On the first of several successive accountings the executor or administrator is entitled to full commissions on all moneys received and paid out, and half commissions only on moneys received and not

paid out; on the next accounting he is entitled to the other half commissions on moneys since paid out, full commissions on moneys since received and paid out, and so on the subsequent accountings. *Hawley v. Singer*, 3 Dem. (N. Y.) 589.

Insufficiency of Assets to Meet Allowance. — The fact that when the settlement was had there was not before the court sufficient property to admit of immediate payment of the commissions to which the executor was entitled did not affect the power of the court to make the allowance at the time. *Matter of Prentice*, 25 N. Y. App. Div. 209.

3. No Right to Retain Compensation Before Judicial Allowance. — *Wheelwright v. Wheelwright*, 2 Redf. (N. Y.) 501; *Whitney v. Phoenix*, 4 Redf. (N. Y.) 180; *Wheelwright v. Rhoades*, 11 Abb. N. Cas. (N. Y. Supreme Ct.) 382, 28 Hun (N. Y.) 57; *Meeker v. Crawford*, 5 Redf. (N. Y.) 450; *Lacey v. Davis*, 4 Redf. (N. Y.) 402; *In re Gerow*, (Surrogate Ct.) 23 N. Y. Supp. 847; *Matter of Butler*, 1 Connolly (N. Y.) 58; *Hodges v. Armstrong*, 3 Dev. L. 14 (N. Car.) 253.

Commissions Are Not to Be Deducted as of the date of filing the account, but as of the date of the settlement. *Haskins v. Teller*, 3 Redf. (N. Y.) 316.

Premature Appropriation — Liability for Interest. — If an executor or administrator, before judicial allowance of his commissions, appropriates to his own use on account thereof funds of the estate, he may be charged with interest on the amount so appropriated. *Wheelwright v. Rhoades*, 11 Abb. N. Cas. (N. Y. Supreme Ct.) 382, 28 Hun (N. Y.) 57; *Matter of Peyser*, 5 Dem. (N. Y.) 244; *Lacey v. Davis*, 4 Redf. (N. Y.) 402.

4. Retaining Funds Pending Allowance. — *Wheelwright v. Wheelwright*, 2 Redf. (N. Y.) 501.

5. Withholding Commissions Until Final Distribution. — *Conover v. Ellis*, 49 N. J. Eq. 549.

6. Law in Force When Services Were Rendered Governs Allowance — *Alabama*. — *Key v. Jones*, 52 Ala. 238; *Gould v. Hayes*, 19 Ala. 438.

Maryland. — *Gaines v. Reutch*, 64 Md. 517.

Missouri. — *Matter of Tutt*, 41 Mo. App. 662.

Montana. — *In re Dewar*, 10 Mont. 426.

Virginia. — *Turner v. Turner*, 1 Gratt. (Va.) 11.

(d) **From What Fund Allowance May Be Made.** — The claim of an executor or administrator for compensation is one of the expenses of administration and is payable out of any funds in his hands in preference to legacies, distributive shares, and debts, but it is not payable out of legacies, unless the general estate is insufficient to pay both, nor is it ordinarily payable out of the real estate, unless there is no personalty or the personalty has been exhausted.¹

(e) **For What Compensation Is Allowed.** — The purpose of allowing compensation to executors and administrators is to reward them not only for their time, labor, and trouble in administering the estates, but also for the responsibility incurred and for the fidelity with which they discharge the duties of their trusts.² Commissions, in those jurisdictions where compensation is made in that form, are intended to compensate the executor or administrator for the performance of all the duties imposed on him by law; and if he renders any services not required of him in the ordinary course of the administration, he can claim no compensation therefor unless it is provided by statute that special compensation may be allowed for extraordinary services.³ If, however, the statute merely provides that the court may allow a reasonable compensation, without fixing any limit or prescribing any mode of estimating it, it seems that the court may make an allowance for each service rendered to the estate.⁴

1. Preference of Claim for Compensation. — *Williamson v. Wilkins*, 14 Ga. 416; *Logan v. Troutman*, 3 A. K. Marsh. (Ky.) 66; *Matter of Nicholson*, 1 Nev. 518; *Halsey v. Van Amringe*, 6 Paige (N. Y.) 12.

Commissions Are Not Chargeable on Legacies, unless indirectly by way of abatement, when the general estate is not sufficient to pay them. On a regular accounting, the whole amount of receipts and disbursements forms the basis of charging commissions, which are then deducted, and the legacies paid out of the surplus remaining after the payment of the debts and expenses of administration. *Westerfield v. Westerfield*, 1 Bradf. (N. Y.) 198.

The Residuary Estate is generally subject to the payment of commissions, and not sums specifically bequeathed. *McKnight v. Walsh*, 23 N. J. Eq. 137.

If There Is No Personal Estate, or if it has been exhausted, the claim of an administrator for compensation for services in selling real estate to pay debts will be allowed out of the proceeds of the real estate sold. *Loftis v. Loftis*, 94 Tenn. 232. Compare *Newsom v. Newsom*, 3 Ired. Eq. (38 N. Car.) 411.

Compensation for Managing and Selling Real Estate Devised to Be Sold for the benefit of the testator's children must be paid out of the proceeds of the land, so as to leave the personalty for the payment of debts. *Justices v. Lee*, 1 T. B. Mon. (Ky.) 250.

Separate Administration of Realty and Personalty. — Where the personal property was bequeathed to one class of persons and the real estate to another class, and one of the executors administered the personalty and the other executor administered the realty, and they rendered separate accounts, it was held that each executor should have commissions out of the fund represented by him. *Matter of Mansfield*, to Misc. Rep. (N. Y. Surrogate Ct.) 206.

Commissions on Income. — Where a fund is given to the executor in trust to pay the income to the beneficiaries, it is held that the executor's commissions are properly chargeable to the body of the estate, in the absence of any

indication in the will that they are to be charged in the income. *Matter of Mount*, 2 Redf. (N. Y.) 405. But see *Grinnell v. Baker*, 17 R. I. 41.

An Executor of an Executor is entitled to commissions on pecuniary legacies paid out under the will of the first testator, such commissions to be retained out of the fund due to the legatees; but he is not entitled to commissions from the estate of his immediate testator, on the hypothesis that the amount was due as a debt from his estate to the former estate, unless it appears that the last testator claimed the fund adversely to the legatees, under the first will. That the money and notes of the two estates were so commingled that they could not be distinguished is immaterial if the deceased executor had charged himself with them. *Matter of Jones*, 25 Ga. 414.

Where an Executor Is Insolvent and Is Indebted to the Estate, his indebtedness will be applied in satisfaction of his commissions. *Freeman v. Freeman*, 4 Redf. (N. Y.) 211.

2. Compensation for Fidelity and for Risk Incurred. — *Powell v. Burrus*, 35 Miss. 605; *Merrill v. Moore*, 7 How. (Miss.) 271, 40 Am. Dec. 60; *Hipkins v. Bernard*, 2 Hen. & M. (Va.) 21.

3. Commissions Allowed as Entire Compensation. — See *infra*, this section, *Amount of Compensation — Commissions*.

Guaranteeing Bills of Exchange remitted by the executor to the persons beneficially interested in the estate does not entitle him to commissions. *Esswein v. Seigling*, *Riley Eq.* (S. Car.) 200, 2 Hill Eq. (S. Car.) 600.

Receiving Interest on Money Loaned by the Testator has been held not to entitle the executor to commissions, his claim being available only under the statute relating to compensation for extra services. *Rutledge v. Williamson*, 7 Desaus. (S. Car.) 150.

4. Compensation Left to Discretion of Court. — In *Sherrell v. Shepard*, 19 Fla. 300, it was held that an administrator should be allowed compensation for services *bona fide* rendered in endeavoring to collect and in investigating the

(f) **Forfeiture or Loss of Right** — *aa.* **POWER TO DENY COMPENSATION.** — The power of the court in any case to withhold the compensation provided for by statute generally depends on its terms. Thus, it has been held that where the statute declares that executors and administrators shall be compensated for their services and prescribes the amount to be allowed them, the court has no power under any circumstances to deny them the prescribed compensation.¹ Another line of decisions under statutes equally positive in terms asserts the power of the court to refuse any allowance to an executor who has been guilty of any neglect or improper conduct whereby the estate has suffered loss. The theory of these decisions is that the compensation provided for by the statutes is incident to and belongs to a faithful administration of the estate, and is not intended to be allowed under other circumstances.²

bb. **GROUND FOR DENYING COMPENSATION** — (*aa.*) *Acts or Omissions of Representative.* — **General Rule.** — As a general rule the court may refuse to allow compensation to an executor or administrator if he has been guilty of misconduct or neglect, or is in anywise in default.³

Misconduct. — It is well settled as a general rule that any misconduct on the part of an executor or administrator amounting to a breach of duty is a sufficient ground for denying compensation.⁴

condition of notes, the makers of which were reputed to be solvent.

1. Power to Withhold Compensation Denied. — The provision of the *Wisconsin* statute (now *Sanb. & B. Annot. Stat.*, 1898, § 3929), that an executor or administrator "shall be allowed all necessary expenses in the care, management, and settlement of the estate, and for his services one dollar per day, and commissions upon the amount of personal estate collected and accounted for by him, and the proceeds of real estate sold under an order of the County Court for the payment of debts or legacies as follows: for the first thousand dollars at the rate of five per cent.; for all above that sum and not exceeding five thousand dollars, at the rate of two and one-half per cent.; and for all above five thousand dollars, at the rate of one per cent." was held to be imperative in respect to commissions and to give the court no discretion to withhold them. *Matter of Fitzgerald*, 57 *Wis.* 508.

In *Maryland* the same rule has been laid down. *Handy v. Collins*, 60 *Md.* 229, 45 *Am. Rep.* 725.

And it was formerly held in *New York* that the court had no power to deny compensation. *Halsey v. Van Amringe*, 6 *Paige* (N. Y.) 12; *Dakin v. Demming*, 6 *Paige* (N. Y.) 95. But later decisions are the other way. *Stevens v. Melcher*, 152 *N. Y.* 551. *Cook v. Lowry*, 95 *N. Y.* 114; *Matter of Harnett*, (Surrogate Ct.) 15 *N. Y. St. Rep.* 725; *Matter of Conklin*, 2 *Connoly* (N. Y.) 176.

Compare the statutes in other jurisdictions.

2. Power to Withhold Compensation Affirmed. — Notwithstanding the positive terms of the *Missouri* statute (now *Rev. Stat.* 1889, § 222), that the court "shall" allow on all settlements of the accounts of executors and administrators, as compensation for their services and trouble, a commission of five per cent. on personal property and on money arising from the sale of real estate, it was held that the commissions were intended to compensate only a faithful administration. *State v. Berning*, 74 *Mo.* 87.

See also *Cook v. Lowry*, 95 *N. Y.* 114, where *Andrews, J.*, said: "Commissions are allowed to trustees as a compensation for services in the execution of the trust, and in a case of gross neglect or of unfaithfulness we think the court may properly disallow them."

3. Grounds for Denying Compensation — Neglect or Misconduct — *Alabama.* — *Stewart v. Stewart*, 31 *Ala.* 207; *Ivey v. Coleman*, 42 *Ala.* 409.

Louisiana. — *Touzanne's Succession*, 36 *La. Ann.* 420; *Badillo v. Tio*, 7 *La. Ann.* 487.

New Jersey. — *Brewster v. Demarest*, 48 *N. J. Eq.* 559; *Frey v. Demarest*, 17 *N. J. Eq.* 71; *Warbass v. Armstrong*, 10 *N. J. Eq.* 263.

New York. — *Stevens v. Melcher*, 152 *N. Y.* 551; *Matter of Conklin*, 2 *Connoly* (N. Y.) 176; *Matter of Harnett*, (Surrogate Ct.) 15 *N. Y. St. Rep.* 725; *McMahon v. Allen*, 4 *E. D. Smith* (N. Y.) 519.

North Carolina. — *Grant v. Reese*, 94 *N. Car.* 731.

Pennsylvania. — *Re Atherton's Estate*, 8 *Kulp* (Pa.) 150; *Palmer's Estate*, 2 *Del. Co. Rep.* (Pa.) 180.

4. Misconduct as Ground for Denying Compensation — Fraud. — In *Arnold v. Blackwell*, 2 *Dev. Eq.* (17 *N. Car.*) 1, an executor who attempted to retain for his own benefit a portion of the assets of the estate was denied commission thereon.

Misappropriation of Assets. — So, too, the executor or administrator will be denied commissions on funds which he had converted, where he attempted to conceal the conversion when he settled his accounts. *Davis v. Eastman*, 68 *Vt.* 225. See also *Chapman v. Brite*, 4 *Tex. Civ. App.* 506; *Drake's Estate*, 2 *Kulp* (Pa.) 256.

But it is held that such conversion is not a ground for denying him compensation for prior faithful services. *Foster v. Stone*, 67 *Vt.* 336.

Using Trust Funds for Individual Purposes is ground for refusing to allow commissions thereon. *Frey v. Demarest*, 17 *N. J. Eq.* 71; *Blauvelt v. Ackerman*, 23 *N. J. Eq.* 495, 25 *N. J. Eq.* 570; *Geiger's Appeal*, 24 *W. N. C.* (Pa.)

Neglect of Duty. — There is considerable variety in the decisions as to the nature of a neglect or default which will constitute a ground for denying compensation. In some cases it has been said that any gross neglect or wilful default is sufficient.¹ Other and more numerous authorities are to the effect that compensation should be denied only when the neglect or default causes loss or injury to the estate,² and that so far as the services have been bene-

264. 1 *Mona. (Pa.)* 547; *Ziegler's Estate*, 4 *Montg. Co. Rep. (Pa.)* 17.

Mingling Trust Funds with Individual Funds is also such misconduct as furnishes ground for denying commissions. *Frey v. Demarest*, 17 *N. J. Eq.* 71; *Matter of Matthewson*, 8 *N. Y. App. Div.* 8; *Williamson's Estate*, 18 *W. N. C. (Pa.)* 138, 2 *Pa. Co. Ct. Rep.* 221; *Bond's Appeal*, 2 *Penny. (Pa.)* 241.

Removing Property from Jurisdiction of Court. — In *Pearson v. Darrington*, 32 *Ala.* 227, it was held that compensation should be denied to an administrator who wilfully and in violation of an injunction removed from the jurisdiction of the court property of the estate which he had purchased, the sale having been set aside, and afterwards disobeyed an order of the court to bring the property back again.

Improper Contests with Beneficiaries. — An executor or administrator who denies the title of the beneficiaries to a part of the estate, or their right to have an account from him as to moneys collected, is not entitled to commissions thereon. *Barrett's Estate*, 31 *Pittsb. Leg. J. (Pa.)* 53; *Smith's Estate*, 37 *Pittsb. Leg. J. (Pa.)* 33.

Speculating with Trust Funds. — Commissions will be denied where an executor has lost trust funds in speculation, though he had theretofore been faithful in the performance of his duties. *Richardson's Estate*, 12 *W. N. C. (Pa.)* 386.

Procuring Sale of Land by Fraud. — In *Ambledon v. Dyer*, 53 *Ark.* 224, it was held that commissions should be denied to an administrator who improperly kept the administration open by concealing that he had money enough to pay all debts, and procured a sale of land of the estate for that purpose.

Acceptance of Benefit of Wrongful Acts. — Compensation for services rendered will be allowed notwithstanding unfaithful administration, if the services have been beneficial to the persons interested in the estate and they have accepted the benefit. *Jennison v. Hapgood*, 10 *Pick. (Mass.)* 77.

1. Gross Neglect or Wilful Default. — *Matter of Conklin*, 2 *Connoly (N. Y.)* 176; *Matter of Harnett*, (*Surrogate Ct.*) 15 *N. Y. St. Rep.* 725.

An administrator who is guilty of wilful default or gross negligence in the management of the estate cannot be heard to complain that commissions have not been allowed him. *Hall v. Wilson*, 14 *Ala.* 295.

In *Matter of Matthewson*, 8 *N. Y. App. Div.* 8, commissions were denied where the executrix, to whom the testator had given merely the income of the estate for life, treated the estate as if it had been given to her absolutely. The court said: "Commissions are given to representatives as a compensation for their services in protecting the estates of those for whom they are acting as trustees, and the *cuius que trustent* are entitled to the perform-

ance of such services in the preservation of the estate, and that they be rendered in such manner as an ordinarily prudent and careful man would exercise such powers under the like conditions and circumstances. In this case no such services were performed. The law provides for the manner in which such a trustee shall act towards the trust estate. It is the duty of such a trustee, upon the receipt of an estate represented by him, to make and file in the proper court an inventory of the property coming into the hands of such trustee, so that those who are interested in the estate may, at the very outset of a trusteeship, be able to ascertain what property they are entitled to. After the making of such an inventory, the trustee should have the property appraised, and such property as the widow, as such, is entitled to should be set apart by the appraisers. If these requirements had been fulfilled at the outset of the trusteeship, the character and extent of the property would have been fully disclosed. It could easily have been ascertained what was principal and what was income, what was the property of the residuary legatees and upon what property the life tenant was entitled to income. In the proper discharge of her duties as trustee, an account showing the manner in which she was discharging such trust should have been made by her, and an accounting had before the proper court, that those who were interested in the property might thus be apprised of the manner in which it was being administered by the trustee, and whether the life tenant was using only such moneys as belonged to her under the terms of the will, or whether she was encroaching upon the corpus of the estate, which belonged to the residuary legatees. None of these things were done by this trustee. For more than nine years she treated all of this property as though she were the sole and exclusive owner and entitled to the whole of the estate. We think that the management of this estate has been prejudicial to the interests of those entitled to the residue and remainder of the estate. We are of the opinion that negligence has been shown by this trustee in caring for the property intrusted to her. These commissions, being for services, should be denied, unless the services have been performed in such a manner as those interested in the residue of the estate had a right to expect. These services have not been so performed, and we think that these parties should not be called upon to pay from this estate the commissions of this trustee. To allow commissions under such circumstances would be countenancing and abetting negligent acts of this trustee in the management of this estate."

2. Loss or Injury Resulting from Neglect of Duty. *United States.* — *Walker v. Walker*, 9 *Wall. (U. S.)* 743.

ficial to the estate, the executor or administrator is entitled to compensation, though he has been unfaithful in the administration.¹ It has also been held that, though an executor or administrator has been guilty of misconduct, he may still be allowed compensation for prior faithful services.²

Failure to Make Periodical Returns. — It has been held that failure of an executor or administrator to make the periodical returns to the Probate Court as required by law is of itself a sufficient cause for withholding the compensation to which he would otherwise be entitled, but there are authorities to the contrary.³ In

Alabama. — *Powell v. Powell*, 10 Ala. 900; *Hall v. Wilson*, 14 Ala. 295; *Smith v. Kennard*, 38 Ala. 695; *Pearson v. Darrington*, 32 Ala. 231; *Donelson v. Posey*, 13 Ala. 752; *Gould v. Hayes*, 19 Ala. 438, 25 Ala. 432; *Lyon v. Foscue*, 60 Ala. 468.

Florida. — See *Eppinger v. Canepa*, 20 Fla. 262.

Louisiana. — *Lee's Succession*, 4 La. Ann. 579; *Touzanne's Succession*, 36 La. Ann. 420.

Massachusetts. — *Blake v. Pegram*, 109 Mass. 541.

New Jersey. — *Brewster v. Demarest*, 48 N. J. Eq. 559; *Moore v. Zabriskie*, 18 N. J. Eq. 51.

North Carolina. — *Grant v. Reese*, 94 N. Car. 720.

Pennsylvania. — *Hermstead's Appeal*, 60 Pa. St. 423; *Norris's Appeal*, 71 Pa. St. 106; *Clauser's Estate*, 84 Pa. St. 51, *Unruh's Estate*, 13 Phila. (Pa.) 337, 37 Leg. Int. (Pa.) 134. See also *Aston's Estate*, 5 Whart. (Pa.) 240; *Matter of Dyott*, 2 W. & S. (Pa.) 557; *Bredin v. Kingland*, 4 Watts (Pa.) 420; *Swartswalter's Account*, 4 Watts (Pa.) 77; *Stehman's Appeal*, 5 Pa. St. 414; *McCahan's Appeal*, 7 Pa. St. 59; *Berryhill's Appeal*, 35 Pa. St. 245.

South Carolina. — *Brown v. McCall*, 3 Hill L. (S. Car.) 335.

Vermont. — See *Hapgood v. Jennison*, 2 Vt. 294.

Mere Neglect will not deprive an executor or administrator of his right to compensation if he acted in good faith. *Fross's Appeal*, 105 Pa. St. 258. See also *Schoeneich v. Reed*, 8 Mo. App. 356; *Wilson v. Staats*, 33 N. J. Eq. 524.

And even in a case of extreme negligence (loss of books and vouchers) commissions were allowed, but the representative was charged with the expenses of a reference to an auditor in order to state an account which was rendered necessary by such negligence. *Miller's Estate*, 16 W. N. C. (Pa.) 115.

Keeping Money Unemployed—Failure to Invest. — An executor who retains money in his hands unemployed does not thereby forfeit his commissions, though he is charged with interest on it. *Goult v. Burritt*, 11 Grant's Ch. (U. C.) 523; *Frost v. Denman*, 41 N. J. Eq. 47. But if it was his duty to invest, and he neglected to do so, he is not entitled to any commissions. *Warbass v. Armstrong*, 10 N. J. Eq. 263; *Frey v. Demarest*, 17 N. J. Eq. 71; *McKnight v. Walsh*, 23 N. J. Eq. 136.

Unauthorized Investments. — Compensation for the general services of an administrator will not be denied on the ground that he failed to comply with the law in regard to investments, where he settled in accordance with the law relating to unauthorized investments, so that no loss fell on the estate. *Sanderson v. Sanderson*, 20 Fla. 292.

Retaining Irregular Securities. — The mere fact that an executor retained irregular securities, which became worthless by an unforeseen and extraordinary disaster, is not such a dereliction of duty as will justify a refusal of commissions. *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349.

Failure to Obey Directions in Will. — Failure to make an actual division as directed by the will of a fund committed to the executor for the benefit of several persons was held not to forfeit his right to compensation, because the actual division of the fund into parts was not necessary to initiate the trust. *Foote v. Bruggerhof*, 66 Hun (N. Y.) 406; 22 N. Y. Supp. 1105, 67 Hun (N. Y.) 652.

Carrying on Decedent's Business. — Commissions will not be denied because the administrator incurred losses by carrying on a speculative business in which the decedent was engaged, where the administrator managed the rest of the estate so skillfully as greatly to increase its value. *Shinn's Estate*, 166 Pa. St. 121, 45 Am. St. Rep. 656.

Failure to Keep Regular Accounts. — It is not a universal rule that commissions will not be allowed where an account has not been kept. But it will be a general rule in this court, since it argues either a fraud or negligence which nearly amounts to it. *Finch v. Ragland*, 2 Dev. Eq. (17 N. Car.) 137.

Keeping the Accounts Loosely and Inaccurately will not justify withholding compensation entirely, where the executor, who was not a man of education or acquainted with accounts, acted honestly. *Hoover v. Wilson*, 24 Ont. App. 424.

Failure to Answer Citation to Make Final Settlement. — It is in the discretion of the court to allow full commissions to an administrator, though he had been removed and a successor appointed on his failure to answer a citation to make a final settlement and distribution, where he afterwards appeared and made a final settlement. *Spratt v. Baldwin*, 33 Miss. 581.

1. Compensation for Beneficial Services Notwithstanding Unfaithful Administration. — *Campbell v. McCormick*, 1 Ohio Cir. Dec. 281.

2. Misconduct Not Ground for Denying Compensation for Prior Faithful Services. — *Foster v. Stone*, 67 Vt. 336.

3. Rule Denying Compensation for Failure to Make Periodical Returns. — *Eppinger v. Canepa*, 20 Fla. 262; *Sanderson v. Sanderson*, 20 Fla. 292; *Hamilton v. Hamilton*, 6 Ky. L. Rep. 95; *Estill v. McClintic*, 11 W. Va. 399. See also *Cairns v. Hedges*, 1 Ohio Cir. Dec. 387.

Loss to Estate. — Mere neglect to file an account within the time required by law has been held not a ground for forfeiting commissions, unless loss to the estate results there-

some jurisdictions this matter is the subject of special statutory provisions.¹

Mistakes. — Mistakes on the part of an executor or administrator are not ground for denying his right to compensation, where no improper motives are attributable to him.²

Employment of Agents or Attorneys. — The provisions for compensation generally contemplate a personal performance of the services by the personal representative, and do not authorize an allowance where he has employed an agent or attorney at the expense of the estate.³

from. *Nelson's Estate*, 12 W. N. C. (Pa.) 440. See also *Fox's Estate*, 5 Kulp (Pa.) 218; *Birkholm v. Wardell*, 42 N. J. Eq. 337; *Matter of Barcalow*, 29 N. J. Eq. 282, *reversed* on another point in 36 N. J. Eq. 611; *Hapgood v. Jennison*, 2 Vt. 294.

In *Alabama* it has been held that the right to compensation is not forfeited merely by failure to make annual returns if the administrator has managed the estate with prudence and good faith, and has been guilty of no default in settling, when required to do so. *Craig v. McGehee*, 16 Ala. 41; *Gould v. Hays*, 19 Ala. 438. But compensation was denied where an account against the administrator was stated and allowed in his absence, he having failed to appear and file his accounts and vouchers when cited. *May v. Carlisle*, 68 Ala. 135.

1. Statutory Provisions. — In *Georgia*, by statute, if any executor or administrator shall neglect to render annual accounts, he shall not be entitled to any commissions for his trouble in the management of the estate. *Fall v. Simmons*, 6 Ga. 265; *Kenan v. Hall*, 8 Ga. 417; *Doster v. Arnold*, 60 Ga. 316. *Construing* this statute in *Fall v. Simmons*, 6 Ga. 265, Nisbet, J., said: "The meaning is, if he shall neglect to render account, in the manner pointed out by law, in each and every year, he shall forfeit, not his commissions on the returns so neglected, which appertain to the neglected year, but all commissions for his trouble in the management of the estate. The requirement to make returns is mainly for the benefit of creditors, heirs, distributees, and minors; and the forfeiture is in the nature of a penalty to secure the faithful performance of the duty. Such is the meaning and such the policy of the law. We are not at liberty to construe away its meaning, or defeat it by perverting its policy. We must give it its full effect. And as the administrator in this case did not make regular annual returns, we hold with the court below that he has forfeited all commissions for his trouble in managing the estate."

In *South Carolina* there was formerly a statute similar in terms to the *Georgia* statute, but it was construed to mean that commissions should be denied only during the years that the executor or administrator neglected to make returns, and not during the whole period of his administration. *Roberts v. Johns*, 24 S. Car. 590; *Davidson v. Moore*, 14 S. Car. 266; *Koon v. Munro*, 11 S. Car. 154; *Lay v. Lay*, 10 S. Car. 208. See also *Brown v. McCall*, 3 Hill L. (S. Car.) 335; *Jenkins v. Fickling*, 4 Desaus. (S. Car.) 369; *Benson v. Bruce*, 4 Desaus. (S. Car.) 463; *Frazier v. Vaux*, 1 Hill Eq. (S. Car.) 203; *Ramsay v. Ellis*, 3 Desaus. (S. Car.) 78; *Black v. Blakely*, 2 McCord Eq.

(S. Car.) 1; *Wright v. Wight*, 2 McCord Eq. (S. Car.) 188.

Under this statute special compensation for extraordinary services as well as ordinary commissions was forfeited by failure to make returns. *Wallace v. Ellerbe*, Rich. Eq. Cas. (S. Car.) 49.

If an Executor Died Before the Time for His Annual Account, his personal representative might make it within a year after taking out administration or probate, and thereby prevent a forfeiture of commissions. *Corbin v. Howell*, Bailey Eq. (S. Car.) 183.

This Statute Was Repealed in 1872, and it is now held in *South Carolina* that an executor or administrator does not forfeit his commissions for a failure to make returns. *Tompkins v. Tompkins*, 18 S. Car. 30; *Lay v. Lay*, 10 S. Car. 208.

In *Virginia*, also, it was formerly provided by statute that compensation should be forfeited in case of failure to make returns as required by law. *Wood v. Garnett*, 6 Leigh (Va.) 271; *Turner v. Turner*, 1 Gratt. (Va.) 12; *Morris v. Morris*, 4 Gratt. (Va.) 293; *Nelson v. Page*, 7 Gratt. (Va.) 160. By the present statute, however, the matter is left to the discretion of the court. *Trevelyan v. Lofft*, 83 Va. 141; *Lovett v. Thomas*, 81 Va. 245; *Moorman v. Crockett*, 90 Va. 185.

But the present statute of *Virginia* does not authorize the withholding of compensation in a case where the estate is administered by the court. *Fauber v. Gentry*, 89 Va. 312.

2. Bona Fide Mistakes Not Ground of Forfeiture. — *Heft's Appeal*, 19 W. N. C. (Pa.) 302.

Claiming by mistake a credit to which he was not entitled will not deprive an executor of his commissions where there was no fraudulent intent. *Hoffer's Estate*, 156 Pa. St. 473.

Unsuccessful Business Policy. — Commissions will not be denied because management of the estate by the administrators resulted in insolvency, where they acted on the recommendation of competent advisers and with the approval of the creditors of the estate. *Merkel's Estate*, 131 Pa. St. 584, 25 W. N. C. (Pa.) 460.

Mistaken Construction of Will. — The fact that an executor has made it necessary for persons interested in the estate to institute proceedings against it in order to obtain their rights does not affect the right to compensation where such condition of affairs resulted from a wrongful construction given to the will by the executor, acting in good faith. *Miller's Appeal* (Pa. 1887) 8 Atl. Rep. 864.

3. Employment of Agents or Attorneys. — If the executor or administrator employs an agent or attorney to perform services which he ought to perform himself he will not or finally be allowed compensation therefor

(bb) *Renunciation or Waiver of Right.* — The right to compensation may be renounced or waived, and where there has been such renunciation or waiver no allowance can afterwards be made, either to the executor or administrator himself or to his representatives.¹

in addition to the amount paid to the agent or attorney. It is accordingly held that commissions on collections will not be allowed where the executor employed an attorney when he might have made the collection himself. *Carter v. Cutting*, 5 Munf. (Va.) 223.

So, too, where the proceeds of real estate sold by a real-estate agent employed by an executor who had a power of sale were paid over to a trustee, and not to the executor, the latter was not allowed commissions. *Sloan's Estate*, 7 Pa. Co. Ct. Rep. 377.

But it is held that an executor who employs a real-estate agent to sell land will not be denied commissions on the proceeds where he acted in good faith. *Gallet's Estate*, 45 Leg. Int. (Pa.) 14, 19 Phila. (Pa.) 15. Compare *Jacobs v. Jacobs*, 99 Mo. 427, in which case it was said that "the statute is the measure of the executrix's compensation for the discharge of her duties, and whether the duty be discharged by her or her agents, there can be but one compensation allowed for its performance, and that at the rate fixed by the statute."

1. Right to Compensation May Be Renounced or Waived — California. — *Matter of Davis*, 65 Cal. 309.

Maryland. — *Mott v. Fowler*, 85 Md. 676, citing *Ohlendorf v. Kanne*, 66 Md. 499. But see *contra Eversfield v. Eversfield*, 4 Har. & J. (Md.) 12.

New York. — *Matter of Hopkins*, 32 Hun (N. Y.) 618, 98 N. Y. 636; *Secor v. Sentis*, 5 Redf. (N. Y.) 570.

South Carolina. — *McCaw v. Blewit*, 2 McCord Eq. (S. Car.) 103.

"It Violates No Rule of Public Policy to hold one to his agreement who voluntarily seeks an appointment, in a case like this, under the promise to the court and parties interested that he will make no charge for his services. The desire to administer upon large estates for the purpose of obtaining compensation in the way of commissions would prompt many to tender a donation of their services, if they were assured by the chancellor that such promises would be disregarded and the full compensation allowed them as fixed by law." *Per Pryor, J.*, in *Bate v. Bate*, 11 Bush (Ky.) 639.

Waiver Binding on Assignees and Representatives of Executor or Administrator. — *Doty v. Cox*, 15 Ky. L. Rep. 68; *Frishmuth's Estate*, 14 Pa. Co. Ct. Rep. 49, 34 W. N. C. (Pa.) 427; *Mulligan's Estate*, 1 Pa. Dist. Rep. 511, 12 Pa. Co. Ct. Rep. 166, 157 Pa. St. 98.

What Constitutes Renunciation — Agreement with Next of Kin. — In *Matter of Davis*, 65 Cal. 309, it was held that a promise by a son of a widow to administer without charge, whereupon the widow relinquished her right in his favor, was equivalent to a renunciation of the right to compensation.

In *Bate v. Bate*, 11 Bush (Ky.) 639, it was held that the right to compensation was renounced where the administrator before his appointment stated in open court that he would accept the appointment without any

charge for his services, and afterwards, under an express stipulation to that effect, was permitted to qualify. It was also held in this case that it was immaterial whether or not the promise was made to all the next of kin. See also *Matter of Hopkins*, 32 Hun (N. Y.) 618, 98 N. Y. 636.

Partial Settlement Without Allowance. — No presumption that the right of an executor or administrator to compensation has been waived arises from the fact that a partial settlement of his accounts is silent as to the question of compensation. *Clay v. Hart*, 7 Dana (Ky.) 17.

Failure to Claim Compensation in Probate Court. — In *Williams v. Cubage*, 36 Ark. 307, it was held that on an appeal by an administrator *de bonis non* to the Circuit Court from a decree of the Probate Court confirming the original administrator's account, the case being tried *de novo* in the Circuit Court, commissions might be allowed the original administrator in the Circuit Court, though he did not credit himself with any in the Probate Court and none was allowed by the decree, and he did not appeal.

Further and Adequate Compensation may be allowed where an account is restated, notwithstanding the claim made in a former erroneous account. *Schwoyer's Estate*, 2 Woodw. (Pa.) 456.

Failure to Retain Amount Due. — An executor does not waive his right to commissions on the income by paying it over to the beneficiaries without deducting the amount due him. *Matter of Mount*, 2 Redf. (N. Y.) 405; *Matter of Prentice*, 25 N. Y. App. Div. 209.

Transfer of Estate to Trustees Without Claiming Compensation. — In *Frishmuth's Estate*, 14 Pa. Co. Ct. Rep. 49, 2 Pa. Dist. Rep. 814, 34 W. N. C. (Pa.) 427, it was held that an executor waived his right to commissions where he paid over the estate within thirty days after the testator's death to the trustees appointed by the will, made no claim for or deduction of commissions, and died three years later without asserting such claim.

Declaration After Assuming Office. — In *Albro v. Robinson*, 93 Ky. 195, it was held that where an executor, years after his appointment and after he had become insolvent, said that he did not intend to take any compensation, a claim for an allowance for his services made by his co-executor and surety, who had become liable for his default, would not be rejected.

Execution of Receipt for Fees. — A receipt for fees given by an executor on a voluntary settlement fifteen years before the accounting, pursuant to which settlement the estate was distributed, bars any right to an allowance on the accounting. *Matter of Hodgman*, 69 Hun (N. Y.) 484, 140 N. Y. 421.

Acting Through Friendship for Family. — An agent who assumed the administration through friendship for the family of the decedent, on appointment by the administratrix, is not entitled to commissions. *Mason v. Roosevelt*, 5 Johns. Ch. (N. Y.) 534.

(cc) *Revocation of Authority.* — The fact that the authority of an executor has been terminated by the revocation of his letters or of the probate of the will does not affect his right to compensation for services previously rendered while acting in good faith.¹

(dd) *Compensation Prohibited by Will.* — The question whether a provision in the will of a decedent that the executor shall have no compensation authorizes the court to refuse an allowance therefor depends on the construction given to the statutes relating to the subject, and in respect to this there is a difference of opinion. Some authorities hold that the effect of the statutes is to command an allowance to a certain amount, and that the court has no power to refuse it, though the will expressly provides that the executor shall have no compensation,² while other authorities take the view that the object of the statutes in fixing the commissions of executors was merely to furnish a definite and simple rule, to be applied in all cases where there should be need for the application of any rule at all, and that it was not intended to prevent testators either from fixing the amount of compensation that their executors should receive, or from denying any compensation whatever.³

(ee) *Charging Gross Sum for Services.* — The fact that a gross sum is charged for the compensation claimed to be due, instead of stating the several items, is not a ground for disallowing the charge entirely, unless no part of the services for which the charge was made appears to have been legitimate.⁴

(2) *Amount of Compensation* — (a) *Commissions* — *aa. IN GENERAL.* — The amount of the compensation of an executor or administrator is usually fixed by the allowance, pursuant to statutory provisions, of commissions at a certain rate, and such allowance is generally in full payment for his entire time, trouble, and risk in attending to the settlement of the estate, unless further provision is made for compensation when special services have been rendered.⁵

Refusal of Coexecutor to Charge Commissions. — The right of an executor to his commissions cannot be affected by the refusal of his co-executor to make any charge. *Schoeneich v. Reed*, 8 Mo. App. 356.

1. **Revocation of Authority Not Forfeiture of Compensation.** — *Wood v. Nelson*, 10 B. Mon. (Ky.) 230; *Brown's Succession*, 27 La. Ann. 331; *Rice's Succession*, 14 La. Ann. 317; *Poindexter's Succession*, 19 La. Ann. 22; *Brooks v. Jackson*, 125 Mass. 307.

Will Adjudged Void. — Compensation will be allowed for services rendered in good faith by an executor where the will was duly admitted to probate, though the decree establishing the will is afterwards reversed on appeal and the will is adjudged void. *Comstock v. Hadlyme Ecclesiastical Soc.*, 8 Conn. 263, 20 Am. Dec. 100.

Irregular Qualification — Failure to Give Bond. — An executor who was allowed to qualify without giving bond and is afterwards removed on that account is not entitled to commissions. *McDonogh's Succession*, 7 La. Ann. 472.

Full Commissions will be allowed to an administrator, notwithstanding the revocation of his letters because of his failure to answer a citation, and the appointment of an administrator de bonis non, where he had fully administered the estate before his letters were revoked. *Spratt v. Baldwin*, 33 Miss. 581.

2. **Rule that Right to Compensation Cannot Be Taken Away by Will.** — *Handy v. Collins*, 60 Md. 229, 45 Am. Rep. 725; *State v. Baker*, 8 Md. 49; *McKim v. Duncan*, 4 Gill (Md.) 72.

3. **Rule that Right to Compensation May Be Taken Away by Will.** — *Secor v. Sentis*, 5 Redf.

(N. Y.) 570. See also *infra*, this section, *Amount of Compensation Fixed by Will*, where the power of a testator to control the compensation of the executor by fixing the amount thereof to the exclusion of the statutory allowance is discussed.

4. **Charging Gross Sum for Services.** — In *Evarts v. Nason*, 11 Vt. 122, the court said: "It is difficult to see by what rule of law a charge is rendered illegal on account of its generality. It is altogether a question of fact, and there can be no doubt that it is the duty of the triers, before they allow gross charges, to require good and satisfactory proof of their justness, and more especially in cases where items have been professedly kept. If there is uncertainty arising from the manner of keeping the account, in a case where items could well be kept, this should never be permitted to operate in a party's favor, but rather the reverse; and should be examined and allowed with great caution."

But if it does not appear that any part of a charge in gross is legitimate, the whole charge must be disallowed. *Foster v. Stone*, 67 Vt. 336. Compare *Wright v. Wilkerson*, 41 Ala. 267; *Re Wolfe*, (Prob. Ct.) 4 Ohio N. P. 336.

5. **Commissions Allowed by Statute.** — See the various local codes and statutes in the United States.

Commissions Allowed in Full of All Services — Arkansas. — *Fix v. Bell*, 14 Ark. 76.

Kentucky. — *Renick v. Renick*, 92 Ky. 335; *Quaintance v. Darnell*, 14 Ky. L. Rep. 238.

Louisiana. — *Young v. Chaney*, 3 La. 401; *New Orleans v. Baltimore*, 15 La. Ann. 625; *Liles's Succession*, 24 La. Ann. 490.

bb. RATE OF COMMISSIONS. — Rate Fixed by Statute. — The statutes in some jurisdictions prescribe the exact rate of commissions or percentage which shall be allowed, and the courts cannot vary the amount which may be allowed except so far as they may be authorized to award special compensation for extraordinary services.¹

Rate Limited by Statute. — In other jurisdictions the statutes merely provide that the allowances shall not exceed a certain rate per cent., leaving the precise rate, in each particular case, to the discretion of the court, subject to such limitation.²

Rate in Discretion of Court Without Statutory Limitation. — And in other jurisdictions, again, the statutes merely authorize the courts to allow such compensation as may be reasonable, without fixing any limit or providing any measure for the

Mississippi. — *Satterwhite v. Littlefield*, 13 Smed. & M. (Miss.) 302.

Missouri. — *Gamble v. Gibson*, 59 Mo. 585; *Jacobs v. Jacobs*, 99 Mo. 427.

New York. — *Collier v. Munn*, 41 N. Y. 143; *Vanderheyden v. Vanderheyden*, 2 Paige (N. Y.) 287, 21 Am. Dec. 86; *Fisher v. Fisher*, 1 Bradf. (N. Y.) 335; *Matter of Hayden*, 1 Connolly (N. Y.) 454; *Matter of Butler*, 1 Connolly (N. Y.) 58. See *Manning v. Manning*, 1 Johns. Ch. (N. Y.) 527.

North Carolina. — See *Schaw v. Schaw*, Tayl. (3 N. Car.) 125; *Morris v. Morris*, 1 Jones Eq. (54 N. Car.) 326.

Allowances in Addition to Commissions. — See *infra*, this section, *Special Compensation for Extraordinary Services*.

1. Rate of Commissions Fixed by Statute. — In many states the statutes prescribe the exact rates of the commissions which may be allowed to executors and administrators.

Louisiana. — *Robertson's Succession*, 49 La. Ann. 80; *Calloway's Succession*, 49 La. Ann. 968; *Girod's Succession*, 4 La. Ann. 386; *Day's Succession*, 3 La. Ann. 624; *Milne's Succession*, 1 Rob. (La.) 400; *Baillio v. Baillio*, 5 Martin N. S. (La.) 229.

New Jersey. — Under the New Jersey statute (Gen. Stat. 1895, p. 2380, § 110) the exact rate of commissions is fixed where the receipts do not exceed fifty thousand dollars. If the receipts exceed fifty thousand dollars, commissions are allowable in the discretion of the court, not exceeding five per cent.

New York. — *Hosack v. Rogers*, 9 Paige (N. Y.) 461.

South Carolina. — *Logan v. Logan*, 1 McCord Eq. (S. Car.) 1; Rev. Stat. 1893, § 2069.

Texas. — In Texas the statute provides that executors and administrators shall be allowed five per cent. on all sums that they may receive in cash, and the same percentage on all sums paid out by them in cash. *Claridge v. Lavenburg*, 7 Tex. Civ. App. 155; Rev. Stat. 1895, art. 2245.

See also the codes and statutes of the several states.

A Typical Statute of this class is Code Civ. Pro. Cal., 1897, § 1618, which provides that an executor or administrator "must be allowed commissions upon the amount of estate accounted for by him, as follows: for the first thousand dollars, at the rate of seven per cent.; for all above that sum, and not exceeding ten thousand dollars, at the rate of five per cent.; for all above ten thousand dollars, and not ex-

ceeding twenty thousand dollars, at the rate of four per cent.; for all above twenty thousand dollars, and not exceeding fifty thousand dollars, at the rate of three per cent.; for all above fifty thousand dollars, and not exceeding one hundred thousand dollars, at the rate of two per cent.; and for all above one hundred thousand dollars, at the rate of one per cent."

2. Rate of Commissions Limited by Statute — *Alabama.* — *Newberry v. Newberry*, 28 Ala. 691; Code 1896, § 219.

Arkansas. — *Smith v. Worthington*, 53 Fed. Rep. 977; *Ex p. Bell*, 14 Ark. 76.

Florida. — *Moore v. Felkel*, 7 Fla. 44; Rev. Stat. 1892, § 1868.

Kentucky. — *Barb. & C. Ky. Stat. 1894*, § 3883. Formerly the allowance was entirely in the discretion of the court. *Ramsey v. Ramsey*, 4 T. B. Mon. (Ky.) 151; *Wood v. Lee*, 5 T. B. Mon. (Ky.) 65; *Cabell v. Cabell*, 1 Metc. (Ky.) 334.

Maryland. — *Dalrymple v. Gamble*, 68 Md. 156; *Gwynn v. Dorsey*, 4 Gill & J. (Md.) 453; *Wilson v. Wilson*, 3 Gill & J. (Md.) 20; *McPherson v. Israel*, 5 Gill & J. (Md.) 60; *Thomas v. Frederick County School*, 9 Gill & J. (Md.) 115; Pub. Gen. Laws, art. 93, § 5.

Mississippi. — *Spratt v. Baldwin*, 33 Miss. 581; *Satterwhite v. Littlefield*, 13 Smed. & M. (Miss.) 302; *Powell v. Burrus*, 35 Miss. 605; *Cherry v. Jarratt*, 25 Miss. 221; Annot. Code 1892, § 1956.

New Jersey. — Commissions not exceeding five per cent. are allowable when the executor or administrator receives amounts exceeding fifty thousand dollars. When the amounts coming into his hands are less than that sum, the rate of commissions is fixed by the statute. *Matter of Wolfe*, 34 N. J. Eq. 223; Gen. Stat. 1895, p. 2380, § 110. See also *Mathis v. Mathis*, 18 N. J. L. 59.

North Carolina. — *Potter v. Stone*, 2 Hawks. (9 N. Car.) 30; *Walton v. Avery*, 2 Dev. & B. Eq. (22 N. Car.) 405; *Bond v. Turner*, 2 Murph. (6 N. Car.) 331; *Washington v. Emery*, 4 Jones Eq. (57 N. Car.) 32; *Graves v. Graves*, 5 Jones Eq. (58 N. Car.) 280; Code 1883, § 1524.

See also the codes and statutes of the several states.

A Typical Statute of this class is Code Ala. 1896, § 219, which provides: "Executors and administrators may be allowed such commissions on all receipts and disbursements by them, as such, as may appear to the Probate Court a fair compensation for their trouble,

allowance by a percentage or otherwise; ¹ but a rate is usually adopted by the courts as the one which will be applied in ordinary cases, though a different rate will be allowed in any case in which the customary rate is either excessive or inadequate.²

Consideration Affecting Exercise of Discretion.—The exercise of the discretionary power of the court in the matter of fixing the commissions of executors and administrators, whether the rate is limited by statute or is left wholly open for the determination of the court, is governed by the amount of money handled, and the time, labor, risk, and anxiety incident to the management of the estate; ³ and the range of the allowances that have been made in view of the facts and circumstances of particular cases is very wide.⁴

risk, and responsibility, not to exceed two and one-half per cent. on the receipts, and the same percentage on the disbursements."

1. Rate of Commissions Not Fixed or Limited by Statute—*Florida*.—*Sherrell v. Shepard*, 19 Fla. 300; Rev. Stat. 1892, § 1868. This statute is somewhat peculiar. It provides that executors and administrators shall have "a just and fair compensation for their services," and also a compensation not exceeding six per cent. on money arising on sales of personal property and lands of the decedent.

Indiana.—*Collins v. Tilton*, 58 Ind. 374; *Watkins v. Romine*, 106 Ind. 378; *Cox v. Baker*, 113 Ind. 62; *Burns's Annot. Stat.* 1894, § 2551.

Rhode Island.—*Williams v. Herrick*, 18 R. I. 120; Gen. Laws 1896, c. 219, § 8.

West Virginia.—*Kester v. Lyon*, 40 W. Va. 161; Code, c. 87, § 17.

Canada.—*McMillan v. McMillan*, 21 Grant's Ch. (U. C.) 369; *Thompson v. Freeman*, 15 Grant's Ch. (U. C.) 384; *Torrance v. Chewett*, 12 Grant's Ch. (U. C.) 407.

See the various local codes and statutes.

A Typical Statute of this class is Gen. Laws R. I. 1896, c. 219, § 8, which provides that executors and administrators shall be allowed "such recompense for their personal trouble as the Probate Court, on settling their accounts, shall consider just."

This System Is Disapproved by Dayton, J., who says that the "want of some standard to regulate judicial discretion is a most serious grievance to orphans and others, whose interests should be better protected." *Mathis v. Mathis*, 18 N. J. L. 59.

2. The Usual Rate of commissions adopted by the courts in those jurisdictions in which there is no statutory limit is five per cent.

Kentucky.—*Cabell v. Cabell*, 1 Metc. (Ky.) 334. It is now provided by statute in Kentucky that the allowance shall not exceed five per cent. on amounts received and disbursed. *Barb. & C. Stat.* 1894, § 3383.

Pennsylvania.—*Gilpin's Estate*, 138 Pa. St. 143, 38 Pittsb. Leg. J. (Pa.) 127; *Pusey v. Clemson*, 9 S. & R. (Pa.) 204; *Rockafeld's Estate*, 4 Lanc. L. Rev. (Pa.) 113.

Tennessee.—*Ex p. Parker*, (Tenn. 1881) 19 S. W. Rep. 571.

Virginia.—*Triplett v. Jameson*, 2 Munf. (Va.) 242.

West Virginia.—*Estill v. McClintic*, 11 W. Va. 399.

Canada.—*Chisholm v. Barnard*, 10 Grant's Ch. (U. C.) 481.

"Five per cent. commission on moneys

passing through the hands of executors and trustees may or may not be an adequate compensation, or may be too much, according to circumstances. There may be very little money got in, and a great deal of labor, anxiety, and time spent in managing an estate, when five per cent. would be a very insufficient allowance." *Per* Chancellor Vankoughnet, in *Chisholm v. Barnard*, 10 Grant's Ch. (U. C.) 479.

Five Per Cent. on a Large Estate will not be allowed, except under special circumstances. *Taylor's Estate*, 3 Pa. Dist. Rep. 691.

On the Proceeds of Real Estate the usual allowance in *Pennsylvania* is two and one-half per cent. *Rockafeld's Estate*, 4 Lanc. L. Rev. (Pa.) 113. *Compare* *Pickering's Estate*, 4 Pa. Dist. Rep. 263.

More than the Usual Allowance will not be granted unless a proper case therefor is shown by clear and convincing evidence. *Ashurst v. Ashurst*, 13 Ala. 781.

3. Considerations Affecting Exercise of Discretion—*Alabama*.—*Gould v. Hays*, 25 Ala. 426.

Indiana.—*Pollard v. Barkley*, 117 Ind. 40.

New Jersey.—*Pomeroy v. Mills*, 37 N. J. Eq. 578; *Matter of Wolfe*, 34 N. J. Eq. 223.

North Carolina.—*Potter v. Stone*, 2 Hawks (9 N. Car.) 30; *Ex p. Haughton*, 3 Dev. L. (14 N. Car.) 441.

Pennsylvania.—See *Evans's Estate*, 1 Pa. Super. Ct. Rep. 37; *Titlow's Estate*, 11 Pa. Co. Ct. Rep. 625.

Canada.—*Chisholm v. Barnard*, 10 Grant's Ch. (U. C.) 481; *Thompson v. Freeman*, 15 Grant's Ch. (U. C.) 384; *McMillan v. McMillan*, 21 Grant's Ch. (U. C.) 369.

4. Rate of Commissions Allowed in Particular Cases.—**One Per Cent.** only was allowed on an estate amounting to something more than one million three hundred thousand dollars. *Matter of Wolfe*, 34 N. J. Eq. 223.

Two Per Cent. was considered sufficient for collecting and disbursing money, where the money was at ready command, and the persons to whom it was to be paid were few in number and easily ascertained, and the responsibility and danger of mistake were slight, though the usual rate for such services is two and one-half per cent. *Wendell v. French*, 19 N. H. 205.

Two and One-half Per Cent. was allowed on the proceeds of real estate in the absence of any special trouble in making the sale. *Schweitzer's Estate*, 3 Northam. L. Rep. (Pa.) 40.

The same rate was held a reasonable compensation for the settlement of an estate

Review on Appeal. — As a general rule the exercise by a probate court of its discretion in awarding compensation to an executor or administrator is not reviewable on appeal unless it is shown that the discretion was manifestly abused, or there was no evidence to support the award.¹

amounting to twenty-nine thousand dollars. *McMillan v. McMillan*, 21 Grant's Ch. (U. C.) 369.

And in another case two and one-half per cent. was allowed with respect to so much of the estate (fifteen thousand dollars) as consisted of a deposit in bank, a higher rate being allowed on the proceeds of sales made by the administrator. *Ex p. Parker*, (Tenn. 1881) 19 S. W. Rep. 571.

Three Per Cent. was held a sufficient allowance where the estate was large and easy to settle. *Pusey v. Clemson*, 9 S. & R. (Pa.) 204; *Walker's Estate*, 9 S. & R. (Pa.) 223; *Stevenson's Estate*, 4 Whart. (Pa.) 98; *Robb's Appeal*, 41 Pa. St. 45; *Yeiger's Estate*, 3 Northam. L. Rep. (Pa.) 207.

Three and One-half Per Cent. has been allowed on the proceeds of real estate sold in the usual way and without unusual trouble. *Pickering's Estate*, 4 Pa. Dist. Rep. 263.

The same rate was allowed on two hundred and eighty-nine thousand dollars, where the executors were compelled to bring and conduct suits to ascertain exactly what land the testator owned, and to sell it under a power in the will. *Rogers v. Hand*, 39 N. J. Eq. 270.

Four Per Cent. was held to be a liberal compensation where the estate amounted to forty thousand dollars, and consisted mostly of securities which were turned over *in specie* to the distributees at their request. *Kauffman's Appeal*, 20 W. N. C. (Pa.) 364.

The same rate on eighty-eight thousand dollars was held not to be extravagant, where the estate was settled in one year, and it was considered immaterial that the administratrix divided her commissions with an agent. *Johnston's Appeal*, (Pa. 1887) 11 Atl. Rep. 78. See also *Harbster's Appeal*, 125 Pa. St. 1, where four per cent. was allowed on an estate exceeding one hundred and thirty-five thousand dollars in amount.

Five Per Cent. is considered a reasonable allowance where the estate is small and the settlement involves a great deal of trouble. *Bendall v. Bendall*, 24 Ala. 295, 60 Am. Dec. 469; *Pinckard v. Pinckard*, 24 Ala. 250; *Siddall's Estate*, 5 Pa. Dist. Rep. 102, 17 Pa. Co. Ct. Rep. 424; *Corby's Estate*, 5 Kulp (Pa.) 159; *Woodward's Estate*, 27 W. N. C. (Pa.) 407, 6 Kulp (Pa.) 7; *Davis's Appeal*, 100 Pa. St. 204. See also *Ex p. Parker*, (Tenn. 1881) 19 S. W. Rep. 571.

In *Stanberry v. Robinson*, (Ky. 1894) 27 S. W. Rep. 973, it was held that five per cent. on \$242,274 was excessive where the estate was free from complication, and more than \$210,000 of it was turned over by the administrator to the distributees in the securities in which it had been left by the decedent. See also *Thompson v. Freeman*, 15 Grant's Ch. (U. C.) 384, holding that five per cent. on two hundred and eighty-six thousand dollars was excessive.

Seven and One-half Per Cent. was allowed on personal assets amounting to one thousand

eight hundred and twenty dollars. *Matter of Miller*, 1 Ashm. (Pa.) 323.

Ten Per Cent. was allowed on collections where the debts were very small and numerous, and the debtors were presumed to have been much dispersed. *Cavendish v. Fleming*, 3 Munf. (Va.) 198. See also *M'Call v. Peachy*, 3 Munf. (Va.) 288.

The Requirement of a Heavy Bond is a fact which should enter into the consideration. *Matter of Wolfe*, 34 N. J. Eq. 223.

Loaning Money. — In *New Hampshire* one per cent. per annum has been allowed for loaning funds of the estate, guaranteeing payment, and collecting. *Gordon v. West*, 8 N. H. 444.

Services Not Beneficial to the Estate, such as contesting an alleged will, or settling claims before letters were granted, or taking part in contests over granting and retaining letters, are not to be considered in determining the amount of an administrator's compensation. *Taylor's Estate*, 3 Pa. Dist. Rep. 691.

Value of Precedents. — In *Matter of Wolfe*, 34 N. J. Eq. 223, it was said that in fixing the compensation not much aid is to be derived from precedent, but that the allowance in each case must depend on the circumstances.

"The circumstances of each case, as it arises, must afford the criterion of commissions; a positive standard would necessarily work injustice." *Matter of Miller*, 1 Ashm. (Pa.) 323. See also *Miskimin's Estate*, 35 Pittsb. Leg. J. (Pa.) 92.

1. Review on Appeal — Want of Evidence or Manifest Abuse of Discretion — United States. — *Nicholls v. Hodge*, 2 Cranch (C. C.) 582.

Arkansas. — *Reynolds v. New Orleans Canal, etc., Co.*, 30 Ark. 520.

Florida. — *Sanderson v. Sanderson*, 20 Fla. 292.

Kentucky. — *Ramsey v. Ramsey*, 4 T. B. Mon. (Ky.) 151; *M'Cracken v. M'Cracken*, 6 T. B. Mon. (Ky.) 342; *Clark v. Newman*, (Ky. 1886) 1 S. W. Rep. 880.

Michigan. — *Matter of Mower*, 48 Mich. 441.

Mississippi. — *Spratt v. Baldwin*, 33 Miss. 581.

North Carolina. — *Green v. Barbee*, 84 N. Car. 69; *Walton v. Avery*, 2 Dev. & B. Eq. (22 N. Car.) 405.

Canada. — *Torrance v. Chewett*, 12 Grant's Ch. (U. C.) 407.

Trial De Novo on Appeal. — In some jurisdictions, on appeal from the Probate Court to the Circuit Court a trial *de novo* is had in the Circuit Court, which may review the allowance of commissions. *Matter of Boothe*, 38 Mo. App. 456.

In Maryland it is held that the matter is entirely in the discretion of the Orphans' Court and that its decision within the statutory limits is not subject to review. *Dalrymple v. Gamble*, 68 Md. 156; *Wilson v. Wilson*, 3 Gill & J. (Md.) 20; *Gwynn v. Dorsey*, 4 Gill & J. (Md.) 453; *McPherson v. Israel*, 5 Gill & J. (Md.) 60; *Thomas v. Frederick County School*, 9 Gill & J. (Md.) 115. See also *Nicholls v. Hodges*, 1

cc. ON WHAT PROPERTY COMMISSIONS ARE ALLOWED — (aa) General Rule. — The general rule is that an executor or administrator is entitled to commissions on all the property of the estate which comes into his hands as assets and is accounted for by him.¹ This includes any increase over the appraised value of the estate,² but it ordinarily excludes property belonging to third persons, though

Pet. (U. S.) 562; *West v. Smith*, 8 How. (U. S.) 402.

1. Commissions Allowed on All Property Received and Accounted For — California. — *Matter of Simmons*, 43 Cal. 543; *Matter of Isaacs*, 30 Cal. 105; *Ord v. Little*, 3 Cal. 287.

Louisiana. — *Day's Succession*, 22 La. Ann. 367; *Powell's Succession*, 14 La. Ann. 427; *McDonogh's Succession*, 7 La. Ann. 472.

Maryland. — *McPherson v. Israel*, 5 Gill & J. (Md.) 60.

Mississippi. — *Merrill v. Moore*, 7 How. (Miss.) 271, 40 Am. Dec. 60; *Shurtliff v. Witherspoon*, 1 Smed. & M. (Miss.) 613.

New Jersey. — *Pomeroy v. Mills*, 37 N. J. Eq. 578.

New York. — *Green v. Sanders*, 18 Hun (N. Y.) 308.

Oregon. — *Steel v. Holladay*, 20 Oregon 462.

"**The Whole of the Estate** of a deceased person which may come into the possession of the executor or administrator (with the interest, profit, and income thereof), except such parts of it as may have decreased or been destroyed without his fault, must be accounted for, upon the basis of the inventory, in the final settlement of the administration. In such accounting the court, in the exercise of its jurisdiction of the estate and its administration, is authorized to allow the executor or administrator for all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting necessary proceedings or suits in courts, and for his services commissions allowed by law 'upon the amount of the estate accounted for by him.'"³ *Matter of Ricaud*, 70 Cal. 69.

Debts Fictitious in Character or Exaggerated in Amount cannot be made the basis for calculating commissions, though they are included in the inventory. *Foulkes's Succession*, 12 La. Ann. 537.

Personalty Subject to Lien. — When personalty subject to a lien is sold by the lienholder, and the balance in excess of the amount secured is paid to the administrator, he is entitled to commissions only on such balance. *Hitchcock v. Mosher*, 106 Mo. 578.

As to Encumbered Realty see *infra*, this section, *On What Property Commissions Are Allowed — Real Estate*.

Property Subject to Power of Appointment. — An executor is not entitled to commissions for investing and managing a fund as to which he is given a power of appointment. *Lippincott v. Stokes*, 6 N. J. Eq. 122.

Foreign Assets. — Commissions are not allowable on money collected by the administrator in a foreign jurisdiction and paid to a creditor residing therein, no administration having been granted in that jurisdiction. *Jones v. Jones*, 39 S. Car. 247.

Property Not Administered. — An administrator is not entitled to commissions on funds

which he has not administered, though they belong to the succession. *Butterly's Succession*, 10 La. Ann. 258.

Funds Not Accounted For. — No commissions are allowable on funds as to which the executor or administrator is in default in not having accounted for them. *Prince v. Towns*, 33 Fed. Rep. 161; *Wallace v. Ellerbe*, Rich. Eq. Cas. (S. Car.) 49.

In Florida commissions are allowed only on the proceeds of property sold. In respect to other services the compensation is in the discretion of the court. *Sherrell v. Shepard*, 19 Fla. 300.

Balance of Account. — Commissions will not be allowed on the entire balance shown by the account, if it is composed in part of the balance of a former account on which commissions had previously been allowed, but the allowance will be limited to the amount which came in since the former account. *Matter of Miller*, 1 Ashm. (Pa.) 323.

Inventory. — In some jurisdictions the amount of the inventory is the basis of the allowance of commissions. *Robertson's Succession*, 49 La. Ann. 80; *McPherson v. Israel*, 5 Gill & J. (Md.) 60.

But the inventory contemplated by the statute is the one which was the measure of the administrator's bond, and not a subsequent inventory taken without a new bond. *Shaffer v. Cross*, 13 La. Ann. 110.

If Any Claims Were Not Carried in the Inventory, or if carried were classified therein as bad debts, and no commissions levied thereon, the subsequent collection of such claims entitles the executor to commissions. *Bougère's Succession*, 30 La. Ann. 423.

The **Inventory** may be looked at for the purpose of ascertaining the amount of the estate, but the valuation therein is not conclusive. *Matter of Fernandez*, 119 Cal. 579; *Matter of Simmons*, 43 Cal. 549; *Hinchley's Estate*, 58 Cal. 516.

As to the effect of failure to account for all the assets, see also *supra*, this section, *Grounds for Denying Compensation*.

Statutory Regulations. — In some jurisdictions the statutes prescribe the assets on which commissions shall be allowed. See the various local codes and statutes in the United States.

2. Excess over Appraisement. — If an amount in excess of the appraised value of the estate is realized, commissions are allowable on the excess. *Evans v. Iglehart*, 6 Gill & J. (Md.) 171.

This rule has been applied even where the statute provides that the commissions shall be allowed "on the amount of the appraised value" of the estate, the court saying that the words "appraised value" were intended to cover the whole estate administered. *Merrill v. Moore*, 7 How. (Miss.) 271, 40 Am. Dec. 60; *Sprott v. Baldwin*, 34 Miss. 327.

Interest on Funds in Hand. Commissions

inventoried as part of the estate, unless the circumstances are such as to impose on the executor or administrator the duty of caring for the property in question, in which case commissions will be allowed.¹

(bb) *Assets Not Received by Executor or Administrator.* — The converse of the proposition that commissions will be allowed on those assets which come into the hands of the executor or administrator is that no allowance will be made in respect to assets which did not come into his hands.²

(cc) *Assets Lost or Wasted.* — If any assets have been lost by the neglect or

will be allowed on interest accumulating in the hands of the executor or administrator who does not deduct his commissions until final settlement. *Drake v. Drake*, 82 N. Car. 443; *Wright v. Wright*, 2 McCord Eq. (S. Car.) 185.

Commissions on Interest Accruing to a Distributee on the surplus in the hands of the executor or administrator after deducting commissions will not be allowed, however, because this would reduce the rate of interest to which the distributee is entitled. *Thomas v. Frederick County School*, 9 Gill & J. (Md.) 115.

Interest on Investments. — In *South Carolina* a special rate of commissions is allowed on interest made by lending the money of the estate. *Briggs v. Holcome*, 3 Rich. Eq. (S. Car.) 15; *Bobo v. Poole*, 12 Rich. Eq. (S. Car.) 224.

1. Property of Third Persons. — Commissions cannot be allowed on property of third persons, though it was in the possession of the decedent at the time of his death and was inventoried as property of the estate, where an action for its recovery was pending against the decedent at the time of his death, and was finally determined in favor of the claimants. *Matter of Ricaud*, 70 Cal. 69. See also *Matter of Simmons*, 43 Cal. 543.

So, too, where a judgment had been recovered by a third person against the decedent for the possession of property in his possession at the time of his death, though an appeal had been taken from the judgment and was pending when the accounts of the executors were settled. *Delaney's Estate*, 110 Cal. 563.

But where an administrator, pending an action against him to recover specific funds, collected and invested them with the consent of all the parties in interest, it was held that he should be allowed commissions on such funds, because it was his duty under the circumstances to take care of them until the question as to the ownership was decided. *Wells v. Robinson*, 13 Cal. 133. See also *Girod's Succession*, 4 La. Ann. 386.

Property Held in Trust by Decedent. — In *Bohrer v. Otterback*, 21 D. C. 32, it was held that an administrator should not be denied commissions on money received by him in his representative capacity, though it afterwards turns out that the money was a trust fund in the decedent's hands. The reason assigned for this is that the administrator assumed in respect to such property a responsibility required by the court, and was put to trouble and expense, and was therefore entitled to compensation whether the money belonged to the estate or not. Compare *Haines v. Hay*, 67 Ill. App. 445.

It has also been held that where demands

had been assigned to the decedent in trust to collect them for the assignor, the administrator, having succeeded to the trust, was entitled to commissions on making the collections. *De Peyster v. Ferrers*, 11 Paige (N. Y.) 13. Compare *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167.

And in *Clark v. Newman*, (Ky. 1886) 1 S. W. Rep. 880, it was held that it was discretionary with the court to allow to the administrator of a sheriff commissions on taxes collected by the administrator.

In another case the testator and his divorced wife were tenants in common of certain property. The decree of divorce, pursuant to the agreement of the parties, provided that the testator should manage the whole property and pay to his wife a certain monthly sum on account of her interest. By his will the testator devised his estate to his executors to manage for a certain period. They accordingly took charge of the entire property and accounted monthly to the testator's widow. It was held that the will gave the executors no control over the interest of the widow in the common property, and that they were entitled to no commissions for their management and care of such interest. *Blanckenburg v. Jordan*, 86 Cal. 171.

2. Assets Not Received by the Executor or Administrator — *California.* — *Matter of Simmons*, 43 Cal. 543.

Louisiana. — *Macarty's Succession*, 5 La. Ann. 434; *Gollain's Succession*, 31 La. Ann. 173.

New Jersey. — *McKnight v. Walsh*, 23 N. J. Eq. 136, 24 N. J. Eq. 498.

Oregon. — *Steel v. Holladay*, 20 Oregon 462.

Pennsylvania. — *Vanderford's Appeal*, (Pa. 1888) 12 Atl. Rep. 491; *Smethurst's Estate*, 43 Leg. Int. (Pa.) 153, 18 Phila. (Pa.) 66.

And this is true even though he is charged with the amount on the ground that he had been guilty of a default. *Bald v. Thompson*, 17 Grant's Ch. (U. C.) 154; *Gilson's Estate*, 18 W. N. C. (Pa.) 570.

Application of Rule. — In *Sloan's Estate*, 7 Pa. Co. Ct. Rep. 377, it was held that an executor was not entitled to commissions on the proceeds of land sold under a power in the will, where the sale was made, not by the executor, but by a real-estate agent who paid over the money to a third person as trustee to be invested as directed by the will. See also *Ball v. Brown*, *Bailey Eq.* (S. Car.) 374. Compare *Hipkins v. Bernard*, 4 Munf. (Va.) 83, allowing commissions on the amount of debts due the estate, where the executor collected no money, but took mortgages to secure the debts and transferred the mortgages to the person entitled to the estate.

improper conduct of the executor or administrator, the weight of authority seems to be that he is not entitled to commissions thereon, though he has been charged in his account with the amount lost;¹ but there are decisions to the contrary.²

(*add*) *Receipts and Disbursements.* — In some jurisdictions the amount of commissions to be allowed in any case is measured by the amount of money received and disbursed in the course of the administration.³ The receipt and disbursement of money are made separate items of service by the express terms of the statutes in some states, and commissions are allowed separately at the prescribed rate on all sums received and on all sums disbursed;⁴ but even when the statutes are not explicit in this respect, as where commissions are to be allowed at a specified rate for "receiving and paying out" funds, the courts usually construe them to mean that half of the specified commissions are to be allowed for receiving and half for paying out.⁵ In other states the receipts alone are the basis of the allowance of commissions;⁶ and then again the rule has been adopted of making the computation not on the receipts, but on the actual disbursements.⁷

1. Commissions Not Allowed on Assets Lost by Fault of Representative. — *Bald v. Thompson*, 17 Grant's Ch. (U. C.) 154; *Gilson's Estate*, 18 W. N. C. (Pa.) 570; *Jones v. Jones*, 39 S. Car. 247. Compare *Shinn's Estate*, 166 Pa. St. 121, 45 Am. St. Rep. 656, 36 W. N. C. (Pa.) 36.

In Maryland it is provided by statute that, in the allowance of commissions, assets which may have been lost or may have perished shall be excluded. *Eversfield v. Eversfield*, 4 Har. & J. (Md.) 12.

2. Rule Allowing Commissions on Funds Lost. — In some jurisdictions it is held that if an executor or administrator is charged with funds lost by his fault or neglect, he should be allowed his commissions on the amount, because it is sufficient punishment to compel him to make good the loss. *Milmo's Succession*, 47 La. Ann. 126; *Matter of Mount*, 2 Redf. (N. Y.) 405; *Meacham v. Sternes*, 9 Paige (N. Y.) 404; *Edmonds v. Crenshaw*, Harp. Eq. (S. Car.) 224.

3. Commissions on Receipts and Disbursements. — *Newberry v. Newberry*, 28 Ala. 691; *Betts v. Betts*, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 317; *Ruff v. Summers*, 4 Desaus. (S. Car.) 539; *Jones v. Jones*, 39 S. Car. 247; *Claridge v. Lavenburg*, 7 Tex. Civ. App. 155.

Temporary Administrators. — In *New York*, though temporary administrators are entitled to commissions at the same rate as are allowed to executors and administrators generally, they are not limited to commissions on receipts and disbursements, but may be allowed commissions on the value of specific property. *Egan's Estate*, 7 Misc. Rep. (N. Y. Surrogate Ct.) 262; *Green v. Sanders*, 18 Hun (N. Y.) 368.

4. Separate Allowance on Receipts and Disbursements — Terms of Statute. — *Wright v. Wilkerson*, 41 Ala. 267; *Newberry v. Newberry*, 28 Ala. 691; *Logan v. Logan*, 1 McCord Eq. (S. Car.) 1; *Claridge v. Lavenburg*, 7 Tex. Civ. App. 155.

This allowance of commissions on receipts and disbursements as separate items is well illustrated by a case in which Confederate money was received by the administrator and partly disbursed while it was yet current, the residue having become worthless in his hands

by the fall of the Confederate government before he settled his accounts. It was held that the statute allowing two and one-half per cent. "on receipts" meant two and one-half per cent. of that which had been received, and that therefore his commissions on receipts should be allowed out of the Confederate money on hand at the time of the accounting; but that as to the disbursements made in Confederate money the just and equitable rule was that he should be allowed two and one-half per cent. of a sum equal to the value of the benefit resulting to the estate from the disbursements. *Dockery v. McDowell*, 40 Ala. 476. Compare *Trammel v. Philleo*, 33 Tex. 395.

5. Separate Allowance on Receipts and Disbursements — Construction of Statute. — *Matter of Mason*, 98 N. Y. 536; *Ward v. Ford*, 4 Redf. (N. Y.) 34; *Matter of Roosevelt*, 5 Redf. (N. Y.) 601 [*citing* *Matter of Kellogg*, 7 Paige (N. Y.) 265; *Matter of Roberts*, 3 Johns. Ch. (N. Y.) 43; *Howes v. Davis*, 4 Abb. Pr. (N. Y. Supreme Ct.) 71].

6. Receipts as Basis for Commissions. — In several states commissions are generally allowed on the amount of the receipts of the executor or administrator. *Gulick v. Conover*, 15 N. J. L. 420; *Pomeroy v. Mills*, 37 N. J. Eq. 578; *Farneyhough v. Dickerson*, 2 Rob. (Va.) 582; *Estill v. McClintic*, 11 W. Va. 399, though in some instances commissions have been allowed on disbursements. *Boyd v. Oglesby*, 23 Gratt. (Va.) 674.

"The Usual Mode of Compensation to the fiduciary for service is by a commission on receipts, but where that affords no basis some other process is allowable, but generally a per centum, greater or less, on receipts will answer all purposes. If a small commission is not just, the commissioner or Probate Court can increase it." *Kester v. Lyon*, 40 W. Va. 161.

7. Disbursements as Basis of Commissions. — This was formerly the rule in *Kentucky*. *Webb v. Webb*, 6 T. B. Mon. (Ky.) 167; *Beeler v. Hill*, 5 Dana (Ky.) 43. The present rule in *Kentucky* is to allow commissions on all amounts received and distributed." *Barb. & C. Stat.* 1894, § 3883.

Meaning and Scope of Terms. — The terms "receipts" and "disbursements," as here used, ordinarily refer to money actually received and paid out.¹ But in many cases the actual manual receipt of the money on the one hand and paying it out on the other are not required, if the result is produced in another way;² and in another class of cases even the actual receipt and disbursement

1. Meaning of Terms "Receipts" and "Disbursements." — The term "receipts" is construed to mean pecuniary assets only, excluding other property which may come to the hands of the personal representative; and "disbursements" means money or currency paid out in extinguishment of the liabilities of the decedent, or the expenses of administration. *Wright v. Wilkerson*, 41 Ala. 267.

Receipts. — *Securities* coming into the hands of an executor do not constitute "receipts" on which half commissions can be allowed, until he has converted them into money or they have been accepted by the legatees in payment of legacies. *Matter of McAlpine*, 126 N. Y. 285, *reversing* 12 N. Y. Supp. 662.

Taking Possession of a Savings-bank Book is not the receipt of the money deposited, and therefore does not entitle the administrator to commissions on the amount of the deposit, where it has been lost by the subsequent failure of the bank. *Sheerin v. Public Administrator*, 2 Redf. (N. Y.) 421.

Price of Property Sold — Purchase by Administrator. — An administrator is not considered as receiving the price of property of the estate sold by him, in such a sense as to entitle him to commissions, where he was himself the purchaser. *Vance v. Gary*, Rice Eq. (S. Car.) 2.

Uncollected or Worthless Claims. — No commissions are allowable, as a general rule, on debts due the estate, if they are not collected. *Handy v. Collins*, 60 Md. 229, 45 Am. Rep. 725; *Vanderford's Appeal*, (Pa. 1888) 12 Atl. Rep. 491; *Kester v. Lyon*, 40 W. Va. 161. *Compare Re Behee's Estate*, 8 Kulp (Pa.) 157.

But specific compensation may be allowed for services rendered in attempting to make the collection. *John's Estate*, 2 Chest. Co. Rep. (Pa.) 281; *Kester v. Lyon*, 40 W. Va. 161.

The Rule in Louisiana seems to be that commissions will be allowed in some cases on the amount of debts due the estate, though they were not collected. *Johnston's Succession*, 1 La. Ann. 75; *Day's Succession*, 3 La. Ann. 624.

Claim Bequeathed to Executor. — Under the rule that commissions are not allowable on uncollected debts, an executor is not entitled to commissions on a debt due to the testator and bequeathed to the executor. *Handy v. Collins*, 60 Md. 229, 45 Am. Rep. 725.

Disbursements — Investing Proceeds of Sale. — Commissions for "paying out" money will not be allowed for the investment of the proceeds of real estate. *Betts v. Betts*, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 317.

Investment of the Funds of the estate is not a final disposition of them, and therefore does not entitle the personal representative to commissions as for money paid out. Investments are the subject of a separate allowance under the statute in *South Carolina*. *Taveau v. Ball*, 1 McCord Eq. (S. Car.) 456.

Payment by an Administrator to Himself of

his claim against the estate is not a disbursement on which commissions can be allowed. *Brown v. Walker*, 38 Tex. 109. See *contra Matter of Mount*, 2 Redf. (N. Y.) 405; *Heft's Appeal*, (Pa. 1887) 9 Atl. Rep. 87. *Compare Matter of Willets*, 112 N. Y. 289; *Phoenix v. Livingston*, 101 N. Y. 451; *Matter of Mason*, 98 N. Y. 536; *Matter of Moffat*, 24 Hun (N. Y.) 325.

Improper Disbursements. — Commissions are not allowed on disbursements which have been disallowed by the court. *Pryor v. Davis*, 109 Ala. 117.

Balance Due from Deceased Executor. — Where a deceased executor was indebted on his account to the testator's estate, commissions are not allowable for the benefit of his (the deceased executor's) estate on payment by his administrator to the surviving executor of such balance. *Griffin v. Bonham*, 9 Rich. Eq. (S. Car.) 71.

Advancements. — No commissions are allowable on advancements made by the decedent in his lifetime to the legatees or next of kin. The only duty of the executor or administrator in reference thereto is to take a receipt, and this is only a constructive receiving and paying out for which commissions will not be allowed. *Hill v. Nelson*, 1 Dem. (N. Y.) 357; *Barhite's Appeal*, 126 Pa. St. 404.

2. Debt Bequeathed to Debtor. — In *Miller's Estate*, 13 Pa. Co. Ct. Rep. 137, 32 W. N. C. (Pa.) 232, it was held that commissions were allowable on a debt due to the testator, though it was canceled by a bequest to the debtor. *Compare Handy v. Collins*, 60 Md. 229, 45 Am. Rep. 725, denying commissions in such a case.

Debt of Distributee Deducted from Distributive Share. — Where an administrator settles with the distributees who were indebted to the decedent, paying them the amount of their shares, less the amounts of their indebtedness, and taking receipts in full for their shares, he is entitled to commissions on such indebtedness, because, said Pleasants, J., though it was not actually paid into his hands, "it is clear that for all purposes of law and right he collected and disposed of it for the estate and as administrator. To have received it with one hand as assets and paid it back, with more, as distributive share, with the other, would have been an idle and superfluous ceremony, which the law would not require." *Elder v. Whittemore*, 51 Ill. App. 662.

Securities Retained in Specie. — In *Matter of Curtiss*, 15 Misc. Rep. (N. Y. Surrogate Ct.) 545, it was held that executors who did not convert into money the securities of the estate which came into their hands were nevertheless entitled to commissions on the amount of the value thereof, if a conversion into money was not necessary to pay debts and legacies. The court said: "It would be impolitic for the law to deny to executors commissions under

of money are not considered within the rule so as to authorize the allowance of commissions thereon, as where receipts and payments are made in carrying on the decedent's business,¹ or where the executor or administrator converts into money property which was specifically bequeathed.²

(ee) *Payment of Legacies or Distributive Shares.* — The payment of a legacy or distributive share is generally considered a disbursement on which commissions may be allowed, as well as the payment of debts and expenses of administration, but the rule is not universal.³

such circumstances, because to do so might invite the disposal of investments judiciously made by the testator for the purpose only of entitling such executors to commissions upon the proceeds. It is the policy of the law to remove this temptation. It must, therefore, be held that the executors have the right to have the securities considered as cash for the purpose of computing their commissions."

In *Hardt v. Birely*, 72 Md. 134, an executor who was directed by the will to keep all the moneys of the estate invested was allowed commissions on the amount of securities in which funds of the estate were invested at the testator's death.

Bonds Taken for Price of Property Sold. — In *South Carolina*, where commissions are allowed only on money received and money disbursed, it is held that the allowance will be made if funds practically pass through the representative's hands, though they do not actually do so. *Tompkins v. Tompkins*, 18 S. Car. 1; *Jones v. Jones*, 39 S. Car. 247.

Thus, where real estate of a decedent was sold by the executor and the bonds taken for the purchase money were delivered to and accepted by the heirs in satisfaction of their shares of the estate, commissions were allowed on the amount of the bonds, because it was in the power of the executor to have secured his commissions by collecting the money. *Deas v. Spann*, Harp. Eq. (S. Car.) 176; *Gist v. Gist*, 2 McCord Eq. (S. Car.) 473.

So, too, where a creditor of the estate was the purchaser and payment was made by crediting the amount of his claim on the price. *Kiddle v. Hammond*, Harp. Eq. (S. Car.) 223.

But where the sale was made by a master under a decree against the executor foreclosing a mortgage, and the land was bid off by the mortgagee for less than his debt, and payment was made by credit being given for the amount of the bid, it was held that the executor was not entitled to commissions, because the money could not be regarded in any shape, actually or constructively, as having been received or paid away by the executor. *Ball v. Brown*, Bailev Eq. (S. Car.) 374.

1. Carrying on Decedent's Business. — Money received and paid out by an administrator in carrying on the decedent's business is not within the statute allowing commissions on receipts and disbursements. The reason of the law in this respect is illustrated by *Aldrich, J.*, as follows: "Suppose a fishmonger, who daily bought and sold \$100 worth of fish, should die intestate, and his administrator, by leave of the court, should continue the business for forty days. At the expiration of the forty days, the administrator will have 'received' \$4,000, and 'paid away' \$4,000, in the purchase and sale of fish. If he should be

allowed commissions for receiving and paying out \$4,000, the estate will owe him \$200 as commissions, and the result would be that the administrator could credit his commissions account with \$100, the corpus of the estate, and apply the profits of his forty days' business, if any, towards the payment of the \$100 still due. If such a principle was recognized, it would enable administrators, if so inclined, to actually destroy estates for their own advantage." *Jones v. Jones*, 39 S. Car. 247. Compare *Thompson v. Freeman*, 15 Grant's Ch. (U. C.) 384; *Dwyer v. Kalteyer*, 68 Tex. 554.

The Profits of the Business carried on by the executor, and not the sums received and paid out by him in conducting it, are held to be the basis on which his commissions are to be computed. *Beard v. Beard*, 140 N. Y. 260.

See also *Matter of Hayden*, 54 Hun (N. Y.) 197, affirmed without opinion in 125 N. Y. 776, where *Barker, P. J.*, said: "While it is apparent that the money was received and paid out in the execution of the provisions of the will and pursuant to the authority given by it, it nevertheless does not appear that from the business any profit or any advantage resulted to the estate. The buying and selling incident to the conduct of a manufacture or other business is, at best, a species of reinvestment of the trust funds. If commissions were to be allowed each time a stock in trade were purchased or sold, it is quite probable, as well as possible, for a case to arise where the executor's commissions would largely consume the body of the estate, especially where the stock in trade is rapidly turned over, and no great profit is realized from the transactions."

2. Collection of Securities Specifically Bequeathed. — An executor who collected the amount of insurance policies which were specifically bequeathed is not entitled to commissions thereon, because his only duty was to transfer them to the legatee. *Platt v. Moore*, 1 Dem. (N. Y.) 191.

Sale of Chattel Specifically Bequeathed. — An executor is not entitled to commissions on the proceeds of the sale by him of property specifically bequeathed, though the sale was by the direction of the legatee. *Farquharson v. Nugent*, 6 Dem. (N. Y.) 290.

3. Commissions Allowed on Legacies and Distributive Shares. — *West v. Smith*, 8 How. (U. S.) 402; *Williamson v. Wilkins*, 14 Ga. 416; *Jones v. Jones*, 39 S. Car. 247.

In *North Carolina* it has been held that commissions are not allowable on payments to legatees or distributees under the statute of that state (Code N. Car., 1883, § 1524) which provides for commissions on receipts and expenditures. The decisions seem to be based on the use of the word "expenditures." *Potter v. Stone*, 2 Hawks (9 N. Car.) 30;

(*ff*) *Property or Securities Delivered in Specie.* — Within the rule limiting the right to commissions to receipts and disbursements, no allowance can be made for property transferred or delivered in specie to legatees or next of kin, unless it is treated as money, or other special circumstances exist which may effect an exception to the general rule.¹

Clarke *v.* Cotton, 2 Dev. Eq. (17 N. Car.) 51; Peyton *v.* Smith, 2 Dev. & B. Eq. (22 N. Car.) 325. But see Shepard *v.* Parker, 13 Ired. L. (35 N. Car.) 103.

In Texas it is expressly provided by statute that commissions shall not be allowed "for paying out money to the heirs or legatees" and it is held that a payment to a foreign executor by an administrator with the will annexed appointed at the request of the foreign executor is a payment to the heirs within the statute. Spofford *v.* Minor, 13 Tex. Civ. App. 534.

Legacies Charged on Land Devised—Payment by Devisee. — If the devisee of land charged with legacies and expenses of administration pay the legacies and tender to the executor the costs of administration, no commissions are allowable on the amount of the legacies. Williams *v.* Williams, 8 Ohio St. 300.

Legacy Charged on Land Devised to Executor. — An executor to whom land is devised charged with a provision for the support of the testator's widow is not entitled to commissions on an amount of such provision, because accepting the devise makes the charge his individual debt. Muth's Estate, 6 Pa. Co. Ct. Rep. 597.

Conditional Devise to Residuary Legatees. — Where land was devised to one of the residuary legatees in satisfaction of his share of the residue on his paying the difference between the appraised value of the land and the value of his share, it was held that the executor was not entitled to commissions on such share where the legatee accepted the devise and paid the difference as provided by the will. Burtis *v.* Dodge, 1 Barb. Ch. (N. Y.) 77.

Commissions on Income. — Some authorities hold that where an executor is directed to pay the income of a fund to the beneficiary, he acts as executor and is entitled as such to commissions on the income. Drake *v.* Price, 5 N. Y. 430; Foote *v.* Bruggerhof, 66 Hun (N. Y.) 406; Matter of Prentice, 25 N. Y. App. Div. 209; Lansing *v.* Lansing, 45 Barb. (N. Y.) 182, 1 Abb. Pr. N. S. (N. Y.) 280, 31 How. Pr. (N. Y.) 55.

Thus, if the management of a legacy to an infant is given to the executor, he is entitled to commissions on the income of it. Perry *v.* Maxwell, 2 Dev. Eq. (17 N. Car.) 488.

On the other hand, it has been held that if to the ordinary powers and duties of an executor, which are to take possession of the goods and chattels of the testator, to collect the debts due to him, to sell the goods and chattels, so far as may be necessary for the payment of the testator's debts and the pecuniary legacies and expenses of administration, and to distribute the residue of the assets among the persons entitled to them under the provisions of the will, there are superadded the power and duty to invest portions of the testator's estate and to pay over the income, such power and duty, being appropriate to the office of a trustee

rather than that of an executor, are held to constitute a trust, and the executor, in executing them, is regarded as a trustee, and is not entitled to commissions as executor. Grinnell *v.* Baker, 17 R. I. 41.

1. Commissions Not Allowed on Specific Legacies Delivered to Legatees — *New Hampshire.* — Gordon *v.* West, 8 N. H. 444.

New York. — Hall *v.* Tryon, 1 Dem. (N. Y.) 296; Schenck *v.* Dart, 22 N. Y. 420.

Pennsylvania. — Zeigler's Appeal, (Pa. 1886) 4 Atl. Rep. 837.

South Carolina. — College *v.* Willingham, 13 Rich. Eq. (S. Car.) 203; Ruff *v.* Summers, 4 Desaus. (S. Car.) 529.

Virginia. — Hipkins *v.* Bernard, 4 Munf. (Va.) 92; Farneyhough *v.* Dickerson, 2 Rob. (Va.) 582.

Hawaiian Islands. — Molteno's Estate, 3 Hawaiian 288.

In Maryland it is held that an executor is entitled to commissions on the value of a chattel which is specifically bequeathed, because it is the subject of appraisal, and besides the executor is responsible for it on his bond until he assents to the legacy and delivers it to the legatee. Handy *v.* Collins, 60 Md. 229, 45 Am. Rep. 725.

Property Bequeathed for Life. — Where the use of specific property is bequeathed for life and the executor is charged with the duty of seeing that proper security is given by the usufructuaries, commissions will be allowed him. Morvant's Succession, 46 La. Ann. 301.

Commissions Not Allowed on Specific Chattels Delivered to Next of Kin. — *Ex p.* Burney, 29 Ga. 33; Scroggs *v.* Stevenson, 100 N. Car. 354; Walton *v.* Avery, 2 Dev. & B. Eq. (22 N. Car.) 405; Spruill *v.* Cannon, 2 Dev. & B. Eq. (22 N. Car.) 400; Claycomb *v.* Claycomb, 10 Gratt. (Va.) 589.

Sale of Chattel Specifically Bequeathed. — Even if an executor, at the request of the legatee, sells a chattel specifically bequeathed, and pays the money to the legatee, he is not entitled to commissions thereon. Farquharson *v.* Nugent, 6 Dem. (N. Y.) 296.

Securities Delivered in Payment of Legacies and Distributive Shares. — The delivery of securities in specie to legatees and distributees and the acceptance thereof by them are held to be the equivalent of a payment in money so as to entitle the executor or administrator to his commissions. Rockafeld's Estate, 4 Lanc. L. Rev. (Pa.) 113; Tompkins *v.* Tompkins, 18 S. Car. 1; Jones *v.* Jones, 39 S. Car. 247; Deas *v.* Spann, Harp. Eq. (S. Car.) 176; Gist *v.* Gist, 2 McCord Eq. (S. Car.) 473.

In regard to the difference between the delivery of specific chattels and the delivery of securities, Pearson, J., said: "It is argued, this note, being passed over without the trouble of collection, is like the case of a slave delivered to a distributee, whose value is not to be included under the head of 'receipts.' The argument merited consideration, but we

(gg) *Debts Due from Executor or Administrator.* — The decisions are not in accord as to whether an executor or administrator is entitled to commissions on a debt due from himself to the decedent. The allowance has been made on the theory that such debts are presumed to have been paid as soon as the personal representative assumes the duties of his office,¹ but the weight of authority seems to be the other way.² If, however, he has actually paid his debt to the estate, he will be allowed half commissions for disbursing it.³

(hh) *Real Estate.* — In a preceding part of this article it has been stated that an executor or administrator, in the absence of special authority, has nothing to do with the real estate of his testator or intestate,⁴ and it is accordingly held that if he collects the rents and profits he is not entitled to commissions, unless he had authority to do so.⁵ But in some jurisdictions commissions are allowed on real estate as well as on personalty.⁶

Proceeds of Realty.—Commissions are allowed on the proceeds of real estate sold by an executor or administrator under an order of court or power in the will,⁷

have come to the conclusion that the cases are not the same. In reference to a slave, the administrator has no responsibility; whereas, by not requiring payment of the note, he becomes chargeable for the amount. There is the further consideration: a note passed over in this way is kept at interest all the time. This is for the benefit of the estate, and if the administrator chooses to take the risk, we can see no reason for requiring him to collect any note." *Shepard v. Parker*, 13 Ired. L. (35 N. Car.) 103.

And in another case the principle was said to be that "that which was used as money, in equity and fairness, should be regarded and considered as money." *Jones v. Jones*, 39 S. Car. 247.

Bequest of Unidentified Stocks and Bonds of Specified Amount. — An executor is entitled to commissions on a bequest of stocks and bonds of a certain amount, but not otherwise definitely specified, whereby there is imposed on him the duty of selecting securities of the required amount from among those belonging to the estate. *Thompson v. Pritchard*, 12 N. Y. Wkly. Dig. 80, 11 Rep. 582.

In *Rowland v. Morgan*, 3 Dem. (N. Y.) 289, *sub nom.* *Morgan's Estate*, 15 Abb. N. Cas. (N. Y. Surrogate Ct.) 198, 1 How. Pr. N. S. (N. Y.) 182, it was said that a strict interpretation of the statute would not authorize the award of commissions on any assets of a decedent's estate except such as had been theretofore actually reduced to money; but that it had been repeatedly held that the provision should be so construed as to treat the reception of every variety of assets as a reception of money, and the application of such assets to the discharge of debts and legacies, to the establishment of trusts, etc., as a paying out of moneys within the meaning of that expression.

1. Rule Allowing Commissions on Debts of Executors and Administrators. — *Griffin v. Bonham*, 9 Rich. Eq. (S. Car.) 71. See also *Bougère's Succession*, 30 La. Ann. 423. In this case, however, commissions for the collection of a note of the executor to the decedent were denied on the ground that the note was included in the inventory, on which a commission had already been charged.

2. Rule Denying Commissions on Debts of Executors and Administrators. — *Com. v. Bracken*,

(Ky. 1895) 32 S. W. Rep. 609; *Worsley v. Worsley*, 16 B. Mon. (Ky.) 455; *McKnight v. Walsh*, 23 N. J. Eq. 136, 24 N. J. Eq. 498; *Hoffer's Estate*, 156 Pa. St. 473; *Barhite's Appeal*, 126 Pa. St. 404, 24 W. N. C. (Pa.) 64; *Spackman's Estate*, 2 Chest. Co. Rep. (Pa.) 153; *Farneyhough v. Dickerson*, 2 Rob. (Va.) 582; *Carter v. Cutting*, 5 Munf. (Va.) 227.

3. Commissions for Disbursing Amount of Individual Debt. — *Smith's Estate*, 37 Pittsb. Leg. J. (Pa.) 33; *Stewart's Estate*, 1 Lack. Jur. (Pa.) 225.

4. Rights and Duties in Respect to Real Estate. — See *supra*, this title, *Management and Care of Estate — Real Property*.

5. Commissions Not Allowed on Rents Collected Without Authority. — *Scudder v. Ames*, 89 Mo. 496; *Franket's Estate*, 2 Leg. Int. (Pa.) 406; *Walker's Appeal*, 116 Pa. St. 419.

Commissions Allowed on Rents Lawfully Collected. — *Sparrow's Succession*, 40 La. Ann. 484; *Fisher v. Fisher*, 1 Bradf. (N. Y.) 335; *In re Washbon*, (Supreme Ct.) 14 N. Y. Supp. 672.

Profits of Leasehold. — An executor is entitled to commissions on the gross proceeds of a farm operated by him under a lease which had been held by the decedent. *Walker's Estate*, 6 Pa. Co. Ct. Rep. 515.

6. Commissions Allowed on Real Estate. — (*Ord v. Little*, 3 Cal. 287; *Smith v. Cheney*, 1 Rob. (La.) 98; *Girod's Succession*, 4 La. Ann. 386.

The Appraised Value of the real estate is not conclusive as to the commissions to be allowed thereon, but the real value may be shown. *Matter of Smith*, 18 Wash. 129; *Matter of Sour*, 17 Wash. 675.

If the Realty Is Sold either by the administrator or by the trustees in a deed of trust securing a debt, the commissions are estimated on the price for which the sale was made, and not on the appraised value. *Matter of Fernandez*, 119 Cal. 579.

7. Commissions Allowed on Proceeds of Realty — Florida. — *Sherrell v. Shepard*, 19 Fla. 400. **Maryland.** — *Waring v. Darnall*, 10 Gill & J. (Md.) 126.

Mississippi. — *Shurtliff v. Witherspoon*, 1 Smed. & M. (Miss.) 613.

New York. — *Phoenix v. Livingston*, 101 N. Y. 451; *Matter of Prentice*, 25 N. Y. App. Div. 209.

if the proceeds come into his hands;¹ but it is not necessary in all cases that there should be an actual receipt of the money.²

Equitable Conversion of Realty. — Where an equitable conversion of realty into personalty has been effected by a power of sale given by the will to the executors, but at the time of the accounting the estate is held by the executors as such, and the real estate is still unconverted, they are not entitled to commissions on the principal thereof, unless the will gives them such right without regard to whether there has been an actual conversion or not.³

Partition of Realty. — Where real estate was partitioned among the heirs, and

North Carolina. — *Scroggs v. Stevenson*, 100 N. Car. 354.

Pennsylvania. — *Nathans v. Morris*, 4 Whart. (Pa.) 389; *Snyder's Appeal*, 54 Pa. St. 67; *Clark's Estate*, 11 Phila. (Pa.) 53, 32 Leg. Int. (Pa.) 126; *Pickering's Estate*, 4 Pa. Dist. Rep. 263.

The Condition of the Title to lands sold under an order of the court cannot affect the administrator's statutory right to commissions on the proceeds, where he has disbursed them in the payment of duly established claims against the estate. *Crenshaw v. Bentley*, 31 Mo. App. 75.

Land Sold by Preceding Administrator. — An administrator is not entitled to commissions on land sold by his predecessor in office under an order of court and brought into court for distribution without his agency. *Moore v. Randolph*, 70 Ala. 575.

Sale under Agreement of Heirs. — Commissions are not allowable on the price of lands sold by the administrator under the written agreement of the heirs, who execute the conveyance, though the sale is reported to the Probate Court. In such case the administrator does not act in his representative capacity, but as the agent of the heirs. *Key v. Jones*, 52 Ala. 238.

If a Real-estate Agent Effects a Sale of land which an executor was given power to sell, and the heirs join in the conveyance, and the purchase money is paid over directly to a trustee appointed under the will to invest it, commissions to the executor will not be allowed. *Sloan's Estate*, 7 Pa. Co. Ct. Rep. 377.

Nor is the executor or administrator entitled to commissions on the proceeds of a sale made by a real-estate agent where the agent was paid for his services out of the estate. *Jacobs v. Jacobs*, 99 Mo. 427.

Unsuccessful Efforts to Sell. — Commissions may be allowed on the value of real estate which the executor was directed by the will to sell, though he failed to effect a sale after repeated efforts. *Donat's Estate*, 15 Pa. Co. Ct. Rep. 379, 3 Pa. Dist. Rep. 749.

Where an Executor Is Also Appointed Trustee under the will, and is given power to sell real estate, his right to commissions as executor on the proceeds of the real estate sold depends on the question whether in making the sale he acted in his capacity of executor or in his capacity of trustee. *Hoxie's Estate*, 3 Pa. Dist. Rep. 296, 34 W. N. C. (Pa.) 406.

If a Sale Was Not Necessary for the payment of debts, commissions will not be allowed on a sale made for that purpose. *Matter of Turner*, 1 Hawaiian 266.

1. Receipt of Proceeds Essential to Right to Commissions. — *Loague v. Brennan*, 86 Tenn. 634.

Purchase by Mortgagee at Foreclosure Sale. — Where a testator's land was sold by a master on the foreclosure of a mortgage and purchased by the mortgagee for less than the mortgage debt, payment of the price being made by the allowance of a credit to the amount thereof on the debt, it was held that the executor was not entitled to commissions on the price, because it could not be considered under such circumstances as having passed through his hands. *Ball v. Brown*, *Bailey Eq. (S. Car.)* 374.

2. Purchase by Creditor of Estate. — Where the price of property sold by an executor is paid by crediting the amount on a debt due from the estate to the purchaser, the executor is entitled to commissions on the whole amount bid at the sale. *Kiddle v. Hammond*, *Harp. Eq. (S. Car.)* 223.

Purchase by Heirs of Testator. — It has been held that where an executor sold his testator's land to the heirs, taking their bonds for the price, and afterwards delivered the bonds to them in satisfaction of their shares of the estate, commissions will be allowed on the amount of the bonds on the theory that they had been treated as so much money. *Deas v. Spann*, *Harp. Eq. (S. Car.)* 176; *Gist v. Gist*, 2 *McCord Eq. (S. Car.)* 473.

Commissions are also allowed on the price of land sold by the executor of the deceased owner to the next of kin, where the price was settled by charging the amount against the distributive shares of the purchasers and taking their receipts. *Smith v. Buchanan*, 5 *Dem. (N. Y.)* 169.

3. Commissions Not Allowed in Case of Mere Equitable Conversion. — *McLaren's Estate*, 6 *Misc. Rep. (N. Y. Surrogate Ct.)* 483; *Matter of Clinton*, 16 *Misc. Rep. (N. Y. Surrogate Ct.)* 199; *Matter of Hardenbrook*, 23 *Misc. Rep. (N. Y. Surrogate Ct.)* 538.

Commissions Given by Will. In *Stein v. Huesmann*, 38 *N. J. Eq.* 405, the testator devised all his estate, real and personal, to his executors in trust to take possession of it, receive the rents and profits, convert it into money as soon as possible without incurring unreasonable loss, and, after payment of debts, expenses, and particular legacies, to pay over the residue to the residuary legatee. There was also a provision in the will authorizing and requesting the executors to retain as their compensation five per cent. of the money realized by them on the settlement of the estate, both real and personal. It was held that the testator intended the executors to

the executor joined in the deeds, either as a party in interest or because of a power of sale given him by the will, he is not thereby entitled to commissions on the value of the property, if a sale was not necessary to carry out the intention of the will, or if the will gave him no authority in reference to partition.¹

Sale of Encumbered Realty. — According to the weight of authority, if real estate subject to an incumbrance is sold by an executor or administrator, he is entitled to commissions only on the balance of the price remaining after deducting the amount of the incumbrance.²

(ii) *Partnership Estates.* — It has been held that an administrator is not entitled to compensation for winding up the affairs of a partnership of which the decedent was a member, because that is the duty of the surviving partner;³ but

have five per cent. on the value of all his property, the value to be fixed by what it should realize on an actual conversion, and that therefore they were entitled to such percentage on the value of the real estate, though they did not actually convert it, but paid all the debts and legacies out of the proceeds of the personality.

1. Partition of Realty. — In *Matter of Tilden*, 44 Hun (N. Y.) 441, the will gave power to the executors to sell the real estate, but gave them no power to divide it among the heirs. The heirs, however, divided it under an agreement between themselves, executing conveyances in which the executors joined to convey any title they might have. The court held that there was no execution of the power of sale so as to entitle the executors to commissions, though they entered the appraised prices of the real estate in their accounts. "They did not sell for money," said the court; "they received no money, and their conveyance added no weight to the partition which the owners of the fee made among themselves."

In *Metcalf v. Colles*, 43 N. J. Eq. 148, the testator devised his real estate to his children, subject to a power of sale in the executor so far as it should be necessary to sell in order to effectuate a division or to pay debts. The debts were paid from the personal estate, and the division of the real estate was surrendered to the devisees, and accomplished by them by agreement followed by conveyance. The executor joined in this conveyance as devisee and therein declared, as executor, that it was not necessary to sell the real estate in order to carry out the provisions of the will. It was held that the real estate did not come into the hands of the executor so as to entitle him to commissions thereon under the statute.

In *Buxton v. Shaffer*, 43 W. Va. 206, it was held that an executor was not entitled to commissions on the value of real estate devised to the testator's children, though the executor was given a power of sale for the interest of all concerned, and the children, by agreement among themselves, made partition by conveyances to each other, the executor joining in the deeds. See also *Bruce v. Lorillard*, 62 Hun (N. Y.) 416.

2. Sale of Encumbered Realty — Commissions Not Computed on Incumbrances. — *Baucus*, 24 Hun (N. Y.) 109, reversed on another point in 89 N. Y. 1; *Brolasky's Appeal*, 3 Penny. (Pa.) 327; *Buerhaus v. De Saussure*, 41 S. Car. 457.

Land Subject to Dower. — An executor who sells land subject to a dower charge is not entitled to commissions on the amount of such charge. *Pritchett's Estate*, 2 Chest. Co. Rep. (Pa.) 158.

In *New York* it was formerly held that commissions were to be allowed on the actual price for which the land was sold, without deducting the amount of the mortgage. *Cox v. Schermerhorn*, 18 Hun (N. Y.) 16. But this decision was overruled by the later case of *Baucus v. Stover*, 24 Hun (N. Y.) 109, cited *supra*, in which it was said that *Cox v. Schermerhorn* cites no authority except *Matter of De Peyster*, 4 Sandf. Ch. (N. Y.) 511, which decides nothing on the point in question.

In *Texas* the present rule is that commissions are allowable on the whole price without any deduction on account of the incumbrance. *Huddleston v. Kempner*, 87 Tex. 372, overruling *James v. Corker*, 30 Tex. 617; *Watt v. Downs*, 36 Tex. 116.

Purchase by Mortgagee from Administrator of Mortgagor. — In *Zeiger's Estate*, 11 Pa. Co. Ct. Rep. 517, it was held that an administrator was not entitled to commissions on a sale by him of mortgaged real estate to the mortgagee, but that an allowance would be made based on the actual value of his services in the transaction.

3. Administrator Who Is Surviving Partner Not Allowed Compensation for Winding up Partnership. — *Pickens's Estate*, 14 W. N. C. (Pa.) 407; *Gregory v. Menefee*, 83 Mo. 413. But the rule in *Missouri* was changed by statute. See *Matter of Tutt*, 41 Mo. App. 662.

Even if the services of the administrator in winding up the affairs of the partnership were required in consequence of the incapacity of the surviving partner, he is not entitled to compensation out of the decedent's estate. *Miller's Appeal* (Pa. 1886) 7 Atl. Rep. 100.

But if an executor who is the testator's surviving partner is directed by the will to carry on the business, he is entitled to the compensation fixed by the will, in addition to his interest in the profits of the firm. *Allen's Estate*, 7 Pa. Co. Ct. Rep. 14, 45 Leg. Int. (Pa.) 227, affirmed 125 Pa. St. 544.

Administrator of Surviving Partner. — In *McCullough v. Barr*, 145 Pa. St. 459, 20 W. N. C. (Pa.) 123, the administrator of the surviving partner was allowed commissions out of the partnership, where the affairs of the firm were much confused for want of proper accounts, and involved large sums of money.

compensation will be allowed for the distribution of any moneys realized from the partnership.¹

(b) **Allowance of Gross Amount.** — Under the statutes which leave it to the discretion of the court to fix the amount of compensation in each particular case, whether such discretion is restricted by a provision that the allowance shall not exceed a certain percentage of the assets, or whether it is without restriction, the allowance need not be made in the form of a percentage, but may be in the form of a gross sum, so long as it is within the limit, if any is imposed.²

(c) **Per Diem Allowance.** — A *per diem* allowance is provided for in some jurisdictions, either as full compensation or in addition to other allowances.³

(d) **Amount of Compensation Fixed by Will.** — It is generally held that the amount of the compensation of an executor may be fixed by a provision in the will, though at a less sum than would otherwise be allowed by law, and that if he accepts the trust he is bound by such provision and cannot claim the statutory rate of compensation.⁴

1. Distribution of Moneys Realized from Partnership. — *Smith's Estate*, 37 Pittsb. Leg. J. (Pa.) 33.

The Value of a Partnership Interest on which the executor of a deceased partner is entitled to commissions is to be determined by the amount of property realized on liquidation of the partnership, and not by an inventory made before the liquidation. *Milmo's Succession*, 47 La. Ann. 126.

2. Allowance of Gross Amount. — In *Ray v. Doughty*, 4 Blackf. (Ind.) 115, one hundred and eighty dollars were allowed where the amount disbursed was three thousand and ten dollars.

In *Stanberry v. Robinson*, (Ky. 1894) 27 S. W. Rep. 973, six thousand dollars were allowed for the settlement of an estate worth two hundred and forty-two thousand two hundred and seventy-four dollars.

In *Fidelity Trust, etc., Co. v. Watkins*, (Ky. 1897) 42 S. W. Rep. 753, the court allowed sixteen thousand dollars on an estate of one million dollars.

In *Matter of Power*, 92 Mich. 106, an allowance of one hundred dollars was made on an estate of five thousand dollars.

In *Andress v. Andress*, 46 N. J. Eq. 528, an allowance of four thousand three hundred dollars was reduced to three thousand dollars, where the estate, amounting to one hundred and seven thousand dollars, consisted mostly of securities, and the only acts performed by the administrator were to keep them safely, collect the income, divide them into equal shares, and pass them over to the next of kin.

In *Gilpin's Estate*, 138 Pa. St. 143, four thousand six hundred and fifty dollars were allowed for administering on an estate amounting to about eighty-nine thousand dollars.

In *Kauffman's Appeal*, (Pa. 1887) 12 Atl. Rep. 31, an allowance of two thousand dollars was held excessive and was reduced to one thousand six hundred dollars where the estate amounted to about forty thousand dollars, mostly in securities, which were divided by the heirs among themselves, and only four hundred and fifty dollars were disbursed by the administrator.

In *Stewart's Appeal*, 110 Pa. St. 410, the court allowed four thousand dollars on the settlement of a complicated estate, where the credits

amounted to \$74,821.16 and the debts amounted to \$127,387.07.

In *St. Clair's Appeal*, (Pa. 1888) 15 Atl. Rep. 914, an allowance of one thousand one hundred and fifty dollars was made on an estate of ninety-five thousand dollars.

In *Williams v. Herrick*, 18 R. I. 120, following *Grinnell v. Baker*, 17 R. I. 41, one thousand five hundred dollars was the amount allowed out of an estate of about seventy-nine thousand dollars. See also *Newell v. West*, 149 Mass. 520; *Wisner v. Mabley*, 70 Mich. 271.

3. Per Diem Allowances. — See the several codes and statutes.

A greater *per diem* allowance than one dollar, as provided for by How. Annot. Stat. Mich., 1882, § 9015, may be made in a proper case, another section of the statute authorizing special compensation. Thus, five dollars per day were allowed for time and services, including the use of the administrator's horse and vehicle, in getting possession of real estate, collecting rents, and renting farms. *Matter of Nuckols*, 103 Mich. 297.

Only Time Actually and Necessarily Occupied in the affairs of the estate can be considered in making a *per diem* allowance. *Higbie v. Westlake*, 14 N. Y. 281.

A Per Diem Allowance Cannot Be Made when a different mode of fixing compensation is prescribed by statute. *Booker v. Armstrong*, 93 Mo. 49.

4. Compensation May Be Fixed by Will — *Kentucky*. — *Brown v. Brown*, 6 Bush (Ky.) 652.

Louisiana. — *Fink's Succession*, 13 La. Ann. 103.

Massachusetts. — *Little v. Little*, 161 Mass. 188; *Manning v. American Board of Foreign Missions*, 8 Met. (Mass.) 566.

New York. — *Secor v. Sentis*, 5 Redf. (N. Y.) 570; *Greer v. Greer*, 5 Redf. (N. Y.) 214; *Matter of Gerard*, 1 Dem. (N. Y.) 244.

Pennsylvania. — *Bartolett's Appeal*, 1 Walk. (Pa.) 77; *Re Hays's Estate*, 27 Pittsb. Leg. J. N. S. (Pa.) 263; *Allen's Appeal*, 125 Pa. St. 544; *Shippen v. Burd*, 42 Pa. St. 461.

Virginia. — *Jones v. Williams*, 2 Call (Va.) 102.

Hawaii. — *In re King*, 3 Hawaiian 384.

An Executor Who Accepts the Office under the will is bound by its terms in respect to the compensation which it provides that he shall

Effect of Bequest to Executor. — But in order that a legacy to an executor may operate as a provision for his compensation in lieu of his right under the statute, the intention of the testator that it shall have such effect must appear from the will. That the testator so intended is obvious when it is recited in the will that the legacy is to compensate him for his services.¹ If the will

receive as such. *Hays's Estate*, 183 Pa. St. 296. Compare *Young v. Smith*, 9 Bush (Ky.) 429. And this applies as well to a trust imposed on the executor by the will, because executing the trust is but executing the will. *Shippen v. Burd*, 42 Pa. St. 461.

Effect of Statute Regulating Commissions. — In *Secor v. Sentis*, 5 Redf. (N. Y.) 570, it was held that the statute authorizing the surrogate to allow compensation to an executor or administrator, and fixing the rate thereof, is not mandatory, and does not affect the right of a testator to fix the amount of the compensation.

But in Maryland it is held that a testator cannot, by anything put in his will, in any wise affect the commissions which the law allows to his executor. *McKim v. Duncan*, 4 Gill (Md.) 72; *State v. Baker*, 8 Md. 49; *Handy v. Collins*, 60 Md. 229, 45 Am. Rep. 725. And it is now provided by statute in that state (Pub. Gen. Laws Md., 1888, art. 93, § 6) that "if anything be bequeathed to an executor by way of compensation, no allowance of commissions shall be made unless the said compensation shall appear to the court to be insufficient; and if so it shall be reckoned in the commission to be allowed by the court." *Renshaw v. Williams*, 75 Md. 498.

Compensation for Special Services was held to be authorized by a will by which the testator appointed his confidential clerk and book-keeper one of his executors, and directed his other executors to allow him such yearly compensation for his special services as they might deem proper. *Clinch v. Eckford*, 8 Paige (N. Y.) 412.

Commissions Allowed on "Debts" — Government Bonds. — In *Matter of Filden*, 44 Hun (N. Y.) 441, modifying 5 Dem. (N. Y.) 230, the term "debts," in a provision in the will that the executors should receive five per cent. commissions on "the collection of debts owing to me," was held to include the principal of United States government bonds owned by the testator at the time of his death and paid by the government to the executors. On this question the court said: "The United States bonds which were held by the testator at the time of his death were part and parcel of the interest-bearing obligations of the United States, and formed part of the public debt. In the use of the word 'debts' by the testator in the clause referred to, no distinction is made in the character of the obligation or debts which might be owing to the testator. The language is that the executors are to be entitled to a commission of five per cent. for the collection of debts owing to the testator. This language necessarily includes each and every obligation for the payment of money which was held by the testator and which was subsequently collected by the executors. There is no meaning of the word 'debt' which excludes the interest-bearing obligations of the United States or of the state. They were part and parcel of the public debt, and recognized as

such by the statutes of the United States in reference thereto. The bonds of the United States were as much of a debt as the bonds of any corporation which issued its obligations for the payment of money, or as the obligations of any individual who issued his commercial paper payable at a future day. It would seem, therefore, that the money collected from the United States upon the payment of its obligations came within the provisions of the section referred to, and the executors were entitled to commissions thereon at the rate of five per cent."

Commissions Allowed on Money "Collected." — A provision in a will that the executor "shall receive a commission of six per cent. upon all moneys collected by him" does not entitle him to six per cent. on the amount of the entire proceeds of the estate coming into his hands, but the words "moneys collected" will be taken in their ordinary sense. *Ireland v. Corse*, 67 N. Y. 343.

A Provision that the Executors Shall Be "Handsomely" Paid does not authorize more than the ordinary rate of commissions, where it does not appear that they were put to any extraordinary trouble in settling the estate. *Waddy v. Hawkins*, 4 Leigh (Va.) 458.

A Provision for the "Usual" Commissions means commissions at the rate adopted by the court as the standard (it not being fixed by statute) to be applied in all ordinary cases, and it was so held in a case where the estate amounted to five hundred thousand dollars. *In re Lilly*, 181 Pa. St. 478.

1. Mere Bequest to Executor Does Not Deprive Him of Commissions. — *Matter of Mason*, 98 N. Y. 527; *Campbell v. Mackie*, 1 Dem. (N. Y.) 185; *Oden v. Windley*, 2 Jones Eq. (55 N. Car.) 440.

In Louisiana a legacy to an executor deprives him of his right to commissions unless the testator provided that the executor should have the legacy over and above his commissions. *Ross's Succession*, 1 La. Ann. 129; *Gardere's Succession*, 48 La. Ann. 289. Compare *Kirkland v. Narramore*, 105 Mass. 31; *Rothmahler v. Myers*, 4 Desaus. (S. Car.) 215, 6 Am. Dec. 613; *Granberry v. Granberry*, 1 Wash. (Va.) 246, 1 Am. Dec. 455, discussing and recognizing the English rule that bequests to persons who are named as executors are considered *prima facie* to be given to them in that character, and that, when it is once settled that the bequests are made to them as executors, if they renounce the trusts, refuse to act, or are guilty of culpable neglect in not undertaking the executorship, or from mental or bodily infirmity are incapable, or die before taking on themselves the trusts, the condition on which the legacies are given being not performed, they cannot be claimed.

The Test is whether the right of the legatee to take the legacy depends on his acting and rendering services as executor, or whether it is a bounty to him which he is entitled to re-

does not contain such recital, the intention may be gathered from other provisions.¹

Inadequacy of Testamentary Provision. — This is not an absolute rule, however, and the court may make an allowance in excess of the amount fixed by the will if such amount is not an adequate compensation for the services of the executor.²

Renunciation of Testamentary Provision. — By statute in some jurisdictions an executor may renounce the provision made by the will for his compensation and take his statutory commissions, but otherwise he shall have only the compensation provided by the will.³

ceive as if he had no other connection with the will than as legatee under it. *Matter of Mason*, 98 N. Y. 527.

Ambiguity as to Intent. — Where the terms of a bequest to the executor may be construed as depriving him of his statutory right to compensation, or may be construed otherwise with equal reason, that construction will be adopted which permits him to have compensation. *Marshall v. Wysong*, 3 Dem. (N. Y.) 173.

An Intent to Deprive the executrix, who was the testator's widow, of the right to commissions was held to appear where the will gave her the bulk of the estate and provided that the executors other than the widow should "receive and take the full rate of commissions provided by law for each executor." *Matter of Kernochan*, 104 N. Y. 618.

Bequest to Executor Who Is Required to Perform Special Services. — In *Nathan's Estate*, 6 Pa. Dist. Rep. 481, the testator appointed a trust company and a personal friend executors. He had previously made an agreement with the trust company that its commissions should be only two and one-half per cent. Nothing was said to the individual executor about his commissions, but the will provided that he should carry on the testator's business as long as it should be deemed expedient by the executors, and gave him five hundred dollars per annum during the period that he should carry on the business as compensation for his services in lieu of commissions as executor and trustee. It was held that such provision for compensating the individual executor related only to his services in carrying on the business, and that he was entitled to equal commissions with the trust company for his general services as executor. A strong reason given for this construction of the will was that should the business be discontinued at any time, in the exercise of the discretion vested in the executors and trustees, one of their number would receive no compensation whatever, while the other would continue to receive the agreed rate of commissions on the income during the existence of the trust and on the principal of the real estate as it might from time to time be converted.

Bequest Expressly as Compensation of Executor. — *Fletcher v. Hurd*, (Supreme Ct.) 14 N. Y. Supp. 388.

1. Inference from Amount of Provision. — In *Matter of Haines*, 8 N. J. Eq. 506, it was held that the executors, who were the testator's sons, were not entitled to the statutory commissions, where the will gave them the greater part of the estate and provided that all the testator's just debts and expenses should be paid and satisfied out of their legacies.

Provision for Compensation of Other Executors. — In *Matter of Kernochan*, 104 N. Y. 618, it was held that where the will gave the greater part of the estate to the testator's widow, making her one of the executors, and provided that the other executors should have full commissions, she was entitled to no commissions.

Provision that Executors Should Receive No Compensation. — In *Secor v. Sentis*, 5 Redf. (N. Y.) 570, it was held that a bequest of half of the residue of the estate to one of the executors and the other half to the wife of the other executor, with a direction that they should receive no compensation, was in lieu of their statutory right.

2. Inadequacy of Provision — Further Allowance by Court. — *Denison v. Denison*, 17 Grant's Ch. (U. C.) 306; *Raines v. Raines*, 51 Ala. 237; *Good's Estate*, 150 Pa. St. 307; *Matter of Guen*, 1 Ashm. (Pa.) 317.

Extraordinary Services necessarily rendered by an executor whose compensation was fixed by the will justify a further allowance by the court. *Bartollett's Appeal*, 1 Walk. (Pa.) 77; *R. Hays's Estate*, 27 Pittsb. Leg. J. N. S. (Pa.) 263.

3. Renunciation of Testamentary Provision Requisite to Allowance of Statutory Compensation. — *Fink's Succession*, 13 La. Ann. 103; *Secor v. Sentis*, 5 Redf. (N. Y.) 570. See also the codes and statutes of the several states.

Time Within Which Renunciation Must Be Made. — It has been held that though the statute does not prescribe the time within which the executor must renounce the provisions of the will fixing his compensation, yet he must do so as soon as it can be ascertained which is the most beneficial course for him, or the right will be lost by laches. *Arthur v. Nelson*, 1 Dem. (N. Y.) 337.

But in a later case it was held that the right remains unimpaired as long as the executor has not indicated his election between the testamentary provision and the statutory commissions, either by taking one or the other, or by some other mode. *Matter of Weeks*, 5 Dem. (N. Y.) 194. See also *Matter of Arkenburgh*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 744.

Estoppel to Renounce. — A statement made by the executor before the will was admitted to probate that he was satisfied with the compensation provided for therein does not estop him afterwards to renounce the provision. *Matter of Arkenburgh*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 744.

Retracting Renunciation. — An executor cannot retract his renunciation without the consent of the parties in interest. *Matter of Weeks*, 5 Dem. (N. Y.) 194.

(e) **Amount of Compensation Fixed by Agreement.** — The compensation of an executor or administrator may be fixed, irrespective of the statutory allowances, by agreement between him and the persons interested in the estate.¹

(f) **Successive Administrations.** — In case of successive administrations, that is, when an executor or administrator dies, resigns, or is removed while the administration is incomplete, and it is finished by his successor in office, the usual practice is to apportion among the successive incumbents, on equitable principles, the amount of compensation which ordinarily would have been allowed to the original executor or administrator if the entire administration had been conducted by him.² There seems to be no fixed rule by which an apportionment of the compensation may be made in all cases.³ The subject is more or less regulated, however, by local statutes or practice relating to the mode of determining the amount of compensation to which executors and administrators in general are entitled. Thus, in those jurisdictions where the court is authorized to allow such compensation as may be deemed reasonable for the services performed, without limitation as to amount, it is obvious that the court may allow to each of several successive representatives a reasonable compensation for the services performed by him. But where the compensation is measured by commissions on the amount or value of the estate administered, the usual practice is to allow to each representative commissions on that part of the estate administered by him.⁴ And where commissions on receipts and

The Statute Does Not Operate Retrospectively, and therefore does not apply to a case where the will was admitted to probate after the statute was passed. *Aspinwall v. Pirnie*, 4 Edw. Ch. (N. Y.) 410.

1. **Compensation May Be Fixed by Agreement** — *Iowa*. — *In re Mansfield*, 80 Iowa 681.

Massachusetts. — *Newell v. West*, 149 Mass. 520.

New York. — *In re Turfler*, (Surrogate Ct.) 24 N. Y. Supp. 91.

Pennsylvania. — *Koch's Estate*, 148 Pa. St. 459.

Vermont. — *Hubbell v. Olmstead*, 36 Vt. 619.

Canada. — *In re Hamilton*, 29 Nova Scotia

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A **Promise to Pay a Fair Compensation** is a mere promise to pay what may be allowed by law, and therefore does not affect the amount of the allowance which will be made to the executor or administrator on the settlement of his accounts. *Ratcliff v. Davis*, 38 Miss. 107.

An **Agreement by Some of the Beneficiaries** that the executor shall have additional compensation does not entitle him to an allowance thereof. *Matter of Hayden*, 1 Connolly (N. Y.) 454.

Consideration of Agreement. — An agreement by the person first entitled to administer with the person next entitled not to charge commissions if the person secondarily entitled would not apply is without consideration. *Coste's Succession*, 43 La. Ann. 141.

2. **Successive Administrations — Apportionment of Compensation** — *California*. — *Ord v. Little*, 3 Cal. 287.

Louisiana. — *Girod's Succession*, 4 La. Ann. 386.

Maryland. — *Haslett v. Glenn*, 7 Har. & J. (Md.) 22.

Mississippi. — *Cherry v. Jarratt*, 25 Miss. 221; *Spratt v. Baldwin*, 33 Miss. 581.

North Carolina. — *Scroggs v. Stevenson*, 100 N. Car. 354.

Hawaii. — *Treadway v. Phillips*, 3 Hawaiian 178.

When the Administration Has Not Been Completed the court may in its discretion allow less than the minimum rate of commissions fixed by statute. Such minimum rate applies only in case of a completed administration. *Parker v. Gwynn*, 4 Md. 423.

The Allowance of Commissions to a Collector does not affect the right of the executor or administrator of the same estate to commissions. They are distinct and independent allowances for different services. *Wilson v. Wilson*, 3 Gill & J. (Md.) 20.

3. **Apportionment Not Governed by Fixed Rules.** — Where an administrator resigns or is removed, leaving the administration incomplete, there is no fixed rule of compensation for the services he has rendered, but in such a case it is the duty of the Probate Court to examine into the nature and value of the services rendered, and, comparing, as well as possible, that which has been done with what yet remains to be done in the course of administration, to apportion the compensation which has been fixed by law for the whole, according to sound judgment. *Ord v. Little*, 3 Cal. 287.

4. **Discretion of Court.** — As to the jurisdictions in which the amount of compensation is in the discretion of the court, without limitation as to amount, see *supra*, this section, *Amount of Compensation*.

Allowance to Successive Representatives According to Property Administered by Each. — *Barton's Estate*, 55 Cal. 87, *criticising* *Ord v. Little*, 3 Cal. 289; *Girod's Succession*, 4 La. Ann. 386; *Day's Succession*, 3 La. Ann. 624; *Smith v. Cheney*, 1 Rob. (La.) 98; *Cairns v. Chaubert*, 9 Paige (N. Y.) 160.

The fact that the maximum commissions have been allowed to the original administrator does not deprive the succeeding administrator of his right to commissions on the part of the

disbursements are the measure of compensation, the simple mode has been followed of allowing commissions to each on his receipts and disbursements.¹

(g) **Special and Temporary Administrators.** — The amount allowable to special and temporary administrators as compensation for their services is generally committed to the discretion of the court in view of the circumstances of the particular case,² but the allowance may be at the same rate as in the case of other administrators.³

(h) **Executors Who Are Also Trustees — Right to Double Commissions.** — When the same person is both executor of and trustee under a will, he is sometimes allowed double commissions, that is, full commissions in each of the two capacities in which he acts. Such double allowance is proper, however, only when the will contemplates a several and separable action by the executor and trustee in each capacity, not at the same time, but at different stages of the administration.⁴ Conversely, if an executor holds funds on a trust which is

estate left unadministered by the original administrator. *Lemmon v. Hall*, 20 Md. 168.

Money Collected by Original Representative. — Where money was collected by the original representative and deposited in bank, he alone is entitled to commissions on it, and his successor is not entitled to commissions for distributing it, because the distribution is not an additional administration of the fund for which commissions may be allowed. *Bougère's Succession*, 30 La. Ann. 423. In regard to this decision it will be observed that *Louisiana* is not one of the states in which commissions are allowed separately on receipts and disbursements.

When Apportionment May Be Made. — In *Barton's Estate*, 55 Cal. 87, it was held, on an application of the rule that each representative is entitled to commissions on the part of the estate administered by him, that the court has no basis on which to make an apportionment until the closing of the estate. See also *Matter of Levinson*, 108 Cal. 450; *Marvin's Estate*, Myr. Prob. (Cal.) 163.

In *Milne's Succession*, 1 Rob. (La.) 400, the court said: "This commission is the compensation which the executor is entitled to for administering the whole estate; he cannot, therefore, begin his administration by pocketing it; for if he be prevented by death, or otherwise, from proceeding and completing his administration, it would be absurd to say that he is entitled to the same compensation as if he had completed his work. Nor can it be pretended that, on every mutation of the executorship, the preceding and succeeding incumbents are each entitled to a commission on the whole estate. The compensation due to each incumbent is to be reckoned on the portion of the estate which he administers."

In *Mississippi* it was formerly provided by statute that the court might make to a retiring executor or administrator such allowance as it should deem right and proper, and under this statute it was held that the allowance should correspond with the trouble, services, and responsibilities in administering the estate. *Cherry v. Jarratt*, 25 Miss. 221.

1. Allowance to Successive Representatives According to Receipts and Disbursements of Each. — *Matter of Depew*, 6 Dem. (N. Y.) 54; *Matter of Newland*, 7 Misc. Rep. (N. Y. Surrogate Ct.) 728; *Betts v. Betts*, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 317; *Lyendecker v. Eisemann*, 3

Dem. (N. Y.) 72; *Griffin v. Bonham*, 9 Rich. Eq. (S. Car.) 71.

2. Special and Temporary Administrators — Amount of Compensation in Discretion of Court. — *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93; *Matter of Moore*, 88 Cal. 1; *Lewis v. McCabe*, 16 Mo. App. 398.

A Special Administrator is not entitled to commissions on money and property delivered to his successor in office, as such delivery is neither money paid out nor property fully administered so as to entitle him to statutory commissions. *Hawkins v. Cunningham*, 67 Mo. 418; *Matter of Boothe*, 38 Mo. App. 456.

3. The Rate of Compensation fixed by the statute for an administrator may be taken as the standard for determining a proper allowance to be made to a special administrator, the amount of the allowance to him being left by the statute to the discretion of the court. *Matter of Moore*, 88 Cal. 1; *In re Handfield*, 16 Mo. App. 332; *Egan's Estate*, 7 Misc. Rep. (N. Y. Surrogate Ct.) 262.

The amount of commissions which may be allowed to a collector is not affected by the amount to which the executor or administrator is entitled, because they are distinct and independent allowances for different services. *Wilson v. Wilson*, 3 Gill & J. (Md.) 20.

In *New York* it is held that the statutory commissions of executors and administrators furnish the standard by which the commissions of a temporary administrator are to be measured, but that "the fact that an executor is not entitled to commissions on property specifically bequeathed is no reason for depriving a temporary administrator of commissions thereon," because "the object of the law in providing for the appointment of a temporary administrator is to insure the safety and preservation of the property, and ordinarily its ultimate delivery in kind by the administrator upon the termination of his office, and the compensation which is awarded to him is given for these services." *Egan's Estate*, 7 Misc. Rep. (N. Y. Surrogate Ct.) 262.

4. Rule Allowing Double Commissions. — *Matter of McAlpine*, 126 N. Y. 285; *Matter of Crawford*, 113 N. Y. 560; *Johnson v. Lawrence*, 95 N. Y. 154; *Lavtin v. Davidson*, 95 N. Y. 263; *Matter of Clinton*, 12 N. Y. App. Div. 132; *Matter of Beard*, 77 Hun (N. Y.) 111; *Matter of Curtiss*, 15 Misc. Rep. (N. Y. Surrogate Ct.) 545; *Matter of Babcock*, 52 Hun (N.

inseparable from the executorship, or, in other words, if the trust is annexed to the executorship, it is held that he is entitled to commissions only in his capacity as executor.¹

When Functions as Executor and Trustee Respectively Are Separate. — No rule can be formulated for determining when the functions of a person who is both executor and trustee are separate, further than to say that they must be made separate by the will, either expressly or by implication.²

Y.) 510; *Ex p. Witherspoon*, 3 Rich. Eq. (S. Car.) 13.

In *Matter of McAlpine*, 126 N. Y. 285, the Court of Appeals, referring to the cases of *Johnson v. Lawrence*, 95 N. Y. 154, and *Laytin v. Davidson*, 95 N. Y. 263, lays down the following rule for determining whether a person is entitled to double commissions: "Both cases agree in the rule that double commissions to the same persons, first in the character of executors and then in that of trustees, are to be awarded only when the will contemplates a several and separable action in each capacity, not at the same but different stages of the administration, and that they are not to be allowed where the will makes no such separation, but blends the two duties and commingles them without a severance. To the ordinary duties of an executor may be added the performance of a trust in such a manner that the two functions run on together. It is the duty of an executor, as such, to pay to a legatee the amount of the legacy in the manner and at the time provided by the testator, and it does not change that duty that the payment of the principal is postponed and the income made payable annually in the meantime. A trust duty may thus be imposed upon an executor which thereby becomes and is made a function of his office. A will must go further than that to admit of double commissions, and must clearly and definitely indicate an intention of the testator to end the executor's duty at some point of time, and require him thereupon to constitute and set up one or more several trusts, to be held and managed as such for the interest of the beneficiary."

In *Baker v. Johnston*, 39 N. J. Eq. 493, the ordinary said: "This is one of that class of cases in which the duty of the executors as such ends at a certain point and their duty as trustees begins there. In such cases the executors are entitled to lawful commissions for their services as such, and they will, as trustees, be entitled to compensation for the services they may render in that capacity. The court deals with them in the matter of compensation in such cases precisely as if the two trusts, the executorship and the trusteeship, were in different hands." In support of this proposition the following cases were cited: *Mitchell v. Holmes*, 1 Md. Ch. 287; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Hurlbut v. Durant*, 88 N. Y. 121; *Aston's Estate*, 5 Whart. (Pa.) 228; *Ex p. Witherspoon*, 3 Rich. Eq. (S. Car.) 13.

In Pennsylvania it is expressly provided by statute (Act March 17, 1864) that a person who is both executor and trustee shall not be allowed commissions in both capacities. *Scull's Estate*, 17 Pa. Co. Ct. Rep. 198, 4 Pa. Dist. Rep. 699; *Reed's Estate*, 8 Montg. Co. Rep. (Pa.) 98. But it is held that this statute

does not forbid an allowance of double commissions where a trust intervenes between the performance of the executorial duties and the trust duties imposed on the executor as trustee, and such trust duties cannot be performed by him until the intervening trust has been discharged by the trustee therein, and the property transferred back to the executor. *Scull's Estate*, 17 Pa. Co. Ct. Rep. 198, 4 Pa. Dist. Rep. 699.

When Functions as Executor End and Those as Trustee Begin. — The mere mental determination of an executor to appropriate property in his hands as such to himself as trustee under the will is not such a setting apart as to entitle him to any separate compensation for his services as trustee. *Miller v. Congdon*, 14 Gray (Mass.) 114.

1. Double Commissions Not Allowed When Trust Is Annexed to Office of Executor. — *Albro v. Robinson*, 93 Ky. 195; *Bruere v. Gulick*, 41 N. J. Eq. 269; *Everson v. Pitney*, 40 N. J. Eq. 543; *In re Thompson*, (Surrogate Ct.) 1 N. Y. Supp. 213; *Valentine v. Valentine*, 2 Barb. Ch. (N. Y.) 430; *Drake v. Price*, 5 N. Y. 430, affirming 7 Barb. (N. Y.) 388; *Hall v. Hall*, 18 Hun (N. Y.) 359; *Hall v. Hall*, 78 N. Y. 539; *Hurlbut v. Durant*, 88 N. Y. 126.

Inseparability of Functions of Executor and Trustee Questioned. — In *Pitney v. Everson*, 42 N. J. Eq. 365, the theory that the two offices of executor and trustee could be so incorporated, the one with the other, that they could not be disjoined for the purpose of compensating the person who had acted in such dual capacity for the services he had so respectively performed was questioned. *Beasley, C. J.*, said: "In my opinion a man must act in one or the other of such capacities, and he cannot, in his administration of any part of the property committed to him, be said to act in a duplex character, for each act done must, in contemplation of law, be that of an executor or that of a trustee. Nor can a testator, even by the use of express terms for the purpose, create an office compounded of the two distinct offices of executor and trustee, for when the requisite conditions appertaining to person and property exist, the law itself imperatively declares that such state of affairs produces a trust. If the situation, in point of law, plainly denotes a trusteeship, the testator cannot convert it into an executorship by calling it such."

2. When Functions as Executor and Trustee Are Separate. — In *Laytin v. Davidson*, 95 N. Y. 263, the testator gave to his executors his real estate and personal property in trust to pay debts and legacies and to construct a burial vault, and "upon the further trust" to divide the residue of his estate into five equal shares and to pay the income of one share to each of his five children for life, and on the death of any

(i) **Special Compensation for Extraordinary Services** — *aa. GENERAL RULE.* — It is well settled, as a general rule, that if an executor or administrator, in the course of his administration, renders to the estate services not ordinarily required or expected of him, he is not entitled to special compensation therefor, unless it is so provided by statute or by the will under which he acts; and this is true though he might properly have employed a third person at the expense of the estate to perform such services.¹

In New York the rule in regard to special compensation seems to be that an allowance will be made if the services for which it is claimed were outside the official duties of the executor or administrator, but that no allowance will be

child to distribute the principal of the share of the one so dying among his grandchildren then living and the issue of any deceased grandchild; and provided an annuity for his wife. In this case it was said that the will clearly contemplated a period of time when the duties of the executors as such should end and they should assume the character exclusively of trustees for the widow and children of the testator; that the duty to pay debts and legacies presently payable and to construct a burial vault was strictly executorial, and on the accomplishment thereof the property was given "upon the further trust" to divide the residue, etc., which trust could not be performed until the residue should be ascertained by an accounting.

In *Matter of Beard*, 77 Hun (N. Y.) 111, the will contained six provisions. The first four provided for the payment of the testator's funeral expenses, debts, and certain pecuniary and specific legacies. The fifth provision gave all the rest, residue, and remainder of the estate to the executors and testamentary trustees thereafter appointed, in trust for the benefit of the testator's daughter for life, and prescribed the final and absolute disposition to be made of such residue on the termination of the trust. The sixth provision of the will appointed certain persons "executors of and testamentary trustees under" the will, and gave them power to sell, lease, and invest the property as they might see fit. It was held that the duties of the executors as such were provided for by the first four provisions of the will, and that until they were completely performed the duties as trustees imposed by the fifth provision could not be undertaken.

Other cases in which double commissions were allowed on the ground of the separate and distinct nature of the duties to a person who was both executor and trustee are *Phoenix v. Livingston*, 101 N. Y. 451; *Matter of Crawford*, 113 N. Y. 560; *Matter of McAlpine*, 126 N. Y. 285; *Matter of Curtiss*, 15 Misc. Rep. (N. Y. Surrogate Ct.) 545; *Matter of Babcock*, 52 Hun (N. Y.) 510.

When Functions as Executor and Trustee Are Inseparable. — In *Johnson v. Lawrence*, 95 N. Y. 154, the testator, after briefly providing for the payment of his debts, directed his "executors hereinafter named" to carry on his business and apply the profits to the support of his family; also out of the income and profits of the estate to pay an annuity to the widow, and from the surplus income to support, educate, and maintain the testator's children, and as each child should attain a certain age to pay his or her share of the estate; and finally the

will appointed certain persons executors and authorized them to sell and convey any or all of the real estate as they should deem advisable. It was said that it was apparent that from the very beginning the duties of the executors were blended inseparably with the trust duties and were so intended to remain, because there was no trust fund as a separate and distinct entity from the general body of the estate until the final division, and there was no point of time prior to that division at which it could be said that one function ended and the other began. On the contrary, it was said that the ordinary duty of an executor to turn the estate into money was suspended at the outset and in its room was put the duty of carrying on the business with all the assets on hand, and hence as a trust duty it sprang into life at the same instant with the executorship and was inextricably blended with it. See also *Westerfield v. Westerfield*, 1 Bradf. (N. Y.) 198; *Lansing v. Lansing*, 45 Barb. (N. Y.) 182; *Mann v. Lawrence*, 3 Bradf. (N. Y.) 424; *Holley v. S. G.*, 4 Edw. Ch. (N. Y.) 284; *Valentine v. Valentine*, 2 Barb. Ch. (N. Y.) 430.

1. Rule Denying Special Compensation — *Florida.* — *Sanderson v. Sanderson*, 20 Fla. 292.

Illinois. — *Willard v. Bassett*, 27 Ill. 37, 79 Am. Dec. 393; *People v. Allen*, 25 Ill. App. 657.

Kentucky. — *Renick v. Renick*, 92 Ky. 335.

Louisiana. — *Key's Succession*, 5 La. Ann. 567; *Sprol's Succession*, 21 La. Ann. 545; *New Orleans v. Baltimore*, 15 La. Ann. 625.

Mississippi. — *Satterwhite v. Littlefield*, 13 Smed. & M. (Miss.) 302.

Missouri. — *Gamble v. Gibson*, 59 Mo. 585.

North Carolina. — *Morris v. Morris*, 1 Jones Eq. (54 N. Car.) 326.

South Carolina. — *Snow v. Callum*, 1 Desaus. (S. Car.) 542.

The commissions that the law or courts allow to the executor or administrator, said Wagner, J., are the extent of his compensation. "He may employ the services of an agent or attorney, if necessary, and pay for them out of the estate, but if he undertakes to act in such capacities himself for the estate, he can receive no compensation. This rule is so strict that it has been held that if the trustee has a partner and employs such partner, no charge can be made by the firm." *Gamble v. Gibson*, 59 Mo. 585 [citing *Collins v. Carey*, 2 Beav. 128; *Lincoln v. Windsor*, 9 Hare 158; *Christophers v. White*, 10 Beav. 523; *Lyon v. Baker*, 5 De G. & Sm. 622; *Manson v. Baillie*, 2 Macq. H. L. Cas. 80].

made, however extraordinary or meritorious the services may be, if they were incident to the office or were imposed by the will of the decedent.¹

66. SPECIAL COMPENSATION ALLOWED BY STATUTE. — The statutes of several states provide that in addition to the allowance by way of commissions or otherwise for the time, labor, and risk incident to the management and settlement of the estate, the court may allow to every executor or administrator a reasonable compensation for any "extraordinary" services rendered by him.²

1. Rule in New York. — *Collier v. Munn*, 41 N. Y. 143, 7 Abb. Pr. N. S. (N. Y.) 193; *Morgan v. Hannas*, 13 Abb. Pr. N. S. (N. Y. Ct. App.) 361; *Clinch v. Eckford*, 8 Paige (N. Y.) 412; *Matter of Hayden*, 1 Connolly (N. Y.) 454; *McWhorter v. Benson*, *Hopk.* (N. Y.) 38; *Betts v. Betts*, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 317.

Executors are not entitled to any compensation beyond their commissions as such for performing the duties imposed on them by the will, in *New York*, unless the will itself provides for such extra compensation. *In re Taft*, (Supreme Ct.) 8 N. Y. Supp. 282.

But in *Matter of McCord*, 2 N. Y. App. Div. 324, this rule was limited to services within the official duties of the executor or administrator. The court said: "It is insisted that the services for which Albert McCord, Jr., claimed compensation outside of his commissions were only those which his official duty imposed upon him, and the rule is invoked that an agreement allowing any other or greater compensation for such services, however meritorious, than the amount fixed by law, cannot be enforced. While this rule is settled and firmly supported by authority, it is equally well settled that if services are performed by an executor, outside of his official duties, he may be allowed compensation therefor, and that an agreement to that effect, which is just and fair, will be enforced. There is, therefore, no trouble about the law, but the question in each case will reduce itself to one of fact as to whether the services rendered, and for which compensation is claimed, were those which the executor was bound to render in his official capacity as executor, or were those which were outside of his official duties."

In *Matter of Braunsdorf*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 666, the distinction between the two classes of cases is very clearly drawn. In this case the executor, who had been in the testator's employ as a skilled mechanic, continued the business at the request of the beneficiaries, but without authorization by the will, and on his accounting he was allowed compensation, in addition to his commissions, for the services so rendered. In distinguishing this case from the cases in which special compensation had been denied, the court said: "Here the will did not direct the executor to continue to carry on the business; he did it on his own responsibility and at the request of some of the contestants. The duties performed by him as a skilled mechanic were not in the line of his duty as executor, and were not imposed upon him by the will nor by law. In all of the cases cited by counsel for the contestants, the duties for which extra compensation was sought were executorial in their character. The services rendered by this ex-

ecutor were of such a character as an executor could not be required to render, and could not perform without the mechanical skill and training which this executor possessed." See also *Lawrance v. Garner*, (Supreme Ct.) 1 N. Y. Supp. 534; *Lent v. Howard*, 80 N. Y. 169.

2. Special Compensation for Extraordinary Services Allowed by Statute — *Alabama*. — *Craig v. McGehee*, 16 Ala. 41; *Reese v. Gresham*, 29 Ala. 91; *Holman v. Sims*, 39 Ala. 709; *Wright v. Wilkerson*, 41 Ala. 267; *Ivey v. Coleman*, 42 Ala. 409; *Waller v. Ray*, 48 Ala. 468; *Raines v. Raines*, 51 Ala. 237; *Teague v. Corbitt*, 57 Ala. 529; *Munden v. Bailey*, 70 Ala. 63; *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93. *California*. — *Matter of Moore*, 96 Cal. 522; *Code Civ. Pro.*, § 1618.

Iowa. — *Matter of Gloyd*, 93 Iowa 303; *Patterson v. Bell*, 25 Iowa 149; *Code*, 1897, § 3415.

South Carolina. — *Wallace v. Ellerbe*, Rich. Eq. Cas. (S. Car.) 49; *Jones v. Jones*, 39 S. Car. 247; *Rev. Stat.* 1893, § 2070.

Wisconsin. — *Ford v. Ford*, 88 Wis. 122; *Schinz v. Schinz*, 90 Wis. 236; *Sanb. & B. Annot. Stat.*, 1898, § 3929; *Gary's Prob. Law*, § 528. As to the former rule in Wisconsin, see *Cameron v. Cameron*, 15 Wis. 1, 82 Am. Dec. 652; *King v. Whiton*, 15 Wis. 684.

See further the codes and statutes of the several states.

Discretion of Probate Court. — The allowance of special compensation for extraordinary services usually rests in the discretion of the court before which the question is tried. *Scott v. Dorsey*, 1 Har. & J. (Md.) 227; *Doty v. King*, (Mich. 1897) 71 N. W. Rep. 1080; *Matter of Mower*, 48 Mich. 441; *Loomis v. Armstrong*, 49 Mich. 521, 63 Mich. 355; *Wisner v. Mabley*, 74 Mich. 143; *Steel v. Holladay*, 20 Oregon 462.

In *Matter of Young*, 97 Iowa 218, it was held that compensation for extraordinary services was properly disallowed where no charge of compound interest had been made against the administrator, as might have been done for a period of twenty years.

Statement of Claim. — It has been held that the services for which special compensation is claimed should be particularly stated, specifying the value of each service, and that unless this is done no allowance should be made therefor. *May v. Green*, 75 Ala. 162; *Steel v. Holladay*, 20 Oregon 462. But see *contra*, *Schinz v. Schinz*, 90 Wis. 236; *Ford v. Ford*, 88 Wis. 122.

Proof of Claim. — Proof must be made of each special service for which extra compensation is claimed, and of its particular value. *May v. Green*, 75 Ala. 162; *Wisner v. Mabley*, 70 Mich. 271; *Platt v. St. Clair*, *Wright* (Ohio) 526.

It must also be shown that the special services were necessary to proper performance by

cc. FOR WHAT SERVICES ALLOWED. — Only such services as are of an unusual and extraordinary character, not connected ordinarily with the management of estates, are contemplated by the statutes allowing extra compensation.¹ Thus, where an executor or administrator is also a lawyer, an allowance will be made for professional services in those jurisdictions where special compensation is allowed for extraordinary services,² but in other jurisdictions such allowances are unauthorized.³ So, too, compensation will be allowed under such statutes for services rendered in making or completing crops on the

the executor or administrator of the duties of his office, and that the statutory allowances were inadequate compensation therefor. *Matter of Gloyd*, 93 Iowa 303.

The court is not concluded by the testimony of the witnesses as to the value of the special services, but it may allow whatever sum may seem proper, though it is less than the value stated by any of the witnesses. *Ford v. Ford*, 88 Wis. 122.

1. "Extraordinary Services" Defined. — *In re Johnston*, 7 Ohio Dec. 1, 4 Ohio N. P. 156.

Duties Ordinarily Devolving on an Administrator are not the subject of extra compensation within the statutes. *Teague v. Dendy*, 2 McCord Eq. (S. Car.) 207, 16 Am. Dec. 643; *Logan v. Logan*, 1 McCord Eq. (S. Car.) 1.

Distance of Residence from County-seat. — The fact that an administrator resides at a considerable distance from the county-seat does not entitle him to extraordinary compensation for his services. *Watkins v. Romine*, 106 Ind. 378.

2. Special Compensation for Legal Services Allowed by Statute. — *Ditmar v. Bogle*, 53 Ala. 169; *Teague v. Corbitt*, 57 Ala. 529; *Munden v. Bailey*, 70 Ala. 63; *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93; *Wisner v. Mabley*, 74 Mich. 143.

The Rate of Compensation for Legal Services rendered by an executor or administrator who is also an attorney at law is not governed by the ordinary charges of a lawyer, but a fair and reasonable allowance will be made in view of all the facts of the particular case. *Munden v. Bailey*, 70 Ala. 63; *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93; *Harris v. Martin*, 9 Ala. 895. See also *Wisner v. Mabley*, 70 Mich. 271, in which case *Sherwood, C. J.*, said in regard to the amount which would be allowed for professional services: "The statute having fixed the compensation of an executor at a very moderate sum except in unusual cases, it very clearly appears that the position should never be sought or given with a desire to make money or profit. The position is an honorary one, and should be so regarded. Good business ability, rather than professional skill, is the element most needed in the administration of estates; and compensation, save in the exceptional cases, should be adjusted by the value of services among that class. If an attorney is selected, he cannot expect that he will be allowed charges for services in the discharge of his trust duties, gauged by the prices of professional men. This he knows, or should know, when he accepts the trust; and if not content with such compensation as the statute gives, or the court may reasonably allow, for discharging the duties of the trust requested by his friend, he should decline, and allow another to take the place."

3. Rule Disallowing Compensation for Legal Services — *Illinois*. — *Willard v. Bassett*, 27 Ill. 37, 79 Am. Dec. 393.

Indiana. — *Taylor v. Wright*, 93 Ind. 121.

Louisiana. — *Liles's Succession*, 24 La. Ann. 492; *Key's Succession*, 5 La. Ann. 567.

New York. — *Valentine's Estate*, 9 Abb. N. Cas. (N. Y. Surrogate Ct.) 313; *Lent v. Howard*, 89 N. Y. 179; *Matter of Reed*, (Surrogate Ct.) 12 N. Y. St. Rep. 139; *Collier v. Munn*, 41 N. Y. 143; *Matter of Howard*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 170.

Washington. — *Matter of Young*, 4 Wash. 534.

In *Willard v. Bassett*, 27 Ill. 37, 79 Am. Dec. 393, the court, by *Caton, C. J.*, said: "The only question in this case is whether an attorney of this court, who is an administrator, is entitled to an allowance against the estate for professional services, in cases which he prosecutes or defends as such administrator. The authorities are uniform that this should not be allowed, and every principle of sound policy forbids it. The law cannot permit the idea that a person can take the office of executor or administrator as a business, or as a means of making money. It must ever associate with that place, to a certain extent, the idea of benevolence or philanthropy. We must ever assume that whoever takes such a position is actuated by an impulse of generosity and a desire to do good to others, rather than to make it a source of profit to himself. He must not be expected to suffer loss in the discharge of his duties, hence he must be allowed his necessary disbursements, and a reasonable compensation for the time and trouble bestowed upon the business of the estate. But beyond this the court should never go. If he chooses to exercise his professional skill as a lawyer in the business of the estate, that must be considered a gratuity. To allow him to become his own client, and charge for professional services in his own cause, although in a representative or trust capacity, would be holding out inducements for professional men to seek such representative places to increase their professional business, which would lead to most pernicious results. This is forbidden by every sound principle of professional morality as well as by the policy of the law."

In *Indiana* it is expressly provided by statute that in no case shall an attorney's fee be included in the allowance to an executor or administrator for his personal services. *Pollard v. Barkley*, 117 Ind. 40.

In *Tennessee* it was at one time held that where an executor or administrator is himself an attorney at law, he may either employ other counsel or he may give to the business his own professional services, and that in the

decendent's land, keeping together and managing the estate for the benefit of the next of kin, when authorized to do so, or for any other services of an unusual or extraordinary character, not connected ordinarily with the management of estates.¹

8. Forms and Requisites of the Accounts — In General. — The form and manner of stating the accounts of executors and administrators is not prescribed by statute, but in many cases rules have been laid down by the courts in regard to the matter.² Thus it is held that every item after the filing of the inventory, whether it is a receipt or a disbursement, must be distinctly and particularly entered, either in the account or on a list or schedule furnished to the

latter case he is entitled to the same compensation which he would have paid to another attorney in the former case. *Fulton v. Davidson*, 3 Heisk. (Tenn.) 614.

This decision was afterwards questioned in *State v. Butler*, 15 Lea (Tenn.) 113. And in the still later case of *Loague v. Brennan*, 86 Tenn. 634, it was held that a public administrator, from considerations of public policy, ought not to be allowed compensation as attorney in addition to his commissions as administrator.

1. Making or Completing Crops. — *Craig v. McGehee*, 16 Ala. 41; *Lee v. Lee*, 6 Gill & J. (Md.) 316. But see *Snow v. Callum*, 1 Desaus. (S. Car.) 543, and *Jenkins v. Fickling*, 4 Desaus. (S. Car.) 369, holding that services of an overseer of the decedent's plantation were not within the statute providing for an allowance of extra compensation.

Keeping Estate Together. — *Reese v. Gresham*, 29 Ala. 91; *Waller v. Ray*, 48 Ala. 468.

Continuing Business of Decedent. — Special compensation, and not commissions, will be allowed where the business of the testator was continued by his executor. *Dwyer v. Kalteyer*, 68 Tex. 554. But see *supra*, this section. *On What Property Commissions Are Allowed — Receipts and Disbursements.*

Going Out of the State to settle a partnership of which the testator was a member has been held a service for which the executor is entitled to extra compensation. *Wisner v. Mabley*, 74 Mich. 143.

Receiving Interest on Money Loaned by the testator has been held a service for which the executor is entitled to compensation only under the provisions of the *South Carolina* statute relating to special services. *Rulledge v. Williamson*, 1 Desaus. (S. Car.) 159.

Bringing Suit to Construe a Will is a service not required of an executor or administrator "in the common course of his duty," and therefore special compensation is allowable under the *Ohio* statute. *Re Wolfe*, (Prob. Ct.) 4 Ohio N. P. 336. See also *Wisner v. Mabley*, 74 Mich. 143.

Attending to Pending Litigation. — "The ordinary attendance to a pending case in favor of an executor does not belong to the class of extraordinary services which the statute permits to be specially compensated." *Holman v. Sims*, 39 Ala. 709. Within this principle special compensation will not be allowed where the services consisted of inquiries respecting the evidence in suits pending against the estate of the intestate, and conversations with a witness on the subject, while the administrator was in another county on his indi-

vidual business. *Dockery v. McDowell*, 40 Ala. 476.

Nursing Sick Slaves and furnishing them with necessaries has been held a proper subject for special compensation. *Edelen v. Edelen*, 11 Md. 415.

Keeping Real Estate in a Tenantable Condition is a duty imposed on the executor by a will which provides that he shall receive the income of it for designated purposes, and therefore he is not entitled to special compensation in such a case. *Wilkinson v. Abbott*, (N. J. 1895) 30 Atl. Rep. 1098. *Compare Squibb's Estate*, 1 Del. Co. Rep. (Pa.) 529.

Attending the Audit is not a service for which the executor should be allowed extra compensation, when he has received legal commissions. *Shirk's Estate*, 4 Del. Co. Rep. (Pa.) 214.

For Other Instances of what are or are not extraordinary services, see *Wisner v. Mabley*, 74 Mich. 143; *May v. Skinner*, 149 Mass. 375; *Urann v. Coates*, 117 Mass. 41; *In re Hamilton*, 29 Nova Scotia 240.

2. Form of Account Not Prescribed by Statute. — In *Solomons v. Kursheedt*, 3 Dem. (N. Y.) 307, it was held that the statutes do not prescribe any special form to be adopted by an executor in making up his account, but the court said that every such account should contain a clear and definite statement of the executor's dealings with his testator's estate, so that it can be made the subject of intelligent objections.

The Correct Form is to charge the account with the amount of the inventory and appraisement of personal property, and all moneys received since filing the same from debts due decedent, not inventoried, together with any excess over the appraised value realized by a sale of the personal property, or any portion thereof, and any proper surcharges either admitted or duly proved. Credit is then to be allowed for preferred debts, expenses of administration, allowance to the widow or children, if claimed, loss upon appraisement by sale, and debts of decedent if undisputed and estate solvent. The true balance for distribution will thus appear." *Squire's Estate*, 11 Phila. (Pa.) 110, 33 Leg. Int. (Pa.) 22.

Matters of Distribution should not be blended in the same account with matters of administration. An administration account properly settled shows only the balance remaining after the payment of debts and expenses of the administration. *Jones's Appeal*, 99 Pa. St. 129; *Lewis's Estate*, 20 W. N. C. (Pa.) 88; *Parker's Estate*, 12 Pa. Co. Ct. Rep. 436.

court.¹ Within this principle an executor may be required to specify in his account the kind of money received by him,² and it is held that where the decedent was a member of a partnership at the time of his death, the final account of the executor should show the condition of the concern and the eventual interest in it.³

Annual Rests. — Another ordinary requirement in the statement of such accounts is that it shall be made with annual rests.⁴

Verification. — Before an account can be allowed it must be verified by the oath of the executor or administrator.⁵

9. Effect of Settlement — Intermediate or Partial Settlements. — The intermediate or partial settlements which are ordinarily required to be made in the course of the administration of a decedent's estate are *prima facie* evidence of the correctness of the accounts, so that the burden of proof is on any one who seeks to impeach them, but they are not conclusive on persons who were not present or represented,⁶ except that local statutes in some jurisdictions make

And where an accounting blending matters of administration and of distribution has been confirmed, though without objection, it may be opened, even after the lapse of the statutory time for opening final settlements (five years), if refunding bonds have not been taken from the distributees. *Jones's Estate*, 28 Pittsb. Leg. J. (Pa.) 375; *Jones's Estate*, 11 W. N. C. (Pa.) 554. Compare *St. Clair's Appeal*, (Pa. 1888) 15 Atl. Rep. 914.

Mingling Proceeds of Real Estate with Personality. — The fact that an account mingles with statements as to personal property statements as to the proceeds of the real property is not a sufficient ground for rejecting it. *In re Place*, 1 Redf. (N. Y.) 276.

As to the Form of the Account in General, see also *In re Jones*, 1 Redf. (N. Y.) 263, 5 N. Y. Leg. Obs. 124; *Cassady's Estate*, 37 Leg. Int. (Pa.) 246, 13 Phila. (Pa.) 365; *John's Estate*, 1 Chest. Co. Rep. (Pa.) 311; *Cummings's Estate*, 2 Kulp (Pa.) 64; *Dayton's Estate*, 11 Luz. Leg. Reg. (Pa.) 91; *Fell's Estate*, 36 Leg. Int. (Pa.) 460, 13 Phila. (Pa.) 289; *Rankin's Estate*, 9 W. N. C. (Pa.) 407; *Thomas's Estate*, 2 Kulp (Pa.) 160.

1. Accounts Must Be Itemized. — *Hutchinson's Appeal*, 34 Conn. 300; *Fairman's Appeal*, 30 Conn. 205; *Atwater v. Barnes*, 21 Conn. 237; *Swan v. Wheeler*, 4 Day (Conn.) 137. Compare *Liddel v. McVickar*, 11 N. J. L. 44, 19 Am. Dec. 369.

The Income should be stated separately from the principal. *Evans's Estate*, 11 Phila. (Pa.) 113, 33 Leg. Int. (Pa.) 45.

2. Specifying Kind of Money Received. — *Magraw v. McGlynn*, 26 Cal. 420. In this case the settlement was made during the war of the rebellion, when there were two kinds of money in circulation, viz., gold and United States treasury notes. The court said that the account which the executor is required to render must show among other things the amount of money in his hands belonging to the estate, "and if it be a matter of interest to those beneficially concerned, we deem it competent for the court to require a specification of the kind of money received, for it is the money received by him on behalf of the estate which the creditors, legatees, and distributees, as the case may be, are entitled to have."

3. Partnership Affairs. — *Gardere's Succession*, 48 La. Ann. 289. See also *Marre v. Ginochio*, 2 Bradf. (N. Y.) 165.

4. Annual Rests. — *Young v. McKinnie*, 5 Fla. 542; *Buerhaus v. De Saussure*, 41 S. Car. 457.

5. Verification by Executor or Administrator Necessary. — *Bailey v. Blanchard*, 12 Pick. (Mass.) 166; *Kellett v. Rathbun*, 4 Paige (N. Y.) 102; *Gardner v. Gardner*, 7 Paige (N. Y.) 112; *Terry v. Dayton*, 31 Barb. (N. Y.) 519. But see *contra*, *Sheldon v. Wright*, 7 Barb. (N. Y.) 39.

Effect of Verification. — When an account is duly verified, items in it which are not disputed are to be deemed admitted. *Westervelt v. Gregg*, 1 Barb. Ch. (N. Y.) 469.

The Executor in Person must swear to the account. The oath of his attorney is not sufficient. *Case's Estate*, 1 Kulp (Pa.) 370.

6. Effect of Periodical or Partial Settlements — United States. — *Lupton v. Janney*, 13 Pet. (U. S.) 381.

Alabama. — *Tayloe v. Bush*, 75 Ala. 432; *Ditmar v. Bogle*, 53 Ala. 169; *Scruggs v. Orme*, 46 Ala. 533; *Jones v. Jones*, 42 Ala. 218; *Holman v. Sims*, 39 Ala. 709; *Newberry v. Newberry*, 28 Ala. 691; *Rhodes v. Turner*, 21 Ala. 210; *Smith v. Smith*, 13 Ala. 329; *King v. Cabiness*, 12 Ala. 598; *Savage v. Benham*, 11 Ala. 49; *Willis v. Willis*, 9 Ala. 330; *Brazeale v. Brazeale*, 9 Ala. 491. Before the adoption of the code in Alabama partial or annual settlements without notice to parties in interest were not evidence in favor of the executor or administrator. *Pearson v. Darrington*, 32 Ala. 227.

California. — *Runyon's Estate*, 53 Cal. 196.

Connecticut. — *Clement's Appeal*, 49 Conn. 519; *Mix's Appeal*, 35 Conn. 121, 95 Am. Dec. 222.

Delaware. — *Robinson v. Robinson*, 3 Harr. (Del.) 433.

Georgia. — *Brown v. Wright*, 5 Ga. 29; *Smith v. Griffin*, 32 Ga. 81.

Illinois. — *Long v. Thompson*, 60 Ill. 27; *People v. Lott*, 36 Ill. 447; *Bliss v. Seaman*, 59 Ill. App. 236; *Clifford v. Davis*, 22 Ill. App. 316.

Indiana. — *Fraim v. Millison*, 59 Ind. 123; *Collins v. Tilton*, 58 Ind. 374; *Goodwin v. Goodwin*, 48 Ind. 584; *State v. Brutch*, 12 Ind. 381; *Sherry v. Sansberry*, 3 Ind. 320; *Murdock v. Holland*, 3 Blackf. (Ind.) 114; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377.

them conclusive if they are not objected to within a certain time.¹ But as to persons who appeared at the settlement and contested the account as presented, the order or decree made in the proceeding is a final adjudication of the matters involved.² And an intermediate or partial settlement generally concludes the executor or administrator, unless he can show some error arising from oversight, mistake, or miscalculation;³ but it is held that the statement of an account in the court of probate is not an admission that the balance shown by it is actually in hand.⁴

Final Settlements. — A final settlement is in effect a judgment, and until it is reversed on appeal or vacated by competent authority it is conclusive on both the representative and the persons interested in the estate who were not under disability and who were duly cited in the proceeding or voluntarily appeared,

20 Am. Dec. 123; *Allen v. Clark*, 2 Blackf. (Ind.) 343; *State v. Wilson*, 51 Ind. 96.

Iowa. — *In re Heath*, 58 Iowa 36.

Kentucky. — *Amos v. Heatherby*, 7 Dana (Ky.) 45; *Burnes v. Burton*, 1 A. K. Marsh. (Ky.) 349; *Manion v. Titsworth*, 18 B. Mon. (Ky.) 582.

Louisiana. — *Belloccq's Succession*, 28 La. Ann. 154; *Curatorship of Beecroft*, 28 La. Ann. 824; *Caballero's Succession*, 25 La. Ann. 646.

Maine. — *Arnold v. Mower*, 49 Me. 561; *Coburn v. Loomis*, 49 Me. 406.

Maryland. — *Sewell v. Slingluff*, 62 Md. 592; *Wilson v. McCarty*, 55 Md. 277; *Matter of Stratton*, 46 Md. 551; *Seighman v. Marshall*, 17 Md. 550; *Scott v. Fox*, 14 Md. 388.

Massachusetts. — *Denholm v. McKay*, 148 Mass. 434, 12 Am. St. Rep. 574; *Granger v. Bassett*, 98 Mass. 463; *Field v. Hitchcock*, 14 Pick. (Mass.) 405.

Michigan. — *Hilton v. Briggs*, 54 Mich. 265.

Mississippi. — *Dement v. Heth*, 45 Miss. 388; *Sumrall v. Sumrall*, 24 Miss. 258; *Harper v. Archer*, 9 Smed. & M. (Miss.) 71.

Missouri. — *Clarke v. Sinks*, 144 Mo. 448; *Myers v. Myers*, 98 Mo. 262; *North v. Priest*, 81 Mo. 561; *West v. West*, 75 Mo. 204; *Ritchey v. Withers*, 72 Mo. 556; *McClelland v. McClelland*, 42 Mo. App. 32.

New Hampshire. — *Allen v. Hubbard*, 8 N. H. 487.

New Jersey. — *Jackson v. Reynolds*, 39 N. J. Eq. 313; *Liddel v. McVickar*, 11 N. J. L. 44, 19 Am. Dec. 369; *Livington v. Combs*, 1 N. J. L. 50.

New York. — *Valentine v. Valentine*, 4 Redf. (N. Y.) 265.

North Carolina. — *Grant v. Hughes*, 94 N. Car. 231; *State University v. Hughes*, 90 N. Car. 537.

Ohio. — *Muskingum Bank v. Carpenter*, 7 Ohio (pt. 1) 21, 28 Am. Dec. 616.

Pennsylvania. — *Rhoad's Appeal*, 39 Pa. St. 186; *Walker's Estate*, 3 Rawle (Pa.) 243; *Marrion v. Davey*, 1 Dall. (Pa.) 164.

Rhode Island. — *Sherman v. Chace*, 9 R. I. 166.

Tennessee. — *Stephenson v. Stephenson*, 3 Hayw. (Tenn.) 123; *Stephenson v. Yandel*, 5 Hayw. (Tenn.) 261; *Turney v. Williams*, 7 Yerg. (Tenn.) 172; *Elrod v. Lancaster*, 2 Head (Tenn.) 571, 75 Am. Dec. 749; *Milly v. Harrison*, 7 Coldw. (Tenn.) 191; *Curd v. Bonner*, 4 Coldw. (Tenn.) 632; *Vaccaro v. Cicalla*, 89 Tenn. 63.

Texas. — *Richardson v. Kennedy*, 74 Tex. 507; *Ingraham v. Rogers*, 2 Tex. 465.

Virginia. — *Leake v. Leake*, 75 Va. 792; *Newton v. Poole*, 12 Leigh (Va.) 112; *Sherman v. Christian*, 9 Leigh (Va.) 571; *Burwell v. Anderson*, 3 Leigh (Va.) 348; *McCall v. Peachy*, 3 Munf. (Va.) 288; *Cavendish v. Fleming*, 3 Munf. (Va.) 198; *Mountjoy v. Lowry*, 4 Hen. & M. (Va.) 428.

West Virginia. — *Kyles v. Kyle*, 25 W. Va. 376.

1. Annual or Partial Settlement Conclusive After Certain Time. — *Harlin v. Stevenson*, 30 Iowa 371; *Fross's Appeal*, 105 Pa. St. 258; *Shindel's Appeal*, 57 Pa. St. 43; *Carter v. Edmonds*, 80 Va. 58.

2. Intermediate Settlements Conclusive as to Persons Contesting — *Alabama*. — *Duke v. Duke*, 26 Ala. 673.

District of Columbia. — *Mercer v. Hogan*, 4 Mackey (D. C.) 520.

Louisiana. — *State v. Judge*, 30 La. Ann. 183.

New Jersey. — *Voorhees v. Voorhees*, 18 N. J. Eq. 223.

Tennessee. — *Turney v. Williams*, 7 Yerg. (Tenn.) 211.

Compare *Wood v. Barringer*, 1 Dev. Eq. (16 N. Car.) 67.

The Amounts and Priorities of Claims against the estate, when contested on the settlement of a provisional account, are conclusively determined by the decree of the court, and cannot afterwards be contested on the settlement of the final account. *Triche's Succession*, 39 La. Ann. 289.

3. Annual Settlement Generally Binding on Executor or Administrator. — *Capdeville v. Erwin*, 13 La. Ann. 286; *Effinger v. Richards*, 35 Miss. 540.

In *Stone v. Morgan*, 65 Miss. 247, the executor reported as in his hands money which had in fact been stolen from him before he made his report, and his account was allowed and passed by the court. It was held that he was estopped on his final account to claim credit for the amount so lost.

Errors Arising from Mistake, Oversight, or Miscalculation may be corrected at the instance of the executor or administrator on the final accounting, if it is shown that the correction will not prejudice the adverse party. *Stone v. Morgan*, 65 Miss. 247.

4. Statement of Account Not Admission that Balance Is in Hand. *Com. v. Snyder*, 62 Pa. St. 153; *McIntosh's Estate*, 158 Pa. St. 525; *Page's Estate*, 3 Pa. Dist. Rep. 213.

as to all the matters involved in the account and passed on by the court.¹ It is also generally held to be conclusive on the sureties of the executor or administrator,² but not on his successor in office, if the successor was not a party to the proceeding;³ nor does it of itself operate as a discharge of the executor

1. **Final Settlement Conclusive until Vacated or Set Aside** — *Alabama*. — *Sampey v. Sowell*, 93 Ala. 447; *Seawell v. Buckley*, 54 Ala. 592; *Molawell v. Holmes*, 40 Ala. 391.

Arkansas. — *Jones v. Graham*, 36 Ark. 383; *Dooley v. Dooley*, 14 Ark. 122.

California. — *Matter of Burdick*, 112 Cal. 387; *Matter of Coutts*, 87 Cal. 480, 100 Cal. 400; *Tobelman v. Hildebrandt*, 72 Cal. 313; *Matter of Stott*, 52 Cal. 403.

Georgia. — *Echols v. Almon*, 77 Ga. 330; *Jacobs v. Pou*, 18 Ga. 346.

Indiana. — *Manifold v. Jones*, 117 Ind. 212; *Carver v. Lewis*, 104 Ind. 438; *Vestal v. Allen*, 94 Ind. 268; *Pate v. Moore*, 79 Ind. 20; *Candy v. Hanmore*, 76 Ind. 125; *Peacock v. Leffler*, 74 Ind. 327; *Sanders v. Loy*, 61 Ind. 298; *Holland v. State*, 48 Ind. 391; *Barnes v. Bartlett*, 47 Ind. 93; *Reed v. Reed*, 44 Ind. 429; *Camperv. Hayeth*, 10 Ind. 528.

Kansas. — *Proctor v. Dicklow*, 57 Kan. 119; *Musick v. Beebe*, 17 Kan. 47.

Kentucky. — *Larue v. White*, 8 Dana (Ky.) 45.

Louisiana. — *Simonin v. Czarnowski*, 47 La. Ann. 1334; *Hoss's Succession*, 42 La. Ann. 1022; *Triche's Succession*, 39 La. Ann. 289; *Bujac v. Loste*, 12 La. Ann. 96.

Maine. — *Harlow v. Harlow*, 65 Me. 448; *Arnold v. Mower*, 49 Me. 561. Compare *Smith v. Lambert*, 30 Me. 137.

Maryland. — *Roberts v. Roberts*, 71 Md. 1. Compare *Haslett v. Glenn*, 7 Har. & J. (Md.) 17; *Spedden v. State*, 3 Har. & J. (Md.) 251; *Scott v. Fox*, 14 Md. 388; *Beatty v. Maryland*, 7 Cranch (U. S.) 281; *Mitchell v. Mitchell*, 3 Md. Ch. 71.

Massachusetts. — *Parcher v. Bussell*, 11 Cush. (Mass.) 107.

Minnesota. — *State v. Probate Ct.*, 40 Minn. 296.

Mississippi. — *Stubblefield v. McRaven*, 5 Smed. & M. (Miss.) 130, 43 Am. Dec. 502; *Crowder v. Shackelford*, 35 Miss. 321; *Austin v. Lamar*, 23 Miss. 189; *Singleton v. Garrett*, 23 Miss. 195.

Missouri. — *State v. Gray*, 106 Mo. 526; *Robards v. Lamb*, 89 Mo. 303; *Williams v. Petticrew*, 62 Mo. 460; *Barton v. Barton*, 35 Mo. 158; *Caldwell v. Lockridge*, 9 Mo. 362; *Voshage v. Voshage*, 45 Mo. App. 172; *Jones v. Brinker*, 20 Mo. 87; *State v. Roland*, 23 Mo. 95; *Whittelsey v. Dorsett*, 23 Mo. 236; *Standard v. Lacks*, 25 Mo. App. 64.

New Jersey. — *Matter of Heath*, 52 N. J. Eq. 807; *Adams v. Adams*, (N. J. 1888) 14 Atl. Rep. 575; *Ordinary v. Kershaw*, 14 N. J. Eq. 527.

New York. — *Matter of Hodgman*, 140 N. Y. 421; *Denton v. Sanford*, 103 N. Y. 607; *Baldwin v. Smith*, 91 Hun (N. Y.) 230, 638; *Ashley v. Lamb*, 50 Hun (N. Y.) 568; *Foulks v. Foulks*, 57 Hun (N. Y.) 591, 32 N. Y. St. Rep. 1038; *Brown v. Brown*, 53 Barb. (N. Y.) 217; *Kellett v. Rathbun*, 4 Paige (N. Y.) 102; *Newcomb v. St. Peter's Church*, 2 Sandf. Ch. (N. Y.) 636; *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12.

Ohio. — *McAfee v. Phillips*, 25 Ohio St. 374; *In re Hess*, 3 Ohio N. P. 62, 4 Ohio Dec. 413.

Oregon. — *Bellinger v. Thompson*, 26 Oregon 320.

Pennsylvania. — *McFadden v. Geddis*, 17 S. & R. (Pa.) 336; *Burd v. M'Gregor*, 2 Grant's Cas. (Pa.) 353; *M'Lenahan v. Com.*, 1 Rawle (Pa.) 357; *Fox v. Winters*, 4 Rawle (Pa.) 174; *Thompson v. McGaw*, 2 Watts (Pa.) 161; *Clark v. Callaghan*, 2 Watts (Pa.) 259. See *Kohr v. Fedderhaff*, 4 S. & R. (Pa.) 248.

South Carolina. — *Wright v. Wright*, 2 McCord Eq. (S. Car.) 185; *Simkins v. Cobb*, 2 Bailey L. (S. Car.) 60.

Tennessee. — *Allen v. Shanks*, 90 Tenn. 359; *Cooper v. Burton*, 7 Baxt. (Tenn.) 406.

Texas. — *Sabrinus v. Chamberlain*, 76 Tex. 624; *Debrell v. Ponton*, 27 Tex. 623; *Townsend v. Munger*, 9 Tex. 300.

Vermont. — *Probate Ct. v. Merriam*, 8 Vt. 234.

Wisconsin. — *Schinz v. Schinz*, 90 Wis. 236; *Barker v. Barker*, 14 Wis. 131.

Where the supposed will under which the executor was acting when the settlement was made is afterwards held not to be the will of the decedent, the settlement is nevertheless conclusive, in an action against him to recover a distributive share. *McFadden v. Geddis*, 17 S. & R. (Pa.) 336.

A decree on final settlement ascertaining the amount on hand for distribution is conclusive on the representative, and he cannot oppose a decree of distribution on the ground that part of the fund adjudged by the decree of settlement to be in his hands did not belong to the estate. *Matter of Burdick*, 112 Cal. 387.

Effect as to Payment of Debts. — The provision of the *New York* statute making a final settlement conclusive that the moneys paid are correct relates to the validity of the debt and the right of the party to whom it is paid, as well as to the fact of payment. *Wright v. Methodist Episcopal Church*, Hoffm. Ch. (N. Y.) 202. But see *Poughkeepsie Bank v. Hasbrouck*, 6 N. Y. 216.

Priority of Debts. — In *State v. Cornwell*, 2 Harr. (Del.) 473, it was held that a settlement showing the payment of debts is evidence that the debts were paid, but not that the payments were in due order.

Compliance with Statutory Requirements Essential. — A final settlement is not conclusive if made before the expiration of the time allowed by law for the presentation of claims, *Shirley v. Thompson*, 123 Ind. 454, nor if the statutory publication of notice was not made, *Van Liew v. Barrett, etc.*, *Beverage Co.*, 144 Mo. 509.

2. **Final Settlement Conclusive on Sureties of Executor or Administrator.** — *Bellinger v. Thompson*, 26 Oregon 320. See also *supra*, this title, *Administration Bonds*, subd. 5. *f. (1) (c) Evidence*.

3. **Final Settlement Not Conclusive on Successor of Accounting Executor or Administrator.** — *Emmons v. Gordon*, (Mo. 1893) 24 S. W. Rep. 146,

or administrator.¹

Persons Who Were Not Made Parties to the proceeding by a citation in the manner prescribed by law are not bound by the settlement, but they may, in an appropriate proceeding, litigate any matter in which they are interested, though it was included in the order of decree of settlement.²

As to Matters Not Included in the Settlement, either because of omissions from the account, or because any question of right or liability was not presented for adjudication, or where assets are subsequently received, it is obvious that the settlement can have no effect as to any one.³ A settlement is conclusive only as far as it goes, and a further accounting may be required as to any property not accounted for at the settlement or subsequently received.⁴

10. Opening and Setting Aside Settlements — *a.* **INTERMEDIATE OR PARTIAL SETTLEMENTS.** — An intermediate or partial settlement, being only *prima facie* correct, may be impeached, surcharged, or falsified at any time and in

(Mo. 1894) 25 S. W. Rep. 938; *Henderson v. Henderson*, 21 Mo. 379.

1. Final Settlement Alone Does Not Discharge Representative — *Alabama.* — *Ligon v. Ligon*, 84 Ala. 555; *Norman v. Norman*, 3 Ala. 389; *Tarver v. Tankersley*, 51 Ala. 309; *Simmons v. Price*, 18 Ala. 405.

Mississippi. — *Henderson v. Winchester*, 31 Miss. 290. *Compare Grinstead v. Fonte*, 32 Miss. 120.

Missouri. — *Caldwell v. Lockridge*, 9 Mo. 362; *Rugle v. Webster*, 55 Mo. 246.

Ohio. — *Weyer v. Watt*, 48 Ohio St. 545.

Washington. — *Hazelton v. Bogardus*, 8 Wash. 102.

2. Final Settlement Not Conclusive as to Persons Not Parties — *United States.* — *Butterfield v. Smith*, 101 U. S. 570.

Louisiana. — *Couder's Succession*, 47 La. Ann. 870.

Mississippi. — *Treadwell v. Herndon*, 41 Miss. 38.

New York. — *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Keegan v. Smith*, 25 Civ. Pro. Rep. (N. Y. City Ct.) 417.

Tennessee. — *Murray v. Luna*, 86 Tenn. 326.

Virginia. — *Hurt v. West*, 87 Va. 78.

For a Full Discussion of the subject of parties to proceedings for the settlement of administration accounts, see *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, title PROBATE AND ADMINISTRATION.

A Claimant Whose Right to Appear Was Denied is not concluded by the decree of settlement. *Werborn v. Austin*, 82 Ala. 498.

Settlement with Person Assuming Without Authority to Represent Legatee. — An unauthorized settlement with an executor in the probate court, by a person assuming to have authority to represent a legatee, but in fact without such authority, is not binding on such legatee. *Jacks v. Adair*, 31 Ark. 616.

3. Final Settlement Not Conclusive as to Matters Not Adjudicated — *Arkansas.* — *Crowley v. Mellon*, 52 Ark. 1.

Missouri. — *Nelson v. Barnett*, 123 Mo. 564; *Rugle v. Webster*, 55 Mo. 240.

New Jersey. — *Vreeland v. Westervelt*, 45 N. J. Eq. 572.

New York. — *Wurts v. Jenkins*, 11 Barb. (N. Y.) 546; *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207; *Paff v. Kinney*, 1 Bradf. (N. Y.) 1. *Compare Paff v. Kinney*, 5 Sandf. (N. Y.) 380.

Ohio. — *McAfee v. Phillips*, 25 Ohio St. 374. *Pennsylvania.* — *Hibshman v. Dulleban*, 4 Watts (Pa.) 183.

Vermont. — *Boomhower v. Babbitt*, 67 Vt. 327; *Davis v. Eastman*, 66 Vt. 651; *Probate Ct. v. Merriam*, 8 Vt. 234.

Illustrations. — If a fund out of which a legacy is payable is excluded from the settlement, though against the objection of the legatee, there is no adjudication of her right under the provision of the *New York* statute (Code Civ. Pro., 1898, § 2742) that a final settlement shall be conclusive as to moneys collected and included in the account. *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207.

A final settlement finding that a certain sum was due to a distributee, and directing payment to him, does not preclude the executor from setting up, in defense to an action by the distributee for the sum so awarded, an assignment made by the distributee to the executor before settlement. *State v. Jones*, 131 Mo. 194.

A final settlement is not conclusive as to assets in the hands of an executor or administrator and not accounted for or passed on by the court. *McAfee v. Phillips*, 25 Ohio St. 374; *Davis v. Eastman*, 66 Vt. 651.

A final settlement by and discharge of an executor on his application for leave to resign does not relieve him from liability to creditors where he has committed a devastavit by applying the assets to the payment of legacies, leaving debts unpaid. *Thomas v. Riegel*, 5 Rawle (Pa.) 266.

A decree homologating an account only in "so far as not opposed" does not conclude the heirs as to items to which opposition was filed by creditors. *Schaffer's Succession*, 13 La. Ann. 113.

4. Further Accounting — *Mississippi.* — *Smith v. Hurd*, 7 How. (Miss.) 188; *McCullom v. Box*, 8 Smed. & M. (Miss.) 619.

New York. — *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12; *Sheldon v. Sheldon*, (Supreme Ct.) 11 N. Y. Supp. 477.

Ohio. — *McAfee v. Phillips*, 25 Ohio St. 374. *Oregon.* — *Dray v. Bloch*, 29 Oregon 347.

Pennsylvania. — *Groff's Appeal*, 45 Pa. St. 379; *Davis's Estate*, 6 W. N. C. (Pa.) 15. See also *Neill's Estate*, 15 W. N. C. (Pa.) 158; *Seeger's Estate*, 6 W. N. C. (Pa.) 369; *Caldwell's Estate*, 6 W. N. C. (Pa.) 370.

any proceeding, or errors or mistakes may be corrected on the final settlement.¹

b. FINAL SETTLEMENTS — (1) *Jurisdiction* — (a) *Courts of Probate* — *General Rule*. — A final settlement in the probate court of the accounts of an executor or administrator, being in effect a judgment, cannot, as a general rule, be set aside or changed by that court after the term at which the settlement was made, unless by statutory authority,² except so far as the court may act in the exercise of the power which all courts possess to set aside void judgments which have been entered therein.³ Where this rule obtains the remedy of any party to the settlement who has been aggrieved is by appeal for the correction of errors in the decree, or by resort to a court of equity in case of fraud or mistake.⁴

Equity Power of Courts of Probate. — In some jurisdictions, however, courts of probate have equity powers, by virtue of which it is held that they may set

1. Falsifying, Surcharging, or Correcting Annual Settlements — *Alabama*. — *King v. Cabiness*, 12 Ala. 598; *Smith v. Smith*, 13 Ala. 329; *Holman v. Sims*, 39 Ala. 709; *Jones v. Jones*, 42 Ala. 218.

California. — *Runyon's Estate*, 53 Cal. 196.

Connecticut. — *Mix's Appeal*, 35 Conn. 121, 95 Am. Dec. 222; *Clement's Appeal*, 49 Conn. 519.

Illinois. — *Long v. Thompson*, 60 Ill. 27.

Indiana. — *State v. Wilson*, 51 Ind. 96; *Goodwin v. Goodwin*, 48 Ind. 584.

Iowa. — *In re Heath*, 58 Iowa 36.

Kentucky. — *Burnes v. Burton*, 1 A. K. Marsh. (Ky.) 349; *Manion v. Titsworth*, 18 B. Mon. (Ky.) 582.

Louisiana. — *Belloq's Succession*, 28 La. Ann. 154; *Curatorship of Beecroft*, 28 La. Ann. 824; *Caballero's Succession*, 25 La. Ann. 646.

Maine. — *Arnold v. Mower*, 49 Me. 561; *Coburn v. Loomis*, 49 Me. 406.

Maryland. — *Sewell v. Slingluff*, 62 Md. 592; *Martin v. Jones*, 87 Md. 43; *Matter of Stratton*, 46 Md. 551; *Wilson v. McCarty*, 55 Md. 277; *Seighman v. Marshall*, 17 Md. 550; *Bantz v. Bantz*, 52 Md. 686.

Massachusetts. — *Denholm v. McKay*, 148 Mass. 434, 12 Am. St. Rep. 574; *Granger v. Bassett*, 98 Mass. 462; *Field v. Hitchcock*, 14 Pick. (Mass.) 405.

Michigan. — *Hilton v. Briggs*, 54 Mich. 265.

Mississippi. — *Dement v. Heth*, 45 Miss. 388; *Harper v. Archer*, 9 Smed. & M. (Miss.) 71.

Missouri. — *West v. West*, 75 Mo. 204; *McClelland v. McClelland*, 42 Mo. App. 32; *Ritchey v. Withers*, 72 Mo. 556; *North v. Priest*, 81 Mo. 561.

New Hampshire. — *Allen v. Hubbard*, 8 N. H. 487.

New Jersey. — *Liddel v. McVickar*, 11 N. J. L. 44, 19 Am. Dec. 369; *Jackson v. Reynolds*, 39 N. J. Eq. 313.

New York. — *Valentine v. Valentine*, 4 Redf. (N. Y.) 265.

North Carolina. — *Grant v. Hughes*, 94 N. Car. 231.

Pennsylvania. — *Rhoads's Appeal*, 39 Pa. St. 186; *Walker's Estate*, 3 Rawle (Pa.) 243.

Rhode Island. — *Sherman v. Chace*, 9 R. I. 166.

Tennessee. — *Shields v. Alsup*, 5 Lea (Tenn.) 508; *Turney v. Williams*, 7 Yerg. (Tenn.) 172; *Curd v. Bonner*, 4 Coldw. (Tenn.) 632.

Texas. — *Ingraham v. Rogers*, 2 Tex. 465.

Virginia. — *Leake v. Leake*, 75 Va. 792; *Newton v. Poole*, 12 Leigh (Va.) 112; *Sherman v. Christian*, 9 Leigh (Va.) 571; *Burwell v. Anderson*, 3 Leigh (Va.) 348; *Mountjoy v. Lowry*, 4 Hen. & M. (Va.) 428; *Cavendish v. Fleming*, 3 Munf. (Va.) 198.

West Virginia. — *Kyles v. Kyle*, 25 W. Va. 376.

Mistakes in an Annual Settlement may be corrected on appeal from the final settlement. *Williams v. Petticrew*, 62 Mo. 460.

If the Legatees or Distributees Are Infants, without guardians, partial settlements are not in the nature of settled or stated accounts so as to require surcharging or falsifying before they can be opened, but they are only *prima facie* evidence and may be opened for a general account. *Elrod v. Lancaster*, 2 Head (Tenn.) 571, 75 Am. Dec. 749; *Turney v. Williams*, 7 Yerg. (Tenn.) 210.

The Burden of Proof is on the party impeaching or proposing to re-examine the account. *Tayloe v. Bush*, 75 Ala. 432; *Ditmar v. Bogle*, 53 Ala. 169; *Scruggs v. Orme*, 46 Ala. 533; *Shafer v. Shafer*, 85 Md. 554; *Martin v. Jones*, 87 Md. 43; *Ripple's Estate*, 9 Kulp (Pa.) 66, 112.

2. As to the effect of final settlements, see *supra*, this section, *Effect of Settlement*.

3. Void Settlements Opened by Court of Probate. — *Laird v. Reese*, 43 Ala. 148; *Barwick v. Rackley*, 45 Ala. 215; *Watt v. Watt*, 37 Ala. 543; *Trawick v. Trawick*, 67 Ala. 271.

Court of Confederate Government. — A final settlement is not void because it was had in a probate court acting under the authority of the Confederate government and ordering a distribution of Confederate bonds and assets. *Catterlin v. Morgan*, 50 Ala. 501; *Griffin v. Ryland*, 45 Ala. 688.

4. Errors Corrected Only by Appeal or by Suit in Equity — *Alabama*. — *Seawell v. Buckley*, 54 Ala. 592.

Arkansas. — *Ragsdale v. Stuart*, 8 Ark. 268.

Indiana. — *Barnes v. Bartlett*, 47 Ind. 98; *Camper v. Hayeth*, 10 Ind. 528.

Michigan. — *Grady v. Hughes*, 64 Mich. 540.

Nevada. — *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376.

New Jersey. — *Boulton v. Scott*, 3 N. J. Eq. 231.

Ohio. — *Johnson v. Johnson*, 26 Ohio St. 357.

Equitable Relief Against Fraud or Mistake. — See *infra*, this section and subsection, *Courts of Equity*.

aside final settlements on the ground of fraud, mistake, or accident.¹

Statutory Power of Court of Probate. — In other jurisdictions the power is expressly conferred by statute.²

(b) **Courts of Equity.** — The power to relieve against fraud or mistake is an ancient and well-established branch of equity jurisdiction, and in the exercise of it a court of equity may, on such grounds, at the instance of any person who has been injured, set aside or open a final settlement in a probate court.³ And this power is not abrogated by statutes conferring similar powers on courts of probate, but such statutes merely operate to give concurrent jurisdiction in the matter.⁴

(2) **Grounds for Setting Aside Final Settlements** — (a) **In Equity.** — A final settlement in a probate court can be set aside by a court of equity, or by a court of probate in the exercise of equity powers, only on the ground of fraud,

1. **Equitable Power of Probate Court to Open Final Settlements.** — *Sellew's Appeal*, 36 Conn. 186; *Ayer v. Messer*, 59 N. H. 279; *Pew v. Hastings*, 1 Barb. Ch. (N. Y.) 452; *Smith v. Rix*, 9 Vt. 240; *Adams v. Adams*, 21 Vt. 162.

A Case for Equitable Relief must be shown in a proceeding in the surrogate's court to open a settled account. *Valentine v. Valentine*, 2 Barb. Ch. (N. Y.) 430.

2. **Statutory Power of Probate Court to Open Final Settlement** — *California*. — *Williams v. Price*, 11 Cal. 212; *Wiggin v. Superior Ct.*, 68 Cal. 398; *Matter of Cahalan*, 70 Cal. 604.

Indiana. — *Reed v. Reed*, 44 Ind. 429; *Dillman v. Barber*, 114 Ind. 403.

Maine. — *Smith v. Dutton*, 16 Me. 308.

Massachusetts. — *Stetson v. Bass*, 9 Pick. (Mass.) 27; *Hall v. Cushing*, 9 Pick. (Mass.) 396.

Mississippi. — *McCullum v. Box*, 8 Smed. & M. (Miss.) 610. As to the former rule in Mississippi, see *Austin v. Lamar*, 23 Miss. 189.

New Jersey. — *Boulton v. Scott*, 3 N. J. Eq. 231; *Vanmeter v. Jones*, 3 N. J. Eq. 520; *Black v. Whitall*, 9 N. J. Eq. 572; *Stevenson v. Phillips*, 15 N. J. Eq. 236; *Trimmer v. Adams*, 18 N. J. Eq. 505; *Jackson v. Reynolds*, 39 N. J. Eq. 313; *Crombie v. Engle*, 19 N. J. L. 82; *Hyer v. Morehouse*, 20 N. J. L. 125; *Engle v. Crombie*, 21 N. J. L. 614.

New York. — *Matter of Tilden*, 98 N. Y. 434; *Matter of Hawley*, 100 N. Y. 206; *Matter of McGorray*, 65 Hun (N. Y.) 624, 48 N. Y. St. Rep. 141; *Strong v. Strong*, 3 Redf. (N. Y.) 477; *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12.

Pennsylvania. — *Parker's Appeal*, 61 Pa. St. 478; *Kinter's Appeal*, 62 Pa. St. 318; *Cramp's Appeal*, 81 Pa. St. 90; *Scott's Appeal*, 112 Pa. St. 427; *Meckel's Appeal*, 112 Pa. St. 554.

Affirmance on Appeal. — The fact that a settlement has been affirmed on appeal does not affect the statutory power of the Orphans' Court to open it within the time specified by statute. *Parker's Appeal*, 61 Pa. St. 478; *Young's Appeal*, 99 Pa. St. 74.

3. **Final Settlements Set Aside in Equity** — *United States*. — *Griffith v. Godey*, 113 U. S. 89; *Ridenbaugh v. Burnes*, 14 Fed. Rep. 93; *Pratt v. Northam*, 5 Mason (U. S.) 103.

Alabama. — *Watt v. Watt*, 37 Ala. 543; *Morrow v. Allison*, 39 Ala. 70.

Arkansas. — *Dooley v. Dooley*, 14 Ark. 122; *Clark v. Shelton*, 16 Ark. 474; *Osborne v.*

Graham, 30 Ark. 66; *Mock v. Pleasants*, 34 Ark. 63; *Shegogg v. Perkins*, 34 Ark. 117; *Jones v. Graham*, 36 Ark. 383; *Hankins v. Layne*, 48 Ark. 544.

California. — *Sanford v. Head*, 5 Cal. 297.

Georgia. — *Walker v. Wootten*, 18 Ga. 119; *Pass v. Pass*, 98 Ga. 791.

Indiana. — *Miller v. Steele*, 64 Ind. 79; *Allen v. Clark*, 2 Blackf. (Ind.) 343; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377, 20 Am. Dec. 123; *Ray v. Doughty*, 4 Blackf. (Ind.) 115.

Kentucky. — *Speed v. Nelson*, 8 B. Mon. (Ky.) 507.

Mississippi. — *Foute v. McDonald*, 27 Miss. 610; *Neylans v. Burge*, 14 Smed. & M. (Miss.) 201; *Green v. Creighton*, 10 Smed. & M. (Miss.) 159, 48 Am. Dec. 742; *Turnbull v. Endicott*, 3 Smed. & M. (Miss.) 304.

Missouri. — *State v. Stephenson*, 12 Mo. 178; *Stong v. Wilkson*, 14 Mo. 116; *Jones v. Brinker*, 20 Mo. 87; *State v. Roland*, 23 Mo. 95; *Mitchell v. Williams*, 27 Mo. 399; *Sullivan County v. Burgess*, 37 Mo. 300; *Picot v. Bates*, 47 Mo. 390; *Clyce v. Anderson*, 49 Mo. 41; *Lewis v. Williams*, 54 Mo. 200; *Sheetz v. Kirtley*, 62 Mo. 417; *Byerly v. Donlin*, 72 Mo. 271; *Smiley v. Smiley*, 80 Mo. 44.

New Jersey. — *Black v. Whitall*, 9 N. J. Eq. 572; *Boulton v. Scott*, 3 N. J. Eq. 231; *Vanmeter v. Jones*, 3 N. J. Eq. 520.

North Carolina. — *James v. Matthews*, 5 Ired. Eq. (40 N. Car.) 28.

South Carolina. — *McCrac v. Hollis*, 4 Desaus. (S. Car.) 122; *Harris v. Stilwell*, 4 S. Car. 19.

Texas. — *Portis v. Cummings*, 14 Tex. 139.

Vermont. — *Green v. Sargeant*, 23 Vt. 466, 56 Am. Dec. 88.

Virginia. — *Wyllie v. Venable*, 4 Munf. (Va.) 369.

Wisconsin. — *McLachlan v. Staples*, 13 Wis. 448.

In *Texas* suit may be bought at any time within two years after a settlement to have it revised or corrected. *Birdwell v. Kauffman*, 25 Tex. 189; *Dunson v. Payne*, 44 Tex. 539; *Helffenger v. George*, 14 Tex. 569.

For a Full Discussion of the question of equitable relief against judgments, see the title JUDGMENTS.

4. **Statutory Power of Courts of Probate Concurrent with Power of Equity Courts.** — *Boulton v. Scott*, 3 N. J. Eq. 231; *Vanmeter v. Jones*, 3 N. J. Eq. 520; *Black v. Whitall*, 9 N. J. Eq. 572.

mistake, or accident.¹

The Fraud for which a final settlement may be set aside may either be positive and actual, with intent to cheat and wrong those interested in the estate, or it may consist of any improper act or concealment which operates as a fraud and results in a loss, whatever the motive.² But it must be shown by clear and satisfactory evidence.³

Mistakes for which final settlements may be set aside are only mistakes of fact. Mistakes of law will not avail.⁴

1. Equitable Grounds for Setting Aside Final Settlements—Fraud, Mistake, or Accident—United States.—*Pratt v. Northam*, 5 Mason (U. S.) 95; *Mallett v. Dexter*, 1 Curt. (U. S.) 178.

Alabama.—*Mock v. Steele*, 34 Ala. 198.

Indiana.—*Ray v. Doughty*, 4 Blackf. (Ind.) 115; *Miller v. Steele*, 64 Ind. 79; *Allen v. Clark*, 2 Blackf. (Ind.) 343; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377, 20 Am. Dec. 123.

Kansas.—*Young v. Scott*, (Kan. 1898) 54 Pac. Rep. 670.

Massachusetts.—*Davis v. Cowdin*, 20 Pick. (Mass.) 510; *Stetson v. Bass*, 9 Pick. (Mass.) 27; *Wiggin v. Swett*, 6 Met. (Mass.) 194, 39 Am. Dec. 716; *Pratt v. Northam*, 5 Mason (U. S.) 95.

Mississippi.—*Smith v. Hurd*, 7 How. (Miss.) 188.

Missouri.—*Houts v. Shepherd*, 79 Mo. 141; *Weinerth v. Trendley*, 39 Mo. App. 333.

New Jersey.—*Conover v. Conover*, 1 N. J. Eq. 403.

New York.—*Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12; *Pew v. Hastings*, 1 Barb. Ch. (N. Y.) 452.

Rhode Island.—*Sherman v. Chace*, 9 R. I. 166; *Williams v. Herrick*, 18 R. I. 120.

Mere Illegal Allowances are no grounds for setting aside a settlement in equity, where they were not obtained by misrepresentation or deception. *Mock v. Pleasants*, 34 Ark. 63.

Technical Irregularities in the administration do not furnish a ground for impeaching a settlement in equity. *Young v. Scott*, (Kan. 1898) 54 Pac. Rep. 670.

2. Fraud May Be Actual or Constructive.—*Clyce v. Anderson*, 49 Mo. 37.

False Representation by Administrator.—A final settlement will be set aside in equity where the administrator, for the purpose of inducing the distributees not to object to the allowance of a certain credit, represented the credit to be correct and made statements as to the circumstances out of which the credit grew which, if true, plainly demonstrated its correctness, and the distributees, being ignorant of the circumstances, relied on such statements and representations. *Mock v. Stepele*, 54 Ala. 198.

Returning a False Inventory is a fraud for which a final settlement may be set aside. *West v. Reavis*, 13 Ind. 294.

The Suppression of Assets by an executor or administrator is a sufficient ground for surcharging his accounts after the close of the administration. *Ringgold v. Stone*, 20 Ark. 526; *Stone v. Stillwell*, 23 Ark. 444; *Jefferson v. Edrington*, 53 Ark. 545; *Osborne v. Graham*, 30 Ark. 66.

Omitting Proper Charges.—An executor is guilty of such misconduct as will vitiate his

settlement as fraudulent where it appears that he wilfully omitted to charge himself with assets which he knew came to his hands, and for which he knew he had not accounted, because such conduct is a violation of that good faith which the law imposes on all trustees, and is not consistent with honest and fair dealing. *Houts v. Shepherd*, 79 Mo. 141.

Improper Credits.—It is a fraud on the estate for which a final settlement will be set aside, where an executor or administrator takes a credit to which he is not entitled in any view of the case. *Houts v. Shepherd*, 79 Mo. 141. Thus it was held that an administrator was guilty of fraud where he obtained credit for money which he knew he had never paid out. *Morrow v. Allison*, 39 Ala. 70.

So, too, it was considered fraudulent for an executor to obtain credit for the full amount of a note which he settled at a considerable discount. *Matter of Beach*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 393.

But it is not fraudulent to obtain credit for disbursements actually made, though they were improper. It was so held in regard to taxes actually paid by an administrator without an order from the Probate Court. *Sorrels v. Trantham*, 48 Ark. 386.

Nor is the fact that an administrator illegally procured allowances in his favor a ground for equitable relief, if he committed no fraud. *Jones v. Brinker*, 20 Mo. 87; *Whittelsey v. Dorsett*, 23 Mo. 236.

An executor is not chargeable with actual fraud because he is credited with one or two items not in fact paid, where the account was made out by his attorney in his absence and without his knowledge. *Williams v. Rhodes*, 81 Ill. 571.

3. Clear and Satisfactory Evidence of Fraud Required.—*Phillips v. Broughton*, 30 Mo. App. 148.

The *New Jersey* statute authorizing the Orphans' Court to open a final settlement, if some fraud or mistake is proved "to the satisfaction of" the court, is held to mean that the evidence must be clear and satisfactory to call for the exercise of the power. *Johnson v. Eicke*, 12 N. J. L. 316.

As to Evidence of Fraud in General, see the title **FRAUD AND DECEIT**.

4. Mistakes of Fact are the only mistakes for which a settlement will be set aside. Thus, in a case where the homestead law, which theretofore gave the widow and children an estate in fee, was amended a few months before the decedent's death by giving them less estate and providing that the homestead right might be sold, subject to the rights of the widow and children, for the payment of the decedent's debts, the administrator, in ignorance of the amendment, sold all the real estate except the

(b) **Statutory Grounds.** — Besides fraud and mistake, which have been considered in preceding paragraphs, there are certain statutory grounds on which courts of probate are authorized to set aside final settlements of the accounts of executors and administrators, and these grounds vary more or less in each jurisdiction in which statutes on the subject have been enacted.¹

homestead and made a final settlement. It was held that he could not afterwards have the settlement opened, so as to enable him to sell the homestead for the payment of a debt due him from the decedent's estate, his mistake as to the title of the widow and children being one of law, and not of fact. *Weinerth v. Trendley*, 39 Mo. App. 333.

A Mistake in Favor of a Distributee does not give him the right to impeach a final settlement. *Griffith v. Vertner*, 5 How. (Miss.) 736.

Mistake as to Persons Entitled to Distribution. — In *Defriez v. Coffin*, 155 Mass. 203, the administrator, without obtaining a decree of distribution, paid over the balance in his hands to persons who he supposed were the intestate's heirs, and his account showing such payments was approved by the Probate Court. Afterwards it appeared that the persons to whom payment had been made were not the heirs. It was held that the account should be opened and the administrator charged, at the instance of the persons entitled, with the amount of the payments.

1. Statutory Grounds for Setting Aside Final Settlement. — The *New York* statute (Code Civ. Pro., 1898, § 2481, subdiv. 6) provides that a surrogate shall have power to open, vacate, modify, or set aside a decree or order of his court "for fraud, newly discovered evidence, clerical error, or other sufficient cause," such power to be exercised only in a like case and in the same manner as a court of record and of general jurisdiction exercises the same powers. *Matter of Patterson*, 79 Hun (N. Y.) 371.

"**Other Sufficient Cause**" is construed to mean causes of like nature with those specifically named. *Matter of Tilden*, 98 N. Y. 434.

The subdivision cited does not permit a resort to this method of review where the only error complained of is one of law. *Matter of Dey Ermand*, 24 Hun (N. Y.) 1; *Matter of O'Neil*, 46 Hun (N. Y.) 500; *Matter of Hawley*, 100 N. Y. 206; *Farmers' L. & T. Co. v. Hill*, 4 Dem. (N. Y.) 41; *Matter of Beach*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 393.

Failure to Claim Commissions. — A settlement will not be opened under the *New York* statute to enable the executor to obtain an allowance of commissions which he had omitted to claim, it not being shown why he did not make the claim at the proper time, because "no court of general jurisdiction would permit its decree to be opened upon the mere suggestion or proof of one of the parties that some item of credit was not allowed him. When a party has had his day in court, he must show that it was not his fault that he did not improve it, before he can get another day on the same matter." *Matter of O'Neil*, 46 Hun (N. Y.) 500.

Neglect. — Relief of an administrator from the consequences of his own neglect is not authorized by the *New York* statute. *In re Mull*, (Surrogate Ct.) 5 N. Y. Supp. 202.

The Pennsylvania Statute (Act Oct. 13, 1840;

Pepper & L. Dig. 1894, p. 3298, § 65) provides that the judges of the Orphans' Court, on a petition "alleging errors" in an account, "shall grant a rehearing of so much of said account as is alleged to be error, * * * and give such relief as equity and justice may require." *Riddle's Estate*, 19 Pa. St. 431; *Russell's Appeal*, 34 Pa. St. 258. See also *George's Appeal*, 12 Pa. St. 260; *Bucknor's Estate*, 7 W. N. C. (Pa.) 470; *Curry's Estate*, 1 Leg. Gaz. Rep. (Pa.) 484; *Scott's Appeal*, 112 Pa. St. 427.

This statute adopts the principle governing the bill of review in equity. *Riddle's Estate*, 19 Pa. St. 431; *Stevenson's Appeal*, 32 Pa. St. 318; *Russell's Appeal*, 34 Pa. St. 258; *Priestley's Appeal*, 24 W. N. C. (Pa.) 305; *Hartman's Appeal*, 36 Pa. St. 70.

It supplies the place of a writ of error. *Bishop's Appeal*, 26 Pa. St. 470.

Effect of Distribution. — Under the *Pennsylvania* statute a settlement cannot be opened after payment and distribution under decree. *Johnson's Appeal*, 114 Pa. St. 132, 18 W. N. C. (Pa.) 205; *Bishop's Estate*, 10 Pa. St. 469; *Duffy's Estate*, 13 Phila. (Pa.) 216, 36 Leg. Int. (Pa.) 149.

Payment and distribution not made under decree, but made voluntarily before the account was filed, do not affect the right to a review. *Whelen's Appeal*, 70 Pa. St. 410. See also *Charlton's Appeal*, 6 W. N. C. (Pa.) 456.

But where an estate has been settled and releases have been executed by the legatees to the executor, the accounts will not be opened after his death in order to restate it on a strict calculation of interest. *Deardorff's Appeal*, 6 Watts (Pa.) 159. And see *Mylin's Case*, 7 Watts (Pa.) 71.

Omission to Take Credit for Disbursements. — The mere fact that an executor did not take credit for taxes and interest paid by him does not entitle him to have the account reviewed a year after it has been confirmed, where he does not explain his mistake or show facts which he did not know at the time. *Simmons's Estate*, 12 Pa. Co. Ct. Rep. 139, 30 W. N. C. (Pa.) 503. Compare *Clauser's Estate*, 1 W. & S. (Pa.) 208, holding that an administrator who had omitted to present his own claim against the estate had a right to a review under the statute.

But it was held that a review would not be allowed in favor of a creditor of an insolvent estate who had omitted to present his claim, because the rights of a creditor of an insolvent estate are fixed according to law by the auditor's report. *Stoevers Appeal*, 3 W. & S. (Pa.) 154.

If an executor omits to claim the commission to which he is entitled, there being a misunderstanding as to the character of the assets, the account may be opened for the purpose of making the proper allowance. *Levy's Estate*, 14 Pa. Co. Ct. Rep. 100, 3 Pa. Dist. Rep. 42.

(3) *Distinction Between Opening, Settlement, and Surcharging or Falsifying Account.* — There is a distinction between surcharging or falsifying an account and opening or setting aside the settlement, in this, that when the settlement is opened or set aside the whole account is thrown open for review, and if the matter is in a court of equity it is remitted to the court of probate for resettlement; while a surcharge or falsification affects only some particular item or items, the account in other respects standing as correct.¹

(4) *Who May Maintain Proceeding.* — A final settlement may be set aside in a proper case, either in equity or in a court of probate, at the instance of any person who is interested in the estate or in the administration thereof, and who is injuriously affected by the matters on which the claim for relief is predicated,² if he has not been guilty of any negligence,³ and has not acqui-

Distribution Decreed on Basis of Appraisement. — An audit will be opened and a supplemental audit directed where the balance ordered to be distributed in fixed amounts was based on the inventory and appraisement, and not on an actual conversion into cash. *Page's Estate*, 3 Pa. Dist. Rep. 212.

The Indiana Statute provides that a final settlement may be set aside for mistake, fraud, or illegality, and it is held that a settlement may be set aside under this statute where letters of administration were procured by a false and fraudulent representation of death. *Jaap v. Digman*, 8 Ind. App. 509.

The New Jersey Statute authorizes the Orphans' Court to open a final settlement for fraud or mistake. *Stevenson v. Phillips*, 15 N. J. Eq. 236.

Compare other local codes and statutes in the United States.

1. **"The Distinction Between Opening an Account and Surcharging and Falsifying It** is important; because, when opened, the whole of it may be unraveled; but when permission is given merely to surcharge and falsify, the onus is on the party who alleges mistakes to prove them. The account *prima facie* stands as correct; and if the party can show an omission for which he should have a credit, it is added (surcharged); or, if a wrong charge has been made against him, it is deducted, which is called a falsification." *Cowan v. Jones*, 27 Ala. 317.

When a Settlement Has Been Set Aside in equity, the whole account is remitted to the Probate Court for resettlement. *Searles v. Scott*, 14 Smed. & M. (Miss.) 94; *Neylans v. Burge*, 14 Smed. & M. (Miss.) 201; *Foute v. McDonald*, 27 Miss. 610.

Surcharging or Falsifying. — Where an account is opened to correct an alleged mistake in any particular item or items, the whole account is not thereby thrown open for review, but the court is confined to the alleged mistake, and to those matters in the account an alteration of which is incidental to a correction of the mistake. *Stevenson v. Phillips*, 15 N. J. Eq. 236.

The rule is settled that where errors or mistakes only are shown to exist in the account, the account will not be opened, as will be done where fraud is shown, but the party alleging the error or mistake in the court will be permitted to surcharge or falsify it. *Cowan v. Jones*, 27 Ala. 317.

2. **"As a General Proposition** creditors or distributees are the only persons (except, perhaps, the sureties of the administrator in certain cases) who have any concern with the

accounts or settlements of an administrator, and they alone possess the legal capacity to maintain actions to falsify such settlements." *Voshage v. Voshage*, 45 Mo. App. 172.

The Next of Kin of a Deceased Distributee cannot sue to surcharge the accounts of the administrator of the first decedent. The personal representatives of the deceased distributee are the proper persons to maintain the proceeding. *Hordage v. Hordage*, (Ark. 1886) 1 S. W. Rep. 707.

An Administrator De Bonis Non may have the settlement of his predecessor opened for fraud or mistake. *Crombie v. Engle*, 19 N. J. L. 82, 21 N. J. L. 614.

Surety on Note Given by Administrator for Debt of Estate. — A surety on a note given by an administrator for a debt of the estate has no right to have the final settlement of the administrator set aside, though he (the surety) was compelled to pay the note, the administrator being insolvent, and though he assumed the relation of surety on the administrator's agreement to pay the note out of the estate. *Voshage v. Voshage*, 45 Mo. App. 172. See also *Crowley v. McCrary*, 45 Mo. App. 350.

The Surety on the Official Bond of an Administrator may have a settlement opened for fraud in which the distributees participated to his injury, but a settlement will not be opened at his instance because the administrator withheld claims against the estate which he might have allowed, if the distributees did not collude with him to produce this result and it was done without their agency, privity, or consent. *Williamson v. Howell*, 4 Ala. 693.

Creditors of the Decedent may intervene in a suit brought by the legatees and devisees to falsify the accounts of the executor. *Smith v. Britton*, 2 Patt. & H. (Va.) 124.

Creditors of Administrator. — Where an administrator acknowledges in his account that he is indebted to the heirs, and it is evident that he is indebted to them, the judgment homologating the account cannot be annulled; but it may be reduced by the creditors of the administrator if they show that the whole sum allowed is not due. *Fendler v. Daigre*, 19 La. Ann. 190.

Persons Without Actual Notice. — In some jurisdictions it is provided by statute that any person interested who did not have actual notice of the proceeding and was not present at the settlement may proceed to have it opened or set aside. *Morrow v. Allison*, 39 Ala. 70; *Shirley v. Thompson*, 123 Ind. 454; *West v. Reavis*, 13 Ind. 294; *Van Aken v. Welch*, 80 Iowa 114.

3. **Negligence of Petitioner.** — A settlement

esced in or ratified the transaction on which he predicates his right to relief.¹

(5) *Time Within Which Proceeding Must Be Brought* — **Rule in Equity.** — As a general rule, in the absence of statutory limitations, there is no fixed time within which a proceeding in equity must be instituted to open or set aside a final settlement, but relief may be granted at any time, so long as the complainant has not been guilty of such delay as to charge him with laches; and each case must be determined on its own facts and circumstances.² In some jurisdictions, however, the time is expressly limited by statute.³

Rule in Probate Court. — The statutes which have been passed in some states giving to the courts of probate power to open final settlements usually limit the time within which the application must be made.⁴

c. **SETTLEMENTS OUT OF COURT.** — Where a settlement out of court is had between an executor or administrator and the legatees or distributees it is generally held that it cannot afterwards be opened except in equity on the ground of fraud or mistake,⁵ though according to some authorities a settle-

will not be opened unless the petitioner was free from neglect. *Hazlett v. Burge*, 22 Iowa 531; *Williams v. Price*, 11 Cal. 212.

1. **Ratification of Settlement.** — In *Starrett v. Keating*, 61 Ill. App. 189, which was a suit by distributees to set aside a settlement on the ground of fraud, it was held that the plaintiffs had ratified the settlement and so lost their right to relief where they had notice of all the facts in regard to the settlement, notwithstanding which they treated the property distributed as their own for several years.

2. **No Positive Limitation in Absence of Statute.** — *Sipperly v. Baucus*, 24 N. Y. 46.

Doctrine of Laches Applied. — Where there is no statute fixing the precise time within which a bill must be brought to surcharge or falsify the accounts of an executor or administrator, a court of equity will apply the doctrine of laches and staleness of demands, and fix a term according to the circumstances of each case. *Bland v. Stewart*, 35 W. Va. 518; *Redmond v. Ely*, 2 Bradf. (N. Y.) 175; *Burton v. Dickinson*, 3 Yerg. (Tenn.) 112. See also *Matter of Holderbaum*, 82 Iowa 69.

Acquiescence for Fifteen Years has been held sufficient to preclude the opening of a settlement which appears to have been voluntarily and intelligently made, though it may have been advantageous to a fiduciary. *Pinson v. Puckett*, 35 S. Car. 178.

After a Lapse of Twenty Years the account of an executor, in which he had been credited with the amount of a claim not collected, will not be opened in order to charge the executor with it on the ground that he should have collected it, the credit having been acquiesced in during the whole time. *Pennypacker's Appeal*, 14 Pa. St. 430.

In *Davis v. Cawdin*, 20 Pick. (Mass.) 510, a final account of twenty years' standing was opened on the ground of fraud, but in this case there had been no acquiescence, the complainants having been prosecuting their claim in various forms during the whole time. Compare *Taylor v. Benham*, 5 How. (U. S.) 233, holding that it must be a very strong case of fraud or of clear accident or mistake which could ever make it just to open a settlement after the lapse of twenty years and the death of the parties concerned.

A Delay of Four Years in making application to open a settlement on the ground of mistake

was held not to show laches, where there was no evidence that the mistake had been discovered within that time. *Sipperly v. Baucus*, 24 N. Y. 46.

3. **Statute of Limitations.** — *Hordage v. Hordage*, (Ark. 1886) 1 S. W. Rep. 707; *Matter of Cahalan*, 70 Cal. 604; *Handly v. Snodgrass*, 9 Leigh (Va.) 484; *Nelson v. Kownslar*, 79 Va. 468; Code Va., 1887, § 2921. See also *Bland v. Stewart*, 35 W. Va. 518. And see the title LIMITATION OF ACTIONS.

4. **Rule in Probate Court — Time Usually Limited.** — In *Indiana* a final settlement may be opened by the Probate Court within three years. *Reed v. Reed*, 44 Ind. 429; *Dillman v. Barber*, 114 Ind. 403.

In *Iowa* any person interested who had no notice of the settlement may have it opened within three months, but after a settlement has stood for three months it can be opened only for fraud or mistake. *Patterson v. Bell*, 25 Iowa 149.

In *Pennsylvania* a final account cannot be opened after five years from the time of settlement. *Bunting's Appeal*, 4 W. & S. (Pa.) 469. And even within the five years a settlement will not be opened if the balance found to be due has been actually paid and discharged. *Lehr's Appeal*, 98 Pa. St. 25.

The *New Jersey Statute* authorizing the Orphans' Court to open final settlements does not specify the time within which the proceeding must be instituted. It depends on the discretion of the court and circumstances of each case. *Hyer v. Morehouse*, 20 N. J. L. 125.

The *New York Statute* contains no time limitation, but it has been held that after the lapse of a considerable time (five years in this case) the settlement should not be disturbed except on the strongest proof. *In re Waack*, (Supreme Ct.) 5 N. Y. Supp. 522.

See also the various local codes and statutes in the United States.

5. **Settlement Between Parties Opened Only in Equity** — *District of Columbia*. — *Patten v. Glover*, 1 App. Cas. (D. C.) 466.

Massachusetts. — *Forbes v. Allen*, 166 Mass. 101.

New York. — *Matter of Wagner*, 119 N. Y. 28; *Matter of Pruyn*, 76 Hun (N. Y.) 128, affirmed 141 N. Y. 544.

North Carolina. — *James v. Matthews*, 5 Fred. Eq. (40 N. Car.) 28.

ment between the parties out of court is not conclusive.¹

XIII. INSOLVENT ESTATES. — In some jurisdictions special statutory provision is made for the settlement of insolvent estates. By these statutes exclusive jurisdiction of the claims of creditors is given to the probate court, and no action at law can be maintained against the executor or administrator by a creditor, except for the *pro rata* share of his claim which may be decreed to him in the proceeding. As a general rule, commissioners are appointed by the court to pass on the claims against the estate, or a special administrator, chosen by the creditors, is appointed and the executor or administrator therefore appointed is supplanted. The settlement of an insolvent estate under the statute is in the main on the same lines as proceedings under the insolvency and bankruptcy laws, and will be treated in full in another part of this work.²

XIV. ADMINISTRATORS WITH THE WILL ANNEXED — 1. Powers and Duties in General. — At common law an administrator with the will annexed succeeds to all the powers and is charged with all the duties which pertain by law to the office of executor,³ or which are conferred by the will on the executor, as such, and do not involve any personal confidence or trust, but are annexed by the will to the office of executor.⁴

Ohio. — *Piatt v. Longworth*, 27 Ohio St. 159.
Pennsylvania. — *Barber's Estate*, 142 Pa. St. 476.

South Carolina. — *Murrel v. Murrel*, 2 Strobb. Eq. (S. Car.) 148, 49 Am. Dec. 664. See also *Fraser v. Hext*, 2 Strobb. Eq. (S. Car.) 250.

1. Settlements out of Court Held Not Conclusive. — In *New Hampshire*, where administration is granted and bond is given to the judge of probate, a settlement made out of court by the heirs with the administrator is not conclusive on the parties, but will be evidence for the consideration of the judge of probate in deciding whether a further settlement shall be ordered. *Clarke v. Clay*, 31 N. H. 393. See also *Smilie v. Siler*, 35 Ala. 88.

2. Settlement of Insolvent Estates. — See the title **INSOLVENCY AND BANKRUPTCY**.

3. Administrator with Will Annexed Succeeds to Powers and Duties of Executor — *Alabama.* — *Lucas v. Doe*, 4 Ala. 679.

Indiana. — *Davis v. Hoover*, 112 Ind. 426.

Iowa. — *Shawhan v. Loffer*, 24 Iowa 217; *Lees v. Wetmore*, 58 Iowa 170.

Kentucky. — *Simpson v. Hawkins*, 1 Dana (Ky.) 306; *Peebles v. Watts*, 9 Dana (Ky.) 102, 33 Am. Dec. 531.

Massachusetts. — *Farwell v. Jacobs*, 4 Mass. 634.

Mississippi. — *Kelly v. Davis*, 37 Miss. 76.

New York. — *Bowers v. Emerson*, 14 Barb. (N. Y.) 652; *Luers v. Brunges*, 56 How. Pr. N. Y. Supreme Ct.) 282.

Virginia. — *M'Cal v. Peachy*, 3 Munf. (Va.) 288.

Performance of Decree Against Executor to Pay Legacy. — An administrator with the will annexed is bound by a decree which directed the executor to pay a legacy out of the estate. *Bowers v. Emerson*, 14 Barb. (N. Y.) 652.

Enforcement of Decree for Accounting Against Executor. — An administrator with the will annexed, appointed on the removal of executors, may enforce a decree against the executors made on their accounting. *Clapp v. Meserole*, 1 Abb. App. Dec. (N. Y.) 362, 1 Keyes (N. Y.) 281.

Right to Recover Possession of Real Estate. —

The power of an executor under the *Rhode Island* statute to sue for the possession of the real estate of the testator, pending an appeal from a decree of a court of probate granting letters testamentary, devolves on the administrator with the will annexed. *Scott v. Monks*, 16 R. I. 225.

Powers Not Conferred on Executor. — An administrator with the will annexed has no power to collect the rents of the testator's real estate, where no such power was given to the executor by the will. *Matter of Blow*, 2 Connoly (N. Y.) 360.

Chargeable with Notice of Contents of Will. — An administrator with the will annexed is chargeable with notice of the contents of the will, although it be in a particular as to which the will has no direct legal effect. *Moore v. Minerva*, 17 Tex. 20.

4. Power or Trust Annexed to Office. — A power or trust annexed to the office of executor passes to the administrator with the will annexed, unless a personal confidence in the discretion of the person named as executor is plainly expressed or implied. *De Peyster v. Clendining*, 8 Paige (N. Y.) 310; *Edgerton v. Conklin*, 25 Wend. (N. Y.) 224; *Bain v. Matteson*, 54 N. Y. 663; *Sanders's Estate*, 5 Kulp (Pa.) 521.

Peremptory Directions. — When the testator directs his executors, as such, and not *nominatim*, to do a certain act at all events, giving them no discretion in the matter, the power survives; and on the death of the executor it may be exercised by the administrator with the will annexed. *King v. Talbert*, 36 Miss. 367.

A Power Given to the Executor to Invest funds of the estate passes to the administrator with the will annexed. *Hall v. Cushing*, 9 Pick. (Mass.) 395; *Robinson v. Ostendorff*, 38 S. Car. 66.

When No Executor Is Appointed by a will by which property is given to the executor in trust, the administrator with the will annexed becomes a trustee for the trusts declared in the will, as much as if he had been named execu-

2. Testamentary Powers Involving Personal Trust. — If a will gives to the executor powers or imposes duties which involve a personal trust in him, and do not ordinarily come within the scope of an executor's functions, such powers and duties do not pass to an administrator with the will annexed, unless it is clear that the testator so intended.¹

3. Statutory Extension of Powers. — In some jurisdictions it is provided by statute that administrators with the will annexed shall have the same powers and be subject to the same duties as executors.²

4. Power to Sell Real Property. — It is generally held that a power to sell real property given to the executor by the will does not pass to the administrator with the will annexed, in the absence of any statutory provision on the subject, or of any indication that the testator intended the power to devolve on the administrator with the will annexed, should any be appointed, because the executor does not take it as executor, but as devisee.³

tor. *Jones v. Jones*, 2 Dev. Eq. (17 N. Car.) 387.

1. A Personal Trust Imposed on the Executor does not pass to the administrator with the will annexed.

United States. — *Ingle v. Jones*, 9 Wall. (U. S.) 486.

Kentucky. — *Gulley v. Prather*, 7 Bush (Ky.) 168; *Shields v. Smith*, 8 Bush (Ky.) 604.

Maine. — *Knight v. Loomis*, 30 Me. 204.

Mississippi. — *Cohea v. Johnson*, 69 Miss. 46.

New Jersey. — *Stoutenburgh v. Moore*, 37 N. J. Eq. 63; *Brush v. Young*, 28 N. J. L. 237.

North Carolina. — *Creech v. Grainger*, 106 N. Car. 213.

Pennsylvania. — *Ebert's Appeal*, 9 Watts (Pa.) 300.

Texas. — *Tippett v. Mize*, 30 Tex. 361, 94 Am. Dec. 313; *Vardeman v. Ross*, 36 Tex. 111.

Wisconsin. — *Matter of Besley*, 18 Wis. 451.

Continuing Decedent's Business. — Powers conferred on an executor by the will to continue the business of the testator as long as in the executor's judgment it should be profitable, and to pay out of the profits as much as in his judgment should be necessary for the testator's widow and children, are personal to and discretionary with the executor, and become extinct at his death. They do not pass to the administrator with the will annexed under the provision of the *North Carolina* statute that "an administrator with the will annexed has all the rights and powers, and is subject to the same duties, as if he had been named executor in the will." *Creech v. Grainger*, 106 N. Car. 213.

2. Powers Given to Executor Extended by Statute to Administrator with Will Annexed. — *Conklin v. Egerton*, 21 Wend. (N. Y.) 430; *Creech v. Grainger*, 106 N. Car. 213; *Saunders v. Saunders*, 108 N. Car. 327. See also the various local codes and statutes in the United States; and *infra*, this section, *Power to Sell Real Property*.

3. Power to Sell Land — Rule at Common Law. — At common law a power to sell lands, conferred on an executor, could not be executed by an administrator with the will annexed.

England. — *In re Clay*, 16 Ch. Div. 3, 43 L. T. N. S. 402, 29 W. R. 5.

Alabama. — *Lucas v. Doe*, 4 Ala. 679; *Posey v. Conaway*, 10 Ala. 811.

Delaware. — *Lockwood v. Stradley*, 1 Del. Ch. 298, 12 Am. Dec. 97.

Iowa. — *Hodgin v. Toler*, 70 Iowa 21.

Missouri. — *Compton v. McMahan*, 19 Mo. App. 494.

New Jersey. — *Den v. King*, 1 N. J. L. 494; *Lanning v. Sisters of St. Francis*, 35 N. J. Eq. 392.

New York. — *Conklin v. Egerton*, 21 Wend. (N. Y.) 430; *Gilchrist v. Rea*, 9 Paige (N. Y.) 66. But see *Anderson's Estate*, 5 N. Y. Leg. Obs. 302.

North Carolina. — *Gay v. Grant*, 101 N. Car. 206.

Pennsylvania. — *Moody v. Fulmer*, 3 Grant's Cas. (Pa.) 17; *Moody v. Van Dyke*, 4 Binn. (Pa.) 31, 5 Am. Dec. 385.

Power of Sale Is a Personal Trust. — "It is a general and well-settled rule, both in law and equity, that a power given by will to the executor to sell and convey land is to be considered as a personal trust. In contemplation of law, the power is given in consequence of the confidence which the testator had in the judgment, discretion, and integrity of the executor, and the execution of that power cannot, by the executor, be delegated to any other person. *Hawkins v. Kemp*, 3 East 410; *Berger v. Duff*, 4 Johns. Ch. (N. Y.) 368; *Hamilton v. Royse*, 2 Sch. & Lef. 330. It would be absurd to suppose that the confidence which the testator had in the knowledge and integrity of his executor, and which induced him to confide to such executor the power of selling and conveying his lands, could extend to unknown persons." *Wills v. Cowper*, 2 Ohio 124.

Though the Object of the Sale Be the Payment of Debts, an administrator with the will annexed cannot execute a naked power of sale given to the executor appointed by the will. *Moody v. Van Dyke*, 4 Binn. (Pa.) 31, 5 Am. Dec. 385.

Effect of Conveyance. — A conveyance made by an administrator with the will annexed in execution of a power of sale given by the will to the executor is void on its face and therefore does not create such a cloud on the rightful title as will warrant a court of equity in setting it aside. *Posey v. Conaway*, 10 Ala. 811. See also *Hall v. Irwin*, 7 Ill. 176.

Sale Directed After Death of Executor. — In *Curran v. Ruth*, 4 Del. Ch. 27, lands were devised for life to the wife, who was appointed executrix, to be sold within one year after her death by a person named in the will, and in case of his refusal and "nonacceptance from

Statutes in the United States have generally conferred authority on administrators with the will annexed to sell land under a power of sale given by the will to the executor.¹ The extent of the authority so conferred is not uniform, but depends on the terms of the statute and the construction given to it by the court in each jurisdiction.²

any cause which he may deem sufficient, then the proper authority shall appoint some suitable person to execute the same." The person named died before the testator, and no letters testamentary were ever applied for by the wife. It was held that the administratrix with the will annexed had power to make the sale, and a specific performance would be decreed.

Removal of Executor — Subsequent Appointment as Administrator with Will Annexed. — An executor who had been removed for becoming a nonresident, and who was afterwards appointed administrator with the will annexed on returning to the state, may still execute a power of sale given by the will. *Hetzell v. Easterly*, 66 Barb. (N. Y.) 443.

1. Administrator with Will Annexed Authorized by Statute to Execute Power of Sale — California. — *Kidwell v. Brummagim*, 32 Cal. 436.

Indiana. — *Davis v. Hoover*, 112 Ind. 423.

Kentucky. — *Owens v. Cowan*, 7 B. Mon. (Ky.) 152; *Gulley v. Prather*, 7 Bush (Ky.) 167; *Shields v. Smith*, 8 Bush (Ky.) 601; *Peebles v. Watts*, 9 Dana (Ky.) 103, 33 Am. Dec. 531; *Steele v. Moxley*, 9 Dana (Ky.) 139.

Maryland. — *Venable v. Mercantile Trust, etc.*, Co., 74 Md. 187.

Massachusetts. — *Farwell v. Jacobs*, 4 Mass. 634.

Mississippi. — *Cohea v. Johnson*, 69 Miss. 46.

New Jersey. — *Howell v. Sebring*, 14 N. J. Eq. 84.

New York. — *Mott v. Ackerman*, 92 N. Y. 539; *Matter of Kick*, (Surrogate Ct.) 11 N. Y. St. Rep. 688.

North Carolina. — *Vaughan v. Farmer*, 90 N. Car. 607; *Council v. Averett*, 95 N. Car. 131; *Gay v. Grant*, 101 N. Car. 206; *Hester v. Hester*, 2 Ired. Eq. (37 N. Car.) 330.

Ohio. — *Elstner v. Fife*, 32 Ohio St. 358.

Pennsylvania. — *Jackman v. Delafield*, 85 Pa. St. 381; *Lantz v. Boyer*, 81 Pa. St. 325; *Maus v. Maus*, 80 Pa. St. 194; *Evans v. Chew*, 71 Pa. St. 47; *Royer v. Meixel*, 19 Pa. St. 240; *Livingood v. Heffner*, 21 W. N. C. (Pa.) 148; *Still's Estate*, 12 Pa. Ct. Rep. 379, 2 Pa. Dist. Rep. 105, 31 W. N. C. (Pa.) 252; *Olwine's Appeal*, 4 W. & S. (Pa.) 492; *Hassinger's Appeal*, 10 Pa. St. 454.

South Carolina. — *Drayton v. Grimke*, *Bailey Eq. (S. Car.)* 392; *Robinson v. Ostendorff*, 38 S. Car. 66.

Tennessee. — *Blakemore v. Kimmons*, 8 Baxt. (Tenn.) 470; *Green v. Davidson*, 4 Baxt. (Tenn.) 488.

Virginia. — *Brown v. Armistead*, 6 Rand. (Va.) 594.

No Power Is Given to the Administrator with the Will Annexed in any case to sell real estate directed by the will to be sold, unless the will gives a power of sale to the executor. *Montague v. Carneal*, 1 A. K. Marsh. (Ky.) 351; *Gay v. Grant*, 101 N. Car. 206.

In Tennessee an administrator with the will annexed can execute a power of sale contained

in the will, though the will was probated prior to the act giving such an administrator the power to sell. *Blakemore v. Kimmons*, 8 Baxt. (Tenn.) 470.

2. In California an administrator with the will annexed is invested by statute with all the powers conferred on the executor named in the will, and he has unqualified authority to sell the testator's real estate, if the executor had power under the will to sell it. *Kidwell v. Brummagim*, 32 Cal. 436.

In Kentucky the statute is similar to that of California, and it is held that an administrator with the will annexed is authorized to sell and convey lands which the will empowered or directed the executor to sell, even when the power given to the executor is discretionary. *Owens v. Cowan*, 7 B. Mon. (Ky.) 157; *Gulley v. Prather*, 7 Bush (Ky.) 167; *Shields v. Smith*, 8 Bush (Ky.) 601; *Peebles v. Watts*, 9 Dana (Ky.) 103, 33 Am. Dec. 531; *Steele v. Moxley*, 9 Dana (Ky.) 139. But see *Brown v. Hobson*, 3 A. K. Marsh. (Ky.) 380, 13 Am. Dec. 187.

The Illinois Statute which provides for the appointment of an administrator on the death of a sole executor or sole surviving executor if there is "anything remaining to be performed in the execution of the will" does not authorize an administrator with the will annexed to execute a power of sale in a will, because, it is said, the words quoted mean only something to be performed as executor, and belonging to the office proper of executor, and do not extend to anything to be done as agent or trustee under a power given to sell land. *Nicoll v. Scott*, 99 Ill. 537. See also *Hall v. Irwin*, 7 Ill. 176; *Bigelow v. Cady*, 171 Ill. 229.

Under the Maryland Statute providing that whenever a testator has directed his real estate to be sold for the payment of debts or other purposes, and the executor shall decline to act, an administrator with the will annexed may be appointed and execute the trust in the same manner and to the same extent as the executor could have done, the administrator with the will annexed may execute a mandatory power of sale conferred on an executor who declines to act. *Venable v. Mercantile Trust, etc.*, Co., 74 Md. 187.

In Missouri it was provided by a former statute (Wag. Stat. 93, § 1) that the sale of real estate under a power in a will should be made by the administrator with the will annexed "if no other person be appointed by the will for that purpose, or if such person fails or refuse to perform the trust." *Dilworth v. Rice*, 48 Mo. 124; *Evans v. Blackiston*, 66 Mo. 437; *Compton v. McMahan*, 19 Mo. App. 494. But by the revision of 1879, the clause "if such person fail or refuse to perform the trust" was omitted, thus leaving the matter as it was at common law. *Compton v. McMahan*, 19 Mo. App. 494.

Under the South Carolina Statute a power given to executors to sell land for the payment of the testator's debts may be exercised by the

In England the power of administrators with the will annexed has not been extended in this respect.¹

If a Special Trust or Confidence Is Reposed in the executor in regard to the sale of real estate, the power, as a general rule, does not pass under the statute to the administrator with the will annexed. This is the case when the power of sale is conferred on the executor *nominatim*, or where the exercise of the power is committed to the discretion of the person named as executor.²

But if the Power Is Peremptory, so as to effect an equitable conversion of the real property, and the executor is required to apply the proceeds to purposes within the scope of his ordinary executorial functions, he takes the power *virtute officii*, though it was conferred on him by name, and it devolves on the administrator with the will annexed.³

administrator with the will annexed, unless the will expressly provides that the sale shall be made by no other person than the executors. *Drayton v. Grimke*, Bailey Eq. (S. Car.) 392.

1. Administrator C. T. A. Not Authorized to Execute Power of Sale in England. — *In re Clay*, 16 Ch. Div. 3, 43 L. T. N. S. 402, 29 W. R. 5.

2. Power of Sale Conferred on Executor *Nominatim*. — A purely personal trust is imposed on executors where a power of sale is given to them *nominatim*, and it cannot ordinarily be executed by an administrator with the will annexed under the statute. *Lockwood v. Stradley*, 1 Del. Ch. 298, 12 Am. Dec. 97; *Brown v. Hobson*, 3 A. K. Marsh. (Ky.) 380, 13 Am. Dec. 187; *Cohea v. Johnson*, 69 Miss. 46.

If the Power of Sale Is Discretionary a personal trust is reposed in the executor, and it is generally held that in such cases the statutes authorizing the administrator with the will annexed to sell land under a power of sale conferred on the executor by the will do not apply.

Delaware. — *Lockwood v. Stradley*, 1 Del. Ch. 298, 12 Am. Dec. 97.

Kentucky. — It was so held in *Brown v. Hobson*, 3 A. K. Marsh. (Ky.) 380, 13 Am. Dec. 187. But see *contra*, *Gulley v. Prather*, 7 Bush (Ky.) 168; *Shields v. Smith*, 8 Bush (Ky.) 604; *Owens v. Cowan*, 7 B. Mon. (Ky.) 152; *Peebles v. Watts*, 9 Dana (Ky.) 103, 33 Am. Dec. 531; *Steele v. Moxley*, 9 Dana (Ky.) 139.

Mississippi. — *Montgomery v. Millikin*, 5 Smed. & M. (Miss.) 151, 43 Am. Dec. 507.

New Jersey. — *Chambers v. Tulane*, 9 N. J. Eq. 146.

New York. — *Cooke v. Platt*, 98 N. Y. 35, affirming 51 N. Y. Super. Ct. 55; *Dominick v. Michael*, 4 Sandf. (N. Y.) 374; *Dunning v. Ocean Nat. Bank*, 51 N. Y. 407, 19 Am. Rep. 293, affirming 6 Lans. (N. Y.) 206.

Power to Divide by Deed Real Estate Equally Among the Testator's Children, at the discretion of the executor, and to collect the income and pay it to the children or their guardian, is outside of the ordinary duties of an executor, and does not pass to the administrator with the will annexed under the statute. *Hepburn's Estate*, 8 Phila. (Pa.) 206.

Power of Sale to Execute Collateral Trust. — In *Pennsylvania* it is held that the statute empowers an administrator with the will annexed to execute a power to sell in order to bring the land into a course of administration, but not

to execute a trust for a collateral purpose; for instance, to manage the property and invest the proceeds for accumulation; or to maintain the widow and children; or to turn the land into money for the convenience of partition; or to exercise any discretionary power confided to his predecessor in the administration of his personal fitness and fidelity. For purposes purely administrative, the statute gives the devise of a power the effect of a devise of the title, and puts an administrator with the will annexed on a footing with a testamentary trustee. *Ross v. Barclay*, 18 Pa. St. 179, 55 Am. Dec. 616. See also *Waters v. Margerum*, 60 Pa. St. 44.

3. Peremptory Power of Sale for Administrative Purpose. — A power of sale given to executors for the purpose of paying debts or making distribution, where there is an equitable conversion, and the power is imperative and does not grow out of a personal discretion confided in the individual named as executor, may be exercised by an administrator with the will annexed under a statute which gives such administrators the same rights and powers and renders them subject to the same duties as if they had been named as executors. *Venable v. Mercantile Trust, etc., Co.*, 74 Md. 187; *Cohea v. Johnson*, 69 Miss. 46; *Schroeder v. Wilcox*, 39 Neb. 136; *Koopman v. Carroll*, 50 Neb. 824; *Mott v. Ackerman*, 92 N. Y. 539; *Carpenter v. Bonner*, 26 N. Y. App. Div. 462; *Clifford v. Morrell*, 22 N. Y. App. Div. 470; *Evans v. Chew*, 71 Pa. St. 47; *Jackman v. Delafield*, 85 Pa. St. 381; *Maus v. Maus*, 80 Pa. St. 194; *Ross v. Barclay*, 18 Pa. St. 179, 55 Am. Dec. 616; *Potts v. Breneman*, 182 Pa. St. 295; *Kline's Estate*, 2 Leg. Chron. (Pa.) 137; *Lantz v. Boyer*, 81 Pa. St. 325; *Still's Estate*, 12 Pa. Co. Ct. Rep. 379, 2 Pa. Dist. Rep. 105, 31 W. N. C. (Pa.) 252; *Tarrance v. Reuther*, 13 Montg. Co. Rep. (Pa.) 102.

When Power of Sale Is Peremptory. — It was held that a power of sale was not discretionary, and could therefore be executed by the administrator with the will annexed where the will directed the executors to sell the real estate of the testator, "provided the said land will sell for as much, in their judgment, as will be equal to its value." The clause quoted, said Carr, J., "so far from an enlargement is a restriction of their power. If he had said they should sell the land, without more, they might have sacrificed it. He meant to prevent this, and therefore restrained their power to a sale for a fair price." By ap-

If No Executor Is Appointed by a will which authorizes the executors to sell real estate, or if the clause of the will giving the power of sale does not name the

pealing to their judgment as to the value of the land it cannot be supposed that he meant to submit it to their arbitrary will, and that they might so exercise that will as to defeat the whole purpose of the power given them." *Brown v. Armistead*, 6 Rand. (Va.) 594.

In *Carpenter v. Bonner*, 26 N. Y. App. Div. 462, it was held that the will did not give the executors any discretion as to whether or not a sale should be made where it authorized the executors "at their discretion to sell and convert all my real estate, and I direct them to divide the net proceeds of both real and personal estate into three equal and separate portions or funds;" the words "at their discretion" merely relating to the time at which the sale might be made.

The Distinction between the cases in which a power of sale given by the will to the executor may be exercised under the statute by the administrator with the will annexed and those in which it may not be so exercised is clearly drawn by Finch, J., in the case of *Mott v. Ackerman*, 92 N. Y. 539. In this case the learned judge said: "The question has been left by the disagreement of the courts in some uncertainty, which should be dispelled so far as it is possible to do so. The statute provides that administrators with the will annexed 'shall have the same rights and powers and be subject to the same duties as if they had been named executors in such will.' 2 Rev. Stat. 72, § 22. In construing this statute great differences of opinion have arisen. *De Peyster v. Clendinning*, 8 Paige (N. Y.) 296; *Conklin v. Egerton*, 21 Wend. (N. Y.) 430; *Edgerton v. Conklin*, 25 Wend. (N. Y.) 224; *Roome v. Philips*, 27 N. Y. 357; *Bain v. Matteson*, 54 N. Y. 663; *Bingham v. Jones*, 25 Hun (N. Y.) 6. The debate has turned mainly upon the inquiry what were the distinctive duties of an executor as such, and when they were to be regarded as not appertaining to his office, but as personal to the trustee. Where the will gives a power to the donee in a capacity distinctively different from his duties as executor, so that as to such duties he is to be regarded wholly as trustee and not at all as executor, and where the power granted or the duty involved imply a personal confidence reposed in the individual over and above and beyond that which is ordinarily implied by the selection of an executor, there is no room for doubt or dispute. In such case the power and duty are not those of executors, *virtute officii*, and do not pass to the administrator with the will annexed. But outside of such cases the instances are numerous in which by the operation of a power in trust authority over the real estate is given to the executor as such and the better to enable him to perform the requirements of the will. It will not do so say, in the present state of the law, that whenever a trust or trust power is conferred upon executors, relating to real estate, some personal confidence distinct from that reposed in executors is implied. An executor is always a trustee of the personal estate for those interested under the will. We have recently so decided

where the trust character could only be derived from the office and its relation to rights claimed through it. *Wager v. Wager*, 89 N. Y. 161. And we have held, also, that where a will devised and bequeathed to the executors the residue of real and personal estate, in trust, to sell and convert the same, to divide the balance into shares, to invest it in bond and mortgage, and to pay over the income for a time and finally the principal, the proceeds of the land sold became legal assets in the hands of the executor, for which he was liable officially, and for which his sureties were responsible; and that an objection that he held the proceeds as trustee, and not as executor, and could only be made accountable in equity, was not well taken. *Hood v. Hood*, 85 N. Y. 571. We have no doubt, therefore, that where a power of sale is given to executors for the purpose of paying debts and legacies, or either, and especially where there is an equitable conversion of land into money for the purpose of such payment and for distribution, and the power of sale is imperative and does not grow out of a personal discretion confided to the individual, such power belongs to the office of executor, and, under the statute, passes to and may be exercised by the administrator with the will annexed."

In *Livingood v. Heffner*, 21 W. N. C. (Pa.) 148, a testator gave to his widow the use of his entire estate for life, with a direction that "in case my wife desires the land shall be sold, my executor may sell the same, and the money received therefor shall be put on interest for her support during her lifetime, or as long as she may remain my widow." By the next clause the testator appointed one W. executor, with power "to give a deed for my real estate, the same as I myself could have done if living." The court said that the "words of the will are capable, perhaps, of being construed in a permissive sense only, but as the widow was the principal subject of the testator's solicitude, and the provision was wholly in her interest, in the event of her request and his refusal, we think the execution of the power would have been enforced. * * *

It is a general power to convey the real estate; it is restricted only by the particular provisions of the second clause, to wit, that the widow, during her widowhood, was entitled to the 'occupation and possession' of the land, and it was not to be sold unless she desired that it should be, in which case, says the testator, 'my executor may sell the same;' subject to this limitation, the executor would appear to have ample power to convey the land at his discretion."

In *Lantz v. Boyer*, 81 Pa. St. 325, the court said: "It may now be considered as definitively settled that whenever a power is given by will to executors to sell real estate with a view to the distribution of the proceeds among legatees, such power belongs to them *virtute officii*, and may be exercised by administrators *de bonis non* with the will annexed, under the 67th section of the Act of February 24, 1834, Pamph. L. 86, which provides that

executor, it is generally considered that the power is intended to be given to the executor *virtute officii* and may therefore be executed by the administrator with the will annexed.¹

5. **Property Subject to Administration with the Will Annexed.** — Administration with the will annexed, according to the weight of authority, extends to the entire personal estate of the testator, and is not limited to that portion which has been disposed of by the will;² though in some jurisdictions it has been held to be so limited.³

XV. ADMINISTRATORS DE BONIS NON — 1. Powers and Duties in General — a. DOCTRINE AT COMMON LAW. — At common law an administrator *de bonis non*, as the phrase designating his office implies, succeeds only to such of the assets of the estate as have not been administered by the executor or administrator who preceded him, that is, such as remain in the form in which the decedent left them at the time of his death, or are capable of being identified as the property of the decedent, and such of the debts due to the decedent as remain unpaid. With respect to such assets his powers, duties, and liabilities are the same as those of his predecessor,⁴ and he may recover them from the

‘all and singular the provisions of this act relative to the powers, duties, and liabilities of executors are hereby extended to administrators with a will annexed.’”

1. **Executor Not Appointed or Not Named in Clause Giving Power of Sale.** — *Kidwell v. Brummagin*, 32 Cal. 436; *Jackson v. Ferris*, 15 Johns. (N. Y.) 346; *Matter of Kick*, (Surrogate Ct.) 11 N. Y. St. Rep. 688; *Hester v. Hester*, 2 Ired. Eq. (37 N. Car.) 330; *Council v. Averett*, 95 N. Car. 131.

This rule does not seem to be applicable to a case where it was not the intention of the testator that the power of sale should be executed by the executor. Thus, it was held that an administrator with the will annexed could not sell real estate under a will which contained the following provisions: The real estate was devised to the testator's widow during her widowhood, and to the testator's son after termination of the widowhood. At the son's death it was directed to be sold and the proceeds distributed among certain persons. The widow was appointed executrix, but no one was appointed to make the sale. *Chandler v. Delaplaine*, 4 Del. Ch. 503.

2. **All the Property of the Testator**, including that not specifically bequeathed by the will, is subject to administration with the will annexed. *Landers v. Stone*, 45 Ind. 404; *Sullivan v. Fosdick*, 10 Hun (N. Y.) 173; *Ex p. Brown*, 2 Bradf. (N. Y.) 22; *Parris v. Cobb*, 5 Rich. Eq. (S. Car.) 450.

The Reason is probably founded on the well-known proposition stated by Parsons, C. J., in *Hays v. Jackson*, 6 Mass. 149, that “according to the strict rules of law, there can be no undivided personal estate in a will, where an executor is appointed; for he has all the personal estate, whether acquired before or after the will, in trust — first, to pay the debts, and then the legacies; and if any remained, it was his own, unless the testator, by his provision for the executor, had excluded him from it; in which case he was trustee of the remainder for the next of kin.”

3. **Property Not Disposed of by the Will.** — In *Georgia* it has been held that an administrator with the will annexed has no authority to administer upon any portion of the estate of the

testator not disposed of by the will. *Harper v. Smith*, 9 Ga. 461; *Ashburn v. Ashburn*, 16 Ga. 213; *Dean v. Biggers*, 27 Ga. 73.

4. **Administrator de Bonis Non Succeeds Only to Unadministered Assets at Common Law** — *England*. — *Atty.-Gen. v. Hooker*, 2 P. Wms. 340; *Jenkins v. Plume*, 1 Salk. 207; *Wankford v. Wankford*, 1 Salk. 306; *Barker v. Talcot*, 1 Vern. 473; *Betts v. Mitchell*, 10 Mod. 316; *Elliott v. Kemp*, 7 M. & W. 306; *Lloyd v. Stoddart*, *Atabl.* 152.

United States. — *Ennis v. Smith*, 14 How. (U. S.) 400; *Beall v. New Mexico*, 16 Wall. (U. S.) 535; *U. S. v. Walker*, 109 U. S. 258; *Wilson v. Arrick*, *MacArthur & M.* (D. C.) 228, 112 U. S. 83.

Alabama. — *Chamberlain v. Bates*, 2 Port. (Ala.) 550, 27 Am. Dec. 667; *Willis v. Willis*, 9 Ala. 330; *Nolly v. Wilkins*, 11 Ala. 872; *Abney v. Pickett*, 21 Ala. 739; *King v. Griffin*, 6 Ala. 387; *Harbin v. Levi*, 6 Ala. 399; *Callier v. Boykin*, *Minor* (Ala.) 206; *King v. Green*, 2 Stew. (Ala.) 133, 19 Am. Dec. 46; *Kelly v. Kelly*, 9 Ala. 908; *Swink v. Snodgrass*, 17 Ala. 653, 52 Am. Dec. 190; *Whitworth v. Oliver*, 39 Ala. 286; *Graves v. Flowers*, 51 Ala. 402, 23 Am. Rep. 555; *Martin v. Ellerbe*, 70 Ala. 326; *Eubank v. Clark*, 78 Ala. 73.

Aransas. — *Hemphill v. Hamilton*, 11 Ark. 425.

Connecticut. — *American Board of Foreign Missions*, 27 Conn. 344.

Florida. — *Gregory v. Harrison*, 4 Fla. 56; *Deans v. Wilcoxon*, 25 Fla. 980.

Georgia. — *Paschal v. Davis*, 3 Ga. 261; *Thomas v. Hardwick*, 1 Ga. 78; *Oglesby v. Gilmore*, 5 Ga. 56; *Gilbert v. Hardwick*, 11 Ga. 599.

Illinois. — *Rowan v. Kirkpatrick*, 14 Ill. 1; *Newhall v. Turney*, 14 Ill. 338; *Short v. Johnson*, 25 Ill. 489; *Stose v. People*, 25 Ill. 600; *Hanifan v. Needles*, 108 Ill. 403.

Indiana. — *Anthony v. McCall*, 3 Blackf. (Ind.) 86; *Ferguson v. Sweeney*, 6 Blackf. (Ind.) 547; *Young v. Kimball*, 8 Blackf. (Ind.) 167; *State v. Gooding*, 8 Blackf. (Ind.) 567; *Lucas v. Donaldson*, 117 Ind. 130.

Iowa. — *Shawhan v. Loffer*, 24 Iowa 217; *Stewart v. Phenice*, 65 Iowa 475.

Kentucky. — *Graves v. Downey*, 3 T. B.

original executor or administrator,¹ or from any one in whose possession they may be found;² but he cannot require a settlement of the accounts of the

Mon. (Ky.) 355; *Slaughter v. Froman*, 5 T. B. Mon. (Ky.) 19, 17 Am. Dec. 33; *Carrol v. Connet*, 2 J. J. Marsh. (Ky.) 195; *Felts v. Brown*, 7 J. J. Marsh. (Ky.) 147; *Floyd v. Breckenridge*, 4 Bibb (Ky.) 14; *Bradshaw v. Com.*, 3 J. J. Marsh. (Ky.) 632; *Oldham v. Collins*, 4 J. J. Marsh. (Ky.) 50; *Bellomy v. Bellomy*, 3 Bush (Ky.) 109; *Warfield v. Brand*, 13 Bush (Ky.) 77.

Maine. — *Waterman v. Dockray*, 78 Me. 139; *Hodge v. Hodge*, 90 Me. 505.

Maryland. — *Hagthorp v. Hook*, 1 Gill & J. (Md.) 270; *Sibley v. Williams*, 3 Gill & J. (Md.) 52; *Hagthorp v. Neale*, 7 Gill & J. (Md.) 13; *Alexander v. Stewart*, 8 Gill & J. (Md.) 226; *Johnson v. Farmer's Bank*, 11 Md. 412; *Lemmon v. Hall*, 20 Md. 171; *State v. Hart*, 57 Md. 238.

Massachusetts. — *Weeks v. Gibbs*, 9 Mass. 74.

Mississippi. — *Davis v. Brandon*, 1 How. (Miss.) 154; *Morse v. Clayton*, 13 Smed. & M. (Miss.) 373; *Searles v. Scott*, 14 Smed. & M. (Miss.) 94; *Kelsey v. Smith*, 1 How. (Miss.) 68; *Prosser v. Yerby*, 1 How. (Miss.) 87; *Probate Judge v. Green*, 1 How. (Miss.) 146; *Stubblefield v. McRaven*, 5 Smed. & M. (Miss.) 130, 43 Am. Dec. 502; *Rives v. Patty*, 43 Miss. 338; *Dement v. Heth*, 45 Miss. 388.

Missouri. — *Gamble v. Hamilton*, 7 Mo. 469; *Harney v. Dutcher*, 15 Mo. 89, 55 Am. Dec. 131; *State v. Dulle*, 45 Mo. 269.

New Jersey. — *Brownlee v. Lockwood*, 20 N. J. Eq. 239; *Carrick v. Carrick*, 23 N. J. Eq. 364; *Bradway v. Holmes*, 50 N. J. Eq. 311. But see *Lindsley v. Personette*, 35 N. J. Eq. 355, which seems to conflict with the other New Jersey decisions on this point.

New York. — *McMahon v. Allen*, 4 E. D. Smith (N. Y.) 519; *Walton v. Walton*, 4 Abb. App. Dec. (N. Y.) 512; *Luers v. Brunges*, 56 How. Pr. (N. Y. Supreme Ct.) 282.

Ohio. — *Blizzard v. Filler*, 20 Ohio 479; *Tracy v. Card*, 2 Ohio St. 431; *Curtis v. Lynch*, 19 Ohio St. 392.

Pennsylvania. — *Pennsylvania Bank v. Haldeman*, 1 P. & W. (Pa.) 161; *Potts v. Smith*, 3 Rawle (Pa.) 361, 24 Am. Dec. 359; *Allen v. Irwin*, 1 S. & R. (Pa.) 549; *Carter v. Trueman*, 7 Pa. St. 315; *Miller v. Com.*, 111 Pa. St. 321.

Rhode Island. — *Probate Ct. v. Smith*, 16 R. I. 444.

South Carolina. — *Villard v. Robert*, 1 Strobb. Eq. (S. Car.) 393; *Smith v. Carrere*, 1 Rich. Eq. (S. Car.) 123.

Tennessee. — *Bell v. Speight*, 11 Humph. (Tenn.) 451; *Thomas v. Stanley*, 4 Sneed (Tenn.) 411; *Smith v. Pearce*, 2 Swan (Tenn.) 127; *Stott v. Alexander*, 2 Sneed (Tenn.) 650; *Shackelford v. Runyan*, 7 Humph. (Tenn.) 141.

Texas. — *Murphy v. Menard*, 11 Tex. 673; *Cochran v. Thompson*, 18 Tex. 652; *Johnson v. Hogan*, 37 Tex. 77; *Brown v. Franklin*, 44 Tex. 559; *Williams v. Verne*, 68 Tex. 414.

Vermont. — *Merriam v. Hemmenway*, 26 Vt. 565.

Virginia. — *Coleman v. M'Murdo*, 5 Rand. (Va.) 51; *Cheatham v. Burfoot*, 9 Leigh (Va.) 580. See also *Cocke v. Harrison*, 3 Rand. (Va.) 494.

An administrator *de bonis non administratis* takes possession of the goods and chattels of the testator or intestate, which remain in specie and unadministered. He is appointed to finish what is left unfinished, and for no other purpose. *Gregory v. Harrison*, 4 Fla. 56.

An administrator *de bonis non* succeeds to all the rights, powers, and duties of his predecessor in the administration. "He steps into his shoes, and takes up the business of the estate where he left it. The duties and powers of such an administration relate back to the death of the person of whom he is the second representative. He has all the rights and powers over the assets which remain unadministered that his predecessor had. The duty and right to collect all the debts remaining uncollected, and not accounted for by the first administrator or executor, devolve upon him. This would apply to all choses in action of the deceased, whether in suit or not; and as well to judgments not collected as to claims not sued upon." *Smith v. Pearce*, 2 Swan (Tenn.) 128. See also *Ferebee v. Baxter*, 12 Ired. L. (34 N. Car.) 64.

Debts Due to the Decedent pass to the administrator *de bonis non* and may be collected by him. *Blendynburgh v. Lowry*, 4 Cranch (C. C.) 368; *Morrow v. Taggart*, 45 Ala. 293; *Newhall v. Turney*, 14 Ill. 338; *Barnett v. Vanmeter*, 7 Ind. App. 45.

A Note Belonging to the Decedent and remaining uncollected in the hands of the administrator at the time of his resignation passes to the administrator *de bonis non* as unadministered assets. *Reed v. Reeves*, 13 Bush (Ky.) 447.

Actual Receipts of Proceeds of Administered Chattels. — Though the administrator *de bonis non* has no title to assets that have been administered by his predecessor, or the proceeds thereof, yet if an administrator *de bonis non* receives from the administrator of his predecessor the proceeds of assets converted by his intestate, with the assent of the parties entitled to recover them of him, and under a decree of a court of competent jurisdiction, he is thereby completely protected for such payments. *Burnley v. Duke*, 2 Rob. (Va.) 108.

1. Recovery of Assets from Predecessor. — *Judge v. Price*, 6 Ala. 36; *Price v. Simmons*, 13 Ala. 749; *King v. Smith*, 15 Ala. 264; *Martel v. Martel*, 17 Tex. 396; *Baldwin v. Dearborn*, 21 Tex. 446; *Boulware v. Hendricks*, 23 Tex. 667; *Grant v. McKinney*, 36 Tex. 62; *Johnson v. Morris*, 45 Tex. 463. See also the cases cited in the last note *supra*.

In *Massachusetts* it is held that an administrator *de bonis non* cannot compel the personal representatives of his predecessor to deliver all the assets in his hands belonging to the estate of the first decedent until the accounts of the deceased administrator are settled. *Field, Knowlton, and Barker, JJ.*, dissenting as to goods and chattels of the first decedent remaining in specie unadministered and unappropriated. *Foster v. Bailey*, 157 Mass. 160.

2. Recovery of Assets from Third Person. — Assets in the hands of a third person at the time of the death of an administrator, or an

former executor or administrator.¹

Assets Are Administered within this rule if they have been in any wise converted or changed in form, either wholly or in part, by the original executor or administrator.² Thus, a sale is an act of administration,³ and the administrator *de bonis non* is not entitled to the proceeds, though his predecessor took a note payable to himself in his representative capacity,⁴ and it is immaterial that his conduct amounted to a devastavit;⁵ but if the sale was made under a void order of court, it does not effect a conversion so as to preclude the administrator *de bonis non* from recovering the property sold, though it may bar the right of the original administrator to recover it.⁶ As to choses in action, the rule is the same as in the case of specific chattels. If the executor or administrator alters the property in them, they become administered assets, and do not pass to the administrator *de bonis non*.⁷ It is also an

executor intestate, are recoverable by the administrator *de bonis non*. Langford v. Mahony, 4 Dr. & War. 81; Luers v. Brunges, 56 How. Pr. (N. Y. Supreme Ct.) 282; Colt v. Lasnier, 9 Cow. (N. Y.) 320.

1. Administrator de Bonis Non Cannot Require Predecessor to Account at Common Law. — Swink v. Snodgrass, 17 Ala. 658, 52 Am. Dec. 190; Waring v. Lewis, 53 Ala. 615; Green v. Byrne, 46 Ark. 453; Hardwick v. Thomas, 10 Ga. 266; Gilbert v. Hardwick, 11 Ga. 599; Steele v. Atkinson, 14 S. Car. 159, 37 Am. Rep. 728; Murphey v. Menard, 11 Tex. 673. But see Villard v. Robert, 1 Strobh. Eq. (S. Car.) 393, in which Chancellor Johnston, after reviewing numerous English and American cases, reaches the conclusion that the authorities do not sustain the proposition that an administrator *de bonis non* cannot require an accounting from the original administrator.

2. When Assets Are Administered — Conversion or Change of Form — United States. — Calder v. Pyfer, 2 Cranch (C. C.) 430.

Alabama. — Martin v. Ellerbe, 70 Ala. 340.

Georgia. — Gilbert v. Hardwick, 11 Ga. 599; Oglesby v. Gilmore, 5 Ga. 56.

Illinois. — In re Richart, 58 Ill. App. 91.

Kentucky. — Slaughter v. Froman, 5 T. B. Mon. (Ky.) 19, 17 Am. Dec. 33; Saffran v. Kennedy, 7 J. J. Marsh. (Ky.) 189.

New Jersey. — Carrick v. Carrick, 23 N. J. Eq. 364; Brownlee v. Lockwood, 20 N. J. Eq. 239.

South Carolina. — Miller v. Alexander, 1 Hill Eq. (S. Car.) 25.

Marriage of Executrix or Administratrix. — The rule in force before the enactment in England of the Married Women's Property Act of 1882, that marriage was an absolute and unqualified gift by the wife to the husband of all the goods and personal chattels of which she was possessed on marriage or became possessed afterwards in her own right, does not apply to goods held by her as executrix or administratrix, because such a gift may prove disadvantageous to the creditors or next of kin of the decedent and because, also, the wife took no beneficial interest in such goods, and therefore had none which the law could transfer to her husband. Thompson v. Pinchell, 11 Mod. 178; 1 Roper on Husband & Wife (2d ed.) 187.

Assent by Executor to Legacy for Life. — Where chattels are bequeathed for life with remainder over, the assent of the executor to the life tenant generally leaves nothing that can vest in

an administrator *de bonis non*, because the assent to the life tenant in such case is an assent to the ulterior legatee also. Windley v. Gaylord, 7 Jones L. (52 N. Car.) 55.

Mortgage of Leasehold. — In Skeffington v. Whitehurst, 3 Y. & Coll. Exch. 1, it was held that on the death of an administrator who had mortgaged the leasehold estate of his intestate, reserving the right to redeem to himself, his executors, administrators, and assigns, the equity of redemption vested in the personal representative of the administrator, and not in the administrator *de bonis non* of the intestate; but on appeal to the House of Lords (9 Cl. & F. 220), though the decision was affirmed on other grounds, Lords Cottenham, Brougham, and Campbell did not concur with the view of the trial judge as to the equity of redemption, because, it was said, though no action at law could be brought on the mortgage deed except in the name of the administrator's personal representative, yet when it is clear that he had no claim on the estate, and that the administrator *de bonis non* is the person to whom the reconveyance must ultimately be made, there seems to be no reason why he should not be allowed to file a bill against the mortgagee to redeem. See also Butler v. Bernand, Freem. Ch. 139.

Property Remaining in Specie. — If a horse, a piece of plate, a bundle of money laid away by itself, a note payable to the intestate, or the like, be found unchanged in the hands of the representatives of the deceased administrator, the administrator *de bonis non* may take possession of it and convert it into money. Sibbs v. Philadelphia Sav. Fund Soc., 153 Pa. St. 345.

3. Sale Is Act of Administration. — See the cases cited in the next preceding note.

4. Note Given for Price of Property Sold. — Oglesby v. Gilmore, 5 Ga. 56; Kendall v. Lee, 2 P. & W. (Pa.) 482.

5. Martin v. Ellerbe, 70 Ala. 340.

6. Sale under Void Order of Court Not a Conversion. — Hopper v. Steele, 18 Ala. 828; Wier v. Davis, 4 Ala. 442; Bragg v. Massie, 38 Ala. 89, 79 Am. Dec. 82; Ikelheimer v. Chapman, 32 Ala. 676; Hall v. Chapman, 35 Ala. 553; Wyatt v. Rambo, 29 Ala. 510, 68 Am. Dec. 89.

7. Alteration of Property in Choses in Action. — Martin v. Ellerbe, 70 Ala. 340.

In Barker v. Taleot, 1 Vern. 473, it was held that where the administrator received part of the rent due his intestate, and accepted a note

act of administration to hire out chattels,¹ to lease land,² or to retain a specific chattel in satisfaction of a debt due to the executor or administrator from the estate.³ So, too, if an executor or administrator buys property of the estate at a sale thereof under execution, or if he takes property of a third person, and the owner recovers damages against him for such taking, the property so bought or taken becomes his individually, and does not pass to the administrator *de bonis non*;⁴ or if the persons interested in the estate refuse to receive a note taken by the executor or administrator for money of the estate loaned by him, and he discharges their claims by paying cash, or transferring other securities to them, he becomes the owner of such note in his own right, and it does not pass to the administrator *de bonis non*.⁵

Devastavit by Predecessor. — At common law an administrator *de bonis non* is not responsible for any devastavit or maladministration by his predecessor,⁶ nor has he any right to recover for such devastavit or maladministration,⁷ but

for the residue, there was such an alteration of the property as vested it in the administrator, and therefore on his death it should go to his personal representative, and not to administration *de bonis non*.

In *Catherwood v. Chabaud*, 1 B. & C. 150, 8 E. C. L. 65, it was held that where a substituted cause of action is such that the original executor or administrator could sue in his representative capacity, the right of action devolves on the administrator *de bonis non* of the original decedent, because he succeeds to all the legal rights which belong to the original executor or administrator in his representative capacity; and, therefore, where a bill of exchange was indorsed generally and delivered to an administrator for a debt due the intestate, and the administrator died before the bill became due, and before it was paid, the administrator *de bonis non* could sue on the bill.

The Transfer of a Note to a Distributee is not an act of administration as to the note, but it is still unadministered assets, and the administrator *de bonis non* may sue on it, or, if it be secured by mortgage, he may maintain a bill to foreclose the mortgage, though the guardian of the distributee has recovered a judgment at law on the note. *Morse v. Clayton*, 13 Smed. & M. (Miss.) 373.

1. Hiring Out Chattels. — *Harney v. Dutcher*, 15 Mo. 89, 55 Am. Dec. 131.

2. Leasing Lands. — *Boyd v. Sloan*, 2 Bailey L. (S. Car.) 311.

Where an administrator made an underlease of the intestate's term for years, reserving the rent to himself, his executors, etc., with covenant to pay rent, it was held that his executor, and not the administrator *de bonis non*, should have the rent, because the rent reserved vested in the administrator in his individual capacity. *Drue v. Baylie*, Freem. 402.

3. Retaining Chattel in Payment of Individual Claim Against Estate. — *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 312. "The rule is well established," said Chancellor Kent, in this case, "that if an executor or administrator pays, out of his own moneys, debts to the value of the assets in hand, he may apply the assets to his own use, towards satisfaction of the moneys he has expended. * * * The assets, by such election, become absolutely his own property."

4. Purchase by Executor at Execution Sale or Taking Goods of Third Person. — 1 Williams on

Executors (7th Am. ed.) 773, citing *Wentw. Off. Ex.* (14th ed.) 200, and *Toller on Executors* 239.

5. Payment to Distributees of Amount of Note Belonging to Estate. — *Blakely v. Carter*, 70 Wis. 540.

6. Administrator De Bonis Non Not Responsible for Devastavit by Predecessor. — *Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 703; *Bliss v. Seaman*, 165 Ill. 422, affirming 59 Ill. App. 236.

7. Administrator De Bonis Non Cannot Recover for Devastavit by Predecessor — *Alabama*. — *Waring v. Lewis*, 53 Ala. 615; *Nolly v. Wilkins*, 11 Ala. 872; *Lyon v. Odom*, 31 Ala. 234; *Chamberlain v. Bates*, 2 Port. (Ala.) 550, 27 Am. Dec. 667.

Arkansas. — *Finn v. Hempstead*, 24 Ark. 111; *Ludlow v. Flournoy*, 34 Ark. 451; *State v. Rottaken*, 34 Ark. 144; *Gibson v. Ponder*, 40 Ark. 195; *Green v. Byrne*, 46 Ark. 453; *Beard v. Roth*, 35 Fed. Rep. 397.

Florida. — *Deans v. Wilcoxon*, 25 Fla. 980; *Gregory v. Harrison*, 4 Fla. 56.

Illinois. — *Rowan v. Kirkpatrick*, 14 Ill. 1.

Indiana. — *State v. Gooding*, 8 Blackf. (Ind.) 567; *Graham v. State*, 7 Ind. 470, 65 Am. Dec. 745; *Lucas v. Donaldson*, 117 Ind. 139.

Kentucky. — *Oldham v. Collins*, 4 J. J. Marsh. (Ky.) 49; *Feltz v. Brown*, 7 J. J. Marsh. (Ky.) 147.

Maryland. — *Hagthorp v. Hook*, 1 Gill & J. (Md.) 270.

Mississippi. — *Prosser v. Yerby*, 1 How. (Miss.) 87; *Searles v. Scott*, 14 Smed. & M. (Miss.) 94; *Forniquet v. Forstall*, 34 Miss. 87; *Prosser v. Leatherman*, 4 How. (Miss.) 237, 34 Am. Dec. 121; *Miller v. Helm*, 2 Smed. & M. (Miss.) 687; *Kelsey v. Smith*, 1 How. (Miss.) 68; *Probate Judge v. Green*, 1 How. (Miss.) 146; *Stubblefield v. McRaven*, 5 Smed. & M. (Miss.) 130, 43 Am. Dec. 502; *Rives v. Patty*, 43 Miss. 338.

New Jersey. — *Thiefes v. Mason*, 55 N. J. Eq. 456; *Brownlee v. Lockwood*, 20 N. J. Eq. 239; *Carrick v. Carrick*, 23 N. J. Eq. 367.

Ohio. — *McCoy v. Gilmore*, 7 Ohio, (pt. ii.) 268.

Pennsylvania. — *Potts v. Smith*, 3 Rawle (Pa.) 361, 24 Am. Dec. 359; *Kendall v. Lee*, 2 P. & W. (Pa.) 482.

Rhode Island. — *Probate Ct. v. Smith*, 16 R. I. 444.

South Carolina. — *Smith v. Carrere*, 1 Rich.

that right, independently of statute, belongs exclusively to the next of kin, creditors, and others interested in the estate.¹

Moneys Collected by an Executor or Administrator in his representative capacity and kept separately are unadministered assets, and the administrator *de bonis non* is entitled to them; but if they are mingled with the individual money of the executor or administrator they are considered as converted or administered, and do not pass to the administrator *de bonis non*, and the original executor or administrator, or his personal representative if he dies, is accountable directly to the next of kin, legatees, or creditors of the original decedent.²

Money Due on Contracts Made by Original Executor or Administrator. — It is well settled that where an executor or administrator, in his representative capacity, takes a note for money due the estate, or makes a contract in any other form, or recovers a judgment the proceeds of which, if collected by him, would be

Eq. (S. Car.) 123; *Johnston v. Lewis*, Rice Eq. (S. Car.) 40.

Texas. — *Johnson v. Hogan*, 37 Tex. 77; *Brown v. Franklin*, 44 Tex. 559.

Virginia. — *Cheatham v. Burfoot*, 9 Leigh (Va.) 580; *Coleman v. M'Murdo*, 5 Rand. (Va.) 51.

At common law a devastavit committed by an executor or administrator was a personal tort which died with the person. *Young v. Kimball*, 8 Blackf. (Ind.) 167; *Lucas v. Donaldson*, 117 Ind. 139.

"The cases regard any portion of the estate which the former administrator has appropriated to his own use, ceasing to keep it apart from his individual estate, as administered, whether the appropriation was right or not." *Probate Ct. v. Smith*, 16 R. I. 444.

1. Cause of Action for Devastavit Belongs to Creditor, Next of Kin, Etc. — *United States.* — *Beall v. New Mexico*, 16 Wall. (U. S.) 540.

Illinois. — *Rowan v. Kirkpatrick*, 14 Ill. 1. *Indiana.* — *Young v. Kimball*, 8 Blackf. (Ind.) 167.

South Carolina. — *Johnston v. Lewis*, Rice Eq. (S. Car.) 40.

Tennessee. — *Thomas v. Stanley*, 4 Sneed (Tenn.) 411.

Texas. — *Johnson v. Hogan*, 37 Tex. 77.

2. Money Collected by Original Executor or Administrator — *England.* — *Wankford v. Wankford*, 1 Salk. 306.

United States. — *United States v. Ames*, MacArthur & M. (D. C.) 278; *Wilson v. Arrick*, MacArthur & M. (D. C.) 228, 112 U. S. 83; *U. S. v. Walker*, 109 U. S. 258.

Kentucky. — *Thomason v. Thomason*, 1 Metc. (Ky.) 53.

Massachusetts. — *Marvel v. Babbitt*, 143 Mass. 226.

North Carolina. — *Hackney v. Steadman*, 1 Jones L. (46 N. Car.) 207.

Pennsylvania. — *Stair v. York Nat. Bank*, 55 Pa. St. 364, 93 Am. Dec. 759; *Sibbs v. Philadelphia Sav. Fund Soc.*, 153 Pa. St. 345.

Vermont. — *Sargent v. Kimball*, 37 Vt. 323.

Courts of common law, as well as of equity, have long recognized that assets of an estate, including money so long as the fund can be identified, in the hands of an executor or administrator, are held by him in *autre droit* and *quasi* in trust. *Marvel v. Babbitt*, 143 Mass. 226.

Money Received by the Agent or Attorney of the Original Executor or Administrator. — Money re-

ceived by a third person as the agent or attorney of the original executor or administrator may be recovered as assets in an action by a subsequent administrator. *Blydenburgh v. Lowry*, 4 Cranch (C. C.) 368. And if the administrator *de bonis non* fails for a long time to require the agents of the former administrator to account, he is chargeable with the whole balance appearing to be due from such agents, unless he can show that his failure was excusable. *Lidderdale v. Robinson*, 2 Brock. (U. S.) 159. But see *Sloan v. Johnson*, 14 Smed. & M. (Miss.) 47, holding that where an administrator placed a note belonging to the decedent in the hands of attorneys for collection, and they collected it, the administrator *de bonis non* could not sue the attorneys for the money so collected.

Money Deposited by Administrator. — In *Hackney v. Steadman*, 1 Jones L. (46 N. Car.) 207, it was held that where an administrator, being at the point of death, deposited the money of the estate with one of the sureties on his official bond, for safe keeping, with instructions to pay it over to his intestate's estate on the settlement thereof, the administrator *de bonis non* was entitled, after demand and refusal, to recover the money before final settlement.

Money Deposited in Bank by Decedent. — In *Sibbs v. Philadelphia Sav. Fund Soc.*, 153 Pa. St. 345, it was held that an administrator *de bonis non* is not entitled to recover from a bank the amount of a deposit which originally stood in the name of the intestate, but which the deceased administrator reduced to his possession by a transfer to his own credit and which his administrator had since drawn out.

Balance Due on Final Account of Original Executor or Administrator. — An administrator *de bonis non*, unless authorized by statute, cannot sue his predecessor on his bond for a balance in money due by him in his final account; but creditors and distributees may do so. *Byrd v. Holloway*, 6 Smed. & M. (Miss.) 323; *Rives v. Patty*, 43 Miss. 338.

The Reason of the Rule that an administrator cannot take moneys collected by the original administrator or standing to his credit as such is that it would interfere with the settlement of the accounts and deprive the estate of the means of reimbursement for payments made and for services rendered. *Slaymaker v. Farmers' Nat. Bank*, 103 Pa. St. 616; *Sibbs v. Philadelphia Sav. Fund Soc.*, 153 Pa. St. 345.

assets in his hands, and he dies before making the collection, the money due is unadministered assets which pass to the administrator *de bonis non*, though the original executor or administrator could elect to sue either in his individual or representative capacity.¹

1. Money Due on Contracts Made by Original Executor or Administrator — England. — Bull *v.* Palmer, 2 Lev. 165; Partridge *v.* Court, 5 Price 412, 419; King *v.* Thom, 1 T. R. 487; Webster *v.* Spencer, 3 B. & Ald. 360, 5 E. C. L. 316; Elliott *v.* Kemp, 7 M. & W. 306; Catherwood *v.* Chabaud, 1 B. & C. 150, 8 E. C. L. 65; Hirst *v.* Smith, 7 T. R. 178; Moseley *v.* Rendell, L. R. 6 Q. B. 338.

Alabama. — King *v.* Green, 2 Stew. (Ala.) 133, 19 Am. Dec. 46.

Arkansas. — Hemphill *v.* Hamilton, 11 Ark. 425.

Indiana. — Sheets *v.* Pabody, 6 Blackf. (Ind.) 120, 38 Am. Dec. 132.

Kentucky. — Burrus *v.* Roulhac, 2 Bush (Ky.) 39. But see Saffran *v.* Kennedy, 7 J. J. Marsh. (Ky.) 188.

Massachusetts. — Sullivan *v.* Holker, 15 Mass. 374.

New York. — Walton *v.* Walton, 4 Abb. App. Dec. (N. Y.) 512; Luers *v.* Brunges, 56 How. Pr. (N. Y. Supreme Ct.) 282.

Ohio. — Mathews *v.* Meek, 23 Ohio St. 272.

Rhode Island. — McGuinness *v.* Whalen, 17 R. I. 619.

South Carolina. — Ross *v.* Sutton, 1 Bailey L. (S. Car.) 126, 19 Am. Dec. 660.

Tennessee. — Smith *v.* Pearce, 2 Swan (Tenn.) 127.

This rule, which was laid down in Bull *v.* Palmer, 2 Lev. 165, was overturned for a short time by the cases of Betts *v.* Mitchell, 10 Mod. 316, and Hosier *v.* Arundel, 3 B. & P. 7, but was finally reaffirmed and established by the later cases *ubi supra*. Hemphill *v.* Hamilton, 11 Ark. 425.

In Moseley *v.* Rendell, L. R. 6 Q. B. 338, the defendant had employed Hepburn, a coach builder, and there was due him at his decease forty-seven pounds and sixteen shillings. Hepburn's widow took out administration, but died a few months later. In the interval between the taking out of administration and her death, the administratrix carried on the business on the same premises, and did work for the defendant to the amount of eighteen pounds. The work consisted generally of repairs to carriages, and was done with the intestate's tools and materials, with the exception of a shaft. After the death of the widow the plaintiff's wife took out administration *de bonis non* of Hepburn. On these facts it was objected that the cause of action was personal to the widow, and passed to her representative, and not to the representative of the original testator; but it was held that the proper inference was that the first administratrix had carried on the business for the benefit of the estate; that the money recovered would, therefore, be a part of the assets of the intestate; and consequently that the action was rightly brought by the administratrix *de bonis non*. Cockburn, C. J. (page 342), clearly states the principle applicable to this class of cases. "It appears to me," he said, "that the plaintiff as the administratrix *de bonis non* is the proper

person to sue, because, although the promise was made to the widow, and the plaintiff is not her representative, yet the promise was made to the widow, not in her personal capacity, but as administratrix of her husband. It has been long ago laid down that though the executor of an executor represents the original testator, yet that rule does not apply to the administrator of an administrator, and that, consequently, when the estate of a deceased person has been left unadministered at the death of the administrator, it is necessary in order to complete the administration to take out administration *de bonis non*. Now if the promise was made to the original administratrix as administratrix, the proceeds of the action would be assets, and the present plaintiffs were the proper persons to sue."

In Catherwood *v.* Chabaud, 1 B. & C. 150, 8 E. C. L. 65, Abbott, C. J., remarked: "It was clearly established by the evidence that the bill in question was given to S. C. as the administratrix of J. C., for money due to her intestate. She took it as assets, and if she had received the money, that must undoubtedly have been accounted for to his estate. The money not having been received in her lifetime, the bill remained as a part of J. C.'s estate, and the right to it devolved upon the persons who afterwards became his representatives. * * * It has been decided in a variety of modern cases that an administrator may sue as such upon a promise made to him in his representative character, and that principle governs my opinion in the present case; for where the cause of action is such that the first administrator may sue in his representative character, the right of action devolves upon the administrator *de bonis non* of the estate."

But see Newhall *v.* Turney, 14 Ill. 338, in which it was held that a note taken by an administrator for the price of goods of the estate sold by him was his individual property and could be sued on by his personal representative. The court referred to the cases holding that the administrator *de bonis non* could sue on such note, but concluded that it was not necessary to examine the point decided by those cases, because the controversy was between the administrator's personal representative and the maker of the note.

See also, as to the rights of the personal representative of the former executor or administrator to sue in such cases, Arrington *v.* Hair, 19 Ala. 243; Cravens *v.* Logan, 7 Ark. 103; Cook *v.* Holmes, 29 Mo. 61, 77 Am. Dec. 548.

Note Taken in Individual Name of Administrator. — It has been held in *New York* that where an executor, in his individual capacity, loans money belonging to the estate and takes a bond and mortgage payable to himself individually, the cause of action thereon, in case of his death, accrues to him personally, and on his death his personal representatives only, and not the administrator *de bonis non*, can

Distinction Between Valid and Invalid Acts of Administration. — In equity the strict rule of law that any conversion or change in the form of the assets effected by the executor or administrator constitutes an act of administration is not adopted, but a distinction is made between valid and invalid acts of administration, and if the executor or administrator converts or disposes of the assets fraudulently or otherwise, in violation of his duty, such an act will be adjudged void, and the subject of such improper dealing may be recovered by the administrator *de bonis non* as unadministered assets,¹ or he may sue his predecessor for an accounting;² and in some jurisdictions the rule is the same at law.³

b. MODERN AMERICAN DOCTRINE. — In the *United States* the authority of administrators *de bonis non* has been extended far beyond that which was accorded to them at common law. As a general rule in modern practice, administration of this character is not regarded as separate and distinct from the preceding administration, as it was at common law, but rather as a continuation of it, the one beginning where the other left off; and an administrator *de bonis non* not only succeeds to the unadministered assets, but all the powers and duties of the preceding executor or administrator vest in him for the purpose of enabling him to complete the administration.⁴

sue. *Caulkins v. Bolton*, 98 N. Y. 511 [*distinguishing* *Walton v. Walton*, 4 Abb. App. Dec. (N. Y.) 512; *Luers v. Brunges*, 56 How. Pr. (N. Y. Supreme Ct.) 282].

Contracts of the Original Administrator for the sale of property belonging to the estate are personal to him, and the administrator *de bonis non* cannot sue on them. *Ross v. Sutton*, 1 Bailey L. (S. Car.) 126, 19 Am. Dec. 660.

1. Assets Improperly Disposed of Recoverable in Equity by Administrator De Bonis Non — *Florida*. — *Deans v. Wilcoxon*, 25 Fla. 980.

Georgia. — *Hardwick v. Thomas*, 10 Ga. 266.

Indiana. — *Duffy v. State*, 115 Ind. 351; *Harvey v. State*, 123 Ind. 260.

Mississippi. — *Probate Judge v. Green*, 1 How. (Miss.) 146; *Prosser v. Leatherman*, 4 How. (Miss.) 237, 34 Am. Dec. 121; *Milner v. Helm*, 2 Smed. & M. (Miss.) 687; *Scott v. Searles*, 7 Smed. & M. (Miss.) 498, 45 Am. Dec. 317; *Prestidge v. Pendleton*, 24 Miss. 80; *Forniquet v. Forstall*, 34 Miss. 87.

Texas. — *Cochran v. Thompson*, 18 Tex. 652.

"Collusion Between the Administrator and Ostensible Purchaser is an essential element to deprive the sale of its effect as an administration, and leave the asset unadministered, and subject to the power of the administrator *de bonis non*." *Deans v. Wilcoxon*, 25 Fla. 1050.

As to the rights of *bona fide* purchasers generally, see *supra*, this title, *Management and Care of Estate* — *Sale and Transfer of Personal Property* — *Validity of Sale*.

The Same Rule Applies to Land of an intestate, and therefore where an administrator has conveyed such land, claiming it as his own, the administrator *de bonis non* may recover it for the purpose of administering it, if there be a satisfactory showing that it is necessary to do so, for the purpose of paying the debts of the intestate. *Seabrook v. Brady*, 47 Ga. 950.

In *South Carolina*, however, it is held that an administrator *de bonis non* cannot recover property which has been fraudulently transferred by his predecessor, because the administrator *de bonis non* stands in the place of the first administrator and is concluded by whatever con-

cluded him. *Johnston v. Lewis*, Rice Eq. (S. Car.) 40; *Steele v. Atkinson*, 14 S. Car. 154, 37 Am. Rep. 728.

2. Accounting for Property Wrongfully Disposed Of. — *Whitaker v. Whitaker*, 12 Lea (Tenn.) 393.

3. Assets Illegally Transferred by Original Administrator. — In *Jelke v. Goldsmith*, 52 Ohio St. 499, it was held that an administrator *de bonis non* was entitled to recover possession of promissory notes, belonging to the intestate's estate, which had been illegally transferred to the defendant by the original administrator.

Fraudulent Transfer—Recovery at Law. — In *Alabama*, if the administrator in chief fraudulently or without consideration disposes of the assets to one cognizant of the fact that he is acting in violation of his trust, and they remain in specie, capable of identification, the administrator *de bonis non* is entitled at law to recover them. *Swink v. Snodgrass*, 17 Ala. 653, 52 Am. Dec. 190. But if the parties in interest elect to treat such fraudulent sale as an administration, the administrator *de bonis non* cannot recover. *Elliott v. Branch Bank*, 20 Ala. 345.

A Sale Without an Order of Court, or under an Order of Court Void for Want of Jurisdiction, does not change the property out of the estate, but merely destroys the right of action to recover of the administrator making it. A succeeding administrator is invested with a right to recover the property as unadministered assets. *Hopper v. Steele*, 18 Ala. 828; *Wier v. Davis*, 4 Ala. 442; *Bragg v. Massie*, 38 Ala. 80, 79 Am. Dec. 82; *Ikelheimer v. Chapman*, 32 Ala. 676; *Hall v. Chapman*, 35 Ala. 553; *Wyatt v. Rambo*, 20 Ala. 510, 68 Am. Dec. 80.

A Private Sale of Personal Property by an Administrator, being in violation of the statute, is void, and the administrator *de bonis non* succeeding is entitled to recover the property of the purchaser. *Hopper v. Steele*, 18 Ala. 828 (*Dargan, C. J., dissenting*); *Wyatt v. Rambo*, 20 Ala. 510, 68 Am. Dec. 80; *Woolfork v. Sullivan*, 23 Ala. 548, 58 Am. Dec. 305.

4. Modern American Doctrine Administrator de Bonis Non Succeeds to All Powers and Duties of

Property of Every Kind in the hands of the original executor or administrator, including any balance that may be due from him to the estate on account of property sold or moneys collected, passes, as a general rule, to the administrator *de bonis non* under the system prevailing in the United States.¹

Predecessor. — *Shawhan v. Loffer*, 24 Iowa 217; *Stewart v. Phenice*, 65 Iowa 475; *Trumble v. Williams*, 18 Neb. 144.

"The Authority of an Administrator De Bonis Non is precisely that of an administrator in chief, lessened in consequence of the previous administration." *Moseley v. Mastin*, 37 Ala. 219.

The New Administrator Takes the Place of the Original Administrator, and proceeds with the administration, beginning at the point where the original administrator laid down his trust, clothed with all the rights, privileges, and exemptions of the original administrator, but no more, and is, at the same time, subject to all the responsibilities of a general administrator. *Coleman v. Raynor*, 3 Coldw. (Tenn.) 25; *Shackelford v. Runyan*, 7 Humph. (Tenn.) 141.

An Administrator de Bonis Non Must Complete the Administration in All Respects, "and, to that end, his power, rights, authority, and duties relate back to the death of his intestate. He is bound only by the lawful acts done by his predecessor in and about the estate. It is his duty to get possession of all the remaining personal property, including rights and credits, to sell the property, collect the debts due, and apply the money thus realized to the discharge of all unpaid debts and liabilities with which the estate in his hands is properly chargeable, and in the orderly course of administration. He should also particularly require the administrator or executor of the first administrator to account to him for all property and effects of his intestate that he had not properly administered, and, if need be, compel him to do so by appropriate legal steps. If, however, the first administrator had wasted such assets, or made other default, and he, or if he be dead, his estate, be clearly and certainly insolvent, and if the sureties to his administration bond be so insolvent, or, if he gave such bond and the same was lost or destroyed, and the sureties could not, by active diligence, be ascertained, then, the facts being clear, it would not be necessary that he should bring action, because it would be fruitless and put the estate to useless costs. The administrator should, in such respects, be very vigilant, otherwise he would be held accountable for his laches." *Brittain v. Dickson*, 104 N. Car. 550.

An Order of Sale Granted to the Original Administrator remains in force and may be executed by the administrator *de bonis non*. *Gress Lumber Co. v. Leitner*, 91 Ga. 810.

As Long as Anything Remains to Be Done by an Administrator, the administrator *de bonis non* may maintain a proceeding to recover the funds of the estate in the hands of his predecessor at the time when the preceding administration terminated. *Vastine v. Dinan*, 42 Mo. 269; *Scott v. Crews*, 72 Mo. 261; *Morehouse v. Ware*, 78 Mo. 100; *State University v. Hughes*, 90 N. Car. 537.

An administration is never complete so long

as there are debts uncollected or assets remaining in the hands of the administrator for distribution. It is the duty of an administrator to collect the assets, pay the expenses of his administration, discharge the debts of his intestate, and make a final distribution among the next of kin of his intestate. If an administrator dies before this is done, his administration is unfinished, and an administrator *de bonis non* must be appointed to finish his administration, and so on *ad infinitum*, until a final and complete distribution of the estate. *Lansdell v. Winstead*, 76 N. Car. 366; *Ham v. Kornegay*, 85 N. Car. 119.

Sales Made by Predecessor. — An administrator *de bonis non* may collect the purchase money of property sold by his predecessor, and may enforce the statutory lien created by such sale. *Prestridge v. Pendleton*, 24 Miss. 80. But he cannot make a deed to realty sold by his predecessor under an order of court, because the statute regulating such sales does not authorize him to do so. *Davis v. Brandon*, 1 How. (Miss.) 154. See also *Heffernan v. Grymes*, 2 Leigh (Va.) 512. Compare *Deans v. Wilcoxon*, 25 Fla. 980.

1. Administrator De Bonis Non May Recover Balance Remaining in Predecessor's Hands — United States. — *De Valengin v. Duffy*, 14 Pet. (U. S.) 282.

Alabama. — *Wood v. Sullens*, 44 Ala. 686.

Connecticut. — *Chamberlin's Appeal*, 70 Conn. 363.

Illinois. — *Nevitt v. Woodburn*, 160 Ill. 203.

Kansas. — *Musick v. Beebe*, 17 Kan. 47.

Maryland. — *Getty v. Long*, 82 Md. 643.

Massachusetts. — *Wiggin v. Swett*, 6 Met. (Mass.) 197, 39 Am. Dec. 716; *Buttrick v. King*, 7 Met. (Mass.) 20; *Minot v. Norcross*, 143 Mass. 326.

Minnesota. — *Balch v. Hooper*, 32 Minn. 158; *Palmer v. Pollock*, 26 Minn. 433.

Missouri. — *State v. Hunter*, 15 Mo. 490; *State v. Fulton*, 35 Mo. 323; *Vastine v. Dinan*, 42 Mo. 269; *State v. Dulle*, 45 Mo. 269; *Wickham v. Page*, 49 Mo. 526; *Seymour v. Seymour*, 67 Mo. 303; *State v. Heinrichs*, 82 Mo. 542; *Hodge v. Hodge*, 90 Me. 505; *Bolton v. Whitmore*, 12 Mo. App. 581; *Booker v. Armstrong*, 93 Mo. 49.

New Jersey. — *Aldridge v. McClelland*, 34 N. J. Eq. 237.

New York. — *Yale v. Baker*, 2 Hun (N. Y.) 468, 5 Thomp. & C. (N. Y.) 10.

North Carolina. — *Ham v. Kornegay*, 85 N. Car. 119; *Latta v. Russ*, 8 Jones L. (53 N. Car.) 111; *Lansdell v. Winstead*, 76 N. Car. 366; *State v. Johnston*, 8 Ired. L. (30 N. Car.) 381; *State v. Britton*, 11 Ired. L. (33 N. Car.) 110; *Taylor v. Brooks*, 4 Dev. & B. L. (20 N. Car.) 143; *Goodman v. Goodman*, 72 N. Car. 508; *Grant v. Reese*, 94 N. Car. 720.

Ohio. — *Slagle v. Entekin*, 44 Ohio St. 637.

Pennsylvania. — *Com. v. Strohecker*, 9 Watts (Pa.) 479; *Weld v. McClure*, 9 Watts (Pa.) 495.

South Carolina. — *Villard v. Robert*, 1

Devastavit by Original Executor or Administrator. — He may also recover against his

Strobb, Eq. (S. Car.) 403; *Miller v. Alexander*, 1 Hill Eq. (S. Car.) 25.

Texas. — *Boulware v. Hendricks*, 23 Tex. 667; *Todd v. Willis*, 66 Tex. 704.

The Assets of an Estate Are Not Regarded as Administered, under the modern American doctrine, until they have been collected and applied as required by law or by the will of the testator. *Balch v. Hooper*, 32 Minn. 158; *Casoni v. Jerome*, 58 N. Y. 321; *Tracy v. Card*, 2 Ohio St. 431; *Curtis v. Lynch*, 19 Ohio St. 392; *Douglas v. Day*, 28 Ohio St. 175; *Slagle v. Entrekin*, 44 Ohio St. 637.

Thus, in *Florida* it is said that an administration is correctly defined to be "a change, alteration, or conversion" of the goods of the testator or intestate, and by this is meant a change in the property, not a change in specie. *Gregory v. Harrison*, 4 Fla. 56; *Adams v. Internal Imp. Fund*, 37 Fla. 266.

In *Iowa* money in the hands of an administrator at the time of his removal may be recovered by the administrator *de bonis non* unless it appears that all the debts of the estate have been liquidated. *Stewart v. Phenice*, 65 Iowa 475, *distinguishing* *Kelley v. Mann*, 56 Iowa 625.

The Maryland Act of 1798, c. 101, subc. 14, § 2, which made it the duty of administrators *de bonis non* to administer all things described therein as assets not converted into money and not distributed or delivered or retained under the court's direction, did not make anything subject to administration in the hands of the administrator *de bonis non* which did not exist in specie; but by a later statute (Act 1820, c. 174, § 3; Pub. Gen. Laws, art. 93, § 72) an administrator *de bonis non* was authorized to recover "all the bonds, notes, accounts, and evidences of debt which the deceased administrator may have taken, received, or had as administrator at the time of his death, and also * * * the money in his hands as such." *Sibley v. Williams*, 3 Gill & J. (Md.) 52; *Donaldson v. Raborg*, 26 Md. 326.

But an administrator *de bonis non* in *Maryland* cannot recover money in the hands of his predecessor, unless authorized to do so by an order of court, so that it may be ascertained whether such money is unadministered assets. *West v. Chappell*, 5 Gill (Md.) 228; *Johnson v. Farmers' Bank*, 11 Md. 414; *State v. Hart*, 57 Md. 234.

In *Missouri* the decisions on this point are not harmonious. Thus, in *State v. Campbell*, 10 Mo. 724, and *State v. Morton*, 18 Mo. 53, it was held that the heirs or distributees may sue the administrator for failure to account for money received by him, as soon as the failure occurs, though no order of distribution or final settlement has been made.

In *State v. Fulton*, 35 Mo. 323, it was held that when an administrator dies or is removed before final settlement the administrator *de bonis non* alone can sue for assets unadministered, and that the heirs have no right of action, though the debts have been paid, until distribution is ordered.

In *Vastine v. Dinan*, 42 Mo. 269, it was held that the heirs have a right of action when the

debts have been paid and distribution ordered. In *State v. Maison*, 44 Mo. 305, it was held that the heirs can sue, though no order of distribution has been made, if the debts have all been paid and there has been a final settlement.

In *State v. Dulle*, 45 Mo. 269, it was held that the heirs have no right of action for unadministered assets until distribution has been ordered.

In *State v. Farmer*, 54 Mo. 439, it was held that an administrator *de bonis non* has the right to sue for and collect assets for the purpose of properly distributing them.

In *State v. Thornton*, 56 Mo. 325, it was held that when the debts have been paid, the distributees may sue though there has been no order of distribution and no final settlement, and that in such case there is no necessity for the appointment of an administrator *de bonis non*.

In *Scott v. Crews*, 72 Mo. 261, it was held that notwithstanding the previous decisions giving distributees the right of action when the debts have been paid, the Probate Court may appoint an administrator *de bonis non*, and that such administrator may recover unadministered assets in the hands of his predecessor.

In *Morehouse v. Ware*, 78 Mo. 100, the court, after a review of the previous decisions, reached the conclusion that the right of the administrator *de bonis non* to recover unadministered assets is not affected by the fact that an order of distribution has been made, but that until such order is complied with and the heirs have been paid the estate is not fully administered.

Choses in Action, When Collected, are converted into money, and are therefore administered in the sense of the *Maryland* statute (Act 1798, c. 101, subc. 14, § 4), which defines unadministered assets to be such as have not been converted into money. Accordingly it was held that where an attorney collected for an administrator money due the decedent, and the administrator gave the debtor a receipt for the amount, and charged himself with it in his account, it was administered assets, though the attorney never paid it over to the administrator. *Wilson v. Arrick*, 4 MacArthur & M. (D. C.) 228, 112 U. S. 83.

Books and Papers Belonging to Estate. — Under the *Texas* statute an administrator *de bonis non* may compel his predecessor to deliver books and papers belonging to the estate, but not his own vouchers. *Miller v. Jasper*, 10 Tex. 513.

A Final Settlement Is Not Necessary in order to enable an administrator *de bonis non* to recover the assets in the hands of the former administrator, or to hold the sureties on his bond. *State v. Porter*, 9 Mo. 356.

Right of Administrator De Bonis Non Exclusive. — Ordinarily the right of the administrator *de bonis non* to the unadministered assets is exclusive of the legatees, next of kin, and creditors. *Smith v. Billing*, 3 Cranch (C. C.) 355; *Lee v. Wright*, 1 Rawle (Pa.) 149; *Little v. Walton*, 23 Pa. St. 164; *Connelly's Appeal*, 1 Grant's Cas. (Pa.) 366; *Com. v. Strohecker*, 9

predecessor or his predecessor's representatives for any devastavit or maladministration.¹

Accounting by Original Executor or Administrator. — And he is authorized in some states to require a settlement of his predecessor's accounts.²

Watts (Pa.) 479; Montgomery's Estate, 7 Phila. (Pa.) 504; New Jersey Mut. L. Ins. Co. v. Corbin, 34 Leg. Int. (Pa.) 36, 12 Phila. (Pa.) 257.

Liability for Negligence. — If an administrator *de bonis non* fails to use due care and diligence in collecting all of the assets in the hands of the first administrator when the administration terminated, he is liable to the persons interested in the estate, though he was not guilty of positive fraud. Grant v. Reese, 94 N. Car. 720.

But he is not liable for a failure to collect judgments recovered by the former administrator, where he did not have notice of the existence of such judgments. State v. Rugles, 23 Mo. 339.

Where the Decedent Died Before the Enactment of the Statute abrogating the common-law rule that an administrator *de bonis non* succeeds only to the assets left unadministered by his predecessor, the statute does not apply, and therefore an administrator *de bonis non* is not in such case chargeable on his accounting with the proceeds of sales made by his predecessor. *In re Small*, 5 Pa. St. 258.

1. Administrator De Bonis Non May Recover Devastavit by Predecessor — *Alabama*. — Whitworth v. Oliver, 39 Ala. 286; Martin v. Ellerbe, 70 Ala. 326; Eubank v. Clark, 78 Ala. 73.

Georgia. — Oglesby v. Gilmore, 5 Ga. 56; Knight v. Lassetter, 16 Ga. 151.

Indiana. — Graham v. State, 7 Ind. 470, 65 Am. Dec. 745; State v. Porter, 9 Ind. 342; Myers v. State, 47 Ind. 293; Day v. Worland, 92 Ind. 75; Lucas v. Donaldson, 147 Ind. 139.

Louisiana. — Granger v. Reid, 36 La. Ann. 845.

Minnesota. — Palmer v. Pollock, 26 Minn. 433.

Mississippi. — Forniquet v. Forstall, 34 Miss. 87.

Missouri. — State v. Campbell, 10 Mo. 724; State v. Morton, 18 Mo. 53; State v. Farmer, 54 Mo. 439; Morehouse v. Ware, 78 Mo. 100; Van Bibber v. Julian, 81 Mo. 618.

North Carolina. — Ferebee v. Baxter, 12 Ired. L. (34 N. Car.) 64; Cannon v. Jenkins, 1 Dev. Eq. (16 N. Car.) 426; Badger v. Jones, 66 N. Car. 305; Hardy v. Miles, 91 N. Car. 131; Grant v. Reese, 94 N. Car. 720; Brittain v. Dickson, 104 N. Car. 547.

Ohio. — Herckelrath v. Van Nes, (Cinc. Super. Ct.) 31 Cinc. Wkly. L. Bul. 35.

Pennsylvania. — Drenkle v. Sharman, 9 Watts (Pa.) 485.

Tennessee. — Shackelford v. Runyan, 7 Humph. (Tenn.) 141; Whitaker v. Whitaker, 12 Lea (Tenn.) 393.

Texas. — Grothaus v. Witte, 72 Tex. 124.

In Indiana a recovery by an administrator *de bonis non* for a devastavit committed by his predecessor can be had only in an action on the official bond of the predecessor. Lucas v. Donaldson, 117 Ind. 139.

In Maryland an administrator *de bonis non*

cannot recover for a devastavit committed by his predecessor. The provision of the statute allowing a recovery for "all the bonds, notes, accounts, and evidences of debt which the deceased administrator may have taken, received, or had as administrator at the time of his death, and also * * * the money in his hands as such" (Act 1820, c. 174, § 3; Pub. Gen. Laws, art. 93, § 72), is held not to give the administrator *de bonis non* the right to recover for property which has been wasted or destroyed. In such cases the creditors or others interested in the estate must resort to the estate of the delinquent executor or administrator. Sibley v. Williams, 3 Gill & J. (Md.) 52.

The Rhode Island Statute (Pub. Stat., c. 184, § 27), which gives an action to "an administrator appointed to succeed an executor or administrator resigning or removed" to recover the goods and effects of the decedent, is held not to authorize an action by the administrator *de bonis non* to recover for a devastavit or maladministration by his predecessor, but only a direct action against such predecessor or his representatives for the goods of the decedent remaining unadministered; and furthermore only to authorize such an action where the predecessor has resigned or has been removed, and not where he died in office. Probate Ct. v. Smith, 16 R. I. 444.

Limitation of Power to Sue for Devastavit. — In some jurisdictions an administrator is authorized to sue for a devastavit or maladministration by his predecessor, only in cases of removal or resignation, and not where the predecessor has died in office. Marsh v. People, 15 Ill. 284; Short v. Johnson, 25 Ill. 489; Stose v. People, 25 Ill. 600; Duffin v. Abbott, 48 Ill. 17; Tracy v. Card, 2 Ohio St. 431; Herckelrath v. Van Nes, (Cinc. Super. Ct.) 31 Cinc. Wkly. L. Bul. 35.

2. Requiring Settlement of Predecessor's Accounts. — Simmons v. Price, 18 Ala. 405; Whitworth v. Oliver, 39 Ala. 286; Martin v. Ellerbe, 70 Ala. 326; Matter of Radovich, 74 Cal. 536, 5 Am. St. Rep. 466; Matter of O'Brien, 45 Hun (N. Y.) 284; Clark v. Ford, 3 Keyes (N. Y.) 370, 3 Abb. Pr. N. S. (N. Y.) 245, 34 How. Pr. (N. Y.) 478, 1 Abb. App. Dec. (N. Y.) 359; Harrison v. Clark, 87 N. Y. 572.

An administrator *de bonis non* who has obtained a decree on the settlement of the accounts of the preceding administration is chargeable with such decree as money received. Seawell v. Buckley, 54 Ala. 592.

In Ohio, where an executor or administrator has died, the administrator *de bonis non* cannot require an accounting, but the only remedy given by the statute is by an action on the bond of the deceased executor or administrator. Douglas v. Day, 28 Ohio St. 175.

In Tennessee an administrator *de bonis non* may compel a former administrator to account by a bill in equity. Whitaker v. Whitaker, 12 Lea (Tenn.) 393; but not in an action at law. Stott v. Alexander, 2 Sneed (Tenn.) 650; Cheek

In Some Jurisdictions the subject is wholly regulated by statute, and an administrator *de bonis non* has no other powers than such as the statute confers.¹

2. Privity Between Successive Administrators. — As a general rule, there is no technical privity between an executor and administrator and the succeeding administrator *de bonis non*,² because the administrator *de bonis non* takes the unadministered assets as the representative of the decedent, and not as the representative of the preceding executor or administrator.³ Therefore, a judgment recovered by or against one is not enforceable at common law by or against the other.⁴ But this principle has been changed in *England*,⁵ and in

v. Wheatley, 3 Sneed (Tenn.) 484; *Thomas v. Stanley*, 4 Sneed (Tenn.) 411.

In *Shackelford v. Runyan*, 7 Humph. (Tenn.) 141, Judge Reese said: "However it may be in England or elsewhere, an administrator *de bonis non* in our state is clothed with the full powers and subject to all the duties of the first personal representative, and is embraced and described in our statutes by the general description of administrator, whether by such statute powers are given or duties imposed. It results from this that he can call to account the personal representatives of the first administrator."

If the Preceding Administrator Has Already Accounted to the surrogate, the administrator *de bonis non* cannot require him to account as to matters included in the previous settlement. *Yale v. Baker*, 2 Hun (N. Y.) 468, 5 Thomp. & C. (N. Y.) 10.

1. Powers of Administrator De Bonis Non Wholly Regulated by Statute. — *Croxton v. Renner* 103 Ind. 223; *Stewart v. Phenice*, 65 Iowa 475.

2. No Technical Privity Between Successive Administrators — England. — *Yaites v. Gough*, Yelv. 33.

Alabama. — *Graves v. Flowers*, 51 Ala. 402, 23 Am. Rep. 555; *Martin v. Ellerbe*, 70 Ala. 326.

Connecticut. — *Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 703; *American Board of Foreign Missions*, 70 Conn. 344.

Massachusetts. — *Grout v. Chamberlin*, 4 Mass. 611.

Mississippi. — *Ruff v. Smith*, 31 Miss. 59; *Duncan v. Watson*, 28 Miss. 187.

Pennsylvania. — *Allen v. Irwin*, 1 S. & R. (Pa.) 549; *In re Small*, 5 Pa. St. 258.

3. Administrator De Bonis Non Represents Decedent, and Not Predecessor — England. — *Catherwood v. Chabaud*, 1 B. & C. 154, 8 E. C. L. 67.

Alabama. — *Weeks v. Love*, 19 Ala. 25.

Connecticut. — *American Board of Foreign Missions*, 27 Conn. 344.

Maine. — *Waterman v. Dockray*, 78 Me. 139.

Maryland. — *State v. Wright*, 4 Har. & J. (Md.) 148.

Mississippi. — *Sloan v. Johnson*, 14 Smed. & M. (Miss.) 47.

Tennessee. — *Bell v. Speight*, 11 Humph. (Tenn.) 451.

"By the Common Law, the Two Administrations Were Separate, Distinct, Independent of each other. The one was not the mere successor to or continuation of the other. Each was, of itself, an immediate, full administration. The administrator in chief, by the terms of the grant to him, was clothed with title to, and the duty and authority of administering, all

the goods and chattels, rights and credits, which were of the testator or intestate at the time of his death. The administrator *de bonis non*, by the terms of the grant to him, was confined, limited in authority to the goods and chattels, rights and credits, of the testator or intestate, which were unadministered; it was *de bonis non administratis*. The import of the terms of the respective grants clearly indicates the distinction between them, and, so far as regards the administrator *de bonis non*, directs attention as to what act of the administrator in chief, or what was done while his authority was of force, within the line of his duty, was an administration." *Martin v. Ellerbe*, 70 Ala. 339.

In *Tiffany v. Thompson*, 9 Grant's Ch. (U. C.) 244, the power of an administrator *de bonis non* to call in question the administration of his predecessor in office was referred to, and a doubt was expressed, but the point was not decided.

4. A Judgment Recovered by an Executor or Administrator is not enforceable at common law by the administrator *de bonis non*, but he may bring a new action for the same cause. *Yaites v. Gough*, Yelv. 33, Cro. Jac. 4; *Turner v. Davies*, 2 Saund. 149; *Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 703; *Grout v. Chamberlin*, 4 Mass. 612; *Allen v. Irwin*, 1 S. & R. (Pa.) 549.

A Writ of Error to correct a judgment obtained by an executor cannot be maintained at common law by the administrator *de bonis non*, because of the want of priority between them. *Grout v. Chamberlin*, 4 Mass. 611.

Scire Facias, for the same reason, cannot be sued out by an administrator *de bonis non* on a judgment recovered by the preceding administrator. *Allen v. Irwin*, 1 S. & R. (Pa.) 549; *Potts v. Smith*, 3 Rawle (Pa.) 361, 24 Am. Dec. 359.

A Judgment Against an Executor is, as to the succeeding administrator *de bonis non*, *res inter alios acta*, and is neither binding on him nor admissible as evidence against him. *Graves v. Flowers*, 51 Ala. 402, 23 Am. Rep. 555; *Wilson v. Auld*, 8 Ala. 842; *McLaughlin v. Nelms*, 9 Ala. 925; *Rogers v. Grannis*, 20 Ala. 247; *Brothers v. Gunnels*, 110 Ala. 436; *Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 703; *Ruff v. Smith*, 31 Miss. 59.

5. Statutory Authority of Administrator De Bonis Non to Enforce Judgment. — By statute 17 Car. II., c. 8, § 2, it was provided that "where any judgment after a verdict shall be had by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue forth a scire facias and take execution upon such judgment." *Underhill v. Dever-*

the *United States* various statutes on the subject have been enacted, giving administrators *de bonis non*, with or without the will annexed, power to prosecute or defend actions commenced by or against their predecessors, to commence and prosecute actions on promises made to their predecessors in their representative characters, to sue and defend writs of error, writs of scire facias, and writs of execution on judgments obtained by or in the name of their predecessors, and to proceed with and perfect all executions which may have been issued thereon at the instance of such predecessors.¹

Qualification of Rule. — The rule that there is no privity between successive administrators is subject, however, to the important qualification that all acts of the executor or administrator done in the rightful administration of the estate are binding on the administrator *de bonis non*.² Thus, it has been held

eux, 2 Saund. 720, note. See *Turner v. Davies*, 2 Saund. 149. See also *Grout v. Chamberlin*, 4 Mass. 611. Under this statute it must appear that the judgment was after verdict. A judgment by default is not within the equity of the statute. *Clerk v. Withers*, 1 Salk. 322, 2 Ld. Raym. 1072, 6 Mod. 290, 11 Mod. 35. But if an administrator obtains a decree in equity and dies before enrolment, the administrator *de bonis non* may revive the decree with the equity of the statute. *Owen v. Curzon*, 2 Vern. 237; *Fletcher v. Sanders*, 7 Dana (Ky.) 347, 32 Am. Dec. 96.

This statute has been repealed, but the cases provided for by it are said to come within order 41, rule 3, of the Rules of the Supreme Court, 1883, "whereby it is enacted that where any judgment is pronounced by the court or a judge in court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the court or judge shall otherwise order, and the judgment shall take effect from that date, provided that by special leave of the court or a judge a judgment may be antedated or postdated." 2 Williams on Executors (7th Am. ed.) 95.

1. Statutory Provisions in United States — *Alabama*. — Russell v. Erwin, 41 Ala. 292. See also *Taylor v. Benham*, 5 How. (U. S.) 233.

Arkansas. — *State v. Murray*, 8 Ark. 199.

Connecticut. — *Mansfield v. Lynch*, 59 Conn. 331.

Kentucky. — *Fletcher v. Sanders*, 7 Dana (Ky.) 345, 32 Am. Dec. 96.

Massachusetts. — *Brown v. Pendergast*, 7 Allen (Mass.) 427; *National Bank v. Stanton*, 116 Mass. 438. The Massachusetts statute was enacted in 1817 in consequence of the decisions in *Grout v. Chamberlain*, 4 Mass. 613 (contrary to what was before supposed to be the law, 1 Dane Abr. 577), that there was, by the common law, no privity between an executor and an administrator *de bonis non*; that the latter therefore could not maintain a writ of error to reverse a judgment recovered by the former; that such judgment became ineffectual by the death of the former while it was unsatisfied; and that a new action might be brought for the same cause of action, by the latter. *Brown v. Pendergast*, 7 Allen (Mass.) 427.

Nebraska. — *Burlington, etc., R. Co. v. Crockett*, 17 Neb. 570; *Trumble v. Williams*, 18 Neb. 144.

New York. — *Dole v. Roosevelt*, 8 Cow. (N. Y.) 333.

North Carolina. — *Thompson v. Badham*, 70 N. Car. 141.

Pennsylvania. — *Meiser v. Eckhart*, 19 Pa. St. 201; *Com. v. Strohecker*, 9 Watts (Pa.) 479.

Tennessee. — *Brasfield v. Cardwell*, 7 Lea (Tenn.) 252.

But an administrator *de bonis non* is not entitled to have execution of a decree in favor of his predecessor until he has made himself a party, either by scire facias or according to the course of courts of equity. *Ellison v. Andrews*, 12 Ired. L. (34 N. Car.) 188.

2. Administrator De Bonis Non Bound by Lawful Administrative Acts of Predecessor. — *Martin v. Elieber*, 70 Ala. 340; *Johnston v. Lewis*, Rice Eq. (S. Car.) 40; *Coleman v. M'Murdo*, 5 Rand. (Va.) 51. See also *Breckinridge v. Waters*, 4 Dana (Ky.) 628.

In *Duncan v. Watson*, 28 Miss. 187, Mr. Justice Handy, delivering the opinion of the court, said: "In many respects the acts of the administrator, within the sphere of his duty and power, are obligatory upon his successor, so far as to charge the estate. They bind the administrator *de bonis non* because the estate came to his hands charged with them by acts of the administrator which he might legitimately do in the management of the estate while in his hands. If this were not so, the admission of the payment of a debt due the estate, or the execution of a receipt therefor, which is but another form of admitting payment by the administrator, would not bind the estate in the hands of his successor; and the administrator would be capable of doing no act, however legitimate, to the management of the estate, and in whatever good faith done, that could create a liability upon the estate, or continue one already existing. Under this rule, if the intestate, in his lifetime, had contracted to pay a sum of money by a stated time, upon a third person performing a certain act, and the intestate died before the time appointed, and the other party complied with his contract by the day, the admission by the administrator that the other party had complied would not be sufficient to give him the benefit of the contract against the estate. Such a principle, if carried out, would produce the greatest inconvenience to estates, if it would not make the administration of them impracticable. We take it to be clear that an administrator may make admissions which will bind the estate, provided he acts in good faith and with due regard to the best interests of the

that there is such privity between an executor or administrator and the administrator *de bonis non* that in assumpsit by the administrator *de bonis non* the promise may be alleged to have been made to the original executor or administrator; ¹ and in some jurisdictions a promise by an executor or administrator to pay a debt which is barred by the statute of limitations precludes the administrator *de bonis non* from pleading the statute in an action against him for such debt. ²

Privity Created by Statute. — In some jurisdictions it is held that a privity between an administrator *de bonis non* and the preceding executor or administrator is created by statutes providing that an action by or against an executor or administrator shall not abate by his death, but may be revived by or against the administrator *de bonis non*; but in other jurisdictions this result is held not to follow from statutes which give an administrator *de bonis non* the right to recover from his predecessor for devastavits or to require him to account. ³

estate, and in a matter necessarily connected with its administration."

If an Administrator Agrees to Sell a chattel interest in real estate and dies before the agreement is completed, the administrator *de bonis non* stands in such privity of estate that he will be compelled to perform the agreement. *Hirst v. Smith*, 7 T. R. 178; *Cubbidge v. Boatwright*, 1 Russ. 549.

An administrator *de bonis non* will not be permitted to repudiate the contract of his predecessor without compensating the other party for all loss that may result to him. *Cock v. Carson*, 38 Tex. 284.

Presentation of Claims. — A written acknowledgment by an executor that a claim was presented within the time required by law is evidence of the fact of presentation as against the administrator *de bonis non*. *Starke v. Keenan*, 5 Ala. 590. So, too, an admission by an executor or administrator made while in office that a claim against the estate was duly presented to him. *Pharis v. Leachman*, 20 Ala. 662.

A Settlement by the Original Administrator cannot be impeached by the administrator *de bonis non* on the ground that a just debt paid had not been previously allowed by the Probate Court. *Young v. Scott*, (Kan. 1898) 54 Pac. Rep. 670.

Acts Done Before Grant of Letters. — An act done by an administrator before letters are granted, which is validated under the rule that for certain purposes the letters relate back to the death of the decedent, is binding on the administrator *de bonis non*, because he is only the successor of the first administrator, and has no greater rights. Thus, a payment by a savings bank of the amount of a deposit made by a decedent, to a person who is afterwards appointed administrator, is validated by the subsequent grant of letters, and the administrator cannot recover the amount of the deposit from the bank. *Whitlock v. Bowery Sav. Bank*, 36 Hun (N. Y.) 460.

Fraudulent Acts of Administrator. — In an action by an administrator *de bonis non* on a note taken by the former administrator for the price of chattels of the estate sold by him, the purchaser may show in defense that such former administrator committed a fraud by artfully concealing the defective condition of the chattels sold. *Rice v. Richardson*, 3 Ala. 428.

1. Action on Promise Made to Original Executor or Administrator. — *Hirst v. Smith*, 7 T. R. 178; *Moseley v. Rendell*, L. R. 6 Q. B. 338.

2. Promise by Original Executor or Administrator to Pay Debt Barred by Limitation. — See *supra*, this title, *Powers, Duties, and Liabilities in General* — *Power to Waive Statute of Limitations*.

3. Privity Created by Statute. — In *Thompson v. Badham*, 70 N. Car. 141, the court, after reciting certain statutory provisions relating to the revival of actions in the name of the administrator *de bonis non*, said: "Under these or similar acts it has been settled in this state that a privity does exist between an administrator and an administrator *de bonis non*, for many if not for all purposes. The latter succeeds to all the rights of the intestate in respect to personal property which the administrator has not fully administered. He alone, to the exclusion of creditors and distributees, can recover from the representative of a deceased administrator not only the property remaining *in specie* (which is the general law), but also the value of the assets which the administrator has wasted or misapplied." See also *Stacy v. Thrasher*, 6 How. (U. S.) 60; *Duke v. Ferebee*, 7 Jones L. (52 N. Car.) 10; *Hackney v. Steadman*, 1 Jones L. (46 N. Car.) 207; *State v. Johnston*, 8 Ired. L. (30 N. Car.) 397; *Ferebee v. Baxter*, 12 Ired. L. (34 N. Car.) 64; *State v. Britton*, 11 Ired. L. (33 N. Car.) 110; *State University v. Hughes*, 90 N. Car. 537; *Gilliam v. Watkins*, 104 N. Car. 180; *Neagle v. Hall*, 115 N. Car. 415; *Ham v. Kornegay*, 85 N. Car. 119; *Alexander v. Wolfe*, 88 N. Car. 398; *Merrill v. Merrill*, 92 N. Car. 657; *Dykes v. Woodhouse*, 3 Rand. (Va.) 287.

Privity Is Not Created by statutes which give the administrator *de bonis non* the right to recover from his predecessor for a devastavit or to require him to account. "These statutes," said Brickell, J., "are designed to expedite the administration of estates, the payment of the debts of the decedent, and a distribution to those entitled. We can discover in them no purpose to create a privity or connection between the two administrations which would render the acts or admissions of, or judgments against, the one administrator binding on the other. The reasons prevailing at common law for esteeming the judgment *res inter alios acta*

XVI. SPECIAL AND TEMPORARY ADMINISTRATORS—1. In General.—The powers and duties of a special or temporary administrator are usually fixed by statute, or by the terms of the letters granted to him, and terminate when letters testamentary or general letters of administration are granted.¹

The Collection and Preservation of the Estate is generally the extent of the authority of a special administrator;² but in order to preserve the estate he is authorized to bring all necessary actions, and to appear and defend actions against the estate, or to prosecute actions brought by the decedent in his lifetime.³

are as potent for so esteeming it under the statutory provisions to which we have referred." *Graves v. Flowers*, 51 Ala. 402, 23 Am. Rep. 555. And in *Martin v. Ellerbe*, 70 Ala. 341, the same judge said: "The title, authority, and duty of the administrator *de bonis non* are simply enlarged [by the statute], and extended to the reduction into possession of assets for the payment of debts or legacies, or for distribution, to which it was not extended at common law." See also *Thomas v. Sterns*, 33 Ala. 137.

1. Special and Temporary Administrators—Powers Fixed by Letters or by Statute.—*Faulkner v. Daniel*, 3 Hare 217; *Davis v. Chanter*, 2 Phil. 545, 17 L. J. Ch. N. S. 297; *Dull v. Drake*, 68 Tex. 205.

In California the office and duties of a special administrator are very similar to those of a receiver in equity. Each is appointed by the court to take charge, under its direction, of property in litigation, or which is involved in the proceedings before it, with a view to its care and preservation for the parties to whom the court may ultimately decide that it belongs. The powers and duties of each are special, and limited to such as are defined by statute, or expressed in the order of his appointment, or which he may from time to time receive for the purpose of more effectually preserving the estate intrusted to his charge. *Matter of Moore*, 88 Cal. 1.

In Indiana the statute (Rev. Stat. 1894, § 2391) provides that the powers of a special administrator are "to collect and preserve the property of the testator or of the intestate until demanded by an executor or administrator duly authorized to administer the same." *Tomlinson v. Wright*, 12 Ind. App. 292.

The Nebraska Statute (Comp. Stat. 1897, c. 23, § 181) provides that a special administrator "shall collect all the goods, chattels, and debts of the deceased, and preserve the same for the executor or administrator who may afterwards be appointed, and for that purpose may commence and maintain suits as an administrator, and may sell such perishable and other personal estate as the Probate Court may order to be sold." *Cadman v. Richards*, 13 Neb. 383.

A Nominee of the Crown taking out administration to the estate of an intestate is under the same obligation as any other administrator. *Atty.-Gen. v. Kohler*, 9 H. L. Cas. 654, 8 Jur. N. S. 467, 5 L. T. N. S. 35, 9 W. R. 933.

2. Authority Generally Limited to Collection of Debts and Preservation of Estate—England.—In *Goods of Radnall*, 2 Add. Ecc. 232.

Alabama.—*Flora v. Mennice*, 12 Ala. 836; *Erwin v. Branch Bank*, 14 Ala. 307; *Briarfield Iron Works Co. v. Foster*, 54 Ala. 622; *Underhill v. Mobile F. Department Ins. Co.*, 67 Ala.

45; *Wolffe v. Eberlein*, 74 Ala. 99, 49 Am. Rep. 809.

California.—*Henry v. Superior Ct.*, 93 Cal. 569.

Indiana.—*Tomlinson v. Wright*, 12 Ind. App. 292.

Iowa.—*Masterson v. Brown*, 51 Iowa 442.

Mississippi.—*Henderson v. Clarke*, 27 Miss. 436.

New York.—*Riegelman v. Riegelman*, 4 Redf. (N. Y.) 492; *Matter of Parish*, 29 Barb. (N. Y.) 627, 8 Abb. Pr. (N. Y.) 336; *Gottsbarger v. Smith*, 2 Bradf. (N. Y.) 86.

Authority to Lease Real Estate is not given by a statute which declares that the powers of a special administrator are to "collect the personal property, take possession and receive the rents and profits of the real property, preserve and secure the debts, and collect the debts and credits of the decedent." *Lee v. Lee*, 74 N. Car. 70.

Power to Enter into Agreed Case.—A special administrator whose powers are limited to the collection and preservation of the estate until demanded by an executor or administrator duly authorized to administer it has no authority to enter into an agreed case in relation to money or property which he has in his hands. *Tomlinson v. Wright*, 12 Ind. App. 292; *State v. Tomlinson*, 16 Ind. App. 662.

Power to Sell Property of Estate.—An administrator *pro tem.* has no right to sell property of the estate without an order of the Probate Court. *Robinson v. Martel*, 11 Tex. 149.

3. Power to Sue.—The authority given by the *Alabama* statute to "maintain suits as administrator" for the purpose of securing and preserving the estate authorizes a special administrator to file a bill in equity to prevent the removal or destruction of the assets and for their preservation. *Erwin v. Branch Bank*, 14 Ala. 307; *Briarfield Iron Works Co. v. Foster*, 54 Ala. 622.

"In respect to suits he [the special administrator] stands on the same footing as all other administrators, and he is the judge of the propriety of his own course of action, subject only to his liability when the administration is terminated, and the accounts are settled before the surrogate. If he fail to institute suits at the instance of parties in interest, upon the offer of sufficient indemnity against costs, he may be held accountable for the loss resulting from his refusal. The authority he receives consists in 'special letters of administration, authorizing the preservation and collection of the goods of the deceased,' and the statute expressly declares that he shall have power 'to collect the goods, chattels, personal estate, and debts of the deceased, and to secure the same at such reasonable expense as the surrogate shall allow, and for these

He cannot, as a general rule, pay any claims against the estate, either debts of the decedent, costs and expenses of proving the will, funeral expenses, legacies, or distributive shares.¹

2. Administrators Pendente Lite. — A temporary administrator appointed during the pendency of litigation respecting the will or the right to the administration, known as an administrator *pendente lite*, is generally held to be an officer of the court by which he is appointed, and not the mere agent of the persons on whose recommendation he was selected;² and his authority at common law was quite limited, being confined to the collection and preservation of the effects of the decedent.³ But this authority has been considerably

purposes he may maintain suits as administrator.' The law therefore empowers him to bring suits 'as administrator,' and this too of his own motion, and without being compelled in the first place to ask the permission of the surrogate." *DeLafield v. Parish*, 4 Bradf. (N. Y.) 24. See also *Libby v. Christy*, 1 Redf. (N. Y.) 465, *sub nom.* *Christy's Estate*, Tuck. (N. Y.) 24.

The Power to Prosecute or Defend Actions or proceedings by or against the decedent or his estate is a necessary incident to, and may be inferred from, the power of a special administrator to collect and preserve the assets. *Masterson v. Brown*, 51 Iowa 442.

Power given by statute to "commence and maintain suits as an administrator" includes, by necessary inference, the power to appear and defend an action against the estate, *Cadman v. Richards*, 13 Neb. 383; or to be substituted as defendant in place of the decedent in an action the cause of which survives, *Getty v. Amelung*, 7 Alb. L. J. 415.

An Action to Recover Chattels Fraudulently Transferred by the Decedent is not maintainable by a special administrator in *Minnesota*. *Richmond v. Campbell*, (Minn. 1898) 73 N. W. Rep. 1099.

A Collector cannot be sued in his representative capacity at common law. *Erwin v. Branch Bank*, 14 Ala. 307.

1. No Authority to Pay Claims Against Estate. — *Erwin v. Branch Bank*, 14 Ala. 307; *Henry v. Superior Ct.*, 93 Cal. 569; *State v. Tomlinson*, 16 Ind. App. 662; *Pickering v. Weiting*, 47 Iowa 242; *Henderson v. Clarke*, 27 Miss. 436; *Matter of Parish*, 29 Barb. (N. Y.) 627, 8 Abb. Pr. (N. Y.) 336; *Matter of Haskett*, 3 Redf. (N. Y.) 165; *Matter of Cogswell*, 4 Redf. (N. Y.) 241; *Riegelman v. Riegelman*, 4 Redf. (N. Y.) 492; *Matter of Aaron*, 5 Dem. (N. Y.) 362.

In New York an action on a debt of the decedent may be maintained against a special administrator by leave of the surrogate; but such leave will not be granted where the estate might suffer a greater injury therefrom than the creditors would by a refusal. *Matter of Fleming*, 5 Dem. (N. Y.) 336.

The *New York* statute also provides that the surrogate may, by order, authorize a temporary administrator "to pay funeral expenses, or any expenses of the administration of his trust, or stenographer's or referee's fee on contest of a will or administration; and he may also direct the payment of a legacy or other pecuniary provision under a will, or a distributive share or just proportionate part thereof." Code Civ. Pro. N. Y., 1898, § 2972.

Under this provision fees for legal services rendered to the temporary administrator are considered "expenses of the administration," and as such may be paid by the temporary administrator by leave of the surrogate. *Stokes v. Dale*, 1 Dem. (N. Y.) 260.

Costs allowed by a decree awarding administration are not within the statute, and therefore the surrogate cannot order the temporary administrator to pay them, even with the consent of the parties. *Badger's Estate*, 3 Month. L. Bul. (N. Y.) 71.

Nor can the temporary administrator be permitted to pay a sum to enable the proponents of the will to procure the attendance of expert witnesses to testify as to the mental capacity of the testator. The authority of the court to direct the application of any moneys in the hands of the temporary administrator is limited to the occasions for which provision is made by the statute. *Kruse v. Fricke*, 2 Dem. (N. Y.) 264, 4 Civ. Pro. Rep. (N. Y.) 177.

The expenses of a controversy over the probate of a will or the right to administer which the surrogate may direct the temporary administrator to pay are limited to the stenographer's and referee's fees. *Matter of Aaron*, 5 Dem. (N. Y.) 362.

A temporary administrator cannot charge the estate with money paid by him to a surety company for becoming the surety on his official bond. *Jenkins v. Shaffer*, 6 Dem. (N. Y.) 59.

Presentation of Claims. — Since a special administrator has no authority to allow or to pay claims against the estate, a claim need not be presented to him in order to prevent the bar of the statute of limitations. *Erwin v. Branch Bank*, 14 Ala. 307; *Pickering v. Weiting*, 47 Iowa 242.

Distribution cannot be made by a special administrator. *Henderson v. Clarke*, 27 Miss. 436. See also *supra*, this title, *Distribution of Estate — By Whom Payment or Delivery May Be Made*.

2. Administrators Pendente Lite Are the Officers of the Court. — *Stanley v. Bernes*, 1 Haggl. 10; 221; *Ellmaker's Estate*, 4 Watts (Pa.) 35.

Analogy to Receivership. — An administrator *pendente lite* occupies more nearly the position of a receiver, who acts under the direction of the court, than that of a general administrator. *Lamb v. Helm*, 56 Mo. 433.

3. Powers at Common Law. **Collection of Assets.** — *Adair v. Shaw*, 1 Sch. & Lef. 254; *Goodrich v. Jones*, 2 Curt. Ecc. 457; *Gallivan v. Evans*, 1 B. & B. 192.

Interest on Balance in Hand. — An administrator *pendente lite* is not liable for interest on

extended both in *England* and in the *United States*, so that in general terms it may be said that an administrator *pendente lite* may now do almost anything that a general administrator could do,¹ except invest the funds, pay legacies, and distribute the estate.²

The Duration of the Authority of an administrator *pendente lite* is limited *ex vi termini* to the pendency of the litigation which was the occasion of his appointment;³ but if an appeal is taken therein it operates as an extension of the litigation, and the powers of the administrator *pendente lite* continue until the appeal is disposed of.⁴

3. Administrators Ad Litem. — The powers of an administrator *ad litem*, which are very limited, are generally defined by the terms of his appointment, and he can do no act not authorized thereby.⁵

a balance in his hands during the pendency of the contest. *Gallivan v. Evans*, 1 B. & B. 191.

1. The Court of Probate Act (20 & 21 Vict., c. 77, § 70) provides that an administrator *pendente lite* shall have all the rights and powers of a general administrator other than the right of distributing the residue of the personality. *Tichborne v. Tichborne*, L. R. 2 P. & D. 41.

All Lawful Acts done by an administrator *pendente lite* are binding on the estate. *Patton's Appeal*, 31 Pa. St. 465.

Actions by Administrator Pendente Lite. — As an incident to his authority to collect and preserve the effects of the decedent, an administrator *pendente lite* has power to bring any suits that may be necessary for that purpose. *Knight v. Duplessis*, 1 Ves. 324; *Walker v. Wollaston*, 2 P. Wms. 576; *Ball v. Oliver*, 2 Ves. & B. 96; *Libby v. Cobb*, 76 Me. 471; *Matter of Colvin*, 3 Md. Ch. 278; *Kaminer v. Hope*, 18 S. Car. 561.

Thus, he may file a bill in equity to redeem a mortgage in order to stop the running of the statute of limitations. *Libby v. Cobb*, 76 Me. 471.

Participation in the Contest respecting the will or the right to the administration is no part of the duty of the administrator *pendente lite*. *Dietrich's Appeal*, 2 Watts (Pa.) 332; *Ford v. Ford*, 7 Humph. (Tenn.) 92.

2. Administrator Pendente Lite Cannot Invest Funds, Pay Legacies, or Distribute Estate. — *Gallivan v. Evans*, 1 B. & B. 191; *Adair v. Shaw*, 1 Sch. & Lef. 254; *Benson v. Wolf*, 43 N. J. L. 78; *Ellmaker's Estate*, 4 Watts (Pa.) 35; *Com. v. Mateer*, 16 S. & R. (Pa.) 416; *Winpenny's Estate*, 11 Phila. (Pa.) 20, 32 Leg. Int. (Pa.) 50; *Kaminer v. Hope*, 9 S. Car. 253; *Stevenson v. Wilcox*, 16 S. Car. 432.

But if he pays a legacy in good faith, he will be allowed therefor on his accounting. *Adair v. Shaw*, 1 Sch. & Lef. 254.

Payment of Annuity. — In appointing an administrator *pendente lite* the court cannot, except with the consent of all interested parties, give him special powers to pay an annuity, by way of maintenance, to one of the residuary legatees who is also one of the next of kin. *Whittle v. Keats*, 35 L. J. P. & M. 54.

3. Powers Cease with Contest Which Occasioned Appointment. — *Ro Bards v. Lamb*, 89 Mo. 303; *Cole v. Wooden*, 18 N. J. L. 15; *Brown v. Ryder*, 42 N. J. Eq. 356; *Thomson v. Tracy*, 60 N. Y. 174; *Winpenny's Estate*, 11 Phila. (Pa.) 20, 32 Leg. Int. (Pa.) 50.

"An administration *pendente lite* is a limited trust, and expires *eo instanti* the will is established; the very name implies that it cannot exist longer than the pendency of the suit. Upon the establishment of the will, the executor may immediately act, even before probate. There is no necessity for a citation to revoke the letters *pendente lite*, but the register may proceed to grant letters to the executors, or, where they renounce, to the administrator with the will annexed; and this was the course here pursued." *Com. v. Mateer*, 16 S. & R. (Pa.) 416.

In *Cole v. Wooden*, 18 N. J. L. 15, Hornblower, C. J., speaking of the duration of the office of administrators *pendente lite*, says: "Their authority is more limited than that of any other administrators, and *ex vi termini* ceases the moment the suit concerning the will is terminated. If the will is established, they are at once superseded by the executors, or, if occasion requires, by administration, with the will annexed, or during minority, or *durante absentia*; but they can no longer act as administrators, either in relation to third persons or to each other. If on the other hand the will is overruled, administration at large is to be granted to those who by law may be entitled to have it. Immediately, then, as soon as the will was abandoned, and the deceased admitted to have died intestate, new letters ought to have been granted to proper persons, as general administrators, in ordinary cases. If new administrators had been appointed, they would have had a right to call on the administrators *pendente lite* to settle their accounts; and if the administrators *pendente lite* claimed or were entitled to the general right of administration, they might have been required by the persons interested to close up their accounts as special administrators."

A suit against an administrator *pendente lite* may, on the termination of the contest respecting the will, be abated by him by a plea of *puis darrein continuance*. *State v. Craddock*, 7 Har. & J. (Md.) 40.

4. Effect of Appeal. — *Taylor v. Taylor*, 6 Prob. Div. 29; *Gresham v. Pyron*, 17 Ga. 263.

In *Texas* a temporary administrator's powers cease on the day for taking up probate business at the next term of the County Court after he was appointed. *Dull v. Drake*, 68 Tex. 205.

5. Administrators Ad Litem. — See *supra*, this title, *Appointment and Tenure of Office — Special and Temporary Administrators — Adminis-*

4. **Administrators Durante Minoritate.** — The authority of an administrator *durante minoritate* is limited only in point of time, and in other respects it is the same as that of a general administrator.¹

XVII. REPRESENTATIVES OF EXECUTORS AND ADMINISTRATORS — Executor of Executor. — It has been seen in a previous part of this article that an executor of a sole executor, or a sole surviving executor, became the representative of the first testator at common law, but that this rule has generally been abrogated in the *United States*.²

As to Other Representatives of Executors and Administrators, that is, administrators of either executors or administrators and executors of administrators, and also executors of executors in the jurisdictions where the common-law rule respecting them has been changed by statute, their powers and duties in regard to the unadministered portion of the estate of the first decedent are limited to taking possession of such assets in order to preserve them until the appointment of an administrator *de bonis non*, and delivering them to the administrator *de bonis non* when appointed. This is the general rule in regard to the personal representatives of decedents occupying fiduciary relations.³ But such of the assets of the estate of the first decedent as have been "administered," so as to divest the title of the estate, pass to the representative of the deceased executor or administrator as assets of the estate of his decedent.⁴ It

trators *ad Litem*, where their powers are incidentally discussed.

In *Russell v. Umphlet*, 27 Ark. 339, it was said that an administrator *ad litem*, not being under any bond or affidavit, is without authority of law to bind any one in interest, and that no decree can be properly made against him.

In *New York* it is provided that "where a right of action is granted to an executor or administrator by special provision of law, if it appears to be impracticable to give a bond sufficient to cover the probable amount to be recovered, the surrogate may, in his discretion, accept modified security and issue letters limited to the prosecution of such action, but restraining the executor or administrator from * * * the enforcement of any judgment recovered therein until the further order of the surrogate." Code Civ. Pro., 1898, § 2664. Under this statute it is held that where such letters are granted for the purpose of recovering damages for the death of the decedent, the administrator has no right to receive the amount recovered, and that payment to him by the defendant does not discharge the latter. *Lowman v. Elmira, etc.*, R. Co., 85 Hun (N. Y.) 188.

1. **Powers of Administrator Durante Minoritate Same as Those of Ordinary Administrator.** — *In re Cope*, 16 Ch. Div. 49, 50 L. J. Ch. 13, 43 L. T. N. S. 566, 29 W. R. 98; *Lawson v. Crofts*, 1 Sid. 57; *Fotherby v. Pate*, 3 Atk. 603; *Monsell v. Armstrong*, L. R. 14 Eq. 423; Com. Dig., tit. Administration, (F); Roll. Abr., tit. Executors, (M), (1).

Dicta to the Contrary in older cases were disapproved of by Sir George Jessel, M. R., in *In re Cope*, 16 Ch. Div. 49, 50 L. J. Ch. 13, 43 L. T. N. S. 566, 29 W. R. 98, as follows: "The question in this case is raised by reason of some obscure dicta in some musty old law books about the power of an administrator *durante minore astate*. The limit to his administration is no doubt the minority of the person, but there is no other limit. He is an ordinary administrator, he is appointed for the very pur-

pose of getting in the estate, paying the debts, and selling the estate in the usual way; and the property vests in him."

A Power of Sale given to executors may be executed by an administrator *durante minoritate*, if it could be executed by a common administrator. *Monsell v. Armstrong*, L. R. 14 Eq. 423.

See also *supra*, this title, *Appointment and Tenure of Office — Special and Temporary Administrators — Administrators Durante Minoritate*, where their powers are incidentally considered.

2. **Executor of Executor.** — See *supra*, this title, *Appointment and Tenure of Office — Executors — Executor of Executor*.

3. **Powers and Duties of Representatives of Executors and Administrators in General.** — See *supra*, this title, *Management and Care of Estate — In General — Trust Estates*. See also the various local codes and statutes in the United States.

The Duty to Deliver the Assets to the Administrator De Bonis Non is not affected by the fact that the deceased executor had a personal claim against the estate of his testator, and that a special proceeding regarding it is pending. *Stewart v. O'Donnell*, 2 Dem. (N. Y.) 17.

4. **What Assets Vest in Representative of Deceased Executor or Administrator.** — Money collected by an administrator in his representative capacity and deposited in bank to his credit as administrator passes at his death to his personal representative, and not to the administrator *de bonis non* of the estate of which he had been the representative. *Slaymaker v. Farmers' Nat. Bank*, 103 Pa. St. 616; *Sibbs v. Philadelphia Sav. Fund Soc.*, 153 Pa. St. 345, 32 W. N. C. (Pa.) 68.

A bond and mortgage taken by an executor in his individual name for money of the estate which he had loaned in his individual capacity is enforceable only by his personal representative. *Caulkins v. Bolton*, 98 N. Y. 511.

For a Full Discussion as to what passes to an administrator *de bonis non* and what to the

is also the duty of such representative to settle the administration accounts of his decedent.¹ If the deceased executor or administrator had committed a devastavit, the rule at common law was that no action would lie against his representative, because a devastavit was regarded as a tort,² but the only remedy in such case was in equity.³ According to the modern practice in the *United States*, however, an action at law may be brought against the representative of a deceased executor or administrator for a devastavit committed by such decedent.⁴

XVIII. INDEPENDENT EXECUTORS. — In some jurisdictions a peculiar form of administration is authorized by statutes which provide that a testator may direct his executor to administer the estate without the intervention or control of the court of probate.⁵

XIX. EXECUTORS DE SON TORT — 1. **Definition.** — An executor *de son tort* (of his own wrong) is defined to be a person who, without any authority, intermeddles with the estate of the decedent and does such acts as properly belong to the office of an executor or administrator.⁶

2. **General Principles.** — What acts make a person liable as an executor *de son tort* is a matter of law for the court to decide, but the existence of the facts is for the determination of the jury.⁷

representative of the deceased executor or administrator, see *supra*, this title, *Administrators De Bonis Non*.

1. **Duty to Settle Administration Accounts of Decedent.** — *Wilson v. Hinton*, 63 Ark. 145; *Murray v. Vanderpoel*, 2 Dem. (N. Y.) 311; *Wood v. Crooke*, 5 Redf. (N. Y.) 381; *Spencer v. Popham*, 5 Redf. (N. Y.) 425. See also *Matter of Ranney*, 66 How. Pr. (N. Y. Surrogate Ct.) 291, *sub nom.* *Bunnell v. Ranney*, 2 Dem. (N. Y.) 327. And see *supra*, this title, *Accounting — Duty to Account*.

2. **Action for Devastavit Committed by Deceased Executor or Administrator Not Maintainable at Common Law.** — *Taliferro v. Bassett*, 3 Ala. 670; *Draughon v. French*, 4 Port. (Ala.) 352. See also *Anthony v. McCall*, 3 Blackf. (Ind.) 86; *Griffith v. Beasley*, 10 Yerg. (Tenn.) 434.

3. **Remedy in Equity.** — *Draughon v. French*, 4 Port. (Ala.) 352. See also *Moore v. Smith*, 5 N. J. Eq. 649, 4 N. J. Eq. 485; *Schenck v. Schenck*, 16 N. J. Eq. 174.

4. **Modern Rule in United States — Action for Devastavit.** — *Windsor v. Bell*, 61 Ga. 671; *Barbour v. Robertson*, 1 Litt. (Ky.) 93; *Sibley v. Williams*, 3 Gill & J. (Md.) 52; *Trescott v. Trescott*, 1 McCord Eq. (S. Car.) 417.

5. **Independent Executors.** — The *Texas* statute provides that "any person capable of making a will may so provide in his will that no other action shall be had in the County Court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement, and lists of claims of his estate." *Rev. Stat. Tex.*, 1895, art. 1995; *Smithwick v. Kelly*, 79 Tex. 564; *Dwyer v. Kalteyer*, 68 Tex. 554; *Lumpkin v. Smith*, 62 Tex. 251; *Lacy v. Williams*, 8 Tex. 182; *McIntyre v. Chappell*, 4 Tex. 187.

Formerly, under the *Texas* statute, in order to take the administration of an estate out of the Probate Court, it was not enough that the will contained a provision which the statute contemplated, but it was also necessary that the persons entitled to the estate should give their assent, otherwise the estate could be settled only in a Probate Court. *Henderson v. Van Hook*, 25 Tex. Supp. 453.

The *Washington* statute (Code 1881, § 1443, 2 Hill's Annot. Stat. 1891, § 955; now embodied in 2 Ball. Annot. Codes 1897, § 6196) provides that "in all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that letters testamentary or of administration shall not be required, it shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will in the manner required by existing laws; and after the probate of such will, all such estates may be managed and settled without the intervention of the court, if the said last will and testament so provides." *Newport v. Newport*, 5 Wash. 114; *Miller v. Borst*, 11 Wash. 260.

Insolvency is held not to disable a testator from exercising his power, under the *Texas* statute, of exonerating his estate from the probate jurisdiction of the courts. *Shackelford v. Gates*, 35 Tex. 782.

6. **Executor De Son Tort Defined.** — *Barnard v. Gregory*, 3 Dev. L. (14 N. Car.) 223.

"An Executor De Son Tort is a person who, without any authority from the deceased or the ordinary, does such acts as belong to the office of an executor or an administrator." *Alexander v. Kelso*, 1 Baxt. (Tenn.) 5.

See also *Swinburne on Wills*, pt. 4, § 23, pl. 1; *Godolph.*, pt. 2, c. 8, § 1; *Wentw. Off. Ex.* (14th ed.), c. 14, p. 320; 1 *Williams on Executors* (7th Am. ed.) 298.

The *Georgia* Statute (Code 1895, § 3310) defines an executor *de son tort* as follows: "If any person, without authority of law, wrongfully intermeddles with, or converts to his own use, the personality of a deceased individual whose estate has no legal representative, he shall be held and deemed an executor in his own wrong."

See also statutes in other jurisdictions.

7. **When Liability Exists — How Determined.** — *Padget v. Priest*, 2 T. R. 97; *Haacke v. Gordon*, 6 U. C. Q. B. 424; *Ward v. Beville*, 10 Ala. 197, 44 Am. Dec. 478; *Brown v. Durbin*, 5 J. J. Marsh. (Ky.) 172.

"The question whether the defendant was

When Doctrine Applies. — It has often been said that there cannot be an executor *de son tort* when there is a rightful executor or administrator, because if a stranger gets possession of the goods of the decedent he is a trespasser to the rightful executor or administrator, and may be sued as such.¹ This statement, however, is not to be understood as denying that in any case there may be an executor *de son tort* when there is a rightful executor or administrator, for it is held that if a person gets the goods of a decedent into his hands before administration is granted he remains chargeable as executor *de son tort* afterwards, unless he delivers the goods to the rightful administrator before an action is brought.² Another instance occurs where a fraudulent transfer of property had been made by the decedent in his lifetime. In such case the fraudulent grantee is chargeable as executor *de son tort* at the suit of creditors in those jurisdictions where an executor or administrator cannot sue to set aside fraudulent transfers made by his testator or intestate.³ And if a stranger assumes to act as executor, collecting assets, or paying debts or legacies, he becomes an executor *de son tort* though there is a rightful executor or administrator.⁴

Rights and Powers. — An executor *de son tort*, though subject to all the liabilities of a rightful executor or administrator, does not possess the same rights and powers.⁵

An Executor De Son Tort of a Duly Constituted Executor is liable at common law in respect of the debts of the original testator.⁶

executor *de son tort* was partly a question of law and partly of fact. The court determines what state of facts will constitute a party executor of his own wrong, and the jury determines whether such facts exist in the given case." *Caruthers v. Moore*, 1 Shannon Tenn. Cas. 60.

1. No Executor De Son Tort Where There Is Rightful Representative. — The proposition stated in the text has been laid down in the following cases: *Reade's Case*, 5 Coke 33; *Anonymous*, 1 Salk. 313; *Fowler v. Cooke*, 1 Salk. 297; *Ward v. Beville*, 10 Ala. 200, 44 Am. Dec. 478; *Turner v. Child*, 1 Dev. L. (12 N. Car.) 25, 17 Am. Dec. 555; *Francis v. Welch*, 11 Ired. L. (33 N. Car.) 215. See also *Tomlin v. Beck*, T. & R. 438; *Hall v. Elliot*, 1 Peake N. P. (ed. 1795) 86; *Bacon v. Parker*, 12 Conn. 212; *O'Bannon v. Cord*, 1 Ky. L. Rep. 398, 3 Ky. L. Rep. 183; *McMorine v. Storey*, 3 Dev. & B. L. (20 N. Car.) 87.

2. Taking Possession Before Grant of Administration. — *Anonymous*, 1 Salk. 313; *Reade's Case*, 5 Coke 33; *Ward v. Beville*, 10 Ala. 200, 44 Am. Dec. 478.

3. Fraudulent Grantee Chargeable as Executor De Son Tort — *Georgia*. — *Gleaton v. Lewis*, 24 Ga. 209; *Clayton v. Tucker*, 20 Ga. 452; *Howland v. Dews*, R. M. Charl. (Ga.) 383.

Kentucky. — *Warren v. Hall*, 6 Dana (Ky.) 450.

Maine. — *Allen v. Kimball*, 15 Me. 116.

Maryland. — *Dorsey v. Smithson*, 6 Har. & J. (Md.) 61.

Mississippi. — *Garner v. Lyles*, 35 Miss. 176.

Missouri. — *Foster v. Nowlin*, 4 Mo. 18.

New York. — *Osborne v. Moss*, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252.

North Carolina. — *Sturdivant v. Davis*, 9 Ired. L. (31 N. Car.) 365; *McMorine v. Storey*, 3 Dev. & B. L. (20 N. Car.) 87.

Pennsylvania. — *Crunkleton v. Wilson*, 1 Browne (Pa.) 361.

Virginia. — *Chamberlayne v. Temple*, 2 Rand. (Va.) 384, 14 Am. Dec. 786; *Shields v. Anderson*, 3 Leigh (Va.) 729.

See also *infra*, this section, *Acts Constituting Executor De Son Tort — Possession Taken or Held under Conveyance from Decedent*.

If the executor or administrator has no authority, under the local law, to sue to set aside fraudulent conveyances of his testator or intestate, the fraudulent grantee is not liable to him as executor *de son tort*, but only to creditors. *Simonton v. McLane*, 25 Ala. 353; *Tucker v. Williams*, *Dudlev L. (S. Car.)* 329; *Hopkins v. Towns*, 4 B. Mon. (Ky.) 124, 39 Am. Dec. 497; *Dorsey v. Smithson*, 6 Har. & J. (Md.) 61.

Setting Aside Fraudulent Conveyance of Decedent. — As to the right of executors and administrators to sue to set aside fraudulent conveyances and transfers made by their testators or intestates, see *supra*, this title, *Management and Care of Estate — Setting Aside Fraudulent Conveyances*.

4. Assuming to Act as Executor. — *Anonymous*, 1 Salk. 313; *Ward v. Beville*, 10 Ala. 200, 44 Am. Dec. 478; *State v. Rogers*, 1 Harr. (Del.) 121, note a; *Foster v. Nowlin*, 4 Mo. 18.

5. Executor Not Entitled to Privileges of Ordinary Executor. — *Carmichael v. Carmichael*, 2 Phil. 101, 10 Jur. 908.

Right to Sue. — An executor *de son tort* has no power to sue in respect to the decedent's estate. *Francis v. Welch*, 11 Ired. L. (33 N. Car.) 215. But see *Oughton v. Seppings*, 1 B. & Ad. 241, 20 E. C. L. 380, in which it was said that an executor *de son tort* has a sufficient title to maintain an action against a mere wrongdoer for the seizure of a chattel.

6. Executor De Son Tort of Duly Constituted Executor. — *Meyrick v. Anderson*, 14 Q. B. 719, 68 E. C. L. 719, 14 Jur. 457, 19 L. J. Q. B. 231.

An Executor De Son Tort of an Executor De Son Tort has been held to represent the first testator, and where property was held by the first testator in trust the statute of limitations does not begin to run in respect to such property in favor of the executor *de son tort* of the person who was executor *de son tort* of the first testator, until he has terminated the relation by converting the trust property to his own use.¹

An Executor of an Executor De Son Tort is not liable for a breach of contract committed by the original testator, though the executor *de son tort* had actually possessed himself of the property in respect to which the contract was made.²

The Term "Administrator De Son Tort" is inaccurate. No such person is recognized by law; and where a person is sued in that capacity, it will be presumed to have been through oversight or ignorance, and that an executor *de son tort* was intended.³

3. Modern American Doctrine. — In several of the states of the Union the doctrine of liability as executor *de son tort* to creditors of a decedent has been declared by the courts to be abrogated by the statutory systems for the administration of the estates of decedents adopted therein.⁴ On the other hand, the doctrine is still recognized and is frequently applied in many states.⁵

1. Executor De Son Tort of Executor De Son Tort. — *Dawson v. Callaway*, 18 Ga. 573.

2. Executor of an Executor De Son Tort Not Liable for Breach of Contract by Original Testator. — *Wilson v. Hodgson*, 41 L. J. Exch. 49, L. R. 7 Exch. 84, 20 W. R. 438.

3. Administrator De Son Tort Not Recognized by Law. — *Hutchinson v. Fulghum*, 4 Heisk. (Tenn.) 550.

4. Doctrine Abrogated in United States — *Arkansas*. — *Barasien v. Odum*, 17 Ark. 122; *Rust v. Witherington*, 17 Ark. 129.

California. — *Bowden v. Pierce*, 73 Cal. 459; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656; *Hamilton's Estate*, 34 Cal. 468; *Valencia v. Bernal*, 26 Cal. 335.

Kansas. — *Fox v. Van Norman*, 11 Kan. 214.

Louisiana. — The doctrine of the common law in regard to executors *de son tort* does not obtain under the system prevailing in this state. See *Carl v. Poelman*, 12 La. Ann. 344; *Walworth v. Ballard*, 12 La. Ann. 245. *Compare Mouton's Succession*, 3 La. Ann. 561.

Michigan. — *Gilkey v. Hamilton*, 22 Mich. 283.

Missouri. — *Rozelle v. Harmon*, 29 Mo. App. 569.

Ohio. — *Dixon v. Cassell*, 5 Ohio 533; *Benjamin v. Le Baron*, 15 Ohio 517.

Oregon. — *Rutherford v. Thompson*, 14 Oregon 236.

Texas. — *Ansley v. Baker*, 14 Tex. 607, 65 Am. Dec. 136; *Green v. Rugely*, 23 Tex. 539; *Hunt v. Butterworth*, 21 Tex. 133, 73 Am. Dec. 223; *Vela v. Guerra*, 75 Tex. 595.

The Alabama Statute provides that "no person is liable to an action, as executor of his own wrong, for having taken, received, or interfered with the property of a deceased person, but is liable to the executor or administrator for the value of all the property so taken or received, and for all damages caused by his act to the estate of the deceased." *Winfrey v. Clarke*, 107 Ala. 355.

In New York the doctrine has been abolished by statute. *Brown v. Brown*, 1 Barb. Ch. (N. Y.) 189; *Field v. Gibson*, 20 Hun (N. Y.) 274;

Rev. Stat. N. Y. (Banks's 9th ed.), vol. 2, p. 1907, § 17. The change effected by this statute seems to lie only in taking the right of action away from creditors or others beneficially interested in the estate, and giving to the legal representative of a decedent the exclusive right to sue intermeddlers. See *Brown v. Brown*, 1 Barb. Ch. (N. Y.) 189; *Muir v. Leake*, etc., Orphan House, 3 Barb. Ch. (N. Y.) 477; *Mills v. Mills*, 115 N. Y. 80; *In re Richardson*, 2 Misc. Rep. (N. Y. Surrogate Ct.) 288.

As to the former rule in New York, see *Campbell v. Tousey*, 7 Cow. (N. Y.) 64.

The Vermont Statute providing that an administrator may recover of any person embezzling or alienating any of the effects of a deceased person before the granting of administration, double the value, and that he "shall in no other way or manner be liable therefor," is held only to take away the common-law right of a creditor to sue such person as executor *de son tort*, and not to take away the common-law right of the administrator to sue in trespass or trover. *Roys v. Roys*, 13 Vt. 543. See also *Shaw v. Hallihan*, 46 Vt. 389, 14 Am. Rep. 628; *Blodgett v. Converse*, 60 Vt. 410.

5. Doctrine Recognized in United States — *United States*. — *Peters v. Breckenridge*, 2 Cranch (C. C.) 518.

Alabama. — *Simonton v. McLane*, 25 Ala. 353.

Connecticut. — *Bennett v. Ives*, 30 Conn. 329; *Marcy v. Marcy*, 32 Conn. 314; *Bacon v. Parker*, 12 Conn. 212.

Delaware. — *Wilson v. Hudson*, 4 Harr. (Del.) 168.

Georgia. — *Barron v. Burney*, 38 Ga. 264.

Illinois. — *McClure v. People*, 19 Ill. App. 107.

Indiana. — *Brown v. Sullivan*, 22 Ind. 359, 85 Am. Dec. 421.

Iowa. — *Madison v. Shockley*, 41 Iowa 451; *Elder v. Littler*, 15 Iowa 65.

Kentucky. — *Brown v. Durbin*, 5 J. J. Marsh. (Ky.) 170.

Maine. — *White v. Mann*, 26 Me. 361.

4. Acts Constituting Executor De Son Tort — *a.* IN GENERAL. — As a general rule, a person makes himself an executor *de son tort* by any act of intermeddling with the goods of a decedent by which he assumes to dispose of them, or otherwise to usurp the functions of a duly constituted executor or administrator.¹ Though it is not necessary to constitute a person an executor *de son tort* that in dealing with the estate he should act in the character of executor,² the test is whether the acts done by him are of a sort that may properly be done only by such a functionary.³

b. USURPING FUNCTIONS OF EXECUTOR OR ADMINISTRATOR. — Within the general rule stated in the preceding paragraph, a person who is not an executor or administrator becomes an executor *de son tort* if, without color of title, he takes possession of the personal property of a decedent's estate,⁴ or

Maryland. — Neale *v.* Hagthorp, 3 Bland (Md.) 565; Baumgartner *v.* Haas, 68 Md. 32.

Massachusetts. — Mitchel *v.* Lunt, 4 Mass. 654.

Mississippi. — Hunt *v.* Drane, 32 Miss. 243; Ellis *v.* McGee, 63 Miss. 168.

Missouri. — Foster *v.* Nowlin, 4 Mo. 18. But see Rozelle *v.* Harmon, 29 Mo. App. 582.

New Hampshire. — Emery *v.* Berry, 28 N. H. 473, 61 Am. Dec. 622.

New Jersey. — Parker *v.* Thompson, 30 N. J. L. 311.

North Carolina. — Bailey *v.* Miller, 5 Ired. L. (27 N. Car.) 444, 44 Am. Dec. 47.

Pennsylvania. — Crunkleton *v.* Wilson, 1 Browne (Pa.) 361.

South Carolina. — Hubble *v.* Fogartie, 3 Rich. L. (S. Car.) 413, 45 Am. Dec. 775.

Tennessee. — Mitchell *v.* Kirk, 3 Sneed (Tenn.) 319.

Virginia. — Hansford *v.* Elliott, 9 Leigh (Va.) 79.

The Doctrine Is Also Recognized by the numerous cases cited in other portions of this section relating to executors *de son tort*.

1. What Acts Constitute Executor De Son Tort — *In General.* — "There are many acts of a stranger which will constitute him an executor *de son tort*; such as taking possession of the assets and converting them to his own use, paying debts or legacies, commencing actions, releasing debts, etc., and, indeed, any acts done which belong to the office of an executor and furnish evidence to creditors of his being such." Bacon *v.* Parker, 12 Conn. 212.

Almost Any Intermeddling with the goods of a decedent makes the person so intermeddling liable as an executor *de son tort*.

England. — Edwards *v.* Harben, 2 T. R. 587; Hobby *v.* Ruell, 1 C. & K. 716, 47 E. C. L. 716.

Canada. — Powell *v.* Wathen, 10 New Bruns. 258.

Alabama. — Ward *v.* Beville, 10 Ala. 197, 44 Am. Dec. 478; Densler *v.* Edwards, 5 Ala. 31.

Delaware. — State *v.* Rogers, 1 Harr. (Del.) 121, note *a.*

Georgia. — Wilson *v.* Hall, 67 Ga. 53.

Kentucky. — Johnston *v.* Duncan, 3 Litt. (Ky.) 163, 14 Am. Dec. 54; Brown *v.* Durbin, 5 J. J. Marsh. (Ky.) 170.

Mississippi. — O'Reilly *v.* Hendricks, 2 Smed. & M. (Miss.) 388.

Missouri. — Swift *v.* Martin, 19 Mo. App. 488.

New Hampshire. — Emery *v.* Berry, 28 N. H. 473, 61 Am. Dec. 622.

South Carolina. — Howell *v.* Smith, 2 Mc-

Cord L. (S. Car.) 516; Givens *v.* Higgins, 4 McCord L. (S. Car.) 286, 17 Am. Dec. 742; Hubble *v.* Fogartie, 3 Rich. L. (S. Car.) 413, 45 Am. Dec. 775.

Tennessee. — Killebrew *v.* Murphy, 3 Heisk. (Tenn.) 546; Alexander *v.* Kelso, 1 Baxt. (Tenn.) 5.

The Rule Was Formerly Very Strict that no one could intermeddle in the least with the estate of a deceased person, not even to the milking of a cow, without becoming liable as executor *de son tort*. Gerret *v.* Carpenter, 2 Dyer 166*b*, note 11, cited in Hooper *v.* Summersett, Wightw. 16; Padget *v.* Priest, 2 T. R. 97.

But while this strictness has been much relaxed in modern times, the rules against such intermeddling are still regarded as important, because the time that elapses before the grant of the administration affords opportunities of which evil-disposed or intrusive and officious persons should not be allowed to take advantage by interfering with the administration of the person who may thereafter be appointed. Walton *v.* Hall, 66 Vt. 455.

At Common Law a Person Nominated as Executor did not, by assuming to act as such before probate, become an executor *de son tort*. Killebrew *v.* Murphy, 3 Heisk. (Tenn.) 546.

Acting under Void Letters of Administration, or in excess of the authority conferred through letters granted, constitutes one an executor *de son tort*. Bradley *v.* Com., 31 Pa. St. 522; Anonymous, 3 Dyer 256*a*.

As to the powers of an executor before probate of the will, see *supra*, this title, *Powers, Duties, and Liabilities in General* — *Powers Before Probate or Grant of Letters*.

2. Acting in Character of Executor Not Essential. — Seally *v.* Powis, 1 H. & W. 2.

3. Test of Liability. — "The acts by which a person may make himself chargeable as executor in his own wrong are acts of such a character as to indicate that he is possessed of authority to administer upon the estate. 'The material fact to be found is that the party has intruded into the office of executor, and this may be inferred from such acts as are lawful for an executor alone to do, such as collecting, releasing, and paying debts, or any other acts evincing a claim of right to dispose of the effects of the deceased.'" Selleck *v.* Rusco, 46 Conn. 370. See also Wilson *v.* Hudson, 4 Harr. (Del.) 168.

4. Taking Possession of Assets — *England.* — Samuel *v.* Morris, 6 C. & P. 620, 25 E. C. L. 565.

sells it or gives it away,¹ or pays debts or legacies,² or carries on the business in which the decedent was engaged at the time of his death.³ And it has

Georgia. — *Howland v. Dews*, R. M. Charl. (Ga.) 383.

Iowa. — *Murphy v. Murphy*, 80 Iowa 740.

Kentucky. — *Johnston v. Duncan*, 3 Litt. (Ky.) 163, 14 Am. Dec. 54.

Maryland. — *Neale v. Hagthorp*, 3 Bland (Md.) 551; *Glenn v. Smith*, 2 Gill & J. (Md.) 493, 20 Am. Dec. 452.

Massachusetts. — *Root v. Geiger*, 97 Mass. 178.

Mississippi. — *Perkins v. Sturdivant*, (Miss. 1888) 4 So. Rep. 555.

New York. — *Campbell v. Tousey*, 7 Cow. (N. Y.) 64.

South Carolina. — *Hubble v. Fogartie*, 3 Rich. L. (S. Car.) 413, 45 Am. Dec. 775; *Ex p. Davega*, 31 S. Car. 413.

If a person having some color to intermeddle with the goods of the decedent exceeds his authority, that will make him an executor *de son tort*. *Wiley v. Truett*, 12 Ga. 588.

If a Widow Continues in the Possession of her deceased husband's goods, and uses them as her own, she is liable as an executrix *de son tort*. *Hawkins v. Johnson*, 4 Blackf. (Ind.) 21.

But the mere circumstance that a widow has possession of some goods of her deceased husband's estate is not sufficient of itself to render her personally liable to a suit at law for a debt due from the estate, whether she holds the goods under a will of the deceased or as executrix *de son tort*. *Chandler v. Davidson*, 6 Blackf. (Ind.) 367.

Acting under Void Letters of Administration. — A person who acts under letters of administration which are void because the administration bond is executed only by one surety is an executor *de son tort*. *Bradley v. Com.*, 31 Pa. St. 522.

Property Taken under Bequest in Will. — In *Wilbourn v. Wilbourn*, 48 Miss. 38, it was held that where the testator's widow, to whom he had bequeathed his personal estate for the use of herself and their children, subject to his debts, had the use and possession of the property for several years before the qualification of the executor, she was liable as executor *de son tort* for so much of the property, including income, as she appropriated.

Merely Asserting a Claim to the property of a decedent does not make one an executor *de son tort* though the claim was made under a fraudulent conveyance and the sale of the property was thereby injured. *Barnard v. Gregory*, 3 Dev. L. (14 N. Car.) 223.

1. Disposing of Decedent's Property. — A person who sells or gives away property of a decedent thereby makes himself an executor *de son tort*. *Reade's Case*, 5 Coke 33b; *Padget v. Priest*, 2 T. R. 97; *Upchurch v. Norsworthy*, 15 Ala. 705; *Gentry v. Jones*, 6 J. J. Marsh. (Ky.) 154.

But this principle has its foundation in the desire of the law to preserve it in the hands of its authorized agents undiminished, so that first, creditors, second, legatees, and third, heirs, may have what belongs to them, each class in the statutory order of precedence; and it was accordingly held that where the de-

cedent left no property but his wearing apparel, and his widow gave this away, after paying from her own means more than its value in satisfaction of the expenses of his last sickness and burial, she was not liable as an executrix *de son tort*. *Taylor v. Moore*, 47 Conn. 278. See also *Bogue v. Watrous*, 59 Conn. 247. In this case decedent owned personal property worth about one hundred dollars, and there were claims due him amounting to sixteen dollars and twenty-five cents. These claims the defendant, his widow, collected, and used the money, together with the proceeds of the personal property, all of which she sold, in paying the preferred claims against her husband's estate, which amounted to ninety-six dollars and eighty cents, about as much as she realized from the estate. She did not take out administration, and no proceedings were had for the settlement of the estate in the Probate Court. In addition to the above, the defendant paid out of her own money a claim of ninety dollars for groceries, and one for wood the amount of which was not found. It was held that the defendant was not liable as executrix *de son tort*, because she had paid away more than she received.

2. Payment of the Decedent's Debts by a person who is not the executor or administrator is an act which makes him an executor *de son tort*. *Bacon v. Parker*, 12 Conn. 212; *Bennett v. Ives*, 30 Conn. 329; *Gay v. Lemle*, 32 Miss. 309; *Leach v. Pillsbury*, 15 N. H. 137; *Howell v. Smith*, 2 McCord L. (S. Car.) 516; *Jones v. Jones*, 39 S. Car. 247. *Compare Serle v. Waterworth*, 4 M. & W. 9, 6 Dowl. P. C. 684, 2 Jur. 745. In this case the widow of a hair-dresser who died in October, 1836, continued to reside in his house and keep open the shop (through which was the entrance to the house), but there was no proof of any articles being sold. In November she received notice of a bond debt of one hundred pounds due from him, and in December had his goods valued. In January, 1837, on the application of a creditor to whom he owed twenty-four pounds for goods, she gave a promissory note for that amount, payable to the creditor twelve months after date. In March she took out administration. It was held in an action against her on the promissory note that this was not evidence to charge her as executrix *de son tort*.

Paying with One's Own Money the debts of a decedent does not make one executor *de son tort*. *Carter v. Robbins*, 8 Rich. L. (S. Car.) 29.

Payment of Legacies. — If a person who is neither executor nor administrator assumes to pay legacies given by the decedent's will, he becomes an executor *de son tort*. *Bacon v. Parker*, 12 Conn. 212.

3. Continuing Decedent's Business. — The wife of a trader, who continues after his death to keep the house open and sell goods left therein at his decease, is made thereby an executrix *de son tort*. *Keith v. Perks*, 4 New Bruns. 552.

In *Hooper v. Summersett*, Wightw. 16, the husband of an executrix was charged as executor *de son tort* where he carried on the trade of the testatrix (a victualler), though he and

been held that one may be made an executor *de son tort* by the form of his plea or answer in an action brought against him as executor,¹ or by filing for record a will which had been left in his possession by the testator.²

c. POSSESSION TAKEN OR HELD UNDER CONVEYANCE FROM DECEDENT.—It is generally held that where one in his lifetime makes a fraudulent conveyance of his property, the fraudulent grantee may, after the death of the grantor, be charged by the grantor's creditors as executor *de son tort* in respect to the property so conveyed, because the rightful representative of the grantor, being bound by the fraud, is not chargeable in his representative capacity, and cannot recover from the fraudulent grantee.³ If, however, the conveyance was made for a proper purpose, the grantee does not ordinarily become an executor *de son tort* after the grantor's death.⁴

his wife, who was a daughter of the testatrix, were living in the testatrix's house, and the will was afterwards proved by the executrix.

1. Answering in an Action as Executor or pleading any other plea than *ne unques executor* will make one an executor *de son tort*. *Haacke v. Gordon*, 6 U. C. Q. B. 424; *Jessup v. Simpson*, 14 U. C. Q. B. 213; *Davis v. Connelly*, 4 B. Mon. (Ky.) 136.

2. Filing Will for Record.—In *Morrow v. Cloud*, 77 Ga. 114, the decedent left a will in the possession of one M., who filed it and had it recorded by the ordinary, but took out no letters with the will annexed, nor any other legal authority to administer on the estate. It was held that by such act M. made himself executor *de son tort*.

3. Fraudulent Grantee of Decedent Chargeable as Executor De Son Tort—*England*.—*Hawes v. Loader*, Yelv. 196; *Edwards v. Harben*, 2 T. R. 587.

Alabama.—*Densler v. Edwards*, 5 Ala. 31; *Watts v. Gayle*, 20 Ala. 817; *Simonton v. McLane*, 25 Ala. 353.

Georgia.—*Howland v. Dews*, R. M. Charl. (Ga.) 383; *Gleaton v. Lewis*, 24 Ga. 209; *Clayton v. Tucker*, 20 Ga. 452.

Kentucky.—*Hopkins v. Towns*, 4 B. Mon. (Ky.) 124, 39 Am. Dec. 497.

Maine.—*Allen v. Kimball*, 15 Me. 116.

Maryland.—*Dorsey v. Smithson*, 6 Har. & J. (Md.) 61.

Mississippi.—*Garner v. Lyles*, 35 Miss. 176.

New York.—*Osborne v. Moss*, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252; *Babcock v. Booth*, 2 Hill (N. Y.) 181.

North Carolina.—*Bayner v. Robertson*, 3 Dev. L. (14 N. Car.) 439; *McMorie v. Storey*, 3 Dev. & B. L. (20 N. Car.) 87; *Norfleet v. Riddick*, 3 Dev. L. (14 N. Car.) 221; *Bailey v. Miller*, 5 Ired. L. (27 N. Car.) 444, 44 Am. Dec. 47; *Sturdivant v. Davis*, 9 Ired. L. (31 N. Car.) 365.

Pennsylvania.—*Stockton v. Wilson*, 3 P. & W. (Pa.) 129; *Crunkleton v. Wilson*, 1 Brown (Pa.) 361.

South Carolina.—*Tucker v. Williams*, Dudley L. (S. Car.) 329; *Anderson v. Belcher*, 1 Hill L. (S. Car.) 246, 26 Am. Dec. 174.

Tennessee.—*Russel v. Lanier*, 4 Hayw. (Tenn.) 289; *Cobb v. Lanier*, 4 Hayw. (Tenn.) 297.

Compare *Peters v. Breckenridge*, 2 Cranch (C. C.) 518. See also *supra*, this section, *General Principles*, the paragraph *When Doctrine Applies*.

In Some Jurisdictions, however, personal representatives may sue to set aside fraudulent conveyances made by their testators and intestates, in which event the reason of the rule that the fraudulent grantee may be charged by the decedent's creditors as executor *de son tort* does not apply. See *supra*, this title, *Management and Care of Estate—Setting Aside Fraudulent Conveyances*.

4. Conveyance to Secure Debt to Grantee.—In *Mills v. Mills*, 115 N. Y. 80, a debtor conveyed land to his creditor with the intention that the creditor might sell it and reimburse himself to the amount of the debt, and pay over the surplus to the grantor. The grantee, in the lifetime of the grantor, sold the land, receiving more than sufficient for his reimbursement, and the balance was still in his hands at the time of the grantor's death. It was held that the grantee was not liable as executor *de son tort* in respect to such balance, because an executor *de son tort* is one who intermeddles with the estate of the decedent after his death, while in this case all the estate which the grantee had, or which came into his hands, came to him rightfully, and he simply became a debtor to account.

An Agent in possession of his principal's goods for the purpose of selling them may sell after the principal's death and reimburse himself for advances made on account of the goods, and he does not thereby become an executor *de son tort*. *Debesse v. Napier*, 1 McCord L. (S. Car.) 106, 10 Am. Dec. 658.

Conveyance to Indemnify Grantee as Surety.—In *O'Reilly v. Hendricks*, 2 Smed. & M. (Miss.) 388, a debtor in his lifetime conveyed personal property to his surety to secure the surety against liability by reason of his suretyship. The surety became liable, and sold the property after the death of the debtor to indemnify himself. It was held that he did not thereby make himself executor *de son tort*, and that the fact of a surplus remaining in his hands after satisfying the debt was not sufficient so to charge him, administration not having been taken out on the estate of the debtor.

Assignment for Benefit of Creditors.—In *Chattemore v. Stove Co. v. Adams*, 81 Ga. 319, it was held that an assignee for the benefit of creditors, who took possession of the property assigned and sold it partly before and partly after the death of the assignee, and applied the proceeds as directed by the assignment, was not liable as executor *de son tort*, though

d. **DEALINGS WITH EXECUTOR DE SON TORT.** — The transfer of property of a decedent's estate by an executor *de son tort* to a third person does not make such third person an executor *de son tort* also, in the absence of collusion between them.¹

e. **ACTS DONE AS AGENT.** — It is not necessary in all cases that a person dealing with the estate of a decedent should act on his own responsibility in order to constitute him an executor *de son tort*. He may become so liable in respect to acts done by him as the agent or servant of a third person. Accordingly, one who acts as the agent of an executor *de son tort* becomes himself an executor *de son tort*,² unless the acts done by the agent are of such a nature as would not have rendered the principal liable had he performed them himself,³ or unless the acts so done as agent are legalized by a subsequent grant of administration to the principal.⁴ So, too, one who was the

the assignment was void for want of a proper affidavit as to the list of creditors.

Transfer of Notes Charged with Debts. — In *Marshall v. Strange*, (Ky. 1888) 9 S. W. Rep. 250, the holder of a note assigned it to his son, verbally charging the fund, when it should be collected, with the payment of the assignor's debts. The assignee collected the note after the assignor's death, and, having applied only a part of it to the payment of the assignor's debts, it was held that he was liable to the unpaid creditors for the residue.

A Voluntary Grantee Disposing of Property in the Lifetime of the Grantor does not become an executor *de son tort* after the death of the grantor. *Morrill v. Morrill*, 13 Me. 415.

1. **Persons Dealing with Executor De Son Tort.** — If one who has possessed himself of the property of a decedent hands it over to another person, such other person, though he may be charged in equity as a trustee in respect to the property, is not liable as an executor *de son tort*. *Paull v. Simpson*, 9 Q. B. 365, 58 E. C. L. 365, 15 L. J. Q. B. 382; *Hill v. Curtis*, L. R. 1 Eq. 90, 13 L. T. N. S. 584, 12 Jur. N. S. 4, 14 W. R. 125, 35 L. J. Ch. 133; *Tomlin v. Beck*, T. & R. 438, *dissenting* from a dictum of Lord Cottenham in *Carmichael v. Carmichael*, 2 Phil. 101; *Dickenson v. Naul*, 1 N. & M. 721, 4 B. & Ad. 638, 24 E. C. L. 130; *Wiley v. Truett*, 12 Ga. 588; *Johnson v. Gaither*, Harp. L. (S. Car.) 6; *Nesbit v. Taylor*, Rice L. (S. Car.) 296; *Caruthers v. Moore*, 1 Shannon Tenn. Cas. 60.

So a creditor does not become an executor *de son tort* by obtaining payment of his debt from an executor *de son tort*. *Hursell v. Bird*, 65 L. T. N. S. 709.

The party who, even knowingly, receives goods from an executor *de son tort* and deals with them as his own does not himself thereby become an executor *de son tort*. *Smith v. Porter*, 35 Me. 287. But see *Mitchell v. Kirk*, 3 Sneed (Tenn.) 319, holding that where a creditor of a decedent, knowing that administration had not been granted, obtained payment of his claim from the widow, an administrator afterwards appointed may sue him as executor *de son tort* for the amount so received from the widow.

Collusion between an executor *de son tort* and a third person to whom he transfers goods of the decedent, it has been suggested, might render the third person liable as executor *de son tort* also. *Hill v. Curtis*, L. R. 1 Eq. 90,

12 Jur. N. S. 4, 35 L. J. Ch. 133, 13 L. T. N. S. 584, 14 W. R. 125. And it was so held in *Caruthers v. Moore*, 1 Shannon Tenn. Cas. 60.

2. **Acts Done as Agent of Executor De Son Tort.** — One who, as agent of an executor *de son tort*, gets possession of assets of the estate, becomes himself an executor *de son tort*, and he is not relieved of liability as such by delivering the assets received by him to his principal, *Sharland v. Mildon*, 5 Hare 469, 10 Jur. 771, 15 L. J. Ch. N. S. 434; *In re Lovett*, 3 Ch. Div. 198; *Stevenson v. Valentine*, 27 Neb. 338; *Turner v. Child*, 1 Dev. L. (12 N. Car.) 331, 17 Am. Dec. 555; because the only way in which an executor *de son tort* can purge himself is by delivering the property to the rightful executor or administrator before he is sued as executor *de son tort*, *Padget v. Priest*, 2 T. R. 97; *Curtis v. Vernon*, 3 T. R. 587; *Hill v. Curtis*, L. R. 1 Eq. 90, 12 Jur. N. S. 4, 35 L. J. Ch. 133, 13 L. T. N. S. 584, 14 W. R. 125.

Cases to the Contrary. — In *Givens v. Higgins*, 4 McCord L. (S. Car.) 286, 17 Am. Dec. 742, it was held that one acting as agent for the widow, and not knowing in what character she was acting, would be considered as her agent merely, and not as exercising such control over the funds of the estate as to make himself liable. In this case the defendant had, by direction of the widow, transferred certain property of the decedent in payment of one of his debts.

In *Magner v. Ryan*, 19 Mo. 196, it was held that a person who had, by direction of the widow, sold certain goods and paid over to her the proceeds, was not liable as executor *de son tort*, and that no one was liable as such for acts in reference to the administration of an estate which he had done merely as the servant of another.

3. **Acts in Respect to Which Agent Incurs No Liability.** — If the acts done are not such as would have charged the principal as executor *de son tort*, the agent does not become so chargeable, as where a person takes possession of the property of the decedent, at the request of the widow, for the purpose of taking care of it, *Brown v. Sullivan*, 22 Ind. 359, 85 Am. Dec. 421; or under the same circumstances sells perishable property of the estate, *Perkins v. Ladd*, 114 Mass. 420, 19 Am. Rep. 374.

4. **Acts of Agent Legalized by Subsequent Grant of Letters to Principal.** — *Hill v. Curtis*, L. R. 1 Eq. 90, 12 Jur. N. S. 4, 35 L. J. Ch. 133, 13 L.

agent of a decedent makes himself executor *de son tort* if, after the decedent's death, he performs acts which he was authorized as such agent to perform during the decedent's lifetime; ¹ but this result does not follow from acts done as the agent of the rightful executor or administrator. ²

Acting as Agent of the Distributees will not make one an executor *de son tort*, if the estate has no creditors. ³

f. ACTS RESPECTING REAL ESTATE. — Intermeddling with real estate of which the decedent held the fee will not make the intermeddler an executor *de son tort*. Such intermeddling is a wrong merely to the heir or devisee, and does not affect the administration. ⁴ Neither can there be an executorship of this nature with respect to a term of years in reversion, because there can be no entry; ⁵ but there may be such an executorship in respect to a term of years in possession. ⁶

g. ACTS RESPECTING FOREIGN ASSETS. — It is held that a person who, without authority, takes possession of assets in one state and takes them into another is chargeable as executor *de son tort* in the state into which he takes them, ⁷ unless the act was lawful in such foreign jurisdiction. ⁸

T. N. S. 584, 14 W. R. 125; *Sharland v. Mildon*, 5 Hare 469; *Bryant v. Helton*, 66 Ga. 477.

1. Acts Done as Agent of Decedent. — In *Padget v. Priest*, 2 T. R. 97, the defendant, who had been employed by the decedent in his lifetime to sell goods for him, was held liable as executor *de son tort* where he made sales after the decedent's death. See also *White v. Mann*, 26 Me. 361. Compare *Darr v. Darr*, 59 Iowa 81.

But an assignee for the benefit of creditors does not become an executor *de son tort* because of acts done in good faith under the assignment after the death of the assignor, though the assignment was void because it was not executed in accordance with the requirements of law. *Chattanooga Stove Co. v. Adams*, 81 Ga. 319.

2. Acts Done as Agent of Rightful Executor. — A man who possesses himself of the effects of a decedent under the authority of, and as agent for, the rightful executor cannot be charged as an executor *de son tort*. *Hall v. Elliot*, 1 Peake N. P. (ed. 1795) 86; *Cottle v. Aldrich*, 4 M. & S. 175, 1 Stark. 37, 2 E. C. L. 24; *Sharland v. Mildon*, 5 Hare 469, 15 L. J. Ch. N. S. 434. And it is immaterial whether the will has been proved or not. *Sykes v. Sykes*, L. R. 5 C. P. 113, 39 L. J. C. P. 179, 18 W. R. 551, 22 L. T. N. S. 236. But if he continues to act after the death of the executor whose agent he was, he may be charged as executor *de son tort*, though he acts under the advice of another of the executors who had not proved. *Cottle v. Aldrich*, 4 M. & S. 175, 1 Stark. 37, 2 E. C. L. 24.

3. Agent of Distributees. — In *Outlaw v. Farmer*, 71 N. Car. 31, the next of kin of an intestate, whose estate was not indebted, appointed certain persons their agents to settle the estate and make distribution. The agents, as such, sold the property, taking a bond for the price, which they transferred to an administrator afterwards appointed. In an action on the bond brought by the administrator it was contended by the obligors that the bond was void, because the obligees were executors *de son tort*; but it was held that under the circumstances of the case they were not executors *de son tort*, and that the bond was valid, there being a manifest distinction be-

tween estates owing debts, where the rights of creditors and third parties intervene, and estates owing no debts, where the rights of the distributees only are involved.

4. Intermeddling with Lands Does Not Constitute Executor De Son Tort. — *King v. Lyman*, 1 Root (Conn.) 104; *Johnson v. Johnson*, 80 Ga. 260; *Claussen v. Lafrenz*, 4 Greene (Iowa) 224; *Morrill v. Morrill*, 13 Me. 415; *Mitchel v. Lunt*, 4 Mass. 654.

5. Term of Years in Reversion. — *Henrick v. Burgess*, Moor 126.

6. Term of Years in Possession. — A person may be an executor *de son tort* in respect to a term of years and so become liable on the covenants contained in the lease. Thus, where one without authority collected rents accruing on subleases of the premises until the termination of the principal lease, he was held liable as executor *de son tort* for breach of a covenant therein to keep the premises in good repair. *Williams v. Heales*, 43 L. J. C. P. 80, L. R. 9 C. P. 177, 22 W. R. 317, 30 L. T. N. S. 20. See also *Garth v. Taylor*, *Freem.* 261; *Bain v. McIntyre*, 17 U. C. C. P. 500.

So, too, he may be charged with waste, *Norwich v. Johnson*, 3 Lev. 35, 3 Mod. 90; or with the rent reserved in the lease, *Fielding v. Cronin*, 16 Ir. L. Rep. 379.

7. Taking Possession of Foreign Assets. — *Hopkins v. Towns*, 4 B. Mon. (Ky.) 124, 39 Am. Dec. 497; *Emery v. Berry*, 28 N. H. 473, 61 Am. Dec. 622; *Caruthers v. Moore*, 1 Shannon Tenn. Cas. 60. See also *Densler v. Edwards*, 5 Ala. 31.

8. Taking Possession of Foreign Assets Pursuant to Local Law. — In *Beavan v. Hastings*, 2 Kay & J. 724, 2 Jur. N. S. 1044, it was held that where property left in Belgium by the decedent, an Englishman residing there, was taken into possession by his brother as next of kin under the Belgian law, by which a person so taking possession of a decedent's property is considered to have admitted assets as between himself and creditors of the decedent, the brother did not become an executor *de son tort* in England.

"A Foreign Administrator collecting assets belonging to his intestate, where such administration was granted, and bringing them here,

h. ACTS RESPECTING PARTNERSHIP ASSETS. — Intermeddling with the assets of a partnership of which the decedent was a member does not make the intermeddler an executor *de son tort*, but merely renders him liable to account to the surviving partner.¹

i. TAKING ASSETS UNDER COLOR OF TITLE. — It is a well-settled rule that a person does not make himself an executor *de son tort* by taking possession of the property of a decedent's estate, in good faith, under a colorable claim of title adverse to the estate, though the title asserted proves indefensible.²

j. ACTS OF KINDNESS AND CHARITY. — Acts of a stranger in respect to the estate of a decedent, when done merely from motives of kindness or charity, and for no other purpose, do not amount to a usurpation of the functions of an executor or administrator, or constitute an officious intermeddling with the estate.³ Thus a person does not become an executor *de son tort* by directing the funeral of the decedent and defraying the expenses of it, though he appropriates to that purpose assets of the decedent's estate;⁴ or by taking

is not liable to be sued here as executor *de son tort*." *Caruthers v. Moore*, 1 Shannon Tenn. Cas. 60.

1. *Intermeddling with Partnership Assets.* — *Hunt v. Drane*, 32 Miss. 243.

2. *Taking Goods under Color of Title.* — *Ward v. Beville*, 10 Ala. 197, 44 Am. Dec. 478; *Densler v. Edwards*, 5 Ala. 31; *Claussen v. Lafrenz*, 4 Greene (Iowa) 224; *Smith v. Porter*, 35 Me. 287; *Turner v. Child*, 1 Dev. L. (12 N. Car.) 25, 17 Am. Dec. 555; *Brown v. Brown*, 1 C. Pl. Rep. (Pa.) 8; *Morris v. Lowe*, 97 Tenn. 243. *Compare Semmes v. Porter*, *Dudley* (Ga.) 167; *Baumgartner v. Haas*, 68 Md. 32; *Howell v. Smith*, 2 McCord L. (S. Car.) 516.

A Widow who takes property of her deceased husband under a claim of statutory exemption does not become liable as executrix *de son tort*. *Frierson v. Wesbery*, 11 Rich. L. (S. Car.) 353.

If a Person Sets Up in Himself a Colorable Title to the possession of the goods of the decedent, it is sufficient to exempt him from being charged as executor *de son tort*, though he may not be able to establish a completely strict and legal title. *Femings v. Jarrat*, 1 Esp. N. P. 335.

Thus, where the defendant drew money from a savings bank on an order signed by a depositor since deceased, and the executor requested the bank to make the payment, it was held that the defendant was not chargeable as an executor *de son tort*, because he did not receive this money from the savings bank as money due the estate, but as his own. *Selleck v. Rusco*, 46 Conn. 372.

But possession of goods by a person who had received them from the decedent in his lifetime under a colorable sale may be sufficient to charge such person as an executor *de son tort*. *Seally v. Powis*, 1 H. & W. 2.

And it has been held that where a creditor took an absolute bill of sale of the goods of his debtor, but agreed to leave them in his possession for a limited time, and in the meantime the debtor died, whereupon the creditor took and sold the goods, he was liable to be sued as executor *de son tort* for the debts of the decedent, because the debtor's continuing in possession was inconsistent with the deed, and fraudulent against creditors. *Edwards v. Harben*, 2 T. R. 587.

3. *Acts Which Do Not Constitute Executor De Son Tort* — General Rule Stated. — "There are

other acts, equivocal in their character, and such as are ordinarily performed by an executor, which, when explained, as they may always be, will appear to be mere acts of kindness and charity, and such as will not subject a stranger to the actions of creditors; such as locking up and preserving the goods, ordering the funeral obsequies, making a schedule of assets, feeding the cattle, repairing the houses, etc. All these, and perhaps many other acts, may be necessary for the comfort of the family and the preservation of the estate, before a will can be found and proved, and before administration can, with propriety, be commenced." *Bacon v. Parker*, 12 Conn. 212.

Acts of Kindness and Charity may be performed without subjecting the person to the liability of an executor *de son tort*. *Brown v. Sullivan*, 22 Ind. 359, 85 Am. Dec. 421; *Emery v. Berry*, 28 N. H. 473, 61 Am. Dec. 622. See also *Brown v. Benight*, 3 Blackf. (Ind.) 39, 23 Am. Dec. 373.

4. *Directing Funeral.* — In *Harrison v. Rowley*, 4 Ves. Jr. 212, the master of the rolls said: "Giving directions for the funeral is only an act of charity, and will not make a man executor. God forbid it should; for then the deceased could not be buried by any one, from the apprehension of being involved as executor." And in *Camden v. Fletcher*, 4 M. & W. 378, 1 H. & H. 361, 3 Jur. 57, it was held that where a person receives a debt due to the estate of a person deceased, for the purpose of providing the funeral, he will not thereby become chargeable as executor *de son tort*, unless he receives a greater sum than is reasonable for that purpose, regard being had to the estate and condition of the deceased. See also *Serle v. Waterworth*, 4 M. & W. 9, 2 Jur. 745, 6 Dowl. P. C. 684; *Pettengill v. Abbott*, 167 Mass. 307; *Ralston's Estate*, 158 Pa. St. 645.

But if the estate is insufficient to pay the funeral expenses in full, a debtor of the estate who applies the whole amount of the debt to the payment in full of one item of the funeral expenses, leaving the balance unpaid, becomes liable as executor *de son tort* to the persons holding claims against the estate for the unpaid items, to the extent of their *pro rata* shares of the sums paid out. *Bennett v. Ives*, 30 Conn. 329.

steps to preserve the estate from loss or waste.¹

5. Liabilities of Executor De Son Tort — *a. IN GENERAL.* — An executor *de son tort* is subject to all the liabilities of an ordinary executor without being entitled to any of his privileges.² And this liability may be enforced by the decedent's lawful representatives,³ or by creditors, legatees, or distributees,⁴ unless their right to proceed against him has been taken away by statute.⁵

b. EXTENT OF LIABILITY. — At common law the liability of an executor *de son tort* is not measured by the amount of all the property of the decedent that would pass by a will, but by the amount of assets that came to his hands.⁶

In *Conflict with the Authorities* cited *supra*, this note, is the remark of Wheeler, J., that defraying funeral expenses out of the assets of the estate will make one liable as executor *de son tort*. *Shaw v. Hallihan*, 46 Vt. 394, 14 Am. Rep. 628.

1. Measures for Protection of Estate Impose No Liability. — *Bac. Abr.*, tit. Executors, B, 3; *Swinburne on Wills*, pt. 2, § 23; *Brown v. Sullivan*, 22 Ind. 359, 85 Am. Dec. 421; *Glenn v. Smith*, 2 Gill & J. (Md.) 493, 20 Am. Dec. 452; *Blodgett v. Converse*, 60 Vt. 410.

In *Peters v. Leeder*, 47 L. J. Q. B. 573, it became necessary, soon after the death of the decedent, and before letters of administration could be taken out, for his widow to vacate the house which he had occupied, and to remove his furniture therefrom. She accordingly removed part of the furniture to a smaller house which she had purchased, and the residue she sold at auction. The proceeds of the auction, as well as the valuation price of the goods retained by the widow, were duly handed over to the administrator afterwards appointed. Actions having been brought against both the widow and the auctioneer, charging them respectively as executors *de son tort*, it was held that there had been no wrongful intermeddling with the assets, or dealing with them in such a way as denoted an usurpation of the functions of an executor.

In *Graves v. Poage*, 17 Mo. 91, the decedent and the defendant, citizens of Missouri, were digging gold on shares in an unsettled part of California. On the death of the decedent, leaving some gold and wearing apparel, the defendant sold the wearing apparel, caused the gold to be weighed, and a memorandum to be made by his acquaintances, and after paying out of it the expenses of the last sickness and interment started to bring the remainder home to the decedent's family in Missouri. On his way home the gold was stolen. It was held that the defendant was acting merely out of kindness and charity, and that therefore he was not liable as an executor *de son tort*.

A Widow, on the death of her husband, may live where the family resided at that time, and take care of the estate, without becoming liable as an executor *de son tort*. *Ward v. Bevell*, 10 Ala. 197, 44 Am. Dec. 478.

The *Tennessee Statute* authorizes the widow to take into her possession and care all the estate of her deceased husband and the growing crops. *Killebrew v. Murphy*, 3 Heisk. (Tenn.) 546.

2. Liabilities in General. — *Carmichael v. Carmichael*, 2 Phil. 101, 10 Jur. 908.

A Wrongful and a Rightful Executor Differ only in that the first is to take no benefit of his

own wrongful acts. *Oxenham v. Clapp*, 2 B. & Ad. 309, 22 E. C. L. 84.

The *South Carolina Statute* of 1789, which protects executors and administrators from suits until nine months after the death of the testator or intestate, does not apply to executors *de son tort*. They may be sued immediately after intermeddling. *Chambers v. Davison*, 1 Hill L. (S. Car.) 50. See also *McIntire v. Carson*, 2 Hawks (9 N. Car.) 544.

3. Lawful Representatives of Decedent May Sue Executor De Son Tort. — *McCoy v. Payne*, 68 Ind. 327; *Muir v. Leake*, etc., *Orphan House*, 3 Barb. Ch. (N. Y.) 477; *Stockton v. Wilson*, 3 P. & W. (Pa.) 129; *Shaw v. Hallihan*, 46 Vt. 389, 14 Am. Rep. 628.

4. Creditors May Sue Executor De Son Tort. — *Coote v. Whittington*, L. R. 16 Eq. 534; *In re Lovett*, 3 Ch. Div. 198; *Webster v. Webster*, 10 Ves. Jr. 93; *Elder v. Littler*, 15 Iowa 65.

Legatees May Sue Executor De Son Tort. — *Hansford v. Elliott*, 9 Leigh (Va.) 70.

Distributees May Sue Executor De Son Tort. — *Bryant v. Helton*, 66 Ga. 477; *Lee v. Gibbons*, 14 S. & R. (Pa.) 105.

5. While Any Debts Are Unpaid the executor *de son tort* is not liable to the distributees of the decedent's estate. *Leach v. Pillsbury*, 15 N. H. 137; *Muir v. Leake*, etc., *Orphan House*, 3 Barb. Ch. (N. Y.) 477; *Lee v. Wright*, 1 Rawle (Pa.) 149.

6. Extent of Liability — Amount of Assets Received — England. — *Yardley v. Arnold*, 2 Dowl. N. S. 311 10 M. & W. 141, C. & M. 434, 41 E. C. L. 239; *Osborne v. Rogers*, 1 Saund. 265, note 2, citing 2 Dyer 166b, in margin; *Hoooper v. Summersett*, Wightw. 16; *Oxenham v. Clapp*, 2 B. & Ad. 309, 22 E. C. L. 84; *Mountford v. Gibbon*, 4 East 441; *Parten v. Baseden*, 1 Mod. 213; *Keble v. Osbeston*, 110b. 49; *Anonymous*, 1 Salk. 313; *Curtis v. Vernon*, 3 T. R. 587.

United States. — *Roggenkamp v. Roggenkamp*, 68 Fed. Rep. 605; *Baysand v. Lovering*, 1 Cranch (C. C.) 206.

Alabama. — *Berry v. Ferguson*, 58 Ala. 316. *Connecticut.* — *Olmsted v. Clark*, 30 Conn. 110.

Illinois. — *Truett v. Cummons*, 6 Ill. App. 73. *Iowa.* — *Elder v. Littler*, 15 Iowa 65.

Kentucky. — *McKenzie v. Pendleton*, 1 Bush (Ky.) 164; *Brown v. Durbin*, 5 J. J. Marsh. (Ky.) 172.

Maryland. — *Glenn v. Smith*, 2 Gill & J. (Md.) 493, 20 Am. Dec. 452.

Massachusetts. — *Mitchel v. Lunt*, 4 Mass. 654; *Weeks v. Gibbs*, 9 Mass. 77.

Mississippi. — *Hill v. Henderson*, 13 Smed. & M. (Miss.) 688; *Gay v. Lemle*, 32 Miss. 309.

Missouri. — *Swift v. Martin*, 19 Mo. App. 488.

This rule has sometimes been re-enacted by statute,¹ and in several jurisdictions a much greater liability is imposed.²

c. RELIEF FROM LIABILITY—(1) *Taking Out Letters of Administration*.—An executor *de son tort* may purge his wrong and legalize his tortious acts by taking out letters of administration.³

(2) *Delivery of Assets to Rightful Representative*.—And he may also avoid liability by turning over to the rightful representative, before an action is brought against him, all the assets which had come into his hands;⁴ but he cannot relieve himself by delivering over the effects to the rightful executor or administrator after an action has been brought.⁵

(3) *Proper Administration of Assets Received*.—One who is sued as

New Hampshire.—Neal *v.* Baker, 2 N. H. 477; Bellows *v.* Goodall, 32 N. H. 99.

Pennsylvania.—Roumfort *v.* McAlarney, 82 Pa. St. 193; Nass *v.* Vanswearingen, 7 S. & R. (Pa.) 196; Stockton *v.* Wilson, 3 P. & W. (Pa.) 130.

South Carolina.—Leach *v.* House, 1 Bailey L. (S. Car.) 42; Kinard *v.* Young, 2 Rich. Eq. (S. Car.) 247; Cook *v.* Sanders, 15 Rich. L. (S. Car.) 63, 94 Am. Dec. 139.

Texas.—Lockhart *v.* White, 18 Tex. 102.

On the Death of an Executor De Son Tort his estate is liable to the same extent that he himself would have been if living. Alfriend *v.* Daniel, 48 Ga. 154; Swift *v.* Martin, 19 Mo. App. 488.

1. Common-law Rule Re-enacted by Statute.—Elder *v.* Littler, 15 Iowa 65.

2. Liabilities of Executors De Son Tort Increased by Statute.—The Georgia Statute (Code 1895, § 3310) provides that an executor *de son tort* shall be liable to the creditors and heirs or legatees of the estate for double the value of the property possessed or converted by him, without the right to set off any debt due to him by the deceased, or voluntarily paid by him out of the assets. Alfriend *v.* Daniel, 48 Ga. 154.

The Indiana Statute provides that every person who unlawfully intermeddles with any of the property of a decedent is chargeable as an executor of his own wrong, and is liable to an action by any creditor, etc., to the extent of the damage occasioned thereby, and must account for the full value of such property, with ten per centum thereon. Wilson *v.* Davis, 37 Ind. 141; Leach *v.* Prebster, 35 Ind. 415.

The Louisiana Statute makes an intermeddler liable both civilly and criminally, but he must be convicted criminally before he can be subjected to liability in a civil action. Walworth *v.* Ballard, 12 La. Ann. 245; Carl *v.* Poelman, 12 La. Ann. 344.

The New Hampshire Statute provides that if any person shall unlawfully alienate the estate of a deceased person, he shall be chargeable as executor in his own wrong to double the value of the estate so alienated. Pickering *v.* Coleman, 12 N. H. 148; Bellows *v.* Goodall, 32 N. H. 97; Neal *v.* Baker, 2 N. H. 477.

The North Carolina Statute provides that "no person shall enter upon the administration of any decedent's estate, until he has obtained letters therefor, under the penalty of one hundred dollars." To incur the penalty, under this statute, it is held that something more must be done than merely taking the property of a decedent into possession and converting

it to one's own use. That might make him an executor *de son tort*, but he would not incur the penalty, unless, in the words of the act, he entered upon the administration of the estate without first having obtained letters therefor. Administration implies management, not the mere holding the possession of property, but the performance, with regard to it, of such acts as are incident to lawful administrations, as by selling the property, or collecting and paying the debts, or distributing the estate. Currie *v.* Currie, 90 N. Car. 553.

Compare the statutes in other jurisdictions.

3. Relief from Liability—Taking Out Letters of Administration—England.—Vaughan *v.* Browne, 2 Stra. 1106, Andr. 328; Curtis *v.* Vernon, 3 T. R. 587.

Alabama.—Ward *v.* Beville, 10 Ala. 200, 44 Am. Dec. 478.

Connecticut.—Olmsted *v.* Clark, 30 Conn. 108.

Massachusetts.—Shillaber *v.* Wyman, 15 Mass. 322.

New Hampshire.—Emery *v.* Berry, 28 N. H. 473, 61 Am. Dec. 622; Clements *v.* Swain, 2 N. H. 476.

New York.—Rattoon *v.* Overacker, 8 Johns. (N. Y.) 126; Vroom *v.* Van Horne, 10 Paige (N. Y.) 549, 42 Am. Dec. 94; Priest *v.* Watkins, 2 Hill (N. Y.) 225, 38 Am. Dec. 584; Matter of Faulkner, 7 Hill (N. Y.) 181. See also *In re Richardson*, 2 Misc. Rep. (N. Y. Surrogate Ct.) 288.

Compare Tweedy *v.* Bennett, 31 Conn. 278; Green *v.* Dewit, 1 Root (Conn.) 184.

4. Delivery of Assets to Rightful Representative.—Curtis *v.* Vernon, 3 T. R. 587; Oxenham *v.* Clapp, 2 B. & Ad. 309, 22 E. C. L. 84; Crookshank *v.* Macfarlane, 7 New Bruns. 544.

A Fraudulent Donee who has become liable to creditors as executor *de son tort* cannot discharge himself by delivery of the thing given to one who afterwards obtains letters of administration, because such administrator is not chargeable with the value of the property as assets, by reason of the transfer made by the intestate. Morrison *v.* Smith, Busb. L. (N. Car.) 399.

Delivery to Foreign Administrator.—In Nisbet *v.* Stewart, 2 Dev. & B. L. (19 N. Car.) 24, it was held that a resident of North Carolina, at whose house a citizen of Georgia died, was not chargeable as an executor *de son tort* for paying over to an administrator in Georgia money found about the person of the deceased.

5. Delivery of Effects to Rightful Representative After Action Brought.—Curtis *v.* Vernon, 3 T. R. 587, 2 H. Bl. 18.

executor *de son tort* may show in defense that he has applied either the whole amount or some part of the assets that came into his hands to the purposes to which it would have been the duty of a rightful executor or administrator to apply it,¹ but not that he has applied the assets to the satisfaction of debts due to himself, though of a superior degree,² or to the payment of a legacy given him by the will.³ The application of the assets to the payment of the decedent's debts is merely matter of defense, however, and cannot be pleaded in bar of an action by the lawful representative.⁴

1. All Acts Which a Rightful Executor or Administrator Could Have Done will, if done by an executor *de son tort*, completely protect him against liability. *Gay v. Lemle*, 32 Miss. 309.

Thus, if an executor *de son tort* has paid the funeral expenses of the decedent the amount thereof will be deducted from the assets received by him. *Yardley v. Arnold*, 2 Dowl. N. S. 311, 10 M. & W. 141, 41 E. C. L. 239, C. & M. 434.

Just Debts of a Decedent paid according to their legal priority may be set off against the amount for which the executor *de son tort* has made himself liable.

England. — *M'Carthy v. Donovan*, 13 Ir. C. L. Rep. 195; *Mountford v. Gibson*, 4 East 441; *Icely v. Grew*, 6 N. & M. 467, 36 E. C. L. 439; *Hobby v. Ruell*, 1 C. & K. 716, 47 E. C. L. 716.

United States. — *Roggenkamp v. Roggenkamp*, 68 Fed. Rep. 605.

Georgia. — *Dorsett v. Frith*, 25 Ga. 537.

Indiana. — *Reagan v. Long*, 21 Ind. 264.

Maine. — *Tobey v. Miller*, 54 Me. 480.

Massachusetts. — *Weeks v. Gibbs*, 9 Mass. 74; *Carey v. Guillow*, 105 Mass. 18, 7 Am. Rep. 494.

Pennsylvania. — *Saam v. Saam*, 4 Watts (Pa.) 432.

See also *Emery v. Berry*, 28 N. H. 473, 61 Am. Dec. 622; *Cook v. Sanders*, 15 Rich. L. (S. Car.) 63, 94 Am. Dec. 139; *Winn v. Slaughter*, 5 Heisk. (Tenn.) 191.

An executor *de son tort* may, after action brought by a simple contract creditor, pay a specialty debt, and plead the payment of that debt in bar to the action. *Oxenham v. Clapp*, 2 B. & Ad. 309, 22 E. C. L. 84. But see *Hardy v. Thomas*, 23 Miss. 544, 57 Am. Dec. 152, expressing disapprobation of this rule, and favoring the rule that gave the right to the lawful executor to recover in full, and left the executor *de son tort*, for his remedy for paying debts, the privilege of proving them against the estate and recovering payment ratably with the other creditors.

If the Pro Rata Share of a Creditor Is Exceeded, such payment will protect the executor *de son tort* only to the extent of the *pro rata* share, and he is liable to the other creditors for the excess. *Bennett v. Ives*, 30 Conn. 329; *Gay v. Lemle*, 32 Miss. 309.

Statutory Allowances Paid to the Widow may be set off in an action by distributees. *Crispin v. Winkleman*, 57 Iowa 523; *Bryant v. Helton*, 66 Ga. 477; *Barron v. Burney*, 38 Ga. 264.

If an Estate Be Insolvent, it is held to be no defense to an action against an executor *de son tort* that he has voluntarily paid debts to the extent of the liability incurred by him, as he has no right to elect whom he will pay. *Neal*

v. Baker, 2 N. H. 477. See also *Winn v. Slaughter*, 5 Heisk. (Tenn.) 191.

In Trover by a lawful executor or administrator against an executor *de son tort*, the defendant cannot show in defense that he has paid debts to the amount of the value of goods in his possession at the time of the action. He can defend on that ground only as to the goods which he has sold. *Hardy v. Thomas*, 23 Miss. 544, 57 Am. Dec. 152.

2. Executor De Son Tort Cannot Apply Assets to His Own Debts — *England*. — *Prince v. Rowson*, 1 Mod. 208; *Picard v. Brown*, 6 T. R. 550; *Vaughan v. Browne*, 2 Stra. 1106, Andr. 328; *Alexander v. Lane*, Yelv. 137; *Ayre v. Ayre*, 1 Ch. Cas. 33; *Coulter's Case*, 5 Coke 30; *Baker v. Berisford*, 1 Sid. 76.

California. — *De La Guerra v. Packard*, 17 Cal. 183.

Kentucky. — *McMeekin v. Hynes*, 80 Ky. 343.

Maryland. — *Strike's Case*, 1 Bland (Md.) 57; *Glenn v. Smith*, 2 Gill & J. (Md.) 493, 20 Am. Dec. 452; *Baumgartner v. Haas*, 68 Md. 32.

Massachusetts. — *Carey v. Guillow*, 105 Mass. 18, 7 Am. Rep. 494.

New Hampshire. — *Brown v. Leavitt*, 26 N. H. 493.

North Carolina. — *Turner v. Child*, 1 Dev. L. (12 N. Car.) 331, 17 Am. Dec. 555.

South Carolina. — *Leach v. House*, 1 Bailey L. (S. Car.) 42; *Cook v. Sanders*, 15 Rich. L. (S. Car.) 63, 94 Am. Dec. 139; *Kinard v. Young*, 2 Rich. Eq. (S. Car.) 247.

Tennessee. — *Sharp v. Caldwell*, 7 Humph. (Tenn.) 415; *Partee v. Caughran*, 9 Yerg. (Tenn.) 460; *Hutchinson v. Fulghum*, 4 Heisk. (Tenn.) 550.

Virginia. — *Shields v. Anderson*, 3 Leigh (Va.) 729.

3. Executor De Son Tort Cannot Retain Legacy to Self. — *Wilbourn v. Wilbourn*, 48 Miss. 38.

4. Payment of Debts Not Pleadable in Bar. — *Elworthy v. Sandford*, 3 H. & C. 330, 34 L. J. Exch. 42, 12 W. R. 1008, 10 L. T. N. S. 654; *Whitehall v. Squire*, Carth. 104.

Proof of Payments to the full amount for which a person has made himself liable as executor *de son tort* does not authorize a nonsuit under the general issue in an action by the lawful executor or administrator against him. Anonymous, 12 Mod. 441. See also *Mountford v. Gibson*, 4 East 441. The contrary to this is laid down in *Bull. N. P.* 48, but the authorities cited do not seem to support the position taken.

By Statute 43 Eliz., c. 8, an executor *de son tort* was expressly authorized to deduct, "to and for himself, allowance of all just, due and principal debts, upon good consideration, without fraud, owing to him by the intestate at the time of his decease, and all other payments

6. Validity and Effect of Acts of Executor De Son Tort — a. AS TO SELF. — The effect of a stranger's intermeddling with the estate of a decedent is to render him liable as executor to creditors or others having claims against the estate to the extent of the assets which came into his hands, without any of the privileges of an executor;¹ but he may afterwards take out letters of administration for the purpose of constituting himself the legal representative of the decedent with whose estate he has intermeddled.²

b. AS TO THIRD PERSONS. — Where an executor *de son tort* undertakes to dispose of the property of the decedent to third persons, his acts in that regard do not operate to vest in such third persons any better title than the executor *de son tort* himself had, and therefore they cannot hold it as against a rightful executor or administrator.³ But they acquire a right to the possession as against all persons other than the legal representative of the decedent.⁴ No liability as executor *de son tort*, however, is imposed on a third person by reason of the fact that an executor *de son tort* has given or sold to him goods of the decedent, if there was no fraud or collusion in the transaction.⁵

c. AS TO RIGHTFUL REPRESENTATIVES. — The acts of an executor *de son tort* are good as against the rightful representative of the decedent, only when they are lawful and are such as the rightful representative was bound to perform in the due course of administration.⁶

made by him." *Winn v. Slaughter*, 5 Heisk. (Tenn.) 198.

1. As to Liabilities Incurred by intermeddling, see *supra*, this section, *Liabilities of Executor De Son Tort*.

2. Rights of Executor De Son Tort to Letters of Administration. — The fact that a person entitled to administer on the estate of a decedent has, by intermeddling, rendered himself liable as an executor *de son tort* does not deprive him of his right to letters of administration. *Carnochan v. Abrahams*, T. U. P. Charl. (Ga.) 196; *Bingham v. Crenshaw*, 34 Ala. 683.

As to the Effect of a grant of administration to an executor *de son tort*, see *infra*, this section, *Executor De Son Tort Appointed Administrator*.

3. Executor De Son Tort Cannot Make Valid Disposition of Assets to Third Persons — Alabama. — *Carpenter v. Going*, 20 Ala. 587.

Georgia. — *Wylly v. King*, Ga. Dec. (pt. ii.) 7; *Wiley v. Truett*, 12 Ga. 588.

Maryland. — *Rockwell v. Young*, 60 Md. 563. *New Hampshire.* — *Giles v. Churchill*, 5 N. H. 337.

North Carolina. — *Hostler v. Scull*, 2 Hayw. (3 N. Car.) 179, 1 Am. Dec. 583.

Compare Roumfort v. McAlarney, 82 Pa. St. 193.

A Creditor of an Intestate who receives goods of the intestate, after his death, from his widow, in payment of his debt, cannot protect his possession against an action of trover by the lawful administrator on the ground of such delivery having been made by one who has, by such intermeddling, made herself executrix *de son tort*, no fact appearing to give color to her having acted in that respect in the character of executrix except the single act of wrong complained of, in which the defendant participated. *Mountford v. Gibson*, 4 East 441, 1 Smith 129.

But in *Rockwell v. Young*, 60 Md. 563, it was intimated that a sale by an executor *de son tort* of goods of the estate to a creditor of

the estate, in payment of his claim, would give him a good title.

A Purchaser from an Executor De Son Tort, having no better title than his vendor, cannot, when sued in trover by the rightful administrator, show in mitigation of damages that, since his purchase, the executor *de son tort* has paid debts which the administrator was bound to pay in due course of administration. *Carpenter v. Going*, 20 Ala. 587.

Limitation of Rule. — In *Pickering v. Coleman*, 12 N. H. 148, Gilchrist, J., referring to the rule that an executor *de son tort* cannot, by a sale of the goods of the deceased, give any title to the purchaser against a rightful administrator, said that perhaps this position should be received with the limitation that he cannot convey a good title where the sale is not in the due course of administration.

4. Possessory Right of Purchaser from Executor De Son Tort. — In *Woolfork v. Sullivan*, 23 Ala. 548, 58 Am. Dec. 305, it was held that a *bona fide* purchaser for valuable consideration, at a public sale by an executor *de son tort*, acquired at least a possession and right of possession, which he could maintain against all the world except the legal representative of the decedent, and as against him an actual possession of which he could be deprived only by suit.

5. See *supra*, this section, *Acts Constituting Executor De Son Tort — Dealings with Executor De Son Tort*.

6. Acts of Executor De Son Tort Binding on Rightful Representative. — *Graysbrook v. Fox*, Plowd. 282; *Buckley v. Barber*, 6 Exch. 164, 15 Jur. 63, 20 L. J. Exch. 114; *Morgan v. Thomas*, 8 Exch. 302; *Coulter's Case*, 5 Coke 30b; *Bain v. McIntyre*, 17 U. C. C. P. 500. See also *Barr v. Cabbage*, 52 Mo. 404; *Caper-ton v. Ballard*, 4 W. Va. 420.

Payment of the Just Debts of a decedent by an executor *de son tort*, having due regard to the priorities given by law, is binding on the rightful representative. *Parker v. Kett*, 1 Ld.

d. EXECUTOR DE SON TORT APPOINTED ADMINISTRATOR. — It seems to be a well-settled principle that all acts of an executor *de son tort* done in the due course of administration are legalized by a subsequent grant to him of letters of administration, though there are some decisions to the contrary.¹

Raym. 661; *Baker v. Berisford*, 1 Sid. 76; *Thomson v. Harding*, 2 El. & Bl. 630, 75 E. C. L. 630, 18 Jur. 58, 22 L. J. Q. B. 448.

Interrupting Statute of Limitations. — An executor *de son tort* cannot, by confessing judgment, or making payments on account of a debt, or by any other act of his, give a new start to the statute of limitations as against the rightful administrator or the parties beneficially interested in the estate. *Grant v. McDowell*, 8 Grant's Ch. (U. C.) 468.

Execution Against Executor De Son Tort. — In *Canada* real estate cannot be sold under an execution obtained against an executor *de son tort*. *McDade v. Dafeo*, 15 U. C. Q. B. 386; *Wrathwell v. Bates*, 15 U. C. Q. B. 391; *Graham v. Nelson*, 6 C. P. 280.

1. Grant of Administration to Executor De Son Tort — Previous Acts Legalized — England. — *Vaughan v. Browne*, Andr. 328, 2 Stra. 1106; *Baker v. Beresford*, 1 Keb. 285; *Pyne v. Woolland*, 2 Vent. 179; *Williamson v. Norwitch*, Style 337. Compare *Curtis v. Vernon*, 3 T. R. 587.

Illinois. — *McClure v. People*, 19 Ill. App. 105.

Massachusetts. — *Andrew v. Gallison*, 15 Mass. 325, note; *Hatch v. Proctor*, 102 Mass. 351.

Missouri. — *Magnar v. Ryan*, 19 Mo. 196.

New Hampshire. — *Clements v. Swain*, 2 N. H. 475; *Emery v. Berry*, 28 N. H. 473, 61 Am. Dec. 622.

New York. — *Rattoon v. Overacker*, 8 Johns. (N. Y.) 126; *Priest v. Watkins*, 2 Hill (N. Y.) 225, 38 Am. Dec. 584.

South Carolina. — *Walker v. May*, 2 Hill Eq. (S. Car.) 22.

Payment of Debts and Legacies Validated by

Grant of Letters. — *Wilson v. Wilson*, 54 Mo. 213; *Pinkham v. Grant*, 78 Me. 158.

Retainer of Individual Debts. — An executor *de son tort* may retain for a debt due him from the decedent, when he obtains a lawful grant to himself of letters of administration. *Pyne v. Woolland*, 2 Vent. 180; *Williamson v. Norwitch*, Style 337.

Cases to the Contrary. — In *Wilson v. Hudson*, 4 Harr. (Del.) 168, the court said: "It seems to be settled that acts done by an administrator *de son tort* will not bind the same person as rightful executor, any more than they would bind a third person who should become administrator. * * * If it were otherwise it would be in the power of any creditor, combining with the widow, as in this case, though all by the act becoming administrators *de son tort*, to administer the goods and defraud other creditors. The only safe rule is to hold that such sale does not change the property, and that the person afterwards becoming lawful administrator can recover it."

In *Doe v. Glenn*, 3 N. & M. 837, 1 Ad. & El. 49, 28 E. C. L. 33, it was held that an executor *de son tort* to whom administration is subsequently granted may repudiate an agreement made by him to surrender a term for years vested in the intestate. See also *Motter v. Brown*, 1 H. & C. 686; *Laury v. Aldred*, 2 Brownl. 185.

Promise to Pay Debts — Effect on Statute of Limitations. — In *Haselden v. Whitesides*, 2 Strobb. L. (S. Car.) 353, it was held that the promise of an executor *de son tort* to pay a debt of the decedent will not bind him and prevent the bar of the statute of limitations to a suit for the debt brought against him afterwards as the rightful administrator.

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